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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Dyches' motion to suppress evidence.
2. There was insufficient evidence presented to convict Mr. Dyches of any crime.
3. Error is assigned to Findings and Conclusions on Admissibility of Evidence CrR 3.6, Findings as to Disputed Facts, which read as follows:

The "shop" location was a chicken coop that had been converted to a storage facility. It did not have running water or toilet facilities. Prior to the officers' service of the warrant Dyches had been storing a recreational vehicle in a parking place on the property. Dyches had also stayed in the recreational vehicle for a short while, until James Jungers the owner of the property, advised the intermediary tenant that Dyches could [sic] not reside on the property and would have to remove the recreational vehicle. Dyches then removed the vehicle.

* * *

James Jungers also testified that the storage facility was not fit for human habitation and that there was no agreement for Dyches to reside in the storage facility. That testimony was consistent with Dyches [sic] own testimony when he talked of there being no lighting or plumbing in the storage facility and that he had to go outside the storage facility and use and [sic] outhouse for a bathroom. Shortly before officers served the warrant, Jungers told Dyches that he could no longer store his belongings in the storage unity [sic]. Jungers made this decision based upon complaints he had from other tenants regarding Dyches.

4. Error is assigned to Findings and Conclusions on Admissibility of Evidence CrR 3.6, Reasons for

Admissibility or Inadmissibility of the Evidence, which read as follows:

The court holds that the facts contained in the warrant provided sufficient probable cause to believe that the dealing of methamphetamine had occurred at the shop location. At 12215 Valley Avenue E, in Sumner. The contents of the affidavit for probable cause sufficiently established the reliability of the informant.

* * *

Moreover, the affidavit was carefully written to separate the informants [sic] observations from what the officer observed or inferred. The observations of the informant were sufficient to establish that he [sic] informant had direct personal knowledge of the things he claimed. The sole exception to the adequacy of the basis for the informant's personal knowledge is that the affidavit for probable cause does not lay out the basis for the informant's knowledge that James Dyches was a methamphetamine "cook" is omitted, there is probable cause to believe methamphetamine was delivered at the "shop" location.

* * *

The Storage facility was not a residential facility. Dyches had no residential tenancy in the storage facility. Because Dyches [sic] tenancy was not residential, and because it was only by oral agreement with an intermediary to the owner James Jungers, Dyches [sic] tenancy was not subject to the landlord tenant act and could be terminated immediately by Jungers. Dyches [sic] tenancy in the storage unit was terminated by Jungers when Dyches was advised by Jungers to move out of the storage unit. Accordingly, Dyches had no standing to challenge the search of the storage unit.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does a defendant need to have a tenancy interest in a building in order to have standing to challenge a search of the building by police? (Assignments of Error Nos. 1, 3, and 4).
2. Does a complaint for a search warrant present sufficient evidence to establish probable cause to issue a search warrant where the complaint fails to include sufficient facts establishing the credibility of the informant? (Assignments of Error Nos. 1, 3, and 4)
3. Is there sufficient evidence to convict Mr. Dyches of Unlawful Manufacturing of a controlled substance where no evidence was presented establishing that Mr. Dyches knew the components of the lab were located in the building, ever used or touched the components of the lab, or that the methamphetamine found in the building was manufactured on or about June 25, 2004 in the State of Washington? (Assignment of Error No. 2)
4. Is there sufficient evidence to convict Mr. Dyches of possession of a controlled substance with intent to deliver where the State presented no evidence which established Mr. Dyches had an intent to deliver the substance? (Assignment of Error No. 2)
5. Is there sufficient evidence to convict Mr. Dyches of possession of possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine where the State presented no evidence that the pills found contained pseudoephedrine, no evidence to establish that the components of the lab were capable of manufacturing methamphetamine on the date in question, and no evidence of Mr. Dyches intent with regard to the pills? (Assignment of Error No. 2)

C. STATEMENT OF THE CASE

Factual and Procedural Background

James Jungers owns the property located at 12215 Valley Avenue in Sumner. RP 153. The property has a chicken house and nine shops on it. RP 153-155. In late June or early July 2004, Mr. Jungers rented the chicken house to James Dyches. RP 153-154. Mr. Gaspar, a man who rented space in the shops on the property, came to Mr. Jungers and told him that Mr. Dyches wanted to rent the wooden building to park collector cars in it. RP 154. Mr. Gaspar gave Mr. Jungers \$200 and told Mr. Jungers that he had rented the building to Mr. Dyches. RP 154. Mr. Jungers never had any contact with Mr. Dyches. RP 155.

The rental of the building began on June 1, 2004. RP 155. Shortly after Mr. Dyches rented the building, a motor home was moved onto the property. RP 155. Mr. Jungers was told Mr. Dyches was living in the motor home so Mr. Junger left a note on the motor home telling Mr. Dyches that he had two days to get the motor home off the property. RP 156. Mr. Jungers left the note a few days after receiving payment from Mr. Gaspar. RP 156. Mr. Junger knocked on the door of the motor home but did not attempt to contact anyone at the wooden building. RP 157. A few days after the note was left, the motor home was gone. RP 157.

At the time Mr. Jungers rented the wooden building it was an open access building with no locks on the doors. RP 161. Mr. Jungers could not remember the last time he had been inside the wooden building prior to renting it to Mr. Dyches. RP 162-163.

Mr. Rick Crawford, the man renting the shop next to Mr. Gaspar's shop, was known to the police to be a drug dealer. RP 171. Mr. Junger had seen Mr. Crawford and Mr. Gaspar associating with each other. RP 172. Detective Gill did not remember ever talking to Mr. Crawford. RP 184.

On June 24, 2004, Detective Donald Gill was conducting a narcotics investigation with a confidential informant, Brian Phy. RP 83, 395. The initial target of the investigation did not have any methamphetamine to sell, but while the confidential informant was in the initial target's house, a lady in the house named Patty told the informant that she knew where to get methamphetamine. RP 84, 395. Patty did not tell the informant the name of the person who she could buy methamphetamine from. RP 413-414.

The informant, Patty, and another woman named Bridgette, exited the initial target's house and got into a van. RP 87, 395. The van drove to 12215 Valley Avenue East. RP 87-88. The address the van drove to was a compound which contained auto body shops, a mechanic shop, a spray

shop, and a wooden structure. RP 88-89. Patty told the informant to sit in the van, then got out of the van and went into the wooden structure. RP 89, 396. Five to ten minutes later, Patty exited the wooden structure, got back in the van, and gave the informant some drugs. RP 92-94, 395. Shortly after Patty exited the wooden building, Mr. Dyches and another man exited the wooden structure. RP 93, 395-396.

Three days later, on June 28, 2004, Detective Gill applied for and obtained a search warrant for the wooden structure. RP 95-96. The warrant was served July 1, 2004, at 7:30 in the evening. RP 96-97. Prior to executing the warrant, the officers surveilled the wooden structure for over an hour and observed Mr. Dyches walking in and out of the wooden structures several times before getting into a van and driving away. RP 98-101. After Mr. Dyches left, Detective Gill and the other officers executed the search warrant. RP 102.

The wooden structure was a 48 foot long, 18 foot wide structure. RP 158. Inside the building a wall divided the building into two areas with a opening allowing people to walk between the two areas. RP 109. On one side of the wall was what police officers believed to be a living area, and on the other side were two cars, lumber, tools, car parts, and junk. RP 109-110.

The area where the cars were located was very cluttered with tools, car parts, and other items and was very hard to move around in. RP 114. A purse was found near the vehicles. RP 178. A methamphetamine lab was located in the area of the building where the cars were located. RP 114. The methamphetamine lab was dismantled into component parts and stored in a series of boxes and a backpack. RP 179-180, 195, 275. A box containing documents addressed to Mr. Dyches was also found in the area next to the cars in the south end of the structure. RP 270-272. Detective Gill never saw Mr. Dyches moving the boxes around. RP 181.

Detective Gill did not smell any ammonia in the building. RP 181. Detective Steven Pigman also did not smell any toluene, paint thinner, or ammonia at the scene. RP 276.

During the search of the building police discovered a brown ziplock baggie in the arm of a chair which contained .2 grams of methamphetamine (RP 260, 297), a mason jar found in the backpack which contained an estimated .5 grams of methamphetamine residue based on the lab technician's visual approximation of the volume of the residue (RP 261-262, 298-299), and at some point collected a sample of a substance which contained methamphetamine (RP 299-302) but the record is unclear where the sample came from. It was impossible to tell whether the methamphetamine had been made with the equipment found in the

wooden structure, whether the methamphetamine had been made in the State of Washington, or how old the methamphetamine was. RP 305-307. The police also found a five-pack of what Detective Pigman described as pseudoephedrine tablets (RP 234) but no evidence was introduced establishing that the tablets had ever been tested for pseudoephedrine content or where the tablets had been found.

On the side of the wall the officers believed was a living area there were chairs around a coffee table, a camp stove on a table, a toilet, and a stereo system. RP 126-127. The toilet was in the northwest corner of the building. RP 163.

No evidence was introduced establishing that Mr. Dyches' fingerprints were on any of the items recovered.

On September 1, 2004, Mr. Dyches was charged with unlawful manufacturing of a controlled substance, unlawful possession of a controlled substance with intent to deliver, and unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine all taking place on or about June 25, 2004. CP 1-4.

On April 4, 2005, the charges were amended to include allegations that each crime was committed within 1000 feet of a school bus stop. CP 5-8.

On April 13, 2005, Mr. Dyches moved to dismiss all charges against him pursuant to CrR 8.3 and *State v. Knapstad*. CP 12-27. Mr. Dyches argued that there was no evidence that he was ever a participant in or an accomplice to the manufacturing or possession of methamphetamine or its precursors. CP 12-27. The trial court denied this motion. RP 13-16, 4-13-06.¹

On July 12, 2005, Mr. Dyches moved to suppress all evidence seized during the search of the wooden structure on grounds that the search warrant for the structure was issued without a proper finding of probable cause. CP 68-93. The trial court denied the motion on grounds that Mr. Dyches lacked standing to challenge the search because he had no tenancy in the wooden structure and that the complaint for the warrant set forth sufficient facts to issue the search warrant. RP 51.

Trial began on July 12, 2005. RP 80.

At the close of the State's case, Mr. Dyches moved to dismiss all charges based on the State's failure to meet the burden of proof necessary to convict Mr. Dyches. RP 417-429. The trial court denied the motion with regard to all counts. RP 427-429.

¹ The transcript of the hearing on the *Knapstad* motion was not numbered continuously with the rest of the report of proceedings. Reference will be made by giving the page number followed by the date of the hearing.

On August 17, 2005, Mr. Dyches was convicted on all counts and the jury found the crimes were committed within 1000 feet of a school bus stop. CP 210-215.

Notice of appeal was filed on October 16, 2005. CP 253-254.

D. ARGUMENT

1. **The trial court erred in denying the motion to suppress**

The probable cause statement given by Detective Gill contained in the complaint for search warrant relied exclusively on information provided by the confidential informant to establish probable cause to issue the warrant. The portions of the complaint which provide information relevant to establishing probable cause to search the wooden structure are as follows:

Confidential and reliably [sic] informant number 03-02 has assisted police on many occasions with the investigation of narcotic cases. The CI has assisted police with investigations that have led to the arrest and conviction of many narcotic dealers. The CI has provided police with information on methods of use, packaging, and transporting of narcotics and items used to manufacture methamphetamine.

The CI called me by cell phone and told me that Scott was out of methamphetamine and that he was going with the two women to a place near the Sumner Cemetery nicknamed "the shop". The CI stated that they were going to buy methamphetamine there...Detectives followed closely and watched as the van turned into a gravel driveway marked by a mailbox with the address of 12215 Valley Avenue East just outside of Sumner. I watched the

van stop in front of a Brown [sic] house that looked like it had been re-modeled [sic] for storage. The driver of the van got out and went into the house. After about 10 minutes Patty came out of the structure and got back into the van. Patty was followed out by two men that went to a silver van.

Patty and the CI left the address and returned to the East Valley Apartments with Detectives [sic] following. The CI then walked back to me and got into my car. The CI provided to me .4 grams of white powder that later tested positive for methamphetamine...

The CI told me that he had met with Scott and was told that he had no more methamphetamine. Patty stated that she could get some at "the shop" and offered to drive the CI and another customer, Bridgette, to "the shop" and purchase some methamphetamine. The CI agreed and called me.

The CI stated that when they arrived at "the shop" Patty told him/her and Bridgette to stay in the van and she would be right back. The CI stated that Patty went around to the South side of the building and disappeared into the house.

The CI stated that when Patty came out of the house she was followed by a white male, 30 YOA with reddish brown hair that was cut in a crew cut fashion. The second man that came out was identified as Jimmy Dykes. The CI stated that he recognized Dykes and knows that he is a methamphetamine cook.

The CI stated that when Patty got into the van she handed him/her a small plastic baggie containing a white powdery substance. This is the same bag that the CI gave to me at the East Valley Apartments that later tested to be .4 grams of methamphetamine.

I asked the CI about "the shop". The CI stated that he/she has heard of it before and heard methamphetamine is sold there.

The CI description of the incident matched what detectives had witnessed.

CP 88-90.

The trial court denied Mr. Dyches' motion to suppress the evidence on two grounds: (1) Mr. Dyches lacked standing to challenge the search because he did not have a tenancy in the building, and (2) the judge who issued the warrant did not abuse her discretion because the complaint for the warrant satisfied both prongs of the *Aguilar/Spinelli* test for informant reliability and provided sufficient probable cause to issue the warrant. RP 51. The trial court was in error.

a. Mr. Dyches had standing to challenge the search of the wooden structure

Whether Mr. Dyches had a tenancy in the structure searched is irrelevant to the question of whether or not he had standing to challenge the search. Although automatic standing has been the subject of some controversy, and has been abandoned by the U.S. Supreme Court, it "still maintains a presence in Washington." *State v. Williams*, 142 Wn.2d 17, 22, 11 P.3d 714 (2000).

A person may rely on the automatic standing doctrine only if the challenged police action produced the evidence sought to be used against him. *Williams*, 142 Wn.2d at 23, 11 P.3d 714. To assert automatic

standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure. *State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). As to the second requirement, possession may be actual or constructive to support a criminal charge. *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969). A defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item. *Id.* at 29, 459 P.2d 400.

Here, Mr. Dyches is charged with unlawful possession of a controlled substance with intent to deliver and unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine. Both these crimes have possession as an element, and because Mr. Dyches was renting the wooden structure he can be deemed to have been in constructive possession of the items found therein. Mr. Dyches therefore has automatic standing to challenge the search of the wooden structure.

- b. The complaint for search warrant was insufficient to support the issuance of the search warrant since it failed to establish the credibility of the informant.*

The warrant clause of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution require that a search warrant be issued upon a determination of probable cause based upon 'facts and circumstances sufficient to establish a reasonable inference' that criminal activity is occurring or that contraband exists at a certain location. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

An affidavit in support of a search warrant must set forth sufficient facts and circumstances to establish a reasonable probability that criminal activity is occurring or is about to occur. *State v. Petty*, 48 Wn.App. 615, 621, 740 P.2d 879, *review denied* 109 Wn.2d 1012 (1987). Affidavits are to be read as a whole, in a commonsense, nontechnical manner, with doubts resolved in favor of the warrant. *State v. Casto*, 39 Wn.App. 229, 232, 692 P.2d 890 (1984), *review denied*, 103 Wn.2d 1020 (1985).

A magistrate may issue a search warrant based on information received from an informant if the affidavit establishes probable cause to believe that the items sought will be found in the place to be searched. *Casto*, 39 Wn.App. at 232, 692 P.2d 890. Generally, great deference is given to the issuing magistrate's probable cause determination. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

Reasonableness is the key in determining whether a search warrant should issue. *State v. Gunwall*, 106 Wn.2d 54, 73, 720 P.2d 808 (1986).

While deference is to be given to the magistrate's ruling and doubts are to be resolved in favor of the warrant's validity, *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981), the deference accorded to the magistrate is not boundless. *State v. Maxwell*, 114 Wn.2d 761, 770, 791 P.2d 222 (1990). The review of a search warrant's validity is limited to the information the magistrate had when the warrant was originally issued. *Aguilar v. State of Texas*, 378 U.S. 108, 84 S.Ct. 1509, 1522 n.1 (1964); *State v. Stephens*, 37 Wash.App. 76, 80, 678 P.2d 832 (1984).

Where a search warrant issued without probable cause, evidence gathered pursuant to the search should be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Crawley*, 61 Wash.App. 29, 808 P.2d 773, *review denied*, 117 Wn.2d 1009, 816 P.2d 1223 (1991).

Regardless of whether the information in the affidavit came from an informant or from the affiant's personal observations, the affidavit must set forth more than mere conclusions. The underlying facts and circumstances leading to the conclusions must be included. Otherwise, the magistrate becomes no more than a rubber stamp for the police. *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 723; *State v. Stephens*, 37 Wn.App 76, 79, 678 P.2d 832, *review denied*, 101 Wn.2d 1025 (1984).

The basic test for probable cause necessary for a judicial officer to issue a search warrant based on information obtained from an informant was established in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). Those requirements are: first, the affiant must set forth the underlying circumstances necessary to permit the magistrate issuing the warrant to independently determine that the informant had a factual basis for his allegations; and, second, the affiant must present sufficient facts so the magistrate may determine the credibility or the reliability of the informant. *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743 (1982), *cert denied* 102 S.Ct. 2967, 457 U.S. 1137, 73 L.Ed.2d 1355 (1982).

To meet the *Aguilar-Spinelli* test, the credibility of the informant must be demonstrated and the mere statement that an informant is credible is not sufficient. *Fisher*, 96 Wn.2d at 965, 639 P.2d 743.

To satisfy the basis of knowledge prong, the informant must declare that he has personally seen the facts asserted and is passing along firsthand knowledge. If the informant is relying on hearsay, the basis of knowledge prong can only be satisfied by sufficient information so that the hearsay establishes a basis of knowledge. *State v. Jackson*, 102 Wn.2d 432, 437-438, 688 P.2d 136 (1984). *See also State v. Gunwall*, 106

Wn.2d 54, 70-71, 720 P.2d 808 (1986) (the basis of knowledge prong requires the affidavit to recite the manner in which the informant gathered the information); *State v. Wolken*, 103 Wn.2d 823, 700 P.2d 319 (1985).

If the informant's tip fails under either prong, probable cause may still be established by independent police investigation which corroborates the tip to such an extent that it supports the missing elements of the *Aguilar/Spinelli* test. The independent police investigation must corroborate more than merely innocuous details. *State v. Jackson*, 102 Wn.2d at 438.

The mere statement that an informant is credible is not sufficient to meet the *Aguilar/Spinelli* test for informant credibility, however, it is almost universally held to be sufficient if information has been given which has led to arrests and convictions. *State v. Woodall*, 100 Wn.2d 74, 76, 666 P.2d 364 (1983).

Here, only one paragraph of the complaint deals with establishing the credibility of the confidential informant:

Confidential and reliably [sic] informant number 03-02 has assisted police on many occasions with the investigation of narcotic cases. The CI has assisted police with investigations that have led to the arrest and conviction of many narcotic dealers. The CI has provided police with information on methods of use, packaging, and transporting of narcotics and items used to manufacture methamphetamine.

CP 88-90.

These are nothing more than mere statements that the informant is reliable, not credible, and insufficient to meet the test put forth by *Aguilar/Spinelli*. Detective Gill indicates that the informant has assisted the police in other investigations which culminated in arrests and conviction, but Detective Gill does not indicate how the informant aided the police, specifically whether or not the informant's role was to give information to the police. The complaint provides only that the informant has provided the police with information, not that that information was accurate or verified by independent police investigation. Without facts establishing that the informant has provided information in the past which led to arrests or was corroborated through independent police investigation, there was insufficient evidence contained in the complaint for the search warrant to establish that the informant was credible.

The police investigation in this case, following the informant and observing the building from a distance, simply corroborates the innocent details that the informant rode to the building in the back of a van, waited while the driver of the van went into the building, and then produced a baggie containing methamphetamine to Detective Gill. No investigation was done to corroborate that the baggie was obtained inside the building and not from the other passenger in the vehicle, from the driver of the

vehicle independent of her trip inside the building, or that the informant didn't simply find the baggie of methamphetamine in the passenger compartment of the van or in the house where he initially tried to purchase methamphetamine. The complaint does not contain facts indicating that Patty was observed carrying the baggie of methamphetamine back to the van or purchasing the baggie inside the building.

Similarly, the complaint never puts forth facts establishing the basis for the informant's assertions that Mr. Dyches was a "methamphetamine cook." Beyond Detective Gill's bald statement that the informant claimed to know Mr. Dyches and know that Mr. Dyches was a "cook," no facts are presented establishing the informant's basis of this knowledge or that the knowledge was firsthand knowledge and not hearsay.

Because the reliability of the informant was never established, and because there was no independent police investigation to corroborate the informant's statements to Detective Gill about where the drugs were acquired, and because no facts were given to establish the basis and reliability of the informant's knowledge that Mr. Dyches was a methamphetamine cook, there was insufficient evidence present in the complaint to establish probable cause to issue the warrant. The warrant

was improperly issued and all evidence seized pursuant to it should have been suppressed.

2. There was insufficient evidence to convict Mr. Dyches of any crime.

Where a criminal defendant challenges the sufficiency of the evidence, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 19 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Id.* Circumstantial and direct evidence are of equal weight upon review by an appellate court. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

If there is insufficient evidence to prove an element, reversal is required and retrial is 'unequivocally prohibited.' *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

a. *The State presented insufficient evidence to establish Mr. Dyches manufactured a controlled in the State of Washington on or about June 25, 2004*

RCW 69.50.401 provides, in pertinent part,² “[e]xcept as authorized by this chapter, it is unlawful for any person to manufacture...a controlled substance.”

RCW 69.50.101(p) defines “manufacture” as,

the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term does not include the preparation, compounding, packaging, repackaging, labeling, or relabeling of a controlled substance:

(1) by a practitioner as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

(2) by a practitioner, or by the practitioner's authorized agent under the practitioner's supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.

Possession may be actual or constructive to support a criminal charge. *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969). A

² Mr. Dyches was charged under statutes which went into effect on July 1, 2004, despite the alleged crime having been committed on June 25, 2004. The main difference in the statutes appears to be simply the reorganization of content and not the modification of the elements of the crimes. However, it appears that the charging document contains

defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item. *Callahan*, 77 Wn.2d at 29, 459 P.2d 400. Dominion and control means that the object may be reduced to actual possession immediately. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). However, mere proximity is not enough to establish possession. *Jones*, 146 Wn.2d at 333, 45 P.3d 1062.

As discussed above, all evidence in this case relating to the manufacturing of methamphetamine was discovered pursuant to an invalidly issued search warrant and should have been suppressed. However, should this court find that the search warrant was validly issued, there was still insufficient evidence presented at trial to convict Mr. Dyches of manufacturing methamphetamine.

The evidence introduced at trial established that the officers discovered a dismantled methamphetamine lab spread through four boxes and a backpack when they executed the search warrant. These items were not found in Mr. Dyches' physical possession, and the State presented no evidence that Mr. Dyches would have been able to reduce the items to his actual possession immediately.

sufficient allegations to support the charges. For the sake of argument, reference will be made to the statutes under which Mr. Dyches was charged.

Further, the lab was dismantled in boxes and not functional. No anhydrous ammonia was smelled or discovered, and .5 of the .7 estimated grams of methamphetamine discovered in the wooden building was residue found in one of the jars recovered. While the residue in the jars may lead to a logical inference that some of the components had been used to manufacture methamphetamine at some point in the past, the State presented no evidence that the methamphetamine found was manufactured, or even could have been manufactured, at that location on or about June 25, 2005, or even that it was manufactured in the State of Washington. The State's own witnesses confirmed this upon cross-examination. RP 305-307.

Further, the State presented no evidence that Mr. Dyches was at all involved in any activity which might possibly be construed to fall under the expansive definition of "manufacturing" found in RCW 69.50.101. Mr. Dyches was not seen in possession of any of the boxes or the items in the boxes, no evidence was introduced establishing that his fingerprints were on the boxes or any other item recovered, and none of the evidence introduced at trial was found on Mr. Dyches person.

The prosecutor argued that Mr. Dyches could be found to have "manufactured" methamphetamine because the definition of manufacture includes preparation and "preparation includes boxing things up so you

can use them later.” RP 496. The State never introduced any evidence regarding who boxed the lab components up and how they arrived in the wooden structure. The only relation between Mr. Dyches and the boxes is that he was renting the building in which they were found, a building which had stood open and unlocked prior to Mr. Dyches rental, and was packed full of miscellaneous junk to the point that the police had a difficult time performing the search.

Viewing the evidence in a light most favorable to the State establishes only that the police found the components to a dismantled and once-used methamphetamine lab in a building rented by Mr. Dyches and located in a complex where a known drug dealer rents space and which building was unsecured with open access prior to Mr. Dyches renting it. Mr. Junger testified that the building was empty at the time he rented it to Mr. Dyches, but he could not remember the last time he inspected the building prior to renting it.

Because the State failed to present sufficient evidence that Mr. Dyches knew the lab components were there and presented no evidence as to the time or location of the manufacture of the methamphetamine found, the State presented insufficient evidence to establish that Mr. Dyches manufactured methamphetamine on or about June 25, 2004.

b. *The State presented insufficient evidence to establish that Mr. Dyches possessed a controlled substance with intent to deliver*

The statutory elements of possession of controlled substance with intent to deliver are (1) unlawful possession of (2) a controlled substance with (3) intent to deliver. *State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2005).

As discussed above, aside from the testimony regarding Patty's delivery of a baggie of methamphetamine to the confidential informant, all evidence in this case was discovered pursuant to an invalidly issued search warrant and should have been suppressed. However, should this court find that the warrant was validly issued, there was still insufficient evidence presented to establish that Mr. Dyches possessed methamphetamine with the intent to distribute it on June 25, 2004.

The testimony at trial indicated that the methamphetamine was recovered from two places: the residue in a mason jar and a baggie containing .2 grams of methamphetamine found in the arm of a couch in the building. No packaging materials, scales, or other paraphernalia were recovered which might lead to an inference that Mr. Dyches intended to sell any of the methamphetamine recovered in the search.

The State presented insufficient evidence that Mr. Dyches possessed methamphetamine with the intent to deliver.

- c. *The State presented insufficient evidence to establish that Mr. Dyches possessed pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine*

As discussed above, all evidence in this case relating to Mr. Dyches possession of pseudoephedrine and/or ephedrine was discovered pursuant to an invalidly issued search warrant and should have been suppressed. However, should this court find that the search warrant was validly issued, there was still insufficient evidence presented at trial to convict Mr. Dyches of possession of pseudoephedrine and/or ephedrine with intent to manufacture.

No evidence was presented to establish that the pills recovered in the building actually contained pseudoephedrine. Further, no evidence was presented as to what Mr. Dyches intended to do with the pills. The methamphetamine lab was not a functioning lab, and key components to the production of methamphetamine, such as anhydrous ammonia, were missing from the materials recovered in the search. As discussed above, it is uncertain whether Mr. Dyches even knew that the components to the meth lab were in the building.

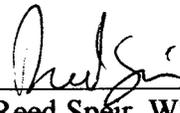
The State presented insufficient evidence to establish that Mr. Dyches possessed of pseudoephedrine and/or ephedrine with intent to manufacture.

E. CONCLUSION

“A person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” *State v. Yoakum*, 37 Wn.2d 137, 144, 222 P.2d 181 (1950). The charges in this case are based entirely on nothing but the innuendo that because the components to a methamphetamine lab were found in a building Mr. Dyches was renting, Mr. Dyches must have known they were there and used them. The evidence presented by the State was insufficient to convict Mr. Dyches of any of the charges brought against him. For the reasons stated above, this court should vacate Mr. Dyches’ convictions and dismiss the charges against him.

DATED this 31st day of July, 2006.

Respectfully submitted,



Reed Spier, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

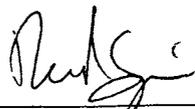
Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 31st day of July, 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. James Dyches, DOC# 961758
Airway Heights Corrections Ctr., Box 1809
Airway Heights, WA 99001

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 31st day of July, 2006.



Reed Speir, WSBA No. 36270

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