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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

SERGEY VLADIMIR KOTLYAROV,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 16-1-01143-0
The Honorable Timothy Ashcraft, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Sergey Kotlyarov's CrR 3.6 motion to suppress.
2. The trial court erred when it concluded that a search of a large dresser in Sergey Kotlyarov's room was valid under the "protective sweep" exception to the warrant requirement.
3. The State failed to meet its burden of proving, beyond a reasonable doubt, that Sergey Kotlyarov was armed with a firearm when he committed the crime of possession of a controlled substance.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the "protective sweep" exception to the warrant requirement allows officers who enter private property to lawfully arrest an occupant to do a cursory search of areas adjoining the location of the arrest, but where the officers in this case did not enter the property in order to make an arrest, did the trial court err when it concluded that the search of a large dresser in Sergey Kotlyarov's room was valid under the "protective sweep" exception to the warrant requirement? (Assignments of Error 1 & 2)
2. Did the State fail to meet its burden of proving, beyond a

reasonable doubt, a nexus between the firearms and the crime of possession of a controlled substance? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Sergey Vladimir Kotlyarov with one count of unlawful possession of a controlled substance (methamphetamine) with intent to deliver (RCW 69.50.401). (CP 14) The State alleged that Kotlyarov was armed with a firearm when he committed this offense. (CP 14) The State also charged Kotlyarov with four counts of unlawful possession of a firearm in the second degree (RCW 9.41.040). (CP 14-16)

The trial court denied Kotlyarov's pretrial motions to suppress evidence and custodial statements. (CP 19-31, 117-24, 125-28; 12/05/17 RP 3-9)¹ The court also rejected Kotlyarov's argument that his prior felony conviction, which resulted in the loss of his right to bear arms, was unconstitutionally invalid on its face. (CP 46-52; 12/05/17 RP 10-35)

The jury convicted Kotlyarov of unlawful possession of a

¹ The transcripts will be referred to by the date of the proceeding.

controlled substance, while armed with a firearm, and all four counts of unlawful possession of a firearm. (12/14/17 RP 763-65; CP 110-16) The court sentenced Kotlyarov within his standard range to a term of 60 months. (01/26/18 RP 776-77; CP 132, 135-36) Kotlyarov filed a timely Notice of Appeal. (CP 142)

B. SUBSTANTIVE FACTS

1. Facts from CrR 3.6 and CrR 3.5 Hearing

Shortly after 6:00 PM on March 11, 2016, Lakewood police officers Darrell Moore and Jacob Veenker responded to a report of a burglary in progress at a business located at 11304 Steele Street South. (12/04/17 RP 38-39, 40, 127-28; CP 117) The reporting party, Andrey Kramareusiky, reported that a white male wearing a camouflage jacket had broken into his building with another unknown male. (12/04/17 RP 40-41; CP 117)

Officers Moore and Veenker and several other officers pulled into the parking lot in front of what appeared to be a tire repair business. (12/04/17 RP 41, 56) A large garage-style door was open, and they saw a white male wearing a camouflage jacket standing outside. (12/04/17 RP 41-42; CP 118) The man, Sergey Kotlyarov, initially refused the officers' commands to place his hands in the air, turn around, or lay on the ground. (12/04/17 RP

45-46; CP 118) But Officer Veenker eventually detained Kotlyarov by handcuffing him and placing him in the patrol car. (12/04/17 RP 46; CP 118)

The officers attempted to clear the building to make sure that there were no other people inside the business. (12/04/17 RP 48; CP 118) They found no one, but they were unable to access one area in the rear of the business because the door was locked. (12/04/17 RP 54; CP 118)

Officer Moore interviewed Kotlyarov after he was advised of and waived his *Miranda* rights. (12/04/17 RP 50, 129-30; CP 118) Kotlyarov initially claimed that he owned the building. (12/04/17 RP 56; CP 119) Officer Moore asked for permission to search the business for proof of Kotlyarov's ownership, and Kotlyarov agreed. (12/04/17 RP 56; CP 119) But Kotlyarov eventually explained that he was only living there. (12/04/17 RP 60-61; CP 119) Kotlyarov told Officer Moore that he had been living in a back room accessed through the locked door. (12/04/17 RP 60-61; CP 119)

Officer Moore asked whether Kotlyarov could prove that he lived there, and Kotlyarov said he would find the keys and show the officer his living space. (12/04/17 RP 60-61; CP 119) According to Officer Moore, Kotlyarov was unable to find the keys and was

acting strangely, as if he did not want the officer to access the room. (12/04/17 RP 62, 124; CP 119)

Officer Moore also spoke to Kramareusiky. He told the officers that he owned the shop, and eventually acknowledged that he knew Kotlyarov. (12/04/17 RP 59) Kramareusiky fired Kotlyarov a week prior, but Kotlyarov was still living there. (12/04/17 RP 59; CP 119) Kramareusiky believed that Kotlyarov was engaged in criminal activities, claimed he had seen Kotlyarov with a gun, and wanted the officers to arrest Kotlyarov. (12/04/17 RP 58-59, 60-61; CP 119)

Officer Moore concluded that Kotlyarov was not a burglar, but he also could not determine whether Kotlyarov or Kramareusiky actually owned the building. (12/04/17 RP 59, 62, 83, 105, 107, 108, 138; CP 120) Officer Moore informed the men that this appeared to be a civil matter, not a criminal matter, and he gave Kramareusiky information on how to begin a legal eviction process. (12/04/17 RP 62; CP 120) Officer Moore then told Kramareusiky that they had to leave because they needed to respond to a more pressing call. (12/04/17 RP 62; CP 120)

Kramareusiky was unhappy that that officers were not going to arrest or remove Kotlyarov, and he told the officers that Kotlyarov

would shoot him if they left. (12/04/17 RP 62, 107; CP 120) The officers did not believe Kramareusiky, and they started to leave. (12/04/17 RP 63, 108; CP 120) But Kramareusiky ran to the back room and kicked in the locked door. (12/04/17 RP 63; CP 120) Kotlyarov immediately ran after Kramareusiky and pushed past him into the room. (12/04/17 RP 63-64; CP 120)

Concerned that the situation was rapidly escalating and may turn violent, Officer Moore followed the men into the room. (12/04/17 RP 63; CP 120) He immediately saw a handgun on a table about “two arm’s lengths away” from Kotlyarov. (12/04/17 RP 63, 66; CP 120) Concerned for their safety, Officer Moore ordered Kotlyarov to the ground, but he did not comply. (12/04/17 RP 64; CP 121)

The trial court entered the following written findings of fact describing what occurred next:

19. Officer Moore could see [Kotlyarov] looking around. Officer Moore feared [Kotlyarov] was thinking of trying to get the gun, which was next to the officer. He delivered a forward right kick to the abdominal area of [Kotlyarov]. [Kotlyarov] dropped to the ground. Officer Veenker took control of [Kotlyarov] and handcuffed him.
20. Officer Moore kept security of the room. Officer Moore directed Officer Veenker to open a large dresser, so they could make sure there were no people hiding in the dresser, who could possibly

ambush the officers. When Officer Veenker opened the dresser, Officer Moore could see that it contained two long guns, which appeared to be rifles.

21. While the officers waited for additional units, within Officer Moore's eyesight, he saw a large stash of rifle rounds and handgun rounds, which were in a bed drawer. The rounds were within arms-reach of [Kotlyarov]. Officer Moore saw glass pipes, burnt at the end of the bulbs. The officer knows that these pipes are commonly used to smoke methamphetamine. Officer Moore saw strips of aluminum foil. Through his training and experience, the officer knows that drug users commonly use strips of aluminum foil to smoke prescription pills. The officer saw various prescription pill bottles, on the ground, near the glass pipes.
22. Officer Moore ran [Kotlyarov's] name with records. He discovered [Kotlyarov] has a felony conviction for Attempt to Elude. The fire department cleared [Kotlyarov] for transport to jail. After St. Clare Hospital also cleared [Kotlyarov], he was booked into the Pierce County Jail.

(CP 121)

Officer Moore obtained a search warrant and seized the weapons and drug-related items. (12/04/17 RP 73; CP 122) Kotlyarov moved to suppress these items, arguing that no exception to the warrant requirement allowed entry into the back room. (12/04/17 RP 157-62; CP 19-26) Alternatively, Kotlyarov argued that the firearms discovered in the large dresser should be suppressed because no valid warrant exception allowed the officers

to open the large dresser to look for additional people. (12/04/17 RP 163-66; CP 26-31)

First, the trial court denied Kotlyarov's "motion to suppress evidence obtained via entry" into Kotlyarov's room. (CP 122, 123) The trial court found that any consent previously given by Kotlyarov had either been impliedly limited to exclude the back room or had expired once the officers expressed their intent to leave. (12/05/17 RP 5-6; CP 122) However, the trial court found that Officer Moore's entry into the back room was authorized under the exigent circumstances or the community caretaking exceptions to the warrant requirement. (12/05/17 RP 6; CP 122-23)

The trial court also denied Kotlyarov's "motion to suppress evidence obtained via the search of the large dresser" in Kotlyarov's room. (CP 124; 12/05/17 RP 8-9) The court's written conclusions explain its rationale:

6. Officer Moore and Officer Veenker lawfully opened a large dresser in [Kotlyarov's] room, without a warrant, finding two long guns. When an officer arrests a person the officer can conduct a protective sweep of the immediate area, to include warrantless searches of potential hiding places, from which an attack can be launched. This protective sweep does not require probable cause or reasonable suspicion. Officer Moore and Officer Veenker lawfully searched the large dresser in [Kotlyarov's] room, finding two long

guns.

7. Even if a protective sweep does require a reasonable suspicion, this Court finds that Officer Moore had a reasonable belief based on specific and articulable facts that the large dresser in defendant's room harbored an individual who could have posed a danger to the officers. Officer Moore and Officer Veenker lawfully searched the large dresser in [Kotlyarov's] room, finding two long guns.

(CP 123-24)²

2. Facts from Trial

In addition to the testimony presented during the suppression hearing, the State also presented evidence that a Washington State identification card and a New York driver's license bearing Kotlyarov's name and likeness, and a court citation mailed to Kotlyarov at the Steel Street address were found in the back room. (12/06/17 RP 226-27, 250; 12/11/17 RP 502-03) Officers also collected two operable shotguns and one operable rifle from the large dresser, and one operable pistol from the table. (12/06/17 RP 258-59, 281, 291, 295, 298; 12/11/17 RP 501-02, 536-39)

During the search the officers also collected a baggie containing approximately 7.9 grams of methamphetamine, two

² A complete copy of the trial court's written Findings and Conclusions on Admissibility of Evidence are attached in the Appendix.

digital scales, 103 empty baggies, glass pipes and other drug paraphernalia. (12/06/17 RP 218, 260-61, 305, 12/07/17 RP 322-323; 12/11/17 RP 504-05, 564-65)

IV. ARGUMENT & AUTHORITIES

A. THE WARRANTLESS SEARCH OF THE LARGE DRESSER VIOLATED KOTLYAROV'S STATE AND FEDERAL PRIVACY PROTECTIONS BECAUSE THE PROTECTIVE SWEEP EXCEPTION DID NOT APPLY.

1. The protective sweep exception did not apply because a valid arrest is a prerequisite.

Law enforcement officers do not have authority to conduct a protective sweep of a citizen's property unless the officers are present on the property in order to serve an arrest warrant or to make a valid arrest. Here, the officers conducted the protective sweep of a large dresser before making an arrest and before they developed probable cause to make an arrest. The protective sweep exception therefore did not apply, and firearms discovered during the sweep must be suppressed.

Article I, section 7 of the Washington Constitution, provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The right to privacy includes the right to be free from warrantless searches, which are "unreasonable per se." State v. Hendrickson, 129 Wn.2d 61, 70,

917 P.2d 563 (1996).³

In Maryland v. Buie, the United States Supreme Court held that the Fourth Amendment permits protective sweeps. 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). “[A]s an incident to the arrest the officers [can], as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” 494 U.S. at 334.

The scope of such a sweep is limited to a “cursory visual inspection of places where a person may be hiding.” State v. Hopkins, 113 Wn. App. 954, 959, 55 P.3d 691 (2002) (citing Buie, 494 U.S. at 334-35). “If the area immediately adjoins the place of arrest, the police need not justify their actions by establishing a concern for their safety.” Id. But when a sweep extends beyond the immediate area, “there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest

³ Both the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution prohibit unreasonable searches and seizures. But article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections. See e.g. State v. Hinton, 179 Wn.2d 862, 868, 319 P.3d 9 (2014).

scene.” Id. (quoting Buie, 494 U.S. at 334). The protective sweep may last “no longer than is necessary to dispel the reasonable suspicion of danger.” Buie, 494 U.S. at 335-36.

There is a split of authority in Washington over whether the protective sweep exception to the warrant requirement set forth in Buie is valid only if it occurs incident to arrest. In Hopkins, Division Three stated that, “**While making a lawful arrest**, officers may conduct a reasonable ‘protective sweep’ of the premises for security purposes.” 113 Wn. App. at 959-60 (emphasis added) (citing Buie, 494 U.S. at 334-35). Citing the Hopkins decision, this Court has similarly held, “Police may conduct a protective sweep of the premises for security purposes **as part of the lawful arrest of a suspect.**” State v. Sadler, 147 Wn. App. 97, 125, 193 P.3d 1108 (2008) (emphasis added) (citing Hopkins, 113 Wn. App. at 959).

In State v. Boyer, Division One recognized that “the weight of authority specifically limit[s] protective sweeps to arrests or to executions of arrest warrants[.]” 124 Wn. App. 593, 602, 102 P.3d 833 (2004). The Boyer court acknowledged that “[t]he concept of a protective sweep was adopted to justify the reasonable steps taken by arresting officers to ensure their safety while making an arrest.” Boyer, 124 Wn. App. at 600 (citing Buie, 494 U.S. at 334).

But later, in State v. Blockman, Division One upheld a protective sweep even though it was not conducted in conjunction with an arrest or execution of an arrest warrant. 198 Wn. App. 34, 392 P.3d 1094 (2017).⁴ The court stated that, “In many cases, including Buie, the facts were that the protective sweep was conducted after or in the course of making an arrest, but nothing in the rationale of Buie or its progeny suggests that an arrest is an indispensable prerequisite.” 198 Wn. App. at 38-39.⁵

This Court should reject Division One’s holding in Blockman, and instead find that a valid arrest or arrest warrant is a prerequisite to application of the protective sweep exception. The Court will find ample support for this position.

Numerous decisions of the Eighth, Ninth and Tenth Circuit Courts of Appeal have specifically declined to extend the protective sweep exception beyond the context of an arrest, and have held that an arrest or valid arrest warrant is a prerequisite to a protective

⁴ Affirmed on other grounds by State v. Blockman, 190 Wn.2d 651, 416 P.3d 1194 (2018).

⁵ Our State Supreme Court has thus far declined to resolve this split. See State v. Blockman, where the Court specifically states: “While courts are still undecided as to whether the protective sweep warrant exception explicated in Buie extends beyond arrest situations, this case is not the proper vehicle to reconcile the split. As a result of Burton’s unambiguous consent to officers searching her apartment, it is unnecessary for us to decide the applicability of Buie in nonarrest situations.” 190 Wn.2d 651, 658, 416 P.3d 1194 (2018).

sweep. See United States v. Davis, 290 F.3d 1239, 1242 n. 4 (10th Cir. 2002) (rejecting an argument that protective sweeps should sometimes be permitted absent an arrest); United States v. Smith, 131 F.3d 1392, 1396 (10th Cir. 1997) (noting that a protective sweep “is a brief search of premises during an arrest to ensure the safety of those on the scene”); United States v. Torres-Castro, 470 F.3d 992, 997 (10th Cir. 2006) (noting, in connection with application of the doctrine, that “protective sweeps must be performed incident to an arrest”); United States v. Waldner, 425 F.3d 514, 517 (8th Cir. 2005) (declining the invitation to “extend Buie further”); United States v. Reid, 226 F.3d 1020, 1027 (9th Cir. 2000) (refusing to permit a protective sweep where the defendant was not under arrest).

It is also notable that at least one Justice of our State Supreme Court has chosen to address this question, and has determined that the Buie Court’s holding was limited to protective sweeps in the incident-to-arrest situation. Blockman, 190 Wn.2d at 663 (Gordon McCloud, J. (concurring)). Justice Gordon McCloud noted that the Buie exception provides for two types of searches—a quick “look” into spaces immediately adjoining the place of arrest that could conceal a person and a broader sweep for persons if

there is reason to believe a dangerous individual is present—but that “both are ‘incident to ... arrest.’” 190 Wn.2d at 664-65 (Gordon McCloud, J. (concurring)).

Furthermore, while both the Federal and Washington State constitutions prohibit unreasonable searches and seizures, Washington’s article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections. See *e.g.* State v. Hinton, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). As Justice Gordon McCloud noted in her Blockman concurrence,

If we were to ... hold that Buie protective sweeps can be incident to limited consent to enter, we would be giving Washingtonians less privacy protection in our state courts than they enjoy in our local federal courts. That can’t be right: the Washington Constitution is more protective, not less protective, of our individual privacy rights than the federal constitution.

Blockman, 190 Wn.2d at 665 (citing Hinton, 179 Wn.2d at 868).

Also, any expansion of the protective sweep doctrine is unjustified because the doctrine is premised on the assumption that an arrest is confrontational by its very nature. Thus, expanding the doctrine will encourage law enforcement to gain legal entry through “knock and talk” type requests and then gather evidence without any requirement of suspicion or compliance with the Fourth Amendment or article I, section 7.

Here, Officer Moore did not arrest anyone, or even indicate an intent to arrest anyone, before the protective sweep. In fact, the officers had determined that no burglary had occurred and they were preparing to leave. (CP 120; 12/04/17 RP 59, 62, 63, 83, 105, 107) And, the officers did not have grounds to arrest Kotlyarov at the time they conducted the protective sweep. Kramareusiky, not Kotlyarov, kicked in the locked door. (CP 120, 12/04/17 RP 63) Officer Moore saw a handgun on the table when he entered the room, but that is not by itself a crime. (CP 120, 12/04/17 RP 63) Officer Moore wanted to physically detain Kotlyarov for safety reasons, but Kotlyarov was not yet under arrest. (CP 121, 12/04/17 RP 64, 67) Officer Moore did not observe the drug paraphernalia, and did not learn of Kotlyarov's prior felony conviction, until after the protective sweep and after the discovery of the additional firearms in the large dresser had already occurred. (CP 121, 12/04/17 RP 69, 71-72) Thus, the threshold requirement for a protective sweep was not met under the circumstances of this case.

The trial court determined that the sweep was lawful because it included only the immediate area and because there were facts to support a belief that another potentially dangerous

individual was present.⁶ (CP 123-24) But that is irrelevant because there was no arrest preceding the sweep. The State therefore failed to establish that the search of the large dresser was justified under the “protective sweep” exception to the warrant requirement.

The firearms discovered in the large dresser should have been suppressed. See State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999) (when an unconstitutional search occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed); State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). The fact that the officers may have inevitably discovered the firearms during the subsequent execution of the warrant does not alter this result because Washington does not recognize the inevitable discovery doctrine. State v. Winterstein, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (inevitable discovery doctrine incompatible with article I, section 7); State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2003) (inevitable discovery exception would create no incentive for State to comply with article I, section 7).

⁶ When reviewing the denial of a motion to suppress, this court reviews the trial court's conclusions of law *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (citing State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

2. Kotlyarov may argue this ground for the first time on appeal.

Kotlyarov's trial counsel argued that the search of the large dresser was an illegal search. (CP 26; 12/04/17 RP 163-66) But trial counsel primarily argued that it was not a valid protective sweep because "[t]here was no reason to believe that a dresser was holding an ambusher that would have popped out to shoot the police." (CP 29; 12/04/17 RP 163-64)

Although counsel did not cite Buie and did not specifically argue that the search was improper because it did not follow a valid arrest, trial counsel did note in his briefing that "[e]ven after Officer Moore and Officer Veenker ordered Mr. Kotlyarov to the floor, they still did not specify *any* crime they thought was apparent. It was only while Officer Moore was waiting for additional units that he thought he detected drug paraphernalia." (CP 28, emphasis in original)

In any event, RAP 2.5(a)(3) permits an appellant to raise for the first time a manifest constitutional error. Erroneous suppression rulings have been found to constitute such error. See, e.g., State v. Littlefair, 129 Wn. App. 330, 339, 119 P.3d 359 (2005) (A trial court's failure to suppress evidence seized as the result of an

unlawful search affects a constitutional right and may thus be raised for the first time on appeal.).

Furthermore, Kotlyarov asks this Court to answer a purely legal question; because he moved to suppress the evidence, the trial court held a hearing and all pertinent facts are of record. This Court needs nothing more to determine whether Kotlyarov raises a manifest error of constitutional magnitude. *Cf. State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (“If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.”). This Court should therefore reject any assertion that RAP 2.5(a) precludes this Court from reviewing the merits of the above arguments.

B. THE STATE FAILED TO PROVE A NEXUS BETWEEN THE FIREARMS AND THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE.

The jury answered in the affirmative when asked to determine if Kotlyarov was armed with a firearm during the commission of the possession of a controlled substance offense.⁷ (CP 112; 12/14/17 RP 764) However, the evidence does not

⁷ The State alleged that Kotlyarov possessed the methamphetamine with the intent to deliver, but the jury rejected that charge and convicted Kotlyarov of simple possession. (CP 110-11; 12/14/17 RP 763)

support a finding that there was a nexus between the firearms and the methamphetamine possession.

The Sentencing Reform Act authorizes a sentence enhancement whenever a defendant is armed with a deadly weapon during the commission of a crime. RCW 9.94A.533(3), (4), .602. A person is “armed” if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes, and there is a connection between the defendant, the weapon, and the crime. State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) (quoting State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). To support a finding that a defendant was armed with a deadly weapon during the commission of a crime, there must be a nexus between the weapon and the crime. State v. O'Neal, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007) (quoting State v. Schelin, 147 Wn.2d 562, 575-76, 55 P.3d 632 (2002)).

In determining whether a defendant is armed, the court “should examine the nature of the crime, the type of weapon, and the circumstances under which the weapon is found (e.g., whether in the open, in a locked or unlocked container, in a closet on a shelf, or in a drawer).” Schelin, 147 Wn.2d at 570. In this case, all four firearms were found in the back room where Kotlyarov was

living. (12/06/17 RP 214, 215, 217) A handgun was sitting in plain view on a table, and three long guns were inside the large dresser. (12/06/17 RP 215-17; 12/11/17 RP 511)

However, a person is not armed simply because a weapon is present or on the premises during the commission of a crime. Schelin, 147 Wn.2d at 570 (the mere presence of a weapon is not sufficient to impose a firearm enhancement). Courts are especially careful in this area because of the constitutional right to bear arms. U.S. Const. Amend. II; Wash. Const. art. I, § 24; see also State v. Rupe, 101 Wn.2d 664, 703-08, 683 P.2d 571 (1984) (“constitutionally protected behavior cannot be the basis of criminal punishment;” thus, courts must be protective of the right to bear arms during criminal trials implicating gun possession); State v. Johnson, 94 Wn. App. 882, 892-97, 974 P.2d 855 (1999).

When a crime is a continuing crime—like a drug possession or manufacturing operation—a nexus exists if the weapon was “there to be used,” which requires more than just the weapon’s presence at the crime scene. State v. Gurske, 155 Wn.2d 134, 138, 118 P.2d 333 (2005). Generally, in drug cases, courts have found the required nexus between the drug crime and a weapon where there is evidence from which a jury can infer that the weapon

was used to protect the possession, distribution or manufacture of the drugs, and was therefore used in furtherance of the crime.

For example, in Schelin, the Court concluded that the jury could infer that the defendant was using the weapon to protect his marijuana grow operation, where the operation was located in the same room in which the officers found the defendant and the easily-accessible weapon. 147 Wn.2d at 574-75.

In State v. O'Neal, officers searched the defendants' methamphetamine laboratory. 159 Wn.2d at 503. Besides evidence of drug manufacturing, the officers found over 20 guns, body armor, night vision goggles, and a police scanner. 159 Wn.2d at 503. The Court affirmed the firearm enhancements, noting that since the weapons were easily accessible to protect the drugs, and since the defendants kept a police scanner in the laboratory, the jury could find that the defendants used the guns to protect the drugs. 159 Wn.2d at 502, 504.

In Eckenrode, the defendant called the police, alerting them to an intruder in his house. 159 Wn.2d at 491. The defendant told the dispatcher he was armed, and police later found what appeared to be methamphetamine, dried marijuana, two firearms, and a police scanner in the house. 159 Wn.2d at 491-92. The Court

affirmed Eckenrode's firearm enhancements, finding that the presence of two weapons and a police scanner supported an inference that he was monitoring police activity against the chance he might be raided. 159 Wn.2d at 494. Therefore, a jury could readily have found that the weapons were there to protect an apparent drug manufacturing operation. 159 Wn.2d at 494.

In State v. Neff, during a search of the defendant's garage, police found two loaded pistols in a safe, which also contained four bags of marijuana. Police also found two security cameras and a monitor in the garage on which to view live feeds. 163 Wn.2d 453, 464, 181 P.3d 819 (2008). An officer testified that the monitors were for counter surveillance. The Court found the presence of the additional equipment was enough to find that Neff used the guns to protect his drug operation. 163 Wn.2d at 464-65.

In Valdobinos, by contrast, police arrested the defendant when he offered to sell cocaine to an undercover officer. They searched his house, finding cocaine and an unloaded rifle under his bed. 122 Wn.2d at 274. The Court reversed the firearm enhancement, holding the jury could not infer from an unloaded rifle near the cocaine that the defendant was armed. 122 Wn.2d at 282.

And in Johnson, police executing a search warrant for drugs

arrested the defendant, took him into the living room and sat him down. 94 Wn. App. at 891-92. They then asked him if there were any weapons in the home. 94 Wn. App. at 891-92. Johnson indicated that there was a loaded handgun in a bookcase under the coffee table five to six feet in front of him. 94 Wn. App. at 892. The court rejected the State's contention that the mere presence of the weapon on the premises established the requisite nexus to support the enhancement. 94 Wn. App. at 896-97.

In this case, the methamphetamine and firearms were all found in the same room of the tire shop, but that is the only room that Kotlyarov occupied so it is natural that all of his personal possessions would be in that room. Only the handgun was in the open area of the room, and there is no evidence that it was in close proximity within the room to the methamphetamine or other drug-related items. There were no additional security items or police monitors located in the business or the room. There was no evidence that Kotlyarov used the firearms to protect his possession of the methamphetamine.

As in Valdobinos and Johnson, the mere presence of a weapon on the premises does not establish the requisite nexus to support the enhancement. There evidence is insufficient to

establish a nexus between Kotlyarov's constructive possession of the methamphetamine and the firearms. The jury's firearm finding should be reversed, and Kotlyarov's firearm sentence enhancement should be stricken.

V. CONCLUSION

The protective sweep exception to the warrant requirement does not apply to the search in this case because it was not performed pursuant to a valid arrest. Accordingly, the trial court should have suppressed the firearms discovered inside the large dresser, and Kotlyarov's convictions for possessing those three firearms must be reversed. Additionally, the State also failed to prove that Kotlyarov's firearms had any nexus to his possession of methamphetamine. Kotlyarov's firearm enhancement must also be reversed.

DATED: September 7, 2018



STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Appellant Sergey V. Kotlyarov

CERTIFICATE OF MAILING

I certify that on 09/07/2018, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Sergey V. Kotlyarov, DOC# 405400, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



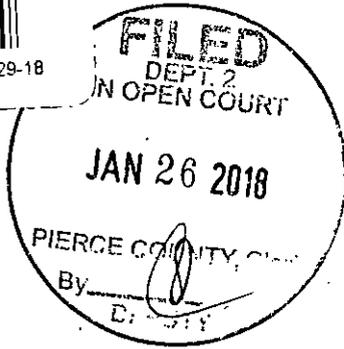
STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

FINDINGS AND CONCLUSIONS ON ADMISSIBILITY OF EVIDENCE CR 3.6



16-1-01143-0 50681882 FNCL 01-29-18



ORIGINAL

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 16-1-01143-0

vs.

SERGEY VLADIMIR KOTLYAROV,

FINDINGS AND CONCLUSIONS ON
ADMISSIBILITY OF EVIDENCE CrR
3.6

Defendant.

THIS MATTER having come on before the Honorable Timothy L. Ashcraft on the 5th day of December, 2017, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

FACTS

1. Officer Darrell Moore is a credible witness.
2. Officer Jacob Veenker is a credible witness.
3. On March 11, 2016, at approximately 6:17pm, Lakewood Police Department Officers Darrell Moore, Jacob Veenker and several other officers, responded to a report of a burglary in progress, located at 11304 Steele Street South, Lakewood, Washington.
4. The reporting party, Andrey Kramareuskiy, called to report that a white male in a camouflage jacket (later identified as defendant, Sergey Kotlyarov) had broken into the building, with another male. Mr. Kramareuskiy stated that he saw the front door was

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1 open and that he saw two subjects going in and out of the business. Mr. Kramareuskiy
2 said the business was closed.

3 5. The officers arrived on scene. The officers saw defendant – a white male, wearing a
4 camouflage jacket. Defendant was in front of the business. A large garage door to the
5 business was wide open.

6 6. Officer Moore and another officer had their guns drawn. Officer Veenker ordered
7 defendant to place his hands in the air. Defendant was reluctant to follow Officer
8 Veenker's commands. Officer Veenker had defendant turn around, but defendant started
9 to turn in circles. Officer Moore heard defendant say that he should not have to do these
10 things. Officer Veenker ordered defendant to keep his hands up and walk backwards,
11 towards the officers. Defendant refused to walk backwards. The officers had to tell
12 defendant to stop and get on the ground. At this point, Officer Moore had safety
13 concerns, because the garage door was open and there was still a suspect outstanding.

14 7. Officer Veenker ordered defendant to the ground. Defendant dropped to his knees and
15 refused to go farther to the ground. Defendant said the ground was wet. Multiple times,
16 Officer Veenker ordered defendant to the ground. Defendant refused.

17 8. Officer Veenker handcuffed defendant, frisked him and placed him in a patrol car.
18 Officer Veenker advised defendant of his *Miranda* warnings, from a department-issued
19 card. Defendant was asked whether he understood his rights and whether he wanted to
20 speak to the officers. Defendant nodded his head up and down. Defendant said, "Yup."

21 9. The officers attempted to clear the building. The building was large and cluttered. There
22 was a locked door, to which the officers had no access.
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10. Officer Moore interviewed defendant and asked what was going on. Defendant claimed that he worked at this location. Defendant claimed that he was the actual owner of the business and that Mr. Kramareuskiy was lying. Defendant said the officer should ask Mr. Kramareuskiy for the keys, to make sure he actually owned the business. Defendant said he had the keys. He added that he had the keys and could open the business and the interior doors, because he was the owner. Officer Moore asked defendant whether he would open the doors and allow the officer to check and see whether he actually lived there. Defendant said, "Yeah." Defendant said there was no one else at the business.

11. Officer Moore spoke to Mr. Kramareuskiy, who said that he was the owner of the shop. Mr. Kramareuskiy said, a week prior, he fired defendant. Mr. Kramareuskiy suspected that criminal activity was taking place, at the shop. Mr. Kramareuskiy said that various tattooed people came, throughout the night. He said, on a previous occasion, he had seen defendant with a firearm. Mr. Kramareuskiy asked for defendant to be taken to jail, for breaking into the business.

12. Eventually, defendant admitted that Mr. Kramareuskiy owned the business. Defendant admitted that he had been living in the back room, which had a white door. Officer Moore asked whether defendant could prove that he lived there. Defendant said he would show the officers that he lived in the back room. Defendant also offered to grab his keys, and let the officer check.

13. Officer Moore followed defendant into the building. The two walked around for a while. Defendant failed to find his keys. Defendant initially said that he lived in the locked back room, but then acted in a way that, to Officer Moore, made it seem like defendant wanted the officer to stay away from that location. Officer Moore pointed out that defendant was

1 acting strange and asked whether another person was hiding in the back room. Defendant
2 claimed there was not a person hiding in the back room.

3 14. Officer Moore believed that defendant had intentionally not found the key to the back
4 room. Officer Moore believed that he no longer had defendant's consent to search the
5 back room.

6 15. Officer Moore informed defendant and Mr. Kramareuskiy that the situation appeared
7 civil. He informed Mr. Kramareuskiy that they had a priority call with a weapon, to
8 which they needed to respond.

9 16. Mr. Kramareuskiy claimed that, if Officer Moore left, defendant would shoot him. Mr.
10 Kramareuskiy said he was going to kick the door open. Officer Moore told Mr.
11 Kramareuskiy that it would be best to go through the courts. Mr. Kramareuskiy rushed
12 back to the locked white door and immediately kicked it open. Defendant pushed Mr.
13 Kramareuskiy out of the way and ran into the room. Officer Moore followed the
14 defendant and Mr. Kramareuskiy.

15 17. After Officer Moore watched defendant run to the back and dart into the room, Officer
16 Moore feared Mr. Kramareuskiy's claim, that defendant would shoot him, might be true.
17 Officer Moore also feared that the two might end up in a fight, which would escalate this
18 issue.

19 20 18. Officer Moore stepped into defendant's room and immediately scanned. He saw a black
21 semi-automatic handgun, to the right of his person and the doorway. He saw defendant
22 standing near the doorway facing the officer. Officer Veenker was to the left of Officer
23 Moore. Both officers had their weapons drawn. Officer Moore ordered defendant to the
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1 ground. Defendant failed to comply. Officer Moore gave a couple additional orders, for
2 defendant to drop to the ground. Again, defendant failed to comply.

3 19. Officer Moore could see defendant looking around. Officer Moore feared defendant was
4 thinking of trying to get the gun, which was next to the officer. He delivered a forward
5 right kick to the abdominal area of defendant. The defendant dropped to the ground.
6 Officer Veenker took control of defendant and handcuffed him.

7 20. Officer Moore kept security of the room. Officer Moore directed Officer Veenker to open
8 a large dresser, so they could make sure there were no people hiding in the dresser, who
9 could potentially ambush the officers. When Officer Veenker opened the dresser, Officer
10 Moore could see that it contained two long guns, which appeared to be rifles.

11 21. While the officers waited for additional units, within Officer Moore's eyesight, he saw a
12 large stash of rifle rounds and handgun rounds, which were in a bed drawer. The rounds
13 were within arms-reach of defendant. Officer Moore saw glass pipes, burnt at the end of
14 the bulbs. The officer knows that these pipes are commonly used to smoke
15 methamphetamine. Officer Moore saw strips of aluminum foil. Through his training and
16 experience, the officer knows that drug users commonly use strips of aluminum foil to
17 smoke prescription pills. The officer saw various prescription pill bottles, on the ground,
18 near the glass pipes.

19 22. Officer Moore ran defendant's name with records. He discovered defendant has a felony
20 conviction for Attempt to Elude. The fire department cleared defendant for transport to
21 jail. After St. Clare Hospital also cleared defendant, he was booked into the Pierce
22 County Jail.
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23. Officer Moore applied for a search warrant. Judge Heller granted the application. Officer Moore, Officer Veenker and two investigators, served the search warrant. During service of the search warrant, the officers found defendant's driver's license, multiple firearms, boxes of ammunition, a homemade suppressor, two-digital scales, baggies, and 7.9-grams of a substance, which would later test positive as methamphetamine.

REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

1. Officer Moore did not subjectively believe that he had consent to enter defendant's room. Officer Moore's entered defendant's room, without consent.
2. The totality of facts show, exigent circumstances justified Officer Moore's entry into defendant's room. The Court has taken into account, the following factors: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) whether there is strong reason to believe that the suspect is on the premises; (5) the likelihood that the suspect will escape if not swiftly apprehended; and (6) whether the entry can be made peaceably. Given the statements by Mr. Kramareuskiy, the actions of defendant, and the other observations listed above, Officer Moore reasonably believed that defendant might shoot Mr. Kramareuskiy, unless Officer Moore intervened by stepping into the room. The exigent circumstances exception applies. Officer Moore lawfully entered defendant's room.
3. This Court denies defendant's motion to suppress evidence obtained via Officer Moore's entry into defendant's room.

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4. The totality of facts shows community caretaking concerns, which justified Officer Moore's entry into defendant's room. The community caretaking emergency exception, justifies a warrantless entry into a protected area: (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched. Given the statements by Mr. Kramareuskiy, the actions of defendant, and the other observations listed above, Officer Moore reasonably believed that Mr. Kramareuskiy needed assistance. In addition, Officer Moore reasonably believed that, to assist, Officer Moore had to enter into defendant's room. The community caretaking emergency exception applies. Officer Moore lawfully entered defendant's room.
 5. This Court denies defendant's motion to suppress evidence obtained via entry into defendant's room.
 6. Officer Moore and Officer Veenker lawfully opened a large dresser in defendant's room, without a warrant, finding two long guns. When an officer arrests a person the officer can conduct a protective sweep of the immediate area, to include warrantless searches of potential hiding places, from which an attack could be launched. This protective sweep does not require probable cause or reasonable suspicion. Officer Moore and Officer Veenker lawfully searched the large dresser in defendant's room, finding two long guns.
 7. Even if a protective sweep does require a reasonable suspicion, this Court finds that Officer Moore had a reasonable belief based on specific and articulable facts that the large dresser in defendant's room harbored an individual who could have posed a danger

to the officers. Officer Moore and Officer Veenker lawfully searched the large dresser in defendant's room, finding two long guns.

- 8. This Court denies defendant's motion to suppress evidence obtained via the search of the large dresser in defendant's room, which contained two long guns.

DONE IN OPEN COURT this 26 day of January, 2018.

Timothy L. Ashcraft

JUDGE

TIMOTHY L. ASHCRAFT

Presented by:

Brad Hashimoto

BRAD HASHIMOTO

Deputy Prosecuting Attorney
WSB # 46324

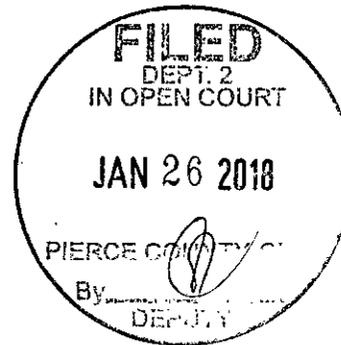
Approved as to Form:

Aaron Talney

AARON TALNEY

Attorney for Defendant
WSB # 22154

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