

30593-7-III

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June 29, 2012  
Court of Appeals  
Division III  
State of Washington

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNIE LLOYD TRAUB, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

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APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Conclusion of Law 1:

There was sufficient probable cause for the issuance of the search warrant in this case.

(CP 57).

2. The trial court erred in entering Conclusion of Law 5:

The search of the residence was not beyond the scope permitted.

(CP 57).

3. The trial court erred in entering Conclusion of Law 6:

The search of the upper level of the residence was not excessive.

(CP 57).

4. The trial court erred in entering Conclusion of Law 7:

The observations of the officers executing the search warrant did not indicate that the residence was a multi-unit residence.

(CP 57).

5. The trial court erred in entering Conclusion of Law 8:

Nothing indicated that the use of the premises was restricted to certain residents of the home. Nothing alerted the officers that there were separate residences within the home.

(CP 57).

6. The trial court should have suppressed the evidence seized from the defendant's bedroom pursuant to a search warrant.
7. The trial court abused its discretion in imposing community custody.

#### B. ISSUES

1. An affidavit contains facts that evidence of criminal activity could be found in the basement of a multiple-unit residence. The affidavit does not mention the upstairs unit of the residence. Under the Fourth Amendment and Const. Art. I, § 7, does the affidavit provide probable cause to issue a warrant to search the entire multiple-unit residence?
2. The search warrant was for the entire residence, rather than being limited to the basement unit. In this multiple-unit residence, is the search warrant invalid for failing to specify a sub-unit, namely, the basement unit?
3. At sentencing, Mr. Traub asked the trial court not to impose any community custody. The trial court declined, stating it was required to impose community custody. Did the trial court abuse its discretion by failing to exercise discretion regarding whether or not to impose community custody?

### C. STATEMENT OF THE CASE

Yakima County Sheriff's Deputy Christopher Stearley went to 3291 Kays Road in Wapato in response to a domestic violence call. (CP 55; RP 60-61). Police dispatch advised the responding law enforcement officers that the alleged offender was in the basement of the residence. (CP 23, 55). When Deputy Stearley arrived at the residence, he met with Robert Ross. (CP 23, 56). Mr. Ross informed him that the alleged offender, Amber Ross, was in the basement and would not come out. (CP 23, 56).

Deputy Stearley tried to get Ms. Ross to come to the basement door, but was unsuccessful. (CP 23, 56). Deputy Stearley then sought the assistance of the homeowner, Johnnie Traub, who opened the exterior basement door with a screwdriver. (CP 23, 56; RP 61, 69-71). Ms. Ross was located in the basement and questioned by responding officers about the domestic violence complaint. (CP 23-24, 56). She was escorted out of the residence. (CP 24, 56).

While he was in the basement, Deputy Stearley saw some marijuana plants. (CP 24, 56; RP 62, 75). Mr. Ross provided Deputy Stearley with medical marijuana paperwork. (CP 23-24, 56; RP 65, 75-77). Deputy Stearley contacted Robert Tucker, a detective with the Yakima County Sheriff's Office, and he wrote a police report for

Detective Tucker. (CP 56; RP 20-21). Detective Tucker applied for a search warrant for the entire residence. (CP 15-18, 56; RP 20).

In his affidavit for a search warrant, Detective Tucker wrote “Deputy Stearley stated he did not enter or observe the entire residence, since the situation took place in the lower portion of the residence in few rooms [sic].” (CP 16).

The search warrant named Mr. Ross, and did not mention Mr. Traub. (CP 20-21). It authorized a search of the entire residence. (CP 20-21). It described the residence as “a multi store residential home . . . .” (CP 20).

Law enforcement officers executed the search warrant at the residence. (CP 20-21, 56; RP 24-25). Mr. Traub was inside the residence, on the main floor. (CP 56; RP 24-26). Mr. Traub stated it was his residence, and indicated his bedroom was in the northwest corner. (CP 56). Officers found methamphetamine in Mr. Traub’s bedroom. (CP 56; RP 28).

During the execution of the search warrant, the doorway to the basement was open. (CP 56; RP 26). There was an exterior door to the basement, which was secured on both the inside and outside by padlocks. (CP 56; RP 58). The basement had a hot plate and a small refrigerator.

(CP 56; RP 99-100). Officers found marijuana plants in the basement.  
(CP 56; RP 28-29).

The State charged Mr. Traub with one count of possession of a controlled substance, methamphetamine, in violation of RCW 69.50.4013(1). (CP 1). Mr. Traub moved to suppress the evidence seized during the execution of the search warrant. (CP 2-31).

At the hearing held on Mr. Traub's motion to suppress, Deputy Stearley described the residence as a two-storey, residential address. (RP 60). He told the court he entered the basement through an exterior door, and that while he was in the residence, he only went in the basement. (RP 61-62, 71, 74). Deputy Stearley said he did not obtain information about whether anyone was paying rent for the basement. (RP 63-64). He acknowledged that he referred to the basement of the residence in his police report as the "basement apartment." (CP 23-24; RP 68). Deputy Stearley told the court there was a television and a bathroom in the basement. (RP 73). He said based on what he was told by Mr. Ross, the basement was a residence where Mr. Ross was residing. (RP 74).

Detective Tucker told the court he did not go to the residence before writing the affidavit for the search warrant. (RP 22). He testified that he spoke with Deputy Stearley and reviewed his police report. (RP 21-22, 37-39, 58). Detective Tucker said Deputy Stearley told him

the marijuana plants were located in the basement. (RP 21). He acknowledged that Deputy Stearley's report referred to the basement of the residence as a "basement apartment," and that Deputy Stearley's investigation focused solely on the lower unit of the residence. (RP 45, 48, 58-59). Detective Tucker admitted that, in writing the search warrant affidavit, he had no information about the upper unit in the residence. (RP 47).

Detective Tucker testified that he looked up the residence in his database, and that it did not indicate any subunits. (RP 22-23). He told the court that he was involved in the execution of the search warrant, and that he did not see anything that indicated there were separate units within the residence. (RP 24-25).

Mr. Traub told the court he was living in the upstairs unit of the residence, and Mr. Ross was living in the downstairs unit. (RP 82, 85). He testified that Mr. Ross was the renter of the downstairs unit. (RP 88-90). Mr. Traub said the basement has two bedrooms, a living room, a fireplace, a bathroom, and "[a] big, huge patio and its own entrance and windows." (RP 85-86). He testified that it had "a big long table and it had the four burner hot plate and his microwave and -- so that was sort of his makeshift . . . kitchen." (RP 100). He also said that the basement had a "mini fridge." (RP 100). Mr. Traub told the court that

there are locks on both sides of the interior door leading from the upstairs unit to the downstairs unit, so that Mr. Ross “felt safe with his stuff and nobody was invading his privacy and I didn’t want nobody invading my privacy.” (RP 100).

Deputy Stearley’s police report, which was admitted as an exhibit during the suppression hearing, refers to the basement of the residence throughout as an apartment. (CP 23-24, 32; RP 42). The report does not mention the upstairs of the residence. (CP 23-24). It states that a room in the basement contained several marijuana plants. (CP 24).

The trial court denied Mr. Traub’s motion to suppress. (CP 57; RP 121-125). The trial court entered findings of fact and conclusions of law on the motion. (CP 55-57).

Mr. Traub was convicted, as charged, following a stipulated facts trial. (CP 34-49; RP 128-136). He was sentenced to fifteen days’ confinement. (CP 43; RP 142). Mr. Traub asked the trial court not to impose any community custody. (RP 137-141). The trial court imposed community custody, stating, “I think I have to impose community custody” and “I think I am obligated under the law to impose a period of community custody.” (CP 42-45; RP 142-143). The Judgment and

Sentence reflects that community custody was imposed, but it does not indicate the length of time of community custody. (CP 42-45).

Mr. Traub appealed. (CP 50).

#### D. ARGUMENT

1. THE TRIAL COURT SHOULD HAVE SUPPRESSED THE EVIDENCE SEIZED FROM THE DEFENDANT'S BEDROOM PURSUANT TO A SEARCH WARRANT.

In reviewing the denial of a suppression motion, the court determines whether substantial evidence supports the challenged findings of fact, and whether the findings support the conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Unchallenged findings of fact are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). Conclusions of law from an order on a suppression motion are reviewed *de novo*. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

The Fourth Amendment of the United States Constitution and Article I, § 7 of the Washington Constitution protect citizens from unreasonable searches and seizures, and provide that a search warrant may only be issued upon a showing of probable cause. *State v. Lyons*,

-- Wn.2d --, 275 P.3d 314, 316-17 (2012). The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Article I, § 7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without the authority of law.” Wash. Const. Art. 1, § 7. The search warrant obtained for the entire multiple-unit residence where Mr. Traub resided was not supported by probable cause, and the search warrant should have been limited to the basement unit.

- a. There Was No Probable Cause For The Issuance Of A Search Warrant For The Entire Multiple-Unit Residence.

A search warrant “must be supported by an affidavit that particularly identifies the place to be searched and items to be seized.” *Lyons*, 275 P.3d at 316. In order for an affidavit to establish probable cause, it “must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched.” *Id.*

(citing *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)). “[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

While the courts must evaluate an affidavit in a commonsense, rather than a hypertechnical manner, “the [reviewing] court must still insist that the magistrate perform his ‘neutral and detached’ function and not serve merely as a rubber stamp for the police.” *Lyons*, 275 P.3d at 317 (citations omitted) (internal quotation marks omitted) (alteration in original). The existence of probable cause is a legal question which the reviewing court considers *de novo*. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).

Here, the trial court issued a search warrant for the entire residence, consisting of two units. (CP 20-21). However, Detective Tucker’s affidavit only contained facts that evidence of criminal activity could be found in the basement unit. (CP 16). The affidavit was based solely on Detective Tucker’s conversation with Deputy Stearley and Deputy Stearley’s police report, and it indicated that Deputy Stearley only

observed the basement unit. (CP 16). Deputy Stearley's police report does not mention the upstairs of the residence. (CP 23-24).

Accordingly, Detective Tucker's affidavit in support of a search warrant did not set forth sufficient facts that criminal activity could be found in the upstairs unit of the residence. *See Lyons*, 275 P.3d at 316 (citing *Maddox*, 152 Wn.2d at 509). There was no nexus between the item to be seized and the place to be searched, the entire residence, where the affidavit only addressed the basement unit. *See Thein*, 138 Wn.2d at 140 (quoting *Goble*, 88 Wn. App. at 509). There was no probable cause for the issuance of a search warrant for the entire multiple-unit residence. The methamphetamine found in Mr. Traub's bedroom should have been suppressed.

b. The Search Warrant Should Have Been Limited To The Basement Unit Within The Multiple-Unit Residence.

"A search warrant for a multiple-occupancy building will usually be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of one or more subunits indiscriminately." *State v. Alexander*, 41 Wn. App. 152, 153-54, 704 P.2d 618 (1985). There are two exceptions to this general rule: the "multiple

unit” rule and the “community living unit” rule. *Id.* at 154. The multiple-unit rule applies when:

1) [T]he multiple occupancy character of the building was not known and could not have been discovered by reasonable investigation; (2) the discovery of the multiple occupancy occurred only after the police had proceeded so far that withdrawal would jeopardize the search; and (3) upon discovery of the multiple occupancy, reasonable efforts were made to determine which subunit is most likely connected with the criminality under investigation and to confine the search accordingly.

*Id.*

Thus, under this exception, “if the building in question appears to be a single-occupancy structure rather than a multiple-occupancy structure, and neither the affiant nor the investigating or executing officers knew or had reason to know of the building's actual multiple-occupancy character until execution of the warrant was under way, the warrant is not defective for failure to specify a subunit within the named building.” *Id.*

In contrast, the community living rule applies “where several persons or families occupy the premises in common rather than individually, as where they share common living quarters but have separate bedrooms.” *Id.* at 154-55.

Here, the search warrant is defective for failing to specify a subunit, specifically, the basement unit where Mr. Ross resided. *See Alexander*, 41 Wn. App. at 153-54. The multiple-unit rule does not apply.

*See id.* at 154. Assuming the residence appears to be a single-occupancy structure, both the affiant, Detective Tucker, and the investigating officer, Deputy Stearley, knew or had reason to know of the residence's multiple-occupancy character prior to the execution of the warrant. Deputy Stearley entered the basement unit through its own exterior door, rather than through the door to the upstairs unit. (RP 61-62, 74). He observed evidence of separate living quarters, namely, a television and a bathroom. (RP 73). Mr. Ross told Deputy Stearley the basement was a residence where he was residing. (RP 74). Deputy Stearley referred to the basement unit in his police report as the "basement apartment." (CP 23-24; RP 68).

Detective Tucker did not go to the residence prior to obtaining the search warrant. (RP 22). His information came from Deputy Stearley, and he was well aware that the investigation was of the lower level, an area that Deputy Stearley referred to as an apartment. (RP 21-22, 37-39, 45, 48, 58-59).

The community living unit rule also does not apply. *See Alexander*, 41 Wn. App. at 154-55. Mr. Traub and Mr. Ross did not occupy the residence in common, but individually. They did not share common living quarters. (RP 73, 84-85, 100). The basement unit contained separate living quarters, including its own kitchen. (RP 100). The interior door between the upstairs and downstairs units contained

locks on both sides, to ensure the privacy of the tenants. (RP 100) *Cf. Alexander*, 41 Wn. App. at 156 (in finding that the community living unit rule applied, reasoning that “[a]lthough each had his own bedroom, none of the bedrooms was an independent living unit, separately locked, or otherwise identifiable as a private space.”).

The search warrant here should have been limited to the basement unit within the multiple-unit residence. The methamphetamine found in Mr. Traub’s bedroom should have been suppressed.

## 2. THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING COMMUNITY CUSTODY.

“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

When an offender is sentenced to a term of confinement of one year or less, for a felony violation of RCW chapter 69.50, “the court *may impose* up to one year of community custody.” RCW 9.94A.702(1)(d) (emphasis added). Use of the term “may” in a statute has a permissive or discretionary meaning. *See, e.g., Nat’l Elec. Contractors Ass’n v. Riveland*, 138 Wn.2d 9, 28, 978 P.2d 481 (1999). A trial court’s failure to exercise discretion is an abuse of discretion. *State v. Flieger*, 91 Wn. App. 236, 242, 955 P.2d 872 (1998).

Mr. Traub was convicted of a felony violation of RCW chapter 69.50, and sentenced to fifteen days' confinement. *See* RCW 69.50.4013(2) (except for possession of forty grams or less of marijuana, a violation of RCW 69.50.4013(1) is a class C felony). Therefore, the trial court had the discretion to impose up to one year of community custody. *See* RCW 9.94A.702(1)(d). Mr. Traub asked the trial court not to impose any community custody. (RP 137-141). The trial court declined, assuming that it was required to impose community custody. (RP 142-143). The trial court's failure to exercise discretion in imposing community custody was an abuse of discretion. *See Flieger*, 91 Wn. App. at 242. The case should be remanded for reconsideration of the imposition of community custody. *See In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333-34, 166 P.3d 677 (2007) (when the trial court fails to exercise its discretion in imposing a sentence, the remedy is to remand for reconsideration of the sentence).

#### E. CONCLUSION

Where the affidavit in support of the search warrant made no mention of the upstairs unit in a multiple-unit residence, there was no probable cause for the issuance of a search warrant for the entire residence. Because the residence was a multiple-unit residence, the search

warrant should have been limited to the basement unit. For these reasons, the trial court should have suppressed the methamphetamine found in Mr. Traub's bedroom. Mr. Traub's conviction for possession of a controlled substance should be dismissed.

In the alternative, the case should be remanded for reconsideration of the imposition of community custody.

Dated this 29th day of June, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

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STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    )     No.   30593-7-III  
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                                  vs.            )     CERTIFICATE  
  )     OF MAILING  
JOHNNIE LLOYD TRAUB,         )  
  )  
                                  Appellant.    )  
\_\_\_\_\_

I certify under penalty of perjury under the laws of the State of Washington that on June 29, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on June 29, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on June 29, 2012.

  
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