

68603-8

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NO. 68603-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

TJUAN BLYE,

Appellant.

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

The Honorable George N. Bowden, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. THERE WAS AN INSUFFICIENT NEXUS BETWEEN THE ITEM TO BE SEIZED AND THE PLACE TO BE SEARCHED.

In his opening brief, appellant Tjuan Blye argues the search warrant was improperly issued because the affiant failed to establish a nexus between the item to be seized (the gun) and the place to be searched (the 805 1/2 residence). Brief of Appellant (BOA) at 5-10. In response, the State claims that application of a “commonsense” approach to the probable cause determination supports the trial court’s finding that there was probable cause to search the house. Brief of Respondent (BOR) at 10-19. However, Washington case law does not support this supposition. While there is no Washington case directly on point, the facts of this case are more like those cases in which the search warrant was found to lack probable cause¹ and less like those cases cited by the State.²

The facts of this case are similar to those in Thein. There, officers discovered a marijuana business at one location. They

¹ State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999); State v. Goble, 88 Wn. App. 503, 945 P.2d 263 (1997); State v. Olson, 73 Wn. App. 348, 869 P.2d 110 (1994).

² BOR at 14, 18, citing: State v. G.M.V., 135 Wn. App. 366, 144 P.3d 358 (2006); and State v. Perez, 92 Wn. App. 1, 963 P.2d 881 (1998).

also were provided information by several individuals that the supplier of the marijuana was Thein. Based on this information and the officer's statement about what he believed to be the common habits of drug-dealers (such as storing drugs in their residences and concealing their residences), a search warrant was issued. Thein was arrested and convicted of possession of marijuana with intent to deliver. Thein, 138 Wn.2d at 137-39.

On appeal, Thein challenged the trial court's denial of his motion to suppress the evidence seized due to the lack of nexus between the alleged criminal conduct and his residence. In response, the State argued that a nexus is established between the items to be seized and the place to be searched where there is sufficient evidence to believe a suspect is probably involved in drug dealing and the suspect resides at the place to be searched. Id. at 140-41.

The Washington Supreme Court disagreed with the State, holding that conclusory assertions in a warrant application about the common habits of drug dealers were not enough, by themselves, to support the issuance of a warrant to search a suspected drug dealer's home for contraband. Id. at 150-51. Specifically, the court held that the conclusory assertion in a police

officer's affidavit that "it is generally a common practice for drug traffickers to store at least a portion of their drug inventory and drug related paraphernalia in their common residences," in the absence of any statements actually tying the defendant's home to suspected criminal activity, was insufficient to establish a nexus between evidence of illegal drug activity and the place to be searched. Id. at 148-49, 151.

As in Thein, the affidavit here rested primarily on evidence of drug dealing off the residential premises and the affiant's belief as to how drug dealers typically act and their common habits. As the State points out, the affiant claimed turning powder cocaine into crack cocaine typically required an indoor environment. BOR at 15. He also stated his belief that drug dealers commonly hide drugs where they reside. CP 16-18. As in Thein, these generalized statements without more corroborative evidence were simply insufficient.

Beyond such generalized statements of general drug dealing habits, the only other evidence linking Blye to the 805 ½ residence was the fact he was a frequent house guest at the location, and the fact that he once left the residence, got in his car, and then engaged in a drug transaction. However, as shown below, the fact

that officers could only directly connect the drugs to one location (Blye's car) and could not make such a connection with the residence is fatal to the State's argument.

Where there are two possible locations for storing drugs (i.e. a suspect's car and suspect's residence) and officers cannot make a sufficient connection between the drugs and the residence, probable cause is not established. See, Goble, 88 Wn. App. at 505-07.

In Goble, police learned Goble and Loraine Stamper resided at 206 1st Street, in Morton, Washington. A confidential source told officers that Goble often received illegal drugs through the mail. An officer contacted the United States Postal Inspector, who verified that Stamper was currently renting P.O. Box 338. He asked the postmaster to watch for, and notify him of, any packages addressed to that box. Id.

A few weeks later, the same confidential source told police that Goble had recently received a shipment of controlled substances. An officer asked the mail handling facility at Sea-Tac Airport to watch for, and notify him of, any packages addressed to P.O. Box 338 in Morton. Shortly afterward, the Sea-Tac mail facility advised that it was in possession of a package addressed to Goble

at P.O. Box 338. After a drug dog alerted on the package, police obtained a valid federal search warrant for the package. When the officer executed the warrant, methamphetamine was found.

Officers then procured a search warrant to follow the package and, if officers observed the package at the residence, they could search Goble's residence. Officers observed Goble pick up the package and return to his residence, but they failed to see Goble actually enter the residence with the package. Despite this, the search warrant was executed and methamphetamine were found. Goble was charged with possession of methamphetamine with intent to deliver and convicted. Id.

On appeal, Gobel challenged that the search warrant due to a lack of sufficient nexus. The Court of Appeals agreed and reversed. It held that at the time the warrant was issued, probable cause was lacking, explaining:

When the magistrate issued the warrant, he had no information that Goble had previously dealt drugs out of his house, rather than out of a different place (for example, a tavern, his car, or a public park). He had no information that Goble had previously stored drugs at his house, rather than in some other place (for example, his car, at his place of employment, at a friend's house, or buried in the woods). He had no information that Goble had previously transported drugs from the post office to the house, or that Goble had previously said he intended to do so. In sum, he

had no information from which to infer, at the time he issued the warrant, that Goble would take the package from the post office to his house, or that the package would probably be found in the house when the warrant was executed.

Id. at 512.

The facts of this case are similar to those in Goble. In both cases, the trail between the drugs and the defendant ended at the car, not at the residence. As in Goble, here the magistrate had no information that Blye had previously stored or dealt drugs out of the 805 ½ residence, rather than a different place such as his car. There was no evidence Blye had previously transported drugs from the residence or that he ever said he intended to do so. Thus, as in Goble, the magistrate simply did not have enough facts known to him to establish probable cause.

The facts of this case are also similar to those in Olson, 73 Wn. App. 350-51. In Olson, Drug Enforcement Agency (DEA) agents received a telephone call from an unidentified person, who informed the agents that Bruce Olson and David Olson were involved in a marijuana grow operation at 12295 Madrona Road in Port Orchard. The property was owned by Bruce. During surveillance of the property, however, agents observed David visit the property. Id.

Agents eventually detected an odor of marijuana emanating from a brick building on Bruce's property. The next day, officers observed David and his wife, Jeanette, arrive at 12295 Madrona in their car. They parked next to the brick building and then entered it. They left the brick building and the premises approximately 30 minutes later. David drove to 11452 Fairview Boulevard in Port Orchard – a property owned by David. Agents ran a criminal background check and discovered David had a prior drug charge involving the possession of one pound of marijuana. Id.

Based on the above, the agents obtained search warrants authorizing searches for evidence of a marijuana grow operation at David's Fairview residence and Bruce's Madrona residence. Upon execution of the search warrant at the Fairview residence, agents discovered several marijuana plants in the master bedroom in addition to scales, baggies, and a small amount of dried marijuana. David was charged with, and eventually convicted of, unlawful manufacture of marijuana. Id.

The principal piece of evidence supporting the issuance of the warrant as to David's house was an officer's statement, which he based on his training and experience, that individuals who cultivate marijuana commonly "hide marijuana, the proceeds of

marijuana sales, and records of marijuana transactions in secure locations, 'safe house' or within the premises under their control ... not only for ready access, but also to conceal them from law enforcement personnel." Id. at 351-52, 365.

Upon appellate review, this Court decided that the affidavit in support of a warrant established probable cause as to Bruce's house. However, this Court concluded the warrant affidavit as to David's house did not establish probable cause, explaining:

An officer's belief that persons who cultivate marijuana often keep records and materials in safe houses is not, in our judgment, a sufficient basis for the issuance of a warrant to search a residence of a person connected to the grow operation. If we adopted the position urged on us by the State, we would be broadening, to an intolerable degree, the strict requirements that there be probable cause to believe that evidence of a crime will be discovered at a certain location.

Id. at 357.

As in Olsen, the facts in this case do not establish probable cause. First, in both cases, the affiant related the suspect's prior relevant criminal drug history but failed to connect it with the residence. Second, in both cases, officers had strong evidence supporting the search of one location (i.e. Blye's car and Bruce's home), but they overreached when trying to extend the search to

another location for which the evidence was lacking. Third, in both cases, the principle evidence supporting the search of the second location was the affiant's belief as to how drug dealers typically act and their common habits. Given these similarities, this Court should similarly hold to that strict probable cause requirements were not met here.

In contrast to the factual similarities of the cases cited above, the State primarily relies on two cases that are distinguishable. First, the State relies on G.M.V. BOR at 14, 18. There, officers directly observed a drug suspect leave a residence for a meeting with a confidential informant. They followed the suspect to the drug buy location and then back to the house. The suspect came to a second buy from another direction, but again returned to the house. A search warranted was issued for the house and, as a result, G.M.V. was arrested and charged with possession of the marijuana. G.M.V., 135 Wn. App. at 369-79.

On appeal, G.M.V. challenged her conviction, arguing the evidence should have been suppressed because the warrant was not supported by probable cause. Division III disagreed. Emphasizing the officer's direct observations of the suspects

coming from, and going to, the residence before and after two controlled buys, it upheld the warrant. Id.

G.M.V. is distinguishable on two grounds. First, officers connected the suspect and the residence to multiple drug buys, thus increasing the strength of the suspect's connection to the residence. Here, there was only one observed buy, and officers did not even see Blye return to the residence afterward. More importantly, in G.M.V., there is no mention that the suspect ever left the residence and then got in his a car to deliver the drugs. Indeed, the suspect was only 15 and presumably did not drive. Thus, there was the suggestion that the suspect was storing his drugs in a second location. In this case, however, officers observed Blye leave the residence, get in his car, and then conduct the drug deal. Thus, there were two locations, but for only one of which was there a direct link to the controlled buy (Blye's car).

The State relies on Perez, 92 Wn. App. 7, which is also distinguishable. BOR at 14, 18. There, officers had evidence supporting their belief that a particular residence was a "safe house" to store drugs. Officers engaged in an extensive investigation. They directly observed a suspect go to the "safe

house” twice immediately after two controlled buys where he brought only the exact amount of drugs asked for. Id.

In upholding the warrant, this Court found persuasive the fact that the informant provided specific information to the police that the suspect carried only the amount of cocaine needed for each transaction, and the fact that officers made direct observations of the suspect’s activity following the informant’s pages to arrange the controlled buys. It held: “In the context of the information they had received from the informant, that pattern of activity clearly supported an inference that [the residence was a place] where [the suspect] kept contraband, proceeds or other evidence of his drug dealing activities.” Id. (emphasis added).

Here, officers never established facts suggesting the 805 ½ residence was a “safe house” for drugs. Additionally, the level of investigation in this case was far less vigorous than that in Perez. Finally, unlike in Perez, the investigation here showed no pattern of activity indicating Blye used the residence as a place to keep drugs or other related items. At most, their observations of the residence revealed a pattern of behavior establishing the unremarkable fact that Blye often stayed with his girlfriend. Anything more was simply speculation.

As shown above, the facts of this case are very similar to Thein, Goble, and Olsen and are distinguishable from those cases cited by the State. As such, this Court should hold that the warrant was not supported by probable cause and reverse the convictions.

II. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD REASONABLY CONCLUDE BLYE KNEW THE GUN WAS STOLEN.

In his opening brief, Blye asserts the State did not provide sufficient evidence to prove he had actual or constructive knowledge that the gun was stolen. BOA at 10-16. In response, the State claims that its proof of the fact that the serial number was partially scraped off was sufficient to meet its burden. BOR at 24-25.

It is important to remember what Blye was charged with. He was charged with possessing a stolen gun. He was not charged with possessing a gun that he knew was illegal or had a partially obliterated serial-number. Thus, it was not enough for the state to prove facts from which the jury could infer Blye knew the gun to be illegal or he knew the serial number was partially altered. Here the State had to prove an additional level of knowledge. It had to prove

beyond a reasonable doubt that Blye had knowledge that the gun was stolen.

The argument put forth by State on appeal only sets forth facts that are arguably sufficient to establish Blye's knowledge that the gun had an altered serial number. Compare, for instance, U.S. v. Nesmith, 29 Fed. Appx. 681 (2nd Cir. 2002). Nesmith was charged with one count of possession of a firearm with an obliterated, removed, or altered serial number, in violation of 18 U.S.C. § 922(k). The State offered evidence that Nesmith possessed the gun, and expert testimony that the obliteration of the serial number was such that an individual could not handle the gun without noticing the obliteration. The Second Circuit held this was a sufficient basis on which a jury could infer that Nesmith knew the serial numbers were obliterated. Id. at 685.

As in Nesmith, here the evidence when looked at in the light most favorable to the State established beyond a reasonable doubt that Blye knew the gun was partially altered. Unlike in Nesmith, however, it does not establish all the elements of the crime Blye was charged with.

Here, the State had to prove beyond a reasonable doubt not only that Smith possessed the gun, not only that he knew the serial

number was altered, but that Blye knew the gun was stolen. And it had to prove this via sufficient corroborative evidence. Because the gun had not been recently stolen, the State's corroborative evidence of guilty knowledge could not be slight. See, State v. Couet, 71 Wn.2d 773, 776, 430 P.2d 974 (1967) (holding that slight corroborative evidence is all that is needed if the property at issue has been recently stolen). It did not meet this burden.

The partial alteration of the serial number on the gun handle was not sufficiently corroborative to establish the knowledge element beyond a reasonable doubt. First, this fact only supported a reasonable inference that the gun was illegal.³ Second, the fact that the serial number was still legible on the gun slide undermines the corroborative force of this fact. A reasonable person would expect, if one is attempting to hide the stolen status of a gun, he would obliterate or alter all serial numbers on the gun. As the State concedes, however, the gun at issue here had a completely legible set of serial numbers remaining on the slide. BOR at 24. Thus, the jury could not reasonably infer knowledge based on the fact that in one location on the gun the serial number was partially

³ See, cases cited in BOA at 14.

altered, while in another location it remained unchanged and completely legible.

For reasons stated above and those set forth in appellant's opening brief, this Court should find the evidence was insufficient to support the conviction for possessing a stolen firearm, and it should, therefore, reverse the conviction.

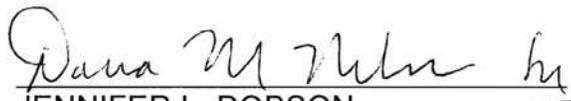
B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this Court should reverse.

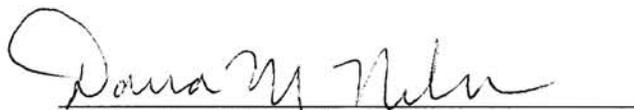
DATED this 27th day of March, 2013.

Respectfully submitted,

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
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v.)	COA NO. 68603-8-1
)	
TJUAN BLYE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF MARCH 2013.

x *Patrick Mayovsky*