

No. 42260-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Jarrold Airington,

Appellant.

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

The Honorable Judges David Edwards and Gordon Godfrey

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

I. The evidence should have been suppressed at trial. 1

A. The search warrant was overbroad and cannot be saved by the doctrine of severability. 1

B. The four corners of the warrant affidavit establishes that officers failed to announce their purpose prior to entering the residence; thus, the warrant was based on illegally obtained information..... 8

C. The initial forcible entry into Mr. Airington’s residence was unlawful, and tainted the search warrant. 8

II. Mr. Airington was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. 8

CONCLUSION 9

TABLE OF AUTHORITIES

FEDERAL CASES

Cassady v. Goering, 567 F.3d 628 (10th Cir. 2009)..... 7

Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965). 1, 2

United States v. Sells, 463 F.3d 1148 (10th Cir.2006)..... 7

Zurcher v. Stanford Daily, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525
(1978)..... 1, 2

WASHINGTON STATE CASES

Coluccio Constr. v. King County, 136 Wash.App. 751, 150 P.3d 1147
(2007)..... 4, 5

In re Pullman, 167 Wash.2d 205, 218 P.3d 913 (2009) 3

State v. Higgins, 136 Wash.App. 87, 147 P.3d 649 (2006) 5

State v. Perrone, 119 Wash.2d 538, 834 P.2d 611 (1992)..... 1, 2, 5, 6, 8

State v. Riley, 121 Wash.2d 22, 846 P.2d 1365 (1993)..... 1, 2

State v. Young, 123 Wash.2d 173, 867 P.2d 593 (1994)..... 1

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I..... 1, 2

U.S. Const. Amend. IV 7

U.S. Const. Amend. VI..... 8

U.S. Const. Amend. XIV 8

ARGUMENT

I. THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED AT TRIAL.¹

A. The search warrant was overbroad and cannot be saved by the doctrine of severability.

A search warrant must be based on probable cause. *State v. Young*, 123 Wash.2d 173, 195, 867 P.2d 593 (1994). A search warrant must also describe the things to be seized with particularity. *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).

Search warrant affidavits must establish probable cause for each item to be seized; in this way, general warrants are avoided. *Id.*, at 545-546. Where materials protected by the First Amendment are sought, the affidavit and warrant must be closely scrutinized to ensure compliance with these rules. *Id.*, at 547; *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)).

¹ Respondent's Brief does not follow the order of the arguments set forth in Appellant's Opening Brief. For the court's convenience, this Reply Brief adheres to the original sequence, insofar as possible, while addressing Respondent's arguments.

1. Respondent concedes that the warrant is overbroad with regard to items protected by the First Amendment.

In this case, nothing in the affidavit established probable cause to search for “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.” CP 5-6, Ex. 1, 2. Such items were not even mentioned in the affidavit.

Respondent concedes that the “authorization to search [for these items] was not supported by probable cause.” Brief of Respondent, p. 11. Accordingly, the warrant was overbroad.² *Perrone*, at 545-546; *Zurcher*, *supra*; *Stanford*, *supra*.

Furthermore, the warrant itself did not describe these items with “the most scrupulous exactitude.” *Stanford*, at 485. Instead, it authorized officers to search through any papers or electronic media, without limitation. This, too, rendered the warrant overbroad. *Id.*

2. Respondent concedes that the warrant is overbroad with regard to “moneys.”

² Respondent points out that none of these items were found during the search. Brief of Respondent, p. 11. Proper execution of a search cannot cure an overbroad warrant. *Riley*, at 29.

The affidavit did not mention money and included no specific facts suggesting drug dealing (or any other profitable criminal enterprise). Nor did it specify how the officers were to distinguish between drug money and other kinds of money. CP 5-6; Ex. 1, 2. Accordingly, the warrant was overbroad with regard to “moneys.” Respondent concedes that the affidavit did not establish probable cause to search for “moneys.” Brief of Respondent, p. 11.

3. Respondent fails to address the warrant’s overbreadth with regard to “weapons.”

The affidavit established probable cause to seize a shotgun; however, the warrant authorized seizure of “weapons” generally. This authorized the executing officers to seize kitchen knives, baseball bats, bows and arrows, heavy tools, or any other object that could be used in a fight. The affidavit did not justify seizure of any weapons other than the shotgun (and other firearms the officers found in plain view during execution of the warrant.)

Respondent does not address the warrant’s overbreadth with regard to “weapons.” Brief of Respondent, pp. 8-13. The absence of argument on this point may be treated as a concession. *See In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009).

4. The warrant affidavit did not establish probable cause to believe that additional firearms would be found, and the warrant did not particularly describe the shotgun.

Although the affidavit provided probable cause to seize the shotgun the officers had observed, the warrant was much broader: it authorized police to search for (and seize) “any and all firearms.” CP 5-6; Ex. 1, 2. Because the police lacked probable cause to believe other firearms were present, the warrant should not have allowed them to tear the residence apart searching for more guns.³

Respondent does not point to any facts in the affidavit suggesting the existence or location of additional firearms. *See* Brief of Respondent, pp. 9-10. Instead, Respondent contends—without citation to authority—that probable cause to seize a specific shotgun establishes probable cause to believe other firearms are present. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007).

The warrant affidavit did not provide probable cause to search for “any and all firearms” other than the shotgun specifically mentioned. Accordingly the warrant was overbroad because it authorized police to

³ Of course, if police encountered other firearms in plain view while lawfully in the house, they would have been justified in seizing them under the plain view exception to the warrant requirement. Or, in the alternative, police could have applied for an addendum to the warrant. But unsupported speculation that other firearms might be present does not establish probable cause to search for such other firearms.

search for other guns in the absence of probable cause. *Perrone*, 545-546. Furthermore, by using the generic description “any and all firearms” when a more particularized description was available (as set forth in the affidavit), the search warrant was overbroad for violation of the particularity requirement. *Id*; see also *State v. Higgins*, 136 Wash.App. 87, 91-92, 147 P.3d 649 (2006).

5. The affidavit did not provide probable cause to search for or seize all “still photographs” other than those specifically mentioned, and the warrant did not particularly describe with particularity the still photographs to be seized.

The warrant authorized police to search for and seize any “still photographs;” however, the affidavit established probable cause to seize only those specific photographs hanging in the living room and specifically described. CP 5-6; Ex. 1, 2. Respondent apparently contends—again without citation to authority—that observation of these particular photos justified language authorizing police to search for and seize *any* “still photographs,” regardless of whether or not they were evidence of a crime. Brief of Respondent, p. 11. The absence of citation to authority suggests there is none supporting Respondent’s position. *Coluccio Constr.*, at 779.

6. The search warrant cannot be saved by the doctrine of severability.

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. Furthermore, the use of generic categories such as (*inter alia*) “still photographs,” “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.

The severability doctrine (upon which Respondent relies to save valid portions of the warrant) “does not apply in every case.” *Perrone, at* 556. Instead, “[w]here a search warrant is found to be an unconstitutional general warrant, the invalidity due to unlimited language of the warrant taints all items seized without regard to whether they were specifically named in the warrant.” *Id.* Because the warrant here was an illegal general warrant, the severability doctrine does not apply. *Id.*

There is another reason the severability doctrine cannot be applied: severance is not available when the valid portion of the warrant is relatively insignificant compared to the balance of the warrant. *Id, at* 557. Here, as Respondent admits, the warrant described only “three items for

which probable cause existed.” Brief of Respondent, p. 12.⁴ These three items are relatively insignificant compared to the other broad categories of items the warrant authorized police to search for – the bank records, bank statements, video tapes, personal computers, peripheral devices, electronic storage media (floppy disks, tape drives, compact disks, etc.), letters, crib sheets, moneys, weapons, and still photographs listed in the various parts of the warrant.

Furthermore, even if the doctrine were applied, it could not save this warrant. Under the Fourth Amendment, severance is permitted only “where ‘each of the categories of items to be seized describes distinct subject matter in language not linked to language of other categories...’” *Cassady v. Goering*, 567 F.3d 628, 638 (10th Cir. 2009) (quoting *United States v. Sells*, 463 F.3d 1148, 1158 (10th Cir.2006)). The warrant in this case fails that test, because in order to save those portions Respondent claims are valid, a reviewing court would have to pluck the word “firearms”⁵ from the phrase “any and all firearms and weapons,” and the phrase “still photographs” from the paragraph that begins “To include, but

⁴ Respondent lists these three items as drugs, drug paraphernalia, and “the firearm,” apparently conceding that the authorization to search for “still photographs” is overbroad. Brief of Respondent, p. 12.

⁵ Itself an overbroad description of the shotgun described in the affidavit.

not limited to moneys; bank records and bank statements...” This is the kind of editing forbidden by the Court in *Perrone*.

The search warrant in this case was astoundingly overbroad, describing broad categories of items for which the affidavit did not supply probable cause, and failing to describe with particularity even those items for which probable cause existed. The severability doctrine does not apply, and could not meaningfully be employed to save any portion of the warrant. Because the warrant was overbroad, the evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice. *Perrone, supra*.

- B. The four corners of the warrant affidavit establishes that officers failed to announce their purpose prior to entering the residence; thus, the warrant was based on illegally obtained information.

Mr. Airington rests on the argument set forth in his Opening Brief.

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

Mr. Airington rests on the argument set forth in his Opening Brief.

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

Mr. Airington rests on the argument set forth in his Opening Brief.

CONCLUSION

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

Respectfully submitted on April 23, 2012.

BACKLUND AND MISTRY



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



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 Reply 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 Reply 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 April 23, 2012.



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

BACKLUND & MISTRY

April 23, 2012 - 10:13 AM

Transmittal Letter

Document Uploaded: 422603-Reply Brief.pdf

Case Name: State v. Jarrod Airington

Court of Appeals Case Number: 42260-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Answer/Reply to Motion: ____
- Brief: Reply
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Manek R Mistry - Email: **backlundmistry@gmail.com**