

66143-4

66143-4

No. 66143-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL ROOSEVELT SMITH,
Appellant.

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APPELLATE DIVISION
COURT OF APPEALS
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles R. Snyder
The Honorable Steven J. Mura

BRIEF OF APPELLANT

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A. SUMMARY OF APPEAL

Michael Roosevelt Smith appeals following convictions for delivery of heroin and possession of heroin with intent to deliver.¹ The latter charge was based upon evidence recovered during the execution of a search warrant. Although Smith had already been arrested, claiming a need to conduct a “protective sweep” of the premises, the police broke into a locked closet in Smith’s bedroom, seized and confiscated a lockbox inside the closet that was not covered by the warrant’s limited scope, and, once the box was at the precinct, obtained another warrant to search it.

The Fourth Amendment’s “protective sweep” exception is inconsistent with article I, section 7’s requirement that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Alternatively, the State did not establish the necessary predicate for application of the exception.

The trial court’s determination that the “plain view” doctrine could support a warrantless seizure of an item that was not immediately recognizable as contraband was also improper, as was the court’s factually unsupported conclusion that the lockbox could have contained documents of dominion and control. The fact that

¹ Smith was also convicted of possession of buprenorphine, a narcotic.

the police later obtained a warrant does not cure the initial unconstitutional seizure.

Finally, an investigation of the crime of delivery of a controlled substance did not supply probable cause to search for documents of dominion and control, which is a further basis to conclude that the “protective sweep” doctrine was improperly applied.

The order denying suppression must be reversed and Smith’s convictions arising out of the unconstitutional search must be dismissed. Further, because the admission of the evidence from the search prejudiced Smith’s ability to receive a fair trial on the remaining counts, they must be reversed and remanded for a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting evidence obtained in violation of Smith’s rights under the Fourth Amendment and article I, section 7 of the Washington Constitution.

2. The trial court erred in entering Finding of Fact 5 regarding Smith’s motion to suppress evidence.²

² The trial court’s “Findings of Fact and Conclusions of Law Re: Suppression” are attached as an Appendix.

3. The trial court erred in entering Finding of Fact 6 regarding Smith's motion to suppress evidence.

4. The trial court erred in entering Finding of Fact 7 regarding Smith's motion to suppress evidence.

5. The trial court erred in entering Finding of Fact 9 regarding Smith's motion to suppress evidence.

6. The trial court erred in entering Conclusions of Law 1, 2 and 3 regarding Smith's motion to suppress evidence.

7. The trial court erred in entering a conviction and judgment where, absent the unlawfully seized evidence, the State could not prove the charged offenses beyond a reasonable doubt.

8. The trial court denied Smith his due process right to a fair trial when it denied his motion to sever counts.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Unlike the Fourth Amendment, which utilizes a flexible "reasonableness" standard that balances subjective expectations of privacy against other interests such as effective law enforcement and officer safety, the Washington Constitution requires that all invasions into individual privacy be done under authority of law – i.e., a valid warrant or one of the narrow exceptions to the warrant requirement. This protection is at its apex in the home. Should this

Court hold that the Fourth Amendment's "protective sweep" rule, which permits a search without a warrant, probable cause, or, in some cases, reasonable suspicion, is contrary to article I, section 7's requirement of authority of law?

2. The Fourth Amendment's "protective sweep" rule is designed to ensure officer safety while executing an arrest warrant. Washington has not extended the rule to the execution of search warrants. Should this Court decline to do so here?

3. Where a "protective sweep" is conducted of property outside of the area immediately adjoining the site of an arrest, the Fourth Amendment requires police to identify specific, articulable facts that would warrant a reasonably prudent officer in the belief that the area to be searched harbored a dangerous person. Police here did not identify evidence supporting the objective conclusion that Smith's closet harbored a dangerous person, and instead testified that they conduct a "protective sweep" every time they execute a search warrant. Should this Court hold that the search was not permissible under the Fourth Amendment?

4. The narrow "plain view" exception to the warrant requirement has three predicates under article I, section 7: (1) a prior justification for intrusion; (2) inadvertent discovery of

incriminating evidence; and (3) immediate knowledge by the officer that he had evidence before him. A lockbox sighted in the closet was not contraband, nor was it immediately apparent that it was evidence; at most, there was a basis to suspect that it could contain evidence. Did the warrantless seizure of the lockbox violate article I, section 7?

5. Findings of fact following a CrR 3.6 hearing must be supported by substantial evidence in the record. Where the State's witnesses only testified that they believed a lockbox found in Smith's closet might contain narcotics and currency, was the trial court's finding of fact that the box could also be used to store documents of dominion and control unsupported by substantial evidence?

6. The Washington Supreme Court has held that the Fourth Amendment's "inevitable discovery" doctrine is incompatible with article I, section 7's "nearly categorical" exclusionary rule. Should this Court reject any claim that the fruits of the warrantless seizure of the lockbox are admissible because police obtained a search warrant after the fact and so the evidence inevitably would have been discovered?

7. The particularity requirement of the Fourth Amendment and article I, section 7 require a nexus, based upon specific, articulable facts, between criminal activity and the item to be seized, and a nexus between the item to be seized and the place to be searched. A warrant that fails to meet these requirements lacks probable cause. Smith was being investigated for the crime of delivery of a controlled substance. The elements of this offense are (1) delivery and (2) guilty knowledge. Did a warrant for “documents of dominion and control”, which are probative towards neither of these elements, fail to establish the requisite nexus between the criminal activity under investigation and the things to be seized, and lack probable cause?

8. If there was no probable cause to issue the warrant, did the protective sweep, which was conducted after Smith was arrested solely because the officers remained in his apartment to search for documents of dominion and control, violate Smith's Fourth Amendment and article I, section 7 rights?

9. Must Smith's convictions arising from the unconstitutional searches be reversed and dismissed? In addition, must Smith's remaining convictions be reversed for a new trial because the

admission of the evidence acquired from the searches prejudiced his ability to receive a fair trial?

D. STATEMENT OF THE CASE

In approximately August of 2009, Bellingham police officers commenced a narcotics investigation targeting appellant Michael Smith. 2RP 100-01.³ Christina Crapser had been charged with two counts of delivery of a controlled substance and agreed to work with the police department as a confidential informant in exchange for having those charges dismissed. 4RP 27-28, 57-58. She told her police “handler,” Kyle Nelson, that she could purchase heroin from Smith. 4RP 28.

On August 20, 2009, Crapser telephoned a man she claimed was Smith and told him she wanted to “play basketball.”⁴ 4RP 59. Crapser and the man arranged to meet, but when Crapser arrived at the appointed place, she was contacted by a white man (Smith is black), who told her he wanted a ride to Lakeway. 2RP 51; 4RP

³ The verbatim report of proceedings consists of four volumes of transcripts. A volume containing proceedings from April 8, April 20, and August 30, 2010 is referenced herein as 1RP. A volume containing proceedings from June 23, August 9, October 4, October 5, October 6, and October 19, 2010 is referenced herein as 2RP. A volume containing a transcript from October 24, 2010 is referenced herein as 3RP. A volume containing the transcription of an afternoon session on October 25, 2010 by court reporter Sandra Sullivan is referenced herein as 4RP.

⁴ According to Nelson, this is a common term for an “eight-ball” of heroin. 4RP 59.

32. Crapser did not feel comfortable proceeding with the deal because she did not know the man, and did not purchase drugs from him. 2RP 33-34. According to observing officers, the white man left and returned to an apartment believed to be Smith's. 2RP 103.

Later that evening Crapser telephoned someone she alleged was Smith and told him she did not know he was sending someone else out to meet her, and that she did not feel comfortable dealing with someone she did not know. 4RP 33. The man reassured her that the white man was a friend and said they would get in touch with one another later. 4RP 34, 63.

On August 28, 2009, Crapser contacted Nelson and said that she had been in touch with Smith. 4RP 64. She said that she had arranged to purchase an "eight-ball" of heroin for \$130. Id. Nelson directed Crapser to contact Smith again in his presence, so she placed a telephone call to confirm the meeting location. Id.

Later that day, Nelson observed a black man, whom he believed was Smith, standing near the "Little Bugs" store in Bellingham, near the prearranged meeting location. 2RP 66. Observation officers saw the man approach Crapser's vehicle and lean in with both arms in the vehicle. Id. Crapser stated that Smith

placed drugs on the seat of the car and then left. 4RP 35. Crapser later gave Nelson six bindles of black tar heroin. 4RP 67.

Crapser's next telephone call was made on September 4, 2009, again to the same telephone number. 4RP 68. Crapser said she wanted to play basketball and the man on the other end of the line replied, "yeah, let's play basketball" and they arranged to meet. Id. For this transaction, Crapser wore a wire. 4RP 69.

At the meeting place, observation officers saw a black man they believed to be Smith and two white men approach Crapser's car. 2RP 59. The black man did not move toward the car, but one of the white men did. Id. He initially made contact through the passenger side, then came around to the driver's side and reached both arms into the car. 2RP 60. He then handed Crapser a Camel cigarette pack which contained heroin. 4RP 37-38.

The police did not take any action against Smith for three months. On December 14, 2009, at approximately one in the afternoon, police officers staked out Smith's residence. 3RP 14. Their stakeout was rewarded when Smith returned to his home. 3RP 15. Even though they had probable cause for his arrest based on the earlier controlled buys, however, they did not arrest him. 3RP 15. They did contact him, identifying themselves as police

officers, and asked him to identify himself, but he walked away.

3RP 15, 21.

The officers claimed that they did not try to arrest Smith at this point because they were not completely certain of his identity. Id. But they did not even detain him for the limited purpose of verifying who he was. Instead they permitted him to reenter his apartment, and successfully applied for a search warrant.⁵ 3RP 15, 21.

Sergeant Claudia Murphy testified in support of the telephonic warrant application, which was heard by a court commissioner.⁶ She averred that based upon the controlled buys, the crime being investigated was delivery of heroin. CP 136. She testified that the search warrant was for Smith's address and would search for "a black male in his late twenties wearing a black hooded sweatshirt with blue jeans. He has a goatee and . . . he's six feet tall and weighs 180 pounds." Id. Murphy also asked for

⁵ There is no explanation provided in the record as to why the officers sought a search warrant and not an arrest warrant.

⁶ The transcription of the telephonic warrant application indicates that Judge Snyder heard the warrant, but other portions of the record suggest that this is an error. See CP 134 (noting that the warrant application was heard before District Court Commissioner Anthony Parise).

authorization to search for “documents of dominion and control.”

Id.

In support of the warrant Murphy stated that three successful controlled buys of heroin had been completed between August 11, 2009 and September 28, 2009. CP 137-39. The commissioner confirmed that the purpose of entering the apartment was to search for Smith and place him under arrest. CP 140. The commissioner also confirmed that the sole reason for seizing documents of dominion and control was to “establish his residency at that address.” Id. The commissioner approved the warrant at 4:20 p.m. CP 144.

Consistent with Murphy’s representations, the warrant authorized by the commissioner directed the police to

Search for, seize, secure, tabulate and make return according to law the following property and things[:]
Black Male, in his late 20’s named “Mike,” wearing a black hooded sweatshirt with blue jeans. He has a goatee and is approximately 6-0 tall and weighs 180 pounds, documents of dominion and control.

CP 126.

When the police executed the warrant they were able to immediately place Smith in custody without incident. 3RP 9.

Nevertheless they continued to search his apartment for documents

of dominion and control, and located a shoebox near Smith's bed containing a W2 form and an electronic scale, as well as buprenorphine, a narcotic. 3RP 18, 20. The police also located seven empty Camel cigarette boxes. 3RP 18.

In the far right corner of Smith's bedroom was a locked closet. 3RP 7, 12, 23. Laughlin stated that Bellingham police officers were trained to conduct a protective sweep "in any location where a search warrant is executed." 3RP 12. During the entire time that they were conducting surveillance of Smith's residence (approximately four hours), the police had not observed any other person entering. 3RP 8, 20. Nevertheless, Detective Brooks Laughlin claimed that the locked closet posed a "potential risk" because it "could easily hide another individual who could possibly be armed or a threat" to the officers. 3RP 11-12.

Nelson asked Smith for keys to the closet but he did not provide them. 3RP 22. An officer then forced the lock with a small pocketknife. 3RP 12. There was no one inside the closet. 3RP 13. On a shelf, however, there was a lockbox. 3RP 5, 13. It was locked. Id. Although the warrant did not authorize seizure of this item, the police took the lockbox with them back to the Bellingham Police Department evidence room. 2RP 63; CP 146.

The police then applied for another warrant to search the lockbox. In a telephonic warrant application to the Honorable Charles Snyder, Detective Nelson stated the police were searching for:

Controlled substances including but not limited to heroin, all items including paraphernalia and equipment associated with the manufacturing, possession, ingestion, distribution and storage of controlled substances; currency associated with the distribution of heroin; and papers of dominion and control.

Appendix at CP 146-47.

Under questioning by the prosecutor, the following exchange then transpired:

Q (by Mr. Chambers): And what crime is being investigated on the face of your warrant there? We can list it, it would be delivery of controlled substances, is that correct?

A (by Detective Nelson): Correct.

Q: It would be actually if we found drugs in there, it would be possession with intent to deliver controlled substance?

A: Correct.

Q: And we'd be writing that on the face of the warrant if the judge grants a search warrant, is that correct?

A: Correct.

CP 146.

Without specifying when the controlled buys had occurred, Nelson noted that the deliveries had been made in Camel cigarette boxes, and that seven Camel cigarette boxes had been seized during the execution of the earlier warrant. CP 146-47. He stated that Smith had \$715 in currency on him but his W2 form indicated he had earned \$3900 in 2008, and that there were a lot of expensive electronic gadgets in his apartment. CP 148-49.

Murphy also testified in support of the second warrant. She stated that in June of the same year (i.e., six months prior to application for the warrant) the mother of a 16-year-old heroin addict had reported to police that she found a lockbox similar to the one seized from Smith's home in her daughter's room. CP 150. The mother surrendered it to the police, and inside police found nine and a half grams of heroin. CP 150-51. The daughter was promptly arrested and questioned while in custody. According to Murphy, she stated that she stayed with Smith on and off, and mentioned that he kept a safe containing drugs and sometimes cash in his closet. CP 152. She also provided information regarding how Smith would arrange his sales, which Murphy testified was corroborated by the police investigation in September. CP 153. During the same conversation (in June, 2008), the girl

also gave Murphy a three-number combination for the safe. CP 154.

Judge Snyder found probable cause to search the box based on (a) the information provided by the process of purchasing drugs from Smith which (b) was corroborated by “the 16 year old girl who has specific information about the sales and about the existence of the box itself, the combination to the box, and the contents of that box.” CP 155. Judge Snyder further found:

the items found within Mr. Smith’s apartment regarding finances and his possessions would I think corroborate the finding of probable cause that he has been dealing and possessing drugs from that apartment and the possession in that apartment and that the silver and black lock box is likely to contain those items that are being sought[.]

CP 156-57.

The combination for the lockbox that the teenage heroin addict had given Murphy did not work, but when the lockbox was broken open police recovered 175.4 grams of heroin, and additional empty Camel cigarette boxes. 2RP 72.

Smith was prosecuted for two counts of delivery of heroin, one count of possession of heroin with intent to deliver, and one count of possession of buprenorphine. CP 87-89. Judge Snyder denied Smith’s motion to suppress evidence obtained in violation of

his Fourth Amendment and article I, section 7 rights, and Judge Mura denied Smith's motion to sever counts. CP 4-7; 2RP 32-35. A jury convicted Smith of all counts as charged. CP 61-62. Smith appeals. CP 8-18.

E. ARGUMENT

1. THE SEARCH OF THE CLOSET WAS NOT JUSTIFIED UNDER THE "PROTECTIVE SWEEP" EXCEPTION TO THE WARRANT REQUIREMENT.

a. The "protective sweep" exception to the warrant requirement violates article I, section 7. Under the Fourth Amendment and article I, section 7, warrantless searches of constitutionally protected areas are presumptively invalid unless one of the narrow exceptions to the warrant requirement applies. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999); U.S. Const. amend. IV; Const. art. I, § 7. "Exceptions to the warrant requirement are to be 'jealously and carefully drawn.'" State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005) (citation omitted). The State bears the burden of establishing an exception to the warrant requirement by clear and convincing evidence. State

v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); State v. Ibarra-Raya, 145 Wn. App. 516, 187 P.3d 301 (2008).

i. A “protective sweep” permits a warrantless intrusion upon the privacy of the home. Under both the Fourth Amendment and article I, section 7, the home is afforded the highest protection against government intrusion. “This constitutional protection is at its apex ‘where invasion of a person's home is involved.’” State v. Eisfeldt, 163 Wn.2d 628, 635, 185 P.3d 580 (2008) (citation omitted).

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV (emphasis added). By contrast, article I, section 7 provides an unambiguous and inflexible mandate that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7.

Thus, the right to privacy within the home notwithstanding, one of the exceptions to the Fourth Amendment’s requirement of a warrant founded upon probable cause is the so-called “protective sweep,” recognized in Maryland v. Buie, 494 U.S. 325, 334, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). In Buie, the Court held that

“as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” Id. With regard to spaces “beyond that,” the Court requires only a showing of reasonable suspicion, as in Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed 2d 1201 (1983).

Thus, the Court held that for a protective sweep of other areas of the home to be lawful,

[T]here must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

Buie, 494 U.S. at 334. The Court reasoned that the officers’ interest in taking “reasonable steps to ensure their safety” after and while making an arrest was “sufficient to outweigh the intrusion such procedures may entail.” Id.

Unlike the Fourth Amendment, article I, section 7 “clearly recognizes an individual’s right to privacy with no express limitations.” State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (quoting

State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)).

Where the Fourth Amendment is concerned with whether the defendant possessed a “reasonable expectation of privacy,” article I, section 7 “focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984).

No Washington court has considered the question whether a “protective sweep exception” to the warrant requirement exists under article I, section 7. This Court should hold that because a protective sweep may be conducted without a warrant or probable cause, and turns upon considerations of “reasonableness” which do not exist under our state constitution, it violates article I, section 7.

ii. The Fourth Amendment’s “reasonableness” analysis is inconsistent with the article I, section 7’s absolute requirement of authority of law. The touchstone of any analysis under the Fourth Amendment is reasonableness. “It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures.” Buie, 494 U.S. at 331; see also Eisfeldt, 163 Wn.2d at 634 (“The Fourth Amendment protects only against ‘unreasonable searches’ by the State, leaving individuals subject to

any manner of warrantless, but reasonable searches.”) Morse, 156 Wn.2d at 9 (same).

In determining whether a given search violated the Fourth Amendment guaranty, a court will balance the intrusion upon the individual’s Fourth Amendment rights against its promotion of legitimate government interests. Buie, 494 U.S. at 331; see also Terry, 392 U.S. at 21. This balancing was critical to the Court’s analysis in Buie. See 494 U.S. at 330 (analogizing the “protective sweep” to the Terry “frisk” and noting that under the Fourth Amendment, “there is ‘no ready test for determining reasonableness other than by balancing the need to search ... against the invasion which the search ... entails” (quoting Terry, 392 U.S. at 21)); 494 U.S. at 332 (“[t]he ingredients to apply the balance struck in Terry and Long are present in this case”); 494 U.S. at 334 n. 2 (observing that permitting a protective sweep based upon reasonable suspicion “strikes the proper balance between officer safety and citizen privacy”).

However, “[u]nlike in the Fourth Amendment, the word “reasonable” does not appear in any form in the text of article I, section of the Washington Constitution.” Morse, 156 Wn.2d at 9. “Understanding this significant difference between the Fourth

Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.” Eisfeldt, 163 Wn.2d at 635. Article I, section 7, instead, “focuses on the rights of the individual rather than on the reasonableness of the government action.” Morse, 156 Wn.2d at 12.

Under the explicit language of article I, section 7, “the warrant requirement is especially important as it is the warrant which provides the requisite ‘authority of law.’” Ladson, 138 Wn.2d at 350. Thus, Washington courts have scrupulously guarded against warrantless police intrusion into a residence, even where under the Fourth Amendment such intrusion might be “reasonable.” Morse, 156 Wn.2d at 11-12 (invalidating Fourth Amendment’s “apparent authority” doctrine); State v. Ferrier, 136 Wn.2d 103, 115, 960 P.2d 927 (1998) (“knock and talk” procedure violated warrant requirement of article I, section 7); City of Seattle v. McCready, 123 Wn.2d 260, 270-72, 868 P.2d 134 (1994) (no authority of law for magistrates to issue search warrants for peoples’ homes on less than probable cause); Young, 123 Wn.2d at 181-82 (warrantless infrared surveillance of home violated article I, section 7); State v. Chrisman, 100 Wn.2d 814, 821-22, 676 P.2d 419 (1984) (no

authority of law for police to follow arrestee into apartment absent a valid warrant or some exigency).

A “protective sweep” is justified by neither a warrant, nor probable cause, nor, for the areas immediately surrounding the searching officers, reasonable suspicion. Buie, 494 U.S. at 334. But under article I, section 7, the Court has steadfastly refused to dilute the constitutional mandate of authority of law as expressed by a valid warrant or recognized exception to the warrant requirement. This Court should conclude that the Fourth Amendment’s “protective sweep” exception is contrary to article I, section 7.

b. The State failed to establish grounds for a protective sweep under the Fourth Amendment. Even assuming that a “protective sweep” could survive article I, section 7’s command that government intrusions upon individual privacy occur only under “authority of law,” the State did not establish the necessary predicates to show the protective sweep exception applies.

i. In Washington, a search warrant does not provide a predicate for a protective sweep. “A ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and

conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.” Buie, 494 U.S. at 327. “In Washington, as in most jurisdictions, the protective sweep has not been extended to the execution of search warrants.” State v. Boyer, 124 Wn. App. 593, 601, 102 P.3d 833 (2004) (citation omitted). As the Court in Boyer noted, even those jurisdictions that have extended Buie to the execution of a search warrant have done so only because the officers articulated specific facts that would support a prudent officer in the belief that the area harbored a dangerous person. Id. at 602; see e.g. State v. Davila, 999 A.2d 1116, 1127-28 (N.J. 2010)⁷ (discussing principles underlying

⁷ Importantly, Davila was decided under the reasonableness standard of the Fourth Amendment. See 999 A.2d at 1124. Further, in holding that a protective sweep could occur outside the arrest context, the New Jersey Supreme Court delineated strict constitutional parameters:

A protective sweep may only occur when (1) police officers are lawfully within private premises for a legitimate purpose . . . and (2) the officers on the scene have a reasonable articulable suspicion that the area to be swept harbors an individual posing a danger. Where those substantive conditions are met, as a matter of procedure, the sweep will be upheld only if (1) it is conducted quickly; and (2) it is restricted to places or areas where the person posing a danger could hide. Importantly, when an arrest is not the basis for officer entry, the legitimacy of the police presence must be carefully examined as well as the asserted reasons for the protective sweep. Enhanced precautions are necessary to stem the possibility that a protective sweep is nothing more than an unconstitutional warrantless search. The police cannot create the danger that becomes the basis for a protective sweep, but rather must be

extension of rule); Drohan v. Vaughn, 176 F.3d 17, 22 (1st Cir. 1999) (reiterating that standard to be applied is Buie reasonable suspicion standard).

In this case, the fact that the police sought a search warrant, rather than an arrest warrant, where their principal objective was to take Smith into custody, presents a somewhat anomalous circumstance.⁸ Cf., State v. Hopkins, 113 Wn. App. 954, 958, 55 P.3d 691 (2002) (“Why the officers obtained a search warrant is not clear, because an arrest warrant, by itself, provides authority for the police to enter a person’s residence to effectuate his or her arrest”). Nevertheless, the officers’ error does not supply a basis to deviate from the general rule that a protective sweep is permissible in Washington only when police are executing an arrest warrant. State v. Thorsen, 98 Wn. App. 528, 538, 990 P.2d 446 (1999) (“[i]t is not a matter of whether the officer made a mistake in good faith” but whether he had a lawful basis for his action); State v. White, 97

able to point to dangerous circumstances that developed once the officers were at the scene. Where police are present in a home in a non-arrest context, there is too great a potential for the pretextual use of a protective sweep to turn an important tool for officer safety into an opportunity for an impermissible law enforcement raid.

999 A.2d at 1119.

⁸ This fact certainly supports the conclusion that the police used the entry into Smith’s home as a pretext to conduct a search.

Wn.2d 92, 107-08, 640 P.2d 1061 (1982) (no good faith exception to article I, section 7's exclusionary rule). Because the search warrant did not provide authority for the sweep, the search should be invalidated.

ii. The officers did not possess the requisite reasonable suspicion that the closet harbored a dangerous person, but instead employed a general practice of conducting a sweep any time a warrant was executed. Alternatively, this Court should invalidate the search of the closet because it was not supported by the requisite "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene" required under Buie. Buie, 494 U.S. at 337.

Both McLaughlin and Nelson testified that it was the practice of Bellingham police to conduct a sweep every time they executed a search warrant. 3RP 12, 17. Thus, far from first determining whether the existence of a specific danger justified a sweep at the time of the search, the State's witnesses were placed in the position of supplying a rationale for the sweep after the fact. The sole testimony mustered at the CrR 3.6 hearing that related to the "sweep" in this instance amounted to two factors: (1) Smith's home

had a closet, which, theoretically at least, was big enough to hide a person, and (2) three months earlier, when Smith allegedly had made the deliveries to the police informant, he was seen in the company of two other people.⁹ 3RP 9. Given that after four hours of surveillance, the police had no reason to believe another person was in Smith's home, these facts do no more than support a remote possibility of danger to the officers. Taken together with the incontrovertible testimony that it is the general practice of Bellingham police to conduct a sweep every time they execute a warrant, these purported justifications fail to establish the predicate of a reasonable suspicion based on articulable facts which would warrant a prudent officer in the belief that the closet harbored a dangerous person.

“[A] ‘general desire to be sure that no one is hiding in the place to be searched is not sufficient’ to justify a protective sweep outside the immediate area where an arrest has occurred.”

Hopkins, 113 Wn. App. at 960 (quoting State v. Schaffer, 133 Idaho 126, 131, 982 P.2d 961 (Idaho App. 1999)); see also State v.

⁹ The trial court's findings reflect the speculative nature of the search. See e.g. CP 5, Finding of Fact 4 (noting that police officers had been observing the apartment for a few hours and saw only Smith enter) and Finding of Fact 5 (justifying search with post hoc rationalization that “[s]ince the officers could easily defeat the lock on the closet, a person hiding inside could also easily exit the closet and surprise the officers”).

Spencer, 848 A.2d 1183, 1196 (Conn. 2004) (“The generalized possibility that an unknown, armed person may be lurking is not . . . an articulable fact sufficient to justify a protective sweep”) (emphasis in original). Further,

allowing the police to conduct protective sweeps whenever they do not know whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a house in order to conduct a protective sweep.

United States v. Colbert, 76 F.3d 773, 778 (6th Cir. 1996). The “protective sweep” in this case was invalid, and the after-acquired evidence must be suppressed.

2. THE OFFICERS LACKED AUTHORITY TO SEIZE THE LOCKBOX WITHOUT A WARRANT.

The first search warrant issued in this case was limited in scope. The officers were permitted to search for and seize Smith himself, and to search for documents of dominion and control. CP 126. Despite this clear limitation, the officers seized the lockbox they found in the closet and brought it back with them to the station. The trial court’s primary justification for upholding this unusual and intrusive warrantless seizure was that the lockbox was in “plain view.” CP 5 (Finding of Fact 6); CP 7 (Conclusion of Law 2). The court alternatively concluded that it was likely to contain documents

of dominion and control. CP 5 (Finding of Fact 6); CP 7 (Conclusion of Law 2). Neither of these rationales survives article I, section 7's warrant requirement.

a. "Plain view" did not justify the seizure of the lockbox. Any search or seizure under article I, section 7 begins with the presumption that warrantless seizures are per se unreasonable under the Washington Constitution. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). The Supreme Court has recognized exceptions for consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry investigative stops. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010).

The "plain view" exception is applicable when police who possess a prior lawful justification for an intrusion (in Washington, a warrant or one of the narrow exceptions to the warrant requirement) come across a piece of evidence incriminating the accused. Coolidge v. New Hampshire, 403 U.S. 443, 465-66, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Under article I, section 7, the exception has three necessary predicates: "(1) a prior justification for intrusion; (2)

inadvertent discovery of incriminating evidence;¹⁰ and (3) immediate knowledge by the officer that he had evidence before him.” Chrisman, 100 Wn.2d at 819.

[T]he extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the ‘plain view’ doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Coolidge, 403 U.S. at 466 (emphasis added); accord Horton v. California, 496 U.S. 128, 136, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) (stressing, “not only must the item be in plain view; its incriminating character must also be ‘immediately apparent.’”).¹¹

The Washington Supreme Court has reiterated that the exception “requires that the officer had a prior justification for the intrusion and immediately recognized what is found as incriminating evidence such as contraband, stolen property, or other item useful as

¹⁰ In Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), the Court expanded the exception under the Fourth Amendment to hold that discovery need not be inadvertent. Washington has not adopted this rule under article I, section 7. State v. Kull, 155 Wn.2d 80, 85, 118 P.3d 307 (2005).

¹¹ Likewise, the tactile equivalent of the “plain view” exception, sometimes called the “plain feel” exception, stands for “[t]he principle that a police officer, while conducting a legal pat-down search, may seize any contraband that the officer can immediately and clearly identify, by touch but not by manipulation, as being illegal or incriminating.” Garvin, 166 Wn.2d at 248 n. 5 (emphasis added).

evidence of a crime.” State v. O’Neill, 148 Wn.2d 564, 583, 62 P.3d 489 (2003).

The premise underlying “plain view” is that when an officer is in a place he has a legitimate justification to be, and sees an item in plain view that he immediately recognizes as contraband, he has not conducted a search. Even under the Fourth Amendment, however, the Supreme Court has cautioned, “[i]t is important to distinguish ‘plain view’ . . . to justify seizure of an object, from an officer’s mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search . . . the former generally does implicate the Amendment’s limitations upon seizures of personal property.” Horton, 496 U.S. at 133 n. 5 (citations omitted, emphasis in original).

[P]lain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent ‘exigent circumstances.’ Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

Coolidge, 403 U.S. at 468 (emphasis in original); accord Myrick, 102 Wn.2d at 514-15; State v. Swetz, 160 Wn. App. 122, 134-35, 247 P.3d 802 (2011).

In this case, the lockbox itself was not an item that was illegal for Smith to possess. Rather, the State's assertion at the CrR 3.6 hearing was that a similar lockbox had been described by an arrested teenage heroin addict six months earlier, who allegedly told Murphy that Smith kept heroin and sometimes money there. 3RP 5. McLaughlin also claimed that based upon his "training and experience," "drug dealers" use that "particular kind of lockbox" to store narcotics and currency. 3RP 13. Even assuming the truth of both assertions, however, this does not transform the lockbox into "immediately recognizable" contraband. Nor does it create the exigent circumstances that could have justified a warrantless seizure. Instead, at most its presence was potentially incriminating, and thus could have supported probable cause. "Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant." Tibbles, 169 Wn.2d at 369.

Accordingly, upon noting the presence of the lockbox, the police should have secured the premises and applied for a second

search warrant. This they did not do. Instead, they circumvented the warrant requirement and seized the item, applying for a warrant only once they had removed it to the Bellingham Police precinct. 2RP 63; CP 146. This Court should conclude that the warrantless seizure violated article I, section 7.

b. The claimed possibility that the lockbox could contain documents of dominion and control was not supported by the evidence and did not justify the seizure. The trial court found in the alternative that the lockbox was a “logical location for a person to store documents of dominion and control” and thus that the seizure was permissible under the warrant. CP 5 (Finding of Fact 7). There was absolutely no testimony presented to support the court’s finding of fact, however. Thus, both the finding and the court’s conclusion of law echoing the finding were improperly entered.

A challenged finding of fact is reviewed to determine whether it is supported by substantial evidence. Garvin, 166 Wn.2d at 249. “Evidence is substantial when it is enough ‘to persuade a fair-minded person of the truth of the stated premise.’” Id. (citation omitted). None of the State’s witnesses testified that they believed the lockbox contained documents of dominion and control. Instead

they eagerly explained their suspicion that the lockbox was used to store narcotics and currency. See 3RP 5 (Murphy testifies, “as soon as I saw the lock box, the first thing that went through my mind is that this young woman was exactly right in what she had told me”); 3RP 13 (Laughlin testifies that he had been briefed by Murphy regarding the information she had received from the teenage heroin addict).

Therefore, far from being based upon any evidence in the record, let alone evidence sufficient to “persuade a fair-minded person” of its truth, the court apparently based its finding on its own experience. This was manifestly improper.

The record . . . must be proved. The reason for the rule is apparent. The decision of a cause must depend upon the evidence introduced. If a court should take judicial notice of facts . . . , it would make those facts, unsupported by evidence in the case in hand, conclusive against the opposing party; while if they had been properly introduced, they might have been controverted and overcome.

Swak v. Dep’t of Labor and Indus., 40 Wn.2d 51, 54, 240 P.2d 560 (1952).¹²

¹² See also ER 201 (permitting a court to take judicial notice only of facts that are not in reasonable dispute in that they are “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned”).

This Court should conclude the trial court's finding of fact that the lockbox could have been used to store papers of dominion and control was not supported by any evidence in the record.

c. The warrant obtained after the lockbox had already been confiscated and taken to the Bellingham police station does not cure the illegality because the inevitable discovery exception does not exist under article I, section 7. Because the seizure of the lockbox was not done pursuant to a warrant or any of the narrowly drawn exceptions to the warrant requirement, the after-acquired evidence must be suppressed. "The constitutionally mandated exclusionary rule provides a remedy for individuals whose rights have been violated and protects the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence." State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009). The Washington Supreme Court has held that the language used by the framers of the Washington Constitution "mandate[s] that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy." White, 97 Wn.2d 110. Rather, because the intent of the exclusionary rule is to protect privacy rather than deter unlawful government action, "whenever the right is unreasonably violated, the remedy must follow." Id.

Any assertion that the evidence should be admissible because it would have been discovered by a warrant depends on an iteration of the inevitable discovery rule. But in Winterstein, the Court rejected the Fourth Amendment's inevitable discovery rule "because it is incompatible with the nearly categorical exclusionary rule under article I, section 7." Winterstein, 167 Wn.2d at 636. In O'Neill, the precursor to Winterstein, the Court refused to apply the inevitable discovery rule, finding it would leave "no incentive for the State to comply with article I section 7's requirement that the arrest precede the search." O'Neill, 148 Wn.2d at 592. Here, similarly, application of the rule would leave no incentive for police to obtain a warrant before seizing evidence. This Court should reject any claim that the after-the-fact warrant salvages the illegality of the unconstitutional seizure.

3. THE CRIME BEING INVESTIGATED DID NOT
SUPPLY PROBABLE CAUSE TO SEARCH FOR
DOCUMENTS OF DOMINION AND CONTROL.¹³

a. Documents of dominion and control were irrelevant to prove the elements of the crime of delivery of a controlled substance. It is axiomatic that a search warrant may issue only upon probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause exists “if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” Id.

Accordingly, “probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.”

Id. (citation omitted).

In Thein, after extensive analysis of decisions from this and other jurisdictions, the Court expressly adopted a rule requiring that

¹³ Although Smith did not litigate the propriety of the Commissioner’s probable cause determination below, he may litigate it for the first time on appeal as a manifest error affecting a constitutional right. RAP 2.5(a)(3). An error is manifest if an appellant can show actual prejudice resulting from the error. State v. Abuan, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 1496182 at 3 (April 12, 2011) (citation omitted). “An appellant demonstrates actual prejudice when he establishes from an adequate record that the trial court likely would have granted a suppression motion.” Id. (citing State v. Contreras, 92 Wn. App. 307, 312, 966 P.2d 915 (1998)). Here, this Court has the entire record that was before Commissioner Parise when he issued the warrant. CP 144-61.

search warrant affidavits contain specific facts establishing the required nexus. Id. at 141-48. In so doing, the Court rejected the contention that “it is reasonable to infer evidence of drug dealing will likely be found in the homes of drug dealers.” Id. at 147. Instead the Court concluded, “[a]bsent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.” Id.

Thus, in State v. Dalton, 73 Wn. App. 132, 868 P.2d 873 (1994), the Court concluded that evidence Dalton had delivered controlled substances and was the sender of a package of marijuana that had been intercepted by law enforcement did not support the issuance of a warrant to search his home. “Probable cause to believe a man has committed a crime on the street does not necessarily give rise to probable cause to search his home.” Id. at 140 (citation omitted); approved by Thein, 138 Wn.2d at 148.

Both the Fourth Amendment and article I, section 7 also abjure general warrants. Stanford v. Texas, 379 U.S. 476, 485-86, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); State v. Perrone, 119 Wn.2d 538, 556-58, 834 P.2d 611 (1992). “A warrant can be ‘overbroad’ either because it fails to describe with particularity items for which

probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist.” State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003). A search pursuant to a warrant “must be circumscribed by reference to the crime under investigation; otherwise, the warrant will fail for lack of particularity.” State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993); accord Thein, 138 Wn.2d at 140 (“probable cause requires a nexus between criminal activity and the item to be seized”). “[A] warrant may not describe items that are not shown to be contraband or evidence of crime.” Maddox, 116 Wn. App. at 805 n. 21.

The elements of the crime of delivery of a controlled substance are (1) delivery and (2) “guilty knowledge.” State v. Nunez-Martinez, 90 Wn. App. 250, 253, 951 P.2d 823 (1998). Documents of dominion and control – i.e., documents tending to show that Smith resided at the residence that was searched – in no way enhanced the State’s ability to prove either essential element of delivery. Stated differently, there was no nexus between the criminal activity under investigation (delivery of heroin) and the item to be seized. The warrant authorizing seizure of documents of dominion and control lacked probable cause.

b. If probable cause did not exist to search for documents of dominion and control, then the search exceeded its lawful scope and the after-acquired evidence must be suppressed.

Because the portion of the warrant authorizing seizure of documents of dominion and control lacked probable cause, the search of the closet cannot be justified as falling within the scope of a proper warrant. Nor can it be justified by the protective sweep exception, which is limited in scope and duration.

A “protective sweep”, even if justified, must last “no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.” Buie, 494 U.S. at 335. The record must support a causal relation between a sweep and law enforcement officers’ claimed necessity to protect themselves while making an arrest. United States v. Akrawi, 920 F.2d 418, 420-21 (6th Cir. 1990) (nexus not established where officers confronted and arrested homeowner at entrance without resistance, remained in residence for 45 minutes, and did not testify to the length of the protective sweep or at what point it occurred); see also United States v. Archibald, 589 F.3d 289, 298 (6th Cir. 2009) (declining to uphold “protective sweep” where defendant was arrested at

entryway but sweep was conducted of interior of home); People v. Williams, 12 Misc.3d 1184(A), 2006 WL 2022190 at 4 (N.Y.Co.Ct. 2006)¹⁴ (finding improper “search of other rooms in the apartment for no particularized reason but ‘officer safety’ after the subject of the arrest warrant had been taken into custody”).

There is no indication in the record that the officers encountered any resistance when they entered the apartment or that they had any difficulty immediately placing Smith into custody. Indeed, the record strongly supports the inference that Smith was immediately arrested as soon as police gained entrance to his home and was safely in custody when the officers conducted their search of the closet. 3RP 7 (Murphy implies that Smith was arrested at the entry to the apartment), 3RP 22 (Nelson testifies that Smith declined to give the officers keys when they sought to breach the locked closet). The closet was not in the entryway of Smith’s apartment, but rather in the back corner of his bedroom,¹⁵ an area that the police had no reason to enter except to conduct a search. 3RP 23. This Court should conclude that the “protective

¹⁴ Williams is an unreported decision. Under New York law, such decisions are not precedent but are entitled to “respectful consideration.” Eaton v. Chahal, 146 Misc.2d 977, 983, 553 N.Y.S.2d 642 (N.Y. Sup. 1990).

¹⁵ Nelson testified to the layout of Smith’s single-bedroom apartment, and stated that the bedroom was located to the back of the living area, which was to the right of the entryway. 3RP 22-23.

sweep” was done not to assure the officers’ safety during the arrest, but for purposes of the search, and was unlawful. All fruits of the unconstitutional protective sweep must be suppressed.

4. SMITH’S CONVICTIONS MUST BE REVERSED.

a. The possession with intent to deliver and possession of buprenorphine charges must be reversed and dismissed. The remedy for an unconstitutional search or seizure is suppression of the after-acquired evidence. “[W]henver the right [to privacy] is unreasonably violated, the remedy must follow.” White, 97 Wn.2d at 110. Accordingly, Smith’s convictions for possession of heroin with intent to deliver and possession of buprenorphine, both of which flow directly from the unconstitutional search of his home, must be reversed and dismissed.

b. Smith’s remaining convictions must be reversed for a new trial, because the admission of the evidence acquired during the search prevented him from receiving a fair trial. Additionally, Smith’s remaining convictions should be reversed, because the admission of the evidence that Smith possessed a substantial quantity of heroin when he was arrested prejudiced his

ability to receive a fair trial on the two counts of delivery of a controlled substance.¹⁶

Prior to trial, Smith moved to sever counts I and II, charging delivery of heroin, from counts III and IV, charging possession of heroin with intent to deliver and possession of buprenorphine. 2RP 32. He argued that he could not receive a fair trial in a delivery prosecution where the State was able to introduce evidence that on a different occasion Smith was found to possess 175 grams of heroin. 2RP 33. He noted that the deliveries preceded the possession arrest by nearly four months, and thus the relevance of the evidence to the delivery charges was minimal.

The Supreme Court has held that “[s]everance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant’s guilt for another crime or to infer a general criminal disposition.” State v. Sutherby, 165 Wn.2d 870, 833, 204 P.3d 916 (2004). In determining whether severance is necessary to avoid prejudice, a court considers:

- (1) the strength of the State’s evidence on each count;
- (2) the clarity of defenses as to each count;
- (3) court instructions to the jury to consider each count

¹⁶ In the interest of conforming with this Court’s brief length limit and avoiding duplication of arguments, Smith submits this argument for consideration of Assignment of Error 8, challenging the trial court’s denial of his motion to sever counts.

separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.

Id. at 884-85 (citation omitted). At issue in this case is the court's incorrect ruling that the evidence of the deliveries and the heroin recovered during the search would be cross admissible if the crimes were charged separately. See 3RP 35.

Under ER 404(b) a party is prohibited from introducing "other acts" evidence as proof that he had the propensity to engage in certain conduct. "A defendant must be tried for the offenses charged, and evidence of unrelated conduct should not be admitted unless it goes to the material issues of motive, intent, absence of accident or mistake, common scheme or plan, or identity." Sutherby, 165 Wn.2d at 887.

The trial court's rationale for finding the evidence would be cross-admissible is difficult to understand. The court asserted the deliveries and possession charges established "intent" in both prosecutions, but this conclusion does not account for the four month gap between the alleged deliveries and Smith's alleged possession. Further, the evidence in support of the possession charges was much stronger than the evidence that Smith had engaged in or was an accomplice to delivery of a controlled

substance. Crapser was an unreliable witness because she had much to gain from her favorable testimony – the dismissal of two counts of delivery of a controlled substance. 4RP 57. During one of the alleged deliveries, Smith himself was not alleged to have physically handed drugs to Crapser; instead, another man did so, while Smith remained at a distance. 2RP 59-60. But with the addition of evidence of a substantial quantity of heroin in Smith's home, even though found four months later, a conviction on the delivery counts was virtually assured.

This Court should conclude that the admission of the evidence acquired during the unconstitutional search prejudiced Smith's ability to receive a fair trial on the remaining counts, and, in the alternative, that the trial court erred in denying Smith's motion to sever.

F. CONCLUSION

This Court should conclude that the Fourth Amendment's "protective sweep" exception to the warrant requirement is contrary to article I, section 7. Moreover, even if the exception could somehow apply, this Court should conclude that its necessary predicate of a reasonable suspicion was not established on this record. In the alternative, this Court should conclude that the State did not articulate a valid exception to the warrant requirement to justify the seizure of the lockbox, and that in any event probable cause to conduct the search underlying the protective sweep was absent.

Smith is entitled to reversal and dismissal of the convictions arising from the unconstitutional search. Smith is further entitled to a new trial on the remaining counts.

DATED this 31st day of May, 2011.

Respectfully submitted:

 28806
for

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Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

SCANNED 4

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2010 OCT 20 AM 10:33

WHATCOM COUNTY
WASHINGTON

BY _____ 

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY**

THE STATE OF WASHINGTON,)
)
 Plaintiff.)
)
 vs.)
)
 MICHAEL ROOSEVELT SMITH,)
)
 Defendant.)

No.: 09-1-01508-5

**FINDINGS OF FACTS AND
CONCLUSIONS OF LAW RE:
SUPPRESSION**

ORIGINAL

This matter having come regularly before the court on October 4, 2010 and the court having heard the testimony of Detectives Nelson and Laughlin and Sergeant Murphy and heard the argument of counsel makes the following:

I. FINDINGS OF FACT

1. Detectives executed a search warrant at 1517 Texas Street, apartment number 23 on December 15, 2009. This warrant authorized the search of these premises for Michael Roosevelt Smith and documents of dominion and control.

2. Apartment 23 is a one bedroom apartment with a closet in the bedroom with a locking door. This door was locked and Mr. Smith, who was then under arrest, refused to provide officers with a key. The closet was quickly entered without the key.

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3. In the course of the investigation, persons other than Mr. Smith had participated in the drug deals and most of the deals had involved activity either coming or going from the apartment.

4. Detectives believed that they had seen Mr. Smith going into the apartment earlier on December 15, 2009. They had kept the apartment under surveillance for the next few hours while a search warrant could be obtained and executed. They had not seen anyone go into the apartment during that time, but did not know if persons had been present inside before they established surveillance.

5. The closet in the bedroom was in close proximity to the area the detectives were going to search and to the location where defendant was arrested. Since the officers could easily defeat the lock on the closet, a person hiding inside could also easily exit the closet and surprise the officers. The closet was therefore a location reasonably searched in the course of a protective sweep of the premises.

6. Inside the closet, Detective Laughlin observed a lockbox on a shelf. He knew, at that time, that a witness had reported to Sergeant Murphy that Mr. Smith possessed such a lockbox and that he kept drugs and money inside. He was also aware that other details provided by the witness concerning Mr. Smith's heroin dealing had been corroborated during the investigation. Thus, it was reasonable for Detective Laughlin to immediately recognize the lockbox as evidence relevant to the case.

7. The lockbox is also a logical location for a person to store documents of dominion and control. Its seizure is also reasonable and justifiable under the authority of the search warrant to search for such items.

8. The search warrant for the lockbox was granted on December 15, 2009. The last controlled buy occurred on September 4, 2009 with the other buys preceding this date by a couple of weeks. The detectives observed seven empty Camel cigarette packages in the bedroom of the apartment on December 15, 2009. These same types of packages had been used as containers for heroin in several of the drug buys conducted earlier. Also, the court was aware when granting this warrant that Mr. Smith's drug business had been operating prior to June, 2009 when the witness had provided information. He also knew that the operation was still operational in September of 2009 when the controlled purchases of heroin had been effectuated by the detectives.

9. Lastly, a W-2 form found in the apartment established taxable income of \$3800 for Mr. Smith in 2008. The detectives observed several items of expensive electronic equipment in the apartment which would be unlikely to have been purchased by a person of limited financial means. The totality of the circumstances indicate that it was reasonable for the court to conclude that Mr. Smith's criminal enterprise was a continuing, ongoing activity in December of 2009.

From the foregoing Findings of Fact, the court makes the following:

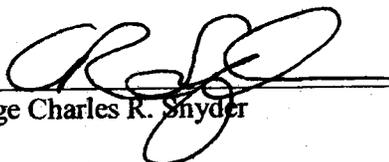
II. CONCLUSIONS OF LAW

1. The detectives lawfully conducted a protective sweep of the apartment 23 at 1517 Texas Street on December 15, 2009. The bedroom closet was a reasonable location to search in conducting this sweep.

2. The lockbox was appropriately seized under a plain view analysis or as a container for documents of dominion and control.

3. Information provided in support of search warrant for lockbox was not stale and the warrant was not issued without probable cause.

DATED this 20 day of October, 2010.



Judge Charles R. Snyder

Presented by:



CRAIG D. CHAMBERS, WSBA #11771
Deputy Prosecuting Attorney

Copy received:

approved for entry, appeal proabations noted at sentencing.



Darrin Hall
Attorney for Defendant