

NO. 50173-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES LEE BURKE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-00865-6

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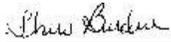
BRIEF OF RESPONDENT

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TINA R. ROBINSON  
Prosecuting Attorney

JOHN L. CROSS  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

<b>SERVICE</b>	<p>Thomas E. Weaver Po Box 1056 Bremerton, Wa 98337 Email: tweaver@tomweaverlaw.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED October 19, 2017, Port Orchard, WA  <b>Original e-filed at the Court of Appeals; Copy to counsel listed at left.</b> <b>Office ID #91103 kcpa@co.kitsap.wa.us</b></p>
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether there was probable cause that the crime of harassment occurred and whether there was probable cause that evidence of that crime was to be found in Burke's motor home?

2. Whether the United States Constitution or the Washington Constitution require a warrant for the testing of lawfully seized evidence?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Charles Lee Burke was charged by information filed in Kitsap County Superior Court with possession of a controlled substance and harassment (gross misdemeanor). CP 1.

Pretrial, Burke moved to suppress the evidence that supported the unlawful possession charge. CP 8. An evidentiary hearing was held that included the testimony of investigating officer Detective Meyer. 1RP 5. The trial court denied the motion in oral ruling. 1RP 31-33. The trial court entered Findings of Fact and Conclusions of Law for Hearing on CrR 3.6. CP 53.

Following denial of his suppression motion, Burke proceeded to trial on stipulated facts. CP 61. The trial court entered a verdict of guilty. CP 66.

Burke was sentenced within the standard range to 14 days confinement on each count, concurrent. CP 85. The present appeal timely followed. CP 96.

**B. FACTS**

1. CrR 3.6 hearing

Detective Meyer testified that he assisted on the service of a search warrant on a motor home. 1RP 5-6. The motor home had been impounded and was located in a secure lot. 1RP 6. The search warrant authorized a search for guns, ammunition, and evidence of dominion and control. Id.

Detective Meyer was assigned to search the single bedroom in the back of the motor home. Id. The detective found a box that was large enough to contain guns or ammunition. 1RP 7. He removed the box from a clear plastic wrap, opened the lid, and found that it contained numerous hypodermic syringes and a round, purple Tupperware container. Id. This container was large enough to contain ammunition. Id. The container had a clear top and upon inspection the detective saw “that it contained a crystalline substance that I recognized as methamphetamine.” 1RP 7. Upon completion of the search of the motor home, the Tupperware container and its contents were seized because it contained contraband that was seen in plain view. 1RP 8.

Before the search, Detective Meyer had become aware of the

circumstances of the motor home impound. 1RP 9. This included that no gun had been seen by the reporting party. Id. And, upon opening the first box the Detective saw that some of the syringes appeared to have been used. 1RP 12. The box was heavy enough to have contained ammunition or a small gun. 1RP 12-13. The searching officers did not remove anything from the Tupperware container at the scene of the search. 1RP 14. Detective Meyer immediately recognized the substance as methamphetamine having “seen methamphetamine hundreds of times.” 1RP 14.

## 2. Trial Stipulation

Burke stipulated that police had responded to a report of a male with a gun who appeared to be under the influence of narcotics. CP 61. The caller reported that the male had threatened to kill her boyfriend, Mr. Prince. CP 61-62. The male was leaving in a large RV. Id.

Deputies stopped the RV. CP 62. Burke was detained and the RV was secured. Id. Burke denied having a gun. Id. The reporting parties came to the scene and identified Burke and the RV. Id. One victim had had an argument with Burke and Burke had said he would get his gun and end the problem. Id. The victim was concerned that he would be assaulted. CP 62-63.

Investigation revealed that the RV had been parked in front of the victims’ residence for one to two weeks and was partially blocking access

to the residence. CP 62. Mr. Prince approached Burke about moving the RV, had a cordial conversation with Burke, and went toward the house. Id. Then, Burke approached Mr. Prince yelling and screaming. Id. Burke said he was going to get his gun from his RV and end the problem. Id. Mr. Prince and his girlfriend, Ms. Shelton, were afraid, left the scene, and called 911. Id. Deputies observed that Ms. Shelton trembling and frightened by what happened. Id.

Burke, in this context, stipulated that the box that Detective Meyer found was large enough to contain a gun or ammunition. CP 63. He stipulated that Detective Meyer recognized the substance as methamphetamine. Id. He stipulated that a presumptive test was positive for methamphetamine and that the Washington State Patrol Crime Laboratory confirmed that the substance found was .22 grams of methamphetamine. CP 64. Written statements by Ms. Shelton and Mr. Prince were attached to the stipulation. CP 76-81.

### 3. Complaint For Search Warrant

The search warrant Complaint is attached to the state's response to Burke's suppression motion. CP 31. The Complaint explained the applicant's law enforcement experience and recited essentially the above noted facts, including the initial call alleging that Burke had a gun and Mr. Princes's later correction that Burke said he was going to get a gun. CP 32. The Complaint asks for a warrant to search for and seize all firearms,

ammunition, and paperwork evidencing ownership or purchase of firearms and dominion and control of the vehicle. CP 33.

The warrant, also attached to the state's response, recites that it is for evidence of the crime of harrassment. CP 34. The warrant authorized the search for and seizure of firearms, ammunition, and paperwork. CP 34. The RV to be search is particularly described in the warrant. CP 35.

## II. ARGUMENT

### A. **THERE WAS PROBABLE CAUSE TO BELIEVE THAT BURKE COMMITTED THE CRIME OF HARRASSMENT AND PROBABLE CAUSE TO BELIEVE THAT THE GUN BURKE REFERRED TO WAS LOCATED IN THE RV THAT WAS SEARCHED.**

Burke argues that the Complaint does not establish probable cause for the crime of harrassment or that evidence of that crime may be found in the RV. This claim is without merit. A determination that a warrant should issue is an exercise of judicial discretion and is reviewed for abuse of discretion. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). “An application for a search warrant should be judged in the light of common sense with doubts resolved in favor of the warrant.” 128 Wn.2d at 286 (internal page-break and citation omitted).

First, in claiming that there was not probable cause to believe the crime of harassment was committed, Burke does not address the proof necessary to establish probable cause for that crime. RCW 9A.46.020 (1) provides a person is guilty of harassment if “(a) Without lawful authority, the person knowingly threatens: (i) To cause bodily injury immediately or in the future to the person threatened or to any other person;” and “(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” The speaker of the threat need not actually intend to carry it out; it suffices that a reasonable speaker could foresee that the threat would be taken seriously. *See State v. Boyle*, 183 Wn. App. 1, 8, 335 P.3d 954 (2014), *review denied*, 184 Wn.2d 1002 (2015). “The nature of the threat depends on the totality of the circumstances, and a reviewing court does not limit its inquiry to a literal interpretation of the words spoken.” 183 Wn. App. at 8.

In *State v. Barnes*, 158 Wn. App. 602, 243 P.3d 165 (2010) the Court of Appeals considered a situation very similar to the present case. There, the defendant was in a bank, became upset, and said “I feel like going and getting a gun and shooting everyone.” 158 Wn. App. at 605. Bank employees called police and around two hours later, near the bank, the police saw Barnes getting into a car. 158 Wn. App. at 606. The police approached and arrested Barnes for felony harassment. *Id.* Through the

car window, police observed a gun box. *Id.* The police opened the unlocked car door, retrieved the gun box, and looked inside, finding a handgun. *Id.*

The *Barnes* trial court suppressed the gun on Barnes's motion. 158 Wn. App. at 608. The trial court granted the state's motion to dismiss finding that the suppression order substantially impaired the state's ability to proceed and the state appealed. *Id.* Barnes cross-appealed, arguing that it was not reasonable for the police to suppose that his car contained evidence of the crime of harrasment. 158 Wn. App. at 609. The Court said that "[t]he fact that Barnes had access to a gun when he threatened to return and shoot everyone at the bank branch is evidence which could lead a reasonable person to infer his threat was genuine and that he had taken steps to carry it out." 158 Wn. App. at 610. Thus, the gun was relevant on the harrasment charge as it tended to prove that Barnes had made a true threat at the bank. *Id.*

The present case includes a very similar threat. The difference is that no express threat to kill was made. But here Burke was not convicted of a felony violation of RCW 9A.46.020. Moreover, given that this court is not constrained to simply review the literal words spoken, the circumstances of Burke's remark provides sufficient information to establish probable cause for investigation of the crime of harassment.

Here, the victims found themselves in an antagonistic dispute with the man who had been parked in front of their house for an extended period of time. Burke “yelled and screamed” at Mr. Prince and then said he would get his gun and take care of the problem. It is entirely reasonable for Mr. Prince to believe that he, Mr. Prince, was the problem that Burke intended to take care of when he retrieved his gun. And, as noted above, it matters not whether Burke actually intended any such occurrence. Thus it appears that there is sufficient information here to warrant conviction beyond a reasonable doubt for the crime of harassment.

But the present inquiry focuses probable cause. Probable cause entails facts sufficient to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity. *State v. Gentry*, 125 Wn.2d 570, 607, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). Or, another formulation, “reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe” the suspect is involved in criminal activity. *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949); *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Under either permutation, the facts of the present case rather clearly raise the probability that Burke was engaged in the crime of harassment.

Similarly, the facts support a finding that there was probable cause

to believe evidence of the crime was to be found in Burke's RV. Here, the standard is that the officer must have probable cause to believe that the items sought are connected with criminal activity and will be found in the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); *see generally* Justice Charles W. Johnson and Justice Debra L. Stephens, *Survey of Washington Search and Seizure Law* :2013 Update, 36 Seattle Univ. L. Rev. 1581, 1610 (2013). In the present case, Burke argued with the victims, yelled and screamed at them, and then returned to the RV that the victims had seen him living in, while threatening that he was going there to retrieve his gun. Further, the Complaint recites that the RV was registered to Burke. CP 32.

As with the *Barnes* case, *supra*, the gun was relevant to the prosecution under RCW 9A.46.020. And, that gun was probably located in Burke's RV—that is where he went when he said he was going to get the gun. Both kinds of probable cause are present in this case. This claim fails.

**B. NO AUTHORITY SUPPORTS THE PROPOSITION THAT A WARRANT IS NECESSARY IN ORDER FOR THE STATE TO TEST LAWFULLY SEIZED EVIDENCE.**

Burke next claims that the evidence should have been suppressed,

not because of any defect in the warrant or because of a defect in the execution of the warrant, but because the warrant did not encompass the testing of the substance. This claim is without merit because no such second warrant is required.

First, Burke concedes that the Tupperware container with the methamphetamine in it was lawfully found and lawfully seized because it was in plain view. Brief at 11. Second, Burke argues the reasoning of a reversed case in asserting that a secondary warrant was necessary in order to test the lawfully seized substance in the Tupperware container. Moreover, Burke ends by seeming to recant his concession of plain view seizure by arguing that since the substance was not the object of the search warrant, its testing required an additional warrant. Brief at 14. No authority is asserted for this proposition other than the reversed case, *State v. Martines*, 182 Wn. App. 519, 331 P.3d 105 (2014).

A unanimous Supreme Court reversed at 184 Wn.2d 83, 355 P.3d 1111 (2015).<sup>1</sup> There, it was held that “[a] warrant authorizing a blood draw necessarily authorizes blood testing, consistent with and confined to the finding of probable cause.” 184 Wn.2d at 93. It seems that Burke here relies on the clause after the comma. Insofar as the Supreme Court’s holding relies on analysis of the requisites of a warrant and the existence

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<sup>1</sup> Burke mis-cites the Supreme Court’s *Martines* decision, citing it as 184 Wn.2d 833.

of probable cause to issue the warrant, Burke seems to believe that the discovery by surprise of an item that is immediately recognizable as contraband should change the analysis. The problem with this position is that whether the drugs were seized as a particularly described item in the warrant or by surprise as contraband in plain view, the lawfulness of the seizure is established. Evidence of a crime simply does not change its character because it was seized in one or another lawful manner. Burke concedes that the seizure is lawful in this case; at which point the issue of probable cause for the seizure no longer obtains.

Having lawfully seized item in its possession, the state is allowed “to test or examine the seized materials to ascertain their evidentiary value.” 184 Wn.2d at 93, *quoting, State v. Grenning*, 142 Wn. App. 518, 532, 174 P.3d 706 (2008), *affirmed*, 169 Wn.2d 47, 234 P.3d 169 (2010). Detective Meyers’ experience supports his plain view seizure of the drugs as a matter of probable cause. *See State v. Sistrunk*, 57 Wn. App. 210, 214, 787 P.2d 937 (1990) (officer need not have absolute knowledge that the object is related to a crime; sufficient for the officer to have probable cause to believe the object is evidence of a crime). But consideration of evidentiary value requires the prosecution to establish the actual chemical makeup of the substance for use in litigation. Prosecutors do not need

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The correct cite is 184 Wn.2d 83.

warrants in order to use lawfully seized evidence of a crime.

The *Grenning* case involved a computer hard-drive containing child pornography. 169 Wn.2d at 50. There, 20 counts of possession of child pornography were reversed because the trial court unduly restricted a defense expert's access to the drive. *Id.* The discovery violation part of the case is not on point here, but it is notable that both the state and the defense lawyers are going to need to have forensic examination, or testing, of the item to determine its evidentiary value. Burke's position here is that none of these forensic tests should be done without a secondary warrant authorizing the particular testing done. The warrant requirement and the plain view doctrine allow the seizure of the evidence and say nothing at all about how that evidence is used thereafter. *See United States v. Burnette*, 698 F.2d 1038, 1049 (9<sup>th</sup> Cir. 1983) ("once an item in an individual's possession has been lawfully seized and searched, subsequent searches of that item, so long as it remains in the legitimate uninterrupted possession of the police, may be conducted without a warrant"); *accord*, *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003).

With no authority, Burke seeks a rather massive extension of the warrant requirement. Every time the state wants to test fire a gun used in a murder case that was discovered in plain view, it must stop and seek a warrant. Neither the Forth Amendment nor Article I section 7 of the

Washington Constitution go that far. Moreover, once those constitution provisions are satisfied in terms of seizing plain view contraband, they no longer apply. Burke's reasonable expectation of privacy or right not to be disturbed in his private affairs does not extend to the possession of contraband. *See, e.g., United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 950, 181 L. Ed. 2d 911 (2012) (reasonable expectation of privacy under Forth Amendment); *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998) (intrusion into private affairs under Article 1, section 7). He has no constitutional interest in what happens to that contraband, including its testing or the placing of the drugs in an incinerator to destroy them. *See State v. Alaway*, 64 Wn. App. 796, 798, 828 P.2d 591, *review denied*, 119 Wn.2d 1016 (1992) (even property no longer needed as evidence cannot be returned if it is contraband). Burke's claim fails.

### III. CONCLUSION

For the foregoing reasons, Burke's conviction and sentence should be *affirmed*.

DATED October 19, 2017.

Respectfully submitted,

TINA R. ROBINSON  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

JOHN L. CROSS  
WSBA No. 20142  
Deputy Prosecuting Attorney

Office ID #91103  
kcpa@co.kitsap.wa.us

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