

No. 50173-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

V.

CHARLES BURKE

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BRIEF OF APPELLANT

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A. Assignments of Error

Assignment of Error

The trial court erred by denying Mr. Burke's motion to suppress evidence recovered from his motorhome on July 4, 2016.

Issues Pertaining to Assignments of Error

1. Does the Complaint in support of Search Warrant establish probable cause Mr. Burke was probably involved in the crime of harassment and that evidence of the crime of harassment would be found in his motorhome?
2. Did the testing of the contents of the Tupperware container constituted a separate and independent search for which there was not lawful authority?

B. Statement of Facts

Charles Burke was charged by information with one count of possession of methamphetamine and one count of harassment (misdemeanor) on July 4, 2016. CP, 1. Prior to trial, he filed a motion to suppress pursuant to CrR 3.6. CP, 8. A hearing was held on February 27, 2017 and the motion was denied. A subsequent motion to reconsider (CP,

50) was also denied. CP, 57. Findings of Fact and Conclusions of Law were entered. CP, 53

Mr. Burke proceeded to trial on stipulated facts. CP, 61. The Court found him guilty as charged. RP, 5 (March 20, 2017)<sup>1</sup>. The Court imposed 14 days in jail. CP, 85. A timely notice of appeal was filed. CP, 96.

The Search Warrant and the Complaint in Support of Search Warrant are contained in the records as attachments to the defense suppression motion. CP, 17. The crime being investigated is Harassment in violation of RCW 9A.64.020. CP, 21. The Warrant authorizes the search for firearms, ammunition, and dominion and control paperwork. CP, 21.

According to the Complaint, law enforcement was called out to a 911 call of a “man with a gun.” CP, 18. When they arrived, they interviewed Joseph Prince and Chantel Shelton who advised them they got into a verbal dispute with Mr. Burke. Mr. Burke told Mr. Prince was going to get a gun from his motorhome and “end this problem.” Mr. Prince got into his car and asked Ms. Shelton to call 911 because he had

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<sup>1</sup> All references to the report of proceeding are to the suppression hearing, held on February 27, 2017, unless otherwise indicated.

just been threatened with a gun. Mr. Burke told police after being *Mirandized* that he never had a gun and, “What [i]f I was someone else and got a gun.” The motorhome is registered to Mr. Burke and was towed to an impound lot. Implicit in the Complaint<sup>2</sup>, and made clear at the suppression hearing, was that fact that neither victim actually saw a gun during the interaction and that this fact was known to law enforcement prior to the search warrant request. RP, 9.

The sole witness at the suppression hearing was Kitsap County Detective Dave Meyer. RP, 5. Detective Meyer assisted other officers in executing a search warrant of a trailer. RP, 6. He was authorized to search for firearms, ammunition, and items of dominion and control. RP, 6. On the bedroom floor, under a sweatshirt, he found a cigar-type box wrapped in clear plastic. RP, 6. Upon opening the lid of the box, he found several hypodermic needles and a small Tupperware container. RP, 6. The Tupperware container was on its side and he could not see into it. RP, 7. The Tupperware container was too small to fit a firearm, but could have contained ammunition. RP, 7, 16. He pulled the Tupperware container out of the box and noticed it had a clear top. RP, 6. Inside the Tupperware

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<sup>2</sup> At the Suppression hearing, Mr. Burke argued that this omission was a material misrepresentation in violation of *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). The trial court concluded that there was no *Franks* violation because “it makes sense to the Court why the victim did not see a gun, and therefore this was not a material omission.” RP, 32; CP, 54-55, Conclusions of Law III and IV. Mr. Burke does not assign error to this Conclusion.

container, he could see that there was a crystalline substance that from his training and experience appeared to be methamphetamine. RP, 6. He opened the lid and showed the contents to another officer. RP, 14.

Sergeant Twomey performed a NIK test on the substance and it showed a presumptive positive reading for methamphetamine. CP, 63. On October 6, 2016, Martin McDermot, a forensic scientist with the Washington State Patrol Crime Laboratory, tested the substance and determined it contained 0.22 grams of methamphetamine. RP, 64.

### C. Argument

1. The Complaint does not establish probable cause Mr. Burke was probably involved in the crime of harassment and that evidence of the crime of harassment would be found in the motorhome.

A necessary prerequisite for a search warrant is probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). An application for a warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate. *Id.* Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances

sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *Id.* Accordingly, probable cause 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. *Id.*

In *Thein*, the police developed probable cause to believe the defendant was a drug dealer and, using boilerplate language, argued that drug dealers frequently keep evidence of their criminal behavior in their residences. The State argued that a nexus is established between the items to be seized and the place to be searched where there is sufficient evidence to believe a suspect is probably involved in drug dealing and the suspect resides at the place to be searched. *Id.* at 141. The Supreme Court disagreed saying, “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 588

In *State v. Hosier*, 124 Wn App. 696, 103 P.3d 217 (2004) the Court affirmed a search warrant for the offense of harassment. The defendant had left multiple alarming notes in places likely to be discovered. The search warrant authorized the search of his home for handwriting examples, writing materials such as notepads, and writing

utensils. The Court concluded there was a sufficient nexus between the criminal conduct and the items authorized in the search warrant.

Relevant to Mr. Burke's case, in order to issue a valid search warrant, the Complaint needed to establish two things: (1) facts and circumstances sufficient to establish a reasonable inference that he was probably involved in the crime of harassment; and (2) that evidence of the crime of harassment would be found can be found in his motorhome. The Complaint alleges he made some threatening comments to two individuals, saying he was going to retrieve a gun from his motorhome and "end this problem." This allegation is sufficient to establish the first requirement that he probably committed the crime of harassment.

But there is no attempt in the Complaint to establish that evidence of the crime of harassment would be found in the motorhome. No gun was ever seen by any of the witnesses. The crime of harassment is complete once the threat has been made. Whether he did or did not have a firearm does not change the criminal nature of the threats. Mr. Burke could have been completely lying about retrieving a firearm, and he would still be guilty of harassment. In fact, no firearm was ever discovered during the search and the trial court had no difficulty finding him guilty at trial of harassment.

There is one fact noticeably absent from the Complaint in this case. The Complaint does not allege Mr. Burke had any criminal history or was otherwise not authorized to possess a firearm. As such, Mr. Burke had the right to possess a firearm. *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed 2d 894 (2010). There was no reason to search for a firearm or ammunition.

There was not a sufficient basis in fact from which to conclude evidence of illegal activity would likely be found in his motorhome. The Complaint does not establish probable cause and the suppression motion was denied in error.

2. The drug testing of the substance in the Tupperware container constituted a separate and independent search for which there was not lawful authority.

Findings of Fact and Conclusions of Law were entered in this case and are all supported by substantial evidence. CP, 53. Law enforcement entered the trailer with a warrant authorizing a search for firearms, ammunition, and dominion and control paperwork. There were not authorized to search for or seize controlled substances. When Detective Meyer picked up the Tupperware container, he determined it was large enough to contain ammunition. CP, 54. It had a clear lid and he could see

the contents, which he believed to be methamphetamine. CP, 54. Treating these findings as verities, and assuming the warrant itself was valid, Mr. Burke concedes for the purpose of this appeal that the search of Tupperware container and the seizure of its contents were lawful as a plain view search. *State v Murray*, 8 Wn. App. 944, 509 P 2d 1003 (1973).

But the search did not end there. Sergeant Twomey next did a NIK test and the substance was then sent to the Washington State Patrol Crime Laboratory for forensic testing. This was a separate and independent search and required legal authorization. Mr. Burke argued this separate search was unlawful in the trial court. CP, 8. As argued in his suppression motion, “If law enforcement suspected the syringe to contain illegal narcotics, the proper course of action would be to apply for an additional warrant to seize them and then search them to test for illegal substances. The seizure of the syringes and then NIK testing and then NIK testing and sending them to a lab is certainly a search and seizure. There was no warrant authorizing this and there are no exceptions to the warrant requirement in this circumstance.” CP, 15.

Although Mr. Burke clearly argued that the drug testing constituted a separate search for which there was no legal justification, the trial court wholly ignored this issue. The trial court limited its Conclusions of Law

to whether the seizure of the Tupperware container and its contents was lawful. It makes no mention of the argument, clearly preserved for appeal, that the testing was a separate and illegal search.

The procedural history of a recent DUI case is illustrative. *State v. Martines*, 184 Wn.2d 833, 55 P.3d 1111 (2015), *reversing* 182 Wn.App. 519, 331 P.3d 105 (2014). In *Martines*, the defendant was arrested for DUI and the officer obtained a warrant to draw blood. The warrant did not specifically authorize the testing of the blood, however, and law enforcement did not seek a separate warrant. The blood was tested and the results of the test were used at trial. The Court of Appeals reversed, saying, “It is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data *is a further invasion* of the tested employee's privacy interests.” *Martines*, 182 Wn.App. at 528 (emphasis in original), citing *Skinner v. Ry. Labor Exec's Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). The Court of Appeals concluded that because the “testing of the blood is a search, a warrant is required.” *Martines*, 182 Wn.App. at 530.

The Washington Supreme Court reversed. The Court began its analysis by observing that warrants must state with particularity the items to be searched and seized. The purpose of the particularity requirement is threefold: (1) preventing exploratory searches, (2) protecting against seizure of objects on the mistaken assumption that they fall within the warrant, and (3) ensuring that probable cause is present. *Martines*, 184 Wn 2d at 93, citing *State v. Perrone*, 119 Wn. 2d 538, 834 P.2d 611 (1992).

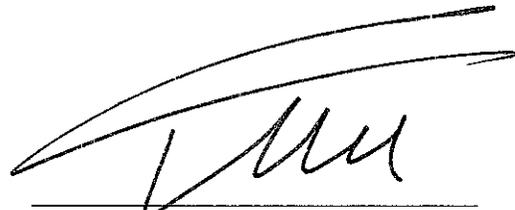
The Court then looked at the warrant at issue from a “commonsense” viewpoint and held that the Court of Appeals erred. The Court said, “A warrant authorizing a blood draw necessarily authorizes blood testing, consistent with and confined to the finding of probable cause. The only way for the State to obtain evidence of DUI from a blood sample is to test the blood sample for intoxicants.” *Martines* at 93. The Court further said, “The warrant in this case was supported by probable cause to believe Martines’s blood contained evidence of DUI. We apply a commonsense reading to the warrant and conclude it authorized not merely the drawing and storing of a blood sample but also the toxicology tests performed to detect the presence of drugs or alcohol. *Martines* at 93.

Applying these principles to Mr. Burke's case, once law enforcement obtains a search warrant for controlled substances based upon probable cause, they are authorized subsequently to test any substances seized to confirm the identity of the substance. But the search warrant in Mr. Burke's case does not authorize a search for controlled substances, nor could it based upon the probable cause. While Mr. Burke concedes the seizure of the Tupperware container and its contents as being in plain view, law enforcement was still required to obtain a warrant for any subsequent testing. No effort was made to obtain such a warrant and the motion to suppress results of the substance testing should have been granted.

D. Conclusion

The motion to suppress in the trial court should have been granted and the charge of possession of a controlled substance should have been dismissed.

DATED this 21<sup>st</sup> of August, 2017.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

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**THE LAW OFFICE OF THOMAS E. WEAVER**

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