

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

35243-5-II

STATE OF WASHINGTON
RESPONDENT,

VS.

PAUL D. MAKI
PETITIONER.

STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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A.

**STATE'S RESPONSE TO APPELLANT'S
ASSIGNMENTS OF ERROR**

1. The trial court did not err in admitting evidence obtained as a result of a search warrant; there was probable cause for the magistrate to issue a search warrant.

2. The trial court delayed its ruling on defense motions for a new trial, but this delay did not prejudice the Appellant.

3. The Appellant did not experience ineffective assistance of counsel due to the failure to pursue CrR 3.6 and other motions for a new trial.

4. The trial court did not improperly comment on the evidence by engaging in two colloquies concerning the air pistol that was introduced into evidence.

5. The Appellant did not experience ineffective assistance of counsel due to the failure to preserve the issue related to the trial court's purported improper comments on the evidence.

6. The trial court did not err in denying the Appellant's motions for a new trial.

B.

STATEMENT OF THE CASE

The State accepts Mr. Maki's recitation of the statement of the case in his initial brief and his supplemental brief. However, the State would note that Mr. Maki's statement on page 6 of his original brief, which pertains to Judge Michael Sullivan not ruling on Mr. Maki's motions for a new trial, is incorrect. As delineated in Mr. Maki's supplemental brief at 5, Judge Sullivan did ultimately enter an order denying the Appellant's motions for post-trial relief.

C.

ARGUMENT

1. THE MAGISTRATE DID NOT ERR IN FINDING THAT THERE WAS PROBABLE CAUSE TO ISSUE A SEARCH WARRANT.

a. Search Warrant Requirements.

In determining whether a search warrant is valid, a reviewing court considers whether the affidavit in support of the search warrant on its face contains sufficient facts to support a finding of probable cause. To establish probable cause, an affidavit must contain facts sufficient for a reasonable person to conclude that the defendant is probably involved in criminal activity. State v. Cole,

128 Wash. 2d 262, 286, 906 P.2d 925 (1995). “Probable cause is established when the affidavit sets forth facts sufficient to lead a reasonable person to conclude there is a probability the defendant is involved in criminal activity.” State v. Young, 123 Wash. 2d 173, 195, 867 P.2d 593 (1994), citing State v. Cord, 103 Wash. 2d 361, 365-66, 693 P.2d (1985). When the sufficiency of a search warrant affidavit is reviewed, the affidavit must stand alone and cannot be supplemented with evidence or information presented during a subsequent motion to suppress. State v. Blackshear, 4 Wash. App. 587, 590, 723 P.2d 15 (1986).

When a judge authorizes a search warrant, his determination is given great deference. State v. Cord, 103 Wash. 2d at 366; accord, State v. Vickers, 148 Wash. 2d 91, 108, 59 P.3d 58 (2002) (great deference is given to the probable cause determination of the issuing judge, and his discretion is reviewed only for abuse of discretion). Doubts about the existence of probable cause are resolved in favor of the decision made by the judge who issued the search warrant. State v. Young, 123 Wash. 2d at 195. A warrant should not be viewed in a hyper technical manner, and generally should be resolved in favor of the validity of the warrant. State v.

Garcia, 63 Wash. App. 868, 871, 824 P.2d 1220 (1992); State v. Partin, 88 Wash. 2d 899, 904, 567 P.2d 1136 (1977) (an application for a search warrant should be judged in the light of common sense with doubts resolved in favor of the warrant). A judge who is asked to issue a warrant is entitled to draw reasonable inferences from the facts and circumstances relayed to him. State v. Maffeo, 31 Wash. App. 198, 642 P.2d 404 (1982). Probable cause to issue a search warrant exists if the affidavit supporting the warrant recites "objective facts and circumstances which, if believed, would lead a neutral and detached person to conclude that more probably than not, evidence of a crime will be found if a search takes place." In re detention of Petersen, 145 Wash. 2d 789, 797, 42 P.3d 942 (2002).

Washington courts apply the two-pronged Aguilar-Spinelli test to evaluate the validity of warrants issued where the existence of probable cause depends on an informant's tip. State v. Cole, 128 Wash. 2d at 286-87, State v. Salina, 119 Wash. 2d 192, 199-200, 829 P.2d 1068 (1992). This standard comes from Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). Under this test, the State must prove (1) the informant's basis of knowledge and (2) the informant's veracity and

reliability. State v. Tarter, 111 Wash. App. 336, 340, 44 P.3d 899 (2002). First hand information normally satisfies the "basis of knowledge" prong of the Aguilar-Spinelli test. State v. Smith, 110 Wash. 2d 658, 663, 756 P.2d 722 (1988). Other evidence corroborating the informant's tip may be considered. State v. Duncan, 81 Wash. App. 70, 76, 912 P.2d 90 (1996). The knowledge prong can be satisfied if an observer gives enough first hand facts to a police officer with the required skill, training or experience to link the observation to criminal activity. State v. Garcia, 63 Wash. App. at 872 (citing State v. Berlin, 46 Wash. App. 587, 592, 731 P.2d 548 (1987)).

The amount of evidence necessary to establish the reliability prong of the Aguilar-Spinelli test depends upon whether the informant is a professional or a citizen informant. State v. Northness, 20 Wash. App. 551, 556-57, 582 P.2d 546 (1978) (Washington courts have drawn a distinction between a professional and a citizen informant and have relaxed the showing of reliability as to citizen informants); State v. Wilke, 55 Wash. App. 470, 778 P.2d 1054 (1989). Thus, the determination of credibility depends to some extent on whether the informant is truly a citizen

informant, i.e., an innocent victim or an uninvolved witness to criminal activity. State v. Payne, 54 Wash. App. 240, 244, 773 P.2d 122 (1989). Because a “citizen who is an eyewitness or a victim lacks the opportunity to establish a record of previous liability, . . . evidence of past reliability is no longer required in the case of citizen informants.” State v. Northness, 20 Wash. App. at 556. However, “heightened demonstrations of credibility [are required] for citizen informants whose identities were known to police but not revealed to the magistrate.” State v. Ibarra, 61 Wash. App. 695, 700, 812 P.2d 114 (1991).

Even so, the Supreme Court has held that even if nothing is known about an informant, the facts and circumstances surrounding the furnishing of the information can support a reasonable inference that the informant is telling the truth. State v. Lair, 95 Wash. 2d 706, 710, 630 P.2d 427 (1981). Where an informant’s identity is known to the police but not to the magistrate, the informant may be deemed credible even if the affidavit fails to explain why he or she wishes to remain anonymous. State v. Cole, 128 Wash. 2d at 288.

b. Applicability of search warrant requirements to this case.

The affidavit for a search warrant in this case (see Exhibit A) meets the requirements of the Aguilar-Spinelli test. The informant is a citizen informant; hence, the reliability prong of Aguilar-Spinelli, is not at issue. Northness, 20 Wash. App. at 556. Consequently, the seminal question is whether the affidavit in question contains a sufficient basis of knowledge to justify a search warrant.

The affidavit indicates that Officer Charles Gailey of the Raymond Police Department was able to determine that “the victim was not seriously injured.” According to the victim, an individual named “Paul” had shot the victim in the chest with what appeared to be an air pistol and had threatened to kill the victim. The victim also indicated that “Paul” had fled on a bicycle and that the victim had followed the assailant to 1235 Cedar Street in Raymond. The victim saw the assailant enter the residence at this location. When the Raymond police went to this residence, a person answered the door who verbally identified himself as “Paul”. In addition, the Raymond police had had previous contacts with a person named “Paul” at this address.

From this information, the magistrate reasonably knew that an assault likely had taken place. This inference is based on the statement in the affidavit that the victim was not seriously injured. From this assertion, there is an implication that the victim was injured to some extent. Further, the victim identified his assailant as "Paul" and showed the police the house that "Paul" entered. The police then verbally confirmed that a person named "Paul" was inside the house. This information was corroborated by the fact that the police, through prior contacts, knew that a person named "Paul" lived in this residence.

From the totality of this information, a magistrate could make a reasonable inference that the victim was telling the truth concerning what happened. Hence, there is a sufficient basis of knowledge to justify the issuance of the search warrant. This conclusion also is buttressed by the fact that a magistrate's decision must be accorded great deference and is reviewed only for an abuse of discretion. State v. Vickers, 148 Wash. 2d at 108. Because there are sufficient facts for a rational decision maker to conclude that a basis of knowledge existed, the magistrate did not abuse his discretion in issuing the search warrant.

The gravamen of Mr. Maki's challenge to the affidavit for a search warrant appears to be that there were insufficient "background" facts to support a warrant. In particular, Mr. Maki notes that the informant's name was not revealed to the magistrate (although it presumably was known to the police), that nothing was known about the victim's history of criminal activity, and that the victim's relationship to "Paul" was not delineated. Appellant's Brief at 15. Since the name of the informant was not revealed to the magistrate, a heightened demonstration of credibility is required. State v. Ibarra, 61 Wash. App. at 700. Nevertheless, this additional burden has been met because the police were able to confirm that (1) the informant sustained an injury of some sort, (2) the informant identified the assailant as "Paul," (3) a person named "Paul" verbally answered the door at 1235 Cedar Street, which was the same address identified by the informant, and (4) prior information corroborated that a person named "Paul" lived at this address.

In essence, this information should lead one to conclude that the victim was a citizen informant who was not an anonymous troublemaker. While more information about the informant could have been provided to the magistrate, the affidavit on its face is

sufficient to justify the issuance of a search warrant pertaining to the insufficiency of the affidavit for a search warrant. Thus, Mr. Maki's argument should be rejected.

- c. Even if the search warrant were deemed to be invalid, reversal of Mr. Maki's convictions is not required.

Mr. Maki was found guilty of two counts of assault in the third degree. The conviction involving the assault of the victim, Mr. Lopez-Servin, essentially turned on whether the trier of fact believed the testimony of Mr. Lopez-Servin. While the introduction of the air pistol likely bolstered the State's case to a small extent, harmless error analysis should be employed here. Even without the introduction of the air pistol, the other evidence introduced at trial is sufficient to sustain the assault conviction involving Mr. Lopez-Servin.

Turning to the assault in the third degree conviction involving Officer Davis of the Raymond Police Department, search warrant deficiencies do not affect the legitimacy of a conviction for an assault on a law enforcement officer. See State v. Cormier, 100 Wash. App. 457, 463, 997 P.2d 950 (2000) and State v. Mierz, 127 Wash. 2d 460, 473-475, 901 P.2d 286 (1995). Since the exclusionary rule is not applicable to an assault on a law

enforcement officer, Mr. Maki's argument concerning the invalidity of the search warrant is inapposite with regard to the assault in the third degree conviction involving Officer Davis.

2. THE TRIAL COURT DID NOT IMPERMISSIBLY COMMENT ON THE EVIDENCE.

Under Article 4 § 16 of the Washington State Constitution, judges are prohibited from commenting on the evidence. State v. Hansen, 46 Wash. App. 292, 730 P.2d 706, 737 P.2d 670 (1986); State v. Swan, 114 Wash. 2d 613, 657, 790 P.2d 610 (1990). An improper comment on the evidence occurs when the court conveys an opinion to the jury regarding the credibility, weight, or insufficiency of the evidence presented. State v. Jacobsen, 78 Wash. 2d 491, 494, 477 P.2d 1 (1970). Stated differently, “[a]n impermissible comment is one which conveys to the jury a judge’s personal attitudes towards the merits of the case or allows a jury to infer from what the judge personally believed the testimony in question.” Swan, 114 Wash. 2d at 657.

Mr. Maki asserts that Judge Michael Sullivan implicitly commented on the dangerousness of the air pistol that was introduced into evidence by requesting that the weapon be pointed

toward the window and by drawing the jury's attention to the trigger lock that was placed on the air pistol. Appellant's Brief at 17-20. These actions by the trial judge do not constitute an improper comment on the evidence. The trial judge asked that the weapon be pointed toward the window (away from the jury) during the examination of Officer Arlie Boggs in the State's case in chief. 2 RP at 60. The trial judge appeared to make this short comment so that members of the jury would feel at ease. At the time the trial judge made this comment, the jury did not know the nature of the air pistol. The trial judge reasonably exercised an abundance of caution to ensure that the jury did not feel threatened by having an air pistol pointed at them.

Similarly, Mr. Maki argues that the trial judge improperly commented on the evidence when he asked Mr. Maki's counsel about the trigger lock device when Mr. Maki was testifying. 2 RP at 99-100. Once again, the brief comments by the trial judge simply clarified that the air pistol was not operable in the courtroom. The only reasonable inference that the jury could draw from the trial judge's statements is that they did not need to be concerned about their personal safety because the air pistol could not be fired. Mr.

Maki incorrectly assumes that the trial judge commented on the dangerousness of the air pistol and thereby prejudiced Mr. Maki. All the trial judge did was indicate to the jury that the air pistol was not operable. The trial judge did not indicate that the air pistol was likely to produce bodily harm. The trial judge did not comment on the dangerousness of the weapon or make statements that would easily cause a jury to infer that a weapon was particularly dangerous.

In short, it is not an abuse of discretion for a trial judge to ensure that jury members feel safe. Since the trial judge did not proffer an opinion concerning the truth or falsity of evidence given, or express a lack of confidence in the integrity of a witness, Balandzich v. Demeroto, 10 Wash. App. 718, 725, 519 P.2d 994 (1974), no violation of Article 4, § 16 of the Washington State Constitution occurred. From the nature and manner of the trial judge's comments, one cannot reasonably infer the attitude of the court toward the merits of the case. The trial judge did not enter into the "fray of combat" and "at greater length than the circumstances warranted." Cf. Egede – Nissen v. Crystal Mountain, Inc., 93 Wash. 2d 127, 141, 606 P.2d 1214 (1980).

Because the trial judge's comments were not phrased in a manner that indicated how the court viewed the merits of the case, id. at 140, Mr. Maki's argument fails.

Moreover, even if one assumes *arguendo* that the trial judge's comments were outside the ambit of judicial propriety, the jury presumably followed the court's instructions. State v. Cerny, 78 Wash. 2d 845, 480 P.2d 199 (1971). Jury instruction no. 1 (see Exhibit B) read as follows:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

Consequently, this jury instruction ameliorated any perceived prejudice that theoretically could have inured to Mr. Maki's detriment.

In addition, it also should be noted that Mr. Maki did not raise this issue in a motion for a new trial after the jury rendered its verdict. See State v. Davis, 41 Wash. 2d 535, 537, 250 P.2d 548 (1952). Because the trial judge had a rational basis for making his

comments viz., ensuring that the jury felt at ease, the trial judge's comments should not be viewed as so flagrant and ill intentioned as to invoke the strictures of Article 4, § 16 of the Washington State Constitution.

3. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT MR. MAKI'S MOTION FOR A NEW TRIAL BASED ON THE FAILURE TO INTRODUCE AN AUDIO TAPE OF A PORTION OF THE INCIDENT.

CrR 7.5 contains the standard for determining whether a new trial should be granted. Under CrR 7.5(a), the trial court may grant a new trial "when it affirmatively appears that a substantial right of the defendant was materially affected." Mr. Maki claims that he meets the standard listed in CrR 7.5 (a)(3), i.e., there is "[n]ewly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial." To prevail on this claim, Mr. Maki must show that the evidence:

(1) will probably change the result if a new trial is granted; (2) has been discovered since trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material to the issues and admissible; and (5) is not merely cumulative or impeaching,

State v. Barry, 25 Wash. App. 751, 757, 611 P.2d 1262 (1980).

Mr. Maki asserts that the audio tape constitutes newly discovered evidence under CrR 7.5 (a)(3). Appellant's Supplemental Brief at 7-8. He argues that the tape was "constructively hidden" by his prior attorneys. Mr. Maki also asserts that he meets the requirements articulated in Barry, because his prior attorneys refused to introduce this audio tape. Mr. Maki seeks a flexible application of the Barry standards and posits that the interests of justice require a new trial. Appellant's Supplemental Brief at 8-9.

This argument, to be blunt, is utterly without merit. Mr. Maki admits that the tape existed before the trial. Appellant's Supplemental Brief at 8. Mr. Maki obviously knew about the audio tape because he recorded a portion of the incident as it occurred. Because the audio tape existed before the trial, this piece of information by its very nature cannot constitute "newly discovered evidence." To assert that this evidence was "newly discovered" because it was "constitutionally hidden" is to engage in legerdemain. As stated in Barry:

Where the allegedly newly discovered evidence was known to the defense or readily obtainable by it before or during the trial and the defense trial strategy was not to utilize such known or

obtainable evidence during the trial, the decision by the defense to change its strategy after an unfavorable verdict does not render the evidence “newly discovered.”

25 Wash. App. at 760 (quoting United States v. Soblen, 203 F. Supp. 542, 565 (S.D. N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), cert. denied 370 U.S. 944 (1962)).

Mr. Maki also incorrectly asserts that the introduction of the audio tape likely would have changed the outcome of the trial. The audio tape, inter alia, contains a constant stream of coarse profanity from Mr. Maki. See Exhibit C. If the audio tape had been introduced into evidence, the jury would have immediately realized that Mr. Maki was highly agitated. Since highly agitated persons are more likely to engage in acts of violence, the audio tape would not have benefited Mr. Maki’s cause.

To summarize, Mr. Maki’s trial counsel exercised sound professional judgment in choosing not to introduce the audio tape. If Mr. Maki’s trial counsel had acquiesced to Mr. Maki’s request to introduce the audio tape into evidence, it is likely that the “table would be turned” and Mr. Maki now would be arguing that his trial counsel was ineffective because he introduced the audio tape. In any event, the standard of review in analyzing a motion for a new

trial under CrR 7.5 is abuse of discretion. Barry, 25 Wash. App. at 759. Since there are a multiple reasons why a rational judge would have denied Mr. Maki's motion for a new trial, the trial court judge did not abuse his discretion.

4. MR. MAKI HAS NOT DEMONSTRATED INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE FAILURE TO PURSUE A CrR 3.6 MOTION, THE FAILURE TO CHALLENGE ALLEGED IMPROPER COMMENTS BY THE TRIAL JUDGE DURING THE COURSE OF THE TRIAL, AND THE FAILURE TO INTRODUCE AT TRIAL AN AUDIO TAPE OF A PORTION OF THE INCIDENT.

- a. A claim of ineffective assistance of counsel must meet specific legal tests.

To sustain a claim of ineffective assistance of counsel, Mr. Trent must show both that trial counsel's performance was deficient and that this deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687-688 (1984). Representation is deficient if it falls below an objective standard of reasonableness, based on a consideration of all of the circumstances. State v. McFarland, 127 Wash. 2d 322, 334-35, 899 P.2d 1251 (1995). Mr. Maki is prejudiced if there is a reasonable probability that but for the deficiency the trial result would have differed. McFarland, 127 Wash. 2d at 335. The reviewing court presumes that trial counsel's

representation fell within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689; In re Pers. Restraint of Pirtle, 136 Wash. 2d 467, 487, 965 P.2d 593 (1998). Ineffective assistance of counsel claims are reviewed de novo. State v. Shaver, 116 Wash. App. 375, 382, 65 P.3d 688 (2003). Strategic or tactical reasons for adopting a certain course of action do not support an ineffective assistance of counsel claim. McFarland, 127 Wash. 2d at 336.

b. Trial counsel's failure to pursue a CrR 3.6 motion does not constitute ineffective assistance of counsel.

Prior to the commencement of the trial, Mr. Maki's trial counsel agreed to a stipulation wherein the State only would introduce the air pistol seized at the Maki residence. See Exhibit D. The stipulation barred the State from introducing into evidence any of the other guns which were seized at the Maki residence.

Mr. Maki now claims that this failure to pursue the CrR 3.6 motion constitutes ineffective assistance of counsel because Mr. Maki essentially had nothing to lose in litigating this motion. Appellant's Brief at 21-24. This argument fails to recognize that Mr. Maki did gain something from entering into the stipulation and abandoning his CrR 3.6 motion, viz., the State was barred from

trying to admit any other guns that were seized. Hence, this decision constitutes a tactical choice which does not meet first Strickland prong pertaining to deficient performance. Trial counsel's decision to enter into the stipulation fell within the wide range of reasonable professional assistance.

Additionally, for the reasons previously articulated, supra, at 10-11, Mr. Maki has not demonstrated that the result of the trial would have been different if the CrR 3.6 motion had been pursued. Consequently, the second Strickland prong has not been met, i.e., there is not a reasonable probability that but for the alleged deficiency there would have been a different trial result. Mr. Maki's ineffective assistance of counsel claim as it pertains to the failure to pursue a CrR 3.6 motion should therefore be rejected.

c. Trial counsel was not ineffective by failing to raise a constitutional challenge under Article 4, § 16 of the Washington State Constitution.

A competent trial attorney would not necessarily attempt to admonish the trial judge during the course of trial for allegedly commenting on the evidence presented. See State v. Davis, 41 Wash. 2d at 537. Therefore, the failure to raise such an objection

during the course of a trial cannot be deemed to be ineffective assistance of counsel.

The more interesting question is whether the failure to bring a motion for a new trial under Article 4, § 16 of the Washington State Constitution constitutes ineffective assistance of counsel. While it certainly was the case that the bringing of such a motion was essentially “a free bite of the apple” (unless one assumes that a trial judge would look less favorably upon the defendant at sentencing), the likelihood of this motion being successful was low. The comments by the trial judge about the air pistol were fleeting (given the entirety of the trial), and the trial judge did not express an opinion regarding the dangerousness of the air pistol. Even if the jury somehow inferred that the trial judge had made a comment on the evidence, jury instruction no. 1 (see Exhibit B) admonished the jury to disregard any such perceived comments. Thus, giving due deference to the professional judgment of trial counsel, the first prong of the Strickland test does not appear to be satisfied.

Even if one assumes that trial counsel should have filed a motion for a new trial based on Article 4, § 16 of the Washington State Constitution because there would be no apparent downside,

the second prong of the Strickland test has not been met. In other words, Mr. Maki cannot demonstrate that the outcome of the trial would have been different if the trial Judge had made no comments about the air pistol. Since jury instruction no. 1 told the jury to disregard any comments made by the trial judge, and since a jury is presumed to have followed the instructions which were given by the trial judge, there is not a reasonable probability that the jury would have rendered a different verdict absent the alleged error. McFarland, 127 Wash. 2d at 335. Consequently, this part of Mr. Maki's ineffective assistance of counsel claim does not pass muster.

d. Trial counsel was not ineffective by failing to introduce an audio tape of part of the incident.

As argued previously, supra, at 17-18, trial counsel made a strategic decision not to introduce the audio tape at trial. See Exhibit C. Because the audio tape contains egregious profanity on the part of Mr. Maki, trial counsel's decision to not introduce the audio tape does not fall below an objective standard of reasonableness. This decision falls within the wide range of reasonable professional assistance. Since strategic or tactical decisions do not give rise to a successful claim for ineffective

assistance of counsel, the first prong of the Strickland test has not been met.

Similarly, the second prong of the Strickland test is likewise not satisfied. There is not a reasonable probability that but for this alleged deficiency the trial result would have been different. The audio tape easily could have convinced the trier of fact that Mr. Maki was very agitated and therefore did indeed assault Officer Ron Davis. Put differently, the introduction of the audio tape cannot be viewed as a guaranteed path to an acquittal. Mr. Maki cannot show that this alleged deficiency prejudiced him. Hence, this portion of his claim of ineffective assistance of counsel fails.

5. THE TRIAL JUDGE DID NOT COMMIT REVERSIBLE ERROR BY DELAYING THE ISSUANCE OF A DECISION ON MR. MAKI'S POST-TRIAL MOTIONS.

Mr. Maki argues that the trial judge's decision to deny the motions for a new trial was untenable because the decision was not rendered for six months and because the decision lacked sufficient analysis. Appellant's Supplemental Brief at 11-12. While it would have been preferable if the trial judge had flushed out his reasoning in denying Mr. Maki's motion for a new trial, the overwhelming inability of Mr. Maki to meet the requirements of CrR 7.5(a) is

crystal clear. Mr. Maki also has not shown how he was prejudiced by the delay. Therefore, the failure of the trial judge to articulate his reasons for denying Mr. Maki's motion for a new trial is of little consequence. "The granting or denial of a new trial is a matter primarily within the discretion of the trial court . . . [and the ruling will not be disturbed] unless there is a clear abuse of discretion." State v. Wilson, 71 Wash. 2d 895, 899, 431 P.2d 221 (1967). No abuse of discretion occurred here. Since the trial court properly exercised its discretion in upholding the jury verdict, Mr. Maki's assertions should be rejected. Mr. Maki's request for a remand hearing, Appellant's Supplemental Brief at 12-13, should be denied.

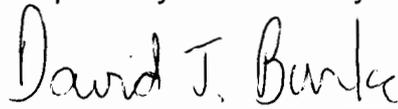
Finally, Mr. Maki's motions for a new trial involve issues that fall under the invited error doctrine. "A party may not set up an error at trial and then complain of it on appeal." State v. Carlson, 61 Wash. App. 865, 877, 812 P.2d 536 (1991). Thus, Mr. Maki should not be given a second chance to re-litigate this case.

D.

CONCLUSION

For the reasons listed above, the relief sought by Mr. Maki should be denied. Mr. Maki's convictions for two counts of assault in the third degree should be upheld.

Respectfully Submitted by:



DAVID J. BURKE – WSBA #16163
PACIFIC COUNTY PROSECUTOR

AFFIDAVIT FOR SEARCH WARRANT

STATE OF WASHINGTON

SS.

PACIFIC COUNTY

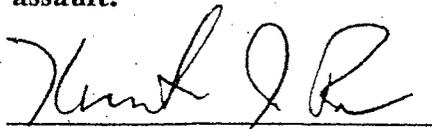
Comes now Chief Kenneth J. Boyes who being duly sworn, upon oath, complains, deposes and says:

I have been a law enforcement officer for the past twelve years. During this time I have completed the Basic Law Enforcement Academy, where I was taught crime scene, assault and sexual assault investigations. I have received ongoing in-service training including but not limited to Interview and Interrogations, Homicide Investigation, Crime Scene Analysis, Child and Adult Sexual Assault, and numerous other trainings related to criminal investigations and the recovery of evidence from crime scenes and other locations.

On March 29th, 2006, I received a call at my residence reference an assault with an air pistol of some type in the Riverdale area of Raymond. Upon arrival at the scene I was told by Officer Charles Gailey who was first on scene that the victim was not seriously injured and had chased the suspect to a residence located at 1235 Cedar St. The victim advised the subject had told him he was going to kill him, shot him twice in the chest with what appeared to be an air pistol, and fled on a bike and rode to the residence and entered. When officers arrived they went to the door and knocked. A male individual answered verbally, ^{at the name of Paul,} and refused entry to Law Enforcement. The residence has been under constant observation since the suspect entered.

Raymond Police Department officers have had contact in the past with an individual known as Paul, at this residence. The victim also indicated the suspects name was Paul.

Therefore I am respectfully requesting a search warrant for a single story white house located at 1235 Cedar St., for the purpose of identifying and arresting the subject within, and to search for any weapons and ammunition associated with this assault.



Chief Kenneth J. Boyes / 2R01

Sworn before me March
29, 2006 @ 10:31 pm


Judge

SUPERIOR CT. PACIFIC CO. WA		
NO. 06-1-00052-6		
IDENT.	EXHIB.	
P	A	A
State vs. Maki		
DATE	6/14/06	

APPENDIX 'A'

SUBSCRIBED AND SWORN to before me this 29th day of March, 2006.

10:31 a.m.

Michael Sullivan

Judge / ~~Commissioner~~, state of Washington,
Superior Court for Pacific Co.

STATE OF WASHINGTON }
PACIFIC COUNTY } SS.

COMES NOW Ken J. Boyer, Chief
(name of person requesting warrant)

Who being first duly sworn, upon oath, complains, deposes and says:

That he has probable cause to believe and in fact does believe that evidence of a crime, or contraband, the fruits of crime, or things otherwise criminally possessed or weapons or other things by means of which a crime has been committed or reasonably appears about to be committed, particularly described as follows:

(SPECIFY ITEMS SOUGHT)
Weapons (Firearms) and ammunition

and all related records, documents, and/or papers that are located in, on, or about certain premises, vehicle(s) and/or person(s) within Pacific County, Washington, designated and described as follows:

(SPECIFY LOCATION, VEHICLE(S) AND/ OR PERSON(S) TO BE SEARCHED)
1235 Cedar St. and detached garage at Rear of Residence

That affiant's belief is based upon the facts and circumstances as set forth in the numbered affidavits, written or typed statements, and/or attachments hereto, which are incorporated herein by this reference.

[Signature]
(Signature of person requesting warrant)

SUBSCRIBED AND SWORN to before me this 29 day of March 2006 10:34pm

[Signature]
JUDGE/COMMISSIONER, Pacific County Court

AFFIDAVIT FOR SEARCH WARRANT

Page 3 of 4 Pages

Pa 3 of 4

In the State of Washington

Pacific County Superior Court

BEFORE Michael J. Sullivan, JUDGE/COMMISSIONER

STATE OF WASHINGTON

PACIFIC COUNTY

} SS.

SEARCH WARRANT

STATE OF WASHINGTON: TO ANY PEACE OFFICER IN PACIFIC COUNTY:

WHEREAS, upon the sworn affidavit made and filed in the above entitled court, the undersigned judge finds that there is probable cause to believe that evidence of a crime, contraband, the fruits of crime, things otherwise criminally possessed, weapons and/or other things which have facilitated a crime or which are likely to facilitate a crime in the near future, located in, on, or about certain premises, vehicle(s) or person(s) within Pacific County, Washington, hereinafter designated and described;

NOW, THEREFORE, IN THE NAME OF THE STATE OF WASHINGTON, you are hereby commanded with the necessary and proper assistance to search for and seize the following property: (SPECIFY ITEMS SOUGHT)

Weapons (Firearms) and Ammunition.

and all related records, documents, and/or papers that are located in, on, or about the premises, vehicle(s), and/or person(s) within Pacific County, Washington, designated and described as follows:

(SPECIFY LOCATION, VEHICLE(S), AND OR PERSON(S) TO BE SEARCHED)

1235 Cedar St and detached garage at rear of Residence.

Said property is to be safely kept and the return of this warrant shall be made within ten (10) days following issuance to the undersigned judge, showing all acts and things done thereunder, with a particular statement of all property seized. A copy of this warrant shall be served upon the person(s) found in actual or constructive possession of such property, and if no person is found in actual or constructive possession thereof, a copy of this warrant shall be conspicuously posted upon the premises or vehicle where the search took place.

Dated this 29 day of March 2006

Michael J. Sullivan

JUDGE/COMMISSIONER, State of Washington

Superior Court for Pacific County

[Signature]

Return of Inventory & Receipt for Property

I received a Search Warrant on the 29th day of MARCH, 2006 and pursuant to the command contained therein, I made due and diligent search of the property and premises, vehicle(s), and/or person(s) described therein and found the following:

1 CROSS BOW Pistol + DART, 1 Daisy Powerline 856 BB
Daisy Pistol model 188 BB, Box 1500 BB's, Belt w/ 39
Pellet R. Hz, 22 Rifle ser# 23525949, 1 22 Rnk 22R
Ammo Box w/ misc. Ammo. Belt w/ 7 Rnds Ammo
more 22 Ammo, 2 cont. BB's
The following items have been seized:

Same as above

The name of person(s) found in actual or constructive possession of seized property is as follows:

Residence of Paul MAKI

The name of person(s) served with true and complete copy of the Search Warrant is as follows:

Paul MAKI

The description of door or conspicuous place where a copy of the Search Warrant was posted is as follows:

The seized property is being kept at the following location:

Raymond PD Evidence

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 29 day of MARCH 2006

at Raymond Washington.

[Signature]

Signature

Ken J. Boyer

Printed Name

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony of the witnesses. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each

party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberation, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties received a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

IN THE SUPERIOR COURT OF WASHINGTON
FOR PACIFIC COUNTY

STATE OF WASHINGTON,

Plaintiff,

NO. 06-1-00052-6

vs.

TRANSCRIPT OF RECORDING DURING
EXECUTION OF SEARCH WARRANT

PAUL D. MAKI,

Defendant.

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SUPERIOR COURT OF PACIFIC COUNTY WASH.		
NO. 06-1-00052-6		
D	2	2
DATE 7/28/06		

ORIGINAL

Maki – What for?

(Unintelligible)

Maki – You want to slide the warrant under the door?

(Unintelligible)

Maki – Why?

(Unintelligible)

Maki – Oh, you can't slide the warrant so I can see it?

(Unintelligible)

Maki – You won't slide the warrant so I can see it for a fact that you're not a liar?

(Unintelligible)

Maki – I don't know, everybody's fucking lying to me lately.

(U)

Maki – Yeah, well you know how many of you all is coming in?

(U)

Maki – How many is that?

(U)

Maki – What? What?

(U)

Maki – Somebody said it's going to be about 10?

(U)

Maki – Ohhhh

(U)

Maki – Why don't you just show me the warrant?

(U)

Maki – Why don't you slide the warrant through the door and put it up to your God damn face?

Alright

Maki – You can slide it right underneath the God damn door.

(U)

Maki – Put it on the door

(U)

Maki – Who is Sullivan?

(U)

Maki – No shit.

(U) count to five or I'm going to kick your door in. One two three four... Open the door. Right here is your warrant.

Maki – May I look at it please?

(U)

Maki – I have the right to look at the warrant.

Officer Boyes – Hey, I am not going to put any of these guys in jeopardy until you open this door so we can see what's going on.

(U)

Maki – Get that fucking thing off me.

Back up

Maki – Get that thing off of me.

Back up (U)

Maki – Get that thing off me you can see my hands are bare.

Officer Boyes – Take him into custody right now just take him into custody. Notify...

(U)

Maki – I ain't playing nothing. What did I do? What the fuck did I do asshole? Huh?
What the fuck did I do?

(U)

Maki – What did I do?

(U)

Maki – What have I done?

(U) Are you the only one in here (U)

Maki – What have I done?

(U)

Maki – This is all my property God damn it. It belongs to me you have no ID. Who are you?

Officer Davis – Officer Davis. Who are you?

Maki – I don't know you.

(U)

Maki – I don't know (U) I don't know you from no where. Do you know me?

No sir.

Maki – I've lived here for years. I don't know you.

(U) get off anything that (U) tonight okay?

Maki – May I see the search warrant now Mr. Boyes?

Officer Boyes – Just as soon as we get the pleasure for you to shut up. You need to settle down. You're just making this thing a lot worse than it really is.

Maki – Look nobody has a right to be in my fucking home.

Officer Boyes – I got a paper here that says I do have a right. Settle down.

Maki – OK. I'm going to remember you.

(U) Woman in background speaking unintelligible

That's good. I'll remember you, too. Trust me, I will.

(U) Woman in background speaking unintelligible

Maki – I didn't do nothing to you, or you Mr. Boyes, or you Mr. Johnson.

Officer Boyes – We got a whole lot more time than to play games with you. Alright?

Maki – Play games? What you want my house?

Officer Boyes- (Laughing) You told us to go get a search warrant. That's what I did.

Maki – That's right.

Officer Boyes – You want to play? We'll play.

Maki – Go ahead.

(hitting sound)

Officer Boyes – Shut up. (can't hear rest of what Boyes says as Maki's too loud over him)

Maki – (U) After what you done to my family?

Officer Boyes – Me?

Maki – No, your officers.

Officer Boyes – Oh, OK.

(U)

Maki – I've talked to you before Ken Boyes.

Officer Boyes – Yeah and you'll talk to me again, too.

Maki – Why are you breaking up my house? Let go of me.

No. Just sit down.

Maki – I am hand cuffed in my own house.

Sit there.

Maki – Is that good enough for you?

It's great, you just cooperate and you'll be OK.

Maki – I'm in my own house. I am a citizen of the United States. I am not no fucking Iraqi.

(U) There's another gun in (U) bedroom, too. I didn't look at it (U)

Maki – Oh, you. Got your job back, huh?

Officer Davis – Yeah.

Maki – Yeah and you're treating me like an asshole? I pay your wages.

Are you going to cooperate?

Maki – I've never done nothing to you. I've never done nothing to you, or you.

(U) Let's just continue that record, okay? Let's continue your track record, sir.

Maki – May I see the search warrant?

Officer Boyes – It's right here on the table. As soon as you calm down, I'm going to let you look at it.

Maki – Ok, bring it here Mr. Boyes...

Officer Boyes – No.

Maki – and let me look at it.

(U)

Officer Boyes – When you settle down

Maki – I'm perfectly capable of looking at it.

Officer Boyes – When you settle down.

Maki – I'm never settled down. This is as settled down as I get. I'm handcuffed. What the hell else do you want?

For you to cooperate.

Maki – I will cooperate if you let go of me. Let go of me.

(U) No sir. That's not the way it works. You cooperate first.

(Another officer) No, you cooperate first.

Maki – Why? Im in my own fucking home.

You cooperate first.

Maki – You're hurting me.

I'm not hurting you

Maki – You're hurting my fucking wrist and you both got a hold of me.

Woman – Don't hurt my baby.

Maki – You're pointing a God damn taser in my face. When I opened the door for your search warrant. Just as Mr. Boyes asked for.

Woman – Please don't hurt him.

Woman – Oh baby.

Maki – May I see a search warrant Mr. Boyes?

Officer Boyes – Uh ya, are you chilled out enough to be able to look at it?

Maki – Yes, I'm chilled out enough to read a search warrant and I have handcuffs on.

If you...

Maki – How much damage do you think I can do? Come on, be real.

Officer Boyes – I'm... I'm not worried about damage

Maki – Be real.

Officer Boyes – You have mouthed...

Woman – Who is he?

Maki – (U) Be real. You guys all got guns and I'm sitting here by myself.

Woman – Will someone please tell me who's here?

(U) Someone reading warrant in background... police department

Maki – God damn it all my life I have never been treated so poorly even by the meanest people I've ever met.

(U) implicated in shooting a pellet pistol, an air pistol at somebody earlier this evening

Maki – There is a pellet pistol hanging in the back room. You want it?

(U) Okay, where at? We're going to take it.

Maki – You want it? It's in the back room hanging up next to the fucking door.

(U) We want (U) he would not come to, he would not open the door

Maki – I have a rifle but it hasn't moved and there's a pistol hanging up by the door and it hasn't moved either... (U) You want it? There it is.

(Woman talking in the back ground) And I don't know (U)

Maki – Hanging up by the God damn hanger

(U)

Maki – You look at it.

(Woman talking in the back ground) I know Miller very well.

Maki – It's a daisy.

This is Charlie Gailey with the Raymond Police Department

(U)

Maki – It's a fucking daisy, god damn it. You guys got 9mm and you're killing me. I'm bad?

You want to read this?

Maki – Yes, sir, I would like to read it.

Woman – (U) giving me a chicken.

Can you see that?

Maki – Am I under arrest? Am I under arrest, sir?

Officer Boyes – You sure aren't free to go.

Maki – Am I under arrest?

Officer Boyes – You're sure not free to go.

(U) That's a tape.

What?

Maki – That's all junk you guys. The bb pistol is in the back. There's a bb pistol and bb rifle right by the back fucking door. You want it, you can have it. God damn it I haven't done a thing wrong and I have not hurt one person on the face of this earth. Yet.

Yet?

Maki – Yet

Officer Boyes – Is that a threat?

Maki – No that is the truth Mr. Boyes. I have been hurt plenty in my life and I have hurt no one and that is a fact.

Woman – Whose the doctor?

(U) There's no doctor here

Woman – Someone told me they were doctor somebody

Nobody said that, no.

Woman – Who is he?

Officer Davis

(U)

Maki – He's new to me.

Maki – How long have you worked for Raymond?

Officer Davis – Uh, you want my history?

Maki – No how long have you worked for the Raymond Police? How long have you been paid by the city of Raymond?

First time 69 and 71 and then

Maki – Oh, you know Howard Funkhouser?

He was my chief.

Maki – Yes I briefly (U) at the Red Rooster. I worked for his mill, too, as a matter of fact.

Maki – Do you know Howard Funkhouser?

(U)

Maki – Howard's dead?

(U) Yeah, he died of cancer.

Maki – I lived in Ashford Prairie. I drink with him at the Red Rooster. I'm sorry I didn't know that either. I didn't even know James Duree was dead, god damn it. The only lawyer I ever paid in my life.

Who was the bearer of bad news, they told you about Duree today too?

Maki – Well he didn't do me much good but I paid him every fucking penny I owed him. Only lawyer I ever paid in my life.

Maki – There's a pistol, a pellet pistol hanging up by the god damn back door. There's another one there. But god damn it, they haven't left this fucking house.

(U)

Maki – Now...

Woman – I've got to get off my feet.

Maki – What does it say you are going to seize here?

Maki – Oh, firearms and ammunition. Son of a bitch.

Maki – Well, good luck.

Maki - You are going to get some really bad heads up right here, huh? Son of a bitch.

Maki – There's a scoped rifle hanging up right there in the back fucking room.

(U) woman in background (U)

(U) Where at sir? (U) where you said?

Maki – If you look at the back door and you look up, hanging up, there is a ...

Got it.

Maki – ... scoped pellet rifle. 177 caliber rifle, you see it?

Do you have a 22 rifle, sir?

Maki – Yes, sir.

Where would that be?

Maki – That is in my closet.

Okay.

Maki – Right there.

Maki – It hasn't been fired in a long time.

You can see. (U)

Whatever.

Maki – Now, could you take the cigarette out of my mouth?

Umhmm.

Maki – Would you put one in my mouth and light it for me? Please, sir.

Will it calm you down then?

Maki – Yes, cigarettes do calm me down, especially in this situation here. See, I'm not used to this happening and I cannot believe a search warrant could possibly be signed by anybody in this situation.

(U) When was (U) Is that the last cigarette?

Maki – Umhmm.

(U) You suck. (laughing)

Excuse me.

Where's the light?

Maki - Uh, I don't know, I think you all took it out of my pocket.

(U) Yeah, it's down on the floor, sir.

Thanks.

Maki - (U) Look in my front pocket, back pocket, I (U).

(U) one of you guys aren't (U) or anything like that.

Maki - That's not a lighter, that's uh (U) fucking pepper spray.

Pepper spray?

Maki - You guys want to spray me go ahead and taser my ass God damn it. (U) fucking world, okay?

(U)

Maki - Wish you all would helped me when my old lady was raped and shit too. I wish you'd all help me. A lot. But nobody helps. So I have no respect for you all. None, zero.

(U)

Maki - Yeah the report was there. Check the sheriff.

(U)

Maki - Somebody took my stuff out of my pocket and threw it. I don't know, is it still in my front pocket?

I don't know, it ain't there.

Maki - (U) God damn it. Somebody threw it somewhere. You guys threw my shit around.

We put it all on the table.

Maki – You know when you come in here with a search warrant, you all could do it a little bit more peacefully. Because if I had a search warrant I know then it's legal, even though I don't believe it is a legal warrant.

It is.

Maki – I don't know how you talked Sullivan into this shit.

Judge Sullivan signed this.

Maki – Oh damn it. May I stand up? In my own house. My lighter is right here somewhere. Did you look right there?

Sit back down.

Maki – There's my keys, it's laying there on the floor somewhere.

Okay, sit back down.

Here you go.

Maki – Thank you, sir. That would be my lighter. There's a little sticker on it. Thank you.

(U)

Maki – Yep, that's it, that's mine, I own it.

I don't want (U)

Maki – Do not move nothing that you do not own and that film is mine. I was on the phone to my family and you're all recorded.

Okay

Hey, Arlie?

Yeah.

Can you go in there and see if the doors (U) been there at all?

Maki – What?

(U)

Maki – What?

(U)

Maki – Could you tell me what's happening?

Well apparently they're conducting the search, sir.

You got into an altercation with a gentleman earlier.

(U) woman in background.

Maki – I've been in no altercations with anyone, yet.

(U) woman in background

What do you mean by that?

Maki – What I said. I've been in no altercations with anybody, except for unless you call altercation you guys shoving me down here and putting these handcuffs on me.

You said yet, what do you mean by yet?

Maki – I haven't yet been in any altercation except for you guys throwing me around.

Are you implying that there's gonna be an altercation?

When you say yet, that means something is coming.

Maki – Well, I don't know what you think, but when you treat people poorly, do you expect that nothing will happen about it?

(U) It would have been a lot simpler if would have came to the door when asked you to.

Maki – And opened the door and had this happen before?

It would have been a lot more civil before I would imagine.

Maki – Were you there when uh my nephew got his ribs broken?

Who's your nephew?

Maki – Eric (U) Maki.

I don't know him.

Maki – Oh. There was no cause for arrest either.

I don't know.

Maki – The boy was taken to the hospital with broken ribs

(U)

Maki – No cause for arrest. That's why I don't open my door.

You're good.

Maki – After what happened to him and a few of my friends. That's my last paper towel, God damn it.

Officer Boyes – Well if you wouldn't have oiled up that pistol, I wouldn't need em.

Maki – I didn't do that.

Officer Boyes – Okay. I just assumed it was yours. I'm sorry, I was wrong.

Maki – It is mine, but I did not put the oil on there. And I would like to find out who god damn tried to wipe (U) that son of a bitch was dripping with thirty weight and I don't understand who did that.

When did...

Maki – That happened weeks ago.

So, it's been hanging there ever since?

Maki – No, I wiped it down a week ago and hung it there. It's been hanging there for some time. But it kept dripping and dripping oil and I don't know why anybody would want to oil a god damned bb pistol that fucking much.

That doesn't make any sense to me.

Maki – No it didn't make any sense to me, that's what I was saying. I said god damn son of a bitch. I was wondering why somebody did that.

(U)

Maki – It was hanging there, minding it's own business and somebody oiled it. There are several many people friends of mine that may have done that, but that was done a long time ago.

(U)

(U) Woman in background

Maki -- You better not touch me.

(U)

Maki -- Am I under arrest?

Not at this time, sir.

Maki -- I am in my own home (U)

We have a search warrant to search your premises.

Maki -- Yes, and I am not violating any law.

(U)

Maki -- (U) exactly. Exactly that.

(U)

Maki -- I hope that clears (U)

(U) clears (U)

Maki -- I ain't no bad guy.

(U)

Maki -- I've been treated like a bad guy.

(U)

Maki -- There's a lot of people you could be treating like bad guys around here. An awful lot. We got rapists, we got arsonists, we got murderers running around here.

(U)

Maki -- And, uh, (U) that's what you do.

(U) Well, you don't get in an altercation with somebody and you don't get this kind of treatment

Maki -- Altercation with somebody?

Umhmm.

Maki - I've been in no altercation, I have touched or harmed no one.

(U)

Maki - That's fact.

(U)

Maki - That's fact.

(U)

Hey Paul, do you have a 30-30?

Maki - No, I had a 30-30 ten years ago.

Okay.

Maki - A single shot H&R topper.

How about a shotgun?

Maki - I had a shotgun years ago. I've had 12 gauges, 20 gauges, I've had all kinds of rifles. I have a 22 left.

(U)

Maki - That is it.

The 22 is loaded, did you know that?

Maki - Yes, sir.

(U)

Maki - Is your weapon loaded?

Uh, yeah.

Maki - Yeah, okay.

(U)

Maki – Okay, now you think my little 22 is a match for your shit? No, I don't think so. I am here alone with her and she cannot defend herself. You think that's a bad idea? Or should I say wait before you come in here...

Got a problem (U)

Maki – ... (U) happen before when Angie Williams came and knocked her down to steal her drugs and you did nothing Ken Boyes. You did nothing Ken Boyes, remember?

Officer Boyes – No.

Maki – You watched from underneath the apple tree. That's my fucking box, leave it alone.

(U)

Maki – There is nothing there for you to evidence.

(U) Don't even think about it.

Maki – I can't believe they even have a warrant.

(U) I got that one (U) rifle (U)

Maki – That's my rifle Arlie.

(U)

Maki – They had no right to take that rifle.

(U) Woman in background

Maki – Do you even care?

(U) Woman in background

Maki – Do you care I am getting stolen from?

(U) Woman in background

(U) weapons, firearms and ammunition

Maki – Am I under arrest?

Maki – Am I under arrest?

Don't know, it's not my case.

Maki – Then why are you stopping me?

(U) Sit down.

Maki – Am I under arrest mother fucker?

Hey (U) get down on the floor (U)

Maki – Am I under arrest?

You are now.

Maki – Why are you stealing my property?

To the car. Take him. (U) Let's go.

Maki – (U) For what?

Assault 2nd Degree.

(U)

Woman – No, No.

Son of a bitch.

Maki – I'm not a son of a bitch. My mother is about dead you cocksucker.

Use your taser if you have to.

He's all right, Della.

He's got one.

Della crying in background.

He's going to sit in the car to mellow out a little bit.

Dummy.

Della – (U) taking him away?

Yeah, he's going to go sit in the car so he can mellow out for a few minutes.

Della -- (U) you're taking him away?

No, he's going to jail.

(U)

Officer Boyes -- He just won't settle down. He's not getting it. So he can get it at Pacific County jail, I don't care. I'm not gonna play games with him anymore.

Della -- I don't blame him, I don't blame him.

Officer Boyes -- (laughing) We're just trying to do our thing here, and that's it.

Della -- (U)

Do you know if there are any other rifles he has hidden around here?

Officer Boyes -- How many of those little bottles of whiskey in your fridge or whatever it is has he had tonight?

Della -- Oh, they come in ten, he doesn't, that's all they were.

Officer Boyes -- So he drank ten of those?

Della -- No.

Mike?

Della -- Me and my girlfriend, we shared one.

Officer Boyes -- Oh, okay.

What brought this on? Does he have any other weapons?

Della -- No...

You don't want this to happen again from where you're at

Della -- No (U) he doesn't.

Della -- I got a rock, you want that?

(U)

Della -- Or dime

) Della – (U)

If you have the money

Della – Well, you can have the spirit

Okay

(U)

Della – How long he's going to in jail?

Well he's being booked on a felony charge, so (U)

Della – Against you?

No, against a neighbor guy I guess.

Della – Just overnight, or what?

I don't have any idea, ma'am.

) Della – Yes, you do.

No, I don't. I mean, I know he'll be there overnight but beyond that I don't know. It's going to be a felony charge so he'll be having to post bail. Depends on how soon he can post bail. But you don't point one of these at some guy's chest and pull the trigger two times and then think it's a big joke, it's not funny.

Della – No.

If I had seen him on the street with this, I would have killed him, because that looks like a gun to me.

Della – Will he get back that gun back? That rifle?

That's gonna be up to the court.

Della – He doesn't use that for anything but going out in the woods and shoot. That's it.

Della – He's had it for a long, long time.

) Della – He's never hurt nobody. He's never shot at nobody.

Well he did tonight. (U)

That's why we (U)

We try to help him stay out of trouble but he just didn't listen.

We want you to help us to help him

It's silly.

Della – Well, he's not going to think I helped him.

You know, the faster you tell us where they're at, the faster we can get out of here.

Della – Well, I don't know.

Okay.

Della – What did you do to him?

Della – Why was he hollering?

Della – What did you do to him?

I didn't do anything to him.

Della – Which one did?

Nobody did anything, he was hollering because he was mad. He was hollering just like he's been hollering all night. He's carrying on like a sixth grader. He wants to act like an animal, then we'll take him up and put him in a cage. You know, I tried and tried and tried to talk to him and let him know that all we needed to do was take care of some stuff and we'd get out of here. He talked himself right into jail. That's it, you know, can only put up with so much.

Della – I'm very sorry.

I'm sorry that you're in the middle of this. It's kind of silly.

(U) Is this a pellet gun?

I know, but (U)

Is this the pellet gun? Is it the only one?

(U)

Do you got the key to the back pad lock so I don't have to um kick the door in?

Della – No, I don't.

Would know where it's at?

Della – (U)

Do you guys have a key?

(U)

Della – The keys are either on him or (U)

I don't know where his stuff went.

(U)

Find out (U)

Della – Where's he at?

He's sitting out in the car right now.

Della – That one?

Uh, I don't know.

Do you know his date of birth, Della?

Della – Yeah.

What's his date of birth?

Della – It's 9-21-57.

Let me try (U)

(U)

Della – Which car is he in?

I don't know.

They might have (U)

Della – Why don't you know?

Last Mary Adam ki, first Paul

They might have taken him to the police department.

Middle D David, dob 092157.

Della – Well how many cop cars are here?

Uh, seven.

Della – Well I hope (U)

What was he saying to you when he were outside wanting to talk to him?

Did he say why?

Corrected birth would be 1956.

Della – 57.

(U) Says on here.

Della – It is?

Yeah.

Did he say anything like that? Why he wouldn't come talk to us?

Della – Where's my husband?

He's out in the car.

Della – He's not my husband. Which car?

Why?

Della – Because I'd like to (U) up to him.

You can't see him.

Della – Why, you think I'm going to run out here like that?

No, I was coming in here to talk to the officers. And you asked me a question.

Okay.

(U)

Did anyone look in all this doors to see if

(phone ringing)

Della – Hello?

Della – Um can you come over?

So what you're saying is...

Della – (U) Can you come over, Bobby?

(U)

Della – They've hauled him off and I've still got cops here and (U)

(U)

Della – Okay. When they go, I'll call you. Bye.

Della – She won't come over unless you guys leave.

We'll be awhile I'm sure.

(U)

Della – (U)

Della – See, he quit drinking for six years.

Yeah, he made the mistake when he started again, didn't he?

Della – He just started a week ago. Six seven years.

Hey, Della?

Della – What?

Who actually owns the house, or are you renting or what?

Della – I'm renting (U)

No, that's okay, I just need (U) the door

Della - (U) called

(U)

End of tape.

FILED

2006 JUN 14 PM 2:09

VIRGINIA LEACH CLERK
PACIFIC CO. WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PACIFIC

State of Washington

Plaintiff/ Petitioner,

vs.
Paul D. Maki

Defendant/ Respondent.

CAUSE NO.:

06-1-00052-6

ORDER RE:

CIR 3,6 motion

THIS CAUSE coming on for hearing on the motion of

the defendant

and the Court being fully advised in the premises, now, therefore,

IT IS HEREBY ORDERED

that the State shall not be
allowed to introduce in its case in chief any
firearms ~~or~~ or ammunition pertaining to firearms.
The State may be allowed to introduce evidence
pertaining to air/BB rifles, air/BB guns, or air/BB
pistols and any associated ammunition.

DATED:

6/14/06

APPENDIX

David M. ...
#5515

David Burke 16/63

ORDER ON MOTION

Michael ...

JUDGE/ COURT COMMISSIONER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PACIFIC COUNTY

NO. 06-1-00052-6

STATE OF WASHINGTON) HON. MICHAEL SULLIVAN, JUDGE
)
Vs.) CT RTPR: A. GILBERT, ASST. CT. ADM.
)
MAKI, PAUL D.-PRESENT) CLERK: VIRGINIA A. LEACH,
) E. Buchanan, Deputy
)
) DATE: JUNE 14, 2006

3.6 HEARING

THIS MATTER comes before the Court for a 3.6 hearing.

David Burke, Pacific County Prosecuting Attorney, is present representing the State of Washington.

Defendant is represented by counsel, Andrew Monson.

Counsel for Plaintiff indicated there is an affidavit compiled by Chief Boyes.

Counsel for Defendant had no objection to the affidavit being filed.

Court advised the hearing cannot proceed without the defendant being present.

Counsel for Plaintiff advised he thought counsel had reached an agreement.

Defendant is now present. (1:35 p.m.)

Court instructed Deputy Clerk to mark the Affidavit for Search Warrant based on there being no objection by defense counsel.

Counsel for Plaintiff conveyed his understanding of the agreement reached between counsel. Counsel further stated between this date and trial he is still asking the other weapons be held conveying the incident is enough where there could be some threat to the community if defendant is allowed to have the firearms. Counsel addressed the Court regarding the standard range.

Court noted it had the Affidavit for Search Warrant dated 3/29/06 marked Plaintiff's Id. A reiterating defense counsel had no objection to its admission for consideration at this hearing. Defense counsel stated he thought Id. A needs to be admitted for this hearing. Court admitted Exhibit A.

Discussion was held regarding the specifics of the agreement.

Court directed counsel to advise what they are asking the Court consider. Court recessed. (1:43 p.m.)

Court is again in session (1:47 p.m.)

Counsel for Defendant stated what he believed is the agreement with Plaintiff's counsel. Counsel for Plaintiff confirmed the agreement.

Counsel for Defendant asked for clarification.

Counsel for Plaintiff made his comments with regard to the agreement on admission of weapons.

Court advised it if agreed, it will sign an order.

Counsel for Plaintiff raised a potential issue concerning the search warrant.

Court later signed "Order CrR 3.6 Motion".

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent.)
)
 vs.)
)
 PAUL D. MAKI,)
)
 Petitioner.)
 _____)

NO 35243-5
AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF PACIFIC)

STATE OF WASHINGTON
BY: *Wm*
DEPT II
07 MAY 21 AM 8:15
COURT OF APPEALS
DIVISION II

VICKI FLEMETIS, being first duly sworn on oath, deposes and says:

I am the Office Administrator for the Pacific County Prosecutor.

That on May 18th, 2007, I mailed a two copies of BRIEF OF RESPONDENT to the following address:

PETER B. TILLER
ATTORNEY AT LAW
P.O. BOX 58
CENTRALIA, WA 98531

Pacific County Prosecuting Attorney
P.O. Box 45
Courthouse
South Bend, WA 98586
Phone: (360) 875-9361
Fax: (360) 875-9362


VICKI FLEMETIS

SUBSCRIBED & SWORN to before me this 18th day of
MAY, 2007.


NOTARY PUBLIC in and for the State
of Washington, residing at Raymond