

NO. 35767-4-II

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

STATE OF WASHINGTON, Respondent

v.

LOWELL MALCOLM WHARTON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE BARBARA D. JOHNSON (Suppression)
and THE HONORABLE ROGER A. BENNETT (Trial)
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-02687-1

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
BY [Signature] COUNTY
COURT OF APPEALS

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I. STATEMENT OF THE CASE

The State accepts the statement of facts as set forth by the appellant, except for the sentencing date. The correct sentencing date was January 5, 2007. In some sections of the argument, it will be necessary for the State to further comment on the evidence and it will be done so at that point.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the appellant is that the trial court erred in not suppressing evidence that the police found during a warrantless arrest and search of the appellant. The appellant claims that the entry into the apartment to arrest and search him was unsupported by exigent circumstances.

This matter was subject to a suppression hearing on August 11, 2006. At the conclusion of the hearing, the court entered its Findings of Fact and Conclusions of Law. (CP 92). A copy of the Findings of Fact and Conclusions of Law are attached hereto and by this reference incorporated herein.

As information in the suppression hearing indicates, the contraband was in plain view in extremely close proximity to the

defendant. Under Article I, § 7 of the Washington Constitution, warrantless searches are per se unreasonable. State v. Khounvichai, 149 Wn.2d 557, 562, 69 P.3d 862 (2003). There are exceptions to the warrant requirement, but the State bears the burden of showing a warrantless search falls within one of these exceptions. Plain view is one such exception. The requirements for plain view are:

1. A prior justification for intrusion,
2. Inadvertent discovery of incriminating evidence, and
3. Immediate knowledge by the officer that he had evidence beforehand.

- State v. Chrisman, 94 Wn.2d 711, 715, 619 P.2d 971 (1980)

What the “plain view” cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification – whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or for some other legitimate reason for being present, unconnected with the search directed against the accused – and permits the warrantless seizure.

- Coolidge v. New Hampshire, 403 U.S. 443, 465-466, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971)

Officer Harris testified at the 3.6 hearing that he and two other officers arrived at the apartment in question at 2:40 am to look for two wanted and potentially violent persons. (RP 9). As he knocked on the

door of the apartment, it swung open. Using his flashlight, Officer Harris saw appellant sitting alone on the couch about six feet from the door.

There was no one else in the room. Located on the couch next to appellant's leg was a used glass smoking pipe, a small plastic baggy containing a white crystal substance, and a cell phone. (RP 10).

Appellant was non-responsive to questions from Officer Harris. With his training and experience (two years as a corrections officer, over six years as a police officer, investigated several hundred methamphetamine cases, recovered hundreds of methamphetamine pipes, and over a hundred plastic baggies of methamphetamine), Officer Harris immediately recognized the items laying next to appellant's leg on the couch as contraband. (RP 12-13). He and the other two officers then entered the apartment and arrested appellant for the contraband. (RP 15-16).

The trial court found that the above facts met the requirements for exigent circumstances justifying the entry and warrantless arrest of appellant. The trial court identified 11 factors that Washington courts have used in determining whether exigent circumstances support a warrantless police entry into a home to make an arrest: Whether (1) a violent or other grave offense is involved; (2) the police have reason to believe the suspect is armed; (3) the police have reasonably trustworthy information that the suspect is guilty; (4) the police have strong reasons to

believe the suspect is on the premises; (5) the suspect is likely to escape if not swiftly apprehended; (6) the police enter peaceably; (7) the police are in hot pursuit; (8) the suspect is fleeing; (9) the arresting officer or the public are in danger; (10) the suspect has access to a vehicle; and (11) there is a risk that the police will lose evidence. State v. Wolters, 133 Wn. App. 297, 301-302, 135 P.3d 562 (2006) (citing State v. Terrovona, 105 Wn.2d 632, 644, 716 P.2d 295 (1986); Dorman v. United States, 140 U.S. App. D.C. 313, 435 F.2d 385, 392-393 (1970); State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983)). None of these factors is dispositive and not every factor is required to be present. State v. Patterson, 112 Wn.2d 731, 736, 774 P.2d 10 (1989); State v. Flowers, 57 Wn. App. 636, 655, 789 P.2d 333, review denied, 115 Wn.2d 1009 (1990).

In the present case, the trial court found five of the eleven factors were present. Possession of a Controlled Substance Methamphetamine is a class C felony. Thus, by definition, it is a grave offense (factor 1). The defendant is sitting alone on a couch with no one else in the room with suspected drugs on the couch next to his leg. Thus the police have reasonably trustworthy information that the suspect is guilty (factor 3), and have strong reasons to believe the suspect is on the premises (factor 4). The police in this case entered the apartment without using any force (factor 6). Finally, considering the disposable nature of

methamphetamine, there was a real risk that the police would lose the evidence if they did not immediately seize it (factor 11). For example, it could easily be consumed or flushed down the toilet, and would be impossible to retrieve. Evaluating the totality of the circumstances, the trial court concluded that there were exigent circumstances which justified the entry by the police to arrest appellant. The trial court did not err in denying appellant's motion to suppress evidence.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the appellant is that the trial court erred in denying his motion to sever the bail jump charge from the methamphetamine charge. He claims that the trial court's failure to sever the bail jump charge was unduly prejudicial.

Appellant was arrested on December 2, 2005, for possession of methamphetamine. The bail jump charge arose from appellant's failure to appear for a court-ordered hearing (Readiness Hearing) on March 2, 2006, which the State added in the Second Amended Information. (CP 9). The record does not reflect that appellant objected to the joinder of these offenses. Hence, appellant does not properly preserve the issue of joinder.

Joinder is appropriate where:

Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or

both . . . Are based on the same conduct or in a series of acts connected together or constituting parts of a single scheme or plan. . .

CrR 4.3(a)(2)

A trial court may join offenses under CrR 4.3(a)(2) where the offenses are of the same or similar character or where the offenses are based on a series of acts connected together or constituting parts of a single scheme or plan. This rule is construed expansively to promote the public policy of conserving judicial and prosecutorial resources. State v. Hentz, 32 Wn. App. 186,189, 647 P.2d 39 (1982). A failure of the trial court to sever counts is reversible only upon a showing that the court's decision was a manifest abuse of discretion. The defendant seeking severance has the burden of demonstrating that a trial involving the counts would be so manifestly prejudicial as to outweigh the concerns for judicial economy. State v. Philips, 108 Wn.2d 627, 741 P.2d 24 (1987); State v. Smith, 74 Wn.2d 744, 755, 446 P.2d 571 (1968); State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

After a motion to sever, the court denied the motion indicating that it was within the court's discretion and that there had been no strong showing of prejudice made by the defendant. (RP December 4, 2006, Volume II, page 10).

The State submits that this matter has not been properly preserved for appeal and that there is insufficient information supplied to the trial court to warrant severing of the counts.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error deals with the jury instructions given by the court and specifically the special verdict form as it relates to a firearm.

As part of the Second Amended Information, under Count 1 Possession of Controlled Substance – Methamphetamine, the defendant was put on notice that the firearm enhancement was alleged. (CP 9). Based on that, the trial court instructed the jury as it relates to the special verdict form and the concept of a firearm. As part of the Court’s Instructions to the Jury (CP 43), Instruction No. 15 reads as follows:

Instruction No. 15

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count 1, Possession of Controlled Substance – Methamphetamine.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use.

A “firearm” is a weapon or device, loaded or unloaded, from which a projectile may be fired by an explosive such as gunpowder.

(Court’s Instructions to the Jury (CP 43) Instruction No. 15)

The defense maintains that nexus language needed to be supplied for the jury and cites to State v. Holt, 119 Wn. App. 712, 82 P.3d 688 (2004) for requiring that trial court instruct the jury to find a nexus between the defendant, the weapon and the crime charged.

Recently, the State Supreme Court in State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005), although not explicitly overruling Holt, held that “express nexus language is not required, in the jury instructions.” Willis, 103 P.3d at 1217. Rather, the instructions are sufficient if they inform the jury that it must find a relationship between the defendant, the crime and the deadly weapon. Willis, 103 P.3d at 1217. This has been interpreted in Willis as the State being required to prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime charged and that the firearm was readily available for offensive or defensive purposes. Willis, 103 P.3d at 1215. Willis went on to interpret the jury instructions that are basically identical to the ones provided to our jury and held that those jury instructions are sufficient. The State submits that the Willis case now controls and the jury was properly instructed.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The fourth assignment of error seems to be very similar to that under No. 3 in that it deals with the firearm enhancement and the

requirement for additional connection or nexus between the defendant and the criminal activity and the firearm. As indicated in State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007), there are some cases in which it would be a better practice to specifically instruct the jury that the defendant was armed only if there is some nexus or connection between the defendant, the weapon and the crime. The State submits that this particular type of information was supplied in the testimony offered at the time of trial. Officer Spencer Harris from the Vancouver Police Department testified for the jury about his extensive training in law enforcement and specifically in the area of drugs and recognition of drugs. (RP December 4, 2006, 22).

He also discussed with the jury that he and other officers were there at the residence in question to find wanted suspects (not the defendant). (RP December 4, 2006, 28). When the officer came in contact with the defendant, the defendant was seated on a couch with a plastic baggie containing crystal substance and paraphernalia within literally inches of his leg. (RP December 4, 2006, 32).

The officer moved the defendant to a chair and noticed that the defendant was fidgeting with his hands behind his back with his back to the officer. (RP December 4, 2006, 35). The officer on checking on this found the handgun that the defendant had hidden on his person and that he

was attempting to push it down into a cushion on the chair. (RP December 4, 2006, 36). It is a reasonable inference from this testimony that there is a connection between the defendant, the drugs and the deadly weapon. The lack of the word “nexus” does not render the generally used enhancement instructions per se inadequate. Eckenrode, 159 Wn.2d at 493-494; Willis, 153 Wn.2d at 374. As long as any rational trier of fact could have found that the defendant was armed, given the evidence in light most favorable to the State, sufficient evidence exists. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The State submits that the evidence at the time of trial establishes the nexus and provides enough information for the jury to be properly instructed using the generally used enhancement instructions.

VI. RESPONSE TO ASSIGNMENT OF ERROR NO. 5

The fifth assignment of error raised by the defendant is a claim of inconsistent verdicts in that the jury found the defendant guilty of Possession of a Controlled Substance – Methamphetamine under Count 1 but not guilty of Unlawful Use of Drug Paraphernalia under Count 2.

In State v. Ng, 110 Wn.2d 32, 750 P.2d 632 (1988), our Supreme Court dealt with the issue of whether an apparent inconsistency between jury verdicts renders a challenged conviction void.

In Ng, a defendant was charged with first degree assault and thirteen counts of first degree felony murder. The “to convict” jury instruction on each charge of felony murder required the jury to find that Ng participated in a robbery and caused a particular victim’s death. Ng, 110 Wn.2d at 35-36. The jury instructions also allowed the jury to find Ng guilty of first degree robbery as a lesser included offense of felony murder and second degree assault as a lesser included offense of first degree assault. The jury convicted Ng of the lesser included offenses. Ng, 110 Wn.2d at 36.

Ng argued that the jury’s verdicts on the robbery charges should be reversed because they were inconsistent with the jury’s acquittal on the felony murder charges. Our Supreme Court rejected Ng’s challenge and stated that although the verdicts were “inconsistent,” the convictions can be upheld “where the jury’s verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt.” Ng, 110 Wn.2d at 48. It reached this conclusion to protect “considerations of jury lenity” and to avoid the “problems inherent in second guessing the jury’s reasoning,” leaving intact “the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons.” Ng, 110 Wn.2d at 48. This reasoning is consistent with State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2002) and is further consistent with United

States v. Powell, 469 U.S. 57, 105 S. Ct. 472, 83 L. Ed. 2d 461 (1984).

Finally, our State has consistently followed the rules set forth in Dunn v. United States, 284 U.S. 390, 76 L. Ed. 2d 356, 52 S. Ct. 189 (1932) where the Supreme Court held that a criminal defendant convicted by a jury on one count of a criminal accusation cannot attack that conviction because it is inconsistent with the jury's verdict of acquittal on another count.

The State submits that there is sufficient evidence to support the conviction for Possession of Methamphetamine.

VII. RESPONSE TO ASSIGNMENT OF ERROR NO. 6

The sixth assignment of error raised by the defendant deals with prosecutorial misconduct in the rebuttal part of closing argument when the State used the term "pucker factor". The claim is that in someway this was an inappropriate phrase to use in argument.

In order to prevail on an allegation of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). A defendant establishes prejudice only if there is a substantial likelihood the instances of misconduct affected the jury's verdict. State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). Courts afford a prosecutor wide latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995). The

appellate court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). In our case, the phraseology came up during the State's rebuttal argument in the following context:

MR. VU: Thank you, Judge.

If there was no weapon, okay, involved, there's no weapon present, versus when there's a weapon present (indicating throughout), is there - - is it a more - - does this raise - - and I - - I quote - - and I'm going to use the vernacular terminology. Does this raise the pucker factors?

MR. SOWDER: Objection.

MR. VU: Yes.

THR COURT: Overruled.

MR. VU: I submit to you yes. Even when this is not loaded (indicating), with this gun alone - - of course, you know, the - - the slide will be forward and whatnot - - would that cause you alarm? Even though you don't know - -

MR. SOWDER: Same objection.

MR. VU: - - if it's loaded or unloaded?

THE COURT: Overruled.

MR. VU: And hence, the presence of the gun by itself, okay, makes it a - - a more serious situation. And because the defendant had it on him, hidden away, makes it that much more serious (indicating), because the officer did not know it was there.

He was armed with this weapon (indicating), regardless if it was loaded or unloaded. The law - - that's what the law says, and I submit that you have to follow the law.

(RP 169, L.3 – 170, L.5)

In our case, there has been no showing by the defense as to how this impacted or prejudiced the defendant nor is there any indication that this alleged improper conduct prejudiced his ability to present a defense or would have had a substantial likelihood of affecting the jury's verdict in the case. There simply has been no showing of prosecutorial misconduct or any impact or affect it would have had if the court is inclined to believe that this phrase was inappropriate.

VIII. CROSS-APPEAL BY THE STATE OF WASHINGTON –
ISSUE: THE TRIAL COURT DID NOT HAVE AUTHORITY
TO STRIKE A FIREARM ENHANCEMENT FINDING BY THE
JURY

As part of the Second Amended Information (CP 9), Count 1 charged Possession of Controlled Substance – Methamphetamine with a firearm enhancement also being alleged.

When this matter went to jury trial, the jury was instructed on the possession of controlled substance – methamphetamine and also provided a special verdict form relating to the firearm enhancement. The Court's Instructions to the Jury (CP 43) included No. 14 dealing specifically with the special verdict form. This was in line also with Special Instruction No. 15 dealing with definition of a firearm.

The jury found the defendant guilty of count 1 and made a specific finding of guilt under the special verdict that he was armed with a firearm

at the time of the commission of the crime. (Special Verdict Form – Count 1, CP 63).

Sentencing in this matter took place on January 5, 2007. A copy of the Felony Judgment and Sentence of that date has been ordered as a supplemental designation of clerk's papers. Apparently, it was inadvertently not included in the original request for clerk's papers. The balance of the argument is in anticipation of the appellate court allowing supplementation of clerk's papers to include a copy of the Felony Judgment and Sentence entered in this case to be submitted.

In the Felony Judgment and Sentence on page 2, it specifically states that "a special verdict/finding for use of firearm was returned on count 1. RCW 9.94A.602, 533."

However, on page 3 of the Felony Judgment and Sentence the trial court has crossed out the 18 month firearm enhancement as it relates to count 1. This cross out is under the initials of the trial court. The defendant then was sentenced without the use of the enhancement.

RCW 9.94A.533 deals with adjustments to standard sentences. Under § 1 of RCW 9.94A.533 is the indications that it does apply to drug cases by specific reference to RCW 9.94A.517. This would include our situation of conviction for Possession Controlled Substance – Methamphetamine.

Under number 3 of RCW 9.94A.533 dealing with adjustments to standard sentences is the following language:

(3) the following additional times **shall** be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime....

It then goes on to indicate under subsection (c) 18 months is to be added to class C felonies. That is what the defendant was convicted of in this case.

Subsection (e) sets forth the following

Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. ...

In State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003), it was held that this firearm provision of the statute is mandatory on the trial courts. As indicated on page 416 of that opinion “Thus, all firearm and deadly weapon enhancements are mandatory and where multiple enhancements are imposed, they must be served consecutively to base sentences and to any other enhancements.” The presumptive maximum sentence of 60 months is to be honored, but 18 months of that must be the

firearm enhancement. DeSantiago, 149 Wn.2d at 416-417. There is absolutely no provision in any of this legislation to allow the trial court to strike a firearm enhancement. This matter was properly submitted to the jury and was a finding by the jury. The legislation is quite clear that it is to be imposed at the time of sentencing. The State submits that the trial court was in error by not following the legislative mandate. This matter should be returned for resentencing and imposition of the mandatory provisions of the statute.

IX. CONCLUSION

The trial court should be affirmed in all respects as it relates to the underlying trial. This matter should be returned for resentencing to impose the firearm enhancement found by the jury.

DATED this 17 day of October, 2007.

Respectfully submitted:

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APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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FILED
JAN 19 2007
Sherry W. Parker, Clerk, Clark Co.

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK**

STATE OF WASHINGTON,

Plaintiff,

v.

LOWELL MALCOLM WHARTON,

Defendant.

No. 05-1-02687-2



~~DEFENDANT'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW ON
DEFENDANT'S MOTION TO SUPPRESS
AND MOTION TO DISMISS FIREARM
ALLEGATION AND MOTION TO DISMISS
BECAUSE OF LACK OF ACTUAL OR
CONSTRUCTIVE POSSESSION~~

The parties appeared before the Honorable Barbara Johnson, Department Six, Clark County Superior Court on August 11, 2006 for a hearing on Defendant's Motion to Suppress, Motion to Dismiss Firearm Allegation and Motion to Dismiss Because of Lack of Actual or Constructive Possession.

Defendant appeared personally and by and through his attorney, James J. Sowder. The State was represented by Deputy Prosecuting Attorney Kasey Vu.

The Court heard argument of counsel, reviewed briefs and heard testimony from Vancouver Police Department Officer Spencer Harris, Department of Corrections Officer Joshua Sparks and the defendant.

Based on the foregoing and the files and records herein, the Court makes the following Findings of Fact and Conclusions of Law.



~~DEFENDANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 1~~

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FINDINGS OF FACT

Undisputed Facts

1. On December 1, 2005 at approximately 2:40 am Vancouver Police Department Officer Spencer Harris, Department of Corrections Officer Joshua Sparks and Deputy Lindsay Schultz of the Clark County Sheriff's Office went as a team to 6208 NE 17th Avenue #G55, Vancouver, Washington, looking for two suspects, Landon Kush and Joseph Hanson.
2. The information, provided through an informant that Mr. Kush and Mr. Hanson were at the apartment. Mr. Kush was wanted by the Department of Corrections for violating conditions of supervision and there was probable cause to arrest Mr. Hanson on unrelated drug charges.
3. Officer Harris knocked on the door to the apartment and it swung open. When the door swung open, Officer Harris observed the defendant sitting on a couch approximately six feet from the door. *Approximately SIX INCHES FROM M*
Close to the defendant's leg on the couch was a glass pipe commonly used to smoke methamphetamine. Officer Harris observed white residue on the pipe which is typical from the use of the pipe to smoke methamphetamine. Next to the glass pipe he also observed a small plastic bag that contained white crystal substance. Next to the defendant, also on the couch and in close proximity to the defendant, Officer Harris saw a cell phone which later was identified as belonging to the defendant.
5. Officer Harris has sufficient training and experience to identify a pipe that has been used for smoking methamphetamine and can identify how methamphetamine is typically packaged.
6. Officer Harris, with the other officer following him, entered the apartment and seized the defendant while he was sitting on the couch and arrested him for possession of drug paraphernalia and possession of suspect methamphetamine. The defendant was placed in handcuffs and placed on a swivel chair in the living room.

[Signature]
~~DEFENDANT'S PROPOSED FINDINGS OF FACT~~
AND CONCLUSIONS OF LAW - 2

- 1 7. While the defendant was sitting in the swivel chair, a pistol dropped from his waistband.
2 The pistol was not loaded. Officer Harris seized the pistol.
- 3 8. Officer Harris advised the defendant of his constitutional rights while he was seated in
4 Officer Harris' patrol vehicle. Defendant acknowledged his rights and agreed to speak
5 with the officers without an attorney. The defendant denied ownership of the drug
6 paraphernalia and alleged methamphetamine.
- 7 9. Also present in the apartment when the officers entered were Joshua Larson and Destiny
8 Henning. Mr. Larson and Ms. Henning were in a back room of the apartment when the
9 officers entered.

10 Disputed Facts

- 11 1. Defendant's actual or constructive possession of the alleged drug paraphernalia and
12 alleged methamphetamine.
- 13 2. The defendant had just arrived at the apartment (approximately one hour) before the
14 officers arrived to assist Ms. Henning in moving.
- 15 3. The defendant was asleep on the floor shortly before the officers entered the apartment.

16 CONCLUSIONS OF LAW

- 17 1. The Court has jurisdiction over the parties and the subject matter.
- 18 2. The officers are entitled to knock on the front door. This was not a knock-and-talk
19 situation as described in State v. Ferrier, 136 Wn.2d 103 (1998). It is undisputed that the
20 door to the apartment opened at least one inch giving Officer Harris a view of the
21 defendant, the suspect drug paraphernalia and the suspect methamphetamine.
- 22 3. The officers were reasonable in entering the apartment given the exigent circumstances.
23 The view of the drug paraphernalia showed recent use and the suspect bindle gave the
24 officers probable cause to arrest the defendant because of his mere proximity to such
25 items.
26

27 
**DEFENDANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 3**

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1 4. The Court has identified eleven factors to be considered in evaluating whether exigent
2 circumstances exist to support a warrantless police entry into a residence, noting State
3 v. Terrovona, 105 Wn.2d 632 (1986) and State v. Wolters, 133 Wn. App. 297 (2006).

4 Those factors include:

5 (1) Whether or not a violent or other grave offense is involved. Possession of
6 methamphetamine or methamphetamine paraphernalia is a Class C felony and a
7 serious offense, although not a violent offense.

8 (2) That the police have reason to believe the suspect is armed. The police did
9 not know the defendant and had no reason to suspect he was armed but had had
10 prior contact with Mr. Kush and Mr. Hanson and believed they may be violent.

11 (3) That the police have reasonably trustworthy information that the suspect is
12 guilty. Officer Harris' observation of the defendant's mere proximity to the
13 alleged drug paraphernalia and the bindle satisfies this prong.

14 (4) That the police have strong reason to believe that the suspect is on the
15 premises. Officer Harris directly observed the defendant on the premises.

16 (5) That the suspect is likely to escape if not swiftly apprehended. The defendant
17 had an opportunity to flee if the officers delayed entry to get a search warrant.

18 (6) That the police entry is made peaceably. The police simply walked into the
19 apartment.

20 (7) That the police are in hot pursuit. There is no hot pursuit of the defendant
21 but there was reliable information that Mr. Kush and Mr. Hanson were present
22 in the apartment.

23 (8) There is no evidence the defendant would flee.

24 (9) There is no evidence the defendant was a danger to arresting officer or to the
25 public.

26 (10) That the suspect had access to a vehicle. The officers did not know this.

27 (11) That there is a risk of the police losing evidence. If the officers waited for


DEFENDANT'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 4

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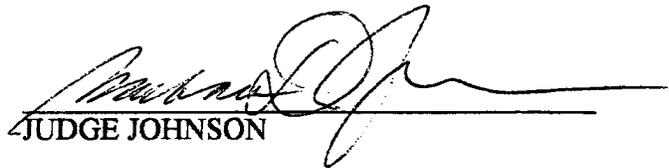
1 a search warrant, the evidence could have been destroyed, although the officers
2 had the authority to control the scene while waiting for a warrant.

3 5. The totality of the above justify the warrantless entry by the officers into the apartment
4 because of exigent circumstances.

5 6. Because the defendant was alone in the room, his ~~mere~~ ^{close} proximity to the alleged drugs
6 and paraphernalia is a sufficient basis for probable cause to arrest the defendant and a
7 prima facie basis sufficient evidence to go to a jury.

8 7. Based on the above, Defendant's Motion to Suppress, Motion to Dismiss Firearm
9 Allegation and Motion to Dismiss Because of Lack of Actual or Constructive Possession
10 are hereby denied.

11
12 Dated this 19 day of ~~September~~ ^{January 2007}, 2006.

13
14 
15 JUDGE JOHNSON

16 Presented by:

17 
18 JAMES J. SOWDER WSBA #9072
19 Attorney for Defendant

20 Service accepted, consent to entry,
21 notice of presentation waived.

22 
23 KASEY VU WSBA# 31528
24 Deputy Prosecuting Attorney

25
26 
27 ~~DEFENDANT'S PROPOSED FINDINGS OF FACT~~
AND CONCLUSIONS OF LAW - 5

