

NO. 42691-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MANNING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Diane M. Wollard, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress evidence of a gun under CrR 3.6.

2. The trial court erred in entering findings of fact 2, 4, and 6 in support of the order denying appellant's suppression motion. CP 24-28.¹

3. The trial court erred in entering conclusions of law 2-5 in support of the order denying appellant's suppression motion. CP 24-28.

4. The trial court erred in entering finding of fact 2 in the findings of fact and conclusions of law on non-jury trial. CP 43.²

Issues Pertaining to Assignments of Error

Police and community corrections officers went to appellant's residence to arrest his wife for a probation violation. They had an arrest warrant but no search warrant. The officers arrested appellant's wife at the front door. Despite achieving their purpose, officers then conducted a "security sweep" of the house. They did not ask for permission to search the house. As a result of the search, officers found a short-barreled shotgun inside a closed, but unlocked, gun safe. Did the trial court err in

¹ The trial court's "Findings of Fact and Conclusions of Law on 3.6 Hearing" are attached as Appendix A.

² The trial court's "Findings of Fact and Conclusions of Law on Non-Jury Trial" are attached as Appendix B.

denying appellant's suppression motion where officers fulfilled the limited purpose of the arrest warrant before the search and then seized the gun without a warrant, permission, or a justifiable exception to the warrant requirement?

B. STATEMENT OF THE CASE

Armed with an arrest warrant for Michael Manning's wife, Flo Frost, Vancouver police and community corrections officers surrounded the couple's residence. RP 38.³ Police intended to arrest Frost for failing to comply with daily reporting requirements while on probation for a third degree assault conviction. RP 9, 24-25, 37, 44-45. The police also had "concerns" Frost and Manning were abusing drugs. RP 18-19. Manning had no prior felony convictions and was not on probation. RP 46, 75.

Community corrections specialist Fili Matua saw Frost through a bedroom window as he approached the house. RP 23, 26-28, 34. Frost was immediately arrested without incident after opening the front door. RP 27, 45. She told officers she and her baby were the only people in the house. RP 31. While Frost remained with Matua's colleague, Matua and police officer Spencer Harris conducted a "security sweep" of the house. RP 27, 35-36, 39, 43, 45-46. Matua acknowledged there were no "noises

³ This brief refers to the verbatim report of proceedings as follows: RP – May 6, October 5, and October 13, 2011.

that would lead to a fear of harm.” RP 31-32. No one asked Frost for permission to search the house. RP 36.

The “security sweep” included entering the unoccupied bedroom where Matua had initially seen Frost. RP 27-28. The bedroom door was propped open with a vacuum cleaner. The door had no lock. RP 28, 39. Matua and Harris observed a five-foot tall gun safe in the room. RP 29, 31, 39. Matua was aware the Department of Corrections (DOC) had granted permission for the safe to be in the house.⁴ RP 12, 33.

Officers saw .22 caliber ammunition and a prescription in Frost’s name on top of the safe. RP 29, 33, 39, 42. The door of the safe was closed. RP 33. No officers expressed concern a person was hiding in the safe. Matua asked Harris to check if the safe was locked. RP 29-30, 33, 40. Harris “hit the [safe] door and the door opened right up.” RP 40. The safe contained several guns, including a shotgun with a barrel measuring 11 ¾ inches. RP 30, 40-42; CP 48.

When questioned, Frost said the bedroom was a “junk room.” RP 41. She denied being in the bedroom when officers arrived. RP 50. After

⁴ Frost’s community corrections supervisor testified that although Frost was not permitted to “possess, use, or own a firearm,” DOC policy did not prohibit a locked gun safe in the house so long as Frost had no access to the safe. RP 6-7, 30.

arriving home, Manning said the firearms belonged to him and he did not have a license for possessing or selling specialty guns. CP 42, 48.

Based on this evidence, the State charged Manning with possession of a short-barreled shotgun or rifle. CP 1. Manning moved to suppress evidence of the gun. CP 3. He argued the officer's warrantless seizure was not justified under the "protective sweep" warrant exception. CP 3.

The trial court denied the motion. RP 60; CP 24. The trial court concluded:

(2) [O]fficers lawfully entered the residence because they had a well founded or reasonable suspicion that Frost had violated her probation by not reporting to DOC[.]

(3) Moreover, there was a sufficient basis to check the gun safe to see if it was locked or not, in order to determine if DOC probationer Frost was in further DOC violation by having access to firearms (an unlocked gun safe in her residence which did have firearms within it); and also for officer safety.

CP 24 (conclusions of law 2-3).

Manning waived his right to a jury trial and agreed to a stipulated facts bench trial. RP 67-68; CP 37, 39. The trial court found Manning guilty. RP 72; CP 42. The court denied Manning's post trial motion to dismiss the conviction on the basis Manning had a state and federal right to bear arms. RP 66, 72; CP 55, 59. The court sentenced Manning to 45 days in jail or work release if eligible. CP 61. Manning timely appeals. CP 71.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY DENYING MANNING'S MOTION TO SUPPRESS BECAUSE POLICE UNLAWFULLY SEIZED THE GUN WITHOUT A WARRANT OR THE PRESENCE OF A JUSTIFIABLE EXCEPTION TO THE WARRANT REQUIREMENT

a. Summary of Argument.

The warrantless search of Manning's gun safe was illegal because police fulfilled the limited purpose of the arrest warrant before the search and no exception to the search warrant requirement applied. The "protective sweep" exception is unavailable because: (1) officers acknowledged no noises "lead to a fear of harm;" (2) no person was in the bedroom where the safe was located; and (3) officers expressed no concerns that a person was hiding in the closed safe.

The "plain view" exception also does not apply because the contents of the safe were not visible until officers manipulated the safe by opening the closed door. Accordingly, police discovered the only evidence related to the charged crime during an unconstitutional search. This Court should therefore reverse Manning's conviction and dismiss the charge with prejudice.

b. The Warrant Requirement Is Most Stringent When Police Invade The Home.

Article I, section 7 provides “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The Fourth Amendment of the United States Constitution establishes the peoples’ right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”

The “authority of law” required by article 1, § 7 is typically a warrant. State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). A warrantless search is per se unconstitutional unless it falls within an exception to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). “Exceptions to the warrant requirement are limited and narrowly drawn.” State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). The State always carries the “heavy burden” of proving a warrantless search is justified. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). The State therefore has the burden of establishing an exception to the warrant requirement by “clear and convincing evidence.” State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

“The distinction between searches of a private home from searches of automobiles or public places is very important under a Fourth

Amendment analysis, and even more so under art. I, § 7 review.” State v. Schroeder, 109 Wn. App. 30, 40, 32 P.3d 1022 (2001). The home receives heightened constitutional protection because it is where a citizen is most entitled to privacy. State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). “For this reason, ‘the closer officers come to intrusion into a dwelling, the greater the constitutional protection.’” Young, 123 Wn.2d at 185 (quoting State v. Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984)).

Police conduct in this case must be analyzed with these established principles in mind. The trial court’s conclusions of law in a suppression hearing are reviewed de novo. State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). The trial court’s findings must support the conclusions of law. Garvin, 166 Wn.2d at 249. Substantial evidence must support those findings. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

c. The Limited Purpose of the Arrest Warrant was Accomplished Before The Warrantless Search of Manning’s Gun Safe.

The trial court concluded officers could lawfully check the gun safe after executing the arrest warrant to determine whether “Frost was in further DOC violation by having access to firearms.” CP 24 (conclusion of law 3). The facts do not support this conclusion. The arrest warrant was issued for a specific alleged probationary violation and police

successfully executed the arrest warrant before searching Manning's home.

“[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.” State v. Hatchie, 161 Wn.2d 390, 395-96, 166 P.3d 698 (2007) (citing Payton v. New York, 445 U.S. 573, 603, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)). See also Steagald v. United States, 451 U.S. 204, 214 n.7, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981) (“[A]n arrest warrant authorizes ... a limited invasion of that person’s privacy interest when it is necessary to arrest him in his home.”). An arrest warrant authorizes police “to enter a residence, execute the arrest, and then *promptly* leave.” Hatchie, 161 Wn.2d at 402. (emphasis added). “[P]olice cannot use an arrest warrant – misdemeanor or otherwise – as a pretext for conducting a search or other investigation of someone’s home.” Hatchie, 161 Wn.2d at 401. That is what happened here.

Police obtained the arrest warrant for Frost after alleging she failed to comply with daily reporting requirements while on probation for a third degree assault conviction. RP 9, 24-25, 37, 44-45; CP 43-44 (finding of fact 4). Police contacted and arrested Frost on that basis

immediately upon entering the house. RP 27, 45. Instead of “promptly leaving” however, they searched the house.

The trial court concluded the search was permissible “most importantly to conduct a standard DOC check of the DOC probationer’s residence.” CP 25 (finding of fact 4). But, “police may not use a parole officer as a ‘stalking horse’ to evade the fourth amendment’s warrant requirement.” United States v. Harper, 928 F.2d 894, 897 (9th Cir. 1991). “Any person not subject to either an arrest warrant or DOC supervision, residing with a person under DOC supervision, is entitled to the full expectation of privacy under our constitution and the Fourth Amendment in his home[.]” State v. McKague, 143 Wn. App. 531, 546, 178 P.3d 1035 (2008). See also Harper, 928 F.2d at 897 (probation search limited to areas and possessions over which the probationer might have exercised dominion or control (citing People v. Alders, 87 Cal. App. 3d 313, 318, 151 Cal. Rptr. 77 (1978)).

Here, officers knew Frost lived with Manning and knew Manning was permitted to have the gun safe to be in the house. While Matua had observed Frost in the bedroom as he approached the home, there is no evidence Frost “exercised dominion or control” over the safe, such as by opening or closing it or removing items from it. These circumstances

suggest the officers used Frost's arrest warrant as a pretext for conducting a search of the house.

Regardless of Frost's probationary status, Manning was entitled to privacy protections in his home. Because officers immediately arrested Frost at the door, their continued presence in and search of the home exceeded the scope of the limited authority granted to them under the warrant. This was unconstitutional.

d. The 'Protective Sweep' Exception Did Not Justify The Warrantless Search Of Manning's Gun Safe.

The trial court, citing "officer safety," relied on the "protective sweep" exception to the warrant requirement to justify the search. RP 59. The facts do not support this reliance. Police did not have an objectively reasonable belief the house, bedroom, or closed gun safe harbored an individual posing a danger to officers.

i. A "Protective Sweep" is Narrowly Defined.

A protective sweep under the Fourth Amendment is a "quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Maryland v. Buie, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990).

“While making a lawful arrest, officers may conduct a reasonable ‘protective sweep’ of the premises for security purposes.” State v. Hopkins, 113 Wn. App. 954, 959, 55 P.3d 691 (2002) (citing Buie, 494 U.S. at 334-35). “The concept of a protective sweep was adopted to justify the reasonable steps taken by arresting officers to ensure their safety while making an arrest.” State v. Boyer, 124 Wn. App. 593, 600, 102 P.3d 833 (2004) (citing Buie, 494 U.S. at 334), rev. denied, 155 Wn.2d 1004 (2005). “[T]he risk of danger with in-home arrests justifies steps by the officers ‘to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.’” Boyer, 124 Wn. App. at 600-01 (quoting Buie, 494 U.S. at 333). When the “sweep” extends beyond the immediate area of the arrest, “there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonable and prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” Boyer, 124 Wn. App. at 600-01; Hopkins, 13 at 959-60.

- ii. There Is No Objectively Reasonable Basis To Conclude A Protective Sweep Was Needed To Find Dangerous Individuals.

Incident to arrest, police may search “in closets and other spaces *immediately adjoining* the place of arrest from which an attack could be

immediately launched.” Buie, 494 U.S. at 334 (emphasis added). Beyond that, however, “there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” Buie, 494 U.S. at 334; Boyer, 124 Wn. App. at 600-01; Hopkins, 13 at 959-60.

The trial court did not determine the bedroom immediately adjoined anything. The first prong of the Buie test cannot be applied for this reason. In reviewing the findings from a suppression hearing, the appellate court will presume that the State has failed to prove a factual issue if the trial court fails to make a finding on that issue. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

Even assuming the bedroom immediately adjoined the front entrance where Frost was arrested, the State produced no facts demonstrating a reasonably prudent officer would have believed the closed safe within the bedroom harbored an individual posing a danger to officers. Frost told officers she and her baby were the only people in the house. RP 31. Matua acknowledged there were no “noises that would lead to a fear of harm.” RP 31-32. Though Matua observed Frost in the bedroom, she was arrested at the front door before the search began. See Hopkins, 113 Wn. App. at 960 (a suspect in custody no longer poses a

danger to arresting officers.) There is no evidence Matua saw Frost make any furtive movements in the bedroom or open or close the safe. Indeed, because Matua did not review Frost's case file before the arrest, there is no evidence he knew the safe was in the bedroom. RP 25. Instead, Matua and Harris searched the house because "it's a standard procedure we do when we enter houses." RP 32.

But, a "general desire to be sure that no one is hiding in the place to be searched is not sufficient' to justify a protective sweep outside the immediate area where an arrest has occurred." Hopkins, 113 Wn. App. at 960 (quoting State v. Schaffer, 133 Idaho 126, 131, 982 P.2d 961 (Idaho App. 1999)). Hunches and inchoate, unparticularized suspicions that there may be a dangerous person somewhere in the home are insufficient to justify a protective sweep. Buie, 494 U.S. at 332, 334 (adopting Terry v. Ohio⁵ standard of reasonable suspicion of danger based on articulable facts). Rather, there must be a reasonable suspicion not only that another person is in the premises, but that the person is dangerous. Hopkins, 113 Wn. App. at 960; 3 Wayne R. LaFave, Search and Seizure, § 6.4(c) at 377 4th ed. 2004) (protective sweep requires reasonable suspicion that both (a) another person is there and (b) the person is dangerous).

⁵ Terry v. Ohio 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

In this respect, Hopkins, is analogous. Sheriff's deputies went to Hopkins' property to arrest her on outstanding felony warrants. At the property, deputies saw two men standing near a shed. One man went inside the shed, and then came back out. Officers handcuffed the men and then arrested Hopkins inside her home without incident. Hopkins, 113 Wn. App. at 956.

Following the arrests, deputies went into the shed "just to do a security check to make sure there were no other individuals inside." Inside the shed, they saw a 3-by 5-foot floor freezer, "big enough to hide a person inside." Deputies opened the freezer, smelled ammonia, and saw evidence of methamphetamine manufacture. Hopkins, 113 Wn. App. at 956-57.

The Court of Appeals found that, "although the presence of the two men outside the shed may have posed a danger when the officers first arrived at the scene, those men and Hopkins had been secured before the 'sweep' began. They thus no longer posed a danger to the arresting officers." Hopkins, 113 Wn. App. at 960. The only other justification for the sweep was that deputies feared other, dangerous persons were in the shed or trailer. Two deputies entered the shed "to make sure there were no other individuals inside." The Court found this amounted to no more than a general desire to be sure that no one is hiding in the place to be searched

and was insufficient to justify the sweep. Hopkins, 113 Wn. App. at 960-61.

Similar to the justification offered in Hopkins, Matua's justification for the search amounted to a general desire to find out whether anyone else was in Manning's home. Neither Matua nor any other officer articulated a reasonable suspicion of a safety threat. Instead, "as soon as" they entered the bedroom, Harris and Matua determined no one was there. RP 32, 42. But instead of leaving the room, Matua asked Harris to check whether the closed safe was locked. RP 33. Neither officer expressed concern a person was hiding in the safe. Rather, Matua admitted he wanted "to check and see if there's firearms in there." RP 34-35. By his own admission, Matua was searching for evidence rather than conducting a "protective sweep."

The officers candidly admitted they conducted the protective sweep as per their general policy, not because they had specific concerns about dangerous individuals lurking about. Generalized suspicion is not enough to satisfy the particularity requirement of the protective sweep exception. Even if it was, officers admitted the "protective sweep" became a search for evidence rather than an attempt to ferret out dangerous individuals.

e. The 'Plain View' Exception Did Not Justify The Warrantless Search of Manning's Gun Safe.

The trial court, citing the officers' "obligation" to check whether the gun safe was locked, relied on the "plain view" exception to justify the warrantless seizure of the gun once the closed safe door was opened. CP 26 (finding of fact 6). The facts do not support this exception.

The "plain view" doctrine is an exception to the warrant requirement that applies after police have intruded into an area where there is a reasonable expectation of privacy. State v. Myers, 117 Wn.2d 332, 346, 815 P.2d 761 (1991). "The doctrine requires that the officer had a prior justification for the intrusion and immediately recognized what is found as incriminating evidence such as contraband, stolen property, or other item[s] useful as evidence of a crime." O'Neill, 148 Wn.2d at 582-83. Objects are immediately recognizable as incriminating evidence when, considering the surrounding facts and circumstances, the police can reasonably conclude they have evidence before them. State v. Hudson, 124 Wn.2d 107, 118, 874 P.2d 160 (1994).

Here, the gun safe was not "immediately recognizable as incriminating evidence." Possession of the gun safe was not itself prohibited. DOC policy did not prohibit a locked gun safe in the house which Frost could not access. RP 6-7, 30. Indeed, Matua was aware the

DOC had previously granted permission for the safe to be in the house. RP 12, 33. Officers could not determine the contents of the closed safe, or whether it was unlocked in violation of Frost's probation conditions, by looking at it. Nor was the ammunition "immediately recognizable as incriminating evidence." While Frost could not "possess, use, or own a firearm," no facts show possessing ammunition was prohibited. Only when police manipulated the safe by opening the closed door were both the probation violation and the incriminating contents of the safe apparent.

Cases have long held movement of an item for purposes of acquiring probable cause to conduct an additional unauthorized search does not satisfy the "plain view" warrant exception. Arizona v. Hicks,⁶ and State v. Murray⁷ exemplify cases in which officers conducted an additional unauthorized search under the guise of "plain view." See also, State v. Johnson, 104 Wn. App. 489, 17 P.3d 3 (2001) (probable cause was lacking to search, seize, or view two videotapes in defendant's apartment because the search warrant contained only generalized statements about the common habits of child abusers and set forth no facts

⁶ 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987).

⁷ 84 Wn.2d 527, 527 P.2d 1303 (1974), cert. denied, 421 U.S. 1004 (1975).

from which to infer the likelihood that videotapes were evidence of the suspected crimes).

In both Hicks and Murray, officers were lawfully in the defendant's home. Hicks, 480 U.S. at 324-25; Murray, 84 Wn.2d at 528-29, 534. They saw a suspected stolen item (a stereo in Hicks, a television in Murray), but lacked probable cause to believe it was stolen. Hicks, 480 U.S. at 326; Murray, 84 Wn.2d at 529, 531. To acquire probable cause, they moved the item until its serial number became visible. They then copied the serial number and compared it with their stolen property reports. Hicks, 480 U.S. at 323-24; Murray, 84 Wn.2d at 529.

Each Court found the plain view doctrine did not justify their conduct because when they first saw the item they lacked "immediate knowledge" (probable cause to believe) that the item was evidence; and when they moved the item to acquire probable cause, they conducted an additional unauthorized search. Hicks, 480 U.S. at 326-28; Murray, 84 Wn.2d at 534-35. As Hicks clearly noted:

[T]aking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry ... the "distinction between 'looking' at a suspicious object in plain view and 'moving' it even a few inches" is much more than trivial for purposes of the Fourth Amendment.

Hicks, 480 U.S. at 325.

Like Hicks and Murray, Matua and Harris may have suspected the safe was unlocked and its contents incriminating, but they did not have “immediate knowledge” that it did merely by looking at it. Only after they moved the handle to open the closed safe did the incriminating contents become visible. Moreover, even after discovering the safe was unlocked, officers took the additional step of opening it to reveal the contents. As Matua acknowledged, checking whether the safe was locked did “not necessarily require opening it[.]” RP 33. By opening the closed safe officers conducted an additional unauthorized search unrelated to the objectives of the initial arrest warrant intrusion.

2. THE UNLAWFULLY OBTAINED GUN MUST BE SUPPRESSED AND THE CONVICTION DISMISSED WITH PREJUDICE.

“When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” Ladson, 138 Wn.2d at 359. Evidence is fruit of an illegal search when it “has been come at by exploitation of the primary illegality.” Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Police discovered Manning’s gun during the course of an unconstitutional search. This Court should reverse Manning’s conviction

and dismiss the charge with prejudice because no evidence remains on which to find guilt beyond a reasonable doubt. State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis remained for conviction because Court concluded motion to suppress evidence should have been granted), cert. denied, 531 U.S. 1104 (2001); State v. Boethin, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (dismissing charges because remaining evidence insufficient to prove guilt beyond a reasonable doubt).

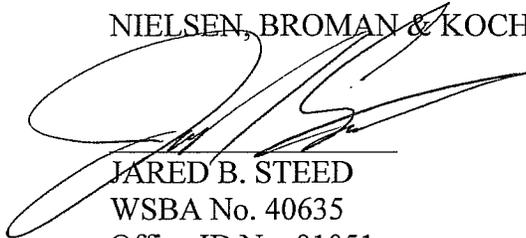
D. CONCLUSION

For the above reasons, Manning's conviction should be reversed and the case dismissed.

DATED this 30th day of March, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

APPENDIX A

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FILED

AUG 19 2011

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Scott G. Weber, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

MICHAEL JAMES MANNING,

Defendant.

No. 10-1-00946-9

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
3.6 HEARING

THIS MATTER having come duly and regularly before the Court on the 6th day of May, 2011, for a 3.6 Hearing, Plaintiff State of Washington appearing by and through Scott S. Ikata, Deputy Prosecuting Attorney for Clark County, State of Washington; and defendant Michael James Manning appearing in person and with his attorney Jeff Sowder, the court now finds the following facts to have been proven beyond a reasonable doubt:

FINDINGS OF FACT

1. The subject incident occurred on February 8, 2010, at approximately 1553 hours when members of the Career Criminal Apprehension Team went to the residence located at 12812 NE 17th Street, in Clark County, Washington. This residence is the

42 (RK)

1 listed residence with Washington State Department of Corrections (hereinafter DOC) for
2 probationer Flo Elizabeth Frost. Frost was wanted by DOC on a felony warrant for a
3 probation violation of community custody escape. Frost was on probation for an Assault
4 III conviction in 2009 and is a convicted felon.

5 2. In addition, prior to going out to the address there was concern that Frost
6 was using drugs and could be suicidal as reported by DOC officer Shelly Feld (on
7 February 5, 2010). There was also concern that there may be firearms in the residence
8 as well. The above information was contained in the DOC file regarding probationer
9 Frost which DOC Supervisor Fili Matua had reviewed prior to this incident.

10 3. DOC Officer Bryan Ford, DOC Fili Matua, and Detective Spencer Harris
11 walked towards the residence. DOC Matua observed Flo Frost coming from the
12 southeast corner bedroom (which bedroom was later found to contain an unlocked safe
13 containing 12 firearms). In either event, the officers had confirmed that the subject
14 residence was the house at which defendant was residing. There was no indication that
15 this was a rooming house or a boarding house where there were a number of other
16 people living in it.

17 4. The officers then knocked on the door and Flo Frost came to the door and
18 allowed the officers to enter. Frost was told that she had a DOC warrant for her arrest.
19 Frost was informed that DOC had issued a warrant for her arrest on 2/3/2010 for failing
20 to report to DOC once she was released from treatment. While DOC Ford was talking
21 with Frost, DOC Matua and Detective Harris checked the residence for any other
22 persons / for safety purposes and most importantly to conduct a standard DOC check of
23 the DOC probationer's residence (Frost had violated her probation by not reporting).
24 Detective Harris indicated that it was a very short time after they entered the
25 defendant's residence that they did a security sweep.

26 5. Per DOC Heather Johnson, Flo Frost, as a convicted felon and probationer,
27 could not have any possession or access to firearms. Pursuant to standard DOC policy:

1 although a locked gun safe (which a probationer has no access to get into) in a
2 probationer's residence can be allowed, an unlocked safe which allows a probationer
3 access to firearms is not allowed and is a violation of probation. Per DOC Johnson,
4 Frost was not allowed to have access to firearms within her residence pursuant to an
5 unlocked gun safe.

6 6. While checking the southeast corner bedroom (from which DOC Matua had
7 observed Frost coming out from) Detective Harris observed a large safe on the east
8 wall. Located on top of the safe were several .22 caliber rounds. Located next to the
9 rounds Detective Harris immediately saw a bottle of Clonazepam dated 2/1/2010 to Flo
10 Frost. DOC Matua was inside the room with Officer Harris by this time. Based on the
11 rounds laying on the safe, and miscellaneous gun boxes on top of the safe, the door to
12 the safe was checked at the direction of DOC Matua and found to be unlocked (which
13 allowed probationer Frost access to firearms). The officers had an obligation to see if
14 there were any other probation violations on the part of defendant. Inside of the safe,
15 based on his training and experience, Detective Harris observed in plain view and
16 immediately recognized an obvious short barreled double barrel shotgun (the shotgun
17 was subsequently measured to be only 11 ¾ inches), along with several other rifles,
18 handguns, and miscellaneous caliber rounds. Detective Harris could immediately see
19 that the short barreled shotgun measured less than his boot. In total, 12 firearms were
20 recovered from the unlocked safe. Moreover, the door to this room did not have a lock
21 on it and the door was propped open with a vacuum in front of it and other
22 miscellaneous items. The room appeared to be either Frost's room or at the very least
23 a common room of the residence.

24 7. Detective Harris interviewed Flo Frost. Post Miranda, Detective Harris asked
25 Flo when the last time was she was in the southeast bedroom. She stated she rarely
26 goes in that room and could not remember when the last time was. Flo stated it was
27 her "junk room". Detective Harris asked her about the gun safe in the room and she

1 said it was her husband's (Michael James Manning's) safe. Subsequently, after contact
2 and an interview with defendant Michael James Manning by law enforcement,
3 defendant Manning was ultimately arrested for the crime of Possession of a Short
4 Barreled Shotgun.

5 Based on the foregoing Findings of Fact, the court makes the following:
6

7 CONCLUSIONS OF LAW
8

9 1. The Court has jurisdiction of defendant Michael James Manning and the
10 subject matter.
11

12 2. The search was lawful because the subject house was the residence of DOC
13 probationer Flo Frost and because Frost had violated a condition of her probation by not
14 reporting. Thus, the DOC and CCAT officers lawfully entered the residence because
15 they had probable cause that probationer Frost was residing at the residence; and the
16 officers lawfully searched the residence because they had a well founded or reasonable
17 suspicion that Frost had violated her probation by not reporting to DOC. The officers
18 had this information pursuant to Frost's DOC file and the warrant which was issued for
19 Frost's arrest.
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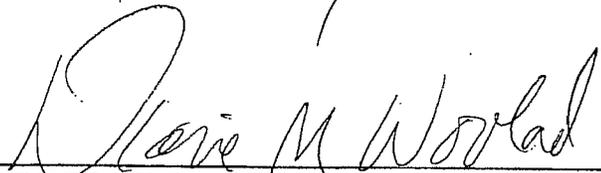
21 3. Moreover, there was a sufficient basis to check the gun safe to see if it was
22 locked or not, in order to determine if DOC probationer Frost was in further DOC
23 violation by having access to firearms (an unlocked gun safe in her residence which did
24 have firearms within it); and also for officer safety.
25

26 4. Regarding the basis to check the gun safe: Frost was observed coming from
27

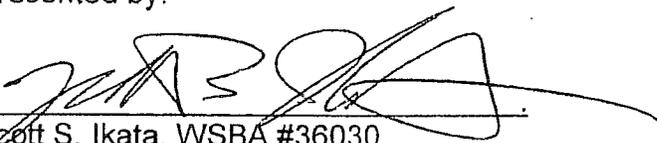
1 the room where the gun safe was located, the door to that room did not have a lock and
2 was propped open by a vacuum, and on top of the gun safe was observed 22 caliber
3 rounds, miscellaneous gun boxes and a pill bottle with Frost's name on it. Also, the
4 room in which the gun safe was located appeared to be either Frost's room or at the
5 very least a common room of the residence.
6

7 5. Based on the above, the evidence presented at the hearing, and the case law
8 cited by the state in its response memorandum, the defendant's motion to suppress the
9 evidence is DENIED.

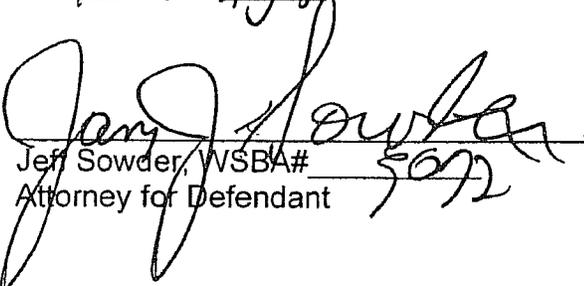
10 DONE in open Court this 19 day of Aug, 2011.

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15 HONORABLE DIANE M. WOOLARD
16 JUDGE OF THE SUPERIOR COURT

17 Presented by:

18 
19 Scott S. Ikata, WSBA #36030
20 Deputy Prosecuting Attorney

21
22 Copy received and approved as to form only
23 this 18 day of August, 2011.

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25 
26 Jeff Sowder, WSBA# 5072
27 Attorney for Defendant

APPENDIX B

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FILED

OCT 05 2011

1:47pm
Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

MICHAEL JAMES MANNING,

Defendant.

No. 10-1-00946-9

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
NON-JURY TRIAL

THIS MATTER having come duly and regularly before the Court on the 5th day of October, 2011, for trial, Plaintiff State of Washington appearing by and through Scott S. Ikata, Deputy Prosecuting Attorney for Clark County; State of Washington, Defendant Michael James Manning appearing in person and with his attorney Jeff Sowder, Defendant having previously entered a knowing, intelligent and voluntary written waiver of his right to trial by a jury, and a knowing, intelligent and voluntary waiver of his right to hear and confront witnesses against him and of his right to call witnesses on his own behalf and to compel their attendance, and the Defendant and the Plaintiff further having stipulated and agreed to the admission into evidence the written Stipulation of Facts of the parties, and the parties having stipulated to the Court's entry of Findings of

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1 Fact and Conclusions of Law based upon said stipulations and exhibits entered into
2 evidence, the Court now finds the following facts to have been proven beyond a
3 reasonable doubt:

4 FINDINGS OF FACT

5 1. On February 8, 2010, at approximately 1553 hours, members of the
6 Career Criminal Apprehension Team went to a residence located at 12812 NE 17th
7 Street, in Clark County, State of Washington. This residence was the listed residence
8 with Washington State Department of Corrections (hereinafter DOC) for probationer Flo
9 Elizabeth Frost. Frost was wanted by DOC on a felony warrant for a probation violation
10 of community custody escape. Frost was on probation for an Assault III conviction in
11 2009 and is a convicted felon.
12

13
14 2. In addition, prior to going out to the address there was concern that Frost
15 was using drugs and could be suicidal as reported by DOC officer Shelly Feld (on
16 February 5, 2010). There was also concern that there may be firearms in the residence
17 as well. The above information was contained in the DOC file regarding probationer
18 Frost which DOC Supervisor Fili Matua had reviewed prior to this incident.

19 3. DOC Officer Bryan Ford, DOC Fili Matua, and Detective Spencer Harris
20 walked towards the residence. DOC Matua observed Flo Frost coming from the
21 southeast corner bedroom (which bedroom was later found to contain an unlocked safe
22 containing 12 firearms). In either event, the officers had confirmed that the subject
23 residence was the house at which defendant was residing. There was no indication that
24 this was a rooming house or a boarding house where there were a number of other
25 people living in it.

26 4. The officers then knocked on the door and Flo Frost came to the door and
27 allowed the officers to enter. Frost was told that she had a DOC warrant for her arrest.

1 Frost was informed that DOC had issued a warrant for her arrest on 2/3/2010 for failing
2 to report to DOC once she was released from treatment. While DOC Ford was talking
3 with Frost, DOC Matua and Detective Harris checked the residence for any other
4 persons / for safety purposes and most importantly to conduct a standard DOC check of
5 the DOC probationer's residence (Frost had violated her probation by not reporting).
6 Detective Harris indicated that it was a very short time after they entered the
7 defendant's residence that they did a security sweep.

8 5. Per DOC Heather Johnson, Flo Frost, as a convicted felon and probationer,
9 could not have any possession or access to firearms. Pursuant to standard DOC policy:
10 although a locked gun safe (which a probationer has no access to get into) in a
11 probationer's residence can be allowed, an unlocked safe which allows a probationer
12 access to firearms is not allowed and is a violation of probation. Per DOC Johnson,
13 Frost was not allowed to have access to firearms within her residence pursuant to an
14 unlocked gun safe.

15 6. While checking the southeast corner bedroom (from which DOC Matua had
16 observed Frost coming out from) Detective Harris observed a large safe on the east
17 wall. Located on top of the safe were several .22 caliber rounds. Located next to the
18 rounds Detective Harris immediately saw a bottle of Clonazepam dated 2/1/2010 to Flo
19 Frost. DOC Matua was inside the room with Officer Harris by this time. Based on the
20 rounds laying on the safe, and miscellaneous gun boxes on top of the safe, the door to
21 the safe was checked at the direction of DOC Matua and found to be unlocked (which
22 allowed probationer Frost access to firearms).

23 7. Inside of the safe, based on his training and experience, Detective Harris
24 observed in plain view and immediately recognized an obvious short barreled double
25 barrel shotgun, a 16 gauge Springfield Arms, with serial number T5675. [See, State's
26 Exhibit Number 1, a photograph showing the location of the shotgun within the safe
27 when the safe was opened.] The length of the barrel of the shotgun was subsequently

1 measured to be only 11 ¾ inches; and the overall length is less than 26 inches. [See,
2 State's Exhibit Number 2, a photograph of the subject shotgun and Number 3, a
3 photograph of the shotgun next to a measuring device.] Detective Harris could
4 immediately see that the short barreled shotgun measured less than his boot and was
5 significantly shortened from its original lawful length. In addition, several other rifles,
6 handguns, and miscellaneous caliber rounds were observed.

7 8. Detective Harris interviewed Flo Frost. Post Miranda, Detective Harris asked
8 Flo when the last time was she was in the southeast bedroom. She stated she rarely
9 goes in that room and could not remember when the last time was. Frost stated it was
10 her "junk room". Detective Harris asked her about the gun safe in the room and she
11 said it was her husband's (Michael James Manning's) safe. Frost also stated that the
12 firearms were defendant Manning's hobby. Frost further stated that she never touches
13 the guns.

14 9. Later on the same day, defendant Michael James Manning was contacted
15 by Frost to come home to watch their child while she went with the officers. When
16 Manning arrived at the residence, Detective Harris spoke with Manning. Manning was
17 never detained or told he could not leave. Manning stated that the various firearms,
18 including the subject shotgun, belonged to him. Manning stated that he had purchased
19 the subject shotgun at a gun show. Manning stated that he was not a licensed gun
20 dealer nor was he licensed for specialty guns. When Detective Harris commented that
21 he did not believe that Manning bought the subject shotgun at a gun show, Manning
22 replied that when he bought the subject shotgun at a gun show he bought it "under the
23 table." Manning then stated that he should have known that \$100 for a shotgun was too
24 good to be true.

25 10. On May 19, 2010, Officer Aaron Gibson of the Vancouver Police
26 Department conducted a function test on the subject short barreled shotgun. Pursuant
27 to a function test for operability, Officer Gibson found that the subject shotgun was

1 operable and capable of firing a projectile by an explosive.

2
3 11. The acts of the defendant hereinabove described occurred in Clark
4 County, State of Washington, on February 8, 2010.

5 Based upon the foregoing Findings of Fact, the Court enters the following
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8 CONCLUSIONS OF LAW:
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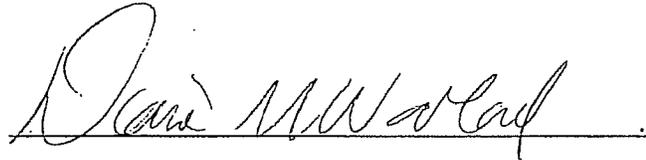
- 10 1. The court has jurisdiction of the Defendant and the subject matter.
11 2. The defendant did knowingly possess a short-barreled shotgun, to wit: a 16
12 gauge Springfield Arms shotgun, which had a barrel length of 11 ¾ inches, knowing that
13 the shotgun was a short-barreled shotgun.
14 3. A short-barreled shotgun means having one or more barrels less than 18 inches
15 in length and any weapon made from a shotgun by any means of modification if such
16 modified weapon has an overall length of less than 26 inches.
17 4. The defendant is therefore guilty of the crime of Possession of a Short-Barreled
18 Shotgun, as charged in Count 1 of the Information.
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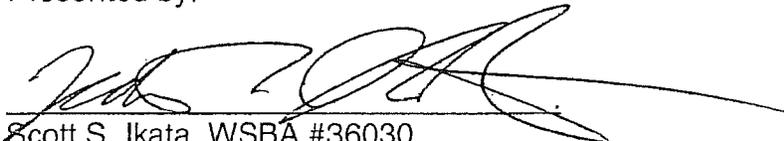
1 5. Judgment and Sentence should be entered accordingly.

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3 DONE in open Court this 5 day of October, 2011.

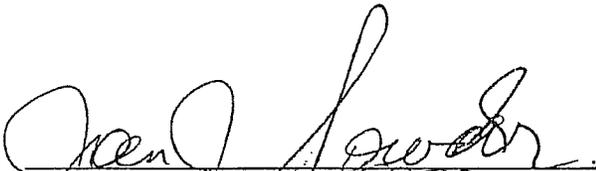
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7 JUDGE OF THE SUPERIOR COURT

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9 Presented by:

10
11 
12 Scott S. Ikata, WSBA #36030
13 Deputy Prosecuting Attorney

14
15 Copy received, approved as to form only for entry
16 this ___ day of October, 2011.

17
18 
19 Jeff Sowder, WSBA# 5072
20 Attorney for Defendant

21
22 
23 Michael James Manning
24 Defendant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 42691-9-II
)	
MICHAEL MANNING,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF MARCH 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL MANNING
3311 CANYON CREEK ROAD
WASHOUGAL, WA 98671

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MARCH 2012.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

March 30, 2012 - 12:22 PM

Transmittal Letter

Document Uploaded: 426919-Appellant's Brief.pdf

Case Name: Michael Manning

Court of Appeals Case Number: 42691-9

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: Appellant's

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: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

prosecutor@clark.wa.gov