

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38784-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

ROY E. BRANDENBURG, JR.,
Appellant.

APPELLANT'S BRIEF

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A. Assignments of Error

Assignments of Error

1. The trial court erred when it denied the defendant's motion to suppress the evidence pursuant to CrR 3.5 and CrR 3.6.
2. The trial court erred when it entered Finding of Fact I. (See appendix where the Court's Findings of Fact and Conclusions of Law are set forth in full.)
3. The trial court erred when it entered Finding of Fact II.
4. The trial court erred when it entered Finding of Fact III.
5. The trial court erred when it entered Finding of Fact IV.
6. The trial court erred when it entered Finding of Fact V.
7. The trial court erred when it entered Finding of Fact X.
8. The trial court erred when it entered Conclusion of Law II.
9. The trial court erred when it entered Conclusion of Law III.
10. The trial court erred when it entered Conclusion of Law IV.
11. The trial court erred when it entered Conclusion of Law V.
12. The trial court erred when it entered Conclusion of Law VI.
13. The trial court erred when it entered Conclusion of Law VII.
14. The trial court erred when it entered Conclusion of Law VIII.
15. The trial court erred when it entered Conclusion of Law IX.
16. The defendant's Fourth and Fourteenth Amendment rights were

violated when Steve Valley searched his residence without a search warrant and/or without Department of Corrections approval and smelled the odor of marijuana which established probable cause for the issuance of a search warrant.

17. The defendant's Const. Art. 1, sec. 3 rights were violated when Steve Valley searched his residence without a search warrant and/or without Department of Corrections approval and smelled the odor of marijuana which established probable cause for the issuance of a search warrant.

Issues Pertaining to Assignments of Error

1. Whether Department of Corrections officer Steve Valley had a specific and articulable factual basis to believe that Joseph Reichert was not living at the address where he was required to report as his address and was in fact living at 3340 NW Sunde Road in Silverdale, Washington?

(Assignments of Error 1, 2, 9, 12 and 14.)

2. Whether there was substantial evidence to support finding of fact V, "That upon opening the door, Officer Valley could smell the overwhelming odor of fresh marijuana coming from inside the residence"? (Assignment of Error 6).

3. Whether there was substantial evidence- or any evidence- produced at the CrR 3.5/3.6 hearing by the State that Mr. Joseph Reichert admitted that he was residing at an address different than the one he had reported to

DOC and of which information officer Valley was aware on July 22, 2008? (Assignments of Error 4, 5, 9,10,11,12 14 and 15.)

4. Whether a well- founded suspicion can be based on the information Mr. Valley obtained from other law enforcement officers that Mr. Reichert was living at the Sunde Road residence, an address that was a different residence from the one at which he was registered, and from the fact that there was at least one vehicle outside the Sunde Road residence that was registered in Mr. Reichert's name?

The evidence is disputed that Reichert admitted that he was living at the Sunde Road residence thereby confirming Officer Valley's suspicions. (Assignments of Error 1, 2, 9,11,12,13 and 14.)

5. Whether Officer Valley was acting akin to a "stalking horse" to help law enforcement evade Fourth and Fourteenth Amendment and Const. Art. I, sec. 7 warrant and probable cause requirements or whether he enlisted the police to assist his own legitimate objectives?

On or about July 21, 2008, Officer Steve Valley contacted Kitsap County Sheriff's Office Detectives Ron Trogdon and Chad Birkenfeld to accompany him on a residential compliance check of probationer Joseph A. Reichert at the Sunde Road address. Valley had been previously contacted by these detectives on two occasions to elicit his help in their drug investigation of Mr. Reichert based on an anonymous tip.

(Assignments of Error 1, 3 and 14.)

6. Whether searching Joseph A. Reichert and obtaining a house key from him while handcuffed, inserting it in the front door lock of a mobile home rented and occupied by defendant Roy A. Brandenburg, opening the door all the way and smelling marijuana constituted a search without a warrant in violation of Mr. Brandenburg's Fourth and Fourteenth Amendment rights? (Assignments of Error 1,3, 5,10,12 and 14.)

7. Whether searching Joseph A. Reichert and obtaining a house key from him while handcuffed, inserting it in the front door lock of a mobile home rented and occupied by defendant Roy A. Brandenburg, opening the door all the way and smelling marijuana constituted a search without a warrant in violation of Mr. Brandenburg's Const. Art. I, sec. 7 rights?

(Assignments of Error 1, 5, 10,12, 13 and 14.)

8. Whether the contact between officer Valley and the KITASAP detectives was a pretext to carry out an unlawful search and/or a pretext to obtain evidence to support a search warrant; rather than a valid and supported request for back-up to conduct a residential compliance check?

Mr. Reichert was on active supervision with DOC and was required to report his residential address to his CCO. Officer Valley, who had never met Mr. Reichert before and was not his supervising probation officer, suspected that Mr. Reichert was not residing at the

On January 16, 2009 Mr. Brandenburg was sentenced to 36 months confinement in the Department of Corrections on count I and 18 months confinement to each of the two remaining counts. His sentence was ordered to run concurrently. 1/16/09 RP 7. A notice of appeal was entered on the same date. CP 119.

Statement of Testimony of CrR 3.5/3.6 Hearing

Ronald Trogdon

Detective Ronald Trogdon testified that he was a detective for the Kitsap County Sheriff's Office. I RP 4. Part of his duties included being assigned to the Special Investigations Unit (SIU). This was a narcotics unit: "knock and talk unit...knock of doors and seek to gain entry basically into residences where narcotics might be suspected." I RP 5.

Earlier in 2008, Trogdon was contacted by an informant. "The informant told us basically that they were familiar with the subject by the name of Joe Reichert and that he owned a tattoo shop in Bremerton, that they had had occasion to have been at the tattoo shop and had witnessed a narcotics transaction of marijuana, and had also subsequently been to the residence and had seen marijuana there. Had not witnessed sales there, but had seen marijuana there, and a substantial amount. And going into the substantial amount, the informant indicated that there was a baggie, a gallon bag, and while they were there, he said there was grooming of the

marijuana buds that was going on.” I RP 8.

The informant indicated that this activity was going on at a residence on Sunde Road in Kitsap County and just north of Silverdale and that Mr. Reichert was living there. id. Then, later in May 2008, after attempting to locate the residence along with Detective Birkenfeld and being unsuccessful, the detective had the informant show them where the residence was located. The license plate number of a vehicle was obtained that indicated it was registered to Mr. Reichert. RP 9.

Steve Valley was a DOC officer who was the department’s basic contact with the Department of Corrections. RP 6. Valley was then contacted to see if Reichert was DOC active. The detectives were advised that he was but that DOC had a different address for him. RP 10. The investigation fizzled out when it was confirmed that no one was living at the DOC supplied address. id. Subsequently, Trogdon received a request from officer Valley to accompany him on an address check on Sunde Road. RP 11. Valley was accompanied by Trogdon and by Birkenfeld to that location. RP 13. Trogdon testified: “We were just there for officer safety reasons.” id. When they arrived they noticed the vehicle that was registered to Mr. Reichert. id.

Once they arrived, Valley knocked on the door and spoke to a person identified as Mr. Reichert through a window in the door. RP 14.

Joe Reichert indicated that he did not want to come outside. Valley later repeated knocking on the door.¹ Valley indicated that he was doing a compliance check and that Reichert needed to come outside. "...eventually 15, 20 minutes later Mr. Reichert came outside." id.

When Reichert came outside he came down off the porch. He was secured by Officer Valley in handcuffs and read his rights. He was assisted by Detective Birkenfeld. RP 16. Reichert was searched and keys were discovered.² Valley called his superiors for direction. Trogdon testified: "He took the keys, tried one of them in the door, and it opened the door." RP 17.

Valley told the other officers that he smelled marijuana. Trogdon tried smelling and he could not smell any marijuana. The door was then shut and secured. RP 18. Trogdon then obtained a telephonic search warrant. id. The occupant(s) refused to come out. The SWAT team was summonsed because the situation was treated as a "barricaded subject." id. This took about one and a half to two hours to execute the warrant. id.

¹ During this time detectives Trogdon and Birkenfeld were located "off the porch." RP 15. Trogdon testified: "Down at the bottom of the stairs, one of us on either side of the stairs...." RP 26.

² These were described as: "There were several keys on the ring." RP 30. Mr. Valley stated: "A couple, three, maybe...Could have been four." RP 108-09.

After establishing perimeter security and being reinforced, the SWAT team was prepared to enter the residence after the negotiators failed to get the occupants to come outside. RP 19. Eventually the defendant, Roy Brandenburg, emerged from the residence. id. There were no other occupants.³ RP 20.

Once the warrant was executed, the officers discovered “multiple pounds of marijuana inside the residence that was packaged”, “a large amount of cash”, “cut tops of plastic bags” and additional bags in Mr. Brandenburg’s room id.⁴

On cross-examination, Mr. Trogdon testified that the police never examined the other address or contacted anybody there, where they thought Mr. Reichert was living because it appeared abandoned RP 23. The police did not contact Reichert at his place of employment to

³ That defendant Roy Brandenburg, Jr. has standing to challenge the evidence used against him is not disputed. Mr. Brandenburg was legitimately present in his own residence when Mr. Valley came to check on Mr. Reichert’s unknown residential status. *Brown v. United States*, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); *State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962). Mr. Brandenburg may claim the constitutional protections from unreasonable searches and seizures.

⁴ See finding of fact VIII: “...police found and seized over nine pounds of marijuana, nearly \$12,000.00..some ecstasy pills, two bulletproof vests, several calibers of ammunition, digital scales, drug smoking paraphernalia, lots of used and unused drug packaging materials.” CP 122.

determine his address.

Cross-examination continued by Mr. Brandenburg's attorney, Mr. Rovang. Two months prior to July 22, 2008 his department had been investigating Mr. Reichert for suspicions of "dealing in drugs or narcotics." RP 31. Officer Valley, who was not Reichert's supervising probation officer, supplied an up-dated address for him. RP 32. One address for Reichert-where the search occurred- was 3340 Sunde Road. RP 33. This was the address that was looked at in May after contacting a confidential informant. However, it was not kept under surveillance and it was not approached. RP 34.

On re-cross examination Mr. Trogdon testified that when they contacted Mr. Reichert's address it was not as a knock and talk investigation. Rather, "We were going there specifically to assist Mr. Valley in a compliance check of Mr. Reichert...." RP 44.

Steve Valley

Steve Valley testified that he was employed by Department of Corrections. RP 49. He is a fugitive apprehension specialist working in Kitsap and Mason counties. id. His primary duty as a Community Corrections specialist was to execute warrants for DOC. RP 50. A secondary duty is to conduct field checks.

He was initially contacted by Kitsap County detectives regarding

Mr. Reichert's alleged activity of selling marijuana and whether he was living at this approved address. RP 54. Two months later he contacted Reichert's probation officer K.C. Butler. RP 55. He then contacted the detectives to do an address check. RP 56.

On the day of the incident he was accompanied by the detectives and they went to Mr. Reichert's address to verify that he was living there. RP 59.⁵ When he contacted Mr. Reichert he was speaking through the window of a door. He did not want to come out onto the porch for fear of being arrested. RP 60-1. Valley continued to knock for about 20 minutes after Reichert stayed inside the residence away from the door. Eventually Reichert emerged from his residence. RP 62. He said, "Take me to jail." id. Valley said: "I am not here to take you to jail." id. Reichert was handcuffed while Valley conducted his investigation. Valley was advised by his supervisor over the phone to "Try the door with one of the keys, see if it opens the door," RP 63.

Valley tried a key. It opened the front door. That is when he smelled the odor of marijuana. RP 63. Birkenfeld confirmed the odor. Valley shut the door and turned the situation over to the detectives who

⁵ Mr. Valley testified that a person on DOC supervision is required to register their address with DOC and to "show" them where they are living and have it approved.

called for a telephonic search warrant. RP 64. Valley testified: "I was just there to assist them then. I mean, I was there for security, scene security, perimeter." RP 64. Once the warrant was obtained the SWAT team and negotiators were called in. RP 65.

Valley testified on cross-examination that his main function was to apprehend fugitives that are on probation. RP 71. On this occasion, he contacted the Kitsap County detectives to accompany him on this field contact. Afterwards he contacted Mr. Reichert's probation officer and asked him for permission to go out and to check on Reichert. RP 68.

Valley admitted that in May he did not pass on the information that Mr. Reichert may not be at his correct address to anyone with the Department of Corrections who might be concerned with his compliance. I RP 79. On Just 21st he called Reichert's CCO and inquired if it would be all right for him to do a compliance check on Reichert. id. Valley admitted that this compliance check was not assigned to him RP 81.

Valley acknowledged that he did not contact his supervisor on July 21st to ask him whether he could go out and do a compliance check on a probationer that was not assigned to him. I RP 81. He decided to do a compliance check on his own. . He was asked.

"Q. So it wasn't at the request of your supervisor, it wasn't at the request of the CCO, it wasn't at the request of the officers. You decided on your own

to go do a compliance check for somebody you don't supervise?

A. I do it all the time." I RP 82.

Valley affirmed that he asked the police officers to accompany him. "I asked them to go." I RP 83.

Valley also admitted that he did not check out Mr. Reichert's registered address. Id. Chronological notes from May 23, 2008 by Reichert's probation officer indicated that WestNet was involved. I RP 85. Valley indicated that he did not give that information to K.C. Butler-who was Mr. Reichert's probation officer. I RP 85-6; 106.

Mr. Valley went to Reichert's address in a Mason county law enforcement vehicle. I RP 89. Valley knocked on the door but did not make any announcement. Id. When he heard a voice inside he announced himself by talking through the door. I RP 90, 103. When Mr. Reichert refused to come out, Valley called his own supervisor who informed him that there was nothing he could do, "Unless you can get him to come out." I RP 91. Valley did so by commanding Reichert to come out. I RP 104-5.

Mr. Valley acknowledged that he told Mr. Reichert that he wanted to check out his living situation. I RP 95. He claimed that this was not a search. Id. He stated he was conducting a compliance check. Id. He further stated that he did not know at the time he contacted Reichert that he was on probation for a misdemeanor. I RP 97.

When Reichert emerged- after about 20 minutes and locked the front door behind him. I RP 107, 115. He was placed in hand cuffs for officer safety. Id. Valley's supervisor advised him to try Reichert's keys to see if they would open the lock on the door. I RP 108. The supervisor said: "Check his pants pockets to see if he's got any keys to the house." Id. The keys by this time were "laying on the car."

Valley was asked:

"Q. But you unlocked the door and opened it because you wanted to see if anyone else was inside, correct?

A. Yes, for safety." I RP 109.

When he opened the door-as far as it went- to see if anyone else was inside. He smelled marijuana and summonsed the two police officers to confirm the odor. I RP 109. Once the odor was confirmed the front door was shut. RP 110. Reichert was subsequently arrested for failure to show Mr. Valley inside this residence to verify that he was living there. RP 116.

Chad Birkenfeld

Chad Birkenfeld testified that he was a detective with the Kitsap County Sheriff's Office. II RP 127. He was part of the Special Investigations Unit involved primarily in narcotics investigations. RP 128. He performed these duties after his normal detective duties.

During May 2008 he was given information that Mr. Reichert "...may be involved in distribution of marijuana." RP 130. They had three

possible addresses for "Tattoo Joe." Id. They began to drive around "...and look at those homes to see if we could identify cars or see if anyone was home at those houses." Id.

Eventually, he and Detective Trogdon were taken by a confidential informant to a location where a blue Probe vehicle was identified as belonging to Joseph Reichert. III RP 131. Then, at the end of May or the beginning of June they shared this information with Officer Valley, i.e., that Reichert was not living at the address he was supposed to be living at. Id. Approximately two and a half weeks prior to July 22, 2008 they re-contacted Valley who advised them that he had not done anything with their information. RP 132.

Then, on July 22nd when Reichert came out of his residence he was searched by Birkenfeld who removed his keys and a wallet. Once the door was opened and Birkenfeld was asked "...to smell the same smell of marijuana." RP 135. At that point, Birkenfeld asked Valley to shut the door and he took over the investigation.

Prior to entry into the residence by the SWAT team Roy Brandenburg emerged. He was placed in handcuffs. II RP 136. He was read his *Miranda* rights. Eventually, Brandenburg gave a taped interview. II RP 137; ex. 12. Brandenburg had nothing in his system that would affect his judgment. RP 138.

K.C. Butler

The defense called K.C. Butler who was Mr. Reichert's probation from the Bremerton office of the Department of Corrections. II RP 147. Reichert's address was on Willamette Meridian. Also, Butler testified: "I knew of his employment, his shop in Bremerton, and so I knew where he could be contacted." RP 148. He continued:

"I had gotten information from Mr. Valley that Mr. Reichert was at this address, I believe it was Sunde, it was off of Clear Creek Road, that he was staying there, and that they had had a confidential informant that had been in to that residence and had purchased controlled substances." RP 149.

Butler added: "He said he was going to go out with WestNET officers the next morning and he would call me." Id.

C. SUMMARY

"...the ultimate issue of whether the search conforms to the Fourth Amendment presents a mixed question of fact and law." *United States v. Jarrad*, 754 F.2d 1451, 1454 (9th Cir.1985) (citing *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied*, 105 S.Ct. 101 (1984) and *Pullman-Standard v. Swint*, 456 U.S. 273, 288, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982)).

According to *State v. Winterstein*, 140 Wn.App. 676, 691, 166 P.3d 1242 (2007), *review granted*, 163 Wn.2d 1033 (2008):

“Washington recognizes a warrantless search exception, when reasonable, to search a parolee or probationer and his home or effects. *State v. Campbell*, 103 Wn.2d 1, 22-23, 691 P.2d 929 (1984) (citing *Hocker v. Woody*, 95 Wn.2d 822, 826, 631 P.2d 372 (1981); see *State v. Coahran*, 27 Wn.App. 664, 666-67, 620 P.2d 116 (1980). A probation or parole officer may search the probationer’s home without a warrant so long as the search is reasonable and is based upon a well founded suspicion that a violation of probation has occurred. *State v. Lucas*, 56 Wn. App. 236, 244, 783 P.2d 121 (1989); *State v. Simms*, 10 Wn.App.75, 87, 516 P.2d 1088 (1973); *Coahran*, 27 Wn. App. at 666-67. A “well-founded suspicion” is analogous to the cause requirement of a *Terry* stop. *Simms*, 10 Wn.App. At 87 (quoting *Terry v. Ohio.*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).”

The test is whether a probation officer used the probation search to help police evade the Fourth Amendment warrant and probable cause requirements or whether the probation officer enlisted the police to assist his own legitimate objectives. CP 8-9 (citing *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991)).

The legal standard is stated in *State v. Winterstein*, 140 Wn.App. Supra at 691: “A probation or parole officer may search the probationer’s home without a warrant so long as the search is reasonable and is based upon a well founded suspicion that a violation has occurred.”

The court also ruled in *State v. McKague*, 143 Wn.App. 531, 542, 178 P.3d 1035 (2008):

“Thus, here, the officers could search Jay’s home so long as

the search was reasonable and the officers had “specific and articulable facts, which, taken together with rational inferences from those facts,’ support that the searched residence was Jay’s. *Terry*, 392 U.S. at 21; *Winterstein*, 140 Wn. App. At 691-92.”

(citing *Terry v. Ohio*, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)).

In assessing the evidence and procedures in this appeal and the challenged evidence obtained as a result of Department of Corrections Officer Steve Valley, this court should note that the evidence that was seized and is being used against Mr. Brandenburg is being used in new criminal proceedings rather than in a proceeding to revoke his probation.

D. Argument

I. THE DEFENDANT’S FOURTH AND FOURTEENTH AMENDMENT AND CONST. ART. 1, SEC. 7 RIGHTS WERE VIOLATED UNDER THE CIRCUMSTANCES OF THIS CASE.

This case began with an unidentified informant who had been to Reichert’s alleged residence on Sunde Road near Silverdale. He had seen marijuana there. He had not seen any sales, but had seen a substantial amount of marijuana as well as baggies and grooming of marijuana buds. I RP 8. Later in May 2008, the detectives had the informant show them where the residence was located. The license plate number of a vehicle there indicated it was registered to Mr. Reichert. RP 9.

Based primarily on this anonymous tip and additional information

about the vehicle the trial court entered a pivotal finding: “That Officer Valley had a specific and articulable factual basis to believe that Joseph Reichert was not living where he had reported and was in fact living at 3340 NW Sunde Road in Silverdale, Washington.” FF I, CP 121.

At the inception it is necessary to determine whether Officer Valley’s actions were reasonable. *State v. Simms*, 10 Wn.App. at 86-88. If the police were to have acted on the informant’s’s tip to secure a search warrant they would have been subjected to the *Aguilar-Spinelli* test.⁶

Trial Court Oral Argument

The following argument is taken verbatim from the argument on Mr. Brandenburg’s motion to suppress the evidence because it sets forth the essential elements to be decided on this appeal as they relate to him.

“MR. ROVANG: May it please the court. On behalf of Mr. Brandenburg, Your Honor, there’s a couple of points I want to emphasize. K.C. Butler’s testimony was that he was available to do the residence

⁶ “[T]he test requires that there appear some underlying circumstances from which the informant concluded that the contraband was where he claimed it to be, and some further circumstances from which the officer could conclude that the informant was “reliable.”

Aguilar v. Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). *See also, Spinelli v. United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584(1969).

check. He had been called by Steve Valley because Steve Valley wanted to go out and do a residence check for him on Mr. Reichert. K.C. Butler said, "Fine. I am not available today. I am at the doctor's." He received that call at the doctor's office on his cell phone and it was his understanding that he and Steve Valley were going to go out together and do this residence check, and the next thing K.C. Butler knew was the next morning he got another call about 10 o'clock in the morning, they were already out there. And Mr. Valley said, "You better come out here. We need your assistance now." By that time it's obvious that it was no longer a residence check. This was Steve Valley acting on behalf of WestNET to go out and do their knock and talk so that they could find some way into this residence.⁷

One of the issues I guess, and my recollection from the last day we had this hearing is what constitutes a search and what doesn't constitute a search, and there was a little play of words during the testimony about – from Mr. Valley as I recall, that "It wasn't a search, I was just checking

⁷ "Q (By Mr. Rovang) These chronological notes indicated that "H had been in conversation with CCO Valley, WestNET, regarding possible dealing of marijuana at address on Northwest Sunde Road, and has info that P has recently moved to 3340 Sunder Road and WestNET was going to do a knock and talk." I RP 85; ex. 1-A (admitted for impeachment purposes; II RP 170.)

the residence. I was just checking to see if he lived there. I wasn't searching for anything."⁸ The Fourth Amendment and Washington law in particular as it interprets the Fourth Amendment says what the Fourth Amendment protects is a reasonable expectation of privacy, and any time the police violate a reasonable expectation of privacy, that's a violation of the Fourth Amendment.

You can call it search in shorthand, but what we are really talking about is a violation of a reasonable expectation of privacy, and the law is pretty clear in Washington that officers without a search warrant, without probable cause, can do things that a normal citizen can do.⁹ They can go to the curtilage of a house, they can walk up the front steps, they can knock on the door, they can be on the porch. They can't go around to the side of the house and sniff at windows. They can't go into areas that are not – that a person reasonably would expect people not to go in. They

⁸ Mr. Valley would not acknowledge that his actions constituted a search of the residence. Also, Mr. Valley stated near the end of his re-cross examination: "I was not searching." I RP 119.

The prosecutor argued in its memorandum: "In the present case Officer Valley's actions did not constitute a search." CP 14. It was argued orally: "We're not dealing with a search in this case." RP 185.

The court was of the same opinion when it considered an objection "THE COURT: He didn't do a search. He's testified earlier." I RP 117.

⁹ *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981) ("An officer is permitted the same license to intrude as a reasonably respected citizen.")

can't go into a garage. They can't violate somebody's reasonable expectation of privacy. And frankly, it's hard to imagine anything more private than the sanctity of your front door, and when somebody turns the key and throws the door open, that is not something that a reasonable person would expect the public to do. That's a violation of privacy.

I submitted a statement of additional authority just trying to emphasize that point,. The Holeman¹⁰ (sic) case, it's no argument to say that police never crossed the threshold. It's not the location of the arresting officer, it's rather the location of the arrestee. Hocker v. Woody absent consent or exigent circumstances, entry into the home of a third party without a search warrant or to search for a fugitive is unreasonable.,¹¹ You can't do that. And clearly, there was a third party here, namely Mr.Brandenburg, that Mr, Valley knew about, that the police knew about, because there was another individual inside, and they had no authority to break into Mr. Brandenburg's house for any reason unless they

¹⁰ *State v. Holman*, 103 Wn.2d 426, 693 P.2d 89 (1985){“A person's home can be invaded to the same extent when police remain outside the house and call a person to the door as when the police physically enter the household itself. Our state constitution guarantees that No person shall be disturbed in his private affairs, or his home invaded, without authority of law. Const. art. 1, sec. 7.)” Id. at 429.

¹¹ 95 Wn.2d 822, 631 P.2d 372 (1981).

followed departmental policy. Which they didn't.¹²

“State v. Jordan,¹³ observation of the interior of a private dwelling through a gap inadvertently left in a curtain window constitutes an unreasonable search, so certainly throwing open the door and sniffing for marijuana constitutes an unreasonable search. And it wasn't just Mr. Valley that did that. He then invited the police up there, in their capacity as police officers, to sniff the air coming from this private residence. And so, once again, it goes beyond what Mr. Valley can even argue he's entitled to do, and he invites the police up for an unlawful search. They become aware through their senses of information and evidence that they would not have been aware of had there not been a breach of that front door. And that wasn't for the purposes of safety.¹⁴ Steve Valley said,

¹² The DOC policies on procedures for a search were referred to during Mr. Valley's cross-examination. I RP 91-5. According to that policy a CCO needs to get a Community Corrections Supervisor or field duty officer's approval and permission before conducting a search. RP 94. Also, a forced entry into a third-party residence is permissible only if it is the only means available under the circumstances. RP 93.

¹³ 29 Wn.App. 924, 631 P.2d 989 (1981) (“...officers' actions [view from porch] in peering in the curtained window of a private residence constituted a search in violation of the Fourth Amendment.”) Id. at 929.

¹⁴ The prosecutor argued as follows: “...he [Valley] pushed the door all the way open..that's for his own safety. What if the person that they can hear and know is still inside, what if he's standing right behind the door? What if he's armed with some kind of weapon?....” RP 189.

“Come up here and sniff this. I think I smell marijuana.”

The other two cases that I cited are basically –they just emphasize the point.¹⁵ So it was a search. There’s no question about it. Was there authority for the search? That becomes the next question. Well, Steve Valley’s supervisor when he called him said, “If they don’t come out, you can’t go in. There’s nothing you can do. You can’t break in” is what Steve Valley said his supervisor told him. And the reason he told him that is because this policy says that when there’s a third party, when it’s a third party residence, you can only break in under certain circumstances. Those circumstances weren’t present, and so he was told by his supervisor, “There’s nothing you can do if Reichert doesn’t come out.” If it was just Reichert’s residence alone, that’s a different matter. Then there is a different section of the policy that says yeah, you can go in there whether he likes it or not. He can’t prevent you from going in. But that wasn’t the

¹⁵ *State v. Houvener*, 145 Wn.App. 408, 186 P.3d 370 (2008) (A search occurs if the government intrudes upon a subjective expectation of privacy that society is willing to recognize as objectively reasonable. Id. at 415.)

State v. Hoke, 72 Wn.App. 869, 866 P.2d 670 (1994)(Police asked detective to investigate possible marijuana operation. Detective smelled marijuana through roof vent on side of house to obtain search. Conviction reversed because of illegally obtained evidence of probable cause.)

“Detective Orendorff testified that he had wanted the occupants to open a door because an opened door causes the air currents to change inside, which, in turn, causes the smell of marijuana to exit through the door.” Id. at 871.

case. Mr. Valley was told by his supervisor that he couldn't go in, and eventually Mr. Reichert came out. Mr. Valley called his supervisor back and said, "Well I think I have the key," and evidently, according to Mr. Valley's testimony, he had permission then to try the key in the lock. He didn't have permission for an unlawful entry at that point. So even assuming everything that the state presents as true, it's still an unlawful search because it exceeded the scope of the authority that Mr. Valley had, it intruded upon Mr. Brandenburg's right to privacy, and as to Mr. Brandenburg, there was an unreasonable search and unlawful search and everything should be suppressed from that point on.¹⁶

The whole scenario reeks of an attempt by law enforcement to get around the Fourth Amendment, and the cases are clear on this, also.

There's a Washington State case that I cited, State v. McKague that cited a bunch of federal authority for the proposition that a parole officer may

¹⁶ See *United States v. Merchant*, 760 F.2d 963, 969 n. 10 (9th Cir.1985), *cert. dismissed*, 480 U.S. 615 (1987): "The government has admitted that the search warrant, secured after the initial warrantless entry, was premised on information obtained as a result of the initial entry. Therefore, the evidence seized pursuant to the warrant was a "fruit" of the originally illegality, and *all* the evidence must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 415, 9 L.Ed. 2d 441 (1963)." (court's italics.)

This point should be as indicated by Detective Trogdon in his telephonic request for a search warrant: "He [Valley] indicated that he smelled a strong odor of marijuana. I could not smell it. Detective Birkenfeld went and stepped up on the porch and smelled it." CP 47.

not act as a stalking horse for a police investigation. That's the Jarrad case. State v. Merchant, which is another federal case, says – and these are Ninth Circuit cases – “Search conditions imposed on a probationer cannot be used as a law enforcement tool.”¹⁷

That's what was going on here. This whole thing was not instituted by Steve Valley because he was interested in verifying a residence. This whole thing came from the law enforcement officers calling Steve Valley saying, “Hey, this guy is on probation. Double-check it for us. We think he's dealing marijuana.” When they didn't hear back from Mr. Valley they made another call and said, “Hey, what are you doing? We haven't heard from you. Would you like to go out and do a residential check?” That's exactly the kind of thing that is not allowed under these cases. Law enforcement cannot instigate parole violations, parole conditions, in order to subvert and go around the Fourth Amendment. That's exactly what's happening here.” II RP 177-83.

Smith v. Rhay

¹⁷*Merchant* at 969 stated: “ We have condemned the practice of using a search condition imposed on a probationer as a broad tool for law enforcement. [citations omitted] Because the search here clearly was not a genuine attempt to enforce probation but apparently had a motive of avoidance of Fourth Amendment requirements, it is this type of law enforcement conduct that ought to be deterred. Consequently, the exclusionary rule applies with full force.” [citation omitted].

The defense submitted a written memorandum in support of its motion to suppress the evidence. CP 6. The defense argued that law enforcement may not evade the warrant requirement by use of a probation officer's authority. Specifically, the defendant argued:

“Although parole officers may conduct supervisory searches without a warrant, they may not act on the request of and in concert with law enforcement officials to evade the warrant requirement.” (citing *State v. McKague*, *supra*, *United States v. Merchant*, *supra*, *United States v. Jarrad*, *supra*, and *Smith v. Rhay*, 419 F.2d 160 (9th Cir. 1969)). CP 8.

Evading the Fourth Amendment and Wash. Const. Art. 1, sec. 7 was the practical effect in the case at bench. For that reason the search was unreasonable.

In *Smith v. Rhay*, *supra*, “...the parole officer was enlisted by the police to locate the parolee as part of their investigation.” *Jarred* at 1445. The same is true in the case at bench. Detectives Trogdon and Birkenfeld did not get out of their patrol vehicle to inspect various locations where Mr. Reichert may have been residing. They did not contact him at his known tattoo shop in the city of Bremerton. Instead, they enlisted Mr. Valley to locate Mr. Reichert as part of their investigation into his drug activity.

In *Smith* the police officers accompanied the parole officer on an investigation at their own request. Here, the police detectives contacted Mr.

Valley on two occasions-as part of their investigation of Mr. Reichert- before Valley re-contacted them. Here, as in *Jarred*, Mr. Valley requested detectives to accompany him. However it was shown in *Jarred* that his parole officer had previously worked in his parole and was his accomplices' former supervising parole officer. Jarred's parole officer was thereby able to independently determine the necessity for conducting the searches: in that case of Jarred's vehicle and of his accomplice's residence.

Here, Officer Valley-whose principal duties were in Mason County-¹⁸ had no previous contact whatsoever with either Mr. Riehcert or with Mr. Brandenburg. In *Smith*, the police first contacted his parole officer and indicated they wanted to talk to him about a burglary. The Court of Appeals reversed Smith's conviction because his parole officer acted in concert with the police by allowing them to view incriminating evidence in Smith's hotel room before it was seized by the police. The Court noted that Smith's parole officer was acting "...not as the supervising guardian, so to speak, of the parolee, but as the agent of the very authority upon whom the requirement for a search warrant is constitutionally imposed." Id. at 162-63.

II. ASSIGNMENTS OF ERROR

¹⁸ Valley is a cross-commissioned Mason County Deputy Sheriff. II R 70. "Q. So sometimes you are a police officer and sometimes you are a probation officer. A. Correct." II RP 70-1.

According to *McKague*: “We apply a substantial evidence test in our review of Ken’s challenge to the trial court’s finding of facts following his motion to suppress. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). “Substantial evidence is ‘evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.’” *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).” *State v. McKague*, 143 Wn.App. at 542.

According to *State v. Hoke*, supra at 873: “Although the trial court’s findings relating to a motion to suppress are of great significance, on review, we must independently evaluate the evidence given the constitutional rights at issue. *Tukwila v. Nalder*, 53 Wn.App. 746, 749, 770 P.2d 670 (1989).

A. THE COURT ERRED WHEN IT ENTERED FINDING OF FACT I.

There was not substantial evidence to support Finding of Fact I, which states in part:

“That officer Valley had a specific and articulable factual basis to believe that Joseph Reichert was not living where he had reported and was in fact living at 3340 NW Sunde Road in Silverdale, Washington.” CP 121, ff.I.

Mr. Valley had never met Mr. Reichert. He testified he told Reichert’s supervising probation officer K.C. Butler: “I told him the information that I had, and asked him if it was okay if I went out and check and verified the address.” I RP 56. Valley did not verify Reichert’s reported address.

He was asked on cross-examination:

Q(Mr. Rovang) You had never been to this address out on Sunde Road, had you?

A No.

Q You didn't know who was living there, did you?

A No, not at all." I RP 77.

In *People v. Coffman*, 2 Cal App. 3d 681, 689, 82 Cal. Rptr. 782, 786, (1970) "...the California Appellate Court refused to uphold a search of a parolee by police accompanied by a parole officer on the following grounds: the parole agent was not engaged in administering his supervisory function. He had not instigated the search nor evinced any official interest in it except in his role as "front" for the police. His presence was a ruse, calculated to supply color of legality to a warrantless entry of a private dwelling."

B. THE COURT ERRED WHEN IT ENTERED FINDING OF FACT II.

There was not substantial evidence to support Finding of Fact II, which states in part:

"...that Officer Valley did not act akin to a "stalking horse" to help law enforcement evade Fourth Amendment warrant and probable cause requirements, but rather Officer Valley enlisted the police to assist his own legitimate objectives. *United States v. Harper*, 928 F.2d 894,897 (9th Cir. 1991)."

Standing alone this mixed finding of fact/conclusion of law may support Valley's actions. However, this finding has to be considered in light

“A. So about 20 minutes later Reichert comes out of the door, the front door and shuts it behind him, and then I go up and talk to him.

Q. All right. Where were the detectives at this point?

A. There were just all around the house.

Q. They were down around the house?

A. Yes.

Q. So, when Mr. Reichert came outside, what did he say to you?

A. He said, “Take me to jail.” I said, “I am not here to take you to jail.”

Q. Did you place him in handcuffs?

A. Yes I did. I told him I was going to detain him for personal safety while I do my investigation.

Q. Did you ask him whether he was living there?

A. Yes, I did.

Q. Do you remember what he said?

A. No, I don’t.” I RP 62.

Valley was asked on cross-examination by Mr. Reichert’s attorney:

Q When you talked through the door, did you ask him, “Are you staying here?”

A I asked him – I told him I was there to check his address and if he was staying there.

Q What was his response?

A I don’t think he gave me a response.” I RP 105.

Valley was asked on cross-examination by Mr. Rovang:

“Q. You only went out there because you wanted to see if Mr. Reichert was living there.

A. Correct.

Q. And you went in the house, correct?

A. Yes.

Q. And then you came out of the house?

A. Yes.

Q. And at that point, you told him that you were doing a compliance check, correct?

A. To verify that he was living there, yes, or if he was or not.

searched another tenant's bedroom." CP 121.

This finding is contrary to the Department of Corrections' own policy regarding third party occupancy. I RP 91-3. Also, Mr. Valley's supervisor did not give him permission to enter into the residence. RP 91. Valley was only given permission to try the key in the front door lock. RP 108. The supervisor's instructions to Mr. Valley are significant where the Fourth Amendment standards are relaxed to accommodate the objectives of probation and to determine reasonableness.

It was argued to the trial court that inserting the house key to see if it worked and then opening the door was a search without a warrant that violated the occupants expectation of privacy. II RP 171-3. It was argued that exhibits 3-11- which depicted pictures of the front door- show that: "If you look at those pictures, in order to stick that key in he's got to cross the threshold." II RP 172. It was further argued: "It's obvious from the pictures there he cannot open that door, unlock the door, close the door without crossing that threshold and doing what a normal citizen would not do. The expectation of privacy." II RP 173.

Based on this testimony there is not substantial evidence to support the courts' finding of fact IV that Mr. Reichert admitted that he was living at the Sunde residence. (See testimony in section C, incorporated herein by reference as if set forth in full). Based on *State v. Hoke*, supra at 873 this

court “...must independently evaluate the evidence given the constitutional rights at issue.”

E. THE COURT ERRED WHEN IT ENTERED FINDING OF FACT V.

There was not substantial evidence to support Finding of Fact V:

“That upon opening the door, Officer Valley could smell the overwhelming odor of fresh marijuana coming from inside the residence. Detective Birkenfeld then stepped up onto the porch to confirm and he was also able to smell marijuana from at least one foot away from the threshold of the open door.” CP122.

Mr. Valley did not describe the odor as overwhelming.²¹ Detective Trogdon was unable to smell any odor of marijuana. What Mr. Valley testified was:

“So once I opened the door, I pushed it open so I could see in there, and once I pushed it open, I could smell the odor of marijuana. So I called for Detective Trogdon. He come up, he couldn’t smell it because I guess he had a cold is what he said, so I had Detective Birkenfeld come up. He could smell, it and I just reached in, closed the door and turned it over to them for further investigation.” RP 63-4.

Additionally, the anonymous tip that the Detectives received did not mention an overwhelming odor of marijuana at this location. IRP 8. Finally, when the last occupant was interviewed by the detectives, Mr. Brandenburg

²¹ Trogdon advised the court when he obtained a search warrant that Valley indicated that the smell of marijuana was strong. CP 47. Birkenfeld testified: “He [Valley] said he smelled a strong odor of marijuana, asked for I believe Detective Trogdon to see if he could smell it, but detective Trogdon had a cold or some sinus issue, so I stepped up to the same smell of marijuana.” II RP 135.

stated that he was not under the influence of any substance, including alcohol or drugs. Ex. 12; CP 34. Brandenburg was alone in his residence for several hours before he emerged. CP 33.

F. THE TRIAL COURT ERRED WHEN IT ENTERED CONCLUSION OF LAW II.

The trial court entered Conclusion of Law II, which stated in part:

“...The contact between officer Valley and the KCSO detectives was not a pretext to carry out an unlawful search nor was it a pretext to obtain evidence to support a search warrant; rather, it was a valid and supported request for back-up to conduct a residential compliance check.” CP 123.

According to *McKague*, supra at 542, challenged conclusions of law are reviewed ne novo. Valley did not contact just any Kitsap County Sheriff as his back-up for officer safety. Valley re-contacted the same two detectives who had previously contacted him on two previous occasions regarding their investigation of Mr. Reichert’s alleged drug activity.

The list of Kitsap County law enforcement personnel who eventually responded to the Silverdale standoff included: Sergeant Jon Brossel, CP 33; Lieutenant Earl Smith, CP 33; Kitsap County Sheriff’s Office SWAT Team members, CP 33; Deputy Fred Breed; CP 33; Deputy Jon VanGesen, CP 34; Detective Duckworth, CP 34; Deputy Scot Eberhard and his canine Buddy, CP 34; investigator Steven Duckworth, CP 60.

The defense argued in its memorandum:

“It is clear that the detectives from the Sheriff’s Department were utilizing the authority of the probation department to advance an investigation...and the assertion that there was a probation investigation, is nothing more than a pretext.” CP 9-10. See *People v. Coffman*, 2 Cal. App. 681, 689, 82 Cal. Rptr. 782, 786, (1970): “...They chose the parole agent rather than a search warrant as their ticket of entry to the apartment. The search was illegal and its evidentiary products inadmissible.”

G. THE TRIAL COURT ERRED WHEN IT ENTERED CONCLUSION OF LAW III.

The trial court entered Conclusion of Law III, which stated in part:

“...Here, there were specific and articulable facts to support the belief that a violation of probation occurred, including Mr. Reichert’s own admission that he was residing at an address different than the one he had reported to the DOC.” CP 123.

As shown above with reference to finding of fact I, the trial court did not disclose or enter a finding as to what facts or information Mr. Valley possessed in order to have a “specific and articulable” factual basis to believe the Mr. Reichert was not living at his reported address.

Reichert’s listed address with probation was “on Willamette Meridian....” II RP 148. But officer Trogdon testified that his team never contacted Mr. Reichert’s probation officer. I RP 21. Detectives Trogdon and Birkenfeld drove past another reported location on one occasion. I RP 33.

No one ever contacted Mr. Reichert at his business of Underground Ink at 2818 Kitsap Way, Bremerton, Washington. CP 54; I RP 25. The incident occurred at 3340 Sunde Road, Silverdale. No one from SIU checked the Sunde address to see if Mr. Reichert was coming and going prior to July 22, 2008. I RP 25.

Finally, there is no testimony in the record that Mr. Reichert admitted to Mr. Valley or anyone else that he was residing at the Sunde Road address.

Officer Birkenfeld. testified on direct examination:

Q What happened then?

A While Officer Valley was on the phone, Mr. Reichert made some comments about not having his rights read to him, something to that effect, so I think at that point I advised him of his rights.

A Did he make any other statements to you at that point?

A. Not that I specifically recall, no.” II RP 133-34.

According to *State v. Sommerville*, 111 Wn.2d 524,760 P.2d 932 (1988):

“Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *State v. Thetford*, 109 Wn.2d 392, 396, 745 P.2d 496 (1987).”

Sommerville at 534. There is not substantial evidence that Mr. Reichert admitted that he was residing at the Sunde Road address.

H. THE TRIAL COURT ERRED WHEN IT ENTERED CONCLUSION OF LAW IV.

The trial court entered Conclusion of Law IV, which states in part:

“...Mr. Reichert admitted to residing at the Sunde Road residence and under *Winterstein* Officer Valley could have entered the residence to confirm that and could have searched the common areas but not Mr. Brandenburg’s bedroom. Further, that using the key found in Mr. Reichert’s pocket to check to see whether it opened the door was not a violation of the Fourth Amendment.” CP 123.

The record shows that Mr. Reichert remained silent about where he was residing. According to Mr. Valley’s testimony, he did not know where Mr. Reichert resided. Additionally, Mr. Valley was not authorized by his superior to enter Mr. Reichert’s residence. His unilateral entry would have been unreasonable. Also, his entry would have violated departmental policy. This is another factor to determine unreasonableness under *Winterstein*.

I. THE TRIAL COURT ERRED WHEN IT ENTERED CONCLUSION OF LAW V.

There was not substantial evidence in the record to support Conclusion of Law V, which states:

“Under the case law, such as *Winterstein* and *State v. McKague*, 143 Wash. App. 531 (2008), the applicable standard for a warrantless search is whether there is a well founded suspicion that a violation of probation had occurred based on the information from other law enforcement officers that Reichert was living at the Sunde Road residence and from the fact that there was at least one vehicle outside the residence that was registered in Mr. Reichert’s name. Officer Valley’s suspicions were then confirmed when Reichert admitted that he was living at the Sunde Road residence.” CP 124.

The trial court erred when it entered Conclusion of Law V. Reichert did not admit that he resided at the Sunde Road residence. Also, like other conclusions of law, the trial court did not address whether the entry in this case or the search of Mr. Reichert's mobile home was reasonable.

Winterstein, 140 Wn.App. at 691 (search must be both reasonable and based upon a well founded suspicion that a violation of probation has occurred.)

Accord, McKague, 143 Wn.App. at 542.

The test is whether the actions of law enforcement were reasonable *and* whether there was a well founded suspicion that a probation violation had occurred. *id.* The trial court never determined reasonableness.

J. THE TRIAL COURT ERRED WHEN IT ENTERED CONCLUSION OF LAW VI.

The trial court erred when it entered Conclusion of Law VI:

“That Officer Valley met this constitutional test based on the information he had from law enforcement, the fact that there was at least one vehicle outside the residence that was registered in Mr. Reichert's name, and Mr. Reichert's own admission to living at a different residence from the one at which he was registered.” CP 124.

Law enforcement had very little information because they did very little investigation. Their information, other than a vehicle registered to Reichert, was based on an anonymous informant's tip. There was no reliability shown by the informant's tip, nor was the credibility of the informant ever

established. *Aguilar v. Texas*, 378 U.S. at 114.; *Spinelli*, 393 U.S. 410.

Reichert's alleged confession is an attempt to bootstrap constitutional safeguards to justify questionable police practices. The appellate law disfavors proving cases where the primary reliance is upon the accused's confession or admissions. In this setting with a SWAT team at the ready, Kitsap County negotiators poised and multiple law enforcement on the scene and in direct communication, it is not surprising that Mr. Reichert did not state that he resided at this address.

K. THE TRIAL COURT ERRED WHEN IT ENTERED CONCLUSION OF LAW VII.

The trial court erred when it entered Conclusion of Law VII:

"That because Officer Valley had a well founded suspicion that a violation of probation had occurred, he was authorized under Washington law to conduct a warrantless entry and search of the residence. Officer Valley, therefore, was authorized to open the door to the residence and his actions in this regard were lawful and did not violate Reichert's or Brandenburg's Fourth Amendment rights." CP 124.

Again, the trial court neglected to determine whether- under all the circumstances- the police practices in these cases was reasonable. The trial court did not address to most important aspect of the constitutional test: the time tested and objective standard of reasonableness. *Winterstein*, 140 Wn.App. at 691; *McKague*, 143 Wn.App. at 542.

L. THE TRIAL COURT ERRED WHEN IT ENTERED

CONCLUSION OF LAW VIII.

The trial court erred when it entered Conclusion of Law VIII:

“Therefore, the Defendants’ motions to suppress are hereby denied.” CP 124.

The trial court erred because Mr. Valley did not have a specific and articulable factual basis to formulate a well-founded suspicion that Mr. Reichert committed a probation or parole violation by changing addresses. Also, as stated above, Mr. Valley’s actions in combination with two pre-selected members of the Kitsap County Sheriff’s office were unreasonable.

M THE TRIAL COURT ERRED WHEN IT ENTERED CONCLUSION OF LAW IX.

The trial court erred when it entered Conclusion of Law IX:

“That both Mr. Brandenburg’s and Mr. Reichert’s statements to law enforcement were made knowingly and voluntarily and are therefore admissible. Further, that Mr. Reichert was not under arrest until after his Miranda warnings were read to him so his additional statements made before Miranda are also admissible.” CP 125.

Mr. Brandenburg’s statements and/or confession should not be admissible into evidence as fruit of the poisonous tree doctrine. See *United States v. Merchant*, supra at 969 n. 10 (citing *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 415, 9 L.Ed. 2d 441 (1963) (evidence seized pursuant to an unlawful entry was a “fruit” of the originally illegality, and *all* the evidence must be suppressed) (court’s italics).

III. STATE CONSTITUTIONAL ANALYSIS

State v. Gunwall, 106 Wn.2d 54, 61, 720 P.2d 808 (1986) requires the following nonexclusive neutral criteria to determine in a given case whether the Washington State Constitution extends greater protections and broader rights to its citizens than does the United States Constitution.

1. The textual language of the State Constitution

Const. article 1, section 7 states: "No person shall be disturbed in his private affairs, or his home invaded without authority of law." "...the relevant inquiry for determining when a search has occurred is whether the State unreasonably intruded into the defendants' private affairs:" *State v. Gunwall*, 106 Wn.2d at 65 (quoting *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984)).

2. Significant differences in the texts of parallel provisions of the federal and state constitutions.

The Fourth Amendment to the United States Constitution guarantees:

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.

"The textual language of article 1, section 7, provides greater protection to individual privacy interests than

the Fourth Amendment. *State v. Gunwall*, *State v. Stroud*, *State v. Myrick*. (citations omitted). Article 1, section 7 protects against warrantless searches and seizures, with no express limitations." (citations omitted).

Seattle v. Mesiani, 110 Wn.2d 454,456, 755 P.2d 775 (1988) (citing *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986)).

3. State Constitutional and Common Law History

". . . in 1889, our State Constitutional Convention specifically rejected a proposal to adopt language identical to that of the Fourth Amendment, before adopting Const. art. 1, section 7 in its present form."

State v. Gunwall, 106 Wn.2d at 66 (citing n. 21: "*Journal of the Washington Constitutional Convention*, 1889 at 497 (B. Rosenow ed. 1962). See Nock, 86 Puget Sound L.Rev. at 332."

Article 1, section 7 should be read independently of federal law in this case. "Washington declared statehood and adopted its state constitution in 1889." *State v. Manussier*, 129 Wn.2d 652, 688, 921 P.2d 473 (1996).

"This may reflect an intention to confer greater protection from the state government than the federal constitution affords from the federal government." *Gunwall* 106 Wn.2d at 61.

"Moreover, Washington, like the vast majority of relatively newer states, copied much of its Declaration of Rights from the constitutions of older states, rather than from the federal charter. It would be illogical to assume that a state constitution that was written before the United States Constitution, or a declaration of rights copied from such a state

constitution at a time when the federal Bill of rights did not apply to the states, was meant to be interpreted with reference to federal courts' interpretations of the Federal Constitution."

Justice Robert F. Utter, *Freedom and Diversity in a Federal System:*

Perspectives on the State Constitutions and the Washington Declaration of Rights, 7 U.P.S. L. Rev. 491, 496-497 (1983).

Washington's Declaration of rights was largely based on the Oregon Constitution, which in turn borrowed heavily from the Indiana constitution. Also adopted were portions of the United States and California Constitutions. Utter at 514. When the state Constitution became effective in November 1889, there were one federal and forty-one previous state constitutions in effect. Utter at 491:

"The early constitutional history of the United States leaves no doubt that state bills of rights were never intended to be dependent on or interpreted in light of the United States Bill of Rights. In fact, most of the early states had declarations of rights some years before the United States Constitution was written, and the United States Bill of Rights was finally added to meet demands for the same guarantees against the federal government that people enjoyed against their state governments."

Utter at 496 (citing 9 U.Balt.L.Rev. 379 (1980)).

4. Preexisting state law.

"In the article I, section 7 context, it is necessary only to examine the fourth and sixth *Gunwall* factors as they apply to this case. The fourth factor requires a

consideration of preexisting state law. Petitioner contends case law demonstrates "a concern of our state's citizenry relating privacy in their homes that supports review on state grounds" He cites *State v. Young* which held that infra-red surveillance of a residence violated the state constitution's protection against warrantless invasion of the home. This court stated "Our decisions have consistently reflected the principle that the home receives heightened constitutional protection. . . .In no area is a citizen more entitled to his privacy than in his home." Thus, preexisting state law would support independent review of Petitioner's case under *Gunwall*."

(*State v. Bustamante-Davila*, 138 Wn.2d 964,979, 983 P.2d 590 (1999)

(citing *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), *State v.*

Gunwall, 106 Wn.2d at 62; other citations omitted). (See, *State v. Young*,

supra at 185: "[I]n no area is a citizen more entitled to his privacy than in his or her home."

It was stated in *State v. Johnson*, 101 Wn.App. 409, 415, 16 P.3d 680, review denied, 143 Wn.2d 1024 (2001): "In addition, article 1, section 7 affords greater protection from an officer's search of a home than the Fourth Amendment. See *State v. Ferrier*, 136 Wn.2d 103, 111-13, 960 P.2d 9276 (1998)."

According to some cases no *Gunwall* analysis is necessary because:

"It is well settled that article 1, section 7 of the Washington State Constitution provides individuals more protection from searches and seizures than the fourth Amendment to the United States Constitution. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982

State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998)."

State v. O'Neill, 148 Wn.2d 564, 595, 62 P.3d 489 (2003) (J. Chambers concurring in part, dissenting in part).

5. Differences in structure between federal and state constitutions.

"...the United States Constitution is a *grant* of limited power authorizing the federal government to exercise only those constitutionally enumerated powers expressly delegated to it by the states, whereas our state constitution imposes *limitations* on the otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law."

State v. Gunwall, 106 Wn.2d at 66 (court's italics.)

"...the explicit affirmation of fundamental rights in our state constitution may be seen as a guaranty of those rights rather than as a restriction on them." *id.* at 62.

Article I, sec. 29 of the Washington Constitution states:

"The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise,"

According to *State v. Manussier*, *supra* at 680: "Factor (5) always favors independent state analysis because"[t]he state constitution *limits* powers of state government, while the federal constitution *grants* power to the federal government." (court's italics; note cited *State v. Russell*, 125 Wn.2d 24,61, 882 P.2d 747 (1994)).

6. Matters of particular state interest or local concern.

There is no need for national uniformity with regard to a probation officer's authority to enter into a residence without a search warrant or without authority of law under Washington's constitutional protections.

The need for national uniformity is already available based on protections of the Fourth and Fourteenth Amendments. These amendments may be interpreted by the federal courts to insure minimum, uniform constitutional standards. See generally, *United States v. Conway*, 122 F.3d 841 (9th Cir. 1997).

National uniformity is out-weighed "by overwhelming state policy considerations to the contrary." *State v. Gunwall*, 106 Wn.2d at 67. The state must respect the dignity and integrity of its citizens by providing greater protections when dealing with state probation officers.

It was stated in *State v. Young*, 123 Wn.2d at 180: "State law enforcement measures are a matter of local concern. *State v. Ortiz*, 119 Wn.2d 294, 320, 831 P.2d 1060 (1992) (Johnson, J., dissenting)."

E. Conclusion

There was no legitimate reason for Officer Valley to open the door to Mr. Brandenburg's residence. Even the Department of Corrections' Policy prohibited him from entering the third party residence.

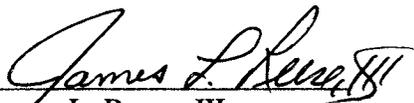
The defense argued that by ruling the way it did, the trial court promotes inadequate investigation by police officers and by corrections

officers. Mr. Valley had no previous contact with Mr. Riechert or with Mr. Brandenburg. Mr. Riechert was on probation for a misdemeanor conviction and was not closely supervised. Mr. Valley could not independently determine the necessity for any kind of a search. Smelling alleged marijuana from the open door was not a valid parole search nor a valid police search. It was a pretext to avoid the constitutional probable cause requirements that Detectives Trogon and Brandenburg were unable to independently establish.

All evidence in this case should be suppressed in this case including Mr. Brandenburg's statements and the recovered items from his vehicle.

Dated this 28th day of July 2009.

Respectfully Submitted,


James L. Reese, III
WSBA #7806
Court Appointed Attorney
for Appellant

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RECEIVED AND FILED
IN OPEN COURT

JAN 23 2009

DAVID W. PETERSON
KITSAP COUNTY CLERK

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 v.)
)
 ROY EDWARD BRANDENBURG, JR.,)
 Age: 23; DOB: 08/19/1985,)
)
 Defendant.)

No. 08-1-00811-6 ✓

FINDINGS OF FACT AND CONCLUSIONS
OF LAW FOR HEARING ON CrR 3.5 AND
3.6

STATE OF WASHINGTON,)
)
 PLAINTIFF,)
)
 v.)
)
 JOSEPH ANDREW REICHERT,)
 AGE: 28; DOB: 07/06/1980,)
)
 DEFENDANT.)

No. 08-1-00812-4

FINDINGS OF FACT AND CONCLUSIONS
OF LAW FOR HEARING ON CrR 3.5 AND
3.6

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court pursuant to a hearing on CrR 3.5 and 3.6; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, testimony of witnesses, if any, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, makes the following-



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FINDINGS OF FACT

I.

That Joseph A. Reichert was on active supervision with the Department of Corrections (hereinafter DOC), and was required to report his residential address. That Officer Valley had a specific and articulable factual basis to believe that Joseph Reichert was not living where he had reported and was in fact living at 3340 NW Sunde Road in Silverdale, Washington.

II.

That on or about July 21, 2008, Officer Steve Valley contacted Kitsap County Sheriff's Office Detectives Ron Trogdon and Chad Birkenfeld to accompany him on a residential compliance check of probationer Joseph A. Reichert at the Sunde Road address. Officer Valley initiated the plan to go conduct the compliance check and requested law enforcement presence for officer safety reasons. The Court finds that Officer Valley did not act akin to a "stalking horse"¹ to help law enforcement evade Fourth Amendment warrant and probable cause requirements, but rather Officer Valley enlisted the police to assist his own legitimate objectives. *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991).

III.

That Officer Valley announced his presence and spent some time talking to Mr. Reichert through the closed door. That after approximately twenty-five minutes Joseph Reichert exited the home on his own accord. That when Joseph Reichert exited the home he locked the door behind him and refused entry to Officer Valley but admitted that he was living there at the Sunde Road residence. Mr. Reichert's admission confirmed Officer Valley's belief that Mr. Reichert was living at the Sunde Road residence in violation of the terms of his community custody.

IV.

Officer Valley obtained the key, tried it in the lock, unlocked the door and pushed it open. Since Mr. Reichert admitted he was living there, Officer Valley could have entered the residence to confirm, and could also have searched the common areas, but could not have searched another tenant's bedroom.

V.

¹ As used in the case of *U.S. v. Jarrad*, 754 F.2d 1451 (1985).



1 That upon opening the door, Officer Valley could smell the overwhelming odor of fresh
2 marijuana coming from inside the residence. Detective Birkenfeld then stepped up onto the
3 porch to confirm and he was also able to smell marijuana from at least one foot away from the
4 threshold of the open door.

5 VI.

6 That the Detectives then told Officer Valley to close the door and that they would take
7 over from that point. That Detective Trogdon applied for and obtained a telephonic search
8 warrant for the residence.

9 VII.

10 That law enforcement could hear at least one other person moving about inside the
11 residence. That Joseph Reichert refused to identify the other person or persons. The detectives
12 read Mr. Reichert his Miranda warnings. Several additional patrol units responded to the scene
13 and it took several hours before the other subject, later identified as Roy Brandenburg, Jr., finally
14 came out of the house.

15 VIII.

16 That after the residence was cleared, the search warrant was executed and police found
17 and seized over nine pounds of marijuana, nearly \$12,000.00 in U.S. currency, some ecstasy pills,
18 two bulletproof vests, several calibers of ammunition, digital scales, drug smoking paraphernalia,
19 lots of used and unused drug packaging materials, and paperwork establishing dominion and
20 control.

21 X.

22 That the officers advised Mr. Brandenburg of his Miranda rights, after which he gave a
23 confession and also provided consent to search his vehicle parked outside the residence. Inside
24 Mr. Brandenburg's vehicle, the officers found more marijuana, more cash, a handgun, and
25 paperwork establishing dominion and control.

26 XI.

27 That an additional search warrant was obtained for Joseph Reichert's business,
28 Underground Ink, where cash was seized that the narcotics K-9 alerted upon, as well as business
29 records, bank records, and other documentary evidence.



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CONCLUSIONS OF LAW

I.

That the above-entitled Court has jurisdiction over the parties and the subject matter of this action.

II.

That Joseph Reichert was on active supervision with DOC and was required to report his residential address to his CCO. That Officer Valley suspected that Mr. Reichert was not residing at the address at which he was registered. The contact between Officer Valley and the KCSO detectives was not a pretext to carry out an unlawful search nor was it a pretext to obtain evidence to support a search warrant; rather, it was a valid and supported request for back-up to conduct a residential compliance check.

III.

Washington recognizes a warrantless search exception, when reasonable, to search a probationer and his home or effects. A probation officer may search the probationer's home without a warrant so long as the search is reasonable and is based upon a well founded suspicion that a violation of probation has occurred. *State v. Winterstein*, 140 Wash.App 676 at 691. A well founded suspicion is analogous to the cause requirements of a *Terry* stop. *State v. Simms*, 10 Wash.App. at 87, *Terry v. Ohio*, 392 U.S. 1 at 9 (1968). Reasonable suspicion for a *Terry* stop must be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the search]." *Terry*, 392 U.S. at 21. Here, there were specific and articulable facts to support the belief that a violation of probation occurred, including Mr. Reichert's own admission that he was residing at an address different than the one he had reported to the DOC.

IV.

That a person on community custody such as Mr. Reichert does not enjoy the same protection under the Fourth Amendment as someone not under supervision. Mr. Reichert admitted to residing at the Sunde Road residence and under *Winterstein* Officer Valley could have entered the residence to confirm that and could have searched the common areas but not Mr. Brandenburg's bedroom. Further, that using the key found in Mr. Reichert's pocket to check to see whether it opened the door was not a violation of the Fourth Amendment.



V.

Under the case law such as *Winterstein* and *State v. McKague*, 143 Wash.App. 531 (2008), the applicable standard for a warrantless search is whether there is a well-founded suspicion that a violation of probation had occurred. In the present case, Officer Valley had a well founded suspicion that a violation of probation had occurred based on the information from other law enforcement officers that Reichert was living at the Sunde Road residence and from the fact that there was at least one vehicle outside the residence that was registered in Mr. Reichert's name. Officer Valley's suspicions were then confirmed when Reichert admitted that he was living at the Sunde Road residence.

VI.

That Officer Valley met this constitutional test based on the information he had from law enforcement, the fact that there was at least one vehicle outside the residence that was registered in Mr. Reichert's name, and Mr. Reichert's own admission to living at a different residence from the one at which he was registered.

VII.

That because Officer Valley had a well founded suspicion that a violation of probation had occurred, he was authorized under Washington law to conduct a warrantless entry and search of the residence. Officer Valley, therefore, was authorized to open the door to the residence and his actions in this regard were lawful and did not violate Reichert's or Brandenburg's Fourth Amendment rights.

VIII.

Therefore, the Defendants' motions to suppress are hereby denied.

IX.

That both Mr. Brandenburg's and Mr. Reichert's statements to law enforcement were made knowingly and voluntarily and are therefore admissible. Further, that Mr. Reichert was not under arrest until after his Miranda warnings were read to him so his additional statements made before Miranda are also admissible.

SO ORDERED this 23rd day of January, 2009.



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PRESENTED BY-

STATE OF WASHINGTON

Barbara O. Dennis

BARBARA O. DENNIS, WSBA No. 34590
Deputy Prosecuting Attorney

JUDGE

[Signature]

APPROVED FOR ~~ENTRY~~ AS TO FORM ONLY

[Signature]
DORAWA, WSBA No. 10928
Attorney for Defendant

Prosecutor's File Number-08-116300-5



AMENDMENT [IV]

Searches and seizures

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.

this rule and CrR 4.1, bail hearings held pursuant to CrR 3.2, and trial settings held pursuant to CrR 3.3, may be conducted by video conference in which all participants can simultaneously see, hear, and speak with each other. Such proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule or policy. All video conference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Any party may request an in person hearing, which may in the trial court judge's discretion be granted.

(2) *Agreement.* Other trial court proceedings including the entry of a Statement of Defendant on Plea of Guilty as provided for by CrR 4.2 may be conducted by video conference only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.

(3) *Standards for Video Conference Proceedings.* The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. Video conference facilities must provide for confidential communications between attorney and client and security sufficient to protect the safety of all participants and observers. In interpreted proceedings, the interpreter must be located next to the defendant and the proceeding must be conducted to assure that the interpreter can hear all participants.

[Amended effective September 1, 1995; December 28, 1999; April 3, 2001.]

Comment

Supersedes RCW 10.01.080; RCW 10.46.120, .130; RCW 10.64.020, .030.

RULE 3.5 CONFESSION PROCEDURE

(a) *Requirement for and Time of Hearing.* When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) *Duty of Court to Inform Defendant.* It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross

examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) *Duty of Court to Make a Record.* After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) *Rights of Defendant When Statement Is Ruled Admissible.* If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

RULE 3.6 SUPPRESSION HEARINGS— DUTY OF COURT

(a) *Pleadings.* Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) *Hearing.* If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

[Adopted effective May 15, 1978; amended effective January 2, 1997.]

4. PROCEDURES PRIOR TO TRIAL

RULE 4.1 ARRAIGNMENT

(a) *Time.*

(1) *Defendant Detained in Jail.* The defendant shall be arraigned not later than 14 days after the date the information or indictment is filed in the adult division of

NOTARY PUBLIC
STATE OF WASHINGTON

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STATE OF WASHINGTON
BY
DEPUTY

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 29th day of July, 2009, he deposited in the mails of the United States of America, postage prepaid, the original and one(1) copy of Appellant's Brief in State of Washington v. Roy E. Brandenburg, Jr. No. 38784-1-II addressed to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, WA 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant, Roy E. Brandenburg, DOC # 874470, Cedar Creek Corrections Center, P.O. Box 37, Littlerock, WA 98556-0037.

James L. Reese, III

Signed and Attested to before me this 29th day of July, 2009 by James L. Reese, III.

Julia S. Reese

Notary Public in and for the State of Washington residing at Port Orchard.
My Appointment Expires: 4/4/13