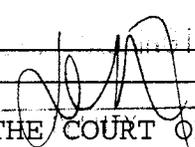


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NO. 34109-3-II

STATE OF WASHINGTON

BY 
IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DANIEL N. AGUE-MASTERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 01-1-00560-2

HONORABLE CHRIS WICKHAM, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Written Findings of Fact and Conclusions of Law for the 11-19-01 CrR 3.6 Hearing having been entered in this case on September 26, 2006, whether the defendant's conviction should be reversed for failure to enter such Findings and Conclusions prior to that time.

2. Whether Deputies, acting for a legitimate purpose, traversed only areas of the defendant's property which were impliedly open to the public, and therefore what they detected could properly be considered later as part of the probable cause for the issuance of a search warrant.

3. Whether the defendant has standing to challenge the legality of the seizure and search of Steven Layton, and if the defendant has such standing, whether the seizure and subsequent search of Layton were legally conducted.

4. Whether the trial court erred in finding that there was probable cause for the issuance of a search warrant even after certain pieces of information were excised from the affidavit due to a failure to show the reliability of the informant.

5. Whether the defendant was properly sentenced pursuant to a conviction for violating RCW 69.50.401(a)(1)(ii).

6. Considering the evidence in a light most favorable to the State, whether there was sufficient evidence for a rational trier of fact to find it proved beyond a reasonable doubt that the defendant's daughter was under 18 at the time of the offense, and that the defendant or an accomplice had manufactured methamphetamine at a time when the defendant's daughter was in or upon the premises of the manufacture.

7. Whether the sentencing court erred in imposing a 60-month penalty, rather than a 24-month penalty, for the presence of a minor in or upon the premises of the manufacture of methamphetamine.

8. Considering the evidence in a light most favorable to the State, whether there was sufficient evidence for a rational trier of fact to find it proved beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the offense.

9. Whether the sentencing court erred in imposing a \$100 DNA fee.

10. Whether the Judgment and Sentence in this cause should be amended to impose a community custody period only to the extent that the total of the defendant's confinement and community custody does not exceed the statutory maximum of 120 months.

11. Whether the sentencing court's failure to solicit the defendant's statement in allocution should be considered for the first time on appeal.

B. STATEMENT OF THE CASE

During the late morning of March 31, 2001, Thurston County Sheriff's Deputy Jason Casebolt, while on patrol, observed a vehicle in a driveway at 3001 104th Avenue in Thurston County. At the time, Tumwater Corrections Officer Michael Morrison was on a "ride along" with Casebolt. There were two gates that separated the driveway

from the street. One gate was closed, but the other was open. Casebolt conducted a records check using the license plate number of the vehicle. He learned that the registered owner was John Steven Hamm, and that there was an outstanding felony warrant for Hamm. 11-19-01 Hearing (AM) RP 5-9, 61; 11-19-01 Hearing (PM) RP 5-6.

Casebolt contacted Deputy Steve Hamilton for assistance. Hamilton responded to that location. Then both officers drove their patrol vehicles down the driveway to the residence, which was a mobile home. There was a sign on a tree by the driveway which read, "No Trespassing". Casebolt noticed the sign as they drove down the driveway, but Hamilton did not. 11-19-01 Hearing (AM) RP 11-17, 62-64.

Both officers approached the front door in uniform. Casebolt later recalled knocking on the door, but Hamilton did not recall that. Both recalled that they heard a noise in the back of the house, and so walked around to the back to

make contact. 11-19-01 Hearing (AM) RP 17, 65-66.

The officers observed a male welding on a vehicle. They attempted to question the male about John Steven Hamm, but the male was evasive in his responses. The male then moved to the back door of the residence, mumbling that he would get the owner. 11-19-01 Hearing (AM) RP 18-19, 66-67.

The male knocked on the door. A female voice inside was heard to say that it was "Steve" at the door, which was the name Hamm was known to go by. The male fit the description the officers had of John Steven Hamm. Eventually, a female opened the door. At that moment, the male attempted to bolt into the residence. The officers grabbed hold of him to prevent this, and the male was then handcuffed. There were propane tanks by the back porch which seemed to be spewing propane, as there was a strong odor of propane. Therefore, the deputies moved the male away from the back porch and over to their patrol vehicles. 11-19-01 Hearing (AM) RP 20-24, 68-70.

The male was asked if he had any weapons on

him, to which the male responded in the negative. The officers then did a pat-down search. There was a knife and a large prescription bottle in one pocket. Casebolt had to remove the prescription bottle in order to grab the knife. The prescription bottle was full of small white tablets. The label had a female name on it and read "pseudoephedrine". 11-19-01 Hearing (AM) RP 26-28, 71.

A little later, the defendant's daughter came out of the residence and demanded that the deputies leave the property. She appeared to be about 13 years old. The officers did not immediately comply with that demand. 11-19-01 Hearing (AM) RP 72-73, 77-78.

The male gave inconsistent answers as to his identity. He had a valid Washington identification card in a name other than John Steven Hamm. Officers then observed that his eye color did not match that reported for Hamm. The male stated that he was staying there at that residence on 104th Avenue. Eventually, the

officers determined that the male was not John Steven Hamm, and so the prescription bottle was returned to him and he was released. He had been detained for approximately 15 to 20 minutes. 11-19-01 Hearing (AM) RP 29-31, 71, 73.

On April 2, 2001, an anonymous informant contacted Deputy Hamilton and informed him that a person named Steven Layton was bragging about having fooled the police as to his identity. The informant also related information about the residence where Hamilton had been on March 31st. The informant stated that the actual renter was Dan Ague-Masters and named a number of other persons who either were staying at the residence or frequented that location. Hamilton determined that there was a felony warrant out for Layton. He then obtained a picture of Layton and confirmed that Layton was the male he had been in contact with at the residence on March 31, 2001. He also determined that Ague-Masters and some of the people reported to be staying at or frequenting the property, including Layton, were known drug

users and convicted felons. CP 56-57.

On that same day, Hamilton contacted the Honorable Judge Susan Dubuisson by telephone and requested a search warrant to search the residence, outbuildings, and vehicles on the property where he had contacted Layton on March 31st. Hamilton requested authorization to search for Layton, and for the manufacture of methamphetamine. CP 54-60. As a basis for a search for methamphetamine manufacture, Hamilton cited Layton's possession of pseudoephedrine in a quantity inconsistent with personal use, the propane tanks being purged, possibly for use to store anhydrous ammonia for methamphetamine production, Layton's history as a drug trafficker and user, and the reported presence of other drug users at the property. CP 58-59.

Judge Dubuisson granted the warrant request. The next day, Hamilton and other officers served the warrant at the property at around 8 in the morning. Trial RP 129-130. Hamilton knocked on the back door and announced officers were there

with a search warrant. After about a minute, the defendant answered the door. When officers entered the residence, they found four other adults there. Also, the defendant's daughter was in the residence. She appeared to be 12 or 13 years old. Trial RP 132-136.

When officers opened the door to a shed on the property, a strong chemical odor was detected.

Therefore, officers refrained from further entry at that time, and instead contacted the Thurston County Narcotics Task Force to process what appeared to be a methamphetamine lab. Trial RP 119, 136.

The shed was searched by the Task Force that same day. Inside were various products, such as lacquer thinner and HEET, and items such as coffee filters, tubing, jars, a fan, an electric burner, a propane tank, Pyrex cookware, and an electronic scale which were consistent with the manufacture of methamphetamine. Trial RP 43-61, 182-186. There was also a scanner tuned to the frequency used by the Thurston County Sheriff's Office, and

a monitor attached to a camera. The camera was focused on the driveway, allowing a view of anyone arriving at the property. 50, 59-60.

Samples were taken from a jar of liquid in a freezer inside the shed. Later testing at the Washington State Patrol Crime Laboratory determined that there was methamphetamine present in the liquid. It appeared that the methamphetamine had not yet been extracted for actual use, and so the manufacturing process was still ongoing. Trial RP 46-47, 121-122, 179-180.

Samples were also taken from a Pyrex measuring cup in the shed. There was a white crystal residue in the measuring cup. Later testing at the Crime Laboratory determined that methamphetamine was present here as well, indicating that the measuring cup had been used in the process of manufacturing methamphetamine. Trial RP 49, 123, 180.

Samples were taken from the liquid in a jar on top of a microwave in the shed. Testing at the Crime Laboratory found that the liquid contained

by-products of the methamphetamine manufacturing process. Trial RP 51, 124, 180.

There were also samples taken from a bi-layer liquid in a jar to the right of the microwave. Lab testing determined that there was methamphetamine present in the liquid as well as the by-products of the methamphetamine manufacturing process. Trial RP 54, 124, 181.

Finally, samples were taken from a bi-layer liquid in a plastic gas can on the floor of the shed. Testing at the laboratory found that this liquid contained methamphetamine and the by-products of the methamphetamine manufacturing process. Trial RP 54-55, 125, 181.

In the master bedroom of the residence, officers found a number of documents with the defendant's name on them. Trial RP 91, 98. A locked safe was located in that bedroom. A locksmith was brought in to open it. Inside the safe were six shotguns, two rifles, four handguns and ammunition. Trial RP 102, 157-164; CP 138-142. There were also syringes and a scale in the

safe. Trial RP 102, 154-155.

On April 17, 2001, an Information was filed in Thurston County Superior Court charging the defendant, Daniel Ague-Masters, with one count of unlawful manufacture of methamphetamine, as well as several other charges. CP 3-4. On June 1, 2001, a First Amended Information was filed, which added a number of alleged enhancements to the manufacturing charge, including a claim the manufacture was in the presence of a minor, that it was within 1,000 feet of a school bus route stop, and that the manufacture had been conducted while armed with a deadly weapon. CP 12-13.

On November 19, 2001, a CrR 3.6 hearing was held before the Honorable Judge Daniel Berschauer. The court upheld the legality of the officers' contact with Layton on 3-31-01 and the pat-down search of Layton, while at the same time rejecting the defendant's claim of standing to challenge that search. The judge excised certain pieces of information from the search warrant affidavit because there was an insufficient showing of the

reliability of the anonymous informant as to those items of information. However, even after such an excising of the affidavit, the court found that the remainder provided sufficient probable cause to support the issuance of the warrant. 11-19-01 Hearing (PM) RP 64-79.

The defendant failed to appear for hearings in this case on several occasions, and bench warrants were issued for his arrest, causing extensive delays in the resolution of this case. The case therefore lingered on for a number of years thereafter. On September 6, 2005, a Second Amended Information was filed. It charged one count of the unlawful manufacture of a controlled substance, specifically methamphetamine, while in the presence of a minor and while armed with a deadly weapon alleged to have occurred on or about April 3, 2001. CP 113. A jury trial of that charge took place with the Honorable Judge Chris Wickham presiding during the period of September 6-8, 2005. The defendant was found guilty as charged.

A sentencing hearing took place on November 4, 2005. The court determined that the standard sentence range was 51 to 68 months. The court imposed a standard range sentence of 60 months. However, the court then added penalties for the special allegations proved at trial. For the presence of a minor in or upon the premises of the manufacture of methamphetamine, the court imposed a penalty of 60 months. As a firearm enhancement, the court imposed 36 months. These enhancements were run consecutive to each other, for a total of 96 months. Since the sum of 60 plus 96 months was greater than the statutory maximum of 120 months, the court imposed a sentence of 120 months in prison. The court also imposed legal financial obligations including a \$100 fee for DNA typing and imposed a community custody range of 9 to 12 months. 11-4-05 Hearing RP 4-7; CP 143-151.

The defendant filed a notice of appeal on December 2, 2005. CP 152. On September 26, 2006, the case came back before the Thurston County Superior Court for consideration of proposed

written Findings of Fact and Conclusions of Law based on the oral ruling of Judge Berschauer at the CrR 3.6 Hearing on November 19, 2001. Such written findings and conclusions had not previously been entered in this case. Since Judge Berschauer had retired in the interim, the matter was heard by the Honorable Judge Gary Tabor. The court determined that the proposed findings and conclusions accurately reflected Judge Berschauer's 11-19-01 ruling and so approved their entry. CP 154-160.

C. ARGUMENT

1. Because written Findings of Fact and Conclusions of Law have been filed in this case, there is no basis for a reversal or dismissal of the defendant's conviction based on a failure to do so.

As noted above, Findings of Fact and Conclusions of Law pertaining to the 11-19-01 hearing were filed on September 26, 2006. On appeal, the defendant seeks to have this court reverse and dismiss for a failure to file Findings of Fact and Conclusions of Law. However, such a response would not be appropriate in this case.

While the State acknowledges that the filing of the Findings and Conclusions in this case was tardy, that alone is not a basis for reversal or dismissal. Such tardiness will result in reversal only if the defendant can establish either that he was prejudiced by the delay or that the findings and conclusions were tailored to meet the issues presented in the appellate brief. State v. Gaddy, 114 Wn. App. 702, 704-705, 60 P.3d 116 (2002), *affirmed on separate grounds* in State v. Gaddy, 152 Wn.2d 64, 93 P.3d 872 (2004).

In the present case, the written findings of fact and conclusions of law simply mirror the detailed findings and conclusions orally made by the trial court at the time of the hearing. Appellant's Brief, on pp. 19-20, sets forth a summary of the trial court's oral ruling on November 19, 2001. That summary is consistent with the conclusions of law recently entered in written form. Therefore, both parties have interpreted the court's oral ruling in the same manner, and so the written Findings of Fact and

Conclusions of Law will certainly not present any surprises to the defendant. Moreover, this shows that there has been no attempt by the State in the written findings and conclusions to somehow revise the trial court's ruling to meet issues raised in the Appellant's brief.

In Appellant's Brief, the defendant argues that the lack of findings of fact and conclusions of law prejudice his appeal by preventing him from being able to properly raise and analyze the issues pertaining to the CrR 3.6 hearing in this case. However, particularly with the present existence of written findings and conclusions, there is no basis for a finding of prejudice.

The trial court's oral factual findings and legal conclusions made on 11-19-01 were so detailed and clear that the creation of a separate document identifying such findings and conclusions has been a mere formality. When a trial court's entry of written findings of fact and conclusions of law is delinquent, or the trial court fails to enter such written findings and conclusions at

all, any error involved is harmless when the trial court has made comprehensive findings and conclusions on the record that allow for appellate review. State v. Hoffman, 116 Wn.2d 51, 95, 804 P.2d 577 (1991); State v. Miller, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998); State v. Smith, 76 Wn. App. 9, 16-17, 882 P.2d 190 (1994); State v. Johnson, 75 Wn. App. 692, 698, 879 P.2d 984 (1994); State v. Smith, 67 Wn. App. 81, 87, 834 P.2d 26 (1992); State v. Rowe, 63 Wn. App. 750, 752, 822 P.2d 290 (1992).

In the present case, the thorough analysis of the relevant issues in the remainder of Appellant's Brief itself demonstrates that the record of the trial court's oral ruling provided a sufficient basis for Appellant to analyze the issues pertaining to the defendant's motion to suppress evidence. The formal Findings of Fact and Conclusions of Law simply repeat the specific findings and conclusions detailed by the court on the record.

2. The Deputies only traversed areas of the defendant's property which were impliedly open to

the public, and did so for a legitimate purpose, and so what they detected with their senses in the process could later be considered as part of the probable cause for the issuance of a search warrant.

The defendant contends on appeal that the entry of the Sheriff's deputies onto the property of the defendant in order to try and contact Hamm was an illegal intrusion upon the privacy of the defendant, and therefore evidence resulting from what the officers detected with their senses while on the property must be excised from the warrant affidavit in any determination of whether there was sufficient probable cause. The defendant contends that he had a reasonable expectation of privacy with regard to the property around the residence.

A law enforcement officer with legitimate business may enter areas of the curtilage, the property surrounding a residence, if those areas of curtilage are impliedly open to the public, such as access routes to entrances to the residence. An officer is permitted the same license to intrude as a reasonably respectful

citizen. However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy. What is reasonable cannot be determined by a fixed formula. It must be based on the facts and circumstances of each case. State v. Seagull, 95 Wn.2d 898, 902-903, 632 P.2d 44 (1981). These legal principles apply both under the Fourth Amendment to the United States Constitution and also under Article 1, section 7 of the Washington State Constitution. State v. Rose, 128 Wn.2d 388, 392 and 399-400, 909 P.2d 280 (1996).

The defendant contends the officers did not go onto the property to conduct legitimate business because they were really there to obtain information for a search warrant rather than to look for John Steven Hamm. Even if that was true, the phrase "legitimate business" includes a legitimate police investigation. Seagull, 95 Wn.2d at 903. The fact that an officer went onto

the curtilage of the property for an investigation focused on the occupants of the residence would not prevent that act from being for legitimate business, provided the officer used an access route which was impliedly open to the public. State v. Rose, 128 Wn.2d 388, 393, 909 P.2d 280 (1996); State v. Petty, 48 Wn. App. 615, 619, 740 P.2d 879 (1987).

Furthermore, the claim that the officers had some ulterior motive for going onto the property is not supported by the evidence. The court found that the officers went onto the property for the legitimate business purpose of determining whether Hamm was there or whether he lived there. 11-19-01 Hearing (PM) RP 65-66; Finding of Fact No. 2 in CP 154-160. An appellate court's review of a trial court's finding of fact is limited to whether it is supported by substantial evidence. State v. Macon, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996). Casebolt testified he went onto the property because there was a vehicle parked in the driveway registered to Hamm, and Hamm had an

outstanding felony warrant. 11-19-01 Hearing (AM) RP 5-6. Hamilton testified he went to assist Casebolt in trying to serve a felony warrant at that property. 11-19-01 Hearing (AM) RP 61. Thus, there was substantial evidence to support the court's finding.

Next, the defendant contends that the route taken by the officers to the front of the residence, and then around to the back, was not impliedly open to the public. Much is made of the fact that there was a "No Trespassing" sign near the driveway. However, the mere presence of a "No Trespassing" sign does not increase the constitutional level of privacy interests enjoyed by the defendant. State v. Vonhof, 51 Wn. App. 33, 40, 751 P.2d 1221 (1988). A far more important consideration is whether access to the residence was blocked in some way.

For example, where the property has been fenced and entry is blocked by a closed gate, in addition to the presence of a "No Trespassing" sign, the appellate court has held that the path

of access to the residence was not impliedly open to the public. State v. Johnson, 75 Wn. App. 692, 705-706, 879 P.2d 984 (1994); State v. Ridgway, 57 Wn. App. 915, 918-919, 790 P.2d 1263 (1990). However, when there has been no gate or other obstruction, or an existing gate has been open, then access to the residence has been held to have been impliedly open to the public, even if a "No Trespassing" sign was present. State v. Poling, 128 Wn. App. 659, 667, 116 P.3d 1054 (2005); State v. Hornback, 73 Wn. App. 738, 743-744, 871 P.2d 1075 (1994); State v. Chaussee, 72 Wn. App. 704, 709-710, 866 P.2d 643 (1994); State v. Vonhof, 51 Wn. App. 33, 34 and 40-41, 751 P.2d 1221 (1988).

In the present case, the court found that a gate on the west side of the property was open, and the Deputies used this access to proceed down the driveway to the residence. 11-19-01 Hearing (PM) RP 66-68; Findings of Fact Nos. 3, 4, and 5 in CP 154-160. These findings were supported by the testimony of Deputies Casebolt and Hamilton. 11-19-01 Hearing (AM) RP 9-15, 62-64. In

addition, witness Carl Howell testified the defendant locked the gates at night, but not during the day. 11-19-01 Hearing (PM) RP 15-16. Thus, the driveway to the defendant's residence was impliedly open to the public.

Even if that is the case, however, the defendant argues that when the officers went to the back of the residence, they departed from the area impliedly open to the public. However, the defendant does not identify anything blocking the path used by the Deputies to contact someone back there, based on the noise they heard. The Deputies were permitted to take such actions as a reasonably respectful citizen might do under the circumstances. Seagull, 95 Wn.2d at 902.

In Seagull, supra, a law enforcement officer initially went to the main entrance of the residence, knocked, and received no answer. He then went to the other side of the residence. He did not take the most direct route to reach the other side. Along the way, he made observations that were then included in an affidavit for a

search warrant. The State Supreme Court held that the officer did not violate the resident's reasonable expectations of privacy. Seagull, 95 Wn.2d at 900, 905.

In reaching this conclusion, the Washington court referred approvingly to the decision of the Federal Court of Appeals for the Eighth Circuit in State v. Anderson, 552 F.2d 1296 (8th Cir. 1977). In Anderson, officers went to the front door of a residence, rang the bell, got no answer, and then heard a dog barking and saw a light in the back yard. They walked around to the back to make contact with someone. On the way back there, they looked in a basement window and saw incriminating evidence. The federal court found that there was no illegal search. Anderson, 552 F.2d at 1300.

The facts of the present case are very similar to those in Anderson and Seagull, supra. The actions of Deputies Casebolt and Hamilton were not inconsistent with what a reasonably respectful citizen might have done under those circumstances.

The court in Seagull, supra, identified

seven factors to consider whether a law enforcement officer traversed an area of the curtilage that was impliedly open to the public, or in the alternative violated a resident's reasonable expectations of privacy. Seagull, 117 Wn.2d at 905. Each of these factors supports the conclusion that the officers in this case did not violate the defendant's right of privacy.

The first consideration is whether the officers spied into the residence in order to observe incriminating evidence. That did not happen in this case. The officers made contact with Stephen Layton outside the residence with the belief he might be John Steven Hamm, and made observations only of the outside of the property.

The second factor is whether the officers acted secretly in going onto the curtilage of the property. In this case, they did not. They drove patrol vehicles down to the residence, and in uniform proceeded to try and make contact.

The third factor is whether the officers approached the residence in daylight. In this

case, they went there in the late morning. 11-19-01 Hearing (AM) RP 61.

The fourth consideration is whether the officers remained reasonably within a direct route of access to an entrance to the residence. In this case, the officers did that. They drove down the driveway, then proceeded to the front door. When they heard the noise, they went directly to the back in the vicinity of the back porch. They did not wander over the property, or go through any areas that were obstructed in some way.

The fifth consideration is whether they attempted to talk with a resident. The officers in this case approached the residence for that very purpose. They wanted to find out if Hamm was present. They proceeded to the back in the hope of contacting a resident there, and for that reason spoke to Layton.

The sixth factor is whether the officers created an artificial vantage point to observe incriminating evidence. In this case, they did not. They simply proceeded to locations where

they hoped to speak to someone at the residence.

A final factor is whether the officers encountered incriminating evidence accidentally. Here, the officers went to look for a person with a felony warrant. They did not find that individual. Instead, they encountered Layton and observed the propane tanks releasing propane.

Deputies Casebolt and Hamilton limited their actions to areas of the curtilage which were impliedly open to the public. There was no violation of the reasonable expectations of the defendant as resident of the property. Therefore, the observations of the officers were properly included in the affidavit for search warrant.

3. The defendant has no standing to challenge the legality of the seizure of Layton or the search of Layton, but even if such standing existed, the search and seizure of Layton were legally conducted and resulting evidence could be considered as part of the probable cause for the issuance of a search warrant.

The defendant argues that evidence found through a search of Layton's person was the result of an illegal seizure and an illegal search, and so that evidence should have been excised from the

search warrant affidavit for purposes of determining whether there was probable cause for the issuance of the warrant. However, the trial court found that the defendant lacked standing to challenge the seizure of Layton and the search of his person. On appeal, the defendant fails to address that conclusion of the court, but instead chooses to ignore it.

The defendant was not charged with a crime of possession, and so there is no question of automatic standing here. See State v. Simpson, 95 Wn.2d 170, 179-180, 622 P.2d 1199 (1980). Thus the defendant would have standing only if he had a legitimate expectation of privacy in the place searched or thing seized. State v. Francisco, 107 Wn. App. 247, 249, 26 P.3d 1008 (2001). The defendant would have no personal expectations of privacy with regard to Layton or something on Layton's person. Therefore, the defendant has no standing to challenge these matters.

Even if there was standing, there would be no basis for the contention that the seizure of

Layton was unlawful. The contention is made that the seizure was unlawful because Layton was in the residence when he was grabbed. That is not factually accurate. The court found that Layton was by the back door and attempted to dart into the residence, but was stopped from doing so and was detained. 11-19-01 Hearing (PM) RP 70; Finding of Fact No. 8 and 9 in CP 154-160.

There was substantial evidence to support this finding. Casebolt testified that the defendant was standing by the back door when he suddenly jumped into the house and attempted to close the door. 11-19-01 Hearing (AM) RP 21-22. Hamilton provided a consistent description of what occurred. 11-19-01 Hearing (AM) RP 68.

The fact that Layton crossed the plane of the doorway while trying to escape would not be determinative. While Layton was outside the door on the back porch he was in a public place. State v. Solberg, 122 Wn.2d 688, 698-699, 861 P.2d 460 (1993). At that time, the officers developed reasonable grounds to detain him based on the fact

that he resembled the description of Hamm and the female had identified him as "Steve", the name Hamm was known to go by. That being the case, Layton could not defeat this detention by escaping into the residence. United States v. Santana, 427 U.S. 38, 40-43, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976).

The trial court found that Hamm was wanted for a serious felony offense. The court then concluded that once Layton, who was thought to be Hamm, had attempted to flee into the house, the officers were justified in conducting a pat-down search of Layton. Once a knife was detected, it was necessary to remove the prescription bottle in order to access the weapon, and therefore the search was appropriate. 11-19-01 Hearing (PM) RP 71-72; Finding of Fact Nos. 10 and 11 in CP 154-160.

During an investigatory detention, a law enforcement officer may conduct a pat-down search of a suspect for weapons if the officer has reasonable safety concerns. State v. Hudson, 124

Wn.2d 107, 112, 874 P.2d 160 (1994); State v. Collins, 121 Wn.2d 168, 177, 847 P.2d 919 (1993).

Here there were articulable concerns that were reasonable under the circumstances. Since it was then appropriate for the officer to remove the knife, it was appropriate to remove the bottle of pills, since that was necessary to gain access to the knife.

Thus, evidence obtained from the seizure of Layton and from the search of his person could be considered as part of the probable cause for the issuance of the warrant.

4. The trial court did not err in determining that, after excising certain portions of the search warrant affidavit as unreliable, the remaining information in the affidavit established probable cause for the issuance of the search warrant.

The trial court excised certain portions of the search warrant affidavit in this case because there was an insufficient showing of the informant's reliability. Conclusion of Law Nos. 7-13 in CP 154-160. However, the court found that after excising these portions there was still sufficient probable cause to justify the issuance

of the warrant. Conclusion of Law No. 14 in CP 154-160. The defendant argues that even if the entire content of Hamilton's affidavit other than the portions excised by the court can be considered for purposes of probable cause, that the information was insufficient to justify the issuance of the search warrant.

An affidavit in support of a search warrant is sufficient if it sets forth facts and circumstances which justify a reasonable belief of the probability of criminal activity at a certain location. The decision of an issuing magistrate that the affidavit is sufficient is reviewed for an abuse of discretion. The magistrate's determination of probable cause should be given great deference by a reviewing court. If there is an adequate showing under oath of circumstances going beyond suspicion and mere personal belief that criminal activity has taken place and that evidence thereof will be found in the premises to be searched, the warrant should be held good. Seagull, 95 Wn.2d at 907.

Search warrant affidavits should be considered by the reviewing court in a common sense, practical manner, rather than in a hypertechnical manner. An issuing magistrate is entitled to draw common sense and reasonable inferences from the facts and circumstances set forth. In re Personal Restraint of Yim, 139 Wn.2d 581, 596-597, 989 P.2d 512 (1999).

Even after excising those portions which the trial court found to be unreliable, the information which the magistrate could consider in finding probable cause included:

- (1) Pseudoephedrine is a necessary precursor in the manufacture of methamphetamine.
- (2) Layton had a prescription bottle containing 150 to 200 pseudoephedrine pills, more than would be consistent with personal use.
- (3) The prescription bottle containing the pseudoephedrine was in the name of a female, and so someone other than Layton.
- (4) Layton had a history of being a trafficker and user of illegal controlled substances.
- (5) There were three apparently brand

new propane tanks on the porch. A strong propane smell indicated they had just been purged of their contents or were in the process of being purged. This would be a necessary step toward using the tanks to store anhydrous ammonia, a necessary ingredient in one of the common methods used to manufacture methamphetamine. (6) Layton had appeared nervous and furtive in his behavior when contacted by the Deputies. He tried to flee into the residence and then hid his true identity.

The issue is then whether a reasonable magistrate, considering this information, could conclude that it was probable methamphetamine manufacturing was taking place at that location. Judge Berschauer concluded that such a conclusion was reasonable and that the District Court Judge had not abused her discretion in approving the issuance of this warrant.

The defendant argues that the affidavit was defective because it simply showed that Layton had been a drug dealer and that he was staying at that location. The defendant relies on case law

holding that the circumstances related in the affidavit must show by specific facts a nexus between the suspected criminal activity and the location to be searched. State v. Thein, 138 Wn.2d 133, 147-149, 977 P.2d 582 (1999); State v. McGovern, 111 Wn. App. 495, 499-500, 45 P.3d 624 (2002).

However, in this case the facts related in the affidavit did show such a nexus. Layton was in possession of the pseudoephedrine at that location. The three propane tanks were being purged at that location. Moreover, Layton became apprehensive and furtive in response to being contacted at that location. Thus, a magistrate could conclude that any methamphetamine production that Layton was involved in was probably at that location.

The defendant also complains that the affiant, Deputy Hamilton, described a strong propane odor, but did not set forth any experience and training in detecting such odors. However, as noted above, a search warrant affidavit is to be

evaluated in a common sense manner. As the trial court noted, anyone who has barbecued would know the smell of propane. 11-19-01 Hearing (PM) RP 78.

The defendant also contends that the information in the affidavit used to establish probable cause was stale. A determination of whether the probable cause in a search warrant affidavit is stale depends on the nature of the criminal activity, the length of the activity, and the nature of the property to be seized. State v. Maddox, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004). The court should look at the totality of circumstances and apply common sense as the test for staleness. The information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a common sense determination that there is continuing and contemporaneous criminal activity or evidence of criminal activity at the location to be searched. Maddox, 152 Wn.2d at 505-506.

Here, the information leading to probable

cause was gathered on March 31st and on April 2nd, 2001. The search warrant was obtained on April 2, 2001.

The request for a search warrant in this case concerned the manufacture of methamphetamine. While such an activity could be a one-time event, it could reasonably be assumed that very often such activity would be ongoing at a location since there would be an ongoing need or desire for the product, whether to sell or consume. State v. Hatchie, ___ Wn. App. ___, 135 P.3d 519, 530 (2006).

As regards the length of the activity, the evidence suggested that tanks may have been purged to store anhydrous ammonia. Such a circumstance would suggest that the manufacture of methamphetamine would be taking place thereafter, and the presence of three tanks would suggest a significant manufacturing effort.

Finally, the evidence to be seized would be evidence of methamphetamine manufacture, including present or past manufacture. Thus, even if the

production of methamphetamine had been completed shortly before the warrant was served, there would still likely be evidence remaining in the form of the finished product, by-products of the manufacturing process, equipment, and remaining amounts of ingredients used in the manufacturing process.

For all these reasons, common sense would dictate that the information in the affidavit was not stale, and could be relied upon to establish probable cause for a search warrant.

5. The defendant was properly sentenced in accordance with the provisions of RCW 69.50.401(a)(1)(ii).

The defendant contends that he was improperly sentenced under RCW 69.50.401(a)(1)(ii), pertaining to the manufacture of methamphetamine, and instead should have been sentenced under RCW 69.50.401(a)(1)(iii), pertaining to other controlled substances, because the jury never found it proved that he had manufactured methamphetamine base, as opposed to a salt or isomer of methamphetamine. His argument is that

the term "methamphetamine" as used in RCW 69.50.401(a)(1)(ii), refers only to methamphetamine base.

However, the contrary was held to be the law in State v. Cromwell, 157 Wn.2d 529, 140 P.3d 593 (2006). The State Supreme Court held that the term "methamphetamine" in RCW 69.50.401(a)(1)(ii) was intended to encompass all forms of methamphetamine, including the salts and isomers of this controlled substance. Cromwell, 157 Wn.2d at 535. Thus, the defendant was properly sentenced in accordance with the provisions of RCW 69.50.401(a)(1)(ii).

6. Considering the evidence in the light most favorable to the State in this case, there was sufficient evidence for a rational trier of fact to find it proved beyond a reasonable doubt that the defendant's daughter was under the age of eighteen at the time of the offense, and that the defendant or an accomplice had manufactured methamphetamine when the defendant's daughter was in or upon the premises of the manufacture.

The defendant argues that the evidence presented at trial was insufficient to support the jury's special verdict finding that the defendant or an accomplice manufactured methamphetamine when

there was a person under the age of eighteen present in or upon the premises of the manufacture. He contends that the evidence failed to prove that Starcia Ague, the defendant's daughter, was a person under the age of eighteen. He also contends there was no evidence that Starcia was in or upon the premises of the manufacture.

The evidence is sufficient to support a verdict if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the allegation proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115

Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In regard to the special allegation regarding a person under eighteen having been on the premises of manufacture, the jury was instructed as follows:

If you find the defendant guilty of Unlawful Manufacture of a Controlled Substance, it will then be your duty to determine whether or not the defendant manufactured, or acted as an accomplice to the manufacture of, a controlled substance when a person under the age of eighteen was present in or upon the premises of the manufacture. You will be furnished with a special verdict form for this purpose.

If you find the defendant not guilty of manufacturing a controlled substance do not use the special verdict form. If you find the defendant guilty, you will complete the special verdict form. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant manufactured, or acted as

an accomplice to the manufacture of, a controlled substance when a person under the age of eighteen was present in or upon the premises of the manufacture, it will be your duty to answer the special verdict "yes".

On the other hand, if, after weighing all the evidence, you have a reasonable doubt that the defendant manufactured, or acted as an accomplice to the manufacture of, a controlled substance when a person under the age of eighteen was present in or upon the premises of the manufacture, it will be your duty to answer the special verdict "no".

Jury Instruction No. 17 in CP 114-134.

Deputy Hamilton testified that Starcia Ague was one of the persons in the residence when the search warrant was served. Trial RP 136. He also testified that on March 31st the defendant's daughter had walked from the residence over to where the Detectives were standing with Steven Layton, and had provided the address at that location. Trial RP 141-143. As regards Starcia's age, Hamilton testified as follows:

Q. And did you see Starcia Ague, yourself?

A. I did, yes.

Q. Did she appear to be an adult?

A. No.

Q. How old would you say she looked like she was?

A. A young teen, maybe 12 or 13 years old.

Trial RP 136.

Detective Ben Elkins also referred to the fact that Starcia had been present when the officers served the search warrant.

Q. Now, do you know how many people were located within the residence when the warrant was searched (sic) on the residence?

A. I do. Again, I can refer to my report.

Q. Sure.

A. (Brief pause.) Upon contact and talking to, at the time, Deputy Hamilton, there had been four adults and one juvenile contacted at the residence.

Q. Okay. And do you know who those four adults were?

A. The defendant; a person named Michelle McLeod, M-c-L-e-o-d, and a/k/a last name Way; first name, Glenn Larson; first name, Kurt Ethridge; and a juvenile who is identified as Starcy Ague, and I believe that was the defendant's daughter.

Trial RP 68. Detective Haller also participated in the search of the defendant's property, and he testified about his observations of Starcia Argue at that time.

Q. All right. And did you contact a person known as Starcia Ague at all?

A. A young female, yes, I did.

Q. Okay. And were you able to ascertain whether or not she was an adult or a juvenile?

A. She was a juvenile.

Q. What was her date of birth?

A. I don't recall. I'd have to look at my report here.

MR. BENJAMIN: Objection, Your Honor, I think we may be running into some hearsay as to how he obtained the knowledge.

... THE COURT: For the record, the objection is sustained.

Q. (By Mr. Soukup) How old does Starcia appear to be?

A. She appeared to be a juvenile.

Q. And what do you mean when you say a juvenile?

A. Under 18.

Thus, the jury heard from two State's witnesses that Starcia was a young female who was under the age of eighteen. It was up to the jury to evaluate the credibility of the testimony in this regard, taking into account the training and

experience of the officers, their ability to observe Starcia so as to accurately approximate her age, and the manner in which they described her. Camarillo, 115 Wn.2d at 71. Thus, a reasonable juror could have concluded from the testimony provided that Starcia was under the age of eighteen beyond a reasonable doubt.

Cases cited by the defendant do not support a different conclusion. In State v. Duran-Davila, 77 Wn. App. 701, 706, 892 P.2d 1125 (1995), the appellate court determined that the only admissible evidence at trial of the age of an alleged juvenile involved in a drug transaction was that she had been seen at a hearing in Juvenile Court. This was not deemed sufficient to satisfy the State's burden of proof. Obviously, the testimony of the officers in this case is quite different and addresses directly the child's age.

In State v. Hollis, 93 Wn. App. 804, 816, 970 P.2d 813 (1999), several defendants were convicted of involving a minor in a drug transaction. In

one case, the minor testified he had been under the age of eighteen. In the other case, the parties stipulated that the minor was under eighteen years of age. Obviously, these are other ways in which the age of a child could be proven, but there is nothing in Hollis, supra, suggesting that these are the only ways to do so.

The defendant also contends that the evidence was insufficient to prove that Starcia was in or upon the premises of the manufacture of methamphetamine. In support of this claim, the defendant relies upon State v. Poling, 128 Wn. App. 659, 116 P.3d 1054 (2005). However, the holding in that case actually supports a finding of sufficiency in the present case.

In Poling, supra, the facts were quite similar to those of the present case. In Poling, officers contacted the defendant at his rural property, upon which there was a residence and a separate shop building. After receiving consent to search for possible manufacture of methamphetamine, the officers searched the shop

and observed numerous items relating to methamphetamine manufacturing. One of the officers then obtained a telephonic search warrant to more thoroughly search the property. Poling, 128 Wn. App. 659, 663-665, 116 P.3d 1054 (2005). Devices and items consistent with the manufacture of methamphetamine and the byproducts of that production were then found in the shop, a van, and in a chicken coop. Id. at 668. There was also evidence that children were in the residence on the property. Id. at 670.

The appellate court reversed a special verdict that a person under age 18 was present in or upon the premises of the manufacture. The reason was that the definition of "premises" given to the jury implied that being anywhere on the property was the same thing as being in or on the premises of the manufacture. Poling, 128 Wn. App. at 669-670. No such instruction was given in this case.

However, Poling also contended that the State's evidence showing there were children

present at the residence was insufficient to prove there was a person under 18 on the premises of manufacture, and therefore the State should be precluded from re-trying him on that allegation. The appellate court disagreed, finding that evidence children were in the residence was sufficient to support a jury finding that a minor was present on the premises of manufacture, despite the fact that the evidence of manufacture was found in the outbuildings on the property. Poling, 128 Wn. App. at 670.

In the present case, the defendant makes the identical argument that was specifically rejected in Poling, supra. Because the evidence of methamphetamine manufacture was found in the shed, although there were syringes and scales in the master bedroom of the residence, and because Starcia was either in the residence or walking on the outside of the property when officers were present, the defendant argues the jury was precluded from finding that Starcia was in or upon the premises of manufacture. Just as in Poling,

supra, that argument must fail under the facts of this case.

7. The Judgment and Sentence in this case must be amended to reflect the fact that the sentence enhancement for a minor being on the premises of manufacture is 24 months in prison, rather than 60 months.

The court imposed a standard range sentence of 60 months, and then imposed consecutive to that penalty a sentence enhancement of 60 months for the verdict that a minor was present on the premises of manufacture, and another 36-month enhancement due to the finding that the defendant was armed with a firearm at the time the crime of methamphetamine manufacturing was committed. This resulted in a sentence of 60 months plus an additional 96 months. However, since the maximum penalty for the crime of manufacturing methamphetamine was 120 months, a sentence of 120 months was imposed. 11-4-05 Hearing RP 3-7; CP 143-151.

On appeal, the defendant has argued correctly that the sentencing law in effect at the time of the defendant's offense required a sentence

enhancement of 24 months, rather than 60 months, if it was proved that a minor was present on the premises of manufacture. RCW 9.94A.310(6). Thus, the State agrees that the Judgment and Sentence should be corrected to reflect the appropriate enhancement. However, such a correction alone will not change the length of the defendant's sentence. The combination of a standard range sentence of 60 months plus this enhancement of 24 months and plus a firearm enhancement of 36 months will result in a sentence of 120 months, which is what the defendant received.

8. Considering the evidence in a light most favorable to the State, there was sufficient evidence for a rational trier of fact to find that the defendant was armed with a firearm at the time of the commission of the offense.

The defendant claims on appeal that there was insufficient evidence to support the jury's verdict finding it proved beyond a reasonable doubt that he was armed with a firearm at the time of the commission of the crime. The discussion of the law pertaining to a sufficiency of the evidence claim, which is set forth above in

section 7 of the Argument in this brief, is incorporated herein by reference.

One of the allegations against the defendant in this case was that he was armed with a firearm at the time of the commission of manufacturing methamphetamine. The jury was accurately instructed that a person is armed with a firearm if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The jury was further instructed that the State must prove beyond a reasonable doubt that there was a rational connection between the defendant, the crime, and the firearm. Jury Instruction No. 18 in CP 114-134; State v. Willis, 153 Wn.2d 366, 371-373, 103 P.3d 1213 (2005).

The evidence in this case was that a locked safe was in the master bedroom of the residence, which was about 100 feet from the shed where there was evidence of methamphetamine manufacturing. Inside the safe were six shotguns, two rifles, and four handguns, ammunition, a scale, and a box of

syringes. Trial RP 101-103, 154-164. Officers also found documents in the master bedroom with the name of the defendant on them, including power bills for that address directed to the defendant and a person named Tina McGrath-Paulson. Trial RP 89-92, 97-98.

In the shed was a police scanner turned to the frequency used by the Thurston County Sheriff's Office. Trial RP 50. There was also a surveillance system, consisting of a monitor in the shed connected to a video camera positioned to show the driveway and anyone arriving by means of that driveway. Trial RP 59-61.

In State v. Simonson, 91 Wn. App. 874, 960 P.2d 955 (1998), police investigated an explosion on a piece of property. They found that a green trailer on the property had apparently been used for some time to manufacture methamphetamine. Another, silver trailer on the property was used as a residence, although some extraction of pseudoephedrine had been conducted in the silver trailer. In a bedroom within the silver trailer,

police found six guns including several shotguns, a rifle, and several handguns. Some of the guns were loaded. Simonson, 91 Wn. App. at 877-878.

Simonson was convicted of manufacturing methamphetamine while armed with a deadly weapon. While Simonson was not on the property at the time of the explosion, his accomplice was present, inside the silver trailer, and so a nexus was found between the guns and the accomplice, and the guns were therefore readily available for use. The appellate court further found that it was reasonable to conclude that the guns were part of a defense system for the methamphetamine laboratory on the property, and so there was a nexus between the guns and the crime. Simonson, 91 Wn. App. at 882-883; also see the discussion of Simonson, supra, in State v. Schelin, 147 Wn.2d 562, 571-573, 55 P.3d 632 (2002).

In the present case also, the evidence showed that there was an ongoing methamphetamine laboratory in an outbuilding on the property, and numerous firearms and ammunition in the

defendant's bedroom within the residence. The defendant was at the residence when officers arrived to serve the search warrant. He was just wearing underwear and appeared to be groggy from just having woken up. Trial RP 146-147.

Given the surveillance system in the shed, and the number and variety of guns in the residence, a juror could reasonably conclude that the guns were part of a defense system for the methamphetamine laboratory on the property. However, unlike in Simonson, supra, the guns in this case were not loaded and were in a locked safe when law enforcement arrived. Thus, the main issue here is whether there was a sufficient nexus between the guns and the defendant, such that the guns were readily available for use.

Detective Hamilton testified that officers arrived at the residence to serve the search warrant around 8 in the morning. Hamilton knocked loudly on the back door and announced their presence. He then waited 45 seconds to a minute without any response from within. Finally, a male

voice was heard and the defendant opened the door with his pit bull next to him. Trial RP 130-132.

An unloaded gun is still a deadly weapon, and its unloaded condition is simply one factor among many to consider in determining whether a gun is readily available for defensive or offensive use. Simonson, 91 Wn. App. at 883. Had the defendant chosen to arm himself that morning, he could simply have unlocked the safe and quickly loaded one of the weapons within. There surely would have been time to do so. The fact that the defendant chose not to take such action does not nullify that possibility. Thus, a reasonable juror could have concluded that the weapons were readily accessible under the circumstances for use.

Considering the evidence in the light most favorable to the State, and drawing all reasonable inferences from the evidence in favor of the State, there was sufficient evidence for a rational juror to find it proved beyond a reasonable doubt that the defendant was armed with

a firearm at the time of the commission of the offense.

9. The Judgment and Sentence should be amended to strike the requirement that the defendant pay a \$100 fee for the collection of a DNA biological sample.

As part of the Judgment and Sentence in this case, the defendant was ordered to pay a \$100 fee for the collection of a DNA sample. CP 143-151. The State agrees with the defendant that RCW 43.43.7541 provides for the imposition of this fee in a sentence imposed for felonies committed on or after July 1, 2002. The offense date in this case was on or about April 3, 2001. Therefore, the sentence in this cause should be amended to remove the requirement to pay the \$100 DNA fee.

10. The Judgment and Sentence in this cause should be amended to provide that a community custody period is imposed, but only to the extent that the total of the defendant's confinement and community custody will not exceed 120 months.

The Judgment and Sentence in this cause imposed 120 months or total confinement, and imposed a period of community custody for 9 to 12 months or for the period of the defendant's earned early release, whichever would be longer, to

follow the defendant's release from confinement. CP 143-151. The crime of manufacturing methamphetamine at the time of the commission of this offense had a maximum penalty of 120 months. RCW 69.50.401(a)(1)(ii). Therefore, the defendant complains that his sentence provides for a total penalty that exceeds the statutory maximum.

Other than legal financial obligations, the terms of a sentence under the Sentencing Reform Act cannot extend beyond the statutory maximum for the crime committed. RCW 9.94A.505(5) (formerly RCW 9.94A.120(14)). Therefore, the total penalty served, including the period of confinement and the subsequent period of community custody, must not exceed that statutory maximum, even when an exceptional sentence is imposed. State v. Guerin, 63 Wn. App. 117, 121, 816 P.2d 1249 (1991).

In State v. Hudnall, 116 Wn. App. 190, 64 P.3d 687 (2003), Hudnall was convicted of assault of a child in the third degree with sexual motivation, a crime which had a maximum penalty of 60 months in custody. The sentencing court

imposed an exceptional sentence of 36 months in confinement and a 36-month period of community custody. The period of community custody imposed was mandated by statute. On appeal, the sentence was vacated due to the fact that the total of confinement and community custody imposed was more than the maximum of 60 months. On remand, the sentencing court maintained the exceptional 36-month prison sentence but reduced the period of community custody to 24 months. However, in an appeal of that modified sentence, Hudnall argued that since the 36-month period of community custody was required by statute, the sentencing court had no choice but to reduce the 36-month prison sentence in order to bring the total within 60 months. Hudnall, 116 Wn. App. at 192-194.

The Court of Appeals disagreed with Hudnall's contention. The court reasoned that a sentencing court had the authority to reduce a standard range sentence when there were substantial and compelling reasons to do so, and that the need to bring the total sentence below the statutory

maximum was a substantial and compelling reason to reduce the period of community custody below the period otherwise required under the Sentencing Reform Act. However, the appellate court directed the sentencing court to put in writing as part of the sentence the reasons for the exceptional period of community custody imposed. Hudnall, 116 at 197-198.

In State v. Sloan, 121 Wn. App. 220, 87 P.3d 1214 (2004), Sloan was convicted for rape of a child in the third degree, for which the maximum penalty was 60 months. The court imposed a 60-month sentence and 36 to 48 months of community custody. Sloan argued on appeal that the combination of confinement plus community custody exceeded the maximum possible sentence. The Court of Appeals disagreed, interpreting the sentence to provide for community custody if Sloan obtained early release up to the point a 60-month sentence had been fully served. When imposing such a sentence in the future, trial courts were instructed to explicitly order that the prison

sentence plus any community custody ordered could not extend the sentence past the statutory maximum. Sloan, 121 Wn. App. at 223-224.

At the time the offense was committed in the present case, the Sentencing Reform Act required that the court impose, as part of any prison sentence for a crime committed under Chapter 69.50 RCW, a period of community custody. The duration of that period of community custody was required to be a community custody range established by the Sentencing Guidelines Commission or the Legislature pursuant to RCW 9.940.040, or the defendant's period of earned early release, whichever was longer. RCW 9.94A.030(5); RCW 9.94A.120(11)(a). As of the date of the offense in this case, the Sentencing Guidelines Commission had established a community custody range of 9 to 12 months for crimes committed under chapter 69.50 RCW. Chapter 437-20 WAC.

Should the defendant in this case receive a period of earned early release, it is possible he could serve the required community custody without

any violation of the requirement that his total sentence be within the statutory maximum. However, the sentence as presently worded does not insure that the statutory maximum will act as an absolute limit upon the sentence.

In order to make the present sentence congruent with the community custody requirement and the requirement that the entire sentence be within the statutory maximum, the sentence should be amended in the manner outlined in State v. Sloan, supra. The sentence should state that a period of community custody is imposed for a period of 9 to 12 months or for the duration of the defendant's period of earned early release, whichever is longer, but only to the extent that the total of the defendant's confinement and community custody do not exceed the statutory maximum of 120 months.

11. While the defendant was denied his right of allocution at sentencing, since he failed to object at that time and has not shown any prejudice arising specifically from that denial, the appellate court should not consider this matter for the first time on appeal.

In the defendant's statement of additional

grounds for review, he complains that he was not given the opportunity for allocution during his sentencing hearing in this case, and claims therefore that the sentence should be vacated.

A sentencing court's failure to solicit a defendant's statement in allocution at time of sentencing constitutes legal error. State v. Hughes, 154 Wn.2d 118, 152-153, 110 P.3d 192 (2005). However, such a failure is not a manifest error affecting a constitutional right. Hughes, 154 Wn.2d at 153. Neither at the time of sentencing nor on any other occasion prior to this appeal did the defendant in this case object to the court's failure to allow him the right of allocution. 11-4-05 Hearing RP 1-10. Therefore, pursuant to RAP 2.5(a), this is not an issue that the defendant has a right to raise for the first time on appeal. Hughes, 154 Wn.2d at 153.

The defendant has not demonstrated on appeal that he was prejudiced by this failure to solicit an allocution. The sentencing court rejected the State's proposal for sentencing, and instead

adopted defense counsel's position regarding the applicable sentence range. 11-4-05 RP 7-9. While several errors were made in the imposition of sentence, those have been addressed above, and the State has already concurred in the need to amend the Judgment and Sentence to address those specific matters. Therefore, the defendant's complaint regarding his right of allocution should not be considered on appeal.

D. CONCLUSION

The State's evidence at trial resulted from a search based upon a search warrant properly issued upon a finding of probable cause. The evidence at trial was sufficient to support not only the conviction for the unlawful manufacture of methamphetamine, but also the special verdicts that a person under 18 was present in or upon the premises of the manufacture, and that at the time the crime was committed, the defendant was armed with a firearm. However, the Judgment and Sentence in this cause should be amended to impose a sentence enhancement of 24 months, rather than

60 months, for the presence of a minor on the premises of manufacture, and to delete the \$100 DNA fee, and to specify that the total period of confinement and community custody in this case cannot exceed the statutory maximum of 120 months.

In all other respects, the State asks that the defendant's conviction for the unlawful manufacture of methamphetamine, and the resulting Judgment and Sentence, be affirmed.

DATED this 16th day of October, 2006.

Respectfully submitted,



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I certify (or declare) under penalty of perjury
under the laws of the State of Washington that the
foregoing is true and correct to the best of my
knowledge.

DATED this 17th day of October, 2006 at Olympia,
WA.


James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney