

original

NO. 35868-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARGERUITE HALL,

Appellant.

Qmum

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable John P. Wulle, Judge

AMENDED OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by concluding that the search warrant in this case satisfies the particularity requirement and was not unconstitutionally overbroad.

2. The trial court erred in entering Finding of Fact 1 insofar as the warrant pertains to the entire residence. Finding of Fact 1 provides:

1. On March 30, 2006 at approximately 11:05 p.m. officers of the Vancouver Police Department arrived at 900 W. 16th, Vancouver, Clark County, Washington to execute a search warrant. The search warrant authorized a search of the residence at that address for drugs.

3. The trial court erred in entering Finding of Fact 2 insofar as the warrant “authorized the police to search the entire residence for evidence of the crimes of possession and distribution of drugs.”

4. The trial court erred in entering Finding of Fact 3 insofar as law enforcement knew or should have known that the residence was a multi-unit dwelling residence due to 161 incidents of previous police contact at the house.

5. The trial court erred in entering Finding of Fact 4 insofar as law enforcement knew or should have known that the residence was a multi-unit dwelling residence due to 161 incidents of previous police contact at the house.

6. The trial court erred in entering Finding of Fact 5 insofar as the court found that that were “insufficient indications within that the house had been divided into separate living units[.]”

7. The trial court erred in entering Finding of Fact 7, which provides:

7. Consistent with Officer Harris’ description the house was being used by a number of transitory individuals all of whom moved rather freely throughout the house, as indicated by the various people present in the basement, coming out of the basement, and on the other levels in the house when police entered.

8. The trial court erred in finding that there are no disputed facts.

9. The trial court erred in entering Conclusion of Law 2, which provides:

2. The residence which was the subject of the search warrant is properly characterized as a “community living unit”. In the house, several persons or families occupied the premises in common rather than individually, as indicated by the fact that they shared common living quarters but had separate bedrooms or sleeping areas, and b the fact that all areas of the residence were generally freely accessible to all occupants of the residence.

10. The trial court erred in entering Conclusion of Law 3, which provides:

3. There were ~~no~~ insufficient indications within or

outside of the residence that the house was a multi unit dwelling. Thus the warrant was valid and provided authority to search the entire residence under State v. Alexander, 41 Wn. App. 152, 704 P.2d 618 (1985), and the police were not required to secure separate warrants for the different levels or areas in the house.

11. The trial court erred in entering Conclusion of Law No. 4.

12. The appellant was denied her right to a unanimous jury verdict by the court's failure to give a unanimity instruction for the offense of possession of a controlled substance.

13. The conviction for possession of a controlled substance was not supported by sufficient evidence for all acts placed before the jury.

14. Insufficient evidence deprived the Appellant of her right to a fair trial as guaranteed by the Const. art. I, §§ 21 and 22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the search warrant in this case, which is over broad for authorizing a search of a portion of the house—the basement—for which probable cause does not exist, and where the basement portion of the house does not fall within the community living exception to the particularity requirement, can be used to justify a search of the basement of the residence? Assignments of Error No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11.

2. Whether the trial court erred in finding that the residence was not a multi-unit dwelling where there was evidence of a “makeshift bedroom”

in the basement? Assignments of Error No. 4, 5, 6, 7, 8, 9, 10, and 11.

3. Whether the police should have known the residence consisted of three stories, including an attic, main floor, and basement, where police had been the house on 161 occasions since 1998? Assignments of Error No. 4, 5, and 6.

4. The Washington Constitution requires all facts essential to a verdict be proven to a unanimous jury beyond a reasonable doubt. In the instant manner, the court's instructions to the jurors did not inform them their verdict for possession of a controlled substance must be based upon unanimous finding of the underlying act. Since there were two acts upon which jurors could have based their verdict, where one act was clearly not supported by substantial evidence, and without clear proof the jurors unanimously agreed to convict Hall based on an act supported by the evidence, did the court's inadequate instructions deprive Hall of her rights to a unanimous jury verdict and due process of law? Assignments of Error No. 12 and 13.

5. Did the State present sufficient evidence to convict the Appellant of possession of methamphetamine? Assignments of Error No. 13 and 14.

C. STATEMENT OF THE CASE

1. Procedural history:

A jury convicted Margeruite Hall of possession of a controlled substance and bail jumping. Clerk's Papers [CP] at 100, 101. The State charged Hall in an information filed in the Clark County Superior Court on April 4, 2006, with possession of methamphetamine, in violation of RCW 69.50.4013(1). CP at 5. The State filed an amended information on November 15, 2006, adding one count of bail jumping, in violation of 9A.76.170(1), (3)(c). CP at 34.

a. Motion to suppress evidence obtained from the basement and from Hall's person during execution of a search warrant on March 30, 2006.

During the execution of a search warrant at a house located at 900 W 16th Street in Vancouver, Washington on March 30, 2006, law enforcement obtained a pipe that was located in the basement of the house and a pipe that was found in Margeruite Hall's pants pocket. Defense counsel filed a motion to suppress evidence obtained during the search on July 7, 2006. CP at 16.

Law enforcement executed a search warrant at 900 West 16th Street. Jerry Hall, Jr., born May 26, 1962, was named on the warrant. 1Report of

Proceedings [RP] at 30.¹ Vancouver Police Officer Spencer Harris initially described the house in a search warrant affidavit as having two stories. The house had bedrooms, a bathroom, a kitchen and living room on the main level. 1RP at 34. Officer Harris stated that downstairs in the basement of the house there was two “make shift rooms” and then “a big open basement[.]” 1RP at 34. In the basement there were two closed areas with walls and “somewhat of a door on those.” 1RP at 35. There was a bed located in the southwest corner of the basement. 1RP at 35. In the basement there were two makeshift bedrooms and a large open area with a bed in the southwest corner. 1RP at 34. There were no bathroom or kitchen facilities in the basement. 1RP at 37. Margeruite Hall was located in the basement when police arrived. 1RP at 36. No barriers prevented police from entry into the open area of the basement where Margeruite Hall was located. 1RP at 38.

Police had previously been to the house 161 times since 1998. 1RP at

¹ The trial record consists of two volumes:

- 1RP March 31, 2006 Preliminary appearance
- April 7, 2006 Motion hearing
- June 6, 2006 Motion hearing
- August 17, 2006 Motion hearing
- October 13, 2006 CrR 3.6 suppression hearing
- November 9, 2006 Motion hearing
- January 25, 2007 Motion hearing
- February 1, 2007 Motion hearing
- 2RP January 29, 2007 Jury trial

39. Police described it as a “flop house.” IRP at 41. According to search warrant affidavits, the confidential informant told police that Jerry Hall, Jr. and his son Jerry Hall III and other family members lived at the house. IRP at 43.

Approximately 13 to 16 people were in the house when police arrived. IRP at 37. Officers went into the basement and found Margeruite Hall near a glass pipe. IRP at 50. Hall was arrested and Officer Blaine Geddry found another glass pipe containing residue in Hall’s pocket. The residue on the pipe found in her pocket tested positive for the presence of methamphetamine. IRP at 51.

The Affidavit of Search Warrant and search warrant were introduced at the suppression hearing on October 13, 2006. Suppression Exhibit 2.

b. Findings of Fact and Conclusions of Law:

The court entered the following findings and conclusions on January 29, 2007:

FINDINGS OF FACT

1. On March 30, 2006 at approximately 11:05 p.m. officers of the Vancouver Police Department arrived at 900 W. 16th, Vancouver, Clark County, Washington to execute a search warrant. The search warrant authorized a search of the residence at that address for drugs.

January 30, 2007 Sentencing hearing

2. The search warrant was granted based upon an Affidavit executed by Officer Spencer Harris. The Affidavit recited that Officer Harris had received information from a confidential informant indicating that a subject named Jerry Lee Hall lived and the residence and was in possession of methamphetamine and was distributing methamphetamine from the residence. The informant also indicted that Jerry Lee Hall concealed methamphetamine on his person, at various locations within the residence, and in vehicles, including a truck belonging to his father, who also resided at the residence. The Affidavit indicated that Hall lived at the residence with his father, Jerry Lee Hall, Sr., and his son, Jerry Lee Hall III, and with other family members, who were not named in the affidavit. The Affidavit and the Warrant described the place to be searched as “a two story residence with a composite roof, residence being wood constructed and brown in color, with a brown in color front door which faces South, with the numbers 900 affixed to the west of the front door in white lettering, having the specific address of 900 W 16th Street, City of Vancouver. . .” The warrant authorized the police to search the entire residence for evidence of the crimes of possession and distribution of drugs. The affidavit for the search warrant also recited that on the occasion of a previous complaint on February 9, 2006 the suspect, Jerry Hall, was contacted at the residence by another Vancouver Police officer, who at that time was “invited upstairs where he contacted Jerry Hall and his son Jerry Hall III.”

3. Prior to obtaining the search warrant Officer Harris had driven by the address to confirm the street address and other details of the description provided by the informant. At that time he observed that the residence appeared to be a single family residence similar to other houses in the neighborhood. He did not observe any outward indication that the residence was a multi-unit dwelling.

4. In the search of the residence the police discovered that there were three levels. On the main level there were at

least two bedrooms, the only bathroom in the house, a kitchen and living room. In the basement there were two makeshift bedrooms and a large open area with a bed in the southwest corner. There were no bathroom or kitchen facilities in the basement.

5. The interior doors in the residence were not locked and the various rooms in the house could be accessed by any of the occupants. There were no insufficient indications within that the house had been divided into separate living units, such as numbers on doors. The occupants on all levels shared the bathroom and kitchen facilities on the main floor.

6. When Officer Harris knocked on the front door, it was opened by a Marla Duncan. There were two other people in the living room. There were a number of other people on the main level, including the parents of Jerry Hall and an older person who was on oxygen support. The target of the investigation, Jerry Hall, and his son Jerry Hall, jr. were found in the attic level. On entering the basement, officers encountered an adult male subject, Ladd Kramer, coming up the stairs from the basement. In the makeshift bedroom at the bottom of the stairs officers found two adults, a man and woman. Defendant was found standing in the open area of the basement with another adult female. A glass methamphetamine pipe was next to them. Defendant Hall was arrested and Officer Geddry found another glass methamphetamine pipe containing methamphetamine in her pocket. A total of about 14 people were found in the house. Police arrested approximately either of them for drug violations or outstanding warrants.

7. Consistent with Officer Harris' description the house was being used by a number of transitory individuals all of whom moved rather freely throughout the house, as indicated by the various people present in the basement, coming out of the basement, and on the other levels in the house when police entered.

8. Defendant Hall had submitted a document to DSHS in November 2005 ~~declaring~~ demonstrating that she was renting a residence in the basement at this address, 900 W. 16th Street.

DISPUTED FACTS

1. There are no disputed facts.

Based upon the foregoing Findings of Fact, the Court enters the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the Defendant and the subject matter.

2. The residence which was the subject of the search warrant is properly characterized as a “community living unit”. In the house, several persons or families occupied the premises in common rather than individually, as indicated by the fact that they shared common living quarters but had separate bedrooms or sleeping areas, and b the fact that all areas of the residence were generally freely accessible to all occupants of the residence.

3. There were ~~no~~ insufficient indications within or outside of the residence that the house was a multi unit dwelling. Thus the warrant was valid and provided authority to search the entire residence under State v. Alexander, 41 Wn.App. 152, 704 P.2d 618 (1985), and the police were not required to secure separate warrants for the different levels or areas in the house.

4. The document filed by Defendant with DSHS does not change the result or create an obligation on the part of the police to obtain a separate warrant for Defendant’s area in the house. The evidence establishes that the police had no knowledge of the document or its contents at any time prior to

filing of the defendant's motion herein, and in fact police access to such a document might very well be prevented by DSHS confidentiality restrictions. Furthermore, the document does not change the fact that for purposes of evaluating whether the search warrant validly authorizes a search of the entire premises, the nature of the residence was a community living unit based upon the shared community living areas and largely unrestricted access to occupants throughout the residence. Therefore, based upon State v. Alexander, supra, the motion to suppress is denied.

CP at 109. Appendix A.

c. Jury instructions.

The matter was tried to a jury on January 29, 2007, Judge John P. Wulle presiding. The State requested an instruction based on *State v. Malone*, 72 Wn. App. 429, 864 P.2d 990 (1994), and *State v. Larkins*, 79 Wn.2d 392, 486 P.2d 95 (1971). Defense counsel objected to the proposed instruction. 2RP at 67-68. After hearing argument, the trial court granted the following instruction:

The law does not require that a minimum amount of drug be possessed, but that possession of any amount is sufficient to support a conviction.

Instruction 9A. CP at 90.

Other than the defense's objection to Instruction 9A, counsel did not take exceptions to requested instructions not given or objected to instructions given. 2RP at 68, 82.

d. Verdict.

The jury found Hall guilty of possession of methamphetamine and bail jumping as charged in the amended information. CP at 100, 101.

e. Sentencing.

Judge Wulle imposed a standard range sentence of 13 months for count 1 and 12 months for count 2, to be served concurrently. 2RP at 120. CP at 114.

2. Substantive facts:

Police executed a search warrant on March 30, 2006 at 900 W 16th Street in Vancouver. 2RP at 30, 39. Police went down a set of stairs into the basement of the house where they found Hall and another female. 2RP at 16. There was a glass pipe located next to the women. 2RP at 16, 31. Exhibit 1. Hall was placed in handcuffs and searched incident to arrest. 2RP at 32. During that search police found a glass pipe in her left front pants pocket. 2RP at 20, 32, 44. Exhibit 2. Exhibit 2 tested positive for the presence of methamphetamine. 2RP at 60. Exhibit 11. Exhibit 1 was not tested by the State. 2RP at 43.

Timely notice of appeal was filed on January 30, 2007. CP at 126. This appeal follows.

D. ARGUMENT

1. **THE SEARCH WARRANT DID NOT ESTABLISH PROBABLE CAUSE TO SEARCH ANY PORTION OF THE HOUSE OTHER THAN THE TWO STORIES DESCRIBED IN THE AFFIDAVIT.**

Vancouver Police Officer Harris wrote a search warrant affidavit alleging that on February 9, 2006, Vancouver police confiscated suspected methamphetamine and drug paraphernalia from Jerry Hall, Jr. upstairs in the house located at 900 W 16th Street. The affidavit describes the residence as “a two story residence with a composite roof, residence being wood constructed and brown in color, with a brown in color front door which faces South, with the numbers 900 affixed to the west of the front door in white lettering, having the specific address of 900 W 16th Street, City of Vancouver, Clark County, State of Washington[.]” Suppression Hearing Exhibit 2. The confidential informant supplying information to Officer Harris alleged that Jerry Hall, Jr. “will conceal methamphetamine in varying locations within the residence.”

On March 21, 2006, Judge Zimmerman signed a search warrant authorizing the search of what was designated a “a two story residence [.]” including “all rooms, and all other parts therein, and to search any storage rooms, safes, trash containers, storage containers, and surrounding grounds

located on the premises, and all vehicles parked in the driveway, in front of the premises, or nearby or adjuration to the location provided that these vehicles can be connected to the defendant.” Suppression Exhibit 2.

Based upon the four-corners of the Affidavit for Search Warrant, there is no probable cause to believe that evidence of criminal activity would be found in any location other than the two stories of the house specified in the affidavit, on the person of Jerry Hall, Jr., or vehicles located at the residence associated with Jerry Hall, Jr. There is no assertion anywhere in the affidavit that a basement exists at the house or that Jerry Hall, Jr. uses the basement portion of the house for illegal purposes. While the affidavit establishes probable cause for the areas of the house used by Jerry Hall, Jr., there is no rational basis to conclude that evidence of criminal activity would be found anywhere other than the two floors of the house described in the affidavit.

The search warrant in this case, which is over broad for authorizing a search in portions of the house for which probable cause does not exist and does not fall within the community living exception to the particularity requirement, cannot be used to justify a search of the basement of the house.

The Fourth Amendment to the United States Constitution requires that search warrant describe with particularity the place to be searched and the person or things to be seized. *State v. Perrone*, 119 Wn.2d 538, 546, 834

P.2d 611 (1992). The purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and prevention of the issuance of warrants on loose, vague, or doubtful bases of fact. *Perrone*, 119 Wn.2d at 545. A search warrant that is not sufficiently particular is over broad and the fruit of that search must be suppressed. *Cf. State v. Thein*, 91 Wn. App. 476, 957 P.2d 1261 (1998), *overruled on other grounds* 138 Wn.2d 133 (1999).

A search warrant must establish a nexus between the criminal activity and the location to be searched. *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999). In *Thein* the Court concluded:

Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. Accordingly, probable cause requires a nexus between criminal activity and the items to be seized, and also a nexus between the item to be seized and the place to be searched.

Thein at 140 (citations omitted). The *Thein* Court cited approvingly to the following language from *State v. Olson*, 73 Wn. App. 348, 357, 869 P.2d 110 (1994):

The rule that the State proposed broadens, to an intolerable degree, the strict requirement that probable cause to search a

certain location must be based on a factual nexus between the evidence sought and the place to be searched.

Thein at 148.

The question created by Hall's case is what meant by the particularity requirement that the "place to be searched" be described with particularity and based upon probable cause.

The correct approach is to tie the place to be searched to the probable cause. In most instances, the probable cause affidavit will establish that the subject of the search moves around the house and has access to all parts of the house. But as the *Thein* case makes clear, the reasonableness of the search must be tied directly to the facts establishing the probable cause that justifies the search in the first instance. Anything else turns the warrant into a general exploratory search, which is what the particularity requirement prohibits.

In Hall's case, the affidavit for Search Warrant is explicit that the house consists of only two stories—not only is there no evidence that Jerry Hall, Jr. ever went to the basement, the police apparently did not know that the basement existed.

The trial court found that the community living exception described in *State v. Alexander*, 41 Wn. App. 152, 704 P.2d 618 (1985) applied to Halls'

case. In *Alexander*, the Court of Appeals started by stating the particularity requirement for multiple-occupancy residences. Generally a warrant is invalid “if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of one or more subunits indiscriminately.” *Alexander*, 41 Wn.App. at 154. There are two exceptions to this rule, however. The first is the multiple-unit exception and the second is the community living exception.

The multiple-unit exception arises when police obtain a warrant for a house believing it is a single family home but, after entry, discover the building is a multiple-occupancy building. In such a case, the warrant is not invalid in its entirety, but police must make reasonable efforts respect the subdivisions of the house and confine their search to the “subunit is most likely connected with the criminality.” *Alexander*, 41 Wn. App. at 154. “A search warrant for a multiple occupancy building will usually be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search one or more subunits indiscriminately.” *Alexander*, 41 Wn. App. at 153-54.

Under the multiple unit exception, if the structure in question appears to be a single occupancy structure rather than that multiple occupancy structure, and neither the affiant or the executing officers knew or had reason

to know of the building's multiple occupancy use until the warrant is being executed, the warrant is not defective for failure to specify a subunit with the structure. *Alexander*, 41 Wn. App. at 153-54. Courts require, however, upon discovery of the multiple occupancy of a building, reasonable efforts to limit the search to the subunit most likely connected to the suspected criminal activity.

The community living exception, on the other hand, does not involve a subdivided building but a residence where multiple people share the common area of the house and have separate bedrooms. In such a case, the community living exception permits a search of the entire residence. *Alexander*, 41 Wn. App. at 155. This Court held in *Alexander* that common portions of a residence not secured against access by other occupants extends probable cause to the entire premises as the contraband could be concealed anywhere within the premises. *Alexander*, 41 Wn. App. at 157.

The trial court found that a DSHS form introduced by Hall during the suppression hearing "doesn't make itself a boarding house situation when all of the indications for that basement area that Ms. Hall and three people were in would indicate otherwise." 1RP at 73-74. The court found that *Alexander* is "on point." 1RP at 74.

The trial court's reliance on *Alexander* is misplaced. First, both the

multiple-unit exception and the community living exceptions are exceptions to the particularity requirement. In order to apply, the exceptions require evidence that the police did not know prior to the search of the residence's multiple occupancy. The multiple-unit exception only applies when "the multiple-occupancy character of the building was not known and could not have been discovered by reasonable investigation." *Alexander*, 41 Wn.App. at 154. The facts of *Alexander* case are illustrative. In *Alexander* the police did not know that the subject of the search had two roommates who each had separate bedrooms. After finding Mr. Alexander's identification in his bedroom, police continued to search, eventually finding LSD. The trial court suppressed the evidence but the Court of Appeals reversed, concluding that the community living exception applies.

On the other hand, in footnote 1, the Court of Appeals comments that prior knowledge of the multiple-occupancy character may not be required for the community living exception to apply, citing *State v. Coatney*, 44 Or. App. 13, 604 P.2d 1269 (1980). Because it was undisputed that the police did not know in *Alexander* of the multiple-occupancy character of the residence prior to entry, this comment is nothing more than dicta. Moreover, *Coatney* is much more ambiguous on this issue than footnote 1 would suggest. Although the case says the officer knew that two people lived at the residence and had

separate bedrooms, the opinion is unclear whether the detective learned this before or after the search started.² In addition, the officer was searching for a pair of tennis shoes with soles matching shoes prints left at a burglary scene. The officer suspected Mr. Coatney's roommate and only searched Mr. Coatney's room after he was unable to find the shoes in the rest of the house. Under these facts, the Court of Appeals concluded that the warrant was not overbroad.

In Hall's case, without conceding that it was a multiple-occupancy house, the potential of multiple-occupancy character of 900 W. 16th Street was amply known to police prior to the search. The confidential informant had been inside the house "in excess of twenty times" and had been inside the house within 72 hours of Officer Harris writing the affidavit. The most compelling evidence, however, is Officer Harris's admission that the police had been to the house a staggering 161 times. IRP at 39.

Because the character of the house was well known to law enforcement prior to the search, the particularity requirement requires that probable cause be found for all areas to be searched—including the basement.

²The opinion says, "On November 30, 1978, the warrant was executed. Anderson was present during the search. Officer Farrington was aware that defendant also resided at that residence and that he had a separate bedroom." The placement of this third sentence after the commencement of the search implies that the officer discovered this fact after the search started.

Second, not a single published case has referenced *State v. Alexander* or the community living exception since *Alexander* was decided by this Court in 1985. This is significant because *State v. Thein*, decided in 1999, has materially altered the way courts analyze the nexus between the criminal activity and the place to be searched.

Third, the permissible scope of a search is a necessarily fact specific inquiry. It must always be analyzed with the probable cause that justified the search warrant in the first instance. As the Court said in *Thein*:

In concluding as we do, we emphasize that the existence of probable cause is to be evaluated on a case-by-case basis. Thus, general rules must be applied to specific factual situations. In each case, the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness. General, exploratory searches are unreasonable, unauthorized, and invalid.

Thein at 149, citing *State v. Helmka*, 86 Wn.2d 91, 542 P.2d 115 (1975).

Hall's proposed rule, which would require that probable cause exist for any area to be searched, strikes the right balance between law enforcement's need to execute a search and the innocent roommate's right to be free from general exploratory searches.

The warrant in this case is over broad and violates the particularity requirement of the Fourth Amendment. The evidence seized from the basement and Hall's person incident to arrest should have been suppressed.

2. **TRIAL COURT DEPRIVED HALL OF DUE PROCESS AND HER RIGHT TO A UNANIMOUS JURY VERDICT BY ENTERING A CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE.**

- a. **Where the State presents multiple acts supporting a conviction, the jury must unanimously find proof of a certain act or each act must independently be supported by proof beyond a reasonable doubt.**

In a criminal prosecution, the Due Process Clause Fourteenth Amendment requires the State prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Based on the state constitutional right to a jury trial, a defendant in a criminal case has a constitutional right to a conviction only by a jury which unanimously agrees that the crime charged has been committed beyond a reasonable doubt. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); Wash. Const. art. I, § 22. Where a criminal prosecutor submits evidence of alternative acts that could independently prove the essential elements of the charged offense, the prosecution must elect one factual basis for conviction, or the jurors must be instructed they must unanimously agree on the same act in convicting the defendant of the crime. *State v. Kitchen*, 110 Wn.2d at 409; *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

Hall was charged in count 1 of the amended information with possession of a controlled substance. CP at 34. To prove unlawful possession of a controlled substance, the prosecution must prove (1) the unlawful nature of the substance, and (2) that the defendant possessed it. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994).

In the case at bar, the prosecution identified two different items that could have contained a controlled substance. RP at 31, 32; Exhibits 1 and 2. Officer Geddry described exhibit 2 for the jurors as a “[g]lass pipe with white substance inside found on the person of Marguerite Hall” 2RP at 33.

Officer Neil Martin examined the two exhibits during the trial, referred to as Exhibits 1 and 2. He explained how he obtained the pipes. 2RP at 18, 19. Officer Geddry testified that how he found the second pipe while searching Hall. 2RP at 32. Sgt. Duane McNicholas explained how he formally marked each item and placed them in evidence envelopes for transportation to the Washington State Patrol Crime Laboratory. 2RP at 53.

Forensic scientist Catherine Dunn tested residue adhering to Exhibit 2, which tested positive for methamphetamine. RP at 60. She tested only one pipe. During closing argument, counsel for the State told that jury that one pipe “was the one that not tested by the lab.” 2RP at 88. The State’s counsel noted that the forensic scientist

also indicated that they don't test everything, especially with a raid like this. It's very typical, both from the officer's perspective not to submit everything to the lab. They don't need to, it would be a waste of State resources to make them test every single piece of evidence when they're coming up with a positive test on everything, anyway.

2RP at 88.

The argument indicates that the pipe denoted as Exhibit 1 also contained residue that *could* have been tested, and in fact the State, by arguing that there was no need to test the pipe "when they're coming up with positive test on everything[,]” implied that a test of the first pipe [Exhibit 1] would result in a positive result for methamphetamine. 2RP at 88. There can be no question that exhibit 1 contained residue that was seen by the jury; during the suppression hearing on October 13, 2006, Officer Harris described the glass pipe that was found by police "directly next to [Hall]" as "a glass methamphetamine pipe with residue." 1RP at 51.

The prosecution never directed the jury to disregard any residue that was present on Exhibit 1. The prosecution never informed the jurors that Exhibit 1 could not be the basis of the verdict in count 1 since it was not tested. The prosecution never contended that Exhibit 1 did not contain methamphetamine.

The jury was not given an instruction must be unanimous as to the

acts underlying the possession offense. Based on the evidence of multiple possible items containing methamphetamine, Hall was not assured a unanimous verdict.

b. **The prosecution did not elect to proceed on only one of the pipes admitted into evidence as containing residue of methamphetamine.**

If the prosecution clearly elects to proceed only upon a single act, a unanimity instruction is not required. An “election” connotes a clear and unambiguous pronouncement that other allegations are not to be considered in deliberations. *See State v. Sargent*, 62 Wash. 692, 695, 114 P. 868 (1911) (State must announce particular act on which it relies). In the case at bar, no such unambiguous declaration occurred.

Before closing arguments, the court read its instructions to the jury. The court instructed the jurors that argument by counsel is not evidence and are merely “intended to help you understand the evidence and apply the law.” Instruction 1. CP at 79. Any remark not supported by the evidence or the law must be disregarded. *Id.* Jurors are presumed to follow the court’s instructions. *State v. Hanna*, 123 Wn.2d 704, 711, 871 P.2d 135, *cert denied*, 513 U.S. 919 (1994).

The jury is expected to base its verdict upon all evidence introduced at trial, and not only that portion of the evidence discussed in closing argument.

Indeed, the court instructed the jury on the premise:

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

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.

Instruction 1. CP at 80. While the prosecutor argues what he perceives as the strongest evidence, the court simultaneously directs the jurors to look beyond the arguments of counsel and decide what evidence they believe or find reliable.

The deputy prosecutor expressly referred to Exhibit 1 during his closing argument; he did not tell the jury to disregard what they saw or heard about Exhibit 1. 2RP at 88. The State never made it manifestly apparent to the average juror that a verdict for possession of the controlled substance could not be based on Exhibit 1.

Among the acts of possession before the jury, reasonable jurors could differ as to which were proven beyond a reasonable doubt. *Petrich*, 101 Wn.2d at 573 (even though some incidents only mentioned without detail, jurors must be accurately instructed as to unanimity).

The jury was ordered not to rely upon the statement of facts as

portrayed by the deputy prosecutor's argument, and instead directed only to rely on the law as defined by the court. There were two acts before the jury for which they could have based their verdict, there were no clear instructions that unanimity was required, or that count 1 requires unanimous agreement as to a different act. The deputy prosecutor did not pronounce that other incidents could not form the basis of the charges. Absent a clear instruction from the court that the verdict must be based on a unanimous finding, Hall was denied her rights to a fair trial by unanimous jury and to be free from being placed in double jeopardy.

c. Reversal is required.

As an error of constitutional magnitude, reversal is required unless the prosecution proves beyond a reasonable doubt that it could not have affected the verdict. *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977); *see also Chapman v. California*, 386 U.S. 18, 87 S. Ct. 2419, 105 L. Ed. 2d 705 (1967) (an error which possibly influenced the jury adversely cannot be harmless).

The jurors heard two instances where Hall could have possessed a controlled substance. No scientific evidence supported the accusations as to the substance recovered from the basement. Exhibit 1 was not proven to be a controlled substance. Absent evidence that Exhibit 1 contained a controlled

substance, her conviction may not be sustained based on the substance in Exhibit 1.

Despite the paucity of scientific evidence relating to Exhibit 1, jurors could have believed it contained a controlled substance since the pipe was treated like the pipe that tested positive for the presence of methamphetamine in Exhibit 2. The jury may have been confused or nonunanimous in its verdict as to which item contained the controlled substance.

Since the jury was never informed it could not base a verdict on Exhibit 1 and the basis of the jury's verdict was never clearly established, the verdict cannot stand. The lack of evidence supporting Exhibit 1, and the absence of a unanimity instruction require reversal. *Green*, 94 Wn.2d at 221.

3. RESIDUE AND SUFFICIENCY OF THE EVIDENCE.

“[S]ufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal.” *State v. Alvarez*, 128 Wn.2d 1, 10, 904 P.2d 754 (1995) quoting *City of Seattle v. Slack* 113 Wn.2d 850, 859, 784 P.2d 494 (1989) (citing *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 636 (1983)).

Hall asserts that the question of whether or not the State presented sufficient evidence to the jury to convict her of possession of

methamphetamine is contaminated by the other errors committed in her case.

Hall recognizes that “RCW 69.50.401(b) does not require that a minimum amount of drug be possessed, but that possession of *any* amount can support a conviction.” *State v. Malone*, 72 Wn. App. 429, 439, 864 P.2d 990 (1994).

The amount of controlled substance in this case was consistently described as “residue.” This is an amount that cannot be weighed. It can only be tested.

A residue case, coupled with an unwitting possession defense all impact the question of the sufficiency of the evidence.

Hall asserts that the circumstances of this case require reversal and remand for a new trial. *See: State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 24 (1999).

F. CONCLUSION

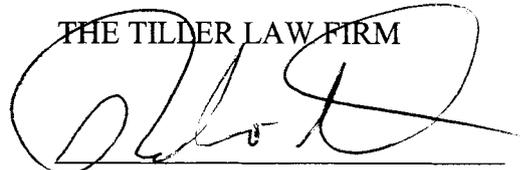
For the foregoing reasons, Margeruite Hall respectfully requests that this Court reverse and dismiss with prejudice her conviction for possession of methamphetamine.

/ / /

DATED: October 10, 2007.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', written over a horizontal line.

PETER B. TILLER-WSBA 20835
Of Attorneys for Margeruite Hall

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Shirley W. Baker, Clerk, Clark Co.

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SCANNED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLATSOP

STATE OF WASHINGTON,

Plaintiff,

v.

MARGERUITE ETHEL HALL,

Defendant.

No. 06-1-00653-4

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
CrR 3.6 Hearing

THIS MATTER having come duly and regularly before the Court on the 13th day of October, 2006 for hearing pursuant to CrR 3.6 on Defendant's Motion to Suppress, Plaintiff State of Washington appearing by and through Bernard F. Veljadic, Deputy Prosecuting Attorney for Clark County, State of Washington, Defendant appearing in person and with her attorney Todd Pascoe, and the Court having heard and considered the testimony of witnesses, evidence presented, and the statements and arguments of counsel, makes the following:

FINDINGS OF FACT

i. On March 30, 2006 at approximately 11:05 p.m. officers of the Vancouver Police Department arrived at 900 W. 16th, Vancouver, Clark County, Washington to execute a

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1 search warrant. The search warrant authorized a search of the residence at that
2 address for drugs.

3 2. The search warrant was granted based upon an Affidavit sworn to by Officer
4 Officer Harris. The Affidavit stated that Officer Harris had received information from a
5 confidential informant identifying that a person named Jerry Lee Hall lived at the
6 residence and was in possession of a vehicle, a truck, and was also in possession of
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25 "invited upstairs where he contacted Jerry Hall and his son Jerry Hall III."

26 3. Prior to obtaining the search warrant Officer Harris had driven by the address to
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1 confirm the street address and other details of the description provided by the informant.

2 At that time he observed that the residence appeared to be a single family residence
3 similar to other houses in the neighborhood. He did not observe any outward indication
4 that the residence was a multi-unit dwelling.

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4. On the main level there were at least two bedrooms, the only bathroom in the house was
5 on the main level, and in the basement there were two bedrooms, a bathroom, a kitchen
6 and a living area. In the basement at corner there was a staircase leading to a
7 utility room in the basement.

8 The exterior doors to the residence were locked and the windows in the
9 house could be accessed by any of the occupants. There was no indication
10 that the house had been divided into separate living units, such as number of units.
11 The occupants on all levels shared the bathroom and kitchen facilities on the main floor.

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6. When Officer Harris knocked on the front door, it was opened by a Marla
Duncan. There were two other people in the living room. There were a number of other
people on the main level, including the parents of Jerry Hall and an older person who
was on oxygen support. The target of the investigation, Jerry Hall, and his son Jerry
Hall, Jr. were found in the attic level. On entering the basement, officers encountered
an adult male subject, Ladd Kramer, coming up the stairs from the basement. In the
makeshift bedroom at the bottom of the stairs officers found two adults, a man and
woman. Defendant was found standing in the open area of the basement with another
adult female. A glass methamphetamine pipe was next to them. Defendant Hall was

1 arrested and Officer Geddry found another glass methamphetamine pipe containing
2 methamphetamine in her pocket. A total of about 14 people were found in the house.
3 Police arrested approximately eight of them for drug violations or outstanding warrants.

4 7. Consistent with Officer Harris' description the house was being used by a
5 number of transitory individuals all of whom moved rather freely throughout the house,
6 as indicated by the various people present in the basement, coming out of the
7 basement, and on the other levels in the house when police entered.

8 8. Defendant Halliday submitted a document to OSPIB in December 2005 indicating
9 that she was using a residence in the basement at this address, 800 W. 16th Street.

10 DEPUTED FACTS

11 1. There are no disputed facts.

12 2. Based upon the foregoing findings of fact, the Court finds the following:

13 CONCLUSIONS OF LAW

14 1. The Court has jurisdiction of the Defendant and the subject matter.

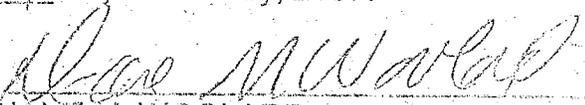
15 2. The residence which was the subject of the search warrant is properly
16 characterized as a "community living unit". In the house, several persons or families
17 occupied the premises in common rather than individually, as indicated by the fact that
18 they shared common living quarters but had separate bedrooms or sleeping areas, and
19 by the fact that all areas of the residence were generally freely accessible to all
20 occupants of the residence.

21 3. There were ~~no~~ ^{insufficient} indications within or outside of the residence that the house was
22 a multi unit dwelling. Thus the warrant was valid and provided authority to search the
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1 entire residence under State v. Alexander, 41 Wn.App. 152, 704 P.2d 618 (1985), and
2 the police were not required to secure separate warrants for the different levels or areas
3 in the house.

4 3. The document filed by Defendant with DSHS does not change the result or
5 create an obligation on the part of the police to obtain a separate warrant for
6 Defendant's area in the house. The evidence establishes that the police had no
7 knowledge of the document or its contents at any time prior to filing of the defendant's
8 motion herein, and in fact police access to such a document might very well be
9 prevented by DSHS confidentiality provisions. Furthermore, the document does not
10 change the fact that for purposes of evaluating whether the search warrant validly
11 authorizes a search of the entire premises, the nature of the residence is as a
12 community living unit based upon the shared community living areas and largely
13 unrestricted access to occupants throughout the residence. Therefore, based upon
14 State v. Alexander, supra, the motion to suppress is denied.
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18 DONE in open Court this 29 day of January, 2007.

19
20 
21 DIANE M. WOOLARD
22 JUDGE OF THE SUPERIOR COURT

23 Presented by:

24  #35235

25 Philip A. Meyers, WSBA #8246

26 Deputy Prosecuting Attorney

27 Copy received, approved for entry
this ___ day of January, 2007.


Todd Mascoe, WSBA#
Attorney for Defendant

FINDINGS OF FACT, CONCLUSIONS OF LAW
ON CrR 3.6 HEARING - Page 5 of 5

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Chum

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARGERUITE HALL,

Appellant.

COURT OF APPEALS NO.
35868-9-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of the Amended Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies of were mailed to Margeruite Hall, Appellant, and Michael C. Kinnie, Prosecuting Attorney, by first class mail, postage pre-paid on October 10, 2007, at the Centralia, Washington post office addressed as follows:

Mr. Michael C. Kinnie
Deputy Prosecuting Attorney
1200 Franklin
P. O. Box 5000
Vancouver, WA 98666-5000

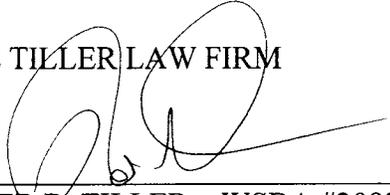
Mr. David Ponzoha
Clerk of the Court
WA State Court of Appeals
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

CERTIFICATE
OF MAILING

Ms. Margeruite Hall
900 W. 16th Street
Vancouver, WA 98660

DATED: October 10, 2007.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Attorney for Appellant

CERTIFICATE
OF MAILING

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