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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By 

No. 320294-III  
IN THE COURT OF APPEALS  
OF  
THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Appellant,

v.

CASEY DUNN AND STEVEN LONG,

Respondents.

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APPEAL FROM SUPERIOR COURT OF THE STATE OF  
WASHINGTON IN AND FOR COLUMBIA COUNTY

Honorable M. Scott Wolfram

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APPELLANT'S OPENING BRIEF

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Rea L. Culwell, Prosecuting Attorney  
June L. Riley,  
Chief Deputy Prosecuting Attorney  
WSBA# 29198  
116 N. Third Street  
Dayton, WA 99328  
509-382-1197

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## **I. INTRODUCTION**

State seeks an order vacating the trial courts orders granting Respondent's Motions to Suppress. State asserts that the affidavit supporting search warrant contained a sufficient nexus between place to be searched (Respondent's residence) and items to be located (stolen items from burglary).

State also seeks vacation of the Order of Dismissal which was required for this appeal to comply with the Rules of Appellate Procedure.

## **II. ASSIGNMENTS OF ERROR**

The court erred in granting the defendant's motion to suppress. Sufficient nexus existed in the search warrant affidavit to connect the residence of the Defendants (Respondents) with the probable location of the stolen items for which the search warrant was issued.

## **A. ISSUE REGARDING ASSIGNMENT OF ERROR**

Is it probable that Long and Dunn would keep stolen property at their residence, which includes a garage and storage building, based upon the facts that Long was seen in possession of two stolen vehicles on the same rural road upon which his and Dunn's residence is located; considering the additional fact that the burglary occurred in the same general rural area as the Long and Dunn residence.

## **III. STATEMENT OF THE CASE**

The search warrant affidavit included the facts as set forth herein. Casey J. Lynn Dunn and Steven Long (Respondent's herein) (hereinafter Long and Dunn), both lived at 447 Hogeye Hollow Road, Dayton, Washington. (CP Index 2- pages 26-43 and Index 4- pages 45-50). On May 3, 2013, Columbia County Sheriff Deputy Lee Brown was dispatched to a report of an abandoned vehicle in a ditch on Steve Shoun's (hereinafter Shoun) property on Ring Canyon Road. (Id). Deputy Brown contacted Shoun, by cell phone, on his way to the scene. (Id). Shoun informed Deputy Brown that he and his assistant had seen the same pickup truck the day before, May 2, 2013 on Hogeye Hollow Road. (Id). Shoun

explained that he had seen Long driving the pickup on Hogeye Hollow Road. (Id). Shoun stated that the pickup truck Long was driving had an ATV with cammo packs in the bed of the truck. (Id). He told Deputy Brown that Long had waved at him as he drove by. (Id).

When Deputy Brown arrived, he observed a Dodge Ram pickup truck with a grey bed and a brown cab in the ditch; the rear of the vehicle sticking out of the ditch. (Id). The ATV was no longer in the back of the pickup. (Id). The pickup truck had license plate number B38538R. (Id). Deputy Brown determined that the pickup truck was registered to Zackary Zink of Dayton. (Id).

After the pickup was pulled from the ditch, Deputy Brown called Shoun and asked him to come to the location to view the pickup and ask him whether it was the same pickup he had seen Long driving on May 2, 2013. (Id). Shoun and his assistant arrived and verified that they had both seen Long driving that same pickup. (Id). Shoun explained that he knew Long because Long had been employed by Shoun in 2010. (Id). Shoun's assistant explained that he had known Long for the past 6 or 7 years. (Id).

Later that day at 1300 hours, Deputy Brown met with Kyle Zink who confirmed that the pickup was his. (Id). Mr. Zink stated that the pickup had been kept at his cabin at 628 Robinett Mountain Road and was

being used as a farm vehicle. (Id). Mr. Zink indicated that the pickup was not to be off of the property and that the last time he was there the pickup had been parked next to a horse trailer on that property. (Id). Mr. Zink stated that the last time he had been to the property was April 30, 2013. (Id).

Mr. Zink told Deputy Brown that he was going to his property and check his cabin to see if the cabin had been entered. (Id). On May 3, 2013 at approximately 1440 hours Deputy Brown was advised to respond to the Zink cabin on Robinett Mountain Road for a report of a burglary. (Id). When Deputy Brown arrived, Mr. Zink advised him that the back door to his cabin had been kicked in and the outbuildings had been entered. (Id). Mr. Zink reported that both of his ATVs were gone as well as generators and a rifle. (Id). Deputy Brown was advised that one of the ATVs had tan colored cammo packs on the back. (Id). The description of the missing ATV matched the description of the ATV seen by Shoun and his assistant in the back of the pickup driven by Long. (Id).

The Affidavit for Search Warrant contained the fact that the residence of Long and Dunn is located at 447 Hogeye Hollow Road in Columbia County. (CP Index 2- pages 26-43). The Affidavit for Search Warrant also contains the fact that Long was seen driving the stolen truck

with the stolen ATV in the back, on Hogeye Hollow Road and that Long's residence is located approximately .1 miles from the intersection of Lower Hogeye Road and Hogeye Hollow Road. (Id).

The search of the home occupied by Long and Dunn resulted in the finding of several items that had been reported stolen as well as methamphetamine.

### **A. PROCEDURAL HISTORY**

Long was charged with Burglary 2<sup>nd</sup> degree, Theft 2<sup>nd</sup> degree – two counts, Malicious Mischief 3<sup>rd</sup> degree – two counts, Residential Burglary, Theft of a Motor Vehicle – 3 counts, Possession of a Stolen Vehicle- 3 counts, Possession of Stolen Property 2<sup>nd</sup> degree-two counts, Theft of a Firearm, Possession of Methamphetamine, Manufacture of Marijuana; based upon the results of the search. Dunn was charged with Possession of Methamphetamine, Manufacture of Marijuana, Possession of Stolen Property 2<sup>nd</sup> degree; based upon the results of the search. Both Long and Dunn moved for suppression of the items seized, arguing lack of nexus.

Respondent's motions to suppress were heard on September 27, 2013 before the Honorable Judge M. Scott Wolfram. Judge Wolfram

suppressed the evidence obtained through the search warrant on the basis that a nexus was not established between Long and Dunn's residence and the probable location of stolen items. (RP Volume A, page 5 lines 17-22). The finding also applied to Dunn's matter since she lived with Long. (RP Volume A, page 6 lines 10-19).

The State moved for findings that the matters could not proceed based upon the suppression motions having been granted. The matters were dismissed without prejudice. This appeal followed. This court granted a motion to consolidate both appeals.

#### **IV. ARGUMENT**

A search warrant may only issue upon a determination by a neutral and detached magistrate that there is probable cause. *State v. Thein*, 138 Wash.2d 133, 977 P.2d 582 (1999).

Probable cause to search a certain location must be based on a factual nexus between the evidence sought and the place to be searched. *State v. Olson*, 73 Wash.App. 348, 357, 869 P.2d 110 (1994).

The issuance of a search warrant is a matter of judicial discretion, the exercise of which may be tested on review. The ultimate question on

review is whether, in discharging his duties, the judicial officer who issued the search warrant abused his discretionary powers. *State v. Patterson*, 83 Wash. 2d 49, 52-53, 515 P.2d 496, 498-99 (1973).

Where facts and circumstances are detailed, the source of the information is credible, and a neutral and detached magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965).

**A. FACTUAL NEXUS BETWEEN THE EVIDENCE  
SOUGHT AND THE PLACE TO BE SEARCHED WAS  
CONTAINED IN THE SEARCH WARRANT AFFIDAVIT**

A comparison of affidavits courts have found insufficient to the affidavit herein reveals that the affidavit was not insufficient.

**1. Affidavits Which Were Held Insufficient:**

A. Absent 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. *State v. Smith*, 93 Wash.2d at 352, 610 P.2d 869.

**B.** If the affidavit or testimony reveals **nothing more than a declaration of suspicion and belief**, it is legally insufficient. *State v. Helmka*, 86 Wash.2d at 92, 542 P.2d 115.

**C.** Probable cause cannot be made out by conclusory affidavits. Record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant. *State v. Patterson*, 83 Wash.2d 49, 52, 61, 515 P.2d 496 (1973).

**D.** The affidavit in *State v. Thein*, 138 Wash.2d 133, 977 P.2d 582 (1999) contained “**nothing more than generalizations** regarding the common habits of drug dealers and lacks any specific facts linking such illegal activity to the residence searched”. (emphasis added).

**E.** The court in *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L. Ed. 159 (1933) held that an affidavit which contains **no underlying facts or circumstances** and is no more than a declaration of suspicion and belief is legally insufficient. (emphasis added).

**F.** The court in *State v. Olson*, 73 Wash. App. 348, 356-57, 869 P.2d 110, 115 (1994) held that the affidavit was insufficient in that matter because **the affidavit contained no facts and simply the**

**conclusions of the officer.** (emphasis added). In explaining why the court felt the affidavit was insufficient the court stated as follows:

The principal piece of evidence supporting the issuance of this warrant was Moss'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.

**G.** The court in *State v. Dalton*, 73 Wash. App. 132, 139-40, 868 P.2d 873, 876-77 (1994) held the affidavit at issue insufficient because "there is **nothing in the affidavit, other than the unconfirmed statements of the unidentified informants,** to indicate that Dalton was selling or delivering controlled substances to others." (emphasis added).

**H.** If the affidavit contains **none of the underlying facts or circumstances** from which the magistrate can find probable cause and is **no more than a declaration of suspicion and belief,** it is legally insufficient. *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933).

**I.** A record must show objective criteria going beyond the personal beliefs and suspicions of the applicants of the warrant. *State v. O'Neil*, 74 Wash.App. 820, 879 P.2d 950 (1994).

In *State v. McReynolds*, 104 Wash.App. 560, 17 P.3d 608 (2000) the court found that the affidavit did not contain a sufficient nexus. The defendants were caught committing a burglary at a construction site. Since the defendants were caught in the act, the court found there was no reason to believe that stolen items would be at their residence. A single crow bar at the scene which might have come from a prior theft was not enough. The McReynolds affidavit did not contain any facts showing proximity of the defendant's with stolen items to defendant's residence, nor any proximity in time.

It is clear that the courts have consistently described an insufficient affidavit as one containing only suspicion and belief with conclusory allegations. Affidavits containing broad generalizations and no factual basis are insufficient.

The affidavit herein is distinguishable and contains facts to support the probability of the location of stolen items. The affidavit showed that there is proximity of the stolen items, seen in Long's possession, to Long and Dunn's residence and a factual basis to believe that large stolen items (vehicles) would be stored at Long and Dunn's home, garage or storage building.

If the affidavit herein had merely stated that Long was seen in possession of a stolen vehicle and based upon the officer's training and experience stolen items are usually kept at a burglar's home, the affidavit would be on par with the affidavits described above and which were held as insufficient. Such is not the case. The affidavit herein does not fall within the parameters of affidavits held insufficient.

**2. The Affidavit Herein Contained Sufficient Facts, Not Just Generalizations and Conclusory Allegations.**

The affidavit in question herein contained facts which were sufficient to support probable cause that illegal activity had taken place and that the fruits of that criminal behavior would likely be found in the home shared by Long and Dunn.

The facts contained in the affidavit (CP Index 2- pages 32-35 – attached to Long's Motion to Suppress) were as follows:

1- Long was seen driving a pickup truck on May 2, 2013 by two individuals (Shoun and his assistant) who recognized Long and who were reliable citizen informants. They had known Long for nearly 10 years,

Shoun had employed him at one time and Shoun's assistant had worked with Long;

2- An ATV was seen in the back of the truck Long was driving and was described as having camo packs;

3- Long was driving this truck on Hogeye Hollow Road in Columbia County. The same road on which Long and Dunn's residence is located;

4- On May 3, 2013, the truck was found abandoned in a ditch in a rural area in Columbia County;

5- The truck Long was seen driving on Hogeye Hollow Road was registered to Mr. Zink, who confirmed that the truck should not have left his property on Robinett Road. The truck was stolen;

6- Mr. Zink's property on Robinett Road had been burglarized sometime between April 30, 2013 and May 3, 2013. Several items had been stolen including the truck Long was seen driving and two ATV's;

7- Mr. Zink provided a description of one of his stolen ATV's that had cammo packs. The description matched the ATV seen in the back of the pickup when Shoun and his assistant saw Long driving the stolen truck on Hogeye Hollow Road;

8- Long's residence he shared with Dunn is located at 447 Hogeye Hollow Road, Columbia County, the rural property included a home, garage and storage building;

9- Long's residence is approximately .1 miles from the intersection of Lower Hogeye Road and Hogeye Hollow Road.

The reasonable inference from these **facts** contained in the affidavit is that Long stole a truck and two ATV's, among other items, from a cabin located in a rural area of Columbia County. Long was then seen driving the stolen truck with the stolen ATV on Hogeye Hollow Road, the same road where the home he shares with Dunn, including garage and storage building, is located. The reasonable inference is that it is probable Long stored stolen items at his and Dunn's rural residence. The reasonable inference is that it is probable the stolen ATV's would be stored at a location where garages and storage buildings are available and close by. Long was seen in possession of the stolen items near this residence. (CP Index 2- pages 32-35).

The affidavit contained the **fact** that these buildings were available. The affidavit contained the **fact** that these buildings belonged to Long. The affidavit contained the **fact** that the stolen items were seen in Long's

possession on the **same road** where his home, garage and storage building were located. The affidavit contained the **fact** that Long was seen in possession of large stolen items in close proximity to his garage and storage building.

These facts are not innocuous details with no corroboration. These facts support probable cause and supply a nexus as to why the stolen property would be at Long and Dunn's home, garage or storage building; because he was in possession of the items in a location close to his home, garage and storage building and had been seen in possession of the stolen items by two credible witnesses.

The affidavit herein clearly contains more than generalizations, conclusory allegations, unconfirmed statements of unidentified informants or mere suspicion and belief without any supporting facts. The affidavit herein does not fit the parameters of the affidavits the courts have found to be insufficient. Sufficient facts were contained within the affidavit providing a nexus between the items sought and Long and Dunn's residence. The motion to suppress was improperly granted and should be overturned.

### 3. The *Thein* Case Is Distinguishable From This Matter

Long and Dunn based their motions to suppress on *State v. Thein*, 138 Wash. 2d 133, 148-49, 977 P.2d 582, 589 (1999). *Thein* is distinguishable. The *McReynolds (Supra)* court acknowledged that the standard to meet the required nexus set out in *Thein (Supra)*, a drug case, might not be applicable to a case involving crimes of theft, burglary or robbery. The court quoted Wayne R. LaFave, *Search and Seizure* §3.7(d), at 381-85 (3d ed. 1996) stating that the reference to the LaFave treatise was helpful in light of the following passage:

Another situation in which this problem arises is when the crime in question was a theft, burglary or robbery in which valuable property was obtained by the perpetrator. Here, the question is whether, assuming a not too long passage of time since the crime, it is proper to infer that the criminal would have the fruits of his crime in his residence, vehicle or place of business. Perhaps because stolen property is not inherently incriminating in the same way as narcotics and because it is usually not as readily concealable in other possible hiding places as a small stash of drugs, courts have been more willing to assume that such property will be found at the residence of the thief, burglar or robber. It is commonly said that in such circumstances account may be taken of “the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal

inferences as to where a criminal would be likely to hide stolen property.” It is most relevant, therefore, that the objects are “the sort of materials that one would expect to be hidden at [the offender's] place of residence, both because of their value and bulk,” and also that the offender “had ample opportunity to make a trip home to hide” the stolen property before his apprehension.

LaFave, § 3.7(d), at 381–84 (footnotes omitted).

*State v. McReynolds*, 104 Wash. App. 560, 569-70, 17 P.3d 608, 614-15 (2000).

The affidavit in this matter falls squarely within the reasoning set forth by LaFave. Particularly, as stated, “It is most relevant, therefore, that the objects are ‘the sort of materials that one would expect to be hidden at the offender’s place of residence...’ and also that the offender ‘had ample opportunity to make a trip home to hide’ the stolen property. These considerations apply to the affidavit herein, where the items sought among other things were large stolen ATVs; where better to hide stolen vehicles than a garage or storage building on a rural property. (CP Index 2- pages 32-35). Also, Long was seen with the stolen truck and ATV on May 2, 2013 and the truck was found on May 3, 2013 without the ATV

allowing Long time to take the ATV from one location on Hogeye Hollow to his residence on Hogeye Hollow.

The affidavit in *Thein* contained much less than the affidavit herein; to equate them is error. The affidavit in *Thein* contained only the supposition that drugs would be found in defendant's residence based upon the officer's training and experience. No facts were contained in the affidavit.

*Thein* does not stand for the proposition that a nexus between the criminal activity and the place to be searched requires some showing that the contraband actually went into the place to be searched. *Id.* at 146–48. *Thein* only requires some nexus. *Id.* at 147. To require law enforcement or citizen to actually witness stolen property being taken into a building would be an impossibly high standard. Affidavits for search warrants should be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. *State v. Patterson*, 83 Wash. 2d 49, 54-55, 515 P.2d 496, 499-500 (1973)

#### **4. Cases Discussed By *Thein* Where Sufficient Nexus Existed Show The Affidavit Herein To Be Sufficient**

The *Thein* court discussed the differences between their matter and *State v. Graham*, 130 Wash.2d 711, 725, 927 P.2d 227, 65 A.L.R. 5th 773 (1996) where the *Thein* court agreed that a sufficient nexus was established. The court looked to the fact that in *Graham*, officers personally observed the suspect in possession of packets that, from experience and training, they believed to contain rock cocaine. The court held that the inference the suspect was in actual possession of an illegal controlled substance was, therefore, drawn from specific facts and informed by experience. The court went on to explain that because the officers in *Graham* provided facts rather than generalizations regarding the common habits of drug dealers sufficient nexus existed in *Graham*.

Like the *Graham* case, Long was personally observed by Shoun and his assistant to be in possession of a truck and ATV later determined to be stolen. Additionally, Long was seen driving the stolen truck with the ATV on the same road his residence is located upon. This facts in this matter are much the same as in *Graham*. The affidavit herein is much

more than mere generalizations on the common habits of an auto thief or burglar.

The affidavit herein contains even more facts than the affidavit in the *Graham* matter, which the *Thein* court looked to as sufficient. A sufficient nexus existed.

In *State v. Cowin*, 116 Wash.App. 752, 67 P.3d 1108 (2003), the court found that sufficient nexus existed and looked to certain facts which included; a property owner finding marijuana plants, grow sites a short distance from the defendant's residence, the same truck, owned by someone other than the defendant, was seen at the grow site and at defendant's residence and was also seen containing items associated with a marijuana grow operation. Sufficient nexus was found to search defendant's residence.

The affidavit herein is replete with facts, similar to the affidavit in *Cowin*. Like the close proximity of the grow site to defendant's residence in *Cowin*, here Long was seen driving a stolen vehicle with a stolen ATV on the same road his residence is located upon. Similarly, the materials associated with the marijuana grow operation, in *Cowin*, which were seen in a truck that had also been seen at defendant's residence; here we have a stolen truck containing a stolen ATV in the possession of Long, on the

same road as his residence. The affidavit herein includes even more facts that the affidavit in *Cowin*, which was upheld as establishing a nexus.

Each affidavit is to be examined with the particular facts of that case in mind. The existence of probable cause for issuance of search warrant is determined on a case by case basis. *State v. Thein*, 138 Wash. 2d 133, 977 P.2d 582, 588-89 (1999).

However, comparison of the affidavits found lacking reveal that the affidavit herein was well outside those parameters.

Additionally, comparison with the affidavits found sufficient to establish probable cause shows this affidavit to be well within the parameters of a fact sufficient affidavit.

The motions to suppress were improperly granted and should be overturned.

### **B. State Seeks Vacation of Order of Suppression and Order Dismissing.**

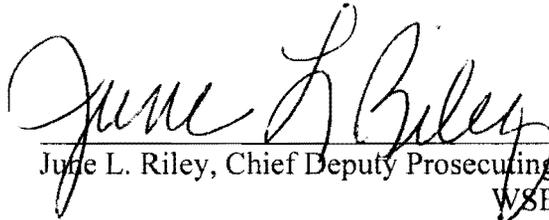
The State was required to seek dismissal of this matter in order to meet the requirements of Rules of Appellate Procedure, RAP 2.2. The proper procedure is for the State to request vacation of the order

suppressing the evidence and the vacation of the order dismissing the underlying matter. *State v. Olson*, 126 Wash. 2d, 315, 893 P.2d 629 (1995).

## V. CONCLUSION

For the foregoing reasons, it is respectfully requested that the Orders granting the motions to suppress be vacated. It is respectfully requested that the Orders dismissing the underlying matters be vacated.

Dated: 18, day of March, 2014



Julie L. Riley, Chief Deputy Prosecuting Attorney

WSBA#29198

Columbia County Prosecuting Attorney

116 N. 3<sup>rd</sup> Street

Dayton, WA 99328

509-382-1197