

NO. 24885-2-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

DAVID GARRETT REEP,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES

(1) May the required degree of particularity in a search warrant be achieved by specifying the suspected crime?

(2) When a search warrant sufficiently describes the premises to be searched, will this justify a search of the personal effects therein belonging to a person occupying the premises if those effects might contain the items described in the warrant?

(3) Is a personal computer by its nature a device for recording information, such that it may be searched for information sought through a search warrant?

(4) Where an officer has preserved the full text of the script he used in applying for a telephonic search warrant, does a reviewing court's consideration of that script constitute a "reconstruction" of the application?

(5) May an unrecorded telephonic search warrant application be reconstructed when the omission of the contemporaneous recording does not impair the reviewing court's ability to ascertain what the magistrate considered when the warrant was issued?

(6) Is RCW 9A.44.115(2)(a) overbroad by infringing on constitutionally protected activities?

(7) Is RCW 9A.44.115(2)(a) unconstitutionally vague when applied to a defendant who, for purposes of his own sexual gratification, knowingly photographs another person without that person's knowledge and consent while that person is situated within a residential backyard enclosed by six-foot tall wooden fencing?

(8) Is a conviction for voyeurism based on the foregoing facts supported by sufficient evidence?

COUNTERSTATEMENT OF THE CASE

The Franklin County Prosecuting Attorney charged David Garrett Reep by Information with having committed the crimes of four counts of voyeurism in violation of RCW 9A.44.115(2)(a). (CP 191-92). The trial court denied Mr. Reep's pre-trial motions to dismiss or suppress evidence. (CP 195-202). Mr. Reep then proceeded to a bench trial based on stipulated facts. (CP 47-59). Mr. Reep was found guilty as charged. (CP 38-40). Judgment and Sentence was entered on January 24, 2006. (CP 20-37). This appeal followed. (CP 19).

The details of the investigation that led to Mr. Reep being charged with four counts of voyeurism are described in the findings of fact entered by the trial court following the suppression hearing

(to which no error is assigned). (CP 195-97). For the court's convenience, a copy of the findings is in the Appendix to this brief at A-1 through A-6.

RESPONSE TO ARGUMENT

(1) The first search warrant was not overly broad in what it authorized to be seized.

Mr. Reep first argues that the initial telephonic search warrant obtained by Detective Nelson did not meet particularity requirements and was overly broad in what it authorized to be seized. However, the warrant provided sufficient particularity in identifying the crime under investigation as the manufacture of methamphetamine. Unchallenged Finding of Fact numbered 4 from the motion hearing states as follows:

Detective Mike Nelson applied for and obtained from the Honorable Carolyn A. Brown a telephonic search warrant for the backyard of the residence and David Reep's bedroom. True and correct copies of the telephonic search warrant form filled out by Detective Nelson were attached to the State's memorandum as Exhibit "A" and admitted as Exhibit "8" for purposes of this hearing. True and correct copies of an accurate transcript of Detective Nelson's telephonic search application were attached to the State's memorandum as Exhibit "B" and admitted as Exhibit "9" for purposes of this hearing.

(CP 196). Accordingly, the telephone search warrant form filled out by Detective Nelson can be found in the record on appeal as

Exhibit "8" and at CP 96-98 (Exhibit "A" to the State's memorandum). A copy is also included in the appendix to this brief at A-7 through A-9. At the beginning of the form, Detective Nelson wrote in that evidence was being sought of the crime of Unlawful Manufacture of a Controlled Substance. (CP 96; Exhibit "8", at 1). In the balance of the form, Detective Nelson went on to make clear that the controlled substance being manufactured was methamphetamine. (CP 96-97; Exhibit 8, at 1-2).

The search warrant was not overly broad in what it authorized to be seized. In lieu of setting forth a list of items to be seized, "[t]he required degree of particularity may be achieved by specifying the suspected crime." State v. Askham, 120 Wn. App. 872, 878, 86 P.3d 1194, review denied, 152 Wn.2d 1032 (2004). Here, the suspected crime was identified as the manufacture of methamphetamine. (CP 96; Exhibit 8, at 1). The officers were properly limited to searching for evidence of that crime. (However, any other obvious evidence of criminal activity encountered during such search could be seized under the "plain view" doctrine. State v. Olson, 32 Wn. App. 555, 559, 648 P.2d 476 (1982)).

For example, pseudoephedrine pills, lithium batteries, glass jars, and tanks of anhydrous ammonia could be searched for and

seized as they would be evidence of the crime of the unlawful manufacture of methamphetamine. Political leaflets and religious articles could not be searched for and seized as they would not be evidence of that crime. The scope of the search was properly limited.

Federal case law also recognizes that the required degree of particularity may be achieved by identifying the crime under investigation, especially when reference is made to a specific criminal episode. See United States v. Spilotro, 800 F.2d 959, 964 (9th Cir. 1986) (“Reference to a specific illegal activity can, in appropriate cases, provide substantive guidance for the officer’s exercise of discretion in executing the warrant.”); United States v. Wong, 334 F.3d 831, 837-38 (9th Cir. 2003) (“The specificity of the items listed in the warrant combined with the language . . . directing officers to ‘obtain data as it relates to this case’ from the computers is sufficiently specific to focus the officer’s search.”); United States v. Caldwell, 680 F.2d 72, 76-77 (9th Cir. 1982) (holding impermissibly general a warrant where, “the only limitation on the search and seizure of appellants’ business papers was the requirement that they be instrumentalities or evidence of violation of the general tax evasion statute,” but noting that if the warrant is

cabined by a “perambulatory statement limiting the search to evidence of particular criminal episodes,” it may fulfill the particularity requirement); United States v. Adjani, 452 F.3d 1140, 1148 (9th Cir. 2006) (upholding search warrant against overbreadth challenge; court notes, *inter alia*, that the warrant limited the search for evidence of a specific crime – transmitting threatening communications with intent to commit extortion). In the instant case, the search warrant not only identified the crime under investigation as the manufacture of methamphetamine, it referenced the specific episode of the fire and explosion in the methamphetamine lab at the Reep residence on June 11, 2004. (Exhibit “8”; CP 96-98).

In State v. Christianson, 40 Wn. App. 249, 698 P.2d 1059 (1985), the warrant authorized the search of a 60 acre ranch, along with vehicles and persons found thereon and the seizure of:

[1] All evidence of the fruits of the crime(s) of manufacturing, delivering, or possessing controlled substances, and [2] all other things by means of which the crime(s) of manufacturing, delivering, or possessing a controlled substance (has) (have) or reasonably appears about to be committed, . . .

See Christianson, 40 Wn. App. at 251. In his majority opinion, Judge Munson observed:

The description of the items to be seized was also sufficiently particular to limit the discretion of the officers executing the warrant. The fact the warrant could have been more precise in identifying marijuana as the focus of the search does not affect its validity, since reasonable particularity is all that is required. The description of the items to be seized was confined to evidence of the suspected crime. A grudging and overly technical requirement of elaborate specificity has no place in determining whether a warrant satisfies the Fourth Amendment requirement of particularity.

Id. at 245 (citations omitted). In the instant case, the search warrant was similarly limited to evidence of the suspected crime. As only reasonable particularity is required, any demand for greater specificity would amount to a grudging and overly technical requirement.

In Olson, 32 Wn. App. 555, an informant had seen a quantity of marijuana in the defendant's residence. The warrant authorized a search for "all illicit drugs and controlled substances". The court noted that the requirements of particularity are met if the evidence to be seized is described with "reasonable particularity", which in turn is to be evaluated in light of "rules of practicality, necessity, and common sense." Olson, 32 Wn. App. at 557 (citing cases). The court went on to observe that "[t]he underlying measure of adequacy in the description is whether given the specificity in the

warrant, a violation of personal rights is likely.” Id. (quoting United States v. Johnson, 541 F.2d 1311, 1313 (8th Cir. 1976)). The Olson court continued:

Furthermore, there was no reasonable likelihood that a violation of the defendant’s rights would occur. The presence of marijuana in a particular residence raises a legitimate inference that marijuana may be present throughout the residence. Therefore, as a practical matter, the language used in the warrant in the present case could not have expanded the scope of a search for marijuana because, in searching for marijuana, the officers were authorized to inspect virtually every aspect of the premises. Any other contraband inadvertently found in the course of such lawful search would clearly be subject to seizure pursuant to the “plan view” doctrine.

Olson, 32 Wn. App. at 558-59 (citations omitted).

The rationale of the foregoing authorities applies here. The operation of a methamphetamine lab potentially involves a myriad of items. See State v. Zunker, 112 Wn. App. 130, 138, 48 P.3d 344 (2002), (“The State’s witnesses testified that the manufacture of methamphetamine requires more than pseudoephedrine and anhydrous ammonia. It also requires: lithium or a similar alkali metal; rock salt; two kinds of solvent, either toluene or denatured alcohol, and an oil-based solvent, acetone or either; a hydrochloric acid gas generator, usually a large mason jar with tubes coming out of it; a large mixing vessel; coffee filters; and a heat source – not

essential, but usual for drying the filters.”), review denied, 148 Wn.2d 1012 (2003). Given the number of items involved and the ease with which they could be concealed, a search related to a methamphetamine lab will require inspection of virtually every aspect of the premises. Any other evidence of criminal activity encountered by the searching officers could be seized under the “plain view” doctrine. Including in the search warrant a specific list of items to be seized would not, as a practical matter, have limited the scope of the search or provided any greater protection of privacy. The trial court’s comments are insightful:

Search warrants should be as narrow as possible and should not be broader than necessary because we have the privacy of individuals in balance with the need of the government to search, and that’s really what the whole idea there is.

The problem with a search warrant for evidence of a methamphetamine lab is – is that there has to be some leeway for common sense to apply, because a methamphetamine lab is quite a complex thing. It’s made up of various ingredients. We know . . . that there was a methamphetamine lab here. That was evidence that was in the warrant. And so common sense and certainly police officers know that . . . you’re going to be in there looking for chemicals. You’re going to be looking for the product, that is, methamphetamine. You’re looking for recipes. You’re looking for dominion and control. And that is a very broad thing that I think is more appropriately defined by identifying the nature of the crime which was done here.

So on these facts it's necessarily a general scope the search warrant is. And you have to balance the practicality of being particular as well. If the best thing you're looking for is identifying the crime, and I think this is one of those instances where it is, you're going to have a broad search.

Also you have to ask would being more particular than was done in this case have narrowed the scope of the search? And it really wouldn't have. It would have just been a listing of hundreds of things that you were looking for. And I think that's best defined by defining the crime.

And so I think the search is fine. The warrant itself is fine. And the execution is fine. That's different than if you were looking for a particular knife or a particular gun. And you're going to have to define that in detail and go after that one item, and then a scope that's broader than that's going to be illegal. But once the government has authority to search a residence for evidence of a methamphetamine lab, . . . that is a broad search. And I don't think it requires the government to list each and every item that they are going to find and where they might find it and that sort of thing, and it becomes impractical.

And so you have to be reasonable and balanced here, and the best way to do that I think is the case that was cited written by Judge Sweeney [Askham, 120 Wn. App. at 878, which recognized that the required degree of particularity may be achieved by identifying the crime under investigation].

(09/13/05 RP, at 151-52).

Moreover, any inartfulness on the part of the officer in filling in the telephonic search warrant form is not material to the validity

of the warrant. The crucial test for a search warrant “is its basis in probable cause, not its adherence to a particular form.” State v. Dodson, 110 Wn. App. 112, 122, 39 P.3d 324, review denied, 147 Wn.2d 1004 (2002). Accordingly, a search warrant will not be invalidated because the officer mistakenly used an incorrect search warrant form and the warrant form did not conform to the affidavit of probable cause. State v. Bushig, 119 Wn. App. 381, 387-88, 81 P.3d 143 (2003) (upholding search warrant despite fact officer used a form for a controlled substance warrant when he was actually seeking to search the residence for a person), review denied, 151 Wn.2d 1037 (2004). See also United States v. Baldyga, 233 F.3d 674 (1st Cir. 2000) (search warrant valid even though officer mistakenly listed the places to be searched in the “things-to-be-seized” section of the form).

At 9-10, Mr. Reep complains that the officer looked on the home computer in his bedroom during the course of executing the first search warrant. Unchallenged Finding of Fact Numbered 5 states in pertinent part, “Detective Mayse proceeded to look at items saved on the computer in David Reep’s bedroom, initially looking for a methamphetamine recipe or other items relating to violations of the Uniform Controlled Substances Act.” (CP 196).

Detective Mayse was certainly justified in looking for a methamphetamine recipe while searching for evidence relating to a methamphetamine lab operated by Mr. Reep. See City of Lynnwood v. \$128 Cash, 61 Wn. App. 505, 509, 810 P.2d 1377 (1991) (“Several items of evidence were removed, including laboratory equipment, chemicals, and recipes for the manufacturing of methamphetamine, LSD, and other controlled substances”); State v. Carlson, 130 Wn. App. 589, 596, 123 P.3d 891 (2005) (recognizing that the methamphetamine manufacturing process follows a recipe), review denied, 157 Wn.2d 1020 (2006). He was further justified in looking for that evidence on Mr. Reep’s personal computer. In today’s world, a computer is where a person would be expected to store his or her personal documents. A computer is nothing more than a notebook with a television screen. As the Ninth Circuit has stated:

Computers are simultaneously file cabinets (with millions of files) and locked desk drawers; then can be repositories of innocent and deeply personal information, but also evidence of crimes. The former must be protected, the latter discovered.

Adjani, 452 F.3d at 1152. In the instant case, a judicial officer had directed the police to search Mr. Reep’s bedroom for evidence of the crime of the manufacture of methamphetamine. Detective

Mayse was every bit as justified in looking on the computer in that bedroom for a methamphetamine recipe as he would have been in looking in a file cabinet or desk drawer, or at a ledger book or paper documents sitting on the same desk where the computer was located. See United States v. Gomez-Soto, 723 F.2d 649 (9th Cir.), cert. denied, 466 U.S. 977, 104 S. Ct. 2360, 80 L. Ed. 2d 831 (1984), in which the Ninth Circuit upheld admissibility of a micro cassette, which was seized during execution of a search warrant that authorized seizure of tangible documents and not electronically stored documents. In Gomez-Soto, the court reasoned that “[i]f a warrant sufficiently describes the premises to be searched, this will justify a search of the personal effects therein belonging to a person occupying the premises *if those effects might contain the items described in the warrant.*” Gomez-Soto, 723 F.2d at 654. Like the micro cassette in Gomez-Soto, a computer is “by its very nature a device for recording information.” Gomez-Soto, 723 F.2d at 655.

(2) The second search warrant was not overly broad in what it authorized to be seized.

Mr. Reep also argues that the second telephonic search warrant, obtained by Detective Mayse, was overly broad in what it

authorized to be seized. In filling in the telephonic search warrant form, Detective Mayse listed the crimes under investigation as "Narcotics/Child Sex". (CP 102; Exhibit 6, at 1). He also provided a list of specific items. (CP 102; Exhibit 6, at 1). A copy of Exhibit 6 is in the appendix at A-13 through A-14.

For the reasons stated in Part 1, the required degree of particularity was achieved by specifying the crimes under investigation. The State's argument in Part 1 is incorporated herein by reference.

Mr. Reep argues that the drug crime was not sufficiently identified as the reference was only to "Narcotics". However, that reference was followed by "namely: muriatic acid, [toluene], metal bowels, burners, glassware, and other precursors consist[ent] with the manufacture of meth." (CP 102; Exhibit 6, at 1). It is clear from this that the crime under investigation was the manufacture of methamphetamine.

Mr. Reep also complains at 13 that "a review of the Revised Code of Washington does not reveal any crime known as child sex." However, the RCW's certainly define many specific crimes dealing with inappropriate sexual behavior involving children.

Accordingly, the warrant did not authorize the seizure of any documents that were not evidence of criminal activity.

Moreover, where the circumstances as a whole established probable cause to believe a crime had been committed, the police officer's inability to articulate the specific crime he suspected will not defeat the finding of probable cause. State v. Gooman, 42 Wn. App. 331, 337, 711 P.2d 1057 (1985), review denied, 105 Wn.2d 1012 (1986). "This is especially true where . . . the known facts could support the elements of closely related or similarly defined crimes." Id. "The 'every day life' evaluation called for [in determining probable cause] does not require that type of categorical precision." Id. "If the standard is met, it will not matter that the officer could not say at the moment of the search whether he suspected, for example, burglary, robbery, or armed robbery, or possession of stolen property." Id.

At the time of applying for the warrant, Detective Mayse had seen the following: (1) photographs on Mr. Reep's computer of young children that appeared to have taken without their knowledge; (2) pictures on Mr. Reep's computer of young girls performing sex acts that appeared to have been graphically simulated; and (3) in Mr. Reep's bedroom, a "collage" of cut-out

magazine pictures of young girl models centered on a nude picture of a young female. (CP 105; Exhibit 7, at 2). (A copy of Exhibit 7 is in the appendix at A-15 through A-17). While it may have been impossible at that point to articulate whether Mr. Reep was stalking the children, engaging in voyeurism, performing sexual acts with children, or participating in child pornography, there was nonetheless probable cause to believe he was committing one or more closely related crimes. Nothing more was required or even possible at that stage of the investigation.

In addition, the fact that Detective Mayse did not cite a specific RCW actually served to make the search warrant more particular. See Adjani, 452 F.3d at 1149, citing Spilotro, 800 F.2d at 964 (considering favorably warrants “describing the criminal activit[y] . . . rather than simply referring to the statute believed to have been violated.”) Here, the reference to the activity (“child sex”) limited the search more than would a citation to a RCW. The police could not search for any evidence that did not relate to child sex.

Moreover, the second search warrant did more than just identify the crimes under investigation. It proved a specific list of items to be seized: “Muratic acid, tulane [sic], metal bowls,

burners, glassware, and other precursors consist[ent] with the production of meth; and any data storage devices to include a computer and its hardware, compact discs, floppy discs, portable storage units such as VSB accessible devices, digital cameras, video cameras, photographs any documentation of criminal activity by the suspect and other evidence not listed that supports the suspected criminal activity.” (CP 102; Exhibit 6, at 1). Combined with the identification of the criminal activity under investigation, the warrant sufficiently limited the scope of the search. See Adjani, 452 F.3d at 1148, citing Wong, 334 F.3d at 837-38 (“The specificity of the items listed in the warrant combined with the language . . . directing officers to ‘obtain data as it relates to this case’ from the computers is sufficiently specific to focus the officer’s search.”) While Mr. Reep complains at 16 of the reference in the warrant to “other evidence not listed that supports the criminal activity,” it is indistinguishable from the direction in Wong to “obtain data as it relates to this case.”

Mr. Reep’s reliance on State v. Nordlund, 113 Wn. App. 171, 53 P.3d 520 (2002), review denied, 149 Wn.2d 1005 (2003) is misplaced. That case involved prosecution for several offenses, including indecent liberties by forcible compulsion, two counts of

unlawful imprisonment, and second degree attempted rape. The charges arose from two separate attacks against two separate victims on the same day. The court held that a person's use of a personal computer to access pornography and send e-mails is not a basis for issuing a search warrant for the computer and a search of its files absent a nexus between such use and the crime under investigation. Id. at 183. In contrast, at the time of applying for the second search warrant in the instant case Detective Mayse had already seen evidence of criminal activity on Mr. Reep's personal computer and elsewhere in his bedroom. (CP 105; Exhibit 7, at 2). Accordingly, there was a direct nexus between the computer and the matter under investigation.

Also misplaced is Mr. Reep's reliance on State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992). In that case, the court found that use of the term "child pornography" was insufficiently particular when read in context of the entire warrant there under consideration. The court noted:

[T]he term "child pornography" is an "omnibus legal description" and is not defined in the statutes. It is a term analogous to "obscenity", and the term "obscenity" is not sufficiently particular to satisfy the Fourth Amendment because it leaves the officer too much discretion in deciding what to seize under the warrant.

Id. at 552-53. In contrast, the elements of the crimes involving sexual misconduct with children are set forth in the statutes. It is not analogous to “obscenity”, as the officer has no discretion in deciding what conduct constitutes a crime involving sexual misconduct with children.

Moreover, as with the first warrant, there was no reasonable likelihood that a violation of Mr. Reep’s rights would occur. There were photographs of children on Mr. Reep’s computer that had been taken without their consent; in close proximity were photographs demonstrating Mr. Reep’s sexual attraction to children. (CP 105; Exhibit 7, at 2). A reasonable inference arose that the photographs of the children taken without their knowledge were for purposes of Mr. Reep’s sexual gratification. The presence of these photographs on Mr. Reep’s computer created an inference that other such matters were saved on the computer. Even if the language in the warrant had been more precise, the result would have been the same: the police were justified in searching all items saved on the computer. See Adjani, 452 F.3d at 1150 (“Computer files are easy to disguise or rename, and were we to limit the warrant to . . . a specific search protocol, much evidence would

escape detection simply because of [the criminals'] labeling of the files documenting [their] criminal activity. The government should not be required to trust the suspect's self-labeling when executing a warrant."). Any other evidence encountered during that search could be seized under the "plain view" doctrine. See Olson, 32 Wn. App. at 558-59.

- (3) The failure to record the application for the second telephonic search warrant is not fatal to the warrant. First, the search was already authorized by the first warrant and the police only sought a second warrant out of an excess of caution. Second, since the entire text of the application was preserved, there was no need for a "reconstruction". Even if the trial court's actions were construed to be a "reconstruction", it was justified by the presence of corroborating physical evidence.**

Mr. Reep next argues that the second telephonic search warrant was invalid because of a mechanical malfunction that prevented the application from being recorded. The following unchallenged findings of fact explain the events that occurred after the first telephonic search warrant had been obtained:

- (5) A team of officers arrived to execute the search warrant and clean up the methamphetamine lab on the morning of June 12, 2004. A "collage" of cut-out magazine pictures was found in David Reep's bedroom and was admitted for this hearing as Exhibit "5". Detective Mayse proceeded to look at items

saved on the computer in David Reep's bedroom, initially looking for a methamphetamine recipe or other items relating to violations of the Uniform Controlled Substances Act. Upon seeing items that he considered suspicious of criminal activity unrelated to violations of the Uniform Controlled Substances Act, he decided to shut down his search and apply for another telephonic search warrant.

(6) Detective Mayse prepared a script for his telephonic search warrant application. True and correct copies of this script were attached to the State's memorandum as Exhibit "D" and admitted for purposes of this hearing as Exhibit "7".

(7) Detective Mayse re-contacted the Honorable Carolyn A. Brown by telephone and applied for another telephonic search warrant by reading from the script he had prepared (Exhibit "7"). Exhibit "7" accurately represents the information provided to Judge Brown by Detective Mayse. Judge Brown orally authorized a second search warrant.

(8) Pursuant to the oral authorization of Judge Brown, Detective Mayse prepared a telephonic search warrant form. True and correct copies of this form were attached to the State's memorandum as Exhibit "C" and admitted for purposes of this hearing as Exhibit "6".

(9) After terminating his phone conversation with Judge Brown, Detective Mayse realized that due to technical difficulties, he had no recording of his conversation with Judge Brown. Detective Mayse made a point to save the script he read to Judge Brown in applying for the search warrant.

(10) The State has stipulated that Judge Brown has no current recollection of the contents of Detective Mayse's telephonic search warrant application.

(CP 196-97). A copy of the script that Detective Mayse prepared and read to Judge Brown (Exhibit 7) is in the Appendix at A-15 through A-17.

Mr. Reep relies on State v. Myers, 117 Wn.2d 332, 815 P.2d 761 (1991). However, Myers is distinguishable for the reasons discussed below.

Myers involved an appeal from a conviction for possession of a controlled substance with intent to deliver. Two officers had gone to the defendant's home pursuant to an anonymous tip that he was selling drugs from the house. The officers contacted the defendant at the front door, informed him of the tip, and requested permission to search the house. A cigarette rolling machine was visible through the front door. The defendant turned and said "come on in" or a similar response that the officers interpreted as consent. The officers entered the house, walked with the defendant to the kitchen, and then back to the front door. Walking through the house, the officers saw a marijuana cigarette, rolling papers, and a "roach" clip. The officers again requested permission to search the house but the defendant denied permission. A neighbor told the officers he had seen people leaving the house with a substance he recognized as cocaine.

One the officers contacted a magistrate by telephone and related the above facts. The magistrate authorized a telephonic search warrant and a search of the house was completed. Controlled substances were found.

The following day, the officer learned the tape of the conversation with the magistrate either was erased or was never recorded. The officer than wrote down what he recalled of the events of the previous day.

At a suppression hearing four months later, the two officers testified to the foregoing facts. The magistrate had little independent recollection of the events. The trial court denied the motion to suppress. The defendant was convicted as charged and appealed.

After reviewing federal and state case law, the appellate court noted that ideally, a recoding of a telephonic affidavit will be made at the time the sworn statements are offered. Myers, 117 Wn.2d at 343. "Parties may reconstruct a recording, however, if the omission in the contemporaneous recording does not impair the reviewing court's ability to ascertain what the magistrate considered when he issued the warrant." Id.

The Myers court noted that the only evidence of the contents of the sworn statement was an officer's report written the day after the search and the testimony of the officers at a suppression hearing four months later. There was no evidence that did not depend on the credibility of the officers. Under the circumstances of that case, it was "impossible to accurately review what the judge considered or found when he issued the warrant to search." Accordingly, evidence seized pursuant to the "reconstructed" affidavit was suppressed. Myers, 117 Wn.2d at 343-44.

As the testimony of the police officers in Myers was completely uncorroborated, it was unnecessary for the court to address what type of verification may be adequate in another case. Nonetheless, the court stated in dicta that an entire sworn statement may be reconstructed "only if detailed and specific evidence of a disinterested person, like the magistrate or court clerk, corroborates the reconstruction." Myers, 117 Wn.2d at 343.

Myers may be contrasted to the decision of the Supreme Court of Wisconsin in State v. Raflik, 248 Wis.2d 593, 636 N.W.2d 690 (2001), which upheld reconstruction of an unrecorded telephonic search warrant application. In Raflik, an officer received a tip from the defendant's landlord that the defendant had

marijuana plants in his garage. The officer called in a telephonic search warrant application from a police station. The officer believed he was speaking on a recorded line. The magistrate granted the warrant and the search was conducted, resulting in controlled substances being seized.

The following day, the officer went to the police station to retrieve the recording and learned for the first time that the line he had used was unrecorded. The officer immediately prepared a written affidavit setting forth the information he had provided to the magistrate. He also re-contacted the magistrate and gave recorded testimony regarding the events of the previous day.

The Raflik court distinguished Myers. It noted that in Myers, “the only evidence of the telephonic affidavit was the police officer’s testimony, offered four months after the original application, and the officer’s report made after the warrant was executed”; under these circumstances, the reconstruction “made it impossible to accurately review what the judge considered” when he issued the warrant. Raflik, 636 N.W.2d at 696. In contrast, in Raflik the application was reconstructed only 18 hours after the application, only one witness was required to testify, the facts that established probable cause were uncomplicated and easily remembered by the witness, and

many of the facts could be corroborated by the affiant's affidavit and warrant filled in separately but simultaneously by the detective and judge during the original telephone application; therefore, reconstruction of the telephonic search warrant application, after it was discovered the application was not recorded, did not violate the defendant's due process rights and right to meaningful appeal. Raflik, 636 N.W.2d at 696-701.

Myers and Raflik are easily harmonized. Both cases recognize that reconstruction of a telephonic search warrant application is acceptable if it does not impair the reviewing court's ability to ascertain what the magistrate considered when the warrant was issued. Myers, 117 Wn.2d at 332; Raflik, 636 N.W.2d at 696. While such review was not possible in Myers, a different situation existed under the circumstances of Raflik.

The instant case is clearly distinguishable from Myers. First, the unrecorded affidavit in Myers related to the only search warrant obtained for the defendant's premises. In our case, the unrecorded application was for a second search warrant. As explained in Part 1 of the this brief, the first search warrant obtained by Detective Nelson authorized the search of everything in Mr. Reep's bedroom, including his personal computer. It is not invariably necessary for

officers to discontinue a search and apply for another warrant when they encounter evidence of a crime other than the one originally being investigated. Obvious evidence of another crime may be seized under the "plain view" doctrine. Olson, 32 Wn. App. at 558-59. Even if the officers come across items not described in the warrant which do not constitute contraband or instrumentalities of crime, the officers may seize the evidence if it will aid in a particular apprehension or conviction, or has a sufficient nexus with the crime under investigation. State v. Stenson, 132 Wn.2d 668, 695, 940 P.2d 1239 (1997). Even though it was not truly necessary, the officer in our case exhibited an excess of caution in shutting down the search and seeking a second search warrant once he encountered evidence of another crime. The police should not be penalized for this great deference to judicial authority. As a practical matter, the second warrant did not expand the scope of the search.

Second, in Myers, and even in Raflik, the officer was speaking extemporaneously when the application was made for the telephonic warrant; therefore, it was necessary for the officer to reconstruct at later time what was said when the application was made. In the instant case, the officer was reading from a prepared

script which was preserved and made available to the reviewing court. As stated in unchallenged Findings of Fact Numbered 6, 7, and 9:

(6) Detective Mayse prepared a script for his telephonic search warrant application. True and correct copies of this script were attached to the State's memorandum as Exhibit "D" and admitted for purposes of this hearing as Exhibit "7".

(7) Detective Mayse re-contacted the Honorable Carolyn A. Brown by telephone and applied for another telephonic search warrant by reading from the script he had prepared (Exhibit "7"). Exhibit "7" accurately represents the information provided to Judge Brown by Detective Mayse. Judge Brown orally authorized a second search warrant.

...

(9) After terminating his phone conversation with Judge Brown, Detective Mayse realized that due to technical difficulties, he had no recording of his conversation with Judge Brown. Detective Mayse made a point to save the script he read to Judge Brown in applying for the search warrant.

(CP 197). Accordingly, unlike in Myers or even in Raflik, in the instant case it was not necessary for the trial court to do a "reconstruction" at all. The full text of the information provided to the magistrate was readily available for review. It remains available to this court, in Exhibit 7 and at Pages 104 through 106 of the Clerk's Papers.

Even if review of Detective Mayse's script would be considered a "reconstruction" of the application, the trial court did not err in refusing to suppress evidence. In Raflik, the court emphasized that the officer had reduced the information to writing in close proximity to the issuance of the warrant. See Raflik, 636 N.W.2d at 696-701. The instant case is even more compelling than Raflik: Detective Mayse reduced the information to writing even before placing the phone call to the magistrate, and read that information in its entirety in applying for the warrant.

Moreover, the evidence here is not based solely on the credibility of the officer. Unchallenged Finding of Fact Numbered 5 states in pertinent part:

A team of officers arrived to execute the search warrant and clean up the methamphetamine lab on the morning of June 12, 2004. A "collage" of cut-out magazine pictures was found in David Reep's bedroom and was admitted for the this hearing as Exhibit "5".

(CP 196). The "collage" consisted of pictures of young girl models centered on a naked picture of a young female. (CP 105; Exhibit 7, at 2). This "collage" subsequently became the centerpiece of Detective Mayse's telephonic search warrant application. (CP 105; Exhibit 7, at 2). The "collage" was preserved and made available

to the reviewing court. (Finding of Fact Numbered 5, CP 196). It constituted corroborative physical evidence that in no way depended on the credibility of the officer.

Mr. Reep will no doubt argue that the fact the physical evidence exists does not prove the officer told the magistrate about it. But it must be remembered that evidence may be either direct or circumstantial, and “one type of evidence is no more or less trustworthy than the other.” State v. Rangel-Reyes, 119 Wn. App. 494, 499, 81 P.2d 157 (2003). The fact that Detective Mayse had just viewed such a shocking thing raises a compelling inference that he included it his search warrant application; in effect, it may be inferred from the existence of the physical evidence that such evidence was described to the magistrate. Indeed, what motive would the officer have had to not mention it? An analogy can be drawn to an officer seeing a dead body on a front porch and then immediately reaching for his cell phone to apply for a telephonic search warrant for the house. If it can be proved the dead body existed, it would constitute strong circumstantial evidence that the officer mentioned the dead body to the magistrate.

While Myers speaks in terms of corroboration by a disinterested “person”, there was simply no independent physical

verification present in that case. Accordingly, Myers cannot be read to preclude consideration of physical evidence as verification of an officer's testimony regarding the content of an unrecorded telephonic search warrant application. Myers does make clear that the critical factor is "the reviewing court's ability to ascertain what the magistrate considered when he issued the warrant." Myers, 117 Wn.2d at 343. That is not an issue in the instant case. As the trial court observed:

This is [a case] where the officer wrote out his testimony for the judge and then read it. And I can tell you from practical experience that officers quite often do that, because they are nervous. They want to write it out first. They don't want to just ad lib it over the phone. So I think it's pretty common for them to . . . read over the telephone their affidavits. That's what the officer testified that he did, so it's my finding that he constructed this before, before he read it to Judge Brown and before he realized that it was lost, and that's reasonable for him to think that it may have been adequate to support a second warrant.

Probably wasn't on its own, but in conjunction with the evidence that was collected, physical evidence collected pursuant to the first search warrant, that is, the collage, and the initial search of the computer, those things with the collage as physical evidence. The written statement itself is corroborative. Now I'd have to believe that he lied about that being written out in advance to find out otherwise, but I didn't find - - I don't believe that. I believe he did write it out in advance and that is sufficient to support the second warrant.

(09/13/05 RP, at 154-55). Not only is it not difficult to ascertain what the magistrate considered, the full text is available to the reviewing court. The matter is succinctly stated in the trial court's Conclusion of Law Numbered 7:

The fact that the application for the second search warrant obtained by Detective Mayse was not successfully recorded is not fatal to the warrant. Reconstruction of a telephonic search warrant application is acceptable if it does not impair the reviewing court's ability to ascertain what the magistrate considered. Here, Detective Mayse prepared a written script which he read to Judge Brown in applying for the warrant. The written script was preserved by Detective Mayse and is before this Court. In addition, the "collage" of cut-out magazine pictures mentioned in the application has been preserved and is before this Court, providing corroboration independent of the testimony of Detective Mayse. Under the circumstances of this case, the reviewing court can reasonably ascertain the full text of the material provided to the issuing magistrate.

(CP 119).

(4) RCW 9A.44.115 is not unconstitutionally vague as applied to the conduct of Mr. Reep.

Mr. Reep next argues that the voyeurism statute is unconstitutionally vague as applied to his conduct. RCW 9A.44.115(2) provides:

A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of

any person, he or she knowingly views, photographs or films:

(a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or

(b) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

RCW 9A.44.115(1)(c) further defines "place where he or she would have a reasonable expectation of privacy" as follows:

(i) A place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another; or

(ii) A place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance[.]

"Surveillance" is defined in RCW 9A.44.115(1)(d) in this manner:

"Surveillance" means secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person[.]

The meaning of the voyeurism statute is not vague or difficult to determine from its language. The instant case is controlled by State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005). Like Mr. Reep, the defendant in Stevenson claimed the voyeurism

statute was void for vagueness as applied to his conduct. The court noted a defendant can prevail on a vagueness challenge only by showing beyond a reasonable doubt that the statute fails to define the offense with sufficient definiteness or fails to provide ascertainable standards to guard against arbitrary enforcement. Id. at 188. When evaluating a statute as applied, a court will look to the actual conduct of the person making the challenge. Id. at 189.

Like Mr. Reep, the defendant in Stevenson claimed the phrase “place where he or she had a reasonable expectation of privacy” was unconstitutionally vague as applied to his conduct. He had parted the blinds and looked at his daughter as she showered in the house where they both lived. However, the court noted:

Nor is the phrase “[p]lace where he or she would have a reasonable expectation of privacy” problematic. RCW 9A.44.115(1)(c). T.S. showered in her bathroom, where no one can dispute that she had a reasonable expectation of privacy. The phrase is sufficiently definite as applied to Stevenson’s actions, and it does not invite inordinate amounts of discretion.

Stevenson, 128 Wn. App. at 190. Accordingly, the defendant in Stevenson was found to have failed to prove beyond a reasonable doubt that RCW 9A.44.115 is unconstitutionally vague. Id.

By the same token, the phrase "place where he or she would have a reasonable expectation of privacy" is not unconstitutionally vague as applied to Mr. Reep's conduct. Since Mr. Reep stipulated to the facts at trial, there can be no question as to the exact nature of his conduct. He took photographs of four children for purpose of arousing or gratifying his own sexual desire. (CP 47). All of the photographs were taken without the knowledge and consent of the person being photographed. (CP 47). At the time the photographs were taken, the children were in the backyards of one of the three homes directly to the north of the Reep residence. (CP 48). These backyards are completely enclosed by six-foot tall wooden stockade fencing. (CP 48). The location is illustrated in a diagram appearing at CP 56; the diagram is also included in the appendix to this brief at A-24 for the court's convenience. The numbers 1, 2, 3, 6 and 7 have been added to the diagram to show where the children were situated at the time the photographs were taken. Also in the appendix are copies of the Stipulated Facts on Bench Trial at A-18 through A-20 and Findings of Fact and Conclusions of Law on Bench Trial at A-21 through A-23.

Certainly when children play in a backyard completely enclosed by a six-foot tall wooden stockade fence, they (and their

parents) have a reasonable expectation that they will be free from hostile surveillance. As in Stevenson, RCW 9A.44.115 leaves no doubt that the conduct in question is proscribed, nor does it invite an inordinate amount of discretion.

Mr. Reep argues at 26 that “[a] statute that makes no distinction between conduct calculated to harm and that which is essentially innocent is an unreasonable exercise of the government’s police power.” However, RCW 9A.44.115 is violated only when, for purposes of gratifying sexual desire, the defendant knowingly views, photographs or films another person without their knowledge or consent when the victim is in a place where he or she has a reasonable expectation of privacy. Such conduct is clearly calculated to harm.

Mr. Reep continues at 27 by stating:

The Appellant believes this court, when reviewing that statute, must look to whether the observation and recording by photographs are different than those from casual observation. If the observation made and recorded by the Appellant were open to the casual observation of others, then the statute is too broad to allow the conviction of the Defendant.

However, RCW 9A.44.115 does not criminalize casual viewing under any circumstances. “Views” is defined as “the intentional looking upon of another *for more than a brief period of time, in other*

than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity.” RCW 9A.44.115(1)(e) (emphasis added). Absent meeting this stringent definition of “viewing”, the defendant must photograph or film his or her victims. Photographing or filming is by its nature more than something casual or cursory.

At 27-28, Mr. Reep emphasizes that he committed no act of criminal trespass. However, the same was true of the defendant in Stevenson, who was in his own home at the time he committed his act of voyeurism. The question is not where the perpetrator was located, but whether the victim was in a place where he or she had a reasonable expectation of privacy. There is nothing in the language of the statute that would mislead anyone into believing they would have a defense to a voyeurism charge based on committing the act from their own home.

Mr. Reep contradicts himself on whether criminal law search and seizure cases are relevant to determining whether a person is in a “place where he or she would have a reasonable expectation of privacy” for purposes of RCW 9A.44.115. At 22, he states as follows: “Because the statute’s specific definitions differ from how the term ‘reasonable expectation of privacy’ is understood in the

context of the Fourth Amendment, we do not consider Larson's (sic) line of argument based on Fourth Amendment cases." At 29, he proceeds to cite Fourth Amendment cases and states, "This court needs to look no further than cases that examine whether a reasonable expectation of privacy can be expected from criminal case law defining the issue."

Mr. Reep was right the first time. For a search to fall within the proscription of the Fourth Amendment, the person "invoking its protection must claim state invasion of a justifiable, reasonable, or legitimate expectation of privacy." City of Pasco v. Shaw, 127 Wn. App. 417, 422, 110 P.3d 1200 (2005) (quoting State v. Crandall, 39 Wn. App. 849, 852, 697 P.2d 250, review denied, 103 Wn.2d 1036 (1985)), review granted, 156 Wn.2d 1016 (2006). "The inquiry requires answers to two questions: (1) whether the individual by conduct has exhibited a subjective expectation of privacy; and (2) whether society is prepared to recognize that expectation as reasonable." Crandall, 39 Wn. App. at 852. In contrast, RCW 9A.44.115 provides two specific statutory definitions of the term "place where he or she would have a reasonable expectation of privacy". The first statutory definition includes places "where a reasonable person would believe that he or she could disrobe in

privacy, without being concerned that his or her undressing was being photographed or filmed by another.” RCW 9A.44.115(1)(b)(i). The second definition includes places “where one may reasonably expect to be safe from casual or hostile intrusion or surveillance.” RCW 9A.44.115(1)(b)(ii). Since different definitions of “reasonable expectation of privacy” are used in RCW 9A.44.115 and in the Fourth Amendment context, criminal law search and seizure cases are not relevant to the instant case.

It is not surprising that “reasonable expectation of privacy” would have different meanings in different contexts. Persons growing marijuana plants in a fenced backyard where the plants could be seen from a neighbor’s second floor window could expect their neighbors to report the matter to the police. However, those same persons would reasonably expect their neighbors to respect their privacy and not subject them to hostile surveillance, even if the neighbors may occasionally take a casual view of the backyard.

(5) RCW 9A.44.115 is not unconstitutionally overbroad.

Mr. Reep next argues, at 30, that RCW 9A.44.115 is overbroad in that it prohibits constitutionally protected free speech rights. Again, Stevenson is dispositive.

The defendant in Stevenson made an identical argument to that put forth by Mr. Reep. The Stevenson court noted that a law is overbroad only if it sweeps within its prohibitions constitutionally protected free speech activities. Stevenson, 128 Wn. App. at 190. It further noted the plurality in State v. Glas, 147 Wn.2d 410, 54 P.3d 147 (2002), had held RCW 9A.44.115 was not unconstitutionally overbroad. While the statute was amended subsequent to Glas, the amendment was not material to the overbreadth analysis. Accordingly, the overbreadth argument was foreclosed by Glas.

Moreover, a person's right to privacy in his or her home does not preclude the State from imposing reasonable regulations on a person's conduct in his or her home. State v. Smith, 93 Wn.2d 329, 345-48, 610 P.2d 869 (1980) (upholding laws prohibiting possession of marijuana for personal use in private homes). Cases discussing the right to privacy in the home generally limit that right to activities involving important or fundamental rights. Id. at 348. Mr. Reep has no fundamental right to engage in voyeurism. See State v. Davis, 53 Wn. App. 502, 768 P.2d 499 (1989) (holding statute prohibiting possession of child pornography did not infringe

on defendant's right to privacy, as the State had a compelling interest in protecting children from sexual exploitation).

RCW 9A.44.115 does not infringe on First Amendment rights. Mr. Reep's overbreadth argument fails.

(6) Mr. Reep's conviction is supported by sufficient evidence.

Finally, Mr. Reep challenges the sufficiency of the evidence to support his convictions for four counts of voyeurism. The applicable law is stated in Rangel-Reyes:

On a challenge to the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution, and we must determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. We must draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. The same standard applies regardless of whether the case is tried to a jury or to the court. The elements of a crime may be established by either direct or circumstantial evidence, and one type of evidence is no more or less trustworthy than the other.

Rangel-Reyes, 119 Wn. App. at 499 (citations omitted).

It is apparent from the language of RCW 9A.44.115 that its coverage extends beyond the activities of a traditional "Peeping Tom". First, it is not necessary that the victim be unclothed or that the photograph be of intimate areas unless the charge is made under RCW 9A.44.115(2)(b). Where, as here, the defendant is

charged under RCW 9A.44.115(2)(a), it need only be shown that the victim was in a place where he or she had a reasonable expectation of privacy. Second, it is not necessary that the victim be in a location where he or she would feel free to disrobe. It is only necessary that the place be one where “one may reasonably expect to be safe from casual or hostile intrusion or surveillance.”

RCW 9A.44.115(1)(c)(ii). As Judge Sweeney has written:

The Washington Legislature did not, however, stop with [RCW 9A.44.115(1)(b)(i)]. It also gave us RCW 9A.44.115(b)(ii). If it is not superfluous, this section protects places other than those protected in (b)(i), i.e., not “private” places where one would normally disrobe but places where one would normally keep one’s clothes on. The reasonable expectation of privacy protected in these places is, therefore, something other than the freedom to disrobe.

State v. Glas, 106 Wn. App. 895, 903, 27 P.3d 216 (2001), *rev’d on other grounds*, 147 Wn.2d 410 (2002). (RCW 9A.44.115(b)(i) and RCW 9A.44.115(b)(ii) were subsequently redesignated as RCW 9A.44.115(c)(i) and RCW 9A.44.115(c)(ii) respectively, but the relevant language remains the same.)

To prove the crime of voyeurism under the circumstances of this case, the State had to prove that Mr. Reep (1) for the purpose of arousing or gratifying his own sexual desire; (2) knowingly photographed; (3) another person; (4) without that person’s

knowledge or consent; (5) while such person was in an area where he or she would have a reasonable expectation of privacy. See Stevenson, 128 Wn. App. at 193. Mr. Reep stipulated to all of these elements except the fifth one, i.e., he denied that the children were in a place where they would have a reasonable expectation of privacy. (CP 47-48).

The stipulated facts reflect that at the time the photographs were taken, the children were in the backyards of one of the three homes directly to the north of Mr. Reep's residence. (Stipulated Fact Numbered 7, CP 48). The parties stipulated to the accuracy of a diagram of these backyards prepared by Detective Ben Majetich of the Pasco Police Department. (Stipulated Fact Numbered 8, CP 48). This diagram appears in the record at CP 56 and a copy is also included in the appendix to this brief at A-24 for the court's convenience. As reflected in the diagram, the backyards are enclosed by wooden fencing measuring six feet in height. (Stipulated Fact Numbered 8, CP 48). The wooden fencing next to the Reep residence is the same height as the wooden fencing that protects the backyards from Court Street, which is the main thoroughfare through the area. (Stipulated Fact Numbered 8, CP 48). The parties also stipulated that the nature of the wooden

fencing was accurately reflected by photographs filed contemporaneously with the stipulated facts (i.e., it is solid wooden stockade-style fencing). (Stipulated Fact Numbered 8, CP 48). A copy of the stipulated photograph appearing at CP 47 is included in the appendix to this brief at A-25 for the court's convenience. (The clarity of the copy in the appendix may be slightly less than the color print filed with the trial court, but should be sufficient to demonstrate the nature of the fence.)

Following the stipulated facts bench trial, the trial court entered Finding of Fact Numbered 11 as follows:

The Court hereby resolves the principal disagreement between the parties by finding that all of the aforesaid persons being photographed were in a place where they would have a reasonable expectation of privacy. The residential backyards surrounded by six-foot stockade fencing were places where one may reasonably expect to be free from casual or hostile intrusion or surveillance within the meaning of RCW 9A.44.115(1)(c)(ii).

(CP 39-40). The trial court elaborated when announcing its oral decision:

[T]his is private property that has a six-foot fence on it that says, "Casual intruders cannot come in here," that, "Hostile intruders cannot come in here." It may still be viewable. It clearly is viewable from the neighbor's property. But the physical location seems to be the issue. And this is an area that I think a person would have a reasonable expectation that they

would not have an intruder and that they would not be viewed for sexual purposes. It is the mentality of the property owners that's at issue initially to determine the location. And I think it's clear that if you have a six-foot tall fenced backyard that you don't expect your children to be photographed, secretly photographed, and that's the issue here.

I think you have a reasonable expectation. It may not be a physical expectation in the sense that somebody, of course, could photograph them from overhead from an airplane, from a balloon or from a tree or from the upstairs neighbors, but the expectation of privacy is there that a person would reasonably be offended if they caught somebody doing that. And in my mind this is the type of physical location that is protected by the voyeurism statute.

The remainder of the elements are really stipulated to[.] [T]hat he was doing it for sexual gratification is the stipulation [and] that they were photographed, not just accidentally viewed or viewed for a legitimate purpose like surveying the neighborhood like the city flies over, or even law enforcement could probably be there[.] . . . For a legitimate government purpose you could view this backyard.

So there's two parts to this: It's an area of reasonable expectation of privacy from general viewing. If people can casually look in there, and I suppose people could even photograph in there, but what makes this a criminal act is that he was doing it with the intent for sexual gratification.

. . . I think this case is distinguishable from [State v. Glas], because this is a private area, and it is signaled to the general public clearly that this is a private area by the six-foot-tall fence, and there has to be a certain degree of respect for that, and the type of respect that's required by the voyeurism statute is that you don't view there in that area for sexual gratification. . . .

There are other cases that could be less clear and that may test this statute, but I think that where you have this clear signal to the outside world that we have a six-foot fence, one, that it's not an area where you could casually or even hostilely intrude and reasonably be expected to be there, and the homeowners certainly don't expect casual or hostile intruders inside their six-foot fence. So on that ground I think that defines this place as one where you can't photograph.

It certainly doesn't prevent all type of surveillance, because it's only six feet tall, but I think it sends the signal to people that you shouldn't be looking in here for your own sexual gratification and/or photographing for sexual gratification. So I think this is a situation that's protected by the statute.

(12/08/05 RP, at 191-94).

At 34, Mr. Reep argues that “[i]t is uncontraverted that [he] took these photographs from his own constitutionally protected area and his residence into areas that were readily viewable from his windows, garage, and driveway.” However, the same was true of the defendant in Stevenson, who was standing in his own home looking into his daughter's bathroom through a window. The court found that defendant's conviction was supported by sufficient evidence. Stevenson, 128 Wn. App. at 192-95.

He continues by arguing at 34 that “[t]he views that Mr. Reep . . . memorialized by use of his camera were views that were not

only available to him from his property, but also from the property of the alleged victim neighbors through chain link fences.” As indicated on Detective Majetich’s diagram, chain-link fences do separate the backyards of 8221, 8217, and 8211 Sunset Lane from each other; however, the outside parameter of these backyards is completely enclosed by six-foot wooden fencing, protecting all three backyards from outside viewing. (CP 56). It is certainly understandable that a homeowner may be willing to share a backyard with two trusted neighbors, yet still assert a privacy interest to the outside world. That is precisely what occurred here. In effect, the three backyards comprise a single fenced compound.

The locations of the children at the time they were photographed by Mr. Reep are designated on the diagram by the numbers 1, 2, 3, 6, and 7. They were clearly within the backyards of 8217 and 8211 Sunset Lane, protected from the outside world by six-foot wooden fencing. Mr. Reep’s residence was at 8205 Sunset Lane, on the opposite side of the stockade fencing. The fence between the backyards and Mr. Reep’s residence is identical to the fence protecting the backyards from Court Street, the main thoroughfare through the area. (CP 56).

At 36, Mr. Reep again attempts to analogize to what constitutes a reasonable expectation of privacy in the Fourth Amendment context. However, as explained in Section (4) of the argument portion of this brief, RCW 9A.44.115(1)(c) sets forth a specific definition of “place where he or she would have a reasonable expectation of privacy” that is different from the way similar terms are used in the Fourth Amendment context; thus, Fourth Amendment cases are not relevant here. That argument is incorporated herein by reference.

Mr. Reep seems to believe his victims had no reasonable expectation of privacy because it was possible for him to see over the six-foot wooden fence from elevated areas on his own property. However, if it was not possible to see into an area, it would not be possible to view or photograph the person located there. The statute clearly contemplates a reasonable expectation of privacy may exist in areas into which it is possible for others to look. This is made clear by the definition of “views” in RCW 9A.44.115(1)(e), to-wit, “the intentionally looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity.” If any area into which it was possible to see was

excluded from the statute's coverage, it would be unnecessary to distinguish between casual and non-casual viewing. Casually looking into a neighbor's fenced backyard at a person located therein is not prohibited by the statute. It is only when a person does such looking for more than a brief period of time in other than a casual or cursory manner, or films or photographs the person, and does so without the person's knowledge and consent and for purposes of sexual gratification that the crime of voyeurism has been committed.

When homeowners enclose their backyards with six-foot tall wooden fences, they have a reasonable expectation of privacy in their backyards. Indeed, such fences are commonly referred to as "privacy fences". Mr. Reep's convictions are supported by sufficient evidence.

CONCLUSION

On the basis of the arguments set forth herein, it is respectfully requested that the convictions of David Garrett Reep

for four counts of voyeurism be affirmed.

Dated this 3rd day of November, 2006.

Respectfully submitted,

STEVE M. LOWE
Prosecuting Attorney

Frank W. Jenny

By:

Frank W. Jenny,
WSBA #11591
Deputy Prosecuting Attorney

APPENDIX

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

STATE OF WASHINGTON,

Plaintiff,

vs.

DAVID GARRETT REEP,
D.O.B.: 07/14/59

Defendant

)
) No. 04-1-50309-3
)
)
) FINDINGS OF FACT, CONCLUSIONS OF LAW,
) AND ORDER DENYING MOTIONS TO DISMISS
) OR SUPPRESS EVIDENCE
)
)
)

THIS MATTER having come before the Court for consideration of defendant's motions for dismissal or in the alternative for suppression of evidence, with the Court having considered the testimony of the witnesses, the documentary evidence, the memorandums and arguments of the parties, and the files and records to date, the Court now makes the following:

FINDINGS OF FACT

(1) On June 11, 2004, emergency personnel responded to an explosion and fire in the fenced backyard of the Reep residence at 8205 Sunset Lane, Pasco, Washington. It is the home of Irvin and Charlotte Reep, and their adult son David Reep was living with them at the time. David Reep was present and had severe burns on his hands that required treatment at the hospital. Items associated with the manufacture of methamphetamine were noted by police in the backyard of the residence. The area was sealed off pending application for a search warrant and arrival of a methamphetamine cleanup team.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING
MOTIONS TO DISMISS OR SUPPRESS EVIDENCE
Page 1 of 6

STEVE M. LOWE
PROSECUTING ATTORNEY
FRANKLIN COUNTY
1016 NORTH 4TH AVENUE
PASCO, WA 99301
Phone (509) 545-3543

1 (2) Detective Jason Mayse spoke to Mr. Reep's parents on the evening of June 11,
2 2004. After being informed that the fire appeared to have resulted from a methamphetamine
3 manufacturing process, the elder Reeps expressed concern about the rest of the house. They told
4 Detective Mayse they had been at dinner and upon their return they could smell a strong chemical odor
5 thought the residence. Detective Mayse asked if their son had a bedroom in the residence and they
6 replied in the affirmative. Detective Mayse asked if they could show him the location of the bedroom and
7 he would do a cursory search for methamphetamine related items for safety. The elder Reeps then
8 walked Detective Mayse through the residence. Detective Mayse did not note any concerning odors in
9 the residence. Detective Mayse told the elder Reeps that he would be including the bedroom in the
10 search warrant.

11 (3) Detective Mayse did not make any inspection of the computer in David Reep's
12 bedroom or any related equipment during the visit to the Reep residence on the evening of June 11,
13 2004. Detective Mayse did not exceed the scope of the consent given by Mr. and Mrs. Reep to inspect
14 the premises during that visit.

15 (4) Detective Mike Nelson applied for and obtained from the Honorable Carolyn A.
16 Brown a telephonic search warrant for the backyard of the residence and David Reep's bedroom. True
17 and correct copy of the telephonic search warrant form filled out by Detective Nelson were attached to the
18 State's memorandum as Exhibit "A" and admitted as Exhibit "8" for purposes of this hearing. True and
19 correct copies of an accurate transcript of Detective Nelson's telephonic search warrant application were
20 attached to the State's memorandum as Exhibit "B" and admitted as Exhibit "9" for purposes of this
21 hearing.

22 (5) A team of officers arrived to execute the search warrant and clean up the
23 methamphetamine lab on the morning of June 12, 2004. A "collage" of cut-out magazine pictures was
24 found in David Reep's bedroom and was admitted for this hearing as Exhibit "5". Detective Mayse
25 proceeded to look at items saved on the computer in David Reep's bedroom, initially looking for a
26 methamphetamine recipe or other items relating to violations of the Uniform Controlled Substances Act.
27 Upon seeing items that he considered to be suspicious of criminal activity unrelated to violations of the

1 Uniform Controlled Substances Act, he decided to shut down his search and apply for another telephonic
2 search warrant.

3 (6) Detective Mayse prepared a script for his telephonic search warrant application.
4 True and correct copies of this script were attached to the State's memorandum as Exhibit "D" and
5 admitted for purposes of this hearing as Exhibit "7".

6 (7) Detective Mayse re-contacted the Honorable Carolyn A. Brown by telephone and
7 applied for another telephonic search warrant by reading from the script he had prepared (Exhibit "7").
8 Exhibit "7" accurately represents the information provided to Judge Brown by Detective Mayse. Judge
9 Brown orally authorized a second search warrant.

10 (8) Pursuant to the oral authorization of Judge Brown, Detective Mayse prepared a
11 telephonic search warrant form. True and correct copies of this form were attached to the State's
12 memorandum as Exhibit "C" and admitted for purposes of this hearing as Exhibit "6".

13 (9) After terminating his phone conversation with Judge Brown, Detective Mayse realized
14 that due to technical difficulties, he had no recording of his conversation with Judge Brown. Detective
15 Mayse made a point to save the script he read to Judge Brown in applying for the search warrant.

16 (10) The State has stipulated that Judge Brown has no current recollection of the
17 contents of Detective Mayse's telephonic search warrant application.

18 (11) David Reep was charged with one count of unlawful possession of controlled
19 substance with intent to deliver as a result of the controlled substance investigation. After pleading guilty
20 and being sentence for that charge, he was charged in the above-entitled matter with four counts of
21 voyeurism in violation of RCW 9A.44.115(2)(a).

22 THE COURT having made the foregoing findings of fact, it now makes the following

23 CONCLUSIONS OF LAW

24 (1) Detective Mayse did not exceed the scope of the consent given by David Reep's
25 parents during his initial inspection of the premises on June 11, 2004. Even if he did exceed the scope of
26 such consent, an unlawful entry by police does not invalidate a subsequent search warrant so long as the
27 unlawful entry did not prompt the decision to seek the search warrant and the lawfully obtained evidence

28 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING
MOTIONS TO DISMISS OR SUPPRESS EVIDENCE
Page 3 of 6

STEVE M. LOWE
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1 before the magistrate established probable cause to search. If any unlawful search was conducted, the
2 results of it were not mentioned in either search warrant application and it had no bearing on the decision
3 to issue either search warrant. There has been no showing that any illegal search prompted the decision
4 to seek either search warrant.

5 (2) The telephonic search warrant application submitted by Detective Nelson established
6 probable cause for the search of the bedroom of David Reep. The application would have provided such
7 probable cause even without the statement of Mr. Reep's parents "that they believed there could be
8 additional items consistent with the manufacture of methamphetamine in David Reep's bedroom located
9 downstairs at 8205 Sunset Lane." The presence of controlled substances or evidence of the
10 manufacturing of controlled substances in a residence raises an inference that other evidence of such
11 activity will be found throughout the residence. Moreover, the fact that a person engages in illegal drug
12 activity in close proximity to his or her residence supports probable cause to search that residence. Since
13 there was evidence that Mr. Reep engaged in illegal drug activity in the fenced backyard of the residence,
14 it was reasonable to search the rest of the residence for evidence of such activity.

15 (3) There is no showing that Detective Nelson made a deliberate omission from his
16 application of the fact that Detective Mayse did not smell any concerning odors when he walked through
17 the residence on the evening of June 11, 2004. Moreover, an omission of fact does not invalidate the
18 warrant so long as the affidavit still supports probable cause when the omitted information is added.
19 Even adding the fact that no odors were noted in the residence by Detective Mayse, there is ample
20 probable cause to search the residence.

21 (4) The fact that the address of the premises is not stated at the top of Detective
22 Nelson's search warrant form is not fatal to the warrant. The crucial test for a search warrant is its basis
23 in probable cause, not its technical adherence to a particular form. The premises to be searched are
24 sufficiently identified in the body of the search warrant form.

25 (5) Detective Nelson's search warrant is not overly broad in what it authorized to be
26 seized. In lieu of setting forth a list of items to be seized, the required degree of particularity may be
27 achieved by specifying the suspected crime. Here, the warrant identifies the suspected crime as the

1 manufacture of methamphetamine. Officers were properly limited to searching for evidence of that crime.
2 Moreover, a more specific list of items to be seized would not have realistically limited the locations that
3 could be searched.

4 (6) Detective Mayse did not exceed the scope of the first search warrant obtained by
5 Detective Nelson when he made his initial inspection of the computer on June 12, 2004. A search
6 warrant for premises will justify the search of the personal effects therein belonging to the person
7 occupying the premises if those effects might contain the items the warrant authorizes to be seized.
8 Detective Mayse properly looked on the computer for evidence the crime of manufacture of
9 methamphetamine.

10 (7) The fact that the application for the second search warrant obtained by Detective
11 Mayse was not successfully recorded is not fatal to the warrant. Reconstruction of a telephonic search
12 warrant application is acceptable if it does not impair the reviewing court's ability to ascertain what the
13 magistrate considered. Here, Detective Mayse prepared a written script which he read to Judge Brown
14 in applying for the warrant. The written script was preserved by Detective Mayse and is before this Court.
15 In addition, the "collage" of cut-out magazine pictures mentioned in the application has been preserved
16 and is before this Court, providing corroboration independent of the testimony of Detective Mayse. Under
17 the circumstances of this case, the reviewing court can reasonably ascertain the full text of the material
18 provided to the issuing magistrate.

19 (8) Aside from the fact it was not electronically recorded, the application of Detective
20 Mayse provided probable cause for the second search warrant issued by Judge Brown.

21 (9) The methamphetamine and voyeurism charges are not subject to mandatory joinder
22 because they are not related offenses. They have no overlapping elements. The fact that some
23 evidence of both crimes was found at the same time is not relevant to this consideration.

24 (10) The voyeurism statute is not unconstitutional as applied to the defendant's conduct.
25 He has no fundamental right to engage in such conduct in his home.

ORDER

Based on the forgoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that the defendant's motions to dismiss or in the alternative to suppress evidence are denied.

DONE IN OPEN COURT this 31 day of January, 2006.

S/Craig J. Matheson
Judge

Presented by:

STEVE M. LOWE #14670#91039
Prosecuting Attorney for
Franklin County

by:

Frank W. Jenny
Frank W. Jenny, #11591
Deputy Prosecuting Attorney

Approved as to form and
notice of presentation waived:

Robert J. Thompson
Attorney for Defendant

pes

(TELEPHONIC SEARCH WARRANT)

In the Superior Court, County, State of Washington.
before the Honorable Judge BROWN

STATE OF WASHINGTON, Plaintiff)

vs.)
REED, DAVID G. Defendant, and)
7-14-59)

SEARCH WARRANT

04-19553

County of)
State of Washington) ss

In the name of the State of Washington, to Sheriff of County and his deputies, or to police officers of the City of Pasco, or to civil officers of the State of Washington duly authorized to enforce:

Whereas sworn complaint has been made to and filed with the undersigned Judge Brown by DET. M. NELSON of the Pasco Police Department stating under oath that he has probable cause to believe that certain evidence to the crime of: UNLAWFUL MANU. OF A CONTROLLED SUB. namely:

On 10-11-04 at 2255 hrs. Det. J. Miller, and other officers from the Pasco Police Dept. and Deputy Dan Gayda of the F.C.S.D. were dispatched to the Residence of 8205 Sunset Lane on the report of a fire either there or near there. Ofc. Miller arrived and upon looking over a back yard fence at 8205 Sunset Lane, He observed a male inside this fenced area trying to put out the fire which was inside this fenced area. Ofc. Miller also noticed a strong chemical smell at this time. Ofc. Miller observed a single Burner-Coleman stove and Mason Tans in the Proximity of the Fire. Officers and Deputy Gayda were let into the Back yard Gate by the Homeowner Irwin Reed. MR. Reed, Irwin

within County:

ORIGINAL

Telephonic Search Warrant (page 2)

Now therefore, you are hereby commanded in the name of the State of Washington, with all necessary and proper assistance, with such force as may be necessary, to enter and search the above-described premises and all buildings, outbuildings, rooms, cellars, or subcellars thereon/ the above described vehicle and its contents, all storage areas, all containers therein as may apply, and to seize all the evidence and items described above, as well as any papers, documents or other matter tending to establish the identity of persons exercising dominion and/or control over the premises or items seized pursuant to this warrant, and to safely keep the same and to make a return of this warrant within 10 days from the date hereof, with a particular statement of all items seized and the name of the person(s) in whose possession the same were found, and if no such items are located the return shall so state. A copy of this warrant shall be served upon the person(s) found in possession of the items seized, as well as a copy of the inventory listing all items seized, and if no such person is present at the time of the execution of this warrant, the copies of the warrant and the inventory shall be left in a conspicuous place upon the premises/within the vehicle. Herein fail not.

Given upon my hand this 12th day of June 20 04

Judge Carolyn Brown
Honorable Judge

ORIGINAL

Telephonic Search Warrant
Narcotics Case #04-19553
Detective Mike Nelson & Judge Carolyn Brown

04-50

FILED
FRANKLIN CO CLERK

2004 JUN 14 A 10:36

MICHAEL J. KILLIAN

BY *[Signature]* DEPUTY

Nelson: Okay, Your Honor, my name is Detective Mike Nelson of the Pasco Police Department and I am speaking with Judge Carolyn Brown. Your Honor, do I have your permission to record this statement and conversation?

Judge Brown: Yes, you do.

Nelson: Thank you. Uh, today's date is June 12, 2004 and the time is now 0810 hours. Uh, Judge Brown, will you swear me in?

Judge Brown: Yes. Do you swear or affirm the testimony you are about to give will be the truth, the whole truth, nothing but the truth so help you God?

Nelson: I do, Your Honor.

Judge Brown: Please go ahead.

Nelson: Okay. Uh, Judge Brown, Your Affiant Detective Mike Nelson, being a duly commissioned police officer for the Pasco Police Department has been employed for approximately 5 years. During Your Affiant's tenure as a police officer, Affiant has received training in the investigation of criminal matters including the investigation of Unlawful Manufacture of Methamphetamine. Um, okay, on June 11, 2004 at approximately 2355 hours Officer Jason Miller and other officers of the Pasco Police Department and Deputy Dan Gayda of the Franklin County Sheriffs Office were dispatched to a residence of 8205 Sunset Lane on the report of a fire either there or near there. Officer Miller arrived shortly thereafter and upon looking over a backyard fence at 8205 Sunset Lane he observed a male inside this fenced area trying to put out a fire which was inside this fenced backyard area. Officer Miller also noticed there was a strong chemical smell at that time. Officer Miller observed a single burner Coleman stove and mason jars in close proximity of the fire. Officers and Deputy Dan Gayda were then let into the backyard gate by the homeowner, Mr. Ervin Reep, spelling on that is REEP. Uh, Mr. Reep is the actual homeowner. Officer Miller and firemen on the scene then discovered that the true nature of the items found at the fire, i.e., mason jars, chemicals consisting of cans of solvent and apparatus consistent with the manufacture of methamphetamine that this fire was caused by a methamphetamine manufacturer. It appeared to Officer Miller and Deputy Gayda that the scene consisted of an illicit operation consisting of a susp, pardon me, a suspicious combination of chemicals and apparatus that either had been used or could be used in the manufacture of methamphetamine. David Reep had chemical

Telephonic Search Warrant
Narcotics Case #04-19553
Detective Mike Nelson & Judge Carolyn Brown

burns on the hands, on his hands and was in the process of putting out the fire. Uh, David Reep is the son of Ervin Reep, the homeowner. His parents, Mr. and Mrs. Ervin Reep, also made statements to officers and firemen at the scene that they believed there could be additional items consistent with the manufacture of methamphetamine in David Reep's bedroom located downstairs at 8205 Sunset Lane. Therefore, Your Honor, I am requesting a search warrant for the backyard area of 8205 Sunset Lane and to enter and search the bedroom of David Reep located at the residence of 8205 Sunset Lane. Uh, you know what, Your Honor?

Judge Brown: What?

Nelson: I just realized I have forgotten to get the physical description of the uh, um, if you'd like I can...

Judge Brown: I don't think you need it. You have the address.

Nelson: That's correct and that was my assumption but then I'm kind of reading down a list and I see the physical description thing on there and I went oh, my gosh.

Judge Brown: I think it's alright if you have the address there. Is it a standalone building? It's not an apartment?

Nelson: Yes, it is a standalone home.

Judge Brown: Then that shouldn't be a problem.

Nelson: Okay. I'll continue then, Your Honor. And it's contents, all storage areas and containers located therein as may apply and to seize the following items of evidence as well as dominion papers, documents consistent with the manufacture of methamphetamine. Herein, fail not, Judge Brown, do I have your permission to sign your name to this search warrant?

Judge Brown: Uh, yes, you do.

Nelson: Thank you, Your Honor, the time is now 0816 hours and the date is June 12, 2004.

Judge Brown: Okay, will you need a destruct order?

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Telephonic Search Warrant
Narcotics Case #04-19553
Detective Mike Nelson & Judge Carolyn Brown

Nelson: Yes, I will, Your Honor, and it was discussed earlier this morning with one of the other officers that's familiar with this process and she told me that I could probably take care of that Monday morning.

Judge Brown: Oh, okay.

Nelson: Is that uh, sufficient?

Judge Brown: Sure. That will be fine.

Nelson: Okay, Your Honor, thank you very much for all your help.

Judge Brown: Sure.

Nelson: Bye.

Judge Brown: Bye.

End of telephonic search warrant.

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(TELEPHONIC SEARCH WARRANT)

In the Superior Court before the Honorable Judge BROWN County, State of Washington.

STATE OF WASHINGTON, Plaintiff
vs. DAVID REED Defendant, and

SEARCH WARRANT

04-19553

8205 SUNSET LANE
ADU
6211 W. CONULT ST.
UNIT # 355

ORIGINAL

County of _____ State of Washington) ss

In the name of the State of Washington, to Sheriff LATELINA of FRANKLIN County and his deputies, or to police officers of the City of Pasco, or to civil officers of the State of Washington duly authorized to enforce:

Whereas sworn complaint has been made to and filed with the undersigned Judge BROWN by JASON MAYSK of the Pasco Police Department stating under oath that he has probable cause to believe that certain evidence to the crime of: NARCOTICS / CHAINSEX, namely:

MURATIC ACID, TULANE, METAL BOWLS, BURNERS, CLASSWARE AND OTHER PRECURSORS CONSIST WITH THE PRODUCTION OF METH; AND ANY DATA STORAGE DEVICES TO INCLUDE A COMPUTER AND ITS HARDWARE, COMPACT DISCS, FLOPPY DISCS, PORTABLE STORAGE UNITS SUCH AS USB ACCESSIBLE DEVICES, DIGITAL CAMERAS, VIDEO CAMERAS, PHOTOGRAPHS AND DOCUMENTATION OF CRIMINAL ACTIVITY BY THE SUSPECT AND OTHER EVIDENCE NOT LISTED THAT SUPPORT THE SUSPECTED CRIMINAL ACTIVITY.

ORIGINAL

Now therefore, you are hereby commanded in the name of the State of Washington, with all necessary and proper assistance, with such force as may be necessary, to enter and search the above-described premises and all buildings, outbuildings, rooms, cellars, or subcellars thereon/ the above described vehicle and it's contents, all storage areas, all containers therein as may apply, and to seize all the evidence and items described above, as well as any papers, documents or other matter tending to establish the identity of persons exercising dominion and/or control over the premises or items seized pursuant to this warrant, and to safely keep the same and to make a return of this warrant within 10 days from the date hereof, with a particular statement of all items seized and the name of the person(s) in whose possession the same were found, and if no such items are located the return shall so state. A copy of this warrant shall be served upon the person(s) found in possession of the items seized, as well as a copy of the inventory listing all items seized, and if no such person is present at the time of the execution of this warrant, the copies of the warrant and the inventory shall be left in a conspicuous place upon the premises/within the vehicle. Herein fail not.

Given upon my hand this 13 day of JUNE, 2004

Judy Brown
Honorable Judge

By Jason D. Mays

Your Honor, my name is DET. MAYSE of the Pasco Police Department and I'm speaking with Judge BROWN. Your Honor, do I have your permission to record this statement and conversation?

Today's date is June 13, 2004, and the time is 11:08. Judge BROWN
Will you swear me in? Judge BROWN, your affiant, Detective Jason Mayse, being a duly commissioned Police officer for the Pasco Police Department since March of 1996. During my tenure as a police officer I have received training in the investigation of criminal matters, including the investigation of SEX CRIMES.

Your Honor, I have received the following information, THAT:

On June 11, 2004 I responded to 8205 Sunset lane, located within the City of Pasco, because of neighbor reports of a loud explosion. When I arrived I observed smoke coming from the far corner of the property. Sitting in the middle of charred out remains was suspect Reep. His hands had been apparently burned from either putting out the fire, or from being present during the explosion.

After viewing the area, myself and other officers suspected that an active meth lab had exploded. I observed what looked like a burner that had been connected to a propane bottle, tubing, glass jars, and the smell of chemicals similar to Tulane, and other precursor chemicals use to manufacture methamphetamine. It was determined at that point that the meth lab clean up crew would be called out to asses the scene and do the clean up. The area was secured until the next day when the team could arrive.

I made contact with the homeowner, who advised their son, David Reep, had recently been involved in counseling for a meth addiction, and had indicated in the past that he knew how to manufacture meth. They also had concerns that maybe he had some other chemicals in his room, which he uses to live in within their home. I did a cursory walk through of the room and didn't immediately noticed any suspicious smells or chemicals; however, I did tell them that we would be adding the room in the clean up search warrant.

ORIGINAL

On June 12, 2004, I arrived along with the clean up crew, and conducted a search of the room. During the search of the room, which was primary focused on meth recipes, and or chemicals, which could have been stored on the suspect's computer or had written, I noticed pictures on his computers of what appeared to be illicit photo's of young children with out their knowledge. There also appeared to be pornographic pictures of young girls conducting sex acts that also appeared to be graphically simulated. At that point I shut the computer down for later forensics.

I also noticed that the suspect had made collage of cut out pictures of young girl models, which included at list on naked picture of a young female. I decided at this point that I would seal off the room, and apply for a second search warrant covering evidence for the crime of child pornography, and/ or stalking.

I was also informed by the suspect's parents that the suspect Reep, had a storage unit nearby and that he would frequent the unit often. I will also be included the storage unit in this warrant.

Therefore your honor I am requesting a search warrant to enter and search the residence and/or Vehicle located at:

8205 Susnset late, a single family residence, with a brick structure, specifically suspects Reeps, bedroom which is located on the lower portion of the house on the Northeast corner.

And the storage unit:

Located at 6217 W. Court St. DBA Express Storage, unit # 355

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ORIGINAL

For the evidence of the crime of: Narcotics, which would include Muratic Acid, Tulane, Large Metal bowl of a bi-layer chemical, propane burners, glassware, and other precursors consist with the production of meth; AND any data storage devices to include a computer and its hardware, compact discs, floppy discs, portable storage units such as USB accessible devices, digital cameras, video cameras, photographs, any documentation of criminal activity by the suspect and any other evidence not listed that support the suspect criminal activity.

And its contents, all storage areas, all containers therein as may apply, and to seize the following items of evidence, as well as any papers, documents or other matter tending to establish the identity of person exercising dominion and/or control over the premises or items seized pursuant to this warrant, and to safely keep the same and to make a return of this warrant with a particular statement of all items seized, and if no such items are located the return shall so state. A copy of this warrant shall be served upon the person or persons found in possession of the items seized, as wall as a copy of the inventory listing all items seized, and if no such person is present at the time of the execution of this warrant, the copies of the warrant and the inventory shall be left in a common place upon the premises and/or within the vehicle.

Herein fail not Judge BROWN, do I have permission to sign your name to this search warrant? Thank you your honor, the time is now 1117.

YES YOU DO !!

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FILED
FRANKLIN CO CLERK

2005 DEC -8 A 10:30

MICHAEL J. KILLIAN

BY *AF* DEPUTY

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

STATE OF WASHINGTON,

Plaintiff,

vs.

DAVID GARRETT REEP,
D.O.B.: 07/14/1959

Defendant

No. 04-1-50309-3

STIPULATED FACTS ON BENCH TRIAL

COMES NOW the parties to the above matter and stipulate that the following facts may be considered by the Court as proved by the parties beyond a reasonable doubt.

- (1) On or about 2004, the defendant David Garrett Reep took photographs of the following persons: K.K. (D.O.B.: 01/05/93); M.K. (D.O.B.: 09/24/99); J.M. (D.O.B.: 07/16/93); and A.M. (D.O.B.: 08/07/90). True and correct prints of these photographs are being filed contemporaneously with this stipulation.
- (2) All of the aforesaid photographs were taken for the purpose of arousing or gratifying the defendant's sexual desire.
- (3) All of the aforesaid photographs were taken without the knowledge and consent of the person being photographed.
- (4) The parties disagree as to whether the persons being photographed were in a place where they would have a reasonable expectation of privacy.

STIPULATED FACTS ON BENCH TRIAL
Page 1 of 3

STEVE M. LOWE
PROSECUTING ATTORNEY
FRANKLIN COUNTY
1016 NORTH 4TH AVENUE
PASCO, WA 99301
Phone (509) 545-3543

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A-18

47

1 (5) The defendant did not commit any act of criminal trespass in taking the aforesaid photographs.
2 At the time of taking the aforesaid photographs, the defendant was on the premises of his
3 parent's residence, where he was residing at the time. That residence is located at 8205 Sunset
4 Lane, Pasco, Franklin County, Washington. Numbers 1, 2, and 3 were taken from the Reep
5 driveway. Numbers 4, 5, and 7 were taken from the Reep garage. Number 6 was taken from
6 the Reep second floor bedroom window.

7 (6) The defendant is 6 feet, four inches tall.

8 (7) The persons being photographed were located in the backyards behind the residences at 8211,
9 8217, and 8221 Sunset Lane, Pasco, Franklin County, Washington. These are the three
10 residences immediately to the north of the Reep residence to the same side of the street.

11 (8) Being filed contemporaneously with these stipulated facts is a diagram prepared by Sergeant
12 Ben Majetich of the Pasco Police Department. This diagram accurately shows the fencing
13 around the back yard of the Reeps' neighbors to the north at the time the aforesaid photographs
14 were taken. As reflected on the diagram, the solid lines show the location of six-foot high
15 wooden fences. The nature of these wooden fences is accurately reflected by photographs
16 being filed contemporaneously with these stipulated facts. The wooden fences measure six feet
17 in height in all locations. The wooden fencing next to the Reep residence is the same height as
18 the wooden fencing that protects the backyards from Court Street, which is the main
19 thoroughfare in the neighborhood. The dotted lines on the diagrams indicate the locations of six-
20 foot high cyclone fences. The copies of the aforesaid photographs were given numbers by the
21 investigating officer, which are shown on the copies provided to the court. The numbers of
22 certain photographs have been added to Detective Majetich's diagram to accurately show the
23 location of the persons being photographed.

24 (9) Also being filed contemporaneously with these stipulated facts are photographs which accurately
25 show the outside of the Reeps residence on the north side, including an elevated driveway on
26 that side.

1 (10) It would have been possible to take similar photographs from the locations at 8221, 8217, and
2 8211 Sunset Lane from their back yards.

3 DATED this 8th day of December, 2005.
4

5 Presented By:

6 STEVE M. LOWE #14670W#91039
7 Prosecuting Attorney for
8 Franklin County

9 by:

Frank W. Jenny
Frank W. Jenny, #11591
Deputy Prosecuting Attorney

10 Approved as to form:

11 Robert J. Thompson

12 Robert J. Thompson
13 Attorney for Defendant

David Garrett Reep
14 David Garrett Reep
15 Defendant

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28 STIPULATED FACTS ON BENCH TRIAL
Page 3 of 3

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1016 NORTH 4TH AVENUE
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

STATE OF WASHINGTON,)	
)	No. 04-1-50309-3
Plaintiff,)	
)	
vs.)	FINDINGS OF FACT AND CONCLUSIONS
)	OF LAW ON BENCH TRIAL
DAVID GARRETT REEP,)	
D.O.B.: 07/14/59)	
)	
Defendant)	

THIS MATTER, having come duly and regularly before the Court for trial, on the 8th day of December, 2005, the defendant being personally present and represented by Robert J. Thompson, Attorney for Defendant, and the State of Washington being represented by Frank W. Jenny, Deputy Prosecuting Attorney for Franklin County, the Court having reviewed the stipulated facts, having reviewed the case record to date, and having been fully advised in the premises, now, therefore, makes the following:

FINDINGS OF FACT

Based upon the foregoing Findings of Fact, the Court makes the following:

- (1) On or about 2004, the defendant David Garrett Reep took photographs of the following persons: K.K. (D.O.B.: 01/05/93); M.K. (D.O.B.: 09/24/99); J.M. (D.O.B.: 07/16/93); A.M. and (D.O.B.: 08/07/90). True and correct prints of these photographs were filed contemporaneously with the Stipulated Facts on Bench Trial and those prints are incorporated herein by reference.
- (2) All of the aforesaid photographs were taken for the purpose of arousing or gratifying the defendant's sexual desire.
- (3) All of the aforesaid photographs were taken without the knowledge and consent of the person being photographed.

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- 1 (4) The parties disagreed as to whether the persons being photographed were in a place
2 where they would have a reasonable expectation of privacy.
- 3 (5) The defendant did not commit any act of criminal trespass in taking the aforesaid
4 photographs. At the time of taking the aforesaid photographs, the defendant was on the
5 premises of his parent's residence, where he was residing at the time. That residence is
6 located at 8205 Sunset Lane, Pasco, Franklin County, Washington. Numbers 1, 2, and 3
7 were taken from the Reep driveway. Numbers 4, 5, and 7 were taken from the Reep
8 garage. Number 6 was taken from the Reep second floor bedroom window.
- 9 (6) The defendant is 6 feet, four inches tall.
- 10 (7) The persons being photographed were located in the backyards behind the residences at
11 8211, 8217, and 8221 Sunset Lane, Pasco, Franklin County, Washington. These are the
12 three residences immediately to the north of the Reep residence to the same side of the
13 street.
- 14 (8) A diagram prepared by Sergeant Ben Majetich of the Pasco Police Department was filed
15 contemporaneously with the Stipulated Facts on Bench Trial and is incorporated herein
16 by reference. This diagram accurately shows the fencing around the back yard of the
17 Reeps' neighbors to the north at the time the aforesaid photographs were taken. As
18 reflected on the diagram, the solid lines show the location of six-foot high wooden fences.
19 The nature of these wooden fences is accurately reflected by photographs that were filed
20 contemporaneously with the Stipulated Facts on Bench Trial and are incorporated herein
21 by reference. The wooden fences measure six feet in height in all locations. The
22 wooden fencing next to the Reep residence is the same height as the wooden fencing
23 that protects the backyards from Court Street, which is the main thoroughfare in the
24 neighborhood. The dotted lines on the diagrams indicate the locations of six-foot high
25 cyclone fences. The copies of the aforesaid photographs were given numbers by the
26 investigating officer, which are shown on the copies provided to the court. The numbers
27 of certain photographs have been added to Detective Majetich's diagram to accurately
28 show the location of the persons being photographed.
- (9) Also filed contemporaneously with the Stipulated Facts on Bench Trial and incorporated
herein by reference are photographs which accurately show the outside of the Reeps
residence on the north side, including an elevated driveway on that side.
- (10) It would have been possible to take similar photographs from the locations at 8221,
8217, and 8211 Sunset Lane.
- (11) The Court hereby resolves the principal disagreement between the parties by finding that
all of the aforesaid persons being photographed were in a place where they would have a

1 reasonable expectation of privacy. The residential backyards surrounded by six-foot
2 stockade fencing were places where one may reasonably expect to be free from casual
3 or hostile intrusion or surveillance within the meaning of RCW 9A.44.115(1)(c)(ii).

4 CONCLUSIONS OF LAW

5 (1) Defendant is guilty of four counts of Voyeurism in violation of RCW 9A.44.115(2)(a) as
6 charged in the Information.

7 DONE IN OPEN COURT this 24 day of January, 2006.

8 S/ Craig J. Matheson
9 Judge

10 Presented by:

11 STEVE M. LOWE #14670\#91039
12 Prosecuting Attorney for
13 Franklin County

14 by:

15 Frank W. Jenny
16 Frank W. Jenny, #11591
17 Deputy Prosecuting Attorney

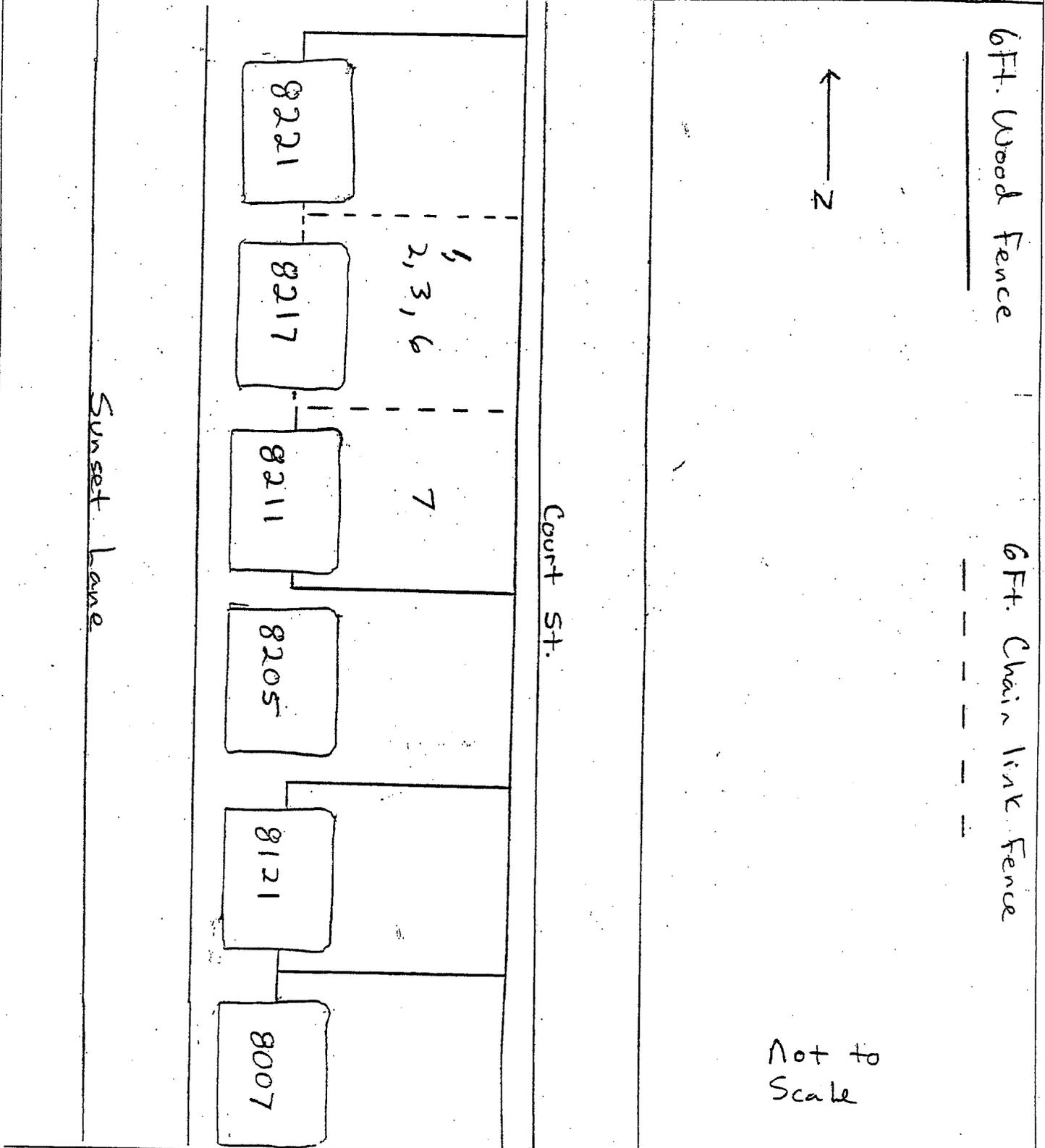
18 Approved as to form:

19 _____
20 Robert J. Thompson
21 Attorney for Defendant

22 pes

NARRATIVE

AGENCY NAME Pasco Police Department	INCIDENT CLASSIFICATION (INC. R.C.W. NUMBER) Narcotics/Child/Other	INCIDENT NUMBER 04-19553
NAME OF VICTIM(S)	ADDL IBR CODES	TOTAL IF OVER 10
	A C	A C



OFFICER NAME / NUMBER Majetich S12	AREA 4	OFFICER NAME / NUMBER	AREA	APPROVED BY <i>[Signature]</i>
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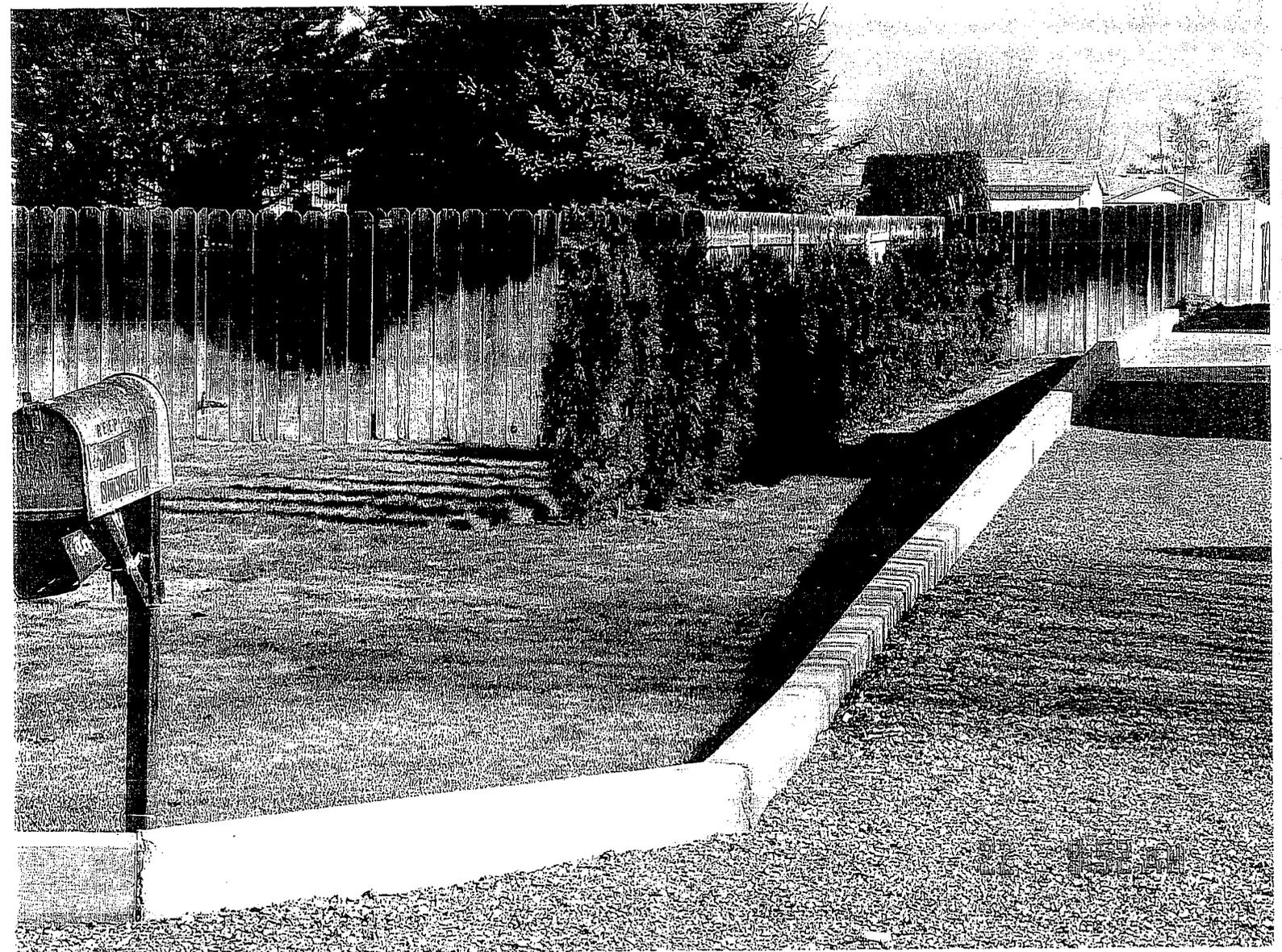


EXHIBIT "B"
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