

NO. 49549-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

KATHLEEN LOUISE NICKS,

Appellant.

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

The Honorable Michael J. Sullivan, Judge, and
The Honorable William J. Faubion

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying appellant Kathleen Nicks' CrR 3.6 motion to suppress evidence obtained as a result of a warrant to search her house and detached garage.

2. The search warrant affidavit failed to establish a nexus between the crimes alleged in the affidavit and the appellant's residence located at 2 Middle Valley Road, Skamokawa, Washington.

3. To the extent the court's written order denying the defense CrR 3.6 suppression motion can be considered findings of fact, the trial court erred in entering an order containing the following:¹

The remainder of Defendant's motion is denied[.]

All other issues raised by the Defense are not persuasive[.]
Therefore, all evidence seized by the State during the search of both the Defendant's residence and garage are not suppressed and are allowed to be offered at trial subject to applicable court rules.

Clerk's Papers (CP) 77-78.

4. There was insufficient evidence to convict Ms. Nicks of possession of methamphetamine as alleged in count 1.

5. There was insufficient evidence to convict Ms. Nicks of second degree possession of stolen property, (count 2); first degree identity theft

¹The trial court's ruling regarding the CrR 3.6 motion is attached as

(count 3); and possession of another's identification (counts 4 and 5).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Law enforcement obtained a warrant permitting them to search the appellant's house and detached garage. Did the trial court err when it denied the motion to suppress where the warrant lacked probable cause to believe evidence of stolen property or evidence from a vehicle prowl that occurred in June, 2014 in Kelso, Washington would be found in the house? Assignments of Error No. 1, 2, and 3.

2. Whether there is sufficient evidence to support convictions for possession of methamphetamine, second degree possession of stolen property, first degree identify theft, and possession of another's identification, where police found a nylon zipped pouch containing methamphetamine residue on a pipe on the floor of the master bedroom, and found a fuel access card, social security card, and two driver's licenses issued to persons other than Ms. Nicks in a desk drawer in the master bedroom, did the State fail to prove the appellant constructively possessed methamphetamine, cards and driver's licenses, where the State failed to establish any connection between the nylon pouch or the methamphetamine, and where there is no evidence that Ms. Nicks used the

desk or had knowledge of evidence contained in the desk drawer, and where she shared the master bedroom with her then-boyfriend Richard Tralefet? Assignments of Error 4 and 5.

C. STATEMENT OF THE CASE

1. Procedural History:

Kathleen Nicks was charged in Wahkiakum County Superior Court with possession of methamphetamine, (count 1; RCW 69.50.4013(1)); second degree possession of stolen property, (count 2; RCW 9A.56.160(1)(c)), and first degree identity theft (count 3; RCW 9.35.020(3)). Clerk's Papers (CP) 6-7. She was also charged in counts 4 and 5 with gross misdemeanors for possession of another's identification. (RCW 9A.56.330(1)). CP 7.

The State alleged in count 2 that Ms. Nicks knowingly possessed a fuel card belonging to DeBriac Logging Company, knowing that the card had been stolen. CP 7. The State alleged in count 3 that Ms. Nicks possessed a social security card belonging to Brandi Kuning. CP 7. In counts 4 and 5, the State alleged that she possessed two Washington State driver's licenses issued to Ms. Kuning and Lisa Williams, respectively. CP 7.

The charges originated from seizure of evidence recovered at Ms. Nicks' residence located at 2 Middle Valley Road, Skamokawa, Washington pursuant to a search warrant signed on January 30, 2015. CP 68-70. The

search warrant and supporting affidavit are attached hereto as Appendix B. Information contained in the search warrant² affidavit is set forth below:

a. Affidavit in support of the search warrant

Wahkiakum County Deputy Sheriff Michael Balch prepared an affidavit requesting a warrant to search Ms. Nicks' residence and detached garage for equipment received from Mighty Quip, distributors of commercial and industrial equipment, and for evidence pertaining to a vehicle prowl that occurred in Kelso, Washington, on June 22, 2014. CP 22-25; Appendix B.

The affiant, Deputy Balch, stated that Brian Tills told him on January 30, 2015, that he had sold equipment on January 28, 2015, to Tiffany Ames. CP 22. He stated that Brian Tills works for Mighty-Quip Industries. CP 23. He stated that a person identifying herself as "Tiffany Ames" paid by check written for the amount of \$5,450.00, and that his employer told him on January 30 that the check was fraudulent. CP 23-24. Mr. Tills did not know the address where he had delivered the equipment, but had a photo of the house on his cell phone. CP 23.

Deputy Balch wrote in his affidavit that he recognized the house in the photo as 2 Middle Valley Road in Skamokawa, and that he knew that Kathleen

²The search warrant and supporting affidavit are attached hereto as Appendix B.

Nicks and her children live in the house. CP 23-24. He stated that Mr. Tills told him that he contacted people at the address and asked them if they needed a diesel and gas generator that he had for sale. CP 24. They agreed and a woman wrote the check and he delivered the equipment to the address and assisted in putting the equipment in a detached garage on the property. CP 24. Mr. Tills described the woman who wrote the check as being around 40 years old, 5'4" tall, with "dirty blond/brown shoulder length hair." CP 24. Mr. Tills had a cell phone photo of the bill of sale for the items he delivered, which included a Mighty-Quip diesel generator, 200 PSI DeWalt electric air compressor, Honda 2" trash pump with hose kit, a 3100 PSI pressure washer, and Honda EU 8500 watt gas generator. CP 24.

Deputy Balch stated in his affidavit that he spoke with Harlan Wheeler, who is Mr. Tills' boss at Mighty-Quip. Mr. Wheeler told the deputy that the check received from the woman who called herself "Tiffany Ames" was reported to have been stolen in Kelso. CP 24. Deputy Balch stated in his affidavit that after Mr. Wheeler told Mr. Tills that the check was fraudulent, Mr. Tills returned to the garage where he had unloaded the equipment and contacted the same two teenage boys who had helped him put the equipment in the garage two days earlier. CP 24. Mr. Tills asked for "Tiffany" and was told they did not know anyone with that name. He asked if the equipment was still

in the garage and they stated that they did not know. CP 24.

Deputy Balch contacted Kelso police officer Ken Hochhalter, who had received a report of a vehicle prowl from Tiffany Ames in June, 2014. CP 24. Deputy Balch's affidavit states that the report of the Kelso vehicle prowl lists among the items taken include a purse with a wallet, driver's license, social security cards and a checkbook belonging to Tiffany Ames. CP 24. Deputy Balch stated that Officer Hochhalter took another statement from Ms. Ames, who said that she did not write the check in the amount of \$5,450.00 received by Mighty-Quip. CP 24.

A warrant authorizing officers to search a double wide mobile home with detached garage at 2 Middle Valley Road, Skamokawa was signed on January 30, 2015. CP 19-21; Appendix B. The warrant authorized search for the following materials:

- Book of bank checks with the name Tiffany Ames printed on them from Fibre Federal Credit Union
- Mighty-Quip Diesel Generator
- 200 PSI DeWalt electric air compressor
- Honda 2" trash pump with hose kit
- 3100 PSI Pressure washer
- EU 8500 watt Honda gas generator
- Bill of sale from Mighty-Quip generator
- Driver's license for Tiffany Ames
- Social security cards for Tiffany Ames, Remington Ames, and Clayton Gownoug.

CP 20.

The warrant was executed on January 31, 2015. Police found none of the equipment delivered by Mighty-Quip in the garage. Police also searched Ms. Nicks' house, and during a search of the master bedroom of the house police found a brown nylon zipped pouch containing methamphetamine on the bedroom floor, and also found two driver's licenses, a social security card, and a fuel card, all of which were issued to other persons, in a nearby desk.

b. CrR 3.5/3.6 suppression hearing

Ms. Nicks moved to suppress statements and evidence obtained by law enforcement during execution of the search warrant on January 31, 2015, on the grounds that there was insufficient probable cause supporting search of the house. CP 17- 41 (Motion for Suppression of Evidence, dated 03/31/16). 3Report of Proceedings (RP)³ at 16-90. The CrR 3.5/3.6 hearing was heard by the Honorable Michael Sullivan on April 4, 2016. 3RP at 16-90.

Deputy Balch testified that during the execution of the warrant on the afternoon of January 31, 2015, several people in the house were "gathered" by police in the dining room and were advised of their *Miranda* rights. 3RP at 25. He testified that Ms. Nicks and her then-boyfriend Richard Trafelet were

³The Verbatim Report of Proceedings consists of the following sequentially paginated hearings. To assist in reference, appellate counsel has cited each volume separately as follows: 1RP (12/14/15); 2RP (3/7/16); 3RP (4/4/16, suppression hearing); 4RP (4/18/16); 5RP (5/9/16); 6RP (6/6/16); 7RP (6/20/16); 8RP (8/29/16, pretrial hearing); 9RP (9/29/16, jury trial, day 1);

among the people in the house, and that Ms. Nicks said that she understood her rights after he read them to the group. 3RP at 25, 26. Ms. Nicks testified that she was sitting on the edge of the bed in the master bedroom while officers searched the room and did not hear Deputy Balch read *Miranda* warnings to the people in the dining room. 3RP at 56.

Regarding the motion to suppress items found in the master bedroom, counsel argued that the contraband obtained from the house should be suppressed due to lack of probable cause to support the warrant and due to the staleness of the information contained in the affidavit. CP 17-41; 3RP at 77-82.

The trial court did not immediately rule on the suppression motions, but ultimately issued a written order that Ms. Nicks' statement to law enforcement during the search was admissible. CP 79-80. The court also entered an order on June 6, 2016, denying the defense motion to suppress contraband found in the residence. The court's written order provided:

1. Defendant's Motion to Suppress Evidence under CrR 3.6 is granted, in part.
2. The radios found during the search and seized are suppressed.
3. The remainder of Defendant's motion is denied.
4. All other issues raised by the Defense are not persuasive.

Therefore, all evidence seized by the State during the search of

both the Defendant's residence and garage are not suppressed and are allowed to be offered at trial subject to applicable court rules.

CP 77-78.

Although court entered orders denying the motions, the trial court did not enter written findings of fact and conclusions of law pursuant to CrR 3.6.

2. Trial testimony:

The case came on for jury trial on September 29 and 30, 2016, the Honorable William Faubion presiding. 9RP at 118-225, 10RP at 227-287. The State introduced evidence regarding a fuel card or a gas card issued by a logging company to a former employee that was found in Ms. Nicks' bedroom by police during the search on January 31, 2015. 9RP at 127-132. Dorothy Olson, office manager for the logging company, testified that a fuel card belonging to the company was missing, and had been previously issued to an employee named Frank Brown. 9RP at 129. The card was activated by use of a Personal Identification Number and used to purchase gasoline on credit for the logging company. 9RP at 129. Ms. Olson testified that Mr. Brown subsequently quit in August, 2014, but did not return the fuel card. 9RP at 130. She stated that Mr. Brown did not have permission to use the card and that he was not permitted to let the card be used by any other person when he worked at the company. 9RP at 130. The card was last used in October, 2014. 9RP at

132.

Lisa Williams testified that she renewed her Washington driver's license online in December, 2014. 9RP at 142. She expected to receive her new license in the mail, but did not receive it. 9RP at 143. Ms. Williams was subsequently contacted by law enforcement, who notified her that it had been recovered during the search. 9RP at 144. She stated that she did not know Katie Nicks or anyone who lives at her house. 9RP at 144.

Brandi Kuning's purse containing her license, cell phone, credit cards and her social security card was stolen from her vehicle in June, 2014, while she was at work in Longview. 9RP at 161, 166. She stated that she left her purse in her car when she went to work and when she returned a window in her car was broken and her purse was gone. 9RP at 161-62. She later received a notice from a credit card company that her application for credit had been denied. She testified that she had not applied for a credit card and that she suspected that someone had used her identity to apply for the card. 9RP at 163.

Pictures of Ms. Kuning's social security card, and driver's license were entered as State's Exhibits 1 and 2. 9RP at 164.

Law enforcement executed the search warrant at Ms. Nicks house shortly after noon on January 31, 2015. Deputy Balch testified that the property is owned by Ms. Nicks' father. 9RP at 170. In January, 2015, Ms. Nicks and

her family lived in the house. 9RP at 170-71. He stated that five officers participated in the search. Police entered the house first and Ms. Nicks was taken to the front room. 9RP at 173. During the search, she wanted to go into what Deputy Balch called the master bedroom, and police let her go into that room while it was being searched. 9RP at 173. In a desk in the room, police located a social security card and drivers' licenses issued to Brandi Kuning, a driver's license issued to Lisa Williams, and a fuel card issued to the DeBriaie Logging company. 9RP at 175-77, 215.

Police found a brown nylon zippered pouch located on the floor between the right side of the bed and a desk in the master bedroom. 9RP at 208. Deputy John Mason opened the pouch and spread the contents on the bed and photographed the items found in the pouch. 9RP at 209. Exhibit 10. A glass pipe located inside the pouch tested positive for the presence of methamphetamine. 9RP at 155.

Deputy Mason testified that the cards, including the social security card and Washington State driver's license issued to Brandi Kuning, the driver's license issued to Lisa Williams, and the fuel card issued to DeBriaie Logging were located inside the desk. 9RP at 213-14, 215, 216. Richard Trafelet's identification was found in a black wallet in a drawer in the desk. 9RP at 216-17.

Ms. Nicks explained that she lived in the house with Richard Trafelet, with whom she had an on-again off-again relationship. 10RP at 229. She had known Mr. Trafelet for many years and had dated him in the past. 10RP at 230. He moved into the house in mid-January, 2015, and brought a large amount of belongings into her house, including four boxes, several duffle bags, and a motorcycle. 10RP at 230. Ms. Nicks and Mr. Trafelet occupied the master bedroom in which police found the contraband. 10RP at 231. She testified that when he moved in, he “took over the bedroom pretty much” and that he used the desk where the cards were located by police. 10RP at 232. She stated that she had personal belongings in the desk, but was not aware of everything in it. 10RP at 232-33. She said that in addition to Mr. Trafelet, her brother had lived in the house and he and his girlfriend also had their personal possessions there, and that their possessions may have been in the desk as well. 10RP at 233. Ms. Nicks identified several items pictured on the desk in the photo entered as Exhibit 6 as belonging to Mr. Trafelet, including a cane, a hat, a container of jewelry, and a glass of apple juice he was drinking at the time of the search, which was left on the desk. 10RP at 234. She stated Exhibit 7, which also showed the desk, showed a tablet Mr. Trafelet was using at the time. 10RP at 234. She denied knowledge of the zipped pouch found on the floor between the bed and the desk containing the pipe that later tested positive for the

presence of methamphetamine. 10RP at 235-36. She stated that she did not go through the drawer in the desk and did not know about the fuel card, identification card, or licenses belonging to Ms. Kuning or to Ms. Williams. 10RP at 238.

3. Verdict and sentence:

The jury found Ms. Nicks guilty as charged in the information on October 7, 2016. 10RP at 283-84; CP 156-60. The court imposed a standard range sentence of six months in counts 1 through 3, and 364 days for each gross misdemeanor, which was suspended for 24 months. 1RP at 298; CP 174. The court ordered legal financial obligations consisting of a \$500.00 crime victim assessment and court costs of \$723.60. CP 176.

Timely notice of appeal was filed October 18, 2016. CP 184. This appeal follows.

D. ARGUMENT

1. THE SEARCH WARRANT WAS UNSUPPORTED BY PROBABLE CAUSE, REQUIRING SUPPRESSION OF EVIDENCE RECOVERED FROM MS. NICKS' HOUSE.

a. A search warrant must establish a nexus between the criminal activity and the place to be searched in order to be constitutionally valid.

The search warrant affidavit did not establish probable cause to search Ms. Nicks' house because it did not establish the requisite nexus between the alleged crime and the place to be searched. The warrant therefore did not satisfy the requirements of article I, § 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. The trial court erred in failing to suppress the evidence found in the house.

The Fourth Amendment to the United States Constitution provides, "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." The particularity requirement has three purposes: "[1] prevention of general searches, [2] prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and [3] 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); *Kentucky v. King*, 563 U.S. 452, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011).

A search warrant must not issue unless there is probable cause to

conduct the search. U.S. Const. amend. IV; Wash. Const. art. I, § 7; *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). “To establish probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched.” *Lyons*, 174 Wn.2d at 359. In determining whether the supporting affidavit establishes probable cause, review is limited to the four corners of the affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). “When adjudging the validity of a search warrant, we consider only the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested.” *State v. Murray*, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988).

The issuance of a search warrant is generally reviewed for abuse of discretion. *Neth*, 165 Wn.2d at 182. While deference is owed to the magistrate, that deference is not unlimited. *Lyons*, 174 Wn.2d at 362. No deference is given “where the affidavit does not provide a substantial basis for determining probable cause.” *Lyons*, 174 Wn.2d at 363.

The trial court’s conclusions of law and its application of law to the facts are reviewed de novo. *State v. Meneese*, 174 Wn.2d 937, 942, 282 P.3d 83 (2012); *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580(2008). The trial court’s assessment of probable cause is therefore reviewed de novo. *Neth*,

165 Wn.2d at 182.

b. There was no probable cause to believe evidence of the alleged crime would be found in Ms. Nicks' residence

The search warrant fails for lack of nexus between the crime and Ms. Nicks' residence. Search warrants are valid only if supported by probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause to search "requires a nexus 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." *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). The affidavit in support of the warrant must set forth facts and circumstances sufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched. *Thein*, 138 Wn.2d at 140.

A warrant to search for evidence in a particular place must be based on more than generalized belief of the supposed practices of the type of criminal involved. *Thein*, 138 Wn.2d at 147-48. Rather, the warrant must contain specific facts tying the place to be searched to the crime. *Id.* "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." *Id.* at 147.

The warrant to search Ms. Nicks' residence fails for lack of nexus. The affidavit did not establish probable cause that evidence of equipment obtained from Mr. Tills and loaded into the garage was in Ms. Nicks' house, and does not contain information that the driver's license shown by the woman who gave Ms. Ames' check to Mr. Tills may be found in the house. The affidavit states that Mr. Tills did not obtain a copy of the identification of the woman who wrote the check, and although he asked to see identification of the person who wrote the check, he "did not look at it that closely." CP 24. No information in the affidavit points to evidence of the driver's licenses being present in Ms. Nicks' house.

The affidavit states that the items from Ms. Ames' case included a checkbook. CP 24. Deputy Balch stated that his "experience is that a book of blank checks or drafts comes in groups of 25." CP 24. There is no information in the affidavit other than the deputy's unsupported contention that "a book of bank checks or drafts comes in groups of 25." CP 24. The affidavit does not say how many individual checks were taken from Ames car in June, 2014, only that it was a "book." No information is listed that it was a full check book, or whether the book was otherwise empty with the exception of a single check. The Kelso Police Department Crime Report document listing property taken on June 22, 2014, from Ms. Ames' car sheds no further illumination on this

question; the document merely lists "1 checkbook" among the property taken. CP 57, 58.

"The affidavit in support of the search warrant must be based on more than suspicion or mere personal belief that evidence of the crime will be found on the premises searched." *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). "Probable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for the suspect's home." *United States v. Ramos*, 923 F.2d 1346, 1351 (9th Cir. 1991), overruled on other grounds by *United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001). In *Thein*, a generalized belief that criminals keep evidence of their crimes at their residence was not enough to establish probable cause to search the residence in the absence of particular facts. The Court held there was insufficient nexus between evidence that a person engaged in drug dealing and the fact that the person resided in the house that was searched. *Thein*, 138 Wn.2d at 150. The affidavit contained specific information tying the presence of narcotics activity to a certain residence, but not the address to be searched pursuant to the warrant. *Id.* at 136-138, 150. The affidavit also contained generalized statements of belief, based on officer training and experience, about drug dealers' common habits, particularly that they kept evidence of drug dealing in their residences. *Id.* at

138-39. The affidavit expressed the belief that such evidence would be found at the suspect's residence. *Id.* at 139. The Court held such generalizations do not establish probable cause to support a search warrant for a drug dealer's residence because probable cause must be grounded in fact. *Id.* at 146-47.

State v. McReynolds, is also illustrative of failure to establish probable cause to search a residence for evidence of crime. In *McReynolds*, the defendants' involvement in a burglary was not enough to establish probable cause to believe evidence of that burglary would be found in the defendants' residence. The Court of Appeals found probable cause lacking to search the defendants' home when the police caught the defendants at the scene of the burglary. *State v. McReynolds* 104 Wn. App. 560, 570, 17 P.3d 608 (2000), rev. denied, 144 Wn.2d 1003, 29 P.3d 719 (2001). The question was whether there was a basis for inferring evidence of other crimes would be at the defendants' residence. *McReynolds*, 104 Wn. App. at 570. A pry bar, stolen along with a large quantity of other tools several weeks earlier, was found at the scene near one of the suspects. *Id.* at 566, 570. Yet the affidavit failed to establish a nexus between any criminal act and the defendants' residence. *Id.* There was no reasonable inference grounded in specific fact that the defendants' residence would contain evidence of a prior crime, even though the

defendants were connected with a large amount of property stolen several weeks earlier. *Id.*

The same guiding principles in *Thein* and *McReynolds* control the analysis here. The affidavit contains no observation that any resident transported the equipment to Ms. Nicks' home; in fact, the reporting party not only witnessed the equipment being placed into the detached garage (rather than the house), he actually helped with carrying the equipment into the garage. CP 24. Nothing in the affidavit shows anyone observed any of the ill-obtained equipment in Ms. Nicks' house itself, nor showed any reason to believe that the equipment or evidence of a crime would be found there.

Instead, the merest thread of a link between the equipment which was loaded into the detached garage, and the house itself, was the deputy's contention that checks, in his experience, come in packets of 25, and that Ms. Ames' check book had been stolen in June, 2014. CP 24.

c. *The information contained in the warrant was stale.*

Even assuming *arguendo* the affidavit demonstrates a nexus between the alleged crime and Ms. Nicks' residence, probable cause is still lacking because the information contained in the warrant was stale.

Probable cause must be timely. *Lyons*, 174 Wn.2d at 357. Facts used to

support probable cause “must be current facts, not remote in point of time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the person or premises to be searched at the time the warrant is issued.” *State v. Spencer*, 9 Wn. App. 95, 97, 510 P.2d 833 (1973).

Stale search warrants violate article I, § 7 and the Fourth Amendment. *Lyons*, 174 Wn.2d at 357, 359. The issue of staleness arises due to the passage of time between the informant’s observations of criminal activity and presentation of the affidavit to the magistrate. *Lyons*, 174 Wn.2d at 360. “The magistrate must decide whether the passage of time is so prolonged that it is no longer probable that a search will reveal criminal activity or evidence, i.e., that the information is stale.” *Id.* at 360-61. This is a fact-specific inquiry, but factors include the time between the known criminal activity and the nature and scope of the suspected activity. *Id.* at 361. It is not enough to set forth that criminal activity occurred at some prior time. The facts or circumstances must support the reasonable probability that the criminal activity was occurring at or about the time the warrant was issued. *State v. Higby*, 26 Wn.App. 457, 460, 613 P.2d 1192 (1980) (one time sale of a small amount of marijuana did not establish probable cause to search two weeks later); *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932). The test for staleness of information in a search warrant affidavit is one of common sense. *State v.*

Riley, 34 Wn.App. 529, 534, 663 P.2d 145 (1983).

In this case, the court did not accept the argument by the defense that information in the affidavit was stale. CP 78. The trial court's ruling, however, is not supported in light of the facts presented at the suppression hearing. Foremost, as argued above, the mere existence of any additional check belonging to Ms. Ames was purely hypothetical. There was no information that more than one check had been stolen from the car in June, 2014; the information was that a 'book' was stolen, which could have contained just a single check if all the others had already been used. In addition, checks, as paper instruments, are far less durable than an object such as a stolen weapon and cannot be anticipated to remain extant for a long period of time.

Perhaps even more compellingly, the Ames vehicle prowl occurred June 22, 2014, more than seven months before Mr. Tills received the Ames check in January, 2015. The critical time frame for establishing timely probable cause is when the criminal activity is observed. *Lyons*, 174 Wn.2d at 361. In this case, over seven months passed between the occurrence of the incident involving the car prowl and execution of the search warrant. There was simply no evidence to support the contention that additional checks—if they even existed—would continue to exist after seven months passed between the vehicle prowl and execution of the search warrant.

In determining staleness, the tabulation of the number of days is not the sole factor, but is one circumstance to be considered in determining staleness. *Lyons*, 174 Wn.2d at 361; *State v. Hall*, 53 Wn.App. 296, 300, 766 P.2d 512, rev. denied, 112 Wn.2d 1016 (1989). Nothing in the affidavit shows evidence of the offense would be found in the house – a place that was not even involved in the crime itself – more than seven months after the crime occurred. The trial court erred in concluding the warrant was not stale.

A link between the fraudulent check and facts, not a generalized belief about the habits of criminals expressed by Deputy Balch, is required to show a nexus between criminal activity and a home. *Thein*, 138 Wn.2d at 150. Here, the facts in the affidavit fall woefully short of establishing that there were additional stolen checks or other contraband in the house itself, or that the equipment was located any place other than the garage where it had been placed two days prior. See *Goble*, 88 Wn.App. at 512 (defendant's picking up package containing narcotics at post office box did not support search warrant for his residence because there was no evidence that he would take the package back to his residence rather than to another location).

d. The evidence must be suppressed

A search conducted pursuant to a warrant unsupported by probable cause violates article I, § 7 and the Fourth Amendment. *Lyons*, 174 Wn.2d at 357, 359. The exclusionary rule mandates suppression of evidence obtained as a result of an unlawful search. Without the evidence obtained from the search, there is no basis to sustain the convictions. The proper remedy is reversal of the convictions and dismissal of the charges. See *State v. Kinzy*, 141 Wn.2d 373, 393-94, 396, 5 P.3d 668 (2000) (no basis remained for conviction where motion to suppress evidence should have been granted); *State v. Boethin*, 126 Wn. App. 695, 700, 109 P.3d 461 (2005) (dismissing charges where evidence suppressed).

2. MS. NICKS' CONVICTION FOR POSSESSION OF METHAMPHETAMINE SHOULD BE REVERSED WHERE THE STATE FAILED TO PROVE DOMINION AND CONTROL OF THE POUCH AND OVER THE METHAMPHETAMINE ITSELF

In every criminal prosecution, the State must prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Ms. Nicks was convicted of three felonies and two misdemeanors involving her

alleged possession of a controlled substance, possession of the fuel card and social security card, and two Washington driver's licenses issued to other people.

The evidence at trial was insufficient as a matter of law to prove Mr. Nicks guilty of possession of a controlled substance. A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Hosier*, 157 Wn.2d at 8; *Salinas*, 119 Wn.2d at 201.

In this case, the State failed to prove Ms. Nicks constructively possessed methamphetamine found in the pouch by the bed when Ms. Nicks had no connection beyond proximity to the methamphetamine. To prove the offense charged in count 1, the State was required to prove beyond a reasonable doubt Ms. Nicks actually or constructively possessed the substance. RCW 69.50.4013(1).

Possession may be actual or constructive. *State v. Escheverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). “Actual possession occurs when the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.” *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). When contraband is not in the personal custody of an individual charged with possession, he is not in actual possession of the contraband but can be found in constructive possession provided he has dominion and control over the goods. *Callahan*, 77 Wn.2d at 29. Dominion and control means the object can be reduced to actual possession immediately. *State v. Turner*, 103 Wn.App 515, 521, 13 P.3d 234 (2000); *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

The State failed to prove dominion and control in this case when all it established was Ms. Nicks’ presence in the bedroom where the pouch was located. As an initial matter, it should be noted that the State failed to attribute ownership of the bag or its contents to either Ms. Nicks or Mr. Trafelet. While no one claimed ownership of the pouch in this case, Ms. Nicks provided undisputed testimony that the pouch did not belong to her and that she had not been aware that it was in the bedroom. 10RP at 237, 241. It is undisputed in

this case that although defense conceded her dominion and control over the bedroom, that was not exclusive; it was undisputed that she shared with bedroom with Mr. Trafelet. In addition, the State, by contrast, provided no evidence as to who owned the pouch. Thus, the lack of evidence as to ownership militates against a finding of Ms. Nicks' dominion and control of the pouch.

The frequently cited Division One case, *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990) is instructive here. In *Spruell*, while executing a search warrant at a residence, police came upon the defendant near a table on which there was cocaine residue, a scale, vials and a razor blade. His fingerprint was on a plate that had apparently held cocaine and seemed to have been thrown upon the arrival of the police. *Spruell*, 57 Wn. App. At 384–85. Relying on *Callahan*, the court found this evidence insufficient to support a possession conviction when the State failed to establish a connection between the defendant and either the drugs or the house:

There is no basis for finding that Hill had dominion and control over the drugs. Our case law makes it clear that presence and **proximity to the drugs is not enough**. There must be some evidence from which a trier of fact can infer dominion and control over the drugs themselves. That evidence being absent, Hill's conviction must be reversed and dismissed on double jeopardy grounds.

Spruell, 57 Wn. App. at 388–89 (emphasis added).

As in *Spruell*, here the State also failed to provide evidence of Ms. Nicks' dominion and control over the methamphetamine itself. Like the defendant in *Spruell*, Ms. Nicks' use of the bedroom was not exclusive but was shared by Mr. Trafelet. Under these circumstances, as was similarly found in *Spruell*, Ms. Nicks could not be found to have had dominion and control over the drugs found in proximity to her in the bedroom, absent evidence of dominion and control over the drugs themselves.

Accordingly, this Court should reverse her conviction. Another Division One case is relevant here. In *State v. George*, 146 Wn. App. 906, 193 P.3d 693 (2008), the State argued the backseat passenger of a vehicle had constructive possession of a drug pipe and its contents when it was found on the floor at his feet and he was the only person in the backseat. *George*, 146 Wn. App. at 920. In addition, the detaining officer had detected a strong odor of marijuana coming from the vehicle. *Id.* at 923.

Division One of this Court found these facts insufficient to establish constructive possession, holding the law required more than mere proximity or even handling of the contraband:

Here there was no evidence about George's past use or ownership of marijuana or paraphernalia. No drugs or paraphernalia were found on his person. There was no evidence such as dilated pupils, odor on his person, matches, or a lighter to suggest that George had been smoking marijuana with or without the pipe. There was no testimony

tending to rule out the other occupants of the vehicle as having possession of the pipe. There was no testimony establishing when George got into the vehicle or how long he had been riding in it. There was no fingerprint evidence linking George to the pipe. And George made no statements or admissions probative of guilt.

George, 146 Wn. App. at 922.

For similar reasons, the State failed to prove constructive possession in this case. Here also, there was no evidence Ms. Nicks used methamphetamine found in the bedroom, and as in *George*, the State did not rule out the ownership of the drugs by other persons who had access to the bedroom as well as Ms. Nicks.

Here, the evidence that Ms. Nicks constructively possessed the pouch containing methamphetamine on the bedroom floor (and cards and identification found in the desk) does not even approach the level of evidence in *Callahan*, and *Spruell*, where there was an admission to past possession (*Callahan*), or a fingerprint found on a plate that held the drugs (*Spruell*). Moreover, *George* reiterates the black letter rule that mere proximity, absent some other indicia of possession, does not support a finding of constructive possession.

For all these reasons, the evidence established Ms. Nicks did not have dominion and control over the pouch or its contents. Without evidence of her dominion and control over the methamphetamine itself, the State failed to

prove constructive possession and this Court should reverse her conviction in count 1.

3. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD MS. NICKS' CONVICTIONS FOR POSSESSION OF THE FUEL CARD, SOCIAL SECURITY CARD, AND DRIVER'S LICENSES FOUND IN THE DESK

As noted above, the test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774(1992). "Actual possession occurs when the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods." *Callahan*, 77 Wn.2d at 29, To meet its burden on the element of possession, the State must establish "actual control, not a passing control which is only a momentary handling." *Callahan*, 77 Wn.2d at 29.

Standing alone, mere proximity is not enough to establish constructive

possession. There must be other facts from which the trier of fact may infer dominion and control. *Spruell*, 57 Wn. App. at 388-89. No single factor is dispositive in making this determination. The totality of the circumstances must be considered. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d 1016 (1995). A person's dominion and control over premises raises only a rebuttable inference of dominion and control over items found therein and is only one factor in determining if constructive possession has been established. Constructive possession may not be conclusively established solely upon evidence of dominion and control over the premises, *State v. Cantabrana*, 83 Wn. App. 204, 207-208, 921 P.2d 572 (1996), since it is not a crime to have dominion and control over the premises where a controlled substance is found. *State v. Olivarez*, 63 Wn. App. 484, 486, 820 P.2d 66 (1991).

Here, the circumstances do not evince proof beyond a reasonable doubt that Ms. Nicks knowingly possessed the fuel card, social security card, and driver's licenses found in the desk. Preliminarily, it is undisputed that the facts do not establish actual custody; the cards and identification were found in a desk drawer. 10RP at 178, 202, 215, 217. Merely being in a room with the desk does not establish that Ms. Nicks had dominion and control over the contents therein, especially where, as here, there was evidence showing that Mr.

Trafelet moved his possessions into the house, and that he was using the desk at the time or shortly before the police arrived to search the house. Mr. Trafelet's cane and hat were near the desk, as was his glass of apple juice he was drinking earlier that day. 10RP at 234. Jewelry that he was working on was in a bag near the desk. 10RP at 234. In addition, Ms. Nicks' brother and his girlfriend had also lived with Ms. Nicks' in the house, and she stated that they may also have left their personal items in the desk. 10RP at 233.

For all these reasons, the evidence established Ms. Nicks did not constructively possess the contraband. Without evidence of her dominion and control over the methamphetamine and cards themselves, the State failed to prove constructive possession and this Court should reverse her convictions.

Even if Ms. Nicks had dominion and control over the room where the cards and identification were found, that merely raises a rebuttable inference of dominion and control over the items. *Cantabrana, supra*. The mere fact that Ms. Nicks may have been in close proximity to the desk and the pouch on the floor, as argued above, is insufficient, standing alone, to prove she constructively possessed the contraband, particularly where there is a paucity of any other evidence linking the those items to Ms. Nicks. Accordingly her convictions in counts 2 through 5 should be reversed and dismissed with prejudice.

4. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

If Ms. Nicks does not substantially prevail on appeal; she asks that no appellate costs be authorized under title 14 RAP. See RAP 14.2. The record does not show that she had any assets. The court imposed legal financial obligations including \$500.00 victim assessment and court costs of \$723 .60 . CP 176.

The trial court found her indigent for purposes of this appeal. CP 190-192. There has been no order finding Ms. Nicks' financial condition has improved or is likely to improve since that finding.

Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court has discretion to deny the State's request for appellate costs in the event this appeal is unsuccessful. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "unless the appellate court

directs otherwise in its decision terminating review.” RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in “compelling circumstances.” *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, Division One concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Ms. Nicks’ continuing indigence, this Court should exercise its discretion and deny any requests for costs in the event the State is the substantially prevailing party.

E. CONCLUSION

For the reasons discussed above, the trial court’s order denying Ms. Nicks’ motion to suppress must be reversed. The evidence must be suppressed and the case remanded for new trial.

In the alternative, Ms. Nicks respectfully requests this Court to reverse and dismiss her convictions consistent with the arguments presented herein. This Court also should exercise its discretion and deny any request

for appellate costs, should Ms. Nicks not prevail in her appeal.

DATED: April 28, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



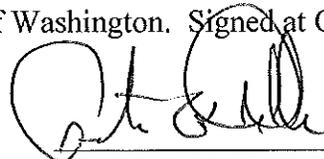
PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Kathleen Nicks

CERTIFICATE

I certify that I sent by JIS a copy of the Brief of Appellant to Clerk of the Court, Court of Appeals, Division II and copies were mailed to Kathleen Nicks, Appellant, and Daniel Bigelow, Wahkiakum County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on April 28, 2017, at the Centralia, Washington post office addressed as follows:

Daniel Bigelow Wahkiakum Prosecuting Attorney PO Box 608 Cathlamet, WA 98612-0608	Mr. Derek M. Byrne Clerk of the Court Court of Appeals 950 Broadway, Ste.300 Tacoma, WA 98402-4454
Kathleen Nicks PO Box 221 Skamokawa, WA 98647	

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on April 28, 2017.



PETER B. TILLER-WSBA 20835
Attorney for Appellant

APPENDIX A

Dated: June 6, 2016.

A handwritten signature in black ink, appearing to read "Michael J. Sullivan", written over a horizontal line.

Judge Michael J. Sullivan

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WAHKIAKUM

STATE OF WASHINGTON) CAUSE NO.
)
Plaintiff,)
)
vs.) SEARCH WARRANT
)
)
Kathleen L. Nicks)
DOB: 12-09-1973)
Defendant,)

TO: THE SHERIFF OF WAHKIAKUM COUNTY, WASHINGTON, OR HIS DEPUTY
OR ANY PEACE OFFICER OF THE STATE OF WASHINGTON,

GREETINGS:

WHEREAS, Michael E. Balch has this day made complaint, on oath, to the undersigned, a Judge (Court Commissioner) of the above-entitled Court in and for said County, that in Skamokawa, Washington, at the following described location, to-wit:

The Kathleen L. Nicks residence, a single story, double-wide mobile home with a detached garage, located at 2 Middle Valley Rd, Skamokawa, Washington 98647

there is now located certain property which is:

- evidence of a crime
- contraband,
- a thing by means of which a crime has been committed,
- a thing by means of which a crime reasonably appears about to be committed,
-
- fruits of a crime,
- criminally possessed,

COPY

NAMELY:

1-book of bank checks, with the name "Tiffany Ames" printed on them as well as "360-749-1541" and the address 100 Fishers Lane Kelso, WA 98626, with the account number "70790480," from Fibre Federal credit union.

1-Mighty-Quip Diesel Generator

1-200 psi Dewalt Electric Air Compressor

1-Honda 2" Trash Pump with hose kit

1-3,100 PSI Pressure Washer

1-EU 8500 Watt Honda gas Generator

Bill of sale from Mighty-Quip

Driver's license of Tiffany Ames

Social Security cards for Tiffany Ames, Remington Ames, and Clayton Gownoug,

and which is:

kept in violation of the laws of the State of Washington, to-wit: RCW 9A.56.160 Possession of Stolen Property 2nd Degree, and RCW 9A.56.030 Theft in the First Degree, and RCW 9.35.020 Identity Theft in the First Degree.

subject to seizure under the laws of the State of Washington, to-wit: CrR2.3/CrRLJ 2.3, and RCW 9A.56.150 Possession Stolen Property in the First Degree, and RCW 10.79.015 [3] OTHER GROUNDS FOR ISSUANCE OF A SEARCH WARRANT (EVIDENCE OF ANY FELONY)

and it having been shown by:

affidavits and complaint filed herein; and,

additional affidavits of _____ . recorded sworn oral testimony; and,

telephonic sworn statements, recorded

that there is probable cause to believe that the allegations of said complaint are true, that the informant referred to therein is a reliable informant, that the complainant and affiants are reliable witnesses, and that the information related therein is accurate; and the court having made an independent determination that sufficient probable cause exists to issue this Search Warrant; **THEREFORE, IN THE NAME OF THE STATE OF WASHINGTON**, you are commanded that with the necessary and proper assistance, you (enter and) search the above described location and the grounds, out buildings and vehicle on or adjacent thereto, (and further search the person of Kathleen L. Nicks) and then and there to seize:

(RCW 69.50.509) all controlled substances there found, together with the vessels in which they are contained, and all implements, furniture and fixtures used or kept for the illegal manufacture, and sale, barter, exchange, administering, dispersing, delivery, distributing, producing, processing, giving away, furnishing, or otherwise disposing of such controlled substance.

SEARCH WARRANT - Page 2

(RCW 10.79.015) the above described evidence of the felony of:

(RCW 77.12.120) the said animals and other items above described.

(CrR 2.3, Cr RLJ 2.3) the above described evidence of the crime of R.C.W. 9A.35.020 Identity Theft in the First Degree, RCW 9A.56.160 Possession of Stolen Property in the Second Degree, and RCW 9A.56.030 Theft in the First Degree

together with evidence of the occupancy of said location and the ownership of said items to be seized, and if the same or any part thereof be found in such search, you will safely keep the same and bring the same forthwith before me to be disposed of according to law. You are further ordered to make a return of this warrant within 3 days, showing all acts and things done thereunder, with a particular statement and inventory of all articles seized and the name of the person or persons in whose possession the same was found, if any, and if no person is found in possession of any such articles, the return shall so state. A copy of this Warrant shall be served upon the person or persons found in possession of any such articles or from whose premises the property is taken, together with a receipt for the property taken, and if no such person be found, or if there be no door, then in any conspicuous place upon the premises. The inventory of items seized shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer.

The search authorized under this Warrant shall be conducted within 3 days of issuance of this Warrant.

GIVEN UNDER MY HAND this 30th day of Jan., 2015.

(JUDGE)(COURT COMMISSIONER)
Of the SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR
WAHKIAKUM COUNTY

By: [Signature]
(As authorized by said Judge
pursuant CrR 2.3 and JcrR 2.10)
(Telephone Search Warrant)

SEARCH WARRANT - PAGE 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF WAHKIAKUM COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 Kathleen L. Nicks)
)
 DOB: 12-09-1973)
)
 Defendant.)

CAUSE No.

AFFIDAVIT AND COMPLAINT
FOR SEARCH WARRANT

STATE OF WASHINGTON,)
) .ss
COUNTY OF WAHKIAKUM)

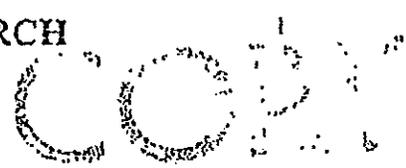
I, Michael E. Balch, being first duly sworn, on oath, (personally appearing)/(by telephone) deposes and says to the Judge whose signature appears below, on this 30th day of January, 2015, that he has reason to believe that at the following described location, in Skamokawa, Washington, and further described as:

The Kathleen L. Nicks residence, a single story, double-wide mobile home with a detached garage, located at 2 Middle Valley Rd. Skamokawa, Washington 98647

there is now located certain property which is

- Evidence of a crime
- Fruits of a crime
- contraband
- Criminally possessed
- a thing by means of which a crime has been committed,
- a thing by means of which a crime reasonably appears about to be committed
-

AFFIDAVIT AND COMPLAINT FOR SEARCH
WARRANT



22

NAMELY:

1-book of bank checks, with the name "Tiffany Ames" printed on them as well as "360-749-1541" and the address 100 Fishers Lane Kelso, WA 98626, with the account number "70790480," from Fibre Federal credit union.
1-Mighty-Quip Diesel Generator
1-200 psi Dewalt Electric Air Compressor
1-Honda 2" Trash Pump with hose kit
1-3,100 PSI Pressure Washer
1-EU 8500 Watt Honda gas Generator
Bill of sale from Mighty-Quip
Driver's license of Tiffany Ames
Social Security cards for Tiffany Ames, Remington Ames, and Clayton Gownoug.
And which is

[x] kept in violation of the laws of the State of Washington, to-wit: RCW 9A.56.160 Possession of Stolen Property 2nd Degree, and RCW 9A.56.030 Theft in the First Degree. and RCW 9.35.020 Identity Theft in the First Degree.

[x] subject to seizure under the laws of the State of Washington, to-wit: CrR2.3/CrRLJ 2.3, and RCW 9A.56.150 Possession Stolen Property in the First Degree, and RCW 10.79.015 [3] OTHER GROUNDS FOR ISSUANCE OF A SEARCH WARRANT (EVIDENCE OF ANY FELONY)

And the facts tending to establish the grounds for issuance of a search warrant are as follows:

I, Michael E. Balch, am a law-enforcement officer for the Wahkiakum County Sheriff's Office and have been so employed for the past 30 years. I have attended and successfully completed the Washington State Criminal Justice Training Commission's Basic Law-Enforcement Academy in Burien, Washington. I have had over 1500 hours of continuing education in law-enforcement and am a certified police officer in the State of Washington. I have successfully investigated and solved numerous felony crimes in Wahkiakum County, Washington.

On 1-30-2015, at approximately 13:15hrs, dispatch received a call from a Brian Tills who stated that he was trying to get property back from an individual who had purchased it with a fraudulent check. He requested contact with a deputy. Sgt. Gary Howell and I met with Tills at the Skamokawa General Store parking lot at approximately 13:46hrs and he explained what was going on. He told us that he had sold some equipment to a Tiffany Ames on 1-28-2015, and today his boss called him and said that the check is fraudulent. The amount of check was \$5,450.00. Tills explained to me that he was at an address on Middle Valley Road and had made the sale. I asked him the specific address and he did not know. All he could do was show me a cell phone photograph of the residence. From the photograph he showed me of the location, it was immediately recognizable as 2 Middle Valley Road, Skamokawa, Washington. I recognized the intersection of Middle Valley and East Valley Road and the residence behind it. I have

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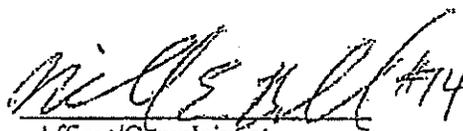
been to this residence multiple times in the last several months and know that Kathleen "Katie" Nicks and her children live here. I have included the photograph and labeled it as "Exhibit A" for identification. He explained to me that he is an employee of Mighty-Quip Industries and he had contacted the people at this address and asked them if they needed a diesel and gas generator and a few other items that he had for sale and they were interested. When the woman wrote the check for the property he dropped it off and assisted them in putting it in their detached garage. I asked if he obtained the identification of the woman who wrote the check and he told me that he did ask to see it, but did not look at it that closely. He was able to describe the woman that called herself Tiffany for me as being a white woman, around 40 years old and 5'4 inches tall with dirty blonde/brown hair, about shoulder length. Sgt. Howell told Tills that we would need more information and asked him to follow us back to the Wahkiakum County Sheriff's Office. At the sheriff's office I was able to download the photographs on Tills's cellphone and print them out. He also had a cell phone picture of the bill of sale for the 5 items he sold to Tiffany. Those items were: 1-Mighty-Quip Diesel Generator, 1-200 psi Dewalt Electric Air Compressor, 1-Honda 2" trash pump with hose kit, 1-3100 psi pressure washer, and 1-Honda EU 8500 Watt gas Generator. Tills wanted me to talk with his boss who had more information on the fraudulent check. His boss's name is Harlan Wheeler. I called Wheeler and he told me that he could get me a copy of the check. He said he was the owner of the business, "Mighty-Quip." He also told me that the check that his employee was given was stolen out of Kelso, and that Kelso Police had the report. Wheeler had the bank fax me a copy of the fraudulent bank check, along with an affidavit of forgery. I have attached a copy of the fax sent to me by Tracy Dillehay of Fibre Federal Credit Union and labeled it "Exhibit B" for identification. I also contacted Kelso, WA Police and talked with Officer Ken Hochhalter. Hochhalter was the officer that took the initial report of a vehicle prowler from Tiffany Ames in June 2014. See Kelso PD report #14-1881 attached. Inside the report it has a list of items taken including a purse with a wallet, driver's license, social security cards and 1 check book belonging to Tiffany Ames. Also, 1 bag of essential oils. Because the check received by the bank was number 3012, I believe the other numbered checks will be around this same number. My experience is that a book of bank checks or drafts comes in groups of 25. Today, Officer Hochhalter took another statement from Tiffany Ames stating that she did not write this check for \$5,450.00. See statement attached as faxed to me by Officer Hochhalter. Brian Tills completed a written statement for me before leaving the sheriff's office and I have included it with this affidavit and labeled it "Exhibit C" for identification. In Tills's statement he explained that after his boss called him about the check today he went back out to the residence in Skamokawa. He contacted the same two teenage boys that helped him unload the property two days ago and asked them if he could speak to Tiffany. "They said they didn't know any Tiffany." He asked to speak to their parents and was told that they were asleep. He asked if the equipment was still in the garage and the kids did not know. Brian Tills also sent me a photograph he took of the garage with the red door he put the items inside. See photograph attached as exhibit D for identification. It is my understanding that Kathleen Nicks has at least 1 teenage son and a daughter, approximately 12-14 years of age. I have met Kathleen Nicks on multiple occasions and have even taken a missing persons report very recently from her and know her description to be consistent with the description given to me by Tills. I know her to

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WARRANT**

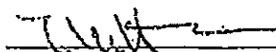
reside at 2 Middle Valley Road in Skamokawa, WA. Her criminal history includes convictions for forgery and theft and unlawful possession of a firearm, along-with Taking motor vehicle without permission. I do not know Brian Tills or Harlan Wheeler. However, I have ran criminal history requests for both subjects and Tills has only traffic offenses in his past. Wheeler has only a felony "Fleeing" conviction and a Gross Misdemeanor conviction for Hit and Run along with traffic offenses. I do not find any other offenses which might question his truthfulness. I also looked at the fraudulent check and how it was signed. I then looked at a Wahkiakum Property release form signed by Nicks on 1-8-2015. The "a" in Tiffany and the "s" in Ames appear similar to the signature that appears on the property release form. I have included a copy of the property release form as Exhibit E for identification. I have also attached the cell phone photograph of the bill of sale as exhibit F.

That affiant complaint further deposes and says that in view of the foregoing information, he has probable cause for the issuance of a search warrant as provided by CrR 2.3 and JCrR 2.10 and the laws of the State of Washington, and this complainant prays that a search warrant may issue to any peace officer of the State of Washington, and that the items referred to heretofore above may be brought before a Judge and disposed of according to law, and that a return of said warrant be made within 3 days, as provided by law.

Complainant further deposes and says that he is a (peace officer) of the State of Washington.


Affiant/Complainant

SUBSCRIBED AND SWORN before me this 30th day of Jan., 2015.
 TELEPHONIC STATEMENT SWORN TO before and recorded by me on the ___ day of _____, 19__, and transcribed on this _____ day of _____, 19__.


(JUDGE)(COURT COMMISSIONER)
of the Superior Court of the State of
Washington in and for Wahkiakum County

AFFIDAVIT AND COMPLAINT FOR SEARCH
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THE TILLER LAW FIRM

September 14, 2017 - 4:17 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v Kathleen Louise Nicks, Appellant
Superior Court Case Number: 15-1-00032-8

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