

No. 35379-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Adrian Perez, Sr.,

Appellant.

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STATE OF WASHINGTON
BY _____
DEPT. OF JUSTICE

Jefferson County Superior Court

Cause No. 06-1-00104-0

The Honorable Judge Craddock D. Verser

Appellant's Reply Brief

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ARGUMENT

I. OFFICERS VIOLATED ARTICLE I, SECTION 7 BY SEARCHING THE LOCKED TRUNK OF MR. PEREZ'S CAR.

Respondent asserts that the search of the locked trunk was legitimate. Brief of Respondent, pp. 6-9. Respondent is incorrect.

First, the affiant himself did not state in the affidavit why he expected to find evidence of manufacture in the trunk. *See* Appellant's Opening Brief, pp. 8-9; Affidavit, Supp. CP. Respondent does not address this argument. Instead, Respondent inexplicably points out that the affidavit met the particularity requirement. Brief of Respondent, p. 7-8. But Mr. Perez did not assert a particularity challenge. If compliance with the particularity requirement solved the probable cause deficiencies with this warrant, as Respondent suggests, then discovery of groceries-- such as eggs, bread, and bacon -- in the passenger compartment could provide probable cause to search the locked trunk for evidence of manufacture, as long as the trunk search was "circumscribed by the reference to the crime being investigated," even if there were no connection between the groceries and the crime of manufacture. Brief of Respondent, p. 7. Respondent's particularity argument is inapposite, and does not advance the analysis.

Second, the items found in the glove box and passenger compartment-- as set forth in the affidavit, without additional information not contained in the affidavit-- did not establish probable cause to believe that evidence of manufacture would be found in the trunk. Appellant's Opening Brief, p. 8-9. Without citation to any particular facts, Respondent claims that the affidavit "recited the facts supporting [the officers'] suspicion" that evidence of manufacture would be found in the trunk. Brief of Respondent, p. 9. But the affidavit is devoid of any suggestion that the items found in the trunk were associated with a manufacture operation, other than the affiant's statement that coffee filters found in the glove compartment "appeared to have been used to manufacture methamphetamine." Supp. CP, Affidavit for Search Warrant, 2nd page. To conclude that the other items-- the scale, the baggie of needles, the unused coffee filters, and the unused plastic hose-- were connected to a manufacture operation somewhere, the magistrate would need to have information not contained within the affidavit.

Respondent asserts that drugs found in the passenger compartment provide probable cause to search the trunk, citing a "legitimate inference" analogous to that in *State v. Olson*, 32 Wn. App. 555, 648 P.2d 476 (1982). Brief of Respondent, p. 8. But *Olson* is a Fourth Amendment case. Probable cause under Article I, Section 7 is different from probable

cause under the Fourth Amendment. *See, e.g., State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984). And our Supreme Court has explicitly disallowed the kind of presumption used here. *See* Appellant's Opening Brief, pp. 5-7; *see also State v. Thein*, 138 Wn.2d 133 at 140, 977 P.2d 582 (1999). Respondent's reliance on Fourth Amendment authority does not help analyze Mr. Perez's Article I, Section 7 claim.

Respondent claims that the affidavit established that items sought would fit within the trunk of the car. Brief of Respondent, p. 11. This is incorrect, because nothing in the affidavit supports this argument, even when the text of the affidavit is interpreted in a common sense manner. In order for the magistrate to conclude that a manufacturing operation would fit within the trunk of a car, the magistrate would need to know the kinds of equipment necessary for manufacture. The affidavit did not spell out the kinds of equipment needed. For all the magistrate knew, the officers were searching for canisters of gas that were ten feet long, 3-yard lengths of rigid metal pipe, and a sterile "clean room" to ensure that the final product wasn't contaminated. The magistrate was not free to presume that evidence of manufacture would fit in the trunk. Instead, the officers were obligated to spell out in the affidavit the kinds of objects they were searching for. Without such information, the affidavit was insufficient.

For all these reasons, the motion to suppress should have been granted. The evidence seized from the locked trunk must be suppressed and the case remanded to the trial court.

II. THE EVIDENCE WAS INADMISSIBLE UNDER THE “INDEPENDENT SOURCE” EXCEPTION TO THE EXCLUSIONARY RULE.

Without citation to the record or authority, Respondent asserts that it is “incontrovertible” that the police would have sought a search warrant for the locked trunk, even if they had not illegally searched it. Brief of Respondent, p. 13. But nothing in the record supports this assertion. The officers did not testify that they would have sought a warrant, even absent their unlawful view of the trunk and its contents. The affidavit is devoid of information proving that the officers would have sought a warrant if they hadn’t already looked inside the trunk.

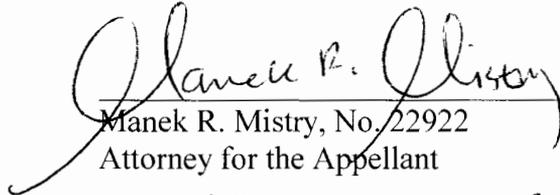
Because the burden is on the state, bare assertions of incontrovertibility will not support application of the independent source doctrine. *State v. Gaines*, 154 Wn.2d 711 at 721, 116 P.3d 993 (2005), citing *Murray v. United States*, 487 U.S. 533, 108 S. Ct. 2529, 101 L.Ed 2d 472 (1988). The evidence 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

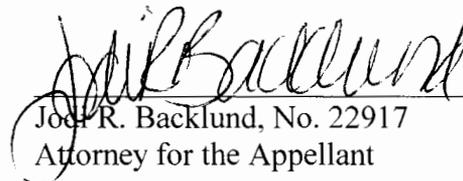
For the foregoing reasons, the evidence discovered in the locked trunk must be suppressed, Mr. Perez's conviction must be reversed, and the case must be remanded to the trial court for a new trial.

Respectfully submitted on June 23, 2007.

BACKLUND AND MISTRY



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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____

DEPUTY

CERTIFICATE OF MAILING

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

Adrian Perez, Sr.
111 Price Street
Port Hadlock, WA 98339

and to:

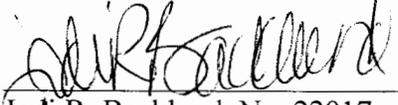
Jefferson County Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368-0920

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

All postage prepaid, on June 23, 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 June 23, 2007.



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