

NO. 35369-5-II  
Consolidated under No. 35357-1-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

RICK JUDGE,

Appellant.

BY *[Signature]*  
STATE OF WASHINGTON  
07 JUL 16 AM 9:00  
COURT OF APPEALS  
DIVISION ONE

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Susan K. Serko, Judge  
The Honorable John R. Hickman, Judge

---

---

BRIEF OF APPELLANT

---

---

CASEY GRANNIS  
CHRISTOPHER H. GIBSON  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

PM 7-13-07

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> . . . . .	1
<u>Issues Pertaining to Assignments of Error</u> . . . . .	2
B. <u>STATEMENT OF THE CASE</u> . . . . .	3
1. PROCEDURAL HISTORY. . . . .	3
2. CrR 3.6 HEARING . . . . .	4
3. TRIAL. . . . .	10
C. <u>ARGUMENTS</u> . . . . .	17
1. JUDGE'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE THE SEARCH WARRANT WAS NOT SUPPORTED BY UNTAINTED INFORMATION SHOWING PROBABLE CAUSE. . . . .	17
a. <u>The Trial Court Erred By Failing To             Exclude All Evidence Obtained As a Result             Of The Unlawful Search Of The Garage.</u> . . . .	18
b. <u>Judge's Exercise Of His Right To Refuse             Consent To Warrantless Entry Into His             Residence Cannot Be Used To Support             Probable Cause To Conduct The Search.</u> . . . .	21
c. <u>The Trial Court Erred In Ruling The             Officer's Observation Of Judge's Backyard             From the Neighbor's Adjoining Backyard             Was Lawful.</u> . . . . .	24

**TABLE OF CONTENTS (CONT'D)**

	Page
i. <u>Judge's Backyard Is A Constitutionally Protected Area Under Article I, § 7.</u> . . . . .	26
ii. <u>The Officer's Observation Is Not Justified Under The Open View Doctrine.</u> . . . . .	33
iii. <u>No Exigent Circumstance Justified Observation Into Judge's Backyard From The Adjoining Yard.</u> . . . . .	41
d. <u>Police Officers Conducted An Unlawful Search When They Physically Entered Judge's Backyard Without a Warrant.</u> . . . . .	46
e. <u>Detective Pigman Conducted An Unlawful Search When He Looked Into The Gas Can In Judge's Backyard.</u> . . . . .	48
f. <u>Error Predicated On Failing To Exclude Evidence As Fruit Of The Poisonous Tree Is Preserved For Review.</u> . . . . .	50
g. <u>Untainted Information In The Affidavit Is Insufficient To Show Probable Cause.</u> . . . . .	52
h. <u>Appellate Counsel May Need To File A Supplemental Brief Because the Search Warrant Affidavit And Opening Motion To Suppress Are Not Currently In The Record.</u> . . . . .	53

**TABLE OF CONTENTS (CONT'D)**

	Page
2.	JUDGE'S EXERCISE OF HIS RIGHT TO REFUSE WARRANTLESS ENTRY INTO HIS HOME WAS IMPROPERLY USED AS EVIDENCE OF GUILT AT TRIAL. . . . . 55
a.	<u>The State Intentionally Elicited Testimony From Two Officers That Judge Refused To Give Police Permission To Enter His Residence Without A Warrant.</u> . . . . . 56
b.	<u>Exercise Of The Constitutional Right To Refuse Warrantless Entry Into The Home Cannot Be Used Against Judge.</u> . . . . . 59
c.	<u>Admission Of Evidence That Judge Exercised His Fourth Amendment Right To Refuse Warrantless Entry Is An Error Constitutional Magnitude.</u> . . . . . 62
d.	<u>The State Committed Prosecutorial Misconduct In Intentionally Eliciting Evidence Of Judge's Refusal And Commenting Upon The Refusal.</u> . . . . . 65
e.	<u>Defense Counsel's Failure To Object Constitutes Ineffective Assistance Of Counsel.</u> . . . . 67
3.	THE COURT ERRED IN FAILING TO SUPPRESS STATEMENTS MADE BY JUDGE, IN VIOLATION OF HIS <u>MIRANDA</u> RIGHTS. . . . 68

TABLE OF CONTENTS (CONT'D)

	Page
a. <u>Evidence In The CrR 3.5 Suppression Hearing.</u> . . . . .	68
b. <u>Judge Was Subject To Custodial Interrogation.</u> . . . . .	71
c. <u>The Error In Admitting Judge's Statements Was Not Harmless.</u> . . . . .	73
4. THE COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS AFTER THE CrR 3.5 HEARING. . . . .	74
a. <u>The Absence Of Written Findings Of Fact And Conclusions Of Law Precludes Effective Appellate Review And Prevents Judge From Knowing What Is Required To Prevail On Appeal.</u> . . . . .	75
b. <u>The Appropriate Remedy Is Dismissal Of Both Counts Rather Than Remand To The Trial Court.</u> . . . . .	77
5. CUMULATIVE ERROR DENIED JUDGE HIS RIGHT TO A FAIR TRIAL. . . . .	78
6. THE COURT ERRED IN ORDERING JUDGE TO SUBMIT TO ALCOHOL EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY. . . . .	79
D. <u>CONCLUSION</u> . . . . .	81

**TABLE OF AUTHORITIES**

	Page
 <b><u>WASHINGTON CASES</u></b>	
<u>Coleman v. Reilly</u> , 8 Wn. App. 684, 508 P.2d 1035 (1973) . . . . .	45
<u>In re Pers. Restraint of Higgins</u> , 152 Wn.2d 155, 95 P.3d 330 (2004) . . . . .	55
<u>Jones v. National Bank of Commerce</u> , 66 Wn.2d 341, 402 P.2d 673 (1965) . . . . .	76
<u>Para-Medical Leasing, Inc. v. Hangen</u> , 48 Wn. App. 389, 739 P.2d 717 (1987) . . . . .	76
<u>State v. Ague-Masters</u> , __ Wn. App. __, 156 P.3d 265 (2007) . . . . .	17
<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999) . . . . .	67
<u>State v. Alexander</u> , 64 Wn. App. 147, 822 P.2d 1250 (1992) . . . . .	79
<u>State v. Alvarez</u> , 128 Wn.2d 1, 904 P.2d 754 (1995) . . . . .	75
<u>State v. Athan</u> , __ Wn.2d __, 158 P.3d 27 (2007) . . . . .	25
<u>State v. Barnett</u> , 139 Wn.2d 462, 987 P.2d 626 (1999) . . . . .	80

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>WASHINGTON CASES (CONT'D)</u></b>	
<u>State v. Bobic</u> , 140 Wn.2d 250, 996 P.2d 610 (2000) . . . . .	34, 35, 40
<u>State v. Boethin</u> , 126 Wn. App. 695, 109 P.3d 461 (2005) . . . . .	21, 53
<u>State v. Boland</u> , 115 Wn.2d 571, 800 P.2d 1112 (1990) . . . . .	29, 30, 32
<u>State v. Cannon</u> , 130 Wn.2d 313, 922 P.2d 1293 (1996) . . . . .	77
<u>State v. Chenoweth</u> , __ Wn.2d __, 158 P.3d 595 (2007) . . . . .	25
<u>State v. Coates</u> , 107 Wn.2d 882, 735 P.2d 64 (1987) . . . . .	18
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984) . . . . .	79
<u>State v. Cole</u> , 128 Wn.2d 262, 906 P.2d 925 (1995) . . . . .	18
<u>State v. Counts</u> , 99 Wn.2d 54, 659 P.2d 1087 (1983) . . . . .	44, 48, 49
<u>State v. Coyle</u> , 95 Wn.2d 1, 621 P.2d 1256 (1980) . . . . .	41-43

**TABLE OF AUTHORITIES (CONT'D)**

Page

**WASHINGTON CASES (CONT'D)**

<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996) . . . . .	23, 24, 60, 62, 63, 66
<u>State v. Eaton</u> , 82 Wn. App. 723, 919 P.2d 116 (1996), <u>overruled on other grounds</u> , <u>State v. Frohs</u> , 83 Wn. App. 803, 924 P.2d 384 (1996) . . . . .	77
<u>State v. Ermert</u> , 94 Wn.2d 839, 621 P.2d 121 (1980) . . . . .	79
<u>State v. Ferro</u> , 64 Wn. App. 181, 824 P.2d 500 (1992) . . . . .	49
<u>State v. Frohs</u> , 83 Wn. App. 803, 924 P.2d 384 (1996) . . . . .	78
<u>State v. Greiff</u> , 141 Wn.2d 910, 10 P.3d 390 (2000) . . . . .	78
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985) . . . . .	63
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986) . . . . .	25, 28, 31, 32
<u>State v. Head</u> , 136 Wn.2d 619, 964 P.2d 1187 (1998) . . . . .	76, 77

**TABLE OF AUTHORITIES** (CONT'D)

	Page
<b><u>WASHINGTON CASES</u></b> (CONT'D)	
<u>State v. Hescoc</u> , 98 Wn. App. 600, 989 P.2d 1251 (1999) . . . . .	76
<u>State v. Hoke</u> , 72 Wn. App. 869, 866 P.2d 670 (1994) . . . . .	35, 36
<u>State v. Holmes</u> , 135 Wn. App. 588, 145 P.3d 1241 (2006) . . . . .	51
<u>State v. Huft</u> , 106 Wn.2d 206, 720 P.2d 838 (1986) . . . . .	20, 23
<u>State v. Jeter</u> , 30 Wn. App. 360, 634 P.2d 312 (1981) . . . . .	44, 45
<u>State v. Johnson</u> , 90 Wn. App. 54, 950 P.2d 981 (1998) . . . . .	79
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003) . . . . .	80
<u>State v. Jones</u> , 146 Wn.2d 328, 45 P.3d 1062 (2002) . . . . .	25
<u>State v. Jorden</u> , 160 Wn.2d 121, 156 P.3d 893 (2007) . . . . .	27
<u>State v. Jungers</u> , 125 Wn. App. 895, 106 P.3d 827 (2005) . . . . .	66

**TABLE OF AUTHORITIES** (CONT'D)

	Page
 <b><u>WASHINGTON CASES</u></b> (CONT'D)	
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986) . . . . .	44
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999) . . . . .	19, 25, 40, 47
<u>State v. Le</u> , 103 Wn. App. 354, 12 P.3d 653 (2000) . . . . .	19
<u>State v. Littlefair</u> , 129 Wn. App. 330, 119 P.3d 359 (2005) . . . . .	51
<u>State v. Lorenz</u> , 152 Wn.2d 22, 93 P.3d 133 (2004) . . . . .	68, 71
<u>State v. Lynd</u> , 54 Wn. App. 18, 771 P.2d 770 (1989) . . . . .	61
<u>State v. Maxfield</u> , 125 Wn.2d 378, 886 P.2d 123 (1994), <u>reversed on other grounds</u> , <u>In re Pers. Restraint of Maxfield</u> , 133 Wn.2d 332, 945 P.2d 196 (1997) . . . . .	32, 52
<u>State v. McCrorey</u> , 70 Wn. App. 103, 851 P.2d 1234 (1993) . . . . .	78
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995) . . . . .	51

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>WASHINGTON CASES (CONT'D)</u></b>	
<u>State v. McGovern</u> , 111 Wn. App. 495, 45 P.3d 624 (2002) . . . . .	21
<u>State v. McKinney</u> , 148 Wn.2d 20, 60 P.3d 46 (2002) . . . . .	31
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999) . . . . .	18
<u>State v. Miles</u> , ___ Wn.2d ___, 156 P.3d 864 (2007) . . . . .	30
<u>State v. Miller</u> , 131 Wn.2d 78, 929 P.2d 372 (1997) . . . . .	73
<u>State v. Murray</u> , 110 Wn.2d 706, 757 P.2d 487 (1988) . . . . .	53
<u>State v. Myrick</u> , 102 Wn.2d 506, 688 P.2d 151 (1984) . . . . .	37
<u>State v. Niedergang</u> , 43 Wn. App. 656, 719 P.2d 576 (1986) . . . . .	76
<u>State v. Pineda</u> , 99 Wn. App. 65, 992 P.2d 525 (2000) . . . . .	76
<u>State v. Portomene</u> , 79 Wn. App. 863, 905 P.2d 1234 (1995) . . . . .	75

**TABLE OF AUTHORITIES (CONT'D)**

Page

**WASHINGTON CASES (CONT'D)**

<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984) . . . . .	66
<u>State v. Reuben</u> , 62 Wn. App. 620, 814 P.2d 1177 (1991) . . . . .	73
<u>State v. Ross</u> , 141 Wn.2d 304, 4 P.3d 130 (2000) . . . . .	18, 20, 33-35, 53
<u>State v. Royal</u> , 122 Wn.2d 413, 858 P.2d 259 (1993) . . . . .	77
<u>State v. Rulan C.</u> , 97 Wn. App. 884, 970 P.2d 821, 990 P.2d 422 (1999) . . . . .	41, 47, 49
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994) . . . . .	66
<u>State v. Sargent</u> , 111 Wn.2d 641, 762 P.2d 1127 (1988) . . . . .	71
<u>State v. Schroeder</u> , 109 Wn. App. 30, 32 P.3d 1022 (2001) . . . . .	49
<u>State v. Seagull</u> , 95 Wn.2d 898, 632 P.2d 44 (1981) . . . . .	35, 39
<u>State v. Smith</u> , 68 Wn. App. 201, 842 P.2d 494 (1992) . . . . .	75, 78

**TABLE OF AUTHORITIES** (CONT'D)

	Page
 <b><u>WASHINGTON CASES</u></b> (CONT'D)	
<u>State v. Surge</u> , 160 Wn.2d 65, 156 P.3d 208 (2007) . . . . .	25
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987) . . . . .	51
<u>State v. Valdez</u> , 137 Wn. App. 280, 152 P.3d 1048 (2007) . . . . .	49
<u>State v. Welker</u> , 37 Wn. App. 628, 683 P.2d 1110 (1984) . . . . .	48
<u>State v. Williams</u> , 102 Wn.2d 733, 689 P.2d 1065 (1984) . . . . .	24
<u>State v. Wilson</u> , 97 Wn. App. 578, 988 P.2d 463 (1999) . . . . .	37
<u>State v. Wolters</u> , 133 Wn. App. 297, 135 P.3d 562 (2006) . . . . .	43, 47-49
<u>State v. WWJ Corp.</u> , 138 Wn.2d 595, 980 P.2d 1257 (1999) . . . . .	63
<u>State v. Young</u> , 76 Wn.2d 212, 455 P.2d 595 (1969) . . . . .	23
<u>State v. Young</u> , 123 Wn.2d 173, 867 P.2d 593 (1994) . . . . .	18, 20, 25, 26, 34, 38, 39

**TABLE OF AUTHORITIES (CONT'D)**

	Page
 <b><u>FEDERAL CASES</u></b>	
 <u>California v. Ciraolo</u> , 476 U.S. 207, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986) . . . . .	38
 <u>California v. Greenwood</u> , 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988) . . . . .	29
 <u>Dow Chemical Co. v. United States</u> , 749 F.2d 307 (6th Cir. 1984), <u>aff'd</u> , 476 U.S. 227, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986) . . . . .	26, 38
 <u>Gasho v. United States</u> , 39 F.3d 1420 (9th Cir. 1994) . . . . .	21
 <u>Griffin v. California</u> , 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) . . . . .	59, 60
 <u>Hardesty v. Hamburg Township</u> , 461 F.3d 646 (6th Cir. 2006) . . . . .	32
 <u>Mincey v. Arizona</u> , 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) . . . . .	49
 <u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) . . . . .	3, 68, 70-73, 75

**TABLE OF AUTHORITIES (CONT'D)**

Page

**FEDERAL CASES (CONT'D)**

<u>Payton v. New York</u> , 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) . . . . .	23
<u>Rhode Island v. Innis</u> , 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) . . . . .	72
<u>Smith v. Maryland</u> , 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979) . . . . .	31
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984) . . . . .	51, 52, 67
<u>United States v. Wilson</u> , 953 F.2d 116 (4th Cir. 1991) . . . . .	63
<u>United States ex rel. Macon v. Yeager</u> , 476 F.2d 613 (3d Cir.), <u>cert. denied</u> , 414 U.S. 855, 94 S. Ct. 154, 38 L. Ed. 2d 104 (1973) . . . . .	24
<u>United States v. Alexander</u> , 835 F.2d 1406 (11th Cir.1988) . . . . .	21
<u>United States v. Griffin</u> , 922 F.2d 1343 (8th Cir.1990) . . . . .	72

**TABLE OF AUTHORITIES (CONT'D)**

	Page
 <b><u>FEDERAL CASES (CONT'D)</u></b>	
<u>United States v. Holt</u> , 264 F.3d 1215 (10th Cir. 2001) . . . . .	20
<u>United States v. Lee</u> , 73 F.3d 1034 (10th Cir 1996), <u>overruled on other grounds</u> , <u>United States v. Holt</u> , 264 F.3d 1215 (10th Cir. 2001) . . . . .	20
<u>United States v. Miller</u> , 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) . . . . .	31
<u>United States v. Prescott</u> , 581 F.2d 1343 (9th Cir. 1978) . . . . .	22, 24, 59-64, 66
<u>United States v. Taxe</u> , 540 F.2d 961 (9th Cir. 1976) . . . . .	66
<u>United States v. Thame</u> , 846 F.2d 200 (3rd Cir. 1988) . . . . .	59, 66
<u>United States v. Thompson</u> , 700 F.2d 944 (5th Cir. 1983) . . . . .	46
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) . . . . .	19, 23

**TABLE OF AUTHORITIES (CONT'D)**

	Page
 <b><u>OTHER JURISDICTIONS</u></b>	
<u>Padgett v. State</u> , 590 P.2d 432 (Alaska 1979) . . . . .	60, 66
<u>Simmons v. State</u> , 419 S.E.2d 225 (S.C. 1992) . . . . .	59, 67
<u>State v. Frankel</u> , 847 A.2d 561 (N.J. 2004) . . . . .	21
<u>State v. Jennings</u> , 430 S.E.2d 188 (N.C. 1993) . . . . .	59
<u>State v. Palenkas</u> , 933 P.2d 1269 (Ariz. App. 1996) . . . . .	60, 62
<u>State v. Pena</u> , 108 N.M. 760, 779 P.2d 538 (N.M. 1989) . . . . .	21
<u>State v. Wilson</u> , 600 N.W.2d 14 (Wis. App. 1999) . . . . .	33
 <b><u>RULES, STATUTES AND OTHERS</u></b>	
CrR 3.5 . . . . .	1, 4, 68, 69, 73-75
CrR 3.5(c) . . . . .	3, 74, 75
CrR 3.6 . . . . .	1, 4, 34, 54

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<b><u>RULES, STATUTES AND OTHERS (CONT'D)</u></b>	
CrR 6.1(d) . . . . .	77
Former RCW 9.94A.715(2)(a) . . . . .	80
Laws of 2003, ch. 379 § 6 . . . . .	80
RAP 9.10 . . . . .	55
RAP 10.1(h) . . . . .	55
RCW 9.94A.310 . . . . .	4
RCW 9.94A.510 . . . . .	4
RCW 9.94A.700(5)(c) . . . . .	80
RCW 69.50.401(1)(2)(b) . . . . .	3
RCW 69.50.4013 . . . . .	3
RCW 69.50.440(1) . . . . .	3
U.S. Const. amend. 4 . . . . .	19, 21, 23-25, 29, 31-33, 59, 60, 62, 66
U.S. Const. amend. 5 . . . . .	23, 24, 55, 60, 62, 68
U.S. Const. amend. 6 . . . . .	24, 51
U.S. Const. amend. 14 . . . . .	55

**TABLE OF AUTHORITIES (CONT'D)**

Page

**RULES, STATUTES AND OTHERS (CONT'D)**

Wash. Const. art. I, § 7 . . . . . 19, 24-26, 28-30, 33, 37, 38, 40, 62

Webster's Third New  
International Dictionary (2002) . . . . . 22

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's CrR 3.6 motion to suppress evidence. CP 80-87.
2. The trial court erred in entering CrR 3.6 "Disputed Fact" 15 and, "Reasons For Admissibility Or Inadmissibility Of The Evidence" 3, 4, 5, 6, 7, 8, 9, 10 and 12. CP 80-87.
3. The trial court erred in admitting evidence that appellant exercised his constitutional right to refuse warrantless entry into his home.
4. Prosecutorial misconduct deprived appellant of his constitutional due process right to a fair trial.
5. Ineffective assistance of counsel deprived appellant of his constitutional due process right to a fair trial.
6. The trial court erred in denying appellant's CrR 3.5 motion to suppress appellant's statements.
7. The trial court erred in failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing.
8. Cumulative error deprived appellant of his constitutional due process right to a fair trial.
9. The trial court erroneously sentenced appellant to submit to alcohol abuse evaluation and treatment as a condition of community custody.

### Issues Pertaining to Assignments of Error

1. Acting without a warrant, officers peered through a crack in appellant's nearly closed garage door. They saw three common household items capable of being used in the manufacture of methamphetamine inside. One officer entered a neighbor's backyard without the neighbor's permission and looked into appellant's backyard, where she saw someone throwing a gas can into the bushes. Officers then entered appellant's backyard without consent, inspected the contents of the gas can, and saw what appeared to be ammonium sulfate inside. Police used the resulting information to obtain a search warrant. Were the warrantless actions taken by police illegal searches? If so, did the unlawfully obtained information invalidate the search warrant, requiring suppression of the evidence?

2. Appellant refused to allow police into his home without a warrant and asked why they wanted him to leave his home. Did the trial court err in concluding this information supported probable cause for a search warrant?

3. At trial, officers testified appellant refused to allow police into his home without a warrant. Was admission of this evidence an error of constitutional magnitude requiring reversal? Did the state commit prejudicial misconduct in eliciting this testimony and arguing appellant's

refusal was evidence of guilt? Was defense counsel ineffective in failing to object to the admission of this evidence and in further failing to object to the state's improper argument?

4. Officers elicited incriminating statements by subjecting appellant to custodial interrogation. Did the trial court err in failing to suppress these statements in the absence of a Miranda warning?

5. CrR 3.5(c) requires entry of written findings of fact and conclusions of law after a suppression hearing. Where the trial court failed to enter written findings of fact and conclusions of law as well as oral findings, must appellant's convictions be reversed and dismissed?

6. Did the trial court err when it ordered appellant to submit to an alcohol abuse evaluation and treatment as a condition of community custody where alcohol bore no relation to the alleged crimes?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY.

The state charged appellant Rick Jerome Judge as an accomplice with possession of methamphetamine and manufacture of methamphetamine while armed with a firearm.<sup>1</sup> CP 1-3; RCW 69.50.401(1)(2)(b); RCW

---

<sup>1</sup> The State also charged Judge with possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, but the court dismissed that charge with prejudice before trial. CP 31-33; RCW 69.50.440(1).

69.50.4013; RCW 9.94A.310/9.94A.510. Judge moved pre-trial to exclude illegally obtained evidence under CrR 3.6 and statements made to police under CrR 3.5. CP 4-30; Supp CP \_\_\_ (State's Response to Motion to Suppress, 6/26/06); 1RP<sup>2</sup> - 3RP; 4RP 37-89. The Honorable Susan K. Serko denied both motions. CP 80-87<sup>3</sup>; 3RP 104-110; 4RP 88-89. The first trial ended in mistrial due to juror misconduct. 4RP 431-33. In the second trial, held before the Honorable John R. Hickman, the jury returned a guilty verdict on both counts and also found Judge was armed with a firearm during the commission of the crime. CP 59-61. The court imposed concurrent standard range sentences on both counts, plus the firearm enhancement. CP 65-78. This appeal timely follows.<sup>4</sup> CP 79.

## 2. CrR 3.6 HEARING

At 8:30 on a Sunday morning, Puyallup police officers Douglas Kitts and Rochelle Brosseau drove to Judge's residence after receiving a complaint of an odor possibly related to drug activity. CP 80; 3RP 34.

---

<sup>2</sup> The verbatim report of proceedings is contained in 22 volumes referenced as follows: 1RP - 7/18/06; 2RP - 7/19/06; 3RP - 7/20/06; 4RP - seven consecutively paginated volumes from 7/24/06, 7/25/06, 7/26/06, 7/27/06, 7/31/06, 8/1/06; 5RP - 11 consecutively paginated volumes from 8/14/06, 8/15/06, 8/16/06, 8/17/06, 8/21/06, 8/22/06, 8/23/06, 8/24/06, 8/28/06, 8/29/06, 8/30/06; 6RP - 9/22/06.

<sup>3</sup> A copy of the Findings and Conclusions On Admissibility of Evidence CrR 3.6 is attached as Appendix A.

<sup>4</sup> Co-defendant Rachelle Birdsong's appeal is consolidated with Judge's appeal.

They approached the house by walking up the driveway towards the attached garage. CP 80, 81. They noticed the garage door was slightly ajar at the bottom, with a gap of four to 12 inches between the ground and the door. CP 81; 1RP 30, 77; 2RP 54. There were no windows on the garage. CP 81; 1RP 47. Brosseau heard a crinkling sound from inside the garage. CP 81; 2RP 55. The officers knocked on the garage door and received no response. CP 81. They then walked towards the front door of the house along a walkway, where they smelled ammonia. CP 81; 1RP 30, 31.

After knocking on the front door, the officers returned to the garage and peered through a crack between the articulated door panels. CP 81, 1RP 34; 2RP 60. The crack was between 1/4 inch and one inch wide. CP 81. They saw two hand held torches, vehicle parts, coffee filters, cans of paint, and cans of what might have been paint thinner or solvent. CP 81; 1RP 49.

While spying through the crack, Brosseau saw Judge in the garage near the door to the interior of the house. CP 81; 2RP 61-62; 3RP 18. Brosseau called to Judge and, without explaining why, beckoned him to come out and talk with the officers. CP 81; 2RP 62. Judge asked "why." 2RP 62. Brosseau told him they needed to talk to him about a complaint. 2RP 62-63. Judge opened the front door of the residence, at which point

officers said they were investigating a chemical odor. 1RP 32. Judge complied with their request to step outside the house and speak with them. 1RP 32.

The officers requested to go inside the house. 2RP 67. Judge asked if they had a warrant, and the officers responded they could get one if needed. 1RP 66; 2RP 67. Judge withheld consent to a warrantless entry into his home. CP 82 ; 1RP 65-66; 2RP 67-68.

The officers declined Judge's request to go back into his house because they suspected a methamphetamine lab was inside, they did not want Judge to destroy evidence or access weapons, and they had a concern for Judge's safety. 1RP 33; 2RP 70.

When asked if anyone else was in the house, Judge said his girlfriend was asleep inside. CP 82; 2RP 67. Rather than let Judge back inside, officers allowed him to call into the house to tell his girlfriend to come out. CP 82; 1RP 36-37. Brosseau heard Judge say on the phone that the police were there and would obtain a warrant. CP 82; 2RP 68-69.

Brosseau claimed Judge was trying to let somebody in the house know the police were there, which caused her to worry someone might grab a weapon or destroy evidence. 2RP 69. Instead of entering the house, Brosseau entered a neighbor's backyard to look into Judge's backyard. CP

82; 2RP 76. Kitts, on the other hand, did not go into the neighbor's backyard at this point because he "had no reason to." 1RP 52.

Judge's house is in a residential area at the end of a cul de sac, with at least 15 feet between property lines. CP 80; 1RP 26. A fence divides Judge's backyard from the neighbor's backyard. CP 82; 2RP 11, 43-44, 72. A portion of the fence is low enough to allow a person standing in the neighbor's backyard to see the back of Judge's house. CP 82; 2RP 72-73, 75. Another fence runs along the opposite side of Judge's backyard. 2RP 11. A fence separates part of Judge's backyard from the front yard. 1RP 53. There is undeveloped land behind Judge's backyard, containing blackberry brambles, trees and other vegetation. 1RP 45.

Before entering the neighbor's backyard, neither Brosseau nor Kitts contacted the neighbor and requested permission to enter. CP 82; 1RP 51; 2RP 75. To reach the backyard, Brosseau first needed to walk across the neighbor's front yard. CP 82; 2RP 71, 3RP 11-12. No pathway of any kind connected the front lawn to the side yard. 2RP 74-75; 3RP 11. Brosseau eventually reached the side yard, which consisted of shrubbery and what Brosseau described as a "pathway" consisting of beauty bark. CP 82; 2RP 70, 71. Nothing indicated people were allowed to walk across the neighbor's front lawn into the backyard. 3RP 12. Brosseau did not see any evidence that the backyard was open to the public. 3RP 12.

After an additional officer arrived, Brosseau went back about 40 feet into the neighbor's yard. 2RP 72; 3RP 30. From this vantage point, Brosseau saw a female, later identified as Rachelle Birdsong, standing behind Judge's house throwing a gas can into the blackberry bushes. CP 83, 86; 1RP 79; 2RP 77. Brosseau ran to the front of Judge's house and told the other officers what she had seen. CP 83; 1RP 79; 2RP 78.

Kitts then ran across Judge's front yard, past the front door of his house, and stopped at the fence separating Judge's front yard from the back. CP 83; 1RP 52-54. From this vantage point he looked into the backyard and saw a gas can flying from the elevated back deck of the house. 1RP 52-54. He also saw ice cubes falling down. 1RP 63.

Prior to the time Brosseau came back from the neighbor's backyard, Detective Steven Pigman arrived. CP 83. Acting without a warrant, Pigman went into Judge's backyard after Brosseau returned from the neighbor's yard. 1RP 81-82; 2RP 10. He retrieved the gas cans from the blackberry bushes, which were about 15-20 feet from the back deck of the house, and looked inside them. CP 86; 1RP 82, 86-87; 2RP 13. They contained white pellets, which Pigman believed to be ammonium sulfate that could be used to make anhydrous ammonia. 1RP 82-83; 2RP 31-32. After entering the backyard, Pigman also saw ice cubes in the backyard area towards the blackberry bushes. 1RP 88; 2RP 32-34.

Brosseau entered Judge's backyard at about the same time as Pigman and observed a little pile of ice cubes on the ground. CP 83; 2RP 78-79. Brosseau did not see the ice cubes while she stood in the neighbor's yard. 3RP 24. She did not see them until she went into Judge's backyard. 3RP 24.

Birdsong was not in Judge's backyard when Brosseau entered. CP 83. Brosseau left the backyard, went back to the garage, and again looked through a crack in the garage door. CP 83; 2RP 79-80. She saw Birdsong inside the house, sprinkling a powder similar to Carpet Fresh on the floor. CP 83; 2RP 80. Officers went to the front door of the residence, opened the door, and ordered Birdsong out of the house at gunpoint. CP 83; 1RP 54.

Pigman obtained a search warrant. CP 84; 1RP 88-89. During the search of the house and garage, officers found items potentially related to a methamphetamine lab. CP 84; 1RP 89.

The trial court ruled the officers conducted an illegal search when they peered through the cracks in the garage and excised this tainted information from the affidavit. CP 84. The court nevertheless denied Judge's motion to suppress, concluding untainted information in the affidavit established probable cause. CP 84-86. This remaining information included (1) officers smelled ammonia; (2) Judge did not allow

police to enter his house without a warrant and asked "why" they wanted him to leave the house; (3) Brosseau observed a woman throw a gas can into the bushes; (4) Pigman observed white pellets inside a gas can; and (5) there was ice in the backyard. CP 85-86.

### 3. TRIAL.

The defense argued there was not enough evidence to prove manufacture of methamphetamine beyond a reasonable doubt because various ingredients and items needed to manufacture were never found. 5RP 99-106, 910-28. Conversely, items that were found had innocent uses. 5RP 911, 914, 922. The state argued the evidence was sufficient to prove manufacture. 5RP 875-901.

There are three stages to the ammonia alkaloid metal method of methamphetamine manufacture. 5RP 756-57. The first stage involves extracting pseudoephedrine from cold or allergy medication tablets. 5RP 548-49, 757. The police did not find pseudoephedrine in any form. 5RP 264, 427-28; 586, 786. Methamphetamine cannot be made without pseudoephedrine. 5RP 600-01, 786.

Extraction of pseudoephedrine is often done by means of some type of mechanism to grind up the tablets. 5RP 549, 757, 759. Police did not find a blender or anything else that could be used to grind tablets. 5RP 264, 586.

The next step is to use a solvent to obtain the pseudoephedrine in powder form. 5RP 549-50. Some kind of filter, such as a coffee filter, is used to separate the pill binder from the pure pseudoephedrine. 5RP 550-51, 757, 760. The police found coffee filters. 5RP 405. One coffee filter had a red substance on it, which could have been a binder material (sugar and starch) left behind after extraction. 5RP 775-76. The state's expert, however, could not say it probably was binder material, and really had no way of knowing if the material resulted from pseudoephedrine extraction. 5RP 788-89.

Other items typically used in phase one include ceramic pots; ethyl alcohol (usually a gasoline additive called Heet); denatured alcohol; regular alcohol; hand-held torches; and a common household funnel. 5RP 161, 191, 549-50, 554, 579-80. Police did not find any alcohol or Heet. 5RP 265, 590. There was no evidence of a ceramic pot.

Police located a common household funnel and handheld torches. 5RP 322, 554. Handheld torches are used to speed up the evaporation of solvent by heating the bottom of a mason jar. 5RP 579-80. Police did not find any container indicating heat had been applied to it. 5RP 271. Moreover, hand torches are used to work on cars. 5RP 844-45. Judge was a mechanic and there were a number of cars on the property. 5RP 839, 841, 842.

The police found empty blister packets of pseudoephedrine in the garage. 5RP 293, 553. Judge has allergies, and pseudoephedrine is found in virtually all decongestant cold and allergy medicines. 7RP 756, 851, 852.

The second phase involves reducing pseudoephedrine to methamphetamine free base. 5RP 554, 758. The Birch Reduction method combines lithium or sodium metal with anhydrous (liquefied) ammonia. 5RP 554, 578. Items found in the second phase include containers of anhydrous ammonia or a combination of ammonium sulfate and a household drain cleaner like Red Devil Lye; lithium; paint thinners or solvents; glass mason jars; a turkey baster; funnels; gas cans; pop bottles converted into pressurized cylinders; camping fuel, and starter fluid. 5RP 161-62, 167, 763.

Batteries are the most common source of lithium metal used to manufacture methamphetamine. 5RP 266-67, 555, 761. Police commonly find battery remnants at lab sites because the lithium is obtained by removing the battery casing. 5RP 555-56, 761-62. The police found an empty package that said "lithium batteries" on it. 5RP 267, 294. But police did not find any lithium battery parts. 5RP 267, 427, 589. A member of the search team testified he did not check to see if any of the electronic items in the house contained the batteries that came from the

empty battery package. 5RP 589. He did not have any idea how the batteries from the package were used. 5RP 589.

Anhydrous ammonia can be created by mixing ammonium sulfate, ammonia nitrate, sodium hydroxide, Red Devil Lye, and water. 5RP 556, 762. This mixture produces ammonia gas, and then the gas is cooled down until it becomes distilled into anhydrous (liquefied) ammonia. 5RP 556-57, 762. Police found an empty container of Red Devil Lye. 5RP 272. Samples recovered from the gas cans tested positive for ammonium sulfate. 5RP 774-75, 778. But lye was not present. 5RP 779, 806. Lye is necessary to produce anhydrous ammonia. 5RP 780-81.

Pigman and Brosseau found ice in the backyard. 5RP 295, 349. To distill the ammonia, the temperature must be minus 28 degrees Fahrenheit. 781. Pigman said ice is used in the cooling process. 5RP 295, 303. But the state's forensic scientist testified ice cubes get no colder than zero degrees, which is too warm to liquefy ammonia. 5RP 781-82. For this reason, dry ice or liquid propane is needed to reach the required cooling temperature. 5RP 787. Police found a liquid propane container attached to a hand torch, but that amount of propane would not sufficiently cool the ammonia. 5RP 799-800, 802. There was no evidence police found dry ice. Tubing is used to help perform the cooling function, but police did not find any tubing consistent with that use. 5RP 804-05.

Propane tanks or some other tank with a valve are most often used to contain the anhydrous ammonia component. 5RP 266. Police did not find any tank consistent with that use. 5RP 266. Gas cans may be used to store anhydrous ammonia. 5RP 293-94. But to create enough pressure to form anhydrous ammonia in a gas can, an air compressor must be used. 5RP 782. There was no evidence police found an air compressor. Further, the container must be capped to maintain pressure and prevent the escape of the ammonia gas. 5RP 782. Police did not find any caps for the gas cans that were found. 5RP 273-74, 620.

When water is used to slow down the reaction process, a bilayered liquid of water and solvent results. 5RP 621-22. Police did not find any bilayered liquid. 5RP 622.

Methamphetamine cannot be made using the Birch Reduction method without anhydrous ammonia. 5RP 780. Police did not find anhydrous ammonia. 5RP 428, 586, 780. Neither did they find any pseudoephedrine powder mixed with lithium; distilled water; camping fuel; or sodium metal. 5RP 267, 428, 589, 590, 600. There was no evidence police found glass mason jars; a turkey baster; pop bottles converted into pressurized cylinders; or starter fluid.

Stage three is called salting out. 5RP 558. The free base, in the form of an oily liquid, is converted into a crystalline form using a

hydrochloric acid gas generator. 5RP 558, 758-59. Pigman testified they did not find any container consistent with an acid gas generator. 5RP 270. Police did not find any containers with acid residue. 5RP 591.

Hydrochloric acid is generated by using rock salt or aluminum foil mixed with muriatic or sulfuric acid inside a closed, lidded container. 5RP 558-59, 763-64. Police did not find sulfuric or muriatic acid, rock salt, or aluminum foil indicating use in methamphetamine manufacture. 5RP 269, 590-91.

Police found tubing consistent with using a glass jar as an acid gas generator. 5RP 561-62, 765-66. But no glassware indicating use in the manufacturing process was found in the house. 5RP 628-29. The tubing was also consistent with use as a marijuana bong. 5RP 783, 785. In addition, the state's expert said the tubing could probably be used for automotive uses, while Judge's father testified the tubing could be used to bleed brakes, a use that is consistent with Judge's work on automobiles. 5RP 808, 839, 841-42, 845-46.

A closed container must be used to keep the gas from escaping, such as two liter pop cans, gas cans, or propane tanks. 5RP 559. Police did not find any caps for the gas cans recovered from Judge's property. 5RP 273-74, 620.

The acid gas is routed into another container, which holds a solvent and the free base. 5RP 559, 764. The solvent can be any kind of paint solvent, such as Xylene. 5RP 560. Police found a can of Xylene. 5RP 563, 627. But police also found paints and primers that go along with Xylene and are found in any garage in America. 5RP 257, 627, 840-41.

The last step is to evaporate the solvent or filter out the methamphetamine, leaving the finished product behind. 5RP 559-60, 759, 765. Acetone is typically used to whiten the product. 5RP 560-61. There was no evidence of Acetone being found.

The police recovered a police scanner and a mounted surveillance camera. 5RP 403, 409, 422, 581-82. Judge installed the camera because someone had earlier stolen items from the garage. 5RP 843-44.

Police found a box of latex gloves in the garage, which can be associated with methamphetamine manufacture, but did not find any used gloves or gloves with precursor residue on them. 5RP 404, 426, 567, 595.

Police found an air-purifying respirator, but it would not have offered adequate protection for use in methamphetamine manufacture. 5RP 409, 566, 595-96. Police did not know the purpose for which the filters on the respirator were used. 5RP 596. The filters may have been used to filter out dirt. 5RP 596.

Police found two firearms approximately 20 feet inside the front door on a stereo cabinet. 5RP 418-21. Police located three electronic weight scales in Judge's bedroom. 5RP 411. Police found a white substance, which later tested positive for methamphetamine, on a plate in the kitchen cupboard. 5RP 410, 416-17, 597, 771-72. One officer testified he had no reason to think this methamphetamine was produced at the Judge residence other than it was found there. 5RP 597. The state failed to match a single fingerprint lifted from various items at the scene to Judge. 5RP 723, 726-27.

C. ARGUMENTS

1. JUDGE'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE THE SEARCH WARRANT WAS NOT SUPPORTED BY UNTAINTED INFORMATION SHOWING PROBABLE CAUSE.

The trial court erred in failing to excise tainted information from the affidavit in addressing whether probable cause supported the search warrant. As a result, the trial court wrongly denied Judge's suppression motion. Reversal is required.

This Court reviews a trial court's denial of a suppression motion by considering whether substantial evidence supports the challenged findings and whether those findings support the trial court's conclusions of law. State v. Ague-Masters, \_\_ Wn. App. \_\_, 156 P.3d 265, 272 (2007). Findings are supported by substantial evidence only if the evidence

sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). This Court reviews conclusions of law de novo. Id., 137 Wn.2d at 214.

A search warrant is valid only if supported by probable cause. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). "Probable cause exists when an affidavit supporting a search warrant sets forth facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity." State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). In reviewing whether probable cause supports the warrant, illegally obtained information must be excised from the affidavit supporting the warrant. State v. Ross, 141 Wn.2d 304, 311-12, 4 P.3d 130 (2000). A search warrant remains valid only if the affidavit contains sufficient untainted facts to establish probable cause independent of the illegally obtained information. Id., 141 Wn.2d at 314-15; State v. Coates, 107 Wn.2d 882, 887, 735 P.2d 64 (1987).

a. The Trial Court Erred By Failing To Exclude All Evidence Obtained As a Result Of The Unlawful Search Of The Garage.

The trial court correctly ruled officers unconstitutionally searched the garage by peering through the crack, but erred in failing to exclude evidence derived from that unlawful search. CP 84-86.

The exclusionary rule requires suppression of evidence obtained as a result of an unlawful search under both the Fourth Amendment of the federal constitution and article I, § 7 of the Washington Constitution. Wong Sun v. United States, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." Ladson, 138 Wn.2d at 359. Evidence is fruit of an illegal search when it "has been come at by exploitation of the primary illegality." Wong Sun, 371 U.S. at 488. Evidence derived directly and indirectly from illegal police conduct must be excluded. State v. Le, 103 Wn. App. 354, 361, 12 P.3d 653 (2000).

In Judge's case, information derived from the initial unlawful search of the garage includes (1) Judge's actions in asking "why" he should leave the garage and his refusal to allow officers to enter his home; (2) Brosseau's observation of the gas can from the adjoining yard made after police questioned Judge about the presence of others inside the home; (3) Kitts's observation of the second flying gas can and ice falling from the back deck while standing at the fence separating the front and back yards; (4) officer observations of the gas cans and ice once officers were inside Judge's backyard; and (5) Pigman's observation of the contents of the gas can. All

this information is tainted because the initial search of the garage directly and indirectly caused this information to be uncovered.<sup>5</sup>

The only untainted piece of information left in the affidavit is the smell of ammonia, which Kitts and Brosseau noticed before they looked in the garage. CP 81; 1RP 30, 31; 2RP 57-58. The smell of ammonia alone is insufficient to establish probable cause because the significance of that odor is entirely ambiguous and susceptible to innocent explanation. It is a common household product. 3RP 18. When it comes to probable cause, "[s]ome facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous." United States v. Lee, 73 F.3d 1034, 1039 (10th Cir 1996), overruled on other grounds, United States v. Holt, 264 F.3d 1215, 1226 n.6 (10th Cir. 2001). Innocuous facts cannot support a finding of probable cause. Young, 123 Wn.2d at 196; State v. Huft, 106 Wn.2d 206, 211, 720 P.2d 838 (1986).

Because the warrant is invalid, the evidence seized pursuant to the warrant must be suppressed. Ross, 141 Wn.2d at 311-12, 314-15. Such evidence includes all items associated with methamphetamine manufacture found in the residence as well as the methamphetamine found in the kitchen

---

<sup>5</sup> While Brosseau was in the neighbor's backyard, police took Judge into custody, handcuffed him, and placed him in the back of a police car. 1RP 52, 61. Judge's arrest was unlawful because police lacked probable cause at this juncture. No evidence, however, derived from the arrest.

cupboard. The proper remedy is reversal of the conviction and dismissal of the charges because remaining evidence is insufficient to prove guilt beyond a reasonable doubt. State v. Boethin, 126 Wn. App. 695, 700, 109 P.3d 461 (2005).

b. Judge's Exercise Of His Right To Refuse Consent To Warrantless Entry Into His Residence Cannot Be Used To Support Probable Cause To Conduct The Search.

Judge assigns error to "Reasons for Admissibility or Inadmissibility of Evidence" 4:

Mr. Judge's actions in asking "why" when asked to come out of the garage and refusing to allow the officers to go into the house to locate other occupants are borderline furtive, especially when considered in light of the totality of the circumstances.

CP 85 (Reasons for Admissibility or Inadmissibility of Evidence 4).

Judge had the right to refuse consent for officers to enter his house, and his exercise of that right may not be used to establish probable cause. State v. McGovern, 111 Wn. App. 495, 500, 501 n.18, 45 P.3d 624 (2002). Other jurisdictions likewise recognize exercise of the right to refuse consent cannot be a legitimate factor supporting probable cause. See, e.g., Gasho v. United States, 39 F.3d 1420, 1431-32 (9th Cir. 1994); State v. Frankel, 847 A.2d 561, 575 (N.J. 2004); State v. Pena, 108 N.M. 760, 766, 779 P.2d 538 (N.M. 1989). "A contrary rule would vitiate the protections of the Fourth Amendment." United States v. Alexander, 835

F.2d 1406, 1409 n.3 (11th Cir.1988). "If the government could use such a refusal against the citizen, an unfair and impermissible burden would be placed upon the assertion of a constitutional right and future consents would not be 'freely and voluntarily given.'" United States v. Prescott, 581 F.2d 1343, 1351 (9th Cir. 1978) (citation omitted). For this reason, refusal to consent to warrantless entry cannot "be evidence of a crime." Id.

The court therefore erred when it made a factual finding that Judge's refusal to allow the police into his home was "borderline furtive." Regardless of whether that finding is supported by substantial evidence, the court erred in concluding as a matter of law that his refusal to allow warrantless entry could be used to support probable cause. There is nothing criminal about exercising a constitutional right.

The court also erred in considering Judge's question of "why" as evidence supporting probable cause. By definition, "furtive" means stealthy, sneaky, secretive, surreptitious, thievish, "obtained underhandedly;" the "look of those who know they ought to be doing something else." Webster's Third New International Dictionary 924 (2002).

When Brosseau told him to come out of the house, she did not tell Judge why she wanted him to come out nor did she identify herself as a police officer. From Judge's perspective, Brosseau was a stranger, standing on his property, spying through a crack in his nearly closed-garage door

for unknown reasons, and directing him to leave the safety of his home and speak with her for further unknown reasons. If anyone, Judge had reason to be suspicious of Brosseau. Asking "why" he should leave the house under that set of circumstances is a natural and reasonable response that has nothing to do with being furtive. Brosseau did not even testify Judge's question made her suspicious in any way. The factual finding that Judge's question was furtive is therefore unsupported by substantial evidence.

Even if the factual finding is valid, the court still erred in concluding as a matter of law that Judge's question could be used to support probable cause. Ambiguous conduct induced by police action will not support a finding of probable cause. Wong Sun, 371 U.S. at 484; State v. Young, 76 Wn.2d 212, 215, 455 P.2d 595 (1969). Neither will innocuous facts. Huft, 106 Wn.2d at 211.

Furthermore, Judge enjoyed both the right to remain in his house and right to refuse to answer an officer's questions. See Payton v. New York, 445 U.S. 573, 588-90, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (Fourth Amendment protects right to be free from warrantless arrest while inside home); State v. Easter, 130 Wn.2d 228, 230, 243, 922 P.2d 1285 (1996) (person has Fifth Amendment right to pre-arrest silence). If an

exercise of his constitutional rights cannot be used as evidence of crime,<sup>6</sup> then simply asking why the police wanted him to forsake his constitutional rights cannot be used as evidence of crime either.

c. The Trial Court Erred In Ruling The Officer's Observation Of Judge's Backyard From the Neighbor's Adjoining Backyard Was Lawful.

Under article I, § 7, police do not have authority to enter a neighbor's backyard without the neighbor's permission in order to look into an adjoining backyard where neither area is impliedly open to the public. The trial court thus erred in ruling information gained from Brosseau's observation of Judge's backyard could be used to support probable cause. The court further erred in alternatively suggesting the warrantless search was justified by exigent circumstances.

Article I, § 7 provides "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, § 7 protects against unreasonable searches and seizures. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). Warrantless searches and seizures are per se unreasonable. Id. The state always carries the "heavy burden"

---

<sup>6</sup> In general, the exercise of a constitutional right cannot be used against a defendant as evidence of criminal wrongdoing. See, e.g., Easter, 130 Wn.2d at 230, 243 (exercise of Fifth Amendment right to pre-arrest silence); Prescott, 581 F.2d at 1351 (exercise of Fourth Amendment rights); United States ex rel. Macon v. Yeager, 476 F.2d 613, 615-16 (3d Cir.), cert. denied, 414 U.S. 855, 94 S. Ct. 154, 38 L. Ed. 2d 104 (1973) (exercise of Sixth Amendment right to counsel).

of proving a warrantless search is justified under one of the narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); Ladson, 138 Wn.2d at 350.

The federal constitution provides the minimum protection against unreasonable searches. Young, 123 Wn.2d at 179-80. "Under the Washington Constitution, it is well established that article I, § 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution." State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). Accordingly, a Gunwall<sup>7</sup> analysis is unnecessary to establish that this Court should undertake an independent state constitutional analysis. Id. 160 Wn.2d at 71; accord State v. Chenoweth, \_\_\_ Wn.2d \_\_\_, 158 P.3d 595, 600 (2007); State v. Athan, \_\_\_ Wn.2d \_\_\_, 158 P.3d 27, 32 (2007). "The only relevant question is whether article I, § 7 affords enhanced protection in the particular context." Surge, 160 Wn.2d at 71.

---

<sup>7</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (setting forth the factors for evaluating whether an issue merits independent state constitutional interpretation).

i. Judge's Backyard Is A Constitutionally Protected Area Under Article I, § 7.

The trial court ruled Brosseau's observation of Judge's backyard from the adjoining backyard was lawful because Judge did not have "an expectation of privacy in a backyard which can be viewed from the neighbor's yard." CP 85 (Reasons For Admissibility and Inadmissibility of Evidence 6). This was error.

"'Private affairs' protected by article I, § 7 are 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from *governmental trespass* absent a warrant.'" Young, 123 Wn.2d at 181 (citation omitted; emphasis added). Judge's backyard constituted a "private affair" under article I, § 7 because it is intimately connected to the experiences of home life. The backyard is an extension of the dwelling itself because "many of the private experiences of home life often occur outside the house. Personal interactions, daily routines and intimate relationships revolve around the entire home place." Dow Chemical Co. v. United States, 749 F.2d 307, 314 (6th Cir. 1984), aff'd, 476 U.S. 227, 106 S. Ct. 1819, 90 L. Ed. 2d 226 (1986). Judge's backyard is immediately adjacent to the house, enclosed by fencing on three sides and bordered by blackberry bushes in the back, beyond which lay

undeveloped land.<sup>8</sup> Brosseau directed her gaze towards a back deck attached to the house. Brosseau ran 40 feet into the neighbor's backyard to gain her vantage point. There is no evidence that Judge's backyard was open to the public.

In determining whether a certain interest is a protected private affair, a central consideration is "whether the information obtained via the governmental trespass reveals intimate or discrete details of a person's life." State v. Jorden, 160 Wn.2d 121, 126, 156 P.3d 893 (2007) (information contained in hotel register, although divulged to hotel personnel, is private affair protected from warrantless search by government). Such intimate details include a person's associations, activities and location. Id., 160 Wn.2d at 129-30.

Government observation of a backyard has the potential to reveal those same details and many more about a person's home life. Indeed, nearly every piece of information revealed within the physical confines of the home itself may potentially be revealed in a residential backyard. A

---

<sup>8</sup> Although of dubious significance, the trial court entered a disputed finding that "[t]here is a fence on the neighbor's portion of the property." CP 82 (Disputed Fact 15). The court did not resolve this disputed fact. Judge nevertheless assigns error to this finding in an abundance of caution. On direct examination, Pigman testified the fence "appeared to be on the neighbor's side." 3RP 34. On cross-examination, Pigman admitted he did not know where the property line was that separated the properties, and so could not say whose side the fence is on. 2RP 43-44. This portion of fact 15 is based entirely on speculative testimony and is therefore erroneous.

person's location, movements, and activities are all capable of being precisely monitored by an officer stationed in an adjoining backyard. Associations with one's spouse, children, family members and romantic partners all potentially take place in the backyard. Tender expressions of affection, angry family quarrels, outward manifestations of embarrassing illness - the list of sensitive information capable of being gained through observation of an area adjacent to the home is endless.

Government agents peering over the fence line are not only in a position to see these things but to overhear home dwellers' face-to-face or telephone conversations with family, friends, enemies, and business associates. Cf. State v. Gunwall, 106 Wn.2d 54, 63, 67-68, 720 P.2d 808 (1986) (police impermissibly learned who a person was contacting by tracking her phone calls). A citizen should not have to fear the intruding eye and uninvited ear of law enforcement while going about daily activities in an area intimately connected with the home. The very act of a government agent peering into the backyard offends article I, § 7 due to the wealth of private information potentially revealed.

Just because such information may be unwittingly exposed to a snooping neighbor, or voluntarily exposed to a friendly one, does not mean the information is likewise available to law enforcement. The fact that one's "private affair" may be exposed to certain private citizens does not

strip it of protection from intrusion by government agents under Article I, § 7.

In Boland, our Supreme Court held an officer's search and seizure of the contents of a garbage container placed curbside for collection is an unconstitutional intrusion into a person's private affairs under article I, § 7. State v. Boland, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990). The Court expressed the analytical framework for this holding as such: "Given that the fundamental purpose of the state constitution is to govern the relationship between the people and their government rather than to govern the relationship between private parties . . . it also follows that we concern ourselves only with the reasonableness of governmental intrusion into a private individual's garbage and not the reasonableness of such intrusions by private individuals." Boland, 115 Wn.2d at 575. The Court reasoned "[w]hile it may be true an expectation that children, scavengers, or snoops will not sift through one's garbage is unreasonable, average persons would find it reasonable to believe the garbage they place in their trash cans will be protected from warrantless governmental intrusion." Id. at 578; cf. California v. Greenwood, 486 U.S. 35, 37, 40-41, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988) (under Fourth Amendment, no reasonable expectation of privacy exists in garbage left on curbside outside curtilage of home

because garbage is exposed to public "snoops" and third-party trash collector).

Just as people reasonably believe police will not rummage through their trash bags to discover their personal effects, people reasonably believe police officers will not trespass into their neighbor's backyard to spy into their own. Although it would be unreasonable to expect a neighbor to absolutely refrain from looking over the fence into one's backyard, an average person would be offended to find an officer peering over his neighbor's fence to observe one's actions, listen to one's conversations, and otherwise snoop for evidence of crime.

Boland is part of a line of cases decided under Article I, § 7 that protect information from warrantless government intrusion even though the information is accessible to those who are not government agents. For example, bank records are a private affair. State v. Miles, \_\_\_ Wn.2d \_\_\_, 156 P.3d 864, 868 (2007). Banking information potentially reveals sensitive personal information, such as "what the citizen buys, how often, and from whom. They can disclose what political, recreational, and religious organizations a citizen supports. They potentially disclose where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more." Miles, 156 P.3d at 869. The fact that bank customers voluntarily reveal that information to the bank and its

employees does not alter their private character. Id. at 868; cf. United States v. Miller, 425 U.S. 435, 442-43, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (no Fourth Amendment protection of bank records because customer has no legitimate expectation of privacy in financial information "voluntarily conveyed to . . . banks and exposed to their employees in the ordinary course of business.").

Similarly, phone records are a person's private affairs because of the type information they reveal, including where calls are made and to whom. Gunwall, 106 Wn.2d at 63, 67-68. Those records do not lose their protection against government invasion merely because the phone company and its employees have access to the records. Id. at 67; cf. Smith v. Maryland, 442 U.S. 735, 743-744, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979) (no Fourth Amendment protection for dialed telephone numbers; no legitimate expectation of privacy in information voluntarily turned over to third parties such as the telephone company because there is always risk that company will reveal the dialed numbers dialed to police).

All the sensitive information gained from one's garbage, bank records and telephone records can be gained from government eavesdropping of the backyard as well.

Part of the "private affair" determination involves the extent to which the subject matter is voluntarily exposed to the general public. State

v. McKinney, 148 Wn.2d 20, 29, 60 P.3d 46 (2002) (driver's license records not private affair because such information did not disclose a person's associations, personal dealings, or movements). Judge's backyard, being directly adjacent to the house, was not exposed to the general public. Brosseau had to run 40 feet into the neighbor's yard to look into Judge's backyard. Moreover, a next door neighbor is not the general public. The neighbor is a third party capable of observing Judge's backyard affairs, but as cases like Boland and Gunwall show, voluntary exposure of intimate information to a third-party private citizen does not mean government agents may lawfully access that same information without a warrant.

Even under Fourth Amendment analysis, the curtilage of one's home can be protected from government intrusion even though neighbors have a view of the area. Hardesty v. Hamburg Township, 461 F.3d 646, 653 (6th Cir. 2006) (fact that neighbors could see back deck through rows of pine trees along the back of yard did not undermine conclusion back deck was curtilage protected from warrantless search). "Curtilage is the land immediately surrounding and associated with the home - that area associated with the intimate activity of a home and the privacies of life." State v. Maxfield, 125 Wn.2d 378, 398, 886 P.2d 123 (1994), reversed on other grounds, In re Pers. Restraint of Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). "The curtilage of a home is so intimately tied to the home

itself that it should be placed under the home's umbrella of Fourth Amendment protection." State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). "In a smaller urban community, it is not unusual for others to be able to see into the rear yard of a house. Curtilage is not to be defeated merely because the subject area may be observed by some." State v. Wilson, 600 N.W.2d 14, 19 (Wis. App. 1999). To hold otherwise would allow the government to conduct warrantless searches of urban backyards with impunity. Id.

That same reasoning applies with equal force under article I, § 7. If this Court were to hold officers do not conduct a search when they trespass into someone's backyard for the purpose of looking into an adjoining backyard, there is nothing to stop the police from making this a routine fishing expedition, subjecting both the innocent and the guilty alike to intrusion without limitation. One's choice to live among others in a residential community instead of holing up as a hermit in an isolated rural fortress should not give the government carte blanche to pry into that person's home life.

ii. The Officer's Observation Is Not Justified Under The Open View Doctrine.

The trial court erroneously ruled Brosseau's observations of Judge's backyard were permissible under the "open view" doctrine. CP 85 (Reasons For Admissibility and Inadmissibility of Evidence 6). The basic

requirements of the doctrine are not established because Brosseau did not make her observations from a lawful vantage point and what she did observe was not knowingly exposed to the public.

Under the open view doctrine, when a law enforcement officer is able to detect something by using her senses while lawfully present at the place where those senses are used, that detection does not generally constitute a search. Young, 123 Wn.2d at 182. However, an officer's visual surveillance constitutes a search if (1) the officer is not at a lawful vantage point; (2) the officer observes an object from a lawful but intrusive vantage point; or (3) the object under observation is not voluntarily exposed to the general public and is private information. The nature of the property observed is also a factor in determining whether a surveillance is unconstitutionally intrusive. Id. at 182-83; Ross, 141 Wn.2d at 312-13.

Prior to entering the neighbor's property, Brosseau did not contact the neighbor or receive permission to enter the neighbor's backyard. CP 83 (Disputed Fact 14).<sup>9</sup> The lack of permission means Brosseau was not at a lawful vantage point when she observed Birdsong's actions.

In Bobic, the Supreme Court addressed the constitutionality of an officer's warrantless observation of a commercial storage unit through a

---

<sup>9</sup> Although labeled a disputed fact in the written findings, there was no dispute at the CrR 3.6 hearing that Brosseau and Kitts did not contact or receive permission from the neighbor. 2RP 51, 75.

small, preexisting hole in an adjoining storage unit. State v. Bobic, 140 Wn.2d 250, 253, 254, 996 P.2d 610 (2000). The Court held a detective's observations did not constitute a search "because the objects under observation were in 'open view.'" Bobic, 140 Wn.2d at 258-59. After noting an officer must be lawfully present at the vantage point to invoke the open view doctrine, the Court concluded "the detective was lawfully inside the adjoining unit because the manager had given him permission to enter." Id. at 259.

Brosseau's view was impermissible because she entered the neighbor's property without permission. She trespassed in order to obtain her vantage point. The open view doctrine does not justify warrantless searches in the absence of a lawful vantage point.

In addition, Brosseau's vantage point was unlawful because she was not standing in an area impliedly open to the public. An officer with legitimate business is only permitted to enter the curtilage areas of a private residence which are impliedly open to the public, such as access routes to the house. Ross, 141 Wn.2d at 312. An officer's authority to enter private property is coextensive with that of a "reasonably respectful citizen." State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981); State v. Hoke, 72 Wn. App. 869, 877, 866 P.2d 670 (1994).

A reasonably respectful citizen would not, like Brosseau, walk 40 feet into a person's backyard without invitation. No access route connected the neighbor's backyard to a place impliedly open to the public. Areas of curtilage impliedly open to the public include a driveway, walkway, or access route leading to the residence or its porch. Hoke, 72 Wn. App. at 874. Although there was what Brosseau described as a "pathway" made of beauty bark in the neighbor's side yard, that pathway did not extend beyond the side yard. To reach this barked area leading to the backyard, Brosseau needed to trespass across the neighbor's front lawn. 2RP 71. There was no pathway connecting the front lawn to the bark path, and nothing otherwise indicated people are allowed to walk across the neighbor's front lawn into his backyard. 2RP 74-75; 3RP 11-12. Brosseau admitted she did not see any evidence that the neighbor's backyard was open to the public. 3RP 12.

Typical "open view" cases involve officers entering the curtilage of a defendant's property and seeing what there is to be seen. That scenario differs factually from Judge's case, where an officer entered a neighbor's curtilage and then looked into Judge's curtilage from that vantage point. There appears to be no Washington case law addressing this precise scenario. But analogous case law shows an officer's vantage point while

outside the curtilage of a suspect's house must still be open to the public in order to be lawful.

Aerial surveillance cases provide a useful model of comparison to Judge's case because in both situations the government is outside a person's curtilage looking in. In Myrick, the Supreme Court assessed the lawfulness of aerial surveillance in terms of the open view doctrine, citing the lawful vantage point requirement. In that case, aerial surveillance of the property was not a search under Const. article I, § 7 because marijuana gardens were identifiable with the unaided eye "from the lawful and nonintrusive altitude of 1,500 feet above ground level." State v. Myrick, 102 Wn.2d 506, 514, 688 P.2d 151 (1984).

Myrick and subsequent case law established aerial surveillance requires a warrant "if *the vantage point is unlawful* or the method of viewing is intrusive." State v. Wilson, 97 Wn. App. 578, 582, 988 P.2d 463 (1999) (emphasis added). In determining the minimum lawful vantage point, the court in Wilson adopted the FAA regulations, which permit fixed wing aircraft to operate at an altitude of 500 feet above the ground in non-congested areas. Id., 97 Wn. App. at 582-83. Wilson explained "[f]ive hundred feet above the ground is then a lawful vantage point because fixed wing aircraft can legally operate at that altitude. And the vantage point is therefore no more intrusive than police standing on a public street corner,

or other legal vantage point." Id. at 583. Similarly, the United States Supreme Court held aerial surveillance conducted at a height of 1000 feet was not a search because the observations took place "within public navigable airspace" and "[a]ny member of the public flying in this airspace who glanced down could have seen everything that these officers observed." California v. Ciraolo, 476 U.S. 207, 213-14, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986); cf. Dow Chemical Co., 476 U.S. at 237 n.4 (holding aerial surveillance of industrial complex was not a search, but finding "it important that this is not an area immediately adjacent to a private home, where privacy expectations are most heightened.").

These aerial surveillance cases establish the lawfulness of a vantage point from which the police look onto someone's property depends on whether a member of the public could lawfully do the same. A member of the public, acting as a reasonably respectful citizen, could not lawfully enter the neighbor's backyard to look into Judge's yard. Brosseau's observation of Judge's backyard was therefore a warrantless search.

Even if a vantage point is lawful, the open view doctrine remains unsatisfied if the area observed and the information gained from that observation is a private affair under article I, § 7. Young, 123 Wn.2d at 183-84. In Young, the Supreme Court held infrared surveillance of a home did not satisfy the open view requirements because the surveillance, which

took place from the lawful vantage point of a public street, revealed sensitive information contained in the home that was not otherwise available to the public. Id. (such information included homeowner's financial inability to heat the entire home, the existence and location of energy consuming and heat producing appliances, and the number of people who may be staying at the residence on a given night).

The trial court concluded Brosseau's observations were made from a vantage point in which Judge did not have an expectation of privacy. CP 85 (Reasons For Admissibility and Inadmissibility of Evidence 6). This conclusion ignores the lesson of Young. Just as the police in Young conducted a warrantless search of the home despite doing surveillance from a public street in which no person has an expectation of privacy, so did Brosseau conduct a warrantless search of Judge's backyard even though she was standing in an area in which Judge had no expectation of privacy.

Under the open view doctrine, government surveillance is unconstitutionally intrusive when the government agent is on the outside looking inside to that which is not "knowingly exposed to the public." Id. at 182. Conversely, the open view doctrine is satisfied only when "[t]he object under observation is not subject to any reasonable expectation of privacy." Seagull, 95 Wn.2d at 902. The dispositive factor is not whether

a person has an expectation of privacy in the vantage point, but whether a person has an expectation of privacy in the object under observation.

As described above, Judge did not expose his backyard to the general public and the information contained in his backyard is a private affair. Brosseau's observation into his backyard was therefore a search rendering the open view doctrine inapplicable. Cf. Bobic, 140 Wn.2d at 259 (commercial storage unit, in contrast to the home, is not the kind of location entitled to privacy protection under article I, § 7).

For all these reasons, Brosseau conducted a warrantless search when she looked into Judge's backyard and saw Birdsong throw the gas can. This tainted information should have been excised from the affidavit supporting probable cause.

In addition, subsequent evidence derived from this unlawful search must be suppressed as fruit of the poisonous tree and excised from the affidavit as well. Ladson, 138 Wn.2d at 359. Such evidence includes (1) Kitts's observation of the second flying gas can and ice falling from the back deck while standing at the fence separating the front and back yards (2) officer observations of the gas cans and ice once officers were inside Judge's backyard; and (3) Pigman's observation of the contents of the gas can.

iii. No Exigent Circumstance Justified Observation Into Judge's Backyard From The Adjoining Yard.

Although unclear, the trial court appeared to alternatively rule Brosseau's observations from the adjoining backyard were lawful due to exigent circumstances. CP 85, 86 (Reasons For Admissibility and Inadmissibility of Evidence 5 and 10). The trial court erred in so ruling because the state did not carry its burden of proving this narrowly drawn exception to the warrant requirement.

The exigent circumstance exception arises in the context of danger to police or the public, where the suspect is fleeing, or where there is a danger of destruction of the evidence. State v. Rulan C., 97 Wn. App. 884, 889, 970 P.2d 821, 990 P.2d 422 (1999). The trial court justified Brosseau's observations into Judge's backyard on the basis of two potential exigent circumstances: to prevent escape of a suspect and to prevent the destruction of evidence. CP 85, 86 (Reasons for Admissibility or Inadmissibility of the Evidence 5 and 10).

"To prove that exigent circumstances are present, the State must be able to 'point to specific, articulable facts and the reasonable inferences therefrom which justify the intrusion.'" State v. Coyle, 95 Wn.2d 1, 9, 621 P.2d 1256 (1980) (citation omitted). "The mere possibility of escape is not sufficient to satisfy the 'particularity' requirement . . . and neither

is a general presumption that certain classes of suspects are more likely to attempt to escape." Id. "[A]n officer's general experience which would tend to suggest an exigency may be present is likewise insufficient." Id., 95 Wn.2d at 9-10.

In Coyle, the trial court excused noncompliance with the "knock and wait" statute on the ground that the possibility of escape through a rear window of the motel room constituted an exigent circumstance. Id. at 8. Our Supreme Court reversed because the state failed to satisfy its burden of showing police were aware of specific facts that indicated the defendant had resolved to make an escape attempt, had made preparations to escape, or had initiated an escape attempt prior to the police entry. "The police had absolutely no information about the defendant prior to their entry; they merely entertained a general suspicion, a speculative possibility of escape." Id. at 10.

The police here likewise had no particularized information about Birdsong before Brosseau looked into Judge's backyard. The trial court found Judge's phone calls into the residence, in which he said "something to the effect that the police are here and would be obtaining a warrant,"<sup>10</sup> created "one of two possibilities in her mind: either she has a dangerous situation which she needs to cure because there is someone else in the

---

<sup>10</sup> CP 82 (Disputed Fact 13).

residence and there is a safety concern given the strong smell of ammonia<sup>11</sup> and/or there could be criminal activity occurring and she is concerned that the person might escape or destroy evidence." CP 85 (Reasons for Admissibility and Inadmissibility of Evidence 5). Brosseau may have entertained a subjective belief that an exigency existed, but the trial court erred in concluding as a matter of law that the phone calls justified observation of Judge's backyard under the exigency exception to the warrant requirement. "[T]he mere possibility of escape is not sufficient to satisfy the 'particularity' requirement." Coyle, 95 Wn.2d at 9.

Brosseau did not even know whether it was possible to exit the house from the back. The most charitable reading of Brosseau's testimony, as measured from the objective standpoint of a reasonable officer, is that she was aware Birdsong had an opportunity to escape. But the test is whether the suspect is likely to escape, not whether the suspect has an opportunity to escape. State v. Wolters, 133 Wn. App. 297, 303, 135 P.3d 562 (2006). Simple awareness that the police are present and investigating

---

<sup>11</sup> This accurately reflects Brosseau's testimony, but from both a subjective or objective standpoint, Brosseau's response to the professed concern for Birdsong's safety is nothing short of bizarre. Instead of running into the house to save Birdsong from the supposedly dangerous fumes, she ran into the neighbor's backyard and watched from afar. This demonstrates Brosseau's professed concern for Birdsong's safety was a sham, and that the officer's earlier attempt to enter the house on this basis was a ruse to conduct a search for incriminating evidence.

a possible crime on the premises does not mean, from the standpoint of a reasonable objective officer, that a person inside the residence is likely to flee.

Furthermore, Birdsong at that point could not even be considered a suspect. The only thing officers knew about her was that she was Judge's girlfriend and that she was asleep in the house. That is not enough evidence to support even a reasonable suspicion that she was involved in criminal activity, let alone to show she was likely to flee from that criminal activity. See State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (level of articulable suspicion required to justify investigative stop is "a substantial possibility that criminal conduct has occurred or is about to occur."). Nothing in the record shows Birdsong was likely to escape, and so Brosseau's observation of the backyard for this purpose is unjustified.

Neither was Brosseau's observation of Judge's backyard justified on the basis of a destruction of evidence exigency. This exception is applicable only within the narrow range of circumstances that present a real danger that evidence might be lost. State v. Counts, 99 Wn.2d 54, 63, 659 P.2d 1087 (1983). The police must reasonably fear imminent destruction of evidence. Id., 99 Wn.2d at 62. "A belief that contraband will be destroyed must be based upon sounds or activities observed at the scene or specific prior knowledge that a particular suspect has a propensity to

destroy contraband." State v. Jeter, 30 Wn. App. 360, 362, 634 P.2d 312 (1981). Mere suspicion is not enough. Coleman v. Reilly, 8 Wn. App. 684, 687, 508 P.2d 1035 (1973). "No blanket exception exists for narcotics cases, in spite of the relative ease of disposal of drugs." Jeter, 30 Wn. App. at 362.

The officers did not know whether Birdsong had a propensity to destroy contraband, while Judge's phone calls into the residence at most establish a mere possibility that Birdsong would destroy evidence. That is not enough to justify Brosseau's warrantless observation of Judge's backyard.

Moreover, Brosseau entered the neighbor's backyard because that was the police department's general policy, not because she had specific concerns about destruction of evidence that rose above unarticulated suspicion. When asked why she went into the neighbor's backyard, Brosseau explained:

Generally, at any home or building that we would think that there is a possibility of criminal activity, we would usually take a point at two different diagonals of the property so you could view the backside and the front side so that people either didn't leave or destroy evidence. And, at that point in time, I was trying to make sure that the girlfriend that was supposed to be inside the house wasn't actually, you know, having heard that warning and decided that she was going to take off and then we'd still think she was inside the house and in some jeopardy when she was actually gone.

2RP 76.

Brosseau's testimony shows she takes "a point at two different diagonals" in order to view the backside of the property any time "there is a possibility of criminal activity." As a matter of general policy, Brosseau spies into a suspect's backyard regardless of whether she has specific facts on which to base a reasonable belief that a suspect will destroy evidence in that location. Generalized suspicion is not enough to satisfy the particularity requirement of the exigency exception. Brosseau, by her own admission, would have looked into Judge's backyard as a matter of course.

Furthermore, government agents cannot justify their search on the basis of exigent circumstances of their own making. United States v. Thompson, 700 F.2d 944, 950 (5th Cir. 1983). Here, officers would not let Judge back into the house but allowed him to call Birdsong. Brosseau then relied on those phone calls as the reason for why she went into the backyard. Manufactured exigencies do not qualify as an exception to the warrant requirement.

d. Police Officers Conducted An Unlawful Search When They Physically Entered Judge's Backyard Without a Warrant.

The trial court concluded "[o]nce Officer Brosseau observed someone throwing things off the back deck, it was reasonable for her and the other officers to go into the backyard to prevent escape and to prevent

the potential destruction of evidence." CP 86 (Reasons for Admissibility or Inadmissibility of Evidence 7). The court used information obtained from this search, including observation of ice cubes and gas cans, to support probable cause. CP 86 (Reasons for Admissibility or Inadmissibility of Evidence 8). The court's rulings were wrong for two reasons.

First, regardless of whether an exigency existed at that point, information obtained from this search must still be suppressed as fruit of the poisonous tree because it derived from (1) the unlawful search of the garage and (2) Brosseau's unlawful search of Judge's backyard from the adjoining yard. Ladson, 138 Wn.2d at 359.

Second, no exigent circumstance justified the warrantless entry into Judge's backyard. Exigent circumstances exist where it is impractical to obtain a warrant. Rulan C., 97 Wn. App. at 889. "The State must show reasons why it was impractical, or unsafe, to take the time to get a warrant." Wolters, 133 Wn. App. at 303. The state made no such showing in Judge's case. Not one of the three officers who testified at the suppression hearing said they had no time to get a warrant prior to physically entering the backyard. See Rulan C., 97 Wn. App. at 889 (rejecting state's exigent circumstance argument because no evidence in record it would have been impractical for police to obtain telephonic search warrant).

In determining whether a true exigency existed, the court should consider alternatives available to officers at the time of the search. State v. Welker, 37 Wn. App. 628, 633, 683 P.2d 1110 (1984). Those alternatives include guarding the premises or evidence while officers obtain a search warrant. Counts, 99 Wn.2d at 62; Wolters, 133 Wn. App. at 303. Instead of searching this constitutionally protected area, an officer could simply have stood guard and kept an eye on the backyard while officers obtained a warrant. By this time there were no less than five officers on the scene. 1RP 25, 53, 74, 77, 79; 2RP 28, 30. Judge was already handcuffed in the back of a police car. 1RP 52, 61. Guarding the premises while waiting for a warrant would have prevented any theoretical escape or destruction of evidence in the backyard.

For these reasons, information gleaned from the unlawful intrusion cannot be used to support probable cause.

- e. Detective Pigman Conducted An Unlawful Search When He Looked Into The Gas Can In Judge's Backyard.

The court found, without further explanation, that "[i]t was also legitimate for Detective Pigman to go and investigate the contents of the gas cans." CP 86 (Reasons For Admissibility or Inadmissibility of Evidence 8). This ruling is wrong.

"Absent a warrant, the observation of contraband is insufficient to justify intrusion into a constitutionally protected area for the purpose of examining more closely, or seizing, the evidence which has been observed." State v. Ferro, 64 Wn. App. 181, 182, 824 P.2d 500 (1992). But that is exactly what Pigman did here.

The trial court did not conclude any exception to the warrant requirement justified Pigman's search, nor could it. "[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation." Mincey v. Arizona, 437 U.S. 385, 393, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). By definition, justification for a warrantless search on the basis of exigent circumstances no longer exists once the exigency ceases. State v. Valdez, 137 Wn. App. 280, 289, 152 P.3d 1048 (2007); State v. Schroeder, 109 Wn. App. 30, 44, 45, 32 P.3d 1022 (2001). No exigency existed when Pigman looked into the gas can.

Furthermore, the state did not prove officers had no time to get a warrant prior to inspecting the gas can's contents. Rulan C., 97 Wn. App. at 889. The findings of fact give no indication evidence in the backyard might have been destroyed before a warrant could be obtained. An officer could simply have stood guard and kept an eye on the gas cans while officers obtained a warrant. Counts, 99 Wn.2d at 62; Wolters, 133 Wn. App. at 303.

When Pigman looked into the gas can, he saw ammonium sulfate inside. Pigman included this information in his affidavit supporting probable cause. This was tainted information. The trial court thus erred in failing to excise it from the search warrant affidavit and otherwise relying upon it to find probable cause.

f. Error Predicated On Failing To Exclude Evidence As Fruit Of The Poisonous Tree Is Preserved For Review.

As described above, the court erred in failing to exclude evidence obtained from multiple unlawful searches as fruit of the poisonous tree. Defense counsel moved to suppress the evidence obtained from the unlawful searches but did not specifically raise the fruit of the poisonous tree doctrine as a reason why the search warrant was invalid. The trial court, however, was on notice as to what relief Judge was seeking. Defense counsel argued that once the court excised the tainted information discovered as a result of the unlawful search of the garage, then the remaining information consisting of the ammonia odor was insufficient to show probable cause. 3RP 95-96. Under these circumstances, the lack of a specific reference to the poisonous theory tree theory is immaterial for preservation purposes.

In any event, the trial court's failure to suppress evidence seized as the result of a bad search warrant is an error of constitutional magnitude that can be raised for the first time on appeal so long as the facts necessary

for review are in the record. State v. Littlefair, 129 Wn. App. 330, 338, 119 P.3d 359 (2005); State v. Holmes, 135 Wn. App. 588, 592, 145 P.3d 1241 (2006). The error here is preserved because the failure to excise tainted information from the warrant on a poisonous tree theory was an error of constitutional magnitude and the record contains the facts necessary for its adjudication. Indeed, the facts relevant to the poisonous tree theory are the same set of facts introduced into evidence and considered by the trial court for each of the searches at issue. Judge suffered actual prejudice because the trial court, had it followed the law, would have suppressed all evidence derived from the illegal searches. Cf. State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995) (to show actual prejudice from defense counsel's complete failure to move for suppression, must show the trial court likely would have granted the motion if made).

In the event this Court finds the error was not of constitutional magnitude, then defense counsel was ineffective in failing to raise the poisonous tree theory below. Criminal defendants have the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). Reversal is required once Judge shows (1) his attorney's performance was deficient and (2) he was prejudiced by the deficiency. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d

222, 225-26, 743 P.2d 816 (1987). Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Strickland, 466 U.S. at 694.

Given the merits of the poisonous tree theory, there is no legitimate reason why defense counsel failed to specifically raise and apply the poisonous tree theory to each of the unlawful searches at issue in the case. Assuming the trial court followed the law, it would have suppressed all evidence deriving from the unlawful searches on the basis of this theory. See Maxfield, 133 Wn.2d at 344 (actual prejudice resulted from ineffective assistance because application of the exclusionary rule would have resulted in the suppression of all the evidence seized from searches).

For all of these alternative reasons, this Court should address the merits of the poisonous tree argument raised in this brief.

g. Untainted Information In The Affidavit Is Insufficient To Show Probable Cause.

For the reasons described above, the following information is tainted and must be excised from the search warrant affidavit: (1) Judge's actions in asking "why" he should leave the garage and his refusal to allow officers to enter his home; (2) Brosseau's observation of the gas can from the adjoining yard made after police questioned Judge about the presence of

others inside the home; (3) Kitts's observation of the second flying gas can and ice falling from the back deck while standing at the fence separating the front and back yards; (4) officer observations of the gas cans and ice once officers were inside Judge's backyard; and (5) Pigman's observation of the contents of the gas can. Ross, 141 Wn.2d at 311-12, 314-15.

The smell of ammonia, by itself, is insufficient to establish probable cause because it is innocuous and of ambiguous significance. See C. 1. a., infra. The warrant is therefore invalid. All evidence seized pursuant to the warrant must be suppressed and all charges dismissed due to insufficient evidence. Boethin, 126 Wn. App. at 700.

h. Appellate Counsel May Need To File A Supplemental Brief Because the Search Warrant Affidavit And Opening Motion To Suppress Are Not Currently In The Record.

In determining the validity of a search warrant, the reviewing court considers "only the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested." State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988). In this case, the affidavit in support of the search warrant is not in the court file. The trial court, however, expressly and necessarily relied on the affidavit in ruling that remaining, untainted information in the affidavit was sufficient to support probable cause. 3RP 104-10. For this reason, the affidavit should have been filed and made a part of the record. Without reviewing

the affidavit, appellate counsel has no way of verifying whether the trial court considered information outside the affidavit in determining whether probable cause supported the warrant. Neither is counsel able to verify whether the affidavit is otherwise sufficient.

Appellate counsel made diligent efforts to obtain a copy of the affidavit by requesting it from trial counsel and the Pierce County prosecutor's office. See Affidavit B. Neither party provided a copy of the affidavit to date.

The record further shows defense counsel moved to suppress evidence obtained as a result of illegal searches. The state filed a written rebuttal to the opening motion. Supp CP \_\_\_ (State's Response to Motion to Suppress, supra). Defense counsel filed a reply. CP 4-30. The trial court held a CrR 3.6 hearing as a result. CP 80-87 1RP - 3RP. But for unknown reasons, defense counsel's written, opening motion to suppress is not in the file.

Appellate counsel made diligent efforts to obtain a copy of the opening motion by requesting it from trial counsel and the Pierce County prosecutor's office. See Affidavit B. Neither party provided a copy of the motion to date.

In the event appellate counsel obtains the search warrant affidavit or written suppression motion and the record is ultimately settled,<sup>12</sup> Judge may need to file a supplemental brief to set forth any issues that were not raised in the opening brief on appeal as a result of not being able to earlier review the contents of the affidavit and motion.<sup>13</sup>

2. JUDGE'S EXERCISE OF HIS RIGHT TO REFUSE WARRANTLESS ENTRY INTO HIS HOME WAS IMPROPERLY USED AS EVIDENCE OF GUILT AT TRIAL.

Admission of evidence that Judge refused to let police enter his house without a warrant violated Judge's due process right to a fair trial under the Fifth and Fourteenth Amendment because it allowed the jury to infer guilt from an exercise of his constitutional right. Defense counsel did not object to the admission of such evidence or the prosecutor's remarks on the subject, but introduction of that evidence was an error of constitutional magnitude warranting reversal. In addition, the state committed prosecutorial misconduct in eliciting and commenting upon that evidence.

---

<sup>12</sup> RAP 9.10 allows the record to be supplemented after initial transmission to the appellate court if a party has made a good faith effort to provide those portions of the record.

<sup>13</sup> Under RAP 10.1(h), the appellate court may, on its own motion or on motion of a party, authorize the filing of a supplemental brief. In addition, the court has inherent authority to address issues raised in a supplemental brief when such consideration is necessary to render a decision on the merits. In re Pers. Restraint of Higgins, 152 Wn.2d 155, 160, 95 P.3d 330 (2004).

Moreover, defense counsel was ineffective in failing to object both to the repeated admission of such evidence and the prosecutor's opening statement and closing argument referencing the evidence.

a. The State Intentionally Elicited Testimony From Two Officers That Judge Refused To Give Police Permission To Enter His Residence Without A Warrant.

In her opening statement, the prosecutor told the jury that Judge refused to let police into his home. 5RP 93. The prosecutor later elicited the following testimony from Officer Brosseau:

Q: Did you or Officer Kitts tell Mr. Judge why you were there?

A: Yes.

Q: What did you tell him?

A: Well, initially while I was still at the garage door I told him that we had a complaint that I needed to talk to him about, and once he came to the front door and Officer Kitts and I were with him, we went out towards the street, Officer Kitts explained what the complaint was about.

Q: What was Mr. Judge's response to that when he was told what the complaint was about?

A: He said, "That's just crazy," or, "This is just crazy."

Q: Did he ask you anything?

A: Yes. He asked if we had a warrant.

Q: What was the response to that, when he asked if you had a warrant?

A: We -- I believe it was me, but I know we as a pair at least told him due to the circumstances, we would probably request one or we could request one.

Q: Did you ask Mr. Judge if you could go inside the house?

A: We did.

Q: Did you tell him why you wanted to go inside the house?

A: Yes. This was -- Officer Kitts said that, you know, if he would just let us come in and confirm that there's no problem we'll just apologize for the inconvenience and leave.

Q: What was the purpose of asking if you could go into the house?

A: To try and determine where this strong chemical scent was coming from and whether or not that was from an illegal activity.

Q: Was there any concern at all about other individuals being inside the house?

A: Yes.

Q: Now, what was Mr. Judge's response when you asked if you could go into the house?

A: He said -- he said no. And then he also said that it wasn't his house and that he should check with his father.

Q: Now, at any point did Mr. Judge make you aware that there was someone else inside the house?

A: Yes.

...

Q: Who else did he tell you was inside the house?

A: His girlfriend.

Q: Now, up until the time that Mr. Judge told you his girlfriend was inside the house did you think any people might be inside the house?

A: No.

Q: Did that raise any concerns for you?

A: Yes.

Q: Why was that?

A: Well, if in fact there were illegal activities going on there could be any number of people in the home and they could pose a danger for us.

Q: When Mr. Judge told you that his girlfriend was inside the house, did you ask again if you could go inside?

A: Yes.

Q: What was the reason for asking if you could go into the house?

A: He said that she was asleep upstairs, and the concern at that point became well, if she's asleep and she doesn't know what's going on and there's fumes in the house as well, which we don't know for sure the fumes were inside the house, but if there were fumes in there and she was asleep, she might be overcome by them, and so we asked him if we could accompany him in the house to wake her up.

Q: Now, after explaining this to Mr. Judge, the concerns you just outlined, did he allow you to go into the house with him to wake her up?

A: No.

5RP 336-39.

The prosecutor also questioned Officer Kitts as follows:

Q: Did either you or Officer Brosseau ask for permission to go into the house, check it out?

A: Yes.

Q: What was the reason for asking to go inside?

A: To make sure everyone inside was okay or if anybody else was in there that they were okay because of the odor that was coming from the house.

Q: At the time that you were walking up toward the house and knocking on the door, did you have any idea how many people, if any, were inside the house?

A: No.

Q: Did you have any idea at that point whether there were any weapons in the house?

A: No.

Q: When you asked Mr. Judge for permission to go into the house to see if anyone else was in there did he allow you inside?

A: No.

Q: What was his response?

A: He wanted to know why we wanted to go in and what the problem was. We explained to him that the odor that we can smell and the things that we saw in the garage, we were afraid that it could possibly be a meth lab, and that the fumes and -- that we could smell in the -- we were afraid that it was toxic inside and that somebody's life could be in danger if they were inside and remained inside

5RP 122-23.

In closing argument, the prosecutor urged the jury to "keep in mind both defendants' conduct in this case is absolutely inconsistent with innocent

activity that was occurring at the residence" and pointed out Judge was "unwilling to cooperate with law enforcement." 5RP 880.

b. Exercise Of The Constitutional Right To Refuse Warrantless Entry Into The Home Cannot Be Used Against Judge.

It appears Washington has not passed upon the issue, but other jurisdictions uniformly hold the state is not permitted to use a defendant's invocation of his Fourth Amendment right to be free from warrantless searches as evidence of guilt. See, e.g., Prescott, 581 F.2d at 1351-52; State v. Jennings, 430 S.E.2d 188, 200 (N.C. 1993); Simmons v. State, 419 S.E.2d 225, 226, 227 (S.C. 1992). In Prescott, the Ninth Circuit held "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing. If the government could use such a refusal against the citizen, an unfair and impermissible burden would be placed upon the assertion of a constitutional right and future consents would not be 'freely and voluntarily given.'" Prescott, 581 F.2d at 1351.

In reaching that conclusion, courts have compared exercise of a defendant's right to avoid self-incrimination to the right to be free from warrantless searches. See, e.g., Prescott, 581 F.2d at 1351-52; United States v. Thame, 846 F.2d 200, 206 (3rd Cir. 1988). In Griffin, the United States Supreme Court held a prosecutor may not argue to a jury that a defendant's

exercise of the Fifth Amendment right to remain silent is evidence of guilt because allowing such comment would be a "penalty . . . for exercising a constitutional privilege." Griffin v. California, 380 U.S. 609, 613, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Our Supreme Court has similarly held it is error to admit evidence of a defendant's pre-arrest silence because to do so would eviscerate a defendant's constitutional right to remain silent. Easter, 130 Wn.2d at 230, 243.

Just as it is impermissible for a prosecutor to comment on a defendant's invocation of his Fifth Amendment right to silence, so it is impermissible to use a defendant's invocation of his Fourth Amendment protections against him. The right to refuse consent "protects both the innocent and the guilty, and to use its exercise against the defendant would be, as the Court said in Griffin, a penalty imposed by courts for exercising a constitutional right." Prescott, 581 F.2d at 1352. The right to refuse to consent to warrantless search "would be effectively destroyed if, when exercised, it could be used as evidence of guilt." Padgett v. State, 590 P.2d 432, 434 (Alaska 1979). Admission of such evidence violates a defendant's due process rights to a fair trial by creating an inference that defendant's invocation of constitutional rights is evidence of his guilt. State v. Palenkas, 933 P.2d 1269, 1278, 1280 (Ariz. App. 1996).

Officers first told Judge they wanted to enter the home to search for evidence of illegal activity. Judge refused consent. Upon learning his girlfriend was inside, officers changed rationales and told Judge they wanted to go into the house out of concern for her safety. Judge again refused to allow them inside. If the officers truly and reasonably believed Birdsong was in danger, they arguably had authority to enter the house without consent under the emergency exception to the warrant requirement. State v. Lynd, 54 Wn. App. 18, 21, 771 P.2d 770 (1989). But the claimed emergency must be actually motivated by a perceived need to render aid. It cannot be a pretext for conducting an evidentiary search. Id. The fact that officers did not enter Judge's home shows their professed concern for Birdsong's safety was a ruse to conduct a search for incriminating evidence, which makes admission of Judge's refusal all the more nefarious. Not only did the jury hear Judge refused to allow officers to conduct an outright search of his house, but were also left with the impression Judge was so depraved that he would not allow officers to save his girlfriend by letting them into the house.

In any event, Judge had no obligation to ascertain whether an exception to the warrant requirement existed when confronted with the officers' request to enter his home. The court in Prescott reasoned:

When . . . the officer demands entry but presents no warrant, there is a presumption that the officer has no right

to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused. An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime, [n]or can it be evidence of a crime.

Prescott, 581 F.2d at 1350-51 (internal citations omitted).

That reasoning applies with full force to Judge's situation.

c. Admission Of Evidence That Judge Exercised His Fourth Amendment Right To Refuse Warrantless Entry Is An Error Constitutional Magnitude.

Defense counsel did not object to the officers' impermissible testimony, but the error is preserved for appellate review because the admission of that testimony was an error of constitutional magnitude. RAP 2.5(a)(3) provides a "manifest error affecting a constitutional right" may be raised for the first time on appeal.

The error implicates a constitutional right because the Fourth Amendment and article I, § 7 protect a person's right to be free from warrantless searches. Cf. Easter, 130 Wn.2d at 235 (use of pre-arrest silence as substantive evidence of guilt is not merely an evidentiary issue because it implicates Fifth Amendment right to be free from self-incrimination). Further, use of such evidence violates the due process right to a fair trial. Palenkas, 933 P.2d at 1278, 1280.

An error is "manifest" when there is "a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). To determine whether such error is supported by a plausible argument, the court must preview the merits of the claimed error to see if the argument has a likelihood of succeeding under harmless error analysis. Id. A constitutional error is harmless only if (1) the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error; and (2) the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Admission of evidence regarding Judge's refusal to permit warrantless entry was manifest because the state's clear purpose in eliciting this evidence was to induce the jury to infer guilt from Judge's actions. The "ominous implication" behind the argument that refusal to provide consent is evidence of criminal wrongdoing "is that only guilty persons have anything to keep from the eyes of the police." United States v. Wilson, 953 F.2d 116, 126 (4th Cir. 1991). The danger of prejudice lies therein.

As explained by Prescott:

[U]se by the prosecutor of the refusal of entry, like use of the silence by the prosecutor, can have but one objective to induce the jury to infer guilt. In the case of the silence, the prosecutor can argue that if the defendant had nothing to

hide, he would not keep silent. In the case of the refusal of entry, the prosecutor can argue that, if the defendant were not trying to hide something or someone . . . she would have let the officer in. In either case, whether the argument is made or not, the desired inference may be well drawn by the jury. This is why the evidence is inadmissible in the case of silence. It is also why the evidence is inadmissible in the case of refusal to let the officer search.

Prescott, 581 F.2d at 1352 (internal citations omitted).

The error was not harmless beyond a reasonable doubt. The untainted evidence against Judge on the manufacturing charge was ambiguous, allowing for opposite inferences. The items found by the police had legitimate uses, several necessary components of the manufacturing process were not found, and a number of items typically associated with manufacturing were not found either. See B.3., infra. Untainted evidence supporting the manufacturing charge by no means necessarily led to a finding of guilt.

As for the possession charge, defense counsel argued dominion and control had not been proven, and that the drugs belonged to someone else. 5RP 429-30, 923-24, 925, 928-29. Evidence showing constructive possession was circumstantial and did not compel the conclusion Judge possessed the methamphetamine found in the kitchen cupboard, especially in the absence of corroborating fingerprints. See B.3., infra.

In assessing the totality of evidence, Judge's refusal to allow police to enter the house may have tipped the scales in favor of conviction. From

the jury's perspective, the act of refusal showed he had something to hide, and so he must be guilty.

Further, Judge was charged as an accomplice on both charges. CP 1-3. The court instructed the jury on accomplice liability. CP 44 (Instruction 8). The state argued the jury could convict Judge as an accomplice or a principal. 5RP 877, 896. The jury may have convicted Judge as an accomplice, in which case the prejudicial effect of admitting the proscribed evidence is even greater. Judge acted as an accomplice if he aided another person in committing a crime. CP 44 (Instruction 8). But more than mere presence and knowledge of criminal activity of another must be shown. CP 44. Judge's act of refusing admittance carried particular weight on the issue of accomplice liability. It was a compelling piece of evidence that went beyond mere presence and knowledge because it constituted an affirmative act linking him to criminal activity. The danger is that the jury may have construed Judge's refusal to allow entry as evidence that he was attempting to aid Birdsong's criminal activity inside.

d. The State Committed Prosecutorial Misconduct In Intentionally Eliciting Evidence Of Judge's Refusal And Commenting Upon The Refusal.

A defendant's due process right to a fair trial is denied when the prosecutor elicits improper evidence or makes improper comments and there is a substantial likelihood that these misdeeds affected the jury's verdict.

State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Jungers, 125 Wn. App. 895, 902-03, 106 P.3d 827 (2005).

It is improper for the prosecutor to argue a defendant's reliance on his Fourth Amendment rights constitutes evidence of guilt. Thame, 846 F.2d at 206-07; United States v. Taxe, 540 F.2d 961, 969 (9th Cir. 1976); Padgett, 590 P.2d at 434. For the reasons stated above, there is a substantial likelihood the prosecutor's actions in eliciting the testimony, in combination with her comments on that evidence, affected the verdict. Where, as here, there is no objection at trial, a claim of misconduct is waived unless the flagrant or ill-intentioned nature of the misconduct creates incurable prejudice. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

The prosecutor did not accidentally place Judge's refusal before the jury. The only reason to elicit such testimony is to allow the jury to infer guilt. Prescott, 581 F.2d at 1352 The evidence here, once admitted, would have been impervious to a curative instruction because of its singularly pernicious nature. This is a situation where a "bell once rung cannot be unring." Easter, 130 Wn.2d at 238 (referring to prosecutorial use of silence to infer guilt) (citation omitted). Such evidence is "so readily subject to misinterpretation by a jury as to render a curative or protective instruction of dubious value." Prescott, 581 F.2d at 1352.

e. Defense Counsel's Failure To Object Constitutes Ineffective Assistance Of Counsel.

In the event this Court finds the error was not of constitutional magnitude or that the prosecutorial misconduct claim has not been preserved for review, then defense counsel was ineffective in failing to object to the challenged evidence and the prosecutor's remarks on that evidence.

While legitimate trial tactics cannot be the basis for an ineffectiveness assistance claim,<sup>14</sup> no legitimate trial tactic justified counsel's failure to prevent the repeated admission of prohibited evidence that could only have the purpose of inducing the jury to infer guilt. Here, "counsel's failure to fulfill such a basic tenet of criminal defense brings his representation of the petitioner below the standard of reasonableness under the prevailing standards of the profession." Simmons, 419 S.E.2d at 227 (counsel ineffective in failing to object to state's examination of defendant regarding refusal to allow a warrantless search of his vehicle).

To demonstrate prejudice, the defendant need only show counsel's deficient performance undermined confidence in the outcome. Strickland, 466 U.S. at 694. The defendant need not show that counsel's deficient performance more likely than not altered the outcome. Id. at 693.

---

<sup>14</sup> State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

For the reasons set forth above in the constitutional magnitude and prosecutorial misconduct sections above, there is a reasonable probability the improper evidence affected the verdict. This Court cannot be confident it did not.

3. THE COURT ERRED IN FAILING TO SUPPRESS STATEMENTS MADE BY JUDGE, IN VIOLATION OF HIS MIRANDA RIGHTS.

Judge's statements, admitted as evidence of guilt at trial, should have been suppressed because he was subject to custodial interrogation without being read his Miranda rights. Reversal is required.

To preserve an individual's right against compelled self-incrimination under the Fifth Amendment, police must inform a suspect of his rights before custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966). Statements elicited in noncompliance with this rule must not be admitted as evidence at trial. Id., 384 U.S. at 444, 476-77. This Court reviews de novo whether the trial court derived proper conclusions of law from its findings of fact after a CrR 3.5 hearing. State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004).

a. Evidence In The CrR 3.5 Suppression Hearing.

The parties agreed the admissibility of Judge's statements turned on whether police should have given him Miranda rights. 4RP 77-84, 86-88.

At the CrR 3.5 hearing, Officer Brosseau testified she and Officer Kitts confronted Judge at his residence. 4RP 45, 47. Officer Brosseau peered through a crack in the garage door panels and saw Judge inside. 4RP 46-47. She told Judge she wanted to talk to him and beckoned him to the garage door. 4RP 60. Judge complied by leaving the house from the front door. 4RP 47-48. At that point, the officers directed Judge to accompany them away from the front door towards the front of the driveway. 4RP 61. The officers told Judge they suspected narcotics activity. 4RP 48-49, 67-68.

The officers requested permission to enter the house to determine the cause of a chemical odor in the air, which they associated with a methamphetamine lab. 4RP 50-51. Judge did not give consent for officers to search the house. 4RP 50, 62. Officers also asked if they could look in the garage to determine the origin of the chemical odor. 4RP 67. Judge did not give his consent for officers to search the garage. 4RP 68-70. Judge asked if the officers had a warrant. 4RP 49, 60. The officers responded they did not have a warrant but could probably get one. 4RP 49, 60-61.

Judge then asked to go back inside the house, but officers did not let him. 4RP 61. Brosseau told Judge that they wanted to prevent him from destroying evidence. 4RP 70.

In response to the officers' question of whether anyone was still inside the residence, Judge said his girlfriend was asleep inside. 4RP 53-54. The police told him they were concerned for Birdsong's safety because of the ammonia fumes and wanted to enter the residence for that reason. 4RP 53-54. Judge did not allow officers to enter the residence for this alleged reason either. 4RP 54. The police did not allow Judge to go back into the house to warn her himself. 4RP 50, 61.

The police "offered" to let Judge call into the residence to wake her up. 4RP 54. Brosseau deliberately stood nearby, without making any effort to conceal her presence, and listened to what was said when Judge called into the residence. 4RP 55. Judge called several times and talked to a phone machine. 4RP 54-55. Over the phone, Judge said his girlfriend needed to come outside, that the police were there, and that they could obtain a warrant. 4RP 55. Although Judge's statements on the phone were not made in immediate response to police questioning, the police induced him to make these calls by not allowing Judge back inside the house and then telling him his girlfriend may be in danger from ammonia fumes. 4RP 53-56. Officers handcuffed Judge after he made his phone calls. 4RP 57. Officers never read Judge his Miranda rights. 4RP 64.

b. Judge Was Subject To Custodial Interrogation.

The trial court ruled statements made by Judge while on the phone were admissible because Judge was not subject to custodial interrogation when he made the statements. 4RP 88. This was error.

"Custodial interrogation" is questioning initiated by law enforcement officers after a person has been deprived of his or her freedom in any significant way. Miranda, 384 U.S. at 444. "Custodial" refers to whether the suspect's freedom of movement was restricted at the time of questioning. State v. Sargent, 111 Wn.2d 641, 649-50, 762 P.2d 1127 (1988). The test is whether a reasonable person in the individual's position would believe he was in police custody to a degree associated with formal arrest. Lorenz, 152 Wn.2d at 36-37.

Officers restricted Judge's movement. They first ordered him out of the residence, then directed him to leave the front of the house, and did not allow him back into the house when he wanted to leave the officers' presence. Before Judge called into the residence, officers advised him they suspected narcotics activity and that they could get a search warrant if needed. Judge presumably knew that incriminating evidence that could be associated with methamphetamine manufacturing would be found inside the residence once police searched it. "[T]he fact that the individual has become the focus of the investigation is relevant to the extent that the

suspect is aware of the evidence against him and this awareness contributes to the suspect's sense of custody." United States v. Griffin, 922 F.2d 1343, 1348 (8th Cir.1990) (citation and internal quotation marks omitted). Being told by police that a warrant would be obtained in the absence of consent would signal to a reasonable person in Judge's position that arrest was a foregone conclusion. Judge was in custody because a reasonable person would believe his movements were restricted to a degree associated with formal arrest.

"[T]he term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) (warning application of Miranda rules not limited to police interrogation practices that involve express questioning).

The officers' actions qualify as interrogation for Miranda purposes. Once officers learned, through questioning, that someone else was inside the house, they again requested permission to enter the house. Judge denied permission, as was his constitutional right, but offered to go back into the house himself to alert Birdsong. Officers did not allow Judge back inside the house but offered to let him call into the house. The police, by warning

of the need to alert Birdsong about the fumes while not allowing Judge back into the house, elicited the incriminating statements Judge made in their presence while on the phone. The police knew it was reasonably likely Judge would say something incriminating because anything he said regarding the presence of police could be used as evidence of guilt. Brosseau's own testimony at the CrR 3.5 hearing that Judge was attempting to "warn" Birdsong, simply by relating to her the fact that police were present and could get a warrant, proves this point. 4RP 55-56. The police baited Judge and he bit.

c. The Error In Admitting Judge's Statements Was Not Harmless.

Admission of statements in violation of Miranda is an error of constitutional magnitude. State v. Reuben, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991). Constitutional error is presumed prejudicial, and the state bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). A constitutional error is harmless only if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Id.

At trial, Kitts and Brosseau testified Judge called Birdsong and said the police were outside, they wanted her to come out, they thought there

was a methamphetamine lab inside the house, and that they were talking about getting a warrant. 5RP 124, 339-41. The prosecutor referenced these statements in opening argument, and in closing argument claimed they were "absolutely inconsistent with innocent activity." 5RP 93, 880-81.

As described in section C. 2. c. infra, the jury may have convicted Judge as an accomplice, in which case his phone calls to Birdsong carry significant prejudicial effect. Judge's statements were affirmative acts that went beyond mere presence and knowledge of criminal activity. They show he aided Birdsong in the crimes by warning her of the police presence. Admission of the statements was therefore not harmless beyond a reasonable doubt.

**4. THE COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS AFTER THE CrR 3.5 HEARING.**

CrR 3.5(c) requires the trial court to enter written findings of fact and conclusions of law after a suppression hearing. Here, the trial court not only failed to make written findings of fact and conclusions of law, but also neglected to make any oral findings. The proper remedy under these circumstances is reversal of Judge's convictions and dismissal of both counts.

a. The Absence Of Written Findings Of Fact And Conclusions Of Law Precludes Effective Appellate Review And Prevents Judge From Knowing What Is Required To Prevail On Appeal.

After the CrR 3.5 hearing, the court must set forth in writing "(1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor." CrR 3.5(c).

"Written findings are essential to permit meaningful appellate review." State v. Alvarez, 128 Wn.2d 1, 16, 904 P.2d 754 (1995) (citation and internal quotation marks omitted). Equally important, written findings "allow the appealing defendant to know precisely what is required in order to prevail on appeal." State v. Smith, 68 Wn. App. 201, 209, 842 P.2d 494 (1992). The state, as the prevailing party, has the responsibility to present written findings to the trial court. State v. Portomene, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995).

At the conclusion of the CrR 3.5 hearing here, the court simply stated "[this court is going to find all the statements as discussed during this hearing made by Mr. Judge are admissible." 4RP 88. The following exchange occurred shortly after:

Ms. Ludlow: Your Honor . . . just briefly, the Court is required to enter findings and conclusions on the 3.5 hearing. Is the Court finding that the statements made by Mr. Judge are not pursuant to custodial interrogation, and therefore, Miranda would not apply?

The Court: Yes.

4RP 88.

The court's oral opinion cannot substitute for written findings of fact in this case. First, the oral statement that Judge's statements were not made pursuant to custodial interrogation is a conclusion of law, not a finding of fact. "If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact, but if the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law." State v. Niedergang, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986); see also Para-Medical Leasing, Inc. v. Hangen, 48 Wn. App. 389, 397, 739 P.2d 717 (1987) ("If a term carries legal implications, a determination of whether it has been established in a case is a conclusion of law.").

Moreover, error cannot be assigned to an oral opinion. Jones v. National Bank of Commerce, 66 Wn.2d 341, 345, 402 P.2d 673 (1965). "A court's oral opinion is not a finding of fact." State v. Hescoek, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999); accord State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

Additionally, the court's oral opinion is completely opaque, leaving Judge to guess which "facts" presented at the hearing the court relied upon to support its conclusion of law. See State v. Pineda, 99 Wn. App. 65,

78-79, 992 P.2d 525 (2000) (without factual findings, "the parties and a reviewing court have no way to know what the trial court believed the facts to be."). "An appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." Head, 136 Wn.2d at 624.

b. The Appropriate Remedy Is Dismissal Of Both Counts Rather Than Remand To The Trial Court.

Ordinarily, remand for entry of written findings of fact and conclusions of law is the remedy for an initial failure to make written findings. See 136 Wn.2d at 623 (addressing CrR 6.1(d)). Reversal of the conviction and dismissal is proper, however, if prejudice can be shown from the lack of findings. Id. at 624; State v. Royal, 122 Wn.2d 413, 422-23, 858 P.2d 259 (1993). The absence of written findings of fact and conclusions of law in Judge's case, together with the complete lack of oral findings, is inherently prejudicial to Judge and cannot be cured by the belated entry of written findings.

One example of prejudice is where written findings entered after remand appear tailored to meet the errors asserted on appeal. Head, 136 Wn.2d at 624-25. Tailoring occurs if the written findings and conclusions fail to track the oral opinion on the issues material to the appeal. State v. Cannon, 130 Wn.2d 313, 330, 922 P.2d 1293 (1996); State v. Eaton, 82

Wn. App. 723, 727, 919 P.2d 116 (1996), overruled on other grounds, State v. Frohs, 83 Wn. App. 803, 811 n.2, 924 P.2d 384 (1996). Where, as here, there are no oral findings with which to compare the written findings, it becomes impossible for both the appellant and the appellate court to verify whether tailoring has occurred. As the court in Smith cogently recognized, "[t]he more cursory the court's oral remarks, the harder it will be to tell whether, in fact, there has been some tailoring." Smith, 68 Wn. App. at 209. Here, the trial court made no oral finding of fact whatsoever. Under such circumstances, Judge's inability to verify whether belated written findings are tailored to overcome the issues on appeal by comparing the written and oral findings is inherently prejudicial and creates an appearance of unfairness. See State v. McCrorey, 70 Wn. App. 103, 116, 851 P.2d 1234 (1993) (complete lack of findings compels reversal due to appearance of unfairness). Remand for written findings would not cure the problem, but only highlight its existence. This Court should therefore reverse Judge's convictions and dismiss both counts due to the complete absence of findings.

5. CUMULATIVE ERROR DENIED JUDGE HIS RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant deserves a new trial when errors, although individually not reversible error, cumulatively produce an unfair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390

(2000); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Even where some errors are not properly preserved for appeal, the court has discretion to examine them for their cumulative effect. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether the state denied the defendant a fair trial. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). Reversal is required where the cumulative effect of errors materially affect the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

Here, the jury heard evidence that (1) Judge refused to allow officers into his home; and (2) Judge called Birdsong to warn her of the police presence. For the reasons given in the harmless error analysis on both of these issues, reversal is required because the cumulative effect of these errors denied Judge a fair trial.

6. THE COURT ERRED IN ORDERING JUDGE TO SUBMIT TO ALCOHOL EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

The sentencing court acted outside the bounds of statutory authority when it ordered Judge to obtain an alcohol abuse evaluation and follow through with treatment. CP 70, 77.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). RCW 9.94A.700(5)(c) allows the sentencing court to order an offender to "participate in crime-related treatment or counseling services" as a condition of community custody. Former RCW 9.94A.715(2)(a)<sup>15</sup> authorizes the court to "order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." In light of these statutory provisions, a court may not order an offender to participate in alcohol treatment or counseling as a condition of community custody unless alcohol use contributed to the crime. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003).

The court ordered Judge to submit to a "drug/alcohol eval[uation] and follow through w[ith] treatment per CCO" and elsewhere ordered "alcohol/drug treatment per CCO." CP 70, 77. There is no evidence alcohol contributed to Judge's alleged offenses in any manner whatsoever. Accordingly, the sentencing court erred by ordering Judge to obtain an

---

<sup>15</sup> Laws of 2003, ch. 379 § 6.

evaluation for alcohol abuse and to follow through with treatment.<sup>16</sup> Id.  
at 207-08.

Although this sentencing error was not raised below, a sentence imposed without statutory authority can be challenged for the first time on appeal. Id. at 204. On remand, this Court should order the sentencing court to strike the conditions pertaining to alcohol treatment and counseling. Id. at 212.

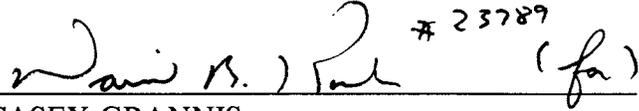
D. CONCLUSION

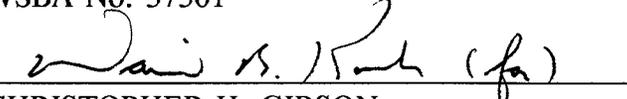
For the reasons stated, this Court should reverse Judge's convictions and dismiss all charges with prejudice. In the event this Court declines to dismiss the charges, this Court should remand for a new trial.

DATED this 13<sup>th</sup> day of July, 2007.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

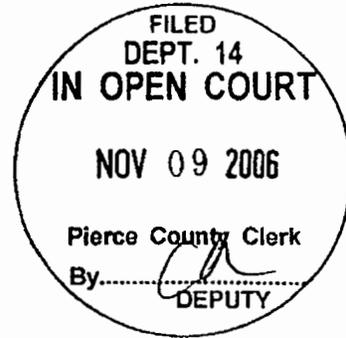
 # 23789 (fa)  
\_\_\_\_\_  
CASEY GRANNIS  
WSBA No. 37301

 (fa)  
\_\_\_\_\_  
CHRISTOPHER H. GIBSON  
WSBA No. 25097  
Office ID No. 91051  
Attorneys for Appellant

---

<sup>16</sup> Judge does not assign error to the evaluation and treatment for substance abuse.





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-04223-2

vs.

RICK JEROME JUDGE,

FINDINGS AND CONCLUSIONS ON  
ADMISSIBILITY OF EVIDENCE CrR  
3.6

Defendant.

THIS MATTER having come on before the Honorable S. Serko on the 20th day of July, 2006, 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 DISPUTED FACTS

1. On August 28, 2005, Officers D. Kitts and R. Brosseau of the Puyallup Police Department were dispatched to a complaint of a suspicious odor that was possibly related to drug activity at 1313 - 11<sup>th</sup> Street Place SW in Puyallup.
2. The residence is located in a residential area on a cul de sac approximately one mile from downtown Puyallup. The houses are fairly close together with approximately 15 feet between property lines.
3. The property consists of a three (3) level residence with an attached garage.

05-1-04223-2

- 1 4. The officers approached the house by walking up the driveway towards the garage. As  
2 the officers approached the garage, they noticed that the garage door was slightly ajar  
3 at the bottom – approximately 4-6 inches and perhaps as much as a foot.
- 4 5. The garage door consists of articulated panels. When the garage door is rolled up, it  
5 creates small cracks between the panels.
- 6 6. While walking up to the garage, Officer Brosseau heard a crinkling sound similar to a  
7 wrapper or tin foil from inside the garage. Brosseau also saw a pool of an unknown  
8 clear liquid coming from under the garage door.
- 9 7. Officers knocked on the garage door and received no response. After receiving no  
10 response at the garage door, the officers walked along a walkway towards the front  
11 door. At the corner of the garage, the officers smelled the strong odor of ammonia.  
12 The officers knocked on the front door of the residence and again received no  
13 response.
- 14 8. Officer Brosseau went back to the garage door and looked into the garage through one of  
15 the cracks in the panels. The crack was between ¼ inch and an inch wide. While  
16 looking through the cracks, Brosseau saw defendant, Rick Judge, in the garage near  
17 the door to the interior of the house. Brosseau also saw 2 hand held torches and cans  
18 of what she believed might be paint thinner or solvent. Brosseau called to Judge and  
19 asked him to come out and talk with the officers.
- 20 9. Officer Kitts also looked into the interior of the garage through the cracks in the panels.  
21 Officer Kitts saw a stack of coffee filters on a bench in the garage.
- 22 10. Both Kitts and Brosseau testified that when they looked into the garage, they did not open  
23 the garage door. They did not touch or manipulate the door or the panels making up  
24  
25

05-1-04223-2

1 the garage door. Both officers testified that they did not look into the garage through  
2 the opening at the bottom of the door. Both officers testified that they did not stand  
3 on anything in order to see into the garage.

4 11. Three to five minutes passed between the time the officers knocked on the garage door  
5 and defendant Judge opened the front door of the residence. Judge refused to allow  
6 the officers to enter the residence to check for additional people who might be at risk  
7 due to the odor of ammonia.

8 12. Judge did tell the officers that his girlfriend was asleep inside the house. Judge was  
9 allowed to call into the house using his cell phone to ask his girlfriend to come out.  
10 Judge made at least two (2) phone calls into the residence.

11 13. Officer Brosseau was standing within earshot of Judge when he made the phone calls into  
12 the residence. Brosseau heard Judge say something to the effect that the police are  
13 here and would be obtaining a warrant.

14 14. After another officer arrived, Officer Brosseau went to the property located to the south  
15 of Judge's residence. This property is owned by an individual <sup>Mr. O'Leary</sup> who is also an   
16 employee of the City of Puyallup and has been known to Officer Brosseau for several  
17 years. Brosseau walked across the front yard and along a pathway which runs along a  
18 side yard. Prior to going onto this property, Officer Brosseau did not contact the  
19 property owner and request permission.  
20

21 15. The neighboring property is elevated above the Judge backyard. There is a fence on the  
22 neighbor's portion of the property. A portion of the fence is roughly at chest level for  
23 Officer Brosseau and offers a clear and unobstructed view into the Judge backyard.  
24  
25

05-1-04223-2

- 1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25
16. While standing on the neighbor's property, Officer Brosseau saw a blond female, later identified as defendant Rachelle Birdsong, throw a red gas can into some blackberry bushes at the back of the Judge property.
17. After Officer Brosseau saw Birdsong toss the gas can into the blackberry bushes, she ran to the front of the Judge property and informed the other officers who were there.
18. Prior to the time Officer Brosseau came back from the neighbor's property, Detective S. Pigman, a member of the Puyallup Police Department clandestine methamphetamine lab team arrived. He contacted the officers who were in front of the residence with defendant Judge. When Detective Pigman walked into the front yard near the garage, he also smelled a strong odor of ammonia. Officers Kitts, Brosseau and Pigman all testified that the odor of ammonia is commonly associated with the production of methamphetamine.
19. After Officer Brosseau informed the other officers of her observations of Birdsong, Officer Kitts ran across the front yard of Judge's property towards the back yard. Kitts saw an object come flying off the back deck of the residence.
20. Officer Brosseau also went into the backyard of the Judge residence. By the time she arrived, the female had disappeared. Officer Brosseau went back to the garage and looked through the crack in the door. Brosseau saw Birdsong inside the house. Birdsong appeared to be sprinkling a powder similar to Carpet Fresh on the carpet or floor. Officers went to the front door of the residence and opened the door. Birdsong was ordered out of the residence.

05-1-04223-2

1 21. Detective Pigman obtained a superior court search warrant. During a search of the  
2 residence and garage, officers found items related to a methamphetamine lab as well  
3 as firearms.

4 22. Prior to the time that the search warrant was obtained, none of the officers entered the  
5 residence or garage except perhaps to cross the threshold when ordering Ms.  
6 Birdsong out of the residence.

7 REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

- 8 1. If the only evidence in the probable cause affidavit was as to observations made by  
9 officers looking through the crack in the garage, the search warrant would be  
10 unlawful and the evidence suppressed. The observations into the garage did not  
11 constitute an open view observation because at least one officer testified that he or  
12 she had to get about one inch away from the garage door in order to see through the  
13 crack.
- 14 2. Looking into the garage in this case can be distinguished from merely glancing at  
15 something. The officers in this case were peering or spying into the garage trying to  
16 locate something that might support criminal activity.
- 17 3. In this case, however, the observations of the items inside the garage are not the only  
18 evidence contained in the search warrant affidavit. Case law also repeatedly talks  
19 about odors and furtive gestures combined with other circumstances to determine  
20 whether or not there is probable cause to issue a search warrant. The search warrant  
21 in this case clearly has those additional circumstances. The individual who called the  
22 police, who we know to be the neighbor, Mr. O'Leary, smelled a strong ammonia  
23 odor coming from the residence. The first officers to arrive on the scene smelled the  
24  
25

05-1-04223-2

1 ammonia odor. Detective Pigman also smelled the odor of ammonia when he arrived.

2 The officers were at a lawful vantage point when they smelled the odor of ammonia  
3 and had the right to rely on any of their senses while at that lawful vantage point.

4 4. The odor of ammonia combined with the fact that Officer Brosseau was aware that at  
5 least one person was in the garage or residence made it reasonable for the officers to  
6 attempt to locate that individual and encourage him or her to come out. Mr. Judge's  
7 actions in asking "why" when asked to come out of the garage and refusing to allow  
8 the officers to go into the house to locate other occupants are borderline furtive -  
9 especially when considered in light of the totality of the circumstances.

10 5. Additionally, Judge's phone calls into the residence which were overheard by Officer  
11 Brosseau create one of two possibilities in her mind: either she has a dangerous  
12 situation which she needs to cure because there is someone else in the residence and  
13 there is a safety concern given the strong smell of ammonia and/or there could be  
14 criminal activity occurring and she is concerned that the person might escape or  
15 destroy evidence. In overhearing Judge's phone calls into the residence, Officer  
16 Brosseau was relying on her sense of hearing while at a lawful vantage point.

17  
18 6. Officer Brosseau's entry onto the neighbor's property is not an invasion of defendants'  
19 expectation of privacy. Neither of the defendants have an expectation of privacy in a  
20 backyard which can be viewed from the neighbor's yard. This case is not analogous  
21 to an aerial search; it is more analogous to an officer who, while on a neighboring  
22 property, smells marijuana. Any observations made by Brosseau were made in open  
23 view from a vantage point in which neither defendant had an expectation of privacy.  
24  
25

05-1-04223-2

- 1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25
7. Once Officer Brosseau observed someone throwing things off the back deck, it was reasonable for her and the other officers to go into the backyard to prevent escape and to prevent the potential destruction of evidence.
  8. It was also legitimate for Detective Pigman to go and investigate the contents of the gas cans. When it became clear to him that it was some kind of white pellets that could be fertilizer which contain ammonium sulfate, it adds to the totality of the circumstances that establish probable cause for issuance of the search warrant. The white pellets and the presence of ice in the backyard support Detective Pigman's conclusion of a probability of criminal activity taking place at the residence.
  9. After eliminating all references to the observations of the interior of the garage, there is still sufficient evidence to establish probable cause for issuance of the search warrant.
  10. The Court does not find that there were exigent circumstances justifying peering into the garage. However, exigent circumstances do exist for the observations made of defendants' backyard.
  11. The errors contained in the affidavit of probable cause rise to the level of slight discrepancies. They were not made intentionally or in reckless disregard for the truth. The defendant bears the burden of making a substantial showing that such false statement was included in the search warrant affidavit. Defendants have not made such a showing.
  12. Defendants' motion to suppress is DENIED. Defendants' motion for a *Franks* hearing is also DENIED.

05-1-04223-2

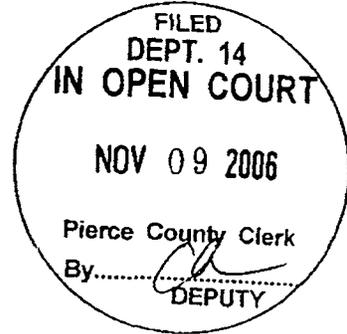
DONE IN OPEN COURT this 9 day of ~~September~~ <sup>November</sup>, 2006.

Susan M. ...  
JUDGE

Presented by:

Dione J. Ludlow  
DIONE JOY LUDLOW  
Deputy Prosecuting Attorney  
WSB # 25104

Approved as to Form:  
James Edmund Oliver  
JAMES EDMUND OLIVER  
Attorney for Defendant  
WSB # 29984



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Appendix B

AFFIDAVIT OF APPELLATE COUNSEL  
CHRISTOPHER H. GIBSON

Since June 1, 2007, undersigned counsel has been attempting to obtain copies of two documents clearly relevant to appellate issue raised in State v. Rick Judge, No. 35369-5-II (consolidated under 35357-1-II); the affidavit of probable cause in support of the search warrant and defense counsel's written motion to suppress the evidence seized during execution of the search warrant. Without these documents, counsel cannot establish the merit of certain issues on appeal.

Counsel was unsuccessful in obtaining the documents from the superior court file of Rachelle Birdsong, the co-defendant and co-appellant (No. 35369-5-II) in this matter. Counsel contacted trial counsel to obtain the missing document in early June and understood that the documents would be provided. Despite repeated attempts to re-contact trial counsel to find out the status of the documents, the documents have not been provided.

Attempts to contact the trial prosecutor, Dione Ludlow, by telephone to request copies of the missing documents have been unsuccessful. Therefore, on June 18, 2007, the office manager for Nielsen, Broman & Koch, John Sloane, contacted Heather Johnson, a legal assistant to the Pierce County Prosecutor's Office, to request the needed documents and was told she would need to request the file and speak with her supervisor, Deputy Prosecutor Kit Proctor, about providing the documents. On June 21, 2007, Ms. Johnson informed Mr. Sloane:

I have spoken to my supervisor and unfortunately [sic], if these documents are not part of the Clerk's file then we are not able to provide them to you. Also, if they are not a part of the Clerk's file they are [not] able to be used for purposes of the appeal.

If you have any other questions or if I have misunderstood what you were requesting please let me know.

E-mail from Ms. Johnson dated June 21, 2007 at 2:38 p.m.

Thereafter, counsel contacted Ms. Proctor to discuss Ms. Johnson's response. Ms. Proctor informed counsel that before providing the requested documents, she needed proof that the requested materials were actually before the trial court. When counsel suggested that Ms. Proctor contact the trial deputy, Ms. Ludlow, to see if she could recalled whether the requested documents were before the trial court, Ms. Proctor explained that with such heavy case loads it was unlikely Ms. Ludlow would recall. Counsel then immediately contacted the contract attorney working on Mr. Judge's appeal, Casey Grannis, and requested that he submit to Mr. Sloane those portions of the record showing the trial court's consideration of the written defense motion to suppress and affidavit of probable cause so that they could be scanned and e-mailed to Ms. Proctor via Ms. Johnson.

Mr. Grannis provided the requested record to Mr. Sloane on Friday, June 22, 2007. Unfortunately, the copier/scanner/fax machine at Nielsen, Broman & Koch malfunctioned early that day and remained inoperable until repaired over the following weekend.

On Monday, June 25, 2007, Mr. Sloane e-mailed Ms. Johnson scanned copies of the record showing the requested documents had been considered by the trial court. Having had no response from Ms. Johnson, by Thursday morning, June 28, 2007, Mr. Sloane called Ms. Johnson's office and received a message stating that Ms. Johnson had been out of the office from June 25-27, 2007, but would be returning on Thursday, June 28, 2007. Mr.

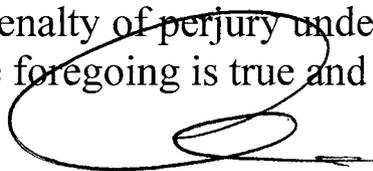
Sloane left a message requesting Ms. Johnson to contact him as soon as possible for an update on whether the Prosecutor's office would willingly provide the requested documents.

As of July 6, 2007, Mr. Sloane had been informed by Ms. Johnson that a copy of the search warrant affidavit had been located, but that a copy of the written defense motion to suppress had not. Ms. Johnson also explained that she had been able to contact trial counsel, Mr. James Oliver, and was faxing him a stipulation (presumably agreeing that the affidavit had been considered by the trial court) and was hoping to obtain from him a copy of the written defense motion to suppress. Ms. Johnson indicated that she hoped to have the requested materials forwarded to our office by Monday, July 9, 2007. As of the writing of this Affidavit (2:30 p.m. on Thursday, July 12, 2007), the Prosecutor's office has not forwarded the requested materials.

Without the affidavit and motion documents, counsel cannot adequately assess the merits of certain potential claims on appeal. These documents are missing from the superior court file despite a clear record they were considered by the trial court. Repeated efforts to obtain these documents from those involved at trial have failed so far. Efforts will continue to obtain these materials for consideration in Mr. Judge's appeal.

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

July 12, 2007  
Date



\_\_\_\_\_  
Christopher H. Gibson, WSBA No. 25097

Seattle, Washington  
Place of Signing

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

COURT OF APPEALS  
DIVISION II

07 JUL 16 AM 9:00

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

STATE OF WASHINGTON )  
 )  
Respondent, )  
 )  
vs. )  
 )  
RICK JUDGE, )  
 )  
Appellant. )

COA NO. 35357-1-II

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13<sup>TH</sup> DAY OF JULY 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KATHLEEN PROCTOR  
PIERCE COUNTY PROSECUTING ATTORNEY  
930 TACOMA AVENUE SOUTH  
ROOM 946  
TACOMA, WA 98402
- [X] SHERI ARNOLD  
P.O. BOX 7718  
TACOMA, WA 98417
- [X] RICK JUDGE  
DOC NO. 898738  
MCNIEL ISLAND CORRECTIONS CENTER  
P.O. BOX 881000  
STEILACOOM, WA 98388

**SIGNED** IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF JULY 2007.

x Patrick Mayovsky