

NO. 35979-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

RODNEY GLYNN CECIL,

Appellant.

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BRIEF OF APPELLANT

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court erred when it entered that portion of Finding of Fact 4 on the defendant's suppression motion wherein it found that Ronald Russell "rents the residence to the defendant and to Timothy Hyde," and when it entered that portion of Conclusion of Law that states that "Gloria Elliott was not associated with the residence nor was she associated with the defendant. There was no reason why that check needed to be there." CP 205-209.

2. The police violated the defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment when they searched his home pursuant to a warrant issued in reliance upon an affidavit that did not establish probable cause and when they exceeded the scope of the warrant, and the trial court erred when it denied the defendant's motion to suppress this evidence. CP 14-17, 58-61; Exhibit 7; RP 9-70.

3. The trial court violated Washington Constitution, Article 4, § 16 when it allowed the state over defense objection to elicit evidence that the police searched the defendant's home and computer pursuant to judicially authorized warrants. RP 112-113, 129.

4. The trial court violated the defendant's right to due process under

Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgement of conviction against the defendant for first degree trafficking in stolen property because the state failed to present substantial evidence on this charge.

*Issues Pertaining to Assignment of Error*

1. Does a trial court err if it enters findings of fact unsupported by substantial evidence?

2. Do the police violate a defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment if they search her home pursuant to a warrant issued in reliance upon an affidavit that does not establish probable cause or if they exceed the scope of the warrant, and does a trial court err if it denies a motion to suppress the evidence seized when the police executed the warrant?

3. Does a trial court violate Washington Constitution, Article 4, § 16 if it allows the state over defense objection to elicit evidence that the police searched the defendant's home and computer pursuant to judicially authorized warrants?

4. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgement of conviction for an offense unsupported by substantial evidence?

## STATEMENT OF THE CASE

At about 8:55 pm on April 19, 2005, officers of the Vancouver Police Department served a search warrant at 1216 West 19th in Vancouver. RP 11, 30. The warrant authorized the police to search for three individuals with outstanding arrest warrants: Vicky Carstensen, Dawn Jeantet, and Timothy Hyde. CP 18. The house at 1216 West 19th consists of a main floor, a basement, and a second floor. RP 32-33. The search warrant affidavit indicated that Mr Hyde rented the basement. RP 60. The affidavit did not specify how access is made to either the second floor or the basement. RP 58-61.

During the execution of the search warrant one of the officers entered what he knew to be the defendant's bedroom on the main floor of the house, ostensibly to "look" for the persons named in the warrant. RP 34. Once inside the bedroom he saw a laptop computer, a "thumb drive," and a printer. RP 34. On top of the printer he saw a check, face up, made out to a "Gloria Elliott." *Id.* He also saw "check stock" by the printer. RP 34-35. Having a hunch that this might be evidence of a forgery, he seized these items, and later obtained a warrant authorizing the search of the laptop and the thumb drive. *Id.* Based upon the seizure of the check, the check stock, and information obtained during a search of the laptop and thumb drive, the state charged the defendant with one count of first degree trafficking in stolen

property, four counts of second degree identity theft, and three counts of forgery. CP 1-2.

The first charge of trafficking in stolen property also alleged that this count constituted a “major economic offense” in that (1) it involved multiple victims or multiple incidents per victim, and (2) it involved a high degree of sophistication, a high degree of planning, or occurred over a lengthy period of time. CP 1. Although the state later twice amended the information, these amendments did not change the number or substance of the original charges. CP 49-52, 76-78, 135-137.

The defense later brought a motion to suppress all evidence seized during the execution of both warrants, arguing that (1) the first search warrant did not establish probable cause sufficient to authorize a search of the house, (2) the requesting officer’s search warrant affidavit intentionally or recklessly omitted relevant information that would have vitiated probable cause, and (3) the officers exceeded the scope of the warrant when they seized the computer, thumb drive, check, and check stock. CP 4-32, 49-52. The information the defense alleged that the officer omitted from his affidavit was that another police officer had searched the house a few days previous and found no evidence that the wanted persons were present or lived at that address. *Id.*

The court later held a hearing on the motion, during which the state

called the officer who had given the affidavit in support of the warrant as well as the officer who had entered the defendant's bedroom on the main floor of the house and seized the check, check stock, computer, and thumb drive. RP 9-46. The first officer testified that at the time he signed the search warrant affidavit he was unaware that other officers had recently been in the house. RP 15-20. The second officer testified that at the time he entered the defendant's bedroom on the first floor of the house, he was aware that the defendant had a prior conviction for forgery. RP 34-35. As a result, when he saw the check made payable to Gloria Elliot, he assumed the defendant had forged it. *Id.*

Following argument, the court denied the motion and later entered the following findings of fact and conclusions of law in support of its ruling.

#### **FINDINGS OF FACT**

1. On April 12, 2005, Vancouver police officer Spencer Harris submitted an affidavit for a search warrant to search for three subjects, Vickie Carstensen, Dawn Jeantet, and Timothy Hyde, at 1216 W. 19<sup>th</sup> Street, Vancouver, Clark County, Washington. Officer Harris indicated that these three individuals had outstanding felony warrants for their arrest. Clark County District Court Judge Vernon Schreiber authorized the warrant.

2. As it relates to Vickie Carstensen, Officer Harris indicated in the affidavit that he was "made aware" that she was living at the residence but does not identify the source of that information. He also states that he saw a woman who "resembled" Carstensen when he went to the residence on April 11, 2005.

3. As it relates to Dawn Jeantet, Officer Harris indicates in the

affidavit that the checked other Vancouver police reports that lists her address as the target address and that she was the girlfriend of the defendant. However, Officer Harris does not articulate the specifics of this information and how it was obtained.

4. As it relates to Timothy Hyde, Officer Harris indicates in the affidavit that he spoke with the owner of the target residence, Ronald Russell, who confirmed that he rents the residence to the defendant and to Timothy Hyde. Mr. Russell also identified Timothy Hyde from a photo that was shown to him by Officer Harris.

5. There was information that Vancouver Police Officer Acee conducted a prior search of the target residence the day prior to Officer Harris submitting his affidavit to Judge Schreiber. Officer Acee also submitted his report of his search less than twenty four hours prior to Officer Harris submitting his affidavit to Judge Schreiber. Officer Harris did not work with Officer Bryan Acee during that time and does not recall ever talking to Officer Acee about his prior search.

6. There was information that Vancouver Police Sergeant Mike Chylack, Clark County Drug Court liaison, was at the target residence approximately two weeks prior to the search to conduct a compliance check of the defendant, who was a participant in the Clark County Drug Court program. Sgt. Chylack indicated that he was only in the defendant's room and was unaware of who else may have been in the residence. Even though Sgt. Chylack indicates that he told Officer Harris about this prior compliance check, Officer Harris does not recall talking to him about it.

7. On April 19, 2005 Vancouver Police executed the search warrant at 1216 W. 19<sup>th</sup> Street, Vancouver, Clark County, Washington.

8. Upon execution of the search warrant, Sgt. Chylack went into the defendant's bedroom looking for any of the three wanted persons. While in the bedroom Sgt. Chylack observed what happened to be a check to Gloria Elliott laying face upon on a printer that was connected to a laptop computer with an attached external thumb-drive. Also observed next to the computer was blank check stock paper. Sgt. Chylack was able to observe these items without having

to manipulate them.

9. Because of his contact with the defendant in the Clark County Drug Court program, Sgt. Chylack was aware of the defendant's prior felony convictions for Identity Theft and Forgery. Sgt. Chylack was not aware of any connection between the defendant and the name of the person on the check, Gloria Elliott, and suspected that the defendant was involved in fraud related activities. The check, the computer, and blank check stock were seized.

10. As a participant of the drug court program the defendant signed a contract that permitted a search of his residence when requested by a drug court officer. There is no evidence that Sgt. Chylack requested to search defendant's residence pursuant to the drug court contract.

11. Vancouver Police submitted an affidavit and obtained a search warrant for the laptop computer and attached external thumb-drive.

### **DISPUTED FACTS**

1. The check-like document was not immediately recognizable as contraband. The court finds that it was for the reasons stated in Conclusions of Law No. 7 and Findings of Fact No. 9.

### **CONCLUSIONS OF LAW**

1. The Court has proper venue and jurisdiction to hear the above-entitled matter.

2. The affidavit submitted by Officer Harris did not support probable cause to search for Vickie Carstensen nor Dawn Jeantet. However, since the owner of the residence indicated that he did rent to Timothy Hyde and he was able to identify him from viewing a photograph, probable cause was established to search for Timothy Hyde.

3. The search of defendant's bedroom was not a drug court search as Sgt. Chylack did not request to search the bedroom pursuant to the drug court contract.

4. In regard to any *Franks v. Delaware* issue, there is no evidence that Officer Harris deliberately made any misrepresentations or omissions nor did he recklessly disregard the possibility that material information existed. There is no evidence that Officer Harris would have found Officer Acee's report nor is he expected to check for a court compliance check by Sgt. Chylack, it was made clear that Sgt. Chylack was only in defendant's bedroom and that he was not aware if anyone else was in the residence. His information would not negate probable cause. There is no basis on *Franks v. Delaware* grounds to void the search.

5. The search warrant to search for Timothy Hyde at 1216 W. 19<sup>th</sup> Street, Vancouver, Clark County, Washington was valid and lawful.

6. A plain view search is an exception to the search warrant requirement under the Fourth Amendment to the United States constitution and Article 1, Section 7 of the Washington constitution.

7. This Court finds the testimony of Sgt. Chylack credible and persuasive. He entered the defendant's bedroom under lawful authority of a valid search warrant. He was looking for people in a room and in areas where people might be found. He was in the process of looking in the defendant's room when he observed, in plain view, a check to Gloria Elliott, face up, on a printer that was attached to a laptop computer. Gloria Elliott was not associated with the residence nor was she associated with the defendant. There was no reason why that check needed to be there. In addition, Sgt. Chylack observed blank check stock in plain view next to the computer. Based upon Sgt. Chylack's observations along with his knowledge of the defendant's criminal history, he had reason to believe, and did believe, that he was observing evidence of a crime. Sgt. Chylack lawfully seized the check and blank check stock paper which were in plain view.

8. Since the printer containing the check was attached to the laptop computer it would be logical and reasonable to assume that the printed check information came directly from the computer. Therefore, there was probable cause for the warrantless and temporary seizure of the computer until a search warrant could be obtained. This court rules that the defendant's privacy rights

regarding the computer were not severely impacted when the computer was temporarily seized until a search warrant was obtained. The reviewing magistrate found probable cause to search the laptop computer.

9. Because the search warrant to look for Timothy Hyde was valid and Sgt. Chylack was lawfully in an area where the seized items were observed in plain view, the "mere evidence" issue raised in Defendant's second amended motion to suppress is irrelevant.

10. Defendant's motion to suppress is denied.

CP 205-209.

The case later came to trial before a jury with the state calling 10 witnesses, who included three police officers who had either executed the search warrant at the defendant's house or obtained the search warrant for the computer. RP 106, 118, 124. Over defense objection, the trial court allowed these officers to testify that they had seized the computer, thumb drive, check, and check stock pursuant to a judicially authorized search warrant, and they had searched the computer and thumb driver pursuant to a separate judicially authorized warrant. RP 112-113, 129. The court did sustain a defense objection to the following question and answer during the state's direct examination of one of the officers who helped execute the search warrant.

Q. Okay, and what were your duties on the Neighborhood Response Team?

A. Primarily our job was to take the burden off of patrol as far as problem houses. We did a lot of search warrants. We had arrested a lot of career criminals.

We would do directed patrol areas that had -- were --

RP 125.

At this point the defense objected to this question and answer. *Id.*  
The court sustained the objection and instructed the jury to disregard. *Id.*

The state also called a computer expert who works for the Vancouver Police Department. CP 106-225. This expert testified that she had examined the computer and jump drive, and that she had been able to recover a number of deleted items from both. RP 130-142. These items included checks, personal and financial information, merchandise orders, and e-mail for the following five people: Gloria Elliot, Jerry Hoffman, Barbara Larey, Gary Lass, and Cheryl Michaels. RP 130-164. The specific documents were as follows:

(1) A Union Bank check made payable to Gloria Elliot similar to the physical check the officer found on the printer (Exhibits 1 and 6), RP 142-143, 178-179;

(2) A State Farm Insurance check made payable to Gloria Elliott for injuries sustained in a motor vehicle accident (Exhibit 7), RP 144-145, 181-182;

(3) A Bank of America check made payable to Gloria Elliot (Exhibit 8), RP 145, 182-183;

(4) An e-mail to [Onlinesystems2007@Yahoo.com](mailto:Onlinesystems2007@Yahoo.com) containing the name, address, telephone number, social security number for Jerry Hoffman (Exhibit 9), and an internet order for a book billed to Jerry Hoffman and shipped to a Sandy Roberts in Vancouver (Exhibit 10), RP 146-148, 195;

(5) An internet order from Barbara Larey to CandleMart that includes Barbara Larey's VISA credit card number and instructs that the items purchased be shipped to a Donna Jeannette at 810 West 17th Street in Vancouver (Exhibit 12), RP 152, 198-199;

(6) An e-mail containing the name, address and social security number for Gary Lass (one number incorrect) (Exhibit 15), RP 153-154, 210-212; and

(7) An e-mail that includes a credit card number for Cheryl Michaels, and includes information on a purchased made on that account in the amount of \$338.00 (Exhibit 16), RP 153-154, 220-222.

In its case in chief, the state also called Gloria Elliot, Jerry Hoffman, Barbara Larey, Gary Lass, and Cheryl Michaels as witnesses. RP 178, 186, 198, 208, 220. Ms Elliot testified that the Union Bank check, the State Farm check, and the Bank of America check all had her name on them as payee, along with her address and other identifying information. RP 178-184. However, she had no idea who made the checks, she did not receive the checks, she had not been injured in a motor vehicle accident, and she did not give anyone permission to use her name and address. *Id.* Mr. Hoffman testified that he did not order a book online, he did not know a Sandy Roberts, he had no knowledge of the e-mail bearing his personal information, and he did not give anyone permission to use his personal information. RP 186-195. Ms Larey testified that she did not order anything from CandleMart, she did not know a Sandy Roberts, and she did not give anyone permission to use her personal and financial information. RP 198-206. Mr.

Lass testified Exhibit 15 includes his name, address, and his social security number with one number incorrect, and he did not give any person permission to possess this information. RP 208-214. Finally, the state called Cheryl Michaels, who testified that Exhibit 16 contained her old credit card number, that she did not make the purchase noted in the document, and she did not give anyone permission to use her old credit card number. RP 110-222.

As its final witness in the case the state called Deborah Sprain. RP 248-274. Mr. Sprain testified that she was friends with the defendant, and over the past year she would provide names, addresses, and financial information via e-mail to the defendant and he would pay her one-third of the money or goods he could steal using the information. RP 253-257. Jerry Hoffman and Gary Lass were two of the people whose financial information she gave to the defendant. RP 261-265. While on the witness stand, she identified the laptop computer in evidence as belonging to the defendant, although she admitted she had never seen him use it. RP 265-266, 271. On cross-examination Ms. Sprain admitted that she was testifying in order to get a significant reduction in charges pending against her, that she had prior convictions for theft and forgery, and that she had given the defense a taped statement refuting what she was now claiming to be true. RP 267-273.

After the state rested its case the defendant moved to dismiss count

I on the basis that the state had failed to present any evidence that the defendant had trafficked in stolen “property.” RP 290-292. The court denied the motion on the basis that the court believed that personal or financial information could qualify as “property.” RP 292-298. The defense then objected to the trial court’s ruling that it would allow the state to impeach the defendant with his prior convictions for identity theft if he chose to testify. RP 298-300. Specifically, the defense stated that the defendant did want to testify and that but for the court’s ruling he would testify. *Id.* The defense then rested its case without calling any witnesses. RP 307.

After the defense rested its case the court instructed the jury with neither side making any objections or taking any exceptions. RP 306. Following argument by counsel, the jury retired to deliberate, eventually returning verdicts of guilty on all counts. CP 184, 187-193. The jury also returned special verdicts finding that the trafficking charge (Count I) “involved multiple victims” and involved a “high degree of sophistication or planning.” CP 185-186.

At a later sentencing hearing the defense objected to the state’s calculation of the offender score. CP 218-233. However, the defense’s own calculations put the defendant’s offender score at 9 or more. *Id.* After argument on this issue the trial court imposed an exceptional sentence of 96 months on Count I on a range of 63 to 84 months, and standard range

sentences of 57 months each on counts II, III, IV, and V, and 29 months each on Counts VI, VII, and VIII, with all sentences to run concurrently. CP 289-290. The defendant thereafter filed timely notice of appeal. CP 304.

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the case at bar, the defendant has specifically assigned error to that portion of Finding of Fact No. 4 on the suppression motion wherein the court found that Ronald Russell "rents the residence to the defendant and to Timothy Hyde." In fact, as the officers' testimony during the suppression motion clarified, the house consists of three stories, which included a main floor, a second floor, and a basement. A close review of Officer Harris's

affidavit reveals that the owner of the house told him that Timothy Hyde only rents the basement of home from him, not the main floor or the second floor.

That affidavit states:

I showed Ronald a booking photo of Hyde and he stated that was the person who was renting the basement of his house since December 2004 and also confirmed that was the person he knew as Timothy Hittle.

CP 60.

Thus, substantial evidence does not support the trial court's finding that Mr. Hyde rented the whole residence, or that he rented any other portion of the residence with the defendant. Rather, the affidavit reveals that the defendant and Mr. Hyde were separate tenants of the owner of the house. As the defendant's second argument herein clarifies, this distinction is critical.

In this case, the defendant has also assigned error to the trial court's factual finding in Conclusions of Law No. 4, wherein it states that "Gloria Elliott was not associated with the residence nor was she associated with the defendant. There was no reason why that check needed to be there." In fact, Detective Chylack did not claim this in his testimony at the suppression motion. Rather, he stated that he did not know a person named Gloria Elliott, and he was unaware of any relationship or association she might or might not have with the defendant or his bedroom. His specific testimony on this point was as follows:

Q. Okay. And were you familiar with that name [Gloria Elliott] at all?

A. No, I never heard of her before.

Q. And based on your knowledge of Mr. Cecil, were you aware of that name being associated with him at all?

A. No, I didn't.

RP 24.

There is a wide difference between a statement that a person has no association with a particular house and its resident on the one hand, and a claim that a particular police officer was unaware of any such relationship. Thus, the trial court erred when it found that "Gloria Elliott was not associated with the residence nor was she associated with the defendant. There was no reason why that check needed to be there." This distinction is also important to the defendant's second argument in this brief.

**II. THE POLICE VIOLATED WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT WHEN THEY SEARCHED THE DEFENDANT'S HOME PURSUANT TO A WARRANT ISSUED ON LESS THAN PROBABLE CAUSE AND WHEN THEY EXCEEDED THE SCOPE OF THE WARRANT, AND THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE THE POLICE SEIZED.**

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment search warrants may only be issued upon a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 977 P.2d

582, 585 (1999); *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). In order for the judge, rather than the requesting officer, to make that determination, the affidavit must state the underlying facts and circumstances so that the judge can make a “detached and independent evaluation of the evidence.” *Id.* “Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” *Id.*

In the case at bar the defendant’s makes two separate arguments as to why the trial court erred when it issue the search warrant: (1) Officer Harris’s affidavit did not establish probable cause to search, and (2) the police exceeded the scope of the warrant when they seized items neither mentioned in the warrant nor immediately recognizable as contraband or evidence of a crime. The following presents these arguments.

***(1) Officer Harris’s Affidavit Did Not Establish Probable Cause to Search.***

In a 2001 case, Judge Morgan of Division II of the Court of Appeals provided an erudite opinion explaining the principle that there is no probable cause to issue a search warrant unless the facts in the affidavit prove *two* nexus. *State v. Johnson*, 104 Wn. App. 489, 17 P.3d 3 (2001). There must

be both “a nexus between criminal activity and the item to be seized” and “a nexus between the item to be seized and the place to be searched.” *Id.* (quoting a different case). This means that any search warrant affidavit “must contain facts from which to infer (1) that the item to be seized is probably evidence of a crime, and (2) that the item to be seized will probably be in the place to be searched when the search occurs.” *Id.*

When a search warrant is challenged, the reviewing court performs a *de novo* evaluation of the warrant and affidavit, examining them in a commonsense manner. *State v. Perez*, 92 Wn.App. 1, 963 P.2d 881 (1998). Although the reviewing court is to give deference to the issuing judge, it must find the warrant invalid if the information on which the warrant is based is not sufficient to establish probable cause. *Id.*

For example in *State v. Thein, supra*, the defendant was charged with possession of marijuana with intent to deliver and defrauding a public utility after the police executed a search warrant at the defendant’s residence and found a large quantity of marijuana. The affidavit given in support of the search warrant contained a detailed description of the prior execution of a search warrant at another address. Based upon the evidence seized during the execution of this warrant along with the interview of a number of witnesses the police developed strong evidence that the defendant was then and had in the past been dealing large quantities of marijuana. Based upon this

information and the general experience of the police that drug dealers usually keep drugs and evidence of their drug dealing at their homes, the police sought and obtained the warrant they executed at the defendant's house.

Following his arrest the defendant unsuccessfully moved to suppress the evidence seized from his home. After conviction the defendant appealed and the court of appeal affirmed. From that point the defendant sought and obtained review before the state supreme court. In addressing the issues presented the court noted a division between the three divisions of the court of appeals in Washington as well as a division among the many federal and state courts that had addressed this issue. After examining a number of these cases the court held that the mere fact that the police have probable cause to believe that the defendant is a drug dealer does not create probable cause to search that person's home without some evidence other than police speculation that there will be evidence of the drug dealing in the defendant's house.

In the case at bar the "thing" to be sought was actually a person with an outstanding warrant named Ronald Hyde.<sup>1</sup> The officer's affidavit meets

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<sup>1</sup>In the case the officer also sought permission to search for two other persons with outstanding warrants. However, at the end of the suppression motion the trial court ruled that probable cause did not exist to believe that the officers would find the first two persons at the stated residence. The court later entered findings and conclusions to support this decision. The state did not cross-appeal from this adverse ruling.

Judge Morgan's first nexus because it establishes probable cause to believe that there was an outstanding felony warrant for Mr. Hyde's arrest. Thus, in a manner of speaking, Mr. Hyde's continued presence at large in defiance of the warrant constitutes the first nexus. The information in the affidavit attempting to show that Mr. Hyde would be found at the place the officer requested to search, the second nexus, was found in the following paragraph from the officer's affidavit, wherein he states the following about his conversation with the owner of the house.

I showed Ronald [the owner and lessor of the house] a booking photo of Hyde and he stated that was the person who was renting the basement of his house since December 2004 and also confirmed that was the person he knew as Timothy Hittle.

CP 60.

A number of inferences can be logically drawn from the owner-landlord's statement to the police that Mr. Hyde rents the basement of the house. The first is that the house is divided into at least two, if not three separate residences. The first residence is in the basement that Mr. Hyde rents. The second is the main floor of the house, if not the second floor also, that the defendant rents. The third inference that can be logically drawn from this statement is that the basement has a separate access from the main floor, as do many basements which are rented separately from the remainder of a house. The owner-landlord's statement to the police does not imply that the

defendant and Mr. Hyde jointly rent the whole structure (*see* Argument I).

Given that the officer's affidavit clarifies that Mr. Hyde only rented the basement of the house, there was certainly probable cause to believe that the officers would encounter Mr. Hyde in that portion of the building that he rents. However, at the same time there is no probable cause to believe that the officers would encounter Mr. Hyde in those portions of the structure that another person leases. Much less does this affidavit make it more likely than not that the police would encounter Mr. Hyde in that area of the defendant's leasehold that he reserves for use as his bedroom. Thus, the affidavit fails to establish probable cause to search either the main floor of the house or the defendant's bedroom on the main floor of the house. In other words, to use Judge Morgan's explanation, the affidavit fails to prove the second nexus. Consequently, the trial court erred when it denied the defendant's motion to suppress because their entry into his bedroom, and their observations therein, were based solely upon a search warrant issued in reliance upon an affidavit that did not establish probable cause to enter either the main floor of the house or the defendant's bedroom.

***(2) The Police Exceeded the Scope of the Warrant  
When They Seized Items Neither Mentioned in the Warrant  
Nor Immediately Recognizable as Contraband or Evidence  
of a Crime.***

Under Washington Constitution, Article 1, § 7 and United States

Constitution, Fourth Amendment warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless search unless the prosecution meets its burden of proving that the search falls within one of the various “jealously and carefully drawn” exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

In the case at bar the search warrant the police obtained did not authorize the search for or seizure of anything other than the three persons with the outstanding warrants. Neither did the affidavit establish probable cause to seize any items. Thus, the officer’s decision to seize the check, the check stock, the computer, and the thumb drive out of the defendant’s bedroom exceeded the scope of the search warrant and constituted a warrantless seizure of these items. In this case the court found this warrantless seizure justified under the “plain view” doctrine. As the following explains, this ruling was in error.

The “plain view” doctrine is an exception to the warrant requirement that applies after police have intruded into an area in which there is a reasonable expectation of privacy. *State v. Myers*, 148 Wn.2d 583, 815 P.2d 761 (1991). Under this exception, if the police had prior justification for the

intrusion, saw an item sitting in plain view, and then immediately recognized it as incriminating evidence such as contraband, stolen property, or an other item useful as evidence of a crime, then the seizure of the item does not offend the privacy interests protected in Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment. *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); *State v. Lair*, 95 Wn2d 706, 630 P.2d 427 (1981)). What is required for the application of this exception is a “practical, nontechnical probability” that the item in question constitutes incriminating evidence. *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

In the case at bar the police had no information as to who the named person on the check was. For all they knew it was the defendant’s girlfriend, or a family member for whom he had agree to print checks. The officer’s belief that the check was evidence of a forgery was merely a hunch; at best speculation. As such, it did not raise to the level of a reasonable probability that the check or the other items were evidence of a crime. Thus, in the case at bar the state failed to meet its heavy burden to prove that this exception to the warrant requirement applied in this case. Consequently, the trial court erred when it denied the defendant’s motion to suppress the evidence the officer seized upon the execution of the first warrant.

**III. THE TRIAL COURT VIOLATED WASHINGTON CONSTITUTION, ARTICLE 4, § 16 WHEN IT ALLOWED THE STATE OVER DEFENSE OBJECTION TO ELICIT EVIDENCE THAT THE POLICE SEARCHED THE DEFENDANT’S HOME AND COMPUTER PURSUANT TO JUDICIALLY AUTHORIZED WARRANTS.**

Under Washington Constitution, Article 4, § 16, “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A statement made by the court in front of the jury constitutes an impermissible “comment on the evidence” if a reasonable juror hearing the statement in the context of the case would infer the court’s attitude toward the merits of the case, or would infer the court’s evaluation relative to the disputed issue. *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 670 (1986). In *State v. Crotts*, 22 Wash. 245, 60 P. 403 (1900), the Washington Supreme Court wrote the following concerning the purpose behind this constitutional provision.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

*State v. Crotts*, 22 Wash. at 250-51.

The courts of this state “rigorously” apply the prohibition found in Article 4, § 16, and presume prejudice from any violation of this provision.

*State v. Bogner*, 62 Wn.2d 247, 382 P.2d 254 (1963). In *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995), the court puts the matter as follows.

Our prior cases demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. Art. 4, Sec. 16. Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *State v. Bogner*, 62 Wash.2d 247, 249, 253-54, 382 P.2d 254 (1963). In such a case, "[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment". *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wash.2d 485, 519 P.2d 249 (1974); *see also Bogner*, 62 Wash.2d at 253-54, 382 P.2d 254.

*State v. Lane*, at 838-839.

In the case at bar the trial court allowed the prosecutor to elicit evidence that was both irrelevant and constituted a comment by the judge on the validity of the officers' actions. This occurred when, over defense objection, the trial court allowed two officers to testify that they had seized the computer, thumb drive, check, and check stock pursuant to a judicially authorized search warrant, and they had searched the computer and thumb driver pursuant to a separate judicially authorized warrant. RP 112-113, 129. Initially, one is left to ask what the relevance of this evidence was. Under ER 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Under ER 402, "all relevant evidence is admissible" with certain limitations. By contrast, under this same rule "[e]vidence which is not relevant is not admissible." Thus, before testimony or exhibit can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951). Finally, the "existence of any fact" as that term is used in these two rules cannot rest upon guess, speculation, or conjecture. *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970).

In the case at bar the officers' justification for the two searches was not a fact at issue before the jury. The fact that the officers acted under the auspices of judicially authorized warrants did not make the real facts at issue (whether or not the defendant committed the crimes charged) any more or less likely. Thus, the evidence that the two searches were judicially authorized was not relevant and not admissible. That is not to say that this evidence did not have a powerful effect on the jury. First, a reasonable jury, finding that the searches were judicially authorized, would more likely than not assume that the judge in whose courtroom they sat had authorized the two search warrants. Second, that same jury would then assume that since the judge authorized the search warrants, he must himself have believed that the defendant was guilty of the crimes charged. This impression was emphasized in this case by the following evidence the state elicited on direct during the state's direct examination of one of the officers who helped execute the

search warrant.

Q. Okay, and what were your duties on the Neighborhood Response Team?

A. Primarily our job was to take the burden off of patrol as far as problem houses. We did a lot of search warrants. We had arrested a lot of career criminals.

We would do directed patrol areas that had -- were --

RP 125.

It is true in this case that the court instructed the jury to disregard this evidence. However, there was no way to undue the emphasis this question and answer placed upon the fact that the jury twice heard the judge allow the state to elicit the fact that the search warrants were judicially authorized. In allowing this evidence the court put its imprimatur on officers' actions and commented on the officers' obvious belief that the defendant was guilty. Thus, the court commented on the evidence and violated Washington Constitution, Article 4, § 16.

In this case this comment on the evidence was far from harmless beyond a reasonable doubt, which constitutional errors must be in order to sustain a conviction following a trial that included constitutional errors. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985). A constitutional error is not harmless beyond a reasonable doubt unless the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Davis*,

154 Wn.2d 291, 305, 111 P.3d 844 (2005). In the case at bar the untainted evidence was overwhelming that the owner of the laptop computer had committed the crimes charged. However, the evidence was far from overwhelming that the defendant was the owner of the computer. The only evidence to support this conclusion was the weak inference that it was his computer because it was in his bedroom, and the highly compromised evidence of a convicted felon who (1) was testifying in order to obtain favorable treatment for her own crimes, and (2) had given the defense contradictory statements. This evidence is not overwhelming on that one fact that is required for most convictions: that the defendant was the person who committed the offenses. As a result, the defendant is entitled to a new trial.

**IV. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGEMENT OF CONVICTION AGAINST THE DEFENDANT FOR FIRST DEGREE TRAFFICKING IN STOLEN PROPERTY BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THIS CHARGE.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25

L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of

fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar the state charged the defendant in count I with first degree trafficking in stolen property under RCW 9A.82.050(1). This statute provides as follows:

(1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050(1).

Although this statute provides two alternative methods of committing the crime, the state only charged the defendant in this case under the second alternative. The last amended information alleged:

That he, RODNEY GLYNN CECIL, in the County of Clark, State of Washington, between January 25, 2004 and May 31, 2005, did knowingly traffic in stolen property, to wit: personal identification and financial identification; contrary to Revised Code of Washington 9A.82.050.

CP 135.

The problem with this allegation is that even though the state did present substantial evidence that the defendant had trafficked in “personal identification” and “financial identification,” these two items are not “property” even if the information is stolen. The term “property” is not

defined in RCW 9A.82. As such, the court may look to the common definition of the term used in the dictionary. *State v. Smith*, 118 Wn.App. 480, 93 P.3d 877 (2003). Webster's New Collegiate Dictionary defines the term "property" to include "a quality or trait belonging and especially particular to an individual or thing" or "something owned or possessed." Webster's New Collegiate Dictionary (1977), p. 923. Under these common definitions a person's name, address, telephone number, e-mail address, and credit card number are not property in the true sense because they are not particular to a person or thing. They are simply pieces of information about a person that are possessed by numerous persons or entities. In other words, apart from copyrighted information, one cannot "own" collections of letters and numbers that form personal and financial data. The legislature recognized this fact in 1999 when it adopted RCW 9.35.001, which states:

The legislature finds that financial information is personal and sensitive information that if unlawfully obtained by others may do significant harm to a person's privacy, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain and use financial information. The legislature intends to penalize unscrupulous people for improperly obtaining financial information.

RCW 9.35.001.

In order to facilitate this need to protect "information" as opposed to "property" the legislature criminalized a new type of conduct: the possession of personal or financial information with the intent to commit a crime. For

example, under RCW 9.35.020 the state now has a new offense called “identity theft,” which makes it illegal to “knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” Were “identification or financial information of another person” actually “property” then there would have been no need to adopt these statutes since the possession of the information with the requisite *mens rea* would be punishable under the common theft and possession of stolen property statutes. However, “identification or financial information of another person” is not “property” and the legislature recognized this fact then it criminalized the possession of “information” as opposed to property.

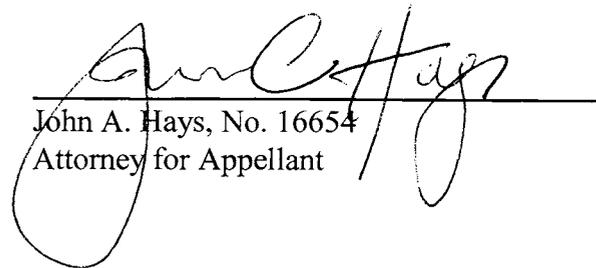
In the case at bar, the evidence seen in the light most favorable to the state proves that the defendant possessed “information” only, and then only in electronic form. He did not possess “property.” As such, he cannot be found guilty of an offense such as trafficking which has, at its core, a requirement that the defendant possess “property.” He may be convicted of identity theft and was in this case.

## CONCLUSION

The trial court erred when it denied the defendant's motion to suppress illegally seized evidence and when it entered judgment of conviction against him for an offense unsupported by substantial evidence. In the alternative, the trial court denied the defendant a fair trial when it improperly commented on the evidence.

DATED this 7th day of September, 2007.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION,  
ARTICLE 4, § 16**

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

**UNITED STATES CONSTITUTION,  
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**RCW 9.35.001**

The legislature finds that financial information is personal and sensitive information that if unlawfully obtained by others may do significant harm to a person's privacy, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain and use financial information. The legislature intends to penalize unscrupulous people for improperly obtaining financial information.

**RCW 9A.82.050**

(1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 RODNEY GLYNN CECIL, )  
 )  
 Appellant, )

CLARK CO. NO: 06-1-01571-1  
APPEAL NO: 35979-1-II  
  
AFFIDAVIT OF MAILING

STATE OF WASHINGTON )  
 ) vs.  
 COUNTY OF CLARK )

CATHY RUSSELL, being duly sworn on oath, states that on the 7<sup>TH</sup> day of SEPTEMBER, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS  
PROSECUTING ATTORNEY  
1200 FRANKLIN ST.  
VANCOUVER, WA 98668

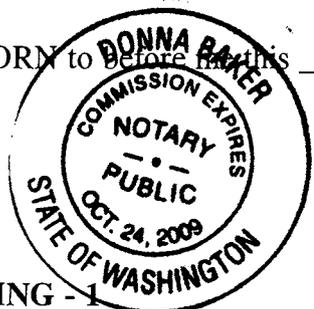
RODNEY GLYNN CECIL  
3413 N.E. 138TH  
VANCOUVER, WA 98682

and that said envelope contained the following:  
1. BRIEF OF APPELLANT  
2. AFFIDAVIT OF MAILING

DATED this 7<sup>TH</sup> day of SEPTEMBER, 2007.

*[Signature: Cathy Russell]*  
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this *[Signature]* day of SEPTEMBER, 2007.



*[Signature: John A. Hays]*  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: LONGVIEW/KELSO  
Commission expires: 10-24-09