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Court of Appeals  
Division II  
State of Washington  
8/13/2019 1:17 PM

No. 52708-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

J. LEONOR SALAZAR DIMAS,

Appellant.

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

The Honorable John C. Skinder, Judge  
Cause No. 17-1-00337-34

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether law enforcement may properly search pill bottle containers when they have authorization to search a residence for digital storage devices and hand-written passcodes.

2. Whether the plain view exception to the warrant requirement allows the seizure of a white powdery substance which the Agent believed to be a controlled substance, which was discovered during an otherwise lawful search of a residence.

B. STATEMENT OF THE CASE.

The appellant, J. Leonor Salazar Dimas, was convicted following a jury trial of one count of possession of a controlled substance. Supp CP \_\_. He was sentenced to 60 days confinement, with eligibility to serve the second 30 days on work release. CP 8-17. This appeal follows, assigning error only to a pretrial suppression motion.

Prior to trial, Salazar Dimas, moved to suppress evidence obtained pursuant to a search warrant issued by the United States District Court. Supp CP \_\_. The State responded and an evidentiary hearing occurred on August 20, 2018. Supp CP \_\_, RP

1.<sup>1</sup> At the hearing, the State offered the testimony of FBI Agent Richard Schroff. RP 5.

Agent Schroff was involved in a multi-agency organized crime drug enforcement task force, which also investigated financial components to crime. RP 8. On June 8, 2016, Agent Schroff participated in exercising a search warrant at Salazar Dimas' residence along with other personnel from the FBI, Social Security Administration, DEA , IRS and Tumwater Police Department. RP 9.

Agent Schroff indicated that the IRS was the primary agency, and that they were responsible for the routine paperwork, documentation and were the seizing agency for financial records, electronic devices and things that were covered in the warrant. RP 10. The FBI agreed to be the seizing agency if other contraband was located. RP 10.

Agent Schroff noted:

Given the warrant allowed us to search for electronic devices including like thumb drives, SSD cards, small electronics which we found to store electronic evidence of other crimes we're investigating, it allowed us to search smaller areas, drawers, small containers, that sort of thing; essentially anything that was inside that residence we were allowed to search.

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<sup>1</sup> For purposes of this brief, the State will refer to the 58 page Verbatim Report of Proceedings of the Evidentiary Hearing held on August 20, 2018, as "RP." It does not appear as though Salazar Dimas has arranged for transcription of the entire trial.

RP 11. The search warrant affidavit and search warrant were admitted during the hearing without objection. Exhibit 1, Exhibit 2; RP 12, 27.

During the search, IRS Special Agent Ryan Thompson came and found Agent Schroff and informed him that they had found what they believed were drugs. RP 13. Agent Thompson and DEA Special Agent Dan Olson were searching Salazar Dimas' bedroom when they located several pill bottles. RP 13. Inside some of the pill bottles Agent Schroff observed a white powdery substance which Agent Schroff believed may be cocaine; others had a green leafy substance that Agent Schroff believed to be marijuana. RP 13-14.

Agent Schroff ensured that the IRS agents properly marked on their administrative forms regarding the discovery and ensured that they photographed the evidence in place. RP 15. Agent Schroff then took the pill bottles to the kitchen where he had Tumwater Officer Yancey conduct a field test on the substance which came back positive for cocaine. RP 15. The pill bottles were then seized. RP 15.

Agent Schroff testified regarding his belief that the white powdery substance was cocaine and the green leafy material was

marijuana. RP 16-17. He noted that the packaging on the bottle, in his training and experience, was consistent with how people package cocaine, marijuana, methamphetamine and heroin. RP 17. Agent Schroff indicated that he believed the substance was a controlled substance and could not think of anything else that would be packaged that way. RP 17. The seized powdery substance was slightly less than seven grams of cocaine. RP 20.

During cross examination, defense counsel asked "what was your opinion on the limitation of that warrant then? Was there any limitation on search?" to which Agent Schroff responded, "We were allowed to search any container on that property that could contain the things outlined in the attachments on the warrant." RP 22. Defense counsel followed up, "You could search any container. Was there any limitation, essentially is my question?" to which Agent Schroff responded, "No." RP 22-23.

Following the hearing, the trial court found that "the agents searching Mr. Salazar's house had authority and correctly searched everything that could hold an electronic or digital device that was small." RP 52. The trial court further indicated "so the Court is finding that there was an exception in this case and that would be the plain view exception," and "the real focus on this case was

whether it was immediately recognizable that this was contraband, and the Court finds that it was.” RP 54-55. The trial court entered written findings of fact and conclusions of law denying the suppression motion. CP 4-7.

C. ARGUMENT.

1. The trial court correctly found that law enforcement had the proper authority to search the pill bottles pursuant to the warrant.

Following a finding of probable cause, a search warrant may be issued by a neutral and detached magistrate. State v. Gore, 143 Wn.2d 288, 296, 21 P.3d 262 (2001). Search warrants are supposed to be evaluated in a commonsense manner, rather than hyper technically. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); State v. Perrone, 119 Wn.2d 538, 549, 834 P.2d 611 (1992); State v. Partin, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977).

A trial court’s denial of a motion to suppress is reviewed for substantial evidence to support the findings of fact and de novo for the conclusions of law. State v. Rooney, 190 Wn. App. 653, 658, 360 P.3d 913 (2015), *review denied*, 185 Wn.2d 1032, 377 P.3d 731 (2016). A search warrant for a house authorizes a search of containers in the house that could hold one or more of the items

specified in the warrant. State v. Simonson, 91 Wn. App. 874, 886-887, 960 P.2d 955 (1998). “A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found, and is 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.2d 318, 325-326, 415 P.3d 639 (2018); *citing*, United States v. Ross, 456 U.S. 798, 820-21, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

In this case, the warrant specifically authorized a search of the premises for items that tend to be very, very small, such as mail keys, safety deposit box keys, smart cards, PC keys, any digital/magnetic/electronic storage device (which would also include SD cards and “thumb” or “jump” drives), encryption devices, and passwords and passcodes (which can be written on very small scraps of paper). Exhibit 2. The warrant included authority to search for “any digital device or storage device” capable of storing evidence of the listed offenses. Id. at Attachment B, pg. 2.

In State v. Olson, 32 Wn. App. 555, 559, 648 P.2d 476 (1982), Division I of this Court stated, “in searching for marijuana, the officers were authorized to inspect virtually every aspect of the premises. Any other contraband inadvertently found in the course

of such lawful search would clearly be subject to seizure pursuant to the plain view doctrine.” (Internal quotations omitted.) Handwritten passcodes and digital storage devices are no different.

Agent Schroff testified:

Given we were searching for electronic devices including SSD memory cards which can be the size of a pinky nail - - and which during our search warrants on other types of cases, I've found SSD cards - - they can store electronic records including financial records the size of my pinky nail or smaller inside small containers like a pill bottle.

RP 22. It is clear in this case that the trial court correctly found that the scope of the search warrant authorized the search of the pill bottles.

Moreover, sufficient evidence supported the trial court's finding that “the nature of electronic storage medium and devices that the warrant authorized the agents to search was very small.” CP 6. Where substantial evidence in the record supported challenged facts, those facts will be binding on appeal. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Not only did Agent Schroff testify regarding the size of such items, he also noted that in his experience in previous cases such items have been located in “small containers like a pill bottle.” RP 22. The search warrant clearly authorized the search for small items. In modern society, it

is common knowledge that very small electronic devices can hold significant amounts of information.

The trial court's findings of fact were supported by sufficient evidence and the legal conclusions that the officers had the authority to search containers that could hold small objects and that the officers acted within the scope of the warrant authorization were correct.

2. Because the officers were searching within the scope legally authorized by the search warrant, the seizure of the cocaine was lawful under the plain view doctrine.

One exception to the warrant requirement is the plain view doctrine. "The plain view doctrine has three main elements: (1) prior justification for police intrusion, (2) inadvertent discovery, and (3) immediate knowledge by police that the material in plain view is evidence of a crime." State v. Munoz Garcia, 140 Wn. App. 609, 624, 166 P.3d 848 (2007), citing State v. Lair, 95 Wn.2d 706, 714, 630 P.2d 427 (1981). However, neither article I, section 7, nor the Fourth Amendment still require inadvertent discovery to justify a seizure under the plain view exception. See Horton v. California, 496 U.S. 128, 130, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); State v. Hudson, 124 Wn.2d 107, 114 n.1, 874 P.2d 160 (1994)

(noting the *Horton* revision to the plain view test). Thus, the test now only contains two parts.

“Immediate knowledge is required under the plain view exception in order to prevent police from engaging in a generalized search for incriminating material.” Munoz Garcia, 140 Wn. App. at 625, citing State v. Alexander, 33 Wn. App. 271, 273, 653 P.2d 1367 (1982). “Objects are immediately apparent for purposes of a plain view seizure when, considering the surrounding facts and circumstances, the police can reasonably conclude they have evidence before them.” Id., quoting Lair, 95 Wn.2d at 716; State v. Hudson, 124 Wn.2d 107, 118, 874 P.2d 160 (1994). An officer does not need to know with certainty that a substance is contraband in order for the plain view doctrine to apply. State v. Gonzales, 46 Wn. App. 388, 340, 731 P.2d 1101 (1986). “In other words, police have immediate knowledge if the officers have a reasonable belief that evidence is present.” Munoz Garcia, 140 Wn. App. at 625. A court will “consider both the prior information known to police and the surrounding circumstances when evaluating whether items were immediately apparent as evidence.” Id., quoting State v. Henry, 36 Wn. App. 530, 532-33, 676 P.2d 521 (1984). For example, in Gonzales, a clear vial of capsules and pills, “viewed in context” of

other items of drug paraphernalia, was properly seized. 46 Wn. App. at 400-01.

In Texas v. Brown, 460 U.S. 730, 75 L.Ed.2d 502, 103 S.Ct. 1535 (1983), the United States Supreme Court upheld the seizure of an opaque balloon that contained an illicit substance even though the contents were not visible. The Court stated that “use of the word immediately apparent was very likely an unhappy choice of words, since it can be taken to imply an unduly high degree of certainty as to the incriminating character of the evidence is necessary for an application of the plain view doctrine.” Id. at 741 (internal quotations omitted). Because the officer, based on his previous narcotics arrest and discussion with other officers, possessed probable cause to believe that the balloon contained an illicit substance, the Court held that the “immediately apparent” requirement was satisfied. Id. at 742. All that is required, explained the Court, is “a practical, nontechnical probability that incriminating evidence is involved.” Id.

“Any other contraband inadvertently found in the course of such lawful search would clearly be subject to seizure pursuant to the plain view doctrine.” State v. Olson, 32 Wn. App. 555 at 559. The situation described in Olson is what happened in this case. The

trial court noted that Agent Schroff testified regarding his training and experience, which included the investigation of drug crimes. CP 4. Moreover, the trial court found that Agent Schroff was working as part of a task force and that the defendant had been the subject of an investigation for organized crime, financial crimes and drugs. CP 4. These findings were supported by the testimony of Agent Schroff. RP 5-7, 8.

When an IRS agent and a DEA agent observed the cocaine during their otherwise lawful search, they notified Agent Schroff, who was the FBI agent responsible for such contraband. CP 5, RP 13, 11. The testimony supported the rational inference that the IRS agent, the DEA agent, and the FBI agent all believed the substance was cocaine. RP 14. Agent Schroff testified that at first impression, he “believed the white powdery substance was cocaine.” RP 16. The trial court’s finding that law enforcement immediately recognized the substance as a controlled substance and, therefore, the requirements of the plain view test were met, was supported by the evidence. The trial court correctly denied Salazar Dimas’ motion.

D. CONCLUSION.

The trial court's findings of fact and conclusions of law were supported by the evidence presented during the suppression hearing. The law enforcement officers were acting within the lawful confines of the federal warrant when they discovered the controlled substance in plain view. The trial court correctly denied Salazar Dimas' motion to suppress the evidence. The State respectfully requests that this Court affirm the Judgment and Sentence.

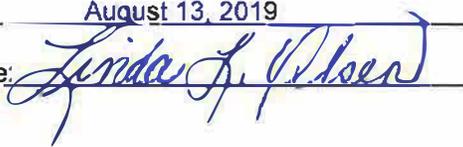
Respectfully submitted this 13<sup>th</sup> day of August, 2019.

  
\_\_\_\_\_  
Joseph J.A. Jackson, WSBA# 37306  
Attorney for Respondent

**DECLARATION OF SERVICE**

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: August 13, 2019  
Signature: 

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

**August 13, 2019 - 1:17 PM**

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**Superior Court Case Number:** 17-1-00337-2

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