

COURT OF APPEALS

CO. JUDGE: 11/11/05

STATE OF WASHINGTON
BY cm

NO. 37833-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDALL J. PATTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAMANIA COUNTY

The Honorable Brian Altman, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1396
Longview, WA 98632
(360) 425-8155

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A. ASSIGNMENTS OF ERROR

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C. STATEMENT OF THE CASE

1. Procedural Facts.

The Skamania County Prosecuting Attorney, by an amended information, charged Randall Patton with possession of methamphetamine with intent to deliver. CP 31. The amended information alleged that the possession occurred within 1,000 feet of the perimeter of a school ground. CP 31.

Pre-trial, Mr. Patton challenged the issuance and service of a search warrant on his Stevenson, Washington, home and a vehicle parked outside the home. CP 11-29; RP 10-41. The court

denied Mr. Patton's suppression motion. RP 38-41. The court filed written findings of fact and conclusions of law to support its oral ruling. CP 38-41.

On the date set for his jury trial, Mr. Patton filed a written waiver of his right to a jury trial. CP 42; RP 42. The court also engaged Mr. Patton in a very brief colloquy about his jury waiver. RP 42. The court accepted Mr. Randall's jury trial waiver. RP 42-43.

The court gave Mr. Patton a new trial date without objection. RP 43. At that trial, the court found Mr. Patton guilty as charged in the amended information. RP 210-14. The court entered written findings of fact and conclusions of law in support of the verdict. CP 44-46.

The court sentenced Mr. Patton to a standard range sentence of 16 months plus 24-months for the school enhancement for a total sentence of 40 months. CP 49, 52; RP 219, 222. Mr. Patton appeals every part of his judgment and sentence. CP 61.

2. CrR 3.6 Motion.

Mr. Patton moved to suppress the evidence seized from, among other places, his car. CP 11-29; RP 24-25. He argued, among other things, that there was no nexus between the

information in the search warrant affidavit and any cars owned by Mr. Patton. CP 16; RP 24-25. The search warrant affidavit alleged that two confidential informants had recently seen or been involved in the purchase of methamphetamine from Mr. Patton's home. CP 26-28. Neither of the allegations involved a car owned or used by Mr. Patton. CP 26-27. Instead, the search warrant affidavit merely said that the detective, a member of the Clark-Skamania Drug Task Force, knew that persons involved in methamphetamine distribution hide narcotics in places to include in vehicles. CP 29. Based on this generalization, the authorizing judge signed the search warrant authorizing the police to search "any vehicles registered to or operated by the occupants of" Mr. Patton's home. CP 21.

3. Trial Facts.

When the police came to Randall Patton's door with a search warrant in hand, they found the house empty except for Mr. Patton's bedroom. RP 67, 97-98. Mr. Patton had lost his home to foreclosure and was moving out with the help of some friends. RP 68, 98, 138, 189. The house is within 1,000 feet of the local high school grounds. RP 116-22.

Mr. Patton is an admitted methamphetamine addict and has used methamphetamine with regularity for six years. RP 132. As

such, it was not unusual that, when the police entered his bedroom, they found, sitting on top of a small safe, a small baggie containing methamphetamine and a pipe used to smoke methamphetamine. RP 68, 72-73, 87.

Mr. Patton was cooperative with the police investigation. He opened the small safe when the police asked him to do so. RP 74. The police found 16 individual packages of methamphetamine in the safe as well as \$3,000 cash. RP 74-75. In a drawer under the bed, the police found freezer-type baggies and a triple beam scale. RP 69, 76, 77-78. In Mr. Patton's car, the police found a second set of scales. RP 164.

During his testimony, Mr. Patton explained that all of the methamphetamine was his and for his personal use. RP 135. He had advertised his 1955 Chevy on Craig's List and found a buyer, Russell Hayek, who paid \$4,600 for the car. RP 137, 182-84. He used part of the proceeds from that sale to buy all of the methamphetamine a Vancouver-area drug dealer would sell him. RP 136. After paying a few bills and buying some food, he put the remaining cash in his safe. RP 137. The purchased methamphetamine came in the individual packages that the police found in his bedroom safe. RP 136. Mr. Patton explained the

scales found in the drawer under the bed belonged to a friend he had cared for until she passed away. RP 142. The friend used the scales to weight herbal medicine. RP 142-43. He hadn't seen the scales since her death in 2003. RP 155. He explained that the scale found in his car was to weigh the methamphetamine he, as an addict, bought and used. RP 164. When he purchased methamphetamine he wanted to know that he was getting the quantity that he paid for. RP 164-65. The baggies in the drawer under the bed were for his coin collection. RP 139-40, 162.

Unfortunately, the court, sitting as the trier of fact, did not believe Mr. Patton's testimony. RP 210-14. Instead, the court found that the items from the safe, the other parts of the bedroom, and Mr. Patton's car were evidence not simply of unlawful possession of methamphetamine but of unlawful possession of methamphetamine with the intent to deliver it. RP 210-14.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING MR. PATTON'S MOTION TO SUPPRESS EVIDENCE SEIZED DURING THE UNLAWFUL SEARCH OF HIS CAR.

- a. Mr. Patton moved to suppress evidence on the basis that the search warrant did not establish an adequate nexus between the place to be searched and the things to be seized.

Pretrial, Mr. Patton moved to suppress evidence recovered pursuant to a search on the basis that the affidavit failed to include sufficient facts to permit a reasonable person to conclude evidence of a crime would be found in any car owned by him. CP 16. Citing State v. Rivera, 76 Wn. App. 519, 888 P.2d 740 (1995), Mr. Patton contended the affidavit failed because it did not allege facts to support that any searched vehicle was somehow involved with alleged drug transactions. CP 16; RP 37.

While conceding for the purpose of the motion that probable cause existed to believe that Mr. Patton was involved in criminal activity, Mr. Patton argued that the search of any cars registered to him and located at his home was not reasonably connected to the facts asserted in the search warrant affidavit. Similarly, Mr. Patton contended that absent some evidentiary basis beyond mere speculation linking the criminal activity to his cars, the warrant lacked the required showing of a nexus. CP 16; RP 24-25.

Following a hearing, the court denied the motion. RP 38-41. The court subsequently entered written findings of fact and conclusions of law setting forth its reasoning. CP 38-41.

- b. The particularity requirement of the Fourth Amendment and Article I, § 7 of the Washington State Constitution is tied to the

probable cause determination and requires the State to show a nexus between alleged criminal activity, the place to be searched, and items to be seized therefrom.

The Fourth Amendment provides in relevant part, “no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. Amend. 4. Article I, § 7 states, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Under Article I, § 7, the warrant requirement is especially important as it is the warrant which provides the “authority of law” referenced therein. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

The Fourth Amendment’s particularity requirement is closely intertwined with the probable cause requirement, and prevents general searches and “the issuance of warrants on loose, vague, or doubtful bases of fact.” State v. Perone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992); State v. Nordlund, 113 Wn. App. 171, 179-80, 53 P.3d 520 (2002). “The problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person’s belongings....” Perone, 119 Wn.2d at 545 (quoting

Andresen v. Maryland, 427 U.S. 463, 490, 96 S. Ct 2737, 2748, 49 L. Ed. 2d 627 (1976) (internal citation omitted)).

Generic assertions in warrants violate the federal and state constitutions unless the warrant specifically identified the alleged criminal activities in connection with which the items are sought and properly establishes a nexus between the search and the activities. State . Goble, 88 Wn. App. 503, 508-09, 945 P.2d 263 (1997); United States v. Spilotro, 800 F.2d 959, 964 (9th Cir. 1986). It is this aspect of the particularity determination that is tied to probable cause. "It must be probable (i) that the described items are connected with criminal activity, and (ii) that they are to be found in the place to be searched." Perrone, 119 Wn.2d at 548 (quoting 2 W. LaFave, Search and Seizure § 4.6(a), at 236 (2nd Ed. 1987)); Goble, 88 Wn. App. at 508-09.

Probable cause has at least two necessary aspects. One is whether a reasonable person, given the evidence presented, would believe that the item sought is contraband or other evidence of a crime (in other words, that crime has occurred or is occurring, and that the item sought is evidence of that crime). If the answer is yes, the police have a valid reason to seize the item sought. The other is whether a reasonable person, given the evidence presented, would believe that the item sought is likely to be found at the place to be searched. If the answer is yes, the police have a valid reason to search that place. Thus, probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.

Goble, 88 Wn. App. at 508-09 (internal citations omitted).

- c. The warrant failed to establish a sufficient nexus between the alleged criminal activity and the evidence to be seized, and between the criminal activity and the places to be searched.

Whether a warrant's description is sufficiently particular is reviewed de novo. Perrone, 119 Wn. 2d at 549. Under this standard, this Court should find that the warrant did not set forth an adequate nexus to justify the search of Mr. Patton's car. There was simply no information in the search warrant affidavit linking any evidence of drug dealing to Mr. Patton's car. The bald assertion by the affiant, Detective Wychoff, that people involved in methamphetamine distribution hide narcotics in many places to include cars is insufficient.

In requiring search warrant affidavits to establish an adequate nexus for probable cause, the Washington Supreme Court has insisted "[a] finding of probable cause must be grounded in fact. State v. Thein, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." Id. Detective Wychoff's affidavit identifies no facts connecting Mr.

Patton's car to the two specific allegations in the search warrant affidavit. This Court should find the trial court erred in denying Mr. Patton's motion to suppress.

- d. The constitutional violation requires suppression of all after-acquired evidence,

Where there has been a violation of the Fourth Amendment, courts shall suppress evidence discovered as a direct result of the search as well as evidence which is derived of the illegality: the "fruits of the poisonous tree." Nardone v. United States, 371 U.S. 341, 60 S.Ct. 266, 84 L.Ed 307 (1939); Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L.Ed. 2d 441 (1963). Similarly, the remedy for a violation of the privacy rights secured by Article I, § 7 is suppression of the evidence obtained as a result of the unconstitutionality. State v. Young, 123 Wn.2d 173, 196, 867 P.2d 593 (1994). Mr. Patton requests this Court find the State failed to establish a nexus between the offense, the places to be searched, and the items to be seized. He requests reversal of his conviction and remand for a trial which the evidence will be excluded.

- 2. THE TRIAL COURT ERRED IN FINDING THAT MR. PATTON'S WAIVER OF HIS RIGHT TO A JURY TRIAL WAS KNOWING, INTELLIGENT, AND VOLUNTARY.**

a. A waiver of the right to a jury trial must be knowing, intelligent, and voluntary.

The constitutional right to due process of law provides all defendants the right to a fair trial. U.S. Const. Amend. 5, 14; Wash. Const. Art. 1 § 3;¹ State v. Van Antwerp, 22 Wn. App. 674, 591 P.2d 844 (1979), reversed on other grounds, 93 Wn.2d 510, 610 P.2d 1322 (1980). Defendants are also constitutionally entitled to a trial by a jury. U.S. Const. Amend. 6; Wash. Const. Art 1 § 21.² “That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” Blakely v. Washington, 542 U.S. 296, 306 124 S. Ct. 2531, 159 L.Ed. 403 (2004). Constitutional rights may be waived by knowing, intelligent, and voluntary acts. State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994); Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984); In re James, 96 Wn.2d 847, 851, 640 P.2d 18 (1982). The validity of any waiver of a constitutional right, as well as the

¹ U.S. Const. amend 5: “(N)or be deprived of life, liberty, or property, without due process of law.”

U.S. Const. amend. 14: “(N)or shall any State deprive any person of life, liberty, or property, without due process of law.”

Wash. Const. art 1, § 3: “No person shall be deprived of life, liberty, or property without due process of law.”

² U.S. Const. amend 6: “(T)he accused shall enjoy the right to a speedy and public trial, by an impartial jury....”

Wash. Const. art. 1 § 21: “The right of a trial by a jury shall remain inviolate but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.”

inquiry required by the court to establish waiver, is dependent upon the circumstances of each case, including the defendant's experience and capabilities. Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed 1461, 58 S. Ct. 1019, 146 A.L.R. 357 (1938).

The right to a jury trial is constitutional, and as such a waiver of a jury must be "knowingly, intelligently, and voluntarily made." State v. Treat, 109 Wn. App. 419, 427, 35 P.3d 1192 (2001), citing State v. Bugai, 30 Wn. App. 156, 157, 632 P.2d 917 (1981). The waiver must either be in writing, or done orally on the record. State v. Wicke, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979); State v. Rangle, 33 Wn. App. 774, 775-76, 657 P.2d 809 (1983).

A written waiver, however, cannot be regarded as conclusive of a valid waiver of jury trial. State v. Downs, 36 Wn. App. 143, 145, 672 P.2d 416 (1983), review denied, 100 Wn.2d 1040 (1984). In scrutinizing an oral waiver of the right to a jury, "every reasonable presumption should be indulged against the waiver of such a right, absent an adequate record to the contrary." Wicke, 91 Wn.2d at 645. Indeed, the United States Supreme Court has cautioned:

Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal

cases is of such importance and has such a place in our traditions, that, before any waiver can be effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses deal with increase in gravity.

Patton v. United States, 281 U.S. 276, 312-313, 50 S. Ct. 253, 263, 74 L. Ed. 854 (1930).

If the defendant challenges the validity of the jury waiver on appeal, the prosecution bears the burden of proving a valid waiver. Id.; State v. Donahue, 76 Wn. App. 696, 697, 887 P.2d 485 (1995). Because it implicates the waiver of an important constitutional right, the appellate court reviews the waiver de novo. State v. Vasquez, 109 Wn. App. 310, 34 P.3d 1255 (2001).

- b. Mr. Patton's waiver of his constitutional right to a jury trial was invalid.

In Mr. Patton's case, he did sign a jury waiver:

WAIVER OF JURY TRIAL

Having been advised by the Court of my right to a trial by jury and having had an opportunity to consult with counsel, I do hereby, with the approval of the Court, waive my right to trial by jury.

CP 42.

Mr. Patton also engaged in a brief in-court colloquy with the court.

THE COURT: I have here a Waiver of Jury Trial, I see you signed that, sir? Do you understand you do have a right to trial by jury and you also have a right to waive that. My understanding is you're waiving your right to a jury trial, which means that a judge will decide your case. Is that your understanding?

MR. PATTON: Yes, Sir.

RP 42.

However, the record does not reflect that he fully understood the right to a jury trial. Neither the written waiver nor the colloquy demonstrate that he was aware that he could participate in selection of the jury, that he had the right to an impartial jury of his peers, that the jurors would be required to presume him innocent unless satisfied of his guilt beyond a reasonable doubt, or that the jury had to be unanimous to return a verdict of guilty.

This record does not establish that Mr. Patton was fully aware of his constitutional right to a jury trial, thus, the waiver cannot be sustained on appeal.

c. Reversal is the appropriate remedy.

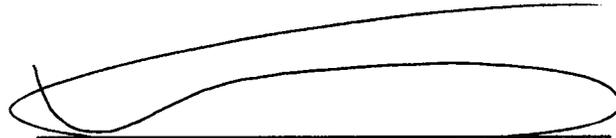
The trial judge's colloquy was inadequate, and the finding of a knowing, intelligent, and voluntary waiver of jury trial was

erroneous. Constitutional rights may only be waived by knowing, intelligent, and voluntary acts. Acrey, 103 Wn.2d at 208-09. The erroneous finding of a valid jury waiver deprived Mr. Patton of his constitutional rights to due process of law and to trial by jury. The Court should reverse Mr. Patton's conviction and remand for further proceedings.

E. CONCLUSION

Mr. Patton is entitled to reversal and remand for a new trial with a jury.

Respectfully submitted this 12th day of January, 2009.



LISA E. TABBUT/WSBA #21344
Attorney for Appellant

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY cm
DEPUTY

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

STATE OF WASHINGTON,)	Court of Appeals No. 37833-7-II
)	
Respondent,)	
)	CERTIFICATE OF MAILING
vs.)	
)	
RANDALL J. PATTON,)	
)	
Appellant.)	
)	
)	
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I, Lisa E. Tabbut, certify and declare:

That on the 12th day of January 2009, I deposited into the mails of the United States Postal Service, a properly stamped and addressed envelope, containing the Brief of Appellant and Certificate of Mailing (prosecutor only) addressed to the following parties:

Peter S. Banks
Skamania County Prosecuting Attorney
P.O. Box 790
Stevenson, WA 98648-0790

And

CERTIFICATE OF MAILING - 1 -

LISA E. TABBUT
ATTORNEY AT LAW

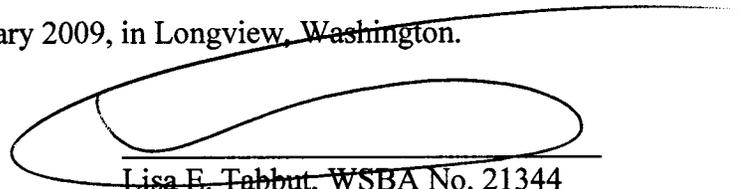
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Phone: (360) 425-8155 • Fax: (360) 425-9011

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Randall J. Patton/DOC#884202
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326-0769

I certify under penalty of perjury pursuant to the laws of the State of Washington
that the foregoing is true and correct.

Dated this 12th day of January 2009, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Appellant