No. 44996-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Aaron Johnson,

Appellant.

Thurston County Superior Court Cause No. 12-1-00645-1

The Honorable Judge James J. Dixon

Appellant's Reply Brief

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I. THE WARRANT TO SEARCH MR. JOHNSON'S CAR WAS UNCONSTITUTIONALLY OVERBROAD AND UNSUPPORTED BY PROBABLE CAUSE.

A. The affidavit did not provide probable cause to believe that the officers would find evidence of a crime in Mr. Johnson's car.

Probable cause requires a nexus between criminal activity, the item to be seized, and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Generalizations and boilerplate language cannot provide the individualized suspicion required to justify the issuance of a search warrant. *Thein*, 138 Wn.2d at 147-148.

The warrant affidavit in this case provided that "it is common" for officers to find certain documents, weapons, and restraints during warrant searches. CP 232. This statement and the rest of the information in the affidavit are insufficient to provide probable cause to believe (1) that officers would find any physical evidence of the offense– violation of a no contact order—and (2) that there was a nexus between any physical evidence that existed and Mr. Johnson's car. Nonetheless, the state argues that the affidavit was sufficient because it provided *reasonable suspicion* to believe that Mr. Johnson had *committed a crime*. Brief of Respondent, pp. 15-18. This argument is misplaced.

First, a search warrant must be based on probable cause, not reasonable suspicion. *Thein*, 138 Wn.2d at 140. Second, even probable cause to believe that Mr. Johnson had violated the no contact order would not justify issuance of a warrant to search his car. Instead, police must establish probable cause to believe evidence of a crime is located in the place to subject to search. *Thein,* 138 Wn.2d 140.

In *Thein*, for example, probable cause to believe that the accused dealt drugs did not provide a basis to search his home. *Id.* at 148. The affidavit failed to show "reasonably specific underlying circumstances that establish[ed] evidence of illegal activity [would] likely be found in the place to be searched." *Id.* at 147-48. Similarly, the warrant affidavit here may have provided probable cause to believe that he had violated a no contact order. But it did not provide reason to believe that the officers would find any evidence of the offense in the vehicle. Indeed, the broad language of the warrant is indicative of the confusion regarding what, exactly, would constitute physical evidence of violation of a no contact order.

The state argues that the affidavit established a nexus. Respondent points out that police arrested Mr. Johnson in his car. Brief of Respondent, p. 17. But the accused in *Thein* was living in his house when the police suspected him of dealing drugs. That fact, alone, did not

provide "a nexus between any physical evidence or contraband and his home." *Id.* at 147-48. The same is true in Mr. Johnson's case.

The affidavit also referred to Mr. Johnson's legal possession of a gun several weeks earlier. At that time, he carried his gun pursuant to a valid concealed weapons permit. CP 234. Respondent suggests that the lawfulness of his prior possession is irrelevant. Brief of Respondent, pp. 17-18. Respondent's argument lacks merit. First, the propensity-based statement that Mr. Johnson possessed a gun in mid-May does not establish probable cause to believe he possessed one in mid-June. Second, Mr. Johnson's history of carrying a firearm legally does nothing to elucidate whether he was likely to be carrying one after he had been prohibited from doing so by the pre-trial no contact order.

The warrant to search Mr. Johnson's car was issued without probable cause to believe that the officers would find evidence of a crime inside. *Thein*, 138 Wn.2d at 147-48. Mr. Johnson's convictions must be reversed and the evidence suppressed on retrial. *Id.*

B. The search warrant was unconstitutionally overbroad because it authorized police to search for and seize items that were not described with sufficient particularity and for which the affidavit did not provide probable cause.

A search warrant must describe the items to be seized with sufficient particularity to limit the executing officers' discretion and to

inform the owner of the property what items the officers may seize. *State v. Riley*, 121 Wn.2d 22, 27-29, 846 P.2d 1365 (1993). A search warrant is unconstitutionally overbroad unless: (1) there is probable cause to seize all items described in the warrant; (2) the warrant sets out objective standards for officers to differentiate which items are subject to seizure; and (3) the warrant describes the items as particularly as possible. *State v. Higgins*, 136 Wn. App. 87, 91-92, 147 P.3d 649 (2006).

The warrant in this case authorized an exploratory search of Mr. Johnson's car for anything that looked like evidence of a crime, including:

> All firearms, any containers, implements, fruits of the crime, equipment or devices used or kept for illegal purposes, evidence of ownership of such property or rights of ownership or control of said property; records including any notebooks or written or electronic records, associated with any firearms found in violation of RCW 9.41.098.
> CP 236.

Notably, Respondent does not argue that the affidavit provided probable cause to believe that the officers would find any of these items (except possibly a gun) in Mr. Johnson's car. Brief of Respondent, pp. 18-20. Nothing in the affidavit provides reason to believe that Mr. Johnson owned or had in his car any "any containers, implements, fruits of the crime,[1] equipment or devices used or kept for illegal purposes" or

[1] Indeed, neither the affidavit nor Respondent explains what "fruits of the crime" of violation of a no contact order would be. CP 231-35; Brief of Respondent.

"records including any notebooks or written or electronic records, associated with any firearms." CP 236.[2] The warrant fails on this basis alone. *Higgins*, 136 Wn. App. at 91-92.

Likewise, the warrant fails the second *Higgins* factor by neglecting to set out any standards for the officers to differentiate which items were subject to seizure. *Higgins*, 136 Wn. App. at 91-92. The state argues that a "reasonable person" would read the warrant to permit search for items "only as they pertain to the crime for which probable cause was found." Brief of Respondent, p. 19. Respondent points out that the list includes a provision for "fruits *of the crime*." Brief of Respondent, p. 19 (*citing State v. Reid*, 38 Wn. App. 203, 212, 687 P.2d 861 (1984)). In *Reid,* the court found that a provision of a warrant authorizing seizure of "any other evidence of the homicide" was not overbroad. *Id.* at 212.

Reid does not support Respondent's position. The modifier "of the crime" limits only the noun "fruits." The provision following this phrase authorizes search and seizure of any "equipment or devices used or kept for illegal purposes." CP 236. That portion of the warrant affords the officers almost unbounded discretion to search for any evidence of any

[2] Likewise, as noted above, the information in the affidavit concerning Mr. Johnson's legal possession of a gun several weeks previously was insufficient to provide probable cause to believe that he possessed a gun.

crime. *State v. Reep*, 161 Wn.2d 808, 815, 167 P.3d 1156 (2007). The state's reliance on *Reid* is misplaced.

Because the officers did not have probable cause to believe that they would find *any* evidence of a crime in Mr. Johnson's car, the third *Higgins* factor – whether the warrant described the items with as much particularity as possible – is inapposite. *Higgins*, 136 Wn. App. at 91-92. Even so, the state argues that the warrant passes this factor because a more specific description of the items subject to seizure was not available. Brief of Respondent, p. 19 (citing *State v. Stenson*, 132 Wn. 2d 668, 691, 940 P.2d 1239 (1997)). *Stenson* dealt with an investigation into the murder of a suspect's business associate. *Id.* In that case, a warrant authorizing seizure of evidence of a business or personal relationship between the suspect and the deceased was not overbroad. *Id.* at 693.

But the warrant in Mr. Johnson's case authorized a much broader search. It permitted seizure of *any* evidence of *any* crime. The reason a more accurate description was not available in Mr. Johnson's case is not because the police had access only to limited information. The warrant was written so broadly because the officers did not have any reason to believe that any specific items of evidence were in the car. Instead, the warrant authorized a general exploratory search of the type prohibited by the state and federal constitutions.

The court violated Mr. Johnson's state and federal constitutional rights by admitting evidence seized pursuant to an overbroad search warrant. *Reep*, 161 Wn.2d at 817. His convictions must be reversed and the evidence suppressed on retrial. *Id.*

C. The search warrant was overbroad because it authorized seizure of First Amendment materials for which there was no probable cause and that were not described with "scrupulous exactitude."

The particularity requirement "is to be accorded the most scrupulous exactitude" when a warrant authorizes seizure of materials protected by the First Amendment. *Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965).

Here, the warrant authorized police to search for and seize "records including any notebooks or written or electronic records, associated with any firearms found in violation of RCW 9.41.098." CP 236. The state argues that these items are "not protected by the First Amendment." Brief of Respondent, pp. 21-22. In support of this contention, the state cites Supreme Court dicta that not all speech carries equal value under the First Amendment. Brief of Respondent, p. 21 (*citing Snyder v. Phelps*, -- U.S. --, 131 S.Ct. 1207, 1215-16, 179 L.Ed.2d 172 (2011)). But being of "unequal First Amendment importance" is not the same as having no protection. The state's claim to the contrary is inaccurate.

The affidavit provides no information suggesting that any notebooks or written or electronic records existed or would be found in Mr. Johnson's car. The state responds simply that: "it is reasonable to infer that records pertaining to a firearm would be kept with the firearm." Brief of Respondent, p. 23.

This is incorrect for three reasons. First, as argued above, there was no reason to believe that Mr. Johnson possessed a firearm. Second, the affidavit does not establish a nexus between any firearm and Mr. Johnson's car. Finally, it is not "reasonable to infer" that a person would carry records related to a gun with him/her every time s/he left the house. It is not even clear what relationship a "notebook" would have to a firearm. The affidavit did not provide probable cause to search for notebooks and other records in Mr. Johnson's car.

The warrant did not include any language limiting the officers in their search through any notebooks or records found in the car. Respondent argues that the language meets the particularity requirement because it limits itself to documents regarding unlawfully possessed firearms. Brief of Respondent, p. 22. But the affidavit does not provide probable cause to believe that Mr. Johnson unlawfully possessed a gun or had one in his vehicle. Likewise, there was no reason to believe that any such documents existed or were in the car.

The warrant permitted the officers to rummage through any paperwork or digital media they found regardless of whether it had anything to do with the crimes under investigation. The state responds that the Fourth Amendment only requires particularity regarding items subject to seizure. Brief of Respondent, p. 23. Without citation to authority, respondent argues that the only particularity limitation on things to be searched is that they must be items that could conceivably be seized. Brief of Respondent, pp. 23-24. But that is exactly why the particularity requirement exists. *State v. Perrone,* 119 Wn.2d 538, 545, 834 P.2d 611 (1992). The state and federal constitutions both protect against fishing expeditions. *Id.* The mechanism for protecting against unreasonable searches requires specificity regarding what is subject to seizure. *Id.* This requirement is particularly stringent for warrants involving First Amendment materials. *Stanford,* 379 U.S. at 485.

The court erred by admitting evidence seized pursuant to an overbroad warrant. *Perrone,* 119 Wn.2d at 547. Mr. Johnson's convictions must be reversed. *Id.*

D. The court erred by admitting items seized from Mr. Johnson's car that were neither listed on the warrant nor admissible under the plain view doctrine.

In Mr. Johnson's case, the officers seized a wig, a pair of sunglasses, and a receipt. They found these items in his car, but they were

not listed on the warrant. RP (trial) 688-89; Exs. 105, 106, 108. The state argues that the wig and sunglasses fell under the provision of the warrant for "implements of the crime of violation of a protection order." Brief of Respondent, p. 24. Respondent claims that the receipt was admissible because "receipts are generally considered to be evidence of ownership." Brief of Respondent, p. 24.

The state's argument is indicative of just how unconstitutionally overbroad the warrant was. Under respondent's interpretation, virtually anything could be deemed an implement of the crime. For example, one could argue that any clothing, grooming supplies, pens and paper, stargazing equipment, camping supplies, mirrors, or tools could be "implements" used in violating a protection order.

The state wants to have it both ways, arguing simultaneously that the warrant's language (1) meets the particularity requirement, and (2) is so broad that it encompasses anything that could conceivably be used by a person violating a protection order. Both cannot be true.

The court erred by admitting evidence found in Mr. Johnson's car that was neither listed on the warrant nor admissible under the plain view doctrine. *State v. Link*, 136 Wn. App. 685, 696-697, 150 P.3d 610 (2007); *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 29

L.Ed.2d 564 (1971). Mr. Johnson's convictions must be reversed and the evidence suppressed on remand. *Id.*

II. THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. JOHNSON OF FELONY STALKING.

Mr. Johnson relies on the argument in his Opening Brief.

III. THE COURT ABUSED ITS DISCRETION BY ADMITTING EVIDENCE WHOSE PROBATIVE VALUE WAS OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

Mr. Johnson relies on the argument in his Opening Brief.

IV. THE IMPOSITION OF FIREARM ENHANCEMENTS VIOLATED MR. JOHNSON'S RIGHT TO NOTICE BECASUSE THE INFORMATION DID NOT ALLEGE A NEXUS BETWEEN THE WEAPON AND THE OFFENSES.

A charging document provides inadequate notice if it fails to allege all essential elements of a sentencing enhancement. *State v. Zillyette,* 178 Wn.2d 153, 307 P.3d 712 (2013); *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. An element qualifies as essential if the state must prove it beyond a reasonable doubt. *Id.*

Before the court may impose a firearm or deadly weapon enhancement, the prosecution must prove a nexus between the weapon and the offense. *State v. Brown*, 162 Wn.2d 422, 431-435, 173 P.3d 245 (2007). The Information charging Mr. Johnson failed to allege a nexus

between any firearms and the offenses. CP 2-3. Respondent agrees that the state must prove a nexus in order to enter a firearm enhancement. Brief of Respondent, p. 31. Without citation to relevant authority, however, the state claims that the nexus requirement is definitional so it does not need to be included in the charging language. Brief of Respondent, pp. 33-34.

But respondent does not explain what term the nexus element "defines." Brief of Respondent, pp. 33-34. The state relies on cases finding that definitions need not be included in the Information. Brief of Respondent, p. 33. But, in each of those cases, the definitions actually defined a term that was already present in the charging language. *See e.g. State v. Phuong*, 174 Wn. App. 494, 542, 299 P.3d 37 (2013) (charging document need not include a definition of the term "restrain"); *State v. Tinker*, 155 Wn.2d 219, 222, 118 P.3d 885 (2005) (definition of "value" included all property, so it did not need to be included in the Information); *State v. Lorenz*, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004) (charging document did not need to include the definition of "sexual contact"); *State v. Allen*, 175 Wn.2d 611, 630, 294 P.3d 679 (2013) (definition of "threat" did not need to be in the charging language).

The nexus requirement does not "define" any term in the language of the firearm enhancement. The state's claim that it "defines" the

enhancement itself stretches the meaning of "definition" beyond reasonable bounds.

The Information failed to properly allege the firearm enhancements. *Id.* The firearm enhancements must be vacated. *Id.*

V. THE SENTENCING COURT VIOLATED DUE PROCESS BY IMPOSING FIREARM ENHANCEMENTS WHICH THE STATE DID NOT PROPERLY CHARGE.

A sentencing court may not impose a firearm enhancement when the state has charged only a deadly weapon enhancement. *In re Personal Restraint of Delgado*, 149 Wn. App. 223, 234, 204 P.3d 936 (2009). Here, the court erred by entering a firearm enhancement even though the state only charged that Mr. Johnson "was armed with a deadly weapon, to wit: a silver and black semi-automatic handgun." CP 2-3.

The *Delgado* court reversed a firearm enhancement when the Information alleged that the accused was "armed with a deadly weapon, to wit: a firearm." *Id.* at 235. Even so, the state argues that the Information's reference to a handgun cures the defect. Brief of Respondent, pp. 34-35. But the even clearer allusion to "a firearm" in *Delgado* did not alter the fact that the Information charged only a deadly weapon enhancement in that case. *Id.* Respondent's argument is foreclosed by *Delgado*.

Mere citation to the numerical code of a statutory section does not provide the accused with adequate notice of the charges s/he faces. *See, e.g., City of Auburn v. Brooke*, 119 Wn.2d 623, 634-636, 836 P.2d 212 (1992); *Zillyette*, 178 Wn.2d at 162. Nor does recitation of a numerical citation alter the offense or enhancement actually charged. *See, e.g., State v. Hopper*, 118 Wn.2d 151, 160, 822 P.2d 775 (1992). Nonetheless, the state argues that the defect in Mr. Johnson's charging document is resolved by the fact that it references the firearms enhancement statute in addition to the RCW section for the deadly weapon enhancement. Brief of Respondent, p. 34. Again, the state's argument is foreclosed by the caselaw. *Brooke*, 119 Wn.2d at 634-636; *Zillyette*, 178 Wn.2d at 162. An accused person "should not have to search for the rules or regulations they are accused of violating." *Zillyette*, 178 Wn.2d at 163.

A jury's special verdict finding use of a firearm cannot cure the failure to allege that enhancement in the information. *Delgado*, 149 Wn. App. at 235. The jury in *Delgado* returned some special verdicts finding use of a firearm. *Id.* Nonetheless, the court reversed all of the firearm enhancements because, *inter alia*, the state did not allege them in the charging document. *Id.* at 237-38. Still, the state argues that Mr. Johnson's firearm enhancements should be upheld because they were found by the jury. Brief of Respondent, p. 36. But the language on the

special verdict forms is irrelevant to whether the state properly charged Mr. Johnson. Respondent's argument is misplaced.

Mr. Johnson's firearm enhancements were not charged and must be vacated. *Delgado,* 149 Wn. App. at 229. The court must remand his case for imposition of deadly weapon enhancements. *Id.*

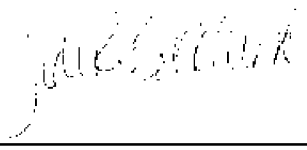
CONCLUSION

The court violated Mr. Johnson's state and federal constitutional rights by admitting evidence seized pursuant to a search warrant that was not supported by probable cause and was unconstitutionally overbroad. There was insufficient evidence to convict Mr. Johnson of felony stalking. The court erred by admitting evidence that was extremely prejudicial to Mr. Johnson and of limited probative value. Mr. Johnson's convictions must be reversed.

The court violated Mr. Johnson's constitutional right to notice of the charges against him by imposing firearm sentencing enhancements that were not alleged in the charging document. In the alternative, Mr. Johnson's firearm enhancements must be vacated.

Respectfully submitted on April 17, 2014,

BACKLUND AND MISTRY



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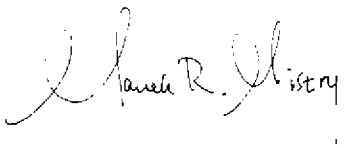

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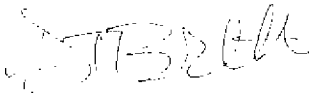

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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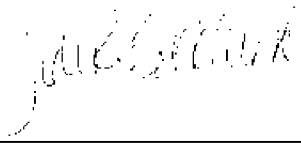

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