

NO. 80755-8  
SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

TERRY LEE WINTERSTEIN

Petitioner.

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BRIEF OF PETITIONER

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**A. ASSIGNMENTS OF ERROR**

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**II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE CCO'S ACTIONS WERE REASONABLE UNDER TERRY.**

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**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**I. DID THE COURT OF APPEALS ERR IN APPLYING TERRY ANALYSIS TO THE QUESTION OF WHETHER THE COMMUNITY CORRECTIONS OFFICER HAD THE AUTHORITY OF LAW, UNDER ARTICLE I, § 7, TO ENTER AND SEARCH MR. WINTERSTEIN'S PRIOR RESIDENCE EVEN THOUGH MR. WINTERSTEIN PROPERLY EFFECTUATED A CHANGE OF HIS ADDRESS WITH DOC?**

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**C. STATEMENT OF THE CASE**

The house that was the subject of this warrant and the initial warrantless search by DOC clearly bore the address of 646 Englert Road. CP 131. A motor home (RV) near the house bore the address of 646 ½ Englert Road. CP 131.

The warrantless search was conducted by Corrections Officer Kris Rongen and two other officers from DOC. RP Vol. II (6-28-05), 130. The DOC officer undertook this search with officers from the Clark-Skamania Drug Task Force and the Cowlitz Wahkiakum Drug Task Force because he had been informed by Clark-Skamania that they believed there was a methamphetamine lab at 646 Englert Road. RP Vol. II (6-28-05) 130-131. The Task Force knew they didn't have enough evidence to obtain a search warrant and utilized DOC to circumvent the warrant requirement. RP Vol. II (6-28-05), p. 203-204. Officer Rongen made the initial entry. RP Vol. II (6-28-05) 131. In one of the bedrooms of the residence, which the DOC officers knew did not belong to Mr. Winterstein and was later determined to be Mr. Soderlind's, the officers observed items that they believed indicated the presence of a meth lab. RP Vol. II (6-28-05), 139, 264, Trial

RP Vol. II, 183. This observation was made from the threshold of the door. RP Vol. II (6-28-05), 201.

Trial counsel for Mr. Soderlind, John Hays interviewed Kris Rongen in an attempt to verify the information given to him by Mr. Soderlind. CP 157. Mr. Rongen told him that Mr. Winterstein had come to DOC and changed his address using the Kiosk computer on February 6<sup>th</sup>, 2003, the same day as the search. CP 157. Mr. Rongen said there was no way to tell whether Mr. Winterstein visited the Kiosk before or after the search, and stated he had no way of knowing about the change of address because it happened on the same day. CP 157. Mr. Coppola, the deputy prosecutor, later informed Mr. Hays' that Mr. Rongen had confirmed for him that Mr. Winterstein changed his address on February 6<sup>th</sup>, 2003. CP 157. Mr. Northrip, trial counsel for Mr. Winterstein, had consulted extensively with Mr. Hays about the State's representations regarding the date on which Mr. Winterstein changed his address with DOC. CP 134. Mr. Northrip also received discovery from the State, in the form of a report from CCO Rongen, stating affirmatively that according to DOC records, Mr. Winterstein did not change his address with DOC until February 6<sup>th</sup>, 2003. CP 135. Based on the State's representations, Mr. Northrip, like Mr. Hays, abandoned a pre-trial motion to suppress. CP 135.

On December 20<sup>th</sup>, 2004, Mr. Winterstein proceeded to trial on the charge of manufacturing methamphetamine. After closing arguments were completed in the trial, Mr. Northrip, and deputy prosecutor Heiko Coppola were reviewing the exhibits that had been admitted prior to them being submitted to the jury. CP 137. Exhibit 122 had been labeled "misc. documents." CP 137. Within these documents was a billing statement dated January 13<sup>th</sup>, 2003, addressed to Mr. Winterstein at 646 ½ Englert Road. CP 137. (Exhibit 4). This document had never been provided to either Mr. Hays or Mr. Northrip during discovery, and proved that the prior representations of the deputy prosecutor and DOC were in fact misrepresentations, whether intentional or not. CP 137-138.

Following Mr. Winterstein's conviction, both Mr. Winterstein and Mr. Soderlind made motions under CrR 7.8. Mr. Winterstein moved for relief from judgment under CrR 7.8 (b) (2) (3) and (5), allowing relief from judgment based on newly discovered evidence and based on the misrepresentation of an adverse party, as well as Mr. Winterstein's constitutional right to be free from unreasonable searches and seizures. CP 130. The State stipulated that this document showing that Mr. Winterstein had changed his address with DOC at least as early as January 13<sup>th</sup>, 2003, constituted newly discovered evidence as contemplated by CrR 7.8 (b) (2). Because the newly discovered evidence pertained to a

suppression issue, the successful litigation of which would have required dismissal of the State's case, all parties agreed that Mr. Winterstein and Mr. Soderlind would litigate their respective motions in the form of a suppression motion. RP Vol. II (6-28-05), 109. All parties stipulated that if the Court agreed that CCO Rongen lacked the legal authority to enter 646 Englert Road to look for Mr. Winterstein, based on Mr. Winterstein's prior change of address, then all evidence observed during the course of this warrantless entry and seized in the subsequent search warrant should have been suppressed and that relief from judgment and dismissal of the cases was required. Id. This motion was heard before the Honorable James Warne on June 28<sup>th</sup>, 2005. It should be noted at this point that no findings of fact and conclusions of law were entered following this motion, so this entire statement of the case is based upon the Report of Proceedings, the Clerk's Papers and Exhibits.

The Court took testimony at the June 28<sup>th</sup> motion from CCO Kris Rongen, and Cowlitz-Wahkiakum Task Force Detective Tim Watson. On February 6<sup>th</sup>, 2003, Mr. Winterstein was a probationer under his supervision. Id. at 120. Rongen testified that probationers will meet with an intake officer, who reviews the conditions of supervision with the probationer, before they are assigned to a field officer (such as Rongen). Id. at 121. When an offender meets with the field officer, the CCO will

again review the same written conditions with the offender that was provided to him by the intake officer. Id. The Court admitted exhibit 8, entitled "Standard Conditions," which was the document of written conditions given to Mr. Winterstein when he was placed on probation. Id. at 123, Exhibit 8.

These written conditions required, among other things, that the probationer *notify* the community corrections officer before change of residence or employment. RP Vol. II (6-28-05) 164, Exhibit 8. Rongen testified that he told Mr. Winterstein, as he tells all of his probationers, that prior to changing his address, he would need to come in and talk with him (Rongen) and get his permission. Id. at 124.

CCO Rongen also explained the Kiosk device at the Longview DOC office. He testified that an offender can change his address using this machine. Id. at 126. This Kiosk also might be referred to as the Genie. Id. at 159. He testified however, that under *his* conditions, an offender must meet with him and get *permission* to change his address before he could utilize the Kiosk to change his address. Id. at 126-127. When asked if changing one's address with the Kiosk met DOC's requirements, Rongen testified that the Kiosk simply doesn't meet *his* requirements as a CCO. Id. at 213-214. He conceded, however, that he is an employee of DOC, that his authority as a community corrections officer

is derived from the authority given to him by DOC, and that he has no greater authority than DOC. Id.

Rongen admitted that he instructs his probationers to use the Kiosk, and that the Kiosk specifically allows a probationer to notify a community corrections officer of a change of address. Id. at 168.

Revealing his disdain for the Kiosk, CCO Rongen testified there is “no merit” to a change of address done at the Kiosk. Id. at 220. He stated: “[T]o base my supervision off what a computer is asking somebody, instead of a face-to-face contact, that’s not sufficient enough. That face-to-face contact is what generates my rapport; my understanding...where the violation behavior is, things of that nature. So I’m not gonna base information off the Kiosk reporting.” Id. at 221. Rongen then grudgingly conceded that offenders are allowed to change their address at the Kiosk, and that the Department encourages offenders to use it. Id. at 221-223.

CCO Rongen admitted that he has access to any information an offender puts into the Kiosk from the computer at his desk. Id. at 168, 219. Although he wouldn’t open up that particular program on a daily basis, he would normally open it up before he went out to do a field contact. Id. at 127-128. He did not explain why, in spite of the fact he was aware an offender could change his address using the Kiosk, he did

not check the database prior to the search on February 6<sup>th</sup>, 2003. Id. at 186-187.

With regard to the incident on February 6<sup>th</sup>, 2003, CCO Rongen conceded before he went to Englert Road, he met with the officers from both the Clark-Skamania and Cowlitz-Wahkiakum task forces at the Woodland Police Department early in the morning for a raid planning meeting. Id. at 204-205. The Task Force officers had informed Rongen that they believed there was a meth lab at 646 Englert Road but that they didn't have enough evidence to obtain a search warrant. Id. 203-204. When he arrived at 646 Englert Road, he knocked on the door and announced himself. Id. at 131. At the same time, the door "came open." Id. When he entered, he went down the hallway to where the bedrooms were located. Id. He ordered the other people in the residence to have a seat in the living room. Id. Another officer went into the bedroom they believe to belong to Mr. Winterstein. Id. One of the people he encountered in the house was Sunshine O'Connor, who he believed was Mr. Winterstein's girlfriend. Id. at 132. Rongen asked her where Mr. Winterstein was and whether he still lived there. Id. at 132-133. When asked by the Court why he asked Ms. O'Connor if Mr. Winterstein still lived there, Rongen stated that it was for the purpose of verification, "just one more additional thing." Id. at 136. Rongen was never asked why, if

he had no actual knowledge that Mr. Winterstein had changed his address to 646 ½ Englert Road, he felt it necessary to ask Ms. O'Connor if Mr. Winterstein still lived there as a means to establish that his address was 646 Englert Road, not 646 ½ Englert Road. Report of Proceedings.

Rongen testified, over the objection of both defense attorneys, that Ms. O'Connor replied yes, that Mr. Winterstein was still living there. Id. at 137.

Rongen testified he then went to the bedroom he believed to be Mr. Winterstein's and "verified Mr. Winterstein's room as being how I recollected from my last visit there..." Id. at 138. Again, Rongen was not asked why it was necessary to perform this verification when he had no reason to believe, according to him, that Mr. Winterstein had changed his address. Report of Proceedings. While looking in the area of the bedrooms, Rongen looked into another bedroom (later determined to be Mr. Soderlind's) and saw a scale with white residue on it, a jar of what appeared to be red phosphorous, and a meth pipe. Id. at 139. He then backed out the house and informed the Task Force officers of his discovery, and they subsequently obtained a search warrant. Id. at 141. Mr. Winterstein was not there at the time the DOC officers entered 646 Englert Road. Id. at 202, 209.

Detective Watson of the Cowlitz-Wahkiakum Narcotics Task

Force testified on behalf of the State. He testified that after he obtained a search warrant, he entered the motor home which bore the address of 646 ½ Englert Road. Id. at 248. He testified it did not appear that anyone was living there. Id. No contraband was found in the motor home. Id. at 252. Detective Watson testified on cross-examination that although it would have been awkward to move around the motor home due to the large number of boxes within it, one could nevertheless do so. Id. at 253. He also conceded that someone could have slept there, in spite of its messy condition. Id. at 253.

The defense argued that Rongen, based upon the violation of failure to report, had the authority to enter only Mr. Winterstein's home and to search for Mr. Winterstein in particular. Id. at 260-261, 270. Rongen did not have the authority to conduct a warrantless search of someone else's home, or to search for evidence of a crime. Id. at 270-271.

The Court denied the motion of both defendants for relief from judgment. The Court agreed with both defense attorneys that Mr. Winterstein was not required to get permission from CCO Rongen before he changed his address, and was permitted to utilize the Kiosk to do so. Id. at 291-292. The Court, however, was ultimately persuaded by information gathered by Rongen *after* the warrantless entry into 646

Englert Road, and ruled that Rongen had the lawful authority to conduct this warrantless entry and search because he had acted in good faith. *Id.* at 292-293.

**D. ARGUMENT**

**I. THE COURT OF APPEALS ERRED IN APPLYING TERRY ANALYSIS TO DETERMINE WHETHER THE CCO HAD THE AUTHORITY OF LAW TO ENTER A RESIDENCE OTHER THAN MR. WINTERSTEIN'S.**

Division II's opinion, establishing a "specific and articulable facts" standard for entry into a residence, ignored the body of precedent holding that prior to entering a home to conduct a search, law enforcement must possess authority of law under Article I, § 7 of the Washington State Constitution. *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *State v. Wallin*, 125 Wn.App.648, 660, 105 P.3d 1037 (2005); *State v. Morse*, 156 Wn.2d 1 (2005); *State v. Littlefair*, 129 Wn.App. 330, 340 (2005). Instead, the court stated: "Washington caselaw does not appear to address the lengths to which an officer must go to ensure that the address he or she is searching is, indeed, the probationer's residence." (Opinion at page 15). The Court chose to apply the "specific and articulable facts" standard promulgated in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), to decide whether law enforcement officers possess the authority of law to enter a residence other than a probationers. *Id.* A warrant exception exists

for the search of a probationer's home, car, and personal effects upon a well-founded suspicion that a probation violation has occurred. *State v. Patterson*, 51 Wn.App. 202, 204-05, 752 P.2d 945 (1988); *State v. Campbell*, 103 Wn.2d 1, 22, 691 P.2d 929 (1984). Probation officers do not have general authority to search wherever they want; they have authority to search the homes, cars, or persons of *probationers*, not of other persons. *Id.*

Mr. Winterstein argues that Division II erred in holding that *Terry* analysis controls the question of whether the CCO had the authority of law under Article I, § 7 to enter the residence at 646 Englert Rd.

**II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT CCO'S RONGEN'S ENTRY INTO THE RESIDENCE AT 646 ENGLERT RD. WAS REASONABLE UNDER TERRY.**

Should this Court affirm the Court of Appeals' holding that *Terry* analysis controls the question of how a CCO must determine the address of a probationer prior to entering a residence at which he no longer resides, Mr. Winterstein argues that CCO Rongen did not have a reasonable basis to believe he still lived at 646 Englert Rd. The Court noted two possible sources of information regarding Mr. Winterstein's current address: (1) the official address possessed by the DOC (646 ½

Englert Road) and (2) CCO Rongen's "previous experience" meeting Mr. Winterstein at the house at 646 Englert Rd. Id.

In then concluding that CCO Rongen acted reasonably in ignoring the information contained in his own database and instead relying on his past contacts with Mr. Winterstein, the Court relied on two factors: (1) the fact that CCO Rongen believed he possessed the authority to require Mr. Winterstein to obtain his permission before moving and (2) the fact that Mr. Winterstein's new address was a motor home on the same piece of property as the mobile home bearing the address 646 Englert Rd. Id.

The Court of Appeals erred in finding Rongen had "a reasonable belief" Mr. Winterstein still lived at 646 Englert Rd. The first factor relied on by the Court, that Rongen believed he possessed the authority to require Mr. Winterstein to obtain his permission before changing his address, should not have been considered by the Court of Appeals. This belief on the part of Rongen was specifically rejected as reasonable by the trial court. The trial court found that Rongen did not have the authority to alter the rules of Mr. Winterstein's supervision which simply required him to notify DOC of a change of address, not obtain permission prior to moving. The trial court further found that changing one's address using the Kiosk was an approved method by which to change an address and that Mr. Winterstein had properly effectuated a change of address. The

Court of Appeals affirmed each one of these findings. (Opinion at page 11-12). CCO Rongen's grandiose imagination regarding his power as a community corrections officer does not render his belief on this point reasonable.

The second factor relied on by the Court lacks reason and appears to reflect a misunderstanding of the facts. CCO Rongen did not know until well after this search (several months after, if we are to believe he didn't knowingly lie to both the Deputy Prosecutor and both defense attorneys about when he became aware of this change of address) that Mr. Winterstein had changed his address to the motor home on the property. How can the fact that Mr. Winterstein changed his address to a motor home (as though that, in itself, is an unreasonable act) be used as a factor in determining the reasonableness of CCO Rongen's belief when CCO Rongen was not even aware of this fact? He became aware of this fact after he entered 646 Englert Rd. and searched it.

In order for this fact to be considered in the "specific and articulable facts" calculus, he must have been aware of it *before* he entered 646 Englert Rd. *Terry* requires that a detention must be justified at its inception. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002), citing *State v. Collins*, 121 Wn.2d/168, 173, 847 P.2d 919 (1993). "For a permissible *Terry* stop the State must show that (1) the initial stop is

legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes.” *Duncan*, at 172, *Collins* at 173. Here, the entry was not justified at its inception where CCO Rongen claimed not to know, until months after this search, that Mr. Winterstein had changed his address to the motor home.

**III. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE DOCTRINE OF INEVITABLE DISCOVERY JUSTIFIED THIS SEARCH UNDER ARTICLE 1, SECTION 7.**

The Court of Appeals’ reliance on the doctrine of inevitable discovery was error. The State never raised inevitable discovery as a justification for this search. This issue was raised sua sponte by Judge Penoyer at oral argument. The Court of Appeals relied on *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995). The doctrine of inevitable discovery, which has never been officially adopted by this Court<sup>1</sup>, is *not* an exception to the warrant requirement but an exception to the exclusionary rule of the Fourth Amendment. The Court of Appeals recognized as much when it stated that under the doctrine of inevitable discovery the “suppression of the evidence” was not affected. (Opinion at page 16).

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<sup>1</sup> *State v. O’Neill*, 148 Wn.2d 564, 592, 62 P.3d 489 (2003), n.11.

This Court has consistently refused to recognize any exception whatsoever to the exclusionary rule of Article I, § 7. In *State v. White* this Court held:

The language of [Article I, § 7] constitutes a mandate that the right to privacy shall not be diminished by the gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than curbing governmental actions.

*State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). “Whenever the right is unreasonably violated, the remedy *must* follow.” (Emphasis in original.) *Id.*; *State v. Boland*, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990); see also, *State v. Young*, 123 Wn.2d 173, 196, 867 P.2d 593 (1994); *In re the Personal Restraint of Maxfield*, 133 Wn.2d 332, 343, 945 P.2d 196 (1997); *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); *State v. Barker*, 143 Wn.2d 915, 922, 25 P.3d 423 (2001).

*White*, and its view that Article I, § 7 requires an automatic exclusionary remedy, was entirely consistent with long-established cases. S. Pitler, Washington Law Review, *The Origin and Development of Washington’s Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 Wash. L. Rev. 459, 474-80 (1986). The Supreme Court first recognized the Washington Constitution’s requirement of exclusion in *State v. Gibbons*, 118 Wash. 171, 184, 203 P. 390 (1922). The Court continued to apply this state

remedy until the early-1960s when *Mapp v. Ohio* found the Fourteenth Amendment made the federal rule applicable in state courts. Pitler, at 486, citing, *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Following *Mapp*, the Washington Courts began applying the federal rule without mention of the state rule. Pitler, at 487-89. The Court's decisions in that period relied entirely on the Fourth Amendment without mention of Article I, § 7. These cases did not repudiate the independent nature of the Washington exclusionary rule, they simply ignored it.

*White* then ended this roughly 20-year period with the Court's return to the independent and more protective state exclusionary rule. *White* was followed in quick succession by a string of decisions reaffirming the broader protections of Article I, § 7. Pitler, at 493-96. The independent and automatic nature of the Washington exclusionary rule is thus long-established, and has been consistently relied upon by this Court in the 24 years following *White*. Here, the Court of Appeals relied on this Court's holding in *State v. Warner*, 125 Wn.2d 876, 889 P.2d 479 (1995) to conclude that inevitable discovery is an accepted exception to the exclusionary rule under Article I, § 7. However, the portion of *Warner* which addresses the doctrine of inevitable discovery dealt with a violation of the 5<sup>th</sup> Amendment and relied entirely upon federal case law. *Warner*

at 888. Further, in *State v. O'Neill*, this Court stated that inevitable discovery has not been recognized as an exception to the exclusionary rule under Article I, § 7. *State v. O'Neill*, 148 Wn.2d 564, 592, 62 P.3d 489 (2003), n.11.

Even if the Court of Appeals was entitled under Article I, § 7 to rely on the doctrine of inevitable discovery, the Court erred in holding it applied in this case because the evidence does not suggest that the police would have inevitably discovered the evidence by lawful means. The Court of Appeals held as follows: Had CCO Rongen gone to the motorhome at 646 ½ he would have found it “uninhabitable,” he would have concluded that Mr. Winterstein was living at 646 Englert Rd., he would have gone to the residence, he would have asked those inside whether Mr. Winterstein was living there, they all would have said “yes,” and CCO Rongen would then have proceeded as he did. This conclusion is entirely speculative. Further, it is contrary to the evidence.

Officer Watson conceded that a person could have lived in the motorhome despite its messy state, and, more importantly, CCO Rongen *did not* ask the occupants he encountered whether Mr. Winterstein was living there until he had already entered the house and begun searching it. He had already looked inside of both Mr. Winterstein and Mr. Soderlind’s bedrooms by the time he asked Sunshine O’Connor whether Mr.

Winterstein lived there. Assuming, as the Court of Appeals did, that CCO Rongen would have asked the occupants gathered at the residence whether Mr. Winterstein lived there *prior to entering* is not warranted. The opinion of the Court of Appeals characterizes the evidence as though CCO Rongen in fact asked, prior to entering, whether Mr. Winterstein lived there (see Opinion at page 16, paragraph 3). That was not the case. The evidence here does not support the Court of Appeals' conclusion that the evidence that gave rise to the search warrant would have been inevitably discovered by lawful means. The Court of Appeals erred when it concluded that inevitable discovery is a recognized exception to the exclusionary rule under Article I, § 7, and this conclusion is contrary to precedent from this Court.

**E. CONCLUSION**

For the reasons above, this Court should reverse the Court of Appeals and reverse Mr. Winterstein's conviction.

Respectfully submitted this 26<sup>th</sup> day of June, 2008.

  
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