

FILED  
COURT OF APPEALS  
JAN 14 2011 4:45  
STATE OF WASHINGTON  
CMM

No. 33988-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Gregory Haapala,**

Appellant.

---

Jefferson County Superior Court

Cause No. 05-1-0012-6

The Honorable Judge Craddock D. Verser

**Appellant's Reply Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501  
(360) 352-5316  
FAX: 740-1650

**TABLE OF CONTENTS**

**TABLE OF CONTENTS..... i**

**TABLE OF AUTHORITIES..... ii**

**ARGUMENT ..... 1**

**I. THE ILLEGAL GENERAL WARRANT ISSUED IN THIS CASE  
AUTHORIZED SEIZURE OF BOOKS, PAPERS, DOCUMENTS,  
RECORDS AND OTHER ITEMS PROTECTED BY THE FIRST  
AMENDMENT..... 1**

**II. MR. HAAPALA DID NOT ASSUME THE RISK OF THIRD-PARTY  
CONSENT TO SEARCH HIS RESIDENCE BECAUSE HE WAS  
PRESENT AT THE TIME OF THE SEARCH. .... 2**

**III. THE TRIAL JUDGE FAILED TO INQUIRE INTO DEFENSE  
COUNSEL’S CONFLICT OF INTEREST. .... 4**

**IV. MR. HAAPALA’S ATTORNEY WAS AFFECTED BY THE CONFLICT  
OF INTEREST. .... 5**

**V. THE TRIAL COURT’S “REASONABLE DOUBT” INSTRUCTION  
VIOLATED DUE PROCESS AND WAS UNCONSTITUTIONAL  
(ARGUMENT INCLUDED TO PRESERVE ANY ERROR)..... 6**

**VI. THE STATE DID NOT ESTABLISH ANY CRIMINAL HISTORY  
PREVENTING WASHOUT OF MR. HAAPALA’S 1992 CONVICTION.  
..... 6**

**VII. IF THE OFFENDER SCORE ISSUE IS WAIVED, MR. HAAPALA WAS  
DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL. .... 7**

**CONCLUSION ..... 8**

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Lewis v. Mayle*, 391 F.3d 989 (9th Cir., 2004)..... 5

*Lockhart v. Terhune*, 250 F.3d 1223 (9th Cir., 2001)..... 5

*Stanford v. Texas*, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)..... 1

*Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525  
(1978)..... 1

**STATE CASES**

*Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405, 36 P.3d 1065 (2001). 5

*State v. Bennett*, 131 Wn. App. 319, 126 P.3d 836 (2006)..... 6

*State v. Bennett*, 2006 Wash. LEXIS 842 (2006)..... 6

*State v. Christian*, 95 Wn.2d 655, 628 P.2d 806 (1981)..... 3

*State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999)..... 7

*State v. Leach*, 113 Wn.2d 735, 782 P.2d 1035 (1989)..... 3

*State v. Maddox*, 116 Wn.App. 796, 67 P.3d 1135 (2003)..... 2

*State v. Mathe*, 102 Wn.2d 537, 688 P.2d 859 (1984)..... 2

*State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005)..... 3, 4

*State v. Perrone*, 119 Wn.2d 538, 834 P.2d 611 (1992)..... 1, 2

*State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993)..... 2

*State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2004)..... 2

*State v. Walker*, 136 Wn.2d 678, 965 P.2d 1079 (1998)..... 3

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. I ..... 1  
U.S. Const. Amend. IV ..... 3

**OTHER AUTHORITIES**

3 LaFave, *Search and Seizure* (3<sup>rd</sup> ed. 1996) ..... 3  
RAP 9.5 ..... 7

## ARGUMENT

### **I. THE ILLEGAL GENERAL WARRANT ISSUED IN THIS CASE AUTHORIZED SEIZURE OF BOOKS, PAPERS, DOCUMENTS, RECORDS AND OTHER ITEMS PROTECTED BY THE FIRST AMENDMENT.<sup>1</sup>**

Respondent argues that the search warrant affidavit provided probable cause to seize from Mr. Haapala's residence "financial records showing drug transactions as well as electronic equipment that could 'facilitate the distribution and/or purchase of controlled substances.'" Brief of Respondent, p. 15-16. If the warrant were limited to these items, Respondent would have a stronger argument; however, the warrant was far broader, and sought "Any books, papers, documents, [or] records... etc.," whether or not they were related to drug dealing. CP 65.

Because the First Amendment protects documents and electronic records, the warrant must be closely scrutinized to ensure compliance with the particularity and probable cause requirements. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *State v. Perrone*, 119 Wn.2d 538 at 547, 834 P.2d 611 (1992).

---

<sup>1</sup> Respondent's arguments do not follow the order in which they were presented in Appellant's Opening Brief. The original order is preserved here.

Here, nothing in the affidavit establishes probable cause to believe that “any books” found in Mr. Haapala’s residence would have evidentiary value. Nor is there anything establishing that any “papers,” any “documents” or any “records” found in the residence would contain evidence of criminal activity. Despite this, the warrant authorized seizure of all these items, and numerous others as well. CP 65.

Because probable cause did not exist for these items, the warrant was overbroad. *State v. Maddox*, 116 Wn.App. 796 at 805, 67 P.3d 1135 (2003); *State v. Riley*, 121 Wn.2d 22 at 29, 846 P.2d 1365 (1993). The seized items must be suppressed, the conviction must be reversed, and the case must be dismissed with prejudice. *Perrone, supra*.

**II. MR. HAAPALA DID NOT ASSUME THE RISK OF THIRD-PARTY CONSENT TO SEARCH HIS RESIDENCE BECAUSE HE WAS PRESENT AT THE TIME OF THE SEARCH.**

Respondent argues that Craig had “common authority” to consent to a search of the residence. Brief of Respondent, p. 12-15, *citing State v. Mathe*, 102 Wn.2d 537, 688 P.2d 859 (1984). Respondent goes on to assert that Craig had the authority to consent to a search, and that Mr. Haapala had assumed the risk that Craig might consent to a search.

But a resident only assumes the risk of third-party consent when absent from the premises. *State v. Thompson*, 151 Wn.2d 793 at 804, 92 P.3d 228 (2004); *State v. Leach*, 113 Wn.2d 735 at 739, 782 P.2d 1035

(1989); *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). As one commentator has noted, the risk assumed by joint occupancy “is merely an inability to control access to the premises during one’s absence.” 3 LaFare, *Search and Seizure* 731, § 8.3(d) (3<sup>rd</sup> ed. 1996).

Respondent does not address this aspect of the common authority rule. Instead, citing *State v. Christian*, 95 Wn.2d 655, 628 P.2d 806 (1981), Respondent argues that Mr. Haapala “had no reasonable expectation that he could keep Craig out of his room.” Brief of Respondent, p. 14. But *Christian* does not support Respondent’s position. First, *Christian* is a Fourth Amendment case, where the focus was on the defendant’s reasonable expectation of privacy. *Christian*, at 659. Second, the defendant in *Christian* was absent from the premises when the landlord entered. *Christian*, at 656-657.

As the Supreme Court has said,

Persons are not absent merely because the police do not know they are present, nor are they absent until police have come upon them during a warrantless search  
*State v. Morse*, 156 Wn.2d 1 at 4, 123 P.3d 832 (2005).

Here, Haapala was present and able to object; despite this, the police made no effort to contact him, relying instead on Craig’s legal analysis of Haapala’s status and his own authority to consent.

The failure of the police to draw the correct legal conclusions will not excuse an unlawful search, no matter how reasonable the error is. *Morse*, at 12. Where a cohabitant is present, the police must locate that person and obtain their consent. *Morse*, at 14.

In this case, the police were required to find Mr. Haapala and obtain his consent prior to searching the house. Accordingly, Mr. Haapala's conviction must be reversed, the seized items suppressed, and the case dismissed.

Respondent fails to address Mr. Haapala's other arguments regarding the search and the trial court's findings. Accordingly, Mr. Haapala stands on the opening brief with regard to those issues. *See* Appellant's Opening Brief, pp. 18-23.

**III. THE TRIAL JUDGE FAILED TO INQUIRE INTO DEFENSE COUNSEL'S CONFLICT OF INTEREST.**

Respondent does not address the trial court's failure to inquire into defense counsel's conflict of interest. Accordingly, Mr. Haapala stands on his opening brief.

**IV. MR. HAAPALA'S ATTORNEY WAS AFFECTED BY THE CONFLICT OF INTEREST.**

Respondent characterizes defense counsel's involvement in the intimidating charge as "small," and, without citation to authority, argues that the failure to withdraw was a "legitimate and appropriate trial tactic." Brief of Respondent, pp. 16-17. Where no authority is cited, this court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405 at 418, 36 P.3d 1065 (2001).

Respondent does not dispute that a conflict existed. Instead, according to Respondent, withdrawal would have given "a small measure of credibility to Craig's allegations." Brief of Respondent, p. 17. But Washington courts have *never* sanctioned as "legitimate" an attorney's decision to ignore a conflict of interest.

Since Respondent apparently agrees that a conflict existed, reversal is required if the attorney's behavior "seems to have been influenced" by the conflict. *Lewis v. Mayle*, 391 F.3d 989 at 999 (9th Cir., 2004), *citing* *Lockhart v. Terhune*, 250 F.3d 1223 at 1230-1231 (9th Cir., 2001).

Respondent does not provide any argument on this point.

Defense counsel's behavior does seem to have been influenced by the conflict. The defense attorney did not point out Craig's failure to

mention the alleged intimidation during the phone call to counsel. Craig's failure to mention Haapala's alleged threat should have been emphasized to impeach Craig's later assertion that a threat was made.

Because the conflict seems to have influenced Hynson's behavior, Mr. Haapala's conviction must be reversed and the case remanded for a new trial. *Lewis v. Mayle, supra*.

**V. THE TRIAL COURT'S "REASONABLE DOUBT" INSTRUCTION VIOLATED DUE PROCESS AND WAS UNCONSTITUTIONAL (ARGUMENT INCLUDED TO PRESERVE ANY ERROR).**

The Supreme Court has accepted review of *State v. Bennett*, 131 Wn. App. 319, 126 P.3d 836 (2006), and will address the validity of the nonstandard reasonable doubt instruction. *State v. Bennett*, 2006 Wash. LEXIS 842 (2006).

**VI. THE STATE DID NOT ESTABLISH ANY CRIMINAL HISTORY PREVENTING WASHOUT OF MR. HAAPALA'S 1992 CONVICTION.**

Respondent argues that Mr. Haapala "provides no information proving the lack of a prior conviction," and faults him for failing to object. Brief of Respondent, pp. 18, 21. This argument is misdirected for two reasons. First, a defendant has no burden and need not object at sentencing:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To

conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.

*State v. Ford*, 137 Wn.2d 472 at 482, 973 P.2d 452 (1999).

Second, Mr. Haapala *agrees* that he had one prior conviction; he asserts that the prior conviction (from 1992) washed. Respondent claims that the state did not agree that the 1992 conviction washed, despite the prosecutor's apparent agreement in the record; however, the state did not object or seek to correct the transcript pursuant to RAP 9.5(c).

Furthermore, the state did not establish any subsequent convictions that would prevent the 1992 marijuana conviction from washing. Given the state's burden to prove criminal history, the lack of evidence of a subsequent conviction requires exclusion of the 1992 conviction from the offender score, regardless of what the prosecutor agreed to in the trial court. RCW 9.94A.525(2).

Accordingly, Mr. Haapala's sentence must be vacated and the case remanded for sentencing with an offender score of one. *Ford, supra*.

**VII. IF THE OFFENDER SCORE ISSUE IS WAIVED, MR. HAAPALA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Respondent fails to address Mr. Haapala's argument on this issue. Accordingly, Mr. Haapala stands on his opening brief.

**CONCLUSION**

For the foregoing reasons, the conviction must be reversed, the evidence suppressed, and the case dismissed. In the alternative, the case must be remanded for a new trial. If the conviction is not reversed, the sentence must be vacated and the case must be remanded for correction of the offender score and sentencing.

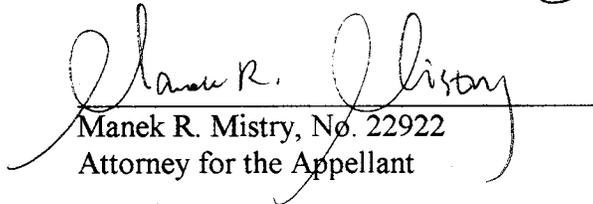
Respectfully submitted on November 14, 2006.

**BACKLUND AND MISTRY**



Jodi R. Backlund, No. 22917  
Attorney for the Appellant





Manek R. Mistry, No. 22922  
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Gregory Haapala, DOC #702506  
Monroe Corrections Center  
PO Box 7001  
Monroe, WA 98272

and to the Jefferson County Prosecuting Attorney.

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 14, 2006.

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

Signed at Olympia, Washington on November 14, 2006.

  
\_\_\_\_\_  
Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant