

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ROBERT M. HEATER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA
COUNTY

THE HONORABLE BRIAN ALTMAN

BRIEF OF RESPONDENT

ADAM NATHANIEL KICK
Skamania County Prosecuting Attorney

YARDEN F. WEIDENFELD
Chief Criminal Deputy Prosecuting Attorney
Attorney for Respondent

Skamania County Prosecuting Attorney
P.O Box 790
240 N.W. Vancouver Ave.
Stevenson, Washington 98648

TABLE OF CONTENTS

A. ISSUES PRESENTED.....1

B. STATEMENT OF THE CASE.....1

 1. PROCEDURAL FACT.....1

 2. SUBSTANTIVE FACTS.....5

C. ARGUMENT.....12

 1. DEPUTY NOLAN'S AFFIDAVIT ESTABLISHES PROBABLE CAUSE THAT EVIDENCE OF A CRIME WOULD BE FOUND IN THE APPELLANT'S VEHICLE..... 12

 2. THE APPELLANT'S CONVICTION SHOULD NOT BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL BASED UPON THE SUPPRESSION HEARING HAVING BEEN HEARD BY A JUDGE PRO TEM, SINCE HE WAS DULY APPOINTED BY THE ELECTED SUPERIOR COURT JUDGE AND AGREED TO BY BOTH PARTIES.....19

 3. THE EVIDENCE PRESENTED AT THE APPELLANT'S TRIAL DID ENTITLE THE JURY TO FIND THE APPELLANT GUILTY BECAUSE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, IT ESTABLISHED THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.....25

D. CONCLUSION.....29

TABLE OF AUTHORITIES

Page

Table of Cases

WASHINGTON CASES

<u>Burton v. Ascol</u> ,.....	23-24
105 Wn.2d 344, 715 P.2d 110 (1986)	
<u>Detention of Petersen v. State</u> ,.....	14
145 Wn.2d 789, 42 P.3d 952 (2002)	
<u>In re Detention of Jones</u> ,.....	14
149 Wn. App. 16, 201 P.3d 1066 (2009)	
<u>National Bank of Washington, Coffman-Dobson Branch v. McCrillis</u> ,.....	19
15 Wn.2d 345, 130 P.2d 901 (1942)	
<u>State v. Belgarde</u> ,.....	22
62 Wn. App. 684, 815 P.2d 812 (1991), affirmed, 119 Wn.2d 711, 837 P.2d 599 (1992)	
<u>State v. Cole</u> ,.....	13
128 Wn.2d 262, 906 P.2d 925 (1995)	
<u>State v. Fisher</u> ,.....	13
96 Wn.2d 962, 639 P.2d 743 (1982), cert. denied, <u>Fisher v. Washington</u> , 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.1355 (1982)	
<u>State v. Freeman</u> ,.....	15
47 Wn. App. 870, 737 P.2d 704 (1987), review denied, 108 Wn.2d 1032 (1987)	
<u>State v. Gross</u> ,.....	18-19
57 Wn. App. 549, 789 P.2d 317 (1990), <u>petition for review denied</u> ,	

115 Wn.2d 1014, 797 P.2d 513 (1990), <u>overruled on other grounds,</u> <u>State v. Thein,</u> 138 Wn.2d 133, 977 P.2d 582 (1999)	
<u>State v. Helmka,</u>	15
86 Wn.2d 91, 542 P.2d 115 (1975)	
<u>State v. J-R Distribs., Inc.,</u>	13
111 Wn.2d 764, 765 P.2d 281 (1988), <u>cert. denied,</u> <u>Reece v. Washington,</u> 493 U.S. 812, 110 S.Ct. 59, 107 L.Ed. 26 (1989)	
<u>State v. Neth,</u>	14-15, 17
165 Wn.2d 177, 196 P.3d 658 (2008)	
<u>State v. Osloond,</u>	24
60 Wn. App. 584, 805 P.2d 263 (1991), <u>petition for review denied,</u> 116 Wn.2d 1030, 813 P.2d 582 (1991)	
<u>State v. Perez,</u>	13, 15
92 Wn. App. 1, 963 P.2d 881 (1998), <u>review denied,</u> 137 Wn.2d 1035, 980 P.2d 1286 (1999)	
<u>State v. Robinson,</u>	22-24
64 Wn. App. 201, 825 P.2d 738 (1992)	
<u>State v. Sain,</u>	20-24
34 Wn. App. 553, 663 P.2d 493 (1983)	
<u>State v. Salinas,</u>	25
119 Wn.2d 192, 829 P.2d 1068 (1992)	
<u>State v. Tarter,</u>	16
111 Wn. App. 336, 44 P.3d 899 (2002)	
<u>State v. Trasvina,</u>	13
16 Wn. App. 519, 557 P.2d 368 (1976),	

<u>review denied,</u> 88 Wn.2d 1017 (1977)	
<u>State v. Washington,</u>	25
135 Wn. App. 42, 143 P.3d 606 (2006), <u>petition for review denied,</u> 160 Wn.2d 1017, 161 P.3d 1028 (2007)	
<u>State v. Young,</u>	13
123 Wn.2d 173, 867 P.2d 593 (1994)	

FEDERAL CASES

<u>Ornelas v. United States,</u>	14
517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)	
<u>United States v. Conley,</u>	16
4 F.3d 1200 (3 rd Cir. 1993), <u>cert. denied,</u> <u>Conley v. United States,</u> 510 U.S. 1177, 114 S.Ct. 1218, 127 L.Ed. 564 (1994)	
<u>United States v. Harris,</u>	12
403 U.S. 573, 91 S. Ct. 2075, 29 L.Ed.2d 723 (1971)	
<u>United States v. Ventresca,</u>	12
380 U.S. 102, 85 S.Ct. 741, 13 L.Ed. 684(1965)	

Rules, Statutes, and Regulations

Washington State

Washington State Constitution, Article IV, Section 5.....	22
Washington State Constitution, Article IV, Section 7.....	19, 23
CrR 3.5.....	1
CrR 3.6.....	1-2
RCW 2.08.180.....	19

Federal

U.S. Constitution, Amendment 5.....8

A. ISSUES PRESENTED

1. Does the search warrant issued in this case establish probable cause that evidence of a crime would be found in the appellant's car?
2. Should the appellant's conviction be reversed and the case remanded for a new trial based upon the suppression hearing having been heard by a Judge Pro Tem?
3. Viewed in the light most favorable to the State, did the evidence presented at the appellant's trial entitle the jury to find the appellant guilty beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On November 17, 2010, the appellant was charged by information with one count of Violation of the Uniform Controlled Substances Act—Possession of Methamphetamine, CP 1-2. Both parties filed omnibus applications on January 13, 2011, CP 4-10. A stipulated order setting motions under CrR 3.5 and CrR 3.6 was filed on the same date. CP 11. The State filed a Notice of Intent to Offer Defendant's Statements under CrR 3.5. CP 12.

On February 11, 2011, the appellant filed a motion to suppress evidence and dismiss under CrR 3.6. CP 13-14. On the same date, a memorandum of authorities was filed to support the motion. CP 15-42. In one of several arguments, the appellant argued that the search warrant issued in this case was not supported by probable cause, CP 30-33. The State replied with its own memorandum on February 25, 2011. CP 44-55.

On February 28, 2011, Superior Court Judge Brian Altman appointed E. Thompson Reynolds as a duly constituted Judge Pro Tem in this cause, CP 63. The parties consented to this appointment on the same date. CP 64.¹

An evidentiary hearing was conducted before Judge Reynolds on February 28, 2011. CP 56-58, RP 1-115. Skamania County Sheriff Deputies Chad Nolan, Russ Hastings, and Summer Scheyer testified for the State. RP 2-86. The appellant offered no testimony. RP 86. After hearing argument from both attorneys, RP 86-105, the Court issued its ruling, RP 105-115. The Court denied the appellant's motion to suppress evidence and dismiss, RP 114.

¹ These two documents are file stamped April 4, 2011 and April 12, 2011 respectively. However, according to the documents themselves, they were both signed on February 28, 2011.

Among other Findings, the Court ruled that the search warrant was supported by probable cause. Id.

On March 3, 2011, the appellant waived speedy trial, agreeing to a new commencement date of March 3, 2011. CP 59-60. On April 28, 2011, the appellant again waived speedy trial, agreeing to a new commencement date of April 28, 2011. CP 65-66.

On June 9, 2011, the appellant filed Motions in Limine, CP 67-74, a Memorandum of Authorities in Support of Exclusion of Evidence Re Defendant's Character, CP 75-76, and a Memorandum of Authorities in Support of Admission of Evidence, CP 77-79. On June 10, 2011, the State filed its Motions in Limine, CP 80-85. On June 30, 2011, the appellant again waived speedy trial, agreeing to a new commencement date of June 30, 2011, CP 86-87. On September 1, 2011, the appellant again waived speedy trial, agreeing to a new commencement date of September 1, 2011, CP 88-89.

On September 20, 2011, the appellant filed a renewed motion to suppress evidence and dismiss, partially asking for reconsideration of the Court's February 28, 2011 denial and

partially raising new grounds. CP 90-217. The State replied on September 26, 2011. CP 218-225.

On September 27, 2011, a hearing on the appellant's renewed motion to suppress evidence and both parties' motions in limine was conducted before Judge Altman. CP 226-228, RP 116-164. Judge Altman indicated he would refer the parts of the appellant's motion to suppress evidence and dismiss that constituted a motion for reconsideration back to Judge Reynolds, CP 226, RP 116-119. However, Judge Altman heard the part of the motion raising new grounds, CP 226-227, RP 119-131. Judge Altman denied the motion. CP 227, RP 131.

Judge Altman then heard both parties' motions in limine. CP 227-228, RP 131-164. Orders were entered memorializing his rulings, CP 229-231, 238-239.

On October 6, 2011, Judge Reynolds denied the appellant's motion for reconsideration of his denial of the appellant's motion to suppress evidence. CP 232.

Jury trial was commenced on October 10, 2011 before Judge Altman. RP 165-324. Skamania County Sheriff Deputies Chad Nolan, Summer Scheyer, and Russ Hastings testified for the State. RP 182-276. Bruce Siggins from the Washington State

Patrol Crime Laboratory also testified for the State. RP 276-296.

The State then rested its case. RP 296.

At the conclusion of the State's case-in-chief, the appellant moved to dismiss based on insufficiency of evidence. CP 264-266, RP 297-300. The Court denied the appellant's motion. RP 300. The appellant then presented two witnesses, RP 301-310, and then rested its case, RP 311-312. The jury was then dismissed for the day, to return the next day (October 11, 2011). RP 312-313. The Court then went over jury instructions with the parties for the rest of the day, RP 314-324.

On October 11, 2011, the Court reads its instructions on the law to the jury, RP 333, CP 267-286. Both the State and the appellant then presented closing arguments. RP 333-365. The jury returned a verdict of Guilty as charged. CP 287, RP 370.

On October 27, 2011, the appellant was sentenced within the standard range, CP 292-293, 294-305, RP 373-386. This appeal follows.

2. SUBSTANTIVE FACTS

On October 15, 2010, Skamania County Sheriff Deputy Chad Nolan was on patrol facing southbound on Skye Road where it intersects with Washougal River Road and Huckins-Bohman

Road. RP 183, 185. He was in uniform in a fully marked patrol car. RP 185. This location is in Skamania County. RP 273.

While on patrol, Deputy Nolan observed three vehicles in a convoy all come to a stop off Huckins-Bohman Road to turn north into Washougal River Road. RP 185. It was almost 11:00 PM. RP 191, 246.

The first vehicle, later found to be driven by the appellant, was a Toyota truck towing a tow dolly without functioning tail-lights, RP 185-186, as required by law, RP 191. There was nobody else in this vehicle. RP 246.

Deputy Nolan regularly saw the appellant driving this vehicle. RP 207. In fact, while the vehicle was not registered to the appellant, every time Deputy Nolan had seen the appellant driving, he was driving that vehicle. RP 221. There were at least three such times (including the current time, RP 223), the first a couple of years prior and the last just the previous week. RP 221-222. Deputy Nolan had never seen the appellant in any other vehicle. RP 222. He had never had contact with that vehicle driven by any other person. RP 223. Deputy Scheyer had also contacted the appellant in the same vehicle the previous year. RP 261-262.

All three vehicles turned left into Washougal River Road, RP 186. The appellant's tow dolly was "really, really close" to the second car. RP 187.

Deputy Nolan pulled in behind the cars, RP 186 passed the third car easily, RP 186-187, and came up to the second car with his lights activated, RP 188. The appellant's truck pulled away as the second car slowed down, but the second car was still not pulling over. Id. Deputy Nolan activated his siren to get around the second car. Id. The appellant's truck passed a good place to park, made almost a 180-degree turn, and pulled in and parked in the opposite side of the road. RP 188-190. The appellant started to step out of his truck, and Deputy Nolan parked his patrol car. RP 190.

Deputy Nolan walked up to the appellant and asked for his information, advising him of the reason for the stop (lack of functioning trailer lights). RP 191. The appellant said that the other cars were following him so closely because he knew he did not have lights. Id. The appellant provided Deputy Nolan with a

Washington State Identification Card but not a Driver's License.

RP 192. The appellant was placed under arrest. RP 193.²

The car that had been directly behind the appellant's, driven by Sara Lewis, RP 195, had also stopped, RP 193. Deputy Nolan believed that Lewis and the appellant were "unofficially . . . romantically involved." RP 194. Also, the past two times that he had had contact with Lewis, the appellant had showed up on scene to pick up her or her vehicle. Id. The most recent of these times was the previous week. Id. On one of these occasions, the appellant picked her up in the vehicle he was driving in this incident. RP 222.

Lewis was also arrested for unrelated reasons, RP 193. Deputy Russ Hastings, who had arrived to assist, took custody of her while Deputy Nolan arrested the appellant. RP 193, 273-274.

In the presence of the jury, Lewis asserted her Fifth Amendment rights and refused to answer any questions about this incident. RP 301-302.

The final car was driven by Jaime Stradford, RP 223, 224. He had known the appellant for about ten years. RP 303-304, 308.

² While the reason for the arrest was stricken from the trial testimony, RP 192, it was for Driving with License Suspended in the Third Degree, as testified to without being stricken at the February 28, 2011 suppression hearing, RP 12-13.

According to Stradford, Lewis was the appellant's "girlfriend," RP 304. Around that time, Stradford was at the appellant's home about once a week. RP 310. Lewis was at the appellant's home every time Stradford was there. Id.

According to Stradford, all three vehicles belonged to the appellant. RP 307-308. However, the truck was the vehicle the appellant drove the most. RP 308, 310. Stradford had never seen Lewis driving it. RP 310.

Stradford was helping the appellant transport a vehicle, so the appellant could fix an electrical issue with it. RP 304. According to him, Lewis was initially in the passenger seat of the appellant's truck while the appellant was "messing with the trailer and getting the car ready to drive," RP 305. She got out about five minutes before they all left and got into a different vehicle. Id. The three of them then drove to Skamania County. RP 306.

Deputy Summer Scheyer had also arrived to assist. RP 193, 253. She had recently attended a 200-hour training for narcotics K-9 and is a certified dog handler, or K-9 handler, with a narcotics dog. RP 250-251. Her dog, named Rocket, is also certified, RP 251, and is a trained K-9 unit for narcotics. RP 252. The training

entails having the dog recognize different narcotics and being proficient in detecting four major narcotics. RP 251.

Deputy Scheyer ran Rocket around both the appellant's truck and Lewis's vehicle, RP 194-195, 255-256, giving a command for him to sniff the outside, RP 254, 255. When the dog sits down, that indicates it has smelled the odor of marijuana, cocaine, methamphetamine, or heroin. RP 255. Rocket gave this positive alert on the appellant's vehicle but not on Lewis's vehicle. RP 195, 256-257. He sat "at the passenger side door right at the seam" of the appellant's vehicle. RP 257. Deputy Scheyer informed Deputy Nolan. Id.

The appellant's vehicle was sealed with evidence tape and transported by Bob's Towing to a secure facility. RP 196, 204. Deputy Hastings followed behind the vehicle and left it in a secured location with all seals intact. RP 274-275.

Deputy Nolan applied for a search warrant to search the appellant's vehicle. RP 195, 204-205, CP 35-39. The application was granted. RP 195, 205.

On October 18, 2010, Deputies Nolan and Scheyer executed the search warrant on the appellant's truck, RP 205-206, 257-258, first making sure the tape was all intact, RP 205, and that nobody

was inside the truck, RP 205-206, 257. The seals showed no evidence of tampering. RP 209. Deputy Nolan opened the door, RP 206, and searched the truck, RP 211, with Deputy Scheyer assisting, RP 258.

Upon folding down the arm-rest "right directly next to the driver," Deputy Nolan found "a CD case which, opened up, is a digital scale that had a bunch of methamphetamine residue on it." RP 210. Deputy Nolan had never seen as much methamphetamine residue on a scale as in this case. RP 211. The scale was in full working order. Id. Deputy Nolan searched this location because he has found it is typical that people do not leave things out in the open when they are trying to conceal them. RP 212-213.

On the passenger side floorboard was a large black bag. RP 212, 258. Deputy Scheyer took that out and looked through it, RP 258. Inside she located "a bindle of methamphetamine," RP 212. It was all wrapped up and secured, RP 259, in paper and then twine, RP 265. Deputy Scheyer gave it to Deputy Nolan. RP 260.

The bag also contained a legal document with both the appellant's name and Lewis's name. RP 213, 238. It contained a diary apparently written by Lewis. RP 239. It contained some

“female items,” RP 238, 264, and “things that indicated that it was a male’s bag, too.” RP 238.

The two items of suspected methamphetamine were placed under seal and sent to the crime lab for testing. RP 214, 221, 242. Bruce Siggins, supervisor of the Chemistry Section at the Washington State Patrol Crime Laboratory, conducted two separate tests on these items. RP 276-277, 282-283, 286-288. Both tests were done to determine the nature of the substance they contained. RP 283-284. The tests yielded consistent results, i.e., that the items contained methamphetamine. RP 285, 286, 289.

C. ARGUMENT

1. DEPUTY NOLAN’S AFFIDAVIT ESTABLISHES PROBABLE CAUSE THAT EVIDENCE OF A CRIME WOULD BE FOUND IN THE APPELLANT’S VEHICLE.

Basic to the review of search warrants is the principle that search warrants are a favored means of police investigation, and supporting affidavits or testimony must be viewed in a manner which will encourage their continued use. United State v. Harris, 403 U.S. 573, 577, 91 S. Ct. 2075, 29 L.Ed.2d 723 (1971)(opinion of Mr. Chief Justice Burger joined by Justices Black, Blackmun, and Stewart) (citing United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed. 684 (1965)).

When a search warrant is properly issued by a judge, the party attacking it has the burden of proving its invalidity. State v. Fisher, 96 Wn.2d 962, 967, 639 P.2d 743 (1982), cert. denied, Fisher v. Washington, 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed. 1355 (1982); State v. Trasvina, 16 Wn. App. 519, 523, 557 P.2d 368 (1976), review denied, 88 Wn.2d 1017 (1977). Until recently, search warrants were reviewed for abuse of discretion. For instance, in State v. Cole, the State Supreme Court ruled that a

magistrate's determination that a warrant should issue is an exercise of judicial discretion that is reviewed for abuse of discretion. This determination generally should be given great deference by a reviewing court.

128 Wn.2d 262, 286, 906 P.2d 925 (1995). See also State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994)("Generally, the probable cause determination of the issuing judge is given great deference."); State v. J- R Distribs., Inc., 111 Wn.2d 764, 774, 765 P.2d 281 (1988), cert. denied, Reece v. Washington, 493 U.S. 812, 110 S.Ct. 59, 107 L.Ed. 26 (1989)("[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant.")

However, more recent case law states that a search warrant is examined de novo. State v. Perez, 92 Wn. App. 1, 4, 963 P.2d 881 (1998), review denied, 137 Wn.2d 1035, 980 P.2d 1286 (1999).

The State Supreme court has explained that its controlling authority, "as distinguished from the Court of Appeals, favors de novo review," Detention of Petersen v. State, 145 Wn.2d 789, 799, 42 P.3d 952 (2002), superseded by statute on other grounds as stated in In re Detention of Jones, 149 Wn. App. 16, 28, 201 P.3d 1066 (2009). In Petersen, the State Supreme Court further explained that under United States Supreme Court standards, the determination of the "'historical facts' in the case, i.e., the events 'leading up to the stop or search,'" is given "'due weight' on appellate review," while the determination of "whether these historical facts amount to probable cause . . . is subject to de novo appellate review." 145 Wn.2d at 799-800, quoting Ornelas v. United States, 517 U.S. 690, 695, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996).

There are two necessary probable cause determinations when analyzing a search warrant:

probable cause that the defendant is involved in criminal activity and [probable cause] that evidence of the criminal activity will be found in the place to be searched.

State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

"Probable cause for a search requires a nexus between criminal

activity and the item to be seized and between that item and the place to be searched.” Id. at 183.

In the review of search warrants, common sense and reasonableness are key:

In performing his independent, detached function, the magistrate is to operate in a commonsense and realistic fashion. He is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth.

State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Hypertechnical interpretations are to be avoided when reviewing search warrant affidavits. State v. Freeman, 47 Wn. App. 870, 873, 737 P.2d 704 (1987), review denied, 108 Wn.2d 1032 (1987). See also Perez, 92 Wn. App. at 4 (“We examine the warrant de novo and evaluate it in a commonsense, practical manner, rather than hypertechnically.”)

Given these standards, it is clear that Deputy Nolan’s affidavit for a search warrant provided probable cause for the magistrate to issue the warrant. In addition to the positive K9 alert on the appellant’s vehicle by Deputy Scheyer’s K9 “Rocket”, CP 38, Deputy Nolan articulated the following facts:

- A search of the appellant’s person yielded a “small capsule” in his pocket “with a white granule substance in it” that the

appellant said was "used to help pass urine tests," CP 36-37.

- The appellant was "concerned for his truck," CP 37.
- Deputy Nolan knew that the appellant had a "history with drugs," which, coupled with the appellant's "decision to pull into a residence he didn't live at and get out of his truck to talk," raised Deputy Nolan's suspicions about the contents of the truck.³ CP 38.

While these facts themselves may or may not support probable cause for the issuance of the search warrant, certainly in conjunction with the positive K9 alert, probable cause was established.

The appellant argues that the affidavit is insufficient since it fails to explain the actual training received by K9 "Rocket" and how

³ In State v. Tarter, 111 Wn. App. 336, 341, 44 P.3d 899 (2002), the Court of Appeals states that "[p]rior convictions . . . may be used as one factor when determining whether probable cause is present," but that there is no controlling authority concerning the effect of prior arrests. The Court of Appeals does not decide this issue but goes on to note that other states do permit the consideration of prior arrests as a factor in determining probable cause. Id. They are also apparently permitted in the federal system. See United States v. Conley, 4 F.3d 1200, 1207 (3rd Cir. 1993), cert. denied, Conley v. United States, 510 U.S. 1177, 114 S.Ct. 1218, 127 L.Ed. 564 (1994) ("The use of prior arrests and convictions to aid in establishing probable cause is not only permissible [citations omitted] but is often helpful.") Here, the appellant's behavior, coupled with Deputy Nolan's knowledge of his prior drug history, should be considered since it is highly suggestive of guilty knowledge (with regard to something in the vehicle).

the training enables it to identify illegal drugs, communicate that information, and distinguish between illegal and legal drugs. Brief of Appellant at 15-17. The appellant cites no case law in support of his argument.

In Neth, the State Supreme Court is called to decide a different issue, namely, whether a dog sniff amounts to a search under the Washington Constitution, 165 Wn.2d at 181. However, the Court was unable to reach that issue because the trial court had already declined to consider the dog sniff in its determination of probable cause by ruling that there was "inadequate foundation that the dog was reliable," Id. The affidavit in that case stated merely that the dog "was trained to recognize the odor of illegal narcotics," Id. The State Supreme Court therefore ruled that "the dog sniff is not Before us." Id.

In any case, the affidavit in the current case contains much more detail:

K9 Rocket's narcotics experience is as follows:
K9 Rocket is trained in the detection of Marijuana, Methamphetamine, Cocaine, and Heroin. He has met the Washington State standards, per Washington Administrative Code, of 200 hours of narcotics training. K9 Rocket is W.A.C certified and has met Clark County Sheriff's Office K9 standards for narcotics detection. He has been utilized in four

narcotics searches and located illegal narcotics one time.

CP 38. This information is not “conclusory,” as the appellant claims, Brief of Appellant at 16, but explains the drugs Rocket is trained to detect, how many training hours he had, his certification under the Washington Administrative Code, and his history. While a magistrate may not have been expected to know Clark County Sheriff's Office standards, certainly a magistrate should be presumed to have at least constructive knowledge of the publicly available Washington Administrative Code.

Furthermore, this information articulates the four drugs “Rocket” is trained to detect. There is no basis to assume that the dog would confuse these four drugs it is trained to detect with legal drugs.

The foundation articulated in the current case is similar to that supporting a search warrant in State v. Gross, 57 Wn. App. 549, 551-552, 789 P.2d 317 (1990), petition for review denied, 115 Wn.2d 1014, 797 P.2d 513 (1990), overruled on other grounds, State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999), where the Court of Appeals found the following to be “more than sufficient”:

The transcript in support of the warrant, which was telephonic, states that the dog was “trained for the

detection of marijuana, hashish, cocaine, and heroine"; "certified by the Washington State Police Canine Association and the Washington State Criminal Justice Training Commission"; [footnote omitted] had been "utilized in cases to detect narcotics on other occasions"; and was "qualified in both local courts and in Federal courts" as an "expert narcotics dog".

Similarly, the affidavit in the current case is sufficient for a probable cause finding.

2. THE APPELLANTS CONVICTION SHOULD NOT BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL BASED UPON THE SUPPRESSION HEARING HAVING BEEN HEARD BY A JUDGE PRO TEM, SINCE HE WAS DULY APPOINTED BY THE ELECTED SUPERIOR COURT JUDGE AND AGREED TO BY BOTH PARTIES.

Under Article IV, Section 7 of the Washington State Constitution:

[a] case in the superior court may be tried by a judge pro tempore . . . with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case. . .

This language is repeated almost verbatim in RCW 2.08.180. The power of a Judge Pro Tem derives from the consent of the parties, without which there is no jurisdiction. National Bank of Washington, Coffman-Dobson Branch v. McCrillis, 15 Wn.2d 345, 357-359, 130 P.2d 901 (1942).

The appellant's February 28, 2011 suppression hearing was heard before Judge Pro Tem E. Thompson Reynolds⁴, RP 1-115, CP 56-58. Judge Reynolds was duly appointed by the elected Superior Court Judge, Brian Altman. CP 63. Judge Reynolds also signed the required oath. Id. Attorneys for both parties also signed a consent to his hearing the case. CP 64.

The procedures of the State Constitution and statute having been followed, Judge Reynolds had jurisdiction to hear the case. However, the appellant claims that the consent signed by both parties' attorneys was insufficient and that it needed to be signed by the appellant himself. Brief of Appellant at 20-23. He analogizes to waivers of jury trial, waivers of right to counsel, and guilty pleas, Id. at 23-26.

The appellant relies primarily on State v. Sain, 34 Wn. App. 553, 663 P.2d 493 (1983). Brief of Appellant at 20-23. In Sain, one attorney was appointed to represent three co-defendants, 34 Wn. App. at 554. He twice stated orally that a certain Judge Pro Tem would be acceptable. Id. This attorney was later allowed to

⁴ While it is apparently of no consequence to the law at issue in this case, it should be noted that the appellant incorrectly states Judge Reynolds "had not then nor previously been elected as either a superior court judge or a judge of a court of limited jurisdiction." Brief of Appellant at 18. In fact, Judge Reynolds

withdraw as to two of the co-defendants but remained as counsel for the third. Id. at 555.

The day before trial, another attorney was appointed to represent the remaining two co-defendants. Id. This attorney's motion to continue trial was denied. Id. Both attorneys signed written stipulations to having the Judge Pro Tem hear the trial "with the understanding the question of the defendants' consent would be raised the following morning." Id. The original attorney representing the one co-defendant added in writing to the stipulation that his client "is to sign later," Id.

The next day, the two defendants represented by the new attorney signed the stipulation, while the third "refused to consent or sign the stipulation," Id. The new attorney renewed his motion to continue which was again denied. Id. His clients then "orally withdrew their consent," to have the Judge Pro Tem hear the case. Id.

The Court of Appeals did not decide whether the oral withdrawal of consent by the two co-defendants deprived the trial court of jurisdiction, Id. at 558, but did rule that the third defendant's

was, prior to Judge Altman, the longstanding Superior Court Judge for Skamania County.

refusal to consent or sign the stipulation “deprived the court of jurisdiction to proceed” as to him, Id. at 556.

While an attorney is impliedly authorized to waive procedural matters, a client's substantial rights may not be waived without that client's consent. [citations omitted] We find the right under Const. art. 4, § 5, to be tried in a court presided over by an elected superior court judge accountable to the electorate is a substantial right. Thus, the requirement of Mr. Sain's written consent could not be waived by Mr. Burchard's unauthorized statements.

Id. at 556-557.⁵

The current case is distinguishable from Sain in that there is no record of the appellant ever having refused consent to have Judge Pro Tem Reynolds hear his suppression motion. In those circumstances, his attorney's written stipulation is sufficient, as has been found several times subsequent to Sain.

In State v. Robinson, 64 Wn. App. 201, 203, 825 P.2d 738 (1992), the defendant's counsel “stipulated in writing to a judge pro tempore, but did not obtain consent or authorization to do so from his client.” On appeal, he cited Sain in contending

that the constitutional right to be tried by an elected superior court judge accountable to the electorate is a

⁵ In State v. Belgarde, 62 Wn. App. 684, 695 (footnote 3), 815 P.2d 812 (1991), affirmed, 119 Wn.2d 711, 837 P.2d 599 (1992), the Court of Appeals noted that “it is debatable whether a litigant's right to an elected judge is substantive rather than procedural.”

"substantial" right which an attorney cannot waive without his client's consent.

Id. The Court of Appeals disagreed:

Robinson's argument and the decisions he cites [footnote omitted] overlook the plain language of article 4, sec. 7, which expressly allows either the parties *or their attorneys* to stipulate to use of a judge pro tempore and to thereby waive the right to an elected judge. *The constitution does not require an attorney to obtain his client's consent Before signing such a stipulation. Therefore, whether the right to an elected judge is a "substantial" right [footnote omitted] is irrelevant.*

Id. at 203-204 (emphasis added).

The Court in Robinson also noted that in Sain, the defendant's attorney qualified his written stipulation with the notation that it was "subject to his client's signature," a condition not asserted by Robinson's counsel, Robinson, 64 Wn. App. at 205 (footnote 1). Similarly, the appellant's stipulation contains no such condition. CP 64.

The Court concluded that

an attorney's "general authority to try the case" authorizes him or her to stipulate to a judge pro tempore on behalf of the client, even if the client is not aware that the judge is a judge pro tempore. Thus, an attorney need not obtain a client's specific consent to a judge pro tempore.

Robinson, 64 Wn. App. at 205, quoting Burton v. Ascol, 105 Wn.2d 344, 352, 715 P.2d 110 (1986).

Even more analogous to the current case is State v. Osloond, 60 Wn. App. 584, 586, 805 P.2d 263 (1991), Petition for Review Denied, 116 Wn.2d 1030, 813 P.2d 582 (1991), where the defendant did “not argue that his attorney signed the stipulation without his consent,” but “merely that he did not personally sign the stipulation or state his consent on the record.” The Court of Appeals held that neither the State Constitution nor the statute “state that a defendant's additional personal consent is necessary.” Id.

The Court went on to find that “Sain is not on point” because, unlike in Sain, Osloond did “not allege that his attorney consented to the appointment of the judge pro tempore without authority to do so” but “merely argues that neither his signature nor a record of his oral consent is present in the record,” Osloond, 60 Wn. App. at 586-587. The Court concluded that “this assertion is insufficient to challenge the validity of the stipulation to the appointment of the judge pro tempore,” Id. at 587.

Similarly, the appellant only makes the bare assertion rejected in Osloond. Therefore, it is insufficient to challenge the

jurisdiction of Judge Pro Tem Reynolds to have heard his suppression motion.

3. THE EVIDENCE PRESENTED AT THE APPELLANT'S TRIAL DID ENTITLE THE JURY TO FIND THE APPELLANT GUILTY BECAUSE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, IT ESTABLISHED THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

The appellant challenges the guilty verdict on the grounds of sufficiency of the evidence, Brief of Appellant at 27-29. Specifically, he argues that there is not sufficient evidence that he possessed either quantity of methamphetamine. Id. at 29.

In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [citation omitted] "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." [citation omitted]

State v. Washington, 135 Wn. App. 42, 48-49, 143 P.3d 606

(2006), Petition for Review denied, 160 Wn.2d 1017, 161 P.3d

1028 (2007), quoting State v. Salinas, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992).

Here, the jury was given a Petrich Instruction, CP 284, entitling it to find the appellant guilty based on possession of *either*

the bundle of methamphetamine in the black bag or the methamphetamine residue on the scale, as long as all 12 jurors agreed that he possessed at least one of them. Seen in the light most favorable to the State, the evidence establishes that:

- The defendant was driving the vehicle in which both quantities of methamphetamine were contained, RP 185-186.
- Nobody else was in the appellant's vehicle when it was stopped, RP 246.
- The appellant regularly drove this vehicle as his primary vehicle, RP 221-222, 261-262, 308, 310.
- The appellant started getting out of the vehicle as soon as he stopped, RP 190.
- The methamphetamine residue was found on a scale concealed behind the vehicle's arm-rest "right directly next to the driver" [i.e., the appellant], RP 210.
- The methamphetamine bundle was found in a black bag in the vehicle, RP 212, 258, that also contained a legal document with the appellant's name, RP 213, 238, and things indicating it was a male's bag, RP 238.

With all inferences drawn in favor of the State, this evidence is more than enough to establish that the appellant possessed both, or certainly at least one, of the items containing methamphetamine. The jury was properly instructed that in deciding whether the appellant constructively possessed the items, it could consider all relevant circumstances including his ability to take actual possession of them, his capacity to exclude others from their possession, and whether he had dominion and control over the premises, CP 280. All of these circumstances could rationally have been found, given the evidence as articulated above.

While there was also evidence presented that could lead one to believe the items, or at least the one in the black bag, belonged to Sara Lewis, the only question on appeal is whether the evidence, seen in the light most favorable to the State and with all inferences drawn in favor of the State, *could* lead a rational juror to find the items (or at least one of them) was possessed by the appellant. Certainly it could, given this standard.

Furthermore, given that evidence was presented of a close romantic relationship between the appellant and Lewis, RP 194, 304, the jury may properly have inferred that one or both of the items belonged to both the appellant and Lewis. Since the jury was

also properly instructed that “[d]ominion and control need not be exclusive to support a finding of constructive possession,” CP 280, it would still have been entitled to find the appellant possessed them.

Finally, the jury was instructed as to the affirmative defense of unwitting possession, CP 282. This defense required the appellant to establish by a preponderance of the evidence that he did not know he was in possession of methamphetamine. Id. The jury, instructed that “personal interest” is a factor in evaluating credibility, CP 269, was free to reject all of the evidence presented by the appellant, especially considering that both of his witnesses had a personal relationship with him: one as a girl-friend, RP 194, 304 and the other as a ten-year acquaintance, RP 303-304, 308.

In any case, other than Stradford’s bare testimony that Lewis had earlier been in the passenger seat while the appellant was getting the vehicle ready to drive, the appellant presented no evidence that he did not know he was in possession of methamphetamine. His behavior upon stopping would actually suggest that he *did* know. In any case, it was his burden to prove that he did not know. The jury was certainly free to reject this defense.

For these reasons, the evidence was sufficient to support the jury's verdict.

D. CONCLUSION

For the above reasons, this Court should affirm the trial court's denial of the appellant's motion to suppress evidence and should affirm the appellant's conviction.

DATED this 24th day of September, 2012.

RESPECTFULLY submitted,

ADAM KICK
Skamania County Prosecuting Attorney

By: *Yarden Weidenfeld*
YARDEN WEIDENFELD, WSBA 35445
Chief Deputy Prosecuting Attorney
Attorney for the Respondent

CERTIFICATE OF SERVICE

Electronic service was effected via the Division II upload portal upon opposing counsel:

jahays@qwestoffice.net

John A. Hays

1402 Broadway St.

Longview, WA 98632-3714

Yarden Weidenfeld
Yarden F. Weidenfeld, WSBA # 35445
September 24, 2012, City of Stevenson, Washington

SKAMANIA COUNTY PROSECUTOR

September 24, 2012 - 2:58 PM

Transmittal Letter

Document Uploaded: 427427-Respondent's Brief.pdf

Case Name: State of Washington v. Robert M. Heater

Court of Appeals Case Number: 42742-7

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: Respondent'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: _____

Comments:

No Comments were entered.

Sender Name: Yarden F Weidenfeld - Email: weidenfeld@co.skamania.wa.us

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

jahays@qwestoffice.net