

NO. 64754-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW ALAN TEMPLE,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE THERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Officers responded to a domestic violence assault at the defendant's home. The assault involved an axe which the defendant placed in his locked bedroom before the police arrived on the scene. Officers obtained a search warrant and entered the defendant's bedroom. In a search of the defendant's room, officers observed and seized an axe, methamphetamine and a glass meth smoking pipe. This appeal deals solely with the validity of the warrant and the seizure of the methamphetamine and pipe.¹

1. Should this Court reject the defendant's claim that the warrant was invalid because it was issued by a court that does not exist?

2. Should this Court reject the defendant's factual claim that there were certain procedural CrRLJ 2.3 violations involving the execution and return of the warrant and inventory?

3. Should this Court reject the defendant's argument that this Court should overturn prior caselaw and find that procedural

¹ The defendant was charged with second-degree assault and possession of methamphetamine but when the State could not procure the assault victim's presence at trial, that count was dismissed. CP 60-61; 3RP 3-4. The verbatim report of proceedings is cited as follows: 1RP--10/28/09, 2RP--10/29/09, 3RP--11/3/09, and 4RP--11/4/09.

noncompliance with CrRLJ 2.3 rules requires invalidation of the warrant with no showing that the defendant was prejudiced?

4. Should this Court reject the defendant's argument that the warrant was invalid because it was overbroad and lacked particularity?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was convicted by a jury of one count of violation of the uniform controlled substances act, possession of methamphetamine. CP 102. On December 11, 2009, he received a standard range sentence of three months confinement with 30 days converted to community service. CP 62-68.

2. SUBSTANTIVE FACTS

Prior to trial, the defendant raised a motion to suppress the evidence seized as a result of a search of his bedroom. CP 23-44. The evidence seized consisted of an axe, a quantity of methamphetamine, and a glass meth pipe. Pretrial Exhibit 5. The search was authorized pursuant to a search warrant obtained under CrRLJ 2.3. Pretrial Exhibit 4. The court held a CrR 3.6 hearing on

October 28, 2009. 1RP. The issues raised herein rely primarily on the affidavit for the search warrant and the search warrant, both of which are reproduced in pertinent part below.

Affidavit for Search Warrant

The undersigned on oath states: I believe that;
(X) Evidence of the crime(s) of Assault 2nd Degree,
(X) Contraband, the fruits of a crime, or other things otherwise criminally possessed, (X) Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed...is/are located in, on, or about the following premises, vehicle, or person:

Residence:

The single family home located at 38375 SE Northern ST in the City of Snoqualmie, County of King, State of Washington.

This premise is a two-story single family dwelling on the south side of SE Northern ST about 50 yards south of Railroad Ave. The building is painted yellow with a front door facing east. The numbers "38375" are displayed near the front door. A driveway runs along the west side of the main building, which leads to a one car garage at the Southwest corner of the property.

My belief is based on the following facts and circumstances:

Your affiant states:

My name is Daniel Moate. I am a police officer with the City of Snoqualmie, where I have been employed as a fully commissioned police officer since February 2008. Prior to that I was a fully Commissioned Police Officer with the City of Algona from August 2000 until

February 2008. I am a successful graduate of the Washington State Criminal Justice Training Commission Basic Law Enforcement Academy, which consisted of 720 hours of training to include criminal investigation, crime scene investigation, searches and seizures, narcotics investigations along with other police related training. I have attended a 40 hour homicide investigation course which included crime scene processing, photography, suspect/victim interviewing, and case preparation.

In addition to my regular duties I am a detective with the Coalition of Small Police Agencies Major Crimes Task Force of King County. I have been involved in numerous investigations into homicides, robberies, assaults, and domestic violence complaints.

INVESTIGATION:

I am a Detective assigned to the Coalition of Small police agencies "Major Crimes Task Force." My information in case is based on the statements of officers who conducted investigations at the scene of the crime and relayed that information to me. I have reviewed the following case and believe there is probable cause for the above listed charges based on the following investigation:

On 12-10-2008 at about 2033 hours Officer Nigel Draveling, Chief James Schaffer, and Sergeant Robert Keeton responded to 38375 as a result of a 911 call regarding the sounds of a female screaming. The 911 call was disconnected.

The listed officers arrived at the residence and located a resident, know as Matthew Alan Temple DOB/07-12-1975. Temple is known to officers as a long time resident of this address. The officers asked Temple about the 911 call and if there had been a dispute. Temple denied that any dispute or altercation had occurred and told the officers that there was a female in the residence.

Officer Draveling located Jessica Lee Allen DOB/02-26-1979 in an upstairs bedroom. Allen had barricaded herself in the bedroom and refused to come out until the officers came to her. Allen said she was hiding from Temple. Officers noted Allen appearing in distressed manor. [sic]

Jessica Allen told Officer Draveling that she and Matthew Temple were in a dating/romantic relationship in which they lived together. Allen said the relationship recently changed direction and she moved into another room. On this night the two commenced an argument regarding the relationship.

Temple, who is the main tenant of the home, confronted Allen in the kitchen. Temple told Allen that she had to move out. During a heated argument regarding the living arrangement Temple said "I want you to die" and retrieved an axe/hatchet. Allen said that Temple held the axe up with both hands in a threatening manor [sic] with the blade pointed down towards her body; the manor [sic] was described by Allen as a posture one would take when chopping wood. Allen said Temple stated, "Keep on smiling bitch." Allen said she told Temple that she was going to call 911 at which time he took one hand off the axe and struck Allen in the face with his fist, while maintaining the threatening posture with the axe with the other hand. Temple then said, "Now you have a reason to call the police."

Allen said she feared for her life and fled to the upstairs room while calling 911 with her cell phone. Allen said she barricaded herself in the bedroom to prevent Temple from attacking her further.

Officer Draveling observed redness and swelling around Allen's right eye. Allen told officers that Temple secured the axe in his bedroom on the bottom floor of the house, and locked the door to the bedroom. Temple told officers that he did put the axe

in the bottom floor bedroom, but denied that it was used to threatening [sic] or assault Allen.

Based on the above listed facts and information I believe there is evidence of assault contained in the above listed residence in the City of Snoqualmie, County of King, State of Washington.

At this time I request authorization to search the described residence and secure the described weapon and any other evidence of this crime or any other that may be contained within said residence.

Pretrial Exhibit 7.

The affidavit was signed and approved by District Court Judge Linda Jacke. Id.

The search warrant contained the caption "Redmond District Court King County" and read in pertinent part:

To any peace officer in the State of Washington:

Upon sworn complaint made before me, there is probable cause to believe that the crime(s) of RCW 9A.36.021 Assault in the 2nd degree has been committed and that evidence of that crime; contraband, the fruits of the crime, or things otherwise criminally possessed, or weapons or other things by means which a crime had been committed or reasonably appears about to be committed; or a person for whose arrest there is probable cause, or who is unlawfully restrained is/are concealed in or on certain premises, vehicles, or persons.

You are commanded to:

1. Search within three (3) days of this date, the premises, vehicle or person(s) described as follows:

The single family home located at 38375 SE Northern ST in the City of Snoqualmie, County of King, State of Washington.

This premise is a two-story single family dwelling on the south side of SE Northern ST about 50 yards south of Railroad Ave. The building is painted yellow with a front door facing east. The numbers "38375" are displayed near the front door. A driveway runs along the west side of the main building, which leads to a one car garage at the Southwest corner of the property.

2. Seize and search, if located, the following property or person(s):

Any dangerous weapons, firearms, blade weapons, or tools that appear to be used as a weapon in the commission of the crime(s); specifically a wood handled axe; all ammunition and shell casings, spent or otherwise that may have been used or a result of the crime; any evidence establishing domain [sp] and control of weapons located, to include damage to the property, by axe, knife or firearm; evidence of examination, by taking video and photographs of the crime scene; canceled mail, rental agreements, utility bills, notices from governmental agencies, and other documents showing dominion and control of the premises; documents, photographs or receipts that show ownership of any firearms.

3. Promptly return this warrant to me, or the clerk of this court. The return must contain an inventory of all property seized.

A copy of the warrant and receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be

conspicuously posted at the place where the property is found.

Pretrial Exhibit 4.

The warrant was signed and approved by District Court Judge Linda Jacke. Id.

Pretrial Exhibit 5, not reproduced here, is the inventory and return of search warrant. The document indicates that the following property was seized: a three foot grey fiberglass handled axe, a metal container with a glass smoking pipe, and a transparent plastic cylindrical container with a white crystallized substance inside. Pretrial Exhibit 5. The document lists the person present when the property was seized and when the inventory was made as Jessica Allen. Id. Allen is a resident of the home and the victim of the domestic violence assault. 1RP 15-17. The document also indicates that Jessica Allen was served with a copy. The inventory and return of warrant was signed by Officer Nigel Draveling. Id.

When the search warrant was executed, Amy Zachary, another resident of the home, was allowed to reach inside the bedroom door and take control of the defendant's pit bull that was locked inside. 1RP 26. As she grabbed the defendant's pit bull, she also grabbed the axe that was sitting just inside the door.

1RP 26. Officer Nigel Draveling then entered the room to search for weapons and evidence of the defendant's dominion and control over the axe and the room. 1RP 25-29. In plain sight sitting on top of a dresser in the defendant's bedroom, Officer Draveling observed the methamphetamine. 1RP 27. At the same time, Officer Draveling observed the glass meth pipe in an open drawer of the dresser. 1RP 27.²

Additional facts are included in the sections they pertain.

C. ARGUMENT

The defendant makes both non-constitutional and constitutional challenges to the search warrant that led to the discovery of the methamphetamine in his bedroom--the basis of his conviction. The defendant's arguments are not well taken. The warrant provided probable cause to enter and search the defendant's room for evidence of second-degree assault--which included the weapon allegedly used in the assault, as well as items

² The facts in the above paragraph are taken from the pretrial CrR 3.6 hearing. These are essentially the same facts that were introduced at trial and that led to the defendant's conviction. See 3RP 106-12, 115-16. There does not appear to be a need to reproduce the trial facts here. It is sufficient to note that if the evidence seized from the defendant's room were suppressed, there would be insufficient evidence to support the defendant's conviction.

of dominion and control. Lawfully in the defendant's bedroom, the police were permitted to seize any obvious contraband observed in plain view, which included the methamphetamine and meth pipe. Any overbreadth in the scope of the warrant played no part in the validity of the warrant. Any procedural defects in the execution of the warrant were not prejudicial.

1. THE KING COUNTY DISTRICT COURT HAS THE POWER TO ISSUE A SEARCH WARRANT.

The defendant cites to State v. Canady,³ and argues that the court that issued the search warrant does not legally exist and therefore the search warrant was invalid. The defendant bases his entire argument on the fact that the caption on the warrant says "Redmond District Court King County," a court he claims does not exist. The defendant's argument and reliance on Canady is misguided.

Canady was convicted of possession of marijuana after a grow operation was discovered in his home. The search warrant that led to the discovery of the grow operation was obtained from a *pro tempore* judge sitting in Department 4N of the Seattle Municipal

³ 116 Wn.2d 853, 809 P.2d 203 (1991).

Court. The Supreme Court held that the warrant was invalid. The problem was that the City of Seattle never enacted an ordinance creating Department 4N, and in addition, *pro tempore* judges were authorized only to sit in the stead of a sitting judge, a sitting judge that in Canady's case did not exist in Department 4N. Canady, 116 Wn.2d at 855-56; see also In re Eng, 113 Wn.2d 178, 194-95, 776 P.2d 1336 (1989). Here, there is no question but that the court and judge had the power to issue a search warrant.

A judge sitting in a court of limited jurisdiction (a District Court), has the authority to issue a search warrant. See CrRLJ 2.3. Here, the defendant does not contest that Linda Jacke, the judge who authorized the warrant, was, and still is, a duly elected King County District Court Judge. According to the King County District Court's web page, Judge Jacke works in the "East Division" of King County District Court "[a]ssigned to Redmond." See <http://www.kingcounty.gov/courts/districtcourt/locations>.

The King County District Court is organized as a "single district court" with multiple "court facilities within the unified district." KCC 2.68.070. The facilities and divisions are as follows:

Southeast division: City of Kent
Southwest division: City of Burien
Vashon business district
Northeast division: City of Bellevue
City of Issaquah
City of Redmond
Shoreline division: City of Shoreline
West Division: City of Seattle

KCC 2.68.070. Although each facility is part of the unified King County District Court, they are commonly referred to by either their division or city location. See, e.g., State v. Lee, 135 Wn.2d 369, 373, 957 P.2d 741 (1998) (phrase "Shoreline District Court" used to refer to the King County District Court facility in the City of Shoreline, Shoreline Division); City of Seattle v. Allison, 148 Wn.2d 75, 85, 59 P.3d 85 (2002) (phrase "Bellevue District Court" used to refer to the King County District Court facility in the City of Bellevue, Northeast Division); State v. Miller, 156 Wn.2d 23, 25, 123 P.3d 827 (2005) (phrase "Northeast District Court" used to refer to the King County District Court facility in the City of Redmond, Northeast Division); State v. Templeton, 148 Wn.2d 193, 203, 59 P.3d 632 (2002) (phrase "King County Northeast District Court" used to refer to the King County District Court facility in the City of Redmond,

Northeast Division; phrase "Seattle District Court" used to refer to the King County District Court facility in the City of Seattle, West Division).

While the defendant may believe that the warrant caption should have contained different language to more specifically identify the issuing court, he cites no authority for the proposition that the wording of the caption means that the issuing court had no authority to issue a warrant. A reviewing court interprets "search warrants in a common sense, practical manner, rather than applying a hyper-technical standard." State v. Brewer, 148 Wn. App. 666, 676, 205 P.3d 900 (internal punctuation omitted) (quoting State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997)), rev. denied, 166 Wn.2d 1016 (2009). In close cases, a reviewing court must resolve doubts in favor of upholding a warrant's validity. State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975).⁴ There can be no question here but that the caption on the warrant, "Redmond District Court King County" refers to the King County District Court facility located in Redmond, the Northeast

⁴ While these cases generally pertain to a court reviewing the affidavit supporting probable cause and the language of the warrant itself, it would be nonsensical to have a totally different, higher and hyper-technical standard when reviewing the caption of the warrant or some other part of the warrant.

Division--the district court Judge Linda Jacke is assigned--and that it is a lawfully created court with the power to issue search warrants.

2. ANY PROCEDURAL NONCOMPLIANCE WITH CrRLJ 2.3 WAS OF NO MOMENT.

The defendant contends that there were certain procedural violations of CrRLJ 2.3 that occurred in his case, and therefore, the search warrant was invalid and the evidence in his case should have been suppressed. This claim has no merit for two reasons. First, there was no evidence presented supporting the defendant's factual assertions and therefore the trial court never made any finding that there were any procedural violations of CrRLJ 2.3. Second, even if there was procedural noncompliance, a defendant must prove that he was prejudiced by the alleged procedural violations before a warrant will be ruled invalid or evidence suppressed--a burden the defendant has not met here.

In issuing a search warrant under CrRLJ 2.3, there are certain procedural requirements placed upon the issuing court and the obtaining police agency or officer. Among the requirements are the following: There must be an affidavit or sworn testimony

establishing grounds for the issuance of the warrant. The warrant must designate the court to which it shall be returned after execution, and upon return, the warrant will be filed in the public files. CrRLJ 2.3(c).

In addition, the officer taking property under the warrant must give the person from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If the person is not present, a copy may be posted. The return of the warrant shall be made promptly to the issuing court accompanied by a written inventory of the property seized. The inventory shall be made in the presence of the person or at least one person other than the officer making the inventory. CrRLJ 2.3(d).

By rule, and by case law, procedural noncompliance with CrRLJ 2.3 does not invalidate a warrant or otherwise require suppression of evidence absent a showing of prejudice to the defendant. The rule specifically provides that:

Absent prejudice to the defendant, procedural noncompliance with rules of execution and return does not compel invalidation of a warrant or suppression of its fruits.

CrRLJ 2.3(g). A plethora of cases have affirmed the rule that a defendant must prove prejudice before a court will invalidate for

procedural noncompliance a warrant that is otherwise supported by probable cause. See, e.g., State v. Parker, 28 Wn. App. 425, 426, 626 P.2d 508 (1981) (peace officer served an unsigned copy of the warrant--warrant valid); State v. Wraspir, 20 Wn. App. 626, 629, 581 P.2d 182 (1978) (officer did not take inventory in the presence of another person--warrant valid); State v. Bowman, 8 Wn. App. 148, 150, 504 P.2d 1148 (1972) (officer failed to properly serve the defendant with the warrant--warrant valid); State v. Smith, 15 Wn. App. 716, 719, 552 P.2d 1059 (1976) (warrant did not designate magistrate for warrant return--warrant valid); State v. Kern, 81 Wn. App. 308, 311, 914 P.2d 114 (officer failed to properly file the inventory and warrant return--warrant valid), rev. denied, 130 Wn.2d 1003 (1996).

Here, at the CrR 3.6 hearing, the court was presented with the affidavit for search warrant (see Pretrial Exhibit 7; CP 34-36, 55-75), the search warrant (see Pretrial Exhibit 7; CP 37-38, 58-59), and the inventory (see Pretrial Exhibit 5; CP 39). The court also heard the testimony of Officer Robert Keeton and Officer Nigel Draveling. 1RP 5, 14.

On appeal, the defendant asserts that the return of warrant, affidavit and inventory were not filed with the issuing court. He also

asserts that he was not provided with a copy of the warrant or a receipt for the property taken and that the inventory was not made in the presence of another person. Def. br. at 29. These claims, however, were not presented in the defendant's CrR 3.6 motion to the trial court.

When a defendant raises a motion to suppress in the trial court, the motion "shall be in writing supported by an affidavit or document...setting forth the facts the moving party anticipates will be elicited at a hearing." The defendant did file a written motion to suppress in the trial court as required. See CP 23-44. In his written motion, he raised three legal issues--a claim that the warrant was overbroad, a claim that the issuing court did not exist, and a claim that there was no nexus between the items sought in the warrant and the place to be searched. CP 23-24. Nowhere in his written motion did the defendant claim that the procedural violations he now claims occurred, and nowhere in his written motion did he provide any facts supporting his claim as required by CrR 3.6.

During the CrR 3.6 hearing--a hearing that addressed the factual and legal issues actually raised, one of the officers was questioned about the warrant paperwork. Officer Nigel Draveling

testified that Officer Daniel Moate wrote the affidavit for the warrant, that Judge Linda Jacke signed the warrant, that Officer Moate brought the warrant to the defendant's residence, and then the search was conducted. 1RP 30-31, 40. A copy of the warrant was left in the defendant's kitchen. 1RP 51. Although he was not specifically asked about a receipt for property, Officer Draveling testified that the "search warrant stuff," except for the inventory, was left on the kitchen table of the defendant's residence. 1RP 47.

Officer Draveling also testified that he completed the inventory and that he then faxed it to Judge Jacke. 1RP 30-31. When then asked if he had a specific memory of faxing the inventory and return of warrant, Officer Draveling said he believed he did so but that it has been awhile. 1RP 30-31, 44. He added that Judge Jacke is very good at calling if she does not get the proper paperwork returned and that there are a lot of checks and balances to make sure the paperwork is properly filed. 1RP 30-31, 44. Officer Draveling testified that a copy of the inventory would have been mailed to the defendant by the records department. 1RP 45. The officer was never asked who was present when he conducted the inventory. The inventory document indicates

Jessica Allen was present when the inventory was made. Pretrial Exhibit 5.

The defendant did not testify at the CrR 3.6 hearing and did not put on any evidence. Thus, there was no evidence before the trial court that the factual allegations the defendant now asserts actually occurred.⁵

The defendant did belatedly raise the assertions he now complains, although he raised them post-testimony. 2RP 19. The prosecutor noted that the assertions had not been raised in the defendant's written motion as required. 2RP 36. The court noted that there was no evidence before the court on the issue other than Officer Draveling's testimony. 2RP 21. Thus, the court ruled that it could not determine if the defendant's allegations were true, but even if they were, any failures were procedural in nature and the

⁵ On appeal, the defendant relies heavily on a declaration prepared by his trial attorney wherein he makes certain factual averments. See CP 78-79. The CrR 3.6 hearing was held on October 28, 2009. 1RP. This declaration was not filed with the trial court until January 11, 2010--the same day the defendant filed his notice of appeal. CP 69-77. This was over two months after the court ruled on the motion. See 2RP 20. The declaration was not presented to the trial judge at the CrR 3.6 hearing, and thus the alleged factual averments contained therein have not been subjected to any scrutiny or cross-examination. It is improper to attempt to supplement the record in this manner, with facts that were not before the trial court. Should the defendant wish to supplement the record with facts that were not before the trial court, he can always bring a personal restraint petition. Otherwise, the declaration of counsel filed months after the CrR 3.6 hearing should not be considered by this Court.

defendant could not show any prejudice. 2RP 21, 39-40; CP 113-16. In short, this issue is foreclosed to the defendant because the factual predicates necessary to prove his legal claim are not in the record before the court.

In any event, even if his factual assertions were proven true, the defendant fails to identify any prejudice. The inventory, affidavit for warrant, return of warrant and the warrant were all made available to counsel and the court. There was no allegation that they were not true and accurate originals or copies of the originals. Further, there is no dispute that the fundamental constitutional requirements of a warrant were met here--that the issuing magistrate be neutral and detached and capable of determining whether probable cause exists for the requested search. State v. Werner, 129 Wn.2d 485, 495, 918 P.2d 916 (1996) (citing Shadwick v. City of Tampa, 407 U.S. 345, 92 S. Ct. 2119, 32 L. Ed. 2d 783 (1972)).

Apparently because he can show no prejudice, the defendant cites to a few out-of-state cases and argues that the rule in Washington is wrong--invalidation of the warrant is required even when no prejudice is shown.

The defendant cites to State v. Montoya, 86 N.M. 119, 520 P.2d 275 (1974) for the proposition that a warrant is void for certain rule noncompliance. However, the defendant's reliance of Montoya fails for two reasons. First, Montoya never had precedential value even within the court's own jurisdiction. The portion of the opinion relied upon by the defendant was a position held by a single judge of a three judge panel,⁶ thus it had no precedential value. See State v. Malloy, 131 N.M. 222, 226, 34 P.3d 611 (stating that the single judge's opinion in Montoya is not a "decision of this Court" and has no precedential value), cert denied, 130 N.M. 722 (2001). Second, the single judge's opinion in Montoya was subsequently rejected. Molloy, 131 N.M. at 225-26; see also State v. Dietrich, 145 N.M. 733, 742, 204 P.3d 748 (recognizing abrogation of Malloy), cert. denied, 145 N.M. 704 (2009).

The defendant's citation to Berger v. State of New York, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967) and United

⁶ One judge in Montoya would have suppressed evidence obtained via a search warrant because the warrant did not require the executing officer to return the warrant and inventory to the court and the warrant and inventory were never returned. A second judge criticized this position but agreed that evidence should have been suppressed by the trial court because the facts contained in the affidavit did not meet the probable cause standard. A third judge dissented.

States v. Eastman, 465 F.2d 1057 (3rd Cir. 1972) are also of no moment. Berger involved an eavesdropping statute that allowed for the issuance of a warrant with no requirement for particularity of the crime committed or being committed, no particularity for the place to be searched and no particularity as to the conversation sought to be recorded. This was found to be in direct contravention of the Fourth Amendment. The case had nothing to do with noncompliance with procedural rules.

Equally non-pertinent, Eastman involved a wiretap statute that included within its provisions that suppression is the remedy for any violation of the statute--a situation that does not exist here. In fact, as stated above, CrRLJ 2.3(g) provides the exact opposite, allowing suppression as a remedy only upon a showing of prejudice.⁷

Finally, the defendant cites to People v. Washington, 75 Misc.2d 1005, 349 N.Y.S.2d 544 (N.Y. Dist. Ct. 1973), but this case is factually very different and it does not support the proposition that

⁷ As discussed in State v. Curry, 103 Idaho 332, 337, 647 P.2d 788 (1982), this is the prevailing rule.

Washington's rule of law is incorrect. In People v. Washington, there was a complete lack of evidence before the court. The police claimed that they filed a return of warrant and inventory but there was no evidence before the court--no warrant, return of warrant or inventory. In short, with "no such items before the court" the court stated that there were "no grounds upon which the court can deny the motion to suppress." Id. Here, the evidence--the warrant, return of warrant, affidavit, and inventory, were all before the court.

The doctrine of *stare decisis* requires "a clear showing that an established rule is incorrect and harmful before it is abandoned." In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). The defendant's citation to these out-of-state cases fails to meet this burden. As case law and the court rule require, a defendant must prove prejudice before suppression of evidence or invalidation of a warrant can be used as a remedy for procedural violations of the rules regarding a search warrant.

3. THE SEARCH WARRANT MET THE PARTICULARITY REQUIREMENTS OF THE FOURTH AMENDMENT AND ANY OVERBREADTH IS SEVERABLE WITHOUT INVALIDATING THE WARRANT.

The Fourth Amendment mandates that warrants describe with particularity the things to be seized.⁸ State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). This requirement serves two functions, it limits the executing officer's discretion and it informs the person subject to the search what items may be seized. State v. Higgins, 136 Wn. App. 87, 91, 147 P.3d 649 (2006) (citing State v. Riley, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993)).

A warrant that does meet the particularity requirement is overbroad. A warrant can be overbroad either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist. State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), aff'd, 152 Wn.2d 499 (2004). An overbroad warrant is not necessarily invalid. Rather, "[u]nder the severability doctrine, infirmity of part of a warrant requires the

⁸ The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

suppression of evidence seized pursuant to that part of the warrant but does not require suppression of anything seized pursuant to valid parts of the warrant." Perrone, 119 Wn.2d at 556 (quoting United States v. Fitzgerald, 724 F.2d 633, 637 (8th Cir. 1983), cert. denied, 446 U.S. 950 (1984)).

Here, the defendant claims that the warrant did not meet the particularity requirement of the Fourth Amendment because it did not specify the particular prong of the second-degree assault statute the defendant was alleged to have committed and thus the warrant authorized a general search for evidence. The defendant relies on Higgins, supra, to support his argument.

Higgins was alleged to have pointed a gun at his wife in his house and fired the weapon. A warrant was issued to search for evidence of the assault. In Higgins, like here, the warrant did not specify which prong of the second-degree assault statute Higgins was alleged to have committed. However, unlike here, this was not the only problem with the warrant. The warrant in Higgins also did not describe with any particularity the property that could be seized. Rather, the warrant simply authorized the seizure of "evidence of a crime, to wit: Assault 2nd DV." Higgins, at 90. As the court noted, second degree assault can be committed, for example, by

intentionally causing harm to an unborn quick child or by administering poison to the victim. Higgins, at 93 (referring to the six different ways [now seven] that second-degree assault can be committed). Thus, with no list of items that could be seized and no limitation on the crime alleged to have been committed, the warrant authorized the search for things such as poison or evidence that the victim was pregnant--items for which there was no probable cause.⁹ Id.

The problem that existed in Higgins does not exist here. While the warrant here did not state which prong of the second-degree assault statute the defendant was alleged to have committed, the warrant did provide a specific list of the property that could be seized pursuant to the warrant. See Pretrial Exhibit 4 paragraph number "2." While the list of property that could be seized was somewhat overbroad (see below), the warrant did not suffer from a lack of particularity, i.e., the warrant did not authorize

⁹ When this situation does exist--a clear lack of particularity, sometimes the problem can be remedied by incorporation of the affidavit in support of issuance of the search warrant, which presumably describes the alleged crime and evidence to be seized in greater detail. See Riley, 121 Wn.2d at 29-30. In point of fact, the affidavit in the Higgins case did describe the crime and the property to be seized with particularity but this did not solve the problem because the affidavit was not attached to the warrant with incorporating language as required for incorporation of the affidavit. Higgins, 136 Wn. App. at 92.

an unfettered general search. Thus, this aspect of the defendant's particularity argument fails. Still, the warrant here was overbroad but not fatally so.

Three factors are relevant to determine whether a warrant is overbroad:

(1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.

Higgins, at 91-92 (internal citations omitted). The State concedes that a portion of the warrant listing the items or property that could be seized under the warrant was overbroad. Specifically, there are no facts in the affidavit for search warrant providing probable cause to seize any firearms, shell cases or knives.

Probable cause requires a nexus between the alleged criminal activity and the items to be seized, and also a nexus between the item to be seized and the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). There are no facts in the affidavit that suggest that a firearm or knife was used in the crime of assault as alleged. Thus, the issuing court should not

have authorized the seizure of these items or related items, e.g., shell casings or ammunition.

As stated above, under the severability doctrine, infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant but does not require suppression of items seized pursuant to valid parts of the warrant. Perrone, 119 Wn.2d at 556. The severability doctrine applies where there is a "meaningful separation" that can be made on "some logical and reasonable basis" between the offending portion and the rest of the warrant. Maddox, 116 Wn. App. at 807. The policy behind the doctrine is described as follows:

It would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and magistrate erred in seeking and permitting a search for other items as well.

Perrone, 119 Wn.2d at 556.

The court in Maddox reasoned that the severability doctrine applies when at least five requirements are met. The five requirements are: 1) the warrant must lawfully have authorized entry into the premises, 2) the warrant must include one or more particularly described items for which there is probable cause,

3) the part of the warrant that is supported by probable cause must be significant when compared to the warrant as a whole, 4) the searching officers must have found and seized the disputed items while executing the valid part of the warrant, and 5) the disputed items must not have been found as part of a generalized search, "i.e., a search in which they flagrantly disregarded the warrant's scope." Maddox, at 808-09. All five factors are met here.

First, the affidavit supports the probable cause determination that the defendant committed an assault upon Jessica Allen with, and while armed with, an axe or hatchet while the two were in the kitchen of the residence searched. Additionally, the affidavit stated that the defendant informed the police that the axe was in his locked bedroom. Thus, the warrant lawfully authorized entry into the house and bedroom.

Second, the warrant directed the police to seize both the weapon used and items that demonstrated dominion and control over the weapon and place the weapon was found. Thus, the warrant contained "one or more particularly described items for which there is probable cause."

Third, the main focus of the warrant was obtaining evidence of the crime as committed--the axe used in the commission of the

crime and proof that the defendant possessed the axe during the commission of the crime, i.e., the items of dominion and control. The inclusion of firearms and knives, while maybe laudable by the officers,¹⁰ was not the major focus of the warrant. Thus, the part of the warrant that was supported by probable cause--the actual weapon used in the assault and proof of possession of the weapon is significant when compared to the warrant as a whole.

Fourth, Officer Draveling discovered the methamphetamine while searching at least in part for items of dominion and control. 1RP 26-28. Thus, the evidence in question was found and seized while executing the valid part of the warrant.

Fifth, there was no evidence presented that Officer Draveling exceeded the scope of the warrant or conducted a general search. In fact, the evidence suggests he conducted a cursory search at best, and discovered the methamphetamine and glass meth pipe without opening any container, drawer or other item and without moving or looking under any item--even though this would have been allowed under the warrant if needed to find evidence of dominion and control.

¹⁰ Officer Draveling testified that "we wanted to take those weapons that he could use to further hurt somebody and make sure we secure them." 1RP 25.

4. THE METHAMPHETAMINE AND GLASS SMOKING PIPE WERE IN PLAIN VIEW IN A LOCATION THE POLICE HAD A LEGAL RIGHT TO BE AND THUS THE ITEMS WERE LAWFULLY SEIZED.

If Officer Draveling had a legal right to be in the defendant's room, i.e., there was a lawful search warrant, items that are outside the scope of the warrant but that are obvious contraband and observed in plain view can be lawfully seized. State v. Lair, 95 Wn.2d 706, 714, 630 P.2d 427 (1981); State v. Olson, 32 Wn. App. 555, 558-59, 648 P.2d 476 (1982).

The Fourth Amendment protects against unreasonable searches. State v. Athan, 160 Wn.2d 354, 373, 158 P.3d 27 (2007). Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The United States and Washington constitutions thus protect a person's home from warrantless searches. State v. Kull, 155 Wn.2d 80, 84, 118 P.3d 307 (2005).

There are exceptions to the warrant requirement. Kull, 155 Wn.2d at 85. "Plain view" is one such exception. The plain view doctrine has three elements (1) a prior justification for the police intrusion, (2) inadvertent discovery of the incriminating evidence, and (3) immediate knowledge by the officer that he had evidence

before him. Lair, 95 Wn.2d at 714 (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). All these elements are met here. The search warrant provided lawful access to the defendant's bedroom. Officer Draveling was not looking for drugs or rummaging through every nook and cranny of the defendant's room. Rather, the methamphetamine and the glass smoking pipe were out in the open--on the top of the dresser and in an open drawer. And finally, Officer Draveling knew immediately that the items were contraband. 1RP 29.

The Lair case is directly on point. In Lair, police obtained a search warrant to look for evidence of marijuana. During the course of the search, an officer found a small folded paper packet, and despite knowing that the packet did not contain marijuana, the officer opened the packet and discovered it contained cocaine. Lair, at 717. The Supreme Court upheld the seizure of the cocaine because the search warrant provided the authority to be in Lair's residence, the finding of the packet was inadvertent and from past experience, the officer knew immediately that the packet likely contained a controlled substance.

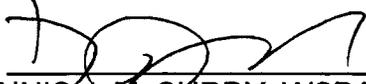
D. **CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 20 day of October, 2011.

Respectfully submitted,

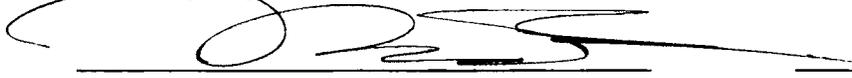
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Scott Wonder, the attorney for the appellant, at 155 108th Ave NE, Suite 700, Bellevue, WA 98004, containing a copy of the Brief of Respondent, in STATE V. TEMPLE, Cause No. 64754-7-I, in the Court of Appeals, Division I, for the State of Washington.

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


Name _____ Date 10-20-11
Done in Seattle, Washington