

FILED  
DEPT. OF SOCIAL SERVICES  
JUL 17 2007  
COWLITZ COUNTY, WA  
DM

NO 33672-3-II.  
Cowlitz County No 03-1-00133-1.

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**BROR ANDERS SODERLIND**

**Appellant.**

---

**BRIEF OF APPELLANT**

---

ANNE CRUSER/WSBA #27944  
Attorney for Appellant

P. O. Box 1670  
Kalama, WA 98625  
360 - 673-4941

**TABLE OF CONTENTS**

**A. ASSIGNMENT OF ERROR.....1**

**I. THE TRIAL COURT ERRED IN DENYING MR. SODERLIND'S MOTION FOR RELIEF FROM JUDGMENT UNDER CrR 7.8 (b)..... 1**

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....1**

**I. THE TRIAL COURT ERRED WHEN IN DENIED MR. SODERLIND'S MOTION FOR RELIEF FROM JUDGMENT BECAUSE CCO RONGEN LACKED THE LEGAL AUTHORITY TO ENTER THE RESIDENCE AT 646 ENGLERT ROAD. .... 1**

**C. STATEMENT OF THE CASE.....1**

**D. ARGUMENT.....16**

**1. THE TRIAL COURT ERRED WHEN IT DENIED MR. SODERLIND'S MOTION FOR RELIEF FROM JUDGMENT BECAUSE CCO RONGEN LACKED THE LEGAL AUTHORITY TO ENTER THE RESIDENCE AT 646 ENGLERT ROAD. .... 16**

**E. CONCLUSION.....33**

## TABLE OF AUTHORITIES

### **Cases**

<i>State v. Barnes</i> , 96 Wn.App. 217, 978 P.2d 1131 (1999).....	27
<i>State v. Collins</i> , 121 Wn.2d 168, 847 P.2d 919 (1993) .....	27
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002) .....	27
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	22
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986).....	27
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999) .....	23
<i>State v. Leach</i> , 113 Wn.2d 735, 782 P.2d 1035 (1989) .....	22
<i>State v. Littlefair</i> , 129 Wn.App. 330, 340 (2005) .....	23, 24, 33, 34, 35
<i>State v. Mance</i> , 82 Wn.App. 539, 918 P.2d 527 (1996) .....	33
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	30
<i>State v. Miller</i> , 91 Wn.App. 181, 955 P.2d 810 (1998) .....	22
<i>State v. Morse</i> , 156 Wn.2d 1 (2005).....	22, 23, 24, 30
<i>State v. Nall</i> , 117 Wn.App. 647, 72 P.3d 200 (2003) .....	30, 32, 33
<i>State v. Patterson</i> , 51 Wn.App. 202, 752 P.2d 945 (1988) .....	25, 26
<i>State v. Rife</i> , 133 Wn.2d 140, 943 P.2d 266 (1997).....	27
<i>State v. Simms</i> , 10 Wn.App. 75, 516 P. 2d 1088 (1973).....	24, 25
<i>State v. Thorson</i> , 98 Wn.App. 528, 990 P.2d 446 (1999).....	34
<i>State v. Turner</i> , 114 Wn.App. 653, 59 P.3d 711 (2005).....	23
<i>State v. Wallin</i> , 125 Wn.App.648, 105 P.3d 1037 (2005) .....	24, 30, 31, 32
<i>State v. White</i> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	23, 27

### **Statutes**

RCW 69.50.401 (a) (1) .....	1
RCW 69.50.401 (d).....	1
RCW 9.94A.631 .....	25
<i>State v. Lucas</i> , 56 Wn.App. 236, 243-44, 783 P.2d 121 (1989) .....	26
<i>State v. Massey</i> , 81 Wn.App. 198, 913 P.2d 424 (1996) .....	26

### **Rules**

CrR 7.8.....	1, 4, 16, 17
CrR 7.8 (b) (2) .....	4
CrR 7.8 (b) (3) .....	4, 17

**A. ASSIGNMENT OF ERROR**

**I. THE TRIAL COURT ERRED IN DENYING MR. SODERLIND'S MOTION FOR RELIEF FROM JUDGMENT UNDER CrR 7.8 (b).**

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

**I. THE TRIAL COURT ERRED WHEN IN DENIED MR. SODERLIND'S MOTION FOR RELIEF FROM JUDGMENT BECAUSE CCO RONGEN LACKED THE LEGAL AUTHORITY TO ENTER THE RESIDENCE AT 646 ENGLERT ROAD.**

**C. STATEMENT OF THE CASE**

On February 11<sup>th</sup>, 2003 the Cowlitz County Prosecuting Attorney charged Appellant, Bror Anders Soderlind with one count of manufacturing methamphetamine, contrary to RCW 69.50.401 (a) (1), and one count of possession of methamphetamine, contrary to RCW 69.50.401 (d). CP 2-3. This charge arose from evidence found during a warrantless search of a residence located at 646 Englert Road in Woodland, which was allegedly the residence of Terry Winterstein, a probationer under the supervision of the Department of Corrections. CP 40. Mr. Soderlind was living in one of the bedrooms in the house at 646 Englert Road. CP 13. The house clearly bore the address of 646 Englert Road. CP 78. A motorhome (RV) near the house bore the address of 646 ½ Englert Road. CP 78.

The warrantless search was conducted by Corrections Officer Kris Rongen and two other officers from DOC. RP (6-28-05), 27. The DOC officers also took officers from the Clark-Skamania Drug Task Force and the Cowlitz Wahkiakum Drug Task Force because he had been informed by Clark-Skamania that they believed there was a methamphetamine lab at 646 Englert Road. RP (6-28-05) 27-28. None of the task force officers participated in the initial, warrantless search of the home by the DOC officers. They were waiting outside. RP (6-28-05) 37, 95. In one of the bedrooms of the residence, which the DOC officers knew did not belong to Mr. Winterstein and was later determined to be Mr. Soderlind's, the officers observed items that they believed indicated the presence of a meth lab. RP (6-28-05), 93-94, 105. This observation was made from the threshold of the door. RP (6-28-05), 95.

Trial counsel for Mr. Soderlind, John Hays, filed a motion to suppress on June 5<sup>th</sup>, 2003. CP 12. This motion was based on Mr. Hays' belief, based on conversations with Mr. Soderlind, that Mr. Winterstein had changed his address with DOC prior to the search on February 6<sup>th</sup>, 2003. CP 41. Mr. Hays interviewed Kris Rongen in an attempt to verify the information given to him by Mr. Soderlind. CP 42. Mr. Rongen told him that Mr. Winterstein had come to DOC and changed his address using the Kiosk computer on February 6<sup>th</sup>, 2003, the same day as the search. CP

43. Mr. Rongen said there was no way to tell whether Mr. Winterstein visited the Kiosk before or after the search, and stated he had no way of knowing about the change of address because it happened on the same day. CP 43. Mr. Coppola, the deputy prosecutor, later informed Mr. Hays' that Mr. Rongen had confirmed for him that Mr. Winterstein changed his address on February 6<sup>th</sup>, 2003. CP 43. Based on this information, Mr. Hays' abandoned his suppression motion and advised Mr. Soderlind to accept the State's offer. CP 43.

On July 3<sup>rd</sup>, 2003, Mr. Soderlind entered a plea of guilty one count of manufacturing methamphetamine. CP 20. Although he and the State jointly recommended an exceptional sentence downward of thirty months' imprisonment, the Court imposed an exceptional sentence downward of forty months' imprisonment. CP 32.

On late December 20<sup>th</sup>, 2004, Mr. Winterstein proceeded to trial on the charge of manufacturing methamphetamine. After closing arguments were completed in the trial, counsel for Mr. Winterstein, Ian Northrip, and deputy prosecutor Heiko Coppola were reviewing the exhibits that had been admitted prior to them being submitted to the jury. CP 85. Exhibit 122 had been labeled "misc. documents." CP 84. Within these documents was a billing statement dated January 13<sup>th</sup>, 2003, addressed to Mr. Winterstein at 646 ½ Englert Road. CP 85. (Exhibit 4). This document

had never been provided to either Mr. Hays or Mr. Northrip during discovery. CP 85.

Following Mr. Winterstein's conviction, both Mr. Winterstein and Mr. Soderlind made motions under CrR 7.8. Mr. Soderlind moved for relief from judgment under CrR 7.8 (b) (2), allowing relief from judgment based on newly discovered evidence, and CrR 7.8 (b) (3) allowing relief from judgment based on the misrepresentation of an adverse party. CP 44. The State stipulated that this document showing that Mr. Winterstein had changed his address with DOC at least as early as January 13<sup>th</sup>, 2003, constituted newly discovered evidence as contemplated by CrR 7.8 (b) (2). Because the newly discovered evidence pertained to a suppression issue, the successful litigation of which would have required dismissal of the State's case, all parties agreed that Mr. Winterstein and Mr. Soderlind would litigate their respective motions in the form of a suppression motion. RP (6-28-05), 6. All parties stipulated that if the Court agreed that CCO Rongen lacked the legal authority to enter 646 Englert Road to look for Mr. Winterstein, based on Mr. Winterstein's prior change of address, then all evidence observed during the course of this warrantless entry and seized in the subsequent search warrant should have been suppressed and that relief from judgment and dismissal of the cases was required. *Id.* This motion was heard before the Honorable James Warne

on June 28<sup>th</sup>, 2005. It should be noted at this point that no findings of fact and conclusions of law were entered following this motion, so this entire statement of the case is based upon the Report of Proceedings, the Clerk's Papers and Exhibits.

The Court took testimony at the June 28<sup>th</sup> motion CCO Kris Rongen, and Cowlitz-Wahkiakum Task Force Detective Tim Watson. CCO Rongen testified that he is a community corrections officer who was previously assigned to the Longview office. RP (6-28-05), 16. On February 6<sup>th</sup>, 2003, Mr. Winterstein was a probationer under his supervision. Id. at 17. Rongen testified that probationers will meet with an intake officer, who reviews the conditions of supervision with the probationer, before they are assigned to a field officer (such as Rongen). Id. at 18. When an offender meets with the field officer, the CCO will again review the same written conditions with the offender that was provided to him by the intake officer. Id. at 19. The Court admitted exhibit 8, entitled "Standard Conditions," which was the document of written conditions given to Mr. Winterstein when he was placed on probation. Id. at 20, Exhibit 8.

These written conditions required, among other things, that the probationer secure written permission from the CCO before leaving the state; that the offender must remain within the geographical area as

directed by the Department of Corrections; that the offender obtain written permission from the CCO before traveling outside of the county in which he resides; and *notify* the community corrections officer before change of residence or employment. RP (6-28-05) 58-59, Exhibit 8. Rongen testified that he told Mr. Winterstein, as he tells all of his probationers, that prior to changing his address, he would need to come in and talk with him (Rongen) and get his permission (i.e. Rongen would have to “pre-approve the address). Id. at 21.

CCO Rongen also explained the Kiosk device at the Longview DOC office. He testified this is a machine which can do numerous things, such as take an impression of an offender’s hand, so that they can get a receipt showing they were there, and that an offender can change his address using this machine. Id. at 23. This Kiosk also might be referred to as the Genie. Id. at 54. He testified however, that under *his* conditions, an offender must meet with him and get permission to change his address before he could utilize the Kiosk to change his address. Id. at 24. When asked if changing one’s address with the Kiosk met DOC’s requirements, Rongen testified that the Kiosk simply doesn’t meet *his* requirements as a CCO. Id. at 107. He conceded, however, that he is an employee of DOC, that his authority as a community corrections officer is derived from the

authority given to him by DOC, and that he has no greater authority than DOC. Id.

Rongen admitted, however, that he instructs his probationers to use the Kiosk, and that the Kiosk specifically allows a probationer to notify a community corrections officer of a change of address:

Mr. Hays: “And, in fact, the Kiosk specifically allows a probationer to do a change of address; does it not?”

Rongen: “To notify an officer of a change of address.”

Mr. Hays: “To notify an officer of a change of address, that-that’s specifically what the Kiosk-what a person is allowed to do at the Kiosk, to notify?”

Rongen: “Correct.”

Id. at 64.

Mr. Northrip: “And the Department of Corrections has a machine in place, in the lobby of where you work?”

Rongen: “Correct.”

Mr. Northrip: “That allows people to change their address, correct?”

...

Rongen: “That it gives them the opportunity to change their address on the machine? Correct.”

Mr. Northrip: “And give notice to their CCO that they’ve done so?”

Rongen: "Correct."

Mr. Northrip: "And that means the DOC machine does not require them, before they do that, to get personal approval from you or anybody else?"

Rongen: "The machine? No."

Id. at 108.

Revealing his disdain for the Kiosk, CCO Rongen testified there is "no merit" to a change of address done at the Kiosk. Id. at 114. He stated: "...[T]o base my supervision off what a computer is asking somebody, instead of a face-to-face contact, that's not sufficient enough. That face-to-face contact is what generates my rapport; my understanding...where the violation behavior is, things of that nature. So I'm not gonna base information off the Kiosk reporting." Id. at 114. Rongen then grudgingly conceded that offenders are allowed to change their address at the Kiosk, and that the Department encourages offenders to use it. Id. at 115

CCO Rongen admitted that he has access to any information an offender puts into the Kiosk from the computer at his desk. Id. at 24, 63. Although he wouldn't open up that particular program on a daily basis, he would normally open it up before he went out to do a field contact. Id. at 24. He did not explain why, in spite of the fact he was aware an offender could change his address using the Kiosk, he did not check the database prior to the search on February 6<sup>th</sup>, 2003. Id. at 81.

CCO Rongen was asked when he first became aware of Mr. Winterstein's change of address, and he claimed it was March 18<sup>th</sup>, 2003. Id. at 66. Mr. Hays, counsel for Mr. Soderlind, confronted CCO Rongen with exhibit 3, which was a violation report generated by his office for Mr. Winterstein dated February 13<sup>th</sup>, 2006. That report bore the address of 646 ½. Exhibit 3. Notably, none of the violations alleged was for failure to notify his community corrections officer of a change of address. Exhibit 3. The report states it was submitted by Kris Rongen. Exhibit 3. It was signed, however, by an officer named Brad Phillips. Exhibit 3, RP (6-28-05), 69. This document was sworn under penalty of perjury. Exhibit 3. Rongen testified that this report would be generated off a computer program called Wizard, which is a component of the Kiosk Genie. Id. at 79. When asked if it was known, when this report was generated, that Mr. Winterstein's address was 646 ½ Englert Road, Rongen replied "By the computer. By the officer? No." Id. at 79. Unbelievably, Rongen then testified: "When I create a document such as this, that's based off of the computer, do I look at the stuff? *Not at all.* This is the only thing I have to change manually is who the report is going to, and that's the Judge." Id. at 79. In other words, Rongen would not, as a matter of practice, read a report that he declares to be true under penalty of perjury and submits to the court.

With regard to the incident on February 6<sup>th</sup>, 2003, CCO Rongen conceded before he went to Englert Road, he had met with the officers from both the Clark-Skamania and Cowlitz-Wahkiakum task forces at the Woodland Police Department early in the morning for a raid planning meeting. *Id.* at 99. The Task Force officers had informed Rongen, in seeking his help, that they believed there was a meth lab at 646 Englert Road, but that they didn't have enough evidence to obtain a search warrant. *Id.* 98. When he arrived at 646 Englert Road, he knocked on the door and announced himself. *Id.* at 28. At the same time, the door "came open." *Id.* When he entered, he went down the hallway to where the bedrooms were located. *Id.* He ordered the other people in the residence to have a seat in the living room. *Id.* Another officer went into the bedroom they believe to belong to Mr. Winterstein. *Id.* One of the people he encountered in the house was Sunshine O'Connor, who he believed was Mr. Winterstein's girlfriend. *Id.* at 29. Rongen asked her where Mr. Winterstein was and whether he still lived there. Both counsel for the defense objected. *Id.* *Id.* at 30. Oddly, when asked by the Court why he asked Ms. O'Connor if Mr. Winterstein still lived there, Rongen that it was for the purpose of verification, "just one more additional thing." *Id.* at 33. He testified that he works off the OBTS, or Offender Based Tracking System, with DOC. *Id.* at 33. "All of my information in there, and I have

to go to the supervisor and get approval, and on that is his correct address of 646, not 646 ½. So, based on that, based on his violation of failing to report, that's the address I went to, and that's the address I knew he resided at. So it's just one more additional thing." Id. Rongen was never asked why, if he had no actual knowledge that Mr. Winterstein had changed his address to 646 ½ Englert Road, he felt it necessary to ask Ms. O'Connor if Mr. Winterstein still lived there as a means to establish that his address was 646 Englert Road, not 646 ½ Englert Road.

Both Mr. Soderlind and Mr. Winterstein objected to Rongen's testimony about what Ms. O'Connor told him as hearsay. Id. at 32-34. The Court ruled that the comment fell within an exception to the hearsay rule because it was a "spontaneous answer to a question about a present, then-existing condition, and it has relevance to the issue of whether he was actually living there." Id. at 33. When Mr. Northrip asked the Court which exception to the hearsay rule he felt this testimony fell under, the Court replied "The one I just made up. I think it's a combination of spontaneous-spontaneous declaration and present-sense impression. Is he living there now? Yes. It has some indicia of reliability." Id. at 34. Once the objection was overruled, Rongen testified Ms. O'Connor replied yes, that Mr. Winterstein was still living there. Id. at 34.

Rongen testified he then went to the bedroom he believed to be Mr. Winterstein's and "verified Mr. Winterstein's room as being how I recollected from my last visit there..." Id. at 34. Again, Rongen was not asked why it was necessary to perform this verification when he had no reason to believe, according to him, that Mr. Winterstein had changed his address. Later, Rongen contradicted this testimony and testified that it was DOC Officer Matua who went into the bedroom believed to be Mr. Winterstein and that he asked Matua if "everything was set up the way it was the last time we were here visiting." Id. at 96. While looking in the area of the bedrooms, Rongen looked into another bedroom (later determined to be Mr. Soderlind's) and saw a scale with white residue on it, a jar of what appeared to be red phosphorous, and a meth pipe. Id. at 36. He then backed out and informed the Task Force officers of his discovery, and they subsequently obtained a search warrant. Id. at 37. Mr. Winterstein was not there at the time the DOC officers entered 646 Englert Road. Id. at 104.

The Court clarified with all parties that they agreed CCO Rongen had a well-founded suspicion that Mr. Winterstein had committed the violation of failure to report. Id. at 47. At this point, both counsel also raised, for the first time, the argument that the nature of Mr. Winterstein's conviction (misdemeanor malicious mischief) may not have provided

CCO Rongen the right, in spite of the probation violation, to search for and arrest Mr. Winterstein at his residence. *Id.* at 47-49. The Court declined to address that issue at that point, but returned to it at the close of the hearing.

Detective Watson of the Cowlitz-Wahkiakum Narcotics Task Force testified on behalf of the State. He testified that after he obtained a search warrant, he entered the motorhome which bore the address of 646 ½ Englert Road. *Id.* at 140. He testified it did not appear that anyone was living there. *Id.* No contraband was found in the motorhome. *Id.* at 144. Detective Watson testified on cross-examination that although it would have been awkward to move around the motorhome due to the large number of boxes within it, one could nevertheless do so. *Id.* at 145. He also conceded that someone could have slept there, in spite of its messy condition. *Id.* at 145.

The Court heard argument from the parties. Mr. Northrip and Mr. Hays argued that CCO Rongen had notice of Mr. Winterstein's change of address prior to February 6<sup>th</sup>, 2003, and that Mr. Winterstein had complied with the requirement that he notify his community corrections officer prior to changing his address. *Id.* at 151-169. The defense argued that Rongen, based upon the violation of failure to report, had the authority to enter only Mr. Winterstein's home and to search for Mr. Winterstein in particular.

Id. at 162. Rongen did not have the authority to conduct a warrantless search of someone else's home, or to search for evidence of a crime. Id. at 162. Mr. Northrip concluded by noting the specious nature of the State's position:

It is difficult for me to conceive that the State is actually making the argument that you cannot impute information from a DOC Kiosk to the DOC officer. The argument I'm hearing is that this Court should not impute the knowledge in the Kiosk to the officer. It's a DOC device. It's a DOC office. They put it in there for people to put this information in it. They don't- the ability to change this is it means that Mr. Winterstein, or anybody else, could put in this change of address information. They allow that to happen. And then to argue that you can't impute that knowledge to them? Imagine that there's an- evidence of a violation in there, and they were using that to go arrest somebody. Would they suddenly...would they credit a Defense argument that oh, that Kiosk is actually a third party contractor, you know, DOC really doesn't have that information, so you weren't allowed to go arrest this person. Could you imagine- it's just hard for me to sit here and listen to it.

Id. at 179-180.

The Court denied the motion of both defendants for relief from judgment. The Court agreed with both defense counsel that Mr. Winterstein was not required to get permission from CCO Rongen before he changed his address, and was permitted to utilize the Kiosk to do so. Id. at 181-182. The Court, however, was ultimately persuaded by information gathered by Rongen *after* the warrantless entry into 646 Englert Road, and ruled that Rongen had the lawful authority to conduct this warrantless entry and search because he had acted in good faith:

The Department had notice of his attempted change of address. Mr. Rongen had notice of his last approved, apparently, address. And this is a key finding here. 646 ½ was not his address, he lived at 646. The change of address to 646 ½ was a ruse. Now, I say that because when Mr. Rongen went to the house in February, Mr. Winterstein's room was the same as it had been when he'd been there in January. When he asked the girlfriend if Mr. Winterstein still lived in the house, the girlfriend said "yes." Mr. Soderlind testified [at Mr. Winterstein's trial], he said Mr. Winterstein still lived in the house, and the detective said nobody was living in the motor home. It was a ruse. So when the officer goes there, *acting in good faith*, to his actual address without knowing that the Defendant has attempted to change his address by way of a ruse, is he bound by it? I don't think so. I don't think he is bound by a ruse.

RP (6-28-05), 182-183.

With regard to the assertion by both defense counsel that the nature of Mr. Winterstein's conviction would also preclude the warrantless entry into 646 Englert Road, the Court noted that this issue had not been briefed but that it struck him as a "significant issue." *Id.* at 183. The Court stated: "[T]hat's a huge rule, and I'm not going to decide it without briefing that issue, and I'm not sure that...Mr. Soderlind still has the right to raise that issue." *Id.* at 183. Mr. Hays conceded that because this particular issue had been available to Mr. Soderlind prior to the newly discovered evidence of Mr. Winterstein's change of address, that it likely could only be raised through a claim, pursuant to CrR 7.8, of ineffective assistance of counsel. *Id.* at 193. Mr. Hays noted that he was ethically precluded from making this argument himself, and asked that new counsel be appointed

for that purpose. Id. at 194. After much back and forth between Mr. Hays and the Court, the Court instructed Mr. Hays to put his request in writing and reserved ruling on the matter. Id. at 200.

The record reveals that this request was never reduced to writing and put before the Court. On August 12<sup>th</sup>, 2005, the Court entered a Bench Order, signed by Mr. Hays and Mr. Coppola, denying Mr. Soderlind's motion for post-conviction relief. CP 100. It is not clear why this portion of the motion was abandoned. Appellate counsel cannot discern from the record if it was abandoned for tactical reasons or because it was agreed by Mr. Hays and Mr. Soderlind they were unlikely to prevail. It appears, unfortunately, that this issue, because the Court was never given the opportunity to rule on it in the proceedings below, cannot now be raised by Mr. Soderlind on appeal.

#### **D. ARGUMENT**

##### **1. THE TRIAL COURT ERRED WHEN IT DENIED MR. SODERLIND'S MOTION FOR RELIEF FROM JUDGMENT BECAUSE CCO RONGEN LACKED THE LEGAL AUTHORITY TO ENTER THE RESIDENCE AT 646 ENGLERT ROAD.**

Because the State agrees that the evidence found in Exhibit 6 is newly discovered evidence and that such evidence could not have been discovered by the due diligence of Mr. Hays or Mr. Northrip, the sole issue before both the trial Court and this Court is whether suppression of

the evidence obtained during both the initial warrantless search by CCO Rongen and the later search warrant by the Task Force is required. The State agreed that if suppression were required, both defendants must be granted relief under CrR 7.8 (b). Mr. Soderlind also maintained at the trial Court, and continues to maintain, that relief is justified under CrR 7.8 (b) (3) which addresses material misrepresentations by an adverse party, although the State did not stipulate to this basis. The misrepresentation in this case, however, is clear: Mr. Hays attempted, several times, to obtain this evidence but was told by the deputy prosecutor, who was relying on the affirmative representation of CCO Rongen, that this evidence did not exist. It was never determined at the June 28<sup>th</sup>, 2005 hearing why CCO Rongen falsely represented that Mr. Winterstein had changed his address at the DOC Kiosk on February 6<sup>th</sup>, 2003, or whether this misrepresentation was intentional or merely reckless. Because we know that the Genie program on the Kiosk contained an address of 646 ½ Englert Road for Mr. Winterstein as early as January 13<sup>th</sup>, 2003, there can be no question that CCO Rongen made a material misrepresentation to Mr. Hays, Mr. Northrip, and Mr. Coppola.

The sole issue, therefore, before this Court is whether the trial Court erred when it found that CCO Rongen had the lawful authority to enter the residence at 646 Englert Road on February 6<sup>th</sup>, 2003 in spite of

Mr. Winterstein's change of address with DOC prior to this date. More specifically, the issues are: (1) Whether Mr. Winterstein effectuated an official change of his address by changing it utilizing the Kiosk in the lobby of the Longview branch of the Department of Corrections or whether he was required to notify CCO Rongen of the change personally; and (2) whether, even if Mr. Winterstein did effectuate an official change of his address, CCO Rongen nevertheless had the lawful authority to enter Mr. Winterstein's former address because the knowledge of the Department of Corrections regarding Mr. Winterstein's new address should not be imputed to CCO Rongen, despite the fact that he is employed by, and acts as an agent for, the Department of Corrections.

The lack of written findings of fact and conclusions of law is frustrating because Appellant is left to decipher the trial Court's somewhat inconsistent oral ruling. The trial Court appeared to hold that Mr. Winterstein had effectuated an official change of his address, but that CCO Rongen was not bound by this new information because the new address was a ruse, and CCO Rongen had acted in good faith by going to the prior address. With regard to the question of whether Mr. Winterstein had effectuated an official change of address, the State, in arguing he did not, relied on the oral condition allegedly given to Mr. Winterstein by CCO Rongen that he obtain Rongen's permission before changing his

address. The trial Court, however, ruled that the written conditions of supervision provided to Mr. Winterstein (exhibit 8) required that he merely notify his community corrections officer prior to changing his address rather than obtain permission from his community corrections officer, and that this condition could not be orally modified by CCO Rongen. RP (6-28-05), 181. “A condition is, in this case, Mr. Winterstein is to notify a community corrections officer before changing his residence. Not get permission, simply notify, that’s the written condition. Mr. Rongen says that he had a different oral condition. I don’t think I can enforce that, when the written condition says notify.” Id. at 181. The Court further held that

[t]he Department [of Corrections] uses the Kiosk to allow people to notify the Department, probationers or parolees, whatever their status is, to notify the Department of a change of address. Mr. Rongen says, yeah, they can do that, but I didn’t give them permission, I told them to report to me before, or get permission before. So, I think the requirement is notify before changing his address. And clearly, they had the notice of change of address by January 13<sup>th</sup>.

RP (6-28-05), 181-182.

It appears, based on the above statement by the Court, that the Court ruled that Mr. Winterstein had effectuated an official change of address with DOC. The Court nevertheless held that CCO Rongen had the

lawful authority to enter the residence at 646 Englert Road to search for

Mr. Winterstein based on the following finding:

The Department had notice of his attempted change of address. Mr. Rongen had notice of his last approved, apparently, address. And this is a key finding here. 646 ½ was not his address, he lived at 646. The change of address to 646 ½ was a ruse. Now, I say that because when Mr. Rongen went to the house in February, Mr. Winterstein's room was the same as it had been when he'd been there in January. When he asked the girlfriend if Mr. Winterstein still lived in the house, the girlfriend said "yes." Mr. Soderlind testified [at Mr. Winterstein's trial], he said Mr. Winterstein still lived in the house, and the detective said nobody was living in the motor home. It was a ruse. So when the officer goes there, *acting in good faith*, to his actual address without knowing that the Defendant has attempted to change his address by way of a ruse, is he bound by it? I don't think so. I don't think he is bound by a ruse.

RP (6-28-05), 182-183.

Appellant submits, based on the oral recitations of the trial Court quoted above, that the Court held as follows: That Mr. Winterstein had changed his address with the Department of Corrections using a method of notification that is approved and accepted by the Department, but that CCO Rongen was nevertheless entitled to ignore this information and search the residence at 646 Englert Road because Mr. Winterstein's *motive* in changing his address from the house at 646 Englert Road to the motorhome marked 646 ½ Englert Road was to effectuate a ruse on the Department, and that CCO Rongen had therefore acted in "good faith." To the extent the Court ruled that Mr. Winterstein had notified the

Department of his change of address using a method approved and accepted by the Department of Corrections, Appellant accepts this finding and does not assign error to it. Appellant does, however, assign error to the Court's conclusion of law that CCO Rongen was nevertheless entitled to search the residence at 646 Englert Road because the Court, in ruling that this change of address was a "ruse," relied entirely on information obtained *after* CCO Rongen's entry into the residence at 646 Englert Road, and because Washington does not recognize a good faith exception to the exclusionary rule.

**1. AUTHORITY OF CCO RONGEN TO ENTER MR. WINTERSTEIN'S RESIDENCE TO LOOK FOR MR. WINTERSTEIN.**

The evidence used to prosecute Mr. Soderlind was first observed by CCO Rongen when he entered the residence at 646 Englert Road without a warrant, and later seized during the service of a search warrant for 646 Englert Road that was issued based upon CCO Rongen's observations. CP 1, 24. It is unreasonable and unconstitutional for a police officer to search or seize without a warrant, under both the Washington and United States constitutions. *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996); *State v. Leach*, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989); *State v. Miller*, 91 Wn.App. 181, 184, 955

P.2d 810 (1998). Exceptions to the constitutionally mandated warrant requirement are jealously and carefully drawn. *Leach* at 738; *State v. Morse*, 156 Wn.2d 1 (2005); *State v. Littlefair*, 129 Wn.App. 330, 340 (2005). The prosecution bears the burden of proving that a warrantless search falls within one of those narrow and carefully drawn exceptions. *Littlefair* at 340, *State v. Turner*, 114 Wn.App. 653, 657, 59 P.3d 711 (2005). Given the presumption of invalidity, if the prosecution does not meet this burden suppression of evidence is mandatory.

Unlike federal law, in Washington, any unconstitutional search or seizure absolutely requires exclusion of all evidence found following the constitutional violation. *State v. Ladson*, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999); *Morse* at 9-10; *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *Littlefair* at 344. “[A]ll subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *Ladson* at 359-60. Unlike the federal system, Washington does not recognize a good faith exception to the exclusionary rule. *Littlefair* at 344; *White* at 107-08; *Morse* at 9-10; *State v. Wallin*, 125 Wn.App.648, 660, 105 P.3d 1037 (2005).

In this case the State relied on the authority of probation officers to search the homes of probationers without a warrant. However, probation officers can only perform such a warrantless search when they have a

well-founded suspicion that a probationer is violating a condition of his probation and is actually living at the location sought to be searched. Probation officers do not have general authority to search wherever they want; they have authority to search the homes, cars, or persons of *probationers*, not of other persons.

In *State v. Simms*, 10 Wn.App. 75, 85, 516 P. 2d 1088 (1973)

Division II held that a parole or probation officer can make a search of a parolee or his home without first obtaining a warrant. However, the Court held that such a warrantless search would be unconstitutional under the Fourth Amendment unless the parole officer had a well founded suspicion of a parole violation, similar to what is required for investigative stops. *Simms*, at 87-88. A later case held that Washington's constitution imposed a similar requirement; a warrantless search of a parolee's person *or home* is unconstitutional unless the parole officer has a reasonable suspicion that the parolee has violated conditions of parole. *State v. Patterson*, 51 Wn.App. 202, 204-06, 208, 752 P.2d 945 (1988). The Legislature incorporated this standard into the Sentencing Reform Act: "If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be required to submit to a search[.]" RCW 9.94A.631.

Our appellate courts have rejected the notion that a parolee or probationer is subject to searches of his person or his home whenever his supervisor decides to search him. *Simms* at 84. “It would seem to be beyond question that to subject the parolee to arbitrary and capricious searches at the whim of his parole officer would be constitutionally impermissible. The Fourth Amendment protection against unreasonable searches and seizures does extend to one released on parole.” *Id.* Further, this standard applies to parolees, not merely probationers. *State v. Patterson* at 204; *State v. Massey*, 81 Wn.App. 198, 199, 913 P.2d 424 (1996) (holding that the “reasonable suspicion” standard applies to searches of persons on community placement). Community Placement is our modern equivalent to parole. These cases emphasize that court orders or Department of Corrections regulations or signed documents purporting to allow searches by a corrections officer at any time at the discretion of the officer will not supersede the rule that a warrantless search must be predicated on a reasonable or well-founded suspicion to believe that the probationer or parolee has violated a condition of his supervision. *State v. Massey*, 81 Wn.App. 198; *State v. Lucas*, 56 Wn.App. 236, 237-38, 243-44, 783 P.2d 121 (1989); *Patterson* at 204.

In adopting the “well founded” or “reasonable” suspicion standard, the *Simms* court relied upon the standard employed in investigative (*Terry*)

stop cases. “Warrantless seizures are per se unreasonable. A warrantless seizure may, however, be reasonable if it is supported by consent or exigent circumstances, or if the search is incident to a valid arrest or a *Terry* investigative stop.” *State v. Barnes*, 96 Wn.App. 217, 221, 978 P.2d 1131 (1999), citing *State v. Rife*, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997). “For a permissible *Terry* stop the State must show that (1) the initial stop is legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes.” *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002), citing *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). The initial stop is legitimate if it is based on a well-founded suspicion of criminal activity. *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). The Supreme Court has defined “articulable suspicion” as a “substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

As such, *before* a CCO can conduct a warrantless search based on reasonable suspicion, the CCO must have an articulable and well founded suspicion, based on objective facts, that the person has committed a violation of his supervision.

Further, if the CCO wishes to enter a home to search for a probationer, it must be the probationer’s home. If the CCO wishes to

enter some place other than the probationer's home to search for a probationer, the CCO would need, *before entering*, an articulable and well founded suspicion, based on objective facts, that the probationer could be found in that place. If that place is the home of another person, the CCO would need a warrant or consent of all residents before entering. The CCO's authority is to search the *probationer's* home, not the homes of other people.

**2. DID CCO RONGEN HAVE THE AUTHORITY OF LAW TO ENTER 646 ENGLERT ROAD WITHOUT A WARRANT OR CONSENT?**

CCO Rongen did have a well founded suspicion that Mr. Winterstein had committed a violation of his probation conditions. That is not at issue in this case. The issue is whether Rongen had the authority of law to enter 646 Englert Road to search for Mr. Winterstein on February 6<sup>th</sup>, 2003. Because, as the Court found, Mr. Winterstein had changed his address with DOC to the motorhome at 646 ½ Englert Road, CCO Rongen lacked the authority of law to enter 646 Englert Road without a warrant. This is so in spite of Mr. Winterstein's admitted probation violation. CCO Rongen did have authority to search 646 ½ Englert Road, the motorhome in which no evidence was found. A search of that location would not have justified the search warrant later issued.

CCO Rongen could have developed some basis to search 646 Englert Road if he had conducted some investigation showing that Mr. Winterstein could be found at that residence on February 6<sup>th</sup>, 2003. Rongen, however, conducted no such investigation.

The Court, in ruling that CCO Rongen had the lawful authority to enter 646 Englert Road in spite of Mr. Winterstein's prior change of address, relied on evidence that was discovered after, and as a direct result of, CCO Rongen's search. Specifically, the Court noted that Ms. O'Connor had told CCO Rongen that Mr. Winterstein still lived there, and the bedroom allegedly belonging to Mr. Winterstein still looked the same as it did when the DOC officers had visited there in November. Such evidence, however, cannot be used to justify the initial entry and warrantless search because this information was gathered *after* the warrantless entry. The warrantless entry into 646 Englert Road, applying the principles of an investigative stop, must have been justified at its inception. Information gathered after the warrantless entry can never be used to justify the entry itself, just as information or evidence discovered after an investigative stop can never be used to justify the stop. The information comprising the articulable suspicion must be known to the

officer *before* the investigative detention occurs. *State v. Mendez*, 137 Wn.2d 208, 224, 970 P.2d 722 (1999).

As noted above, the focus in Washington is not on the “reasonableness” of the government but on the privacy interests of its citizens. *Morse* at 9-10; *State v. Nall*, 117 Wn.App. 647, 651, 72 P.3d 200 (2003); *Wallin* at 655. Recent appellate cases have admonished lower courts of this critical difference between the Fourth Amendment and Article 1, Section 7 of the Washington Constitution.

In *State v. Wallin*, Division I was faced with an unusual case where DOC officers had searched the home of a sex offender they believed to be under their supervision. At issue was an order entered by the trial court modifying Mr. Wallin’s sentence with the intent of extending the period of his community placement for ten years. *Wallin* at 651. The officers, acting on the authority they believed was granted to them by this order, searched Mr. Wallin’s residence based on a well founded suspicion he had violated the terms of his supervision. *Wallin* at 652. During the search, officers found evidence proving that Mr. Wallin had committed, among other things, first degree rape of a child and first degree child molestation. *Wallin* at 652-53. Mr. Wallin, in fact, confessed to these crimes. *Id.* On appeal, Mr. Wallin argued for the first time that the trial court lacked the authority to extend his community placement to ten years and, as such, the

initial warrantless search (which revealed evidence that provided the basis for later search warrants) was conducted without the authority of law.

*Wallin* at 654.

Division I agreed, noting that the invalidity of the order meant that Mr. Wallin's status was not that of an offender under DOC supervision. As such, the lower standard of "reasonable suspicion" did not apply. *Wallin* at 656. The State argued that because the DOC officers could not have known the order was invalid, they were acting with the authority of law. *Wallin* at 657. The Court noted that while the DOC officers reasonably believed they had the authority to conduct the search and had clearly acted in good faith, it did not matter. "But article 1, section 7, as currently read by our state Supreme Court, demands more than belief, and indeed more than good faith. It demands existing authority of law, and none existed here." *Wallin* at 660. Noting that suppression in Washington is mandatory, the Court reversed Mr. Wallin's conviction and dismissed the case. The Court concluded by noting the outrage of this case in light of Wallin's conduct, and subtly urged the Supreme Court to adopt a good faith exception to the exclusionary rule. *Wallin* at 665.

In *State v. Nall*, Clallam County Sheriff's deputies arrested Mr. Nall on an Oregon warrant at the request of the Multnomah County Sheriff's Office in Portland. The Oregon authorities told Clallam County

they had an active warrant for Mr. Nall and a Clallam County deputy verified the warrant with central communications prior to the arrest. *Nall* at 649. Drugs and drug paraphernalia were found during the search incident to arrest. *Id.* It was learned later that this warrant should have been quashed because Mr. Nall's probation in Oregon had been terminated, but the administrative agency responsible for the warrant had made a clerical mistake and failed to quash the warrant. *Nall* at 649.

Division II agreed with the trial court that the officers, in spite of their good faith, did not have the authority of law to make the arrest that gave rise to the search. The Court held that under the fellow officer rule, the officer in Clallam County were presumed to know what the authorities in Oregon knew, which is that Mr. Nall's probation had been terminated and the warrant was void. *Nall* at 651, citing *State v. Mance*, 82 Wn.App. 539, 542, 918 P.2d 527 (1996).

In *State v. Littlefair*, Skamania County officers had placed Mr. Littlefair's property under surveillance suspecting that he was manufacturing marijuana. The officers had obtained permission from the adjoining property owner, Longview Fibre, to observe Mr. Littlefair's property from the Fibre property. *Littlefair* at 336. On the evening in question, Detective Gosner of the Clark-Skamania Task Force, believing he was on Fibre property, smelled a strong odor of growing marijuana

from a venting system in an underground container on Littlefair's property. *Littlefair* at 334. The officer then obtained a search warrant and found evidence of marijuana manufacture. Littlefair moved to suppress on the basis that the detective was actually on his property, not Fibre's property, when he smelled the marijuana. *Littlefair* at 338. The trial court denied the motion, finding that Detective Gosner had reason to believe he was on Fibre property and in fact believed he was on Fibre property. *Littlefair* at 337.

Division II reversed, holding that the State could not rely on the "open view" exception to the warrant requirement where Detective Gosner was not lawfully on Littlefair's property. *Littlefair* at 343-44. "The question is not whether Detective Gosner made a mistake in good faith, but rather whether the detective 'had a lawful basis for his presence in the specific location from which he spied something incriminating.'" *Littlefair* at 343, citing *State v. Thorson*, 98 Wn.App. 528, 537, 990 P.2d 446 (1999). The Court noted that the trial court justified its decision on the basis that the officer had a good faith belief he was not on Littlefair's property, but admonished that Washington does not recognize a good faith exception to the exclusionary rule. *Littlefair* at 344.

Mr. Soderlind's case is very similar to Mr. Littlefair's in that the focus of the trial court should have been on what the officer was required

to know, not on what he did know, and that his actions taken in good faith will not provide the authority of law needed to justify a warrantless search. The trial court's oral decision in Mr. Soderlind's case was perplexing in that the Court held that Mr. Winterstein had, in fact, changed his address with DOC but still held that CCO Rongen acted in good faith. RP (6-28-05), 182-183. It would seem that the Court felt Rongen's actions were analogous to the officer in *Nall* who had no *actual* knowledge that the warrant was void, the officers in *Wallin* who had no *actual* knowledge that the order extending supervision was facially invalid, and the officer in *Littlefair* who had no *actual* knowledge he was on Mr. Littlefair's property. As these cases hold, the actual knowledge of these government agents is immaterial; the only question is whether they were acting with the authority of law. Not only is the supposed "good faith" of CCO Rongen wholeheartedly irrelevant to the Article 1, Section 7 analysis, but the trial court also relied heavily on the *motivation* of Mr. Winterstein in changing his address.

The Court denied this motion because he was angry at Mr. Winterstein for conducting what he believed was a ruse on DOC. However, in forming the conclusion that Mr. Winterstein's change of address was a ruse, the Court relied on information it was prohibited from

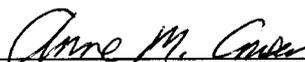
considering, that being information learned by CCO Rongen *after* the warrantless entry.

The only proper consideration before the Court was whether CCO Rongen had the authority of law to enter 646 Englert Road without a warrant to look for Mr. Winterstein despite, as the Court found in its finding of fact, the fact that Mr. Winterstein had officially changed his address with DOC to 646 ½ Englert Road. CCO Rongen clearly did not have the authority of law, under Article 1, Section 7, to make a warrantless entry into 646 Englert Road under the circumstances in which this occurred and the trial court erred in denying Mr. Soderlind's motion for relief from judgment.

**E. CONCLUSION**

The decision of the trial court should be reversed and Mr. Soderlind's case should be dismissed with prejudice.

RESPECTFULLY SUBMITTED THIS 28<sup>th</sup> day of June, 2006.

  
\_\_\_\_\_  
ANNE M. CRUSER, WSBA# 27944  
Attorney for Mr. Soderlind



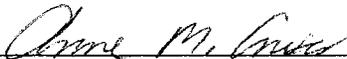
1  
2  
3 AND

4 Mr. Bror Soderlind  
5 31257 Monte Vista Way  
6 Thousand Palms, CA 99276

7 and that said envelope contained the following

- 8 (1) BRIEF OF APPELLANT  
9 (2) DESIGNATION OF EXHIBITS  
10 (3) VERBATIM REPORT OF PROCEEDINGS (TO MS. BAUR)  
11 (4) R.A.P. 10.10 (TO MR. SODERLIND)  
12 (5) AFFIDAVIT OF MAILING

13  
14 Dated this 28<sup>th</sup> day of June 2006

15   
16 ANNE M. CRUSER, WSBA #27944  
17 Attorney for Appellant

18 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of  
19 Washington that the foregoing is true and correct.

20 Date and Place: June 28<sup>th</sup>, 2006, Kalama, Washington

21 Signature: Anne M. Cruser