

No. 48315-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

v.

KEVIN COX

BRIEF OF RESPONDENT

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A. Counterstatement of Assignments of Error

1. Has the State properly invoked this Court's jurisdiction without violating Mr. Cox' right to a speedy trial under the Sixth Amendment and CrR 3.3?
2. Did the trial court enter Findings of Fact and Conclusions of Law that are supported by substantial evidence?
3. Did the trial court err by concluding Officer Ponton recklessly omitted material facts, thereby defeating probable cause for the search warrant?

B. Statement of Facts

Kevin Cox was charged with Unlawful Possession of a Firearm in the Second Degree. CP, 4¹. The defense filed a motion to suppress pursuant to CrR 3.6 and *Franks v. Delaware, infra* CP, 38. The trial court held a hearing at which the arresting officer, Donald Ponton, testified about the circumstances that led to him petitioning for a search warrant of Mr. Cox' vehicle. RP, 1. A transcript of the telephonic search warrant was also available. CP, 23. The trial court held that the Officer Ponton twice

¹ It is worth noting that the State's Designation of Clerk's Papers fails to include either the charging document or the notice of appeal in violation of RAP 9.6(b)

conveyed to the magistrate that Mr. Cox “admitted that he had a firearm in the vehicle when those statements are clearly untrue and were made in reckless disregard of the truth and were not the actual statements and underlining circumstances that would be needed to support probable cause.” CP, 13. Based upon this conclusion, the trial court suppressed the firearm.

Rather than write a detailed statement of facts, Mr. Cox incorporates by reference the trial court’s Findings of Fact and Conclusions of Law, which contain the essential facts from the CrR 3.6 hearing. CP, 9-14; Appendix A. Each of these Findings is supported by substantial evidence and, taken as a whole, are sufficient for review by this Court.

Mr. Cox’ trial was scheduled for November 18, 2015. CP, 62. For reasons that are unclear from the record, there was no hearing on November 18, but there was one on November 19. On November 19, the Court set a hearing for November 25 and entered an order allowing Mr. Cox to travel to eastern Washington for Thanksgiving. CP, 56. On November 25, 2016, at the request of the prosecutor, the trial court entered an order finding that the CrR 3.6 ruling had the “practical effect of terminating the State’s case.” CP, 4. The State filed a notice of appeal on November 30, 2015. CP, 45. On December 18, 2015, the Court entered a

further order modifying the conditions of release. CP, 44 This order includes requirements that Mr. Cox keep the court updated on his address, not possess firearms or other dangerous weapons, maintain contact with his attorney, and not possess or consume illegal drugs. Of note, the State never asked for a stay of the trial, and one has never been entered. Mr. Cox remains under conditions of release, which effectively prevent him from hunting in any form, including bow hunting.

C. Argument

Before reaching the merits of the State's appeal, Mr. Cox objects to the procedural posture of this case. Mr. Cox was scheduled for trial on November 18, 2015. That date came and went without fanfare. On November 25, 2015, the State asked, and received, for a finding from the trial court that the court's pretrial ruling had the "practical effect of terminating the State's case." But the State did not terminate the case. Nor did they move for a stay or a continuance of the trial date. Instead, nearly a month later, the State asked that the conditions of release be modified. Mr. Cox remains under those conditions of release, but without an established trial date, essentially putting him into trial limbo.

While Mr. Cox does not dispute the right of the State to file a notice of appeal, see RAP 2.2(b)(2), such a filing does not automatically

stay the trial date. CrR 3.3(c)(2)(iv) excludes from the “Time for Trial” the period when a case is on appeal, but only after the “acceptance of review or grant of a stay by the appellate court.” Normally when the State seeks to appeal a case pursuant to RAP 2.2(b), it will either dismiss the case without prejudice or seek a stay of the trial date. See, generally, *State v Olson*, 126 Wn 2d 315, 893 P.2d 629 (1995). Neither occurred in this case. In *Olson*, the Supreme Court held that technical violations of RAP 2.2(b) will be overlooked when the “violation is minor and results in no prejudice to the other party and no more than a minimal inconvenience to the appellate court.” *Olson* at 319. But in this case, the procedure used was not minor and resulted in prejudice to Mr. Cox.

Mr. Cox has a Sixth Amendment right to a speedy trial. *Barker v Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). By the time an appellate decision is entered, more than a year will have passed, far more than the 90 days prescribed by CrR 3.3(b). Mr. Cox has been under the trial court’s jurisdiction after the prosecutor advised the court was advised that insufficient evidence remained with which to prosecute him. And he will remain under the trial court’s jurisdiction until such time as this Court terminates the appeal. Although Mr. Cox is out-of-custody, were he to violate his conditions of release, he could be remanded to custody and serve out the remainder of this appeal under lock and key,

despite the fact that he has never been convicted of a crime. The decision of the State to attempt to terminate the prosecution while simultaneously keeping him under the court's jurisdiction for an indefinite period of time is highly prejudicial to Mr. Cox. This Court should enter an order dismissing this case for violation of his right to speedy trial.

Under the Fourth Amendment, factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (1) material and (2) made in reckless disregard for the truth. *State v. Bittner*, 66 Wn. App. 541, 832 P.2d 529 (1992), review denied, 120 Wn.2d 1031 (1993); *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Washington has adopted the same standard as under article 1, section 7 of the Washington Constitution. *State v. Chenoweth*, 160 Wn.2d 454; 158 P.3d 595 (2007).

The State as the Petitioner assigns error to three Findings of Fact from the trial court's Findings of Fact and Conclusions of Law. CP, 9-14. When reviewing a finding of fact, this Court must determine whether substantial evidence supports the trial court's findings and whether those findings support its conclusions of law. This Court considers any fact not objected to a verity on appeal. Conclusions of law are reviewed de novo. *State v. Cheatam*, 112 Wn. App. 778, 51 P.3d 138 (2002). Each of the

trial court's findings of facts in this case is supported by substantial evidence in this case and should be upheld.

Curiously, although the State assigns error to three Findings of Fact, the State fails to assign error to Finding of Fact Number 7. Finding of Fact Number 7 is the finding that drives all the subsequent findings. It reads:

In testimony at the hearing, Officer Ponton acknowledged that Mr. Cox never said "that he has a gun in his car." In fact, when asked if he had any guns in the car, Mr. Cox stated that he had an air rifle and an air pistol; in regard to firearms, he said "no I sold them all;" and in regard to why the officer told the magistrate that "he said that he has a gun in his car." Officer Ponton testified that he assumed this because on further questioning at the hospital Mr. Cox after being told by the officer that he was getting a search warrant for Mr. Cox's car that Cox indicated there might be two 9mm magazines under the front seat.

CP, 11 Because this finding of fact is not objected to, it is a verity of on appeal Because the State fails to assign error to this critical Finding, this Court must conclude Mr. Cox never said he had a gun in his vehicle.

The State first assigns error to Finding of Fact Number 8, which reads:

In the affidavit to the magistrate, Office Ponton specifically stated "then later on he said he might have a 9mm in his car." Officer Ponton indicated he said this because he assumed anyone who still had magazines would still have a weapon.

CP, 11. This Finding is supported by substantial evidence. In his testimony, Officer Ponton testified as follows: "After questioning him a

little bit further, he says he might have some 9 millimeter magazines and that if he did have the guns, it would be under the front seat. Referring, in my line of thinking, I'm thinking 9 millimeter magazines don't fit in air rifles, so when said the guns would be under the front seat, I assumed that there were 9 millimeter pistols under the front seat and then that's -- basically, that's what I based my probable cause for the search warrant off of." RP, 12. Finding of Fact Number 8 is supported by substantial evidence.

The State next assigns error to Finding of Fact Number 9, which reads:

When the magistrate (Judge Wood) questioned the Officer during the telephonic affidavit whether Cox admitted he had a firearm in his vehicle, Officer Ponton said yes.

CP, 11 This Finding is supported by substantial evidence. The State apparently takes issue with this Finding of Fact because Officer Ponton, according to the State's brief, testified "Mr. Cox admitted he had a possible firearm in his vehicle." Brief of Appellant, 4 (Emphasis in Original) The actual testimony in the telephonic search warrant was as follows:

JUDGE: Okay and he's admitted he's got a possible firearm in his vehicle then, huh?

OFFICER: Yeah, he said it would be under the front seat, the front driver's seat, if he did have it. He said there are

magazines in the trunk and then in the trunk there would be a gun.

RP, 36. Officer Ponton's answer to the Magistrate's question was "yeah," followed by three modifiers. Taken in its totality, Officer Ponton's statement was deceptive and misleading.

Taking each of the modifications in order, Officer Ponton's response to the question about a "possible firearm" was that "it would be under the front seat, the front driver seat, if he did have it" RP, 25. Technically, this statement is accurate. But what it ignores is Findings of Fact Number 7 (which is a verity on appeal), where the trial court found Officer Ponton failed to tell Judge Woods that Mr. Cox initially said he had sold all the guns. Given Officer's Ponton's failure to tell Judge Woods Mr. Cox' initial unequivocal statement ("I sold all the guns"), his recitation of Mr. Cox' later equivocal statement (the gun would be under the "driver's seat, if he did have it") becomes all the more ambiguous.

The second modification is also inaccurate. Although Mr. Cox said there would be a 9mm magazine, he did not say it was in the trunk. The testimony was, "After questioning him a little bit further, he says he might have some 9 millimeter magazines and that if he did have the guns, it would be under the front seat." RP, 12. There was no testimony at the

Franks hearing that Mr. Cox ever identified where the 9mm magazine would be found

The most egregious modification, however, is the third one. Mr. Cox never said there were any firearms in the trunk. Period. And Officer Ponton's statement otherwise is completely false.

Taken as a whole, including the three modifications, which range from mildly inaccurate to unabashed prevarication, Finding of Fact Number 8 is supported by substantial evidence.

The State next assigns error to Finding of Fact Number 11, which reads:

The magistrate found probable cause for a search of the Toyota Corolla at 1:23 a.m. on May 25 based on Officer Ponton's assertions to the magistrate that Cox said he had a gun in his car and nowhere in the taped affidavit for search warrant was there any information for the magistrate as to any statements from witnesses or Kep Kepler or any hospital personnel supporting the Officer's conclusory statement in the taped affidavit that "we had information that he had a gun possibly in his possession or at his apartment."

CP, 11. Apparently the State takes issue with the statement that the officer had information there was a gun "possibly in his possession or at his apartment." To the extent it matters, Mr. Cox agrees that there is no credible information supporting the conclusory statement that there was a gun "possibly in his possession or at his apartment." Although Officer Ponton advised Judge Woods that information was conveyed to him by

others about a gun “possibly in his possession or at his apartment,” (See RP, 36) both parties to agree this information was not critical to Judge Woods’ determination of probable cause. The critical issue was whether Mr. Cox admitted to one or more guns in his vehicle. The magistrate was told he did, and the trial court at the *Franks* hearing found he did not, a finding that is supported by substantial evidence in the record.

The trial court relied heavily on *State v. Stephens*, 37 Wn.App. 76, 678 P.2d 832 (1984). In *Stephens*, the police officer noted that marijuana plants needed watering, observed the defendant approach, and then noted the plants had been watered. In the affidavit, the officer said he had observed the defendant water the plants, a statement that was untrue. The Court of Appeals concluded that while the officer’s conclusion that the defendant had watered the plants appeared reasonable in light of the circumstances, the officer decision to state his conclusions rather than what he actually observed usurped the magistrate’s role. The remedy was to excise the “observations” from the affidavit. Without the “observations,” probable cause was lacking and the remedy was suppression.

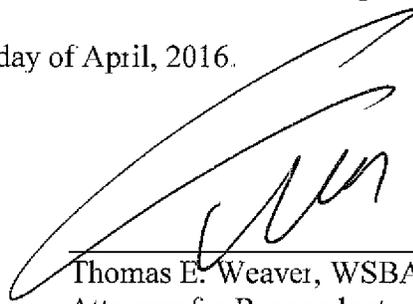
The trial court was correct to rely on *Stephens* in Mr. Cox’ case. Officer Ponton did not hear Mr. Cox state he had firearms in the vehicle. While Mr. Cox may have made some contradictory statements from which

a reasonable magistrate may have found probable cause, it was not Officer Ponton's role to usurp that decision. Officer Ponton had an obligation to provide the magistrate complete and accurate information. As the Findings of Fact amply demonstrate, this he did not do. The remedy is to excise Officer Ponton's conclusions from the telephonic search warrant. Without these conclusions, there is clearly not probable cause. The trial court was correct to suppress and this Court should affirm.

D Conclusion

This order of the trial court should be affirmed. In the alternative, this Court should dismiss for violation of Mr. Cox' speedy trial rights.

DATED this 6th day of April, 2016.



Thomas E. Weaver, WSBA #22488
Attorney for Respondent

WEAVER LAW FIRM

April 06, 2016 - 2:57 PM

Transmittal Letter

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

STATE OF WASHINGTON,) Court of Appeals No.: 48315-7-II
Respondent,) DECLARATION OF SERVICE
vs.)
KEVIN COX,)
Defendant)

STATE OF WASHINGTON)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action

On April 6, 2016, I e-filed the Brief of Respondent in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent via email to the Appeals Department of the Clallam County Prosecuting Attorney's Office (prosecutor@co.clallam.wa.us) through the Court of Appeals transmittal system.

On April 6, 2016, I deposited into the U.S. Mail, first class, postage prepaid, copies of the Designation of Clerk's Papers and the Statement of Arrangements to the defendant:

Kevin Cox
85 Keys Road West
Elma, WA 98541

////

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is
2 true and correct.

3 DATED: April 6, 2016, at Bremerton, Washington

4 
5 _____
6 Alisha Freeman

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