FILED
COURT OF APPEALS
DIVISION II

08 NOV -6 AM 11:19

STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF WASHINGTON

DIVISION II

No. 37363-7-II

STATE OF WASHINGTON,

RESPONDENT,

VS.

CORY RUNYAN,

APPELLANT.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON

FOR CLARK COUNTY

APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS AND ISSUES

Corey RUnyon
Appellant, pro se
855279 : D-403
PO Box 881000
Steilacoom WA 98388-1000

ORIGINAL

TABLE OF CONTENTS

A: Table of Authorities.....ii

State Authorites.....ii

Federal Authorities.....iii

Other authorites.....iv

B: Statement of the Case.....1

C: Assignments of error:

#1: The initial search warrant was void for vagueness ——— 1

#2: There was insufficient evidence to find that Appellant:

(i) Manufactured methamphetamine; and,..... 7

(ii) No evidence was introduced that would support a finding that methamphetamine was manufactured for profit..... 12

#3: There was insufficient evidence to convict appellant of possession of stolen property in the second degree..... 20

#4: Appellant was denied a fair trial due to judicial bias..... 22

#5: There was insufficient evidence to convict appellant of possession of stolen property in the first degree..... 26

#6 Insufficient evidence to find Appellant Possessed a controlled substence ——— 28

Conclusions ——— 29

STATE AUTHORITIES

Brown, State v., 162 Wn 2d 422 (2007).....20, 21
Duncan, State v., 146 Wn 2d 166 (2002).....3
Finch, State v., 137 Wn 2d 792 (1999)..... 8
Garcia, State v., 140 Wn App 609 (2007, Div iii).....3, 5, 6
Gregory, State v., 158 Wn 2d 759 (2006, div ii).....9
Gore, State v., 143 Wn 2d 288 (2001)..... 11
Hosier, State v., 124 Wn App 696 (2004, div I).....2
Johnson, State v., 104 Wn App 489 (2001, Div ii)..... 3
Lane, State v., 56 Wn App 286 (1984, Div 2).....6
Maddox, State v. 116 Wn App 796,
affirmed 152 Wn 2d 499 (2003).....5
Michielli, State v., 132 Wn 2d 229 (1994).....11
Thomas, State v., 150 Wn 2d 821 (2004).....9

Statutes

RCW 69.50.435 ———— 12, 13, 14, 17, 18
RCW 69.50.410 ———— 12
RCW 9A.56.010 ———— 20
RCW 9A.56.140 ———— 26, 27

Constitutional Provisions

Article 1, Sections:

Seven.....1, 3, 5, 6
Nine..... 16
Three..... 14
Twenty-one..... 14
Twenty-two..... 14
Thirty-two..... 19

FEDERAL AUTHORITIES

UNITED STATES SUPREME COURT CASES

Apprendi v. New Jersey, 530 U.S. 466 (2000)..... 16

Arizona v. Fulminante, 499 U.S. 279 (1990)..... 24,25

Blakely v. Washington, 542 U.S. 296 (2004)..... 16

Cage v. Louisiana, 508 U.S. 275 (1993)..... 8, 25

Camara v. Municipal COurt, 387 U.S. 523 (1967)..... 4

Groh v. Ramirez, 540 U.S. 551 (2004)..... 4, 6

Hanford v. Texas, 339 U.S. 476 (1952)..... 4

Miller v. United States, 357 U.S. 301 (1958)..... 5

Murchison, In re, 349 U.S. 132 (1956)..... 24

Rose v. Clark, 478 U.S. 570 (1988)..... 24

Sullivan v. Louisiana, 508 U.S. 275 (1993)..... 25

Winship, In re, 397 U.S. 358 (1970)..... 8, 21

CIRCUIT COURT CASES

Dawson v. City of Seattle, 435 F3d 1054 (2006 , 9th c.)..... 2

F. J. Hanshaw Enters. v. Emerald River Dev., Inc.,
244 F3d 1128 (9th c., 2001)..... 25

Ayala, United States v., 289 F3d 16 (1st c., 2002)_____ 25

Kelly, United States v., 712 F2d 884 (1st c., 1983) _____ 25

Constitutional provisions

Amendment 4..... 1, 5, 6

Amendment 5..... 16

Amendment 6..... 14

Amendment 14..... 14

ASSIGNMENT OF ERROR #1:

(A) THE INITIAL SEARCH WARRANT WAS VOID FOR BEING VAGUE AND OVERBROAD, AND FOR WONT OF PARTICULARITY.

ISSUES RELATING TO ASSIGNMENT OF ERROR

(A) CAN THE VALIDITY OF A SEARCH WARRANT BE UPHELD UNDER EITHER ARTICLE 1, SECTION 7, OF THE WASHINGTON STATE CONSTITUTION, OR THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THAT:

(1) Authorizes random searches for "RECORDS SHOWING THE IDENTITY OF COCONSPIRATORS IN THIS DISTRIBUTION OPERATION", when no information was provided in the underlying affidavit to support the existence of coconspirators? and,

(2) Ostensibly authorizes a title search of every "vehicle" on-site in order to determine if it belongs to the occupants/defendant, and then to further authorize a search of every vehicle "operated" by the occupants, without providing any discernable methods for determining (i) which vehicles were operated by occupants; (ii) failing to define the term vehicle; and (iii) failing to define the term occupants.

ARGUMENT:

(A)(1) Can the validity of a warrant be upheld that authorizes random searches for "RECORDS SHOWING THE IDENTITY OF COCONSPIRATORS IN THIS DISTRIBUTION

OPERATION", when no information was provided in the underlying affidavit to support the existence of coconspirators?

ARGUMENT:

A valid search warrant must describe particularly the placeus that officers may search, and the types of items that they may seize. Dawson v. City of Seattle, 435 F3d 1054 (9th c., 2006). The FOurth AMendment's particularity requirement prevents general searches and the issuance of search warrants on loose, vague, or doubtful bases of fact. State v. Hosier, 124 Wn App 696 (2004, Div 1) affirmed 157 Wn 2d 1.

In the matter presently being reviewed, the affiant asserts that the informant has witnessed numerous possessory offense of methamphetamine by defendant, and asserts that informant has purchased methamphetaminefrom defendant on numerous occasions. Yet, despite the alleged frequencey of these alleged events, no attempts were made at obtaining a controlled buy from the defendant. Instead, in a weak attempt to support the frail credibility of the informant, a controlled buy is obtained via the informant -- not from the defendant, but -- from someone else.

More than this, there is the glaring ommission in all of the information being provided that the defendant is asserted to keep any records relating to coconspirators, or the ongoing criminal enterprise of either manufacturing or distribution, if either of these are truly alleged to exist.

The degree of specificity required under the Fourth amendment may vary with the circumstances of a particular case, but a search warrant must be sufficiently definite so that the officer can identify with reasonable certainty the persons or things to be seized. (My emphasis) State v. Garcia, 140 Wn App 609, 166 P3d 848 (2007). It is well-settled that Article 1, Section 7 of the Washington State Constitution provides its citizens greater protection than does the Fourth Amendment to the United Staes Constitution. State v. Duncan, 146 Wn 2d 166 (2002).

Assertion that affiant officer knows from training and experience that persons involved in such criminal activites often keep contraband or other evidence of criminal activity in their homes are insufficient to establich probable cause. State v. Johnson, 104 Wn App 489 [hn 3[(2001, Div 2).

AN affidavit is insufficient to establish probable cause for issuing a search warrant if it does not relate to facts from which to infer (1) the item to be seized is evidence of a crime; and (2) that the item to be seized will be in place at the time the search occurs [Ibid, at headnote 2].

In the current matter, the warrant ostensibly authorizes the seizure of a broad, but non-inclusive list of records which pruportedly relate to a criminal enterprise that is not described in the information provided either to (i) the investigating officer by the informant; or (2) the court by the affiant officer. There is no nexus between the records

requested to be seized and the enterprise that is alleged to exist. There is no discernable method for either an officer or a citizen to determine which records are evidence and which are not. There is nothing to prevent a general rummaging of one's personal effects, or to prevent arbitrary seizures of all forms of unrelated documents and information (as truly occurred in this case -- Officers having seized appellant's business license, and the entire history of litigation over the zoning of the property. Wherein the state laughed at Defendant when he could not produce records to support his position at the time of trial).

The uniformly applied rule is that a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional. Grob v. Ramirez, 540 U.S. 551, 559, 157 L. ed 2d 1080 (2004) citing Hanford v. Texas. 339 US 476 (1982). That rule is in keeping with the well-established principle that except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant. Grob, 540 U.S. at 560, citing Camara v. Municipal Court, 387 U.S. 523 (1967).

The Grob court went on to say that "we have long held,... that the purpose of the particularity requirement is not limited to the prevention of general searches. A particular warrant also assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the **limits** of his power to search. Ibid, at 540 U.S. 561. (my emphasis).

In a nutshell,a search warrant may not describe items that are not shown to be contraband or evidence of a crime. State v. Maddox, 116 Wn App 796, affirmed 152 Wn 2d 499 (2003). "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter -- all his force dares not cross the threshhold of the ruined tenment." **Miller v. United States**, 357 U.S. 301, 307, 2 L ed 2d 1332 (1958) quoting remarks attributed to William Pitt.

(A)(2) Can the validity of a warrant be upheld under either Article 1, Section 7, of the Washington State Constitution, or the Fourth Amendment to the United States Constitution that ostensibly authorizes a title search of every "vehicle" on-site in order to determine if it belongs to the occupant/ defendant, and then to further authorize a search of every vehicle "operated" by the occupants, without providing and discernable methods for determining (i) which vehicles were operated by occupants; (ii) failing to define the term vehicle; and (iii) failing to define the term occupants.

Without meaning to be redundant, appellant once again refers this court to State v. Garcia, 140 Wn App at HN 18. A search warrant may be overbroad and violate the particularity requirement of the Fourth Amendment if it authorizes police to search persons or to seize items for which there is no

probable cause. To avoid overbreadth, there must be a sufficient nexus between the targets of the search and the suspected criminal activity.

Neither Article 1, Section 7, nor the Fourth Amendemnt, will sustain a warrant that purports to authorize the search of all vehicles owned or operated by by occupants while neither providing nor recognizing any reasonable manner to determine which vehicles: (1) met the definition of vehicle; (2) Failed to identify which vehicles were reportedly owned by occupants; and, (3) failed to provide a reasonable system by which a person would be able to determine the vehicles "operated" by occupants.

A search warrant that purorts to authorize a search of "all persons" is invalid under the particularity requirement. (Garcia, supra). Likewise, is a warrant that seems to authorize a search of all vehicles present and "owned or operated by occupants, without providing some reasonable method of assuring that the officers will not be mistaken in carrying out a search.

The key is that there must be assurances that a mistaken search will not occur. State v. Lane, 56 Wn App 286 (1984, Div 2).

The rule is that a search warrant that fails to conform to the specificity requirement of the Fourth AMendment is unconstitutional. (GROH, supra). Applying this rule to the facts of this case clearly establishes that the warrant failed to state sufficient standards or provide sufficient assurances to prevent a mistaken search, or to reasonably circumscribe the limits of the officers to seize or search property and vehicles.

ASSIGNMENT OF ERROR #2:

THERE WAS INSUFFICIENT EVIDENCE TO FIND THAT ~~DEFENDANT~~ APPELLANT:

(1) Manufactured Methamphetamine; and,

(2) No evidence was introduced that would support a finding that methamphetamine was manufactured "for profit".

ISSUES RELATING TO ASSIGNMENT OF ERROR:

(A) Can a defendant be convicted of manufacturing methamphetamine when the only evidence offered in support of the allegation was **ADDED** to the search inventory report after the report was completed and written into sections that were already crossed out by the officers conducting the search?

(B) Can a school zone enhancement be enforced when no evidence is admitted that methamphetamine was manufactured for profit, and the jury was not instructed on its duty to find the "for profit" element prior to imposing the "school bus stop" enhancement.

ARGUMENT:

(A) Can a defendant be convicted of manufacturing methamphetamine when the only evidence offered in support of the allegation was **ADDED** to the search inventory report after the report was completed and written into sections that were already crossed out by the officers conducting the search?

Normally, a challenge to the sufficiency of the evidence asks whther any rational trier fo fact could have found the elements of the crime beyond a reasonable doubt. State v. Finch, 137 Wn 2d 792, 831, 975 P2d 967 (1999).

The "reasonable doubt" standard is firmly rooted in American jurisprudence, and was clearly enunciated by the United States Supreme Court in In re Winship, 397 U.S. 358, 25 L. ed 2d 368 (1970).

"Beyond a reasonable doubt", however, is a term that seems to be ephemeral, and to somehow defy a clear and succinct definition. Compare **Winship**, supra, with Cage v. Louisiana, 498 U.S. 39, 112 L. ed 2d 339 (1990). In fact, although one can clearly find and locate volumes of caselaw that will most assuredly describe what "beyond a reasonable doubt" is not -- our courts (both state and federal) have incurred great difficulty in setting the parameters of this legal boundry.

In order to help clarify this legal hallmark, Appellant asks this court to adopt the following standardized definition:

Reasonable doubt	:	A reasonable doubt is a doubt for which there is a reason.
Beyond a reasonable doubt	:	Beyond a reasonable doubt is that quanta wherein there no longer exists a reason to doubt.

It seems a clear enough point of reference for appellant to begin this journey in challenging the presentation of the case against himself.

In a challenge to the sufficiency of the evidence, a reviewing court looks at the evidence in a light most favorable to the state, drawing all **reasonable** inferences in the state's favor. State v. Gregory, 158 Wn 2d 759, 817, 147 P3d 1201 (2006). (My emphasis).

I have emphasized the **reasonable** requirement inorder to show that the standard allows consideration of both "circumstantial and direct evidence" as equally reliable (see State v. Thomas, 150 Wn @d 821, 874 (2004)); yet, still requires the inference to be reasonable based upon the evidence being presented.

Within the issue now presented to this court is included a common sense question as to the integrity of the practices employed by the police agency in the investigation of the case, as well as the collection and presentation of the evidence.

FIrst, I ask the court to consider that the reality is that the only evidence presented in support of the manufacturing charge is the glassware (which contains a bi-layer liquid that tested positive for methamphetamine traces and red phosphorous residues (vrp at 508; ln 5-8); and baggies of the chemicle red phosphorous which is accompanied by strainers and cofee filters. These items were allegedly found in seperate containers (evidently portable file cabinets of some kind) in two seperate locations.

Appellant next asks the court to fairly consider the inventory search report upon which these items are first recorded (CP# 46). It is clearly apparent that something is amiss. These are the last two items found and recorded on the list. However, these are written into sections which have clearly and unequivically been marked through. A universal protocol for signifying that those sections are to remain empty and nothing follows.

No explanation is given for this glaring error, which presents a shining picture of impropriey. This is not a violation in the chain of custody -- this is a violation established at the very foundation of the "discovery" and recording process. An **error** that paints a picture not of misfeasance, but of malfeasance.

Without the alleged items discovered and recorded in these sections of the inventory report, any manufacturing charge falls by the wayside. However, there are more telling facts which decry the actions of these officers in relation to these items of evidence. Appellant therefore asks this court to consider the fact that the search inventory report left at the shop is not in conformity with the one submitted as an exhibit at trial. Id est, these last two items are hand written onto the bottom of appellant's copy (in ink) rather than the carbon-transfer manner of the preceding items.

These items, allegedly found in appellant's shop, are the heart and soul of the State's case-in-chief. Yet, the only reasonable inferences that can be drawn (based upon the glaring faults apparent in the collection record) is that some serious doubts exist regarding the integrity and veracity of these items.

Appellant asks this court to herein consider a procedure for something equivilent to a **Franks** hearing, where a defendant can demand an evidentiary hearing upon a showing of deliberate falsehood supported in the record (see State v. Gore, 143 Wn 2d 288 (2001) Holding that if a defendant makes a substantial showing that a false statement was knowingly and intentionally, or with reckless disregard for the truth, was included by affiant in the warrant affidavit, and if the allegedly false statement is necessary to a finding of probable cause, the Fourth amendment requires that a hearing be held).

Washington courts have long recognized the fallability of government agents, and has fashioned legal remedies when a criminal defendant has been prejudiced as a result of governmental misconduct. (See 8.3 (b) Dismissal in Furtherance of Justice; State v. Michielli, 132 Wn 2d 229, 244 (1994).

The issue is whether, after viewing the evidence in a light most favorable to the state, any rational trier of fact can find the essential elements of the crime proven beyond a reasonable doubt.

A reasonable doubt is a doubt for which there is a reason.

There is reason to doubt the integrity and veracity of the items asserted to support the manufacturing charge.

There is reason to doubt the record regarding the preservation and recording of the evidence asserted to support this allegation.

There is reason to doubt the veracity of the testimony offered in support of these allegations.

There is reason to doubt the appellant manufactured methamphetamine.

(2)(B) **CAN A SCHOOL ZONE ENHANCEMENT BE FOUND WHEN NO EVIDENCE IS ADMITTED THAT METHAMPHETAMINE WAS MANUFACTURED FOR PROFIT, AND THE JURY WAS NOT INSTRUCTED ON THE FOR PROFIT ELEMENT PRIOR TO IMPOSING THE SCHOOL BUS STOP ENHANCEMENT?**

ARGUMENT:

In relevant part, **RCW 69.50.435,** is set out as follows: (1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possing with intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:

(a) In a school;

[RCW 69.50.435 cont.]

(b) On a school bus;

(c) Within one thousand feet of a school bus route stop designated by the school district;

(d) Within one thousand feet of the perimeter of the school grounds;

(e) In a public park;

(f) In a public housing project designated by a local governing authority as a drug-free zone;

(g) On a public transit vehicle;

(h) In a public transit stop shelter;

(i) At a civic center designated as a drug-free zone by the local governing authority; or

(j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand [sic] foot perimeter may be punished by a fine up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

[RCW 69.50.435 cont.]

(4) It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took placeentirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with intent to manufacture, sell, or deliver any controlled substance in **RCW 69.50.401 for profit.** The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter. (my emphasis).

Within this issue stand three seperate constitutional principles:

(i) The state is required to prove every element that constitutes the offense beyond a reasonable doubt;

(ii) Article 1, sections 21 and 22 of the Washington State Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution, provide to a criminal defendant the right to have **any fact** (other than a prior conviction) decided by a jury by proof beyond a reasonable

that would increase the penalty beyond the statutory maximum;

(iii) Under the rule of **expressio unis exclusio altarius**, can an enhancement under (1)(j) be imposed for an allegation under (1)(c)?

It is a fundamental principle of American jurisprudence that the burden is on the state to prove every element that constitutes the crime charged. The defendant is not required to present any evidence in his defense. He is not required to speak in his defense. He is not required to present a single witness for examination, nor to cross examine a witness who stands against him. With all of the might of the government standing against him, he needs not raise a finger in defense of himself, because the burden is still on the state to prove his guilt by proof beyond a reasonable doubt as to every element that constitutes the crime charged.

In this case, the legislature -- whether or not it has intended to do so -- has provided essential elements to the offense of manufacturing in a protected zone, by providing for an affirmative defense against the allegation. The legislature has determined that if a person is manufacturing for profit, the enhancement applies all of the time (this is an element). If a person is not manufacturing for profit, then the next question is whether the location can constitute a residence. (That is an element of the offense). If that

element is met, then the next question is whether a person under the age of eighteen or younger was present at any time during the alleged commission of the offense.

In each instance, a determination must be made, specific facts must be found, whose determination ultimately decides if the provision has been violated, and the sentence imposed.

The United States Supreme Court stated in Apprendi v. New Jersey, 530 U.S. 466 (2000) that any fact other than a prior conviction that increases the sentence beyond the statutory maximum must be found by a jury upon proof beyond a reasonable doubt. In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court stated that the statutory maximum (for Apprendi purposes) was the sentence that could be imposed without finding any additional facts, and based solely upon the verdict.

It is clear and apparent that the legislature **intended** to require these facts to be proven by the defendant. However, the legislature's intent is unconstitutional. The unconstitutionally of their intent does not remove the elements. It only alters the standard of proof, and who is required to prove it.

Article 1, Section 9 of the Washington State Constitution provides:

> "No person shall be compelled in any criminal case to give evidence against himself, or to be twice put in jeopardy for the same offense."

Affirmative defenses - by definition - require an evidentiary showing. That in and of itself does not make an affirmative defense (or the requirement of one) to be an unconstitutional (burden-shifting) act -- nor does it necessarily compel one to give evidence against themself. However, there are distinguishing characteristics between the affirmative defense of RCW 69.50.435 (4), and that offered in regards to other defenses.

First, with respect to any other affirmative defenses, it is generally required that the defendant make an evidentiary showing of "some evidence" in order to obtain an instruction regarding the defense (e.g. Self-defense instruction), and then the state must disprove the defense by proof beyond a reasonable doubt.

Secondly, such defenses and evidentiary offerings are made with regard to offenses where the underlying offense is undisputed: e.g:

(i) Self-defense or defense of others:

Admits the underlying conduct, but argues the act was justifiable in order to prevent injury to self or others;

(ii) Duress:

Admits the underlying act, but argues argues compelling reasons to forgive the conduct;

(iii) Entrapment:

Admits the underlying conduct, but argues governmental misconduct unwittingly lured and enticed the defendant, and without said enticement

it is not probable that the defendant would have engaged in the prohibited conduct.

In each of these examples, the defendant is required to present evidence in support of his defense. After making the required evidentiary showing, the state is required to disprove the defense beyond a reasonable doubt. However, the most important distinguishing characteristic between a constitutional affirmative defense, and the unconstitutional requirement of the defense authorized in this statute, is found in the result of a successful evidentiary showing.

In each of the foregoing examples, if the jury finds the affirmative defense to be factual, then the defendant is acquitted of the wrong doing (i.e. the bad act is justified and no punishment is meted out). However, in the current matter, in order to assert the affirmative defense of RCW 69.50.435 (4), a defendant would have to argue and prove that he was manufacturing methamphetamine, but that it was not for profit, etc.

As stated at the outset, the duty is on the state to provide proof beyond reasonable doubt for every fact necessary to establish the offense. The legislature has made it clear that RCW 69.50.435 is meant to punish commercial manufactureers and dealers, and to protect children. It has also made it presumptively apparent that it is not intended to punish the small time user/manufacterer/dealer. In order for this enhancement to be enforced, the burden

is on the state to establish the existence or non-existence of each of these elements.

I ask the court to forgive the lack of citation for this argument. Time constraints have prevented me from thoroughly developing the case histories necessary. However, I have presented a clearly cognizable argument based upon well-known priciples of constitutional law. I ask this courts indulgence and forgiveness.

I do ask this court to consider one other constitutional provision in relation to the foregoing argument, and that is Article 1, Section 32, the Fundamental priciples provision of our state constitution:

> A frequent recurrence to fundamental principles is essential to the security of the individual right, and the perpetuity of free governemnt.

I believe that a fundamental principle of justice is that a defendant should not be required to give up one right, in order to secure another.

Because sentencing proceedings are not seperated in the manner that capital offenses are (i.e., the evidence used for sentencing in this proceeding is the same that was admitted at trial, rather than at a later proceeding) a defendant cannot maintain his innocense throughout the trial if he wants to argue against the application of the school zone enhancement. THis is fundamentally wrong.

ASSIGNMENT OF ERROR #3:

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE

ISSUES RELATED TO ASSIGNMENT OF ERROR

(A) CAN A CHARGE OF POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE BASED UPON AN ALLEGED ACCESS DEVICE BE FOUNDED UPON A FACIALLY EXPIRED ITEM?

ARGUMENT

A defendant's challenge to the sufficiency of the evidence requires the reviewing court to review the evidence in a light most favorable to the state and determine whether any rational trier of fact could have found the elements of the charged offense beyond a reasonable doubt. State v. Brown, 162 Wn 2d 422, 173 P3d 245, 247, ¶ 11 (2007). All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. Id.

RCW 9A.56.010 (1) provides the following definition for "Access Device":

> "Access device" means any card, plate, code, account number, or other means of account access **that can be used** alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument. (My emphasis) (See also VRP at pg 863; Ln 15-21).

Due process requires that a defendant be convicted of a crime only upon a showing that every element of the crime charged has been proven beyond a reasonable doubt. In re Winship, supra. In order for a conviction for Possession of Stolen Property in the Second degree to stand, the device must meet the definition of access device at the time the offense is alleged to have been committed.

It is undisputed that the card was facially expired at the time it was seized (see VRP at Pg 862; ln 18-19: card expired in 2005; charged with possessing it on June 2006).

The state is not just required to prove each element of the offense as charged (Brown, 173 P3 at 248, ¶14), but the state must prove those elements were met at the time the offense is charged to have occurred.

The plain language of the definition of an "Access device" requires that the device "can be used alone or in conjunction with another access device",...

Under a plain reading of the statutory definition, the card that appellant is charged to have possessed cannot support the offense.

Viewing the evidence in a light most favorable to the state, no rational trier of fact can find a key element of the offense. Id est, that the item possessed "**can be used**" ..., at the time it was charged to have been possessed.

ASSIGNMENT OF ERROR: 4

APPELLANT WAS DENIED A FAIR TRIAL DUE TO JUDICIAL BIAS

ISSUES RELATING TO ASSIGNMENT OF ERROR:

(A) IS THE APPELLANT REQUIRED TO SHOW PREJUDICE WHEN THE PRESIDING JUDGE AT TRIAL HAS AN ACTUAL AND SUBSTANTIAL CONFLICT OF INTEREST THAT REQUIRES THE JUDGE TO RECUSE HIMSELF?

ARGUMENT:

It is undisputed in the record that Judge Wulle had a conflict of interest in this case, and that the state's prosecutor (Mr. Vu) was aware of this fact before trial (See VRP at pg 888; ln 19-22).

Mr. William burr and Ms. Judy Fox (alleged owners of the Harley Davidson underlying the PSP 1° charge) were witnessed shaking hands and having a friendly discussion with Judge Wulle outside of the courtroom (see defendant's Motion to Recuse).

This motion was immediately granted, as soon as the court learned that defendant had learned of the conflict.

In an attempt to minimize the error (as well as the degree of conflict) the state gave a lengthy explanation of the events (See VRP; pg 887-89, begining at ln 24, and ending at ln 12 on pg 889).

Thankfully, the state's recording of those events demonstrate the seriousness, as well as the deliberateness of the impropriety.

In begining, the state asserts that when he first spoke to the witnesses, he was informed by them that they knew Judge Wulle (VRP at pg 888; ln 19-22)

Mr. Burr was Judge Wulle's aircraft mechanic for his personal airplane (Ibid, at ln 10-15).

Mr. Vu asserts that he immediately informed Judge Wulle of the conflict, but that his honor denied any recollection of these individuals by name (Ibid, at ln 23-25).

Mr. vu did not notify defense counsel of the asserted and/or possible conflict.

Mr. Vu next states that Judge Wulle then recognized the witnesses as they came in to testify at trial (VRP at 889; ln 1-5).

Judge Wulle did not inform either counsel of his recognition, present the issue on the record, or ask any party if they had any objections to his continuing on the bench. Instead, the Judge maintained secrecy until an inappropriate ex parte communication/association with the witnesses was observed. Only then, after the conclusion of the trial and after a conviction was obtained, did the judge recuse himself from sentencing the appellant.

Therefore, the sole question now presented is whether such an error can ever be deemed harmless.

The United States Supreme Court has recognized a class of constitutional errors that "necessarily render a trial fundamentally unfair" and thus are not amenable to harmless error analysis. Rose v. Clark, 478 U.S. 570, 592 (1988).

The right to be tried before an impartial judge is one of the cornerstones of our system of justice. A bedrock principle whose violation impugns the very integrity of the foundations upon which our courts are built.

This is not an error in the presentation of the evidence against appellant at trial. This is not a challenge to an improper statement or comment on the evidence. This is a challenge to the very fabric from which the concept of due process is woven, and the integrity of the robes worn by our judiciary. (see Arizona v. Fulminante, 499 U.S. 279, 307-09 (1990) Trial error is error which occurred in the presentation of the case to the jury and which may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. In contrast, **structural defects in the framework** within which the trial proceeds involve the basiic protections without which a criminal trial cannot reliably serve its function as a vehicle for a determination of guilt or innocense).

Due process requires that the judge possess neither actual nor apparent bias. (see In re Murchison, 349 U.S. 136-39). The test for actual or apparent bias is the same

in all circuits: i.e., Whether "a reasonable person with knowledge of the facts would conclude the judge's impartiality might reasonably be questioned", F.J. Hanshaw Enters., v. Emerald River Dev., Inc., 244 F3d 1128, 1144 (9th c., 2001). See also U.S. v. Ayala, 289 F3d 16, 27 (1st c., 2002); and also United States v. Kelley, 712 F2d 884, 889 (1st c., 1983) Facts are sufficient if they create a reasonable doubt concerning the judge's impartiality in the mind of a reasonable man).

The judge should have recused himself sua sponte, or at the very least presented the issue to counsels for objection. Instead, the court hid the matter until it was later discovered outside of the courtroom.

The issue now is whether harmless error analysis can be applied to a judge that has an actual and apparent conflict of interest in a trial proceeding.

The rule is that where the error inheres in the very framework in which the trial proceeds, the trial cannot reliably serve its function as a vehicle for a determination of guilt or innocense, and therefor, renders the trial "fundamentally unfair" and such error is not amenable to harmless error analysis. (Arizona v. Fulminante, supra; ROse, supra; SUllivan v. Louisiana, 508 U.S. 275 (1993); and Cage v. Louisiana, 498 U.S. 39 (1990).

A trial before a biased judge denies a defendant the basic trial process and thus, can never be harmless.

ASSIGNMENT OF ERROR #5:

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF POSSESSION OF STOLEN PROPERTY IN THE FIRST DEGREE

ISSUES RELATING TO ASSIGNMENT OF ERROR:

(a) Can Appellant be convicted of Possession of stolen property in the first degree for the alleged possession of a Harley Davidson motorcycle for which he possessed a work order for in a commercial vehicle yard?

Argument:

In order to convict appellant of possession of stolen property in the first degree, it must be established not only that physical possession of the property existed, but that appellant had reason to know that the item alleged to be possessed was stolen.

RCW 9A.56.140 POSSESSING STOLEN PROPERTY -- DEFINITION -- PRESUMPTION.

(1) "Possessing stolen property" means **knowingly** to receive, retain, possess, conceal, or dispose of stolen property **knowing it has been stolen** and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

(2) The fact that the person who stole the property has not been convicted , apprehended, or identified is not a defense to a charge of possessing stolen property.

(3) When a person has in his or her possession, or under his or her control, stolen access devices issued in the names of two or more persons, or ten or more stolen merchandise pallets, or ten or more stolen beverage crates, or a combination of ten or more stolen merchandise pallets and beverage crates, as defined under RCW 9A.56.010, he or she is presumed to know that they are stolen.

(4) The presumption in subsection (3) of this section is rebuttable by evidence raising a reasonable inference that the possession of stolen access devices, merchandise pallets, or beverage crates was without knowledge that they were stolen. (my emphasis)

It is clear that knowledge is an element of this offense. Appellant is required to know that it is stolen. Yet here, in the present matter, the appellant possessed a valid work order from a customer who had dropped-off the motorcycle to be worked on. Appellant is not required to run checks on every vehicle brought to him to work on. No shop is. Vendors generally presume their customers are legitimate. It would be very poor for business if one ran criminal history checks on all of their customers (not to mention, very costly).

The court argued at the suppression hearing that he did not believe the work order to be valid, because the work order spelled the name Ty Sibbly one way in the order, but differently in the signature. The court would not even consider that the work order was filled out by the person taking the order, and then signed by the customer. Of course they are different.

Assignment of Error #6:

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF POSSESSION OF A CONTROLLED SUBSTANCE

ISSUES RELATED TO ASSIGNMENT OF ERROR:

CAN CONSTRUCTIVE POSSESSION BE FOUND BASED UPON AN EMPTY "SCRAPE BAG" ALLEGEDLY FOUND ON THE FLOOR IN THE MIDDLE OF A SHOP THE SIZE OF "HALF-A-FOOTBALL-FIELD?"

Argument:

"Count four refers to this little plastic baggie, exhibit number 40, that Detective Hess so eloquently calls a scrape baggie." VRP at 814-15; Ln 23 - 2.

"It was in the center of the shop on the floor." (Deputy Nelson: VRP 356; Ln 25)

"Like a beacon calling you." VRP 366; Ln 23.

"Detective Nelson, did you sign this-- This?" [Indicating evidence bag containing "scrape bag"] VRP 370; Ln 15-17.

"It doesn't appear that I signed the bag. And I'm supposed to." Ibid.

There is nothing to the record to establish that appellant knowingly possessed anything. There is not even a scintilla of evidence providing for the constructive possession of the item asserted to be found in the middle of a shop floor the size of "Half-a-football-field"; Where the deputy who allegedly found it "forgot" to sign the bag, and he's supposed to.

CONCLUSIONS

1. THere was insufficient evidence to convict appellant of possession of stolen property in the second degree, based upon the asserted possession of an "access device", because at the time the article charged to have been possessed, it did not meet the definition of an access device.

2. THere was insufficient evidence to convict appellant of possession of methamphetamine, because constructive possession of the item alleged to have been possessed cannot be established.

3. There was insufficient evidence to convict appellant of Manufacturing a controlled Substance, because the only items offered as evidence in support of the allegation were improperly added to the search inventory by officers AFTER the search inventory report was closed, and no further items are allowed to be added to the list in the sections crossed through.

4. Both search warrants were unconstitutionally over-broad, and all items seized as a result of them should be suppressed, and/or any evidence obtained in the searches of the motor vehicles, trailers, files, file cabinets, out-buildings, and curtaleges should be suppressed.

5. There was no evidence admitted at trial that meth-amphetamine was manufactured for profit. In order to impose the protected zone enhancement, the state is required to prove the for profit element. The Appellant is not required to disprove the for profit element.

the protected zone enhancement, the state is required to prove the "for profit" element. THe appellant is not required to disprove the "for profit" element.

6. It is an unconstitutional burden-shifting presumption for the statute to require the appellant to present evidence against himself in order to obtain the benefit of the defense intended.

7. All charges should be dismissed based upon an insufficiency of evidence.

8. However, should this court determine that in the case of one or more offenses(viewing the evidence in a light most favorable to the state) the charge/s may be sustainable, the court should suppress all evidence seized under the authority of the unconstitutional search warrants.

FILED
COURT OF APPEALS
DIVISION II
08 NOV -6 AM 11:19
STATE OF WASHINGTON
BY CLERK
DEPUTY

9. Any any other instance, this court should reverse the convictions and remand for a new trial before a different judge, with instructions that if the state charges a violation of a protected zone, the state is obligated to prove the existence (or lack thereof) of each element/fact necessary to impose the enhancement - including the "for profit" element.

Respectfully submitted on ths 4TH day of November, 2008.

Corey Runyon

Corey Runyon, pro se
Appellant

I certify that I mailed a true copy of the foregoing to all parties (and/or their counsel) on this 4TH day of November, 2008.

Corey Runyon
COREY A. Runyon