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No. 52205-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY NGUYEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

OPENING BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 3

D. STATEMENT OF THE CASE..... 4

E. ARGUMENT 9

 1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. NGUYEN OF POSSESSION OF A CONTROLLED SUBSTANCE, AS THE STATE FAILED TO PROVE CONSTRUCTIVE POSSESSION 9

 a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt..... 9

 b. In order to prove that Mr. Nguyen was guilty of possession of a controlled substance, the prosecution was required to show constructive possession..... 11

 c. The prosecution failed to prove that Mr. Nguyen had dominion or control over the methamphetamine in the bowl; therefore, the evidence was insufficient to convict..... 13

 d. The prosecution’s failure to prove all essential elements requires reversal. 17

 2. THE TRIAL COURT’S RULING UPHOLDING THE VALIDITY OF THE SEARCH WARRANT SHOULD BE REVERSED, BECAUSE THE WARRANT WAS OVERBROAD..... 18

 a. A search warrant should only be issued upon a showing of probable cause that the defendant is involved in criminal activity, and that evidence of that activity will be found in the place to be searched 18

 b. The search affidavit was invalid, because there was an insufficient nexus between the items sought and the upstairs

bathroom of Mr. Nguyen’s duplex; the remainder of the warrant is overly broad and not supported by probable cause.	19
c. Because the search warrant was invalid, and because the controlled substance was beyond the scope of the warrant, the court should have suppressed.....	24
3. THE TRIAL COURT’S FAILURE TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD RESULT IN REVERSAL AND DISMISSAL.	24
F. CONCLUSION.....	26

TABLE OF AUTHORITIES

Washington Supreme Court

<u>State v. Acosta</u> , 101 Wn.2d 612, 683 P.2d 1069 (1984).....	9
<u>State v. Callahan</u> , 77 Wn.2d. 27, 459 P.2d 400 (1969).....	11, 12, 15
<u>State v. Cannon</u> , 130 Wn.2d 313, 922 P.2d 1293 (1996)	25, 26
<u>State v. Cronin</u> , 142 Wn.2d 568, 14 P.3d 752 (2000).....	9
<u>State v. Green</u> , 94 Wn. 2d 216, 616 P.2d 628, 632 (1980).....	10
<u>State v. Head</u> , 136 Wn.2d 619, 964 P.2d 1187 (1998)	25, 26
<u>State v. Lyons</u> , 174 Wn.2d 354, 273 P.3d 314 (2012)	19
<u>State v. McKee</u> , __ P.3d __, 2019 WL 1721982, slip op. (Wash. Apr. 18, 2019)	24
<u>State v. Neth</u> , 165 Wn.2d 177, 196 P.3d 658 (2008).	19
<u>State v. Perrone</u> , 119 Wn.2d 538, 834 P.2d 611 (1991)	19, 20, 24
<u>State v. Thein</u> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	19
<u>State v. Vasquez</u> , 178 Wn. 2d 1, 309 P.3d 318, 326 (2013).....	10

Washington Court of Appeals

<u>State v. Alvarez</u> , 105 Wn. App. 215, 19 P.3d 485 (2001).	13
<u>State v. Cantabrana</u> , 83 Wn. App. 204, 921 P.2d 572 (1996).....	11
<u>State v. Cote</u> , 123 Wn. App. 546, 96 P.3d 410 (2004)	11, 13
<u>State v. Friedrich</u> , 4 Wn. App.2d 945, 425 P.3d 518, 526 (2018), <u>review denied</u> , 192 Wn.2d 1012, 432 P.3d 790 (2019)	19, 23
<u>State v. Goble</u> , 88 Wn. App. 503, 945 P.2d 263 (1997).....	20

<u>State v. Hesco</u> ck, 98 Wn. App. 600, 989 P.2d 1251 (1999)	25
<u>State v. Keodara</u> , 191 Wn. App. 305, 364 P.3d 777 (2015)	19, 23, 24
<u>State v. Prestegard</u> , 108 Wn. App. 14, 28 P.3d 817 (2001)	10
<u>State v. Rivera</u> , 76 Wn. App. 519, 888 P.2d 740 (1995).....	20
<u>State v. Silva</u> , 127 Wn. App. 148, 110 P.3d 830 (2005).....	25
<u>State v. Spruell</u> , 57 Wn. App. 383, 788 P.2d 21 (1990)	12, 15
<u>State v. Taylor</u> , 69 Wn. App. 474, 849 P.2d 692 (1993)	25, 26
<u>State v. Turner</u> , 103 Wn. App. 515, 13 P.3d 234 (2000)	11
<u>State v. VanNess</u> , 186 Wn. App. 148, 344 P.3d 713 (2015)	18, 19

United States Supreme Court

<u>Coolidge v. New Hampshire</u> , 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).....	23
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	9
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	10
<u>Marron v. United States</u> , 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927)	20
<u>Sandstrom v. Montana</u> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)	9

Washington Constitution

Article 1, § 3	9
Article 1, § 7.....	18

United States Constitution

Fourth Amendment	18
Fourteenth Amendment	9

Other Courts

United States v. Bautista-Avila, 6 F.3d 1360 (9th Cir. 1993)..... 10

United States v. Lopez, 74 F.3d 575 (5th Cir. 1996)..... 10

Rules

CrR 6.1 24, 25, 26

A. INTRODUCTION

Anthony Nguyen, a Vancouver, Washington homeowner, went through a difficult divorce which caused him financial and emotional problems, requiring him to take on tenants. These tenants turned out to be gang members, who took over Mr. Nguyen's home and victimized him.

Mr. Nguyen was eventually hospitalized for approximately one week in April 2018, due to mental health symptoms. When he returned home, he found his property had been ransacked. He asked for assistance from the police department, to identify gang members with photographs and to keep them out of his home.

Less than 48 hours after Mr. Nguyen was released from the hospital, a man was shot in Mr. Nguyen's front doorway. Police obtained a warrant to search the entire duplex, including the upstairs rooms. A small bag of suspected methamphetamine was found in the shared upstairs bathroom. Mr. Nguyen, who had no experience with the police other than as a crime victim, was charged with possession of a controlled substance.

The search warrant was unconstitutionally overbroad, and the seizure of the controlled substance was beyond the scope of the

warrant. There was also a lack of evidence that Mr. Nguyen possessed the substance. This Court should reverse his conviction and remand.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Nguyen guilty of possession of a controlled substance.

2. The trial court erred in denying Mr. Nguyen's motion to suppress.

3. The trial court erred when it found Mr. Nguyen exercised dominion and control over the controlled substance.

4. The trial court erred when it found Mr. Nguyen did not unwittingly possess the controlled substance.

5. The trial court erred when it found Mr. Nguyen guilty, even if the substance did not belong to Mr. Nguyen, but that visitors to his home put it in his home when they "trashed his place."

6. The trial court erred in entering Finding of Fact 7 following the 3.6 hearing. CP 91.

7. The court erred when it affirmed the validity of a search warrant that was overbroad, and which did not establish a nexus between the place to be searched and the items to be seized.

8. The trial court erred when it failed to enter written findings of fact and conclusions of law following a bench trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove constructive possession of drugs, the State must prove beyond a reasonable doubt that the defendant exercised dominion and control over the drugs. Must Mr. Nguyen's conviction be reversed and dismissed where the State failed to prove beyond a reasonable doubt that he exercised dominion and control over the controlled substance he was charged with possessing?

2. Article I, section 7 provides that no person shall be disturbed in his or her private affairs or their home invaded, without authority of law, such as a valid search warrant. Did the trial court err when it affirmed the validity of the search warrant, where there was an insufficient nexus between the firearm purportedly used by a fleeing assailant on the first floor and the second floor of the duplex?

3. Search warrants must state particularly the items sought, along with the probable cause supporting the search, in order to prevent the violation of privacy, particularly in the home. Was the warrant overly broad because it applied to every room in the home, and sought trace evidence, including biological fluids, fibers, and paint, and also

applied to closed and locked containers? Was the seizure of the drugs in the upstairs bathroom beyond the scope of the warrant?

4. In a case tried without a jury, the court shall enter findings of fact and conclusions of law, pursuant to CrR 6.1(d). Where the court failed to file written findings, should this Court remand?

D. STATEMENT OF THE CASE

Anthony Nguyen lives in Vancouver and previously worked for the city of Portland in storm and waste water management. RP 133-35. He has lived in Clark County for most of his life, and has degrees from Washington State University and Clark College. Id. He lost his job last year, following a difficult divorce, which caused him to take a great deal of sick leave.¹

Mr. Nguyen purchased his Caples Avenue home in 2001. RP 133. In March 2018, suffering from the financial strain of the divorce and his resulting unpaid leave of absence from work, Mr. Nguyen decided to rent out part of his home. RP 136. Mr. Nguyen did not choose his tenants wisely. He explained, “It was a horrible mistake.

¹ Mr. Nguyen’s divorce apparently caused the onset of some mental health issues; he was admitted to an inpatient psychiatric hospital, where he spent the week before this arrest. RP 141-42.

They never paid me for rent. A lot of my stuff has been burglarized. I filed a report.” RP 137.

Mr. Nguyen’s concerns about the trustworthiness of his tenants was corroborated by law enforcement officers, who told Mr. Nguyen that these individuals had taken advantage of him, and that several of them were gang members already on the radar of the Vancouver Safe Streets Task Force. RP 109-10, 114-16, 154-55. The police advised Mr. Nguyen that he should have his tenants “trespassed” from his home, in order to protect what remained of his property. RP 114-16, 154-55. Sergeant Spencer Harris, of the Vancouver Police Department, suggested that Mr. Nguyen work with his task force, and had patrol officers help Mr. Nguyen secure his property from the gang members “frequenting” his home. RP 111, 114-16, 154-55.

On April 23, 2018, this task force was called to Mr. Nguyen’s home to respond to reports of a shooting. RP 99-100.² Sergeant Harris, who was supervising the task force, first met Mr. Nguyen as the officers waited for a search warrant. RP 100-01. Mr. Nguyen was not a suspect in the shooting. RP 111.

² The incident was initially reported as a drive-by shooting, i.e.: from a car and not a house at all. RP 42-43. Police later came to believe the shooter was near the front door of the home, on foot, and ran away after he shot the victim. Id.

Mr. Nguyen was not home when the police arrived at his house; he arrived after a bicycle ride to see several police cars and his house blocked off with yellow tape. RP 146-48. He hoped whatever crisis was happening did not involve his house, and learned from officers that there had been a shooting. RP 146-47. After Mr. Nguyen identified himself, Sergeant Harris told him that once the search warrant was authorized, the search would take several hours. RP 100-01. Mr. Nguyen was told he could leave, which he did. Id.

Upon receipt of the warrant, Sergeant Harris participated in the search of the house. RP 101. The search warrant allowed for a search of the entire premises, including all rooms, for evidence of assault in the first degree. RP 42-44; CP 30-42. The claim supporting the affidavit was that an individual had been shot from the hallway of the home's lower level, and that the shooter had continued running out the back door of the home. RP 35-36, 42-44. Despite this evidence focusing in limited areas of the home, the warrant permitted a search of the entire duplex, including all rooms and containers, for items including trace evidence (hair, fluids, fibers), as well as items pertaining to identity of the occupants. RP 41-44.

Sergeant Harris climbed the stairs to the second floor of the duplex, where the only full bathroom in the residence was located. RP 112-13, 139. Sergeant Harris searched this bathroom and found a glass bowl on the vanity filled with various items. RP 102-03, 150-51. Several of the items belonged to other residents in the household, including a bracelet and a pendant on a purple string. RP 150-51. After Sergeant Harris “rummaged around in the bowl,” he located a small baggie containing a white crystal substance, which he suspected was methamphetamine. RP 35-36, 38, 48, 102-05. Sergeant Harris found Mr. Nguyen waiting patiently outside in the courtyard, getting some sun. RP 107.

The sergeant said when he approached Mr. Nguyen in the courtyard, he asked whether he used methamphetamine. RP 107-08. Mr. Nguyen said he did not, and discussed his job difficulties and his divorce. RP 107-08. Sergeant Harris asked Mr. Nguyen again whether he used methamphetamine; Mr. Nguyen answered no again, and asked whether they had found any. RP 108. When the sergeant stated they had, Mr. Nguyen purportedly asked, “In a glass bowl?” Id.

Mr. Nguyen was charged with possession of the baggie containing the suspected controlled substance, which later tested

positive as methamphetamine. RP 130-32. Sergeant Harris acknowledged his task force had been aware of this residence for some time, because the task force was investigating a number of gang members who had been “frequenting” or “crashing” at Mr. Nguyen’s home. RP 109-10. The sergeant agreed that these suspects are involved in criminal activity, including drug use and distribution. Id.

Sergeant Harris also acknowledged that he found medical paperwork and prescriptions belonging to Mr. Nguyen on the bathroom vanity. RP 104, 143. Mr. Nguyen had been hospitalized at a psychiatric facility during the week before the search of his home, and he suspected his housemates had conducted a number of “gatherings” in his absence. RP 140.³ Mr. Nguyen’s concern was corroborated by Sergeant Harris, who told him that in the week he was hospitalized, there were over 40 noise complaints made by his neighbors. Id.

At trial, Mr. Nguyen challenged the validity of the search warrant, but the trial court upheld it, finding it broad, but not a general

³ Mr. Nguyen testified that he was at the PeaceHealth Hospital for approximately four or five days, followed by three or four days at Telecare, which he referred to as a “mental hospital.” <https://www.telecarecorp.com/clark-county-et>. When he was released on April 21st, Mr. Nguyen came home to find most of his belongings had been stolen in his absence. RP 143-45 (“I was burglarized ... my bed sheets were gone. My iPad Pro, my cell phone was gone”). He stated he found his house in “disarray,” and he kicked out between eight and nine people. RP 143-44. Two days later, the shooting occurred. Id.

search. RP 42-44; CP 22-42; 90-94. Mr. Nguyen waived his right to a jury trial, and after a bench trial, the court convicted Mr. Nguyen, finding he did not unwittingly possess the baggie. CP 44; RP 4, 178-79. The court acknowledged that the drugs were likely left in Mr. Nguyen's home by "one of these multiple ne'er-do-wells who showed up and trashed his place." RP 179.

E. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. NGUYEN OF POSSESSION OF A CONTROLLED SUBSTANCE, AS THE STATE FAILED TO PROVE CONSTRUCTIVE POSSESSION.

- a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt.

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, section 3 of the Washington Constitution and the Fourteenth Amendment of the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the

sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the State, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In a claim of insufficiency, the reviewing court presumes the truth of the State's evidence as well as all inferences that can be reasonably drawn therefrom. State v. Green, 94 Wn. 2d 216, 221, 616 P.2d 628, 632 (1980). However, when an innocent explanation is equally as valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for upholding a determination of guilt. State v. Vasquez, 178 Wn. 2d 1, 17, 309 P.3d 318, 326 (2013); State v. Prestegard, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

- b. In order to prove that Mr. Nguyen was guilty of possession of a controlled substance, the prosecution was required to show constructive possession.

Constructive possession is defined as the exercise of dominion and control over an item. State v. Callahan, 77 Wn.2d. 27, 29-30, 459 P.2d 400 (1969). Constructive possession is established by viewing the totality of the circumstances, including proximity to the property and ownership of the premises in which the contraband is found. State v. Turner, 103 Wn. App. 515, 523, 13 P.3d 234 (2000); State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). The circumstances must provide substantial evidence for the fact finder to reasonably infer the defendant had dominion and control. State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004).

Ownership of a residence, or a vehicle, where contraband is discovered, is one factor to consider when assessing constructive possession. Turner, 103 Wn. App. at 521-24; see Cantabrana, 83 Wn. App. at 208. For example, in Turner, the police found a gun in plain view in the car Turner owned. 103 Wn. App. at 518. Since Turner owned the car, drove it that day, and the gun was in plain view, his dominion and control over the gun was reasonably inferred. Id. at 524.

On the other hand, in Callahan, the defendant was not the owner of the houseboat where drugs were found, but was seen in close proximity to drugs discovered in a cigar box. Callahan was an overnight guest at the houseboat and even admitted to handling the drugs that day. 77 Wn.2d at 28-31. Callahan also owned several pieces of personal property found on the boat, including scales for measuring drugs. Id. at 31. Yet the Supreme Court found his close proximity, knowledge of the drugs, and his ownership of other incriminating items insufficient to consider him a constructive possessor of the drugs. Id.

In State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990), the police observed the defendant standing up from a table as they entered the room; drugs and paraphernalia were found on the table. The Court found the State failed to prove possession where the only evidence was defendant's proximity to the drugs and his fingerprints on a plate containing cocaine residue. Id. at 387-89. The Spruell Court found that the fingerprints proved only fleeting possession at best, which was insufficient to prove actual possession or dominion and control. Id. at 387. Because the defendant in Spruell lacked dominion and control

over the premises, mere proximity and momentary handling were insufficient to prove constructive possession. Id. at 389.

Likewise, in Cote, the defendant was a passenger in a vehicle where contraband was found, and his fingerprints were found on a jar containing some of the contraband. 123 Wn. App. at 548. The State proved that “Mr. Cote was at one point in proximity to the contraband and touched it,” but this was “insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession.” Id. at 550. Lastly, in State v. Alvarez, even though officers found other property belonging to the defendant in the same room as the gun they recovered, including his books, his photographs, and his bank records, the Court found insufficient evidence of dominion and control. 105 Wn. App. 215, 223, 19 P.3d 485 (2001).

c. The prosecution failed to prove that Mr. Nguyen had dominion or control over the methamphetamine in the bowl; therefore, the evidence was insufficient to convict.

There was no evidence presented to connect Mr. Nguyen to the seized methamphetamine, other than his ownership of the home. Mr. Nguyen had not even been present at his home for the week preceding the search. RP 141-42. The prescriptions and discharge papers from

the psychiatric hospital, seized by Sergeant Harris, corroborated the dates of Mr. Nguyen's absence from his home. RP 103-04.

The upstairs bathroom was used by all of the house's residents and visitors, was accessible to everyone in the home, and was unlocked. RP 119-20. There were many items on the shared bathroom vanity – even within the glass bowl – that did not belong to Mr. Nguyen. RP 103-04, 149-51. Mr. Nguyen said the first time he ever saw the baggie containing methamphetamine was in a photograph on his lawyer's laptop computer. RP 150.

Sergeant Harris verified that the Safe Streets Task Force had several gang members on its radar who were known to hang out at Mr. Nguyen's home. RP 109-10. These individuals were known to engage in weapons trafficking, drug distribution and use; hence the task force's interest in them. RP 109-10. The other individuals with access to the upstairs "community bathroom" were distinguishable to the police from Mr. Nguyen, who had no criminal record and no history with law enforcement whatsoever, other than as a victim in need of the police department's protection. RP 6, 114-16, 139. In fact, the task force treated Mr. Nguyen like a crime victim and he cooperated with law

enforcement, identifying photographs of gang members and signing a trespass affidavit. RP 154-55.

Mr. Nguyen denied ever touching the methamphetamine with which he was charged; however, even if he had merely touched it, momentary handling of contraband is insufficient evidence of dominion and control. See Callahan, 77 Wn.2d at 28-31; Spruell, 57 Wn. App. at 389. In its oral ruling, the trial court considered it significant that the sergeant asked Mr. Nguyen whether anybody else was staying in his bedroom, and that he had answered “no.” RP 179. This, however, was not the important question to ask; the critical question was whether anybody else had access to the upstairs bathroom. Sergeant Harris never asked this question, but the evidence at trial was clear – everyone in the house had access to this upstairs bathroom, which had two doorways. RP 113. It was “accessible by both the hallway and the west bathroom... that’s the only bathroom that’s upstairs.” RP 113 (noting this was the only shower in the house, so everyone used it).

Finally, in the week before the search, every individual in the home had access to the bowl in that bathroom, other than Mr. Nguyen. The hospital discharge paperwork seized by police corroborated Mr. Nguyen’s testimony that he was receiving treatment, first at

PeaceHealth Hospital, and then at TeleCare, up until April 21st. RP 103-05, 142-44. When Mr. Nguyen returned home, he was dismayed to find his home in a state of “disarray. I was burglarized.” RP 143. He found that most of his possessions that remained were strewn about, and that someone had clearly been inside his bedroom, which adjoins the upstairs bathroom. RP 143-44. Many of his belongings had been stolen, including his electronics, and even his bed sheets. Id. Mr. Nguyen had to kick out between eight to nine people, in order to bring the number of occupants down to his usual four tenants. RP 144. This suggests that at the time Mr. Nguyen returned from the hospital, there were as many as 13 people at his home.

The court acknowledged that the drugs likely did not belong to Mr. Nguyen, stating in its oral findings: “It may be that it’s not his methamphetamine in the sense that he was aware that someone else put it in there, that one of these multiple ne’er-do-wells who showed up and trashed his place left that stuff there...” RP 179. The court found Mr. Nguyen guilty, regardless, finding that Mr. Nguyen “apparently was aware that there was some crystal substance in this bowl,” as acknowledged by his purported statement to the officer. Id. (emphasis

added). This is not sufficient evidence to prove Mr. Nguyen possessed a controlled substance.

Because of Mr. Nguyen's lack of access to the bathroom for approximately one week before the search, combined with his gang-involved tenants – and their many guests' – continual access at all times, there was insufficient evidence presented that Mr. Nguyen exercised dominion and control over the methamphetamine seized from the communal upstairs bathroom.

d. The prosecution's failure to prove all essential elements requires reversal.

The prosecution failed to sufficiently connect Mr. Nguyen to the methamphetamine, by failing to present sufficient evidence of dominion and control, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. THE TRIAL COURT’S RULING UPHOLDING THE VALIDITY OF THE SEARCH WARRANT SHOULD BE REVERSED, BECAUSE THE WARRANT WAS OVERBROAD.

- a. A search warrant should only be issued upon a showing of probable cause that the defendant is involved in criminal activity, and that evidence of that activity will be found in the place to be searched.

The Fourth Amendment protects people from unreasonable searches and seizures. U.S. Const. amend. IV. Article 1, section 7 of the Washington Constitution further narrows the State’s authority to search, ensuring that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. Because Washington’s constitution provides greater protections of individual privacy, when presented with potential violations under the state and federal constitutions, Washington courts first examine the state law challenges. State v. VanNess, 186 Wn. App. 148, 155, 344 P.3d 713 (2015). The court determines if the challenged state act involved a disturbance of private affairs and then asks whether the law justifies the intrusion. Id.

A search warrant should be issued only if the affiant shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be

searched. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

The record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant. State v. Thein, 138 Wn.2d 133, 147, 977 P.2d 582 (1999) (citing State v. Patterson, 83 Wn.2d 49, 52, 515 P.2d 496 (1973)). Furthermore, the magistrate may not issue a search warrant where the affidavit contains no facts to support the issuance of the warrant. State v. Lyons, 174 Wn.2d 354, 364, 273 P.3d 314 (2012). General search warrants are invalid. State v. Friedrich, 4 Wn. App.2d 945, 959-60, 425 P.3d 518, 526 (2018), review denied, 192 Wn.2d 1012, 432 P.3d 790 (2019) (citing State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1991)).

“The court reviews de novo a trial court’s assessment of a magistrate’s probable cause determination when issuing a search warrant.” State v. Keodara, 191 Wn. App. 305, 312, 364 P.3d 777 (2015); VanNess, 186 Wn. App. at 154.

- b. The search affidavit was invalid, because there was an insufficient nexus between the items sought and the upstairs bathroom of Mr. Nguyen’s duplex; the remainder of the warrant is overly broad and not supported by probable cause.

Probable cause requires a nexus between the items to be seized and the place to be searched. State v. Goble, 88 Wn. App. 503, 511,

945 P.2d 263 (1997). The Fourth Amendment mandates that warrants describe with particularity the things to be seized. State v. Rivera, 76 Wn. App. 519, 522, 888 P.2d 740 (1995). “The particularity requirement prevents general searches; the seizure of objects on the mistaken assumption they fall within the issuing magistrate’s authorization; and the issuance of warrants on loose vague, or doubtful bases of fact.” Perrone, 119 Wn.2d at 548. “As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” Rivera, 76 Wn. App. at 522 (quoting Marron v. United States, 275 U.S. 192, 195, 48 S.Ct. 74, 72 L.Ed. 231 (1927)).

According to the affiant’s statement here, a person was shot in one of two scenarios – either in a drive-by shooting near Mr. Nguyen’s home, or by someone standing in Mr. Nguyen’s front doorway. CP 24. In either version, there is no explanation that suggests small objects or trace evidence would be located in the second floor bathroom of Mr. Nguyen’s home. The alleged victim claimed he was shot near the front door in the downstairs hallway, and that the shooter ran immediately out of the home. Id. There was no plausible scenario that would explain

evidence related to the shooting being found in a small bowl located in the upstairs bathroom.⁴

Other than speculation about evidence related to firearms, such as shell casings, there was no nexus between the remainder of the items sought in the search warrant and the second floor of the duplex. CP 30-31. Item 3 in the warrant sought permission to search for “trace evidence,” from biological fluids to carpet fibers and fingernails. CP 30-31. The warrant sought permission to search all rooms of the duplex, even though the shooting allegedly occurred in the entryway on the ground floor. CP 24, 32.

The trial court initially seemed to be concerned about the broadness of the search warrant, inquiring at the suppression hearing:

You have a search warrant based on the fact that an assault occurred downstairs, that somebody standing in the hallway downstairs was shot by somebody standing over in the living room, who then ran out the back door all downstairs. Why are you rooting around in a bowl in the bathroom for evidence related to that crime?

RP 35-36.

⁴ The search warrant sought evidence “from all rooms,” including firearms and related ammunition, casings, bullet fragments, and supplies. CP 30(2). The warrant sought “trace evidence,” including biological samples, paint chips, dust and soil, fibers, etc. CP 31(3). The warrant also sought personal property related to the identity of persons occupying the property, including documents, ID’s, and keys. CP 31(3).

The court eventually determined that the search warrant, while broad, was not “general.” RP 42-44; CP 90-93.⁵

The trial court erred when it found the search warrant to be valid, despite its breadth. CP 92. The court discussed that it found the evidence sought related to the crime of assault in the first degree, which had recently occurred. RP 45. “So, that tempers the idea that it’s a general search. They’re not just rooting around in there for anything. They’re rooting around in there for evidence related to this assault ...” Id.⁶

This conclusion is not supported by the testimony of Sergeant Harris, who claimed to have found the baggie of methamphetamine in a small bowl atop a bathroom vanity, up a flight of stairs in a separate room from the location of the shooting. RP 102-03. The State presented no evidence that Sergeant Harris was searching for evidence related to the shooting when he entered that upstairs bathroom, or when he was “rooting around” in the bowl. RP 13-14, 45, 111-12.

⁵ The court’s Findings of Fact and Conclusions of Law as to the 3.6 hearing are in the record at CP 90-93. The court did not issue written findings following the bench trial. See Section 3.

⁶ The court characterized Sergeant Harris’s methods as “rooting around in a bowl in the bathroom,” and “rummage[ing] around in the bowl.” RP 35-36, 38. The court still upheld the search warrant. RP 48.

Neither is the court's conclusion consistent with the constitutional particularity requirement articulated by this Court. The purpose of the search warrant particularity requirement is to "prevent[] the sort of general, exploratory rummaging in a person's belongings of the sort 'abhorred by the colonists.'" Friedrich, 4 Wn. App.2d at 959-60 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (internal citation omitted).

In Keodara, this Court found a search warrant overbroad where it permitted a suspect's phone to be searched for "items that had no association with any criminal activity and for which there was no probable cause whatsoever." 191 Wn. App. at 316. The State tried to justify that warrant by arguing that information related to firearms or drugs could be found anywhere on the phone. Id. This Court found the search warrant affidavit insufficient due to overbreadth under the Fourth Amendment. Id.

Here, as in Keodara, the search warrant permitted a search of Mr. Nguyen's entire duplex, including the upstairs bedroom and bathroom, although these areas had no association with any criminal activity. As in Keodara, the search warrant here was overbroad, and

the seized evidence was outside the scope of the warrant. 191 Wn. App. at 312; Perrone, 119 Wn.2d at 545.

- c. Because the search warrant was invalid, and because the controlled substance was beyond the scope of the warrant, the court should have suppressed.

Because the search warrant was invalid, the trial court should have suppressed the evidence. Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. Keodara, 191 Wn. App. at 317-18 (internal citations omitted). The appellate court must look only at the untainted evidence to determine if the totality is so overwhelming that it necessarily leads to a finding of guilt. Id. Without the tainted evidence of the unconstitutional search, no evidence of guilt remained against Mr. Nguyen.

This Court should reverse and remand for further proceedings. State v. McKee, __ P.3d __, 2019 WL 1721982, slip op. (Wash. Apr. 18, 2019).

3. THE TRIAL COURT’S FAILURE TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW SHOULD RESULT IN REVERSAL AND DISMISSAL.

The trial court failed to enter findings of fact and conclusions of law following Mr. Nguyen’s bench trial, as is required by CrR 6.1(d).

This error is not harmless, in light of the deficiencies in the court's oral ruling, and because remand for entry of written findings would prejudice Mr. Nguyen.

“In a case tried without a jury, the court shall enter findings of fact and conclusions of law.” CrR 6.1(d). “Those findings must address each element of the crime separately and indicate the factual basis for each element.” State v. Silva, 127 Wn. App. 148, 151 n.2, 110 P.3d 830 (2005). “A court's oral opinion is not a finding of fact.” State v. Hescok, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999); see also State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (trial court's oral ruling is informal and is not binding unless formally incorporated into written findings).

Written findings and conclusions ensure efficient and accurate appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). “[T]he lack of findings and conclusions in a given case necessarily delays the orderly and efficient process of appellate review.” State v. Taylor, 69 Wn. App. 474, 477, 849 P.2d 692 (1993). Timely filed findings and conclusions simplify and expedite appellate review. Head, 136 Wn.2d at 622-23.

In general, the failure to enter written findings and conclusions requires remand for entry of such findings. Id. at 624. In this case, however, doing so would prejudice Mr. Nguyen. See Cannon, 130 Wn.2d at 329-30. Where the trial court's findings are not drafted before the Appellant's opening brief is filed, an appearance of fairness arises in remanding for entry of findings, where it is likely the findings would be tailored to address the issues raised in the Appellant's brief. See, e.g., Taylor, 69 Wn. App. at 477 (citing cases); Head, 136 Wn.2d at 622-25 (citing cases).

The appropriate remedy here, due to the lack of findings, is to reverse and dismiss. In the alternative, the case should be remanded for the entry of written findings and conclusions under CrR 6.1.

F. CONCLUSION

Because the State did not prove Mr. Nguyen possessed the methamphetamine, Mr. Nguyen's conviction should be reversed and the charge dismissed with prejudice. In the alternative, due to the illegal search, the matter should be reversed and remanded for further proceedings. The case should also be reversed due to the lack of written findings.

Respectfully submitted this 25th day of April, 2019.

s/ Jan Trasen

JAN TRASEN (WSBA 41177)
Washington Appellate Project - 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

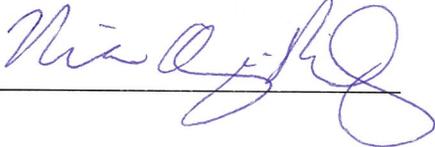
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 52205-5-II
v.)	
)	
ANTHONY NGUYEN,)	
)	
Appellant.)	

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