

NO. 49490-6

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

WILLIAM HOWARD WITKOWSKI and
TINA DEE BERVEN, RESPONDENTS

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 15-1-04375-9 and 15-1-04393-7

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred in finding that the October 29, 2015 search warrant¹ did not include the gun safes or containers for firearms. (Court's Reasons for Admissibility or Inadmissibility of the Evidence #12)²
2. The trial court erred in finding that the search of the gun safes did not fall within the scope of the search warrant addendum. (Court's Reasons for Admissibility or Inadmissibility of Evidence #13)
3. The trial court erred in finding that gun safes are not personal effects. (Court's Reasons for Admissibility or Inadmissibility of Evidence #13)
4. The trial court erred in suppressing the evidence found within the gun safes inside the residence. (Court's Reasons for Admissibility or Inadmissibility of Evidence #14)

¹ There were two search warrants issued in this case—one signed on October 27, 2015, and one signed on October 29, 2015. Both warrants involve the search of the residence located at 31717 47th Ave E. in Eatonville, Washington. The second warrant is an expansion of the first in that the evidence sought was expanded to include evidence of unlawful possession of firearms, identity theft, unlawful possession of a controlled substance, and unlawful use of drug paraphernalia. The trial court and parties below refer to the October 29, 2015 warrant as an addendum to the original warrant.

² While some of the findings of fact and conclusions of law may be mislabeled in this case, it has no impact on this court's analysis. *See State v. Marcum*, 24 Wn. App. 441, 445, 601 P.2d 975 (1979) (findings of fact mislabeled as conclusions of law are treated as findings of fact on review); *State v. Green*, 177 Wn. App. 332, 341, n.7, 312 P.3d 669 (2013) (conclusions of law mislabeled as findings of fact are reviewed as conclusions of law).

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Did the trial court err when it found that the search of a locked gun safe inside the defendants' residence did not fall within the scope of the search warrant addendum, which authorized the police to search the residence for evidence of firearms, drugs and identity theft?

C. STATEMENT OF THE CASE.

1. Procedural Facts

On May 26, 2016, defendant Witkowski was charged by amended information with two counts of possession of a controlled substance with the intent to deliver, twelve counts of unlawful possession of a firearm in the first degree, defrauding a public utility in the first degree, unlawful possession of a controlled substance, and seven counts of possession of a stolen firearm. CP 5-15. Defendant Berven was charged with four counts of unlawful possession of a firearm in the first degree, defrauding a public utility in the first degree, and unlawful use of drug paraphernalia. CP 117-119; 120-121.

Defendant Witkowski filed a motion to suppress, which was joined by defendant Berven. CP 18-39; 122-145. On August 30-31, 2016, all parties appeared to present testimony and argument regarding the

defendants' motion. IRP³. On September 9, 2016, the court entered findings of fact and conclusions of law on each cause number, holding in part that evidence recovered from a safe was suppressed. CP 93-100; 152-159. The same day, the State filed identical motions for reconsideration. CP. In a letter dated September 16, 2016, the trial court denied the State's motion to reconsider in each case. CP 104, 160. On October 4, 2016, the State filed notices for discretionary review in each case. CP 105-114, 161-170. The State's motion for discretionary review was granted on January 6, 2017 and both cases were consolidated.

A search warrant was obtained for the defendant's property, including the main residence, on October 27, 2015. CP 73, 146 (Exhibit #4); IRP 32. The warrant stated that it was for:

31717 47th Ave. E. Eatonville, WA 98328. A brown manufactured home that has two windows with white trim facing south and a fully covered front porch attached to the west side of the residence.

To include any and all outbuildings, garages, and carports.

Id.

It was executed on October 29, 2015. IRP 109. The search warrant sought evidence relating to a grey power meter, a temporary power base, and a lock ring. *Id.* While executing the search warrant,

³ There are two volumes of transcripts. The two volumes are not consecutively numbered, and will therefore be referred to as IRP and IIRP respectively.

additional items including a digital scale, a large gun safe, two shotgun shells, a suspected used methamphetamine pipe, identifications, a printer, a scanner, a card cutter, and a possible laminator were observed. CP 73, 146 (Exhibit #5). Both defendants are convicted felons and prohibited from possessing both firearms and ammunition. *Id.* Thereafter, a second warrant (also referred to as an addendum to the search warrant) was obtained. *Id.* The second warrant expanded the scope of the original search warrant to include evidence of unlawful possession of a firearm, identity theft, unlawful possession of a controlled substance, and unlawful use of drug paraphernalia. *Id.* The second warrant defined the area to be searched as:

- 31717 47th Ave E Eatonville, WA 98328. A brown manufactured home that has two windows with white trim facing south and a fully covered front porch attached to the west side of the residence.
- A brown, elevated shed located northeast of the main residence
- Any and all vehicles and outbuildings located on the property

Id.

On August 30-31, 2016, all parties appeared and argued motions, including argument regarding whether the large gun safe was lawfully searched pursuant to the search warrants. The court ruled orally that the evidence recovered from the gun safe was inadmissible because the

warrant and the addendum failed to reference “containers for firearms.” IIRP 87. The court also found that the gun safe did not constitute a “personal effect” covered by the search warrant. IIRP 88.

2. Facts From Search Warrant Addendum⁴

While executing the search warrant, police discovered an individual on the couch in the living room. On the coffee table near the person was a piece of foil that had been folded into a slight groove, which Deputy Zurfluh recognized as a device often used to smoke narcotics. On the counter in the kitchen was a digital scale. In the dining area, police observed a large gun safe. On a table in one of the bedrooms police located at least two shotgun shells. Both defendants are convicted felons and prohibited from possessing firearms or ammunition. There was also a large hole in the wall that contained items.

Defendant Berven was located in a bedroom. Inside the room was a glass cone with tubing and a glass methamphetamine pipe. There was burned white residue in the pipe. Police discovered a hidden closet with attic access. Inside this hidden space was a hard sided rifle case. In an elevated storage shed on the property, police located a computer with a

⁴ While testimony was presented below on a number of motions raised by the defendants, the subject of the State’s appeal relates only to the adequacy of the second search warrant, *see* CP 73, 146 (exhibit #5). Therefore, the State will limit its fact section only to those facts contained in that warrant.

monitor and live surveillance feed. Also in the shed were identifications banded together, a printer, a scanner, a card cutter, and a possible laminator. The shed where the items were located was the same shed that police had contacted defendant Witkowski in a few days earlier.

Upon execution of the search warrant addendum, the large gun safe was opened by the fire department. IRP 77. Once opened, 11 loaded rifles and shotguns were recovered. IRP 76. The firearms had their serial numbers filed off. *Id.* Also recovered in the safe was a police scanner, \$2,000 in cash, heroin, methamphetamine, oxycodone, cameras, holsters, and various ammunition. IRP 76, 78.

D. ARGUMENT.

1. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE SEARCH OF A LOCKED GUN SAFE INSIDE THE DEFENDANTS' RESIDENCE DID NOT FALL WITHIN THE SCOPE OF THE SEARCH WARRANT ADDENDUM, WHICH AUTHORIZED THE POLICE TO SEARCH THE RESIDENCE FOR EVIDENCE OF FIREARMS, DRUGS AND IDENTITY THEFT.

The standard of review for the issuance of a search warrant is abuse of discretion, with all doubts being resolved in favor of warrant validity. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An affidavit in support of a search warrant must set forth the facts and circumstances to establish a reasonable probability that criminal activity is

occurring or is about to occur. *State v. Higby*, 26 Wn. App. 457, 460, 613 P.2d 1192 (1980). A magistrate's determination as to probable cause and other legal conclusions, such as those here, are reviewed de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007). Findings of fact are reviewed for substantial evidence. *State v. Macon*, 128 Wn.2d 784, 911 P.2d 1004 (1996).

Courts rightly apply a commonsense reading to search warrants and resolve all doubts in favor of their validity. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1993); *State v. Tarter*, 111 Wn. App. 336, 340, 44 P.3d 899 (2002). It remains "axiomatic that if a warrant sufficiently describes the premises to be searched, this will justify a search of the personal effects ... if those effects might contain the items described in the warrant." *United States v. Gomez-Soto*, 723 F.2d 649, 654-55 (9th Cir. 1984) (citing *United States v. Ross*, 456 U.S. 798, 820-21, 102 S. Ct. 2157, 72 L. Ed 2d 572 (1982)).

A failure to specifically designate "locked safes," as in this case, has no bearing on the legality of searching them pursuant to a search warrant when premises where the safes are located provided they are logical repositories of items described by the warrant. The particularity requirement for search warrants "is not ... a demand for precise *ex ante*

knowledge of the location and content of evidence.” *United States v. Banks*, 556 F.3d 967, 972-73 (9th Cir. 2009). Warrants need not be tailored to only evidence or containers known to exist. *Id.* It is enough the affidavit in support of a warrant sets forth facts sufficient to support a reasonable inference evidence of the crime under investigation can be found in the place to be searched. *State v. McReynolds*, 104 Wn. App. 560, 568-69, 17 P.3d 608 (2001).

The United States Supreme Court has addressed the issue of locked containers encountered while serving a search warrant, holding:

A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a house for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marijuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand. This rule applies equally to all containers, as we believe it must.

United State v. Ross, 456 U.S. 798, 820-822, 192 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). A container that may conceal the object of a search authorized by a warrant may be opened immediately; the individual's interest in privacy must give way to the magistrate's official determination of probable cause. *Id.* at 823.

Several federal courts of appeals have held that a search may be as extensive as reasonably necessary as required to locate the items described in the warrant, and is generally not limited by the possibility that separate acts of entry or opening may be required to complete the search. "A warrant to search a specific area for a certain class of things authorizes government agents to break open locked containers which may contain the objects of the search." *United States v. Jackson*, 120 F.3d 1226, 1228-1229 (11th Cir. 1997). A search warrant authorizing a search for controlled substances, as was the case here, grants officers authority "to inspect virtually every aspect of the premises" covered by the warrant. *State v. Olson*, 32 Wn. App. 555, 559, 648 P.2d 476 (1982). In *United States v. Pritchard*, 745 F.2d 1112, 1122 (7th Cir. 1984), the court upheld the search of a locked suitcase that was forced open by federal agents. *Id.* at 1112. The court held that a thorough and extensive search was reasonably required to locate the items described in the warrant and admitted the firearms as evidence in defendant's subsequent trial for

unlawful possession of firearms. *Id.*, see also *State v. Simonson*, 91 Wn. App. 874, 886-87, 960 P.2d 955 (1998) (citing *State v. Lee*, 68 Wn. App. 253, 257, 842 P.2d 515 (1992) *rev'd on other grounds sub nom State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994)); *United States v. Gonzalez*, 940 F.2d 1413, 1420 (11th Cir. 1991) (search of locked briefcase in the defendant's home fell within the scope of a search warrant for documents and currency); *United States v. Snow*, 919 F.2d 1458, 1461 (10th Cir. 1990) (court held that the FBI did not exceed the scope of their warrant when they opened a locked safe to look for documents); *United States v. O'Neil*, 27 F.Supp.2d 1121, 1135 (E.D. Wis. 1998) (court held that a search warrant for firearms permitted the search of a locked safe as long as the firearms could have fit inside the safe).

In *United States v. Morris*, 647 F.2d 568, 573 (5th Cir.1981), the court held that a separate warrant was not required to open locked jewelry box found inside residence searched pursuant to valid warrant. *Id.* at 573. The court also held that the fact that a container is locked does not create any greater expectation of privacy than if it was unlocked. *Id.* This principal has been adopted by Washington Courts. In *State v. Llamas-Villa*, 67 Wn. App. 448, 454, 836 P.2d 239 (1992), the court held that “. . . places which may be searched pursuant to a search warrant are not excluded due to the presence of locks or because some additional act of

entry or opening may be required. *Id.* at 454, *citing* 2 W. LaFave, *Search and Seizure*, § 4.10(a), at 313 (2nd ed. 1987).

In *United States v. Johnson*, 709 F.2d 515 (8th Cir. 1983), the police physically took a floor safe out of the defendant's bedroom and opened it at the police station without the defendant's consent and without a second warrant. *Id.* at 516. The court upheld the search of the safe, holding that the warrant authorized the search of containers found on the premises that might conceal the items listed in the warrant. *Id.*

Other states have also held that locked safes fall within the scope of search warrants if the items being sought could fit within the safe. In *Arkansas v. Stites*, 300 S.W.3d 103 (Ark. 2009), the court held that an officer's search of a safe was within the scope of the warrant because the safe was large enough to hold drugs and handguns. *Id.* at 109-110. In *Jackson v. Florida*, 18 So.3d 1016 (Fla. 2009), the court upheld the search of a locked motel room safe and held that a second warrant was unnecessary. *Id.* at 1029.

Washington courts have also held that locked containers may be opened and searched pursuant to a warrant. In *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.3d 239 (1992), the court held that the search of a padlocked locker in a storage room next to the defendant's apartment was

lawfully searched pursuant to a warrant. *Id.* at 453. In that case, the warrant did not specifically list locked lockers as a place to be searched.

The defendants may attempt to distinguish *Llamas-Villa*, as they did in their response to the State's motion for discretionary review, on the basis that a footlocker is somehow different from a locked safe. In *Llamas-Villa*, as stated above, the storage locker was located in a separate area from the suspect's apartment and was not specifically included in the search warrant. *Id.* at 451. It was also locked with a padlock, which police opened. *Id.* In upholding the warrant, the court approved a more attenuated situation than is present in the case at bar. Not only did the police in *Llamas-Villa* access the storage area that was separate from the suspect's living space, but they also breached the padlock, all of which was approved by the reviewing court. In the case at bar, the safe was located directly in the residence's living space, which was being searched pursuant to a valid warrant.

In *State v. Walker*, 178 Wn. App. 478, 315 P.3d 562 (2013), *reversed in part on other grounds*, *State v. Walker*, 182 Wn.2d 463, 314 P.3d 976 (2015), this division held that because police possessed a valid search warrant when they went to the residence and the warrant included items that could fit in a safe, a motion to suppress items within the safe

would not have been granted even if the trial court had held a CrR 3.6 hearing. *Id.*

In this case, the warrant addendum authorized the police to look for, among other things, drugs and firearms. It is entirely reasonable that guns would be contained in a gun safe. The safe was described as being the size of a refrigerator. IRP 72. In fact, when opened, the gun safe did indeed contain 11 firearms, along with cash, drugs, and ammunition. CP 16-17.

The defendants may assert, as they did in the response to the State's motion for discretionary review, that *O'Neil, Johnson, and Walker* are distinguishable from the case at bar because in the present case the police knew a gun safe was present in residence at the time they sought the addendum. Knowledge that a safe was present in the residence, however, does not distinguish any of the other cases cited by State. Law enforcement's knowledge that a safe is present in a residence is not dispositive. The court's analysis in *O'Neil, Johnson, and Walker* is whether the items sought could fit in the container searched. In this case, the items sought—guns and drugs—could clearly fit within a gun safe. To require otherwise would be to create an obligation for the police to seek an addendum every time they encountered a locked container, or even a

closed door, within a residence they are lawfully searching. That is not what the law requires and such an argument should be rejected.

The warrant authorized police to search for such items within this house. Based on the abundant case law cited above, the police lawfully opened the gun safe and searched its contents. The trial court erred in suppressing the evidence recovered from the safe.

E. CONCLUSION.

The State respectfully requests that this court grant the State's appeal and reverse the trial court's ruling suppressing the evidence recovered from the gun safe.

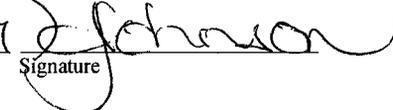
DATED: March 6, 2017.

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