NO. 36929-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

MATTHEW WARREN BISHOP,

Appellant.

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# BRIEF OF APPELLANT

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## *ASSIGNMENT OF ERROR*

### *Assignment of Error*

The trial court erred when it denied the defendant's motion to suppress evidence seized following the defendant's arrest on a Kalama Municipal Court warrant that violated Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, because (1) it was not issued upon a statement given under oath or affirmation, and (2) the unsworn statement given in support of the warrant was stale.

### *Issues Pertaining to Assignment of Error*

Does a trial court err if it denies a defendant's motion to suppress evidence seized following that defendant's arrest on a Municipal Court warrant that was issued in reliance on a written statement that was not given under oath or affirmation and that contained stale information?

## STATEMENT OF THE CASE

On November 11, 2006, the defendant received a citation to appear in Kalama Municipal Court on a charge of shoplifting. CP 14. On December 15, 2006, the defendant appeared with his attorney and pled guilty to that charge. CP 16-17. After accepting the defendant's guilty plea, the court sentenced the defendant to 10 days out-of-custody work crew and 355 days jail suspended. CP 18-19. Following imposition of sentence, the defendant's court-appointed attorney withdrew from the case. CP 20. By a form letter to "Kalama Court" dated December 27, 2006, Robin Lux from "Offender Services" reported that the defendant had been "terminated from the Community Service Program effective 12/27/06". CP 22. Lower in the letter there is an "X" before the line with the preprinted notation "Did not show up for Court." *Id.* This letter was not given under any type of oath or affirmation. *Id.* On March 22, 2007, Judge Koss issued a "no bail" warrant for the defendant's arrest, based upon "Failure to Comply with Court Order." CP 15, 23. The Kalama Municipal Court file does not contain any evidence that this warrant was issued upon any type of statement or claim given under oath or affirmation. CP 12-23.

According to the police reports the state provided defendant's trial counsel in the case at bar, on August 3, 2007, Longview Police Officer Steve Rehaume detained the defendant and requested his identification after

the defendant "jaywalked" on 15th Street in Longview. RP 12-23. The defendant produced a Washington State Identification Card. *Id.* Officer Rehaume then arrested the defendant after "running" his name and discovering from dispatch that the defendant had the outstanding Kalama Warrant noted in the Kalama cause mentioned above. *Id.* During the search incident to that arrest, Officer Rehaume stated that he found methamphetamine and drug paraphrenalia on the defendant's person. *Id.*

Following his arrest, the Cowlitz County Prosecutor charged the defendant with possession of that alleged methamphetamine. CP 1-2. In his police report, Officer Rehaume did not claim any other justification for his search of the defendant other than search incident to the arrest on the Kalama Warrant. CP 12-23. Following the filing of the charge, the defendant filed a motion to suppress the evidence the officer seized on the basis that the arrest warrant was invalid in that (1) it was not issued in reliance upon a statement given under oath or affirmation, and (2) the information in the unsworn statement was stale. CP 3. The defendant also filed an Affirmation of Counsel and a Memorandum of Authorities in support of the motion. CP 4-11, 12-23.

The parties later appeared before the court and argued the motion based upon the following stipulation by the state that defense counsel's statement of facts was correct.

> MS NISLE: Your honor, the State agrees with Defense Counsel's recitation of the facts as to the issuance of the warrant and the subsequent arrest based on the warrant. However, we disagree with the recitation of the case law that's supporting Defense Counsel's claim.

RP 1-11, 12.[1]

Following argument, the court denied the motion. RP 28-34. The defendant thereafter submitted to conviction upon stipulated facts. CP 30-32. The court then sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 34-44, 45.

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[1]The record in this case includes a single volume verbatim report of the suppression motion held on October 16, 2007, and designated herein as "RP."

## ARGUMENT

**THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE SEIZED FOLLOWING THE DEFENDANT'S ARREST ON A KALAMA MUNICIPAL COURT WARRANT THAT VIOLATED WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT, BECAUSE (1) THE WARRANT WAS NOT ISSUED UPON A STATEMENT GIVEN UNDER OATH OR AFFIRMATION, AND (2) THE UNSWORN STATEMENT GIVEN IN SUPPORT OF THE WARRANT WAS STALE.**

In the case at bar, the defendant argues that the trial court erred when it refused to suppress evidence seized as a direct result of a search incident to an arrest made upon the arrest warrant because (1) the warrant was not issued upon oath or affirmation, and (2) the supporting information in the warrant was stale. The following presents these two arguments.

***(1) The Arrest Warrant Was Invalid Because the Statement Given in Support of the Warrant Was Not Made under Oath or Affirmation.***

Generally speaking, under both Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment, arrest warrants may only issue based upon a showing of probable cause supported by oath or affirmation. *State v. Clark,* 143 Wn.2d 731, 24 P.3d 1006 (2001); *Miller v. United States*, 357 U.S. 301, 307, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958). In fact, the language of the Fourth Amendment specifically states that "no warrants shall issue but upon probable cause, supported by oath or

affirmation . . ." United States Constitution, Fourth Amendment. However, our courts have reduced the probable cause requirement for the arrest, search, or issuance of warrants for defendants who have already been adjudicated guilty. *State v. Lucas*, 56 Wn.App. 236, 783 P.2d 121 (1989). Thus, a probation or police officer may arrest or search without a warrant, or by inference, the court may issue a warrant to arrest based upon a probation or police officer's "reasonable belief" that an offender has violated his or her conditions of probation or conditions of release pending sentencing. *State v. Simms*, 10 Wn.App 75, 516 P.2d 1088 (1974).

For example, in *State v. Fisher*, 145 Wn.App. 206, 35 P.3d 366 (2001), the defendant pled guilty to a drug charge and the court released her upon conditions pending sentencing. Prior to the sentencing hearing, the same court issued a warrant for the defendant's arrest upon the state's affidavit alleging that the defendant had violated the court's conditions of release. Upon execution of the warrant and a search incident to that arrest, the police found drugs on the defendant's person. The state then charged the defendant with possession of the drugs found upon her arrest on the bench warrant. Following this charge, the defendant moved to suppress the evidence seized upon an argument that the state's affidavit did not establish probable cause to believe that she had violated her conditions of release.

The trial court eventually denied the defendant's motion, holding that

while the state's affidavit did not establish probable cause, it did establish a "well-founded suspicion" to believe that the defendant had violated her conditions of release. The defendant was later found guilty after a jury trial, and she appealed, arguing that the trial court had erred when it denied her motion to suppress. The Court of Appeals affirmed, holding that the warrant properly issued under CrR 3.2(j) upon the state's allegation that she had violated her conditions of release. After this ruling, the defendant sought and obtained review before the Washington Supreme Court.

Once before the Supreme Court, the defendant argued that to the extent the court rules allow the issuance of an arrest warrant on less than probable cause (*i.e.*, reasonable suspicion), the rules violated Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. In the alternative, the defendant argued that the prosecutor's affidavit failed to meet the reliability and specificity requirements of those same constitutional provisions, which is an implied requirement of the "reasonable suspicion" standard should that standard apply.

In analyzing these arguments, the court first recognized a dichotomy in our constitutional law between the privacy rights of an "accused" person as opposed to the privacy rights of a person who has already been "convicted." The former is entitled to protection under the "probable cause" standard, while the latter is only entitled to the protection of the "reasonable

suspicion" standard, provided the information given in support of the claim of violation meets the reliability and specificity requirements of Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. The court stated as follows on this point.

> Our Court of Appeals cases suggest that an exception to the probable cause requirement exists when a defendant adjudged "guilty" of a felony is released with specified conditions. Although those cases questioned the constitutionality of RCW 9.94A.195 permitting searches without probable cause, that statute, like CrR 3.2(j)(1), also provides for arrest without determination of probable cause. In upholding the constitutionality of RCW 9.94A.195, the Courts of Appeal in Lucas and Massey have ruled that "search and seizure of [probationer's or parolee's] person" only requires a showing of reasonable cause and not probable cause. Thus, the lower standard, reasonable cause, satisfies the Fourth Amendment when a bench warrant is issued for a convicted felon who has been released subject to conditions. This undermines Petitioner's argument that the Fourth Amendment requires probable cause for issuance of a bench warrant.
>
> Respondent is correct in its contention that a "well-founded suspicion" that violation of a condition of release has occurred should be required for the court to issue a bench warrant under CrR 3.2(j)(1) for persons who have pleaded "guilty" to a felony and await sentencing. Under the facts in this case, the rule must be read together with CrR 3.2(f).

*State v. Fisher*, 145 Wn.2d at 228-229.

As the court explained, a "convicted" person, whether sentenced or not, has a reduced expectation of privacy that allows the state to obtain a warrant of arrest on "reasonable suspicion" even though the specific language of the Fourth Amendment requires the existence of "probable cause." Thus,

the court proceeded to the defendant's alternative argument that the prosecutor's affidavit did not establish a "reasonable suspicion" to believe she had violated her conditions of release. In this argument, the court agreed with the defendant, holding as follows:

> The arrest of Petitioner Fisher under the bench warrant in this case was not reasonable because the State in its application for the bench warrant did not provide specific and articulable facts of a willful violation of any condition of her release pending sentencing. The Fourth Amendment requires, at a minimum, that the information the officer relies upon at least carry some indicia of reliability. ***The application and affidavit submitted in support of the bench warrant for arrest of Petitioner did not provide any indicia of reliability or specificity that Petitioner had violated any condition of her release.*** There was at best a vague suggestion that she might have violated the condition that she "have no violation of any criminal laws." But there is absolutely no indication of what laws, if any, she might have violated. The simplest test is to ask the question, "what condition of her release does the State in its application claim was violated by Petitioner Fisher?" From the record in this case, the answer can only be "none," even applying the "well-founded suspicion" standard.

*State v. Fisher*, 35 P.3d at 376-377 (footnotes omitted) (emphasis added).

As the court in *Fisher* clarifies, a warrant may issue for the arrest of a "convicted" person upon a "reasonable suspicion" that the person has violated the terms of his or her judgment and sentence, in spite of the fact that the literal language of the Fourth Amendment requires the existence of "probable cause." However, nothing in *Fisher* or the cases cited therein support an argument that any of the other requirements of the Fourth Amendment or Article 1, § 7, are relaxed when seeking a warrant to arrest a

"convicted" person based upon an allegation that he or she violated a condition of a judgment and sentence imposed by the court. Consequently, as the court in *Fisher* points out, the information given in support of the warrant must still be reliable, it must still allege sufficient facts from which the reviewing authority can conclude that there is a "reasonable suspicion" that the alleged violation has occurred, and it must still be given on oath or affirmation. The decision in *United States v. Vargas-Amaya*, 389 F.3d 901 (9th Cir. 2004), directly addresses the Fourth Amendment's requirement that claims of probation violations be made under oath or affirmation before an arrest warrant may issue upon the claim. The following examines this case.

In *Vargas-Amaya*, *supra*, the defendant pled guilty to one count of importing marijuana in violation of 21 U.S. C. §§ 952 and 960, and was sentenced to 18 months custody and two years probation. After the defendant finished his term of custody, he was released to begin his probationary period, which was scheduled to expire on August 2, 2003. Under federal law, claims that the defendant violated his conditions of probation must be filed and an arrest warrant issued before the probationary period terminates or the court loses jurisdiction to modify the sentence. On June 12, 2003, prior to the termination of probation, the defendant's probation officer filed petition in district court for a no-bail warrant, alleging that the defendant had violated certain conditions of his supervised release. The probation officer did not

make the factual allegations under oath or affirmation. Six days later the court issued the warrant.

On October 3, 2003, two months after the expiration of his term of supervised release, the defendant was arrested on the warrant. Following a hearing on the probation officer's allegations, the district court found a violation of the conditions of probation and revoked the defendant's supervised release, imposing a sentence of eight months custody. The defendant then appealed, arguing that (1) the arrest warrant was void because it violated the Fourth Amendment requirement that the claim given in support of its issuance be "given under oath or affirmation," and (2) that since the warrant was void, the court had lost jurisdiction to revoke his release.

In response, the government argued, *inter alia*, that the "oath and affirmation" requirement of the Fourth Amendment did not apply because the defendant was a probationer who either had no protection under the Fourth Amendment, or at least reduced protections under the Fourth Amendment. The court soundly rejected this argument, finding that while the "probable cause" standard may be reduced to a "reasonable suspicion" standard for probationer's without offending the Fourth Amendment, the oath or affirmation requirement may not be reduced or eliminated. The court held:

> The government argues that a parole violation warrant may issue without "probable cause" supported by "oath or affirmation" because parolees are subject to lesser or no *Fourth Amendment* protections.

> We disagree.
>
> Although, while on supervised release, Vargas was subject to lesser *Fourth Amendment* protection, he was nonetheless protected by the *Fourth Amendment*. *See United States v. Knights, 534 U.S. 112, 122, 151 L. Ed. 2d 497, 122 S. Ct. 587 (2001)*; *Latta v. Fitzharris, 521 F.2d 246, 248 (9th Cir. 1975)* ("It is thus too late in the day to assert that searches of parolees by their parole officers present no *Fourth Amendment* issues."). The cases dealing with lesser *Fourth Amendment* protection are generally concerned with which searches and seizures are reasonable without a warrant. *See e.g.*, *Knights, 534 U.S. at 122* (holding "that the warrantless search of Knights, supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the *Fourth Amendment*"). The cases do not address whether a warrant for violation of the terms of release must comply with the *Warrant Clause*.
>
> Here, by statute, a warrant was required to extend the court's jurisdiction. Unlike the *Fourth Amendment's* malleable restriction on unreasonable searches and seizures, the *Warrant Clause* is exceptionally clear and provides that "*no Warrants shall issue*, but upon probable cause, supported by Oath or affirmation." *U.S. Const. amend. IV* (emphasis added). Thus while certain searches may be permissible when there is less than probable cause, under the *Fourth Amendment*, no warrant is valid unless there is probable cause supported by sworn facts.

*United States v. Vargas-Amaya*, 389 F.3d at 906-907 (Italics in original; footnote omitted).

The same analysis applies in the case at bar. In this case, as in *Vargas-Amaya*, the defendant pled guilty to a crime. In this case, as in *Vargas-Amaya*, the court imposed a sentence that included probation and certain requirements of probation. In this case, as in *Vargas-Amaya*, the defendant's probation officer filed a written request with the court that the

defendant be arrested based upon the probation officer's allegation that the defendant had violated his terms of probation. In this case, as in *Vargas-Amaya*, the probation officer's written allegations were not made under oath or affirmation. Thus, in this case, as in *Vargas-Amaya*, the warrant issued in reliance upon the complaint not made under oath or affirmation was invalid.

In the case at bar, the court's decision to issue an arrest warrant based upon a claim that was not made under oath or affirmation not only violated the Fourth Amendment, but it also violated Washington Constitution, Article 1, § 7. The reason is that while the citizens of any state, including Washington, are free to adopt laws or constitutional provisions that provide more protections than those found under the Fourth Amendment (or for any other right protected in the federal Bill of Rights), the federal constitution establishes minimum standards of protection that the state may not violate. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Thus, any violation of the Fourth Amendment would necessarily also be a violation of Washington Constitution, Article 1, § 7. Our Supreme Court has stated this principle as follows:

> It is by now axiomatic that Article I, Section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment.
>
> Article I, section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision differs from the Fourth Amendment in that Article I,

> Section 7 "clearly recognizes an individual's right to privacy with no express limitations." Accordingly, while ***Article I, Section 7 necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment,*** its scope is not limited to subjective expectations of privacy but, more broadly, protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant."

*State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999) (emphasis added). *See also*, *State v. Surge*, 160 Wn.2d 65, 89, 156 P.3d 208 (2007) (Justice Sanders dissenting) ("The 'private affairs' protected by Article I, Section 7 include every privacy interest protected by the Fourth Amendment.")

Support for this conclusion also flows from the specific language of the two constitutional provisions. The Fourth Amendment states:

> 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, Fourth Amendment.

Under the language of this provision, four core areas of individual privacy interest are given specific protection from governmental intrusion: "persons, houses, papers, and effects." By contrast, under Washington Constitution, Article 1, § 7, the two specific areas of protection are "private affairs and homes." This provision states:

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

Washington Constitution, Article 1, § 7.

Just what constitutes a "private affair" under this constitutional provision has been argued in numerous cases. However, chief among our "private affairs" is the right to be free from state intrusion into one's own body, which is the first interest protected from governmental intrusion under the Fourth Amendment. Justice Sanders put this proposition as follows in his dissent in *Surge:*

> A person's body is cardinal among the "private affairs" protected by Article I, section 7. And the right to preserve the integrity of one's body is fundamental.

*State v. Surge*, 160 Wn.2d at 89.

As the court noted in *State v. Walker*, 157 Wn.2d 307, 313, 138 P.3d 113 (2007), any analysis under Article 1, § 7 begins with two questions: (1) "was there a disturbance of one's private affairs," and (2) "if so, was the disturbance authorized by law?" (citing *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997)). As was just noted, the most private of affairs is the integrity of one's body. Thus, the government intrudes or disturbs a person's "private affairs" when the police make a custodial arrest. As the court states in *State v. Walker*, 101 Wn.App. 1, 999 P.2d 1296 (2000) :

> Washington Constitution, Article I, § 7, provides that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." When served, a warrant of arrest disturbs a person

in his private affairs.

*State v. Walker*, 101 Wn.App. at 5.

Thus, in the case at bar, the officer's actions arresting the defendant "disturbed" the defendant's "private affairs" for the purpose of arguing a violation under Washington Constitution, Article 1, § 7. Under the Washington Supreme Court's *Walker* decision, the question then remains whether or not in the case at bar this action was "authorized by law"? In answering this question, it should first be noted that no Washington Statute or Court Rule specifically allows a judge to issue an arrest warrant for a probation violation based upon an unsworn statement.

However, even if a specific state law or court rule allowed for the issuance of warrants based on unsworn statement, the explicit language of the Fourth Amendment forbids this action. Since the United States Constitution is the supreme law of the land, any action taken in contravention of that law cannot, by definition, be deemed as taken under "authority of law." *See i.e. Moen v. Erlandson*, 80 Wn.2d 755, 757, 498 P.2d 849 (1972) ( "[I]t should be undebatable that our United States Constitution and the decisions of the United States Supreme Court interpreting the constitution are the supreme law of the land.") Thus, in the case at bar, the court's issuance of an arrest warrant in reliance upon an unsworn statement was not taken under "authority of law." The conclusion then follows that the "oath and

affirmation" requirement of the Fourth Amendment is necessarily also a requirement of Washington Constitution, Article 1, § 7.

In the case at bar, the state may argue that suppression is not the appropriate remedy for a court to order under the Fourth Amendment when the police search a defendant incident to a good faith arrest made upon what later is determined to be an invalid warrant. However, any such argument must necessarily fail because in this case the Municipal Court Judge's actions not only violated the Fourth Amendment, but they also violated Washington Constitution, Article 1, § 7, as was just discussed. Regardless as to what the appropriate remedy would be in federal court under a Fourth Amendment analysis, suppression is still the only appropriate remedy for a violation of Washington Constitution, Article 1, § 7. In the *Walker* decision, the Court of Appeals states as follows on this issue:

> The last question is whether the foregoing violation of Article I,§ 7, should be remedied by applying the exclusionary rule. As the State correctly points out, the United States Supreme Court would say no because of limitations it has placed on the exclusionary rule as a Fourth Amendment remedy. The question here, however, is not the remedy for a Fourth Amendment violation, but rather the remedy for a violation of Article I, § 7. To date, the Washington Supreme Court has remedied all violations of Article I, § 7, by applying the exclusionary rule. Indeed, it has declined even to consider limitations parallel to the federal ones when, as here, the State has not raised the issue at the trial court level. Accordingly, we conclude that the exclusionary rule applies here.

*State v. Walker*, 101 Wn.App. at 111-12. (footnotes omitted).

Thus, in the case at bar, the trial court erred when it denied the defendant's motion to suppress the evidence the officer seized when searching the defendant incident to an arrest on an invalid warrant.

***(2) The Arrest Warrant Was Invalid Because the Information in the Statement Given in Support of the Warrant Was Stale.***

As part of the reliability requirements under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment, an affidavit or sworn statement given in support of a request for a search or arrest warrant must set out a time basis for the information provided so the issuing magistrate can satisfy himself or herself that the information is not stale. *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677, 103 S.Ct. 3405 (1984). The amount of time that must pass before information establishing probable cause becomes stale depends upon the nature and scope of the claimed criminal activity. *State v. Johnson*, 17 Wn.App. 153, 156, 561 P.2d 701 (1977); *State v. Hett*, 31 Wn.App. 849, 644 P.2d 1187 (1982).

For example, in *State v. Higby*, 26 Wn.App. 457, 613 P.2d 1192 (1980), the defendant was charged with maintaining a dwelling for the sale of controlled substances after the police executed a search warrant at his home and found marijuana. The affidavit given in support of the warrant stated that an informant had been in the house two weeks previous and had purchased marijuana from the defendant. Following conviction, the

defendant appealed, arguing that the search warrant was defective because the information the confidential informant provided was stale. In addressing this question, the Court of Appeals first set out the rule that a showing of prior criminal activity was not sufficient to establish current probable cause. The court stated:

> It is not enough, however, to set forth that criminal activity occurred at some prior time. The facts or circumstances must support the reasonable probability that the criminal activity was occurring at or about the time the warrant was issued. Tabulation of the intervening number of days is not the final determinant of probable cause, but is only one factor considered along with all the other circumstances including the nature and scope of the suspected criminal activity.

*State v. Higby*, 26 Wn.App. at 461 (citations omitted). *Cf. State v. Smith*, 39 Wn.App. 642, 694 P.2d 660 (1984) (month-old evidence of 100 to 150 three to four foot marijuana plants and an extensive marijuana grow operation was held sufficiently timely to support probable cause.)

The court then went on to invalidate the warrant, holding that information of what appeared to be a single sale of a small amount of marijuana some two weeks previous was insufficient to establish current probable cause to believe that more marijuana could be found at the defendant's house. By contrast, in *State v. Payne*, 54 Wn.App. 240, 773 P.2d 122 (1989), the defendant was charged with growing marijuana following the execution of a search warrant. However, the trial court suppressed all of the

evidence seized on the basis that the information provided by the informant in the supporting affidavit was stale at the time the magistrate authorized the search. In the supporting affidavit, the informant had claimed that he had been in the house in question about three weeks ago, and that he had seen about 11 trays about three foot by six foot in size, a number of three foot marijuana plants in each tray, and a grow light over each tray. The state appealed the suppression.

On review, the Court of Appeals reversed, stating as follows on the staleness issue:

> We disagree with the trial court's conclusion the information was too stale to establish probable cause. A marijuana grow operation is hardly a "now you see it, now you don't" event. A magistrate may look at all the circumstances, including the nature and scope of the suspected criminal activity. Here, the informant reported an extensive grow operation, involving approximately 11 4 by 6 foot trays, lights and fans. These facts clearly indicate the criminal activity was ongoing, and the issuing magistrate could reasonably infer the operation was continuing at the time.

*State v. Payne*, 54 Wn.App. at 247.

In the case at bar, the record reveals that the Kalama Municipal Court sentenced the defendant on 12/15/06 to 10 days work crew. The judgment and sentence did not set a time period for the completion of this requirement. Twelve days later the Coordinator for the Cowlitz County Community Service Program sent the court a letter stating that it had "terminated" the defendant from the Community Service Program because he "[d]id not show

up for Court." This was apparently the only communication concerning the defendant's compliance with the requirements of his judgment and sentence. On 3-22-07, almost 90 days after the date of the probation department's letter, Judge Koss signed a warrant for the defendant's arrest for "Failure to Comply with Court Order." There was no indication in the record concerning the defendant's actions during these 90 days, whether or not he had contacted the Community Service Program and completed the court's requirement on this point. Thus, by the time the court issued the warrant, there had been a significant lapse of time during which the defendant might well have reported to offender services and complied with the sentence. Given this significant lapse of time, the information in the original letter had become stale just as the information in the supporting affirmation in *Higby* had become stale by the lapse of time. Consequently, the warrant issued in this case not only fails because it was not issued in reliance upon statements given under oath or affirmation, but it fails because the information itself was stale and no longer supported a reasonable belief of a violation.

In the case at bar the officer's only legal justification for searching the defendant's person was a search incident his arrest of the defendant on the Kalama Warrant. Under the exclusionary rule, the trial court should have suppressed this evidence given the fact that this warrant was invalid. *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007).

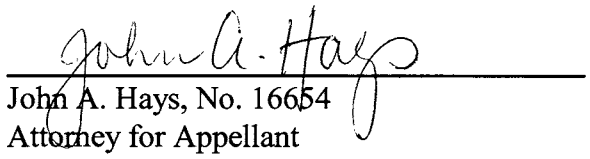
In this case, the state may argue that this court should recognize an exception to this rule because the officer acted in good faith upon his reasonable belief that he was acting in compliance upon a valid judicially authorized warrant. Under the enhanced protections found in Washington Constitution, Article 1, § 7, the Washington State Supreme Court has consistently refused to recognize any such exception to the exclusionary rule. *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005). Consequently, in the case at bar, the trial court erred when it denied the motion to suppress. As a result, this court should reverse the decision of the trial court and remand with instructions to grant the motion to suppress.

## CONCLUSION

The warrant upon which the defendant was arrested was invalid because it was not issued upon oath or affirmation and the information in the supporting document was stale. Consequently, this court should vacate the defendant's conviction and remand with instructions to grant the defendant's motion to suppress.

DATED this 3rd day of April, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

## APPENDIX

### WASHINGTON CONSTITUTION
### ARTICLE 1, § 7

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

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

| | | |
|---|---|---|
| **STATE OF WASHINGTON,** Respondent | ) | **NO. 07-1-01047-2** |
| | ) | **COURT OF APPEALS NO: 36929-0-II** |
| **vs.** | ) | |
| **BISHOP, Matthew W.** Appellant | ) | **AFFIDAVIT OF MAILING** |

**STATE OF WASHINGTON** )
) **ss.**
**COUNTY OF COWLITZ** )

CATHY RUSSELL, being duly sworn on oath, states that on the **3rd day of APRIL, 2008**, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR
COWLITZ COUNTY PROSECUTING ATTY
312 S.W. 1ST STREET
KELSO, WA 98626

MATTHEW W. BISHOP
326 KILKELLY
KALAMA, WA 98625

and that said envelope contained the following:

1. BRIEF OF APPELLANT
2. AFFIDAVIT OF MAILING

DATED this 3RD day of APRIL, 2008.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 3rd day of APRIL, 2008.

HEATHER CHITTOCK
MY COMMISSION EXPIRES
NOVEMBER 4 2009
STATE OF WASHINGTON
NOTARY PUBLIC

Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-09 hc



John A. Hays
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