

**NO. 49490-6-II**

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

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STATE OF WASHINGTON,

Petitioner,

v.

**TINA BERVEN AND WILLIAM WITKOWSKI,**

Respondents.

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

The Honorable Jack Nevin, Judge

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**BRIEF OF RESPONDENT WILLIAM WITKOWSKI**

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## **A. SUMMARY OF ARGUMENT**

Police officers knew that William Witkowski and Tina Berven were convicted felons who could not possess ammunition or firearms. They knew too that in the Witkowski-Berven home there were two gun safes. In requesting and receiving an addendum to a preexisting search warrant to broaden the scope of their search of the Witkowski-Berven home to include ammunition, weapons, and drugs, law enforcement did not seek permission to search the gun safes. Yet, law enforcement returned to the Witkowski-Berven property, searched a locked gun safe, located guns and drugs, and now Witkowski is charged with 20 gun and drug crimes.

Pierce County Superior Court Judge Nevin suppressed the gun and drug evidence because the search of the locked gun safe exceeded the scope of the search authority granted in the addendum to the initial search warrant. This court accepted interlocutory review of Judge Nevins' ruling and Commissioner Bearse reversed Judge Nevin. This judge panel should reverse Commissioner Bearse.

## **B. ISSUE**

Whether the trial court acted within its authority at the suppression motion by invalidating the search warrant and suppressing all of the evidence found in the safes?

## **C. STATEMENT OF THE CASE**

Pierce County law enforcement served a search warrant and an addendum to the search warrant on the Eatonville home William Witkowski shared with Tina Berven. CP Exhibits 4, 5; IRP 33.

The search warrant authorized police officers to search the home, outbuildings, and vehicles only for evidence of theft of power, specifically a grey power meter, a meter base, and a lock ring. CP Exhibit 4. While serving the search warrant, law enforcement saw drug paraphernalia, items possibly used for identification theft, and the following:

- a large gun safe in the dining room
- at least two shotgun shells in a spare bedroom table
- a hard-sided rifle case in a back closet, and
- another large gun safe in a bedroom closet.

CP Exhibit 5; IRP 70-71, 75, 105. The officers knew both Witkowski and Berven were convicted felons and could not lawfully possess either firearms or ammunition. IRP 105.

The offers were also interested in what appeared to be a surveillance system set up in a bedroom. Surveillance systems, they believed, were instrumental in committing crimes. CP Exhibit 4 and 5.

Because of the suspected additional evidence of crimes, the police asked for and received telephonic authorization for a second, broader addendum to the warrant that allowed them to search the house, an elevated shed, and all vehicles and outbuildings on the property for the following:

1. Firearms, firearm parts, and accessories, including but not limited to rifles, shotguns, handguns, ammunition, scopes, cases, cleaning kits, and holster.
2. Printers, computers, scanners, cameras, laminators, card cutters, card stock, paper, and or any other item used or intended to be used for purpose of generating fraudulent documents including but not limited to ID cards, Credit Cards, Vehicle Titles, Registrations, Trip Permits, and prescriptions.
3. File systems including thumb drives, hard drives, papers, or any other means used to store or intended to be used to store personal information of potential identify theft victims.
4. Surveillance Systems used or intended to be used in the furtherance of any of the above listed crimes.
5. Methamphetamines and or any other controlled substances.
6. Any item used as a container for item 4.
7. Drug paraphernalia including but not limited to; scales, foil, pipes, straws, bongs, and syringes.

8. Indicia of occupancy or residency of the location listed in this warrant.

Exhibit 5; IRP 34-36.

While searching under the auspices of the warrant addendum, officers opened the two gun safes. IRP 73, 77. The lesser-sized safe from the bedroom closet was not locked and yielded nothing incriminating. IRP 73. To get into the larger “refrigerator-size” gun safe from the dining room, which was locked, it was removed to the yard where a local fire department used their cutting tools to open it. IRP 72, 77. Inside the larger safe, the officers found, among other things, 11 long guns with the serial numbers filed off, cash, heroin, methamphetamine, and pills. IRP 76.

Witkowski is currently charged with 20 drug and gun crimes plus one felony count of defrauding a public utility. CP 1-3, 5-15.

Pre-trial, Witkowski moved to suppress the evidence seized as a result of the addendum to the first search warrant. CP 18-39. The court heard the suppression motion and took testimony from Pierce County Sheriff’s Deputy Marin Zurfluh, Tina Berven, and Witkowski. IRP, IIRP. The motion focused primarily law on police entry onto the Witkowski-Berven property after which officers gathered evidence of suspected criminal

activity on the property. CP 18-39; IIRP 1-92. Without the entry, it was argued, there was no basis for the first warrant. Without the first warrant, the police would not have been in the house to see suspected evidence of crimes and would have had no basis for the addendum to the first warrant. CP 18-39; IIRP 27-37, 76. Because the initial entry was invalid, and it was the additional information the police obtained during the first search that caused the authorization of the warrant addendum, Witkowski argued for suppression of all evidence collected as a result of the addendum. CP 38-39; IIRP 27-37.

Judge Nevin found the original police entry onto the Witkowski-Berven property was legally made and with the consent of Berven and Witkowski. IIRP 2 at 85-87; CP 98-99. As such, the first warrant and the addendum to it were not tainted by illegally obtained information. IIRP 87; CP 99.

However, the court took issue with the particularity of the addendum as it related to the search of the items identified as gun safes.

The warrant, however, did not include a specific reference to either one of the safes, one of which was specifically described as a gun safe. And this is of significance because it was identified not as a safe but as a gun safe, as well as the other safe in the master bedroom. The first item that the officers were looking for, at least chronologically, in the search warrant were firearms. The warrant made no reference to containers for firearms. It did include a

specific reference to containers for surveillance equipment. Accordingly, the officers, at least insofar as we're talking about the surveillance equipment, were mindful that to get to the surveillance material you have to sometimes have a container indicated as well.

IIRP 87-88.

The State has argued that a locked safe or safe in this matter would constitute a personal effect. I simply don't accept that proposition. I believe that locked containers, or more specifically, firearm safes, particularly, given the fact that they were identified as a firearm safe prior to the application of the second warrant, needed to be included in this. I find that the search of the safes did not fall with the scope of the search warrant. And I am suppressing that which was obtained as a result of the search of the safes.

IIRP 88.

In any event, I think it was a legitimate consensual entry which led to the plain view, which led to consent, which led to legitimate search warrant, which led to the second search warrant, or addendum to the first search warrant, also based on probable cause, but that the scope of the addendum did not extend to the content of those safes. And, accordingly, those contents are hereby suppressed.

IIRP 89. Consequently, the court suppressed the evidence seized pursuant to the addendum. IIRP 77-90; CP 98-100.

#### **D. ARGUMENT**

Judge Nevin decided this case under the Fourth Amendment. IIRP 78-92; CP 98-100. The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and

*particularly* describing the place to be searched, and the persons or things to be seized.” (Italics for emphasis). U.S. Const. Amend. 4. The purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and prevention of the issuance of warrants on loose, vague, or doubtful bases of fact. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). Whether a search warrant meets the particularity requirement is reviewed de novo “in a commonsense, practical manner, rather than in a hypertechnical sense.” *State v. Nordlund*, 113 Wn. App. 171, 179–80, 53 P.3d 520 (2002).

In reviewing the addendum to the warrant, Judge Nevin acted within his authority to find the addendum lacked particularity to search the gun safes. The search warrant addendum particularly described the search of containers for surveillance equipment and thus, by inference, excluded search of containers for guns. CP Exhibit 5; IIRP 77-90. With no authority to search either gun safe, the police violated the particularity limitations of the warrant addendum. Thus the search was illegal and all the obtained evidence must be suppressed.

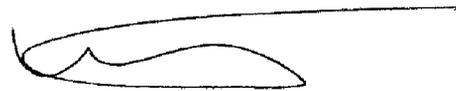
All of the cases cited by the State in its Opening Brief of Appellant stand for the general position that locked containers can be searched

during an otherwise lawful service of a search warrant are distinguishable on this point. See Opening Brief of Appellant, pages 7-13. While it is true under the Fourth Amendment that a separate search warrant is not generally required before police can search a locked container found in an area authorized to be searched, the search of the container itself must be lawful within the parameter of the search warrant. Here Judge Nevin found that not to be the case. The police in searching the locked gun safe exceeded the particularity of the search warrant addendum. This violation of the particularity requirement necessitates suppression. *Perrone*, 119 Wn. 2d at 555.

#### **F. CONCLUSION**

The case should be remanded for the suppression ordered by Judge Nevin.

Respectfully submitted April 21, 2017.



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LISA E. TABBUT/WSBA 21344  
Attorney for William Witkowski

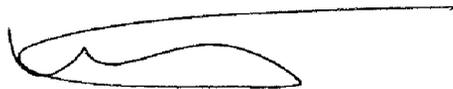
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Respondent to (1) Pierce County Prosecutor's Office, at pcpatcecf@co.pierce.wa.us; (2) Washington Appellate Project at wapofficemail@washapp.org; (3) the Court of Appeals, Division II; and (4) I mailed it to William Witkowski c/o Pierce County Jail #2016221027, 910 Tacoma Ave S, Tacoma, WA 98402.

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

Signed April 21, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for William Witkowski, Respondent

**LISA E TABBUT LAW OFFICE**  
**April 21, 2017 - 4:50 PM**  
**Transmittal Letter**

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