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Court of Appeals  
Division III  
State of Washington  
8/7/2020 8:00 AM

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SUPREME COURT NO.  
COA NO. 36705-3-III

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SUPREME COURT  
STATE OF WASHINGTON  
8/10/2020  
BY SUSAN L. CARLSON  
CLERK

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

JOHN EPPS, JR.,  
Petitioner.

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

Stevens County Cause No. 17-1-00181-8

The Honorable Jessica T. Reeves, Judge

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PETITION FOR REVIEW

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**I. IDENTITY OF PETITIONER**

Petitioner John Epps, Jr., the appellant below, asks the Court to review the decision of Division III of the Court of Appeals referred to in Section II below.

**II. COURT OF APPEALS DECISION**

John Epps, Jr. seeks review of the Court of Appeals unpublished opinion entered on July 9, 2020. A copy of the opinion is attached.

**III. ISSUE PRESENTED FOR REVIEW**

Probable cause does not exist unless specific and articulable facts indicate that the item to be seized is likely to be found in the place to be searched. Did the affidavit in support of the warrant to search Mr. Epps's home fail to establish probable cause when it demonstrated only that a gun he had possessed when he was still legally able to do so was not found at a single pawn shop after a court had prohibited him from possessing weapons?

**IV. STATEMENT OF THE CASE**

When Mr. Epps was ordered not to possess any guns because a no-contact order had been entered against him, he voluntarily surrendered his Concealed Pistol License to the police. RP 63, 188-91. He removed all of the guns from his rural property and either entrusted them with friends or pawned them. RP 164, 190-91.

Even so, the police believed that he still had guns on his property and sought a warrant to search. CP 23-28.

The warrant affidavit stated that Mr. Epps lived in a rural property in Stevens County and that he had a silver and black rifle in his possession when the police served him with a temporary no-contact order on 06/10/17. CP 25, 27.

The affiant searched the Spokane County pawn database and determined that Mr. Epps had pawned thirteen different guns at multiple, different pawn shops in the previous three years. CP 26. Mr. Epps retrieved three of those guns from the pawn shops in 2014 and another one in October 2016. CP 26. The affiant did not know whether those guns were still in Mr. Epps's possession as of the time of the warrant application. CP 26. The affiant did nothing to investigate pawn shops in Stevens County, where Mr. Epps lives. *See* CP 23-28.

On 06/23/17, Mr. Epps told a Sheriff's Deputy that all of his guns were either in pawn shops or in a "safe place." CP 26. The deputy took the "safe place" comment to mean that there were still guns on Mr. Epps's property. CP 28.

The affiant contacted one pawn shop in Spokane County and learned that the silver and black rifle that Mr. Epps had possessed on 06/10/17 was not there. CP 28. The affiant believed that this demonstrated

probable cause to believe that the silver and black rifle was still in Mr. Epps's possession because it had not been located at the pawn shop. CP 28.

A magistrate granted the application for a warrant to search Mr. Epps's property. CP 29.

The day that the police executed the search warrant, one of Mr. Epps's friends was at his property, attempting return two guns to his girlfriend, at her request. RP 163-65, 181-83. Mr. Epps's girlfriend intended to surrender the guns to the police. RP 181.

The police found those guns -- a .22 rifle and a shotgun -- and charged Mr. Epps with two counts of unlawful possession of a firearm. CP 69-70.

Mr. Epps moved to suppress those guns, arguing that the warrant had not been supported by probable cause. CP 17-40. The court denied his motion and the guns, ammunition, and fingerprint and functionality testing results of the guns were admitted against him at trial. RP 14, 75-91, 123-24, 140-61.

The jury acquitted Mr. Epps of possessing the rifle but convicted him of possessing the shotgun. RP 239-40.

Mr. Epps timely appealed. CP 114. The Court of Appeals affirmed his conviction in an unpublished opinion. *See Appendix.*

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

**The Supreme Court should accept review and hold that the trial court violated Mr. Epps's rights under the Fourth Amendment and Wash. Const. art. I, § 7 by denying his motion to suppress evidence seized from his home pursuant to an unconstitutional search warrant, unsupported by probable cause.**

The July 2017 affidavit in support of the warrant to search Mr.

Epps's home alleged facts that can be summarized as follows:

- Mr. Epps lives in Stevens County. CP 25.
- Mr. Epps lawfully possessed a silver and black rifle when the no-contact order<sup>1</sup> was served on 06/10/17. CP 25, 27.<sup>2</sup>
- Mr. Epps had pawned thirteen different guns at *multiple, different* pawn shops in the previous three years, according to the Spokane County pawn database. CP 26.
- Mr. Epps redeemed three of those guns from the pawn shops in 2014 and another one in October 2016. CP 26. The affiant did not know whether those guns were still in Mr. Epps's possession as of July 2017. CP 26. The affiant did nothing to investigate pawn shops in Stevens County, where Mr. Epps lives. *See* CP 23-28.
- On 06/23/17, Mr. Epps told a Sheriff's Deputy that all of his guns were either in pawn shops or in another "safe place." CP 26.

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<sup>1</sup> This initial, temporary, order did not prohibit Mr. Epps from possessing guns. The order prohibiting Mr. Epps from possessing weapons was not entered until 06/19/17. *See* CP 26.

<sup>2</sup> Mr. Epps also told the officers on 06/10/17 that he had purchased another gun the previous day. CP 25. But the affiant determined that Mr. Epps had pawned that recently purchased gun on 06/24/17 and that it was still in the pawn shop at the time of the affidavit. CP 26, 28.



- The affiant contacted *one* pawn shop and learned that the silver and black rifle was not there. CP 28.

The affiant believed that these facts demonstrated probable cause to believe that the silver and black rifle was still in Mr. Epps's possession because it had not been located at a single pawn shop and because the Deputy who spoke to Mr. Epps on 06/23/17 took the "safe place" comment to mean that there were still guns on Mr. Epps's property. CP 28.

But neither of those conclusions are supported by the facts in the warrant affidavit. Indeed, the silver and black rifle could have been pawned at any of the other pawn shops that Mr. Epps had patronized in Spokane County, none of which the affiant checked. Mr. Epps could also have been a customer at pawn shops in Stevens County, where he lived. The fact that Mr. Epps possessed the rifle when he was legally permitted to do so, combined with the fact that he had not pawned it at a single shop in Spokane County is insufficient to establish probable cause that the rifle was still in his possession after he was no longer legally permitted to have it.

Likewise, the deputy's belief that Mr. Epps's "safe place" comment indicated that guns were still on his property is improperly

conclusory and has no basis of knowledge. The deputy's interpretation of Mr. Epps's statement is also inadequate to establish probable cause.

In order to justify issuance of a search warrant, a warrant affidavit must demonstrate probable cause to believe that evidence of a crime will be found on the premises at the time of the search. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012); *State v. Goble*, 88 Wn. App. 503, 508–09, 945 P.2d 263 (1997); U.S. Const. Amend. IV; art. I, § 7. A trial court's conclusion that probable cause has been established is reviewed *de novo*. *State v. Shupe*, 172 Wn. App. 341, 349, 289 P.3d 741 (2012).

**1. The fact that the silver and black rifle had not been located at a single pawn shop in Spokane County was not sufficient to establish probable cause that it would be found at Mr. Epps's home.**

The affiant's primary claim in support of the warrant to search Mr. Epps's home is that, because he had not located the silver and black rifle (which Mr. Epps lawfully possessed on 06/10/17) at the Double Eagle Pawn Shop in Spokane County, then the rifle must have been located on Mr. Epps's property.

First, the fact that Mr. Epps lawfully possessed a gun before he was prohibited from doing so does not necessarily lead to the conclusion that he also unlawfully possessed the gun after a court ordered him not to. The affiant's conversations with the pawn shop owner sheds no light on

whether Mr. Epps had gotten rid of the gun through some other means, such as by selling it or entrusting it to a friend or family member.

Additionally, the affiant's conclusion fails to account for the fact that Mr. Epps had also previously pawned guns at other pawn shops. *See* CP 26. There is nothing in the affidavit permitting the conclusion that Mr. Epps had not pawned the gun somewhere else. *See* CP 23-28.

Finally, Mr. Epps lived in Stevens County, not Spokane County. CP 25. The affiant did not take any steps to investigate pawn shops in Stevens County at all. *See* CP 23-28.

The Supreme Court has explicitly held that police failure to locate contraband in the first place they look does not necessarily establish probable cause to believe that the contraband must be located at a suspect's home. *See State v. Thein*, 138 Wn.2d 133, 150, 977 P.2d 582 (1999) ("Nor do we find it reasonable to infer evidence is likely to be found in a certain location simply because police do not know where else to look for it").

"By this rationale," the Supreme Court noted:

...lack of investigation and fewer details might result in a warrant, whereas thorough investigation revealing more about the suspect - and, therefore, potentially more places to look - would not.

*Id.*

In Mr. Epps's case, the police knew that he had a history of pawning guns at *multiple* pawn shops. CP 26. But they took no steps to determine whether the rifle was in one of those locations before concluding that it must have been located at his home. *See* CP 23-28. As in *Thein*, the finding of probable cause in Mr. Epps's case rewards a lack of reasonable investigation on the part of the police. *Id.*

A similar circumstance was true in *Thein*: the police knew that the suspect in that case owned at least one other house, which had not been ruled out as the location of the contraband. *Id.* at 151. Because it was just as likely that the drugs in that case would have been found at that other house (or were in the possession of other accomplices), the police had failed to establish probable cause to search Mr. Thein's home. *Id.*

In Mr. Epps's case, the police failure to investigate whether the rifle was at any other pawn shop, alone, is enough to undermine the reasonable belief that it would be found at his home. *Id.* The affidavit's claim that the silver and black rifle had not been located at a single pawn shop in Spokane County was insufficient to establish probable cause that it would be found at Mr. Epps's home. *Id.*

**2. Mr. Epps’s statement that his guns were in a “safe place” does not establish probable cause to believe that they would be found on his property.**

Mr. Epps allegedly told a deputy that all of his guns were either pawned or “in a safe place because he lived in the woods.” CP 26. The affidavit does not contain any clarification regarding what Mr. Epps meant by a “safe place.” CP 23-28. The affidavit does, however, state that Mr. Epps’s statement was “interpreted [by the deputy] as him possessing firearms on the property.” CP 28. But the deputy’s belief is inadequate to establish probable cause because it is improperly conclusory and is not grounded in fact.

The allegations in a warrant affidavit must not be merely conclusory. *State v. Youngs*, 199 Wn. App. 472, 476, 400 P.3d 1265 (2017). Likewise, “mere speculation will not do.” *State v. Anderson*, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001). To demonstrate probable cause, a warrant affidavit must “establish circumstances that extend beyond mere speculation or personal belief.” *Id.*

A finding of probable cause must be “grounded in fact.” *Thein*, 138 Wn.2d at 146–47 (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980); *State v. Helmka*, 86 Wn.2d 91, 92-93, 542 P.2d 115 (1975)). Information that is not grounded in fact is inherently unreliable and “frustrates the detached

and independent evaluative function of the magistrate.” *Id.*; *See also Youngs*, 199 Wn. App. at 476.

Accordingly, probable cause cannot be established through conclusory statements, providing an officer’s belief without any facts and circumstances underlying that belief. *Youngs*, 199 Wn. App. at 476; *Helmka*, 86 Wn.2d at 92.

Additionally, even facts that “seem odd and perhaps suspicious” are not enough to establish probable cause if they are consistent with legal activity. *State v. Neth*, 165 Wn.2d 177, 184, 196 P.3d 658 (2008). This is because such equivocal allegations do not constitute specific and articulable facts that a crime has been committed. *State v. Doughty*, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010); *See also State v. Weyand*, 188 Wn.2d 804, 815, 399 P.3d 530 (2017); *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986).

The objective factual allegations in the affidavit in Mr. Epps’s case provide only that he told a deputy that his guns were either pawned or in a “safe place because he lived in the woods.” CP 26. That statement is equivocal at best as to whether the guns were still on Mr. Epps’s property. Accordingly, it is insufficient to establish probable cause. *Neth*, 165 Wn.2d at 184; *Doughty*, 170 Wn.2d at 62-63.

The deputy's personal belief that Mr. Epps's "safe place" comment indicated that the guns were still on his property is inapposite because it is improperly conclusory and not "grounded in fact." *Youngs*, 199 Wn. App. at 476; *Thein*, 138 Wn.2d at 146–47. The deputy's belief and speculation is far from sufficient to establish probable cause that Mr. Epps possessed guns on his property after he was legally barred from doing so. *Anderson*, 105 Wn. App. at 229.

Even so, the Court of Appeals holds that the facts do establish probable cause, relying exclusively on the word "still" in Mr. Epps's statement that he "still had firearms in a safe place because he lived in the woods." Appendix, p. 4. But the addition of the word "still" does not change the analysis.

Indeed, Mr. Epps's statement could just have easily have meant that he "still" had legal ownership of the guns because he lived in the woods and anticipated needing them in the future, but that they had been stored in some unspecified "safe place" outside of his possession.

**3. Mr. Epps's pawn history does not establish probable cause to believe that guns would be found on his property at the time of the warrant search.**

Finally, the warrant affidavit in Mr. Epps's case delineates that the Spokane County pawn database showed that Mr. Epps had pawned thirteen different guns in the previous three years, four of which were later

recovered from the pawn shops. CP 26. The affiant did not take any steps to investigate pawn shops in Stevens County, where Mr. Epps lives. *See* CP 23-28.

In fact, the affiant admitted that he did not know whether any of those four guns were still in Mr. Epps's possession. CP 26. By the affiant's own admission, Mr. Epps's pawn history does not provide specific and articulable facts to believe that he had weapons on his property at the time of the warrant search. *Thein*, 138 Wn.2d at 146-47; *Doughty*, 170 Wn.2d at 62-63.

Additionally, "stale" information is insufficient to justify issuance of a search warrant because it does not demonstrate that evidence of a crime will be found at the time of the search. *Lyons*, 174 Wn.2d at 360-61 (*citing Andresen v. Maryland*, 427 U.S. 463, 478 n. 9, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)).

The allegations in the warrant affidavit establishing that Mr. Epps lawfully possessed and pawned guns in previous years did not establish probable cause to believe that any guns would be found on his property at the time of the warrant search. *Id.*



**4. The trial court's improper denial Mr. Epps's motion to suppress requires reversal.**

As outlined above, the allegations in the warrant affidavit were insufficient to establish probable cause to believe that any weapons would be found on Mr. Epps's property at the time of the warrant search. Accordingly, the trial court violated Mr. Epps's rights under the Fourth Amendment and art. I, § 7 by denying his motion to suppress. *Lyons*, 174 Wn.2d at 360.

A trial court's failure to suppress evidence seized pursuant to an improper warrant is presumed to be prejudicial. *Shupe*, 172 Wn. App. at 351-52. Reversal is required unless the state can prove beyond a reasonable doubt that the improperly admitted evidence did not contribute to the verdict. *Id.*

The state cannot show harmlessness in this case. One of the guns seized pursuant to the warrant formed the basis for Mr. Epps's conviction. RP 123-24. The state also relied on the gun to introduce critical fingerprint and ballistics test evidence, without which conviction would likely have been impossible. RP 140-61.

The improper denial of Mr. Epps's motion to suppress requires reversal of his conviction. *Lyons*, 174 Wn.2d at 360. The Court of appeal should have reversed.

This significant issue of constitutional law is of substantial public interest. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

**VI. CONCLUSION**

The issue here is significant under the State and Federal Constitutions. Furthermore, because it could impact a large number of criminal cases, it is of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted August 7, 2020.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I retained a copy of the Petition for Review for appellant at:

John Epps, Jr.  
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and I sent an electronic copy to

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through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on August 7, 2020.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant/Petitioner

**APPENDIX:**

**FILED**  
**JULY 9, 2020**  
**In the Office of the Clerk of Court**  
**WA State Court of Appeals Division III**

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

STATE OF WASHINGTON,	)	No. 36705-3-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JOHN WARREN EPPS, JR.,	)	
	)	
Appellant.	)	

PENNELL, C.J. — John Epps Jr. appeals his conviction for second degree unlawful possession of a firearm. He argues the firearm was seized as a result of an invalid warrant and he was deprived of his constitutional right to conflict-free counsel. We disagree and affirm.

## FACTS

In June 2017, a protection order was issued against John Epps. As a result of the order, Mr. Epps was required to surrender firearms or concealed pistol licenses in his possession. Mr. Epps surrendered his concealed pistol license, but he did not turn over any firearms. He instead completed a declaration of nonsurrender stating he no longer had any guns in his possession.

Law enforcement came to doubt Mr. Epps's denial of ongoing gun possession. Mr. Epps spoke with a law enforcement officer when he surrendered his concealed pistol license. During that conversation, Mr. Epps admitted he "still had firearms in a, 'safe' place because he lived in the woods." Clerk's Papers (CP) at 54. Mr. Epps also admitted he "had firearms in pawn." *Id.*

Additional investigation revealed Mr. Epps had been holding a silver and black rifle when he was served with the original protection order. Officers reviewed local pawn records that indicated Mr. Epps had pawned 13 different guns between October 6, 2014, and June 24, 2017. Law enforcement accounted for the whereabouts of some of the 13 guns, but not all of them.

A search warrant was obtained for Mr. Epps's property based on the foregoing information. During execution, officers found a shotgun, a .22-caliber rifle, and several

boxes of ammunition. The State charged Mr. Epps with two counts of second degree unlawful possession of a firearm.

Prior to trial, Mr. Epps filed a motion to suppress evidence. He argued the search warrant affidavit did not establish probable cause. The trial court denied the motion.

Mr. Epps's case proceeded to trial. A jury convicted him of possessing the shotgun, but acquitted him of possessing the rifle.

After the jury's verdict, the State sought to have Mr. Epps immediately remanded into custody. In arguing for detention, the State referenced an e-mail it had received from defense counsel indicating Mr. Epps may have attempted through a third party to tamper with a witness in a separate case. Defense counsel opposed detention, arguing the information referenced by the State was stale. The trial court remanded Mr. Epps into custody. It subsequently imposed a sentence of six months' imprisonment.

Mr. Epps appeals.

### ANALYSIS

The first issue raised by Mr. Epps is the validity of the search warrant. All warrants must be supported by probable cause. U.S. CONST. amend. IV. In this context, probable cause requires a reasonable belief—greater than mere suspicion—that evidence of a crime

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will be found in the place to be searched. *State v. Neth*, 165 Wn.2d 177, 182-83, 196 P.3d 658 (2008).

Mr. Epps claims the warrant lacked probable cause because there was no evidence of ongoing firearms possession or a nexus between firearms and his residence. According to Mr. Epps, he merely admitted his firearms were in pawn shops or a safe place. He claims his admission was insufficient to permit an inference of ongoing personal possession, let alone ongoing possession at his residence, as opposed to some other safe location.

Mr. Epps's arguments fail because they do not accurately reflect the record. According to the search warrant affidavit, Mr. Epps did not merely tell law enforcement his firearms were in a "'safe' place." CP at 54. Nor did he only state the firearms were "in a 'safe' place because he lived in the woods." *Id.* Instead, Mr. Epps admitted he "*still* had firearms in a 'safe' place because he lived in the woods." *Id.* (emphasis added). That statement indicated ongoing possession. Mr. Epps was known to have possessed firearms at his property prior to issuance of the protection order. His statement, coupled with the failure to surrender any firearms, permitted a reasonable inference that Mr. Epps continued to possess firearms at his property. *See State v. Lyons*, 174 Wn.2d 354, 363, 275 P.3d 314 (2012). The search warrant was valid.



In addition to challenging the search warrant, Mr. Epps argues he was denied his right to constitutionally effective counsel because his attorney breached a duty of loyalty by disclosing damaging information to the prosecution. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 348, 325 P.3d 142 (2014) (“[T]he right to effective assistance of counsel includes the right to conflict-free counsel.”).

The record fails to support Mr. Epps’s claim. The messages defense counsel shared with the State were not material to Mr. Epps’s firearms case. At the time they were mentioned in court, neither Mr. Epps nor his attorney voiced an objection to the disclosure. We have no information about how or why the messages were disclosed. Speculating that counsel violated the rules of professional conduct and their constitutional duties to Mr. Epps by disclosing the messages to the State would be contrary to the “strong presumption” that counsel’s representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Mr. Epps has not established a basis for relief. *See id.* (“The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the [trial court] proceedings.”). His ineffective assistance of counsel challenge fails.

## CONCLUSION

The judgment of conviction is affirmed.

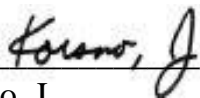
No. 36705-3-III  
*State v. Epps*

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



\_\_\_\_\_  
Pennell, C.J.

WE CONCUR:



\_\_\_\_\_  
Korsmo, J.



\_\_\_\_\_  
Fearing, J.

# LAW OFFICE OF SKYLAR BRETT

August 06, 2020 - 6:48 PM

## Transmittal Information

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**Appellate Court Case Title:** State of Washington v. John Warren Epps, Jr.  
**Superior Court Case Number:** 17-1-00181-8

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