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STATE OF WASHINGTON

NO. 23986-1-III  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**BRENT RICHARD SMITH,**

Defendant/Appellant.

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**RAP 13.4(a) PETITION FOR DISCRETIONARY REVIEW**

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**1. IDENTITY OF PETITIONER**

BRENT RICHARD SMITH requests the relief designated in Part 2 of this Petition.

**2. STATEMENT OF RELIEF SOUGHT**

Mr. Smith seeks review of a published opinion by Division III of the Court of Appeals filed on February 13, 2007. (Appendix "A" 1-8).

**3. ISSUES PRESENTED FOR REVIEW**

1. Should this case be accepted in order to provide clarification to the Court of Appeals that the exigent circumstances exception to the search warrant requirement, (which encompasses both the emergency aid exception and the community caretaking function), is not as broad as its decision conceives it to be?

2. Does the Court of Appeals decision ignore the limitations imposed upon the "protective sweep" exception to the search warrant requirement as established in *Maryland v. Buie*, 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed. 276 (1990), and as refined by *State v. Hopkins*, 113 Wn. App. 954, 55 P.3d 691 (2002)?

#### 4. STATEMENT OF THE CASE

An Information was filed on November 23, 2004 charging Mr. Smith with manufacturing methamphetamine. (CP 79)

A CrR 3.6 hearing was conducted on January 21, 2005. Detective Gonzalez from the Benton County Sheriff's Office was the only officer who testified at the hearing. (01/21/05 RP 12, ll. 15-17; ll. 19-21)

The local Crime Stoppers line had received an anonymous tip that an anhydrous ammonia truck which had been stolen in Sprague, Washington was located at either 203212 or 203260 East SR-397 near Finley, Washington. The FBI received the same anonymous tip. (01/21/05 RP 14, ll. 3-25)

Fifteen (15) officers responded to the area. The truck was located near a house on approximately one (1) acre of fenced ground. (01/21/05 RP 16, ll. 10-16)

Detective Gonzalez approached the truck to determine if the tanks were leaking. He did not notice any leakage. (01/21/05 RP 17, ll. 17-22; RP 20, ll. 10-14)

Other officers contacted the house. It appeared vacant. There were boards on the windows. The anonymous tip received by Crime Stoppers also indicated the house was vacant. (01/21/05 RP 18, l. 23 to RP 19, l. 5; RP 19, ll. 23-24)

A mattress, rifle and dog were seen inside the house. (01/21/05 RP 21, ll. 2-5)

A propane tank with a discolored valve was found near a shed on the property. (01/21/05 RP 21, ll. 12-18)

The officers knocked on the door. After a short period of time Mr. Smith, Kimberly Breuer and the dog came out of the house. (01/21/05 RP 23, ll. 5-9)

When asked, Mr. Smith and Ms. Breuer stated that no one else was in the house. (01/21/05 RP 23, ll. 16-17)

The officers looked inside the house. They saw that the gun was no longer near the mattress. They decided to conduct a "protective sweep" of the house. (01/21/05 RP 23, ll. 18-25; RP 24, ll. 3-7)

The officers wanted to determine if anyone else was inside the house. They were concerned because anhydrous ammonia is a caustic gas and dangerous to the public. (01/21/05 RP 15, ll. 11-15; RP 24, ll. 17-19)

The officers did not have a search warrant. They seized a 16 gauge shotgun from a crawl space on the second floor. No one else was inside the house. While in the house they observed a metal locker in the bathroom. It was identified as a methamphetamine lab by its odor. (01/21/05 RP 17, ll. 13-14; RP 25, l. 11 to RP 26, l. 3; RP 27, ll. 22-25)

A substance later identified as methamphetamine was located on a couch in the living room. A van sitting outside the house was also

searched. Pseudoephedrine tablets, burnt foil and coffee filters were located in the van. (Trial RP 72, ll. 18-22; RP 73, ll. 23-25; RP 78, ll. 14-24)

The trial court denied Mr. Smith's CrR 3.6 motion. It ruled that an emergency existed and that the initial entry into the house was justified. Findings of Fact and Conclusions of Law were entered on August 3, 2005. (01/21/05 RP 42, ll. 21 to RP 43, l. 4; Supp. CP 85-90; Appendix "B")

Following a jury trial Mr. Smith was convicted of manufacturing methamphetamine and Judgment and Sentence was entered on April 1, 2005. (CP 8)

Mr. Smith filed a Notice of Appeal on April 4, 2005. He challenged Conclusions of Law 2 and 3 from the CrR 3.6 hearing. (CP 5; Appendix "B")

The Court of Appeals affirmed the trial court's ruling on the suppression issue by its opinion dated February 13, 2007. (Appendix "A")

##### **5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

A trial court's denial of a CrR 3.6 motion is reviewed to determine whether or not substantial evidence supports the findings of fact. The findings of fact must also support the conclusions of law. Conclusions of law are reviewed *de novo*. See: *State v. Cole*, 122 Wn. App. 319, 322-23, 93 P.3d 209 (2004).

The Court of Appeals decision references facts that were not presented at the CrR 3.6 hearing. These include:

1. “Two individuals were seen in an upstairs window”;
2. “... [T]he tanks presented a danger of explosion due to internal pressure from the evaporating anhydrous ammonia”;
3. “Several houses were located nearby”;
4. “... [T]here was ... a danger of the tanker exploding”.

There is no evidence in the record to indicate that any officer made any attempt to notify anyone at any neighboring residence of any potential danger.

The Court of Appeals decision is contrary to the search warrant requirement of the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

The Court of Appeals decision is in conflict with *State v. Lawson*, slip opinion 33401-1 (10/10/06).

The Court of Appeals decision is in conflict with *State v. Hopkins*, *supra*, and *State v. Boyer*, 124 Wn. App. 593, 102 P.3d 833 (2004).

The Court of Appeals decision misapplies the emergency exception to the search warrant requirement.

The Court of Appeals decision justifies its reasoning by including information from the trial which was not made part of the record at the CrR 3.6 hearing.

#### **WARRANTLESS SEARCH**

A warrantless search is “per se unreasonable” and can be justified only if it falls within one of the “jealously and carefully drawn” exceptions to the Fourth Amendment warrant requirement. *Sanders* [*Arkansas v. Sanders*, 442 U.S. 753, 759-60, 61 L. Ed.2d 235, 99 S. Ct. 2586 (1979)]; *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). The burden is upon the State to show that a warrantless search or seizure falls within one of these exceptions. See *Sanders*, at 760; *Houser*, at 149.

*State v. Simpson*, 95 Wn.2d 170, 188, 622 P.2d 1199 (1980).

The State argued the community caretaking function and the “protective sweep” exceptions to justify the warrantless search. Both exceptions come within the ambit of the emergency exception to the search warrant requirement.

The trial court determined that the emergency exception applied when it entered Conclusions of Law 2 and 3. Mr. Smith does not contest Conclusion of Law 1 which related to the truck and anhydrous ammonia tanks in the yard.

The trial court’s Findings of Fact 6, 7, 9, 11, 12 and 13 (Supp. CP 87-89; Appendix “B”) are the apparent basis for the trial court’s Conclusion of Law 2 and 3.

**A. Community Caretaking Function**

... Washington cases ... have applied the community caretaking exception to search and seizure of automobiles, emergency aid situations, and routine checks on health and safety. *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000), *cert. denied*, 531 U.S. 1104 (2001).

*State v. Schroeder*, 109 Wn. App. 30, 37-38, 32 P.3d 1022 (2001).

No seizure of an automobile was involved in Mr. Smith's case.

Officers were not conducting a routine health and safety check.

They wanted to recover a stolen anhydrous ammonia truck.

The officers had no information that there was anyone living on the property. There was no indication that emergency aid was required.

The emergency aid exception recognizes the community caretaking function of the police to "assist citizens and protect property." *State v. Johnson*, 104 Wn. App. 409, 414, 16 P.3d 680 (2001) (quoting *State v. Menz*, 75 Wn. App. 351, 353, 880 P.2d 48 (1994)). This exception applies when

"(1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched."

... Further, two competing policies come into play when the emergency aid exception is invoked: "(1) allowing police to help people who are injured or in danger, and (2) protecting citizens against unreasonable

searches.” *Johnson*, 104 Wn. App. at 418 (citing *Menz*, 75 Wn. App. at 354-55). We balance these policies in light of the facts and circumstances of each case. *Johnson*, 104 Wn. App. at 418.

*State v. Schroeder, supra*, 38.

Mr. Smith contends that the emergency aid exception is inapplicable under the facts and circumstances of his case. There was no indication that anyone “likely needed assistance for health or safety reasons.”

Neither Mr. Smith nor Ms. Breuer needed assistance. Mr. Smith told the officers that there was no one else inside the house.

The officers had no independent basis to believe that there was an individual inside the house in need of assistance.

Detective Gonzalez testified that the safety sweep of the house was conducted because the two (2) people had come out of it. In addition, the gun could no longer be seen when the officers looked through the front door. (01/21/05 RP 24, ll. 3-7)

Division I of the Court of Appeals recently ruled, under a similar fact pattern, that finding a potential danger to the community falls short of finding that a police officer entertained a specific belief that someone inside a building needed help. This is a necessary step authorizing and validating the emergency exception to the search warrant requirement. *State v. Lawson, supra*.

The Court of Appeals decision fails to address the *Lawson* case. The *Lawson* case was presented at oral argument and by means of an Additional Statement of Authorities on October 16, 2006.

An irreconcilable conflict exists between Division III and Division I on this issue. RAP 13.4(b)(2).

The community caretaking component of the emergency exception is not applicable.

**B. Exigent Circumstances**

The trial court's Conclusions of Law 2 and 3 are not justified due to insufficient Findings of Fact.

There are 11 factors to consider in determining whether exigent circumstances existed to justify a warrantless police entry into a home: (1) a grave offense, particularly a crime of violence, is involved; (2) the suspect is reasonably believed to be armed; (3) there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) the suspect is likely to escape if not swiftly apprehended; (6) the entry is made peaceably; (7) hot pursuit; (8) fleeing suspect; (9) danger to arresting officer or to the public; (10) mobility of the vehicle; and (11) mobility or destruction of the evidence.

*Seattle v. Altschuler*, 53 Wn. App. 317, 320, 766 P.2d 518 (1989); *see also: State v. Cardenas*, 146 Wn.2d 400, 406, 47 P.3d 127, 57 P.3d 1156 (2002).

No crime of violence was involved.

Officers observed a gun, but neither Mr. Smith nor Ms. Breuer were armed when they came out of the house.

The officers believed the house was vacant. They were not looking for a suspect. The Court of Appeals decision confirms this fact. (Appendix "A", p. 5) Thus, they had no reason to believe that there was a suspect inside the house.

Since there was no suspect there was no likelihood of escape.

There was no fleeing suspect and thus no hot pursuit.

There was no vehicle involved. The officers had no idea that any evidence existed in the house.

Entry into the house was peaceable.

Detective Gonzalez testified that he believed there was a potential danger.

Mr. Smith asserts that only two (2) of the eleven (11) *Altshuler* factors have any application to his case. These are factors (6) and (9). Under the *Cardenas* analysis, only factor (6) is present.

The law is clear that an officer cannot conduct a search of a residence property in the absence of a search warrant.

RCW 10.79.040(1) states:

It shall be unlawful for any policeman or any other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided.

RCW 10.79.040(1) must be interpreted in light of the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

Mr. Smith and Ms. Breuer came out of the house. They told the officers that no one else was present. They were unarmed. They were not under arrest. They were merely detained.

When a search extends beyond the limited area in the home of the suspect from which he might obtain weapons or evidentiary items, the Fourth Amendment protection against unreasonable searches and seizures requires that a search warrant be secured from an objective magistrate who must evaluate the "probable cause" affidavits of law enforcement in the light of the necessity that citizens be free from unreasonable searches and the privacy of the individual be safe from unwarranted invasion. *Vale v. Louisiana*, 399 U.S. 30, 26 L. Ed.2d 409, 90 S. Ct. 1969 (1970) and *Shipley v. California*, 395 U.S. 818, 23 L. Ed.2d 732, 89 S. Ct. 2053 (1969) . . . .

*State v. Peele*, 10 Wn. App. 58, 62-63, 516 P.2d 788 (1973).

The officers expressed a personal safety concern. They also expressed a concern for potential danger if the anhydrous ammonia tank was ruptured by a rifle bullet.

Interestingly, the preferred method for destruction of propane tanks containing anhydrous ammonia is to fire a rifle bullet through them. (Trial RP 189, ll. 7-11; RP 190, ll. 17-20)

The *Altschuler* Court, quoting from *Welsh v. Wisconsin*, 466 U.S. 740, 753, 80 L. Ed.2d 732, 104 S. Ct. 2091 (1984) stated, *supra*:

“... [A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense ... has been committed.”

The officers did not see any offense being committed inside the house. They observed a gun, but were unaware of its connection to any crime.

Numerous Washington cases have condemned the exact type of warrantless search conducted in this case. *State v. Ramirez*, 49 Wn. App. 817, 746 P.2d 344 (1987) (probable cause to arrest for a misdemeanor offense together with the likelihood that evidence might be destroyed does not justify a warrantless and nonconsensual entry into a house to arrest the occupants under the exigent circumstances exception); *State v. Morgavi*, 58 Wn. App. 733, 794 P.2d 1289 (1990) (police having insufficient evidence to support an objective belief that a burglary has occurred are not presented with exigent circumstances and a warrantless seizure of marijuana plants inside the house was suppressed); *State v. Swenson*, 59 Wn. App. 586, 799 P.2d 1188 (1990) (police, responding to a call of a house with an open door, who called several times into the house, identifying themselves and asking if anyone was inside, and receiving no response, did not have sufficient probable cause to enter under the exigent circum-

stances exception); *State v. Muir*, 67 Wn. App. 149, 835 P.2d 1049 (1992) (police conducting a warrantless search of a house recently burglarized on the grounds of an emergency when there was no reasonable belief that there was anyone inside the house could not justify a search under the emergency exception to the search warrant requirement).

The Court of Appeals reasoned that there was a danger of the tanker exploding. The Court of Appeals misinterprets the officer's testimony. The testimony was that a propane tank located outside of a shed on the property had the danger of exploding because it was not the type of container designed to hold anhydrous ammonia. On the other hand, the tanker truck was specially built to hold anhydrous. (01/21/05 RP 30, ll. 13-18; RP 35, ll. 11-22)

Moreover, the officers secured the tanker prior to a search of the house. The Court of Appeals reasoning is flawed and runs contrary to the search warrant requirement of the Fourth Amendment and Const. art. I, § 7.

### **C. Protective Sweep**

While making a lawful arrest, officers may conduct a reasonable "protective sweep" of the premises for security purposes. *Maryland v. Buie*, 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed.2d 276 (1990). The scope of such a "sweep" is limited to a cursory visual inspection of places where a person may be hiding. *Id.* at 335. If the area immediately adjoins the place of arrest, the police need not justify their actions by establishing a concern for their safety.

*Id.* at 334. However, when the “sweep” extends beyond this immediate area, “there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Id.*

*State v. Hopkins, supra.*

As previously indicated, neither Mr. Smith nor Ms. Breuer were under arrest when the “protective sweep” was conducted. The Washington Courts have not extended the “protective sweep” exception to a mere detention. Thus, the “protective sweep” exception authorized in *Maryland v. Buie*, 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed.2d 276 (1990) does not apply.

Moreover, since the “protective sweep” involved the entire house, and Mr. Smith and Ms. Breuer had already come out of the house, the officers were required to articulate facts which would indicate a reasonable belief that there was someone else in the house posing a danger to the officers.

As clearly enunciated in *State v. Jeter*, 30 Wn. App. 360, 363, 634 P.2d 312 (1981):

... [A] concern for police safety **must be based upon prior knowledge** or direct observation **that the subject** of the search **keeps weapons *and*** that such person **has a known propensity to use them.**

(Emphasis supplied.)

No testimony was presented at the CrR 3.6 hearing to indicate that either Mr. Smith or Ms. Breuer were individuals known to keep weapons.

No testimony was presented at the CrR 3.6 hearing to indicate that either Mr. Smith or Ms. Breuer had a propensity to use weapons.

The fact of the matter is that the officers did not even know that Mr. Smith or Ms. Breuer were inside the house until they came out.

Even though the *Jeter* case is a “knock and announce” case, it applies under the facts and circumstances of Mr. Smith’s case. The State clearly did not present sufficient evidence of exigent circumstances to justify the “protective sweep” of the house.

“... [T]he question of whether self-protective actions of police are reasonable or necessary can be determined only on a case-by-case basis.” *State v. Johnson*, 11 Wn. App. 311, 315, 522 P.2d 1179 (1974).

Mr. Smith contends that the officers knew the following facts:

1. A gun was observed through a window;
2. After Mr. Smith and Ms. Breuer came out of the house the gun could no longer be seen;
3. It took approximately ten (10) minutes for Mr. Smith and Ms. Breuer to come out of the house;
4. The officers were told that no one else was inside the house.

Also, the “protective sweep” exception has not been extended to the execution of a search warrant. In *State v. Boyer, supra*, 600-601 (2004), the Court determined that

The concept of a protective sweep was adopted to justify the reasonable steps taken by arresting officers to ensure their safety while making an arrest. [Citation omitted.] Generally officers executing an arrest warrant may search the premises for the subject of that warrant but must call off the search as soon as the subject is found. ...

To justify a protective sweep beyond immediately adjoining areas, the officer must be able to articulate “facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” [Citation omitted.] **The sweep is limited to a cursory inspection of places a person may be found and must last no longer than necessary to dispel the reasonable suspicion of danger or to complete the arrest, whichever occurs sooner.** ...

In Washington ... the protective sweep has not been extended to the execution of search warrants.

(Emphasis supplied.)

The officers did not have a search warrant for the house.

Neither Mr. Smith nor Ms. Breuer were under arrest.

The officers merely speculated that another person may be inside the residence with a gun.

As the *Hopkins* Court noted at 960:

The only remaining possibility is that the officers feared that *other*, dangerous persons were in the shed or trailer. But a “general desire to be sure that no one is hiding in the place searched is not sufficient” to justify a protective sweep outside the immediate area where an arrest has occurred. *State v. Shaffer*, 133 Idaho 126, 131, 982 P.2d 961 (Ct. App. 1999); *see United States v. Ford*, 56 F.3d 265, 270 (D.C. Cir. 1995); *Runge v. State*, 701 So.2d 1182, 1186 (Fla. Dist. Ct. App. 1997); *Earley v. State*, 789 P.2d 374, 377 (Alaska Ct. App. 1990).

The trial court’s Finding of Fact number 12 states:

Detective Gonzalez testified that he was concerned **about the possibility of an individual with a weapon inside the residence** both as a threat of being shot and also as a threat that one of the task [*sic*] containing anhydrous ammonia, which would be pressurized, would be punctured. ...

(Emphasis supplied.)

Finding of Fact number 12 clearly indicates that Detective Gonzalez did not have a reasonable articulable suspicion that another person was inside the house with a gun. Finding of Fact 12 amounts to nothing more than an expression of the officer’s desire to make certain that no one was hiding inside the house.

The Court of Appeals decision discusses *Hopkins* and then essentially ignores its holding when making the ruling that the protective sweep was authorized under the facts and circumstances.

6. CONCLUSION

The warrantless search of the house cannot be justified by the community caretaking function.

The warrantless search of the house was not authorized under the emergency exception to the search warrant requirement.

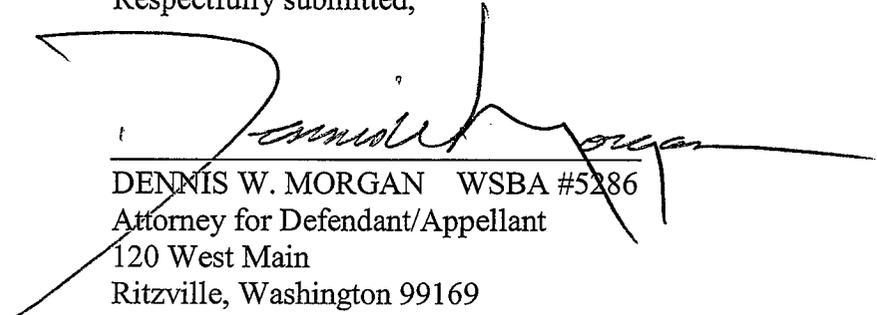
The warrantless search of the house was unauthorized under the "protective sweep" exception to the search warrant requirement.

The trial court's Conclusions of Law 2 and 3 are not supported by its Findings of Fact. Mr. Smith's CrR 3.6 motion should have been granted.

Mr. Smith respectfully requests that the Supreme Court accept review under RAP 13.4(b)(2) and (3).

DATED this 8<sup>th</sup> day of March, 2007.

Respectfully submitted,



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# APPENDIX "A"

**FILED**

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WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 23986-1-III</b>
	)	
<b>Respondent,</b>	)	
	)	
<b>v.</b>	)	<b>Division Three</b>
	)	
<b>BRENT RICHARD SMITH,</b>	)	
	)	
<b>Appellant.</b>	)	<b>PUBLISHED OPINION</b>

KULIK, J. — Brent Smith was convicted of manufacturing methamphetamine based in part on evidence from the warrantless search of a house. Law enforcement searched this house after they found two 1,000 gallon tanks of anhydrous ammonia near the house and after a gun case observed through the window of the house disappeared. Mr. Smith challenges the admission of evidence that was obtained as a result of this search. We hold that the search of the house was within the protective sweep, exigent circumstances, and community caretaking exceptions to the warrant requirement. We affirm the conviction.

## FACTS

Patrol Sergeant Rick Welch received an anonymous tip that a stolen semi truck filled with anhydrous ammonia was located at a specific address in Benton County. This vehicle was stolen from the Spokane area, where both police and the Federal Bureau of Investigation were attempting to locate it. The semi contained two 1,000 gallon tanks that were filled with anhydrous ammonia.

When Sergeant Welch arrived at the address, he could see a semi truck partially concealed by a chain link fence. He verified that this truck was the stolen truck. Sergeant Welch radioed the Tri-Cities drug task force and fire department, and the Washington State Patrol for assistance.

Sergeant Welch testified that he required extensive police back-up because of the volatile nature of anhydrous ammonia. When liquid anhydrous ammonia comes into contact with air, it turns into a gas that can be fatal if inhaled. Another officer testified that they typically find anhydrous ammonia in much smaller amounts, normally between 5 and 20 gallons. Several houses were located nearby. The officers were concerned that the stolen tanks may have been altered and could be leaking anhydrous ammonia. And the tanks presented a danger of explosion due to internal pressure from the evaporating anhydrous ammonia.

Before checking the anhydrous ammonia tanks, police attempted to secure the home and surrounding outbuildings that were near the truck. The primary purpose of this check was officer safety. Sergeant Welch knocked and announced his presence at the house, but no one responded. Two individuals were seen in an upstairs window and a dog was barking inside the house. Police also observed a gun case through one of the windows.

Some time later, a man and woman came out of the house. The man was later identified as Mr. Smith. The gun case that had been near the window was gone. Police were uncertain as to whether there were additional people inside the house. Based on these facts, police did a protective sweep of the house to check for the gun and any other persons who may have been inside.

Police smelled a strong chemical odor immediately upon entering the home. As they were searching, they found the gun case they had seen in the window in a crawl space. Law enforcement secured the residence and obtained a search warrant. Later, police opened what appeared to be a footlocker in the bathroom and found a portable methamphetamine lab.

Mr. Smith was charged with manufacture of methamphetamine.

Mr. Smith made a motion under CrR 3.6 to exclude any evidence obtained during the warrantless search of his residence. The trial court entered findings of fact and

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conclusions of law denying the motion. The court concluded that the officers' sweep of the home fell within the emergency exception to the warrant requirement.

The jury found Mr. Smith guilty of the crime of manufacturing methamphetamine.

#### ANALYSIS

*Did the trial court err by admitting evidence obtained during the search of Mr. Smith's house?*

The fourth amendment to the United States Constitution and article 1, section 7 of the Washington State Constitution generally prohibit warrantless searches. *See, e.g., State v. Ladson*, 138 Wn.2d 343, 348-49, 979 P.2d 833 (1999). This general prohibition, however, is subject to several narrowly drawn exceptions. *Id.* at 349. The burden is on the State to prove the exception. *Id.* at 350. Here, the State asserts that the search was valid because of the protective sweep, exigent circumstances, and community caretaking exceptions to the prohibition against warrantless searches.

#### *Protective sweep exception*

Police may make a protective sweep of the premises for security purposes as part of the lawful arrest of a suspect. *State v. Hopkins*, 113 Wn. App. 954, 959, 55 P.3d 691 (2002). But the scope of the sweep is limited to a visual inspection of only those places where a person may be hiding. *Id.* In addition, a general desire to make sure that there

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*State v. Smith*

are no other individuals present alone is not sufficient to justify a protective sweep. *Id.* at 960.

Here, police were responding to theft of a large amount of anhydrous ammonia. They did not know if individuals were present in the home or adjacent buildings. They observed a gun case through one of the windows in the home. While no one answered the knock on the door, 10 minutes later Mr. Smith and his companion came out of the house. And the gun case was gone from near the window.

Then police searched the house but only areas that could have concealed a person. They limited their search to a visual inspection of those areas. The search was within the protective sweep exception to the warrant requirement.

*Exigent circumstances exception*

Exigent circumstances are also an exception to the warrant requirement. *State v. Morgavi*, 58 Wn. App. 733, 736, 794 P.2d 1289 (1990). Exigent circumstances may include those that present a threat to officer safety. *State v. Jeter*, 30 Wn. App. 360, 362, 634 P.2d 312 (1981).

This court looks to six factors in determining whether exigent circumstances justify a warrantless entry and search: (1) the seriousness or violence of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty;

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*State v. Smith*

(4) whether there is strong reason to believe that the suspect is on the premises; (5) the likelihood that the suspect will escape if not swiftly apprehended; and (6) whether the entry was made peaceably. *State v. Cardenas*, 146 Wn.2d 400, 406, 47 P.3d 127 (2002). Each of the six factors need not be present in every case. *Id.* at 408. All that must be shown is that, in light of these factors, officers needed to react quickly to the situation. *Id.*

In order to find that exigent circumstances exist, this court must also be satisfied that the asserted emergency was not merely a pretext for the search and that the search was “actually motivated by a perceived need to render aid or assistance.” *State v. Loewen*, 97 Wn.2d 562, 568, 647 P.2d 489 (1982). This inquiry involves a determination of both the subjective and objective reasonableness of the belief that an emergency existed. *Morgavi*, 58 Wn. App. at 736.

One of the recognized situations in which a warrantless search may be justified under the exigency exception is where police reasonably believe that persons are in danger of imminent death or harm, or where there are objects present that are likely to burn or explode. *State v. Muir*, 67 Wn. App. 149, 153, 835 P.2d 1049 (1992).

Here, there is little likelihood that the asserted emergency was merely a pretext. Unlike the cases cited by Mr. Smith, law enforcement was not on the premises searching for a particular suspect. From the beginning, police were responding to an emergency. A

potentially lethal chemical was present in large amounts near residences. The tankers held approximately 2,000 gallons of anhydrous ammonia, an amount significantly greater than the amount typically found in the manufacture of methamphetamine. And there was also a danger of the tanker exploding.

The search for suspects was secondary to the need to secure the tanker. While police were concerned for their own safety in light of the gun case they observed, they were also concerned that a person might discharge the weapon at the tank, causing a dangerous chemical spill. Under the facts here, police were acting under exigent circumstances. A swift response was appropriate to protect the officers and the community.

*Community caretaking exception*

Another exception to the warrant requirement that may arise when police confront emergency situations is the community caretaking exception. *State v. Schroeder*, 109 Wn. App. 30, 37, 32 P.3d 1022 (2001). This exception may apply if (1) the law enforcement officer subjectively believed that an individual or individuals needed assistance for health or safety reasons; (2) a reasonable person in the same or a similar situation would also believe that there was a need for assistance; and (3) that there was a reasonable basis to associate the need for assistance with the place to be searched. *Id.* at

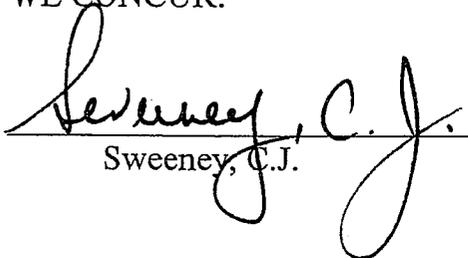
38. As with the exigent circumstances exception, this court must also be satisfied that the claimed emergency was not merely a pretext for a search for evidence. *Id.*

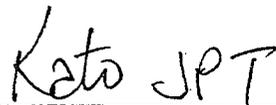
As previously noted, police were responding to a dangerous situation that posed a threat to the health and safety of the community. Testimony showed that inhaling anhydrous ammonia could be lethal and that a large amount of anhydrous ammonia was present immediately next to the home that was searched. Police were uncertain as to how many individuals were present at this location. They observed a gun case in the home that was no longer visible after Mr. Smith and his companion left. Given the volatile nature of anhydrous ammonia, the presence of nearby homes, and the possibility that a firearm might puncture the anhydrous ammonia tanks, it was subjectively and objectively reasonable for the officers to enter the home and conduct a limited search to secure the weapon and any individuals who were present within the home.

We affirm the conviction.

  
\_\_\_\_\_  
Kulik, J.

WE CONCUR:

  
\_\_\_\_\_  
Sweeney, C.J.

  
\_\_\_\_\_  
Kato, J. Pro Tem.

## **APPENDIX "B"**

**ORIGINAL**

**E. KAY STAPLES  
BENTON COUNTY CLERK**

**AUG 03 2005**

**FILED**

**CERTIFIED COPY**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON,

Plaintiff,

vs.

BRENT SMITH,

Defendant.

NO. 04-1-01456-9

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON  
CrR 3.6 HEARING

---

THIS MATTER, having come duly and regularly before the Court for hearing pursuant to CrR 3.6, on the 21<sup>st</sup> day of January, 2005, the defendant being personally present and represented by Richard Johnston, Attorney for Defendant, and the State of Washington being represented by Alex Ekstrom, Deputy Prosecuting Attorney for Benton County, the Court having reviewed the case record to date, and having been fully advised in the premises, now, therefore, makes the following:

# CERTIFIED COPY

## FINDINGS OF FACTS

1. On November 18, 2004, detectives with the Tri-City Metro Drug Task force and other officers received information that that a stolen vehicle containing anhydrous ammonia was located at a residence at 203212 East SR 397, Kennewick, Benton County, State Of Washington.
2. Detective Gonzales of the Tri-City Metro Drug Task Force had responded to the location in the past, twice for methamphetamine laboratories, and once for an incident involving a shotgun. Detective Gonzales was familiar with the layout of the two-story residence, as he had served a search warrant there in the past. The officers believed the property, including the residence, to be vacant.
3. Officers confirmed that the stolen vehicle was located it on the subject property. Multiple law enforcement agencies responded to the location, including the fire department.
4. Officers were concerned about the possibility of a leak of anhydrous ammonia. Officers had information that there may have been 1,000 gallons of anhydrous ammonia in the tank on the vehicle.

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5. The initial entry onto the property was made without a warrant. The initial entry was made by two officers of the Tri-City Metro Drug Task Force, who wore protective gear and approached the vehicle to make sure there were no leaks. Detective Gonzales confirmed that there were no leaks in the two tanks on the vehicle, and that the tanks contained approximately 1,000 gallons of anhydrous ammonia. Detective was, based on his training and information gathered from the Federal Bureau of Investigations concerning the dangers of small amounts of anhydrous ammonia, concerned about the safety of individuals on the subject property, and surrounding properties.
6. At that time, other officers surrounded and contained, but did not enter the residence on the property. Officers knocked and announced their presence at the residence, and no one exited.
7. While containing the residence, Detective Brockman saw, through the window of the residence, what appeared to be a rifle. The apparent rifle was located in the living room area of the first floor next to a mattress.

# CERTIFIED COPY

8. Outside the residence, between the residence and the vehicle, officers found a propane tank with a modified and discolored valve, which Detective Gonzalez recognized by training and experience to be consistent with the storage of anhydrous ammonia.
9. After a period of time, approximately 10 minutes after the initial knock and announce the defendant, Brent Richard Smith, and Kimberly Yvonne Breuer, exited the residence with the white dog. Both the defendant and Smith were handcuffed and detained.
10. The defendant told officers that he had found the residence open, had been there for several days, and was aware of the presence of the truck, but was unaware of its contents.
11. At this point, officer observed that the gun was no longer present in the living room.
12. Detective Gonzalez testified that he was concerned about the possibility of an individual with a weapon inside the residence both as a threat of being shot and also as a threat that one of the tanks containing anhydrous ammonia, which would be pressurized, would be punctured. Detective

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Gonzales testified that he was aware that anhydrous ammonia can cause severe chemical burns in small amounts.

13. Officers entered the residence to do a safety sweep for additional individuals, and to locate the gun. During the safety sweep, officer located at 16 gauge shotgun in an upstairs crawlspace. Also during this safety sweep, officers observed items consistent with the manufacture of methamphetamine, and included this information in their application for a warrant. The warrant was granted, and a search of the residence revealed a methamphetamine laboratory.

### CONCLUSIONS OF LAW

1. The responding officers' initial entry onto the property was an emergency exception to the warrant requirement, based on a fear of a leak of anhydrous ammonia.
2. The officers' entry into the residence to look for other individuals and the weapon was also an emergency exception to the warrant requirement.
3. The defense motion to suppress is denied.

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DONE IN OPEN COURT this 3rd day of August, 2005.

Carmen Mitchell  
Judge

Presented by:

[Signature] 92712  
ALEX EKSTROM  
Deputy Prosecuting Attorney  
OFC ID 91004

Approved as to Form  
[Signature] 34014  
RICHARD JOHNSTON  
ATTORNEY FOR DEFENDANT

Notary Public, Benton County Clerk, do hereby certify  
that the foregoing copy is a true and correct copy of the original  
on file in the office.  
WITNESSE, MY HAND AND Seal of the Said Superior Court  
this 3rd day of August  
2005  
E. Ray Clarke, Ex-Officio Clerk of Superior Court  
[Signature]