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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN THORTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Timothy Ashcraft, Judge

No. 16-1-03132-5

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. PROCEDURE

On August 4, 2016, the State charged Steven Thornton (hereinafter referred to as “defendant”) with 7 counts of possession of a stolen firearm (counts 1 through 7), 20 counts of unlawful possession of a firearm in the first degree (counts 8 through 27) and one count of possession of a stolen vehicle. CP 6-15. On September 21, 2017, the State filed an amended information adding two counts of possession of a stolen firearm (counts VIII and IX) and four counts of unlawful possession of a firearm in the first degree (counts X through XXXIII). CP 24-37.

Defendant filed a 3.6 motion to suppress. CP 38-54. The court heard the suppression arguments on February 22, 2018. RP 6-31. After hearing arguments from both sides, the court denied defendant’s motion to suppress finding that there was probable cause for the search warrant where the requirements of *Aguilar-Spinelli* were met. RP 32.

Jury trial began on February 28, 2018. RP 249. On March 16, 2018, the jury found the defendant guilty beyond a reasonable doubt as charged. RP 1120-1129. Defendant was sentenced on April 27, 2019. RP 25. Defendant had an offender score of 9+ and therefore faced a standard range of 519-692 months in custody. CP 233-255. The State requested the high end of the standard range and defendant requested an exceptional

downward sentence. 4/24/18 RP 11; 18. The court followed the defendant's request for an exceptional downward sentence and imposed a sentence of 212 months in custody including a \$100 DNA fee and \$200 criminal filing fee. CP 241.

Defendant timely filed a Notice of Appeal on May 18, 2018. CP 283-313.

2. FACTS

In April or May of 2016, defendant asked Steven Sands, a good friend of his, to rent out six storage units for him. RP 284-286. Mr. Sands rented out unit A003 at the Stor-Eze storage facility in Puyallup, Washington for defendant. RP 286, 305, 308. Although the unit was rented out in Mr. Sand's name, defendant chose the PIN code, had both of the keys and paid for the storage unit. RP 286, 288. Defendant listed himself as the emergency contact for the rental agreement. RP 289, RP 502. Mr. Sands only went to the unit twice the entire time he'd had it rented out. RP 288-289. Defendant accessed the unit forty or fifty times between May 14, 2016 and July 7, 2016. RP 505. Only defendant stored things in the storage unit. RP 295.

Puyallup Police Detective Eric Barry worked as an investigator for the Special Investigations Unit. RP 302. He received information about defendant using the storage unit for stolen items and began investigating.

RP 305. On July 7th, 2016, Detective Barry asked the manager of Stor-Eze, James Van Buskirk, to contact him if he saw defendant at the facility.

RP 308. Mr. Buskirk contacted Detective Barry that day and said defendant and another person were there. RP 308, 495. Detective Barry and his partner Greg Massey conducted surveillance of defendant and the storage unit. RP 309. Over the course of nearly two hours, they saw defendant going in and out of the unit. RP 310. Detectives saw a street motorcycle, Chevy pickup attached to a trailer with two motorcycles and a go kart. RP 310. Defendant's girlfriend, Cassandra Wells, her mother Rose Wells, and five year old daughter, Ryder, were with defendant. RP 311.

Detective Barry maintained presence at all times during surveillance. RP 312. Officer Massey and Sergeant Fralick joined in the surveillance. RP 312. Steven Sands was never present during the investigation. RP 312. Detective Barry arrested defendant on a warrant. RP 314. Cassie caused a scene as she yelled, screamed and cussed at Detective Barry. RP 319. She yelled at her mother to shut the storage doors. RP 319. Officers had to detain Cassie. RP 320. During the search incident to arrest, officers found \$2,085 cash on defendant. RP 321-322. Detectives found a pistol in the pickup. RP 325. Detective Barry ran a records check of the motor vehicles and one came back as stolen. RP 327.

Defendant told Detective Barry that nothing belonged to him, but later admitted that he owned one of the motorcycles. RP 329. Defendant said all of the things in the storage unit belonged to his cousin "Calvin Larson." RP 331. Defendant denied knowing that the motorcycle was stolen. RP 331. Defendant lied to Detective Barry and claimed there were no firearms in the storage unit, but later said Calvin put firearms in the storage unit. RP 332. Defendant also lied that there were no firearms in the pickup. RP 332. Defendant changed his story again and said there was one hunting rifle belonging to Calvin in the storage unit. RP 333. Defendant later admitted that he'd been in the storage unit several times and that he stored his own things in there. RP 334.

Detective Barry obtained a search warrant to search the storage unit, pickup truck and trailer while defendant was taken to the Puyallup Jail. RP 334. Cassie, her mother and daughter were released at the scene. RP 336-337. Detective Barry found two gun safes in the storage unit. RP 339. Detective Barry contacted defendant to get the combination to the gun safes. RP 341. Defendant lied and said he didn't know anything about gun safes. RP 341. Defendant later admitted he knew the combination to the safes, but that he had to make a phone call to get it. RP 342. Defendant pretended to make a call to get the combination. RP 343-345. Defendant lied to Detective Barry and said that the combination was 1970. RP 348.

When that didn't work, defendant lied again and said it was 1970A. RP 349. Detectives were able to open the safe with a key found in the pickup. RP 350. Detectives entered the other safe using a pry bar and hammer. RP 421. There was a variety of different ammunitions found in the storage unit. RP 361. Ammunition was found near the gun safes. RP 415. A .40 caliber pistol was found in the pickup truck. RP 365. Defendant was prohibited from possessing firearms as he was convicted of assault in the second degree in 2009. CP 92-101; 233-255. They also found ammunition in the pickup truck. RP 367. The stolen motorcycle was found on the trailer attached to the pickup. RP 367. Detectives found twenty seven firearms; one in the pickup truck and the rest inside the storage unit, some of which were locked inside the two safes. RP 372-411. Seven of the firearms were stolen. RP 449-453.

Detectives also found Cassie's mail in the storage unit. RP 413. Defendant claimed that all of the firearms belonged to Calvin, but admitted that his fingerprints might be found on one. RP 455. Detective Barry contacted Calvin Larson. RP 453. Calvin Larson told Detective Barry that he didn't know about any guns in the safe. RP 845. Larson previously saw the blue gun safe in defendant's home. RP 846.

In January 2016, William Fehrs's shop was broken into. RP 900-903. His guns, including eight rifles, were stolen. RP 900-903. Mr. Fehrs's

stolen rifle was recovered in defendant's storage unit. RP 902. Robert Morrow's residence was burglarized in Spring of 2015. RP 907. His firearms were also stolen. RP 907-908. Those firearms were found in defendant's storage unit. RP 907-908. Christopher Jaynes' firearms were stolen out of his garage in April 2016 and recovered in defendant's storage unit. RP 911-912. Mile Demille owns a gun store. RP 953. A gun was stolen from Mr. Demille's store in November 2015 and recovered in defendant's storage unit. RP 955. James Butt's gun was stolen out of his bedroom in August 2015 and recovered in defendant's storage unit. RP 1014-1015. Defendant was photographed using the stolen firearms during a camping trip. RP 982. He was also pictured at the storage unit. RP 984.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO SUPPRESS WHERE DETECTIVE BARRY CORROBORATED THE INFORMANT'S TIP DURING NEARLY TWO HOURS OF SURVEILLANCE.

It is well established in Washington that a search warrant is entitled to a presumption of validity. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007), citing *State v. Wolken*, 103 Wn.2d 823, 827-28, 700 P.2d 319 (1985). When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 967, 639 P.2d 743 (1982). A judge's

determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

“Affidavits in support of search warrants are to be read as a whole, in a common sense, non-technical manner, with doubts resolved in favor of the warrant.” *State v. Casto*, 39 Wn. App. 229, 232, 692 P.2d 890 (1984). Hyper-technical interpretations should be avoided when reviewing search warrant affidavits. *State v. Freeman*, 47 Wn. App. 870, 873, 737 P.2d 704 (1987). The court is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. *State v. Yorkley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975).

In reviewing a search warrant for probable cause, the court looks to the four corners of the search warrant itself. *United States v. Damitz*, 495 F.2d 50 (9th Cir. 1974); *State v. Murray*, 110 Wn.2d 706, 709-710, 757 P.2d 487 (1988). Probable cause to search is established if the affidavit in support sets forth facts sufficient for a reasonable person to conclude that evidence of a crime can be found at the place to be searched. *State v. Maxwell*, 114 Wn.2d 761, 769, 791 P.2d 223 (1990). Facts that, standing

alone, would not support probable cause can do so when viewed together with other facts. *Cole*, 128 Wn.2d at 286.

In evaluating probable cause, as noted above, the court looks to the four corners of the warrant. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Washington courts adhere to the so-called *Aguilar–Spinelli* test: “[W]hen the existence of probable cause depends on an informant’s tip, the affidavit in support of the warrant must establish the basis of the informant’s information as well as the credibility of the informant.” *State v. Cole*, 128 Wn. 2d 262, 287, 906 P.2d 925, 940 (1995).

These two prongs are known as the knowledge prong and the veracity prong:

The two prongs of the *Aguilar-Spinelli* test have an independent status; they are analytically severable and each insures the validity of the information. The officer’s oath that the informant has often furnished reliable information in the past establishes general trustworthiness. While this is important, it is still necessary that the “basis of knowledge” prong be satisfied – the officer must explain how the informant claims to have come by the information in this case. The converse is also true. Even if the informant states how he obtained the information which led him to conclude that contraband is located in a certain building, it is still necessary to establish the informant's credibility.

The most common way to satisfy the “veracity” prong is to evaluate the informant's “track record”, i.e., has he provided accurate information to the police a number of times in the past? If the informant's track record is inadequate, it may be possible to satisfy the veracity prong

by showing that the accusation was a declaration against the informant's penal interest.

To satisfy the “basis of knowledge” prong, the informant must declare that he personally has seen the facts asserted and is passing on first-hand information.

State v. Jackson, 102 Wn.2d 432, 437, 688 P.2d 136 (1984).

If the identity of the informant is known, as opposed to being anonymous or professional, the necessary showing of reliability is relaxed, because “there is less risk of the information being a rumor or irresponsible conjecture which may accompany anonymous informants,” and because “the report is less likely to be marred by self-interest.” *State v. Gaddy*, 152 Wn.2d 64, 72-3, 93 P.3d 872 (2004). Independent police investigation corroborating the informant’s tip sufficiently cures a deficiency in either or both prongs. *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002).

Here, there was probable cause to support issuance of the search warrant where both prongs of *Aguilar-Spinelli* were satisfied. Detective Barry knew the identity of the informant, but withheld the informant’s identity in order to preserve the informant’s safety. CP 341-350 (Search Warrant and Affidavit in Support of Search Warrant). Thus, the necessary showing of reliability is relaxed. The basis of knowledge prong was satisfied because the informant told Detective Barry that they directly

observed numerous bikes/motorcycles/tools inside the storage unit that the defendant told the informant were stolen. *Id.* Detective Barry also noted that the storage unit “was told by Thorton to the informant to contain numerous firearms stolen during burglaries.” *Id.* Taken in a common sense, non-hypertechnical reading of the affidavit, defendant also told the informant that stolen firearms were inside the storage unit or the informant saw the firearms in the unit and the defendant said they were stolen.

Notwithstanding the information from the informant, Detective Barry independently corroborated the informant’s information. He and Detective Massey conducted surveillance on the storage unit, and developed additional information about defendant, his relationship to the storage unit, and what was inside the storage unit.

As a result of the investigation, Detective Barry observed or learned the following: defendant had an open felony warrant for his arrest for escaping community custody, a red pickup arrived towing a trailer containing several dirt bikes/motorcycles/go cart on it, a street motorcycle defendant admitted belonged to him was parked outside the storage unit, the storage unit door was wide open, defendant walked in and out of the storage unit, defendant was working on the dirt bikes/motorcycles, there were two dirt bikes and numerous boxes/shelves inside the storage unit, Cassie admitted only one of the dirt bikes/motorcycles/go carts on the

trailer belonged to defendant, the trailer was registered to defendant, a black pistol was visible from underneath the driver's seat of the pickup, through the open door to the unit, Detective Barry could see numerous power tools and hand tools, two dirt bikes, shelving, and boxes/cases inside the unit, defendant admitted one of the motorcycles on the trailer belonged to him, defendant admitted the blue dirt bike inside the storage unit belonged to him, defendant denied knowing the stolen dirt bike on the trailer was stolen, defendant said he was towing the stolen dirt bike for "Steve" who resides "somewhere" in Tacoma, defendant said he did not know if anything else inside the storage unit was stolen, defendant said nearly all the items inside the storage unit belonged to a "Calvin," but "Steve" is the one who rents the unit, the storage business owner later told detectives that Steven James rented the unit and paid for it, but gave defendant the code for the gate to enter the business and the key to the storage unit, defendant claimed there were no firearms inside the pickup or the storage unit, defendant said that he had seen guns in the storage unit before, defendant said he had seen six rifle cases in the unit, defendant said that "Calvin" was the one who put the items inside the storage unit and who had the hunting rifle, defendant admitted being inside the storage unit on numerous occasions, defendant admitted storing items inside the storage unit, defendant denied committing burglaries, saying it was not

“his thing;” and defendant said he was on DOC supervision for drug possession, but failed to tell Detective Barry that he was also on supervision for possession of a stolen motor vehicle. CP 341-350.

At trial, defendant filed a suppression motion claiming that the requirements of *Aguilar- Spinelli* were not met. CP 38-54. After hearing arguments from both sides, the court denied defendant’s motion, finding that the warrant was supported by probable cause where Detective Barry independently corroborated the informant’s tip. RP 32. Defendant reiterates his claim on appeal. Brief of Appellant at 11-12. However, this claim fails as the warrant affidavit satisfies both prongs of *Aguilar- Spinelli* because the identity of the informant was known but withheld for the informant’s safety, and the informant directly observed the information contained in the warrant affidavit. Additionally, Detective Barry corroborated the information provided by the informant prior to obtaining the search warrant. Thus, both prongs of *Aguilar-Spinelli* were satisfied. As such, this Court should dismiss defendant’s claim and affirm his convictions.

2. DEFENDANT MAY NOT RAISE SUPPRESSION CHALLENGES FOR THE FIRST TIME ON APPEAL WHERE THE ALLEGED ERRORS DO NOT RISE TO THE LEVEL OF A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT.

RAP 2.5 provides: provides in pertinent part:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right. ...

The court in *State v. Valladares* specifically clarified the scope of the exception under RAP 2.5(a)(3) because it was being misconstrued and had been “misread with increasing regularity.” *State v. Valladares*, 31 Wn. App. 63, 75, 639 P.2d 813 (1982), *rev’d. in part on other grounds*, *State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1982). RAP 2.5(a)(3) is a limited exception to the general rule that issues may not be raised for the first time on appeal. *Valladares*, 31 Wn. App. at 75.

The court in *Valladares* went on to hold that where the defendant failed to pursue a challenge to evidence that might have been suppressible, the admission of that evidence was not a clear violation of the defendant’s due process rights, and was therefore not a manifest constitutional error

that could be raised for the first time on appeal. *Valladares*, 31 Wn. App. at 76 (citing *State v. Baxter*, 68 Wn.2d 416, 422-23, 413 P.2d 638 (1966)). Valladares appealed to the Washington Supreme Court, which agreed with and affirmed the Court of Appeal’s analysis on the issue of waiver. See *Valladares*, 99 Wn.2d, at 671-72. The Supreme Court held that by, “withdrawing his motion to suppress the evidence, *Valladares* elected not to take advantage of the mechanism provided for him for excluding the evidence,” and thus waived or abandoned his objections. *Valladares*, 99 Wn.2d at 672. See also *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011).

Only six years after the Court of Appeals in *Valladares* felt the need to clarify “manifest error,” in *State v. Scott*, the Supreme Court again felt the need to clarify the construction to be given to the “manifest error standard.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In *Scott*, the court held that the proper approach to claims of constitutional error asserted for the first time on appeal is that “[f]irst, the court should satisfy itself that the error is truly of constitutional magnitude - that is what is meant by “manifest;” and second, “[i]f the claim is constitutional then the court should examine the effect the error had on the defendant’s trial according to the harmless error standard. [...]” *Scott*, 110 Wn.2d at 688.

The standard set forth in *Scott* has subsequently been elaborated into a four-part analysis.

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then and only then, the court undertakes a harmless error analysis.

State v. Bland, 128 Wn. App. 511, 515-16, 116 P.3d 428 (2005).

Moreover, under RAP 2.5(a)(3), while an appellant can raise a manifest error affecting a constitutional error for the first time on appeal, appellate review of the issue is not mandated if the facts necessary for a decision cannot be found in the record, because in such circumstances the error is not “manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993)).

Here, defendant cannot challenge the evidence for the first time on appeal for two reasons: First, although suppression challenges may implicate or be based on violations of constitutional rights, suppression challenges themselves are not a constitutional right and do not fall under

RAP 2.5(a)(3); Second, the record has not been adequately developed to permit review of the issues.

a. The Suppression Of Evidence Is Not A Constitutional Right That Falls Under RAP 2.5(a)(3).

It is long and well established under both the State and Federal constitutions that if an objection to evidence that was allegedly obtained illegally is not asserted timely, it is waived. See *State v. Gunkel*, 188 Wash. 528, 535-36, 63 P.2d 376 (1936); *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); *State v. Duckett*, 73 Wn.2d 692, 694-95, 440 P.2d 485 (1968). Where a defendant fails to assert a suppression issue at the trial court level, the defendant has waived that argument and may not raise the issue for the first time on appeal. *State v. Mierz*, 127 Wn.2d 460 468, 901 P.2d 286 (1995); See also *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967), *cert. denied*, 389 U.S. 871 (1967). The issue is also waived where a defendant raises a suppression issue at the trial court, but fails to pursue the issue. *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1991).

At the trial court level, the suppression motion must be raised in a timely manner and the court has authority to reject suppression motions that were not made prior to the start of trial. See CrR 4.5(d). CrR 3.6 was

adopted in 1975 and specifically governs motions to suppress evidence. Under CrR 3.6 the defendant has the burden of requesting a hearing on suppression issues. *State v. Gould*, 58 Wn. App. 175, 185, 791 P.2d 569 (1990).

CrR 3.6 motions to suppress evidence are heard prior to the time the case is called for trial. See *Ferguson*, 12 & 13 Washington Practice: Criminal Practice and Procedure, Chap. 23 (3d Ed) (citing CrR 4.5(d)); Tegland, 4A Washington Practice Rules Practice, CrR 3.6. Such a standard is implicit in the language of CrR 3.6 where the rule requires the moving party to set forth in a declaration the facts the party expects to be elicited in the event there is an evidentiary hearing. CrR 3.6(a). A pre-trial hearing is further implicated by the rule's language that based upon the pleadings the court is to determine whether an evidentiary hearing is required. CrR 3.6(b). All of this implicitly requires a pre-trial hearing. The requirement of a pre-trial hearing is also consistent with the legal standards in Washington prior to the adoption of rule CrR 3.6. *State v. Simms*, 10 Wn. App. 75, 77, 516 P.2d 1088 (1973) (citing *State v. Baxter*, 68 Wn.2d 416, 422, 413 P.2d 638 (1966); *State v. Robbins*, 37 Wn.2d 431, 224 P.2d 345 (1950)). Moreover, nothing in CrR 3.6 permits or contemplates successive suppression motions.

The interpretation of CrR 3.6 as requiring pre-trial suppression motions is also consistent with CrR 4.5(d), which governs omnibus hearings.

(d) Motions. All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. Failure to raise or give notice at the hearing of any error or issue of which the party concerned has knowledge may constitute waiver of such error or issue. [...].

Waiver for failure to raise the issue before the trial court applies to suppression motions even where the claimed issue is a constitutional one and there is a reasonable possibility the motion to suppress would have been successful if the issue had been raised. *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990); *See also State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982), *rev'd. in part on other grounds, State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1982). This is because the exclusion of improperly obtained evidence is a privilege that may be waived, and the fact that it was not raised is not an error in the proceedings below. *See Tarica*, 59 Wn. App. at 372 (*citing State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)). In *State v. Baxter*, the court held that the defendant's motion to suppress evidence at the end of the State's case was too late where the defendant was well aware of the circumstances of his

arrest at the time the allegedly unlawful evidence was entered. *Baxter*, 68 Wn.2d at 416.

RAP 2.5(a)(3) provides that the court may refuse to review any claim of error which was not raised at the trial court, however the party may raise for the first time a manifest error affecting a constitutional right.

In *State v. Valladares*, the court held that where a defendant raised and then later withdrew a suppression issue that it could not be raised for the first time on appeal under RAP 2.5(a)(3) because the rule's discussion of manifest constitutional error contemplates a trial error involving due process rights, as opposed to pre-trial rights. *Valladares*, 31 Wn. App. at 75-76.

The alleged failure to raise a suppression issue below can be contrasted with a genuine constitutional violation that properly does fall under RAP 2.5(a)(3). For example, in *State v. Kitchen*, the court did consider a constitutional issue raised for the first time [in a reply brief] where that issue related to the right to a unanimous jury verdict. *State v. Kitchen*, 46 Wn. App. 232, 730 P.2d 103 (1986), *affirmed*, 110 Wn.2d 403, 756 P.2d 18 (1982).

Because the alleged failure to raise a suppression involves pre-trial rights, and does normally implicate a trial error involving due process

rights, the suppression issue raised here does not fall under RAP 2.5(a)(3), and therefore may not be raised for the first time on appeal.

b. The Record Is Not Sufficient To Permit Review For The First Time On Appeal.

Defendant did not directly challenge the scope of the search below. Instead, his suppression challenge was based on a claim that the search warrant lacked probable cause. The trial court rejected defendant's claim, finding instead that probable cause supported the search warrant. RP 32.

The record of the suppression hearing was fairly well developed with regard to whether it was supported by probable cause pursuant to *Aguilar-Spinelli*. However, for purposes of this review the record is not developed as to the scope of the search. Because the State was not put on notice of those issues and the record on them was not adequately developed with regard to them, the record is now insufficient to support review of the defendant's claim for the first time on appeal. By not raising the issue before the trial court, the defendant deprived the State of the ability to put forth any relevant evidence and legal theories, including any alternative legal theories. The evidence may have been admissible under other exceptions to the warrant requirement.

Because the defendant did not raise a challenge to the scope of the search, the State was not put on notice of the issue and was deprived of the

opportunity to develop the record regarding alternative bases supporting the lawfulness of the search or the admission of the evidence. For that reason, the facts necessary for a decision cannot be found in the record and review is unwarranted. *Riley*, 121 Wn.2d at 31-32.

c. Detectives lawfully searched the safe containing seven stolen firearms.

When a warrant authorizes officers to search for evidence, they are generally entitled to search in any place that could contain the evidence for which they are searching and are not limited by the possibility that separate acts of entry or opening may be required to complete the search. *State v. Witkowski*, 3 Wn. App. 318, 325-26 (2018) (citing *United States v. Ross*, 456 U.S. 798, 820-21 (1982)). See also, e.g., *Platteville Area Apt. Ass'n. v. City of Platteville*, 179 F.3d 574, 579 (7th Cir. 1999). Entry into a locked safe has specifically been held to be within the scope of a warrant to search a premises. *Witkowski*, 3 Wn. App.2d 318.

The defense argument on this issue fails to recognize that the position they advocate would often render searches impossible for the simple reason that officers do not have extra sensory perception (ESP) and typically do not know in advance of service of the warrant the circumstances they will find in the place to be searched. For that reason, they are unlikely to know in advance that they will encounter, e.g., as they

did here, a locked safe or some other particular item within the place to be searched. But they are not required to know that because the warrant to search the premises covers those locations on the premises where the evidence could be found.

Here the safe was capable of containing evidence the warrant authorized the officers to seek. Further, the defendant refused to provide the combination to the safe, leaving the officers no option other than to force it open. *Witkowski* directly refutes defendant's claim the search of the safe exceeded the scope of the search warrant. Brief of Appellant at 18. *Witkowski*, 3 Wn. App.2d 318 (Entry into a locked safe explicitly held to be within the scope of a warrant to search a premises). As this Court has held that entry into a locked safe is within the scope of a search warrant, this Court should dismiss defendant's claim and affirm his convictions.

3. THE STATE PROVED BEYOND A REASONABLE DOUBT THAT DEFENDANT HAD KNOWLEDGE OF THE FIREARMS AND MOTOR VEHICLE WHERE HE RENTED IT OUT IN ANOTHER PERSON'S NAME AND LIED SEVERAL TIMES TO DETECTIVES IN ORDER TO DELAY THE INVESTIGATION.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle*

v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review in a juvenile proceeding is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[...]great deference [...] is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld. The State proved beyond a reasonable doubt that defendant had knowledge that the firearms were stolen.

The State charged defendant with nine counts of possession of a stolen firearm. CP 34-37. In order to convict defendant of possession of a stolen firearm, the State was required to prove the following:

- (1) That on or about the 7th day of July, 2016 the defendant possessed or was in control of a stolen firearm;
- (2) That the defendant acted with knowledge that the firearm had been stolen;

- (3) That the defendant withheld or appropriated the firearm to the use of someone other than the true owner or person entitled thereto; and
- (4) That any of these acts occurred in the State of Washington.

CP 331-340 (Jury Instructions No. 12-20); RCW 9A.56.310.

The record reflects that the evidence is sufficient to support the jury finding beyond a reasonable doubt that defendant was guilty of nine counts of possession of a stolen firearm. Several witnesses, including Detective Barry, testified that they arrested defendant at the storage unit holding the stolen firearms on July 7th 2016. RP 302-305; 307-413, 495. The State proved that defendant acted with knowledge that the firearm had been stolen where defendant made several misleading statements to detectives about the firearms and rented the storage unit out in another person's name. RP 286, 332-349. The State proved that defendant withheld the firearms to the use of someone other than the true owner where he held them in the storage unit after they were stolen. RP 302-305; 307-413, 495. Several victims testified that their firearms were stolen and identified as those found in the storage unit. RP 900-1015. The State proved that these acts occurred in the State of Washington where witnesses testified that the storage facility was in Puyallup, Washington. RP 305; 494.

Defendant claims that the evidence was insufficient to prove that he had knowledge that the firearms were stolen. Brief of Appellant at 21. This claim fails where as argued *supra*, there was circumstantial evidence that defendant knew the firearms were stolen. First, defendant lied several times in order to cover up the fact that he had stolen firearms in the storage unit. This was circumstantial evidence proving that he knew the firearms were stolen. Defendant initially told Detective Barry there were no firearms in the storage unit, but later said Calvin put firearms in the storage unit. RP 332. Defendant also lied that there being no firearms in the pickup. RP 332. Defendant said there was one hunting rifle belonging to Calvin in the storage unit. RP 333. Defendant later admitted that he'd been in the storage unit several times and that he stored his own things in there. RP 334. Detective Barry recontacted defendant to get the combination to the gun safes. RP 341. Defendant lied and said he didn't know anything about gun safes. RP 341. Defendant later admitted he knew the combination to the safes, but that he had to make a phone call to get it. RP 342. Defendant pretended to make a call to get the combination. RP 343-345. Defendant lied to Detective Barry and said that the combination was 1970. RP 348. When that didn't work, defendant lied again and said it was 1970A. RP 349. Detectives were able to open the safe with a key they found in the pickup. RP 350.

In addition, the fact that defendant rented the storage facility out in Steven Sands name as opposed to his own, is circumstantial evidence that he knew the firearms were stolen. Defendant clearly didn't want to use his own name because he knew the unit was full of stolen firearms and other things he couldn't lawfully possess. Defendant asked Mr. Sands to rent out six storage units for him in April or May of 2016. RP 285-286. Mr. Sands rented out the unit in his name for the defendant and defendant chose the PIN code for the unit. RP 286. Defendant had both of the keys and paid for the storage unit. RP 288. Mr. Sands only went to the unit twice. RP 288-289. Defendant was listed as the emergency contact for the rental agreement. RP 289. Only the defendant's things went into the storage unit. RP 295.

Defendant claims that the evidence was insufficient to prove that he had knowledge that the firearms were stolen. Brief of Appellant at 21. This claim fails where as argued *supra*, there was circumstantial evidence that defendant knew the firearms were stolen. Defendant rented the storage facility in another person's name and filled it with stolen firearms. Defendant also lied several times to detectives in order to hinder the investigation. In viewing the evidence in the light most favorable to the State, the evidence was sufficient to support the convictions for possession

of a stolen firearm. As such, this Court should dismiss defendant's claim and affirm his convictions.

- a. The State proved beyond a reasonable doubt that the motor vehicle was stolen.

The State charged defendant with one count of possessing a stolen motor vehicle. CP 34-37. In order to convict defendant of possessing a stolen motor vehicle, the State was required to prove the following:

- (5) That on or about the 7th day of July, 2016 the defendant knowingly possessed a stolen motor vehicle;
- (6) That the defendant acted with knowledge that the motor vehicle had been stolen;
- (7) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto; and
- (8) That any of these acts occurred in the State of Washington.

Supplemental CP 371 (Jury Instruction No. 52); RCW 9A.56.068.

The record reflects that the evidence is sufficient to support the jury finding beyond a reasonable doubt that defendant was guilty of possession of a stolen vehicle. Several witnesses, including Detective Barry testified that they arrested defendant at the storage unit with the stolen motor vehicle on July 7th 2016. RP 302-305; 495. The State proved that defendant acted with knowledge that the motor vehicle had been stolen where defendant rented the storage unit out in another person's

name. RP 286, 332-349. The State proved that defendant withheld the motor vehicle to the use of someone other than the true owner where he held it at the storage facility with the rest of the stolen firearms. RP 302-305; 307-413, 495. The State proved that these acts occurred in the State of Washington where witnesses testified that the storage facility was in Puyallup, Washington. RP 305; 494.

Defendant claims that the evidence was insufficient to prove that he had knowledge that the motor vehicle was stolen. Brief of Appellant at 24. This claim fails where as argued *supra*, there was circumstantial evidence that defendant knew the motor vehicle was stolen. Defendant rented the storage facility in another person's name and filled it with stolen firearms. The State proved beyond a reasonable doubt that defendant had knowledge the motorcycle was stolen. As such, this Court should dismiss defendant's claim and affirm his convictions.

4. HOUSE BILL 1783 REQUIRES DEFENDANT'S JUDGMENT AND SENTENCE BE AMENDED TO STRIKE THE DNA DATABASE FEE, \$200 FILING FEE, AND INTEREST ON NON-RESTITUTION FEES AFTER JUNE 7, 2018.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783), effective June 7, 2018, amended the legal financial obligation (LFO) system in Washington State. Particularly, House Bill 1783 eliminates interest accrual on the non-

restitution portions of LFOs as of June 7, 2018, and establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction. Laws of 2018, ch. 269, §§ 1, 18. House Bill 1783 also amended the discretionary LFO statute, former RCW 10.01.160 and RCW 36.18.020(h) to prohibit courts from imposing discretionary costs or the \$200 filing fee on indigent defendants. Laws of 2018, ch. 269, §§ 6, 17.

Our Supreme Court recently held in *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) that House Bill 1783 applies to cases that are pending on appeal. Defendant's case, like *Ramirez*, is still pending on direct appeal and is therefore subject to the provisions of House Bill 1783.

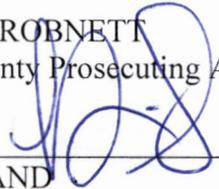
Defendant was found indigent at the time of sentencing. RP 272-273. The sentencing court imposed the \$100 DNA database collection fee and a \$200 criminal filing fee. CP 233-255. Because defendant's case is subject to House Bill 1783, the State agrees that the \$100 DNA database fee and the \$200 criminal filing fee should be stricken, and as of June 7, 2018, interest cannot accrue on non-restitution portions of defendant's LFOs. Defendant's Judgment and Sentence should be remanded to reflect these changes.

D. CONCLUSION.

For the foregoing reasons, this Court should dismiss defendant's claims and affirm his convictions.

DATED: May 13, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



ROBIN SAND
Deputy Prosecuting Attorney
WSB # 47838

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.13.19 Therun Kar
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

May 13, 2019 - 2:08 PM

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