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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred when it denied Appellant's CrR 2.3(e) motion for return of property.
2. In denying Appellant's CrR 2.3(e) motion for return of property, the trial court erred when it concluded that property seized from Appellant's residence shall not be released absent proof of ownership with title, by serial numbers, or other unique identifiers to confirm ownership.
3. The trial court erred when it ordered Brandt's property forfeited without following statutory forfeiture procedures.

Issues Pertaining to the Assignments of Error

1. Did the trial court err when it concluded that the property seized from Appellant's residence, that was not part of this case and/or within the scope of the search warrant, could not be returned to the Appellant unless he prove ownership? (Assignment of Error 1 & 2)
2. Did the trial court err when it ordered Brandt's property forfeited without complying with Washington State's statutory forfeiture proceedings. (Assignment of Error 3)

B. STATEMENT OF CASE

1. Procedural history

On 05-02-08, Pierce County Deputies appeared at Brandt's residence after receiving a tip from an individual who claimed to have witness property belonging to EM Precision LLC., which they had reported stolen.

Upon arriving at Brandt's residence with the owners of EM Precision and without warrant, items were identified by the owners of EM Precision as belonging to them. Brandt was subsequently placed in the deputies patrol unit.

Detective Thomas Catey of the Pierce County Sheriff's Department was then dispatched to the location where he was informed that the owners of EM Precision had identified property belonging to them, by spray paint markings, and other markings applied by them. (See Exhibit A, Probable Cause to Search Properties)

The detective then made complaint on oath before Judge Frederick Fleming in the Superior Court of Pierce County. The complaint alleged that Brandt was to believe to have committed Felony Possession of Stolen

Property, and that evidence of that crime was believed to be in Brandt's residence. (See Exhibit A)

The complaint identified items to be searched for and evidence to be searched for as follows (See Exhibit A at Items to be searched, and evidence to be searched for):

Any and all construction equipment identified as belonging to EM Precision LLC, as viewed by company owners Tim Nemeth and Eli McBee.
Documents showing ownership and/or dominion and control of the listed property.
Any vehicles, trailers, locked containers or buildings on the listed property.
Photographs of the property to include the interior of cargo trailers, box vans and out buildings

The listed items above were alleged to be evidence of the commission of a crime under RCW 9A.56.150 and were believed to be concealed in Brandt's residence and/or vehicles.

The warrant was allegedly issued by Judge Fleming and executed by Detective Catey. Upon the search of Brandt's residence, items other than those named in the warrant or identified by the owners of EM Precision as their property, were seized and confiscated.

Brandt subsequently at the end of the investigation and his case moved the court pursuant to CrR 2.3(e), for the return of the property seized from him that was identified as not belonging to EM Precision LLC., or was not identified as stolen. 1RP at 3.

The court denied the motion and this appeal subsequently followed. 1RP at 7.

2. Facts from Post Trial Proceedings

The relevant indication from the Honorable Judge Vicki Hogan is that the property in question shall not be released to Mr. Brandt absent proof of ownership with title, by serial number or other unique identifiers to confirm ownership. (See Exhibit B, at line 14) 1RP at 5.

C. SUMMARY OF ARGUMENT

This court should reverse the trial court order denying the return of the seized property no longer needed for evidence because the defendant is the rightful owner, the property is not contraband, nor is the property subject to forfeiture proceedings pursuant to statute.

D. ARGUMENT AND AUTHORITIES

In Washington, CrR 2.3(e) governs motions for the return of illegally seized property and also motions for the return of lawfully seized property no longer needed for evidence. *State v. Marks*, 114 Wn.2d 724,

790 P.2d 138 (1990); *State v. Pelkey*, 58 Wn. App. 610, 794 P.2d 1286 (1990); *State v. Card*, 48 Wn. App. 781, 741 P.2d 65 (1987). A court may refuse to return seized property no longer needed for evidence only if (1) the defendant is not the rightful owner; (2) the property is contraband; or (3) the property is subject to forfeiture pursuant to statute; *Barlidal v. City of Bonney Lake*, 84 Wn. App. 135; 925 P.2d 1289 (1996) (Quoting *State v. Alaway*, 64 Wn. App. 796, 798, 828 P.2d 591, review denied, 119 Wn.2d 1016, 833 P.2d 1390 (1992)). See also, e.g., *United States v. Farrell*, 606 F.2d 1341, 1347 (D.C. Cir. 1979); *United States v. Wright*, 610 F.2d 930, 939 (D.C. Cir. 1979); *United States v. Wilson*, 540 F.2d 1100, 1101 (D.C. Cir. 1976); *United States v. Brant*, 684 F. Supp. 421, 423 (M.D.N.C. 1988).

The State did not argue that Brandt is not the rightful owner of the property. Brandt owned the property and was in possession of it when the State seized it, and there are no third party claims against it. The only reason given by the trial court prohibiting Brandt from recovering his property unlawfully seized and forfeited by the court is, “The Court is not able to verify specific ownership in Mr. Brandt,” (IRP at 6). However under both federal and state law, “The seizure of property from someone is prima facie evidence of the persons entitlement”; *State v. Marks*, 114 Wn.2d 724, 734, 790 P.2d 138 (1990) (emphasis omitted) (quoting *United*

States v. Wright, 197 U.S. App. D.C. 411, 610 F.2d 930, 939 (D.C. Cir. 1979)). The trial court further cites "The defendant has not provided proof to the court any evidence of ownership for items seized and ordered forfeited" (See Ex B at line 15) though the State has acknowledged they seized this property from the Brandt. (1RP at 4) Once that concession was made, the burden is on the State to prove a greater right of possession than that of Brandt. *State v. Card*, 48 Wn. App. 781, 790-91, 741 P.2d 65 (1987).

The State did not argue that Brandt was not entitled to return of the property because it was contraband. "Contraband" has been defined by the United States Supreme Court as an object, "the possession of which, without more, constitutes a crime." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 14 L. Ed. 2d 170, 85 S. Ct. 1246, 1250 (1965); *see also Farrell*, 606 F.2d at 1344; *Davis v. Fowler*, 504 F. Supp. 502, 505 (D. Md. 1980). The fact that tools, building equipment, and other personal belongings were along side or in the close proximity to a stolen item does not cause possession of those items to be a crime. Therefore, the property in issue here was not contraband.

And finally, the state did not argue, nor is the property subject to any forfeiture procedures to any state statute, (1RP at 4) therefore the state

did err when it ordered Brandt's property forfeited without complying with Washington State statutory forfeiture procedures, which is exclusive and that unless statutory procedures are followed, a Washington court cannot order forfeiture. Every jurisdiction that has considered the question has held that the power to order forfeiture is purely statutory. *United States v. Farrell, supra; United States v. Lane Motor Co.*, 199 F.2d 495, 496 (10th Cir. 1952), *aff'd*, 344 U.S. 630 (1953); *Ghisolfo v. United States*, 14 F.2d 389 (9th Cir. 1926); *Davis v. Fowler*, 504 F. Supp. 502 (D. Md. 1980); *Brant*, 684 F. Supp. at 424; *State v. Anonymous*, 35 Conn. Supp. 659, 406 A.2d 6 (1979); *State v. One 1960 Mercury Station Wagon*, 5 Conn. Cir. Ct. 1, 240 A.2d 99 (1968); *People ex rel. Mosk v. Barenfeld*, 203 Cal. App. 2d 166, 21 Cal. Rptr. 501 (1962); *Utah Liquor Control Comm'n v. Wooras*, 97 Utah 351, 93 P.2d 455 (1939); *Prudential Ins. Co. v. Rice*, 222 Ind. 231, 236, 52 N.E.2d 624, 626 (1944). The only case to arise in Washington is in accord. *United States v. Two Hundred and Sixty-Seven Twenty-Dollar Gold Pieces*, 255 F. 217 (W.D. Wash. 1919). Scholarly authorities also establish that the United States has never had a common law of forfeiture, and that since colonial times, forfeiture in this country has existed only by virtue of statute. Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 Wm. & Mary L. Rev. 661 (1977-1978); Finkelstein, *The Goring Ox: Some Historical Perspectives*

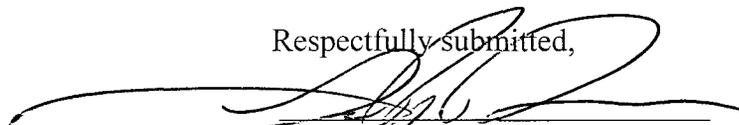
on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty, 46 Temp. L.Q. 169, 183 (1972-1973) (in-depth history of law of forfeiture); cf. O.W. Holmes, *The Common Law* 34-35 (1881). In sum, there has been no authority provided anywhere that the court had the inherent power to order forfeiture of Brandt property, nor does the state provide an exclusive mechanism for forfeiting property of the type involved in this case.

E. CONCLUSION

Because Brandt's property was unlawfully seized for evidence that had no relation to the property of EM Precision LLC., Brandt is the rightful owner, the property is not contraband, the property is not subject to forfeiture procedures, and Brandt is entitled thereto, the property should have been returned. The trial court also had no authority to order any of Brandt's property forfeited absent following statutory procedures. This court should reverse the trial court decision and order Brandt's property returned including any property ordered forfeited.

Dated this 24th day of October, 2011.

Respectfully submitted,



LeRoy R. Brandt

F. APPENDIX

Exhibit A.

Copy of Probable Cause and Search Warrant as transmitted to the Court of Appeals from the Trial Court. (5 pgs.)

Exhibit B.

Trial Court Order

EXHIBIT A

FILED
IN COUNTY CLERK'S OFFICE

A.M. MAY 05 2008 P.M. IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY _____ DEPUTY

COMPLAINT FOR SEARCH WARRANT
(Evidence)

State of Washington)
)
)
County of Pierce)
)
_____)

Cause No.:

08-1-50425-7

COMES NOW Detective Thomas Catey #145/94-032 of the Pierce County Sheriff's Department, being first duly sworn, under oath, deposes and says:
That on or about the 2nd day of May 2008, in Pierce County, Washington, felonies, to-wit: Possession of Stolen Property 1st degree, RCW; 9A.56.150 was believed to be committed by the act, procurement or omission of another, and that the following evidence is necessary to the investigation and prosecution of the said offense, to-wit:

Items to be searched, and evidence to be searched for

- Any and all construction equipment identified as belonging to EM Precision LLC, as viewed by company owners Tim Nemeth and Eli McBee.
- Documents showing ownership and/or dominion and control of the listed property
- Any vehicles, trailers, locked containers or buildings on the listed property
- Photographs of the property to include the interior of cargo trailers, box vans and out buildings.

All of the above items are believed to be material to the investigation or prosecution of the above described felonies for the following reasons:

The listed items are evidence to the crime of Unlawful Possession of Stolen Property 1st degree.

ALL OF WHICH ARE EVIDENCE OF THE COMMISSION OF AN OFFENSE UNDER R.C.W. 9A.56.150 and that the AFFIANT verily believes that the above evidence is concealed in or about a particular place or vehicle, to-wit;

Properties to be searched

19220 196th St E.
Orting, WA 98360.

The 1.96 acre property is accessed off a gravel road. The driveway is also graveled and leads to the residence. At the end of the driveway there is a double wide mobile home cream in color with green trim. The west side of the mobile home faces the driveway. The front door is also on the west side which leads to a wooden deck with a covered porch. It appears that the mobile home is sided with T-111 siding, cream in color with dark green trim. There are numerous cargo trailers and out buildings located on the property.

The above items are material to the investigation or prosecution of the above described felony for the following reasons:

Probable Cause to Search Properties

On 5/2/08, at 1344 hrs, Deputy Filleau #294 and Deputy Carolus #283 contacted victim Tim Nemeth at the intersection of SR162 and Orville Rd E regarding information on the location of his Pacific PD stolen utility trailer and stolen tools from his business. The trailer and tools had been reported stolen by Mr. Nemeth on December 22nd, 2007 to the Pacific police department under case number 2007-1578.

Mr. Nemeth told Deputy Carolus that a long time friend and one of his subcontractors Brett Everson had told him that a guy named "Roy" later identified as Leroy Brandt had contacted him by telephone to ask him if he wanted to buy some nail guns today. While Deputy Carolus was talking with victim Nemeth witness Brett Everson drove up in his vehicle. Mr. Everson told Deputy Carolus that earlier today he was contacted by telephone by suspect Leroy Brandt and ask if he wanted to purchase some nail guns that he had at his residence. Mr. Everson agreed to meet suspect Brandt at his residence. Mr. Everson said that when he contacted Brandt at his residence and was shown the nail guns he recognized the nail guns, power tools, and a utility trailer that was parked behind a shed as victim Tim Nemeth's property. Mr. Everson didn't purchase the power tools but contacted victim Nemeth and informed him of the stolen property that he had seen on Brandt's property.

Deputy Filleau and Deputy Carolus followed Mr. Everson to the long driveway that led to Brandt's residence. They drove down the driveway and as they were approaching the front of the house they could see 2 unidentified white males walking to the back of the property where they lost sight of them. Deputy Carolus could see a white male walking up to the front of the house approaching their vehicles as they drove up. They got out of their patrol vehicles and asked the white male if his name was "Roy" which he replied, "yes." Deputy Carolus explained to Brandt that they were there because they were told that he had a stolen utility trailer and stolen tools on his property. He told Deputy Carolus that he did not have any stolen property at his residence. Deputy Carolus told him that he tried to sell some nail guns to someone today that recognized the tools along with a utility trailer as stolen from a friend of his. Brandt walked them to the side of his residence where Deputy Carolus could see the back tailgate of a white Ford pick up truck down and power tools along with nail guns sitting in the bed of the pick up truck. Deputy Carolus asked Brandt where he got the power tools and he told Deputy Carolus that he buys a lot of his tools at swap meets. From the back of the pick up truck Deputy Carolus could see the front of a white utility trailer that was parked behind an open shop full of tools and equipment. Deputy Carolus asked Brandt about the trailer and he told Deputy Carolus that he had purchased the trailer from "Matt for 4500 dollars along with the miscellaneous tools and such." Deputy Carolus asked Brandt if he had a bill of sell or a title for the utility trailer he said "No." He said that Matt had told him that he was applying for a lost title for the utility trailer and that when he gets the lost title he was going to sign over the utility trailer to him.

Deputy Filleau then called victim Nemeth to contact them at Brandt's residence in an attempt to identify any of their tools and the utility trailer. Mr. Nemeth arrived at the residence a short time later along with his business partner Eli McBee. Mr. McBee and Mr. Nemeth identified the tools in the back of the white Ford Pick up truck belonging to their construction company EM Precision. Mr. McBee said that he could identify the painting on the plastic carrying cases of the power tools as EM Precision. Smith said that he wrote "Top" on their plastic cases so their workers would open the power tool cases correctly without spilling the tool attachments onto the ground. Mr. Nemeth and Mr. McBee then looked at the utility trailer from a distance and believed the trailer to be theirs.

Deputy Carolus advised Brandt of his constitutional rights and detained him in the back of his patrol vehicle. As Deputy Carolus and Deputy Filleau continued with their investigation an unknown person on the property released Brandt from the rear of the patrol vehicle. Brandt fled the area on foot and has not been located.

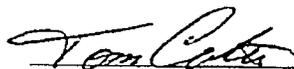
Your affiant responded to the location with Detective Bird #133. Your affiant contacted Mr. Nemeth and Mr. McBee. Your affiant was informed that they were able to identify property belonging to EM Precision by either serial numbers, spray painted markings applied by them or engravings applied by the company. From the front of the property they were able to identify numerous items of property with their applied markings as items taken during the burglary to their business.

Affiant's Training and Experience

Your affiant has been a commissioned Pierce County Deputy Sheriff for over thirteen years. Your affiant has completed the Washington State Criminal Justice Training Academy and is a commissioned law enforcement officer in the state of Washington. Your affiant had received training in interview and interrogation techniques, basic criminal investigations, computer crime investigations, fraud and identity theft. Your affiant has conducted numerous follow up investigations in fraud, identity theft, robbery, theft, unlawful possession of a controlled substance and burglary during the course of his thirteen year career. Your affiant is currently serving at the rank of Detective assigned to the South Hill Criminal Investigative Division of The Pierce County Sheriffs Department investigating fraud and identity theft related crimes.

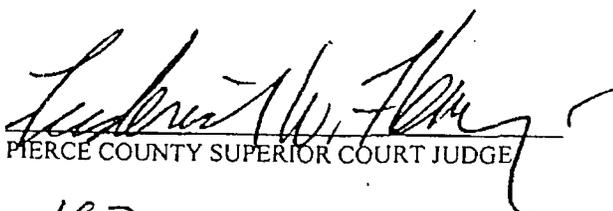
This warrant will be served within Ten (10) days, but is anticipated that it will be served immediately.

Dated this 2nd day of May, 2008



Detective Thomas Catey
Pierce County Sheriffs Department.

GIVEN UNDER MY HAND this 2nd Day of May,
2008.



PIERCE COUNTY SUPERIOR COURT JUDGE

1930

FILED
IN COUNTY CLERK'S OFFICE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE
SEARCH WARRANT

A.M. MAY 05 2008 P.M.

Evidence

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, COUNTY CLERK
BY _____ DEPUTY

State of Washington

County of Pierce

) Cause No.:

08-1-50425-7

THE STATE OF WASHINGTON TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

WHEREAS, Detective Thomas Catey #145/94-032 has this day made complaint on oath to the undersigned, one of the Judges of the above entitled court in and for the said county; That on or about May 2nd, 2008, in Pierce County, Washington, felonies, to-wit: Possession of Stolen Property 1st Degree was believed to be committed by the act, procurement or omission of another, and that the following evidence is necessary to the investigation and prosecution of the said offense, to-wit:

EVIDENCE TO BE SEARCHED FOR

- Any and all construction equipment identified as belonging to EM Precision LLC, as viewed by company owners Tim Nemeth and Eli McBee.
- Documents showing ownership and/or dominion and control of the listed property
- Any vehicles, trailers, locked containers or buildings on the listed property
- Photographs of the property to include the interior of cargo trailers, box vans and out buildings.

Is believed to be in, about or upon certain premises within Pierce County, Washington; here-in-after designated and described as follows:

PROPERTIES TO BE SEARCHED

19220 196th St E.
Orting, WA 98360

The 1.96 acre property is accessed off a gravel road. The driveway is also graveled and leads to the residence. At the end of the driveway there is a double wide mobile home cream in color with green trim. The west side of the mobile home faces the driveway. The front door is also on the west side which leads to a wooden deck with a covered porch. It appears that the mobile home is sided with T-111 siding, cream in color with dark green trim. There are numerous cargo trailers and out buildings located on the property.

And then and there diligently search for said evidence, or evidence material to the investigation or prosecution of said felonies or any part thereof, be found on such search bring the same forthwith to me, to be disposed of according to law. A copy of this warrant shall be served and placed in a conspicuous place. You are commanded therefore, to within 3 days, file a return of service for the court.

GIVEN UNDER MY HAND this 2nd DAY OF MAY, 2008.


PIERCE COUNTY SUPERIOR COURT JUDGE

19130

FILED
IN COUNTY CLERK'S OFFICE

A.M. MAY 05 2008 P.M.

RETURN OF OFFICER

PIERCE COUNTY, WASHINGTON)
KEVIN STOCK, COUNTY CLERK)
BY STATE OF WASHINGTON) ss:
COUNTY OF PIERCE)

NO. 08-1-50425-7

THIS IS TO CERTIFY that I received the within Search Warrant on the 2nd day of May, 2008 and that pursuant to the command contained therein, I made due and diligent search of the property described therein and found the following:

- 1) 12' SILVER TANDEM AXEL TRAIL BLAZER CARGO TRAILER CONTAINING MISCELLANEOUS CONSTRUCTION TOOLS.
- 2) 16' WHITE/CHROME TANDEM AXEL CARGO TRAILER BEARING WASHINGTON LICENSE 4154-TM. CONTAINING MISCELLANEOUS CONSTRUCTION TOOLS.
- 3) BLK. 12' RACKET TRUCK RACK.

Names of persons found in possession of property:

N/A

Names of persons served with true and complete copy of Search Warrant:

LAURA BRANDT

Description of door or conspicuous place where copy of Search Warrant posted:

HAND DELIVERED.

Place where property is now kept: SOUTH HILL PRECINCT
IMPOUND LOT

DATED this 2nd day of May, 2008.



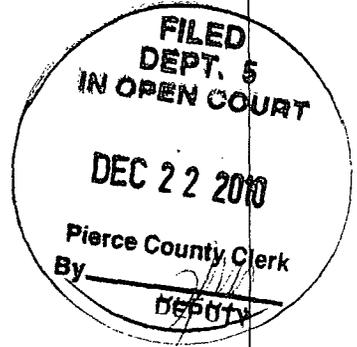
Det. Thomas D. Catey #145/94032

Witnesses:

EXHIBIT B

COPY

COPY



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 08-1-02151-5

vs.

LEROY RAYMOND BRANDT, JR,

ORDER RE: RELEASE OF PROPERTY

Defendant.

THIS MATTER having come on regularly before the undersigned judge of the above-entitled court,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Court's January 2, 2009 ruling regarding forfeiture of property seized during this criminal investigation was modified to reflect that the defendant could petition this court for release of property for which he could provide lawful title. The Deputy Prosecutor's June 2, 2009 property release appropriately reflects the Court's ruling that property shall not be released to the defendant absent proof of ownership with title, by serial numbers or other unique identifiers to confirm ownership. The defendant has not provided proof to this Court any evidence of ownership for items seized and ordered forfeited.

DONE IN OPEN COURT this 22 day of December, 2010.

Vicki Hogan

 JUDGE

Presented by:

Jesse Williams

 JESSE WILLIAMS
 Deputy Prosecuting Attorney
 WSB # 35543

Leroy Brandt, Jr

 LEROY RAYMOND BRANDT, JR

kam

11/07/11 11:12:12
STATE OF WASHINGTON
811

Court of Appeals of the State of Washington
Division II

LEROY R. BRANDT JR.,
Appellant,
vs.
STATE OF WASHINGTON,
Respondent.

Case No.: 40921-6-II

CERTIFICATE OF SERVICE

I, LEROY R. BRANDT JR., declare that, on the 24th day of October, 2011, I deposited the following document;

OPENING BRIEF OF APPELLANT OF CASE NO.: 40921-6-II

or a copy thereof, in the internal mail system of Coyote Ridge Correction Center and made arrangements for postage, addressed to:

Court of Appeals Div II
950 Broadway, Suite 300
Tacoma, WA 98402

Pierce County Prosecutor
930 Tacoma Ave. S. #946
Tacoma, WA 98402

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

Dated this 24th day of October, 2011.



LeRoy R. Brandt Jr.,
Coyote Ridge Corr. Center
P.O. Box 769, GA43
Connell, WA 99326