

NO. 74633-2-I

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

FILED
May 05, 2016
Court of Appeals
Division I
State of Washington

STATE OF WASHINGTON,

Appellant,

v.

JEFFREY I. SCHENCK,

Respondent.

BRIEF OF APPELLANT

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I. ISSUE

Police served a search warrant on the defendant's home, where they found firearms within a locked cabinet in his bedroom. Did the trial court err in holding the police needed a second search warrant to open the cabinet because of their belief that they would likely find guns inside of it?

II. ASSIGNMENTS OF ERROR

(1) The trial court erred in entering an order suppressing evidence.

(2) The trial court erred in dismissing the case.

(3) The trial court erred in entering the following finding of fact:

Although it is not expressly stated in the affidavit, it is likely that law enforcement had a fair amount of information about which parts of the house Jeremy used and where evidence of his suspected crimes might be found.

(4) The trial court erred in entering conclusion of law no. 1:

Because law enforcement officers believed, based upon their investigation, that the locker belonged to the defendant at the time they searched the room, and because they subjectively believed the locker would contain firearms, officers had a duty to obtain a separate warrant to breach the locker and search it.

(5) The trial court erred in entering conclusion of law no. 2:

All firearms seized from the locked cabinet were thus seized without lawful authority and are hereby suppressed.

(6) The trial court erred in entering conclusion of law no. 6:

Furthermore, the defendant's arrest and all statements made pursuant to that arrest are tainted by the unlawful search of the locker and are suppressed as fruit of the poisonous tree. CP 13.

(7) The trial court erred in entering conclusion of law no. 9:

The effect of this ruling is to terminate the State's ability to prosecute this case and the case is hereby dismissed upon motion of the defendant.

III. STATEMENT OF THE CASE

The defendant, Jeffrey Schenck, was convicted of Residential Burglary in 2005. 2 CP__ (sub #2 Affidavit of Probable Cause at 4). By law he is prohibited from possessing firearms. RCW 9.41.040(1). The State charged the defendant with Unlawful Possession of a Firearm in the First Degree when Lynnwood police officers found four rifles and one shotgun inside a locked gun cabinet in his bedroom closet. 1 CP 46; 2 CP__ (sub #2 Affidavit of Probable Cause at 2). The investigation leading up to that discovery was focused on the defendant's son and cohabitant of the family home, Jeremy Schenck.

A. THE INVESTIGATION OF JEREMY SCHENCK.

On January 8, 2015, five Lynnwood police officers initiated an “arrest operation” for the defendant’s son, Jeremy Schenck, who at the time had three active warrants for his arrest. 1 CP 38.¹ The officers conducted surveillance outside Jeremy’s residence, a single story residential home located in the City of Snohomish. This home is “a typical single family residence with several bedrooms, a living room, and a kitchen.” 1 CP 17. The officers followed Jeremy as he left his house in his blue Jeep and drove to work – a construction site in Everett. They approached Jeremy as he was shoveling dirt at the construction site, placed him under arrest, and confirmed the warrants. A search of Jeremy incident to arrest produced a small baggie containing a white crystal substance that later tested positive for methamphetamine. One of the officers deployed his narcotic-trained K-9 around Jeremy’s Jeep. The K-9 gave a positive alert for the odor of narcotics. Pieces of foil and a butane torch were visible in the Jeep’s front passenger area, in plain view from a vantage point outside the Jeep. The Jeep was

¹ The search warrant and its supporting affidavit appear multiple times in the record. This brief will cite to the copy of the warrant and affidavit found at CP 37-44, which was an attachment to the defendant’s motion to suppress. The same documents were admitted into evidence as Exhibit 1 at the November 20, 2015, hearing on the defendant’s motion to suppress. Exhibit 1 will also be designated for appellate review.

impounded to a secured lot while Jeremy was brought to the Lynnwood jail. 1 CP 38-39.

While at the Lynnwood jail a Sergeant and a Detective interviewed Jeremy about a mail theft case in which his blue Jeep (identified by license plate) was caught on surveillance video at the entrance to a gated community in Granite Falls. Although Jeremy denied stealing any mail, he admitted that he was there and manipulated the gate's sensor to gain entry into the community. He also admitted to a ten year methamphetamine addiction, with his current usage costing about \$50 per week. 1 CP 39.

Jeremy Schenck consented to Detective Teachworth searching his cellphone. The search produced several text messages relating to narcotics, including slang references to methamphetamine and suboxone. Additionally, it produced specific references to Jeremy's addiction to heroin. 1 CP 40.

Detectives also spoke with Jeremy's "on and off again girlfriend," who admitted Jeremy had stolen mail in the past. She had been living with Jeremy at the 5819 address until a couple of weeks prior. She was unwilling to confirm any other details about his current criminal activities. 1 CP 40.

After interviewing Jeremy Schenck officers transported him from the Lynnwood jail to the Snohomish County Jail. He was booked him on two felony warrants and the new referral for Possession of Controlled Substance. During a strip search, officers located yet another small baggie of methamphetamine in Jeremy's underwear. 1 CP 40.

The next day, January 9, Lynnwood officer Oleson obtained a search warrant for Jeremy's blue Jeep. Police found a stolen credit card; a stolen \$1,978.37 check with an endorsement "pay to the order of" Jeremy Schenck; a pawn slip and a hotel receipt, each bearing Jeremy's name and the 5819 address; a digital scale with residue; a small plastic baggie containing heroin; two Costco cards and two insurance cards, each belonging to victims of recent mail thefts or vehicle prowls; a backpack containing a set of 11 keys, six of which were of the "shaved" variety commonly used by vehicle prowlers; and a variety of mail in other people's names which included financial information, pin numbers, and a new credit card. 1 CP 40.

Based on all of the above information, on January 10, Officer Oleson prepared an affidavit for a search warrant for Jeremy's residence. He added more detailed information about the many

police reports listing Jeremy as an active mail thief and a suspect in crimes ranging from residential burglary to drug crimes. One of the cases listed Jeremy as "a suspect in firearm, narcotic, stolen property, and mail theft" approximately one year prior in Marysville. 1 CP 41-42.

A judge approved the warrant the same day. The judge found probable cause that evidence of seven crimes would be found within the home. The seven crimes listed on the warrant were Possession of Controlled Substance, Possession of Drug Paraphernalia, Mail Theft, Identity Theft Second Degree, Forgery, and Possession of Stolen Property in the Second and Third Degrees. The warrant authorized seizure of the following items as evidence:

Any illegally possessed controlled substances, narcotic paraphernalia, mail, access devices, payment instruments, financial documents, pawn slips, records, papers of ownership, receipts, scales, ledgers, proceeds, locked containers, and items used for the sale and transport of illegal drugs.

1 CP 44.

B. THE SEARCH WARRANT SERVICE.

Lynnwood police served the search warrant the same day. 2 CP__ (sub #2 Affidavit of Probable Cause at 2). Although the police were aware of the possibility that Jeremy's father and grandmother

also resided in the home, it was not readily apparent which of the three bedrooms belonged to which occupant. RP 4-5. Eventually officer DeGabriele located some court documents belonging to Jeremy Schenck in the room "right off the family room." Officer DeGabriele concluded that the room right off the family room was Jeremy's bedroom. RP 5.

Police described a second bedroom as the "back bedroom," located "at the end of the hallway." This bedroom had some documents with the defendant's name on them, so officers concluded that this bedroom belonged to the defendant. RP 6. Within the defendant's bedroom officers located a locked metal cabinet, approximately 4 feet tall and 1 ½ feet wide. The cabinet had .22 caliber ammunition stacked on top of it, a "Remington" sticker on the front, and air-guns leaning up against it. 1 CP 11; Ex. 2; RP 6, 15. Officers breached the lock on the cabinet and found multiple firearms inside. RP 6. They located the defendant while he was working at a construction site and arrested him for unlawful possession of firearms. RP 7.

C. THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND DISMISS.

The State charged the defendant with Unlawful Possession of a Firearm in the First Degree. 1 CP 46. The defendant filed a CrR 3.6 motion to suppress evidence. The court held an evidentiary hearing on November 20, 2015. The court granted the defense motion to suppress the firearms seized from the locked cabinet. The court found it significant that "law enforcement had sufficient information to believe that the gun locker belonged to the defendant, Jeffrey Schenck, the father of the individual who was the subject of their investigation." RP 41. Although the court recognized that police had a valid search warrant for the defendant's home, including seizure of locked containers, the court also referred to the breach of the lock as a "warrantless entry into a cabinet." Compare RP 41, In. 2-5, with RP 42, In. 2-3.

The State filed a Motion to Reconsider, arguing that a search warrant for a typical single family residence is not limited simply because officers learn that one of the bedrooms was primarily occupied by someone other than the suspect in the crimes named in the search warrant. 1 CP 20. On December 24, the court filed written Findings of Fact and Conclusions of Law denying the

State's Motion for Reconsideration. 1 CP 10-14. It incorporated by reference a "letter opinion" signed and filed on the same date. 1 CP 13, 15-17. These two documents include all of the decisions to which the State has assigned error in this appeal. The court's final conclusion of law recognized that the suppression of evidence had the effect of terminating the State's ability to prosecute the case, and accordingly granted the defendant's motion to dismiss the case. 1 CP 13. The State filed a timely Notice of Appeal. 1 CP 1.

IV. ARGUMENT

A. STANDARD OF REVIEW.

This Court reviews a trial court's conclusions of law at a suppression hearing de novo. Challenged findings of fact are reviewed for substantial evidence, which is enough evidence to persuade a fair-minded, rational person of the truth of the finding. Unchallenged findings of fact are treated as verities on appeal. The surviving findings of fact must support the conclusions of law. State v. Shuffelen, 150 Wn. App. 244, 252, 208 P.3d 1167 (2009).

When a search warrant is properly issued by a judge or magistrate, the party attacking it has the burden of proving its invalidity. State v. Fisher, 96 Wn.2d 962, 639 P.2d 743, cert. denied, 457 U.S. 1137 (1982). Search warrants are a favored

means of police investigation, and supporting affidavits or testimony must be viewed in a manner which will encourage their continued use. United States v. Harris, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971). Hyper technical interpretations are to be avoided when reviewing search warrant affidavits. State v. Freeman, 47 Wn. App. 870, 737 P.2d 704, review denied, 108 Wn.2d 1032 (1987).

On the other hand, any property seized outside of the authorization in a search warrant is presumed improper unless the prosecution can establish an exception to the warrant requirement. See generally State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984).

B. CONCLUSION OF LAW #1 IGNORED THE “COMMUNITY LIVING UNIT RULE” BY LIMITING THE SCOPE OF THE WARRANT BASED ON PERCEIVED BEDROOM OCCUPANCY WITHIN THIS TYPICAL SINGLE FAMILY RESIDENCE.

The trial court’s Conclusion of Law #1 states:

Because law enforcement officers believed, based upon their investigation, that the locker belonged to the defendant at the time they searched the room, and because they subjectively believed the locker would contain firearms, officers had a duty to obtain a separate warrant to breach the locker and search it.

1 CP 13.

Washington courts first adopted the community living unit rule in 1985.

State v. Alexander, 41 Wn. App. 152, 156, 704 P.2d 618 (1985).

The rule holds that if “several persons or families occupy the premises in common rather than individually, as where they share common living quarters but have separate bedrooms... a single warrant describing the entire premises so occupied is valid and will justify a search of the entire premises.” Alexander, 41 Wn. App. at 154-155.

The reasons for the community living unit rule are sound:

[T]here is a broader justification for treating cases of community occupancy differently: where a significant portion of the premises is used in common and other portions, while ordinarily used by but one person for family, are an integral part of the described premises and are not secured against access by the other occupants, then the showing of probable cause extends to the entire premises. For example, if three persons share an apartment, using a living room, kitchen, bath and hall in common but holding separate bedrooms which are not locked, *whichever one of the three is responsible for the described items being in the apartment could have concealed those items anywhere within, including the bedrooms of his cotenants.*

Id. at 155 (court's emphasis; citations omitted).

The search warrant in this case authorized the search of the entire one story residence at the defendant's address. Ex. 1. The

one story house was a "typical single family residence with several bedrooms, a living room, and a kitchen." 1 CP 16. Although officers were aware that the house was occupied by Jeremy Schenck, the defendant Jeffrey Schenck, and Jeremy Schenck's grandmother, they initially had no knowledge of who occupied each bedroom. RP 4-5. It was only after discovering Jeremy's court documents in the room "right off the family room," and papers bearing the defendant's name in the "back bedroom," that officers concluded that each Schenck probably occupied the bedroom in which his respective documents were found. RP 5-6.

However, the discovery of these documents did not conclusively determine which bedroom was used by which occupant. Nothing short of comprehensive video surveillance could have provided such certainty. There was no evidence that any of the bedrooms were *exclusively* occupied by one of the residents to the extent that the other two were prohibited from entry. There was no evidence of locks on the bedroom doors, or any other barrier preventing one of the family members from accessing the bedroom of the other. Therefore a search of the entire home, all three bedrooms included, remained appropriate and lawful under the search warrant. The trial court appeared to recognize as much. 1

CP 16 (“...[T]he Court agrees that officers had authority to search the entire dwelling under Alexander...”).

The reasons supporting the community living unit rule hold particularly true in this case where all three occupants were family members and one of them (the defendant) already had a felony criminal record. Family members tend to help each other, and may be more willing than strangers to allow cohabitants unsupervised access to their otherwise private bedrooms. The defendant, himself previously convicted of Residential Burglary, was already aware and very angry when he learned on January 8th that his son had been arrested. 1 CP 39. When arrested on January 8th, the son (Jeremy) asked permission to give a spare key to the defendant. Id. The defendant had two days before the January 10th warrant service to potentially move or hide evidence incriminating his son. Under these circumstances it was not speculative or unreasonable to suspect that evidence of Jeremy’s drug and property crimes could be found two days later within the locked cabinet in what appeared to be the defendant’s bedroom.

Neither was it speculative or unreasonable for officers to suspect that the locked cabinet, with ammunition on top, a “Remington” sticker on the side, and air guns leaning against it,

might contain firearms inside. Ex. 2. Officers therefore had two perfectly logical yet independent suspicions about the contents of the locked cabinet before they breached it: the cabinet could contain any or all of the evidentiary items authorized by the search warrant they had already obtained, but it could also contain evidence that the defendant unlawfully possessed firearms.

The court erred by holding that the second suspicion effectively obliterated the signed search warrant that was based on the first set of suspicions. This critical error is apparent in the trial court's Conclusion of Law #1, which in turn led to all of the other assigned errors as explained below. 1 CP 13. Contrary to the trial court's reasoning, the search warrant remained valid and provided officers with a legal basis to breach the locked cabinet in the defendant's bedroom. The court never explicitly ruled otherwise, but implied as much by ruling that an additional search warrant was required before breaching the locked cabinet. 1 CP 13, 16. The court never ruled that the search warrant fell short of probable cause to search the entire residence, or that the affidavit in support of the warrant failed to justify seizure of the following pieces of evidence:

Any illegally possessed controlled substances, narcotic paraphernalia, mail, access devices, payment instruments, financial documents, pawn slips, records, papers of ownership, receipts, scales, ledgers, proceeds, locked containers, and items used for the sale and transport of illegal drugs.

1 CP 44.

The warrant itself, and more specifically the list of potential evidence items to be seized, established the only limitation on the parts of the premises that were subject to search. See Platteville Area Apt. Ass'n v. City of Platteville, 179 F.3d 574, 579 (7th Cir. 1999) ("If you are looking for an adult elephant, searching for it in a chest of drawers is not reasonable."). But nothing on the search warrant's list of evidentiary items was incapable of fitting within the large locked cabinet, so officers had a valid reason to suspect that any or all of those items could be found within it. Compare 1 CP 44 with Ex. 2. It would have been investigatory malpractice for officers to leave the locked cabinet undisturbed in their search for evidence of Jeremy Schenck's suspected drug and property crimes. It was judicial error to rule that police needed two search warrants to open one locked container when they already had a perfectly valid search warrant authorizing the entry.

C. CONCLUSION OF LAW #2 WAS ERRONEOUS BECAUSE THE FIREARMS WERE LAWFULLY SEIZED UNDER THE PLAIN VIEW DOCTRINE.

In Conclusion of Law #2 the court held that "all firearms seized from the locked cabinet were thus seized without lawful authority and are hereby suppressed." 1 CP 13. The court did not address the State's argument that the firearms were lawfully seized pursuant to the plain view doctrine. 2 CP __ (docket sub #24, State's Response to Defense Motion to Suppress at 5). This was error.

As previously discussed, the valid search warrant obtained by the police in this case authorized entry into any part of the single family residence that could have contained any of the items listed in the search warrant. 1 CP 44. The list of evidentiary items subject to seizure included controlled substances, which are frequently bought and sold in miniscule quantities. A search warrant authorizing a search for controlled substances grants officers authority "to inspect virtually every aspect of the premises" covered by the warrant. State v. Olson, 32 Wn. App. 555, 559, 648 P.2d 476 (1982). The officers' entry into the large, locked cabinet in the defendant's bedroom was authorized by the search warrant they had already obtained.

Although the warrant authorized entry into the locked cabinet, it did not authorize seizure of the firearms officers discovered as soon as they opened it. 1 CP 44. Because this final step in the search and seizure process was not covered by the warrant, the State bears the burden of proving that an exception to warrant requirement justifies the seizure of the weapons. State v. Williams, 102 Wn.2d at 736. The "plain view" doctrine is an exception to the warrant requirement. State v. Kull, 155 Wn.2d 80, 118 P.3d 307 (2005).

Under the plain view doctrine, an officer must (1) have a prior justification for the intrusion, (2) inadvertently discover the incriminating evidence, and (3) immediately recognize the item as contraband. Inadvertent discovery is no longer a requirement to establish the plain view exception under the Fourth Amendment.

State v. Temple, 170 Wn. App. 156, 164, 285 P.3d 149 (2012) (citations omitted). Likewise, the plain view doctrine does not offend the more rigorous requirements of Article I, section 7 of our State Constitution "where contraband...or unlawful possession of it is fully disclosed and open to the eye and hand." State v. Khounvichai, 149 Wn.2d 557, 565, 69 P.3d 862 (2003).

The plain view doctrine is easily applied to the facts in this case. As soon as police lawfully opened the locked cabinet in the

defendant's bedroom, they stood in a lawful vantage point from which observation of the firearms was unavoidable. The subsequent seizure of the weapons as evidence flowed naturally from officers' knowledge that the defendant was already prohibited from possessing firearms. See 1 CP 11, Finding of Fact #10.

Even though the State asserted the plain view doctrine as the justification for seizing the firearms, the court never analyzed the applicability of the doctrine or even mentioned it at all. This case presents a rather clear example of the plain view doctrine, which provides a legal basis for the officers' seizure of the firearms from the opened cabinet. The seizure of firearms was lawful, so the trial court's Conclusion of Law #2 was made in error.

D. CONCLUSIONS OF LAW #6 AND #9 WERE ERRONEOUS BYPRODUCTS OF THE ERRORS ALREADY DISCUSSED.

The trial court held that "the defendant's arrest and all statements made pursuant to that arrest are tainted by the unlawful search of the locker and are suppressed as fruit of the poisonous tree." 1 CP 13, Conclusion of Law #6. The court also granted the defendant's motion to dismiss the case. 1 CP 13, Conclusion of Law #9.

Again, the search of the locker was not unlawful; it was authorized by a signed search warrant directing officers to search for small items (e.g., controlled substances, mail) in a large place (a house). “[P]laces which may be searched pursuant to a search warrant are not excluded due to the presence of locks or because some additional act of entry or opening may be required.” State v. Llamas-Villa, 67 Wn. App. 448, 454, 836 P.2d 239 (1992). Because the warrant-based entry into the gun cabinet was legal, and the subsequent seizure of firearms justified under the plain view doctrine, the court erred in extending its erroneous suppression of the seized firearms to the subsequent arrest and interview of the defendant. The increasingly drastic remedies employed by the trial court – first suppression of physical evidence, then suppression of the defendant’s statements as “fruit of the poisonous tree”, and ultimately the decision to dismiss the case entirely -- all rested on the faulty conclusion that an officer’s subjective beliefs regarding bedroom occupancy and the contents of a gun cabinet imposed an additional duty to obtain two search warrants to open one locked container. This Court should reverse the incorrect legal rulings and remand the case to the trial court for reinstatement of the criminal charge.

E. THE CHALLENGED FINDING OF FACT WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND HIGHLIGHTS THE TRIAL COURT'S FAULTY REASONING.

The State has assigned error to the following finding of fact, contained in the "letter opinion" denying the State's Motion to Reconsider:

Although it is not expressly stated in the affidavit, it is likely that law enforcement had a fair amount of information about which parts of the house Jeremy used and where evidence of his suspected crimes might be found.

1 CP 16.

The court's language acknowledges that the record contains no evidence that police knew about specific locations within the residence that Jeremy Schenck used (or did not use), or specifically where within the house they might find evidence of the seven crimes listed in the warrant. Because the record contains no such evidence, the court's statement can only be interpreted as an attempted "reasonable inference" from other facts in the record. However, no evidence supports the inference. The officers' knowledge of the interior of Jeremy Schenck's home, and the way in which he used it, was extremely limited. Although Jeremy Schenck's ex-girlfriend confirmed that he lived at the residence as recently as a couple of weeks before the warrant, she would not

confirm any details about his current criminal activity. She would only confirm that Jeremy Schenck had stolen mail in the past and that he used methamphetamine. 1 CP 40. These details did nothing to advance the officers' knowledge about specific locations inside the home where evidence might be found. Nothing else in the record remotely speaks to the issue; the finding of fact was purely speculative.

Whether this Court determines that the challenged finding of fact was justified, or not, has little impact on the erroneous conclusions of law. Even if it remains, it does not establish that any areas of the home were "off limits" under the search warrant. By hypothetical example, if officers had reason to believe that Jeremy Schenck had a locked safe in his own bedroom, and that he told his ex-girlfriend he only stores evidence of his crimes in that safe and nowhere else, the officers would not be required to take him (or his ex-girlfriend) at their word. A full search of the entire home would have been justified even under those circumstances. Likewise, if the defendant's locked cabinet had a sign on it that said, "Jeffrey Schenck's Safe - Contains No Evidence Of Crime!," even this would not have prevented a lawful search of it pursuant to the warrant issued in this case. See, e.g., U.S. v. Hill, 322 F. Supp. 2d

1081, 1090 (C.D. Cal. 2004), aff'd, 459 F.3d 966 (9th Cir. 2006) (“Forcing police to limit their searches to files that the suspect has labeled in a particular way would be much like saying police may not seize a plastic bag containing a powdery white substance if it is labeled “flour” or “talcum powder.”).

Although the challenged finding of fact has no bearing on this Court’s evaluation of the conclusions of law, it is offered as an important example of how thoroughly the trial court discounted the search warrant’s authorization to search the entire house. This error was repeated in the conclusions of law when the court held that a second search warrant was required to breach the safe in what appeared to be the defendant’s bedroom. 1 CP 13. The trial court did not afford any deference to the issuing magistrate’s determination that probable cause justified a search of the entire premises, and imported unjustified limitations on the scope of the warrant based on nothing more than routine investigative observations made by officers during the warrant service. This was clear error and reversal is warranted.

V. CONCLUSION

For the reasons stated above, this Court should reverse the Superior Court's suppression of evidence and the dismissal of the charge, and remand the case for further proceedings.

Respectfully submitted on May 5, 2016.

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

THE STATE OF WASHINGTON,

Appellant.

v.

JEFFREY ISAAC SCHENCK,

Respondent.

No. 74633-2-1

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 5th day of May, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and John L. Rodabaugh, II, john.rodabaugh@frontier.com.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of May, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office