

Danielson

NO. 36470-1-II

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

COURT OF APPEALS
DIVISION II
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STATE BY DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

MELISSA R. DANIELSON,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignments of Error

- A. The search of the outbuilding violated the defendant's right to be free from unlawful searches and seizures.
- B. The defendant was denied her constitutional right to notice of the charges against her where the trial court allowed the State to amend the information during trial.
- C. The defendant was denied her constitutional right to due process where there was insufficient evidence of actual or constructive possession.
- D. The defendant was denied her constitutional right to be free from double jeopardy when she was convicted and sentenced for manufacturing methamphetamine and possession of pseudoephedrine with intent to manufacture methamphetamine.
- E. The trial court violated the defendant's right to due process when it imposed a community custody condition so vague that it does not put the defendant on notice of what conduct is prohibited.

Issues Pertaining to Assignments of Error

- 1. Whether the command to search contained in the search warrant included the outbuilding.
- 2. Whether the affidavit for search warrant contained probable cause to search the outbuilding.
- 3. Whether lawful consent was obtained to search the outbuilding.
- 4. Whether the evidence seized in the outbuilding should be suppressed.
- 5. Whether the trial court erred when it allowed the State to amend the information adding a school bus enhancement during trial.

6. Whether the defendant had dominion and control over the goods to sustain convictions for possession of pseudoephedrine with intent to manufacture methamphetamine, possession of methamphetamine, and manufacturing methamphetamine.

7. Whether convictions for possession of pseudoephedrine with intent to manufacture methamphetamine and manufacturing methamphetamine are the same offense in law and fact in violation of double jeopardy.

8. Whether the trial court violated the defendant's right to due process when it imposed a community custody condition prohibiting the possession or use of any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances.

II. STATEMENT OF THE CASE

A. Factual background.

Tanton Thorp owns the property located at 5910 NE 131st Avenue in Vancouver, Washington. RP 11. He lives on this property and also rents out a separate mobile home. RP 11, 13. Thorp had a written lease agreement with Casey Norris for the mobile home from approximately August of 2005 through February of 2006. RP 38, 29. After Norris left, Allen Brewer entered into a written lease agreement with Thorp on March 1, 2006. RP 26. Thorp testified that Melissa Danielson lived in the mobile home periodically with Norris, and again with Brewer, and helped pay rent. RP 17, 35, 309. Danielson never signed a lease agreement with Thorp. RP 304. On a number of occasions Danielson informed Thorp that she was moving out of the mobile home. RP 383. She

eventually moved out approximately one month prior to June 13, 2006. RP 364. However, she did spend the night with Brewer on June 12, 2006 to celebrate the childrens' birthdays. RP 365.

On June 3, 2006, Tim Boardman of the Clark County Skamania Drug Task Force submitted an affidavit for search warrant to Clark County District Court Judge James P. Swanger. CP 49; Appendix A. In the affidavit, the informant gave Boardman the following information:

While the CRI was at the location he/she observed Melissa Danielson with what the CRI believed to be more than two ounces of methamphetamine. The CRI stated that the methamphetamine was inside the residence at the time it was seen. During the time the CRI was at the above residence, he/she observed at least 5-6 drug transactions where money was exchanged for methamphetamine. The CRI also observed numerous drug scales inside the residence. The CRI also observed numerous types of clean and dirty packaging material and drug paraphernalia within the residence. The CRI also observed numerous people consuming methamphetamine while at the residence.

The CRI knows Melissa Danielson to be the resident of 5910 NE 131st Avenue for at least three weeks.

The warrant specified the following property to be searched:

A white mobile home with green trim and adjacent shed with a gray tarp covering the roof and front of the shed. The mobile home is located down a gravel drive that runs east to west from 131st Avenue. There is a mailbox on the south side of the driveway entrance that reads 5910. The home has a specific

address of 5910 NE 131st Avenue, Vancouver, Clark County, Washington. CP 49; Appendix B.

The search warrant was executed on June 13, 2006.

Tim Boardman and Detective Rosanna Hopkins assisted in the execution of the search warrant on June 13, 2006. They detected Melissa Danielson and her children inside the mobile home. RP 49, 50-59. Boardman testified that he served her with a copy of the search warrant and stated his purpose there, when Danielson volunteered information. RP 49. She told him to look at a metal box in the bedroom next to the bed and pointed out the west window towards the outbuilding door and said to look in there. RP 49. Boardman asked her what was inside the shed, and Danielson responded that she didn't know because Brewer never let them go in there. RP 49-50. Hopkins testified that Danielson led them outside to the outbuilding and specifically pointed at a red suitcase, indicating to look in there. RP 50.

Danielson testified that she asked Hopkins if she could get some food out of the freezer for her children to eat while the police was conducting her search. RP 77. She did not point out items in the shed to Detective Hopkins while she was outside. RP 77.

Danielson was never advised that she had the right to refuse consent to a search of the outbuilding. RP 54. She was never advised that she had the right to

revoke consent. RP 54. And the investigating officers never advised her of the right to limit the scope of consent. RP 54. Danielson was never *Mirandized* until after she was arrested, which was after police searched the bedroom and outbuilding. RP 55. Brewer was on the premises at the time the search warrant was served and executed. RP 54. He did not consent to a search of the outbuilding. CP 36.

The property in question consists of a mobile home running north to south. Ex. 3. With a carport on the south end, an awning running along the west side of the mobile home, and an outbuilding northwest of the mobile home. Ex. 3. There is also a shop located east of the mobile home as well as Tanton Thorp's home located south of the mobile home. Ex. 3.

The command to search contained in the warrant did not include the outbuilding. Photograph No. 36 shows a distinct space between the mobile home and the outbuilding. Ex. 36. All witnesses agreed that there was no entrance into the outbuilding from inside the mobile home. RP 25, 69. The entrance to the outbuilding was approximately twelve to fifteen feet away from the back door of the mobile home. RP 69. The outbuilding had a separate roof from the mobile home. RP 83. The outbuilding did not share any walls in common with the mobile home. RP 84. The outbuilding had a separate foundation. RP 84. On March 6, 2007, during an interview with Stephen Teply, Thorp said the

outbuilding was *not* attached to the mobile home. RP 66. One month later on June 6, 2007, Thorp testified at the suppression hearing that the shed *is* attached, and shares a wall in common with the mobile home. RP 23. (Electrical wires ran from the mobile home into the outbuilding. Brewer covered the exposed wires with about 12 inches of PVC pipe. RP 84. Thorp testified that the outbuilding had nails attaching it to the mobile home. RP 20. No photograph was admitted during the suppression hearing depicting the outbuilding in question. However, at trial, a photograph was introduced. Ex. 36.

The outbuilding was filled with items from previous renters. Danielson observed the previous renter, Norris, manufacture methamphetamine in the mobile home. RP 376. Norris left behind a number of items after he moved out, which were moved into the outbuilding. RP 377. Some items also remained in the house. RP 377.

Brewer told police the contents of the mobile home belonged to him. RP 140. Police found two suitcases in the outbuilding. RP 161-166. Thorp testified that he saw Brewer put the red suitcase in the outbuilding in March of 2006 when he walked over to the mobile home to ask him a question. RP 310. Hopkins located a steel canister in one of the suitcases where she found striker plates, matchbooks, and a prescription for Melissa Danielson. RP 172. In the black suitcase, police found a condenser tube and a cooking dish.

Hopkins also found a PUD bill in a separate bin in the outbuilding with Danielson's name on it. RP 173-174. The bill was not admitted into evidence, and there was no testimony as to what address was on the bill or dates of service. Danielson did not use the outbuilding. RP 362.

Coffee filters and hotplates were discovered in the bedroom closet. RP 250. Multiple pieces of identification for Alan Brewer and a methamphetamine recipe were also found in the bedroom. RP 174, 221. Two blister packs of pseudoephedrine were found on the dresser in the closet. RP 217, 228, 257. A metal box containing glass pipes, needles, spoons, and methamphetamine was also located in the bedroom. RP 139. Other items were found, and pictures were submitted to the jury of a milk container with a red substance, two vials, gasoline can with orange-reddish-yellow stain, Pyrex pan with white residue, two sample containers, and coffee filters stained red (no indication where they were found). RP 169-172. None of the items tested contained Danielson's fingerprints. RP 147.

B. Procedural history.

On September 5, 2006 the Clark County Prosecuting Attorney's office filed an original information charging Melissa Rene Danielson and Alan Gene Brewer with possession of a controlled substance - - methamphetamine,

manufacture of a controlled substance (methamphetamine) with enhancements, and possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine. Danielson entered a not guilty plea on September 28, 2006 to all counts.

An amended information was filed on October 13, 2006 adding enhancements to the possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine. CP 9.

On June 7, 2007, a motion hearing was held before the Honorable Judge Robert L. Harris. CP 51. The defendants moved to suppress evidence pursuant to an unlawful search, and moved to disclose the identity of the informant. CP 41, 38. The court denied defendants' motions. CP 36, 50.

Trial convened on June 13, 2007 before the Honorable Robert L. Harris. RP 108. The co-defendants, Melissa Danielson and Alan Brewer, were tried together. On the second day of trial, during the State's case, the prosecutor orally moved to amend the information changing the school zone enhancement to a school bus stop enhancement. RP 321-323, 326, 351-356. There is no record that the language of the enhancement was read to the defendants or a written copy provided. The court granted the State's motion to amend. RP 354-355. The second amended information was not filed until June 19, 2007, five days after the State rested their case. CP 68.

The jury reached a verdict on June 15, 2007, finding Danielson and Brewer guilty on all counts, and answering the special verdicts affirmatively. CP 59-64. Danielson was sentenced to 134 months confinement. The court imposed community custody with conditions, including the following:

Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand-held electronic scheduling or data storage devices. CP 72.

On June 22, 2007, Danielson filed a motion for a new trial and/or arrest of judgment. CP 80. The hearing was held on October 18, 2007. RP 491-518. The trial court denied defendant's motion in a Memorandum of Opinion dated November 28, 2007. CP 125.

III. ARGUMENT

A. The command to search contained in the search warrant did not authorize the search of the outbuilding. Evidence found in the outbuilding should have been suppressed where the search violated defendant's right to be free of unlawful searches and seizures.

The search warrant in the case at bench authorizes a search of the mobile home and adjacent shed but does not authorize a search of the outbuilding.

The scope of a search pursuant to a warrant is *strictly limited* to the command of the warrant. As stated by the United States Supreme Court in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 394 n. 7, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971): “(T)he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant.” Accord, *State v. Cottrell*, 12 Wn.App. 640, 643, 532 P.2d 644 (1975):

As a general rule search warrants must be strictly construed and their execution must be within the specificity of the warrant.

This is true, despite the preference of the law for warrants, because a search beyond the scope of the warrant is a warrantless search:

Although it would appear that a search made under the authority of a search warrant may extend to whatever is covered by the warrant’s description, provided that such description meets the requirements of particularity, the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant, and he must comply strictly with all the directions contained in it. Search warrants must be strictly construed, and the fact that persons are commissioned officers and armed with a warrant to enter premises confers on them no exemption from the mandates of the Constitution and laws or from the established rules for proceeding in executing and returning the warrant.

Although searches under a warrant are to be preferred to warrantless searches, the predilection of the law for searches made under a warrant is valid only if the searches are conducted according to law and according to the mandates of the warrants themselves. A search that is not so conducted, even though it purports to be done under a warrant, is a misuse of the statutory, if

not of the constitutional, process; the warrant in such a case effects a deceptive assertion of authority upon the person on whom it is served and purportedly gives an undeserved protection to the officer. (Footnotes omitted).

68 Am.Jur.2d *Searches and Seizures*, Sec. 107 at 761-62 (1973) (cited with approval in *State v. Cottrell*, supra at 644).

The rationale behind the rule, at least in terms of Fourth Amendment analysis, is adequately summarized by the court in *United States v. Heldt*, 215 D.C. App. 206, 668 F.2d 1238, 1257, cert. den. 456 U.S. 926, 72 L.Ed.2d 440, 102 S.Ct. 1971 (1981):

When investigators fail to limit themselves to the particulars in the warrant, both the particularity requirement and the probable cause requirement are drained of all significance as restraining mechanisms, and the warrant limitation becomes a practical nullity. Obedience to the particularity requirement both in drafting and executing a search warrant is therefore essential to protect against the centuries-old fear of general searches and seizures.

Art. 1, Section 7 of the State Constitution forbids invasion of privacy by agents of the state “without authority of law,” and actually enhances Fourth Amendment protection in the State of Washington “in that it clearly recognizes an individual’s right to privacy with no express limitations.” *State v. White*, 97 Wn.2d 92, 640 P.2d 1061, 1071 (1982). A search which exceeds the scope of the warrant is in effect a warrantless search, and therefore “without authority of law”

under the Washington Constitution. See *State v. Gunwall*, 106 Wn.2d 54, 69, 720 P.2d 808 (1986).

The warrant in the case at bench does not explicitly authorize a search of the outbuilding. Rather, the warrant *strictly limits* the scope of the search to the mobile home and attached shed. The outbuilding is nowhere mentioned in the command to search. Moreover, the command to search does not contain expansive language authorizing searches of the premises beyond the mobile home and the adjacent shed; e.g., for example, the curtilage, outbuildings, appurtenances, and/or other structures on the premises. Consequently, the search of the outbuilding exceeded the authority conferred by the magistrate in this case.

The present case is controlled by *State v. Kelley*, 52 Wn.App. 581, 762 P.2d 20 (1988). In *Kelley*, the search warrant explicitly authorized the search of Kelley's residence, but did not authorize a search of outbuildings located on the same real property. The court held that since the warrant only authorized a search of Mr. Kelley's house and its attached carport, the officers exceeded the bounds of the search warrant in searching a barn and garage also located on the real property. Accord: *State v. Devine*, 307 Or. 341, 768 P.2d 913 (1989) (Search of apartment on same lot as house for which warrant authorized; exceeded scope of the warrant); *Riojas v. State*, 530 S.W.2d 298 (Tex.Crim.App. 1975) (Search of shed on grounds near house disallowed).

The State's pretrial brief relied upon *State v. Llamas-Villa*, 67 Wn.App. 448, 836 P.2d 239 (1992). That case involved search of an apartment with a warrant, and the issue was whether the contemporaneous search of a locker accessed through a door marked "storage" immediately next to the door of the apartment exceeded the scope of the command to search. The defendant moved to suppress, the trial court denied the motion. On appeal Division I affirmed, concluding that (1) there was no indication that the storage locker would not have been included in the warrant had the police known the layout of the apartment building beforehand, and (2) "unlike the barn and garage in *Kelley*, neither the locker nor the storage room comprised a separate building." *Llamas-Villa*, at 452-53.

First, the analysis in *Llamas-Villa* ignores the fact that "the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant." *Bivens v. Six Unknown Named Agents*, supra at 403 US 394. Obviously, the storage locker was not contained within the command to search in that case and the warrant was not strictly construed by Division I as required by the United States Supreme Court.

Second, the search in *Llamas-Villa* was not analyzed under Art. 1, Section 7, which prohibits searches "without authority of law," and any search which

exceeds the specific parameters contained in the command to search is manifestly without authority of law.

Third, whether the outbuilding was known to the affiant is not only irrelevant to the particularity analysis, but probable cause to search it did not exist in this case.

Fourth, and finally, like *Kelley*, the case at bench involves “a separate building,” unlike the storage room in the *same* building in *Llamas-Villa*. For example, Exhibit 36 shows a distinct space between the mobile home and the outbuilding; all witnesses agreed there was no entrance into the outbuilding from inside the mobile home, RP 25, 69; the entrance to the outbuilding was approximately 12-15 feet away from the back door of the mobile home, RP 69; the outbuilding had a separate roof from the mobile home, RP 83; the outbuilding did not share any walls in common with the mobile home, RP 84; and the outbuilding had a separate foundation, RP 84.

In the case at bench, the warrant did not authorize a search of the “curtilage”, “outbuildings”, “appurtenances”, or “premises”. Given the absence of a specific command to search the curtilage, appurtenances, outbuildings, or premises, the scope of the warrant does not extend to the outbuilding. As in *Kelley*, the outbuilding was outside the scope of the warrant, the resulting search was “without authority of law”, and therefore unconstitutional under both the

Fourth Amendment and Art. 1, Section 7. See *State v. Cottrell*, supra (in virtually all cases where the courts have permitted searches beyond the specific language contained in the command to search, the language of the warrant “included such addenda as ‘and curtilage’ or ‘and appurtenances’”, at 644).

B. The affidavit for search warrant does not contain probable cause to search the outbuilding.

Once again, this issue is controlled by *State v. Kelley*, supra. While the information contained in the affidavit for search warrant supported probable cause to search the mobile home, it did not include information supporting probable cause to search the outbuilding. For example, the affidavit claims that the CRI was an invited guest at the residence and “that the methamphetamine was inside the residence at the time it was seen.” There simply is no information in the affidavit referencing the outbuilding, and, consequently, the affidavit fails to establish probable cause to search the outbuilding. *State v. Kelley*, supra.

C. Consent to search the outbuilding was unlawfully obtained.

Whether consent is voluntary or is the product of duress or coercion is a question of fact to be determined from the totality of the circumstances. *State v. Apodaca*, 67 Wn.App. 736, 739, 839 P.2d 352 (1992); *State v. Cass*, 62

Wn.App. 793, 795, 816 P.2d 57 (1991), *review denied*, 118 Wn.2d 1012 (1992); *State v. Raines*, 55 Wn.App. 459, 462, 778 P.2d 538 (1989), *review denied*, 113 Wn.2d 1036 (1990). The state has the burden of proving that consent was voluntarily given, by clear and convincing evidence. *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975 (1990); *State v. Shoemaker*, 85 Wn.2d 207, 210, 533 P.2d 123 (1975).

In the case at bench, given the fact that the warrant did not authorize a search of the outbuilding, and that probable cause did not exist to search the outbuilding, the search party did not have lawful authority to search the outbuilding based upon the warrant alone. While the state may argue that consent was given by Ms. Danielson, the consent was involuntary in this case because she was never advised of her right to refuse consent to search the outbuilding or that she could at any time revoke consent, or, finally, limit the scope of consent to search the outbuilding.

In *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998), law enforcement officers conducted a “knock and talk” at the defendant’s residence in an effort to investigate a suspected marijuana grow. She was told by them that they had information that a marijuana grow operation was being conducted inside the house and that they wanted to search the home and seize the marijuana. She consented to the search, but was never advised that she had a right to refuse

consent to search, revoke consent to search, or limit the scope of any search conducted. *Ferrier*, at 108-09. Ferrier moved to suppress all the evidence obtained as a result of the search of her home, the motion was denied by the trial court, and she appealed. The Court of Appeals affirmed, but the Supreme Court granted her petition for review and reversed, holding that the failure to inform her of her right to refuse consent, revoke consent, and/or limit the scope vitiated her consent and rendered it involuntary. *Ferrier*, at 118-19.

Likewise, in *State v. Holmes*, 108 Wn.App. 511, 31 P.3d 716 (2001), the defendant's conviction for unlawful possession of a controlled substance was reversed in part because officers, again conducting a "knock and talk", failed to advise Holmes prior to entry that he had a right to refuse to give consent, revoke consent, and/or limit the scope of consent to search. *Holmes*, at 518; accord, *State v. Kennedy*, 107 Wn.App. 972, 29 P.3d 746 (2001).

Key factors underlying the *Ferrier* analysis are that the home is entitled to heightened protection, and that "knock and talk" investigations are inherently coercive. While the case at bench is distinguishable factually because it involves a search of an outbuilding (albeit within the curtilage) as opposed to the mobile home itself, and the investigation in this case was pursuant to a warrant as opposed to a "knock and talk", the same underlying analysis which caused the court to suppress in *Ferrier*, *Holmes*, and *Kennedy*, applies with equal force.

First, an outbuilding located within the curtilage of the home, as in this case, is entitled to the same heightened protection as the home itself. *State v. Ross*, 141 Wn.2d 304, 4 P.3d 130 (2000). Second, officers conducting a “knock and talk” do not have a lawful basis to search the home without first obtaining lawful consent, just as officers executing what amounts to an invalid warrant (insofar as the search of the outbuilding is concerned) have no lawful basis to search either. Finally, if a “knock and talk” is inherently coercive, an invalid warrant which in fact cannot justify a search of an outbuilding, is equally coercive. See *State v. Apodaca*, supra.

Faced with the apparent authority of the invalid warrant, Danielson’s consent to search the outbuilding was coerced, involuntary, and unlawfully obtained just like the invalid consent coerced by officers conducting the knock and talks in *Ferrier*, *Holmes*, and *Kennedy*.

D. Any and all evidence seized as a result of the unlawful search of the outbuilding must be suppressed.

It is well-established that evidence seized without a warrant, or within one of the strictly construed exceptions to the warrant requirement, violates the Fourth Amendment warrant requirement, is without authority of law as required by Art.

1, Section 7, and must be suppressed. E.g., *State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984).

E. The amendment of charges during trial was unconstitutional.

The accused, in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against her, and have a copy thereof. Washington State Constitution, Art. 1, § 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged; this doctrine is elementary, and of universal application, and founded on the plainest principal of justice. *State v. Ackles*, 8 Wn. 462, 464-65, 36 P. 597 (1894).

The court rules prohibit the State from amending an information if substantial rights of the defendant are prejudiced. CrR 2.1(d). This rule operates within the confines of Art. 1, § 22 and is intended to fulfill the constitutional notice provision by allowing the defendant an opportunity to adequately defend herself. *State v. Hakimi*, 124 Wn.App. 15, 98 P.3d 809 (2004); *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987).

In the case at bench, the trial court pointed out in the middle of trial that the information charged defendants with a school grounds enhancement and the jury instruction submitted by the State alleged a school bus stop enhancement.

RP 320-21. The State orally moved to amend the information adding a school bus stop enhancement, and deleting the school grounds enhancement presumptively, prior to calling the Evergreen School District Transportation Department officer, Caroline Dover, to the stand. RP 326. Both defendants made objections and the court reserved its ruling until after the State rested its case. There is no record that the defendant was provided with a written copy of the second amended information during the State's case in chief, or at any time during trial, as the court file indicates it was filed on June 19, 2007, three days after trial. CP 68. The elements of the school bus stop enhancement were not read to the defendants at the time the State moved to amend. RP 326.

In *State v. Pelkey*, the Supreme Court created a bright-line rule that amendments made after the State rested its case in chief are *per se* violations of the constitution and no showing of prejudice is required, unless the amendment is to a lesser degree the same charge or a lesser-included offense. 109 Wn.2d at 491. Where the State did not file a written amended information during its case in chief and where the court did not advise the defendants of the elements the State would be required to prove, this case should be analyzed as an amendment occurring after the State rested. There was constitutionally insufficient notice of the amendment during the State's case in chief, therefore under *Pelkey*, the trial court committed reversible error *per se*.

Where an amendment is made during the State's case in chief, the defendant must prove prejudice. *State v. Ziegler*, 138 Wn.App. 804, 809, 158 P.3d 647 (2007). In *Ziegler*, the defendant was charged with one count of first degree child rape, and one count of first degree child molestation, four incidents with two different children between December 1, 2004 and May 1, 2005. *Id.* at 806. After the children testified, the state moved to amend the information which changed one count of first degree child rape to first degree child molestation and added two additional first degree child rape charges involving one of the children. *Id.* at 807. The amendments were made before the state rested. *Id.* The court held the addition of two new child rape charges was prejudicial and affected the defendant's ability to prepare his defense. *Id.* at 811. However, the court found no prejudice where the charge was amended from child rape to child molestation because the critical difference between the two charges was whether penetration occurred, and the court could not see how the lack of additional discovery or a continuance adversely affected his defense. *Id.* at 810 (citing *State v. Aho*, 89 Wn.App. 842, 849, 954 P.2d 911 (1998)).

Even assuming the court finds the defendant received constitutionally sufficient notice during the State's case in chief, the amendment prejudiced the defendant. An amendment of an information at trial violates Art. 1, § 7 if the amendment contains a new charge. *State v. Carr*, 96 Wn.2d 436, 440, 645 P.2d

1098 (1982). Although some technical amendments are allowed, such as changes in the applicable dates or location of the crime, substantive amendments which change the elements the State is required to prove and the accused to defend against are unconstitutional. *State v. Baker*, 48 Wn.App. 222, 225, 738 P.2d 327 (1987).

Like with the addition of charges in *Ziegler*, Danielson's ability to prepare her defense was affected by the mid-trial amendment. Here the State substantively amended the information in a manner that changed the elements they would have to prove. The original information and first amended information required the State to prove "that the defendant did commit the foregoing offense within 1,000 feet of the parameter of the school grounds." CP 1, 9. In contrast, the second amended information requires the State to prove "that the defendant did commit the foregoing offense within 1,000 feet of a school bus route stop." CP 68. Mid-trial Danielson was required to defend herself against allegations that the manufacturing of methamphetamine occurred within 1,000 feet of a school bus route stop. Based on the original and first amended information, she only had notice that she would need to defend herself against allegations that the crime occurred within 1,000 feet of school grounds. As trial counsel indicated, they did not have an opportunity to investigate or independently test the State's evidence as to whether there was a bus stop within

1,000 feet of the property in question. Instead, the defense only prepared and investigated whether there was a school within 1,000 feet, which even the State conceded did not exist. This is the exact type of amendment prohibited by the constitution. Because the defendants were not apprised of the elements of the amended enhancement, they were not placed on sufficient notice to adequately defend against the charge, and therefore the amendment was unconstitutional.

F. The convictions are not supported by substantial evidence of constructive possession.

In a criminal prosecution, due process requires the State to prove every element of the charged crime beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005) (citing *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2006); *In re Winship*, 397 US 358, 361-64, 909 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). Washington State Constitution, Art. 1, § 3; United States Constitution, Fourteenth Amendment. A reviewing court in evaluating sufficiency of the evidence cannot rest upon guess, speculation, or conjecture in establishing the existence of a fact. *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

Possession can be either actual or constructive. Actual possession occurs when the goods are in the actual physical possession of the defendant;

constructive possession means the defendant has dominion and control *over the goods*. *State v. Spruell*, 57 Wn.App. 383, 788 P.2d 21 (1990); *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Danielson did not have actual physical custody of methamphetamine, pseudoephedrine, or any other evidence of methamphetamine manufacturing. The sole question is whether substantial evidence supports constructive possession in this case.

In *State v. Callahan*, the defendant was a guest on a house boat where drugs were found. 77 Wn.2d at 28-29. The defendant admitted to handling the drugs earlier that day, however the court held that such momentary handling of the drugs was insufficient to establish actual possession and the fact that he was only a guest on the house boat was insufficient to establish dominion and control over the drugs for constructive possession. *Id.* at 31.

Likewise, in *State v. Spruell*, the court found insufficient evidence of actual physical possession as in *Callahan* and resolved the issue of constructive possession. 57 Wn. App. at 387. The home searched belonged to Spruell, however Luther Hill, among others, were at the house when police entered. *Id.* at 384. Hill was in the kitchen. *Id.* On the kitchen table police found several items including white powder residue (cocaine) on a plate. Hill's fingerprint was found on the plate. *Id.* In addition, 11 or 12 grams of marijuana were found on the floor in the kitchen. *Id.* The court was persuaded by the ruling in *Callahan* where

mere proximity to the drugs and evidence of momentary handling was not enough to support a finding of constructive possession. *Id.* at 388.

In the case at bench, Danielson spent one night at Brewer's home just prior to the search. RP 365. Despite previously living at the residence, she moved out of Brewer's home a month earlier. RP 364. She did not lease the residence. RP 304. Danielson did not use the outbuilding. RP 362. Brewer was actually seen placing one of the suitcases seized into the outbuilding. RP 303. In addition, Brewer told police the contents of the motor home belonged to him. RP 140. Danielson did not have dominion and control over the premises; she was a social guest as in *Callahan* and *Spruell*.

Even assuming Danielson did have dominion and control over the premises, the State would have to prove she had dominion and control *over the substance*. See *State v. Cantabrana*, 83 Wn. App. 204, 206, 921 P.2d 572 (1996); *State v. Shumaker*, 2007 WL 4532845, __ P.3d __ (2007). Temporary residence, personal possessions on the premises, or knowledge of the presence of a drug without more is insufficient to show dominion and control necessary to establish constructive possession of a drug. *State v. Hystad*, 36 Wn.App. 42, 49, 671 P.2d 793 (1983); *State v. Davis*, 16 Wn.App. 657, 659, 558 P.2d 263 (1977).

Mere proximity to the illegal substances is insufficient evidence of dominion and control. That is all that the State proved in this case. Therefore,

the convictions violate the defendant's right to due process as they are not supported by substantial evidence.

G. Convictions for possession of pseudoephedrine with intent to manufacture methamphetamine and manufacturing of methamphetamine unconstitutionally placed the defendant in double jeopardy.

No person shall be twice put in jeopardy for the same offense. Washington State Constitution, Art. 1, § 9; United States Constitution, Fifth Amendment. The federal and state double jeopardy clauses are identical in thought, substance, and purpose. *State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959). "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crime constitutes the same offense." *In re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). The *Blockburger* test applies to double jeopardy claims where legislative intent is not expressly disclosed. *Id.* at 816. The test provides:

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *Blockburger v. US*, 284 US 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

In other words, the offenses must be identical both in fact and in law. The crimes of possession of pseudoephedrine with intent to manufacture methamphetamine and manufacture of methamphetamine are legally identical and based on the same act or transaction in this case. The State relied upon the same evidence seized during the execution of the search warrant on July 13, 2006 to prove both charges.

Two charges are not identical in law if “each offense contains an element not contained in the other.” *State v. O’Connor*, 87 Wn.App. 119, 123, 940 P.2d 675(1997). RCW 69.50.401(1) states, “it is unlawful for any person to manufacture...a controlled substance.” Manufacturing is defined as follows:

“Manufacture” means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. RCW 69.50.101(p).

RCW 69.50.440(1) provides, “it is unlawful for any person to possess...pseudoephedrine...with intent to manufacture methamphetamine.” Here, manufacturing methamphetamine does *not* require proof of a fact not contained within the elements of possession of pseudoephedrine with intent to manufacture methamphetamine. Meaning if the State could prove possession of

pseudoephedrine with intent to manufacture methamphetamine, they could also establish manufacturing of methamphetamine. Therefore, the two crimes are the same offense as they are based on the same act or transaction and identical under the law in violation of double jeopardy under Art. 1, § 9 and the Fifth Amendment.

H. The community custody condition is unconstitutionally vague.

Due process guarantees citizens fair warning of what constitutes prohibited conduct. *State v. Simpson*, 136 Wn.App. 812, 816, 150 P.3d 1167 (2007) (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). A prohibition, such as a community custody condition, must be definite enough that an ordinary person can understand what conduct is prohibited and must provide standards of guilt that are clear enough to preclude arbitrary enforcement. *Id.* In a facial vagueness challenge, the court looks to the face of the enactment to determine whether any conviction based thereupon could be upheld. *State v. Aver*, 109 Wn.2d 303, 745 P.2d 479 (1987).

In the case at bench, the community custody condition imposed on Danielson at sentencing is unconstitutionally vague. The applicable condition states:

Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cell phones, police scanners, and hand-held electronics scheduling or data storage devices. CP 72.

Specifically, the language prohibiting the use of “any paraphernalia” that can be used for ingesting, processing, or selling drugs is so vague that it subjects Danielson to arbitrary enforcement. At the whim of a correctional officer, she could be punished for violating a community custody condition for possessing things such as plastic bags, matches, lighters, magazines, cigarette paper, telephones, or even motor vehicles. The lack of specificity fails to provide the defendant fair warning of what conduct is prohibited. Certainly listing items that are prohibited is one way of giving fair warning, however the community custody condition does more than that, it includes language so broad that any number of standard household items may fall into the category of prohibited conduct.

Although Danielson has not been violated under this community custody condition, the issue should be heard on direct appeal because it is the only method to comport with due process. Community custody violations are adjudicated by a department of corrections hearing officer under WAC 137-104-050. In fact, the administrative code specifically precludes review under the Administrative Procedure Act:

The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to Chapter 34-05 RCW, the Administrative Procedure Act. WAC 137-104-050(2).

The only form of relief is the right to appeal the decision to an appeals panel.
WAC 137-104-080.

Procedural due process requires notice and an opportunity to be heard or defend before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 514, 326 P.2d 1004 (1958). If the defendant is denied an opportunity to raise constitutional challenges to community custody provisions on direct appeal, she will be denied the right to be heard or defend herself before a competent tribunal if she is forced to wait until the time she may be violated under such provisions. Therefore, this court should find the challenged condition unconstitutionally vague.

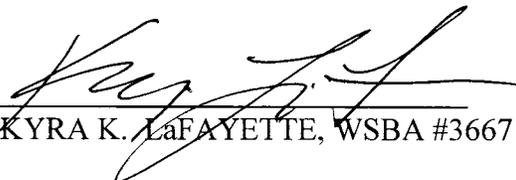
IV. CONCLUSION

Based upon the foregoing arguments and authorities, Danielson's convictions and sentence on all three charges should be reversed, and this case remanded for a new trial.

DATED this 8th day of January, 2008.



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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

NO. 36470-1-II

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 MELISSA R. DANIELSON,)
)
 Appellant.)

DECLARATION OF SERVICE

I declare that on January 8, 2008, a true copy of Appellant's Brief was sent to the following persons via first-class mail, postage prepaid, in an envelope addressed as follows:

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

Signed at Vancouver, Washington this 8th day of January, 2008.



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