

No. 42260-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

vs.

**Jarrold Airington,**

Appellant.

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Grays Harbor County Superior Court Cause No. 11-1-00118-3

The Honorable Judges David Edwards and Gordon Godfrey

**Appellant's Opening Brief**

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### ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Airington's motion to suppress.
2. The trial court violated Mr. Airington's right to privacy under Wash. Const. Article I, Section 7 by admitting evidence seized under authority of an overbroad warrant.
3. The police violated Mr. Airington's right to privacy under Wash. Const. Article I, Section 7 by seizing evidence under authority of an overbroad warrant.
4. The police violated Mr. Airington's Fourth Amendment right to be free from unreasonable searches and seizures by seizing evidence discovered pursuant to an overbroad warrant.
5. The search warrant was overbroad because it authorized police to search for and seize items for which the affidavit did not establish probable cause.
6. The search warrant was overbroad because it failed to describe the things to be seized with sufficient particularity.
7. The search warrant unlawfully authorized police to search for and seize items protected by the First Amendment.
8. The search warrant unlawfully authorized police to search for and seize items numerous protected by the First Amendment, including "bank records and bank statements; video tapes...; personal computers together with peripheral devices attached thereto and records contained on electronic storage media (floppy disks, tape drives, compact disks, etc.); letters and crib sheets."
9. The search warrant unlawfully authorized police to search for and seize "moneys."
10. The search warrant unlawfully authorized police to search for and seize any "weapons."
11. The search warrant unlawfully authorized police to search for and seize "any firearms" and any "still photographs."

12. The four corners of the search warrant affidavit did not support issuance of the warrant.
13. The search warrant was based on evidence unlawfully obtained.
14. The officers' initial forcible entry into Mr. Airington's residence was unlawful because it was based on an invalid arrest warrant.
15. The officers' decision to make a forcible entry was unreasonable, because their stated goal was merely to arrest Mr. Airington on a warrant for failure to appear for a DNA sample (on a charge of fourth-degree assault).
16. The prosecution failed to prove that the forcible entry into Mr. Airington's residence was not a pretext to search for Mr. Tatro.
17. The trial court erred by adopting Finding of Fact No. 1.
18. The trial court erred by adopting Finding of Fact No. 2.
19. The trial court erred by adopting Finding of Fact No. 4.
20. The trial court erred by adopting Finding of Fact No. 9.
21. The trial court erred by adopting Conclusion of Law No. 2.
22. Mr. Airington was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
23. Defense counsel unreasonably failed to argue the correct grounds for suppression of the evidence.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A search warrant is overbroad if it authorizes seizure of items for which probable cause does not exist, or if it fails to describe the things to be seized with sufficient particularity. In this case, the search warrant was overbroad for both reasons. Must the evidence derived from execution of the overbroad search warrant be suppressed?
2. Review of the issuance of a search warrant is limited to the four corners of the affidavit. In this case, the search warrant affidavit established that the officers' initial forcible entry into Mr. Airington's home was made in violation of the "knock and announce" rule. When information derived from the illegal entry is excised from the affidavit, is the affidavit insufficient to establish probable cause?
3. A search warrant may not be based on information illegally obtained. In this case, officers unreasonably relied on an invalid arrest warrant to justify forcible entry into Mr. Airington's home. Must the evidence derived from that unlawful entry be suppressed?
4. Even when equipped with an arrest warrant, officers must act reasonably when deciding to use force to enter a residence. In this case, officers used force to enter Mr. Airington's residence to serve an arrest warrant for failure to provide a DNA sample following conviction for misdemeanor assault. Did the officers act unreasonably when they decided to use force to break into Mr. Airington's residence?
5. Police officers may not use an arrest warrant as a pretext to gain entry to a house. In this case, officers unlawfully used Mr. Airington's arrest warrant as a pretext to enter the house to search for Mr. Tatro. Did the officers' pretextual use of the arrest warrant invalidate the forcible entry and subsequent search warrant, requiring suppression of the evidence?

6. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, Mr. Airington's defense attorney failed to argue the correct grounds for suppression of the evidence. If Mr. Airington's suppression arguments are not preserved for review, was he denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Law enforcement in Grays Harbor County were interested in finding and arresting a group of people they suspected of illegal activity. RP (5/13/11) 3, 6, 22. Consisting of roughly four individuals, the group of suspects included Jarrod Airington. RP (5/13/11) 3, 36. They were especially interested in arresting Ricky Tatro, who they suspected of stealing a car recently. RP (5/13/11) 4-5, 20, 29, 33.

The deputies heard that the group was staying at a rental trailer along the Wishkah River. RP (5/13/11) 2-3, 6, 28-29. Officers learned that all four had warrants outstanding. RP (5/13/11) 3-4. The warrant for Mr. Airington was for failure to appear to give a DNA sample, stemming from a misdemeanor conviction. Ex. 3 (admitted 5/13/11).

Deputy Schrader went to the home of the property owner, who told him that Mr. Airington was the renter for the property, along with his girlfriend. RP 95/13/11) 6, 13.

Officers surrounded the rental trailer, eventually went in with a dog, and found Mr. Airington and two women inside. RP (5/13/11) 7-13. According to Dep. Schrader's affidavit, they announced their presence but not their purpose. Ex. 1 (admitted 5/13/11). The other three individuals they were hoping to arrest were not in the trailer. RP (5/13/11) 17-18.

Inside, they saw suspected methamphetamine, drug paraphernalia, and firearms. RP (5/13/11) 14-15, 25, 31-32, 42.

Officers obtained a search warrant for the house. CP 5-6; Ex. 1, 2 (admitted 5/13/11). This warrant included authorization to seize bank records, computers, letters, electronic storage media, money, weapons, photographs, and many other items. Ex 1 (admitted 5/13/11). Officers seized a gun from a closet in the trailer.

The state charged Mr. Airington with Unlawful Possession of a Firearm in the Second Degree. CP 1-2. He moved to suppress the evidence found within the trailer, but failed to argue that the warrant lacked probable cause and was overbroad. Motion to Suppress, Brief in Support, Memorandum in Response, Supp. CP; RP (5/13/11) 1-56. After a hearing, the court denied the motion and entered findings. RP (5/13/11) 53-55; CP 3-7.

The charge was tried to a jury, who convicted. CP 8. Mr. Airington timely appealed. CP 17.

## ARGUMENT

### **I. THE EVIDENCE ADMITTED AT TRIAL WAS UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 7.**

#### A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Whether a search warrant meets the probable cause and particularity requirements is an issue of law reviewed *de novo*. *State v. Garcia-Salgado*, 170 Wash.2d 176, 183, 240 P.3d 153 (2010); *State v. Reep*, 161 Wash.2d 808, 813, 167 P.3d 1156 (2007). Likewise, the legal validity of an arrest warrant is an issue of law, reviewed *de novo*. *State v. Erickson*, 168 Wash.2d 41, 45, 225 P.3d 948 (2010).

A trial court's findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *State v. Gatewood*, 163 Wash.2d 534, 539, 182 P.3d 426 (2008). In the absence of a finding on a factual issue, the appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *State v. Armenta*, 134 Wash.2d 1, 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wash.App. 259, 265, 39 P.3d 1010 (2002).

- B. The state and federal constitutions impose requirements on the issuance of search warrants, and prohibit warrantless searches absent an exception to the warrant requirement.

Under the Fourth Amendment to the U.S. Constitution,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants 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. IV.<sup>1</sup>

Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7. It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution.<sup>2</sup> *State v. Parker*, 139 Wash.2d 486, 493, 987 P.2d 73 (1999).

Under both constitutional provisions, searches and seizures conducted without authority of a search warrant “are *per se*

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<sup>1</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

<sup>2</sup> Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wash.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986).

unreasonable...subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, 556 U.S. 332, \_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eislefeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wash.2d 621, 626, 183 P.3d 1075 (2008).

Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wash.2d 889, 894, 168 P.3d 1265 (2007). The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wash.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

C. The search of Mr. Airington’s residence was conducted pursuant to an overbroad search warrant.

Under the Fourth Amendment and Wash. Const. Article I, Section 7, search warrants must be based on probable cause. *State v. Young*, 123 Wash.2d 173, 195, 867 P.2d 593 (1994). An affidavit in support of a search warrant “must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate.” *State v. Thein*, 138

Wash.2d 133, 140, 977 P.2d 582 (1999). The facts outlined in the affidavit must establish a reasonable inference that evidence of a crime will be found at the place to be searched; that is, there must be a nexus between the item to be seized and the place to be searched. *Young, at 195; Thein, at 140*. A search warrant must also describe the items to be seized with sufficient particularity to limit the executing officers' discretion to those items for which probable cause exist, and to inform the person whose property is being searched what items may be seized. *State v. Riley*, 121 Wash.2d 22, 27-29, 846 P.2d 1365 (1993).

The particularity and probable cause requirements are inextricably interwoven. *State v. Perrone*, 119 Wash.2d 538, 545, 834 P.2d 611 (1992). A warrant may be overbroad either because it authorizes seizure of items for which probable cause does not exist, or because it fails to describe the things to be seized with sufficient particularity.<sup>3</sup> *State v. Maddox*, 116 Wash.App. 796, 805, 67 P.3d 1135 (2003) (citing, *inter alia*, *Perrone, supra*, and *Riley, supra*).

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<sup>3</sup> One aim of the particularity requirement is to prevent the issuance of warrants based on loose, vague or doubtful bases of fact. *Perrone, at 545*. The requirement also prevents law enforcement officials from engaging in a “general, exploratory rummaging in a person’s belongings...” *Perrone, at 545* (citations omitted). Conformity with the rule “eliminates the danger of unlimited discretion in the executing officer’s determination of what to seize.” *Perrone, at 546*.

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)); *Perrone at 547*. In keeping with this principle, the particularity requirement “is to be accorded the most scrupulous exactitude” when the materials to be seized are protected by the First Amendment. *Stanford, at 485*.

In this case, the affidavit lacked probable cause for a number of items listed in the warrant, including items protected by the First Amendment. First, nothing in the affidavit established probable cause to seize “bank records and bank statements; video tapes...; personal computers together with peripheral devices attached thereto and records contained on electronic storage media (floppy disks, tape drives, compact disks, etc.); letters and crib sheets.” There was no suggestion that any such items existed, that they were located in the residence, or that they related in any way to any criminal activity.<sup>4</sup>

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<sup>4</sup> Boilerplate language in the warrant claimed that “[t]here is probable cause to believe that... controlled substances are being used, manufactured, sold, administered, delivered, cultivated, produced, possessed, or otherwise disposed of.” Ex. 2 (admitted 5/13/11). In fact, the affidavit established (at most) probable cause to believe that controlled substances were being possessed and used in the residence. Ex. 2 (admitted 5/13/11). Even if the officers had solid proof of manufacture, sales, or delivery, it is not clear how the listed items would relate to such crimes.

The search warrant also failed the particularity requirement, because it did not describe these materials with “the most scrupulous exactitude.” *Stanford*, at 485. The warrant authorized police officers to rummage through a broad range of items protected by the First Amendment, including any written material, computer files, or other electronic media. No limitations were imposed on this authority.

Second, nothing in the affidavit established probable cause to seize any “moneys” found in the residence. There was no evidence in the affidavit that Mr. Airington was involved in drug dealing or any other profitable criminal enterprise. Absent some information connecting “moneys” to criminal activity, the authorization to seize “moneys” was not supported by probable cause.

Third, nothing in the affidavit established probable cause to seize any “weapons” found in the residence, other than the shotgun specifically mentioned in the affidavit. Even a convicted felon may lawfully possess weapons other than firearms.

Fourth, the warrant failed to describe with particularity the two items for which the affidavit arguably did provide probable cause. In a warrant under the particularity requirement, the court must determine whether the government could have described the items more particularly in light of the information available to it at the time the warrant was

issued. *State v. Higgins*, 136 Wash.App. 87, 91-92, 147 P.3d 649 (2006). In this case, the affidavit included specific descriptions of the shotgun and the photographs observed inside the residence. Ex. 1 (admitted 5/13/11). Despite this, the warrant authorized seizure of “any firearms” and any “still photographs.” Ex. 2 (admitted 5/13/11).

The search warrant in this case was overbroad because it authorized seizure of items for which probable cause did not exist, and because it failed to describe the items to be seized with sufficient particularity. The use of generic categories such as “computers,” “electronic storage media,” “letters,” “weapons,” and “moneys” transformed the warrant into an illegal general warrant, authorizing police to rummage through Mr. Airington’s property, and to seize any materials that fell within these categories, without any restrictions whatsoever. Ex. 2 (admitted 5/13/11). Because the warrant was overbroad, the evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice. *Perrone, supra*.

D. Deputy Schrader’s affidavit did not justify issuance of the search warrant.

Any evidence tainted by an illegal search or seizure must also be suppressed as “fruit of the poisonous tree.” *Eisfeldt, at 640-641* (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441

(1963)). Where illegally obtained information is used to support a search warrant, the warrant affidavit must be redacted to exclude the unlawfully obtained evidence:

The court must view the warrant without the illegally gathered information to determine if the remaining facts present probable cause to support the search warrant...If the warrant, viewed in this light, fails for lack of probable cause, the evidence seized pursuant to that warrant must also be excluded.

*Eisfeldt*, at 640 (citations omitted). Review of a judge's decision to issue a search warrant is "limited to the four corners of the affidavit." *State v. Neth*, 165 Wash.2d 177, 182, 196 P.3d 658 (2008).

Under Washington's "knock and announce" statute, an officer may forcibly enter a residence to effectuate an arrest, but only after providing "notice of his or her office and purpose." RCW 10.31.040. The remedy for an unexcused failure to comply with the rule is suppression of any evidence obtained after entry. *State v. Richards*, 136 Wash.2d 361, 371, 962 P.2d 118 (1998).

In this case, the affidavit reveals that officers failed to comply with the "knock and announce" rule. Deputy Schrader's narrative indicates only that he announced the officers' *presence*; it does not suggest that he explained their *purpose*.<sup>5</sup> Ex. 1 (admitted 5/13/11). Faced with this

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<sup>5</sup> It is for this reason that Appellant assigns error to the court's Finding of Fact No. 4. CP 4.

information, the issuing judge should have realized that the affidavit revealed a failure to follow the requirements of RCW 10.31.040, and excised any facts obtained following the illegal entry. *Eisfeldt*, at 640.

At the suppression hearing, testimony was introduced that the officers *did* announce their purpose. RP (5/13/11) 8-9. However, the issuing judge did not have the benefit of this information, as it is not contained within the four corners of the affidavit. Ex. 1 (admitted 5/13/11). Because the affidavit reveals a violation of the “knock and announce” statute, those facts obtained following entry must be excised, and the affidavit evaluated “to determine if the remaining facts present probable cause.” *Eisfeldt*, at 640. Because they do not, the evidence must be suppressed and the case dismissed. *Id.*

E. The initial forcible entry into Mr. Airington’s residence was unlawful, and tainted the search warrant.

1. The arrest warrant was invalid, and thus could not justify forcible entry into Mr. Airington’s residence.

Article I, Section 7 explicitly guards the home against invasion without authority of law. Wash. Const. Article I, Section 7. Under this provision, “the home enjoys a special protection.” *State v. Schultz*, 170 Wash.2d 746, 753, 248 P.3d 484 (2011). The closer officers come to intrusion into a dwelling, the greater the constitutional protection. *Id.*

An arrest warrant implicitly carries with it the limited authority to enter a suspect's residence when there is reason to believe the suspect is within. *State v. Hatchie*, 161 Wash.2d 390, 402, 166 P.3d 698 (2007); *Solis-Alarcon v. United States*, 662 F.3d 577, 580 (1st Cir.2011) (citing *Payton v. New York*, 445 U.S. 573, 603, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). The rule applies to misdemeanor warrants. *Hatchie*, at 399.

Under the Fourth Amendment's "good faith" exception to the exclusionary rule, evidence obtained under an invalid warrant may be admitted at trial, but only if the executing officers' reliance on the invalid warrant is objectively reasonable. *United States v. Leon*, 468 U.S. 897, 923, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). It is unreasonable for officers to rely on a warrant that is patently defective on its face. *Groh v. Ramirez*, 540 U.S. 551, 561 n. 4, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).

Unlike its federal counterpart, Washington's exclusionary rule does not have a "good faith" exception. *Compare Leon, supra, with State v. Afana*, 169 Wash.2d 169, 233 P.3d 879 (2010). Thus officers may not rely on an invalid warrant to obtain entry to a residence. Where a warrant is invalid, "any intrusion... on the basis of the warrant[] is without authority of law." *City of Seattle v. McCready*, 123 Wash.2d 260, 280, 868 P.2d 134 (1994).

In this case, the arrest warrant for Mr. Airington was invalid on its face. The search warrant affidavit indicates that the arrest warrant was “for failing to appear for a DNA test on an Assault 4 charge.” Ex. 1 (admitted 5/13/11). The arrest warrant itself notes that Mr. Airington “Failed to appear for DNA sample/Assault 4<sup>th</sup>.” Ex. 3 (admitted 5/13/11). But the court was not authorized to order DNA testing for the charge.<sup>6</sup> RCW 43.43.754. Accordingly, the warrant was invalid on its face.<sup>7</sup>

Because the warrant was invalid, the initial intrusion into the residence occurred without “authority of law,” in violation of Article I, Section 7. *McCready*, at 280. Similarly, the intrusion was unlawful under the federal constitution. The officers were not entitled to rely on the facially invalid warrant; to do so would have been objectively unreasonable. *Groh*, at 561 n. 4. The “good faith” exception does not apply. *Id.*

2. Under the circumstances, the forcible entry into Mr. Airington’s residence was unreasonable.

Although police are generally permitted to enter a residence under the authority of an arrest warrant, the decision to make a forcible entry

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<sup>6</sup> A review of the judgment and sentence reflects that the sentencing court did not order Mr. Airington to provide a DNA sample. Ex. 3 (admitted 5/13/11).

<sup>7</sup> Thus the court’s Finding of Fact No. 1 is incorrect. CP 3.

must still be reasonable: “For instance, it might be unreasonable for the police to break down a suspect’s door in the dead of night to execute a misdemeanor traffic warrant.” *Hatchie*, at 402 n. 8.

In this case, the officers’ stated justification for entering the residence—and the justification relied upon by the prosecutor in court—was to serve an arrest warrant for Mr. Airington’s failure to appear for a DNA sample. Ex. 1 (admitted 5/13/11). Under these circumstances, it was unreasonable for a phalanx of five officers to break down Mr. Airington’s door and send in an apprehension dog to effectuate the arrest. This is especially true because the government is already in possession of Mr. Airington’s DNA, given his 10 prior felony convictions. CP 9.

Because the forcible entry was unreasonable, it violated the Fourth Amendment and Wash. Const. Article I, Section 7. *Hatchie*, at 402 n. 8. Information obtained from that initial entry cannot be used to support the search warrant.

3. The forcible entry into Mr. Airington’s home was unlawful, because the police relied on the arrest warrant as a pretext to search for Tatro.

Article I, section 7, forbids the use of pretext as a justification for a search or seizure. *State v. Ladson*, 138 Wash.2d 343, 353, 979 P.2d 833 (1999). Police cannot use an arrest warrant as a pretext for conducting a search. *Hatchie*, at 402.

Here, the officers' true interest was in Tatro. The affidavit in support of the warrant begins with the officer's recitation that he'd "received information that [Tatro] was possibly at Jarrod Airington's residence." Ex. 1 (admitted 5/13/11). The police were interested in Tatro because he was a suspect in a vehicle theft that occurred the previous day, and because he had an outstanding warrant for Possession of a Stolen Vehicle. Ex. 1 (admitted 5/13/11). Deputy Schrader only checked Mr. Airington for warrants after learning that Tatro might be at Airington's house. Ex. 1 (admitted 5/13/11).

The police apparently lacked sufficient reliable information that Tatro was at Mr. Airington's residence. Instead, Schrader relied on an unnamed informant's tip as the basis for his suspicion that Tatro might be present. Ex. 1 (admitted 5/13/11); RP (5/13/11) 19-20. He later testified that the informant had criminal history, and refused to disclose the informant's name. RP (5/13/11) 20. The prosecutor assured the court that the state was not relying on the informant's tip to establish a basis for the forcible entry. RP (5/13/11) 20.

Viewed objectively, these circumstances establish that the officers' true motivation for going to Mr. Airington's house was to find Tatro.<sup>8</sup>

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<sup>8</sup> Although the officers testified that their use of the arrest warrant was not a pretext to search for Tatro, this testimony was not before the issuing judge. Ex. 2 (admitted 5/13/11).

The use of Mr. Airington's arrest warrant to justify entry was a pretext; as such it was unlawful.<sup>9</sup> *Ladson*, at 353. The observation of the firearm and other contraband cannot supply probable cause to sustain the search warrant.

4. All evidence derived from the initial forcible entry must be suppressed as fruit of the poisonous tree.

When information obtained during the illegal intrusion is redacted from the warrant affidavit, insufficient evidence remains to justify issuance of a search warrant. *Eisfeldt*, at 640-641. Accordingly, any evidence discovered or seized during execution of the search warrant must be suppressed. *Id.* Mr. Airington's conviction must be reversed, and the case dismissed with prejudice. *Id.*

## **II. MR. AIRINGTON WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

### **A. Standard of Review**

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

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<sup>9</sup> For these reasons, Appellant has assigned error to the trial court's Findings of Fact Nos. 2 and 9. CP 4, 6.

- B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.")

- C. If Mr. Airington's suppression arguments are not preserved for review, he was denied the effective assistance of counsel by his attorney's unreasonable failure to argue the correct grounds for suppression.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel sought suppression of the evidence, but failed to argue all available grounds for suppression. There was no strategic purpose for counsel's failure to argue all available grounds. Even

if counsel wished to focus the court's attention on one or two grounds in particular, he should have included minimal briefing on alternate grounds in his written materials.

Had counsel included all viable arguments, the trial court would likely have suppressed the evidence. As noted above, the warrant was astonishingly overbroad. The search and seizure suffered from other constitutional infirmities as well. Accordingly, a motion to suppress on the correct grounds would likely have resulted in suppression of the evidence. This would have resulted in dismissal of the prosecution. Accordingly, the failure to argue the proper grounds for suppression prejudiced Mr. Airington.

For all these reasons, defense counsel's failure to argue the correct grounds for suppression deprived Mr. Airington of the effective assistance of counsel. *Saunders, at 578*. The conviction must be reversed and the case remanded. *Id.*

### **CONCLUSION**

For the foregoing reasons, Mr. Airington's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on February 8, 2012,

**BACKLUND AND MISTRY**

A handwritten signature in cursive script that reads "Jodi R. Backlund".

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

A handwritten signature in cursive script that reads "Manek R. Mistry".

Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jarrod Airington, DOC #738595  
Washington State Penitentiary  
1313 N 13th Ave  
Walla Walla, WA 99362

And to:

Grays Harbor County Prosecuting Attorney  
102 W Broadway Ave Rm 102  
Montesano WA 98563-3621

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 8, 2012.



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**February 08, 2012 - 11:54 AM**

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