

NO. 282660

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN CHARLES BRANDMIRE,

Appellant.

---

BRIEF OF RESPONDENT

---

David B. Trefry WSBA #16050  
Special Deputy Prosecuting Attorney  
Attorney for Respondent

JAMES P. HAGARTY  
Yakima County Prosecuting Attorney  
128 N. 2d St. Rm. 329  
Yakima, WA 98901-2621

NO. 282660

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN CHARLES BRANDMIRE,

Appellant.

---

BRIEF OF RESPONDENT

---

David B. Trefry WSBA #16050  
Special Deputy Prosecuting Attorney  
Attorney for Respondent

JAMES P. HAGARTY  
Yakima County Prosecuting Attorney  
128 N. 2d St. Rm. 329  
Yakima, WA 98901-2621

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	ii-iii
I. <u>ASSIGNMENTS OF ERROR</u> .....	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u> .....	1
1. Did the trial court err when it denied appellant’s motion to suppress?.....	1
2. Did the trial court err when it found probable cause to issue the search warrant for the driver’s area of the car in which appellant was the operator and sole occupant? .....	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u> .....	1
1. The officer’s detention of Brandmire was clearly based upon reasonable suspicion which arose from specific, articulable facts that criminal activity was occurring .....	1
2. The record before the issuing magistrate was sufficient to support her determination of probable cause. This record supports the trial court. The information supplied to both the issuing judge and the judge who denied the motion to suppress established probable cause, this discretionary acts should be overturned.....	1
II. <u>STATEMENT OF THE CASE</u> .....	1
III. <u>ARGUMENT</u> .....	1
RESPONSE TO ASSIGNMENT OF ERROR ONE- THE DETENTION OF BRANDMIRE WAS REASONABLE.....	1
RESPONSE TO ASSIGNMENTS OF ERROR TWO – THERE WAS SUFFICIENT INFORMATION TO ESTALBISH PROBALBE CAUSE.....	16
IV. <u>CONCLUSION</u> .....	23

TABLE OF AUTHORITIES

PAGE

**Cases**

In re Det. Of Peterson, 145 Wn.2d. 789, 42 P.3d 952 (2002)..... 16

State v. Afana, 147 Wn.App. 843, 196 P.3d 770 (2008),  
review granted, 166 Wn.2d 1001, 208 P.3d 1123 (2009)..... 10

State v. Anderson, 105 Wn.App. 223, 19 P.3d 1094 (2001) ..... 23

State v. Atchley, 142 Wn.App. 147, 173 P.3d 323 (2007) ..... 8

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995)..... 22

State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003) ..... 22

State v. Lee, 147 Wn.App. 912, 199 P.3d 445 (2008)..... 14

State v. Maddox, 152 Wn.2d 499, 98 P.3d 1199 (2004)..... 17

State v. Mote, 129 Wn.App. 276, 120 P.3d 596 (2005)..... 10

State v Ng, 104Wn.2d 763, 713 P.2d 63 (1985)..... 2, 12, 13

State v. Nusbaum, 126 Wn.App. 160, 107 P.3d 768 (2005)..... 16, 17

State v. Sieler, 95 Wn.2d 44, 621 P.2d 1272 (1980)..... 13

State v. Solberg, 66 Wn.App. 66, 831 P.2d 754 (1992)..... 2, 13

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (2007) ..... 1, 22

State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999)..... 22

State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994)..... 22

TABLE OF AUTHORITIES (continued)

PAGE

**Federal Cases**

Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380,  
82 L.Ed.2d 599 (1984)..... 2, 12

**Rules**

CrR 3.6 ..... 24

CrR3.6(a) ..... 17

RAP10.3(b) ..... 1

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Did the trial court err when it denied appellant's motion to suppress?
2. Did the trial court err when it found probable cause to issue the search warrant for the driver's area of the car in which appellant was the operator and sole occupant?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The officer's detention of Brandmire was clearly based upon reasonable suspicion which arose from specific, articulable facts that criminal activity was occurring.

2. The record before the issuing magistrate was sufficient to support her determination of probable cause. This record supports the trial court. The information supplied to both the issuing judge and the judge who denied the motion to suppress established probable cause, this discretionary acts should not be overturned.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific areas of the record.

III. ARGUMENT.

**RESPONSE TO ASSIGNMENT OF ERROR ONE - THE  
DETENTION OF BRANDMIRE WAS REASONABLE.**

The Findings of Fact and Conclusions of Law were filed at a much later date. They have not been challenged, Stenson, infra.

These findings specifically address the issue of detention. The Court states “the information available to Officer Glasenapp justified the detention of Mr. Brandmire and his vehicle pending the application for and issuance of a search warrant. A named citizen, Paul Jepson, observed the defendant in a specifically described vehicle at an identified location [Cenex gas station] and he engaged in behavior which was wholly consistent with ingesting controlled substances. Mr. Jepson was concerned the defendant would be proceeding down the road under the influence of drugs and thereby pose (sic) a hazard to the public. Additionally, Mr. Jepson was a chemical dependency counselor which added to his basis of knowledge. Finally, the defendant’s eyes were noted to be dilated, which is symptomatic of being under the influence of some type of drug.” (CP 52-53) The court then sets forth case law to support it’s ruling; Segura v. United States, 468 US 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), State v. Ng, 104 Wn. 2d 763, 713 P.2d 63 (1985), State v. Solberg, 66 Wn. App. 66, 831 P.2d 754 (1992). (CP 23, 53)

It would be hard to find a more clear, concise and accurate presentation of facts and law which would support the State’s contention that the detention of Brandmire was legal and justified.

The reviewing magistrate also specifically addresses the passage of time; "...the passage of time did not turn the process into an illegal search." The court cites "Ng" and the state Supreme Courts analysis wherein the passage of from 6:30 a.m. to 2 p.m. was not found to be "expeditious."

In the trial court the State filed a supplemental response to the motion to suppress. Attached to this supplemental motion was "Grandview Police Officer K. Glasenapp's detailed report." (CP 29) That report and the information in the Supplemental Report of Proceeding establish that there was a reasonable articulable suspicion of criminal activity occurring when the officer contacted Brandmire. Specifically the officer states:

"I talked with the witness Paul Jepson by phone. Jepson reported that he observed a white male, approximately 20-30 years of age snorting something, possibly cocaine. The male was said to be sitting in the driver's seat at the gas pumps, however not pumping gas. The vehicle the male was in had a plate similar to 779 PFX. I arrived at the Cennex Gas Station to find the vehicle at the pump. The vehicle had Washington license 779 PXF, and the driver still was not pumping fuel. The male, later identified as Stephen Charles Brandmire (DOB) 09-15-83 looked back when I

pulled in behind him, lowered his right arm towards the floor board and shifted his body forward.”

This report mirrors the information supplied to the judge who issued the two search warrants. The supplemental VRP – captioned “Telephone application for search warrant” sets forth more than sufficient information upon which the trial court could and did find there was reasonable basis to detain Brandmire while the officer made application for both search warrants. The information supplied was sufficient to supply probable cause to issue the search warrant for Brandmire’s vehicle.

Officer Glasenapp states the following to the issuing judge:

Officer Glasenapp talked with the witness, Paul Gebson by phone. Paul Gebson is a good citizen source of information that was providing the witness statement for no financial or personal gain and only to protect other citizens from the dangers of a person driving under the influence of drugs. Officer Glasenapp does not believe Paul Gebson has a criminal background. Paul Gebson reported that he observed a white male approximately 20 to 30 years of age snorting something, possibly cocaine. The male was said to be sitting in the driver’s seat at the gas pump, however, not pumping gas. The vehicle (sic) the male was in -- the vehicle the male was in with the plates (inaudible) 779 CFX (sic). Officer Glasenapp contacted the (inaudible) by phone and asked for a background and drug use (phonetic). He says he is a drug and alcohol counselor since 1999. He stated that snorting and moving something away from his nose

was consistent with snorting cocaine or another drug, based on his experience. He stated it wasn't a rag that he pulled away from his face (inaudible) he wasn't huffing anything. (Inaudible) was unable to write a statement immediately based upon him being on his way to Spokane, and stated he would be back tomorrow and come in tomorrow to write a statement.

Officer Glasenapp arrived at the Cenix gas station to find the vehicle at the pump. The vehicle had Washington license plate 779 Paul X-Ray Frank, and the drive still was not pumping fuel. The male later identified as Stephen Charles Brandmire, date of birth 09/15/83. Brandmire, in a furtive movement had looked back when Officer Glasenapp pulled in behind him, lowered his right arm towards the floorboard and shifted his body forward.

...

Officer Martin of the Grandview Police Department checked Brandmire's eyes and told me they were constricted. The sun was brightly shining. Officer Martin requested to shine light in Brandmire's eyes. Brandmire approved. Officer Martin observed no changes in eye constriction while using his flashlight, which is common for persons under the influence. (Supplemental RP 1-3)

This information was more than sufficient to establish a reasonable articulable basis for the detention of Brandmire. The witness, Gepson, stated that his concern was that Brandmire not operate his vehicle under the influence of controlled substances. (The witness' name is spelled Gepson, Jeppson and Jepson at various places throughout the record.) The two officers contacted

Brandmire and in a very short time confirmed through their observations that Brandmire was probably under the influence of some type of narcotic. At that point they had a duty to continue the detention. The detention to that point had been minimal and was done in a manner to confirm this report from a know party who was willing to be named, write a report and who had been an alcohol and drug counselor for approximately ten years and who's background, training and knowledge was such that the his information alone would have been sufficient for a search warrant not just the minimal detention which ensued.

Officer Glasenapp then goes on "I contacted the PR by phone and asked what his background in drugs is. He stated he has been a drug and alcohol counselor since 1999. He stated the snorting and moving something away from his nose was consistent with snorting cocaine or another drug based on his experience. He state it was not a rag that he pulled away from his face, so he wasn't huffing anything. Jepson was unable to write a statement Immediately (sic) based on him being on his way to Spokane, but stated he will be back tomorrow and can come in tomorrow to write a statement." (CP 31-33, 50-54, Supplemental RP 1-15)

Brandmire's claim that his actions could just as easily be

that of a person blowing their nose and that there were no “snortable” drugs found is not supported by the very explicit statements made by the named citizen witness, Paul Jeppson, observations based upon his years as a drug and alcohol dependency counselor. When contacted by the officer Mr. Jeppson states explicitly that Brandmire did not have a rag to his face, that he was not huffing, directly contradicting this allegation by Brandmire. The findings state “Upon search of the vehicle after issuance of the search warrant Officer Glasenapp located marijuana, a bindle of methamphetamine, two glass pipes with methamphetamine residue, a class pipe with burnt marijuana, ...a scale....” (CP 57) (Emphasis mine.)

Further, the report submitted along with State’s supplemental motion indicates that found within the vehicle was “a bindle of white crystalline substance from the center console that field tested positive for the presence of methamphetamine. The suspected meth weighed .7 grams after it was field tested.” (CP 32) While this was apparently not tested or admitted in trial it is still a fact before this court. (RP 47-51) This same page lists numerous drugs and drug paraphernalia found by the officer. This included pipes- with burnt meth and marijuana residue,

marijuana, a scale, white prescription pills,

This officer did not stop Brandmire he merely contacted him in a public location. At a set of gas pumps were Brandmire had apparently been sitting for some period of time without pumping gas. The officer did not have his weapon drawn, his lights and siren had not been activated and Brandmire was not placed under arrest at the time of the initial contact. The officer never informed Brandmire that he could not leave and he never placed him under arrest. (RP 25-27) The facts that were supplied to the officer were not from some unknown source or some paid informant. They were from a trained drug counselor acting as a concerned citizen willing to be named and who was named. The day following Brandmire's arrest Mr. Jeppson came to the police department and made a statement which was sent out as part of discovery. (RP 27-28)

State v. Atchley, 142 Wn. App. 147, 162-63, 173 P.3d 323 (2007):

The credibility of a confidential informant depends on whether the informant is a private citizen or a professional informant, and, if a citizen informant, whether his or her identity is known to the police. *State v. Ibarra*, 61 Wash.App. 695, 699, 812 P.2d 114 (1991). When the identity of an informant is known, the necessary showing of reliability is relaxed, as

the information is less likely to be given in self-interest. *State v. Gaddy*, 152 Wash.2d 64, 72-73, 93 P.3d 872 (2004).

However, Washington requires a heightened showing of credibility for citizen informants whose identity is known to police but not disclosed to the magistrate. *Ibarra*, 61 Wash.App. at 700, 812 P.2d 114. To address concerns that the confidential citizen informant is not an "anonymous troublemaker," the affidavit must contain "background facts to support a reasonable inference that the information is credible and without motive to falsify." *Cole*, 128 Wash.2d at 287-88, 906 P.2d 925.

Here, there was sufficient evidence that the credibility of the informant was established. The informant provided his or her name and other contact information to police. The informant received no compensation or other reward in return for the tip. A background check revealed nothing to give Deputy Rosenthal reason to suspect the information provided was false. The informant said his or her reason for coming forward was to assist law enforcement in ridding the community of suspected narcotic manufacturers and traffickers.

The remaining issue under *Aguilar-Spinelli* is whether the affidavit established the confidential informant's basis of knowledge. In order to satisfy this second prong, the affiant "must explain how the informant claims to have come by the information" and "the informant must declare that he personally has seen the facts asserted and is passing on firsthand information." *Jackson*, 102 Wash.2d at 437, 688 P.2d 136

This is far from some anonymous person who calls dispatch to report some innocent act of a person blowing his nose.

There was also the furtive movements by Brandmire as the officer pulled in behind Brandmire's vehicle, "...I pulled up behind his vehicle so we were facing the same way, which was, I believe, west. I observed him shift his body forward and lower his arm – or what looked like lowering his arm toward the floorboards." There was also the information that was developed by the second officer who came to assist. This officer, Officer Martin stated to Officer Glasenapp that Brandmire's pupils were non reactive to light an indication to officer Glasenapp that Brandmire was under the influence (RP 25-28)

While it is true Brandmire was in a vehicle at the time of the contact this was not a vehicle stop. It is far more akin to a contact by an officer on the street of a person. This contact is far more akin to State v. Afana, 147 Wn. App. 843, 196 P.3d 770 (2008), review granted, 166 Wn.2d 1001, 208 P.3d 1123 (2009) or State v. Mote, 129 Wn. App. 276, 120 P.3d 596 (2005), than to cases cited by Brandmire. In Mote at 599, the court states:

Under the Washington Constitution, "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. It is well settled that article I, section 7 provides greater protection of a person's right to privacy than the Fourth Amendment. The right to be free of

unreasonable governmental intrusion into an individual's private affairs encompasses automobiles. The individual asserting a seizure in violation of article I, section 7 bears the burden of proving that there was a seizure. Where the facts are undisputed, the determination of whether there is a violation of article I, section 7 is a question of law reviewed de novo

Not every encounter between a police officer and a private individual constitutes an official intrusion requiring objective justification. Article I, section 7 permits social contacts between police and citizens.. An officer's mere social contact with an individual in a public place with a request for identifying information, without more, is not a seizure or an investigative detention. This is true even when the officer subjectively suspects the possibility of criminal activity, but does not have suspicion justifying a *Terry* stop. Police officers must be able to approach citizens and permissively inquire into whether they will answer questions as part of their "community caretaking" function....

Occupants in vehicles parked in public places are like pedestrians for purposes of article I, section 7 seizure analysis. As the *O'Neill* court held, the distinction between a pedestrian and the occupant of a vehicle dissipates when a vehicle is parked in a public place.. The reasoning of *Rankin* and similar cases is centered on the fact that a driver's traffic infraction gives an officer cause to pull a vehicle over and get the driver's, but not the passenger's, identification. This reasoning does not apply to distinguish occupants in cars parked in public places from pedestrians.

The broad statement in *Rankin* that passengers cannot be asked for identification absent independent cause does not reach occupants in cars parked in public places who happen not to

be in the driver's seat. When an officer makes a social contact with occupants of a car parked in a public place, the officer has no *cause* to seek identification from either the driver *or* other occupants. It is irrelevant to the officer the position in which a particular occupant is seated. Rather the officer is seeking to talk with all the occupants and find out what is going on. The basis for making a social contact with occupants of a parked vehicle is the same basis for making a social contact with a pedestrian: that police officers may engage citizens in conversation in public places even when there is not enough suspicion to justify a *Terry* stop. Such social contact is permitted under article I, section 7 and is not an investigative detention. It is likely for this reason that the *O'Neill* court used the term "occupant" rather than "driver" or "passenger" to describe persons in a parked vehicle. (Citations omitted.)

This initial contact by the officer was not a seizure of Brandmire. It is the State's position that occurred when the consent to search was denied and the officer believed that he had probable cause to search the car. At that time Brandmire was placed in custody and handcuffed. There was nothing further done with his vehicle until and independent magistrate had authorized the issuance of a search warrant, based on probable cause. The Honorable Michael McCarthy cites Segura v. United States, 468 US 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), State v. Ng, 104

Wn. 2d 763, 713 P.2d 63 (1985), State v. Solberg, 66 Wn. App. 66, 831 P.2d 754 (1992). (CP 23)

Cases such as State v. Sieler, 95 Wn.2d 44, 621 P.2d 1272 (1980) where an unidentified informant called in stating there was criminal activity occurring are clearly distinguishable. In the present case the party who made contact with the police department could be called a citizen informant. He called the police department and according to the police report contained in the record he spoke to the officer who responded to the location where Brandmire sat parked. This was a public location where the witness stated that he had just personally seen Brandmire snorting something. He states that when he arrived minutes later Brandmire was still parked. After his initial contact, a very minimal and nonintrusive contact, the officer called Mr. Jeppson and spoke to him again, this time to further inquire of him his background or knowledge of drugs. As fate you have it Mr. Jeppson is an alcohol and drug dependency counselor and had been since 1999. (CP 29-33) The makes this case distinguishable from Sieler.

The judge who issued the search warrant obviously agreed with the officer that there was probable cause, she issued the

warrant. The problem here is that information, as discussed below is not before this court. Therefore it would be the position of the State that because there was probable cause found by the issuing magistrate there was logically a reasonable articulable suspicion of criminal activity occurring when the officer made contact with and first spoke to Brandmire.

Brandmire cites State v. Lee, 147 Wn. App. 912, ,916-19, 199 P.3d 445 (2008):

Police may conduct an investigatory stop if the officer has a reasonable and articulable suspicion that the individual is involved in criminal activity." A reasonable suspicion is the " substantial possibility that criminal conduct has occurred or is about to occur." For over 25 years, when determining whether police have a reasonable suspicion sufficient to justify an investigatory detention, or *Terry* stop, under the Fourth Amendment of the United States Constitution and article I, section 7 of our state constitution, courts have applied the totality of the circumstances test, rather than the *Aguilar - Spinelli* test.. As such, "[w]ith the Supreme Court's adoption of the ' totality of the circumstances' approach to probable cause in *Illinois v. Gates*, the veracity element does not have the independent significance it once had." In fact, a reasonable suspicion can arise from information that is less reliable than that required to establish probable cause.

Specifically, "[t]he reasonableness of the officer's suspicion is determined by the totality of the circumstances known to the officer at the inception of the stop. The totality of the circumstances test allows the court and police

officers to consider several factors when deciding whether a *Terry* stop based on an informant's tip is allowable, such as the nature of the crime, the officer's experience, and whether the officer's own observations corroborate information from the informant. Moreover, " the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."

**A citizen-witness's credibility is enhanced when he or she purports to be an eyewitness to the events described. *State v. Vandover*, 63 Wash.App. 754, 759, 822 P.2d 784 (1992); *United States v. Colon*, 111 F. Supp. 2d 439, 443 (S.D.N.Y.2000) (" crystal clear that the caller had first hand knowledge of the alleged criminal activity" ), *reversed on other grounds*, 250 F.3d 130 (2nd Cir. 2001).**

**Indeed, " victim-witness cases usually require a very prompt police response in an effort to find the perpetrator, so that a leisurely investigation of the report is seldom feasible." 2 LAFAVE, *supra*, at 210.**

**Moreover, courts should not treat information from ordinary citizens who have been the victim of or witness to criminal conduct the same as information from compensated informants from the criminal subculture. 2 LAFAVE, *supra*, at 204.**

**[A]n ordinary citizen who reports a crime which has been committed in his presence ... stands on much different ground than a police informer. He is a witness to criminal activity who acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety. 2 LAFAVE, *supra*, at 208. Thus, the police are entitled to give greater credence to a report from a citizen crime victim than to a report from a criminal associate of the suspect. 2 LAFAVE, *supra*, at 205. Indeed,**

**there is no constitutional requirement that police distrust ordinary citizens who present themselves as crime victims and " [c]ourts are not required to sever the relationships that citizens and local police forces have forged to protect their communities from crime." *United States v. Christmas*, 222 F.3d 141, 145 (4th Cir. 2000).**

(Some citations omitted, emphasis mine.)

**RESPONSE TO ASSIGNMENTS OF ERROR TWO -  
THERE WAS SUFFICIENT INFORMATION TO  
ESTABLISH PROBABLE CAUSE.**

During the work-up by counsel and the court the Deputy Prosecutor asked "...My only objection was, it sounded like the Defense wanted to have a 3.6 hearing." The courts response was "I'm ruling that he can't have one, he had his chance before. So the whole issue of a 3.6 hearing goes to whether or not the hearing that Judge McCarthy had was valid, and that's what he wants to appeal." (RP 58) Findings for the ruling by Judge McCarthy were entered. (CP 50-54)

A search warrant application must state the underlying facts supporting it. *State v. Nusbaum*, 126 Wn. App. 160, 166, 107 P.3d 768 (2005). Whether these facts are sufficient to establish probable cause is a legal determination that will be reviewed de novo. *Nusbaum*, 126 Wn. App. at 166-67 (citing *In re Det. of Peterson*, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002)). This

court shall defer to the issuing judge's probable cause determination by resolving any doubts in favor of the warrant's validity. See State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004).

Probable cause exists if the facts in the affidavit establish a reasonable inference that the defendant is involved in criminal activity and evidence of the crime can be found at the place to be searched. Nusbaum, 126 Wn. App. at 166.

When there is an allegation such as this placed before this court this court may only use that information which was before the court at the time of the motion for suppression.

In this instance at review was done by the Honorable Michael McCarthy. Brandmire challenged the initial ruling of the court with regard to the denial of the motion to suppress. Judge McCarthy reviewed this motion for reconsideration and denied that motion also. In the denial of the motion for reconsideration Judge McCarthy noted “[t]he court, having already reviewed all of the pleadings, determined pursuant to CrR 3.6(a) that an evidentiary hearing would not be necessary since there were no material factual issues in dispute. The matter was thereafter considered and decided without testimony or argument.” (CP 11-12)

The court then went on to say;

“Defense counsel now attempts to raise a factual dispute by asserting that “Officer Glasenapp searched the Defendant’s vehicle after being removed and before that warrant was obtained.” [Motion to Reconsider at page 2, lines 9-11]. This is the type of assertion which should have been set forth in an affidavit filed contemporaneously with the Motion to Suppress. See CrR 3.6 “Motions to suppress...evidence ...shall be in writing supported by an affidavit or document setting forth the facts that moving party anticipates will be elicited at the hearing...” The Defendant did state some facts in his Motion to Suppress Evidence filed on March 12, but they were consistent with the facts relied upon by the State. There was no averment that officer Glasenapp searched the vehicle in advance of the issuance of the search warrant. This tardy assertion is not sufficient to raise a factual dispute justifying reconsideration of the court’s ruling.” (CP 11)

The trial court states

**The Court:** Well, Judge McCarthy has basically ruled on it twice already, so I don’t know that it makes a whole lot of sense having me review it again.....So I will not be reconsidering Judge McCarthy’s ruling. (RP 6-7)

This record is without doubt. The only information which can be considered by this court in determining whether or not Judge McCarthy made an incorrect determination with regard to the veracity of the two search warrants which were issued is the information submitted to Judge McCarthy for review which was the information supplied to the issuing magistrate when it was

presented by way of a telephonic search warrant applied for by Officer Glasenapp.

Appellant supplied a supplemental verbatim report of proceedings. That document is a transcript of the telephonic application for two search warrants for the car owned and operated by Brandmire. The court listened to the officer describe the entire situation, asks questions, limits the initial scope of the search and discusses with the officer if he has reviewed the information with the on-call prosecutor. After the information is supplied to the court the judge finds probable cause to search the automobile. The judge limits this initial entry but states that if more is found the officer can return for a authorization from the court for a more extensive search, which in fact occurs.

The evidence presented to this court in this record, the finding and conclusions and the two letter opinions issued by Judge McCarthy support the determination by the issuing judge that there was probable cause for the issuance of the search warrant. (CP 11-12, 23-24, 50-54, RP Supplemental 1-15)

Brandmire alleges that Judge McCarthy's decision was error and yet the factual information upon which this ruling was made clearly supports the probable cause determination made by

the issuing magistrate. The record herein includes the briefing of the parties at the trial court level and the letter opinions of the court as well as the information upon which the issuing magistrate made a determination that there was probable cause to search.

Judge McCarthy states “I have reviewed the pleadings of the parties as well as the audio recording {marked and admitted as Exhibit A at the court’s direction which has now been transcribed and supplied to this court] of the application for and issuance of the search warrant for Mr. Brandmire and his car.” This and only this information is available for this court to use for purposes of reviewing whether there was probable cause for the issuance of the initial search warrants. This “exhibit A” is now a portion of this record, supplemental verbatim report of proceedings, and there is no doubt there was probable cause to search the vehicle. This is also set forth in the findings and conclusions. (CP 50-54)

It is possible to refer to the written report that was attached to the initial motion to suppress, however the question is not just whether the actions of Judge McCarthy in ruling that the issuing magistrate was correct in her decision but whether that magistrate herself was supplied sufficient information at the time of issuance to allow these search warrants to withstand the present challenge.

It does not matter what the testimony which was elicited at the stipulated trial was, the “fact” remains that the information in question was that which was stated to the issuing judge, this was the information Judge McCarty used to base his ruling. The information, evidence, police reports, facts and testimony from the abbreviated trial have absolutely no bearing on the present challenge to the sufficiency of the information used as a basis for the probable upon which these search warrants were based. The information necessary for proper review is contained in the Supplemental Verbatim Report of Proceedings which set forth the telephonic application for search warrant. (Supplemental RP 1.15)

There were actual findings of fact or conclusions of law entered on the CrR 3.6 hearing as well as the trial. These were entered into the record of the trial court recently and were added to the record before this court in a Supplemental Designation of Clerk’s Papers. The ruling by the Honorable Michael McCarthy are set forth at CP 50-54. Brandmire does not assign error to these findings and conclusions. Such findings are required by CrR 3.6(b). Those findings not only set forth specific findings and conclusions, the court also annotated them to indicate the two

original letter opinions “are incorporated herein as further findings of fact and conclusions of law.” (CP 54)

State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (2007) “Because the Defendant fails to challenge any of the findings of fact entered after the suppression hearing, they are treated as verities on appeal. State v. Gentry, 125 Wn.2d 570, 605, 888 P.2d 1105 (1995). Additionally, the trial court's findings are supported by the evidence.”

The applicable law is well settled. A magistrate's determination that a warrant should issue is reviewed for abuse of discretion and great deference is accorded that decision. State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). An application for a search warrant should be judged in light of common sense with doubts resolved in favor of the warrant. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

A search warrant may issue solely upon a finding of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause exists when the affidavit in support of the warrant contains facts and circumstances from which a reasonable person could infer that criminal activity is probably occurring, and that evidence of such activity can be found at the place to be

searched. *Id.* Probable cause requires (1) a nexus between criminal activity and the item to be seized, and (2) a nexus between the item to be seized and the place to be searched. *Id.* The burden of proof to show lack of probable cause is on the defendant moving for suppression. *State v. Anderson*, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001).

Brandmire has not met his burden. The information supplied and referred to above was more than sufficient to allow the issuing magistrate to find probable cause. The reviewing jurist considered the matter not once but twice with briefing on each occasion from both parties. Even after this extensive review the determination was the same, there was probable cause.

#### IV. CONCLUSION

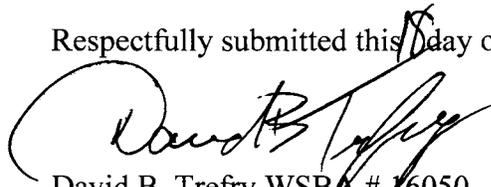
The assignments of error raised were factual in nature, well within the trial courts discretion, or clearly controlled by settled law and the decisions of the court in issuing and upholding the search warrants was not an abuse of discretion.

There were clearly articulable facts which allowed the officer to contact Brandmire. The information was reliable and factual. The detention was minimally intrusive, it occurred in a public location where Brandmire had parked his car.

The sitting judge for the trial in this case properly refused to reconsider Brandmire's numerous requests for another CrR 3.6 hearing. That court correctly ruled that Judge McCarthy had ruled on this issue on two previous occasions and that decision would stand.

The actions of the trial court should stand. This appeal should be dismissed.

Respectfully submitted this 15<sup>th</sup> day of October 2010.

A handwritten signature in black ink, appearing to read "David B. Trefry". The signature is written in a cursive style with a large, looping initial "D".

David B. Trefry WSBA # 16050  
Special Deputy Prosecuting Attorney  
Yakima County, Washington