

NO. 34019-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

FRED IRVINE LEFFLER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Van Doorninck and McCarthy

No. 05-1-01933-8

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is there substantial evidence to support a finding that the police were justified in doing a warrantless search of the defendant's property where there was evidence of an active methamphetamine lab and the officers were performing a safety assessment? (Appellant's Assignment of Error Nos. 1-5, 7).

2. Alternatively, even assuming that the officers were not conducting a safety assessment of the garage, is there still sufficient evidence in the affidavit to support a finding of probable cause for issuance of the warrant? (Appellant's Assignment of Error Nos. 6-7).

B. STATEMENT OF THE CASE.

1. Procedure

On April 22, 2005, the State charged FRED IRVINE LEFFLER, hereinafter defendant, in Pierce County Superior Court, Cause No. 05-1-01933-8, with the crime of unlawful manufacturing of a controlled substance – methamphetamine, in violation of RCW 69.50.401 (1)(2)(b). CP 1-2.

On September 1, 2005, the matter came before the Honorable John McCarthy on defendant's motion to suppress. RP 3, 9/1/05. The court

denied defendant's motion to suppress, finding that the officers properly searched the premises as part of a safety assessment of an active methamphetamine lab. RP 26-29, 9/15/05. Findings of fact and conclusions of law were entered following the suppression hearing. CP 105-113 (APPENDIX A).

On September 28, 2005, the matter resumed for a stipulated bench trial before the Honorable Kitty Ann van Doorninck. RP 3, 9/28/05, CP 104, 114. Defendant was convicted as charged, and sentenced within standard range to 68 months. CP 114-117 (APPENDIX B), 118-129.

This timely appeal follows. CP 130-142.

2. Facts

a. Substantive

On April 21, 2005, officers contacted defendant on his property and found evidence of an active methamphetamine lab that was in the gassing phase. CP 114-115. Defendant admitted that the previous day he had allowed a friend to "pound out some slugs." CP 115. Defendant understood "pound out some slugs" to refer to the gassing phase of methamphetamine manufacture. CP 115. Officers uncovered a large number of items related to methamphetamine manufacture throughout the fifth-wheel trailer and the surrounding property. CP 115-16.

b. 3.6 Hearing

Deputy Greger arrived at defendant's property in response to a tip that there were strong chemical smells coming from the property. RP 8-

9.¹ Deputy Greger has observed close to 100 methamphetamine labs in his 11 year police career and has extensive methamphetamine training. RP 20. Upon arrival, Deputy Greger exited his car, which was parked approximately 30 feet from a fifth wheel trailer, and immediately he could smell a “really harsh chemical smell” in the air. RP 10. Due to the strong chemical smell and for personal safety, Deputy Greger maintained a distance of at least 10 feet from the fifth wheel. RP 16. The smell was noticeably stronger as you approached the fifth wheel. RP 9-10. Sergeant Schneider knocked on the door and defendant identified himself to the officers. RP 10. The officers were able to run a records’ check and learned that defendant had a felony escape warrant with DOC. RP 10. Defendant was taken into custody, read his Miranda rights, and informed of his warrant. RP 11.

DOC Officer McDonough was on scene to handle the warrant and DOC status. RP 11. Officer McDonough advised defendant that DOC had the right to search his trailer. RP 30. Defendant refused to consent to a search. RP 31. Officer McDonough then made clear to defendant that he did not need his permission to enter the premises, and that he was going in there. RP 31. Defendant informed him that there were some chemicals, muriatic acid, “gassing” in the fifth wheel. RP 12, 31. He

¹ Verbatim Report of Proceedings (RP), all references in this section are to the 9/1/05 hearing.

explained that his friend Kelly had stopped by the prior night and was “pounding some plugs.” RP 19. When asked to explain this phrase, defendant said he was “gassing.” RP 19. Deputy Greger understood “gassing” to be a phase in the production of methamphetamine. RP 19. At that point, Officer McDonough decided not to enter the fifth wheel. RP 31.

At this point, Deputy Greger became very concerned for officer safety because he believed there was a lab. RP 11. It was obvious to him based on the smell that was coming off of the defendant that there were some “very, very strong chemicals in the there.” RP 11. A methamphetamine lab team was called in to handle the chemical scene. RP 12.

During defense questioning of Deputy Greger, the defense broached the topic of telephonic warrants, and Deputy Greger explained that he had never applied for one. RP 22-23. Defense then asked him if “To your knowledge, is that something that you could do, if necessary?” RP 23. Deputy Greger replied, “I would imagine I could do that.” RP 23. The prosecutor then asked the deputy if he knew personally the proper procedure to apply for a telephonic warrant, and Deputy Greger explained that he did not and would have to ask his supervisor, but he did know that

they are “very doable.” RP 23. Deputy Greger was not asked, and did not explain how much time a telephonic warrant takes, and whether that factored into the emergency search. RP 23.

Narcotics investigator Franklin Clark with the special investigation unit of the Pierce County Sheriff’s Department arrived to assist with the methamphetamine lab scene, approximately an hour after officers first arrived. RP 34, 37, 48. Clark has extensive training and experience with methamphetamine labs and has processed over 400 methamphetamine labs. RP 35. After being briefed by other officers who were on the scene, Deputy Banach requested that Clark help him clear the property for officer safety reasons as well as a performance safety assessment for the lab items that were believed to be there. RP 37. A “performance safety assessment” is the unit’s way of making sure there is not an active cook or a possible chemical reaction going on that could erupt into flame or explode. RP 37. The assessment was also necessary to make sure there was not a chemical danger to the community, given the proximity of other houses. RP 46. There were houses located within 100 feet of the area, and if there was an active chemical reaction producing fumes it would pose a danger to the surrounding area. RP 46. Only lab team members, dressed in safety equipment and air purifying respirators, can conduct a safety assessment. RP 37-38.

After dressing in safety attire, Officer Clark went inside the structures to confirm what was going on chemically and to make sure

there were no people hiding. RP 38. It is not uncommon at methamphetamine lab sites for persons to be hiding and many times they will be armed. RP 38. Initially Clark assessed the travel trailer, or fifth wheel where defendant was found, the mobile, and then the shed on the garage. RP 38.

Clark entered the travel trailer first to verify there was no threat to the officers and to try to confirm that there was no possible chemical reaction occurring that could have been a danger to the surrounding community. RP 39. Inside Clark observed several jars containing various liquids, a plastic jug labeled "muriatic acid," a plastic bottle containing liquid with tubing coming out of the top, as well as coffee filters and a crock pot with an unknown reddish-brown substance inside it. RP 40. All of the items appeared to be related to the manufacture of methamphetamine. RP 40, 45.

Clark next moved on to an assessment of the mobile home. RP 40. There were fumes coming from the mobile home and so Clark entered to clear it for officer safety reasons. RP 40. If patrol officers perceive a chemical threat they are not suppose to enter the building if they do not have proper protective equipment. RP 42. However, given that the door was open Clark needed to ensure for officer safety reasons that there was no one hiding that could have been armed and posed a threat to personnel on the scene. RP 42. Inside officers located a pressure cooker in the

closet, bottles labeled iodine, syringes, plastic baggies and a triple beam gram scale. RP 43. All items are related to either the manufacture or distribution of methamphetamine. RP 43-44.

Next Clark moved to a shed with an open door to ensure no one was in there because odors prevented a safety check earlier. RP 42. Officers also conducted an assessment of the shed where they observed several plastic gas cans, one with a white residue, and a large drink cooler with a white substance. RP 43. Items appeared to be related to the manufacturing of methamphetamine, specifically the “Nazi” manufacturing method. RP 44.

The officers then moved on to the garage, located just north of the shed for officer safety reasons. RP 44. The officers had not previously searched the area because the odors coming from other places made them concerned to enter any other structure at that point. RP 44. Officers located propane cylinders and some other pressurized cylinders. RP 44. These cylinders are often used to store anhydrous ammonia until it's used in the cooking process for methamphetamine. RP 44.

Clark ultimately wrote the search warrant for defendant's property. RP 35-36, 46. Clark explained that there can be a danger of waiting and getting a search warrant first because of the danger inherent in methamphetamine labs. RP 47-48. For example, he has seen instances where reactions have exploded or tanks were leaking with ammonia and an area had to be evacuated. On a red P iodine cook, one of the by-

products is phosphene gas, which if breathed, is deadly. RP 47. If there was an active cook, the team must shut it down to prevent the emission of gasses. RP 47.

C. ARGUMENT.

1. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT THE OFFICERS WERE CONDUCTING A SAFETY ASSESSMENT OF THE PROPERTY WHERE THERE WAS EVIDENCE OF AN ACTIVE METHAMPHETAMINE LAB.

An appellate court reviews findings of fact from a suppression motion under the substantial evidence standard. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Id. at 644. Unchallenged findings of fact are verities on appeal and an appellate court “will review only those facts to which error has been assigned.” Id. at 647. Conclusions of law are reviewed de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

“A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement[.]” State v. Schroeder, 32 P.3d 1022, 1024 (2001)(quoting, Flippo v. West Virginia, 528 U.S. 11, 120 S. Ct. 7, 8, 145, L. Ed. 2d 16 (1999)). Exceptions to the warrant requirement are narrowly tailored. Id.

at 1025 (*citing*, State v. Ladson, 128 Wn.2d 343, 356, 979 P.2d 833 (1999)).

The court has recognized two subsections within the community caretaking exception to the warrant requirement: (1) the emergency aid exception, and (2) routine checks on health and safety. State v. Kinzy, 141 Wn.2d 373, 386, 5 P.2d 668 (2000). The emergency aid exception recognizes the function of the police to “assist citizens and protect property.” Schroeder, 32 P.3d at 1025 (quoting, State v. Johnson, 104 Wn.App. 409, 414, 16 P.3d 680 (2001)). This exception applies when (1) the officer subjectively believes that someone likely needs assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there is a need for assistance; and (3) there is a reasonable basis to associate the need for assistance with the place searched. State v. Kinzy, 141 Wn.2d, 5 P.3d 668 (2000), *citations omitted*. A reviewing court must be satisfied that the claimed emergency is not a pretext for conducting an evidentiary search. Schroeder, 32 P.3d at 1025, *citing*, Johnson, *supra* at 414. The courts do not require a showing to be made that there is a “strong belief that a specific person is in actual need of help for a serious health or safety reason.” Johnson, 104 Wn. App. 409. Contrasted with the emergency aid exception, the routine check on health and safety involves less urgency. Schroeder, 32 P.3d at 1026. Under routine checks a court must balance the individual’s interest in freedom from police interference against the public’s interest in having

the police perform the community caretaking function. Schroeder, 32 P.3d at 1026 (quoting, Kinzy, 141 Wn.2d at 392).

Where a community caretaking exception does apply, the officers may conduct a noncriminal investigation so long as it is necessary and strictly relevant to performance of the community caretaking function. Schroeder, 32 P.3d at 1024.

In State v. Downey, 53 Wn. App. 543, 768 P.2d 502 (1989), the court examined whether a warrantless search was justified in a methamphetamine scene based on the odor of ether alone under the emergency aid doctrine. In Downey, the officers noticed an ether odor 150 to 200 feet from the defendant's residence. Officers contacted the police narcotics unit and were cautioned that ether is highly volatile and explosive in concentrated form, and were instructed to leave the residence and contact the fire department's hazardous materials squad if the smell of ether overpowered someone or if open chemicals were found. Officers entered to determine whether there was ether inside the building and to ensure that no one was inside. One officer was able to enter only a few feet before the odor interfered with his breathing. The other officer continued into the residence and found a "chemical-type lab with something cooking on a burner" in the basement. On appeal the defendant challenged the warrantless entry. The court rejected this claim finding first there was no question that the officers believed they were in a very dangerous, emergency situation, and that the circumstances also showed

objective reasonableness given the volatile nature of such chemicals, that the home was in a residential area, and the officers did not know whether someone was incapacitated inside. 53 Wn. App. at 545. In reaching this conclusion the court noted that sometimes the smell of ether alone can justify a warrantless search. *Id.*, citing, United States v. Echeogyen, 799 F.2d 1271 (9th Cir. 1986); People v. Duncan, 42 Cal. 3d 91, 103-04, 720 P.2d 2, 227 Cal Rptr. 654, 661 (1986).

Federal courts have also turned to the emergency or community caretaking doctrine in cases involving reports of the presence of hazardous chemicals. Russoli v. Salisbury Tp., 126 F. Supp. 2d 821, 847 (E.D. Pa. 2000). The Ninth Circuit found a police officer's warrantless entry of an apartment justified by the emergency doctrine in United States v. Cervantes, 219 F.3d 882 (9th Cir. 2000), cert. denied, 121 S. Ct. 1242, 149 L. Ed. 2d 150 (2001). Because the officer smelled fumes associated with methamphetamine production and knew that methamphetamine labs are volatile, his belief that an emergency existed was objectively reasonable. Cervantes, 219 F.3d at 890-91. The court added, however, that an investigator's subsequent search of the apartment was not justified by the emergency doctrine because by the time the investigator arrived, the officers had defused the risk of explosion. Cervantes, 219 F.3d at 892.

Other courts agree that the presence of potentially explosive chemicals presents a continuing danger that justifies the warrantless search and seizure of a residence. Russoli, 126 F. Supp. at 848. The Second Circuit upheld the warrantless entry of a fire damaged house by a narcotics detective summoned to the scene after firefighters found chemicals, scales, and vials in the rooms where the fire started. United States v. Callabross, 607 F.2d 559, 561-62 (2nd Cir. 1979), cert. denied, 446 U.S. 940, 100 S. Ct. 2163, 64 L. Ed. 2d 794 (1980). A federal district court upheld a similar entry made after firefighters responded to a report of smoke at a residence. United States v. Clark, 617 F. Supp. 693 (E.D. Pa. 1985), aff'd, 791 F.2d 922 (3d Cir. 1986). Once inside, the fire crew found a dish containing a bubbling liquid as well as materials indicating the presence of a methamphetamine laboratory. Clark, 617 F. Supp. at 695. The fire crew called a narcotics officer who in turn called the DEA to assist in disassembling the lab. The court observed that the chemical dangers presented were equivalent to the danger of rekindling, which is an exigency justifying a warrantless post-fire investigation. Clark, 617 F. Supp. at 697 (*citing Michigan v. Clifford*, 464 U.S. 287, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984)); *see also State v. Calloway*, 111 N.M. 47, 801 P.2d 117, 119, cert. denied, 111 N.M. 77, 801 P.2d 659 (1990) (holding that although the fire had been extinguished and a cause and origin search

completed, the presence of methamphetamine chemicals constituted exigent circumstances justifying the police officer's warrantless entry).

Oklahoma has recently grappled with the issue of methamphetamine labs and emergency searches to secure the scene. Coffey v. Oklahoma, 2004 OK CR 30, 99 P.3d 249 (2004). Adopting the Tenth Circuit's² approach that clandestine methamphetamine labs constitute a public safety hazard rising to exigent circumstances the court noted:

This decision is justified by the extremely volatile and explosive nature of the chemicals used in manufacturing methamphetamine. These, when found in the unsterile and haphazard settings usually associated with clandestine laboratories, have long been proved to constitute both an immediate health hazard to bystanders and a menace to public safety.

99 P.3d at 252. The test announced in Coffey acknowledged that while every methamphetamine lab may not create exigent circumstances, most labs present inherent danger to law enforcement and the community. The test calls for the court to examine whether there is (a) an odor indicating the presence of an apparently dangerous concentration of ether or another chemical commonly used in the manufacture of methamphetamine, (b) reporting officers were aware of the volatile and explosive nature of the chemicals and the potential danger to the public, and (c) the possibility

² See United States v. Rhiger, 315 F.3d 1283, 1288 (10th Cir. 2003).

that persons in the area might be in danger from the chemicals, including officers. Coffey, 99 P.3d at 252.

Turning to the case at bar, the officers were faced with circumstances similar to Downey and Coffey, and properly secured a volatile scene prior to conducting a full search. First, the officers subjectively believed the search was necessary for health and safety reasons, and a reasonable person under the circumstances would reach the same conclusion. From the moment the officers arrived on the scene they could smell a strong odor of chemicals. CP 106, RP 10. Contrary to defendant's assertion on appeal, the officers knew the chemicals were associated with the production of methamphetamine. Investigator Clark testified that he knew that chemicals associated with the production with methamphetamine can give off deadly gasses. RP 47. The trial court also relied on the facts in the affidavit for probable cause for the search warrant, which included details of the chemicals used in methamphetamine, including the inherent danger of such chemicals. CP 109, Plaintiff's Ex. 1.

Defendant himself acknowledged the presence of the lab. CP 106. Based on the strong chemical smell, the officers concluded it was not safe for them to enter the trailer at that time, and the methamphetamine lab team was called to respond and perform a security sweep as well as a safety assessment related to the chemicals. CP 106, 107. RP 11, 12, 37. Defendant further explained that a friend of his had stopped by to "pound

out some slugs” which he explained was “gassing”, and that the friend had spent the last day trying to do so. Deputy Greger knew gassing referred to one of the stages in the manufacture of methamphetamine. CP 107, RP 19. To further the danger and need for immediate assistance, there was a home within 100-200 feet from the defendant’s trailer. CP 110, FOF 15.

Defendant maintains that the delay in the search nullifies the emergency. However, the delay can be explained in the need to enlist the aid of a properly attired team for the search. While a more prompt response would be better for the community and officers on the scene, it does not take away from the fact that there was a very real emergency.

Defendant further argues that because obtaining a warrant was “doable,” there was no need for an emergency assessment. First, defendant misconstrues the record. At no point did the State’s witnesses say that obtaining a warrant was an easy and expeditious route. Instead the witness explained to the court that he was unaware of the procedures to obtain a telephonic warrant but he believed it to be “doable.” RP 23. Availability of a telephonic warrant is merely one factor officers must consider in determining whether circumstances are sufficiently exigent to justify a warrantless search. See State v. McIntyre, 39 Wn. App. 1, 5-6, 691 P.2d 587 (1984), review denied, 103 Wn.2d 1017 (1985). ”Obtaining a telephonic warrant is not a simple procedure.” United States v. Echegoyen, 799 F.2d 1271 (9th Cir. 1986), quoting United States v. Good, 780 F.2d 773, 775 (9th Cir.), cert. denied, 475 U.S. 1111, 106 S. Ct. 1523,

89 L. Ed. 2d 920 (1986). "A telephonic warrant may not be obtained simply by calling a magistrate. Among other things, a 'duplicate original warrant' must be prepared in writing and read to the magistrate verbatim." United States v. Manfredi, 722 F.2d 519, 523 (9th Cir. 1983) (citing United States v. Hackett, 638 F.2d 1179 (9th Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981)).

Here, obtaining a warrant first was impractical given the strong odor and danger presented. There was only an hour delay between initial entry onto the property and the safety assessment. At the time investigator Clark felt that applying for a search warrant was unrealistic because of a need to do an assessment to make sure there was not a chemical danger to the community given that the houses were very close. RP 46.

According to Clark there was a danger in waiting for a search warrant because he has personally witnessed instances where reactions explode or ammonia is leaking and areas had to be evacuated. RP 47. The fact that such a danger turned out not to exist in this case is immaterial; while it may be true that police could have explored warrant options, this is done only with the benefit of 20/20 hindsight. At the time the officers knew of a real danger and did everything they could to quickly secure the scene. A mere hour lapse in time does not make a warrant the reasonable alternative. See, Echegoyen, supra, at 1279, n.6 (holding that a two hour delay before entry to secure the scene did not call for trying to obtain a

telephonic warrant first since obtaining one is not a simple procedure and the risks at the scene may have increased).

Defendant also argues that even assuming that an emergency search could stand under these facts, the courts factual findings are unsupported by the record. (Opening Brief of Appellant at pg. 26, f.n. 2). However, there is substantial evidence in the record to support the finding that the methamphetamine lab team searched the entire property for two reasons, “possible chemical hazards and the presence of any person posing a threat to the officers,” and conducted chemical hazard assessments of each of those buildings. (FOF 14, FOF 16). Investigator Clark testified that the deputies who were originally on scene asked him to clear the property both for officer safety reasons as well as perform a safety assessment. RP 37. Officer Clark testified that after he donned his protective gear he went inside the structures to confirm what was “going on chemically” and to make sure there were no people hiding. RP 38. There were chemicals odors coming from the fifth wheel/travel trailer (RP10), mobile home (RP 40), and shed (RP 42).

There is also sufficient evidence to support an assessment of the garage. The officers had not previously searched the area because of the odors coming from the other structures, and the court correctly concluded that where deputies found hazardous materials “related to methamphetamine manufacturing in the fifth-wheel trailer, the mobile home and the shed, it was reasonable for them to also conduct a chemical

hazard assessment of the garage.” RP 44, FOF 16, COL 4. Contrary to defendant’s argument, State v. Thompson, lends support to the trial court’s finding of an emergency aid exception to search all areas of the property. 112 Wn. App. 787, 51 P.3d 143 (2002), *rev’d on other grounds*, 151 Wn.2d 793, 92 P.3d 228 (2003).³ In Thompson, a trained methamphetamine officer was called to a scene where officers smelled a strong chemical odor in a trailer and viewed several items associated with methamphetamine. Upon arrival the clandestine lab officer entered the trailer to verify that the oven was off, but he also checked the safety of a propane tank and searched the nearby boathouse. In upholding the search under the emergency aid doctrine, the court found that the search of the boathouse was warranted given that the “officers had already found possible methamphetamine laboratory equipment in other areas associated with Thompson.” 112 Wn. App. at 802 (*citing, State v. Downey, supra* at 545). Thus, under Thompson, the garage, like the boathouse, was properly searched given the presence of methamphetamine material throughout the property.

³ On review, the Supreme Court held that the initial entry into the trailer by the first officer to retrieve an occupant’s coat was not valid under the community care taking exception. 151 Wn.2d at 803. It was during this initial entry that the officers became aware that there was a possible active lab. Thus, Division II’s analysis in this case about what transpired following this observation may have little precedential value. However, because defendant argues the facts and holding of this case in its opening brief, the State feels obligated to respond.

In this case officers properly contained a hazardous scene in order to protect themselves and surrounding property, and this court should affirm the trial court's ruling denying suppression.

2. ALTERNATIVELY, THERE IS STILL PROBABLE CAUSE TO SUPPORT ISSUANCE OF A WARRANT AFTER EXCISING THE EVIDENCE RETRIEVED FROM THE GARAGE AND REVERSAL IS UNWARRANTED.

Even assuming that there was insufficient evidence to support a protective sweep of the garage, there is still enough evidence free of the taint to support a finding of probable cause for issuance of the warrant.

Information gathered by violating the constitution cannot be considered in determining whether the affidavit establishes probable cause. See State v. Ross, 141 Wn.2d 304, 314-15, 4 P.3d 130 (2000); State v. Johnson, 75 Wn. App. 692, 709-10, 879 P.2d 984 (1994), review denied 126 Wn.2d 1004, 891 P.2d 38 (1995). The proper procedure for a reviewing court when police have used unconstitutional means to gather some of the information in the affidavit is to determine whether the remaining untainted facts provide probable cause to issue the warrant. State v. Ross, 141 Wn.2d 304, 314-15, 4 P.3d 130 (2000); State v. Johnson, 75 Wn. App. 692,709-10, 879 P.2d 984 (1994), review denied 126 Wn.2d 1004, 891 P.2d 38 (1995). To establish probable cause, the evidence presented must lead a reasonable person to believe both (1) that

the item sought is contraband or other evidence of a crime, and (2) that the item sought is likely to be found at the place searched. State v. Goble, 88 Wn. App. 503, 508-509, 945 P.2d 263 (1997), *citations omitted*. Thus, there must be “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.” Id. The application for a search warrant must be judged in the light of common sense, with doubts resolved in favor of the warrant. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

Here, there is very brief mention of the garage evidence in the application for the search warrant, and finding probable cause after excising this information is easily accomplished. CP 146-157.

In addition to concluding that there was probable cause in the search warrant after excising the garage evidence, this court should also find that once the warrant was issued for search of the premises, the evidence in the garage would inevitably be discovered. The inevitable discovery exception to the exclusionary rule applies if the State can prove "by a preponderance of the evidence that the evidence ultimately or inevitably would have been discovered using lawful procedures." State v. O'Neill, 148 Wn.2d 564, 591, 62 P.3d 489 (2003) (citing Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984)). Given the location of methamphetamine articles found throughout the rest of the property, the issuance of a warrant for search of the garage would more likely than not have been issued.

Finally, even if this court were to conclude that suppression of any evidence seized in the garage is proper, there was still overwhelming evidence of guilt and reversal of the conviction is unwarranted. In order for a court to find a constitutional error harmless it must be convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error. State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995). To make this determination, courts utilize the "overwhelming untainted evidence" test. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Under this test, courts look to the untainted evidence admitted at trial to determine if it is so overwhelming that it necessarily leads to a finding of guilt." Id. A person is guilty of manufacturing methamphetamine if he directly or indirectly produces, prepares, propagates, compounds, converts, or processes methamphetamine. RCW 69.50.101(p), 401. A person can "manufacture" methamphetamine without possessing the final product. State v. Keena, 121 Wn. App. 143, 148, 87 P.3d 1197 (2004).

Here, the evidence in the garage was arguably not even used in the court's determination of guilt. See Findings of Fact and Conclusions of Law, CP 114-117. The search of the garage uncovered very little, only a propane and pressured cylinder. RP 44. The court's findings reflect that guilt was largely determined based on the evidence found in the fifth-wheel trailer. See, CP 115, FOF 7 ("The gassing phase of methamphetamine manufacture was occurring when officers first knocked

on the door of the fifth-wheel trailer and contacted Leffler.”). This finding alone establishes guilt beyond a reasonable doubt of the manufacturing of methamphetamine.

D. CONCLUSION.

This court should affirm the trial court’s ruling denying suppression of evidence seized in this case where the officers were properly conducting a safety assessment of an active methamphetamine lab.

DATED: June 29, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Certificate of Service:

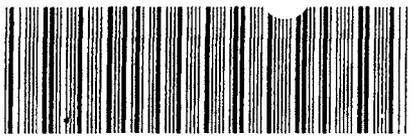
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/3/06 
Date Signature

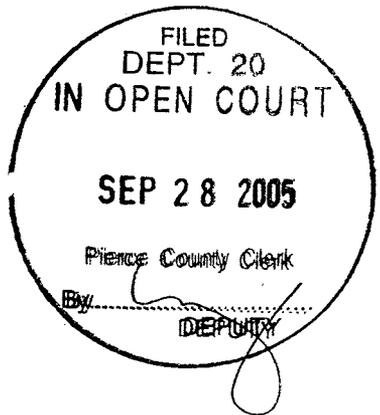
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APPENDIX “A”

Findings of Fact and Conclusions of Law 3.6 Hearing



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, <p style="text-align: center;">vs.</p> FRED IRVINE LEFFLER, <p style="text-align: right;">Defendant.</p>	Plaintiff, Defendant.	CAUSE NO. 05-1-01933-8 FINDINGS AND CONCLUSIONS ON ADMISSIBILITY OF EVIDENCE CrR 3.6
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THIS MATTER having come on before the Honorable John McCarthy on the 1st and 15th days of September, 2005, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

THE UNDISPUTED FACTS

Deputy Greger of the Pierce County Sheriff's Department is part of a community response team. On 04-21-05 at 0948 hours Deputy Greger responded to an anonymous drug complaint at 17113 84th AVE Ct. E. near Puyallup. The information was that the occupants of a fifth-wheel trailer on the property were possibly manufacturing drugs and that the scent of chemicals was present. The complaint also indicated that there was a high volume of traffic to and from the property.

1 Deputy Greger went to the scene and parked about 30 feet from the fifth-wheel
 2 trailer. The trailer was near the driveway on the property. When Deputy Greger got out
 3 of his vehicle he could smell a strong odor of chemicals. Sergeant Schneider knocked
 4 on the trailer door. Deputy Greger could hear someone moving around inside and a
 5 voice that said, "Who is it?" Deputy Greger replied that it was the Sheriff's department
 6 and an individual, identified as Fred Leffler, came out of the trailer, shutting the door
 7 behind him.

8 A records check revealed a felony DOC escape warrant for Leffler's arrest.
 9 Leffler was on active DOC supervision at the time of this incident. Deputy Greger
 10 arrested Leffler on the warrant and advised Leffler of his rights. Community Correction
 11 Officer McDonough was also present as a member of the community policing team.
 12 CCO McDonough advised Leffler he would need to do a check of Leffler's trailer. Leffler
 13 told CCO McDonough that he could not do that. CCO McDonough explained to Leffler
 14 that it was part of his DOC conditions and that CCO McDonough would check the trailer
 15 [notwithstanding Leffler's attempted refusal]. CCO McDonough asked Leffler if there
 16 was a meth lab inside the trailer and Leffler said that there was some muriatic acid
 17 inside and a gasser. Leffler said he was the only one there.

18
 19 Based upon Leffler's statement and the strong chemical smell, the officers
 20 concluded it was not safe for them to enter the trailer at that time. The meth lab team
 21 was called to the scene to respond. Leffler then claimed that a friend of his named
 22 Kelley stopped by yesterday and asked if he could "pound out some slugs." Deputy
 23 Greger asked Leffler what that meant and Leffler said that Kelley needed to do some
 24 gassing. Leffler said that Kelley did not know what he was doing because Kelley spent
 25

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1 the last day trying to gas the product. Leffler said that Kelley spent the night and left
2 about one hour before officers arrived. When Deputy Greger asked Leffler if he could
3 explain gassing, Leffler stated that he wanted to talk to a lawyer. Deputy Greger knew
4 gassing to refer to one of the stages in the manufacture of methamphetamine.

5 Sergeant Schneider and other deputies began to conduct a protective check of
6 the remainder of the property for officer safety reasons. Sergeant Schneider said that
7 as he and other deputies approached a mobile home they noticed a strong chemical
8 odor from the mobile home. Because of chemical related safety concerns, none of the
9 community policing team entered the mobile home to secure it.

10 The officers on the scene called for members of the meth lab team to conduct a
11 security sweep of the property and a safety assessment related to the chemicals. The
12 fire department was not called at this time. The members of the meth lab team arrived
13 about an hour later.

14 Deputies Clark and Banach were members of the meth lab team. They entered
15 the structures on the property and observed evidence of methamphetamine
16 manufacturing in the trailer, in the mobile home and in a shed. In the trailer they found
17 a methamphetamine lab that was consistent with the red phosphorous method of
18 manufacturing methamphetamine. In all three locations the strong chemical odor
19 penetrated the filtered respirators of the lab team members. Deputy Clark did not
20 specifically identify the nature of the odor.

21 Deputies Clark and Banach also entered the garage by manually lifting the car
22 door. Nobody smelled chemical odors outside the garage at any time. In the garage
23 they found additional materials consistent with a meth lab.
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1 After the scene was secured, officers applied for a search warrant. Deputy Clark
2 did not call the fire department to the scene.

3 Leffler was decontaminated by Graham Fire Department and transported to the
4 Pierce County Jail. Leffler was booked on the outstanding warrant, as well as the
5 additional charge of unlawful manufacturing of a controlled substance,
6 methamphetamine.

7 THE DISPUTED FACTS

8 The parties dispute whether:

- 9 1. The community policing team had a reasonable basis to investigate the
10 anonymous complaint to law enforcement.
- 11 2. The officers had a reasonable basis to contact Leffler at the fifth-wheel trailer.
- 12 3. The officers had a reasonable basis to search the premises of Leffler's trailer.
- 13 4. The members of the community policing team had an objectively reasonable
14 concern for officer safety that justified a protective sweep of the remainder of the
15 property.
- 16 5. The community response team officers had a reasonable basis to call the meth
17 lab team to assess the scene.
- 18 6. The meth lab team had a reasonable basis to conduct a safety assessment for
19 chemical hazards
- 20 7. The meth lab team members doing a safety assessment for chemical hazards
21 had a reasonable basis to search the garage.
- 22 8. The distance between the fifth-wheel trailer and neighboring houses.
- 23
24
25

FINDINGS AS TO DISPUTED FACTS

The court adopts and incorporates the undisputed facts and also makes the following specific findings that:

1. Deputy Greger was responding to an anonymous drug complaint.
2. Deputy Greger detected a strong chemical odor from the fifth-wheel trailer, that he could smell from thirty feet away.
3. Deputy Greger and the other responding officers were accompanied by Department of Corrections Community Correction Officer McDonough, who noted that the chemical odor was harsh.
4. Pierce County Sergeant Schnieder knocked on the door of the fifth-wheel trailer. Leffler called out from inside, and answered the door and shut the door behind him. Sergeant Schneider obtained Leffler's name and officers verified that Leffler had a felony warrant for his arrest. Officers cuffed Leffler and arrested him on the warrant.
5. CCO McDonough confirmed Leffler's DOC status
6. Deputy Greger was concerned for officer safety as a result of the chemical odor.
7. Leffler referred to the fact that the chemicals were "gassing."
8. The State's exhibits included the affidavit for probable cause for the search warrant. That affidavit included additional details, and referred to muriatic acid, red phosphorus, and other items related to methamphetamine manufacturing.
9. Out of concerns for officer safety related to chemical hazards, the officers called for the Pierce County Sheriff's Department's meth lab team to respond to the scene.
10. Officers walked the property for officer safety purposes.
11. Leffler was arrested outside the fifth-wheel trailer.

05-1-01933-8

1 12. CCO McDonough was present as part of a community support team. That team
2 assists officers if issues arise involving DOC supervision of individuals being
3 investigated.

4 13. CCO McDonough found that Leffler was on active supervision status. CCO
5 McDonough got a supervisor's permission to search Leffler and the fifth-wheel trailer in
6 which he was residing. Leffler did not consent to a search of the fifth-wheel trailer.
7 Ultimately CCO McDonough did not enter the fifth-wheel trailer and did not conduct a
8 search of the trailer.

9 14. According to Deputy Clark, prior to his arrival members of the community
10 response team were sent in to clear the property for officer safety. They approached
11 the fifth-wheel trailer, mobile home and shed, but did not enter any of the structures
12 because they smelled chemical odors outside each of them. Members of the
13 community response team then called in the meth lab team. Deputies Clark and
14 Banach conducted a protective sweep and hazard assessment of the property. They
15 had two purposes. First, the officers sought to make sure no one else was present who
16 might be a threat to officers. Second, the officers also checked for possible chemical
17 hazards at the scene.
18

19 15. While Deputy Clark testified that the neighbor's house was 100 feet away from
20 Leffler's trailer. Leffler testified the house was about 200 feet away from Leffler's trailer.
21 The State admitted a sheet of photos that showed Leffler's property and the adjacent
22 homes. The court finds that the neighbors house was at least within 200 feet of Leffler's
23 trailer and that it is not significant whether it was actually less than that amount.
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05-1-01933-8

16. While Deputies Clark and Banach conducted the chemical hazards assessment of each of the buildings they observed chemicals and equipment that were hazardous and that he recognized to be commonly used for the manufacture of methamphetamine.

17. Deputy Clark also conducted an assessment of the garage. That structure had not been approached by officers in the earlier sweep.

18. The only officers who conducted a search of the property prior to the service of the warrant were Deputies Clark and Banach.

17. After conducting the hazards assessment, based upon his observations Deputy Clark applied for and obtained a search warrant for the premises.

REASONS FOR ADMISSIBILITY OF THE EVIDENCE

The court makes the following conclusions of law.

1. The initial anonymous complaint to officers about drug activity at Leffler's location did not alone establish probable cause to believe Leffler had committed a crime.

2. The search of the Fifth-wheel trailer was not a search pursuant to DOC authority because the search was not undertaken by CCO McDonough.

3. Th protective search of the fifth-wheel trailer, the mobile home and the shed was valid under the emergency exception because of the chemical smells and possible chemical hazards when considered in conjunction with Leffler's comments regarding "gassing." Pursuant to State v. Downey, 53 Wn. App. 543, 768 P.2d 502 (1989), the officer's initial protective search of the property would not have been valid if it was merely for officer safety from threats by other persons on the property and there were no smells of potentially hazardous chemicals. Without the chemical smells there was no evidence that anyone else was present on the property or a threat to the officers.

4. Where Deputies Clark and Banach found hazardous materials related to methamphetamine manufacturing in the fifth-wheel trailer, the mobile home and the shed, it was reasonable for them to also conduct a chemical hazard assessment of the garage.

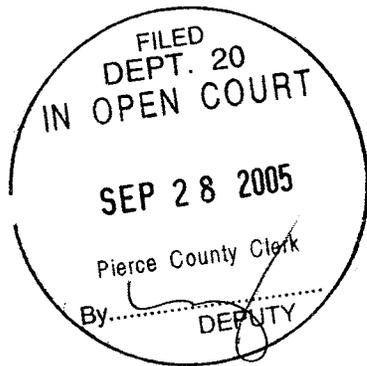
5. Even if the entry into the garage as part of the hazard assessment was unreasonable, the evidence found in the garage is admissible under the doctrine of inevitable discovery where the evidence found at the other locations on the property supported probable cause to search the entire property. The evidence found in the garage would have inevitably been discovered as a result of the service of the search warrant.

6. The warrant was valid and lawfully supported by probable cause to search the premises. The evidence supplied in the probable cause statement that was obtained as a result of the hazard assessment by Deputies Clark and Banach was lawfully obtained as the fruit of a hazard assessment pursuant to the emergency exception.

RULING

The court denies the defendant's motion to suppress the evidence obtained as a result of the search subsequent to the warrant.

DONE IN OPEN COURT this 28th day of September, 2005.



John A. McCarthy
JUDGE

05-1-01933-8

Presented by:



STEPHEN D TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Approved as to Form:



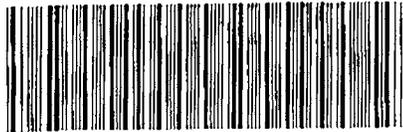
KERRY L GLASOE-GRANT
Attorney for Defendant
WSB # 34011

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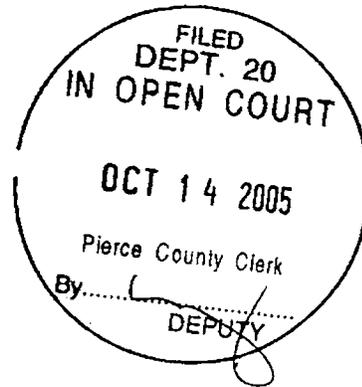
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APPENDIX “B”

Findings of Fact and Conclusions of Law Guilt



05-1-01933-8 23885530 FNFL 10-14-05



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-01933-8

vs.

FRED IRVINE LEFFLER,

Defendant.

FINDINGS AND CONCLUSIONS ON GUILT

THIS MATTER having come on before the Honorable Kitty-Ann van Doorninck on the 28th day of September, 2005, for a bench trial with the parties having stipulated to all the facts to be considered by the court and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions:

The court finds that

1. On or about the 21st day of April, 2005 Frederick Leffler did unlawfully manufacture a controlled substance, methamphetamine.
2. Frederick Leffler knew that methamphetamine was a controlled substance.
3. These acts occurred in the State of Washington.
4. Fred Leffler resided at 17113 84th Ave. Ct. E. in Pierce County and had dominion and control over the entire property and all structures thereon.

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1 5. On or about the 20th day of April, 2005 Fred Leffler allowed a friend known to him
2 as Kelly to "pound out some slugs." Leffler understood "[P]ound out some slugs" to
3 refer to the gassing phase of methamphetamine manufacture under the red
4 phosphorous method of methamphetamine manufacture.

5 6. Fred Leffler told officers that Kelly was not successful in producing
6 methamphetamine.

7 7. The gassing phase of methamphetamine manufacture was occurring when
8 officers first knocked on the door of the fifth-wheel trailer and contacted Leffler

9 8. No other persons were in the fifth-wheel trailer or elsewhere on the property
10 when officers contacted Leffler.

11 9. Methamphetamine was present in residue in coffee filters in Fred Leffler's fifth-
12 wheel trailer.

13 10. There was a large number of items related to methamphetamine manufacture
14 found throughout the fifth-wheel trailer.

15 11. Items related to methamphetamine manufacture were found throughout Leffler's
16 property and that those items related to more than one method of manufacturing
17 methamphetamine.
18

19 12. Leffler is guilty as a principal where the only reasonable inference given the
20 scope of the activity and evidence on the property and Leffler's statements to officers is
21 that Leffler actively participated in the manufacture of methamphetamine.

22 13. Leffler is guilty as an accomplice where he allowed Kelly to conduct the gassing
23 phase of methamphetamine manufacture.
24
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COURT'S FINDING OF GUILT

The court finds the defendant guilty for the following reasons:

1. The court finds and concludes that Leffler is guilty of manufacturing a controlled substance, methamphetamine.

2. The definition of manufacture in RCW 69.50 is a broad definition. The evidence allows the reasonable inference that Leffler's conduct falls within that broad definition.

"Manufacture" means 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 any labeling or relabeling of its container. [...]

3. Leffler is guilty both as a principal, and as an accomplice.

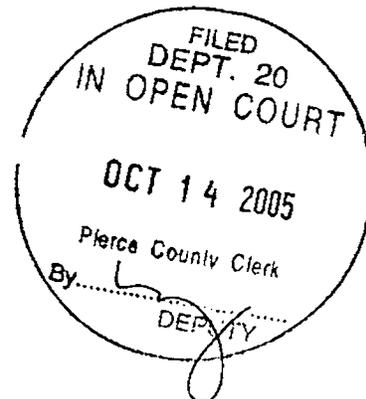
4. As the primary resident of the property, Leffler had dominion and control over the entire property and all its structures.

DONE IN OPEN COURT this 14 day of October, 2005.

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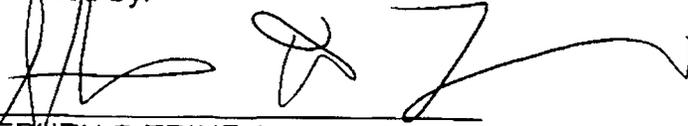
JUDGE

Kitty-Ann van Doorninck



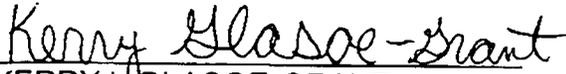
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Presented by:



STEPHEN D TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Approved as to Form:



KERRY L GLASOE-GRANT
Attorney for Defendant
WSB # 34011

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