

NO. 49421-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

GUSTAVO ALLEN,

Appellant.

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

The Honorable David Gregerson, Judge
The Honorable Susan Clark, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The search warrant police served on Mr. Allen's home failed to establish probable cause to search the home in violation of the warrant clauses of the Fourth Amendment to the United States Constitution and article I, section 7 of the state constitution.

2. In its written ruling on Mr. Allen's motion arguing the four corners of the search warrant affidavit failed to establish probable cause to search the house at 22807 NE 72nd Avenue, the court improperly characterized as fact information not contained in the warrant, specifically,

(i) During two separate buys in the 10 days preceding the search warrant application, Sanchez-Luna was followed post buy to 22807 NE 72nd Avenue.

(ii) During two separate buys in the 10 days preceding the search warrant application, Sanchez-Luna was followed in both instances, post buy, to 26001 NE 29th Avenue.

(iii) Surveillance [put] the same individual at three controlled buys and all three times driving first to 26001 NE 29th Avenue and then to 22807 NE 72nd Avenue.

(iv) The observations together with the reasonable inferences that can be drawn from them establish sufficient nexus between the illegal delivery of drugs and the items to be seized and a nexus between the items to be seized and the 22807 NE 72nd Avenue address.

3. In its written ruling on Mr. Allen's challenge to the search warrant, the court had not legal basis to conclude the warrant established a probable cause nexus between Sanchez-Luna's heroin sales and Mr. Allen's home.

4. The trial court erred in not suppressing evidence seized from the house at 22807 NE 72nd Avenue.

5. The trial court erred in not suppressing statements made by Mr. Allen to law enforcement during the service of the improperly issued search warrant.

6. The trial court had no factual basis to order Mr. Allen to register as a felony firearm offender as the jury did not make a finding that he was armed as a principal to the offense.

7. Mr. Allen's 123-month sentence, reached by combining his standard range, a firearm enhancement, a school zone enhancement, and community custody, exceeds the 120-month statutory maximum sentence for possession of methamphetamine with intent to deliver.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The affidavit to support the search warrant established no "nexus" to the residence at 22807 NE 72nd Avenue as a repository of evidence of drug dealing activity engaged in by Sanchez-Luna which

occurred at locations geographically distant from the house. Did the trial court err when it denied Mr. Allen's motion to suppress controlled substances, firearms, and Allen's statement to the police discovered or made pursuant to the search warrant served on his home?

2. Mr. Allen could only be required to register as a felony firearm offender if the jury found he possessed a firearm while possessing methamphetamine with intent to deliver. Yet, the jury was asked only to find whether Mr. Allen possessed a firearm as a principal or an accomplice in the commission of the underlying crime. Without a jury determination Mr. Allen himself literally possessed a firearm, did the trial court act without authority when it ordered Mr. Allen to register as a felony firearm offender?

3. Possession with intent to deliver methamphetamine, coupled with a school zone enhancement, can have a doubling effect and cause a standard 10-year maximum B felony to become a B+ felony with a maximum 20-year sentence. The State agreed not to pursue a doubling effect yet the combined standard range plus enhancements exceeded the 120-month statutory maximum. Must Mr. Allen's sentence be remanded to specify his total sentence cannot exceed a combined total of 120 months?

C. STATEMENT OF THE CASE

1. *Charges, enhancements, convictions, and sentence*

Pursuant to evidence seized during the service of a search warrant at Gustavo Allen's home, the State charged Allen by second amended information with possession with intent to deliver methamphetamine¹ and possession of heroin². CP 41-42; RP³ II 247. The State charged Mr. Allen both as a principal and an accomplice to both offense. CP 41-42. The State's also added a firearm enhancement⁴ and a school bus stop within a 1,000 feet enhancement⁵ to the possession with intent to deliver charge. CP 41-42.

The jury returned verdicts of guilty as charged and unanimously approved the firearm and school bus stop enhancements. CP 86-89.

Mr. Allen's only criminal history was two minor in possession of alcohol convictions in 2014. RP II 461. The court sentenced Mr. Allen on the possession with intent to deliver methamphetamine to 51 standard range months, plus 24 months for the school zone enhancement, and 36 months for the firearm enhancement. RP III 466; CP 81. To those 111

¹ RCW 69.50.401(1); RCW 69.50.401(2)(b)

² RCW 69.50.4013(1)

³ There are 3 volumes of verbatim report of proceedings (RP) as follows:
RP I pages 1-200; RP II pages 201-400; RP III pages 401-468

⁴ RCW 9.94A.533(3) and RCW 9.94A.533(6)

⁵ RCW 69.50.435(1)(c) and RCW 9.94A.533(3)

months, the court added 12 additional months of community custody for a total 123 months. CP 81-82. On the judgment and sentence, the maximum sentence was listed as “10 years.” CP 80. The court imposed 6 concurrent months for the possession of heroin also with 12 months of community custody. CP 81-82.

The court ordered Mr. Allen register as a felony firearm offender upon his release from prison. CP 86.

Allen appeals every part of his judgment and sentence. CP 92. The trial court found him indigent for purposes of appeal. CP 98-100.

2. CrR 3.6 and 3.5 hearings

Pre-trial, Judge Clark heard Mr. Allen’s CrR 3.6 motion challenging the search warrant authorizing the police to search, among other places and things, Mr. Allen’s home at 22807 NE 72nd Avenue, Battle Ground. RP I 3-40. Pleadings filed with the court included a copy of the search warrant affidavit, CP 19-27, and the search warrant, CP 28-31. See search warrant attached as Appendix.

During the service of the warrant, the detectives seized incriminating drug and firearm evidence and took an inculpatory statement from Mr. Allen. CP 2. Mr. Allen sought to suppress all of it. CP 2. Mr. Allen made two arguments in his effort to suppress evidence.

First, he argued the four corners of the search warrant affidavit did not provide probable cause to search the NE 72nd Avenue home for drugs. CP 3-8.

Second, he argued the search warrant was stale because in requesting the warrant, the police specified the person selling the heroin to the CI was Marcos Sanchez-Luna.⁶ CP 8-10. The CI was 100% sure the heroin seller was Sanchez-Luna and had identified him in a Department of Licensing photo provided by Cowlitz Wahkiakum Narcotics Task Force Detective Phillip Thoma. CP 24.

After the magistrate approved the warrant but before the police served it, the police conducted a traffic stop and arrested who they, through their surveillance of the heroin sales and the assurance of the CI, identified as Sanchez-Luna. RP I 26. But “Sanchez-Luna” identified himself via a driver’s license as Jorge Cruz-Pegueros. RP I 25. Detective Thoma immediately sent a photo of Cruz-Pegueros to an undercover police detective involved in the case. RP I 28. The detective looked at the photo and said, “that was the guy,” meaning the person who sold the CI heroin during 3 controlled buys was Cruz-Pegueros. RP I 28. Rather than return to

⁶ To maintain consistency, I use “Sanchez-Luna” throughout the brief to specify the person who sold drugs to the CI.

the issuing magistrate with the conflicting identification of the heroin seller, the police went ahead and served the warrant on 22807 NE 72nd Avenue. In serving the warrant, the police knew the CI's identification of Sanchez-Luna as the heroin seller had been called into question by their undercover detective. CP 24; RP I 25-30.

Judge Clark denied both challenges to the warrant in a written decision. CP 38-40. The court found the misidentification of Sanchez-Luna and Cruz-Pegueros, inconsequential. CP 40.

As to the nexus between Sanchez-Luna's heroin sales and Mr. Allen's house, the court relied on mischaracterized information to find a sufficient nexus to allow the search. CP 38-40.

In the first instance, the court found that after two separate buys in the 10 days preceding the search warrant application, Sanchez-Luna was followed post buy to 22807 NE 72nd Avenue, Battleground. CP 40. That information does not exist in the search warrant affidavit. CP 25.

In the second instance, during two separate buys in the 10 days preceding the search warrant application, the court found Sanchez-Luna was followed in both instances, post buy, to 26001 NE 29th Avenue, Ridgefield. CP 40. In contrast, the search warrant affidavit specifies

Sanchez-Luna was followed just once post-buy to the NE 29th Avenue address. CP 25.

In the third instance, the court found during each of the three buys specified in the warrant affidavit, the police surveilled Sanchez-Luna post-buy driving first to 26001 NE 29th Avenue, Ridgefield and then to 22807 NE 72nd Avenue, Battleground. CP 40. The search warrant affidavit itself notes just one instance, within 10 days of the search warrant application, that Sanchez-Luna was surveilled post-buy traveling first to 26001 NE 29th Avenue, Ridgefield, and then to 22807 NE 72nd Avenue, Battleground.

Before hearing trial testimony, Judge David Gregerson heard and ruled on a CrR 3.5 motion. RP I 70-90. The court allowed into evidence statements Mr. Allen made to Task Force Detectives Khembar Yund and Raymond Hartley. RP I 91-93.

3. Trial testimony

Mr. Allen was in the home when the police served the search warrant. RP I 101. A drug sniffing dog alerted on an area high in the wall of the bedroom identified as Mr. Allen's room. RP I 122-26. With this information, the police accessed the attic through the garage and found, under the insulation, a container holding a pound of methamphetamine. RP I 110, 128-36, 182.

After further search of the house, the task force detectives believed the house was used as a methamphetamine conversion lab where liquid methamphetamine is altered to the more substantial form sold on the street. RP I 168. They believed the conversion process was evident through the number of Igloo-type containers scattered throughout the house, many of which were coated with what either tested positive as, or appeared to be, methamphetamine residue. RP I 168-70; RP II 257, 295.

In the bathroom closest to the Mr. Allen's' bedroom, the police found a grinder containing heroin residue. RP I 145-46, 166.

In Cruz-Pegueros' bedroom, the police found an unloaded rifle and shotgun. RP I 160-64. Various types of ammunition were found in the home. There was ammunition for the shotgun but not for the rifle. RP I 158-62. Both guns proved operable during a pre-trial test fire. RP II 237-40. These weapons formed the basis for the State's allegation that Mr. Allen possessed a deadly firearm in the course of the possession with intent to deliver. RP II 347-48.

Mr. Allen's friend, Rodrick Gray, testified the guns belonged to another friend, Sean Dugan. RP II 289. The guns were stored at the house and used when Mr. Gray, Mr. Allen, and various other people to include

Mr. Cruz-Pegueros went to recreationally shoot them in the woods. RP II 289-91. It was a social event enjoyed with family and friends. RP II 290-91.

Mr. Gray and Mr. Allen enjoyed a long friendship. RP II 282-83. They frequently hung out together at Mr. Allen's house. RP II 283. Mr. Gray acknowledged seeing what he suspected was drug activity at the house. RP II 284. Yet he never knew Mr. Allen to have any personal connection to drug use or drug dealing. RP II 284.

Mr. Allen made incriminating statements to Detectives Yund and Hartley about living at the house and occasionally helping his uncle, Porfirio Sanchez, pick up drugs and break larger quantities into smaller quantities. RP I 186, 191, 194; RP II 254; RP III 302. Mr. Allen told the detectives there were, on average, three pick ups of methamphetamine per month and each averaged 10-15 pounds. RP I 194. Mr. Allen clarified in his trial testimony that his earlier statements about methamphetamine trafficking was untrue. He had been nervous in talking to the police and had just wanted to protect his family. RP II 251, 259. His father is Jorge Cruz-Pegueros. RP II 260. Mr. Allen disavowed personal use of methamphetamine or heroin. He wanted nothing to do with either substance. RP II 265-66. Until recently, Mr. Allen worked in North Dakota. RP II 247. He had been back in the house only a few weeks. Id. He was

trying to get back to work and be able to save enough money to get out of the house. RP II 259.

The detectives collected items collected from the house and submitted them to the Washington State Patrol lab. The items tested positive for methamphetamine and heroin. RP I 199; RP II 213, 216.

Mr. Allen's home was within 1,000 feet of a designated school bus stop. RP II 228, 232-35.

4. Gun enhancement and accomplice liability jury instructions

Instruction 19 specified for the jury what to do with the firearm special verdict.

For proposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant, or an accomplice, was armed with a firearm at the time of the commission of the crime in Count 1.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant, or an accomplice. The State must also prove beyond a reasonable doubt that there was connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime, and the type of weapon.

If one participate in a crime is armed with a firearm. All accomplices to the participant are deemed to be so armed, even if only one firearm, is involved.

A “firearm” is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

Supp. DCP, Court’s Instructions to the Jury.

Instruction 9 explained accomplice liability to the jury.

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

Supp. DCP, Court’s Instructions to the Jury.

The jury was not asked by special interrogatory if they found Mr. Allen an accomplice or a principal in the commission of either offense.

D. ARGUMENT

1. The search warrant failed to establish probable cause to search Mr. Allen's Battleground home.

a. *Probable cause is required to search a home.*

The warrant clauses of the Fourth Amendment to the United States Constitution and article I, section 7 of the state constitution require that a search warrant issue only based on a determination of probable cause. U.S. Const. Amend. 4; Wash. Const. art. 1, § 7; *State v. Fry*, 168 Wn.2d 1, 5–6, 228 P.3d 1 (2010) (citing *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)). Probable cause is established if the affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability a person is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004) (citing *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

There is no “nexus” between the criminal activity and a home to be searched unless there is actual probable cause to believe that evidence of that activity is to be found at that location. *Thein*, 138 Wn.2d at 140. Probable cause requires a connection between criminal activity and the

item to be seized, and also a nexus between the item to be seized and the place to be searched. *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFare, *Search and Seizure* § 3.7(d), at 372 (3d ed.1996). In Mr. Allen's case, there was no such nexus. The warrant affidavit failed to supply the required connection between Sanchez-Luna's drug sales and Mr. Allen's home.

This court's review is limited to the four corners of the affidavit submitted to establish probable cause. *State v. Murray*, 110 Wn.2d 706, 709–10, 757 P.2d 487 (1988); *Wong Sun v. United States*, 371 U.S. 471, 481–82, 83 S.Ct. 407, 414, 9 L.Ed.2d 441 (1963). Probable cause is a legal conclusion this court reviews de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40–41, 162 P.3d 389 (2007). This court reviews a trial court's ruling on a motion to suppress evidence to determine whether substantial evidence supports the court's findings and whether its findings support its conclusions. *State v. Cherry*, 191 Wn. App. 456, 464, 362 P.3d 313 (2015), *review denied*, 185 Wn.2d 1031 (2016). Substantial evidence exists only if the evidence in the record would persuade a fair-minded, rational person of the truth of the finding. *State v. Atchley*, 142 Wn. App. 147, 154, 173 P.3d 323 (2007).

b. *State v. Thein* is the leading case on the requiring a nexus between a home to be searched and the times to be seized.

The *Thein* case presented the Supreme Court with the question whether, if a magistrate determines a person is probably a drug dealer, then a finding of probable cause to search that person's residence automatically follows. *Thein*, 138 Wn.2d at 141. In *Thein*, the police executed a valid search warrant on a structure used by one McKone containing a marijuana grow. *Thein*, 138 Wn.2d at 136. It was determined that the landlord of the structure – Steven Thein -- also supplied McKone with materials for the marijuana operation. Police discovered money orders from McKone to Thein bearing the notation “rent,” found a box of nails addressed to Thein at his residential address, and uncovered boxes of oil filters, marked “Toyota,” corresponding to the fact that Thein owned a Toyota pickup truck. The warrant affidavit asserted that Thein was a drug manufacturer or dealer, and then generically asserted that such persons keep evidence or the substance itself at their home, and on this basis a warrant was issued. *Thein*, 138 Wn.2d at 150.

The Supreme Court ordered suppression, agreeing with Thein that the search warrant affidavit failed to establish the requisite nexus between the criminal activity and his home. *Thein*, 138 Wn.2d at 150. Characterizing

the affidavit's recitation of the box of nails and the oil filters as "innocuous," the Court ruled these items incapable of establishing a nexus and further ruled that generic stereotypes about narcotic traffickers, standing alone, were insufficient to establish the requisite nexus, no matter how consistent the stereotypes were with common sense. *Thein*, 138 Wn.2d at 148–49. The court held that the necessary connection between *Thein*'s residential address and evidence of drug-related crimes was not established as a matter of law because neither the particular facts nor the stereotypes about drug dealers were enough for probable cause. *Thein*, 138 Wn.2d at 147.

c. As in Thein, the search warrant affidavit failed to establish a nexus between suspected drug activity and the target home.

Here, the warrant affidavit established no nexus between the observed conduct of Sanchez-Luna and the home on NE 72nd Avenue beyond boilerplate and relatively innocuous facts, just like in *Thein*. CP 19-27. The affidavit relates three buys between Sanchez-Luna and the CI. CP 24-25. In the last instance, the blue Econovan was at the NE 72nd Avenue house 10 minutes before the buy but no one reported seeing Sanchez-Luna leave the house, or where the Econovan travelled enroute to the buy. RP 24-25. Before returning to the Battleground house, Sanchez-Luna stopped

off at and entered outbuildings at a Ridgefield address and did the same at a grove of trees adjacent to NE 72nd house Avenue. CP 24-25.

In the two other controlled buys described in the warrant affidavit, the affiant noted no connection between Sanchez-Luna and the NE 72nd Avenue house other than Sanchez-Luna was known by the CI to drive a silver Honda Accord. During surveillance of the house in the month prior to the October 19, 2015, search warrant affidavit, a silver Honda Accord was parked at NE 72nd five times. CP 24. Nothing in the search warrant affidavit linked ownership of the car to Sanchez-Luna. CP 23-25.

Moreover, the search warrant affidavit included no information such as whether the controlled buys were being made near the NE 72nd Avenue house. Nothing in the affidavit notes that anyone saw Sanchez-Luna leave the NE 72nd house before the buys or that the police conducted surveillance of any suspect vehicle as it neared the buy location(s).

Nothing about Sanchez-Luna's observed travels showed he was keeping drug supplies at the NE 72nd house. Instead, the affidavit offered nothing other than broad sweeping generalizations about what drug dealers offend do. CP21-22. The boilerplate assertions in the warrant were just that. The affidavit offered that "upper levels sellers rarely keep large quantities of drugs at their residence" but instead they kept their drug

supply commonly “at stash houses or other locations to avoid detection.” CP 21. The affiant knew “that individuals who sell controlled substances frequently conceal the drugs, which they possess for future sales or consumption, as well as scales, packaging material, and records of the sales on their persons, within their residences[.]” CP 22. But these are mere generic assertions, not substantiated by any supportable factual allegations. CP 23-25. Indeed, the affiant also asserts – highly generically – that traffickers of controlled substances often fortify the entrances and windows of their dwellings and/or other buildings used to facilitate the trafficking of controlled substances, or in some cases, the entrances to individual rooms within their dwellings or buildings.” CP 21. These generic claims were not enough to satisfy the protections of the Fourth Amendment and the state constitution under *Thein*.

Importantly, in upholding the warrant and its ostensibly adequate nexus between Sanchez-Luna and the 22807 NE Avenue house, the trial court Judge Clark, relied on “facts” absent from the four corners of the search warrant affidavit. CP 38-40. It is inaccurate that during two separate buys in the 10 days preceding the search warrant application, Sanchez-Luna was followed, post buy, to 22807 NE 72nd Avenue. CP 40. It is inaccurate that during two separate buys in the 10 days preceding the

search warrant application, Sanchez-Luna was followed in both instances, post buy, to 26001 NE 29th Avenue. CP 40. Finally, it is inaccurate that surveillance put the same individual at three controlled buys and all three times driving first to 26001 NE 29th Avenue and then to 22807 NE 72nd Avenue. CP 40.

The reality of the search warrant affidavit is Sanchez-Luna was never observed by police leaving the 22807 NE 72nd Avenue address prior to meeting with the CI. In one instance, the blue Ford Econovan seen parked at the NE 72nd Avenue residence five time in the month leading up to the search warrant affidavit was at the NE 72nd Avenue 10 minutes before a meet up with the CI for a heroin sale. CP 24-24. But no one surveilled the van in the ten minutes between its departure from the residence and its arrival at the buy location. There is no way of knowing if Sanchez-Luna himself left the residence in the Econovan or whether the Econovan stopped along the way to pick up Sanchez-Luna and/or heroin.

The only other observation the police made of Sanchez-Luna and the residence is in one instance, he left the buy, stopped and went to outbuildings at the Ridgefield address, and then went to the Battleground address where he entered a grove a tree before entering the house. CP 24-24. Thus the extent of Sanchez-Luna's connection to NE 72nd Avenue is a

single entry into the house some unspecified amount of time after selling heroin to the CI and after making two stops along the way.

Additionally, but not integral to the lack of probable cause, the absence of nexus is further exacerbated by the passage of time. The Task Force conducted two of the controlled buys within 10 days of the search warrant affidavit and 1 more purchase within 72 hours of the search being presented for judicial approval. The magistrate signing the warrant on October 19, 2015. CP 27. Yet, the warrant was not served until October 28. CP 33.

Also, as the suppression motion revealed, it is not at all clear who the Task Force was dealing with. The CI was “100% certain” she was buying heroin from the person identified in a photo as Sanchez-Luna. CP 24. Post-traffic stop, it seemed clear to Detective Thoma that the CI was not buying from the person she identified previously as Sanchez-Luna. Instead, the undercover police detective was sure “the guy” was Jorge Cruz-Pegueros. RP 11 25. Photos reveal that Sanchez-Luna and Cruz-Pegueros are two different people. CP 34-37. Stating the obvious, it is not possible for one person to be two people. The record before the failed to untangle the identification issue.

Probable cause exists for a search warrant when the affidavit properly sets forth actual facts and circumstances peculiar to the case that establish a reasonable inference that evidence of the crime at issue will be found at the location that police desire to search. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Here, the search warrant failed to show an adequate connection between the drug activity and the place to be searched, resting as it did on mere innocuous facts, and generalizations that drug dealers maintain evidence of the crime at their residences. CP 21-22.

Thein makes clear that the inclusion of innocuous facts in the warrant, along with the boilerplate assertions, does not save probable cause.

The facts of Mr. Allen's case closely align with those in the unpublished decision in *State v. Blye*, 196 Wn. App. 1037, Slip. Op. 46950-2-II (October 25, 2016). See GR 14.1. re citation to unpublished authority for persuasive value only. *Blye* provides this court only with persuasive argument from a like issue previously decided by the court.

In two instances, the police observed Joanne McFarland sell heroin to a CI in a controlled buy at a Bremerton Goodwill parking lot. After the first buy, a detective tried to follow McFarland back to the mobile home

identified by the CI as McFarland's residence. The detective lost track of McFarland but another detective saw McFarland return to the mobile home about 10 minutes after the buy. After the second buy, a detective successfully surveilled McFarland from the buy to the mobile home.

The detectives submitted a search warrant affidavit to the trial court asking for permission to search the mobile home and the court authorized the warrant. In conducting the search, the police located incrimination drug evidence against McFarland's boyfriend, Perry Blye. Blye moved to suppress the warrant arguing the warrant lacked a nexus between McFarland's criminal activity and the place to be searched, i.e., the mobile home.

In invalidating the *Blye* search, this court reviewed *Thein* and its progeny and concluded that a person's return to his or her home after engaging in illegal activity does not, by itself, establish probable cause that illegal activity will be found in the person's home.

In Mr. Allen's case, at best, the search warrant affidavit established one instance where Sanchez-Luna returned to 22807 NE 72nd Avenue after taking a circuitous route and making two stops along the way - once in Ridgefield and one adjacent to the NE 72nd house - before entering Mr. Allen's home. CP 24-25. The search warrant affidavit established no nexus

between Mr. Sanchez-Luna's drug sales and the house at 22807 NE 72nd Avenue. Sweeping generalizations in a search warrant affidavit about how drug dealers operate is not an adequate substitute for the constitutional requirements of search warrant.

d. With probable cause the police searched Mr. Allen's house without legal authority and the evidence should be suppressed.

The search warrant affidavit did not establish probable cause to search the NE 72nd house. Mr. Allen seeks suppression of the warrant's proceeds and fruits. A warrantless search is impermissible under both article I, section 7 of the Washington Constitution and the Fourth Amendment to the U.S. Constitution. Wash. Const. art. I, § 7; U.S. Const. amend. IV; *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The remedy is to suppression all evidence seized and collected, included Mr. Allen's statements to investigating detectives Hartley and Yund under the exclusionary rule or the fruit of the poisonous tree doctrine. *Gaines*, 154 Wn.2d at 716–1; *State v. Jardinez*, 184 Wn. App. 518, 523, 338 P.3d 292, 294 (2014).

2. Because there was no finding that Mr. Allen himself was armed with a firearm, the trial lacked authority to require Allen to register as a felony firearm offender.

RCW 9.41.330 permits a court to use its discretion to require a person convicted of a felony firearm offense to comply with the registration requirements of RCW 9.41.333.⁷ Per RCW 9.41.010(8), "felony firearm offense" means:

- (a) Any felony offense that is a violation of this chapter;
- (b) A violation of RCW 9A.36.045 [Drive-by shooting];
- (c) A violation of RCW 9A.56.300 [Theft of a firearm];
- (d) A violation of RCW 9A.56.310 [Possession of stolen firearm];
- (e) Any felony offense if the offender was armed with a firearm in the commission of the offense.

Mr. Allen was convicted of violating RCW 69.50.401(1)(2)(b) and 69.50.4013(1). As part of the firearm enhancement, the jury was asked to determine if Mr. Allen *or an accomplice* was armed with a firearm at the time of the offense related to the possession of methamphetamine with intent to deliver. Supp. DCP, Court's Instructions to the Jury (Instruction19). The jury answered in the affirmative but was not, by

⁷Since June 9, 2016, the court order offenders convicted of certain crimes to register as a felony firearm offender. None of those offenses are applicable to Mr. Allen.

special interrogatory, asked if Mr. Allen himself was literally armed with a firearm. Mr. Allen only qualifies as a felony firearm offender if he, as “the offender” was armed with a firearm. RCW 9.41.010(8)(e).

Sentencing courts have discretion on whether to require a felony firearm offender to register.

[W]henver a defendant in this state is convicted of a felony firearm offense or found not guilty by reason of insanity of any felony firearm offense, the court must consider whether to impose a requirement that the person comply with the registration requirements of RCW 9.41.333 and may, in its discretion, impose such a requirement.

RCW 9.41.330(1). In exercising this discretion, the court must consider “all relevant factors including but not limited to”:

- (a) The person's criminal history;
- (b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and
- (c) Evidence of the person's propensity for violence that would likely endanger persons.

RCW 9.41.330(2).

Discretionary decisions are reviewed for an abuse of discretion. *State ex. rel. Carrol v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). “Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without

doing so arbitrarily and capriciously.” *Id.* A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A ruling based on erroneous legal interpretation is necessarily an abuse of discretion. *Id.* A decision that “does not evidence a fair consideration” of the requisite statutory factors also constitutes an abuse of discretion. *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462 (1993).

Here the trial court abused its discretion in ordering Mr. Allen to register as a felony firearm offender as there was no specific finding he was armed with a firearm when the methamphetamine was possessed with the intent to deliver it. This court should reverse the registration requirement as the trial court lacked judicial authority to impose the requirement on Mr. Allen.

3. The trial court exceeded Mr. Allen’s statutory maximum 10-year sentence.

A sentencing court’s authority is limited and the court must impose only those sentences authorized by statute. *State v. Boyd*, 174 Wn.2d 470, 471, 275 P.3d 321 (2012). Under RCW 9.94A.505(5), “a court may not impose a sentence providing for a term of confinement or community

custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.” *State v. Slattum*, 173 Wn. App. 640, 653, 295 P.3d 788 (2013). When imposing a sentence, a court is limited to imposing a combination of terms for both confinement and community custody which is less than the statutory maximum for the offense. *Boyd*, 174 Wn.2d at 471-72.

Here, the court should reverse and remand for resentencing, because the sentence imposed exceeded the 10-year statutory maximum for the offense. CP 80-82.

Possession of methamphetamine with intent to deliver is a Class B felony, for which a defendant “upon conviction may be imprisoned for not more than ten years[.]” RCW 69.50.401(1)(b); RCW 9A.20.021(1)(b). In the past, courts deemed it proper to impose a combination of confinement and community custody which exceeded the statutory maximum, based on the assumption that the defendant would earn “good time” credits and serve less than the term of confinement the court imposed. *In re Brooks*, 166 Wn.2d 664, 671-73, 211 P.3d 1023 (2009). The Supreme Court approved this assumption but held that sentencing courts had to write on the judgment and sentence an order for the Department of Corrections (DOC) to ensure that only the statutory maximum was served. *Id.*

In 2009, however, the Legislature changed this practice by enacting RCW 9.9A.701(9). *Boyd*, 174 Wn.2d at 472-73. RCW 9.9A.701(9) provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community 9A.20.021.

As a result, a sentencing court must reduce a term of community custody whenever the standard range sentence of confinement in combination with community custody would exceed the statutory maximum. *State v. Hernandez*, 185 Wn. App. 680, 688, 342 P.3d 820, 823 (2015), *review denied*, 185 Wn.2d 1002 (2016). Thus, it is no longer proper for the court to assume the defendant will spend less time in custody due to possible "good time" or to delegate to DOC the duty of ensuring that the actual time served does not exceed the statutory maximum.

Here, the trial court did not comply with RCW 9.9A.701(9). Instead, the court ordered Mr. Allen to serve 51 months of standard range confinement, plus 24 months for a school zone enhancement and 36 months for a firearm enhancement. RP III 463, 466; CP 81. Besides those combined 111 months, the court added 12 additional months of community supervision, for a total of 123 months. RP III 463, 466; CP 81-

82. Thus, Mr. Allen was ordered to serve 3 months over the statutory maximum.

It is remotely possible the sentence was based on the mistaken assumption that the statutory maximum was actually 20 years even though the judgment and sentence lists 10 years as the maximum. CP 80. In a different case, a 20 year maximum might apply. RCW 69.50.408(1) provides that any person “convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized.” This “doubling” provision, when applied, has the effect of “doubling the maximum term that would otherwise” be proper. *In re Personal Restraint of Hopkins*, 137 Wn.2d 897, 900, 976 P.2d 616 (1999).

As this court has noted, a sentencing court has the discretion to decide whether to apply the “doubling” provision of RCW 69.50.408. *State v. O’Neal*, 126 Wn. App. 395, 429-30, 109 P.3d 429 (2005). A court may even apply the doubling provision to one conviction while declining to apply it to another. *O’Neal*, 126 Wn. App. at 429-30. If the trial court does not exercise its discretion to apply the “doubler” statute, it must sentence the defendant based on the presumptive statutory maximum. *O’Neal*, 126 Wn. App. at 426-28.

In *O'Neal*, the trial court applied the “doubler” to a conviction for manufacturing methamphetamine but declined to apply it to another charge, for manufacturing marijuana. 126 Wn. App. at 426. On review, the issue was whether the trial court erred in calculating the length of the firearm enhancements for each charge based upon the “doubled” maximum, rather than the presumptive maximum for the offense. *Id.* For the methamphetamine charge, this court held, the increased enhancement was proper, because the statutory maximum had been doubled by the trial court below. 126 Wn. App. at 429. But the Court reversed the imposition of a longer enhancement for the marijuana count, because that enhancement was calculated using a standard range which had not been “doubled.” *Id.* This court declared,

As noted, the statutory maximum sentence for the manufacture of marijuana is five years. A trial court has discretion to utilize the doubling provision of RCW 69.50.408. Exercising this discretion, the trial court did not double the maximum on the marijuana count.

O'Neal, 126 Wn. App. at 429-30. Because the trial court had not chosen to “double” the statutory maximum for the marijuana charge, the trial court had to impose a firearm enhancement calculated based on the presumptive statutory maximum, rather than one which was “doubled.” *Id.*

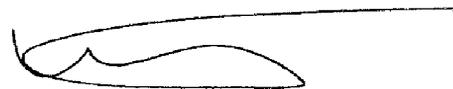
Here, there was a discussion of potential application of the “doubler” effect of the school zone enhancement but the State asked the court not to apply it. RP III 461-63. There is no indication that the trial court exercised its discretion to apply that provision. RP III 465-67. Without the doubler effect, the trial court erred in exceeding Mr. Allen’s maximum 120 month sentence by 3 months. Mr. Allen’s case should be remanded to reflect the 120 maximum cannot be exceeded. *State v. Hibdon*, 140 Wn. App. 534, 538, 166 P.3d 826, 828 (2007).

E. CONCLUSION

All of the physical evidence and any statements attributed to Mr. Allen should be suppressed as fruit of the poisonous tree and Mr. Allen’s convictions dismissed.

In the alternative, Mr. Allen’s obligation to register as a felony firearm offender should be stricken and his case should be remanded to specify the statutory maximum 120 months cannot be exceeded.

Respectfully submitted April 6, 2017.



LISA E. TABBUT/WSBA 21344
Attorney for Gustavo Allen

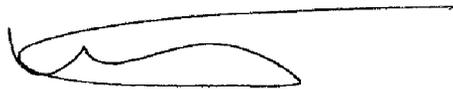
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Gustavo Allen/DOC#392458, Washington Corrections Center, PO Box 900, Shelton, WA 98584.

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

Signed April 6, 2017, in Seattle, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Gustavo Allen, Appellant

APPENDIX A

SUPERIOR COURT OF WASHINGTON
FOR COWLITZ COUNTY

STATE OF WASHINGTON

PLAINTIFF,)

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vs.

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)

22807 NE 72nd Avenue
Battle Ground, Washington, 98604

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Sanchez-Luna, Marcos
4/10/1976

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)

WA# AVY6952, a silver 2003 Honda Accord
VIN# JHMCM56613C038140

)

)

WA#C13741D, a blue 2003 Ford Econovan
VIN# 1FTNE24273HA51628

)

)

All outbuildings on the southwest corner of
26001 NE 29th Ave
Ridgefield, Washington, 98642

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DEFENDANT,

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NO.
AP 3435
COMPLAINT AND
AFFIDAVIT FOR

SEARCH WARRANT

STATE OF WASHINGTON)
COUNTY OF COWLITZ)

I, Phillip Thoma, being duly sworn on oath depose and say that I am a commissioned Trooper with the Washington State Patrol and have been so employed since March 17, 2004. I graduated from the Washington State Patrol Academy in March 2004. The academy consisted of 26 weeks of instruction, practical exercises, and field training in general crimes as well as narcotics recognition and enforcement. From March 2004 until July 2012, I was a Trooper assigned to the Field Operations Bureau (FOB) with duty stations to include Oak Harbor, Vancouver and Kelso. From April 2008 until July 2012, I was assigned to the Serious Highway Crime Apprehension Team (SHCAT). SHCAT focuses on criminal interdiction, which includes apprehending drivers for narcotics violations, weapons possession and trafficking, identity theft and other serious violations. Since August of 2012, I have been assigned as a Detective to the Cowlitz-Wahkiakum Narcotics Task Force (CWNTF) and investigate violations of the Revised Code of Washington, chapter 69.50, involving the detection and arrest of individuals and organizations engaged in narcotics manufacturing and trafficking. I have worked on numerous narcotics investigations and search warrants. During these investigations, I have gained specialized knowledge and intelligence leading to my expertise in the investigation, detection, and prosecution of narcotics violators. During my assignment as a Trooper, I have investigated to successful conclusion and/or assisted in the investigation of; hit and run collisions, DUI's, forgeries, identity thefts, criminal impersonations, drug violations, weapons violations, assaults and frauds among other crimes. Since August 2011, I have been a member of the statewide Cannabis Eradication Response Team (CERT). CERT assists local, state and federal investigators with the investigation, processing and removal of large outdoor marijuana growing operations. During my time with CERT, I have assisted with the investigation, processing and removal of approximately 100 marijuana growing operations.

Prior to my assignment to the Cowlitz-Wahkiakum Narcotics Task Force, I received cross training consisting of 250 hours (90 hours with the Cowlitz-Wahkiakum Narcotics Task Force, 80 hours with the Clark-Skamania Drug Task Force and 80 hours with the Thurston County Narcotics Team) with local drug task forces. During cross training, I observed and assisted in surveillance, meetings with confidential informants (CI's), the authoring and serving of search warrants, and the gathering of intelligence, as well as other vital task force operations.

Since being commissioned as a State Trooper, I have received hundreds of additional hours of specialized police training. In April 2006, I attended the 24 hour Criminal Interdiction Training, sponsored by the El Paso Intelligence Center (EPIC). In March 2007, I completed Highway Drug Investigations for Patrol Officers, also sponsored by EPIC. I attended a 24 hours class entitled Writing Search Warrants in January 2008, which was sponsored by the Midwest Counterdrug Training Center (MCTC). I also attended the 24 hour Basic Spanish for Law Enforcement in March 2008, sponsored by MCTC. In June 2009, I attended Hidden Assets in Commercial Vehicles, a 24 hour class presented by the 4:20 Group. I attended Post Interdiction Investigations in August 2010, which was presented by EPIC. In September 2010, I completed Desert Snow (Phase 7), a 24 hour criminal interdiction class presented by Customs and Border Patrol (CBP). I also completed Regional Auto Theft Training in January 2012, sponsored by the Washington Auto Prevention Authority. I attended a 16 hour Indoor Cannabis Cultivation class in April 2013 sponsored by the

Drug Enforcement Administration (DEA). In March of 2013, I attended the Washington State Patrol Detective Basic Training, as well as a 40 hour Interview and Interrogation class, both of which were sponsored by the Washington State Patrol. I have also attended the 80 hour DEA Basic class.

In addition to the above listed training, I have completed the 96 hour Drug Evaluation and Classification Training, and was certified as a Drug Recognition Expert (DRE) from August 4, 2006 until July 31, 2012. During my time as a DRE, I conducted 56 evaluations of people who were suspected of being impaired. I also testified several times as a DRE during Driving Under the Influence trials.

Through the above mentioned training and experience, I know that controlled substances are normally sold during a somewhat brief contact between the buyer and seller, and that during this time an exchange of United States currency and/or property takes place for the drugs purchased. I also know that the narcotics dealer (seller) usually notifies his or her customers when the illicit drugs are available. The buyer then either goes to the seller's residence or calls the seller on the telephone or otherwise sends a message to the seller to arrange a purchase of the controlled substance.

The seller usually packages the controlled substance in a piece of paper or a plastic baggy, and it is then usually sold in quarter gram, half gram, one gram, sixteenth ounce, eighth ounce, quarter ounce, half ounce, one ounce, one pound, one kilogram or larger quantities, depending on the level of dealing.

I know that upper level sellers rarely keep large quantities of drugs at their residence. Large quantities of drugs are usually kept at "stash" houses or other locations to avoid detection. I know that stash houses are often maintained by co-conspirators or criminal associates. These associates are commonly employed by or receive benefits from the seller. The locations of these stash houses are carefully chosen; often on dead end roads or rural settings that intentionally make them difficult for law enforcement to surveil.

I know that traffickers of controlled substances often fortify the entrances and windows of their dwellings and/or other buildings used to facilitate the trafficking in controlled substances, or in some cases, the entrances to individual rooms within their dwellings or buildings. The traffickers commonly fortify entrances by the use of metal security doors with matching metal door jambs, dead bolt locks, and bars across the door frame. Windows are commonly fortified by nailing or screwing them permanently shut. The fortifications to the trafficker's dwellings and buildings are commonly done so as to protect them and their narcotics supply from robbery and to delay or otherwise impede entry by law enforcement personnel. By delaying or impeding entry of law enforcement personnel narcotics traffickers hope to buy themselves enough time to dispose of any narcotics or narcotics-related evidence before entry is gained.

I know that the seller frequently keeps some type of record to keep track of orders, or to keep track of who owes money from previous transactions. These records (ledgers) are usually kept in a notebook, small slips of paper, cellular telephones or computers, media storage devices, portable hard drives and USB drives and normally have abbreviated names and numbers written on them showing persons sold to and the amount of monies used or owed.

I know that narcotics traffickers often take photographs of friends and/or co-conspirators, or have photographs taken of themselves, documenting their narcotics use and/or manufacture as well as "trophy" photos of narcotics, narcotics paraphernalia and weapons.

I have learned through the aforementioned training and experience that individuals who traffic in controlled substances are frequently involved in other crimes, such as robbery, burglary, theft, receiving stolen property and/or possession of stolen property because controlled substances are expensive to purchase. Drug traffickers normally accept currency or stolen property in trade for the controlled substances. I have personally recovered stolen property and large amounts of United States currency during the investigation of narcotics cases.

I know that traffickers in controlled substances often possess firearms and other weapons for the purpose of protecting themselves, their drugs, and their money from others. I have personally recovered firearms and other weapons, such as knives, clubs, and martial arts devices during my career.

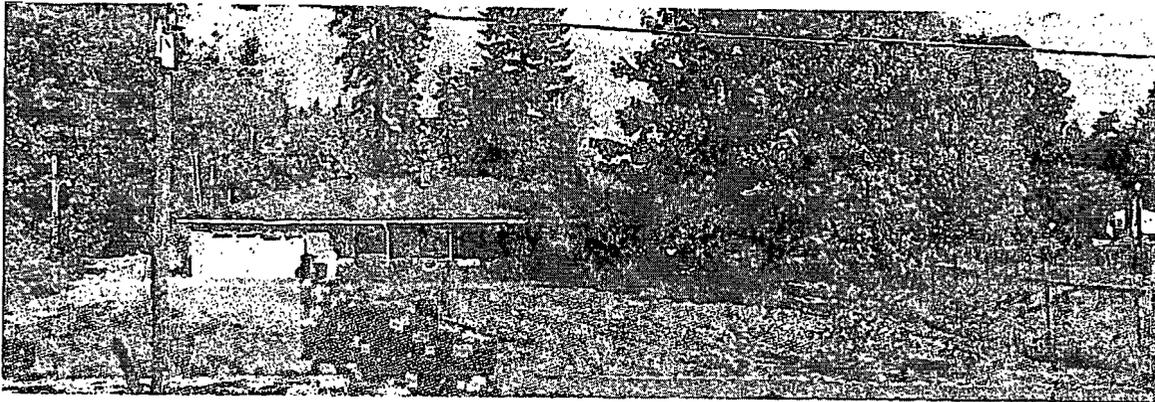
I know from my training and experience both as a Trooper with the Washington State Patrol, and as a Detective with the CWNTF, those involved in narcotics trafficking often use cellular phones to communicate and facilitate their drug enterprise. These communications include, but are not limited to, voice contact, text messaging, and photos sent via electronic mail. These text messages and photos are often stored in the messaging portion of the cellular telephone. I also know narcotics traffickers often store the phone numbers of their customers and of their suppliers in the contact portion of their cellular telephones for easy access and convenience. This information in its various forms is instrumental in identifying additional co-conspirators, customers and suppliers.

I also know that individuals who sell controlled substances frequently conceal the drugs, which they possess for future sales or consumption, as well as scales, packaging materials, and records of the sales, on their persons, within their residences, outbuildings and surrounding curtilage, and within their vehicles. This is to prevent detection from the people they deal with and sell to, as well as from law enforcement authorities. I have recovered or observed such items of contraband concealed in furniture, boxes, clothing, and other closed containers, as well as stored in hulk vehicles, attached or unattached outbuildings or buried in the ground during the service of search warrants. I know that a current trend in avoiding police detection utilized by drug traffickers is to bury their illicit drugs and monies from drug sales in or around the yard area surrounding their residence. These drugs and monies are often wrapped in plastic and covered by aluminum foil, and are sometimes concealed in jars or similar containers. I know that drug traffickers will sometimes use a global positioning device to mark the burial locations in order to be able to quickly locate the locations in the future.

Drug dealing in America is a multi-billion dollar business. With that in mind, businesses that fail to make profits fail to exist. People involved in drug dealing, specifically in drug dealing conspiracies must keep records detailing the information needed (i.e. pay/owe sheets, phone books, notes, etc) to facilitate their drug enterprise.

INVESTIGATION:

I have probable cause to believe and do believe that evidence of a crime and proceeds of criminal activity can be found in/on:



(Photo obtained from Google Earth)

22807 NE 72nd Avenue, Battle Ground, Washington, 98604 is a single story, single family residence with attached garage. The residence's exterior is brick with white trim and there is a mailbox in front of the house on the shoulder of NE 72nd Avenue with the numbers "22807" on it (to include any outbuildings and/or hulk vehicles on the property), as well as the person of Sanchez-Luna, Marcos, 4/10/1976; a silver 2003 Honda Accord, WA# AVY6952, VIN# JHMCM56613C038140; a blue 2003 Ford Econovan, WA#C13741D, VIN# 1FTNE24273HA51628; and the outbuildings on the southwest corner of the property of 26001 NE 29th Avenue, Ridgefield, Washington, 98642. I have probable cause to believe that there can now be found on this property evidence of possession of a controlled substance, to wit heroin.

The Cowlitz-Wahkiakum Narcotics Task Force (CWNTF) signed up a confidential informant (CI). The CI agreed to provide information to develop probable cause for individuals selling controlled substances in Cowlitz and Clark Counties, Washington in exchange for leniency in a criminal matter he/she is involved in. The CI is aware that if the information they provide is not accurate, they will not receive any consideration and will no longer be used as a CI. The CI has demonstrated their knowledge of controlled substances by detailing their own involvement with controlled substances, specifically heroin. The CI has also shown they are knowledgeable about the controlled substances market, quoting accurate prices for certain quantities, and also has shown knowledge of the weights and amounts that controlled substances are typically sold in. This is due to the fact that the CI has purchased controlled substances in the past. The CI has

conducted controlled buys for the CWNTF in the recent past, resulting in probable cause for arrest. The CI has also provided information that has proven to be correct and reliable through the use of undercover surveillance, debriefings, records checks, and intelligence gathered from other law enforcement agencies.

Within the last 1 month, I spoke with the above mentioned CI who told me they could purchase heroin from a Hispanic male that the CI believed lived in the Battle Ground or Ridgefield area of Washington. The CI described this Hispanic male as approximately 40-50 years of age, with a mustache. The CI stated the Hispanic male was "short and fat". The CI also stated that the Hispanic male drives a red Volkswagen Beetle, two types of white pickup trucks and a white BMW passenger car, and a white "work van". Throughout the course of my investigation, using vehicle registration checks and Department of Licensing checks, I was able to identify the Hispanic male as possibly Sanchez-Luna, Marcos, 4/10/1976.

Within the last 1 month, I have conducted surveillance at 22807 NE 72nd Avenue, Battle Ground, and have observed a red Volkswagen Beetle, and a white truck parked behind the residence, which is consistent with the information relayed to me by the CI. I have also observed a blue Ford Econovan, and a silver Honda Accord at the residence. I have seen all of the above mentioned vehicles at the residence no less than 5 times during the time I have been conducting surveillance of the residence. I have also observed multiple hulk vehicles on the property. During the course of my investigation, I showed the CI a Department of Licensing photo of Sánchez-Luna. The CI identified Sanchez-Luna as the person he/she purchases narcotics from, and stated he/she was "100% sure" of Sanchez-Luna being the person in the photograph.

Within the last 72 hours, the CWNTF conducted a controlled buy of heroin from Sanchez-Luna using the above mentioned CI. I met with the CI at a predetermined location, where the CI was searched. No money, drugs or contraband was located during the search. I provided the CI with pre-recorded CWNTF buy funds to complete the drug transaction. The CI was also provided with an audio recording device to record the drug transaction. Photographic evidence was also collected during the controlled buy.

The CI then met with Sanchez-Luna at a location in the Ridgefield area where the CI exchanged the pre-recorded buy funds for heroin.

I again met with the CI at a predetermined location, where they provided me with what I was able to identify as less than one ounce of heroin due to my training and experience. The CI was again searched and no money, drugs or contraband were located. I debriefed the CI and released him/her.

I transported the suspected heroin to the CWNTF office, where I field tested and packaged it. The suspected heroin field tested positive for heroin. I completed a "Request for Laboratory Examination" form, and the evidence was entered by Det. Brent into the Cowlitz County evidence system prior to the completion of her shift.

During the above listed controlled buy, Sanchez-Luna was observed driving the blue Ford Econovan (WA# C13741D). Through the use of aerial surveillance by CWNTF Detective Brent, the blue Ford Econovan was observed at 22807 NE 72nd Avenue, Battle Ground, Washington approximately 10 minutes prior to its arrival at the predetermined meeting location with the CI. After the controlled buy was complete, the blue Ford Econovan was followed directly from the buy location to 26001 NE 29th Avenue, Ridgefield, Washington, where it parked on the southwest corner of the property. Sanchez-Luna was observed parking on a small dirt road on the southwest corner 26001 NE 29th Avenue, Ridgefield, Washington, and exiting the blue Ford Econovan, carrying a backpack. There are several outbuildings on the southwest corner of the property. Sanchez-Luna was seen walking into one of these outbuildings, where he remained for several minutes before exiting the building. After several more minutes, Sanchez-Luna drove directly from 26001 NE 29th Avenue, Ridgefield, Washington to 22807 NE 72nd Avenue, Battle Ground, where he parked on the property and was observed by Det. Brent walking into a grove of trees on the north part of the property. There are multiple hulk vehicles on the north end of the property. After several minutes, Sanchez-Luna emerged from the trees and entered the house.

Within the last 10 days, the CWNTF has conducted 2 additional controlled buys of heroin from Sanchez-Luna. During one of the controlled buys, Sanchez-Luna was followed directly from the buy location to 26001 NE 29th Avenue, Ridgefield, Washington, where he was observed parking in the same area on the southwest corner of the property by Woodland Police Department Det. Palmquist. Due to a lack of a safe surveillance location, Det. Palmquist was unable to watch Sanchez-Luna's movements after he parked his vehicle. Approximately 10 minutes later, Det. Brent arrived in the area, and observed that Sanchez-Luna's vehicle was no longer at 26001 NE 29th Avenue, Ridgefield, Washington. During each of these previous 2 controlled buys, Sanchez-Luna drove a silver 2003 Honda Accord (WA# AVY6952).

I request that a search warrant be issued, see attached copy, herein incorporated in this affidavit for Search Warrant, to any peace officer of the State of Washington commanding him or her to search the property and person of 22807 NE 72nd Avenue, Battle Ground, Washington, 98604 is a single story, single family residence with attached garage. The residence's exterior is brick with white trim and there is a mailbox in front of the house on the shoulder of NE 72nd Avenue with the numbers "22807" on it (to include any outbuildings and/or hulk vehicles on the property), as well as the person of Sanchez-Luna, Marcos, 4/10/1976, a silver 2003 Honda Accord, WA# AVY6952, VIN# JHMCM56613C038140, a blue 2003 Ford Econovan, WA#C13741D, VIN# 1FTNE24273HA51628, and the outbuildings on the southwest corner of the property of 26001 NE 29th Avenue, Ridgefield, Washington, 98642, and seize the following items, property, or evidence:

- a. Controlled substances including, but not limited to heroin.
- b. Paraphernalia for using, packaging, processing, weighing and distributing controlled substances, including, but not limited to scales, funnels, sifters, grinders, containers, plastic bags or materials used to contain controlled substances, heat-sealing devices, diluents/dilutants, and the like;

c. Personal books, letters, papers, notes, pictures, photographs, video and/or audio cassette tapes, computers, palm pilots, cell phones, global positioning system (GPS) devices, pagers or documents relating names, addresses, telephone numbers, and/or other contact/identification information relating to the possession, processing, or distribution of controlled substances;

d. Books, records, receipts, notes, letters, ledgers, and other papers relating to the possession, processing, or distribution of controlled substances;

e. Cash, U.S. currency, foreign currency, financial instruments, and records relating to income and expenditures of money and wealth from controlled substances including, but not limited to money orders, wire transfers, cashier's checks or receipts, bank statements, passbooks, checkbooks, and check registers;

f. Items of personal property which tend to identify the person(s) in residence, occupancy, control or ownership of the premises that is the subject of this warrant, including, but not limited to canceled mail, deeds, leases, rental agreements, photographs, personal telephone books, utility and telephone bills, statements, identification documents, and keys;

g. Fruits of criminal enterprise, or property held or acquired in violation of RCW 69.50.505;

h. weapons, including, but not limited to firearms, ammunition, knives, clubs, swords, martial arts devices, chemical irritants, and electric stun guns;

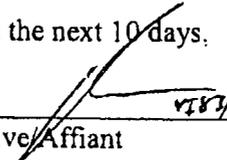
i. Laptop, desktop computers, media storage devices and or portable hard drives.

j. Cellular telephones and the contents of the cellular telephone including, but not limited to call logs, contact information, text messaging, emails and electronic photographs

k. Prerecorded Cowlitz-Wahkiakum Narcotics Task Force buy funds.

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at the place where the property is found.

If approved this warrant shall be served within the next 10 days.



Detective/Affiant

Subscribed and sworn before me this 19 day of Oct, 2015.



Judge/Magistrate/Commissioner

Approved for Presentation:

Prosecuting Attorney, WSBA#

LISA E TABBUT LAW OFFICE
April 06, 2017 - 4:30 PM
Transmittal Letter

Document Uploaded: 2-494213-Appellant's Brief.pdf

Case Name: State v. Gustavo Allen

Court of Appeals Case Number: 49421-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: 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

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lisa E Tabbut - Email: ltabbutlaw@gmail.com

A copy of this document has been emailed to the following addresses:
prosecutor@clark.wa.gov