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Nº. 33740-1-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

CHARLES KEITH MAYFIELD,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 04-1-02556-9
The Honorable Kathryn Nelson, Presiding Judge

Reed Speir
WSBA No. 36270
Attorney for Appellant
917 Pacific Avenue, Suite 406
Tacoma, Washington 98402
(253) 572-6865

ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. Mr. Mayfield was denied his right to present a defense.
2. The trial court erred in refusing to allow admission of evidence regarding Mr. Hartley's statements.
3. The trial court erred in denying Mr. Mayfield's pre-trial Motion to Suppress.
4. There was insufficient evidence to convict Mr. Mayfield of unlawful possession of a controlled substance.
5. There was insufficient evidence to convict Mr. Mayfield of unlawful possession of a firearm.
6. There was insufficient evidence to convict Mr. Mayfield of bail jumping based on his failing to appear for a September 11, 2004 hearing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in ruling that evidence relating to Mr. Hartley's statements was inadmissible where Mr. Hartley was unavailable as a witness and there was sufficient indicia of the reliability of Mr. Hartley's statements?
(Assignment of Error No. 1, 2)
2. Did the trial court err in failing to grant a continuance to allow Mr. Mayfield's father to testify where his testimony would have provided and affirmative defense to the charge of bail jumping? (Assignment of Error No. 1)
3. Does an affidavit for a search warrant present sufficient probable cause to support the issuance of a search warrant where the facts contained in the affidavit fail to establish a nexus between the location sought to be searched and the criminal

activity alleged to be occurring there? (Assignment of Error No. 3)

4. Was there sufficient evidence to convict Mr. Mayfield of unlawful possession of a controlled substance where the search of Mr. Mayfield's apartment was unconstitutional and another person had occupied the room for a week prior and had left his belongings in the room? (Assignment of Error No. 4)
5. Was there sufficient evidence to convict Mr. Mayfield of unlawful possession of a firearm where the evidence introduced at trial established that Mr. Mayfield learned of the existence of the firearm only when he was charged with possessing it? (Assignment of Error No. 5)
6. Was there sufficient evidence to convict Mr. Mayfield of bail jumping based on his failure to appear at a September 11, 2004 hearing when no hearing was scheduled for September 11, 2004? (Assignment of Error No. 6)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On May 24, 2004, Bonney lake Police Officer Scott Lien stopped a vehicle which he knew was the suspect vehicle in a theft/burglary which occurred on May 23, 2004. CP 153-154. During the course of the stop, Bonney Lake Police Officer James Larsen observed motorcycle parts in the trunk of the vehicle including a motorcycle license plate. CP 154. Officer Lien also saw motorcycle parts in the back seat of the vehicle. CP

154. A records check of the license plate showed that it was from a motorcycle reported stolen on May 7, 2004. CP 154.

Officer Lien contacted the driver of the car about the motorcycle parts. CP 154. The driver told Officer Lien that he had received the motorcycle parts in a trade with Joe Shockey. CP 154. The driver told Officer Lien that the gas tank and carburetor for the motorcycle were at Shockey's brother "Chuck's house over by Swiss Park in Bonney Lake." CP 154.

On May 24, 2004, Bonney Lake Police Officer Kurtis Alfano filed a Complaint for Search Warrant for the address of 19616 94th Street East in Bonney Lake, Washington, the registered residence of Rozella Washell, in relation to the investigation of the stolen motorcycle. CP 152-156. The only evidence provided by Officer Alfano which linked Joe Shockey to the residence sought to be searched was that, "Officer's (sic) involved in these incident (sic), including your affiant are very familiar with the residence located next to the Swiss Sportsmans Club. Your affiant has seen Joe Shockey at the residence on several occasions. Your affiant knows the address to be 19616 94th Street East in Bonney Lake, Washington." CP 155. Judge Sergio Armijo issued the warrant. CP 156-158.

On May 22, 2004,¹ Officer Kurtis Alfano came into contact with Mr. Mayfield during the execution of the search warrant. RP 88-89. The search warrant was written for the residence of James Shockey to find stolen motorcycle parts. RP 89. In one of the bedrooms Officer Alfano discovered several needles, a book on how to manufacture methamphetamine, paperwork addressed to Charles Mayfield, and a baggy of off-white powder on the bed. RP 95-96.

Because the warrant was for stolen property and not drugs, the police exited the residence, confirmed that the bedroom belonged to Mr. Mayfield, then applied for an "addendum" to the search warrant to include anything related to methamphetamine, drugs, and drug paraphernalia. RP 96-99, CP 159-167. When the police contacted Mr. Mayfield, he admitted that the bedroom was his, but told the police that while they might find drugs in the residence, the drugs did not belong to him. RP 97-98.

During the second search of Mr. Mayfield's bedroom, the police recovered a .45 caliber firearm, a baggie of powder which field tested positive for methamphetamine, a baggie of white pills, a wallet containing Mr. Mayfield's driver's license, used coffee filters wrapped in tinfoil, the book on how to manufacture methamphetamine, an electronic measuring scale, and plastic baggies. RP 101-103, 209-210

¹ Officer Alfano and the prosecutor apparently mispoke regarding the date. The search

At the time the warrant was served, Mr. Mayfield had been renting the bedroom, but was in the process of moving out of the trailer and into his parent's home in Ellensburg. RP 127, 279, 288, 305, 307. Kenneth Hartley was in the process of moving into the room that Mr. Mayfield was in the process of moving out of. RP 279, 281, 283-284. Mr. Hartley had been at the residence on the day the police served the warrant, but had left prior to the arrival of the police. RP 281. Mr. Hartley had started to move his things into the bedroom. RP 296.

Prior to the day the warrant was served, Mr. Mayfield and his girlfriend had taken a load of his belongings over to his parent's house in Ellensburg and spent a week there. RP 281, 289. During this week, Mr. Hartley occupied the bedroom where the drugs and handgun were found. RP 307.

While in Ellensburg, Mr. Mayfield's girlfriend, Ms. Sherry Adair, bought the .45 caliber handgun found in the bedroom from Mr. Mayfield's step-father, Mr. Gaylen Waschell. RP 287-291. Ms. Adair had left the gun in a bag sitting on the floor of the bedroom with her other bags. RP 292-293. Mr. Mayfield did not know Ms. Adair had a gun or that the gun was in the house. RP 313. The first time Mr. Mayfield learned of the gun's existence was when he was charged with possessing it. RP 314.

warrant was issued on May 24, 2004 and executed the same day.

Mr. Mayfield and Ms. Adair returned to the Tacoma residence very late the night before the police served the search warrant. RP 299. Ms. Adair had woken up and was taking a shower when the police executed the warrant. RP 294, 299. Mr. Mayfield was waiting to take a shower and had tossed his wallet on the bed when he saw the baggy. RP 323. Immediately after he noticed the baggie the police entered the residence. RP 323.

When the police questioned Mr. Mayfield about the drugs, he denied they were his. RP 99. Mr. Mayfield was then arrested and transported to the Pierce County Jail. RP 99. The police ran the registration of the gun and discovered it was registered to a female. RP 141-142.

On May 25, 2004, Mr. Mayfield was charged with one count of unlawful possession of a controlled substance and one count of unlawful possession of a firearm. CP 1-3. On August 26, 2004, the charges were amended to one count of unlawful possession of a controlled substance with intent to deliver and unlawful possession of a firearm in the first degree. CP 4-6.

On September 9, 2004, Mr. Mayfield failed to appear for a scheduled Omnibus hearing. RP 174-175, RP 3, 9-28-04.² On September 28, 2004, in a hearing to quash the bench warrant issued for his arrest, Mr. Mayfield told the court that his attorney had told him he did not need to appear at the September 9, 2004 hearing. RP 3, 9-28-04.

On November 3, 2004, Mr. Mayfield again failed to appear for an Omnibus hearing. RP 180.

On May 2, 2005, the charges against Mr. Mayfield were amended to include unlawful possession of a controlled substance with intent to deliver, unlawful possession of a firearm in the second degree, and two counts of bail jumping based on Mr. Mayfield's failure to appear for the September 11, 2004 and November 3, 2004 hearings. CP 22-24.

John Dunn, a forensic scientist employed by the Washington State Patrol Crime Lab tested the items recovered from the bedroom. RP 244-256. The pills recovered from the bedroom turned out to be pills of vitamin E and one "Aleve" pill. RP 248-249. The "Aleve" pill was not chemically tested, but Mr. Dunn testified that according to the tablet markings the pill contained naproxen and pseudoephedrine. RP 249-250. The digital scale had an amount of white powder in the lid so small that

² Some portions of the verbatim report of proceedings are not numbered in sequence with the rest. Reference to these volumes will be made by giving the page number followed by the date of the hearing.

Mr. Dunn had to use a methanol alcohol solution in order to get a testable sample. RP 250-251. The powder contained methamphetamine. RP 251. The baggie of powder found on the bed contained about four-tenths of a gram of powder containing methamphetamine. RP 113, 252-253. The coffee filters contained both methamphetamine and pseudoephedrine. RP 253-254.

At some point prior to trial, Mr. Hartley, apparently of his own volition, provided both the State and defense counsel with statements that the drugs and drug paraphernalia found in the bedroom did not belong to Mr. Mayfield but actually belonged to him. RP 258-264.

Pre-trial, counsel for Mr. Mayfield moved to suppress all evidence seized under both search warrants on grounds that the initial search warrant was improperly issued due to the affidavit's failure to establish probable cause. CP 11-15, RP 5-13. The trial court denied the motion. RP 13.

Trial began on April 27, 2005. RP 78.

At trial, Mr. Mayfield testified that he was not informed that he had to appear in court on September 9, 2004. RP 317-318.³ Mr. Mayfield testified that he did not appear on November 3, 2004, because he was then living at his parents' house in the foothills of the mountains in Ellensburg,

and during the night of November 2, 2004 it snowed heavily and he did not have an operable vehicle which could drive through the snow. RP 320. Mr. Mayfield attempted to offer testimony from his step-father, Gaylen Waschell, which would confirm that Mr. Mayfield had been living in Ellensburg at the time of the November 3, 2004 hearing and that Mr. Mayfield had been stuck in Ellensburg because of snow, and that his father had sold Ms. Adair a handgun. RP 373-374, 378-380. On the day Mr. Waschell scheduled to testify his truck broke down and he was unable to drive from Ellensburg to Tacoma. RP 378-379. The trial court denied defense counsel's request to allow the witness to testify telephonically and stated that it would not grant any more continuances for "missing witnesses." RP 345-346, 378-380.

Mr. Mayfield's counsel attempted to introduce the written statements of Mr. Hartley, but the trial court held that the statements were hearsay and did not meet any of the hearsay exceptions which would allow the statements to be admitted. RP 258-264. Mr. Mayfield called Mr. Hartley as a witness, however, Mr. Hartley declined to answer any questions and invoked his Fifth Amendment right to not give self-incriminating testimony. RP 265. Following Mr. Hartley's refusal to answer questions, Mr. Mayfield's trial counsel again moved the court to

³ Trial counsel and Mr. Mayfield discuss September 8 in the transcript. It appears that

allow introduction of Mr. Hartley's written statements on grounds that Mr. Hartley's refusal to testify rendered him unavailable under ER 804(a)(1) and that ER 804(b)(3) therefore allowed the admission of Mr. Hartley's written statements. RP 271-272. The trial court again refused to allow entry of Mr. Hartley's written statements because Mr. Mayfield had not proved that the statements were trustworthy. RP 273.

As an offer of proof, Mr. Mayfield offered the testimony of Mr. John Fraser, the investigator for the defense, to corroborate the statements made by Mr. Hartley. RP 350. Mr. Fraser interviewed Mr. Hartley while Mr. Hartley was in the Perce County Jail. RP 351. Mr. Hartley did not express any reluctance when he spoke with Mr. Fraser. RP 351. Mr. Hartley told Mr. Fraser that at the time the search warrant was executed he was in the process of moving into the room that Mr. Mayfield was moving out of and had already put some of his belongings in the room. RP 351-352. Mr. Hartley told Mr. Fraser that the items he had brought to the residence included a scale, some baggies, and 12-13 ounces of methamphetamine which he had purchased recently. RP 352-353. The trial court ruled that the statements were inadmissible because, "[it did not] think that there's anything about the declarant that suggests trustworthiness." RP 370-372.

they misspoke as to the date of the charged crime of bail jumping.

On May 6, 2005, the jury found Mr. Mayfield guilty of unlawful possession of a controlled substance (CP 98), unlawful possession of a firearm (CP 99), and both counts of bail jumping. CP 100-101.

Notice of Appeal was filed on August 31, 2005. CP 129-141.

D. ARGUMENT

1. **Mr. Mayfield was denied the right to present a defense.**

A criminal defendant has a constitutional right to present a defense. Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The Washington Court described importance of the right as follows:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19, 87 S.Ct. at 1923, cited with approval by State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

The right to compulsory process includes the right to present a defense. State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Washington defines the right to present witnesses as a right to present

material and relevant testimony. See State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Violation of the defendant's constitutional right to compulsory process is assumed to be prejudicial, and the State has the burden of showing the error was harmless.

State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

It is an affirmative defense to bail jumping that uncontrollable circumstances prevented the person from appearing. RCW 9A.76.170.

a. *The trial court erred in holding that Mr. Hartley's statements were inadmissible*

ER 804(b)(3) provides:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

A witness asserting the constitutional privilege against self-incrimination is legally unavailable to testify for purposes of the ER 804 exceptions to the rule against hearsay. State v. Welchel, 115 Wn.2d 708, 801 P.2d 948 (1990).

Here, Mr. Mayfield sought to offer the written statements of Mr. Hartley in which Mr. Hartley admitted that the drugs, scale, and drug paraphernalia belonged to him, not Mr. Mayfield. When called at trial Mr. Hartley refused to testify, exercising his fifth amendment right against self-incrimination. Mr. Hartley was therefore unavailable to testify for purposes of ER 804.

The trial court ruled that Mr. Hartley's written statements were inadmissible because Mr. Mayfield had not established corroborative circumstances establishing the statements' trustworthiness. In response, Mr. Mayfield offered the testimony of the investigator for the defense, Mr. Fraser. Mr. Fraser testified that he had interviewed Mr. Hartley in the Pierce County Jail and that Mr. Hartley's statement in the jail matched his written statements he had given to the prosecutor and the defense.

The trial court held that Mr. Mayfield still had not presented sufficient corroborative evidence and ruled that the statements of Mr. Hartley were inadmissible. This was error.

A trial court's ruling on the admissibility of evidence is reviewed for manifest abuse of discretion. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, Russell v. Washington, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

This Washington Supreme Court has articulated a number of factors to be considered in determining the reliability or trustworthiness of out-of-court declarations. The factors are: (1) whether the declarant had an apparent motive to lie; (2) whether the general character of the declarant suggests trustworthiness; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) whether the timing of the statements and the relationship between the declarant and the witness suggest trustworthiness. State v. Anderson, 107 Wn.2d 745, 750, 733 P.2d 517 (1987).

Application of these nine factors shows that Mr. Hartley's statements were reliable and that the trial court erred. First, Mr. Hartley was offering inculpatory statements and therefore had no reason to be lying. Second, little evidence was introduced to establish whether Mr. Hartley was or was not credible. Third, Mr. Hartley apparently voluntarily submitted separate but similar statements to both the State and the defense

as well as Mr. Fraser. Fourth, no evidence was offered regarding the spontaneity of Mr. Hartley's statements, but no evidence was introduced indicating that the statements were coerced either. Fifth, the timing of the statements was unclear, but testimony was offered which indicated that Mr. Hartley looked up to Mr. Mayfield as a sort of role model. This fifth factor might indicate that Mr. Hartley would have a motive to lie about his ownership of the drug and drug paraphernalia, but evidence independent of Mr. Hartley's statements also support the trustworthiness of the statements. Specifically, several witnesses testified that Mr. Mayfield had not been present in the residence for a week prior to the execution of the search warrant but Mr. Hartley had been in the room and had begun to move his property into the room.

The statements of Mr. Hartley were admissible under ER 804 as statements of an unavailable witness made against the declarant's penal interests. There was sufficient evidence in both the circumstances of the statements as well as the testimony of other witnesses to establish the trustworthiness of Mr. Hartley's statements. The trial court abused its discretion in ruling that Mr. Hartley's statements were inadmissible. Denying Mr. Mayfield the ability to present this exculpatory evidence denied Mr. Mayfield the right to present a defense. Had the jury been aware of Mr. Hartley's statement's that the drugs and drug paraphernalia

belonged to him, especially when combined with Mr. Hartley's refusal to answer any questions on grounds that the answers would incriminate him, the outcome of the trial would most likely have been different.

- b. The trial court's refusal to grant a continuance to allow the testimony of Mr. Mayfield's step-father deprived Mr. Mayfield of his right to present a defense*

RCW 9A.76.170, the bail jump statute, provides that:

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrender as soon as such circumstances ceased to exist.

RCW 9A.76.010(4) defines '[u]ncontrollable circumstances' as:

[A]n act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

Mr. Mayfield's defense to the charge of bail jumping based on his failure to appear in court on November 3, 2004 was that he we snowed in at his parent's house in Ellensburg and was unable to drive to Tacoma. Heavy snow blocking his rural driveway would certainly qualify as an act of nature which would support the affirmative defense of uncontrollable

circumstances prohibiting Mr. Mayfield from appearing in court. In support of this defense Mr. Mayfield offered his own testimony and attempted to offer the testimony of his step-father, whose house Mr. Mayfield was residing at in November of 2004. Mr. Mayfield's step-father was unable to reach court on the day of his scheduled testimony due to his truck breaking down in Ellensburg. The trial court refused to grant a continuance to allow Mr. Mayfield's stepfather to come to court and testify, thereby denying Mr. Mayfield his right to offer witnesses and his right to present a defense. The trial court gave no reason for its ruling but simply stated that it was not going to give any more continuances for "missing witnesses."

Mr. Mayfield's stepfather was a critical witness who could provide independent corroboration of Mr. Mayfield's affirmative defense against the charge of bail jumping. Refusing to grant a continuance to allow Mr. Mayfield to present his step-father's testimony deprived MR. Mayfield of his right to present a defense.

The trial court erred in not allowing introduction of Mr. Hartley's statements and in not granting a continuance to allow for the testimony of Mr. Mayfield's step-father. Individually, either one of these decisions deprived Mr. Mayfield of his right to present a defense, and taken together the violation of his rights is even more severe. The denial of Mr.

Mayfield's right to present a witness is presumed prejudicial and the State bears the burden of proving that it was harmless.

2. The trial court erred in denying Mr. Mayfield's motion to suppress evidence obtained pursuant to the search warrants where there was insufficient probable cause to support the issuance of the initial search warrant.

The fourth amendment to the United States Constitution provides that warrants may be issued only upon a showing of "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. The Constitution requires that a detached and neutral magistrate or judge make the determination of probable cause. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing State v. Smith, 16 Wn.App. 425, 427, 558 P.2d 265 (1976)).

A search warrant must be based upon probable cause. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d

1199 (2004). An affidavit of probable cause must show “a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” Thein, 138 Wn.2d at 140, 977 P.2d 582. The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. In re Pers. Restraint of Yim, 139 Wn.2d 581, 596, 989 P.2d 512 (1999) (quoting State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)). However, mere speculation or an officer's personal belief will not suffice. State v. Anderson, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001).

A search warrant probable cause decision is reviewed de novo. Petersen v. State, 145 Wn.2d 789, 799, 42 P.3d 952 (2002). The affidavit must be accepted on its face and any doubts should be resolved in favor of the warrant. State v. Dobyms, 55 Wn.App. 609, 620, 779 P.2d 746, review denied, 113 Wn.2d 1029, 784 P.2d 530 (1989) (citing State v. Fisher, 96 Wn.2d 962, 639 P.2d 743 (1982)).

As stated above, a trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Evidence obtained directly or indirectly through exploitation of an unconstitutional police action must be suppressed, unless the secondary evidence is sufficiently attenuated from the illegality as to dissipate the

taint. Wong Sun v. United States, 371 U.S. 471, 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

In the instant case, Officer Alfano's affidavit in support of the search warrant is based entirely on the statements of the driver of the vehicle. No independent police investigation was performed. Even accepting all the evidence presented in the affidavit as being true, the affidavit fails to establish the necessary nexus between the criminal activity alleged to be occurring, possession of stolen property, and the address sought to be searched. The driver of the car never gave an address to the police and only stated that the other motorcycle parts were at Joe Shockey's brother's house in Bonney Lake. The only evidence contained in the affidavit linking the residence sought to be searched to Joe Shockey was Officer Alfano's statement that he had "seen Mr. Shockey at the residence on several occasions." No evidence is presented in the affidavit to establish where Joe Shockey's brother lived or that the house sought to be searched was his residence. The affidavit essentially amounts to Officer Alfano's mere speculation and personal belief that evidence relating to Joe Shockey's possession of stolen property would be found at the address sought to be searched. Under Anderson this is an insufficient basis on which to issue a search warrant. The affidavit was therefore

untenable grounds upon which to issue a search warrant and the trial court therefore abused its discretion in issuing the search warrant.

The search of Mr. Mayfield's residence was unconstitutional and all evidence discovered during that search must be suppressed. Further, because the second search warrant was authorized based on evidence discovered during the first search, the fruits of the second search were tainted by the unconstitutionality of the first search should also have been suppressed under Wong Sun.

3. There was insufficient admissible evidence to convict Mr. Mayfield of unlawful possession of a controlled substance

In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from them. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Evidence is reviewed in the light most favorable to the State. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201, 829 P.2d 1068.

In a criminal matter, the State must prove every element of the crime charged. State v. Teal, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

As discussed above, the trial court erred in issuing the original search warrant. Without the evidence obtained during the two searches of Mr. Mayfield's residence the State presented no evidence establishing that Mr. Mayfield possessed a controlled substance. The State presented insufficient admissible evidence to convict Mr. Mayfield of unlawful possession of a controlled substance.

4. The State presented insufficient evidence to establish that Mr. Mayfield ever knowingly possessed the handgun.

RCW 9.41.040(2)(a)(i) provides, in pertinent part:

(2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if...the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

Although RCW 9.41.040(2)(a) does not mention "knowledge" in its definition of unlawful firearm possession, our Supreme Court has held that this crime implicitly includes knowledge as a necessary element. State

v. Anderson, 141 Wn.2d 357, 362-363, 5 P.3d 1247 (2000). Thus, in addition to the statutory elements described in RCW 9.41.040(2)(a) above, the State has the burden to prove knowledge as an element of unlawful possession of a firearm. Anderson, 141 Wn.2d at 366, 5 P.3d 1247.

As discussed above, both searches of Mr. Mayfield's residence were unconstitutional and all evidence discovered pursuant to those searches should have been suppressed. Without this tainted evidence there was no evidence that Mr. Mayfield ever possessed a firearm. However, should the court rule that the searches were valid, there was still insufficient evidence presented to convict Mr. Mayfield of unlawful possession of a firearm.

Here, the only evidence presented by the State linking Mr. Mayfield to the handgun was that it was found in the bedroom he had been renting and was in the process of moving out of. The uncontroverted evidence offered by Mr. Mayfield was that Ms. Adair had purchased the handgun and had not told Mr. Mayfield about its existence and that the first Mr. Mayfield even knew of the gun's existence was when he was charged with possession it. This evidence was confirmed by the police officer's testimony that when he performed a registration check on the gun it came back as registered to a female.

The State failed to produce any evidence to establish that Mr. Mayfield knowingly possessed the gun. Even taken in the light most favorable to the State, the evidence introduced at trial does not lead to a reasonable inference that Mr. Mayfield knowingly possessed the handgun, either constructively or actually.

5. There was insufficient evidence to convict Mr. Mayfield of bail jumping based on his failure to appear at a September 11, 2004 hearing.

Count III of the Corrected Third Amended Information charges Mr. Mayfield with the crime of bail jumping based on his failure to appear for a September 11, 2004 hearing. Evidence was presented at trial that Mr. Mayfield failed to appear for a September 9, 2004 hearing, however, no evidence was presented that Mr. Mayfield failed to appear for a hearing on September 11, 2004, or that any hearing was even scheduled for September 11, 2004.

The State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Mayfield had an obligation to appear in court on September 11, 2004. Therefore, there was insufficient evidence presented to convict Mr. Mayfield of bail jumping based on his failure to appear in court on September 11, 2004.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Mayfield's convictions and dismiss the charges against him.

DATED this 12th day of July, 2006.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

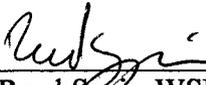
Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 12th day of July, 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. Charles Mayfield, DOC# 268840
Washington Corrections Center
P.O. Box 900
Shelton, WA. 98584

And, I mailed a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 12th day of July, 2006.



Reed Speir, WSBA No. 36270

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