No. 57419-5-II

102647-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JORDAN GODSEY, Petitioner

APPEAL FROM THE SUPERIOR COURT
OF LEWIS COUNTY

THE HONORABLE JUDGE JAMES W. LAWLER

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

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I. IDENTITY OF PETITIONER

Petitioner Jordan Godsey, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Pursuant to RAP 13.4 (b), Petitioner seeks review of of the unpublished decision of the Court of Appeals Division Two in *State v. Godsey,* 2023 WI 7530829, entered November 14, 2023. A copy of the opinion is attached as an appendix.

III. ISSUES PRESENTED FOR REVIEW

A. Article I § 7 guarantees no person shall be disturbed in his private affairs, or his home invaded, without authority of law. Where a warrant allows for seizure of items which are presumptively protected by the First Amendment, there is a heightened standard of "particularity" for identifying the items to be seized.

Did the initial search warrant in this case meet that heightened standard?

B. Is the State entitled to a "do-over" search warrant months after it seized and searched items, and the defendant has filed a motion to suppress?

IV. STATEMENT OF THE CASE

Petitioner Jordan Godsey was charged with four counts of possession of depictions of minors engaged in sexually explicit conduct in the first degree. CP 1-3; RCW 9.68A.070(1); RCW 9.68A.011(4)(a)-(e).

On November 18, 2020, the Chehalis police department got a tip from the Seattle Internet Crimes Against Children Task Force that Mr. Godsey was downloading images of minors engaged in sexual conduct. The Cyber-Tip-Line report contained six uploaded files. CP 18. An officer reviewed the six images

and confirmed they depicted “Tanner Stage 1” females. CP 19.

Officer Dozois prepared a search warrant affidavit to search for the crimes of :

1. RCW9.68A.075 Viewing depictions of a minor engaged in sexually explicit conduct.
2. RCW 9.68A.070 Possession of depictions of minors engaged in sexually explicit conduct.
3. RCW 69.50.401.A.2 Possession of Methamphetamine.

The affidavit noted the search warrant affidavit was “amended” to include a search for suspected methamphetamine, which had been seen inside the home when the warrant was executed. The warrant was executed on 12/10/20 at 12:45 p.m.

***Amended Information: Search Warrant 2020-0190-21 was executed on December 10th 2020 at 1245 hrs. During the search for the electronic devices, some glass smoking devices were observed in an upstairs bedroom. These smoking devices are commonly used for the consumption of methamphetamine. Also observed were at least 2 plastic baggies, containing a white, crystalline substance. Through my training and experience, the substance appears to be methamphetamine. The baggies were small and appeared to be for personal use.

CP 20.

The search warrant signed by Judge Lawler contained the amendment but was not signed until 3:21 pm that same day. CP 25.

A copy of this warrant shall be served on the person or persons found in possession of the item/property described, and that person shall be given a receipt for the evidence seized.

Dated this 10 *day of* Dec *2020 @* 3:21 *am/pm*

James W. Lawler

JUDGE

It is unclear how the officers who conducted the search were able to observe methamphetamines before the

warrant had been signed- or if there was a previous warrant which was executed and then amended but has not been made part of the record.

The search warrant mirrored the affidavit, including listing the crime of possession of methamphetamine. CP 24. It authorized a search:

1. the person and residence of Mr. Godsey: including “any electronic devices that can access the internet and/or save files electronically….
2. To search all the devices in the following manner;

-First, image and download the contents of the devices using WSP High Tech Crimes Unit”
-Second, search the downloaded information for text messages, emails, videos/photographs sent to or received from these devices. Internet searches in relation to the above-mentioned crimes, to include websites and group messages. Any indicators of the ownership of that particular device. Any storage devices used to store information electronically such as SD cards, thumb drives, and CD/DVDs. Any applications used to access and or download/encrypt information. Then extract the information which are evidence of the above crimes.

> 3. (Amended) Search the same residence (910 Ham Hill Road) for controlled substances to include what appeared to be methamphetamine.

CP 24-25.

WSPCL looked at the downloaded information and found images of minors engaged in sexually explicit conduct. 9/6/2022 RP 171-181. The analyst had access to all emails, photographs, text messages associated with each device which had been seized. She reportedly used a computer program which sorted the various types of information into “containers” and then ran a program to search specifically for the items listed as crimes. 9/6/2022 RP 172.

Mr. Godsey filed a motion to suppress the evidence. CP 5-26. He argued the warrant failed to describe with particularity the items to be searched. Specifically, the warrant was overbroad because (1) it lacked any temporal limitations to the time frames known to police via the ICAC report; (2) the warrant cited the criminal code

Mr. Godsey was suspected of violating, but it allowed an unfettered search of each device, commanding the police to “search for downloaded information for :text messages, emails, videos/photographs sent to or received from the devices” without limitation to investigation of the crime of probable cause. And the particularity of the affidavit did not save the warrant because it was not physically attached to the search warrant nor was it incorporated by reference. CP 13.

Six months after the initial warrant, and after all the data had been analyzed, and the defense had filed a motion to suppress, the State sought and obtained a second warrant, authorizing the search which had already been conducted. CP 42-44. The second warrant was described as a ‘do-over’. CP 35;42.

The second warrant limited the temporal scope to the year 2020; it directed the search to include text messages, emails, videos/photos went from the devices

for depictions of minors engaged in sexually explicit conduct as defined by RCW 9.68A.011(a)-(g). CP 43. And to extract any evidence form any device that was evidence of the crimes of possession of depictions of a minor engaged in sexually explicit conduct and/or viewing depictions of a minor engaged in sexually explicit conduct as defined by the statutes. CP 43.

The State argued the second affidavit for the warrant was not based on any material which had been found during the original search and seizure. This time the affidavit was attached to the warrant. CP 42.

The trial court denied the motion to suppress and entered findings and conclusions. CP 49-52. The court signed findings that the original warrant was not overbroad: it authorized law enforcement to extract information which was evidence of the “above crimes” which listed the RCW and name of the crimes. CP 50.

The trial court also found that law enforcement used the information they had at the time for the first warrant and the second warrant was "slightly more specific" and had the same basis for the warrant application. CP 51.

The court concluded the first warrant was not overbroad, was specific enough, and the second warrant was unnecessary. It specifically found the second warrant was an independent source for the evidence collected. CP 51.

Mr. Godsey was convicted on all charges and appealed. The Appellate Court noted that the first warrant did *not* specify what information should be extracted from the electronic devices. *State v. Godsey,* at *2. However, it held that irrespective of the lack of particularity in the first warrant the second warrant was an independent source for the evidence and the evidence was admissible. *State v. Godsey,* at *4.

V. REVIEW SHOULD BE ACCEPTED

Article I § 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded without authority of law." The Fourth Amendment requires that when the State seeks a search warrant it may only be issued "upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the person or things to be seized." *State v. Perrone,* 119 Wn.2d 538,545, 834 P.2d 611 (1992).

The particularity requirement "eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." *Perrone,* 119 Wn.2d. at 546. And prevents "general, exploratory rummaging in a person's belongings." *Perrone,* 119 Wn.2d 545.

Where materials are presumptively protected by the First Amendment, this Court has consistently held there must be a greater specificity of the things to be searched.

Perrone, 119 Wn.2d at 547-548; *State v. Besola,* 184 Wn.2d 605, 611, 359 P.3d 799 (2015).

Here, the original warrant did not specify with particularity what was to be searched. It authorized a full search of the text messages, photos, and possible videos, and lacked any temporal limit. The only specification on the search was internet searches related to depictions of minors in sexually explicit conduct. Under *Besola,* and *Perrone* the original warrant was overbroad. The Court of Appeals held as much when it noted that the first warrant did *not* specify what information should be extracted from the electronic devices.

If a police officer has disturbed a person's " 'private affairs,' " we do not ask whether the officer's belief that the disturbance was justified was objectively reasonable, but simply whether the officer had the requisite " 'authority of law.' " *State v. Betancourth,* 190 Wn.2d 357, 367, 413 P.3d 566 (2018). Under article I, section 7, the requisite "

'authority of law' " is generally a valid search warrant. *Id.* Here, there was no valid authority of law for the original warrant.

At the CrR 3.6 hearing, the State argued "just because law enforcement gets a judicial officer to sign off on a warrant, that's not a windfall for the defendant." 7/11/22 RP 9. In this case, however, it was a windfall for the State.

The error is in holding the lack of legality of the first warrant had no effect on the admissibility of evidence because the "do-over" warrant was not overbroad.

The Court's reliance on *Betancourth* is misplaced. In *Betancourth* the issue was a jurisdictional defect, not a particularity defect. There, the original warrant issued by a district court rather than a superior court necessitated a second warrant from the proper court. *Betancourth,* 190 Wn.2d. at 361. This Court held the independent source doctrine applied and the first warrant did not contaminate

the second. And retrieving additional copies of the sought phone records a year later was meaningless because the police already had the records. *Id.* at 367-368.

Here, the exclusionary rule should have been applied. The second warrant was not issued until long after the State had already conducted their unfettered analysis of the electronic devices. The "do-over" was a remarkable windfall for the State.

A do-over is the antithesis of the heart of the exclusionary rule. The exclusionary rule is designed to (1) protect privacy interests against unreasonable government intrusion; (2) to deter law enforcement from unlawfully obtaining evidence and (3) preserve 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).

In this case, the second warrant was not a jurisdictional correction. It was a correction that occurred

after having access to every piece of information on the cell phones and computers allegedly owned by Mr. Godsey. His private affairs. Holding the second warrant as a correction for the overbroad warrant does not incentivize law enforcement to carefully draft search warrant to avoid overbreadth. And it does not uphold the integrity of the judicial system where a correction occurred only after Mr. Godsey made a motion to suppress the evidence garnered through the overbroad warrant. Had he not objected, the State would certainly have been free to introduce all the illegally garnered evidence.

This Court should accept review under RAP 13.4(b)(3): it is a significant question of Washington State constitutional law.

The application of the independent source doctrine, or “do over” should not be countenanced in this matter.

Mr. Godsey respectfully asks this Court to accept his petition for review.

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. Godsey respectfully asks this Court to accept his petition for review.

This document has 1908 words, excluding the parts of the document exempted from the word count by RAP 18.17. And is submitted in 14 point font.

Respectfully submitted this 14th day of December 2023.

Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

November 14, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JORDAN THOMAS GODSEY, Appellant.	No. 57419-5-II UNPUBLISHED OPINION

MAXA, P.J. – Jordan Godsey appeals his sentence for convictions of four counts of first degree possession of depictions of minors engaged in sexually explicit conduct and the trial court's imposition of community custody supervision fees. In a statement of additional grounds (SAG), Godsey challenges his convictions.

We hold that (1) as the State concedes, the trial court imposed a term of confinement and a term of community custody that exceeded the statutory maximum sentence; (2) as the State concedes, the community custody supervision fees imposed in the judgment and sentence must be stricken; and (3) we reject or decline to consider under RAP 10.10(c) Godsey's SAG claims relating to his convictions. Accordingly, we affirm Godsey's convictions, but we remand for the trial court to correct the term of community custody so Godsey's sentence does not exceed the statutory maximum and to strike the community custody supervision fees from the judgment and sentence.

FACTS

Background

In November 2020, the Chehalis police department received a tip from the Seattle Internet Crimes against Children ("ICAC") task force that Godsey was downloading images of children engaged in sexual activity. CP 37. ICAC is a law enforcement agency task force that investigates crimes against children on the internet, including child pornography. The ICAC report stated that the images were downloaded by Godsey associated with the e-mail Jordan_godsey@hotmail.com. Daniel Dozois, a detective with Chehalis police, conducted an IP address search and confirmed that the images had been accessed from an address where Godsey resided.

The ICAC report contained links to six images. Dozois reviewed the images and determined that they appeared to be depictions of young girls engaged in sexual activity.

Search Warrants for Electronic Devices

Chehalis police obtained a warrant to search the electronic devices at Godsey's residence. The original warrant authorized law enforcement to "[e]xtract the information which are evidence of the above crimes." Clerk's Papers (CP) at 25. The relevant "above crimes" were listed as "RCW 9.68A.075 Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct" and "RCW 9.65A.070 Possession of Depictions of Minor Engaged in Sexually Explicit Conduct." CP at 24. The warrant did not specify what information should be extracted from the electronic devices.

When the warrant was executed, law enforcement seized two phones in Godsey's possession and a desktop computer. The phones and the computer contained hundreds of images and/or videos depicting minors engaged in sexually explicit conduct.

In June 2021, the State charged Godsey with four counts of first degree possession of depictions of a minor engaged in sexually explicit conduct.

Godsey moved to suppress the evidence obtained from his electronic devices pursuant to the original search warrant, arguing that the warrant failed to describe with particularity the things to be seized. In response, Chehalis police requested a new warrant. The new warrant declaration stated,

> This Affidavit for Warrant has been amended and is being submitted to correct any arguable over breadth of the original warrant. The Affidavit and Warrant were previously submitted and granted and the defense has filed a motion to exclude evidence based on warrant over breadth. Pursuant to *State v. Betancourth*, 190 Wn.2d 357 (2018) and *State v. Miles*, 159 Wn. App. 282 (2011), the State is asking for a "do-over" warrant. The information submitted to support this affidavit is not altered in any way based on evidence found during the original search(es). Further, the State does not intend to re-search the devices, this is merely being done in an effort to rectify any arguable errors in the original warrant.

CP at 35. The declaration essentially was the same as the declaration to obtain the original warrant. The trial court issued a new warrant, which specifically directed law enforcement to search for "depictions of minors engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) (a thru g)." CP at 43.[1]

Following a CrR 3.6 hearing, the trial court issued an order denying the motion to suppress. The court concluded that the first warrant was not overbroad and was sufficiently specific, and the second warrant "provided an added layer of protection, and is an independent source for the evidence collected." CP at 51.

[1] The trial court actually issued two essentially identical warrants, one that expired after 10 days and another that was issued 11 days later.

Trial and Conviction

At trial, Dozois testified that when officers executed the search warrant, they seized two cell phones that were in Godsey's pocket and a desktop computer that was in Godsey's room. Godsey was using the computer when law enforcement arrived.

Godsey provided Dozois with the passcode for the phones. When Dozois accessed the phones, he found suspected depictions of minors engaged in sexually explicit conduct in the Google Photos application and other applications.

A forensic search was conducted of the two phones and the computer. This search revealed likely depictions of minors engaged in sexually explicit conduct on all three devices, 412 images and/or videos on one phone, 188 images and/or videos on the second phone, and 114 images and/or videos on the computer. The trial court admitted into evidence 10 images of young girls engaged in sexually explicit conduct.

The jury found Godsey guilty of all four counts as charged. The trial court sentenced Godsey to 89.5 months in confinement and 36 months of community custody. The judgment and sentence contained a provision that mandated payment of community custody supervision fees.

Godsey appeals his convictions and sentence.

ANALYSIS

A. SENTENCE EXCEEDING STATUTORY MAXIMUM

Godsey argues, and the State concedes, that his sentence is unlawful because the combination of his term of confinement and his term of community custody exceeds the statutory maximum sentence. We agree.

A defendant's total sentence cannot exceed the statutory maximum for the offense, including sentence enhancements and community custody. RCW 9.94A.505(5); *State v.*

LaBounty, 17 Wn. App. 2d 576, 582, 487 P.3d 221 (2021). First degree possession of depictions of minors engaged in sexually explicit conduct is a class B felony. RCW 9.68A.070(b). The statutory maximum for a class B felony is 120 months. RCW 9A.20.020(1)(b).

The trial court sentenced Godsey to 89.5 months in confinement and 36 months of community custody, for a total of 125.5 months. This sentence exceeds the statutory maximum of 120 months. Therefore, the term of community custody must be reduced so the total sentence does not exceed the statutory maximum. RCW 9.94A.701(10).

We remand for the trial court to correct the term of community custody in Godsey's judgment and sentence.

B. COMMUNITY CUSTODY SUPERVISION FEES

Godsey argues, and the State concedes, that the community custody supervision fees should be stricken from the judgment and sentence. We agree.

Godsey was sentenced in October 2022. Effective July 2022, RCW 9.94A.703(2) no longer authorizes the imposition of community custody supervision fees. *State v. Ellis*, 27 Wn. App. 2d 1, 17, 530 P.3d 1048 (2023). Therefore, we remand for the trial court to strike the imposition of the community custody supervision fees.

C. SAG CLAIMS

1. Improper Search Warrant

Godsey asserts that the trial court erred in denying his motion to suppress evidence seized from his electronic devices because the search warrant failed to describe with sufficient particularity the things to be seized. We disagree.

a. Legal Principles

The Fourth Amendment to the United States Constitution provides that "no [w]arrants

shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This amendment was designed to prohibit "general searches," and to prevent " 'general, exploratory rummaging in a person's belongings.' " *State v. Perrone,* 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (quoting *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)). Similarly, article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Under these constitutional provisions, a search warrant must be sufficiently particular so that the officer executing the warrant can reasonably ascertain and identify the property authorized to be seized. *State v. Besola*, 184 Wn.2d 605, 610, 359 P.3d 799 (2015). The particularity requirement both "limit[s] the executing officer's discretion" and "inform[s] the person subject to the search what items the officer may seize." *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993). "Warrants for materials protected by the First Amendment require a heightened degree of particularity." *Besola*, 184 Wn.2d at 611. For these materials, the particularity requirement must be strictly applied. *Id.*

b. Validity of First Search Warrant

It is unclear whether Godsey is challenging the first warrant or the second warrant. But whether the first search warrant satisfied the particularity requirement is immaterial because the trial court issued a second search warrant that was more particular.

If the evidence procured by unlawful police action was "obtained pursuant to a valid warrant or other lawful means independent of the unlawful action," the evidence is not subject to exclusion under the independent source doctrine. *State v. Betancourth,* 190 Wn.2d 357, 364-365, 413 P.3d 566 (2018). Courts determine whether challenged evidence has an independent

source by inquiring whether the illegally obtained information affected (1) the magistrate's decision to issue the warrant or (2) the decision of the state agents to seek the warrant. *Id.* at 365. If the illegally obtained information did not affect the magistrate's decision to issue the warrant or the decision of the state agents to seek the warrant, then the evidence is "admissible through the lawful warrant under the independent source doctrine." *Id.*

In *Betancourth,* the district court issued a search warrant for an out-of-state cell phone carrier and the carrier provided the records. 190 Wn.2d at 360-61. However, the superior court later ruled in a separate case that only superior courts were authorized to issue out-of-state warrants. *Id.* at 361. Following this ruling, a detective obtained a second warrant from the superior court based on an affidavit that essentially was identical to the affidavit used to obtain the first warrant. *Id.* at 362. The detective sent the second warrant to the cell phone carrier, but they did not provide any new records because the records already had been provided. *Id.*

The Supreme Court held that the phone records were admissible based on the second, valid warrant under the independent source doctrine even though law enforcement did not reseize the records. *Id.* at 370-73. The court reasoned that the records were "untainted by any prior illegality" because the "decision to issue the 2013 superior court warrant [was not] affected by, or made in reliance on, information obtained from the illegal search." *Id*. at 370.

Here, the trial court's decision to issue the second warrant was not affected by or made in reliance on information obtained in the search pursuant to the first search warrant. The second search warrant declaration essentially was the same as the first search warrant declaration, and was based on the ICAC report. Therefore, under the independent source rule, the information obtained pursuant to the first search warrant is admissible regardless of whether it was valid, as long as the second search warrant was valid.

c. Validity of Second Search Warrant

The first warrant simply referenced the applicable statutes but did not specifically identify the information for which law enforcement was authorized to search. The second warrant corrected this problem by authorizing law enforcement to search specifically for "depictions of minors engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) (a thru g)." CP at 43. We conclude that this language satisfied the particularity requirement.

Therefore, we hold that the trial court did not err in denying Godsey's suppression motion.

2. Sufficiency of Evidence

Godsey asserts that his convictions must be reversed because the State failed to produce sufficient evidence that he *knowingly* possessed depictions of minors engaged in sexually explicit conduct. We disagree.

The test for determining the sufficiency of evidence is whether any rational trier of fact could find the elements of the charged crime beyond a reasonable doubt after viewing the evidence in a light most favorable to the State. *State v. Scanlan*, 193 Wn.2d 753, 770, 445 P.3d 960 (2019). We resolve all reasonable inferences based on the evidence in favor of the State and interpret inferences most strongly against the defendant. *Id.* Circumstantial evidence is as equally reliable as direct evidence. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

RCW 9.68A.070(1)(a) states that a person is guilty of first degree possession of depictions of a minor engaged in sexually explicit conduct "when he or she knowingly possesses a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (e)." A person acts knowingly when "(i) He or she is aware of

a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) He or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense." RCW 9A.08.010(1)(b).

Here, the two phones in Godsey's possession and the computer seized by law enforcement pursuant to the search warrant contained hundreds of images and/or videos depicting minors engaged in sexually explicit conduct. When Dozois accessed Godsey's phones, he was able to see images depicting minors engaged in sexually explicit conduct.

Viewed in the light most favorable to the State, a rational trier of fact could reasonably infer that Godsey knew that depictions of minors engaged in sexually explicit conduct were on his phones and his computer. Therefore, we hold that there was sufficient evidence to support Godsey's convictions.

3. Vague Claims

In request for relief 3, Godsey references the "scope of [the] search warrant," but he does not explain the basis for any claim. SAG at 2. In request for relief 5, Godsey references "probable cause in the information granting [the] search warrant" and then references "defendant's known place of residence," "property to be searched ownership," and "owner of IP address/internet provider." SAG at 2. But Godsey does not explain the nature of any alleged errors.

Under RAP 10.10(c), we will not consider a SAG claim "if it does not inform the court of the nature and occurrence of alleged errors." Accordingly, we decline to address these claims.

CONCLUSION

We affirm Godsey's convictions, but we remand for the trial court to correct the term of community custody in Godsey's sentence so as not to exceed the statutory maximum and to strike the imposition of community custody supervision fees from the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, P.J.

We concur:

VELJACIC, J.

CHE, J.

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on December 14, 2023, I electronically served a true and correct copy of the Petition for Review to the following: Lewis County Prosecuting Attorney at appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov. and Jordan Godsey c/o marietrombley@comcast.net

Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

MARIE TROMBLEY

December 14, 2023 - 12:56 PM

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