NO. 38773-5-II

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

STATE OF WASHINGTON, Respondent

v.

DONNA AMANDA BROEKE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN P. WULLE
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-00419-8

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

On February 28, 2008 a Clark County District Court judge issued a Search Warrant based upon the affidavit of Officer Spencer Harris. The Warrant authorized a search of a residence at 112 S. 32nd Place in the City of Ridgefield, Clark County, for methamphetamine and evidence of the crime of Possession of Methamphetamine with Intent to Deliver. (RP 241). The Warrant also authorized the search of the person of Gabriel Corona, a blue Chrysler Sebring, and a silver Ford Expedition. (RP 242). Copies of the Search Warrant, Affidavit, and Search Warrant Return were filed with the Court as attachments to the Defendant's Motion to Suppress. (CP 20). Copies are attached hereto and by this reference incorporated herein.

On March 6, 2008, at approximately 2:10 p.m. Officer Harris began surveilling the residence at 112 S 32nd Place in preparation for serving the warrant. The officers were also aware that there were outstanding Clark County Superior Court bench warrants for Corona's arrest. (RP 244). Based upon information from an informant that Corona had access to firearms in the residence, and the presence of children in the

residence, the officers hoped to locate and arrest Corona away from the residence.

At 2:41 p.m. Corona and two males came out of the residence through the garage. They walked about the garage and driveway, and looked inside the rear and side of the Ford Expedition. At 2:50 p.m. the two Hispanic males got into a Nissan and departed.

Approximately four minutes after the Nissan had departed the residence, Officer Harris saw Corona and Defendant Donna Broeke walking in and out of the garage. He saw that Defendant had a purse over her shoulder. After a few minutes, Defendant went into the house. Corona left the garage and closed the garage door. Defendant came out of the front door of the house. Both got into the silver Ford Expedition, Defendant in the driver's seat and Corona in the front passenger seat. They then drove away. (RP 252). Officer Harris followed in an undercover vehicle until Officer Free, in a marked patrol vehicle, was able to catch up to the Ford Expedition, and signal it to stop.

Officer Free approached the passenger side of the Ford, where Corona was seated. He attempted to open the door, which was locked. He asked Corona to unlock the door, and Corona complied. Officer Free opened the door and asked Corona to step from the vehicle, advising him

that there was a warrant for his arrest. (RP 359-360). He took Corona into custody, handcuffed him and began to search his person incident to arrest. Corona yelled to Defendant "shut the doors and lock them. They can't search you or the vehicle." (RP 360-361). Officer Free told Corona that the police had a search warrant for the vehicle and his residence and that they would be searching the vehicle. (RP 362). Officer Harris arrived and approached. Officer Free placed Corona in the back of the patrol car, and then advised Defendant to step out of the vehicle because the police were going to search it based on the warrant. Broeke chose to remain at the scene while the vehicle was being searched. Officer Free asked her to stand away from the vehicle. She stood in the street, up on a slight hill, so she would not be in danger from passing vehicles. (RP 362-363).

Officer Harris walked up to Defendant, and explained that the police had a search warrant for the vehicle, and for her residence. Officer Harris read Miranda rights to the Defendant from a Miranda rights card. Defendant acknowledged that she understood her rights and was willing to speak to the officer. Officer Harris told Defendant she was not under arrest. At no time did Officer Harris indicate to Defendant that she was not free to leave, or restrain her in any way. He advised Defendant that if she was going to wait at the scene of the stop she needed to be away from

the police cars and the Ford Expedition. Defendant was highly concerned about her sister and child at the house, and their reaction to the police presence at the house. She indicated that she wanted to be at the house when the search warrant was served. Officer Harris asked Defendant if there was any methamphetamine at the house. She said "No." He asked her if there was any methamphetamine inside the Ford Expedition and she again said "No." When he asked who the Expedition belonged to, she said it was Corona's. Defendant was insistent that she be taken back to the house for service of the search warrant. (RP 416-417; 421). Officer Harris allowed Defendant to converse with Corona a few times while the search of the vehicle was being conducted. (RP 419).

After the officers completed a search of the Ford Expedition, Officer Harris told Defendant that he was going to drive the Ford Expedition back to the house, and that she could get a ride with Officer Free if she wished. Officer Free asked Defendant if she wanted to walk somewhere, or if she wanted a ride back to her residence. Defendant told him she wanted a ride. She got into the back of the patrol car, and placed her seatbelt on, and was driven back to the residence. (RP 364-365).

Other officers had begun searching the residence pursuant to the warrant. When Officer Harris and Officer Free arrived at the residence with Defendant and Corona, Officer Harris learned that the officers had

located a shotgun at the residence as Corona had indicated, that the shotgun had been previously reported stolen, and also that a glass pipe containing a crystalline residue had been located in the southeast bedroom of the residence which appeared to be the bedroom occupied by Corona and Defendant.

Officer Harris asked Defendant if she smoked methamphetamine. Defendant replied "Yes." Officer Harris asked Defendant and Corona if the methamphetamine pipe in their bedroom was for their recreational use of methamphetamine, and they both stated "yes". (RP 422).

Based upon the items found in the house and Defendant's statements, Officer Harris asked Officer Free to place Defendant under arrest for Possession of Methamphetamine. Apparently upon hearing this Corona immediately stated that he wanted to talk. Officer Harris asked Corona if he had given the methamphetamine to Defendant. Corona said "yes", and also said that Defendant still had the methamphetamine with her, and said "I made her do it, I made her hide it." Corona told Officer Harris he had given an ounce of methamphetamine to Defendant and told her to hide it as they were getting pulled over by the police, and that at that time he was trying to delete all of the contacts in his cellular phone so the police could not retrieve them.

Officer Harris then went to Defendant, who was outside the residence, and asked her if she had any drugs on her person. She told him she did not, and claimed she did not know what he was talking about. (RP 426). Officer Harris told her what Corona had told him. Defendant again denied knowing what Officer Harris was talking about. Officer Harris then walked with Defendant into the residence where Corona was. Corona told Defendant to give the methamphetamine to the police. Defendant told them it was in her bra. At that point the handcuffs were removed from Defendant and she reached into the front of her clothing and removed a small amount of methamphetamine in a plastic wrapper. Knowing that Corona had told him that Corona had given Defendant an ounce of methamphetamine, Officer Harris told her he did not believe that what she had produced was all of the methamphetamine. Defendant then looked at Corona, who told her to give the methamphetamine to the officers. Defendant turned away, toward the wall, spread her feet apart, put her hand down into the front of her pants, and removed a plastic baggie containing approximately an ounce of a white crystalline substance. (RP 427-430). The substance was field tested with positive results for methamphetamine. A Crime Laboratory report later confirmed that the plastic bag contained 25.2 grams of methamphetamine.

During the search of the residence pursuant to the warrant, in addition to the pipe with methamphetamine residue and the shotgun, officers found scales, plastic baggies, and two additional methamphetamine pipes in the garage, ammunition for the shotgun and for other types of firearms, and documents in the bedroom of the residence identifying both Defendant and Corona as residing there.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error is a claim by the defendant that she was illegally seized because the police would not return her purse to her. As indicated in the preceding section, the purse was located in the vehicle that the police had a warrant to search.

It has been repeatedly held by Washington appellate courts that a magistrate's determination that a search warrant should issue is an exercise of judicial discretion that is reviewed for an abuse of discretion. The magistrate's determination is to be given "great deference", and all doubts as to the existence of probable cause are to be resolved in favor of validity of the warrant. State v. Yokley (In re Yim), 139 Wn.2d 581, 989 P.2d 512 (1999); State v. Fisher, 96 Wn.2d 962, 639 Wn.2d 743 (1982). A court only "abuses its discretion when its exercise of discretion is

manifestly unreasonable or based upon untenable grounds or reasons." Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 684 P.2d 692 (1984). Moreover, a party challenging the validity of a search warrant has the burden of proving that the warrant is invalid. State v. Fisher, supra.

The argument with regard to search of the vehicle, in any event seems to miss the point, inasmuch as no evidence is offered which was found in the vehicle search. Defendant's argument seems to be that the police detention of the vehicle to search it was illegal, and somehow tainted the later discovery of drugs in possession of Defendant and at Defendant's residence. The fact is that although the officers seized the vehicle, Defendant was NOT detained, and in fact was told she was NOT under arrest, and could leave, or in the alternative could ride back to the residence with officers, which Defendant voluntarily chose to do. Seizure of the vehicle, with or without Defendant's purse in it, is not a detention of Defendant and no authority has been cited for this proposition.

Furthermore, even if Defendant's purse were in the vehicle, there is no indication that the purse was searched, no evidence was located in or seized from the purse, and it would appear that Defendant is not claiming otherwise. The removal of the drugs by Defendant was not directed or compelled by the officers present, since there is no indication that the officers knew the Defendant had secreted the drugs in a body cavity. It

appears that the motivation for Defendant's action apparently was the urging of her boyfriend, Corona, telling her to give the drugs he had given her to the police. It was Defendant herself, at his urging, who chose to produce the drugs in the manner she did.

In the search warrant issued in this case, the vehicle that was stopped is specifically mentioned. Further, the officers indicate in the affidavit for the search warrant that that particular vehicle, purchased fairly recently by one of the participants, had been used approximately twenty times for the purpose of transporting and selling of narcotics. Based on that information, the magistrate issued a search warrant to search the vehicle and because of the nature of the substances, its contents as well. The purse was contained within the vehicle and the officers rightfully retained possession of that for purposes of search. There is absolutely nothing in this case indicate that any contraband was found in that purse nor is there any indication but that the defendant willingly returned to the residence with the officers and that the officers complied with her requests at all times. It is only after the finding of the methamphetamine and the admission by the defendant that she was placed under arrest. Prior to that time she was not in custody.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that there should have been a hearing concerning the confidential informant and her rights were denied by failing to name the informant or compelling production of the informant witness.

The "informer's privilege" or the privilege of the State to withhold from disclosure the identity of persons who furnish information of violations to law enforcement officers has long been recognized, and is codified in Washington by statute, RCW 5.60.060(5) and by court rule. CrR 4.7(f)(2). As Defendant notes, the privilege is not absolute. A defendant's need to know the identity of an informant may overcome the privilege and require disclosure of the informant's identity in some cases where the informant's identity or the contents of his communication is shown to be relevant and helpful to the defense of an accused or is essential to a fair determination of a cause. This occurs primarily in cases where the informant is a *material witness on the question of a defendant's guilt or innocence.* Roviaro v. U.S., 353 U.S. 53; 77 S. Ct. 623; 1 L. Ed. 2d 639 (1957); State v. Casal, 103 Wn.2d 812; 699 P.2d 1234 (1985); State v. Petrina, 73 Wn. App. 779, 871 P.2d 637 (1994). A defendant's constitutional right to compel attendance of witnesses who could materially aid his defense is implicated when the informant is a material

witness to the crime. Whether constitutional concepts of fairness require the State to identify a confidential informant depends on the facts of each case. The trial court may order disclosure if, after considering the crime charged, the possible defenses, the possible significance of the informant's testimony, and any other relevant factors, the trial court determines that disclosure of the informant's identity is relevant and helpful to the defense or is essential to a fair determination of the defendant's guilt, the court must order disclosure. The defendant has the burden to overcome the privilege by showing that disclosure of the informant is necessary under these standards. State v. Petrina, supra; Roviaro v. U.S., supra. In Roviaro, Petrina and most of the cases in which disclosure of the informant's identity has been ordered, the informant is a "transactional witness", i.e., an eyewitness to or involved in the crimes with which the defendant was charged.

Defendant's first argument for disclosure of the informant's identity in this case is that the informant may information relevant and helpful to the defense which would require disclosure under the standards of Roviaro and Petrina. However, the Defendant makes no independent showing of what the informant's specific testimony might be, or how it would aid the defense. Defendant does not make any showing of what her defense might be, or what the informant's testimony would be or how it

would aid her defense. Defendant's only argument and only "showing" is that because the affidavit of Officer Harris does not contain any statements by the informant referring to Defendant, the informant might say something favorable to the defense.

There are two primary problems with this argument in Defendant's case. First, the informant was not a witness to any of the crimes with which the Defendant is charged, since the crimes she is charged with are based on evidence seized by the police in the execution of the search warrant and the contemporaneous arrest of Defendant. There is no showing that the informant might in any way have any information or potential testimony that would somehow dispute that the Defendant pulled an ounce of methamphetamine out of the front of her pants, or a baggie of methamphetamine out of her bra in the presence of the police. There is no showing that the informant might have evidence favorable to the defendant relating to her possession of the pipe containing methamphetamine in her bedroom several days after the filing of the affidavit containing the informant's statements. There is no showing by Defendant that any witness exists who could have relevant and material evidence to her defense.

Secondly, where the Defendant has made uncontested admissions to the crimes with which she is charged, disclosure of the identity of an

informant who was not a witness to the crimes cannot be said to be relevant and necessary to the defense. State v. Lusby, 105 Wn. App. 257, 18 P.3d 625 (2001). In Lusby, the defendant was charged with possession of methamphetamine and possession of marijuana with intent to deliver, based on evidence and drugs seized in her residence during execution of a search warrant. After waiving her right to remain silent she admitted to the police that she sold drugs from the residence, supplied details of the operation, and voluntarily turned over drugs, paraphernalia and proceeds of recent drug sales. She filed a motion to compel the identity of the informant whose information was the basis for the search warrant, on the theory that the informant's possible testimony about *prior* contacts with the defendant might be relevant to her defense. The court held that where she had admitted the crimes she was charged with, and the informant was not a witness to those crimes, there was no basis for disclosure.

This appears to fit our situation quite well. Our defendant voluntarily turned over the contraband after discussion with her boyfriend, the co-conspirator. These admissions to her crimes have absolutely nothing to do with an informant or a establishing the nature of some type of defense. This is consistent with the findings of fact that were entered by the trial court. (Findings of Fact and Conclusions of Law on CrR

3.5/3.6 Hearing and Motion to Disclose Informant, CP 156). The informant in our case was not a witness to any of the activities nor was any of the information that he supplied pertinent to the question of her secreting drugs on her person. There simply is no correlation between the confidential informant's information and the nature of the charges and evidence and proof against this defendant.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error is a claim that a provision of the crime related prohibitions on community custody should be stricken as unconstitutionally vague and further that she can challenge them at this time.

The issue raised on appeal deals with a provision of the Judgment and Sentence based on a plea to Delivery of Controlled Substance – Cocaine and imposing community custody conditions which include 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.
>
> - (Portion of Judgment and Sentence – CP 18)

Generally, as part of any sentence, the sentencing judge may impose and enforce crime-related prohibitions and affirmative conditions. RCW 9.94A.505(8). A crime-related prohibition is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted … ." RCW 9.94A.030(13); State v. Cayenne, 165 Wn.2d 10, 14, 195 P.3d 521 (2008). The Court reviews the imposition of community custody conditions for abuse of discretion and will reverse only if the trial court's decision is manifestly unreasonable or based on untenable grounds. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). The defendant maintains that this particular provision of the defendant's sentence is "hopelessly vague". (Brief of Appellant, page 28). Further, she maintains that this matter should be heard at this time and is ripe for decision.

A statute or condition is void of vagueness if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prescribed. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The Appellate Court presumes that statutes are constitutional and the defendant has a heavy burden of proving that a statute is unconstitutional beyond a reasonable doubt. State v. Smith, 111 Wn.2d 1, 5, 759 P.2d 372 (1988). The fact that some terms in a statute are not defined does not necessarily mean the statute or condition

is void for vagueness. Douglass, 115 Wn.2d at 180. Impossible standards of specificity are not required, and a stature "is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." City of Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988).

The State submits that this identical argument was raised and rejected in State v. Motter, 139 Wn. App. 797, 162 P.3d 1190 (2007). In the Motter case, the defendant challenged the identical provision of his judgment and sentenced. He attacked it for vagueness and for the reasons also raised in this appeal. Division II, in the Motter case, indicated as follows:

> B. Prohibition on Paraphernalia Possession and Use
>
> Second, Motter challenges the trial court's order that he: 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 and data storage devices. CP at 149. This condition does not order affirmative conduct. And, as demonstrated above, Motter's crime was related to his substance abuse. Thus, forbidding Motter from possessing or using controlled substance paraphernalia is a "crime-related prohibition" authorized under RCW 9.94A.700(5)(e). Thus, this condition is valid.
>
> Motter argues that "almost any item can be used for the ingestion of controlled substances, such as knives, soda cans, or other kitchen utensils." Br. of Appellant at 29. A

> community custody condition may be void for vagueness if it fails to define specifically the activity that it prohibits. State v. Riles, 86 Wn. App. 10, 17-18, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998). But Motter fails to cite to authority and his argument consists of one unhelpful sentence in the context of a complex constitutional legal doctrine.
>
> Moreover, Motter's challenge is not ripe. In State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in State v. Langland, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law's constitutionality is not ripe for review unless the challenger was harmed by the law's alleged error. Here, Motter claims that the court order could prohibit his possession of innocuous items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from "pop" cans to coffee filters. Thus, we can review Motter's challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.
>
> - Motter, 139 Wn. App at 804.

In State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008), the Supreme Court held that a pre-enforcement challenge to a community custody condition prohibiting the possession of pornographic material was ripe for review. The Supreme Court found that the pre-enforcement challenge was ripe because a prohibition of possessing pornography

implicates First Amendment rights and thus, dealt with a purely legal issue that courts could solve on the present record without the need for additional facts to aid in the court's inquiry. Bahl, 164 Wn.2d at 752-753.

Bahl further suggested that the following test for appellate courts should be used in determining whether a community custody condition challenge is sufficiently ripe for review: 1. The issues raised are primarily legal, 2. Determination of these issues requires no further factual inquiry; and 3. The challenged action is final.

Applying this test to our situation, the State submits that the defendant's challenge is not ripe for review. In Bahl, the prohibition dealt with possession of pornographic materials which implicated First Amendment rights. But here, the defendant bases her vagueness challenge on a due process argument, which does not implicate the First Amendment. When a vagueness challenge does not involve a First Amendment right, the court evaluates it in light of the facts of particular case. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). An inquiry into whether the community custody paraphernalia condition is unconstitutionally vague, as applied to this defendant, is premature unless or until she can show that the conditions actually caused her harm. Because she has not yet been released form confinement and

placed on community custody, she cannot show that this condition causes her harm.

Further, if a case can be decided on nonconstitutional grounds, the court should decline to consider the constitutional issues. State v. Hirschfelder, 148 Wn. App. 328, 199 P.3d 1017, 1028 (2009). The State submits that the community custody paraphernalia condition of the sentence is not unconstitutionally vague. The issue is not ripe for review. State v. Valencia, 148 Wn. App. 302, 198 P.3d 1065 (2009).

There is a vast difference between a community custody condition, as in Bahl which barred possession of pornography and a community custody condition at issue here which prohibited possession of drug paraphernalia. The defendant cannot assert any specific facts inviting review of whether the facts dealing with possession of drug paraphernalia meet a statutory definition of drug paraphernalia under RCW 69.50.120(a) nor can she argue that she has a specific factual context in which this challenge can be reviewed. As the court in Bahl noted, "ripeness is an appropriate doctrine to apply when deciding whether a pre-enforcement vagueness is premature and applying the ripeness doctrine can help identify the cases where a more developed factual record is necessary before a decision on the constitutionality of the sentencing conditions can be made." Bahl, 164 Wn.2d at 749.

This is apparent when we review the community custody prohibition of possessing drug paraphernalia which requires proof the defendant's intent to use ordinary household objects to ingest or to facilitate the sale or transfer of illegal drugs. Any analysis of this intent is going to require additional factual determination which, obviously, cannot be made while the defendant is still incarcerated. Community custody conditions will not begin to operate until the defendant is out of custody, operating in the real word, and, at that point, this issue may become germane if the community corrections officers decide to impose the conditions. It would only be at that stage where the defendant can suffer any type of significant hardship. If the defendant can show actual harm once she is released on community custody, she would likely have standing to a personal restraint petition raising this issue at that time. RAP 16.4; In re Personal Restraint of Shepard, 127 Wn.2d 195, 191, 898 P.2d 828 (1995).

As indicated by Division II in State v. Valencia, 148 Wn. App. 302, 198 P.3d 1065 (2009):

> Second, Sanchez and Sanchez Valencia's community custody conditions prohibit them from processing drug paraphernalia. And, unlike pornography, a court's determination of whether Sanchez or Sanchez Valencia have been provided sufficient warning of what items they are prohibited from possessing necessarily rests on a factual record demonstrating the manner in which they used or

possessed the item alleged to violate the prohibition. For example, a soda pop can used for its intended purpose is not drug paraphernalia. But when the same soda pop can is modified for use as a pipe to ingest illegal drugs, it becomes drug paraphernalia. Thus, whether Sanchez and Sanchez Valencia's community custody condition prohibits them from possessing an item such as a can of soda pop depends on how they modify it for a different use or intend to use the item. And a reviewing court cannot make that determination without context. Because a more developed factual record is necessary to resolve Sanchez and Sanchez Valencia's vagueness challenge, they fail to satisfy the second prong of the *Bahl* issue maturity test.

Finally, because an innocent object does not transform itself into drug paraphernalia absent a person's intention to use it to ingest illegal drugs, withholding review of the constitutionality of the conditions at issue does not cause Sanchez and Sanchez Valencia significant hardship. In contrast, requiring that the trial court anticipate all future unlawful modifications or potential illegal uses of otherwise innocuous items before lawfully conditioning a convicted drug offender's release on avoiding such unlawful conduct poses a significant and likely insurmountable hardship. We agree, as the dissent suggests, that citation to statutes and infractions defining "drug paraphernalia" like RCW 69.50.102 and RCW 69.50.4121(1)(a)-(m) can assist in defining the phrase. We note, however, that, because these statutory lists are not exclusive, Sanchez and Sanchez Valencia's vagueness challenge remains. Their arguments demand an exhaustive and exclusive list of prohibited items the law does not require. Because it is not possible for the sentencing court to anticipate unlawful modifications and uses of otherwise lawful innocuous items, the validity of an alleged violation is necessary fact-based. Sanchez and Sanchez Valencia's challenge is premature and not ripe for review.

Bahl does not disturb the second limitation to vagueness challenges of community custody conditions: that "'[i]mpossible standards of specificity' are not required

> since language always involves some degree of vagueness." 164 Wn.2d at 759 (internal quotation marks omitted) (quoting *State v. Halstein*, 122 Wn.2d 109, 118, 857 P.2d 270 (1993)). And a community custody condition "is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." *City of Seattle v. Eze*, 111 Wn.2d 22, 27, 759 P.2d 366 (1988). While a greater degree of specificity is required when a community custody condition implicates First Amendment rights, such as a prohibition on possessing pornography, there is no corresponding First Amendment right to possess drug paraphernalia. *Bahl*, 164 Wn.2d at 757-58; *see City of Tacoma v. Luvene*, 118 Wn.2d 826, 842-44, 827 P.2d 1374 (1992) (city ordinance prohibiting soliciting, enticing, inducing, or procuring another to exchange, buy, sell, or use drug paraphernalia did not reach into arena of constitutionally protected First Amendment conduct).
>
> In *Motter*, we reasoned that "[i]t is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances." 139 Wn. App. at 804. Following *Motter*, we hold that the trial court is not required to list every drug paraphernalia item Sanchez and Sanchez Valencia are prohibited from possessing. The condition is sufficiently specific to notify Sanchez and Sanchez Valencia that they shall not use or possess drug paraphernalia. The fact that many legitimate items may be used to ingest or sell drugs does not make this condition unconstitutionally vague, because an item is not drug paraphernalia if possessed for its intended, lawful use. This is particularly true when the condition lists several common items that Sanchez and Sanchez Valencia are prohibited from possessing.

- State v. Sanchez and Sanchez Valencia, 148 Wn. App. at 320-322.

The State submits that this matter is not ripe for review. It does not implicate first amendment constitutional rights and as such there is a

strong likelihood that it would require additional facts to determine whether or not there has been a violation of a condition.

V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 19 day of Oct, 2009.

Respectfully submitted:

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ATTACHMENTS

AFFIDAVIT FOR SEARCH WARRANT, SEARCH WARRANT, AND SEARCH WARRANT RETURN

District Court of Clark County
State of Washington

State of Washington
Plaintiff,

VS

Affidavit for Search Warrant

Gabriel Corona
AKA;
Gabriel Gutierrez Corona
Gilberto Guillen
Gabriel Corona Gutierrez
Gilberto Guillen JR
Defendant

FILED
MAR 11 2008
DISTRICT COURT
CLARK COUNTY, WASH

I, Spencer Harris, being first duly sworn upon oath, hereby depose and say that I have good and sufficient reason to believe the following items, to wit:

1. Methamphetamine, a substance controlled by the Uniform Controlled Substance Act and RCW 69.50.401.

2. Evidence of the crime of Possession of a Controlled Substance with the Intent to Deliver (Methamphetamine) RCW 69.50.401. Consisting of, in part but not limited to, containers of various types commonly associated with the storage and distribution of methamphetamine, United States Currency, buyers lists, sellers lists, and records of sales, personal telephone books, address books, telephone bills, papers and documents containing lists of names, pagers, and cellular telephones.

3. Paraphernalia for packaging, weighing, and distributing methamphetamine, including but not limited to baggies, scales, and other items including firearms.

4. Records relating to the transportation, ordering, manufacturing, possession, sale, transfer and/or importation of controlled substances in particular, methamphetamine, contained in a cellular telephone with the number of (360-773-0255) and/or any other phone located on Gabriel Corona's person, including but not limited to numbers called, Caller ID for incoming calls, phone and/or pager numbers, names and addresses, pin numbers, voice mail access numbers, voice mail password, debit card numbers, calling card numbers, service provider information, on screen images which may contain valuable information, audio voice messages, and text messages.

EXHIBIT A

5. United States Currency and financial instruments for the purpose of tracking proceeds and/or profits.

6. Personal property to establish dominion and control of the residence.

7. Personal property to establish and confirm the identity of the defendant.

8. Photographs of the crime scene and recovered evidence.

The above items are on this date February 28, 2008 in the unlawful possession of the above named defendant in the following residence described as a two story wood framed residence with a composite roof. This residence is brown in color with beige and white trim, having a white in color front door which faces west. This residence has a white in color garage door which also faces west with the numbers 112 which are silver in color numbers to the right of the front door, with the specific address of 112 South 32nd Place, City of Ridgefield, Clark County, State of Washington, including the curtilage thereto.

AND

The person of Gabriel Corona, date of birth of June 18, 1968, being a Hispanic male, approximately 5'9" tall, weighing 235 pounds, with black hair and brown eyes.

AND

A blue in color 2004 Chrysler Sebring bearing Oregon plate 452DBF.

AND

A silver in color Ford Expedition.

Also to be searched are all rooms, and all other parts therein, and to search any storage rooms, safes, trash containers, storage containers, and surrounding grounds located on the premises, and all vehicles parked in the driveway, in front of the premises, or nearby or adjacent to the location provided that these vehicles can be connected to the defendant.

Your affiant is informed and aware of this based on the following: Your affiant is an Officer with the City of Vancouver Police Department and has been employed as such for the past seven years. I am currently assigned to the Patrol Division Neighborhood Response Team. During my employment as a police officer, I have had over one hundred hours of training in criminal investigation and other law enforcement topics to include but not limited to controlled substance identification and investigation of delivery of controlled substances. I have attended a 24 hour street crimes class offered by Reid and Associates which including training in controlled substance investigations. I have also had over 720 hours of training as part of the State of Washington Basic Law Enforcement Academy. I have arrested numerous subjects for possession of controlled substances and have seized quantities of cocaine,

heroin, marijuana, and methamphetamine as well as drug paraphernalia. In addition, I have successfully written at least 100 search warrants and been involved in the execution of over 200 search warrants.

In this official capacity, your affiant during the past 72 hours has learned methamphetamine was being possessed, consumed, and distributed from within the aforedescribed residence, located in the City of Ridgefield, Clark County, State of Washington.

This information was provided by a confidential reliable informant (hereafter referred to as a CRI) This CRI is providing this information in exchange for a positive recommendation on a pending criminal matter.

I am aware that this CRI has a criminal history which includes felony possession of stolen property and controlled substance violations.

This CRI has provided information which has lead to the issuance of eight search warrants and the recovery of three stolen vehicles. These search warrants have led to the arrest of at least eleven persons, recovery of cocaine, methamphetamine, firearms, and drug paraphernalia. This CRI has also conducted a controlled buy of methamphetamine. During this controlled buy the CRI was searched and found to be free of any controlled substance and/or money. The CRI was then given a quantity of money provided by the Police to purchase methamphetamine. The CRI was kept under constant surveillance until the CRI arrived at the target location. The CRI went inside the target location and came out a short time later, being kept under constant surveillance. The CRI handed over a quantity of methamphetamine which the CRI identified as methamphetamine and stated he/she had purchased the methamphetamine from inside the target residence. The CRI was searched and found to be free of any controlled substance and/or money. The amount of methamphetamine recovered was consistent with the amount of money given to the CRI prior to the buy. A portion of the substance recovered field tested positive for the presence of methamphetamine with a Narco 923 test kit. This CRI has also positively identified methamphetamine, cocaine, and marijuana to your affiant.

In this official capacity, in the seventy-two hours prior to presentation of this affidavit (February 25, 2008- February 28, 2008), your affiant was contacted by the same CRI who related he/she was familiar with a male known to the CRI as Gabriel Corona who is consuming, possessing, and distributing methamphetamine from within the aforedescribed residence located at 112 South 32nd Place, City of Ridgefield, Clark County, State of Washington.

The CRI directed me to the aforedescribed residence and pointed this residence out as the residence of Gabriel Corona.

The CRI was shown a Clark County booking photo of Gabriel Corona, date of birth of June 18, 1968 and the CRI confirmed this was the person they know as the defendant, Gabriel Corona.

This CRI advised that within the past 72 hours the CRI observed Gabriel possessing methamphetamine from within the aforedescribed residence. This methamphetamine was contained in multiple plastic baggie inside the residence. The CRI stated Gabriel was also in possession of a used glass methamphetamine pipe containing methamphetamine, functional digital scale, and plastic baggies used for distribution. While inside the aforedescribed residence the CRI observed Gabriel distributing methamphetamine in exchange for United States Currency. The CRI stated this methamphetamine was contained in plastic baggies.

The CRI stated he/she has known Gabriel to be living at this residence for at least four months and has known him for almost a year. The CRI described Gabriel as a Hispanic male, being approximately 5'10" tall, weighing 220 pounds, with black hair.

The CRI stated he/she has been inside this residence on at least ten occasions and has observed methamphetamine, scales, baggies, and glass methamphetamine pipes inside this residence on these occasions. The CRI has also observed Gabriel distributing methamphetamine inside this residence on at least ten occasions. The CRI stated this methamphetamine was contained in smaller plastic baggies and that Gabriel also has a digital scale which he uses to weigh the methamphetamine prior to delivering it to persons. The CRI stated Gabriel distributes methamphetamine in exchange for United States Currency. The CRI stated they have personally purchased methamphetamine from Gabriel in excess of twenty times whether at this residence or by Gabriel delivering methamphetamine in his vehicles. The CRI stated Gabriel Corona uses the cellular phone number of 360-773-0255 to conduct methamphetamine distribution and has for at least six months. The CRI stated they have observed Gabriel conduct methamphetamine deals over this phone excess of thirty times. I have checked this phone number and it returns to Gabriel Corona.

The CRI stated they have observed persons smoking methamphetamine with the use of a glass methamphetamine pipe every time he/she has been inside Gabriel Corona's residence. The CRI stated Gabriel has his own glass methamphetamine pipes inside the residence.

I conducted a criminal history check on Gabriel Corona and learned he has multiple aka's with different dates of birth and social security numbers. Gabriel Corona has a felony conviction for Assault III and Violation of the Uniform Controlled Substance Act (VUCSA-manufacturing, deliver, possession with intent). I contacted the Clark/Skamania Drug Task Force and learned in reference to the VUCSA charge Gabriel Corona was found in possession of approximately a pound of methamphetamine.

I conducted a Washington State Department of Licensing check on Gabriel and learned he gave his address as 10301 Northeast 71st Street, City of Vancouver, State of Washington. From the Washington State Department of Licensing Gabriel G. Corona is listed with a date of birth of June 18, 1970. Gabriel is listed as being 5'9"tall, weighing 210 pounds with brown eyes.

It should be noted that Gabriel Corona's date of birth with the Washington State Department of Licensing is June 18, 1970 and his date of birth listed with the Clark County Sheriff's Office is June 18, 1968.

On December 14, 2007 I became aware that Gabriel Corona was contacted by the Ridgefield Police Department. During this contact Corona was stopped by the Ridgefield Police for a traffic infraction while driving a motor vehicle. Gabriel was subsequently arrested for driving a motor vehicle while his license was suspended / revoked in the third degree. During this contact Gabriel gave his residence as 112 South 32nd Place, City of Ridgefield, State of Washington. The vehicle stopped in this case was a silver in color 2001 Ford Expedition without an attached license plate. Corona stated he had recently purchased the Ford Expedition. The passenger of the Expedition was identified as Donna A. Broeke date of birth of November 29, 1981, who also gave the same address as 112 South 32nd Place, Ridgefield Washington. A photo of Gabriel Corona was attached with the case and is the same person shown to the CRI in the Clark County booking photo of Gabriel Corona, with a date of birth listed as June 18, 1968. This case is documented under Ridgefield case #07-604.

I have personally dealt with Gabriel Corona during a search warrant documented under Vancouver Case #07-17676. During this contact Gabriel Corona was contacted at the search warrant residence. During this contact Corona stated a blue in color 2004 Chrysler Sebring bearing Oregon plate 452DBF located on the property was his.

I have personally seen the blue in color Chrysler parked at the aforedescribed residence in Ridgefield in the past and have observed the person of Gabriel Corona in the driveway and garage of this residence.

The CRI has identified the Chrysler to me in the past and stated they have observed Gabriel Corona deliver methamphetamine from this vehicle in excess of twenty times. The CRI stated Gabriel also has a silver in color Denali which they have observed Gabriel deliver methamphetamine from in excess of fifteen times. The CRI has also identified and pointed this vehicle out to me, which I have observed in front of the aforedescribed residence Ridgefield. The CRI stated Gabriel recently purchased a silver in color Ford Expedition, which is consistent with the Ridgefield Police report. The CRI stated they have observed Gabriel distribute methamphetamine from the silver in color Ford Expedition at least twenty times.

I know from my training and experience that people involved in this type of criminal activity will hide illegal controlled substances in various places. I have located controlled substances hidden in bags, pill bottles, eye glass cases, purses, under drawers, on tables, under furniture, in tool boxes and on persons.

I know from several investigations that used glass methamphetamine pipes contain testable amounts of methamphetamine inside. I have field tested the contents of at least fifty methamphetamine pipes containing a white crystal substance and in every instance the contents of these pipes have field tested positive for the presence of methamphetamine. I have further arrested subjects in possession of glass methamphetamine pipes containing a white crystal substance, a portion of which field tested positive for the presence of methamphetamine. These individuals have been charged and either plead guilty or were tried on the charge of possession of methamphetamine and subsequently sentenced on the

charge possession of methamphetamine under RCW 69.50.401.

From my training and experience I am aware that individuals involved in the consumption/ingestion of illegal controlled substances will sometimes photograph themselves and others taking part.

I know from my training, knowledge, and experience that people involved in the illegal distribution of methamphetamine use cellular telephones and pagers as a way to contact one another and to set up drug transactions. These cellular telephones are utilized in the distribution of methamphetamine to contact customers, co-conspirators and suppliers.

I also know that photographing the crime scene as well as the recovered evidence is critical to showing the court the location of an item at the time of recovery.

Based on the foregoing facts, I ask the court for the issuance of a search warrant for the above described place for the items listed.

I swear under the penalty of perjury that the above is true and correct to the best of my knowledge.

Officer Spencer Harris
Vancouver Police Department

SUBSCRIBED AND SWORN TO BEFORE ME ON
2/28/08.

Judge of the District Court
Clark County
State of Washington

District Court of Clark County
State of Washington

State of Washington
Plaintiff,

VS

SEARCH WARRANT

Gabriel Corona
AKA;
Gabriel Gutierrez Corona
Gilberto Guillen
Gabriel Corona Gutierrez
Gilberto Guillen JR
Defendant

FILED
MAR 11 2008
DISTRICT COURT
CLARK COUNTY, WASH

State of Washington,
Clark County,

The people of the State of Washington, to any Sheriff, Police Officer, or Peace Officer in Clark County: Proof by written affidavit, under oath, made in conformity with the State of Washington Criminal Rules for Courts of Limited Jurisdiction, rule 2.3, having been made to me this day by OFC Spencer Harris of the Vancouver Police Dept, that there is probable cause for the issuance of a search warrant on the grounds set forth in the State of Washington Criminal Rules for Courts of Limited Jurisdiction, rule 2.3, Section (c).

You are therefore commanded, with the necessary and proper assistance, to make a diligent search, good cause having been shown therefore, of the following described property, within 10 days of the issuance of this warrant as a two story wood framed residence with a composite roof. This residence is brown in color with beige and white trim, having a white in color front door which faces west. This residence has a white in color garage door which also faces west with the numbers 112 which are silver in color numbers to the right of the front door, with the specific address of 112 South 32nd Place, City of Ridgefield, Clark County, State of Washington, including the curtilage thereto.

AND

The person of Gabriel Corona, date of birth of June 18, 1968, being a Hispanic male, approximately 5'9" tall, weighing 235 pounds, with black hair and brown eyes.

AND

A blue in color 2004 Chrysler Sebring bearing Oregon plate 452DBF.

AND

A silver in color Ford Expedition.

Also to be searched are all rooms, and all other parts therein, and to search any storage rooms, safes, trash containers, storage containers, and surrounding grounds located on the premises, and all vehicles parked in the driveway, in front of the premises, or nearby or adjacent to the location provided that these vehicles can be connected to the defendant.

For the following items to wit:

1. Methamphetamine, a substance controlled by the Uniform Controlled Substance Act and RCW 69.50.401.

2. Evidence of the crime of Possession of a Controlled Substance with the Intent to Deliver (Methamphetamine) RCW 69.50.401. Consisting of, in part but not limited to, containers of various types commonly associated with the storage and distribution of methamphetamine, United States Currency, buyers lists, sellers lists, and records of sales, personal telephone books, address books, telephone bills, papers and documents containing lists of names, pagers, and cellular telephones.

3. Paraphernalia for packaging, weighing, and distributing methamphetamine, including but not limited to baggies, scales, and other items including firearms.

4. Records relating to the transportation, ordering, manufacturing, possession, sale, transfer and/or importation of controlled substances in particular, methamphetamine, contained in a cellular telephone with the number of (360-773-0255) and/or any other phone located on Gabriel Corona's person, including but not limited to numbers called, Caller ID for incoming calls, phone and/or pager numbers, names and addresses, pin numbers, voice mail access numbers, voice mail password, debit card numbers, calling card numbers, service provider information, on screen images which may contain valuable information, audio voice messages, and text messages.

5. United States Currency and financial instruments for the purpose of tracking proceeds and/or profits.

6. Personal property to establish dominion and control of the residence.

7. Personal property to establish and confirm the identity of the defendant.

8. Photographs of the crime scene and recovered evidence.

and if you find same, or any part thereof, then bring same and items of identification to identify the residents and residence ~~thereof before~~ the Honorable District Court Judge [signature] to be ~~disposed of~~ according to law.

This Search Warrant was issued on 3/28/08 at 7:02 PM

by the Honorable Judge [signature].

Date and time of execution: 3-6-08 1500 hrs.

By Spencer Harris.

District Court of Clark County
State of Washington

State of Washington
Plaintiff,

VS

Gabriel Corona
AKA;
Gabriel Gutierrez Corona
Gilberto Guillen
Gabriel Corona Gutierrez
Gilberto Guillen JR
Defendant

FILED
MAR 11 2008
DISTRICT COURT
CLARK COUNTY, WASH

Search Warrant Return

I, Officer Spencer Harris of the Vancouver Police Department, executed a search warrant on March 6, 2008 at approximately 1500hrs, which was issued by District Court Judge Schreiber on February 28, 2008 at 7:02 pm, which directed a two story wood framed residence with a composite roof. This residence is brown in color with beige and white trim, having a white in color front door which faces west. This residence has a white in color garage door which also faces west with the numbers 112 which are silver in color numbers to the right of the front door, with the specific address of 112 South 32nd Place, City of Ridgefield, Clark County, State of Washington, including the curtilage thereto.

AND

The person of Gabriel Corona, date of birth of June 18, 1968, being a Hispanic male, approximately 5'9" tall, weighing 235 pounds, with black hair and brown eyes.

AND

A blue in color 2004 Chrysler Sebring bearing Oregon plate 452DBF.

AND

A silver in color Ford Expedition.

Also to be searched are all rooms, and all other parts therein, and to search any storage rooms, safes, trash containers, storage containers, and surrounding grounds located on the premises, and all vehicles parked in the driveway, in front of the premises, or nearby or adjacent to the location provided that these vehicles can be connected to the defendant.

SEARCH WARRANT
112 S. 32nd Place
Ridgefield, Washington

- **1098-001**: EVIDENCE - SHOTGUN
Officer Notes: Found along the north wall of the garage by OFC Wilken. Being sent to the lab for fingerprinting
Reported stolen from Cowlitz County

- **1098-002**: EVIDENCE - 2 BAGS OF 9MM BULLETS
Officer Notes: Located in a rack of bins in the middle of the garage by OFC Wilken

- **1098-003**: EVIDENCE - 380 BULLETS
Officer Notes: Located in a bin in the middle of the garage by OFC Wilken

- **1098-004**: EVIDENCE - SHOTGUN SHELLS
Officer Notes: Located in a bin in the middle of the garage by OFC Wilken

- **1098-005**: EVIDENCE - SCALE, BAGGIES, AND 2 PIPES
Officer Notes: Located on the back of the truck in the garage and the pipes are from a shelf along the south wall of the garage by OFC Gabriel

- **1098-006**: EVIDENCE - PIPE WITH WHITE SUBSTANCE INSIDE
Officer Notes: Located in the closet of the S/E bedroom by DET Muller field tested pos for meth by R/O

- **1098-007**: EVIDENCE - RESIDENT ID
Officer Notes: In the names of Gabriel Corona and Donna Broeke located in the S/E bedroom by OFC Matua

- **1098-008**: EVIDENCE - STORAGE UNIT RECEIPT
Officer Notes: Located in the S/E bedroom by OFC Matua

- **1098-009**: EVIDENCE - BULLTES AND GUN BOX
Officer Notes: Located in a toolbox along the S/W corner of the garage by OFC Ford

- **1098-010**: EVIDENCE - MISC DOCUMENTS
Officer Notes: Located in the S/E bedroom by OFC Matua. Letter to Gabriel and PPB Police Report

- **1098-011**: EVIDENCE - DISK OF DIGITAL PHOTOS
Officer Notes: Photos of the crime scene ~~and recovered~~ evidence. Photos taken by R/O.

- **1098-012**: EVIDENCE - CELL PHONE
Officer Notes: Loacted on the passenger side front seat ~~of~~ the Expedition by OFC Harris

- **1098-013**: EVIDENCE - TRIP ~~PERMIT~~
Officer Notes: Located on the front passenger side floorboard of the Expedition by OFC Harris

- **1098-014**: EVIDENCE - PLASTIC WRAPPER WITH WHITE ~~CRYSTAL~~
Officer Notes: From the ora worn by Donna ~~recovered~~ by OFC Harris. Field tested pos for meth by R/O

- **1098-015**: EVIDENCE - BAGGIE WITH WHITE CRYSTAL INSIDE
Officer Notes: Donna removed this item from her vaginal area and turned it over to OFC Harris. Field tested pos for meth by R/O. Approximately 1 ounce.

FILED
COURT OF APPEALS
DIVISION II

09 OCT 22 PM 12: 40

STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON, Respondent, v. DONNA AMANDA BROEKE, Appellant.	No. 38773-5-II Clark Co. No. 08-1-00419-8 DECLARATION OF TRANSMISSION BY MAILING

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

On October 20, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Lisa E Tabbut
Appellate Attorney
PO Box 1396
Longview WA 98632

Donna Amanda Broeke
c/o Appellate Attorney

DOCUMENTS: Brief of Respondent

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

Abby Rowland
Date: October 20, 2009.
Place: Vancouver, Washington.