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Court of Appeals  
Division II  
State of Washington  
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NO. 50664-5-II

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

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STATE OF WASHINGTON, Respondent

v.

DARIN RICHARD VANCE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 11-1-00704-9

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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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1 A. ASSIGNMENT OF ERROR

2 1. The Trial Court erred by denying the Defendant's Motion to  
3 Suppress and Dismiss in the Trial Court's Findings of Fact and  
4 Conclusions of Law entered on July 26, 2017 in the following  
5 particulars:

6 a. By erroneously concluding that the Search Warrant was not  
7 overbroad and met the constitutional particularity requirements.  
8 *See* CP 193 at 6-7 (Conclusion of Law #s 10-12)

9 B. STATEMENT OF THE CASE

10 In 2011, state and federal agents executed a search warrant at the home of Darin  
11 Vance. Judge Vern Schrieber issued the warrant based upon an affidavit submitted to  
12 him by VPD Detective Patrick Kennedy<sup>1</sup>. Appellant filed a motion to suppress and  
13 argued, among other things, that the warrant was overbroad and did not meet  
14 constitutional particularity requirements. *See* CP 22 and 121. The Court denied the  
15 motion. *See* CP 193.

16 C. ARGUMENT

17 1. The Warrant Permitting The Seizure Of Any Computer, Electronic  
18 Equipment Or Digital Storage Device And The Searches Of All Of  
19 Those Devices Was Not Sufficiently Particular To Satisfy The  
20 Fourth Amendment Or Article I, § 7 Of The Washington  
21 Constitution

22 Since 2012, many courts have wrestled with privacy interests in the digital age  
23 including the particularity requirement in relation to the seizures and searches of  
24 electronic storage devices as well as seizures of personal information from Third Parties<sup>2</sup>.

25 <sup>1</sup> A copy of that warrant is found at Clerk's Papers #22 at pp 3-6.

26 <sup>2</sup> *See generally United States v. Carpenter*, \_\_\_ U.S. \_\_\_, 138 S.Ct. 2206 (2018)(Cell Site Location  
Page Information held by third party is protected and requires a warrant not merely an administrative subpoena);  
*Riley v. California*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)(General discussion of the

1 The Washington Court of Appeals addressed the particularity issue in two separate cases.

2 First, the *Keodora* Court evaluated a warrant *post Riley* and *Galpin* and affirmed the  
3 bedrock underpinning of the particularity requirement:

4 *But blanket inferences and generalities cannot substitute*  
5 *for the required showing of “reasonably specific*  
6 *‘underlying circumstances’ that establish evidence of*  
7 *illegal activity will likely be found in the place to be*  
8 *searched in any particular case.* *State v. Thein*, 138  
9 Wash.2d 133, 147–48, 977 P.2d 582 (1999).

10 *Keodara*, 191 Wash. App. at 313 (emphasis supplied)

11 Second, the *McKee* Court, evaluating a warrant strikingly similar to the warrant in  
12 this case, held that the warrant failed to meet the particularity requirement. *McKee, supra*  
13 at 26-28, *relying on Keodara*. Specifically, the *McKee* Court stated:

14 The warrant in this case was not carefully tailored to the  
15 justification to search and was not limited to data for which  
16 there was probable cause. The warrant authorized the  
17 police to search all images, videos, documents, calendars,  
18 text messages, data, Internet usage, and “any other  
19 electronic data” and to conduct a “physical dump” of “all of  
20 the memory of the phone for examination.” The language  
21 of the search warrant clearly allows search and seizure of  
22 data without regard to whether the data is connected to the  
23 crime. The warrant gives the police the right to search the  
24 contents of the cell phone and seize private information  
25 with no temporal or other limitation. As in *Keodara*,  
26 “[t]here was no limit on the topics of information for which  
27 the police could search. Nor did the warrant limit the search  
28 to information generated close in time to incidents for  
29 which the police had probable cause.” *Keodara*, 191 Wash.

30 nature and extent of data stored on private electronic storage devices and, therefore, warrant required for  
31 search of cell phones); *United States v. Jones*, 565 U.S. —, —, 132 S.Ct. 945, 955, 181 L.Ed.2d 911  
32 (2012) (SOTOMAYOR, J., concurring) (“GPS monitoring generates a precise, comprehensive record of a  
33 person's public movements that reflects a wealth of detail about her familial, political, professional,  
34 religious, and sexual associations.”); *United States v. Galpin*, 720 F.3d 436, \_\_\_ (2<sup>nd</sup> Cir 2013)(child  
35 pornography case where court held that warrant constituted a “general” warrant); *State v. Keodara*, 191  
36 Wash. App. 305, 313, 364 P.3d 777, 781 (2015), *review denied*, 185 Wash. 2d 1028, 377 P.3d 718  
37 (2016)(blanket generalities do not satisfy particularity requirement); *State v. McKee*, 3 Wash.App. 2d 11,  
38 413 P.3d 1049 (2018)(Warrant failed to meet particularity requirements).

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2 - APPELLANT’S SUPPLEMENTAL OPENING BRIEF

1 App. at 316, 364 P.3d 777. The warrant allowed the police  
2 to search general categories of data on the cell phone with  
3 no objective standard or guidance to the police executing  
4 the warrant. The language of the search warrant left to the  
5 discretion of the police what to seize.

6 *McKee, supra* at 28.

7 The *McKee* Court specifically held that:

8 the search warrant violated the particularity requirement of  
9 the Fourth Amendment. “ ‘[A] search conducted pursuant  
10 to a warrant that fails to conform to the particularity  
11 requirement of the Fourth Amendment is unconstitutional.’  
12 ” *Groh*, 540 U.S. at 559, 124 S.Ct. 1284  
13 (quoting *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5,  
14 104 S.Ct. 3424, 82 L.Ed. 2d 737 (1984)).

15 *Id.*

16 The *McKee* holding is consistent with *Galpin*:

17 The chief evil that prompted the framing and adoption of the Fourth  
18 Amendment was the “indiscriminate searches and seizures” conducted by  
19 the British “under the authority of ‘general warrants.’” *Payton v. New  
20 York*, 445 U.S. 573, 583, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *Arizona  
21 v. Gant*, 556 U.S. 332, 345, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)  
22 (“[T]he central concern underlying the Fourth Amendment [is] the  
23 concern about giving police officers unbridled discretion to rummage at  
24 will among a person's private effects.”). To prevent such “general,  
25 exploratory rummaging in a person's belongings” and the attendant  
26 privacy violations, *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91  
S.Ct. 2022, 29 L.Ed.2d 564 (1971).

*Galpin, supra* at 445.

27 The *Galpin* Court concluded that where, as here, the property to be searched is an  
28 electronic storage device:

29 the particularity requirement assumes even greater  
30 importance. As numerous courts and commentators have  
31 observed, *advances in technology and the centrality of  
32 computers in the lives of average people have rendered  
33 the computer hard drive akin to a residence in terms of*

1 the scope and quantity of private information it may  
2 contain. *Id.* at 446 (emphasis supplied)<sup>3</sup>.

3 In addition, the *Galpin* Court emphasized the dangers and pitfalls of violating the  
4 particularity requirement:

5 There is, thus, “a serious risk that every warrant for  
6 electronic information will become, in effect, a general  
7 warrant, rendering the Fourth Amendment irrelevant.”  
8 *Id.* This threat demands a heightened sensitivity to the  
9 particularity requirement in the context of digital  
10 searches.

11 *Id.* at 447; *See Thein, supra* at 147–48<sup>4</sup>;

12 In this case, the warrant failed to be sufficiently particular to satisfy the  
13 constitutional mandates of the Fourth Amendment and Article I, §7 of the Washington  
14 State Constitution and the evidence seized and searched pursuant to that warrant should  
15 have been excluded.

#### 16 D. CONCLUSION

17 Mr. Vance has a recognized privacy interest in all of his electronic storage and  
18 digital devices. The Search Warrant left to the execution officers an unbridled

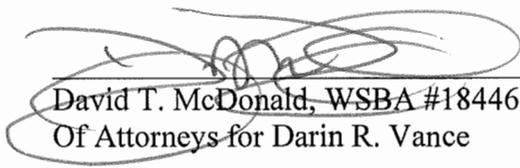
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19 <sup>3</sup> *See United States v. Payton*, 573 F.3d 859, 861–62 (9th Cir.2009); *United States v. Otero*, 563 F.3d 1127,  
20 1132 (10th Cir. 2009) (computer's potential “to store and intermingle a huge array of one's personal papers  
21 in a single place”); Orin Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 569 (2005)  
(Computers “are postal services, playgrounds, jukeboxes, dating services, movie theaters, daily planners,  
shopping malls, personal secretaries, virtual diaries, and more.”).

22 <sup>4</sup> The potential for privacy violations occasioned by an unbridled, exploratory search of a hard drive is  
23 enormous. This threat is compounded by the nature of digital storage. Where a warrant authorizes the  
24 search of a residence, the physical dimensions of the evidence sought will naturally impose limitations on  
25 where an officer may pry: an officer could not properly look for a stolen flat-screen television by  
26 rummaging through the suspect's medicine cabinet, nor search for false tax documents by viewing the  
suspect's home video collection. Such limitations are largely absent in the digital realm, where the size or  
other outwardly visible characteristics of a file may disclose nothing about its content.<sup>8</sup> *United States v.*  
*Galpin*, 720 F.3d 436, 446–47 (2d Cir. 2013)

1 discretion to seize devices and search those devices. The failure to satisfy the  
2 particularity requirement resulted in an invalid warrant and therefore, all evidence seized  
3 as a result of the execution of that warrant should have been suppressed.

4 DATED this 11th day of July 2018

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8 Of Attorneys for Darin R. Vance  
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5 - APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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Respondent,

v.

DARIN RICHARD VANCE,

Appellant.

Court of Appeals No. 50664-5-II

Clark County No. 11-1-00704-9

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I declare under penalty of perjury of the laws of the State of Oregon that the foregoing is true and correct.

Signed at Portland, Oregon this July 11, 2018.



David T. McDonald, WSBA #18446  
Of Attorneys for Darin R. Vance

**DAVID T. MCDONALD PC**

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