

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON,

STATE OF WASHINGTON)

Respondent,)

v.)

DAVID LOREN WALDECK
(your name))

Appellant.)

No. 50292-5-III

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

FILED
COURT OF APPEALS
DIVISION II
2018 FEB 13 AM 11:46
STATE OF WASHINGTON
BY _____
DEPUTY CLERK

I, DAVID WALDECK, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

REGARDING RCW 9.73.230 UNDER 9.73.130 (3) AN APPLICATION TO AUTHORIZE A LAW ENFORCEMENT OFFICER TO RECORD A PRIVATE CONVERSATION IS INSUFFICIENT IF IT DOES NOT ALLEGE THAT OTHER INVESTIGATIVE PROCEDURES WERE TRIED AND HAVE FAILED OR ARE UNLIKELY TO SUCCEED.

REVERSABLE ERROR

WASH V. FREDERICK EARLE PORTER 98 Wn. APP. 631; 990 P.2d 460; 1999 WASH. APP. LEIS 2164 NO. 16941-3-111

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

Date: _____

Signature: _____

ADDITIONAL Ground 1

FAILURE TO MEET STATUTORY REQUIREMENT UNDER RCW 9A.73.030

FAILURE TO COMPLY WITH THE PROCEDURAL REQUIREMENT OF WASH. REV. CODES 9A.73.130 WOULD RENDER AN ORDER BASED UPON FAMILY APPLICATION UNLAWFUL.

1) TAPED CONVERSATIONS OBTAINED UNDER PRIVACY ACT ARE INADMISSIBLE SINCE LAW ENFORCEMENT / PROSECUTION DID NOT STATE NORMAL INVESTIGATIVE PROCEDURES WERE TRIED AND FAILED OR WERE TOO DANGEROUS AND FAILURE TO DO SO IS REVERSIBLE ERROR

SUPPRESSION MOTION WAS FILED BY WALDECK WITH THE TRIAL COURT. TRIAL COURT FOUND THE TAPES ADMISSIBLE.

§2518 18 U.S.C. PROVIDES IN PART (C) THAT A FULL AND COMPLETE STATEMENT AS TO WHETHER OR NOT OTHER INVESTIGATIVE TECHNIQUES HAVE BEEN TRIED AND FAILED OR WHY THEY REASONABLY APPEAR TO BE UNLIKELY TO SUCCEED IF TRIED OR BE TOO DANGEROUS TO EMPLOY.

THE EVIDENCE FROM THE TAPE ISN'T WHAT IT'S OFFERED TO BE. THE PROSECUTION STATES THE RECORDING IS OF A \$50 (FIFTY) DOLLAR DRUG TRANSACTION. I ASK THE TRIAL COURT TO READ THE VERBATIM REPORT OF THE RECORDING. THE FIRST THING YOU SEE IS THAT THE ONLY SPEAKERS THAT ARE IDENTIFIED ARE OFFICER DURBIN AND THE CONFIDENTIAL INFORMANT. ANY OTHER SPEAKERS ARE LISTED AS "UNIDENTIFIED", WALDECK REQUESTED SEVERAL TIMES FOR SPEAKERS TO BE IDENTIFIED. WALDECK WHAT AS FOR AS TO WRITE THOSE WARNINGS PRIOR TO TRIAL AND HAD CO-COUNSEL EMAIL PROSECUTOR BRITTON. NEITHER RESPONDED. OFFICERS CERTIFY THAT ITS WALDECK'S VOICE ON RECORDING, YET THEY DID THAT I HEAR PRIOR TO EVER MEETING OR HEARING HIS VOICE. BASICALLY IT CAME DOWN TO ITS HIS VOICE BECAUSE WE SAY SO. AUDIO WAS PLAYED TO A BLANK SCREEN, NOT MATCHED TO VIDEO. THEN THAT'S THE FACT THAT NO DRUG TRANS ACTION WAS EVEN CAUGHT ON THE RECORDING, IT SOUNDS TO BE OF A DAMAGED OR NEEDING \$100 IN REPAIRS.

ADDITIONAL GROUND 2 CONT. -- PAGE 3

LAW ENFORCEMENT OMITTED CRUCIAL INFORMATION IN APPLICATION FOR INTERCEPT. TO BOLSTER RELIABILITY OF INFORMANT, LAW ENFORCEMENT STATES THAT WITHIN LAST 30 DAYS THE CI WAS SEARCHED PRE BUY AND NO DRUGS WERE FOUND ON HER, LAW ENFORCEMENT OMITTS THAT 50 SOME DAYS PRIOR AT WHAT WAS TO BE ALLEGED BUY NO. 2, THAT HEROIN WAS FOUND ON HER DURING PRE BUY SEARCH. BUY NO. 2 WAS CANCELLED AND CHARGES WERE FORWARDED TO PROSECUTION AND WERE PENDING. A MOTION FOR GOVERNMENT MIS CONDUCT WAS FILED REGARDING THIS. THIS SHOULD OF BEEN INCLUDED IN AFFIDAVIT FOR APPLICATION TO INTERCEPT. AS I HAVE SEVERAL COPIES OF THE AFFIDAVIT SIGNED BY OFFICER DURBEN AND CAPTAIN DEBORAH JOHNSON, I AM SENDING THEM WITH THIS.

TO RECAP WALDECK'S ISSUES WITH 9.73.230
WIRETAP AFFIDAVIT

1) STATEMENT OF FACTS INCOMPLETE AS MUST BE REVERSABLE ERROR.

AS MUST BE TO MEET STATUTORY REQUIREMENTS FOR RCW 9.73.230 AND 9.73.130
AUTHORIZATION FOR INTERCEPT

ADDITIONAL GROUND 1 CONT PAGE 4

2) ALL SPEAKERS MUST BE IDENTIFIED

3) RELIABILITY OR UNRELIABILITY OMITTED

4) NO DRUG TRANSACTION RECORDED ON TAPE OR IN VERBATIM REPORT.

WASH V. FREDERICK EARLE PORTER

98 Wn. App. 631; 990 P.2d 460; 1999 WASH. APP.

LEXIS 2164 No. 16941-3-111 Dec, 23, 1999

PROCEDURAL POSTURE: APPEAL BY CRIMINAL APPELLANT FROM AN ORDER OF THE SUPERIOR COURT OF YAKIMA COUNTY (WA) WHICH CONVICTED APPELLANT UPON EVIDENCE SUBMITTED BY THE STATE FROM INTERCEPTION OF PRIVATE CONVERSATIONS. TAPED CONVERSATIONS OBTAINED UNDER PRIVACY ACT WERE INADMISSIBLE SINCE RESPONDENT DID NOT STATE NORMAL INVESTIGATIVE PROCEDURES WERE TRIED AND FAILED OR WERE TOO DANGEROUS, AND FAILURE TO DO SO IS REVERSABLE ERROR.

9.73.130 (F) THE REVIEWING COURTS ROLE IS NOT TO REVIEW THE SUFFICIENCY DE NOVO BUT TO DECIDE IF THE FACTS SET FORTH IN THE APPLICATION ARE MINIMALLY ADEQUATE TO

ADDITIONAL Ground 1 Court Pages

973.130 (f) ~~used~~ - support the determination that is made. This standard applies in evaluating the probable cause determination as well as the showing of injury or of other investigative techniques.

(CONSTITUTIONAL LAW)

EVIDENCE DIRECTLY PRODUCED BY AN UNLAWFUL SEIZURE IS INADMISSIBLE, ALL EVIDENCE DERIVED FROM AN UNLAWFUL INTERCEPT IS INADMISSIBLE ONCE THE POLICE STEP OUTSIDE THE BOUNDARIES DELINEATED BY THE LAW, THE COURT HAS NO CHOICE BUT TO MAKE INADMISSIBLE ANY INFO-RMATION OBTAINED.

FAILURE TO COMPLY WITH PROCEDURAL REQUIREMENT OF WASH. REV. CODES 9A.73.130 WOULD RENDER AN ORDER BASED UPON FAULTY APPLICATION UNLAWFUL. RELIEF SOUGHT - REMAND FOR TRIAL. SUPPRESS EVID AND AUDIO.

ALSO RELEVANT TO ABOVE 81 Wn. App. 714: STATE V. MANNING, May 13th 1996 THIS CASE HAS THE PROPER STATEMENT OF FACTS AS TO, TOO DANGEROUS TO EMPLOY

**LONGVIEW POLICE STREET CRIMES UNIT
AUTHORIZATION FOR EVIDENCE INTERCEPT
RCW 9.73.230**

AUTHORIZING AGENT: Captain Deborah Johnson

**OFFICERS AUTHORIZED TO INTERCEPT, TRANSMIT OR RECORD:
Sergeant Marc Langlois, Detective Seth Libbey, Detective B.J. Mortensen, Detective
Calvin Ripp, Detective Jordan Sanders, and Detective Brian Durbin**

**PERSONS WHO MAY HAVE COMMITTED OR MAY COMMIT THE
OFFENSE: David Loren Waldeck (5-14-65)**

CONSENTING PARTY: CI 15-340

EXPECTED DATE: 2/3/16 TIME: 2015

LOCATION: 1012 Pacific Ave N

**PROBABLE CAUSE TO BELIEVE THE COMMUNICATION WILL INVOLVE
VIOLATION(S) OF RCW 69.50, 69.41, OR 69.52:**

I, DEBORAH JOHNSON, being duly sworn on oath depose and say that I am a commissioned Police Officer with the Longview Police Department in Longview, Washington and have been so employed for since 1999. I have held the rank of Police Sergeant for 2 years. During those two years I have supervised patrol officers, school officers, traffic units, parking units and the community services unit. I managed patrol officers and school officers who investigated alleged violations of the Revised Code of Washington, Chapters 69.50, 69.41, and 69.52. The investigations involved the detection and arrest of individuals in narcotics possession and trafficking. I currently am assigned as a Captain, which is above the level of first line supervisor, and have been so since August 2011. My current assignment is Commander of the Longview Police Department's Patrol Division.

I have had numerous phases and courses of police training. I am a graduate of the Washington State Criminal Justice Training Commission [WSCJTC] Basic Law Enforcement Academy, which included a course of instruction in narcotics recognition and narcotics law enforcement. I hold law enforcement Supervisory certificates from the Washington State Criminal Justice Training Commission. I have hundreds of additional hours of law enforcement supervisory and management training from various sources.

On February 3rd, 2016 I was advised by Detective Durbin the following information concerning his ongoing investigation:

Detective Durbin is working with a confidential informant, hereafter referred to as CI. CI is working with the Longview Police Street Crimes Unit in exchange for leniency in a criminal matter which he/she was previously involved. CI knows that any leniency granted him/her is dependent on the accuracy and veracity of the information provided. CI knows that he/she will not be granted leniency in the pending criminal matter if the information provided is inaccurate. CI has provided information into the local distribution of controlled substances, which has been corroborated by one previous controlled buy. CI has admitted to the use of meth, heroin, mushrooms and marijuana in the past. X also admitted to selling meth and heroin in the past. X stated that he/she knows what heroin looks like. Based on X's past and drug history, he/she is familiar with how drug transactions are arranged and completed, their sales (pricing and weight), and their packaging.

On February 3rd, 2016, I (Det. Durbin) spoke to CI who advised that he/she could go purchase heroin from David L Waldeck near the 1000 block of Pacific Ave N in Kelso, WA. CI stated he/she spoke to Waldeck who agreed to sell him/her heroin.

During a previous controlled buy operation within the past 30 days CI identified Waldeck as David Loren Waldeck 5-14-65 by looking at a known photograph in which the name was not visible. During this controlled buy operation CI was searched. During the search no drugs or currency were located. CI was provided with US Currency and watched as he/she traveled to meet with Waldeck. After separating from Waldeck, CI turned over a plastic baggy that contained a brown tar like substance. The substance later tested positive for opiates and was consistent with the approximate weight of the predetermined amount. CI was searched again and no drugs or currency were located.

CI has voluntarily agreed to wear a body wire during the transaction and consents to his/her voice being recorded while wearing the wire.

The case plan at this time calls for Det. Durbin to meet with CI. CI will be searched and provided a sum of U.S. currency, which the serial numbers have been prerecorded. The CI will travel to the buy location while being kept under surveillance. CI will be wearing a body wire when he/she meets with Waldeck in the 1200 block of 15th Ave Longview, WA. CI will make every effort to conduct the transaction in the City of Longview, Cowlitz County.

I believe that additional conversation(s) will occur between CI and Waldeck in violation of RCW chapter 69.50, 69.41 and/or 69.52. in regards to the sale of controlled substances.

I feel that it is necessary to monitor and record conversation(s) between CI and Waldeck because transcripts of the conversation(s) may be necessary to verify the contents of the conversation(s). This will be important to corroborate the event and will also aid in defeating any claims of entrapment by Waldeck, which might result in a conflict between CI and Waldeck as to the content and context of the conversation(s).

HAS JUDICIAL AUTHORIZATION PURSUANT TO RCW 9.73.090(2) BEEN ATTEMPTED? NO

IF YES, OUTCOME: JUDGE NOT AVAILABLE: _____ APPROVED _____ DENIED _____

AUTHORIZATION

Based upon the consent of one party to the intended communication and the probable cause set forth above, I hereby authorize the interception, recording or transmission of the proposed private communication indicated.

Debrah J. Moser
Chief Officer or Designee

Date 2/3/10 Time 19:56 hrs.

12/03/15
13:46

LONGVIEW POLICE DEPARTMENT
Media Report

Page: 1406
1

Incident Number: L15-7660

Nature: Drugs
When Reported: 21:36:10 12/02/15
Occurrd between: 21:36:24 12/02/15
and: 21:36:10 12/02/15

Incident Number: L15-7660
Responsible Officer:
Judicial Sts:
Clearance:

Addr: 1351 HUDSON ST
City: LV St: Zip: Area: Contact:

Complainant:

INVOLVEMENTS:

Date	Description	Relationship

COMPLAINANTS		

VICTIMS		

WITNESSES		

SUSPECTS		

Offense
Codes:

Narrative written by: Detective Mortensen

NARRATIVE- RECONSTRUCT INCIDENT:

On 12/02/15 I was assisting in an operation for the Street Crimes Unit. I was searching the vehicle belonging to a CI (#15-340). Located on the driver's side floor board under the floor mat was a small piece of plastic which contained a small amount of brown tar substance. I believed from my training and experience this substance was heroin.

I contacted the CI and the CI denied knowing it was there and stated he/she does not use drugs in their vehicle.

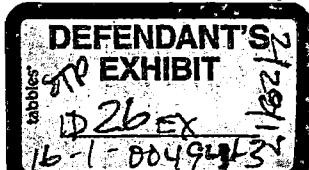
The suspected heroin was taken back to LPD and tested by Detective Durbin which he notified me showed positive results for opiates and weighed .19 grams. The heroin was logged into evidence.

Charges are pending lab results.

I have nothing further at this time.

Report submitted by Detective Mortensen,
Longview Police Department Street Crimes Unit.

RECOMMENDED ACTION: Active.



CCSO LPD KPD WPD KAPD CRPD

ADDITIONAL REPORTS ATTACHED <input checked="" type="checkbox"/> Property/Evidence <input type="checkbox"/> Supplemental <input type="checkbox"/> Medical Release <input type="checkbox"/> Statement(s) <input checked="" type="checkbox"/> NA		DOMESTIC VIOLENCE FORMS ATTACHED <input type="checkbox"/> DV Info Pamphlet provided <input type="checkbox"/> Worksheet <input type="checkbox"/> Strangulation <input checked="" type="checkbox"/> NA <input type="checkbox"/> Risk Assessment		CITATION NUMBER		INCIDENT NUMBER L15-7660	
Final Incident Type Code Drug		<input type="checkbox"/> DV <input type="checkbox"/> Child Abuse <input checked="" type="checkbox"/> NA		Reported Date 12-2-15		Reported Time 2145	
Offense Location / Business or Apartment Name 1400 block Alabama Street		Occurred From Date: 12-2-15 Time: 2145		Occurred To Date: 12-2-15 Time: 2145		Disposition <input type="checkbox"/> 1 <input checked="" type="checkbox"/> 3 <input type="checkbox"/> 6	
ROUTING: <input checked="" type="checkbox"/> Records <input type="checkbox"/> Patrol <input type="checkbox"/> Juvenile <input type="checkbox"/> Detectives <input type="checkbox"/> PA <input type="checkbox"/> Case File <input type="checkbox"/> Drug Units <input type="checkbox"/> City Attorney <input type="checkbox"/> Other							

INVOLVED PERSON Victim Suspect Witness RP Arrest/Summons

FLAG: Assaulted or Resisted LE Threatened LE Access to Firearms Attempted Suicide DOC Active RSO

No.	Name (last, first, middle)			<input type="checkbox"/> Juvenile	Date of Birth / Age	Place of Birth	Sex	Height	Weight	Hair	Eyes
1	Miller, Tia Kirsteen				4-13-67		F	5-4	150	BLN	BLU
Race		Alias Name / Scars, Marks, Tattoos									
<input checked="" type="checkbox"/> ASIAN <input type="checkbox"/> BLACK <input checked="" type="checkbox"/> AMER INDIAN/AK <input type="checkbox"/> HISPANIC <input type="checkbox"/> WHITE <input checked="" type="checkbox"/> UNKNOWN <input type="checkbox"/>											
<input checked="" type="checkbox"/> Home / <input type="checkbox"/> Business Address		City		State		Zip Code		<input type="checkbox"/> Home <input type="checkbox"/> Work <input type="checkbox"/> Cell <input type="checkbox"/> Other			
20836 Mustola RD		Clatskanie		OR							
Driver's License Number		State		<input type="checkbox"/> Resident <input checked="" type="checkbox"/> Non-resident <input type="checkbox"/> Gang		Place of Employment / City		<input type="checkbox"/> Home <input type="checkbox"/> Work <input type="checkbox"/> Cell <input type="checkbox"/> Other			
Offense/RCW		Offense/RCW		Offense/RCW		Type of Injuries		Weapon Used			
69.50.401						N-None		99- None			

INVOLVED PERSON Victim Suspect Witness RP Arrest/Summons

FLAG: Assaulted or Resisted LE Threatened LE Access to Firearms Attempted Suicide DOC Active RSO

No.	Name (last, first, middle)			<input type="checkbox"/> Juvenile	Date of Birth / Age	Place of Birth	Sex	Height	Weight	Hair	Eyes
Race		Alias Name / Scars, Marks, Tattoos									
<input type="checkbox"/> ASIAN <input type="checkbox"/> BLACK <input type="checkbox"/> AMER INDIAN/AK <input type="checkbox"/> HISPANIC <input type="checkbox"/> WHITE <input checked="" type="checkbox"/> UNKNOWN <input type="checkbox"/>											
<input checked="" type="checkbox"/> Home / <input type="checkbox"/> Business Address		City		State		Zip Code		<input checked="" type="checkbox"/> Home <input type="checkbox"/> Work <input type="checkbox"/> Cell <input type="checkbox"/> Other			
Driver's License Number		State		<input type="checkbox"/> Resident <input checked="" type="checkbox"/> Non-resident <input type="checkbox"/> Gang		Place of Employment / City		<input type="checkbox"/> Home <input type="checkbox"/> Work <input type="checkbox"/> Cell <input type="checkbox"/> Other			
Offense/RCW		Offense/RCW		Offense/RCW		Type of Injuries		Weapon Used			
						N-None		99- None			

INVOLVED PERSON Victim Suspect Witness RP Arrest/Summons

FLAG: Assaulted or Resisted LE Threatened LE Access to Firearms Attempted Suicide DOC Active RSO

No.	Name (last, first, middle)			<input type="checkbox"/> Juvenile	Date of Birth / Age	Place of Birth	Sex	Height	Weight	Hair	Eyes
Race		Alias Name / Scars, Marks, Tattoos									
<input type="checkbox"/> ASIAN <input type="checkbox"/> BLACK <input type="checkbox"/> AMER INDIAN/AK <input type="checkbox"/> HISPANIC <input type="checkbox"/> WHITE <input checked="" type="checkbox"/> UNKNOWN <input type="checkbox"/>											
<input checked="" type="checkbox"/> Home / <input type="checkbox"/> Business Address		City		State		Zip Code		<input checked="" type="checkbox"/> Home <input type="checkbox"/> Work <input type="checkbox"/> Cell <input type="checkbox"/> Other			
Driver's License Number		State		<input type="checkbox"/> Resident <input checked="" type="checkbox"/> Non-resident <input type="checkbox"/> Gang		Place of Employment / City		<input type="checkbox"/> Home <input type="checkbox"/> Work <input type="checkbox"/> Cell <input type="checkbox"/> Other			
Offense/RCW		Offense/RCW		Offense/RCW		Type of Injuries		Weapon Used			
						N-None		99- None			

VEHICLE(S) VICTIM (VC) <input type="checkbox"/> STOLEN (ST) <input type="checkbox"/> SUSPECT (SU) <input checked="" type="checkbox"/> STOLEN PLATE (SP) <input type="checkbox"/> RECOVERED (RC) <input type="checkbox"/> OTHER (OT) <input type="checkbox"/>											
License Number	State	Veh Yr	Make	Model	Type	Color	VIN	Value			
Name (last, first, middle)			R/O Address			City / State		Zip Code	Damage		

VEHICLE(S) VICTIM (VC) <input type="checkbox"/> STOLEN (ST) <input type="checkbox"/> SUSPECT (SU) <input type="checkbox"/> STOLEN PLATE (SP) <input type="checkbox"/> RECOVERED (RC) <input type="checkbox"/> OTHER (OT) <input type="checkbox"/>											
License Number	State	Veh Yr	Make	Model	Type	Color	VIN	Value			
Name (last, first, middle)			R/O Address			City / State		Zip Code	Damage		

Investigating Officer / ID #		Date	Supervisor		Date Approved
Durbin 3L41		12-2-15			

CONTENTS

TO THE COURT OF APPEALS

2/7/18

I APOLOGIZE NOW FOR ANY SHORTCOMINGS I HAVE REGARDING MY PRESENTATION OF MY STATEMENT OF ADDITIONAL GROUNDS. I HAVE WRITEN A FIVE PAGE BRIEF REGARDING THE ISSUES AT HAND.

I HAVE INCLUDED FIVE MORE PAGES FROM DISCOVERY. THREE ARE FROM THE AFFIDAVIT I REFER TO. THEY ARE THE WHOLE AFFIDAVIT. THEY DO NOT MEET THE STATUTORY REQUIREMENTS FOR RCW 9.73 THE OTHER TWO WERE EXHIBITS AT TRIAL AND ARE MARKED AS SUCH. THEY SHOW THE INFORMANT AS UNRELIABLE AND SHOULD NOT HAVE BEEN OMITTED FROM THE AFFIDAVIT. YOU WILL SEE THAT "CHARGES WERE PENDING" BECAUSE SHE WAS FOUND TO HAVE HEROIN ON HER DURING THE PREBUY SEARCH OF HER. THAT BUY WAS ALLEGEDLY OF MYSELF AND CANCELLED THAT DAY. THE AMOUNT HAPPENED TO BE ALMOST THE EXACT AMOUNT SHE CLAIMED TO PURCHASE FROM MYSELF. THIS SHOULD ~~BE~~ INCLUDED IN AFFIDAVIT.

RECEIVED

THANK YOU

RESPECTFULLY

Dan Walden

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON