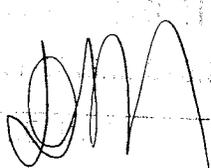


NO. 41519-4-II
Cowlitz Co. Cause NO. 03-1-00997-8

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY 

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

TERRY LEE WINTERSTEIN,

Appellant.

BRIEF OF RESPONDENT

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P.M. 4-25-2011

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I. INTRODUCTION

The appellant was convicted in 2004 of Manufacturing Methamphetamine. The appellant appealed this conviction, and the trial court's denial of a post-trial suppression motion. The appellant's conviction was affirmed by the Court of Appeals, however, the Washington Supreme Court remanded the suppression issue to the trial court for reconsideration in light of that court's decision in State v. Winterstein, 167 Wn.2d 620, 630, 220 P.3d 1226 (2009). The trial court again denied the suppression motion, and the instant appeal was initiated.

II. STATEMENT OF FACTS

The appellant was on probation with the Department of Corrections, hereafter DOC. RP Vol. II (6-28-05) 120. Community Corrections Officer Kris Rongen was assigned to supervise the appellant. Id. As part of his supervision, Officer Rongen visited the appellant at his residence located at 646 Englert Road. Id. at 131-132. Officer Rongen contacted the appellant at this address on at least two occasions in November of 2002. Id. at 236.

In February of 2003, Officer Rongen had reasonable suspicion to believe the appellant had violated the terms of his probation. Id. at 151,

State v. Winterstein, 140 Wn.App. 676, 691, 166 P.3d 1242 (2007). Officer Rongen made plans to contact the appellant at 646 Englert Road, officers from local drug taskforces were enlisted to provide additional security and deal with any clandestine methamphetamine laboratories that might be discovered.¹ RP Vol. II (6-28-05) 205-206. Prior to going to 646 Englert Road on February 6th, Officer Rongen noted that the OBITS database showed this was the appellant's current address. Id. at 136, 159. On this date, Officer Rongen knew the appellant was residing at 646 Englert Road, and was aware of no information to the contrary. Id. 131, 169, 218.

Unknown to Officer Rongen, the appellant had previously engaged in a ruse by using a kiosk at the DOC office to register a new address of 646 ½ Englert Road. In fact, this "address" was a motor home with the number 646 ½ spray painted on it. Id. at 158. When entered pursuant to a search warrant, the motor home was found to be full of stacked boxes. Id. at 248. A person would have to climb over these boxes to move around the vehicle. Id. at 253. In addition, there was no sign anyone was in fact living

¹ The appellant argues this search was a pretext concocted by DOC and the drug officers. The trial court found the search was not pre-textual and this finding was unchallenged on appeal, thus it is a verity.

in the motor home, and it did not appear to the investigating officers that anyone could live there. Id. at 248.

When Officer Rongen entered the house at 646 Englert Road, he located the appellant's girlfriend Sunshine O'Connor. Ms. O'Connor told Officer Rongen the appellant still lived there. Id. at 137. In addition, the appellant's bedroom appeared the same as when Officer Rongen was there previously. Id. at 141. While clearing the residence, Officer Rongen saw components of a methamphetamine laboratory in plain view. Id. at 139. A search warrant was then obtained for the premises, where a working methamphetamine laboratory was subsequently discovered in a travel trailer. Id. at 141.

The appellant was charged by information with manufacturing methamphetamine in violation of RCW 69.50.401. After a jury trial, the appellant was found guilty of this crime. After the verdict, trial counsel discovered documents that indicated the appellant had registered a change of address with DOC using the kiosk at a date prior to the search. The parties decided to litigate this issue through a suppression hearing pursuant to CrR 3.6. The suppression hearing occurred on June 28, 2005, lasting for more than four hours and comprising more than 200 transcribed pages. Id.

at 107-312. At this hearing, the trial court, Honorable Judge James Warne presiding, denied the motion to suppress the fruits of the February 6th search. The trial court held that the appellant's change of address to "646 ½ Englert Road" was ruse designed to prevent DOC from searching his residence. The trial court further held that Officer Rongen was unaware of the change of address, as the address change had not been posted to the OBITS system used by Officer Rongen. Id. at 292-293. The trial court further held that 646 Englert Road was the appellant's actual address, Officer Rongen believed this was his address, and that Officer Rongen had acted in good faith. Id. at 293.

Appellant then filed a timely appeal with this Court. In a published decision, State v. Winterstein, 140 Wn.App. 676, 691, 166 P.3d 1242 (2007), the Court held that under Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the search of the appellant's residence was lawful as Officer Rongen had a reasonable belief that the appellant resided at the address in question. This Court further held that under the doctrine of inevitable discovery, as set forth in State v. Warner, 125 Wn.2d 876, 889 P.2d 479 (1995), suppression was not warranted even if the search was somehow defective. The appellant sought review by the Washington

Supreme Court, which was granted on the sole issue of the lawfulness of the search. State v. Winterstein, 163 Wn.2d 1033, 187 P.3d 269 (table) (2008).

The Supreme Court held that a warrantless search of a probationer's residence is lawful only when the probation officer has probable cause to believe the probationer lives at the place to be searched. State v. Winterstein, 167 Wn.2d 620, 630, 220 P.3d 1226 (2009). The Supreme Court further held the doctrine of inevitable discovery was not compatible with article I, section 7 of the Washington constitution. 167 Wn.2d at 636.

Based on its holding, the Supreme Court remanded the case to the trial court, so that the trial judge could consider the record in light of the newly announced probable cause standard. The Supreme Court stated that “[b]ecause the court below did not apply the proper probable cause standard, we remand for further proceedings to determine whether Rongen had probable cause to believe Winterstein resided at 646 Englert Road at the time of the search.” Id. At 631.

On remand, the trial court noted that the Supreme Court was “directing to apply a different standard to the same information” and

expressed skepticism about the appellant's suggestion that another hearing with testimony was required. RP Vol. I on remand at 1-5. However, the trial court did not immediately resolve the issue, allowing the appellant time to explain what additional testimony he felt was necessary. Id. at 5-6.

The appellant never identified what additional testimony he desired, other than a vague claim that perhaps he would wish to testify himself. Id. at 12-13. The appellant did concede that the sole issue before the court was whether there was probable cause to believe the appellant lived at the address that was searched. Id. at 12. Given this, the trial court ruled that, rather than conducting a duplicative hearing, the court would review the record from the June 28, 2005 hearing and then entertain arguments on the probable cause question. Id. at 13.

After reviewing the record, and hearing the arguments of the parties, the trial court found Officer Rongen had probable cause to believe the appellant lived at 646 Englert Road at the time of the search. CP 8-9. The instant appeal timely followed.

III. ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion By Declining To Hold a Second Duplicative Hearing.

The appellant claims the trial court erred by not holding a second evidentiary hearing on remand from the Supreme Court. However, the Supreme Court did not require such a hearing, and the appellant has not identified any specific reason such a hearing was necessary. This argument is therefore without merit.

The plain language of the Supreme Court's decision in State v. Winterstein, 163 Wn.2d 1033, does not require a second evidentiary hearing. Instead, the Supreme Court remanded the trial court to the trial court "[b]ecause the court below did not apply the proper probable cause standard, we remand for further proceedings to determine whether Rongen had probable cause to believe Winterstein resided at 646 Englert Road at the time of the search." Id. At 631. The appellant's argument amounts to a claim the trial court abused its discretion by declining to hold a second evidentiary hearing. However, an abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Here, the original evidentiary hearing on June 28th, 2005, lasted over four hours and produced a transcript in excess of 200 pages. The

appellant did not identify any specific reason the trial court should hold another hearing on this issue, other than a vague claim that perhaps he would like to testify. RP Vol. I on remand 12-13. The appellant again fails on appeal to explain what would have been achieved by a second hearing. See Appellant's brief at 18-19. Thus, the appellant cannot show prejudice and certainly cannot show that the trial judge's decision not to hold another hearing so "manifestly unreasonable" as to be an abuse of discretion. See Neal, 144 Wn.2d at 609. This Court should hold the trial judge did not err by refusing to hold a second hearing.

II. The Appellant Was Not Denied Due Process.

The appellant argues the trial judge denied him due process of law by purportedly "predetermining" the outcome of the hearing. See Appellant's brief at 20. This claim is unsupported by the record, and is wholly baseless and without merit. As such, it should be rejected by this Court.

Appellate counsel² devotes considerable effort in her brief to denigrating the learned trial judge, accusing the court of presiding over a "farfical hearing," entering "cynical" findings, and paying "lip service" to

the appellant's arguments. See Appellant's brief at 20-21. Such vituperative attacks on the judiciary are unprofessional and unhelpful to this Court's analysis of the legal issues at hand. When read closely, it is obvious that appellate counsel simply disagrees with the trial judge and is apparently angry with the outcome of the case on remand. The actual record shows the trial judge reviewed the testimony of the prior hearing and engaged in a lengthy legal discussion with the parties. RP Vol. I on remand 17-61. Appellate counsel's personal opinions about the decision of a trial court do not establish an abuse of discretion. See Neal, 144 Wn.2d at 609 (test is whether trial court's actions were "manifestly unreasonable). This argument is frivolous, and the Court should summarily reject it.

III. Officer Rongen Had Probable Cause to Believe the Appellant Resided at 646 Englert Road.

The appellant argues the trial court erred by finding there was probable cause to believe he resided at the 646 Englert Road address. As there was substantial evidence to support the trial court's finding, this claim should be denied.

² The State refers to original appellate counsel,, rather than currently appointed counsel.

The trial court entered findings of fact that expressly held that Officer Rongen had probable cause to believe the appellant resided at 646 Englert Road at the time of the search. CP 8-9. An appellate court reviews a trial court's findings of fact under a substantial evidence standard. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). "Substantial evidence" is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Hill, 123 Wn.2d at 644. The appellate court does not reach its own determination on the value of the evidence, but simply considers whether there was substantial evidence to support the finding of the lower court.

Here, Officer Rongen had contacted the appellant at 646 Englert Road on two prior occasions. RP Vol. II (6-28-05) 236. On the date in question, Officer Rongen checked the OBITS database, which listed the petitioner's address as 646 Englert Road. Id. at 136, 159. Thus, Officer Rongen had no knowledge the petitioner was residing anywhere other than this address. The fact the petitioner had conducted a ruse by changing his address in another DOC database is of no import. This evidence was more than sufficient to support the trial court's finding of probable cause.

In truth, it is unclear how the facts, as known by Officer Rongen, could not provide probable cause to believe the appellant lived at 646 Englert Road. Officer Rongen had previously contacted him there, and the OBITS database listed this as his address. United States v. Conway, 122 F.3d 841 (9th Cir. 1997), is instructive in this regard. There, a Washington state probation officer suspected a probationer resided at an address other than his listed one. Id. at 842. The probation officer had information from a confidential informant that the probationer had been seen at the address, the police had seen the probationer leaving the address, and the probationer told the officer that his dog was at the address. Id. at 843. Based on this information, the Ninth Circuit Court of Appeals found there was cause to believe the probationer's actual address was the one searched, rather than the one on file with DOC. Id. at 842-843.

Furthermore, the trial court previously found that Officer Rongen was unaware of the change of address, as the address change had not been posted to the OBITS system used by Officer Rongen. RP Vol. II (6-28-05) at 292-293. The trial court had also held previously that 646 Englert Road was the petitioner's actual address, Officer Rongen believed this was his address, and that Officer Rongen had acted in good faith. Id. at 293. These

findings were unchallenged in the original appeal, and are verities. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Based on these prior findings, and the record of this case, it cannot be reasonably disputed that there was probable cause to believe the appellant lived at 646 Englert Road.

The appellant argues that, because he registered a new fictional address with DOC, this defeats Ofc. Rongen's probable cause that he resided at 646 Englert Road. This argument ignores the actual analysis for probable cause, which looks to what the officer actually knew at the time of the search, not what other facts might have been. See State v. Knighten, 109 Wn.2d 896, 910, 748 P.2d 1118 (1988). A search not initially supported by reasonable suspicion cannot be justified by after discovered facts that provide cause for the search. The same logic dictates that facts discovered after a search, and not known to the officer at the time, do not invalidate the search. Since Officer Rongen was unaware of the address change, this fact is irrelevant to the determination of whether there was probable cause.

Additionally, the Supreme Court has previously addressed level of proof necessary to support a belief a person resides at a certain location. In

State v. Hatchie, 161 Wn.2d 390, 166 P.3d 698 (2007), the court held the police had probable cause to believe a person named in misdemeanor arrest warrant was residing in another person's home. The court posed the question of "when does an officer have 'reason to believe' a place to be entered is the suspect's residence?" Hatchie, 161 Wn.2d at 403. This is the very same question posed here. Notably, in Hatchie, the warrant did not list the address searched as the person's address, and the person's vehicle registration also listed a different location. However, both of the person's vehicles were parked at the home, the person returned to the home after shopping, and a neighbor said the person lived there. Id. at 404-405. This Supreme Court found these facts gave rise to probable cause to believe the person named in the warrant lived at the address. Id. at 405.

Here, unlike Hatchie, Officer Rongen had actually met the appellant at the address and knew that he lived there. This is a far greater level of certainty than the somewhat tenuous evidence found sufficient in Hatchie, where the police had never actually observed the person at the residence. As such, the trial court did not err by finding there was a probable cause to believe the appellant was residing at 646 Englert Road.

This Court should uphold the finding of the trial court, as it was amply supported by the evidence and the applicable law.

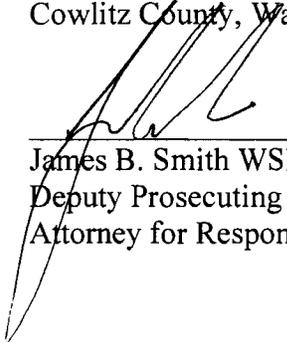
IV. CONCLUSION

Based on the preceding argument, the State asks this Court to uphold the trial court and deny the instant appeal.

Respectfully submitted this 25th day of April, 2011

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By:



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Attorney for Respondent

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
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NO. 41519-4-II BY 
Cowlitz County No. 03-1-00997-8
CERTIFICATE OF MAILING

I, Michelle Sasser, certify and declare:

That on the 25th day of April, 2011, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

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

Mr. Peter B. Tiller
Attorney at Law
P. O. Box 58
Centralia, WA 98531-0058

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

Dated this 25th day of April, 2011.


Michelle Sasser