

No. 35379-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Adrian Perez, Sr.,

Appellant.

STATE OF WASHINGTON
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Jefferson County Superior Court

Cause No. 06-1-00104-0

The Honorable Judge Craddock D. Verser

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Perez's motion to suppress evidence discovered in the trunk of his car.
2. The trial court erred by concluding that discovery of drugs in the passenger compartment of Mr. Perez's car established probable cause to search the car's trunk.
3. The trial court erred by upholding the search warrant.
4. The evidence seized from the trunk of Mr. Perez's car was not admissible under the "independent source" doctrine.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

After Adrian Perez, Sr. was arrested, officers searched him and the passenger compartment of his car. They found a baggie of methamphetamine, a digital scale, a baggie with a strong chemical odor, used hypodermic needles, coffee filters that appeared to have been used to manufacture methamphetamine, unused coffee filters, and an unused length of plastic hose. After the search incident to arrest, the officers opened the locked trunk of the car, performed an inventory search, and discovered additional contraband. They then sought a warrant to search the trunk. There was no showing that the officers would have sought a warrant if they had not seen the items in the trunk.

Mr. Perez moved to suppress the evidence seized from the trunk. The parties agreed that the inventory search was unlawful, and information relating to the inventory search was excised from the affidavit. The trial court denied the suppression motion.

1. Did the trial court err by denying Mr. Perez's motion to suppress evidence discovered following a search of the locked trunk of his car? Assignments of Error Nos. 1-4.
2. Did the trial court err by concluding that controlled substances discovered in the passenger compartment of the car provided probable cause to search the locked trunk? Assignments of Error Nos. 1-4.

3. Did the search warrant affidavit fail to establish probable cause to search the locked trunk of Mr. Perez's car? Assignments of Error Nos. 1-4.

4. Did the search warrant affidavit fail to establish that the evidence sought would fit within the locked trunk of Mr. Perez's car? Assignments of Error Nos. 1-4.

5. Did the search violate Article I, Section 7 of the Washington State Constitution? Assignments of Error Nos. 1-4.

6. Did the state fail to establish that the officers would have sought a search warrant even if they hadn't already searched the trunk and discovered contraband. Assignments of Error Nos. 1-4.

7. Did the state fail to establish that the "independent source" doctrine applied? Assignments of Error Nos. 1-4.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On May 30, 2006, the police in Jefferson County arrested Adrian Perez, Sr. on a warrant and for Driving While License Suspended. Supp. CP, Affidavit for Search Warrant, 2nd page. He was searched, as was the car he was driving. The deputies found a baggie of methamphetamine in Mr. Perez' pocket, as well as a digital scale, a baggie with a strong chemical odor, used hypodermic needles, coffee filters that appeared to have been used for methamphetamine manufacture, unused coffee filters, and an unused length of rubber hose all were found in the passenger compartment of the car. Supp. CP, Affidavit for Search Warrant, 2nd page.

The officers then opened the locked trunk, found a box with several plastic 2 liter bottles with different liquids inside, a metal gallon can of toluene, a section of hose with a pressure gauge, a black metal cooking device. Supp. CP, Affidavit for Search Warrant, 2nd page. Deputy McCarty then secured the car and requested a search warrant for the vehicle. Supp. CP, Affidavit for Search Warrant, 2nd page.

The application for the search warrant listed the above items found, but did not make any connections between the items and the manufacture of methamphetamine. Supp. CP, Affidavit for Search Warrant, 2nd page. Specifically, it did not indicate that he expected to find

evidence of manufacture in the trunk, nor that the needles, the strong chemical odor associated with the baggie found in the glove compartment, the scale, or the unused plastic hose related to manufacture. The affidavit did not allege that the car itself was a rolling methamphetamine lab, nor that drug manufacturers could be expected to hide equipment in the trunks of cars, nor that such equipment would even fit into the trunk. Supp. CP, Affidavit for Search Warrant, 2nd page.

The search warrant was granted. Supp. CP, Search Warrant.

Mr. Perez was charged with Manufacture of Methamphetamine and Use of Paraphernalia. CP 1-3. He challenged the validity of the search warrant. Supp. CP, Motion to Suppress. The parties agreed that the trunk search, prior to the issuance of the warrant, was unlawful. RP (7/7/06) 29-30. The defense argued that the officer would not have sought the search warrant without knowledge of what was in the trunk, that it was overbroad, and that the officers lacked probable cause. RP (8/4/06) 44-52; Supp. CP, Motion to Suppress. The court denied the motion, issuing a Memorandum which indicated that the warrant satisfied the specificity requirement. Supp. CP, Memorandum Opinion and Order.

ARGUMENT

I. THE SEARCH WARRANT FOR THE LOCKED TRUNK OF MR. PEREZ’S CAR VIOLATED ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION.

Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7. Under this provision, search warrants must be based on probable cause. *State v. Young*, 123 Wn.2d 173 at 195, 867 P.2d 593 (1994). The affidavit supporting the warrant application must provide facts establishing a reasonable inference that the defendant is involved in criminal activity and that evidence of the crime will be found at the place to be searched. *Young*, at 195. “[M]ere suspicion, rumor, or strong reason to suspect [wrongdoing]’ are not sufficient” to constitute probable cause. *U.S. v. Vigeant*, 176 F.3d 565, at 569 (1st Cir.,1999), quoting *U.S. v. Han*, 74 F.3d 537 at 541 (4th Cir.1996); See also *Henry v. United States*, 361 U.S. 98, at 101, 80 S. Ct. 168, 4 L.Ed.2d 134 (1959); *U.S. v. Sharpe*, 470 U.S. 675 at 717-718, 105 S. Ct. 1568, 84 L.Ed. 2d 605 (1985).

Appellate courts review the issue of probable cause *de novo*. See *Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L.Ed.2d 911 (1996). Where a search warrant is issued without probable cause,

evidence from the search must be suppressed. *State v. Sanchez*, 74 Wn.App. 763, 875 P.2d 712 (1994).

The warrant affidavit must set forth “the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate.” *State v. Thein*, 138 Wn.2d 133 at 140, 977 P.2d 582 (1999). Furthermore, the constitution requires a nexus between criminal activity and the item to be seized, as well as a nexus between the item to be seized and the place to be searched. *Thein*, at 140.

The federal constitution provides the minimum protection against unreasonable searches; greater protection is available under the Washington constitution. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Although differences are generally examined with reference to the six *Gunwall* factors, no *Gunwall* analysis is necessary where established principles of state constitutional jurisprudence apply:

[The] inquiry is no longer whether article I, section 7 provides greater protection but, rather, does the scope of the protection apply to the facts of the case... [The scope of the protection is determined by examining] those prior cases that have defined the fact that article I, section 7 differs from the Fourth Amendment, at least in the context of the specific legal issue presented...
State v. White, 135 Wn.2d 761 at 769, 958 P.2d 962 (1998).

Facts that establish probable cause under the Fourth Amendment may not be sufficient under Article I, Section 7. *See, e.g., State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984) (informant’s tip must be tested under traditional *Aguilar-Spinelli* test rather than more flexible “totality of the circumstances” test) *responding to Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). “Conclusory predictions” and “blanket inferences” cannot provide probable cause under Article I, Section 7; instead, the police must submit specific facts in support of a warrant application. *Thein, supra*. In *Thein*, an officer obtained a warrant to search a drug dealer’s residence, relying on general ideas about drug dealing to establish that evidence would be found in the home:

[I]t is generally a common practice for drug traffickers to store at least a portion of their drug inventory and drug related paraphernalia in their common residences. It is generally a common practice for drug traffickers to maintain in their residences records relating to drug trafficking activities [I]t is generally a common practice for traffickers to conceal at their residences large sums of money [and] [e]vidence of... financial transactions...[I]t is common practice for drug traffickers to maintain firearms, other weapons and ammunition in their residences...
State v. Thein, at 138-139.

The Supreme Court held that such generalized language could not provide probable cause: “[O]ur precedent requires probable cause be based on more than conclusory predictions. Blanket inferences of this kind

substitute generalities for the required showing of reasonably specific ‘underlying circumstances’ that establish evidence of illegal activity will likely be found in the place to be searched in any particular case.” *State v. Thein*, at 147-148; *see also State v. Nordlund*, 113 Wn.App. 171 at 182-184, 53 P.3d 520 (2002) (“Nor is the [warrant] salvageable by the affidavit’s generalized statements about the habits of sex offenders... These general statements, alone, are insufficient to establish probable cause.”)

By contrast, under the Fourth Amendment, “[d]irect evidence linking criminal objects to a particular site is not required...” *United States v. Parks*, 285 F.3d 1133 at 1142 (9th Cir. 2002). Instead, probable cause can be established by considering the type of crime, the nature of the items sought, the suspect’s opportunity for concealment and normal inferences about where a criminal might hide the evidence. *U.S. v. Parks*, at 1142.

The privacy interests of Washington motorists receive greater protection under Article I, Section 7 than they do under the Fourth Amendment. For example, Washington does not have a broad “automobile exception” to the warrant requirement. *Compare State v. Patterson*, 112 Wn.2d 731 at 735, 774 P.2d 10 (1989) (warrantless search of automobile allowed only if “exigencies in addition to potential mobility

exist”) with *Maryland v. Dyson*, 527 U.S. 465 at 466-467, 119 S. Ct 2013, 144 L.Ed. 2d 442 (1999) (“under our established precedent, the ‘automobile exception’ has no separate exigency requirement.”). Sobriety checkpoints are not permitted in Washington. Compare *Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988) with *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 110 X.Ct. 2481, 110 L.Ed 2d 412 (1990) (sobriety checkpoints consistent with Fourth Amendment). Under Article I, Section 7, inventory searches may not extend to the trunk, absent a manifest necessity. This is true even where the trunk can be opened by means of a trunk release mechanism. *White, supra*. Compare *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980) with *United States v. Cherry*, 436 F.3d 769 (7th Cir. 2006), *cert. den. by Cherry v. United States*, 2007 U.S. LEXIS 160 (2007); see also *United States v. Tueller*, 349 F.3d 1239 (10th Cir. 2003) (inventory search may extend to locked trunk.)

In this case, the warrant authorizing a search of the trunk violated Article I, Section 7. The officers discovered a small baggie of methamphetamine (in the watch pocket of Mr. Perez’s pants), a small digital scale (on the passenger side floor of the car), a baggie with a strong chemical odor, which contained used hypodermic needles and coffee filters (one of which tested positive for methamphetamine) that “appeared

to have been used to manufacture methamphetamine” (in the glove compartment), and finally, a quantity of unused coffee filters and a new unused coiled length of plastic hose (in the back seat). Supp. CP, Affidavit for Search Warrant, 2nd page. Additional items unlawfully discovered in the trunk were excised from the affidavit.¹

These items were insufficient to authorize a search of the trunk under Article I, Section 7. First, the affiant, Deputy McCarty, did not indicate he expected to find evidence of manufacture in the trunk. He did not claim that the needles, the strong chemical odor associated with the baggie found in the glove compartment, the scale, or the unused plastic hose related to manufacture. Although he said that coffee filters found in the baggie “appeared to have been used to manufacture methamphetamine,” he did not explain how they had been used in the manufacture process or suggest that other evidence of manufacture would be nearby. McCarty didn’t claim that the car itself was a rolling methamphetamine lab; instead he asserted (without any factual basis) that he would find “Evidence of the crime(s) of: Possession with Intent to Manufacture RCW 69.50.440, Possession of Drug Paraphernalia RCW

¹ The parties agreed that the final paragraph on the second page of the affidavit could not be considered. RP (7/7/06) 29-30.

69.50.102 and Possession of Methamphetamine RCW 69.50.401H.”

Supp. CP, Affidavit for Search Warrant, 2nd page.

Second, none of the items found on Mr. Perez, in the glove box, or in the passenger compartment suggested that additional evidence of any kind would be found in the trunk.

Third, McCarty did not even provide information about the habits of drug dealers or manufacturers (i.e. “drug manufacturers often hide their equipment in the trunks of their cars”) that the Supreme Court disallowed in *Thein, supra*, much less particularized information suggesting that evidence of manufacture (or other crimes) would be found in this trunk.²

Fourth, even if the used coffee filters (and other items) implied the existence of a lab somewhere, nothing suggested it would be found in the trunk of the car. The logic that would allow a search of the trunk would also authorize a search of Mr. Perez’s home, garage, or shed, a result forbidden by *Thein, supra*.

Fifth, McCarty didn’t establish that components of a methamphetamine lab (or the other unspecified evidence he was seeking) would fit inside the locked trunk. Without such information in the

² The trial court apparently relied on unstated assumptions about the habits of drug users in concluding that “when a controlled substance is located in the passenger compartment of a vehicle there is probable cause... to search the trunk of that same vehicle.” Memorandum Opinion and Order, p. 4, Supp. CP.

affidavit, there was no basis to authorize a search of the trunk under Article I, Section 7. *See, e.g., United States v. Ross*, 456 U.S. 798 at 824, 1025 S. Ct. 2157, 72 L.Ed. 2d 572 (1982):

[The scope of a search] is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.

For all these reasons, the search was unlawful under Article I, Section 7.

In denying Mr. Perez's motion to suppress, the court referred to *State v. Olson*, 32 Wn. App. 555, 648 P.2d 476 (1982), a case decided under the Fourth Amendment. Memorandum Opinion and Order, p. 3, Supp. CP. In *Olson*, evidence that marijuana was being grown in the basement of a residence provided probable cause to search the entire residence. *See also State v. Chasengnou*, 43 Wn. App. 379, 717 P.2d 288 (1986) ("The presence of opium in a private residence raises a legitimate inference that opium may be present throughout the residence.") These cases suggest that a nexus (between the items to be seized and the place to be searched) can be established by considering "the type of crime, nature of the items, and normal inferences where a criminal would likely hide contraband." *Chasengnou, supra*, at 386, quoting *United States v.*

Dubrofsky, 581 F.2d 208 at 213 (9th Cir. 1978).³ But this approach has been rejected in Washington. *Thein, supra*.

The trial court also referenced cases from other jurisdictions, in which contraband discovered in a passenger compartment provided probable cause to search the trunk.⁴ Memorandum Opinion and Order, p. 4.⁵ These Fourth Amendment cases apparently rest on the logic rejected by the Supreme Court in *Thein*: that criminals with contraband in the passenger compartments of their cars have a habit of also keeping contraband in the trunks of their cars. These cases have no bearing on the scope of the protection afforded by Article I, Section 7.

³ For a case in which this logic limited a search, see *State v. Klinger*, 96 Wn. App. 619 at 628, 980 P.2d 282 (1999): “When we apply the nexus requirement to a drug possession case, where there is no evidence of drug trafficking, the scope of the search does not reasonably extend to the entire premises merely by reference to the type of crime. There must be some facts to connect outbuildings or the rest of the property to the crime.”

⁴ In one of the cases, the court did not actually address the issue because the appellant lacked standing and had not challenged the search of the trunk. *State v. Osborne*, 63 Ohio App. 3d 807 (1989).

⁵ The trial court’s citations contain errors. The correct citations are *United States v. Watson*, 697 A.2d 36 (D.C. 1997); *People v. Hunt*, 225 Cal. App. 3d 498 (1990); *Fleming v. State*, 502 So. 2d 327 (Miss. 1987); *State v. Osborne*, 63 Ohio App. 3d 807 (1989); *State v. Olson*, 1998 N.D. 41 (1998); *People v. Dey*, 84 Cal. App. 4th 1318 (2000).

Under our state constitution, a police officer must be able to point to specific facts establishing that evidence will be found in the place to be searched before a warrant may issue. *Thein*. This is true whether the place is a residence, a shed, or the trunk of a car. *Thein, supra*. In addition, the officer must describe the items sought in sufficient detail so that the issuing magistrate can determine whether or not they might be concealed in the place to be searched. *Ross, supra*. The warrant here violated Article I, Section 7, because (1) the officer failed to articulate specific facts establishing that any kind of evidence would be found in the trunk, (2) blanket inferences about the habits of drug manufacturers cannot establish probable cause, and (3) the officer did not assert that the evidence sought would fit in the trunk of the vehicle. The evidence from the trunk must be suppressed. *Thein, supra*. Mr. Perez's conviction must be reversed, and the case must be remanded to the trial court for a new trial.

II. THE STATE FAILED TO ESTABLISH THE EVIDENCE SEIZED FROM THE TRUNK WAS ADMISSIBLE UNDER THE "INDEPENDENT SOURCE" EXCEPTION TO THE EXCLUSIONARY RULE.

Admission of the items seized from Mr. Perez's trunk requires application of the "independent source" rule. *State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993 (2005). Under the rule, "evidence tainted by unlawful governmental action is not subject to suppression [if it] is obtained

pursuant to a valid warrant or other lawful means independent of the unlawful action.” *Gaines*, at 718. To establish the exception, the state must show that the warrant is truly independent; this includes proof that the officers would have obtained the warrant even absent the unlawful intrusion. *Gaines*, at 721, citing *Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529, 101 L.Ed 2d 472 (1988). In *Murray*, the U.S. Supreme Court remanded the case to the district court for a determination of whether or not law enforcement “would have sought a warrant [even] if they had not [illegally] entered the warehouse.” *Murray*, at 543.

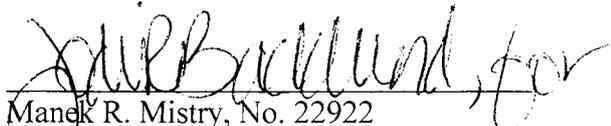
In this case, there is no indication that the deputy would have sought a search warrant if he hadn’t looked in the trunk. *See* Supp. CP, Affidavit for Search Warrant, 2nd page. Because the inventory search of the trunk was illegal, and because the decision to get a warrant was based on the inventory search, the independent source doctrine does not apply. *Gaines, supra*. The evidence found in the trunk must be suppressed. Mr. Perez’s conviction must be reversed and the case remanded to the trial court for a new trial.

CONCLUSION

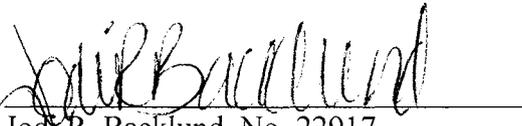
For the foregoing reasons, the evidence must be suppressed, the conviction reversed, and the case remanded to the trial court for a new trial.

Respectfully submitted on March 9, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 9, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 9, 2007.



Jodi R. Backlund, No. 22917
Attorney for the Appellant

BY STATE OF WASHINGTON
MARCH 9 2007
CLERK OF COURT
COURT OF APPEALS
DIVISION II