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ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Rathbun's motion to suppress.
2. The trial court violated Mr. Rathbun's right to privacy under Wash. Const. Article I, Section 7 by admitting evidence seized under authority of a warrant issued without probable cause.
3. The trial court violated Mr. Rathbun's Fourth Amendment right to be free from unreasonable searches and seizures by admitting evidence discovered pursuant to a warrant issued without probable cause.
4. The search warrant affidavit relied on conclusory predictions and blanket inferences, and thus did not establish probable cause to believe evidence of a crime would be found within Mr. Rathbun's home.
5. The trial court erred by adopting Conclusion of Law No. 7.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A search warrant cannot be based on generalizations, because conclusory predictions and blanket inferences do not provide the individualized suspicion required to establish probable cause. Here, the affiant requested permission to search Mr. Rathbun's house because "subjects who possess firearms commonly keep them inside their residences." Was the search warrant invalid because it was issued based on generalizations rather than individualized suspicion?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

While investigating the theft of some custom-made cabinets, Detective Peterson went to Robert Rathbun's home to see if he had noticed any suspicious activity at his neighbor's home. RP (7/15/08) 7-10. As he walked past the open carport, he noticed a cabinet matching those that had been stolen. RP (7/15/08) 10. He also saw an open dresser drawer containing guns, a shotgun, and shells. RP (7/15/08) 11.

The detective knocked on the door, and received no response. Some time later, a car pulled up and the detective spoke with Mr. Rathbun. RP (7/15/08) 14. Mr. Rathbun consented to a search of his home for more cabinets, and none were found. RP (7/15/08) 14-15.

Detective Peterson arrested Mr. Rathbun, a convicted felon who is ineligible to possess firearms. Peterson then requested and obtained a search warrant for Mr. Rathbun's home. Motion, Declaration and Memorandum to Suppress Evidence with Attachments, Supp. CP. In his affidavit, he asserted as follows:

I believe that other evidence of Felon in Possession of a Firearm charges will be located inside the residence as well as in the carport or other areas of the property. I know that subjects who possess firearms commonly keep them inside their residences. They will also keep ammunition for the weapons inside their residences and/or firearm parts, cleaning kits and other items related to firearms.

Motion, Declaration and Memorandum to Suppress Evidence with Attachments (14th page), Supp. CP.

The house was searched, but officers found no additional evidence relating to weapons. RP (10/15/08) 21-83. The police did find evidence of methamphetamine use, including two baggies of methamphetamine, a loaded needle, and other paraphernalia. RP (10/15/08) 21-24, 50-59. They asked for and obtained a second warrant to search for drugs. RP (7/15/08) 27.

The state charged Mr. Rathbun with Possession of Methamphetamine. CP 1. His attorney moved to suppress the evidence, and the court held a suppression hearing. Motion, Declaration and Memorandum to Suppress Evidence with Attachments, State's Memorandum in Response, Supp. CP. The court denied the motion and entered Findings of Facts and Conclusions of Law. CP 3-8.

At trial, the jury convicted Mr. Rathbun as charged. CP 9. He was sentenced within his agreed standard range, and this timely appeal followed. CP 9-16, 17-18.

ARGUMENT

THE SEARCH WARRANT AFFIDAVIT DID NOT ESTABLISH PROBABLE CAUSE TO SEARCH MR. RATHBUN'S RESIDENCE.

The Fourth Amendment provides “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable 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 or things to be seized.” U.S. Const. Amend. IV. The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961). Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.

Under both the federal and state constitutions, search warrants must be based on probable cause. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). Appellate courts review the issue of probable cause *de novo*. See *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996). Where a search warrant is issued without probable cause, evidence from that search warrant must be suppressed. *State v. Sanchez*, 74 Wn.App. 763, 875 P.2d 712 (1994). Furthermore,

subsequent searches and other evidence tainted by the initial unlawfulness must also be suppressed as “fruit of the poisonous tree.” *State v. Schlieker*, 115 Wn.App. 264, 272, 62 P.3d 520 (2003).

An affidavit in support of a search warrant “must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The facts outlined in the affidavit must establish a reasonable inference that evidence of a crime will be found at the place to be searched; that is, there must be a nexus between the item to be seized and the place to be searched. *Young*, at 195; *Thein*, at 140.

Generalizations cannot provide the individualized suspicion required under the Fourth Amendment and Article I, Section 7 of the Washington Constitution. *Thein*. Instead of conclusory predictions and blanket inferences, the police must submit specific facts to establish probable cause. *Thein, supra*. In *Thein*, an officer sought and obtained a warrant to search the defendant’s home. In his affidavit, he provided evidence that the defendant was a drug dealer, and then relied on conclusory predictions and blanket inferences to suggest that this established probable cause to search the defendant’s home. The primary affidavit in *Thein* included the following language:

Based on my experience and training, as well as the corporate knowledge and experience of other fellow law enforcement officers, I am aware that it is generally a common practice for drug traffickers to store at least a portion of their drug inventory and drug related paraphernalia in their common residences. It is generally a common practice for drug traffickers to maintain in their residences records relating to drug trafficking activities, including records maintained on personal computers.... Telephone/address listings of clients must be maintained and immediately available in order to efficiently conduct their drug trafficking business. Moreover, it is generally a common practice for traffickers to conceal at their residences large sums of money, either the proceeds of drug sales or to utilized [sic] to purchase controlled substances. In this vein, drug traffickers typically make use of currency, wire transfers, cashiers checks and money orders to pay for controlled substances. Evidence of such financial transactions and records related to incoming expenditures of money and wealth in connection with drug trafficking would also typically be maintained in residences.

I know from previous training and experiences that it is common practice for drug traffickers to maintain firearms, other weapons and ammunition in their residences for the purpose of protecting their drug inventory and drug proceeds[.]...Firearms and ammunition have been recovered in the majority of residence searches in the drug investigations in which I have been involved.

Thein, at 138-139. The Supreme Court rejected the idea that such generalized language could provide probable cause: “[O]ur precedent requires probable cause be based on more than conclusory predictions. Blanket inferences of this kind substitute generalities for the required showing of reasonably specific ‘underlying circumstances’ that establish evidence of illegal activity will likely be found in the place to be searched in any particular case.” *State v. Thein*, at 147-148; *see also State v. Nordlund*, 113 Wn.App. 171, 182-184, 53 P.3d 520 (2002) (“Nor is the

[warrant] salvageable by the affidavit's generalized statements about the habits of sex offenders... These general statements, alone, are insufficient to establish probable cause.")

In this case, the officer's belief that evidence of a crime would be found inside the residence rested on two generalizations:

I know that subjects who possess firearms commonly keep them inside their residences. They will also keep ammunition for the weapons inside their residences and/or firearm parts, cleaning kits and other items related to firearms.
Motion, Declaration and Memorandum to Suppress Evidence with Attachments (14th page), Supp. CP.

These are the kind of conclusory predictions and blanket inferences condemned by the Supreme Court in *Thein*. Without them, the affidavit does not provide any basis to search the residence.

Because the officer lacked probable cause to believe evidence of a crime would be found inside the residence, the initial search warrant was invalid. Evidence seized under the initial warrant must be suppressed. *Thein, supra*. Since the second warrant was issued based on evidence discovered during execution of the first, any evidence seized under the second warrant must also be suppressed as fruits of the poisonous tree. *Schlieker*. Mr. Rathbun's conviction must be reversed, and the case dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Mr. Rathbun's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on May 18, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Robert Rathbun, DOC #981871
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway, #102
Montesano, WA 98563

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 18, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 18, 2009.



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