

**FILED**  
**Feb 11, 2013**  
Court of Appeals  
Division III  
State of Washington

NO. 30593-7-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHNNIE LLOYD TRAUB,

Appellant.

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BRIEF OF RESPONDENT

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## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. The trial court should have granted the defendant's motion to suppress.
2. The trial court abused its discretion when it imposed community custody.

### B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The trial properly denied the motion to suppress.
2. The court erred when it imposed this condition on Appellant based on its belief that the imposition was mandatory.

## 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 the record as needed.

## III. ARGUMENT.

### **FIRST ALLEGATION.**

The Appellant has not challenged the Findings of Fact, he has challenged some of the Conclusions of Law, State v. Handburgh, 61 Wn. App. 763, 766, 812 P.2d 131 (1991); These findings were unassailed by either party on appeal and, consequently, they are verities on appeal.

Metropolitan Park Dist. v. Griffith, 106 Wn.2d 425, 433, 723 P.2d 1093 (1986). Our review is, therefore, limited to determining if the trial court's findings support its conclusions of law. Willener v. Sweeting, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).

In addition, even where a trial court's written findings are incomplete or inadequate, this court can look to the trial court's oral findings to aid our review. State v. Robertson, 88 Wash.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998). The oral ruling in this case covers four pages, RP 121-25.

Appellant is not challenging the probable cause for this warrant, only the decision by the court that the probably cause extended to the entire residence. The allegation is that the warrant only addressed illegal items found in the “basement unit.” This type of terminology was used throughout the suppression hearing and now on appeal. However there was never any testimony from the owner of the home that this was a multiple unit residence. There was testimony that it was a single family residence. The information gathered by Det. Tucker from his resources indicated that this was a single family residence owned by Rich Traub, apparently the brother of the defendant. (CP 20; RP 12) It was the defendant’s motion to suppress; he did not meet his burden of persuasion in this case. He did not present any pictures that supported the claim that

this was an “apartment” or a “unit” separate from the rest of the home. He did not have Mr. Ross take the stand and testify that there were separate locks, and keys and that he, Mr. Ross, had nothing to do with the upper portion of this single family residence. Rick Traub, the person listed as the owner of the home and who was apparently present in the court room during the trial did not take the stand to assert that this was in fact a multi-unit home or that he rented apartments in his home.

According to the exhibits that were submitted the license to grow marijuana had expired the week before therefore there was no legal method for the marijuana to even be in the home, a home that Traub claimed was his (CP 23) according to the police report written by Dep. Stearley and reviewed by Det. Tucker prior to his application for the search warrant. (CP 31) The initial call to the residence was on March 19, 2011. (CP 23) The “new” license was not issued until the day of the domestic incident. (CP 27)

The use of the term “apartment” by the arresting officer does not somehow turn this single family residence into an apartment complex. There was nothing in the report which was reviewed by Det. Tucker, the author of the search warrant, which would indicate that this was a separate “unit” within the home. There is not a single thing which would demonstrate to or reveal to Det. Tucker that this was a separate unit. The

report does not state anything about rent, utilities, mailbox, unit number, and a separate address, nothing except the word apartment. The officer does not indicate that he walked through the kitchen to get to the grow or to contact the wife of Mr. Ross or that he observed a separate bathroom.

There was information that Mrs. Ross was not welcome there and she was not paying anything. It is noteworthy that even though Mrs. Ross supposedly had only been allowed to stay there a day or two she appeared, from Dep. Stearley's report, to have a significant amount of person items present at this residence to include a vehicle that had been there long enough for a tire to go flat. (CP 23-4) Det. Tucker had checked the data base at his disposal and placed the description of this home from that data base into the search warrant. (CP 20) This detective had information that one person, Rick Traub owned the home, another person the appellant John Traub claimed ownership of the home and a third person claimed he lived in the basement of the home and that the officers had observed an amount of marijuana that exceeded the amount that a person with the "license" can possess "legally." The fact that has not been addressed is that these "licenses" do not disallow the ability of the State to search a residence based on probable cause, these "licenses" merely allow for a rebuttable presumption. A presumption which could not have been

supported due to the expired “license” that Ross had at the time the plants were observed. (RP 120-2)

The warrant was challenged in the fashion of Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause. The same basic standard also applies when affidavits omit material facts. An affidavit will be vitiated only if the defendant can show that the police omitted facts with the intent to make, or in reckless disregard of whether the omission made, the affidavit misleading and that the affidavit, as supplemented by the omitted information, would not have been sufficient to support a finding of probable cause. United States v. Sherrell, 979 F.2d 1315, 1318 (8th Cir.1992); State v. Garrison, 118 Wash.2d 870, 872-873, 827 P.2d 1388, 1390 (1992). Without doubt the determination of the character of the living arrangements when requesting a court to authorize a search warrant is crucial. If the affiant, here Det. Tucker, knew or should have known that the other residents lived in separate “subunits” then his failure to apprise the issuing judge with this information could be considered a serious disregard as to use of the word “apartment” that was used in the report by Dep. Stearley and therefore this information should have been

inserted into the affidavit and then read in totality with the omitted information. But that clearly is not the case here. Traub challenged the warrant and the court allowed limited testimony regarding the knowledge and information that Det. Tucker had at the time of the issuance as well as testimony as to what Dep. Stearley knew from the scene. There is not one single indication in the testimony that anyone believed that this was some sort of subunit of the home.

The use of the word “apartment” was done in connection with the officer’s report of about a domestic situation and the basis for the removal of one person, Mrs. Ross, from this residence. The report made it clear that Mrs. Ross was not a party paying for anything at this home and therefore the request by the officers in this domestic matter had a legal basis for removal of her from that home. It does not thereby turn this basement into a unit, an apartment or some other separate subsection of this home.

The oral decision made by the trial court when it denied the motion to suppress is contained in large part in Appendix A of this Motion. In that ruling the court clearly and concisely sets forth the reasons it denied the Motion. In that ruling the court sets for the facts that were before the officers at the scene which make it clear that this is not a situation where Dep. Stearley or Det. Tucker knew or should have known that this

basement was a subunit of anything. The court points out fact after fact that demonstrate the officers would not, from what was before them at the scene, have known that this basement was a separate apartment.

It is important to note the testimony of Appellant at the suppression hearing. There is nothing in the record that would indicate that at the time of the original officer made contact that Appellant told the officers this was a home that was owned by his brother and that both he and Ross were renting sections of this home from his brother. There is nothing in the record that would indicate to the trial court that the officers in this case should have or did know information which would or should have made them aware that this was a separate “apartment” and that the officers and specifically Det. Tucker, recklessly or purposefully failed to inform the court to which he submitted his application for search warrant of those facts.

At the scene Traub apparently claimed he was in fact the owner of the home, there was no mention that it was owned by his brother, this was not known until later when Det. Tucker checked his available data bases and found the listed owner was the brother of Appellant.

The court in Alexander and the other cases in this area of the law also describe the need, the requirement of the officers serving the warrant to basically back out of the location and get another warrant or stop

searching the location if they did know or should have known that they were venturing into a separate unit or apartment. The testimony from the officers, which supports the ruling and the conclusions of law, was clear that they did not find anything that made them believe that when they searched the upstairs they were in a separate unit or apartment. There is nothing in this record that Mr. Traub, while he was at the scene, told the officers that they were in his portion of this apartment building and that he had nothing to do with the lower section of the home or that the officers were aware that this was a two unit building.

The entirety of the record before the court issuing the search warrant, before the officers at the scene, Det. Tucker and the trial court judge who presided over the hearing was that this was a single family home. The only time there is an indication that there was even any testimony regarding sub-units was when Dep. Stearley was attempting to ascertain whether he could legally remove Mrs. Ross from this location. The basis for that legal removal was Ross had no possessory rights to the residence or the “apartment.” There was not one word of testimony from any person that would indicate that these officers knowingly or fraudulently hid or withheld information from the issuing judge.

The actions of the trial court were clearly discretionary in nature. The court received briefing from all parties, the testimony from two

officers and the defendant and based on that information the court made a discretionary decision with regard the suppression of the search in this case. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) “Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. ....Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” (Citations omitted.)

Even during the testimony of appellant he never stated what if any “rent” was paid by Ross or anyone. There were no pictures presented to the court that would demonstrate that the officers at any time should have or would have recognized this as a multi-unit location. As Alexander points out the officers are bound by the law to take action if they in fact know or realize that the location being searched is a multiple unit residence. That was not true here. None of the testimony from Det. Tucker would lead a reasonable person to assume that this was a multiple unit location. The testimony, which the court pointed out, was that there was

State v. Alexander, 41 Wn. App. 152, 704 P.2d 618 (1985) as argued by all is on point in this case. The one section of Alexander which must be highlighted states as follows: “However, in upholding such searches, courts have required that, upon discovery of the multiple occupancy, reasonable efforts be made to limit the search to the subunit most likely connected to the criminal activity identified in the warrant. See, e.g., United States v. Davis, 557 F.2d 1239, 1248 (8th Cir. 1977); People v. Lucero, 174 Colo. 278, 483 P.2d 968, 970 (1971).” Alexander at 154. See also, State v. Anderson, 84 Hawai'i 462, 935 P.2d 1007 (Hawai'i 1997) which cites Alexander.

Appellant states that the only facts in the affidavit which are evidence of criminal activity pertain to the “basement unit.” Once again the record is clear that the information before Det. Tucker, which obviously included the report written by Dep. Stearley, would not indicated to a reasonable person and, did not appear to the trial court when it made its ruling, that this home had more than one “unit.”

The search warrant met the standard set forth in the cases cited at the trial court as well as here. There was probable cause to search this home. “[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)).

The fact that a person, Mr. Ross presented “his paperwork” does not thereby make this marijuana grow operation “legal.” There is a rebuttable presumption as stated by the court. Further, as pointed out above the “license” that was in the possession of Mr. Ross appears to have been expired at the time he presented it to the officers. There was nothing that the officers at the scene observed and reported to Det. Tucker nor was there any information developed by Det. Tucker during his separate investigation that would lead these officers to believe that there were two apartments or units in this single family residence. The application for the warrant stated the house because this was where the marijuana was observed. There were not acts of omission or negligence on the part of Dep. Stearley or Det. Tucker. There is nothing that must be added into or excised from the affidavit of the search warrant to allow proper analysis of the warrant. It is clear from the ruling of the trial court that 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).

Appellant's claim that the affidavit did not set forth sufficient probable cause of criminal activity would hold weight if there was any indication that this single family residence was anything other than that and there is not.

The edicts of Alexander have been met.

#### **RESPONSE TO ALLEGATION TWO – COMMUNITY CUSTODY.**

It would appear that Appellant has correctly addressed this issue. Although the trial court did apparently take into consideration the request for no Community Custody, the court improperly believed that it was required to impose this condition. As concisely set forth in Appellant's brief community custody is not "mandatory" it is set out in the statute as "may" which means the court has the option of imposing this condition. Because the court stated on the record;

Regarding the issue of community custody, I – **I think I have to impose community custody.** The problem is -- Mr. Traub, if you're not aware and will be -- because of the State Department of Corrections is-- cutting back all over the place and -- particularly here in community custody or community corrections -- is that they are not supervising many, many of fenders -- essentially when

the dust settles at the end of the Legislative session, in all likelihood the only people who would be supervised are sex offenders and nobody else. **They're not going to supervise you, but I have to, I think I am obligated under the law to impose a period of community custody.** (RP 142-3)(Emphasis mine.)

Clearly the court believed that it had no choice with regard to supervision which was not correct. Therefore this case must be remanded for this to be addressed once again with the court aware that it has the option to impose this not an obligation.

#### IV. CONCLUSION

The facts of this case and the law clearly support that the trial court properly denied the motion to suppress. This court should deny this appeal with regard to the first allegation raised by appellant.

The appellant is correct with regard to the second issue, community custody, and therefore this matter must be remanded to the trial court for further consideration of that allegation.

Respectfully submitted this day of February 2013

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# APPENDIX A

The issue becomes whether or not the invasion of the upper portion of the residence is -- is excessive or should not be auth -- should not have been author-ized. I think that the -- the issue here turns on whether or not Mr. Ross is a roommate or a tenant. This is clearly a single family home. I think -- think you get into a hybrid situation where people live in homes; it's not clear, perhaps even to the people living there sometimes, what the -- what the rules are.

The references made to Officer Stearley's report and -- the -- and it -- there are frequent references to the basement apartment. There are also references to the -- to the residence. The -- the problem I have with is I don't -- I'm not inclined to treat Officer Stearley's characterizations as legal conclusions that, in fact, this was a basement apartment.

They -- there is a comment here that -- there's in inquiry made of Mr. Ross whether or not the -- wife had paid rent and other things. I -- I saw them, frankly, in a domestic situation as an effort to -- discredit her as much as possible to get her out of the house. It doesn't become a legal conclusion, either by virtue of what Mr. Ross says or by what the officer concluded.

I think one could easily interpret the officer's report as being that -- Mr. Ross was a tenant. The - - Mr. -- Traub assisted the officers by going down and opening the door to the -- to the basement. I guess arguably if, in fact, -- Mr. Ross was a tenant then that was a violation of the law as well because he had no right to break into the unit.

It -- it would seem that based on that -- and again, what Mr. Traub thinks or doesn't think isn't necessarily significant but -- to the officers, as they're entering the residence -- they see a single family residence. There are no separate numbering system on the home; there's no separate address. There is an upstairs and a downstairs which is fairly common.

The -- Mr. Traub described a locking mechanism both on -- on both sides of the door. It's -- there -- there's -- the officers didn't describe seeing that. Now, should they have seen it and -- possibly. Would that, in and of itself, signify that this is a separate residence? I don't think so.

The -- during Mr. Traub's testimony he was asked to describe the downstairs and he did not include the term -- or the -- an -- an area designated as a kitchen. He did on cross-examination, indicate that there was a -- a hot plate and a small refator -- refrigerator; but to officers going in, and frankly based on what -- the way Mr. Traub characterized it, you would not think that that was a separate unit or that there was a separate kitchen. I don't even -- wouldn't even go so far as to call it a makeshift kitchen. There were a pair of -- a couple of appliances and nothing more.

But there's nothing that would alert the officers that they had a separate residence that they were looking at. And again, I think it turns on whether or not you've got a roommate versus a tenant arrangement. I think it -- it was reasonable for the officers to go in. I think they would have naturally thought this was a roommate situation and that frankly Mr. Ross had the right to go up and down the stairs and use the entire facility. There's nothing that would indicate that use of the premises was restricted in any way.

So I'm going to deny the motion.

(RP 122-125)

Certificate of Service

I, David B. Trefry state that on February 11, 2013, I emailed, by agreement of the parties a copy of the Respondent's Brief, to Ms. Janet Gemberling, C/O Robert Canwell, at [admin@gemberlaw.com](mailto:admin@gemberlaw.com) and to Johnnie L. Traub, 3291 Kays Rd, Wapato, WA 98951.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11<sup>th</sup> day of February, 2013 at Spokane, Washington.

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