

NO. 80755-8  
Cowlitz Co. Cause NO. 03-1-00997-8

**SUPREME COURT OF STATE OF  
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

**TERRY LEE WINTERSTEIN**

Petitioner

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**SUPPLEMENTAL BRIEF IN RESPONSE  
TO PETITION FOR REVIEW**

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## **I. INTRODUCTION**

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court affirm the decision of the Court of Appeals, published in State v. Winterstein, 140 Wn.App. 676, 166 P.3d 1242 (2007).

## **II. STATEMENT OF FACTS**

The petitioner was on probation with the Department of Corrections, hereafter DOC. RP Vol. II (6-28-05) 120. Community Corrections Officer Kris Rongen was assigned to supervise the petitioner. Id. As part of his supervision, Officer Rongen visited the petitioner at his residence located at 646 Englert Road. Id. at 131-132. Officer Rongen contacted the petitioner at this address on at least two occasions in November of 2002. Id. at 236.

In February of 2003, Officer Rongen had reasonable suspicion to believe the petitioner had violated the terms of his probation. Id. at 151, State v. Winterstein, 140 Wn.App. 676, 691, 166 P.3d 1242 (2007). Officer Rongen made plans to contact the petitioner at 646 Englert Road,

officers from local drug taskforces were enlisted to provide additional security and deal with any clandestine methamphetamine laboratories that might be discovered.<sup>1</sup> RP Vol. II (6-28-05) 205-206. Prior to going to 646 Englert Road on February 6<sup>th</sup>, Officer Rongen noted that the OBITS database showed this was the petitioner's current address. Id. at 136, 159. On this date, Officer Rongen knew the petitioner was residing at 646 Englert Road, and was aware of no information to the contrary. Id. 131, 169, 218.

Unknown to Officer Rongen, the petitioner had previously engaged in a ruse by using a kiosk at the DOC office to register a new address of 646 ½ Englert Road. This alleged address was a motorhome with the number 646 ½ spray painted on it. Id. at 158. When entered pursuant to a search warrant, the motor home was found to be full of stacked boxes. Id. at 248. A person would have to climb over these boxes to move around the vehicle. Id. at 253. In addition, there was no sign

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<sup>1</sup> It was suggested to the trial court this search was a pretext concocted by DOC and the drug officers. This claim was denied by the various officers involved and has no basis in fact. Unsurprisingly, the trial court found the search was not pre-textual.

anyone was in fact living in the motor home, and it did not appear to the investigating officers that anyone could live there. Id. at 248.

When Officer Rongen entered the house at 646 Englert Road, he located the petitioner's girlfriend Sunshine O'Connor. Ms. O'Connor told Officer Rongen the petitioner still lived there. Id. at 137. In addition, the petitioner's bedroom appeared the same as when Officer Rongen was there previously. Id. at 141. While clearing the residence, Officer Rongen saw components of a methamphetamine laboratory in plain view. Id. at 139. A search warrant was then obtained for the premises, where a working methamphetamine laboratory was subsequently discovered in a travel trailer. Id. at 141.

### **III. PROCEDURAL HISTORY**

The petitioner was charged by information with manufacturing methamphetamine in violation of RCW 69.50.401. After a jury trial, the petitioner was found guilty of this crime. After the verdict, trial counsel discovered documents that indicated the petitioner had registered a change of address with DOC using the kiosk at a date prior to the search. The

parties decided to litigate this issue through a suppression hearing pursuant to CrR 3.6. At this hearing, the trial court, Honorable Judge James Warne presiding, denied the motion to suppress the fruits of the February 6<sup>th</sup> search. The trial court held that the petitioner's change of address to "646 ½ Englert Road" was ruse designed to prevent DOC from searching his residence. The trial court further held that Officer Rongen was unaware of the change of address, as the address change had not been posted to the OBITS system used by Officer Rongen. *Id.* at 292-293. The trial court further held that 646 Englert Road was the petitioner's actual address, Officer Rongen believed this was his address, and that Officer Rongen had acted in good faith. *Id.* at 293.

Petitioner then filed a timely appeal with Division II of the Court of Appeals. In a published decision, State v. Winterstein, 140 Wn.App. 676, 691, 166 P.3d 1242 (2007), the Court of Appeals held that under Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the search of the petitioner's residence was lawful as Officer Rongen had a reasonable belief that the petitioner resided at the address in question. The

Court of Appeals further held that under the doctrine of inevitable discovery, as set forth in State v. Warner, 125 Wn.2d 876, 889 P.2d 479 (1995), suppression was not warranted even if the search was somehow defective. The Court of Appeals also held there was sufficient evidence to support the conviction and that there was no error in the jury instructions. Petitioner then sought review before this Court, which granted review on the sole issue of the lawfulness of the search. State v. Winterstein, 163 Wn.2d 1033, 187 P.3d 269 (table) (2008).

#### IV. ARGUMENT

##### 1. OFFICER RONGEN HAD REASONABLE SUSPICION TO BELIEVE THE PETITIONER RESIDED AT 646 ENGLERT ROAD

RCW 9.94A.631 states, in pertinent part, that “[i]f there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.” This statute sets forth a reasonable suspicion standard for searches of probationer’s homes. Washington case law has ruled this

standard is analogous to the reasonable suspicion required under Terry, 392 U.S. 1; See State v. Campbell, 103 Wn.2d 1, 22-23, 691 P.2d 929 (1984); State v. Coahran, 27 Wn.App. 664, 620 P.2d 116 (1980); see also United States v. Conway, 122 F.3d 841 (9th Cir. 1997) (holding that search of residence where probationer was suspected to live was lawful under Washington statutes and Fourth Amendment, as DOC has reasonable suspicion that the probationer was residing at the location search).

In the instant case, there is no dispute that Officer Rongen had a reasonable suspicion to believe the petitioner had violated a condition of his probation. The only question is whether it was reasonable for Officer Rongen to believe that 646 Englert Road was the petitioner's residence. Given the facts known to Officer Rongen at the time, this belief was eminently reasonable.

Officer Rongen had contacted the petitioner at 646 Englert Road on two prior occasions. RP Vol. II (6-28-05) 236. On the date in question,

address as 646 Englert Road. Id. at 136, 159. Thus, Officer Rongen had no knowledge the petitioner was residing anywhere other than this address. The fact the petitioner had conducted a ruse by changing his address in another DOC database is of no import.

Indeed, the proper analysis looks to what the officer actually knew at the time of the search, not what other facts might have been. See State v. Knighten, 109 Wn.2d 896, 910, 748 P.2d 1118 (1988). A search not initially supported by reasonable suspicion cannot be justified by after discovered facts that provide cause for the search. The same logic dictates that facts discovered after a search, and not known to the officer at the time, do not invalidate the search.

It is unclear how the facts, as known by Officer Rongen, do not support a reasonable suspicion the petitioner lived at 646 Englert Road. Officer Rongen had previously contacted him there, and the OBITS database listed this as his address. Conway, 122 F.3d 841, is instructive in this regard. There, a Washington state probation officer suspected a probationer resided at an address other than his listed one. Id. at 842. The

probation officer had information from a confidential informant that the probationer had been seen at the address, the police had seen the probationer leaving the address, and the probationer told the officer that his dog was at the address. Id. at 843. Based on this information, the Ninth Circuit Court of Appeals found there was reasonable suspicion to believe the probationer's actual address was the one searched, rather than the one on file with DOC. Id. at 842-843.

Additionally, a recent decision by this Court addresses the facts necessary to support a belief a person resides at a certain location. In State v. Hatchie, 161 Wn.2d 390, 166 P.3d 698 (2007), this Court held the police had probable cause to believe a person named in misdemeanor arrest warrant was residing in another person's home. The Court posed the question of "when does an officer have 'reason to believe' a place to be entered is the suspect's residence?" Hatchie, 161 Wn.2d at 403. This is the very same question posed here. Notably, in Hatchie, the warrant did not list the address searched as the person's address, and the person's vehicle registration also listed a different location. However, both of the person's

vehicles were parked at the home, the person returned to the home after shopping, and a neighbor said the person lived there. Id. at 404-405. This Court found these facts gave rise to probable cause to believe the person named in the warrant lived at the address. Id. at 405.

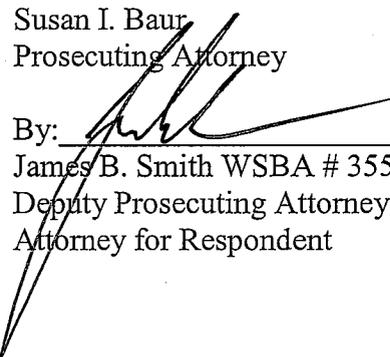
Clearly the Hatchie decision dealt with a more rigorous standard than is at issue here. Probable cause undeniably requires more proof than reasonable suspicion. If the facts of Hatchie, cars parked at the home and statements by a neighbor, provide *probable cause* to believe the person lived there, there is certainly *at least* a reasonable suspicion the petitioner was living at 646 Englert Road. Unlike Hatchie, Officer Rongen had actually met the petitioner at the address and knew that he lived there. This is a far greater level of certainty than the somewhat tenuous evidence found sufficient in Hatchie, where the police had never actually observed the person at the residence. As such, the trial court and the Court of Appeals did not err by finding there was a reasonable suspicion to believe the petitioner was residing at 646 Englert Road.

**V. CONCLUSION**

Based on the preceding argument, and the briefs previously filed, the State respectfully requests this Court affirm the decision of the Court of Appeals that the search at issue was lawful. When viewed as a whole, the records clearly establishes there was a reasonable suspicion supporting the entry into the residence, and that the petitioner engaged in a transparent ruse by attempting to change his address with DOC. This Court should not reward such conduct.

Respectfully submitted this 27<sup>th</sup> day of August, 2008

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