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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

ARTHUR S. DURONE,

Respondent.

Appeal from the Superior Court of Washington for Lewis County
Case No. 18-1-01044-21

Appellant's Opening Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering conclusion of law 2.2, that the search warrant failed to specify the items the officer was to search for or seize, even in broad or general categories or terms, and therefore the search warrant's language allowing the officer to search for and seize any evidence of the listed crimes lacked particularity.
2. The trial court erred in entering conclusion of law 2.4, that, pursuant to *Higgins*, probable cause did not exist in the search warrant affidavit for any controlled substance crimes.
3. The trial court erred in entering conclusion of law 2.5, that the search warrant did not set objective standards by which an officer could differentiate between items subject to seizure and those not for either the crime of unlawful possession of a firearm or possession of a controlled substance, therefore the search warrant left to the officer's sole discretion what constituted "evidence of a crime" without any specificity or limitation.
4. The trial court erred in entering conclusion of law 2.6, that the officer could have described the items to be searched for and seized more particularly in light of the information available to the officer at the time, but only listed the named crimes and asked to search for "evidence of" those crimes, therefore the officer under the circumstances could have requested authority to search for and seize "firearms and ammunition" and "controlled substances and drug paraphernalia" without specific firearms or substances, but the warrant as written did not contain any limitation on evidence to be seized.
5. The trial court erred in entering conclusion of law 2.7, that the search warrant is overbroad, as it failed to meet the particularity requirement.
6. The trial court erred when it ordered the evidence seized solely pursuant to the search warrant suppressed.

7. The trial court erred when it denied the State's motion for reconsideration.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court error when it concluded the search warrant overbroad due to its failure to meet the particularity requirement set forth in the Fourth Amendment of the Constitution?
- B. Did the trial court error when it found there was no probable cause for any controlled substance crimes?
- C. Did the trial court error when it suppressed all the evidence seized solely pursuant to the search warrant?
- D. Did the trial court abuse its discretion when it denied the State's motion for reconsideration on the basis the motion was not timely?

III. STATEMENT OF THE CASE

Trooper Willson¹ conducted a traffic stop on Interstate 5, in Lewis County, on a pickup. CP 40, 46. Durone, the driver, was identified by his Oregon State Identification Card. CP 46. Durone admitted he did not a valid driver's license. *Id.* Durone's license was suspended. *Id.*

Trooper Willson called for a tow truck to remove Durone's pickup from the Interstate due to Durone being unable to find anyone available within a reasonable distance who could retrieve the pickup.

¹ The Findings of Fact and Conclusion of Law misspells Trooper Willson's name, as it contains two 'l's.

Id. Due to the vehicle being towed, Trooper Willson conducted an inventory of the pickup. CP 40, 46. While conducting the inventory of the pickup Trooper Willson located firearms, which could not be left in the pickup pursuant to Washington State Patrol policy. *Id.* While Trooper Willson was retrieving the firearms, he observed a glass cylindrical smoking device with a bulb on the end containing a substance. *Id.* Trooper Wilson, through his training and experience, believed the substance in the smoking device was an illegal substance. *Id.*

Trooper Willson arrested Durone. CP 40, 46. After arresting Durone, Trooper Willson ran a records check and discovered Durone had a prior felony conviction. *Id.* Trooper Willson believed, after inventorying the pickup, his observations, conversations with Durone, and the information received through dispatch, he had probable cause for criminal activity and certain evidence of crimes, Possession of a Controlled Substance and Unlawful Possession of a Firearm (Felon in Possession of a Firearm), located in Durone's pickup. *Id.*

Trooper Willson prepared an electronic probable cause affidavit for a search warrant and emailed it to the magistrate, a Lewis County District Court Judge. CP 40, 45-49. The judge found probable

cause and issued the search warrant. CP 40, 47-48. The judge specifically found probable cause for the crimes of: 1) Possession of a Controlled Substance, 2) Possession of Drug Paraphernalia, and 3) Felon in Possession of a Firearm. *Id.* The search warrant authorizes an officer to search for and seize all items of evidence of the crimes listed in the search warrant. *Id.*

Trooper Willson executed the search warrant on Durone's pickup in the presence of Trooper Pardue. CP 5. Trooper Willson recovered approximately 429 grams in total of suspected marijuana in three different packages. *Id.* Trooper Willson located 25.7 grams of white powder, which Trooper Pardue suspected to be cocaine, in a tin can. *Id.* Four firearms were recovered from the vehicle. *Id.* Durone had a prior felony conviction for manufacture and delivery of controlled substances. *Id.*

The State charged Durone with Count I: Possession of a Controlled Substance, Count II: Possession of a Controlled Substance – Cocaine, Count III: Unlawful Possession of a Firearm in the Second Degree. CP 1-2. Durone brought a motion to suppress the evidence alleging the search warrant was overbroad and lacked particularity. CP 10-24; RP 5-14, 21-23. The State responded to Durone's motion. CP 25-37; RP 16-20. The trial court made several

rulings regarding the search warrant, ultimately finding it was overbroad and failed to meet the particularity requirement. RP 23-25; CP 41-42.

Durone's trial confirmation hearing was held six days after the suppression hearing. RP 5, 27. The State requested the trial court strike the trial date and grant a good cause continuance, as findings of fact and conclusions of law had not been entered from the suppression hearing. RP 27-28. The State told Durone's counsel prior to trial confirmation it planned to ask for reconsideration, but was waiting for the findings of fact and conclusion of law to be entered. RP 27-29. The trial court would not grant the good cause continuance, but did continue Durone's trial within speedy trial. RP 30.

Findings of fact and conclusions of law were entered on May 22, 2019. RP 33-35; CP 39-49. The State filed a motion for reconsideration the next day at the trial confirmation hearing, requested to reset the trial date, and an opportunity to argue the reconsideration motion. RP 43-44. The defense objected. RP 43-44. The trial court, finding the motion for reconsideration untimely, denied the motion. RP 45. The trial court found its rulings from the

suppression hearing effectively terminated the State's case. RP 45; CP 113-14.

The State timely appeals the trial court's order granting the motion to suppress and the denial of the motion for reconsideration. CP 115-29. The State will further supplement the facts in the argument section below.

IV. ARGUMENT

A. THE SEARCH WARRANT MET THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT, THEREFORE THE TRIAL COURT ERRED WHEN IT SUPPRESSED ALL EVIDENCE RECOVERED PURSUANT TO THE LAWFULLY EXECUTED SEARCH WARRANT.

The search warrant issued by the magistrate in Durone's case met the particularity requirement of the Fourth Amendment of the United States Constitution. The trial court erred when it determined the warrant was overbroad for failing to satisfy the particularity requirement. The trial court further erred when it suppressed all of the evidence Trooper Willson seized pursuant to the lawfully executed search warrant. This court should reverse the trial court and remand to allow the State to proceed with its prosecution of Durone.

1. Findings Of Fact And Conclusions Of Law.

Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

In this matter, the State does not assign error to any of the trial court's findings of fact, therefore they are verities on appeal. The State does assign error to conclusion of law 2.2, 2.4, 2.5, 2.6, and 2.7, which the State will argue in the body of its briefing below.

2. Standard Of Review.

The validity of a search warrant is assessed on a case by case basis. *State v. Askham*, 120 Wn. App. 872, 878, 86 P.3d 1224 (2004), *citing State v. Perrone*, 119 Wn.2d 538, 546-47, 834 P.2d 611 (1992). Search warrants are generally reviewed for an abuse of discretion, with great deference to the magistrate. *State v. Haggard*, 9 Wn. App. 2d 98, 109, 442 P.3d 628 (2019). However, a trial court's

findings regarding particularity and overbreadth after a suppression hearing where it has reviewed the affidavit supporting the warrant are legal conclusions that are reviewed de novo. *Cf., Haggard*, 9 Wn. App. 2d at 109 (discussing findings regarding probable cause rather than particularity and overbreadth).

3. The Search Warrant Was Not Overbroad.

The search warrant issued by the district court judge did not lack the required particularity, therefore, the search warrant was not overbroad. Trooper Willson, by using the language, evidence of the crime of..."Possession of a Controlled Substance" and "Felon in Possession of a Firearm," met the particularity requirement of the Fourth Amendment. The trial court erroneously ruled the search warrant was overbroad, and this Court should reverse.

The Fourth Amendment requires that "no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularity describing the place to be searched, and the persons or things to be seized." The warrant requirement places a layer of protection for a citizen against unlawful searches and seizures by government officials. *Steagald v. United States*, 451 U.S. 204, 212, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

In order for a search warrant to issue, a detached and neutral magistrate or judge must make a determination of probable cause to support issuance of a search warrant. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). “Probable cause to issue a search warrant exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” *Maddox*, 152 Wn.2d at 505. In determining the existence of probable cause to issue a search warrant, the magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. *Id.* “It is only the probability of criminal activity, not a prima facie showing of it that governs probable cause to issue a search warrant.” *Id.*

Search warrants are to be tested in a commonsense and realistic fashion as technical requirements of elaborate specificity have no proper place in this arena. *State v. Patterson*, 83 Wn.2d 49, 56, 515 P.2d 496 (1974), citing *U.S. v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965) (internal quotations omitted). On appellate review, all doubts are resolved in favor of a search warrant’s validity. *State v. Kalakosky*, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993). A magistrate’s determination that probable cause exists

to issue a search warrant is entitled to considerable deference by appellate courts. *State v. Jackson*, 102 Wn.2d 432, 436, 688 P.2d 136 (1984).

There are three main purposes behind the particularity requirement guaranteed by the Fourth Amendment, 1) to prevent general searches, 2) to prevent officers from seizing items under the mistaken assumption that those objects fall within the authorization of issuing magistrate, and 3) to prevent the issuance of warrants on vague, loose, or doubtful bases of fact. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (citations omitted). The prohibition against general searches is to prevent a general, exploratory search of a person's belongings. *Id.* The particularity requirement is to protect the occupant and to limit the intrusion upon their expectation of privacy to "no further than is necessary to find particular objects." *Id.* at 545-46.

The "second purpose underlying the particularity requirement, conformance with this requirement eliminates the danger of unlimited discretion in the executing officer's determination of what to seize. *Id.* at 546 (citation omitted). A warrant must enable the person conducting the search "to reasonably ascertain and identify the things which are authorized to be seized." *Id.* (citations omitted). The

circumstances and the type of items that are involved determine the degree of particularity required in a warrant. *Id.* at 546-47.

The third requirement is to ensure the magistrate issues the warrant only upon receiving adequate probable cause that a particular item is connected to criminal activity and can be found in the location to be searched. *Id.* at 548 (internal quotations and citations omitted).

When reviewing the validity of a search warrant in an overbreadth challenge, the court considers three factors, “(1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.” *State v. Higgins*, 136 Wn. App. 87, 91-92, 147 P.3d 649 (2006), *citing*, *United States v. Mann*, 389 F.3d 869, 878 (9th Cir. 2004).

The trial court’s erroneous decision, finding the search warrant overbroad, was based upon its incorrect application of the law. The trial court incorrectly applied the particularity requirements, as set forth by this Court in *Higgins*, to conclude the search warrant

was unconstitutional and suppress the evidence recovered pursuant to the warrant. This Court should reverse the trial court and remand the matter back to allow the State to prosecute Durone.

a. Trooper Willson established probable cause for the crime of possession of a controlled substance.

The trial court determined Trooper Willson failed to establish probable cause for the seizure of controlled substances in his Declaration Under Penalty of Perjury in Support of a Search Warrant. The trial court entered conclusion of law 2.4:

Pursuant to *Higgins*, the Court considered what was searched for and/or found, when it determined if probable cause existed for Possession of a Controlled Substances. The Court concludes probable cause did not exist in the search warrant affidavit for any controlled substance crimes because the only reference to anything related to controlled substances in the affidavit was mention of a glass smoking device believed to contain an illegal substance based on the officer's training and experience; however, the search warrant never established what was to be searched for and the officer ultimately searched for and seized marijuana and a number of other items including other controlled substances.

CP 41-42, *citing, Higgins*, 136 Wn. App. 87. The trial court misapplied the probable cause requirement. The inquiry is whether there was probable cause for a law enforcement officer to seize the items of a particular type described on the face of the warrant. *Higgins*, 136 Wn. App. at 91.

Higgins cites a United States Supreme Court case to assist in the determination of the sufficiency of probable cause to search for an item listed in a search warrant when considering whether a warrant is overbroad. *Higgins*, 136 Wn. App. at 92-93, *citing Groh v. Ramirez*, 540 U.S. 551, 560, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004).

Unless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit presented at the search), there can be no written assurance that the Magistrate actually found probable cause to search for, and seize, every item mentioned in the affidavit.

Id.

The trial court's conclusion of law states it "concludes probable cause did not exist in the **search warrant affidavit** for any controlled substance crimes..." CP 41 (emphasis added). Therefore, the trial court was not actually conducting the evaluation set forth in *Higgins*, but reviewing whether the search warrant affidavit itself established probable cause for possession of controlled substances. The trial court's ruling was flawed, it misapplied the law in *Higgins* that the trial court stated it was relying upon.

Durone did not challenge whether Trooper Willson had adequate probable cause for Possession of a Controlled Substance for the magistrate to issue the search warrant. CP 10-16. Durone

argued a “straightforward single-issued motion.” CP 15. This single issue centered on the constitutionality of the search warrant, but not for lacking probable cause, for lacking particularity and being overbroad. CP 10-16.

If the trial court decided to render a decision regarding whether Trooper Willson established probable cause in the declaration in support of the search warrant for Possession of a Controlled Substance, it misapplied the law as it pertained to that analysis. The trial court’s misapplication is not surprising, as such a decision would be an improper *sua sponte* decision because it was an issue not raised by Durone, and not briefed or argued by the parties. See RP 5-23; CP 10-37.

“It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The issuing judge is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit.” *State v. Davis*, 182 Wn. App. 625, 631, 331 P.3d 115 (2014) (internal quotations, citations, and modifications omitted). The district court judge was entitled to make reasonable inferences that Trooper Willson, a law enforcement officer with specialized training in drug recognition and drug interdiction, recognized a glass smoking device used for smoking

illegal substances which contained a substance he also believes to be illegal, was in fact a controlled substance. The declaration also indicated Trooper Willson believed probable cause existed for "Possession of a Controlled Substance," as Trooper Willson arrested Durone for the crime and could not do such if he did not have probable cause. CP 46. In the declaration under the section, "Facts Specific to this Investigation" Trooper Willson wrote:

While attempting to retrieve the firearms, I observed a clear, glass cylindrical smoking device with a bulb at the end that contained a substance inside which I believed to be an illegal substance. I recognized the glass device as a device used in smoking illegal substances based on my training and experience.

CP 46. Trooper Willson concluded his declaration with a section "Items to Searched For" which states, "Evidence of the crime(s) of:
1. Possession of a Controlled Substance..." *Id.*

The search warrant states:

[T]here is probable cause to believe that evidence of the crime(s) listed below is present in the item/place to be searched, and the ground for issuance of the search warrant exists, specifically for the crimes of:

1. Possession of a Controlled Substance...

YOU ARE COMMANDED TO:

1. Search: *the aforementioned vehicle in its entirety, from the top of the roof, to the bottom of the tires, from the very front of the front bumper, to the very rear of the rear bumper, all voids and recesses.*

2. Seize all items of evidence of the crime(s) listed above...

CP 47. There is no other illegal substance, other than a controlled substance, mentioned, noted, or eluded to within the declaration. Therefore, there was probable cause of criminal activity, specifically Durone's possession of a controlled substance within his vehicle. Therefore, even if the probable cause for controlled substances in the declaration was being challenged in the trial court, the trial court erroneously ruled the declaration lacked probable cause.

This Court should find the trial court incorrectly conducted a probable cause analysis of the declaration of the search warrant, which is not the proper legal analysis set forth by this Court in *Higgins*. This Court should find the trial court's misapplication of *Higgins* led to an erroneous conclusion that the warrant itself lacked the requisite probable cause necessary to meet the particularity requirement. Under the correct application of the law, this Court should find probable cause did exist for all of the items seized in relation to controlled substances, including the marijuana and the cocaine. This Court should reverse the trial court and remand the matter back to allow the State to reinstate its prosecution of Durone.

b. The search warrant was sufficiently particular.

The warrant issued by the district court judge was sufficient particular to meet the particularity requirement of the Fourth Amendment. The distilled version of the issue presented to the trial court was, the search warrant lacked a list of items a law enforcement officer could search for and seize from Durone's vehicle, and therefore the trial court found the warrant lacked the required particularity. The search warrant gave a law enforcement officer the ability to search for, and seize, all items of evidence of the crimes listed on the face of the warrant: Possession of a Controlled Substance and Felon in Possession of a Firearm. CP 47-48. Contrary to the position advanced by Durone, and adopted by the trial court, the wording of the search warrant, using categories of items to be searched, was not overbroad for lacking particularity.

The trial court found the search warrant failed to specify the items to be searched for and seized, and therefore lacked particularity. CP 41-42. The trial court entered conclusion of law 2.2:

The search warrant failed to specify the items the officer was to search for or seize, even in broad or general categories or terms. The search warrant's language allowing the officer to search for and seize any evidence of the listed crimes lacked particularity.

CP 41.

The trial court determined the search warrant failed to set objective standards for a law enforcement officer to be able to determine what could and could not be seized. CP 42. The trial court entered conclusion of law 2.5:

The search warrant did not set objective standards by which an officer could differentiate between items subject to seizure and those not for either the crime of unlawful possession of a firearm or possession of a controlled substance. The search warrant left to the officer's sole discretion what constituted "evidence of a crime" without any specificity or limitation. Since these are possessory crimes, this could include other items such as vehicle registration or title, receipts, and any other non-illicit evidence.

CP 42.

The trial court also found the warrant could have described the items to be seized with more particularity. *Id.* The trial court also entered conclusion of law 2.6:

The officer could have described the items to be searched for and seized more particularly in light of the information available to him at the time, but only listed the named crimes and asked to search for "evidence of" those crimes. The officer under the circumstances could have requested authority to search for and seize "firearms and ammunition" and "controlled substances and drug paraphernalia" without specific firearms or substances, but the warrant as written did not contain any limitation on evidence to be seized.

Id. Finally, the trial court entered conclusion of law 2.7: "The search

warrant is overbroad, as it failed to meet the particularity requirement.” *Id.*

While warrants that have a statutory citation of the crime under investigation are generally seen as more complete, there is not a per se requirement for a statutory citation or the name of the crime to be included on the face of a warrant. *State v. Riley*, 121 Wn.2d 22, 27, 846 P.2d 1365 (1993). A warrant allowing police to search for any and all controlled substances, which contained a laundry list of items related to selling marijuana, including indicia of ownership, after listing the crime Violation of the Uniform Controlled Substance Act, was found to be sufficiently particular. *State v. Chambers*, 88 Wn. App. 640, 646-48, 945 P.2d 1172 (1997). While it is preferred for a warrant to list the controlled substance at issue, because controlled substances are inherently illegal, failing to list the controlled substance or be more precise is not fatal. *Chambers*, 88 Wn. App. at 647-48.

Similarly, a warrant allowing officers to search for “any and all evidence of assault and rape including **but not limited to...**” and then a list of possible items from clothing, human hair, weapons, blood stains, and more, was not found to be overly broad. *State v. Lingo*, 32 Wn. App. 638, 640-42, 649 P.2d 130 (1982) (emphasis

added). “The wording ‘any and all evidence’ was specifically limited to the crimes of assault and rape.” *Lingo*, 32 Wn. App. at 642. A Ninth Circuit case, where officers were explicitly allowed to search through items protected by the First Amendment, the defendant argued the warrant was overbroad because it stated the phrase, “but not limited to” which failed to give officers the required guidance to determine under what circumstances they could seize the items. *United States v. Washington*, 797 F.2d 1461, 1472 (1986). The Ninth Circuit stated, “We disagree. We think that the phrase ‘involvement and control of prostitution activity’ is narrow enough to satisfy the particularity requirement of the Fourth Amendment. It effectively tells the officer seize only items indicating prostitution activity.” *Washington*, 797 F.2d at 1472.

The warrant in this case was sufficiently particular. The search warrant stated the crimes for which the law enforcement officer was searching for evidence of as required. The crimes listed are in themselves sufficiently narrow. Possession of a Controlled Substance is an inherently illegal act, as the trooper was searching evidence of possession, not delivery or possession with intent to deliver which could open a search up to a number of items such as ledgers, records, cash, and more. Felon in Possession of Firearm is

also a sufficiently narrow criminal act. In *Lingo*, “any and all evidence of assault and rape” was considered sufficiently particular and those crimes have a much broader swath of items which could be collected as possible evidence of the crime. Therefore, the warrant did set objective standards for an officer to differentiate what could and could not be seized.

The officer could have included a laundry list of items he wished to include in the search warrant, but then also include the language “included but not limited to” that list the warrant would be considered sufficiently particular. The warrant issued for Durone’s pickup is no less particular than a warrant that states an officer may “search for **any and all evidence of the crime of possession of a controlled substance, including but not limited** to pipes, baggies, syringes, powders, straws, and other items used to ingest controlled substances.” See, *Chambers*, 88 Wn. App. 646-48; *Lingo*, 32 Wn. App. at 640-42.

The trial court, in its oral ruling seemed to take issue with the idea that the trooper could search for items other than the original items seen by the trooper, i.e. the pipe and the guns found during the inventory. RP 23-24. The notion that a police officer would be limited to retrieving only the evidence they saw in plain view once that officer

established probable cause for a crime is nonsensical. There was evidence of a particular crime occurring, and seizure of evidence pertaining to that particular crime was permissible. Search warrants commonly allow seizure for items other than what has been observed directly by an officer or informant. The trial court's limited interpretation would allow an officer, in a manslaughter case, to merely retrieve a gun that the officer had observed but not bloody clothing that officer discovered while conducting the search warrant without backing out and getting an amended search warrant, absent a laundry list of items that included soiled clothing.

The trial court also appeared to misread the warrant. In its ruling it discussed how marijuana was not necessarily an illegal substance, but the search warrant here did not authorize the search for illegal substances.

For what little this is worth, marijuana is not necessarily an illegal substance. It looks like the trooper identified a meth pipe but then ended up searching for all sorts of other things rather than just seizing that pipe that he saw. So in that factor I think that weighs against validity.

RP 24. The trial court was discussing, in part, the probable cause determination argued in the section above, but it also appeared to be discussing the seizure of the marijuana. *Id.* The trial court prior to this statement discusses Trooper Willson's affidavit and notes that the

trooper then searches and seizes marijuana. *Id.* While the trial court is correct, marijuana is not necessarily illegal to possess in Washington State, marijuana is still illegal to possess under certain circumstances. RCW 69.50.360(3); RCW 69.50.4013. The search warrant stated it was to search for “evidence of the crime(s) listed above,” one of which was “Possession of a Controlled Substance. CP 47. Therefore, the trooper could not have searched for marijuana within the legal possession limits.

The items were listed in the warrant were listed with sufficient particularity given the crimes and place being searched. The trial court did not review the warrant in commonsense and realistic fashion. *Patterson*, 83 Wn.2d at 56. Rather, the trial court employed a hyper technical requirement and resolved any doubts it had regarding the search warrant in favor of finding the search warrant unconstitutionally overbroad. *Kalakosky*, 121 Wn.2d at 531; *Patterson*, 83 Wn.2d at 56. This Court should reverse, find the warrant was not overbroad, and evidence seized solely pursuant to the search warrant admissible, and remand the matter back for the State to reinstate its prosecution.

4. The Trial Court Abused Its Discretion When It Denied The State's Motion For Reconsideration For Being Untimely.

The State filed a timely motion for reconsideration and brief in support of the motion for reconsideration of the trial court's granting of Durone's motion to suppress the evidence recovered pursuant to the search warrant. CP 50-112. The trial court orally denied the State's motion, finding it not timely. CP 45. This Court should reverse the trial court's error, and remand the matter back to the trial court to allow the State to reinstate the prosecution of Durone.

Motions for reconsideration are reviewed by this Court for abuse of discretion. *West v. Dep't of Licensing*, 182 Wn. App. 500, 331 P.3d 72 (2014). This Court will find a trial court abused its discretion "only when no reasonable judge would have reached the same conclusion." *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). (internal quotations and citation omitted).

The State filed its motion for reconsideration of the trial court's erroneous ruling suppressing the evidence recovered from as a result of the search warrant one day after the findings of fact and conclusions of law were entered. RP 33-35, 43-45; CP 50-112. The State's argument was as argued above. CP 50-112.

The State acknowledges the criminal rules do not specifically mention motions for reconsideration. However, “[w]here the criminal rules are silent, the civil rules can be instructive as to matters of procedure.” *State v. Hackett*, 122 Wn.2d 165, 170 857 P.2d 1026 (1993). Pursuant to the Rules of Civil Procedure, a motion for reconsideration must be filed within 10 days of the decision that is being considered. CR 59. The hearing must be held within 30 days of the entry of order or decision being considered. *Id.*

The trial court found the State’s motion untimely, insinuating, but not stating explicitly on the record, that it should have been filed 10 days after the trial court’s oral ruling for it to be timely. RP 44-45. The State explained it could not have written the motion for reconsideration before the actual order, with the findings of fact and conclusions of law, was entered the day before. RP 44. The trial court responded, “Why not?” The State responded, “Because I have to have the written order. I can’t ask for reconsideration without the findings and conclusions.” RP 44. The trial court then asked if the motion had been filed and the State explained it had just been filed, as it had written the reconsideration motion as quickly as possible. RP 44-45. The trial court then stated, “Well, I don’t know which trials have been confirmed or not for next week. That basically gives us

two days to handle this, and I don't find that it's timely, so I'm going to deny the motion." RP 45.

The State acknowledges under CR 59 one interpretation would be, in a suppression hearing such as the one at question here, an oral ruling may be sufficient to file a motion for reconsideration, but in Lewis County Superior Court an oral ruling is not sufficient. CR 59; LCR 7. The local court rule, effective September 1, 2001, requires the motion to be made ten days after entry of the judgment or order. LCR 7(5). There is no order entered in a denial of a suppression hearing until the findings of fact and conclusions of law are entered by the trial court.

Therefore, pursuant to Lewis County local court rule the State could not have filed its motion for reconsideration before the findings of fact and conclusions of law were entered. The findings of fact and conclusions of law were entered on May 22, 2018. CP 39-49. The State filed its motion for reconsideration on May 23, 2019. CP 50-112. Absent filing the motion for reconsideration contemporaneously with the entry of the findings of fact and conclusions of law, it is unfathomable how the State could more timely file such a motion. The trial court's determination the State's motion was untimely was an abuse of discretion as no reasonable judge would have

determined a motion for reconsideration, filed one day after the order was entered, was untimely. This Court should reverse the trial court's rulings, remand Durone's matter back to the trial court, and allow the State to proceed with the prosecution of this case.

V. CONCLUSION

The trial court erroneously ruled the warrant issued by the independent, district court judge, was overbroad due to lacking particularity for the items to be seized. The trial court incorrectly reviewed the probable cause of the affidavit of the search warrant for the crime of controlled substance and erroneously stated it was conducting the probable cause analysis set forth in *Higgins*. This incorrect application of law led the trial correct to incorrectly hold the search warrant lacked probable cause for the crimes of controlled substance. The categories described in the search warrant were sufficiently particular to meet the particularity requirement of the Fourth Amendment. Finally, the trial court abused its discretion when it denied the State's motion for reconsideration for being untimely.

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This Court should reverse the trial court and remand the matter to allow the State to reinstate its prosecution of Druone.

RESPECTFULLY submitted this 14th day of October, 2019.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

Appendix A

Findings of Fact and Conclusions of Law



FILED
Lewis County Superior Court
Clerk's Office

MAY 22 2019

Scott Tinney, Clerk

By _____, Deputy

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

ARTHUR S. DURONE,

Defendant.

No. 18-1-01044-21

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER RE: MOTION TO
SUPPRESS EVIDENCE UNDER CrR 3.6

On May 10, 2019, the Court held a hearing on Defendant's Motions to Suppress Evidence pursuant to CrR 3.6. The Defendant was present and represented by attorney Shane O'Rourke and the State was present and represented by Deputy Prosecuting Attorney Karin Phomma.

The Court had previously read the Defendants' Motion and Brief along with attachments, the State's Response Brief and attachments, and reviewed the court file. At the hearing, the Court heard argument from both parties.

The Court now makes the following written Findings of Fact, Conclusions of Law and Order granting the Defendant's Motion pursuant to CrR 3.6 to suppress all evidence obtained from the search warrant in this case.

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I. FINDINGS OF FACT

1.1 The statements of facts submitted by the parties and the police report attached to the Defendant's briefing were reviewed and considered by the Court.

1.2 On December 30, 2018, Trooper Blake Wilson of the Washington State Patrol conducted a traffic stop of the Defendant's vehicle that led to the Defendant's arrest and an inventory of his vehicle being conducted.

1.3 While conducting the inventory of the Defendant's vehicle Trooper Wilson located firearms, which cannot be left in the vehicle pursuant to Washington State Patrol policy.

1.4 While retrieving the firearms Trooper Wilson observed a glass cylindrical smoking device with a bulb on the end containing a substance Trooper Wilson, through his training and experience, believed to be an illegal substance.

1.5 After arresting the Defendant a records check through dispatch advised Trooper Wilson the Defendant had a prior felony conviction.

1.6 After the inventory of the vehicle, conversations with the Defendant, and a record check from dispatch, Trooper Wilson believed he had established probable cause for criminal activity and certain evidence of crimes, Possession of a Controlled Substance and Unlawful Possession of a Firearm (Felon in Possession of a Firearm), located in the Defendant's vehicle.

1.7 Trooper Wilson prepared an electronic probable cause affidavit and proposed search warrant, which he emailed to the magistrate. (Attached hereto as Appendix A, and incorporated herein by reference)

1.8 The magistrate found probable cause and issued the search warrant specifically for the crimes of: 1) Possession of a Controlled Substance, 2) Possession of Drug Paraphernalia, and 3) Felon in Possession of a Firearm. The search warrant authorizes the seizure of all items of evidence of the crimes listed in the search warrant.

1 1.9 The probable cause affidavit and search warrant in controversy in this case,
2 18Y390, were submitted by both parties in briefing and are the documents this
3 Court ruled on.
4

5 **II. CONCLUSIONS OF LAW**

6 2.1 The Court considered three factors, "(1) whether probable cause exists to
7 seize all items of a particular type described in the warrant, (2) whether the
8 warrant sets out objective standards by which executing officers can
9 differentiate items subject to seizure from those which are not, and (3) whether
10 the government was able to describe the items more particularity in light of the
11 information available to it at the time the warrant was issued" when evaluating
12 if the warrant is overbroad. *State v. Higgins*, 136 Wn. App. 87, 91-92, 147 P.3d
13 649 (2006), *citing*, *United States v. Mann*, 389 F.3d 869, 878 (9th Cir. 2004).

14 2.2 The search warrant failed to specify the items the officer was to search for or
15 seize, even in broad or general categories or terms. The search warrant's
16 language allowing the officer to search for and seize any evidence of the listed
17 crimes lacked particularity.

18 2.3 Pursuant to *Higgins* there was probable cause to seize all the firearms, as they
19 were visible and there was no evidence Trooper Wilson was looking for other
20 items.

21 2.4 Pursuant to *Higgins*, the Court considered what was searched for and/or found,
22 when it determined if probable cause existed for Possession of a Controlled
23 Substances. The Court concludes probable cause did not exist in the search
24 warrant affidavit for any controlled substance crimes because the only
25 reference to anything related to controlled substances in the affidavit was
26 mention of a glass smoking device believed to contain an illegal substance
27 based on the officer's training and experience; however, the search warrant
28 never established what was to be searched for and the officer ultimately
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1 searched for and seized marijuana and a number of other items including other
2 controlled substances.

3 2.5 The search warrant did not set objective standards by which an officer could
4 differentiate between items subject to seizure and those not for either the crime
5 of unlawful possession of a firearm or possession of a controlled substance.
6 The search warrant left to the officer's sole discretion what constituted
7 "evidence of a crime" without any specificity or limitation. Since these are
8 possessory crimes, this could include other items such as vehicle registration
9 or title, receipts, and any other non-illicit evidence.

10 2.6 The officer could have described the items to be searched for and seized more
11 particularly in light of the information available to him at the time, but only listed
12 the named crimes and asked to search for "evidence of" those crimes. The
13 officer under the circumstances could have requested authority to search for
14 and seize "firearms and ammunition" and "controlled substances and drug
15 paraphernalia" without specific firearms or substances, but the warrant as
16 written did not contain any limitation on evidence to be seized.

17 2.7 The search warrant is overbroad, as it failed to meet the particularity
18 requirement.

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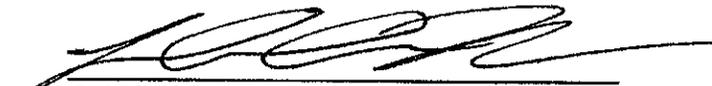
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III. ORDER

3.1 All evidence that was seized solely pursuant to the search warrant in this case is suppressed.

DATED this 22nd day of May 2019.



SUPERIOR COURT JUDGE

Copy received by:

And by:





KARIN PHOMMA, WSBA 47960
Deputy Prosecuting Attorney 35564
Sara I. Beigh

SHANE O'ROURKE, WSBA 39927
Attorney for Defendant

APPENDIX A

RECEIVED

DEC 31 2018

LEWIS COUNTY

IN THE DISTRICT COURT OF JUDICIAL DISTRICT NO. 1 OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

FILED

DEC 31 2018

Lewis County District Court

RE:

No. 18 - 034678

18Y 390

A silver 1997 Ford F-250 pickup bearing Oregon State license plate 769FVP and VIN 1FTFX28L4VKC84860.

DECLARATION UNDER PENALTY OF PERJURY IN SUPPORT OF A SEARCH WARRANT

This declaration and search warrant are being sent to the judge at the following email address: Judge Samuelson at: searchwarrants1@lewiscountywa.gov.
 Judge R.W. Buzzard at: searchwarrants2@lewiscountywa.gov.

This declaration and search warrant were read to the undersigned judge over the telephone.

The undersigned under penalty of perjury of the laws of the State of Washington, declares as follows:

I believe that evidence exists in the above described item/place to be searched of the crime(s) of:
1. Possession of a Controlled Substance
2. Possession of Drug Paraphernalia
3. Felon in Possession of a Firearm.

My belief is based upon the following facts and circumstances:

DECLARANT'S EXPERIENCE

Trooper Blake Willson; I have served as a Washington State Trooper for 5 years. My training and experience regarding investigations of the above crime(s) includes the following:

- Winlock Reserve Academy LCSO
- Washington State Patrol Basic Academy
- Desert Snow Drug Interdiction Training
- Drug Recognition Expert School

Additional training and experience:

I also served with the Lewis County Sheriff's Office for 2 years as a reserve deputy prior to becoming a WSP trooper.

FACTS SPECIFIC TO THIS INVESTIGATION

The undersigned further declares under penalty of perjury of the laws of the State of Washington as follows:

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On 12-30-18 at 0205, I stopped the above pickup for traveling above the posted speed limit southbound on I-5 near milepost 81. I identified the driver of the pickup as Durone, Arthur S. 708-30-63 by his Oregon State Identification Card and Durone admitted he did not have a license. A driver check of Durone through WSP Communications revealed his license was suspended out of Oregon.

Durone did not have anyone available within a reasonable distance to come pickup the truck and I called for a tow. During the inventory of the vehicle, I observed firearms which cannot be left in the vehicle according to WSP policy. While attempting to retrieve the firearms, I observed a clear, glass cylindrical smoking device with a bulb at the end that contained a substance inside which I believed to be an illegal substance. I recognized the glass device as a device used in smoking illegal substances, based on my training and experience.

After arresting Durone for the above crimes, I checked with WSP Communications to see if Durone was legally allowed to have the above firearms in his possession. WSP Communication advised Durone had been convicted of a drug felony in 2000 and would not be allowed to have firearms in his possession.

Declarant proposes that the search will be completed within 10 days of this date.

ITEMS TO BE SEARCHED FOR

- Evidence of the crime(s) of:
- 1. Possession of a Controlled Substance
- 2. Possession of Drug Paraphernalia
- 3. Felon in Possession of a Firearm.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, and is based on my best knowledge, information and belief.

Signed this 30th day of December, 2018, at

Lewis County Washington.

Law Enforcement Officer's Signature /s/Blake Willson

Law Enforcement Officer's Full Name Blake Andrew Willson

Agency Badge/Serial or Personnel Number #1172

Agency Name STATE OF WASHINGTON
Washington State Patrol

The undersigned does hereby certify that the foregoing is a true and correct copy of the original on file in the office of the Lewis County District Court.

Dated this 31 day of December, 2018

Darel Dibble
Lewis County District Court Clerk

By Daniel Sell Deputy

18-1-01044-21 / 17

FILED
DEC 31 2018
Lewis County District Court

STATE OF WASHINGTON)

County of Lewis)

The undersigned does hereby certify that the foregoing is a true and correct copy of the original on file in the office of the Lewis County District Court

Dated this 31 day of December, 2018

Dorel Dioble
Lewis County District Court Clerk

By Dana Soler Deputy

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

RE:

A silver 1997 Ford F-250 pickup bearing Oregon State license plate 769FVP and VIN 1FTFX28L4VKC84860.

No. 18 - 034678

18Y390
SEARCH WARRANT

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON:

The Court finds that based on the *Declaration Under Penalty of Perjury in Support of a Search Warrant* filed herewith, there is probable cause to believe that evidence of the crime(s) listed below is present in the item/place to be searched, and that grounds for the issuance of a search warrant exist, specifically for the crimes of:

1. Possession of a Controlled Substance
2. Possession of Drug Paraphernalia
3. Felon in Possession of a Firearm.

YOU ARE COMMANDED TO:

1. Search: *the aforementioned vehicle in its entirety, from the top of the roof, to the bottom of the tires, from the very front of the front bumper, to the very rear of the rear bumper, all voids and recesses.*
2. Seize all items of evidence of the crime(s) listed above.
3. The search, and seizure of evidence, shall be conducted within 10 days of this date.
4. Promptly return this warrant to the clerk of this Court. The return must include an inventory of all property seized.

18-1-01044-21 / 18

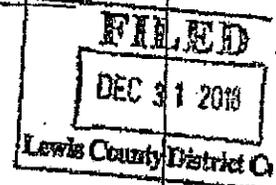
1 A copy of this warrant shall be served on the person or persons found in possession of the
2 item/property described, and that person shall be given a receipt for the evidence seized.

3 Dated this 30th day of December 2018 @ 0344 hrs

4 Wade S. Samuelson

5 Wade S. Samuelson, JUDGE

6 This warrant was issued by the above Judge on Day: December 30th at Time: 0344 hrs



9 STATE OF WASHINGTON

) No. 18 - 034678

) RETURN ON SEARCH WARRANT

11 County of Lewis

) 187390

13 I certify that I received the attached search warrant on the 30th day of December 2018, and that
14 pursuant to the command therein contained, I made a diligent search of the property described
therein and found the following:

- 15 1. CLEAR GLASS SMOKING DEVICE WITH RESIDUE OF SUBSTANCE.
- 16 2. TIN CAN WITH BAGGIE OF WHITE POWDER.
- 17 3. GREEN BAGGIE WITH BROWN GRANULATE
- 18 4. MASON JAR AND PAN WITH BROWN WAX SUBSTANCE & M.J.
- 19 5. 2 RIFLES, 1 SHOTGUN & 1 REVOLVER.

21 PROPERTY NUMBERS:

22 Case # 18 - 034678 - 001 was used for

23 DRUGS/PARAPHERNALIA, 002 FOR FIREARMS.

24 A true and complete copy of the Search Warrant was given to the defendant.

25 The search was conducted at southbound I-5 MP 80 in Chehalis, Lewis County, Washington on
26 the 30th day of December 2018 at approximately 0345.

1 On the 30th day of December, 2018, the seized items were placed into the Washington State
2 Patrol Evidence System.
3 Dated this 30th day of December, 2018
4 By /s/Blake Willson
5 Trooper Blake Willson # 1172
6 State of Washington
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Appendix B

LCR No. 7



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Lewis County Superior Court

LCR NO. 7

PLEADINGS ALLOWED; FORM OF MOTIONS

A. Motions and other papers

1. How Made

Reapplication for order. When an order has been applied for and refused in whole or in part (unless without prejudice), or has been granted conditionally and the condition has not been performed, the same application for an order shall not be presented to another Judge or Commissioner. If a subsequent application is made upon a different statement of facts or law, it shall be shown by affidavit or certified statement what application was made, when and to what Judge or Commissioner, what order or decision was made thereon; and what new facts or law are claimed to be shown.

Failure to comply with this requirement shall, at the request of an opposing party or counsel, result in any order thus obtained being set aside and terms assessed against the counsel or party obtaining the order.

2. Form

All motions and responses or replies thereto shall be in writing, shall be typewritten, or hand printed and shall be presented on paper 8-1/2 by 11 inches in size, on paper containing a vertical line of numbers at the left margin, and shall be double spaced. No pleadings shall be filed or presented which are hand written in cursive form, unless a typed or hand printed version of such pleading is attached to such pleading. The court shall not consider any hand written or cursive pleading without such a typed or hand printed version attached, for any purpose.

3. Required Provisions in Orders Mandating Personal Appearance

In all proceedings wherein an order is to be issued requiring or mandating the personal attendance of a person or a party in open court, the order shall include the following words in capital letters:

YOUR FAILURE TO APPEAR AS ABOVE SET FORTH AT THE TIME, DATE AND PLACE STATED MAY CAUSE THE COURT TO ISSUE A BENCH WARRANT FOR YOUR APPREHENSION AND CONFINEMENT IN JAIL UNTIL SUCH TIME AS THE MATTER CAN BE HEARD OR UNTIL BAIL IS POSTED.

No bench warrant shall be issued in such cases for the apprehension of the cited person if such language has been omitted.

4. Failure to Appear

If the party noting a motion fails to appear for the scheduled hearing, and the opposing party appears, the motion shall be denied or stricken. If the moving party appears and the opposing party does not appear the requested relief shall be granted, if warranted. If neither the moving nor the responding party appears, the motion shall be stricken.

5. Motions For Reconsideration

A. Motions for reconsideration of rulings and all pleadings and documents in support thereof, must be filed and served on opposing counsel, or the opposing party, if unrepresented, and a copy delivered to the Judge or Commissioner making the ruling, within ten (10) days after entry of the judgment or order. Such pleadings shall set forth specific grounds for the reconsideration, and the arguments and authorities in support thereof.

B. The opposing party may, within ten (10) days after receipt of the motion, file and serve on the moving party, and the Judge or Commissioner making the ruling, pleadings and documents in opposition.

C. Each party shall prepare and include in the materials submitted, a proposed order sustaining their respective position on such motion.

D. Oral argument on a motion for reconsideration shall be scheduled only if so ordered by the Judge or Commissioner to whom

the motion is submitted. In no case shall a motion for reconsideration be noted for hearing on the motion calendar unless ordered by the Judge or Commissioner to whom the matter has been submitted. Twenty days after a motion for reconsideration has been submitted and served upon the parties or their counsel as provided for in this rule, and no ruling has been made, either party may submit to the Judge or Commissioner a certification that the matter is ready for a ruling on the motion for reconsideration.

B. Filing of Documents

1. Filing: Case Numbers

Except in consolidated cases, no documents shall be filed with more than one case number, unless sufficient copies are simultaneously provided for each case. Where there are multiple case numbers and no copies provided, the clerk shall place the documents only in the first case number designated.

(effective September 1, 2001)

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TRANSLATION

- 中文形式/Chinese
- 한국어서류/Kor
- Русский/Russian
- Español/Spanish
- Tiếng Việt/Viet



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LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

October 14, 2019 - 3:59 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53383-9
Appellate Court Case Title: State of Washington, Appellant v. Arthur S. Durone, Respondent
Superior Court Case Number: 18-1-01044-1

The following documents have been uploaded:

- 533839_Briefs_20191014155839D2749800_6485.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Durone.art Opening Brief 53383-9.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- greg@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Teri Bryant - Email: teri.bryant@lewiscountywa.gov

Filing on Behalf of: Sara I Beigh - Email: sara.beigh@lewiscountywa.gov (Alternate Email: teri.bryant@lewiscountywa.gov)

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2nd Floor
Chehalis, WA, 98532
Phone: (360) 740-1240

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