

FILED

FEB 11 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29047-6-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

JOSHUA DAVID RAY,
Defendant/Appellant.

BRIEF OF RESPONDENT

Gary A. Riesen WSBA #7195
Chelan County Prosecuting Attorney

Chelan County Prosecuting Attorney's Office
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I. ASSIGNMENT OF ERROR NO. 1

The appellant alleges that there was insufficient probable cause to issue the search warrant in this case and that there was an insufficient nexus between the place to be searched and the evidence of illegal activity.

As reflected in both the affidavit for the search warrant in this case and in the findings of fact entered by the trial court, Detective Drolet of the Wenatchee Police Department responded to a house in the city of Wenatchee where a person had been shot. He discovered an individual named Scott Bates dead in the doorway of the house owned by the appellant, Joshua Ray. From the threshold of the door, Detective Drolet observed a glass smoking pipe used to smoke marijuana on the floor in front of the couch and a rifle on top of the stereo cabinet.

Detective Drolet's affidavit for the search warrant also reflected that the deceased, Scott Bates, "has . . . been convicted at least three times for unlawful possession of controlled substances. He also has multiple charges of unlawful possession of firearms violations."

The warrant reflects that Detective Drolet, based on his observations, expected to find controlled substances, firearms, records and ledgers in one or all of the following places—the house, the computer, the vehicles, the electronic storage media, and the safe. He also indicated that locating these items might assist in identifying why Bates was at Mr. Ray's house.

It is also important to note that Mr. Ray had been shot and was bleeding from a visible gunshot wound to his upper thigh when the police arrived. In addition to the AK 47 rifle which the officer observed, he also saw a .45 caliber pistol near Mr. Bates' hand where he was lying on the floor. Another .45 caliber pistol was near the couch in the residence.

After evaluating this information, the Honorable Lesley A. Allan, Judge of the Chelan County Superior Court, issued the search warrant authorizing Detective Drolet to search for drugs, paraphernalia, proceeds of sales of drugs, ledgers or records, and firearms, both those that had been observed by Detective Drolet from the doorway and other firearms that might be found in the residence.

Upon review at the CrR 3.6 hearing, the Honorable T. W. Small upheld the findings of Judge Allan that probable cause

existed for the issuance of the warrant, even with the exclusion of a statement in the affidavit made by Detective Drolet which was incorrect with respect to Mr. Ray's criminal history.

II. STANDARD OF REVIEW

The issuing magistrate's determination of probable cause is reviewed for abuse of discretion and is given great deference by the reviewing court. State v. Clark, 143 Wn.2d 731 (2001). All doubts are resolved in favor of the warrant's validity. State v. Kalakosky, 121 Wn.2d 525 (1993). Probable cause is established if the affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. State v. Thein, 138 Wn.2d 133 (1999). In determining probable cause, the magistrate makes a practical, common-sense decision, taking into account all the circumstances set forth in the affidavit and drawing common-sense inferences. Illinois v. Gates, 462 U.S. 213 (1983). Probable cause requires a probability of criminal activity, not a prima facie showing of criminal activity. State v. Seagull, 95 Wn.2d 898 (1981).

Here, the officer was able to offer the magistrate some direct evidence of the existence of criminal activity at the residence to be searched. Detective Drolet had observed from the doorway of the residence drug paraphernalia in plain view in the living room. In addition, of course, Mr. Bates was dead on the floor from a gunshot wound and there were firearms of various calibers located, again, in plain view in the residence. Clearly, probable cause existed to search the residence both for firearms that might have been used in Mr. Bates' death and in inflicting Mr. Ray's injury to his leg, and to seize the drug paraphernalia which was in plain view. The presence of drug paraphernalia gives rise to an inference that other drug activity might be occurring on the premises. In addition, Mr. Bates had a criminal history which included prior drug charges and Detective Drolet reflected that the presence of drugs on the property might explain Mr. Bates' armed presence there.

In a normal scenario where an officer is seeking a search warrant, he or she is offering evidence from an informant or a third party of an observation that drugs might be contained on the property. Here, the officer had a direct observation of the drug paraphernalia which does constitute illegal activity. Clearly,

probable cause existed to support the search since criminal activity was taking place.

The appellant also asserts that there is an insufficient nexus between the criminal activity and the items to be seized and also a nexus between the items to be seized and the place to be searched. (State v. Thein, 138 Wn.2d 133 (1999).) Again, there is an obvious nexus between the items to be seized and the place to be searched. The weapons and drug paraphernalia were in plain view. The safe in the premises could contain either additional drug paraphernalia, drugs, or clearly other weapons which might have related to the shooting. The officers were justified in requesting the ability to search the safe since the items to be sought included handguns which clearly could be contained in the safe, as well as drug paraphernalia. The fact that the safe revealed additional controlled substances at the time of the search is not surprising. There was a nexus connecting all of these items with the residence of the appellant, Mr. Ray.

The State submits there was no error in the issuance of this search warrant by the original judge, Judge Allan, nor in the review by Judge Small. The search should be upheld and the evidence against Mr. Ray admitted to support his conviction.

III. ASSIGNMENT OF ERROR NO. 2

The appellant alleges there was insufficient evidence for the conviction and asserts that the temazepam should not have been admitted due to the alleged error with the search warrant.

Since the State submits no error existed with respect to the issuance of the warrant and the subsequent search, the evidence was properly admitted and the conviction should be upheld.

IV. CONCLUSION

Based on the foregoing authorities, the State respectfully requests that the court deny the appeal and affirm the defendant's conviction.

DATED this 9th day of February, 2011.

Respectfully submitted,



Gary A. Riesen WSBA #7195
Chelan County Prosecuting Attorney