

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR	1
II. ISSUES PRESENTED	
1. Did the trial court err in finding that the complaint for the search warrant for Dickjose’s residence and outbuildings contained sufficient facts to establish a nexus between the places to be searched and the crimes being investigated?	3
2. Did the trial court invade the province of the jury to determine Dickjose’s guilt where the trial court’s factual findings on Dickjose’s motion to suppress include findings that Dickjose is guilty of all crimes charged?	3
3. Did the complaint for the search warrant contain sufficient facts for the trial court to make the factual findings that Mr. Dickjose delivered or transported the methamphetamine from his residence to any meetings with Mr. Gross?.....	3
III. STATEMENT OF THE CASE	
Factual and Procedural Background	3
IV. ARGUMENT	8
The trial court erred in denying Dickjose’s motion to suppress the evidence found pursuant to the search warrant on grounds that the complaint for search warrant failed to establish a nexus between Dickjose’s property and the crimes being investigated.	8
1. <i>The trial court’s finding that Dickjose supplied the methamphetamine for the three transactions with the CI is not supported by substantial evidence in the complaint for the search warrant ...</i>	11
2. <i>The complaint contains insufficient facts to support the trial court’s finding that Dickjose</i>	

	<i>transported the methamphetamine from his residence to meeting locations</i>	13
3.	<i>The facts contained in the complaint for the search warrant are insufficient to support the trial court's finding that Dickjose kept methamphetamine and materials necessary to sell it at his home</i>	15
4.	<i>The findings of fact were not support by substantial evidence in the record, therefore, the findings of fact do not support the trial court's conclusions of law that a sufficient nexus existed between the controlled buys and Dickjose's residence and outbuildings</i>	15
5.	<i>The trial court's findings of fact invade the province of the jury</i>	17
V.	Conclusion	19

TABLE OF AUTHORITIES

Page

Table of Cases

Federal Cases

<i>Aguilar v. State of Texas</i> , 378 U.S. 108, 84 S.Ct. 1509 (1964)	10, 12
<i>Spinelli v. United States</i> , 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).....	12
<i>United States v. Ventresca</i> , 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965).....	
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	11

Washington Cases

<i>In re Pers. Restraint of Yim</i> , 139 Wn.2d 581, 989 P.2d 512 (1999).....	10
<i>State v. Ague-Masters</i> , 138 Wn.App. 86, 156 P.3d 265 (2007).....	9
<i>State v. Anderson</i> , 105 Wn.App. 223, 19 P.3d 1094 (2001).....	10
<i>State v. Casto</i> , 39 Wn.App. 229, 692 P.2d 890 (1984), <i>review denied</i> , 103 Wn.2d 1020 (1985)	9
<i>State v. Crawley</i> , 61 Wn.App. 29, 808 P.2d 773, <i>review denied</i> , 117 Wn.2d 1009, 816 P.2d 1223 (1991).....	11
<i>State v. Fisher</i> , 96 Wn.2d 962, 639 P.2d 743 (1982), <i>cert. denied</i> 102 S.Ct. 2967, 457 U.S. 1137, 73 L.Ed.2d 1355 (1982).....	12
<i>State v. Frye</i> , 53 Wn.2d 632, 335 P.2d 594 (1959).....	16-17
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	9

<i>State v. Jackson</i> , 102 Wn.2d 432, 688 P.2d 136 (1984)	12
<i>State v. Maddox</i> , 152 Wn.2d 499, 98 P.3d 1199 (2004)	11
<i>State v. Maxwell</i> , 114 Wn.2d 761, 791 P.2d 222 (1990)	10
<i>State v. Patterson</i> , 83 Wn.2d 49, 515 P.2d 496 (1974).....	14
<i>State v. Seagull</i> , 95 Wn.2d 898, 632 P.2d 44 (1981)	9
<i>State v. Stephens</i> , 37 Wn.App. 76, 678 P.2d 832, <i>review denied</i> 101 Wn.2d 1025 (1984)	10
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999)	9, 10, 16

I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Dickjose's motion to suppress the evidence found pursuant to the search of his home.
2. The trial court's findings of fact invaded the province of the jury.
3. Error is assigned to the trial court's "Disputed Facts," "Findings as to Disputed Facts," and "Reasons for Admissibility or Inadmissibility of the Evidence"¹ entered on May 29, 2009, as follows:
 - a. "Disputed Fact" number 1, which reads, "Defendant Dickjose supplied the methamphetamine for all three (3) controlled buy transactions that are the subject of these prosecutions."
 - b. "Disputed Fact" number 2, which reads, "Defendant Dickjose did not conduct the drug transactions at his residence, but delivered the drugs to another location to complete the transactions."
 - c. "Disputed Fact" number 4, which reads, "Defendant Dickjose used several vehicle to transport the drugs to the transactions, including a silver Dodge pickup with Washington license B84621C, and a white Mercedes, license URDARTZ."

¹ The trial court did not enter any writings specifically titled "Findings of Fact" or "Conclusions of Law." Instead, the document drafted by the Pierce County Prosecuting Attorney and titled "Findings and Conclusions on Admissibility of Evidence CrR 3.6," contains four sections: (1) "The Undisputed Facts"; (2) "The Disputed Facts"; (3) "Findings as to Disputed Facts"; and (4) "Reasons for Admissibility or Inadmissibility of the Evidence." The first three sections can be interpreted to include the trial court's "Findings of Fact," however, the fourth section is a conglomeration of statements of facts, factual findings, statements which are combinations of factual findings and legal conclusions, and several statements which are solely legal conclusions. Thus, the only statements which can be considered to contain "Conclusions of Law" in this document are "Reasons for Admissibility or Inadmissibility of the Evidence" numbers 5, 6, 8, 9, and 10.

- d. "Disputed Fact" number 5, which reads, "Defendant Dickjose kept methamphetamine and the materials necessary to sell methamphetamine at his residence."
- e. "Findings as to Disputed Facts" number 1, which reads, "Defendant Dickjose supplied the methamphetamine for the three (3) methamphetamine transactions with the CI in this case."
- f. "Findings as to Disputed Facts" number 2, which reads, "Defendant Dickjose transported the methamphetamine from his residence to the designated meeting locations via a vehicle for the transactions and returned to his home on 41st after the transactions."
- g. "Findings as to Disputed Facts" number 2, which reads, "Defendant Dickjose transported the methamphetamine from his residence to the designated meeting locations via a vehicle for the transactions and returned to his home on 41st after the transactions."
- h. "Findings as to Disputed Facts" number 3, which reads, "Defendant Dickjose kept methamphetamine and materials necessary to sell it at his home at the stated address."
- i. "Reasons for Admissibility or Inadmissibility of the Evidence" number 4, which reads, "Each transaction involved contact between the CI and defendant Gross and defendant Gross and defendant Dickjose."
- j. "Reasons for Admissibility or Inadmissibility of the Evidence" number 5, which reads, "It is reasonable to believe that drug dealers do not conduct drug transactions at their personal residences. Therefore it is reasonable to conclude that dealers keep their narcotics and narcotic materials at their home."
- k. "Reasons for Admissibility or Inadmissibility of the Evidence" number 6, which reads, "That based upon the facts in the affidavit, it is reasonable to conclude that

defendant Dickjose did not conduct drug transactions at his residence, but delivered the drugs to another location to complete the transactions.”

1. “Reasons for Admissibility or Inadmissibility of the Evidence” number 8, which reads, “It is reasonable to conclude that defendant Dickjose lived at 18111-41st Ave. East at the time of each of the narcotic transactions and that he transported the drugs from his home to another location to complete the transaction rather than doing so at his home.”

II. ISSUES PRESENTED

1. Did the trial court err in finding that the complaint for the search warrant for Dickjose’s residence and outbuildings contained sufficient facts to establish a nexus between the places to be searched and the crimes being investigated? (Assignments of Error nos. 1 & 3)
2. Did the trial court invade the province of the jury to determine Dickjose’s guilt where the trial court’s factual findings on Dickjose’s motion to suppress include findings that Dickjose is guilty of all crimes charged? (Assignments of Error nos. 2 & 3)
3. Did the complaint for the search warrant contain sufficient facts for the trial court to make the factual findings that Mr. Dickjose delivered or transported the methamphetamine from his residence to any meetings with Mr. Gross? (Assignment of Error no 3)

III. STATEMENT OF THE CASE²

Factual and Procedural background

On August 24, 2007, Lakewood Police Officer Sean Conlon met

² Unless otherwise noted, all facts are taken from the Complaint for Search Warrant completed by Officer Sean Conlon and attached as Exhibit #2 to the State’s Response to Defendant’s Motion to Suppress Pursuant to 3.6.

with a confidential informant to conduct a controlled buy of methamphetamine from Dickjose. The confidential informant claimed to have known Dickjose for several years and claimed to know that Dickjose dealt methamphetamine. The confidential informant told Officer Conlon where Dickjose lived and told Officer Conlon that Dickjose had recently purchased a silver Dodge pickup. Officer Conlon drove to the address given by the informant as Dickjose's address and observed a Dodge pickup matching the description given by the informant.

The confidential informant was strip searched and provided with prerecorded "buy money." Officer Conlon then followed the informant to the 5400 block of South Warner Street to meet with another person named Kenny Gross. Gross allegedly called Dickjose, told Dickjose that he wanted a half-ounce of methamphetamine, and Dickjose agreed and told Gross that he was in the area. The informant returned to his vehicle and drove a short distance away. Officer Conlon followed the informant and the informant informed Officer Conlon that Dickjose was on his way.

Other officers observed a silver Dodge pickup pull in front of Gross' residence and observed Gross get into the passenger side of the truck. The officers observed the driver exit the truck, go to the back door of the truck, reenter the truck, then drive away.

Officer Conlon followed the informant back to the 5400 block of

Warner and observed Gross walk up to the informant as the informant exited his vehicle. Gross handed the informant a brown paper bag and then Gross and the informant parted ways. Officer Conlon again followed the informant and met him a short distance away. The confidential informant gave Officer Conlon a paper bag containing 14.1 grams of methamphetamine.

Officers then followed Dickjose for a few hours and observed him make several short stops and contact different individuals. The officers believed this behavior was consistent with narcotics trafficking. The officers continued to observe Dickjose until he returned to his residence.

On October 25, 2007, Officer Conlon again met with the confidential informant to conduct a controlled drug buy. The informant met with Gross and gave Gross the buy money. Gross left the scene and police officers were unable to follow him. Officer Conlon followed the informant and the informant told Officer Conlon that Gross had told the informant that he was going to meet with Dickjose and would meet the informant at Gross' residence at 5421 S. Warner.

Officer Conlon followed the informant to Gross' residence and observed the informant enter Gross' residence. Roughly 30 minutes later, Gross returned to his residence and went inside. During this time Dickjose was observed returning to his home.

The informant exited Gross' residence a few minutes after Gross arrived. Officer Conlon met with the informant and the informant gave Officer Conlon 12 grams of methamphetamine.

On December 5, 2007, Officer Conlon and the informant again performed a controlled buy of methamphetamine. Officer Conlon and the informant went to 5421 South Warner to meet with Gross. En route, the informant called Gross. Gross stated that he had called Dickjose and told Dickjose that he wanted a half-ounce of methamphetamine. Gross also stated that Dickjose agreed and said that he was in the area.

Officers observed Gross leave his residence, followed Gross, and observed Gross meet with a white Mercedes. Det. Punzalan saw Gross briefly contact the driver of the Mercedes at the driver's window, then return to his vehicle and drive back to his residence. Det. Punzalan's description of the driver of the Mercedes was consistent with Dickjose.

The confidential informant arrived at Gross' residence and went inside. The informant gave Gross the buy money and then returned to his vehicle. Officer Conlon followed and met with the informant. The informant provided Officer Conlon with 13.2 grams of methamphetamine.

Officers followed the Mercedes, losing sight of it for a brief period and then locating it again. The Mercedes was followed to 313 S. 67th Street and Dickjose entered the premises and then left. Officer Conlon

pulled alongside the Mercedes and observed that Dickjose was driving. The Mercedes was followed to Dickjose's residence at 18111 41st Avenue East where Dickjose parked the Mercedes and went inside.

On December 7, 2007, Officer Conlon applied for and obtained a search warrant for Dickjose's residence at 18111 41st Ave. E. as well as all outbuildings, trailers, and vehicles on the property and the person of Dickjose. The search warrant was executed on December 13, 2007.

Declaration for Determination of Probable Cause CP 4 - 5. The search of Dickjose's residence, person, outbuildings on his property and vehicle's on his property revealed methamphetamine found in the coat pocket of Ms. Tammie Wright, a person in Dickjose's home at the time of the search, and a half-pound of methamphetamine found in a pickup truck in the driveway which opened with keys from Dickjose's pocket.

Declaration for Determination of Probable Cause CP 4 – 5.

On December 14, 2007, Dickjose was charged with three counts of unlawful delivery of a controlled substance and one count of unlawful possession of a controlled substance with intent to deliver.

On April 7, 2009, Dickjose moved to suppress the evidence found during the search of his property, arguing that the facts set forth in the Complaint for Search Warrant failed to establish a nexus between the crime being investigated and the place that was searched. Defendant's

Memorandum RE: CrR 3.6 Hearing CP 6 - 11.

On April 8, 2009, a hearing was held on the motion to suppress. RP 2-42. Finding that “it is highly likely that individuals that are dealing drugs to others for cash currency would have the product of that drug dealing on them and/or stored in their residence (RP 40), the trial court denied Dickjose’s motion to suppress and found that the search warrant for Dickjose’s property was properly issued. RP 39-42; Findings and Conclusions on Admissibility of Evidence CrR 3.6 CP 31 - 37. Dickjose objected to every finding of fact and every conclusion of law entered by the trial court regarding his motion to suppress. Findings and Conclusions on Admissibility of Evidence CrR 3.6 CP 31 - 37.

On April 9, 2009, Dickjose initiated an interlocutory appeal of the trial court’s denial of his motion to suppress. Notice of Appeal CP 30.

On August 18, 2009, review of Dickjose’s appeal was granted.

IV. ARGUMENT

The trial court erred in denying Dickjose’s motion to suppress the evidence found pursuant to the search warrant on grounds that the complaint for search warrant failed to establish a nexus between Dickjose’s property and the crimes being investigated.

[The Court of Appeals] review[s] a trial court's denial of a motion to suppress by considering whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.

[The Court of Appeals] review[s] conclusions of law de novo, and unchallenged findings become verities on appeal.

State v. Ague-Masters, 138 Wn.App. 86, 97, 156 P.3d 265 (2007) (internal citations omitted).

The warrant clause of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution require that a search warrant be issued upon a determination of probable cause based upon ‘facts and circumstances sufficient to establish a reasonable inference’ that criminal activity is occurring or that contraband exists at a certain location. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Affidavits are to be read as a whole, in a commonsense, nontechnical manner, with doubts resolved in favor of the warrant. *State v. Casto*, 39 Wn.App. 229, 232, 692 P.2d 890 (1984), *review denied*, 103 Wn.2d 1020 (1985).

Reasonableness is the key in determining whether a search warrant should issue. *State v. Gunwall*, 106 Wn.2d 54, 73, 720 P.2d 808 (1986). While deference is to be given to the magistrate’s ruling and doubts are to be resolved in favor of the warrant’s validity (*State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)), the deference accorded to the magistrate is not boundless. *State v. Maxwell*, 114 Wn.2d 761, 770, 791 P.2d 222 (1990). The review of a search warrant’s validity is limited to the

information the magistrate had when the warrant was originally issued.

Aguilar v. State of Texas, 378 U.S. 108, 84 S.Ct. 1509, 1522 n.1 (1964);

State v. Stephens, 37 Wn.App. 76, 80, 678 P.2d 832, *review denied*, 101 Wn.2d 1025 (1984).

The affidavit must set forth more than mere conclusions. The underlying facts and circumstances leading to the conclusions must be included. Otherwise, the magistrate becomes no more than a rubber stamp for the police. *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965); *Stephens*, 37 Wn.App at 79.

It is only the probability of criminal activity, not a *prima facie* showing of it, which governs probable cause. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). An affidavit of probable cause must show “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.” *Thein*, 138 Wn.2d at 140. The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999). However, mere speculation or an officer's personal belief **will not** suffice. *State v. Anderson*, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001).

Where a search warrant issued without probable cause, evidence gathered pursuant to the search must be suppressed. *Wong Sun v. United*

States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Crawley*, 61 Wn.App. 29, 808 P.2d 773, *review denied*, 117 Wn.2d 1009, 816 P.2d 1223 (1991).

1. *The trial court's finding that Dickjose supplied the methamphetamine for the three transactions with the CI is not supported by substantial evidence in the complaint for the search warrant.*

At the time the warrant was issued, the facts known to the issuing judge linked Dickjose to the drugs sales in three ways: (1) the claims of the confidential informant that the informant had first-hand knowledge that Dickjose was a dealer and cook of methamphetamine; (2) the claims of the confidential informant that Gross spoke with Dickjose prior to each controlled buy; and (3) that Gross was seen contacting Dickjose prior to each controlled buy while Dickjose was seated in one of his vehicles. Thus, the finding that Dickjose supplied the methamphetamine rests in large part on the trial court finding that the informant was credible and reliable. However, the facts contained in the complaint are insufficient to permit the trial court to make this determination.

The basic test for probable cause necessary for a judicial officer to issue a search warrant based on information obtained from an informant was established in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct.

584, 21 L.Ed.2d 637 (1969). Those requirements are: first, the affiant must set forth the underlying circumstances necessary to permit the magistrate issuing the warrant to independently determine that the informant had a factual basis for his allegations; and, second, the affiant must present sufficient facts so the magistrate may determine the credibility or the reliability of the informant. *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743 (1982), *cert. denied* 102 S.Ct. 2967, 457 U.S. 1137, 73 L.Ed.2d 1355 (1982).

To meet the *Aguilar-Spinelli* test, the credibility of the informant must be demonstrated and the mere statement that an informant is credible is not sufficient. *Fisher*, 96 Wn.2d at 965.

To satisfy the basis of knowledge prong, the informant must declare that he has personally seen the facts asserted and is passing along firsthand knowledge. If the informant is relying on hearsay, the basis of knowledge prong can only be satisfied by sufficient information so that the hearsay establishes a basis of knowledge. *State v. Jackson*, 102 Wn.2d 432, 437-438, 688 P.2d 136 (1984).

Here, the complaint for the search warrant contains Officer Conlon's statement that the informant was "reliable" and that the informant had known Dickjose for several years and knew Dickjose dealt methamphetamine and "cooked" methamphetamine. However, beyond

these statements, the complaint contains no evidence to determine the informant's basis of knowledge or credibility.

Without the informant's statement that Dickjose was a meth dealer and/or cook and the statements of the informant regarding the telephone conversations between Gross and who the informant reported as Dickjose, the judge who issued the search warrant had knowledge of no facts from which to infer that Dickjose was supplying Gross with the methamphetamine for the controlled buys. Setting aside the informant's statements, the facts contained in the complaint for the warrant only establish that Dickjose met with Gross shortly before the alleged drug sales and drove a truck matching the description of a truck the informant said belonged to Dickjose. Those facts are insufficient to support the inference that Dickjose was supplying methamphetamine to Gross.

2. *The complaint contains insufficient facts to support the trial court's finding that Dickjose delivered or transported the methamphetamine from his residence to meetings with Mr. Gross.*

The only statements in the complaint which might support a finding that Dickjose was transporting methamphetamine are the unnamed informant's hearsay statements that Gross spoke on the phone with Dickjose and that Dickjose told Gross that he agreed to sell Gross methamphetamine or that Dickjose was in the area and would meet Gross

to sell him some methamphetamine. However, these statements are hearsay and, as discussed above, the complaint does not give any facts from which to determine the credibility of the unnamed informant, and the court erred in finding these statements to be sufficiently reliable to base a finding of fact on them.

[I]f the statements of an informant are included in the affidavit or complaint for the search warrant, probable cause means that the issuing magistrate should have before him a substantial and intelligent basis for crediting the report of the informant.

Where the informant's identity is unrevealed, the supporting documents or testimony must provide the issuing court with a stronger basis for finding the hearsay statements credible than if the informant is identified.

State v. Patterson, 83 Wn.2d 49, 52-53, 515 P.2d 496 (1974) (emphasis added) (internal citations omitted).

Here, the complaint contains no facts from which the issuing magistrate or the trial court could determine the credibility of the informant. Absent the informant's statements regarding his knowledge of Dickjose and the contents of the telephone calls between Dickjose and Gross, the facts contained in the complaint are insufficient to support the inference that Dickjose met with Gross for purposes of delivering methamphetamine and that Dickjose transported methamphetamine from his house to the controlled buys.

3. *The facts contained in the complaint for the search warrant are insufficient to support the trial court's finding that Dickjose kept methamphetamine and materials necessary to sell it at his home.*

The facts contained in the complaint for the search warrant contain no information regarding what materials Dickjose did or did not keep in his home. The only way the trial court could have found that Dickjose kept methamphetamine and materials necessary to sell it at his home is if the trial court considered the evidence which was found pursuant to the search warrant when the trial court entered its findings of facts. Because the complaint contains no facts regarding what materials Dickjose kept in his home, the facts contained in the complaint were insufficient to support the trial court's finding that Dickjose kept methamphetamine and materials necessary to sell methamphetamine in his home.

4. *The findings of fact were not support by substantial evidence in the record, therefore, the findings of fact do not support the trial court's conclusions of law that a sufficient nexus existed between the controlled buys and Dickjose's residence and outbuildings.*

The complaint contained no facts linking Dickjose's residence or any of the buildings on his property to drug dealing. Despite this, the trial court still found that the complaint for search warrant contained sufficient facts to support factual findings that Dickjose transported drugs to Gross to complete the controlled buys and that it was reasonable to believe that

Dickjose kept his narcotics and narcotic materials at his home. However, as discussed above, these factual findings are unsupported by the facts in the complaint for the search warrant.

The only statement contained in the complaint for the search warrant which could possibly support a nexus between the investigation into the drug sales and Dickjose's residential property, including the outbuildings, is Officer Conlon's conclusory statement that, based on his training and experience, he knew that "evidence/records of illegal Narcotic [*sic*] sale are frequently kept in the residence and vehicles that the Narcotics [*sic*] dealers are using." This sort of baseless prediction has been specifically rejected by the Washington Supreme Court.

In *Thein*, the Washington Supreme Court specifically rejected the argument that "it is reasonable to infer evidence of drug dealing will likely be found in the homes of drug dealers." *Thein*, 138 Wn.2d at 147. The *Thein* court characterized this logic as "conclusory predictions" and ruled that "[b]lanket inferences of this kind substitute generalities for the required showing of reasonably specific 'underlying circumstances.'" *Thein*, 138 Wn.2d at 147.

The logic rejected by the court in *Thein* is precisely the logic the trial court relied on in this case to find that probable cause existed to search Dickjose's residence and the outbuildings on the property. This is

made patently obvious by the trial court's "Reasons for Admissibility or Inadmissibility of the Evidence" number 5, which reads: "It is reasonable to believe that drug dealers do not conduct drug transactions at their personal residences. Therefore it is reasonable to conclude that dealers keep their narcotics and narcotic materials at their home."

Thus, the complaint for search warrant does not provide substantial support for the trial court's findings of fact that Dickjose was involved in selling methamphetamine, that Dickjose transported methamphetamine, and that Dickjose kept methamphetamine and materials necessary to sell it at his home. Accordingly, the trial court's findings of fact do not support the court's conclusion of law that the complaint for search warrant established a sufficient nexus between Dickjose residence and outbuildings on his property and the controlled buys sufficient for a search warrant to issue.

5. *The trial court's findings of fact invade the province of the jury.*

It is the province of the jury in criminal cases to pass on the weight and sufficiency of the evidence; and when the court finds there is substantial evidence of a fact it must be left for the jury to say whether its probative force meets the standard required for a conviction, whether it convinces them beyond a reasonable doubt of the defendant's guilt.

State v. Frye, 53 Wn.2d 632, 633, 335 P.2d 594 (1959).

Here, the trial court was being asked to decide only whether or not

the search of Dickjose's property was lawful and whether or not the complaint for the search warrant contained sufficient facts to establish a nexus between the controlled buys and Dickjose's residence and outbuildings. However, the factual findings drafted by the prosecutor and signed by the court contain findings that Dickjose was guilty of all crimes charged, specifically: "Findings as to Disputed Facts" numbers 1, 2, and 3, contain factual findings that Dickjose supplied the methamphetamine for the controlled buys, that Dickjose transported the methamphetamine from his residence to the meeting locations with Gross, and that Dickjose kept methamphetamine and materials necessary to sell it at his home; and "Reasons for Admissibility or Inadmissibility of the Evidence" numbers 4, 6, and 8 include findings that Dickjose was involved in the controlled buys and transported the methamphetamine.

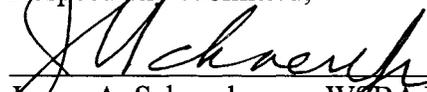
These findings go far beyond the findings required for the court's ruling on Dickjose's motion to suppress and are, in fact, findings that Dickjose is guilty of the crimes charged. Therefore, these findings are improper in that they invade the province of the jury to determine whether or not Dickjose is guilty. Either through design or scrivener's error, the trial court invaded the province of the jury and erred when it entered findings of fact which were, in effect, findings that Dickjose was guilty of the crimes charged.

V. Conclusion

For the reasons stated above, this court should reverse the trial court's ruling below denying the motion to suppress the evidence found during the search of Mr. Dickjose's property and remand for further proceedings where all evidence found during the search is inadmissible.

DATED this 24th day of November 2009.

Respectfully submitted,


James A. Schoenberger, WBA No. 33603
Attorney for Appellant Dickjose

CERTIFICATE OF SERVICE

James A Schoenberger Jr hereby certifies under penalty of perjury under the laws of the State of Washington that on the 24th day of November 2009, I delivered a true and correct copy of the Opening Brief to which this certificate is attached, to the following:

Kit Proctor, Deputy Prosecuting Attorney
Marcus Miller, Deputy Prosecuting Attorney
Pierce County Prosecuting Attorney's Office
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David C. Dickjose
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Signed at Tacoma, Washington this 24th day of November 2009.



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