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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it entered findings of fact on the defendant's motion to suppress because they were not supported by substantial evidence. CP 96-101; RP 1-300.

2. The trial court erred when it denied the defendant's motion to suppress evidence the police obtained in violation of the knock and announce rule under RCW 10.31.040 and in violation of the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. RP 1-300.

3. The trial court erred when it denied the defendant's motion to suppress evidence the police obtained when they exceeded the scope of a search warrant in violation of the defendant's right to privacy under Washington Constitution, Article 1, § 3, and United States Constitution, Fourth Amendment. RP 1-300.

4. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment when it entered judgment of conviction against him for possession of methamphetamine because that charge was not supported by substantial evidence. RP 370-627.

Issues Pertaining to Assignment of Error

1. Does a trial court err when it enters findings of fact unsupported by substantial evidence?

2. Does a trial court err if when it refuses to suppress evidence the police obtained after violating the knock and announce rule under RCW 10.31.040, and after violating a defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment?

3. Does a trial court err if it refuses to suppress evidence the police obtained when they exceeded the scope of a search warrant in violation of a defendant's right to privacy under Washington Constitution, Article 1, § 3, and United States Constitution, Fourth Amendment?

4. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment against him for an offense unsupported by substantial evidence?

STATEMENT OF THE CASE

Factual History

On May 15, 2007, Vancouver Police Detective Brian Acee prepared an affidavit requesting permission to search the defendant's house for the defendant at 5810 NE 94th Avenue in Vancouver. RP 9¹. This house is a single story Rambler of about 2,200 to 2,500 square feet in size. RP 95. Detective Acee is a member of the Clark County Interagency Career Criminal Apprehension Team (CCAT) and helps execute arrest warrants for violent felons. RP 14. According to the affidavit, the purpose of searching for the defendant was to execute a misdemeanor arrest warrant on him that the Clark County District Court had issued when the defendant allegedly failed to appear on a charge of driving while intoxicated. CP 9-11. Detective Acee's affidavit included the following claims:

BOOKER has prior convictions for possession of marijuana, depositing an unwholesome substance, driving under the influence, driving with no valid operator's license, driving with a suspended license and bail jump.

On March 1, 2005, members of the Southwest Washington SWAT team and Vancouver Police Violent Crimes Unit executed a search warrant for fully automatic firearms and methamphetamine at the described premises. I authored that search warrant and was present

¹The record on appeal includes 6 volumes of verbatim reports of the suppression motion and the trial in this case. Since they are continuously numbered, they are referred to herein as "RP [#]" with no volume designation included.

during the execution. Four firearms and methamphetamine was [sic] located on the premises during the search. VCU detectives referred firearm and drug charges on Booker as a result of the search warrant.

CP 10.

In fact, as of the date of Detective Acee's affidavit, the defendant did not have any felony convictions. RP 80. Detective Acee did not claim in the affidavit or during later testimony that the defendant had any pending charges against him at the time of his affidavit, that the firearms taken out of the defendant's home 15½ months previous were automatic weapons, that the defendant had a conviction for a crime of violence, or that the defendant had ever threatened anyone with a firearm, much less threatened a police officer with a firearm. CP 9-11; RP 13-106.

At about 2:10 pm on the same day as the warrant was issued, Detective Acee and nine other officers of the CCAT team drove out to the defendant's house in a special van to execute the search warrant. RP 13-14. As they drove up, a friend of the defendant's exited the front door, walked out into the driveway, and got something out of his car. RP 19-22. The officers then exited their van in a long line and walked up to the defendant's front door. *Id.* As they did, they ordered the defendant's friend to lay down on the ground, place his hands behind his head, and stay still. *Id.* He complied immediately. *Id.* As they got up to the front door, Detective Acee knocked and then quickly yelled out, "Vancouver police department - search

warrant - demand entry - open the door.” RP 24-26. The following is a quote from Detective Acee’s written police report concerning what he claimed happened at the door. RP 75-76.

I knocked on the door, announced, “police with a search warrant, demand entry, open the door.” After waiting 25 to 30 seconds without a response, Sergeant Chylack directed Officer Ford to utilize an entry tool on the door.

Prior to forcing entry, I checked the door handle and found it to be unlocked. I pushed the front door open and again announced, “Police with a search warrant.”

Myself and the other officers entered this – entered the residence.”

RP 75-76.

During a subsequent interview with the defendant’s attorney, Detective Acee reiterated his claim that they waited 25 to 30 seconds after knocking and announcing before entering the house. RP 76. In fact, at a subsequent suppression hearing, Detective Acee again reiterated his claim that they had waited 25 to 30 seconds, which he thought was the appropriate amount of time before entering under the circumstances. RP 73, 75-76.

According to Detective Acee, after waiting 25 to 30 seconds after knocking and announcing, he and the other officers entered the house, finding no one in the entryway or living room. RP 75, 93-94. He and a United States Deputy Marshall then proceeded to the right, went down a hall, entered the master bedroom, but did not find the defendant. RP 27-36. However, they

did see what they believed to be a methamphetamine pipe, in plain view, on a candle in the room, along with some small empty baggies they associated with methamphetamine use. *Id.* However, they returned back down the hall and into the living room without seizing anything. *Id.* Detective Acee claimed that it was only upon returning to the living room that he first saw that other officers had found the defendant in the kitchen-dining room area and arrested him. RP 35-36, 57. Based upon what he had seen in the master bedroom, Detective Acee obtained a subsequent warrant that authorized them to search for drugs. RP 42-43. However, he did not personally execute that warrant and seize either the pipe or the baggies. RP 51-53.

In fact, what Detective Acee did not know at the time he wrote his report and at the time he was interviewed by the defense, was that the defendant had a surveillance camera with audio mounted outside on the house pointing at his driveway. RP 58-69, 247-254. The view from this camera shows the street on the left, the defendant's driveway in the middle of the frame, and the front door entry area with the front door just outside the camera's view on the right. *Id.* The camera broadcast a signal to a VHS tape recorder in his bedroom closet. RP 247-254. After the defendant was released from custody, he gave this tape to his attorney, who then gave it to David Lacey, a videographer and audio editor who works for Limelight Video Productions in Portland, Oregon. RP 189-191.

Once Mr. Lacey obtained the tape, he played it in a machine that allowed him to digitally capture it onto his computer. RP 189-192. He then cut out a 180 second section that shows the view from the camera just before the police arrived up to the point they entered the house. RP 192. Using commercial auditing software, he was able to clarify the audio. RP 192-193. He did this by significantly reducing the background noise, particularly that from the adjacent highway. RP 188-191. He also doubled the volume of the foreground noise, including the voices of the officers. RP 196-206. According to Mr. Lacey, he did not find anything in his review of the VHS tape and the captured video and audio to indicate that the video or audio on the tape had ever been altered from the original. RP 227-228.

The first 67 seconds of the 180 second segment from the video surveillance camera shows the following at the times indicated.

- 0:00 - 0:21 The defendant's friend exits the front door to the right of the screen and walks toward four cars parked in the driveway. There are two cars parked in front and two cars exactly behind them. The defendant's friend walks between the front and the rear cars and opens the front passenger door of the rear car on the far side.
- 0:25 - 0:26 The defendant's friend shuts the door to the car and begins to walk back between the front and rear cars just as the police van comes into view on the street on the left side of the driveway.
- 0:30 - 0:34 The police van drives past the entrance to the driveway and stops as the defendant's friend gets around the rear passenger side of the near front vehicle. He looks back

and sees the police getting out as two of the officers say “Get on the ground, dude, get on the ground now.” The defendant’s friend, facing the officers, complies.

0:38 - 0:44 Detective Acee leads the line of officers up the driveway to the point where the defendant’s friend is on the ground. As he does, Detective Acee says “Stay down where I can see your hands” and “lay down, put hands on the top of your head.” The defendant’s friend complies.

0:54 - 0:56 Detective Acee leads the line of officers up to the front porch area and goes slightly off screen in the right. There are four knocks heard in rapid succession.

0:56 - 0:59 In a loud voice, Detective Acee shouts: “Vancouver police department - search warrant - demand entry - open the door.”

1:02 - 1:04 There is a sound like the door opening and the officers in the front of the line step back to allow the door to open. As this happens, Detective Acee says: “Lay down, dude, lay down, lay down.”

1:05 - 1:07 The line of officers enter the house. As they do they yell again: “Police, search warrant.”

Exhibit 7 (from suppression motion).

During the execution of the search warrant, one of the officers who remained outside called in a license plate number from a small utility trailer that was sitting there and got a reply that it was reported stolen. RP 136-142.

Procedural History

By information filed May 21, 2007, the Clark County Prosecutor charged the defendant Jack Douglas Booker with one count of possession of

methamphetamine and one count of possession of stolen property in the second degree. CP 1-2. Prior to trial, the defense filed a motion to suppress, arguing that (1) the police violated the knock and announce rule when they entered the house without first waiting a reasonable time after knocking and announcing, and (2) that the police exceeded the scope of the search warrant when they found him in the entryway and none the less still searched the house. CP 4-12, 13.

Almost ten months after the filing of the information, the court called the case for a hearing on the defendant's motion to suppress. RP 1. At that hearing, the state called six witnesses, beginning with Detective Acee. RP 13, 107, 122, 136, 146, 158. During Detective Acee's testimony, the state had the defendant's surveillance tape marked as Exhibit No. 3. CP 49; RP 58-59. After the detective identified the exhibit, the state moved to have it admitted into evidence. RP 59-60. The court granted the motion and allowed the state to play the tape. *Id.*

During cross-examination, Detective Acee admitted that he had written in his police report that he and the other officers waited from 25 to 30 seconds after knocking and announcing. RP 75-76. He also admitted that he had continued this claim during a defense interview. *Id.* However, on the witness stand during the hearing he did not continue this claim. RP 76. Rather, he testified that his "memory" of the event was that they waited 25

to 30 seconds, although he admitted that the video tape showed that they did not wait any time at all. *Id.* He also testified on cross-examination that in his opinion, given all of the circumstances as he knew them to exist at the time he knocked and announced, 25 to 30 seconds would have been the appropriate time to wait to comply with the knock and announce rule. RP 73.

During direct examination, Detective Acee maintained that there was nobody in the entryway when he and the other officers entered the house and that the first time he saw the defendant was after he returned from searching the master bedroom. RP 28-29. When faced with the defendant's claim that the defendant had opened the front door and that they had immediately arrested him, Detective Acee still maintained that the defendant was not at the front door. RP 85-94. However, when confronted with the video tape, he admitted that when they opened the door, one of the officers said "lay down dude, lay down, lay down." RP 85. He also admitted that this statement was not directed at any of the other officers and that it was directed towards a specific person. *Id.* Finally, on cross-examination, Detective Acee stated that had they encountered the defendant right when the door opened, there would have been no justification for entering the house. RP 93-94.

Following Detective Acee's testimony, the state called three other officers from the entry team, including two DOC officers who were the third and fourth to enter the house. RP 107, 122, 146, 158. They claimed that they

did not remember seeing anyone in the entryway when they entered, and that they encountered and arrested the defendant in the kitchen. RP 126-130, 151-152. One of the other officers to testify was Sergeant Mike Chylack. RP 158-170. On cross-examination, he admitted that they had only waited a few seconds before entering after knocking and announcing. RP 170-172.

Following the presentation of the state's witnesses on the motion to suppress, the court adjourned for five days. RP 173-182. Once the case was again called in court, the defense called three witnesses, including David Lacey, the audio-video expert, and the defendant. RP 186, 232. Mr. Lacey testified concerning his review of the original tape, his digital capture of the initial 180 seconds, his audio enhancement of that digital capture to make the audio easier to understand, and to the fact that the tape had not been altered. RP 186-229. While on the witness stand, Mr. Lacey identified Exhibit No. 7 as a DVD copy of his 180 second audio-video capture from Exhibit No. 4. RP 207-211. He explained that he had been able to make the audio on the captured sequence much more understandable by reducing the background audio significantly and increasing the foreground audio by 200%. *Id.* The court admitted Exhibit 7 over the state's objection and played it a number of times. RP 207-214, 227-228.

Following Mr. Lacey's testimony, the defendant took the stand on his own behalf. RP 232. He gave testimony concerning how he set up the video

system, and what was shown on the tape. RP 248-251. He also testified that when the police knocked and announced their purpose, he stepped toward the front door, opened it, and told the officers that there were children in the house. RP 254 As he did, one of the officers said "Get down, dude, get down," and he did. RP 254-255. According to the defendant, this happened in the entryway to the house just inside the front door. *Id.*

Following brief rebuttal testimony by the state, the parties presented argument on the motion to suppress. RP 300-336. The court then denied the motion and later entered the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The police arrived at the residence of Defendant Jack Booker, located at 5810 NE 94th Avenue in Vancouver, Clark County, Washington, on the afternoon of May 16, 2007, to serve an arrest warrant on him. The police had obtained a warrant to search this residence for Defendant, based on an outstanding no-bail warrant issued by the Clark County District Court. A copy of the affidavit and search warrant was admitted at the 3.6 hearing as Exhibit 1.

2. Upon arrival, the police encountered an adult male in the driveway in front of the house next to several vehicles and trailers. The police announced themselves to the male by yelling out to him, directed him to the ground, and detained him. The male was not Defendant. The police proceeded toward the front door of the residence.

3. The police believed that their approach to the residence had been compromised, due to the unexpected encounter with the male in the driveway. Detective Bryan Acee was the lead officer, and has had previous contacts with Defendant. Detective Acee previously had

obtained and served a search warrant at this same residence a year or so ago. During the service of that warrant, the police located a number of firearms and ammunition. Detective Acee also had information from police informants that Defendant has a reputation within the local drug subculture as a “taxer - someone who collects on past due drug debts”. Detective Acee had conducted surveillance on Defendant’s residence on previous occasions, and had observed multiple persons frequent the residence.

4. At the front door, Detective Acee knocked, and yelled out words to the effect, “Vancouver Police, search warrant, we demand entry.” After several seconds with no response from inside the house, Sergeant Mike Chylack gave the order to breach the door. Detective Acee checked the door knob, and found that it was unlocked. Detective Acee then opened the front door and entered the house. The other officers behind him also followed him into the house. The short duration of time between the knock and announce and the entry into the residence, based on the facts of this case, as recited above.

5. Upon entry into the house, the officers announced themselves by yelling words to the effect, “Police, search warrant, get on the ground.” The police did not see or encounter any persons in the front portion of the house (entryway and living room). As the police made initial entry into the house, they broke off into pairs to clear the house and search it for Defendant and locate any other occupants, or anything that might be a threat to the officers. Detective Acee and United States Deputy Marshall Leland Rakoz proceeded down the hallway to the right, to clear the bedrooms along the hallway. One of the bedrooms was later determined to be the master bedroom (and Defendant’s bedroom). DOC Officers Fili Matua and Brian Ford headed straight ahead toward the kitchen and dining area. Corporal Neil Martin and another officer headed toward the left side of the house into the garage that had been converted into additional living space.

6. While inside the master bedroom, Detective Acee saw in plain view on a shelf next to the bed a used glass pipe. The glass pipe appeared to contain an off-white crystal substance. Through his training and experience, Detective Acee recognized the pipe as an item that is commonly used to smoke drugs, particularly Methamphetamine, and the crystal substance inside the pipe appeared

to be consistent with the appearance of Methamphetamine. Detective Acee later conducted a field test on the pipe, and obtained a positive response for the presence of Methamphetamine. He also saw a number of small plastic baggies as items commonly used to hold or store Methamphetamine. No persons were located in the master bedroom.

7. While Detective Acee and Deputy Marshall Rakoz were clearing the hallway and master bedroom, the other officers did the same in the other areas of the house. DOC Officers Matua and Ford located Defendant in the kitchen and dining area. Defendant was not located in the immediate area inside the front door. In the converted garage on the left side of house, Corporal Martin located Defendant's wife, daughter, and grandchild. All persons were consolidated in the living room. No other persons were located inside the house.

8. After Defendant was brought to the living room, Detective Acee attempted to obtain his consent to search the rest of his residence for drugs, firearms, and other contraband, based on his observation of the used glass smoking pipe, plastic baggies, and ammunition in the master bedroom. Defendant refused to give consent. Detective Acee then applied for and obtained a second warrant to search Defendant's residence, this time for Methamphetamine and drug paraphernalia. A copy of the second affidavit and search warrant was admitted at the 3.6 Hearing as Exhibit 2. During the service of the second search warrant, the police located inside the master bedroom small used plastic baggies with residue, two firearms, several hundred rounds of ammunition, a collapsible baton, and mail addressed to Defendant.

9. While the other officers were inside the residence, Detective Gordon Conroy positioned himself in the driveway area outside the house as containment, and to provide outside security. Detective Conroy observed in open view, the license plate of a utility trailer parked in the driveway. The license plate on the trailer was visible to the naked eye from several feet away, and did not require any manipulation. Detective Conroy ran the license plate of the trailer, and discovered that the trailer had been reported stolen. He passed this information on to Detective Acee.

10. After Defendant was located and brought to the living room,

Detective Acee proceeded to question Defendant about the evidence that the police had located. Prior to asking him questions, Detective Acee advised Defendant of his Constitutional Rights under Miranda. Defendant acknowledged understanding his rights, waived them, and agreed to talk to Detective Acee. Defendant admitted that he and his wife stayed in the master bedroom. He stated that he found the Meth pipe “down the street” and brought it home so “some kid playing didn’t find it.” He acknowledged that he knew the pipe was the kind that is used to smoke Methamphetamine. When asked about the stolen trailer, Defendant stated that an unnamed friend had dropped it off a few days ago, and he had been using it, and loaned it out for others to use. Defendant’s admissions to Detective Acee were voluntary and made without coercion or threats.

11. At the 3.6 hearing, the Court viewed the video and audio recording of what appears to show the arrival of the police onto Defendant’s property, and the knock and announce at the front door. This tape was admitted as Exhibit 3. This video cassette recording appears to be from Defendant’s surveillance system. Defendant had sole custody and control of the video cassette tape for seven months, before turning it over to the State in December.

12. The taped recording is of little value to the Court. There was testimony regarding the location of one camera. There was testimony that the tape was unaltered. There was no evidence offered regarding the recording system or process that was used to create the tape, nor was there testimony to establish the tape’s chain of custody to ensure its integrity or protection from tampering or alteration. It is unknown what has been done to the tape for the seven months prior to Defendant relinquishing the tape. In this case, the Court finds live testimony from witnesses more helpful.

Based on the foregoing findings of fact, the Court makes its:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of this action and over the parties hereto.

2. The police complied with the requirements of the knock and announce statute, RCW 10.31.040. The short duration of the time

between the knock and announce, and the entry into the residence was justified by the officer's belief that they had been compromised by the unexpected encounter with the male in the driveway in front of the house. This was further supported by the knowledge of the police regarding Defendant's history with firearms, reputation in the drug community, and numerous visitors to the property through prior surveillance by the police.

3. The sweep of the residence was lawful. The police were lawfully on the premises under the authority of a valid warrant to search for Defendant. The police were executing the warrant when they swept the house to locate and arrest Defendant.

4. The discovery of the contraband in Defendant's bedroom was lawful. This was a classic example of plain view discovery. The police observed pipe and plastic baggies during the execution of the search warrant to locate and arrest Defendant, and they recognized immediately upon discovery that the items were evidence of a crime.

5. The discovery of the stolen utility trailer in the driveway was also legal. The police were legally on the property to serve the warrant. The license plate of the trailer was observed in open view. There is no protected privacy interest in DOL records in regards to vehicle licenses.

6. The search warrant was based on probable cause and was executed in a reasonable manner.

7. Defendant's post-Miranda admissions to the police were legally obtained and are admissible.

CP 96-101.

The case later came on for trial, with the state calling 7 witnesses, including Detective Acee and four other officers who helped execute the search warrant. RP 370, 412, 424, 436, 458, 471, 490. They testified consistent with the facts contained in the preceding factual history. *See*

Factual History. In addition, during his trial testimony, Detective Acee repeated his claim that while in the master bedroom he saw what he believed to be a methamphetamine pipe sitting on a candle. RP 382. However, he did not seize the item. RP 383. Rather, after returning to the living room he asked the defendant about it. RP 387. The defendant stated that he had found it down the street and had brought it in to his bedroom to keep it out of the reach of children. RP 387-389.

At no point during Officer Acee's trial testimony did he ever identify any exhibit as being the pipe he saw in the master bedroom but did not seize. RP 370-412. However, he did identify Exhibit No. 3 as a photograph of the pipe he saw. RP 393. At trial, Sergeant Chylack testified that he was the one who had taken the picture of the pipe. RP 417-418. In fact, the state did not present any testimony that anyone ever did go into the master bedroom and seize the pipe. RP 370-522. Rather, what the state did was call Officer Fili Matua, who identified Exhibit 9 as a glass pipe, and Exhibit 10 as some small baggies. RP 428-431. He did not testify as to who gave him the items or as to where they were found. *Id.*

As its final witness during the case-in-chief, the state called John Dunn, a forensic scientist with the Washington State Patrol. RP 490-520. He identified Exhibit No. 9 as a glass pipe with burnt residue in it. RP 507-511. He further testified that he had tested the residue and determined that it

contained methamphetamine. RP 511. During his testimony, the defense moved for the admission of Exhibit No. 9 and the defense objected that the state had failed to lay a proper foundation for the admission of the exhibit. RP 521. The court overruled the objections and admitted the exhibit into evidence. *Id.* The state then closed its case. RP 522.

After the state closed its case, the defense called one witness: Jonathan Crane. RP 542-572. Mr. Crane testified that he was a friend of the defendant and that he had brought the trailer the police identified as stolen over to the defendant's house. *Id.* The defense then rested, and the court instructed the jury with the defense objecting to Instruction No. 11. RP 561-567. Following argument by counsel, the jury retired for deliberation and eventually returned a verdict of "guilty" to Count I (possession of methamphetamine), and "not guilty" to Count II (possession of stolen property). CP 81-82. The court thereafter sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 103-116, 117.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT ON THE DEFENDANT'S MOTION TO SUPPRESS BECAUSE THEY WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the case at bar, the defendant has specifically assigned error to the following portions of findings of fact 4, 5, 6, 7, 8, 11, and 12. These findings stated as follows:

4. ... After several seconds with no response from inside the house, Sergeant Mike Chylack gave the order to breach the door. ... The short duration of time between the knock and announce and the entry into the residence was reasonable, based on the facts of this

case, as recited above.

5. ... The police did not see or encounter any persons in the front portion of the house (entryway and living room).

6. ... The glass pipe appeared to contain an off-white crystal substance. Detective Acee later conducted a field test on the pipe, and obtained a positive response for the presence of Methamphetamine

7. DOC Officers Matua and Ford located Defendant in the kitchen and dining area. Defendant was not located in the immediate area inside the front door. ...

8. ... During the service of the second search warrant, the police located inside the master bedroom ... a collapsible baton, and mail addressed to Defendant.

11. ... Defendant had sole custody and control of the video cassette tape for seven months, before turning it over to the State in December.

12. The taped recording is of little value to the Court. ... In this case, the Court finds live testimony from witnesses more helpful.

CP 96-100.

As the following explains, the foregoing portions of these findings find no support in the record.

Finding of Fact No. 4 in the order denying the defendant's motion to suppress evidence includes these factual claims:

4. ... After several seconds with no response from inside the house, Sergeant Mike Chylack gave the order to breach the door. ...The short duration of time between the knock and announce and the entry into the residence was reasonable, based on the facts of this case, as recited above.

CP 97.

The claim that the officer waited “several seconds with no response from inside the house” is not supported by the record. As both the original and enhanced tapes of the officers’ entry into the house reveals, the officers did not wait any time at all after knocking and announcing before they entered the house. This fact was also admitted by Sergeant Chylack. Thus, this factual claim is not supported by substantial evidence. In addition, the remainder of Finding 4 is actually a conclusion of law. As is set out in Argument II in this brief, it is incorrect.

Finding No. 5 included a claim that “The police did not see or encounter any persons in the front portion of the house (entryway and living room).” Finding No. 7 mirrored this claim and stated:

7. DOC Officers Matua and Ford located Defendant in the kitchen and dining area. Defendant was not located in the immediate area inside the front door. ...

CP 98.

Were this factual issue simply a question of credibility between the testimony of the officers and the defendant, then there would be substantial evidence to support this finding as the court on appeal leaves question of credibility between conflicting witnesses to the trier of fact, regardless of how faulty or biased that decision is. However, the issue on this finding of fact is not a question of credibility between divergent witnesses. Rather, it is a

question of evidence presented by the state in the form of the unenhanced video tape (exhibit 4) and the enhanced computer file (exhibit 7) showing that when the door opened, Detective Acee looked at the defendant and said: “Lay down, dude, lay down, lay down.” In his testimony on cross-examination, Detective Acee admitted that this statement was made by an officer, that it was not directed to an officer, and that it was not a general statement directed to anyone who might be in the house. Rather, he admitted that it was directed towards a specific person.

Given this evidence, the defense argues that no rational or reasonable trier of fact could enter a finding other than the defendant was at the door when the police arrived. In other words, no “fair-minded, rational person” could believe the “truth of the declared premise” that the trial court did in this case. *See State v. Ford, supra*. Thus, the trial court erred when it entered the foregoing portions of findings 5 and 7.

In Finding of Fact No. 6, the court included the following factual claims:

6. ... The glass pipe appeared to contain an off-white crystal substance. Detective Acee later conducted a field test on the pipe, and obtained a positive response for the presence of Methamphetamine

CP 98.

Actually, Detective Acee’s testimony was that the pipe contained

what he believed to be a burnt residue in it, not an “off-white crystal substance.” RP 89-90. In addition, his testimony was that he did not test the pipe or baggies. *Id.*

In finding no. 8, the court stated that “during the service of the second search warrant, the police located inside the master bedroom ... a collapsible baton, and mail addressed to Defendant.” Appellant is unable to find any evidence in the record to support this find.

In finding no. 11, the court found that “ the defendant had sole custody and control of the video cassette tape for seven months, before turning it over to the State in December.” This finding is erroneous as there actually was no testimony whatsoever about the exact length of time the defendant had the video tape. In addition, the record reveals that the defendant gave the videotape to his attorney, not the court. The attorney then gave the original to the court and a copy to the state after he had provided it to an expert to enhance the audio on the tape and verify that no one had tampered with it.

Finally, in finding no. 12, the court stated: “the taped recording is of little value to the Court. ... In this case, the Court finds live testimony from witnesses more helpful.” To the extent this is a factual finding, the defendant assigns error to it. However, it appears to be more of a statement by the court that the court simply does not want to have to state what the tape shows: that

the police, particularly Officer Acee, grossly misstated what happened at the defendant's house and would have persisted in those misstatements but for the fact that there was a video tape. In addition, the court's claim that the recording was of "little value" is belied by the court's other findings of fact. As the testimony revealed from the suppression hearing, Detective Acee persisted throughout his testimony in his claim that they waited 25 to 30 seconds. However, consistent with what the tape showed, the court entered a finding that the police only waited a few seconds at best. Thus, to the extent that finding no. 12 is a factual statement, it is in error.

II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED IN VIOLATION OF THE KNOCK AND ANNOUNCE RULE UNDER RCW 10.31.040 AND IN VIOLATION OF THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Under RCW 10.31.040, Officers seeking to enter a house to execute an arrest warrant or search warrant must first knock and announce the presence and purpose. This provision states:

RCW 10.31.040. Officer may break and enter. To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance.

RCW 10.31.040.

Absent exigent circumstances, an officer's failure to comply with this

statute during the execution of a search warrant requires suppression of the evidence seized. *State v. Hartnell*, 15 Wn.App. 410, 550 P.2d 63 (1976). In addition, the “knock and announce” rule as set out in RCW 10.31.040 is not merely a rule of statutory creation. Rather, it derives from the common law and constitutes a legislative statement of privacy rights also guaranteed under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. *State v. Coyle*, 95 Wn.2d 1, 621 P.2d 1256 (1980); *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). Thus, evidence seized in violation of the “knock and announce” rule must also be suppressed as the “fruit of the poisonous tree.” *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (“When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.”)

The “knock and announce” rule has three main purposes: (1) to reduce the potential for violence to both police and occupants arising from an unannounced entry; (2) to prevent destruction of property; and (3) to protect the occupants’ right to privacy. *Coyle*, 95 Wn.2d at 5. Our courts require “strict compliance with the rule” unless the state can meet its burden to “demonstrate that one of two exceptions to the rule applies: exigent circumstances or futility of compliance.” *State v. Richards*, 87 Wn.App. 285, 941 P.2d 710 (1997). “Exigent circumstances” include a reasonable belief

based upon specific facts that evidence will be destroyed or that the officers' safety will be endangered if the officers comply with the knock and announce rule. *State v. Young*, 76 Wn.2d 212, 455 P.2d 595 (1969). A generalized suspicion of officer safety, or the general easy destruction of narcotics does not meet this requirement. *Id.*

For example, in *State v. Jeter*, 30 Wn.App. 360, 634 P.2d 312 (1981), police sought and obtained prior judicial approval to execute a "no knock" search warrant at the defendant's home based upon their belief that the defendant kept a handgun close to his bed, and that small amounts of narcotics as the police anticipated finding were particularly vulnerable to quick destruction. After execution of the warrant, the state charged the defendant with possession of heroin the police found in a syringe next to the defendant's bed during the execution of the warrant. The defendant then moved to suppress the evidence seized based upon the officers' failure to comply with the knock and announce rule found in RCW 10.31.040. The trial court denied the motion, and the defendant appealed after conviction, arguing that the trial court had erred when it denied his motion to suppress.

After reviewing the facts of the case, the Court of Appeals reversed, holding as follows:

In the present case the trial court's finding of exigent circumstances was based upon a belief that defendant could destroy the contraband and a concern for police safety based upon Holloway's

information that defendant kept a weapon. Neither provides a sufficient factual basis to rise to the level of exigent circumstances. A belief that contraband will be destroyed must be based upon sounds or activities observed at the scene or specific prior knowledge that a particular suspect has a propensity to destroy contraband. No blanket exception exists for narcotics cases, in spite of the relative ease of disposal of drugs. In the present case, police observed no such activities at the scene and had no specific information on defendant's likelihood to destroy contraband.

Likewise, a concern for police safety must be based upon prior knowledge or direct observation that the subject of the search keeps weapons and that such person has a known propensity to use them. Although the belief that defendant kept weapons is supported by police testimony at the omnibus hearing that Holloway told them defendant kept a gun by his bed, police had no prior information that defendant had a known propensity to use the gun in resistance other than a general belief that a convicted felon may have such a propensity. Defendant, however, had no prior convictions for acts of violence or violence against law enforcement officers in particular.

State v. Jeter, 30 Wn.App. at 362-363.

In applying this law and these cases to the facts of the case at bar, one salient fact should be recognized. This fact is that the defendant's body was "the thing" that the police were seeking, not drugs or firearms.² Thus, there was no evidence that the police believed might be destroyed. In addition, the claim of firearms at the house some 15½ months later was itself a bit of a red

²Actually, under the facts of this case, one is left to wonder if this whole scenario of 10 members of CCAT team going to execute an arrest warrant for a failure to appear on a DUI charge against someone without a felony conviction and without a violent conviction was actually a pretext to look for drugs or guns. However, the defense did not argue a pretext or material omission from the supporting affidavit at the trial level and the defendant therefore does not make such an argument on appeal.

hearing simply by the information that the officer did not include in his supporting affidavit. That affidavit failed to claim that the weapons previously found were themselves illegal or that they had been illegally possessed by the defendant. In addition, the only evidence of potential evidence that the police were about to claim regarding a propensity for violence on the defendant's behalf were "rumors" that he was a collector of drug debts by some unnamed police informants. Thus, nothing in the record or the knowledge of the police supported a belief that the defendant was violent or that he had any type of propensity to use a firearm against a police officer.

In fact, a careful review of the evidence in this case reveals that the claim by the state that the police had "been compromised" by the fact that the defendant's friend had walked out into the driveway was a recent invention by the state that arose out of necessity when the defense produced the surveillance tape that showed that Officer Acee had lied when he wrote in his report that they had waited for 25 to 30 seconds after knocking and announcing before they entered. In fact, in the state's written reply to the defendant's motion to suppress, the state did not even make a claim that the police had "been compromised" in a manner that allowed them to ignore the knock and announce rule.

In addition, the trial court's conclusion that since the police had "been

compromised” they didn’t have to obey the statutory and constitutional mandate of knock and announce ignores the fact that the whole purpose of knock and announce is to “compromise” the police by letting those persons in the house to be searched know that the police are at the doorstep and that they are demanding entry under the authority of a judicially authorized warrant. Indeed, the court’s finding that the police had been “compromised” and that this fact justified ignoring the knock and announce requirements was simply a convoluted way of saying that the knock and announce rule is itself wrong because its very purpose is to “compromise” the police.

Finally, the court’s belief that the police had even been compromised is unsupported by the record. Even at twice the volume as shown on the enhanced computer file with the background noise mostly cancelled and that audio taken from an outside microphone, the voices of the police were not loud when they told the defendant’s friend to lay down. This person certainly did not try to speak or alert anyone in the house and the police did not claim they could not see anyone in the house when they approached. Thus, they were not “compromised.” Consequently, the trial court erred when it found that the police were justified when they failed to follow knock and announce in this case.

III. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED WHEN THEY EXCEEDED THE SCOPE OF A SEARCH WARRANT IN VIOLATION OF THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment search warrants may only be issued upon a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582, 585 (1999); *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). In order for the judge, rather than the requesting officer, to make that determination, the affidavit must state the underlying facts and circumstances so that the judge can make a “detached and independent evaluation of the evidence.” *Id.* “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.” *Id.*

In the case at bar, Detective Acee's affidavit establishes probable cause to look for one item and one item only: the defendant's person. Thus, even as Detective Acee admitted in his testimony, once the police found the defendant, the justification the warrant gave to search the defendant's house ended. As a result, as was set out in portion of Argument 1, the only

reasonable, rational finding of fact that could be entered in this case on the issue of the defendant's location at the time the door was opened was that he was in the entryway. This being the case, there was no justification for the officer to enter the defendant's bedroom. Thus, that entry exceeded the scope of the warrant and any evidence the police obtained when they entered the bedroom (their view of the pipe and baggies) should have been suppressed. Since this evidence constituted the sole basis for the issuance of the second warrant, the evidence seized from this warrant should have been suppressed.

IV. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF CONVICTION AGAINST HIM FOR POSSESSION OF METHAMPHETAMINE BECAUSE THAT CHARGE WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the evidence seen in the light most favorable to the

state indicates that (1) when Detective Acee entered the master bedroom in the house, he saw what he believed to be a methamphetamine pipe with residue in it sitting on a candle on the shelf along with some baggies with residue, (2) that the defendant admitted bringing the pipe into the house, (3) that Detective Acee did not seize the pipe or the baggies, (4) that at some point that day someone gave a pipe to Officer Matua, (5) that at trial Officer Matua identified Exhibit No. 9 as a pipe someone gave to him, and (6) that Exhibit No. 9 contained methamphetamine residue in it.

The problem with this evidence is twofold. First, the only pipe the defendant admitted possessing was the pipe Officer Acee saw in the bedroom. However, Officer Acee did not seize this item. In fact, the state did not present any evidence that any officer seized this item. Second, there is no evidence in the record as to who seized Exhibit No. 9 and as to where it was found. At trial, the state never did have Officer Acee even look at Exhibit No. 9 to identify it as the pipe he saw. Neither did the state call the person who found the pipe to identify it. This evidence does not prove beyond a reasonable doubt that Exhibit No. 9 was the pipe Officer Acee saw and the defendant admitted possessing. Thus, the trial court erred when it entered judgement of conviction in this case because the state failed to present substantial evidence to prove beyond a reasonable doubt that the defendant possessed Exhibit No. 9.

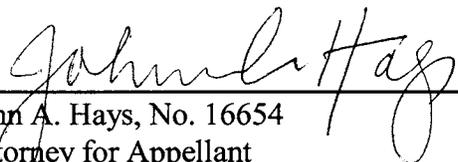
One might well speculate that someone went into the master bedroom, seized the pipe that Detective Acee saw, and then gave it to Officer Matua. However, any such conclusions would be just that: speculation. There is no evidence in the record to support that conclusion. As the court notes in *State v. Moore, supra*, mere possibility, suspicion, speculation, and conjecture are not substantial evidence and they do not meet the due process requirements of proof beyond a reasonable doubt under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant's conviction and remand with instructions to dismiss with prejudice.

CONCLUSION

The trial court erred when it entered judgement of conviction against the defendant on an offense unsupported by substantial evidence. As a result, this court should vacate the defendant's judgment and sentence and remand with instructions to dismiss with prejudice. In the alternative, this court should vacate the judgment and sentence and remand with instructions to grant the defendant's motion to suppress evidence the police when they executed a search warrant in violation and the knock and announce rule and when they exceeded the scope of that warrant.

DATED this 2nd day of October, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 10.31.040

To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY Ch
DEPUTY

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

STATE OF WASHINGTON,
Respondent,

CLARK CO. NO: 07-1-00903-5
APPEAL NO: 37623-7-II

vs.

AFFIDAVIT OF MAILING

BOOKER, Jack Douglas
Appellant

STATE OF WASHINGTON }
COUNTY OF CLARK } vs.

CATHY RUSSELL, being duly sworn on oath, states that on the 2nd day of OCTOBER, 2008, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

JACK DOUGLAS BOOKER
5810 N.E. 94TH AVE.
VANCOUVER, WA. 98662

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 2nd day of OCTOBER, 2008.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 2nd day of OCTOBER, 2008.



Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-2009