

NO. 38954-1-II

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

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DIVISION II
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STATE OF WASHINGTON
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DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ANDREW REICHERT,

Appellant.

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. In denying the Mr. Reichert's motion to suppress, the trial court erroneously entered the following findings:

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- ii. *Finding of Fact No. II.* The text of this finding is set forth in Appendix A to this brief. CP 90.
- iii. *Findings of Fact No. III.* The text of this finding is set forth in Appendix A to this brief. CP 90.
- iv. *Finding of Fact No. IV.* The text of this finding is set forth in Appendix A to this brief. CP 90.
- v. *Finding of Fact No. V.* The text of this finding is set forth in Appendix A to this brief. CP 91.

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- v. *Conclusion of Law No. VII.* The text of this conclusion is set forth in Appendix A to this brief. CP 93.

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vi. *Conclusion of Law No. IX:* The text of this conclusion is set forth in Appendix A to this brief. CP 93.

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4. There was insufficient evidence to support a finding of guilt on the charge of possession of marijuana with intent to deliver.

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Are the findings and conclusions entered by the trial court pursuant to its ruling in the 3.5/3.6 RP supported by substantial evidence? (Assignment of Error No. 1, 2)

2. The trial court erred when it denied Mr. Reichert's motion to suppress evidence because CCO Valley lacked the legal authority to unlock, open and shut the door the Sunde road residence? (Assignment of Error No. 3)

3. Was insufficient evidence presented at trial to support a conviction of possession of marijuana with intent to deliver? (Assignment of Error No. 4)

C. STATEMENT OF THE CASE

1. Procedural History:

The State charged Joseph Reichert by Amended Information with possession of marijuana with intent to deliver as a principal or accomplice. CP 38. Mr. Reichert filed a motion to suppress evidence of an illegal search. CP 13, 31. A 3.5/3.6. Hearing was held beginning on December 17, 2009 before the Honorable Judge Haberly. 3.5/3.6 RP Volumes 1 through 2. At the conclusion of the hearing, the trial court denied the motion to suppress evidence. CP 89.

A jury trial was held beginning on January 7, 2009. On January 15, 2009, Mr. Reichert was found guilty of possession of marijuana with intent to deliver. CP 95. This appeal timely follows. CP105

2. Statement of the Facts:

a. 3.5/3.6 Hearing

Mr. Reichert moved to suppress evidence obtained pursuant to a warrantless search of the Sunde road residence on July 22, 2008 and to suppress statements made to law enforcement on that day.

About May 2008 Detective Trogdon and Detective Birkenfeld obtained information from an informant implicating Mr. Reichert in both possessing and selling marijuana. 3.5/3.6 RP 8-9. The informant also provided information regarding Mr. Reichert's address. The informant told law enforcement Mr. Reichert was living in a residence on Sunde Road.

Id. This information provided by the informant was about two to three weeks old by the time law enforcement received it. 3.5/3.6 RP 9.

The informant went with Detectives Trogdon and Birkenfeld to the Sunde residence. *Id.* The informant pointed out the location of the residence to the detectives. *Id.* The detectives returned to the residence the following day to obtain license numbers from the vehicles in the driveway of the Sunde residence. *Id.* No efforts were made to obtain a search warrant at that time. 3.5/3.6 RP 34.

The next step in the investigation undertaken by Detectives Trogdon and Birkenfeld was to contact Officer Valley, a fugitive apprehension specialist with Department of Corrections. 3.5/3.6 RP 10, 21, 49. Officer Valley's job entailed processing warrants through DOC and filed contacts if requested by office CCOs. 3.5/3.6 RP 49 He is cross-commissioned with the Mason County Narcotics Unit. 3.5/3.6 RP 52. Officer Valley confirmed Mr. Reichert was on active status with the Department of Corrections (DOC) and DOC records showed Mr. Reichert was living at a location other than the Sunde address reported by the informant. *Id.* Mr. Reichert was on supervision for a misdemeanor offense. 3.5/3.6 RP 97. The Detectives asked Officer Valley for information regarding Mr. Reichert's address. 3.5/3.6 RP 31. The Detectives informed Mr. Valley that they had information indicating that Mr. Reichert may be selling marijuana. 3.5/3.6 RP 54. Detectives Trogdon

and Birkenfeld worked together in the investigation of Mr. Reichert. The Detectives did not contact Mr. Reichert's assigned probation officer prior to the search. 3.5/3.6 RP 21.

The Detectives continued their investigation by checking the address listed in DOC records for Mr. Reichert. *Id.* That residence at that address appeared to be vacant. *Id.* Officer Valley was contacted by the detectives to discuss Mr. Reichert's address. *Id.* The Detectives reviewed a number of addresses obtained through the I/Leads computer system to locate Mr. Reichert. 3.5/3.6 RP 130. Officer Valley performed some investigation of his own to find another address for Mr. Reichert. 3.5/3.6 RP 21. Officer Valley found another address for Mr. Reichert and he contacted the Detectives to provide that information. *Id.* The Detectives went to that address and determined that no one was living at the address. *Id.* The Detectives contacted Officer Valley again about a week prior to July 22, and asked him if he had checked on Mr. Reichert. 3.5/3.6 RP 35. Officer Valley had not done so and had forgotten about the address issue. *Id.*

Detective Trogon testified that on July 22, the Detectives received a call from Officer Valley asking the Detectives to accompany him to check on "the address on Sunde road". 3.5/3.6 RP 11. Officer Valley and the Detectives arrived at the Sunde address together. 3.5/3.6 RP 13. Officer Valley recalled informing Mr. Butler, Mr. Reichert's

probation officer, that he was going to check on Reichert's address on July 21. 3.5/3.6 RP55-56, 76, 82. That call occurred after Officer Valley spoke to the Detectives. 3.5/3.6 RP 68. Officer Valley had already arranged the check of the Sunde residence with the Detectives prior to the call to Mr. Butler. *Id.* Officer Valley reviewed the chronological computer notes of the case about May 17 and discovered that Mr. Butler had gone to Mr. Reichert's DOC reported residence. 3.5/3.6 RP 84. No warrant for Mr. Reichert was requested at that time. *Id.*

Officer Valley testified that his purpose in going to the Sunde road address was to determine if Mr. Reichert was living at the address. 3.5/3.6 RP 57. He was not at the residence to violate or arrest Mr. Reichert. *Id.* Officer Valley made the arrangements to visit the Sunde address at the request of the Detectives, not at Mr. Butler's request. 3.5/3.6 RP 69. Officer Valley did not recall discussing the issues presented by the Detectives with anyone from DOC in May 2008, including the issue of Mr. Reichert's potential lack of compliance with his address. 3.5/3.6 RP 78-79. Officer Valley went to the front door of the residence and knocked on the door. 3.5/3.6 RP 13. Officer Valley recalled identifying himself as "with the Kitsap County Sheriff's Office" multiple times. 3.5/3.6 RP 59. That went on for about five minutes. *Id.* Officer Valley commanded Mr. Reichert to come out of the residence to talk about his address. 3.5/3.6 RP 104. Officer Valley did not believe that he had the authority on

that day to enter the residence. 3.5/3.6 RP 91. Under DOC policies as Mr. Valley understood those to be, he could not enter a third party residence without the consent of that third party. 3.5/3.6 RP 92. Officer Valley did not have that third party consent to enter the residence on June 22. *Id.* The DOC policies also state that a CCO may not force entry into a third party residence to arrest or to search for an offender unless either an emergency exists, an arrest warrant existed, or that forced entry was the only means available under the circumstances. 3.5/3.6 RP 92-93. Officer Valley testified that none of those circumstances were present in the this case. *Id.* Also under DOC policies, a CCO may not force entry into any residence at the request of general authority law enforcement. 3.5/3.6 RP 93. DOC policies also provide that planned searches require the approval of a supervisor. 3.5/3.6 RP 93-94. In this case Officer Valley did not have that authority to conduct a search in this case. 3.5/3.6 RP 94-95. Officer Valley testified that had no reason to search, he was merely checking to see if Mr. Reichert was living at the Sunde residence. 3.5/3.6 RP 95. Officer Valley had not asked Mr. Butler for permission to conduct a search. 3.5/3.6 RP 105. Mr. Butler recalled that Officer Valley told him that he was going out the Sunde residence with Westnet officers to speak with Mr. Reichert about possible drug dealing. 3.5/3.6 RP 157-158.

The Detectives stood off the porch, but moved to the left and right corners of the residence. 3.5/3.6 RP 13, 15. Detective Trogdon was close

enough to the door to identify Mr. Reichert peering through the door. 1PR 14. Detective Trogdon could also hear the conversation between Mr. Reichert and Officer Valley. *Id.* Detective Trogdon heard Officer Valley tell Mr. Reichert that they were not going to leave. 3.5/3.6 RP 14. He also heard Mr. Reichert state that he did not want to come out of the residence. 3.5/3.6 RP 29. Officer Valley continued to knock on the door and talk to Mr. Reichert through the door. *Id.* Officer Valley recalled standing on the porch of the Sunde residence and talking to Mr. Reichert periodically for about twenty minutes. 3.5/3.6 RP 61. Mr. Reichert came out the front door after about fifteen to twenty minutes. 3.5/3.6 RP 29. Mr. Reichert locked the door to the residence behind him. 3.5/3.6 RP 115.

Mr. Reichert exited the residence, closed the door behind him, and was handcuffed by Officer Valley. 3.5/3.6 RP 15-16, 62. Officer Valley read Mr. Reichert's rights to him. 3.5/3.6 RP 16. After Mr. Reichert left the residence, Detective Trogdon kept an eye on the residence while Detective Birkenfeld "took an active role with Officer Valley". 3.5/3.6 RP 16. Detective Trogdon could hear movement from inside the residence even after Mr. Reichert was outside of the residence. 3.5/3.6 RP 29. At that point, law enforcement did not know who was "in charge" of the residence. 3.5/3.6 RP 30. Officer Valley asked Mr. Reichert to allow him to go inside the residence to determine if he was living there, but Mr. Reichert refused to allow him to enter the residence. RP 62.

Mr. Reichert was patted down and keys were removed from his pant's pocket by Detective Birkenfeld. 3.5/3.6 RP 30, 133. Detective Birkenfeld did not recall the number of keys or the shape of the group of keys he found in the pocket. 3.5/3.6 RP 140. After Mr. Reichert's refusal to allow entry, Officer Valley contacted his supervisor by phone. 3.5/3.6 RP 63. Prior to opening the door, Officer Valley was not certain Mr. Reichert was living at the Sunde residence. 3.5/3.6 RP 63. Mr. Reichert did not admit that he was living at the residence. 3.5/3.6 RP 63, 105.

Officer Valley took Mr. Reichert's keys, unlocked the door and pushed the door open. 3.5/3.6 RP 17, 63. He pushed the door as wide as it would open. 3.5/3.6 RP 110. While standing at the door, Officer Valley stated that he smelled marijuana. 3.5/3.6 RP 17. Officer Valley recalled smelling marijuana after he pushed the door open. 3.5/3.6 RP 63. Officer Valley stated that he opened the door to check for someone else in the residence out of safety concerns. 3.5/3.6 RP 109. Officer Valley did not shout out to anyone inside the residence or look for anyone in the residence. 3.5/3.6 RP 109.

Detective Trogdon participated in the investigation from that point by walking up to the open door and sniffing for the presence of marijuana. *Id.* Detective Trogdon could not smell marijuana. *Id.* Detective Trogdon had a cold at that time. *Id.* Detective Trogdon told Detective Birkenfeld

that he could not smell any marijuana and that Detective Birkenfeld should go to the door and sniff for Marijuana. *Id.* Detective Trogdon testified that he told Detective Birkenfeld the following: "You are going to need to see if you can smell it." 3.5/3.6 RP 17. Detective Birkenfeld went up the door, sniffed and determined that he could smell marijuana. 3.5/3.6 RP 17-18. The door was shut by Officer Valley. 3.5/3.6 RP 64. Officer Valley had to reach inside the residence to close the door. *Id.* 110. Detective Trogdon next contacted a Kitsap County Prosecutor to obtain a search warrant for the residence. 3.5/3.6 RP 18. The application for the search warrant was based on the smell of marijuana at the residence. *Id.* The warrant was obtained. *Id.*

Officer Valley contacted Mr. Butler by phone and asked him to speak to Mr. Reichert at the scene after Mr. Reichert exited the residence. 3.5/3.6 RP 64. Mr. Butler did arrive on scene following that phone call. *Id.* Officer Valley testified that he did not consider his actions that day to constitute a search. 3.5/3.6 RP 119. However, Officer Valley answered affirmatively that he had been involved in the type of search at issue in this case previously.

During the events listed above, law enforcement heard noises coming from the residence. 3.5/3.6 RP 14-17. They determined that another individual was inside of the residence. 3.5/3.6 RP 16. The decision was made to treat the situation as barricaded subject inside of

the residence. 3.5/3.6 RP 18. The SWAT team and additional officers arrived at the scene. 3.5/3.6 RP 18-19. Mr. Brandenburg eventually left the residence. 3.5/3.6 RP 19. Detective Trogdon estimated it took one and one half to two hours to execute the search warrant. 3.5/3.6 RP 18

3. Trial Facts

For purposes of the issue raised regarding the trial phase of this case, the statement of facts here is focused on the testimony relevant to the search of the Sunde residence pursuant to the search warrant.

At the time of trial Detective Birkenfeld testified that Mr. Brandenburg reexamined in the residence for about two hours before the search warrant was executed. RP 567. Following Mr. Brandenburg's exit from the residence, the residence was search pursuant to the search warrant. 3.5/3.6 RP 20. Deputy Trogdon participated in the search RP 74-112. Deputy Eberhard applied a drug search dog to the residence. RP 484-493. The dog made a positive alert on \$565 that came from Mr. Reichert's wallet. RP 484, 524-525. In the center console and underneath the seat of the Lexus with the license plate of 296 RQC, where marijuana was found. RP 484-485, 516. The dog also made a positive alert to the safe and currency in the closet in the master bedroom. RP 487-488. No effort was made to test the money individually. RP 512. The dog also alerted on money found in the hallway bathroom and a garbage sack containing bags in the kitchen. RP 491.

The dog was also applied to Mr. Reichert's business. RP 494. The only alert made by the dog was to the currency located in a filing cabinet. *Id.* In the bedroom attributed to Mr. Reichert, an open empty safe was found in the closet. RP 74. According to Deputy Vangesen, the safe was found open and had the strong smell of marijuana about it. 2RP 393. The drug dog Buddy. RP 74. Deputy Trogdon found a cut top to a plastic bag with a knife in the area described as the bathroom area of Mr. Reichert's bedroom. 2RP 75, 446. Documents related to Mr. Reichert were found in his bedroom and described by Detective Trogdon. RP 102-108. Detective Duckworth described finding a white board in Mr. Reichert's room with notes regarding bills and a notation "Learn Banking" 2Rp 350. Deputy Vangesen testified that the phrase "learn banking" could have drug implications. RP 391-393. Cash was found in a shelf area next to the closet in the bedroom. RP 448.

In the main living room of the house numerous bags were found. RP 75. Two smoking devices were also found in this part of the residence. RP 76, 545. Some of the bags had cut tops. *Id.* A digital scale was also found in the living room. 2Rp 367. Some bags in the kitchen area contained what Detective Trogdon believed was marijuana residue inside. RP 75. Additional bags and items Detective Trogdon described as packaging material were also found in the kitchen. *Id.* Documents

belonging to Mr. Reichert were found in the common areas of the residence as well. RP 388.

Many items were found in Mr. Brandenburg's bedroom. Those items included: multiple bags with cut tops, bags containing marijuana, Ecstasy pills. 2RP 74-81. Ecstasy was found with \$772 in cash in the right front pocket of jeans found on the floor in Mr. Brandenburg's room. 2RP 344. Another baggie of pills with \$250 was found in the left front packet of jeans found on the floor of Mr. Brandenburg's room. 2Rp 345. Ecstasy was also found in Mr. Brandenburg's car. 2RP 365. Detective Duckworth testified that in his opinion the discovery of the ecstasy indicated that Mr. Brandenburg was selling that drug. *Id.*

Some bags found in Mr. Brandenburg's bedroom contained about one half pound of marijuana. RP 78-79. A total of nine pounds of marijuana was found. RP 80. The majority of the marijuana found at the residence was located in Mr. Brandenburg's room. RP 551 Only .02 of a pound of marijuana was found in the common area of the residence. 2 RP 550-551. Detective Birkenfeld testified that amount was consistent with a personal use quantity. RP 551. marijuana was found in multiple locations in Mr. Brandenburg's room, including in cups located on a top shelf. 2RP 538, 545. About one and a half to two pounds of marijuana were found in the safe located in Mr. Brandenburg's room. Law enforcement also found two bulletproof vests and ammunition. RP 81, 366. A significant amount of

cash was also found totaling to \$12,900. RP 81. Cash in the amount of \$5000 was found hidden in the hall bathroom. 2RP 351. The hall bathroom is directly across from Mr. Brandenburg's room. RP 356. Law enforcement did not take any steps to determine who owned that money. *Id.* \$2,499 was found inside Mr. Brandenburg's safe. RP 251. Detective Duckworth testified that in the closet of Mr. Brandenburg's room was found \$294 in a box, \$350 in a cup, \$890 stuffed in the hood of a hoody jacket. RP 352.

Law enforcement made no efforts to fingerprint the items found in the residence. RP 367-370. Mr. Reichert's place of business and vehicle were also searched pursuant to a search warrant. RP 413.

Roy Brandenburg provided a taped statement to law enforcement. 3.5/3.6 RP 137. Mr. Brandenburg claimed responsibility for all of the items found in the home. RP 549. No one indicated that Mr. Reichert was responsible for the items found in the residence. *Id.* Mr. Brandenburg confessed that he had been involved in the distribution of marijuana for approximately two years. RP 569. Mr. Brandenburg reported that he sold between eight to ten pounds of marijuana per week. RP 570. His sole source of income came from marijuana sales. *Id.* Finally, Mr. Brandenburg admitted that he last purchased marijuana three to four days before the search took place and paid about \$26,500 for the marijuana. *Id.*

Mr. Reichert now appeals the trial court's denial of the motion to suppress and contests the sufficiency of the evidence to support a verdict of guilt.

D. ARGUMENT

1. Insufficient Evidence was presented at the Cr.R.3.5/3.6 RP to support entering Cr.R 3.5/3.6 Findings of Fact: I, II, III, IV and V.

Where the trial court has weighed the evidence, the appellate court review is to determine whether the findings made by the trial court are supported by substantial evidence. *Holland v. Boeing Co.*, 90 Wn.2d 384, 390, 583 P.2d 621 (1978), citing *Morgan v. Prudential Ins.Co. of America*, 86 Wn.2d 432, 545 P.2d 1193 (1976). A trial court's determination of the issues raised in a motion to suppress is reviewed for substantial evidence and to see if the findings support the conclusions of law. *State v. Schlieker*, 115 Wn.App. 264, 269, 62 P.3d 520 (2003). Substantial evidence is defined as "a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The conclusions of law made by the trial court are to be reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 212, 970 P.2d 722 (1999).

The appellant assigns error to Cr.R 3.5/3.6 Findings of Fact: I, II, III, IV and V and Conclusions of Law II, III, IV,V, VII, VIII, and IX entered by the trial court.

(A) Insufficient Evidence was presented at the

Cr.R.3.5/3.6 RP to support entering Cr.R 3.5/3.6 Findings of Fact I.

The Cr.R 3.5/3.6 Findings of Fact I states in part as follows:

“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 90.

There was not sufficient evidence presented to support the trial court’s finding of fact. Officer Valley did not have a specific and articulable basis to believe Mr. Reichert was living at the Sunde road address. Officer Valley testified at the 3.5/3.6 hearing that his purpose in going to the Sunde road address was to determine if Mr. Reichert was living at the address. 3.5/3.6 RP 57. Officer Valley reviewed the chronological computer notes of the case about May 17 and discovered that Mr. Butler had gone to Mr. Reichert’s DOC reported residence. 3.5/3.6 RP 84. No warrant for Mr. Reichert was requested at that time. *Id.* Officer Valley was not the assigned Community Corrections Officer for Mr. Reichert. *Id.* Officer Valley stated that he was not at the residence to violate or arrest Mr. Reichert. 3.5/3.6 RP 57.

The information suggesting Mr. Reichert lived at the Sunde road address came from Detectives Trogdon and Birkenfeld via an informant. 3.5/3.6 RP, 10, 21. The trial court did not make findings regarding the reliability of the informant. Officer Valley did not have any information through the Department of Corrections channels suggesting Mr. Reichert

lived at the Sunde road address. The information in the Department of Corrections computer records showed that Mr. Reichert's CCO had visited the reported address for Mr. Reichert and no warrant or probation violation had been filed following the visit in May. At the time Officer Valley was at the residence, he did not know who was living there. 3.5/3.6 RP, 77. When Mr. Reichert exited the residence, he closed the door behind him. 3.5/3.6 RP, 62.

In the case at hand, the evidence did not support a finding that Officer Valley had a specific and articulable factual basis to believe that Mr. Reichert was living at the Sunde road address. Mr. Reichert's behavior did not indicate that he lived at the residence, instead his behavior is consistent with someone protecting the privacy rights of the occupants of the residence. He did not admit to living at the residence. RP 103. Additionally, Officer Valley believed that another individual was in the residence as well. The fact that Mr. Reichert's vehicle was in the driveway is not dispositive. Mr. Reichert certainly could be visiting a residence, rather than residing at that location. Finally, the fact that Mr. Reichert had a key is not dispositive. An individual may have a key to a residence without necessarily living at that residence.

(B). Insufficient Evidence was presented at the Cr.R.3.5/3.6 RP to support entering Cr.R 3.5/3.6 Findings of Fact II.

The CrR 3.5/3.6 Findings of Fact II states in part as follows:

“...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.” CP 90.

There was not sufficient evidence presented to support the trial court’s finding of fact. This finding appears to actually be a conclusion of law. Any conclusion of law, even if erroneously denominated as a finding of fact will be subject to a de novo review. *Kane v. Klos*, 50 Wn.2d 778, 788, 314 P.2d 672 (1957). The facts presented at the hearing neither support the finding of fact, or a conclusion of law as entered by the trial court.

In this case Officer Valley was not assigned as to supervise Mr. Reichert. Officer Valley’s job entailed processing warrants through DOC and filed contacts if requested by office CCOs. 3.5/3.6 RP 49. Officer Valley contacted Mr. Reichert’s CCO, K.C. Butler and informed Mr. Butler, Mr. Reichert’s probation officer, that he was going to check on Reichert’s address on July 21 (the following day). 3.5/3.6 RP55-56, 76, 82. Officer Valley made the arrangements to visit the Sunde address at the request of the Detectives, not at Mr. Butler’s request. 3.5/3.6 RP 69. Officer Valley did not recall discussing the issues presented by the Detectives with anyone from DOC in May 2008, including the issue of Mr. Reichert’s potential lack of compliance with his address. 3.5/3.6 RP 78-79. The evidence presented in fact show that Officer Valley acted as a “stalking horse” for law enforcement. Although the Detectives could have conducted a “knock and talk”, they had no grounds to obtain a search

warrant, nor did the Detectives conduct a “knock and talk”. Instead the officers stood at the residence with Officer Valley and refused to leave the residence until Mr. Reichert exited the residence. 3.5/3.6 RP, 61. Officer Valley, accompanied by the Detectives, stayed on the premises while Officer Valley continued to demand that Mr. Reichert exit the residence for fifteen to twenty minutes. 3.5/3.6 RP, 61.

Furthermore, the detectives followed up with Officer Valley to remind him to check on the address. 3.5/3.6 RP, 35. Officer Valley had forgotten about the detective’s prior request for a check on Mr. Reichert’s address. *Id.* The facts presented show that in fact law enforcement wanted to search Mr. Reichert’s address and used DOC as a means to accomplish the search. The detectives initially contacted Officer Valley raising the question of Mr. Reichert’s address. Officer Valley had worked with the detectives on previous occasions. The detectives went through Officer Valley rather than Mr. Reichert’s CCO for the address check. 3.5/3.6 RP, 21. After the initial conversation, the detectives followed up with Officer Valley seeking information about the status of Mr. Reichert’s address. 3.5/3.6 RP, 35. Apparently the issue was not a pressing one for Officer Valley, as he forgotten to further investigate the address. *Id.* Finally, Officer Valley did not discuss a possible search of the residence with anyone with DOC. All of these facts support a conclusion that law

enforcement used Officer Valley as a “stalking horse” and the findings of the trial court to the contrary was erroneous.

This finding was also an inappropriate conclusion of law because the search was not reasonable. The key question in determining this issue is whether the probation officer used the probation search as a means to help law enforcement evade the Fourth Amendment warrant and probable cause requirements, or whether the probation officer enlisted law enforcement to assist with his own legitimate objectives. *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991). In this case, the evidence shows that Officer Valley was involved in this case due to the request of law enforcement. The evidence does not show that anyone at DOC requested that Officer Valley verify Mr. Reichert’s address. To the contrary, the DOC records that Officer Valley reviewed showed that in fact Mr. Reichert’s assigned CCO had looked into the address in May and no warrant had been issued, suggesting that no violation had occurred. Officer Valley could have relayed the concerns of law enforcement to Mr. Butler, the assigned CCO, and let him take over any investigation from that point, but he did not. The assertion that Officer Valley was a “stalking horse” is supported by the evidence of the detectives subsequent call to Officer Valley to determine if he had taken any action. The inference to be made from that fact is that the officers wanted to be sure that Officer Valley took action, and that they did not want their

request to be ignored. It was immediately after this contact that Officer Valley contacted the detectives regarding visiting the Sunde address. Officer Valley was working to assist the detectives, not DOC, at the time he went to the Sunde residence and opened the door. Not only did he open the door, but he invited the detectives to the doorway as well. The evidence supports the conclusion that Officer Valley was in fact assisting law enforcement to investigate and uncover information that they on their own would not be able to do. Consequently, the trial court erred in concluding that Officer Valley was not a “stalking horse” for law enforcement. The reasonableness of the search conducted in this case is discussed later in this brief.

Defense counsel also argued that handcuffing and searching Mr. Reichert for officer safety was a pretext. 3.5/3.6 RP, 176. A pretextual arrest occurs where an officer arrests a suspect for the sole purpose of searching for information evidence of another crime. See *State v. Ladsen*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). Pretextual arrests violate article I, section 7 of the Washington State Constitution. *State v. Ladsen*, 138 Wn.2d at 353; *State v. Michaels*, 60 Wn.2d 638, 374 P.2d 989 (1962). In this case the apprehension of Mr. Reichert was pretextual. Officer Valley did not have a sufficient basis for handcuffing and arresting Mr. Reichert prior to the search. Officer Valley did not have a reasonable belief that Mr. Reichert violated a term of his probation.

(C) Insufficient Evidence was presented at the CrR

3.5/3.6 RP to supporting entering CrR 3.5/3.6 Findings of Fact No. III.

Findings of Fact No. III states in part as follows:

“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.”

Mr. Reichert did not admit to living in the Sunde Road residence.

3.5/3.6 RP 103. The court’s finding that Mr. Reichert admitted to residing at the Sunde Road residence was in error.

(D) Insufficient Evidence was presented at the CrR

3.5/3.6 RP to supporting entering CrR 3.5/3.6 Findings of Fact No. IV.

Findings of Fact No. IV states in part as follows:

“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.” CP 90.

This finding appears to be a conclusion of law. As stated previously, conclusions of law are to be reviewed de novo.

No evidence was presented to support a finding that Mr. Reichert admitted he lived at the Sunde residence. Mr. Reichert did not admit to living at the residence. 3.5/3.6 RP 103. In the case at hand Officer Valley testified that he did not go to the residence to violate or arrest Mr. Reichert. 3.5/3.6 RP 69. Officer Valley did not intend to go into the

residence. 3.5/3.6 RP 91. In fact, it was Officer Valley's understanding that he could not enter the residence according to DOC policy. *Id.* Further under DOC policies Officer Valley did not have the authority to conduct a search of the Sunde residence. 3.5/3.6 RP 94-95. Officer Valley did not intend to conduct a search of the residence. *Id.* In order to permit a search of the residence, Officer Valley needed approval of his supervisor. 3.5/3.6 RP 105. Officer Valley did not have such approval. *Id.* Additionally, Officer Valley did not inform or ask permission of the assigned CCO that he intended to search the residence.

DOC has policies prohibiting searches of third party residences without the consent of third parties as well. 3.5/3.6 RP 92. Prior to opening the door of the residence, Officer Valley heard another individual moving about the residence. Officer Valley made no attempt to obtain approval of that third party to enter the residence. DOC policies also state that a CCO may not force entry into a third party residence to search or arrest a probationer in the absence of limited circumstances. 3.5/3.6 RP 92-93. Officer Valley testified that none of the conditions allowing forced entry into a third party residence existed in this case. *Id.* The DOC policies did not give Officer Valley the authority to search the residence. Officer Valley did obtain permission from his supervisor to try the keys found on Mr. Reichert to determine if any of those keys fit the lock on the front door. 3.5/3.6 RP 63. However the record does indicate that Officer Valley

obtained permission to open the door, and Officer Valley's testimony at the time of the hearing was that he did not have any authority to search the Sunde residence. Opening the door on sniffing was in fact a search.

At the time of the 3.5/3.6 hearing defense counsel argued that it would be necessary to cross the threshold to open and close the door. 3.5/3.6 RP 173. The act of inserting the key, opening the door, and closing the door required Officer Valley to cross the threshold of the home and was in fact a search. Officer Valley could not have entered or searched the residence under DOC policy. The finding of the trial court that Officer Valley could have entered the residence and conducted a search was not supported by the evidence. The evidence presented by Officer Valley was to the contrary, his belief was that he could not search the residence.

Although a probationer may have a lesser expectation of privacy by virtue of his status as a probationer, in this case Officer Valley did not believe that DOC policies supported a search. Furthermore, Officer Valley did not have a well founded suspicion that Mr. Reichert violated a term of his probation, as previously argued in this brief. Consequently, a search could not lawfully occur. Concluding as a matter of law that the search was permissible was erroneous and is addressed later in this brief.

(E) Insufficient Evidence was presented at the CrR 3.5/3.6 RP to supporting entering CrR 3.5/3.6 Findings of Fact No. V. CP 91.

Findings of Fact No V states as follows:

That upon entering the door, Officer Valley could smell the overwhelming order of fresh marijuana coming from inside the residence. Detective Birkenfeld then stepped up to onto the porch to confirm and he was also able to smell marihuana from at least one foot away from the threshold of the open door. " CP 91.

The evidence presented at the 3.5/3.6 RP did not support this finding. Officer Valley did not describe the order of the marihuana to be "overwhelming". The testimony of Officer Valley as to the smell he detected at the doorway to the residence was as follows:

"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 order 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 Birkenfel come up. He could smell, it and I just reached in, closed the door, and turned it over to them for further investigation." 3.5/3.6 RP 63-64.

The testimony at the hearing was not in conformity with the findings of the court. Therefore, the trial court erred in making this finding.

2. The trial Court erred when it entered conclusions of law denying Mr. Reichert's motion to suppress evidence because CCO Valley lacked the legal authority to unlock, open, and the shut the door the Sunde road residence.

The search violated Mr. Reichert's constitutional rights because the information available to the CCO was not sufficient to create reasonable suspicion needed to justify the warrantless search and the scope of search was not reasonable.

Warrantless searches are per se unreasonable under both Article I, Section 7 of the Washington State Constitution and the Fourth Amendment to the United States Constitution. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). The lawfulness of a warrantless search is to be reviewed de nove. *State v. Kypreos*, 110 Wn.App. 612, 616, 39 P.3d 371 (2002), (citing *United States v. Van Poyck*, 77 F.3d 285, 290 (9th Cir. 1996)).

Evidence seized as fruit of an illegal, warrantless search are suppressed unless the State meets its burden of proving that the search falls under a jealously and carefully drawn exception to the warrant requirement. *State v. Ferguson*, 131 Wn.App. 694, 128 P.3d 1271, 1275 (2006), citing *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)). If the information contained in an affidavit of probable cause for a search warrant was obtained by an unconstitutional search, the information may not be used to support the warrant. *State v. Ross*, 141 Wn.2d 302, 304, 4 P.3d 130 (2000) (citing *State v. Johnson*, 75 Wn.App. 692, 879 P.2d 293 (1996)). The reasonableness of a search is determined at the moment of its inception. A search which is not reasonable at its inception will not be validated even if it uncovers incriminating evidence. *State v. Grundy*, 25 Wn.App. 411, 607 P.2d 1235 (1980).

Limitations exist on where officers may lawfully go when entering a private citizen's property. "[t]he curtilage of a home is so intimately tied to

the home itself that it should be placed under the home's umbrella of Fourth Amendment protection." *State v. Ross*, 141 Wn.2d 3014, 312, 4 P.3d 130 (2000) (citing *State v. Ridgway*, 57 Wn.App. 915, 918, 790 P.2d 1263 (1990). Residents have an expectation of privacy in the curtilage, or area contiguous with a home." *State v. Poling*, 128 Wn.App. 659, 667, 116 P.3d 1054 (2005) Law enforcement on legitimate business may enter an area of curtilage which is impliedly open to the public, such as an access route to a house or a walkway leading to a residence. *State v. Smith*, 113 Wn.App 846, 852, 55 P.3d 686(2002), (citing *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). Law enforcement entering such areas must "do so as would a 'reasonably respectful citizen.'" *State v. Poling*, 128 Wn. App at 667, quoting *State v. Seagull*, 95 Wn.2d 898, 902 632 P.2d 44 (1981). A substantial or unreasonable departure from his area exceeds the scope of the invitation and violates a constitutionally protected expectation of privacy. *Id.*

A probation officer may search a probations's home without a warrant as long as the search is reasonable and is based upon a well founded suspicion that a probation violation has occurred. *State v. Winterstein*, 140 Wn.App. 676, 691, 166 P.3d 1242, citing *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). A well founded suspicion is defined as analogous to the requirements of a *Terry* stop. *State v. Winterstein*, 140

Wn.App. at 691, citing *Simms*, 10 Wn.App. 87, 516 P.2d 1088; *Terry v. Ohio*, 392 U.S. 1, 9, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Reasonable suspicion to allow a *Terry* stop must be based upon “specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrant the search.” *State v. Winterstein*, 140 Wn.App. at 691, quoting *Terry v. Ohio*, 392 U.S. at 21, 9, 88 S.Ct. 1868. A reasonable suspicion requires sufficient probability but not absolute certainty. *State v. Winterstein*, 140 Wn.App. At 691, quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 346, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

In the case at hand the trial court made conclusions of law and ultimately the trial court found the search of the residence reasonable. Each of the conclusions of law contested by Mr. Reichert are addressed individually below.

(A) The Court erred in entering Conclusion of Law No. II because the contact between Officer Valley and the detectives was a pretext to carry out an unlawful search and/or a pretext to obtain evidence.

The trial court entered conclusion of law II, which states 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 support request for back-up to conduct a residential compliance check.” CP 92.

As previously argued in regards to Findings of Fact No. II, Officer Valley acted to assist law enforcement in obtaining information rather than

to check on Mr. Reichert's address. Probation officers may conduct supervisory searches without a warrant but may not act on the request and of an in concert with law enforcement officials to evade the warrant requirement. *State v. McKague*, 143 Wn.App. 531, 178 P.3d 1035 (1998), *United States v. Merchant*, 760 F.2d 963, 969 (9th Cir. 1985) cert. dismissed, 480 U.S. 615, 107 S.Ct. 1596, 94 L.Ed.2d 614 (1987); *United States v. Jarrad*, 754 F.2d 1451, 1453 (9th Cir. 1985); *Smith v. Rhay*, 419 F.2d 160, 162 (9th Cir. 1969). In the case of *People v. Coffman*, 2 Cal. App. 3d 681, 689, 82. Cal. Rptr. 782, 786 (1970), the Court found a search conducted by a probation officer of a probationer unlawful. The basis for the finding was the probation officer was not engaged in administering his supervisory capacity, he had not instigated the search or shown any interest in the search but for his role as a "front" for law enforcement. The court determined that his presence at the search was a ruse.

In the case at hand, Officer Valley had no contact with Mr. Reichert prior to the day of the search. As previously argued, only the communications from the detectives drew Officer Valley's interest to Mr. Reichert. In fact, at one point Officer Valley forgot about Mr. Reichert until his attention was re-focused on Mr. Reichert after a follow up call from the detectives. Mr. Reichert was not on Officer Valley's case load. In fact, Mr. Reichert had a probation officer assigned to him, Mr. Butler.

Officer Valley did not consult with Mr. Butler regarding the concerns raised by the detectives in their initial call to him prior to the day before the search. The detectives contacted Officer Valley twice requesting Officer Valley take action to check on Mr. Reichert's address. The Detectives limited their contact to Officer Valley, even though the assigned CCO was presumably available. Officer Valley acted alone following the request of the detectives in checking on Mr. Reichert. That action was not requested by the assigned CCO.

Officer Valley testified that he did not go to the Sunde address to violate Mr. Reichert. Also, the officers stayed at the residence and in fact moved to corners of the residence which leads to the conclusion that the detectives were attempting to gather information. They refused to leave until Mr. Reichert presented himself so that they could gather information. The detectives had information via a tipster implying that Mr. Reichert was involved in criminal activity, and the officers wanted to investigate that tip. The detectives used Officer Valley as the means to gather information.

The evidence presented at the 3.5/3.6 RP indicates that Officer Valley went to the Sunde address at the request of the detectives and not to the address at the request of anyone at CCO. The detectives used the authority of DOC to advance their investigation. Officer Valley did testify that he did contact Mr. Butler the day before the search occurred, but that call was made after Officer Valley made arrangements with the detectives

to go to the Sunde address. Officer Valley asked permission of Mr. Butler to go to the Sunde residence, but no request was made to Officer Valley asking for him to take that action. The detectives used Officer Valley to gain admittance and as a mechanism to gather information. The Court erred in concluding that contact between Officer Valley and the detectives was not a pretext to obtain evidence to support a search warrant.

Mr. Reichert also asserts that handcuffing him and searching him for officer safety was also a pretext as previously argued. For the reasons stated, the search (opening and closing the door) was unlawful and the evidence obtained as a result of the search (and the search warrant that was based on the improper opening and closing of the door) should have been suppressed.

(B) The Court erred in entering Conclusion of Law No. III

because Officer Valley did not have specific and articulable facts to support a belief that a probation violation had occurred.

“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 (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."

As set forth previously in this brief, a probation officer may search a probationer's home without a warrant as long as the search is reasonable and is based upon a well founded suspicion that a probation violation has occurred. *State v. Winterstein*, 140 Wn.App. 676, 691, 166 P.3d 1242. In the case at hand, the trial court did not enter findings defining what facts Mr. Valley possessed to create a specific and articulable factual basis to believe Mr. Reichert was not living at his reported address. Officer Valley had access to the DOC computer records which include notes written by Mr. Reichert's probation officer. Presumably Officer Valley had access to Mr. Reichert's reported work address. Additionally, Mr. Reichert had reported a residential address to DOC. Officer Valley was aware of but did not go to the work address to speak with Mr. Reichert regarding his address. 3.5/3.6 RP 25. That would have been an easy method to resolve the address issue. However, going to the work address would not meet the Detectives' goal of gaining access to the Sunde road residence. Officer Valley did not drive by the Sunde residence prior to July 22 to determine if Mr. Reichert's car was in the driveway of the residence. Such a drive by would not invoke any need for officer back up. Officer Valley did not ask Mr. Butler to take steps to verify Mr. Reichert's address either.

The DOC records showed that Mr. Butler made a check on the address reported by Mr. Reichert back in May, and no warrant had been issued. At the time Officer Valley went to the Sunde residence, he had no basis to believe that Mr. Reichert was living at the address, outside of the anonymous tip that was not verified. That alone does not support a reasonable belief that a probation violation had occurred. According to Officer Valley's job description, he is to assist Community Corrections Officers if he is required by the CCO. 3.5/3.6 RP 82. However, in this case Officer Valley took his own initiative at the request of the Detectives to check on Mr. Reichert's address. 3.5/3.6 RP 82. Officer Valley knew that he could not force his way into the residence, so he attempted to talk Mr. Reichert out of the residence. 3.5/3.6 RP 104. Detective Birkenfeld did not testify that he called out to anyone. 3.5/3.6 RP 135. In this case the evidence leads to the conclusion that the detectives were using Officer Valley to gain access to Mr. Reichert that they would not be able to achieve without their assistance. Finally, Mr. Reichert did not admit to residing at the Sunde residence.

(C) The Court erred in entering Conclusion of Law No. IV

because the search of the residence was in fact a violation of the Fourth Amendment.

Conclusion of Law IV states as follows:

"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 Forth Amendment." CP 92.

A probation officer may search a probationer's home without a warrant as long as the search is reasonable and is based upon a well founded suspicion that a probation violation has occurred. *State v. Winterstein*, 140 Wn.App. 676, 691, 166 P.3d 1242, citing *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). In the case at hand, the act of opening the door to the residence, smelling the air coming from the opened residence, asking law enforcement to smell as well, and then reaching into the residence to close the door was an unreasonable search. As previously stated, the DOC policy precluded Officer Valley's entry into the home and Officer Valley testified that he was not there to search the residence. Officer Valley knew that another individual was living at the home and according to DOC policy, he could not search the home without the consent of the third party in the home.

The Court cited the case of *State v. Winterstein, supra*, in support for concluding that the search was lawful. The case of *Winterstein* is distinguishable to the case at hand. In that case, Mr. Winterstein, who was on probation, changed his address from 646 Englert Road to 646 ½ Englert Road. On February 5, 2003 the CCO received information from

law enforcement indicating that Mr. Winterstein was suspected of manufacturing methamphetamine at his residence. The CCO decided to search Mr. Winterstein's residence based on three factors: the information provided by law enforcement, Mr. Winterstein's failure to report as required, and a prior test positive for methamphetamine. *State v. Winterstein*, 140 Wn.App at 680. The CCO testified that when he arrived at 646 Englert road, the door to the home was open, he announced himself and a male voice said "Yeah, come on in." *Id* at 681. The CCO went down the hallway of the residence and observed items that were linked to the manufacture of methamphetamine. The CCO did not enter any rooms from the hallway, but could see the items from the hall.

In the case at hand, Officer Valley did not have a reasonable suspicion that Mr. Reichert violated any term of his probation. In the *Winterstein* case, Mr. Winterstein admitted that the CCO had a well-founded suspicion that he violated terms of his probation. *Id.* At 691. There is not such well-founded suspicion in the present case as previously argued in this brief. Another key distinguishing factor between the *Winterstein* case and the present case, is the address provided by probationer. In the *Winterstein* case, the probationer had previously reported the address searched as his residence. Under DOC rules, a probationer must obtain approval to change an address through DOC. However, in the case at hand, the address searched has never been

reported by Mr. Reichert as his residence. Therefore, Officer Valley had no basis to believe that Mr. Reichert was living at the Sunde road address, therefore the Sunde road address could not be lawfully searched in this case, as no specific and articulable facts supported Officer Valley's belief that Mr. Reichert lived at the Sunde road address and no permission to enter had been given.

(D) The Court erred in entering Conclusion of Law No. V because Officer Valley did not have a well founded suspicion that a violation of probation had occurred.

Conclusion of Law No. 5 states in part as follows:

“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 confirmed when Reichert admitted he was living at the Sunde road residence. “ CP 93.

Warrantless searches of a probationer and or his home must be reasonable. *State v. Massy*, 81 Wn.App. 198 (1986);913 P.2d 424; *State v. McKague*, 143 Wn.App. 531, 178 P.3d 1035 (2998). The information upon which a probation officer acted must be based on some valid reason to believe that a probation violation has occurred. *Id.* A officer must be acting on something more than casual rumor, general reputation, or at the request of police. *State v. McKague, supra.*

In the case at hand, as previously argued Officer Valley had no well founded suspicion that Mr. Reichert had violated a term of his probation. On the issue of reasonableness, the trial court did not make a finding on whether the entry or search or if a confirmation of Mr. Reichert's address would be reasonable. Officer Valley was relying on information provided by the detectives that they in turn received from a confidential informant. The confidential information told the detectives that Mr. Reichert was staying at the Sunde road address. The credibility of the information was not established in the record was reliability of the informant shown.

When police officer seek a warrant based on information obtained from an undisclosed confidential information, or if no warrant is sought the test is applied to the court's poster arrest determination of probable cause, courts employ to Aguilar-Spinelli test to determine whether probable cause exists. *State v. Jackson*, 102 Wn.2d 432, 433, 688 P.2d 136 (1984) (citing *Spinelli*, 393 U.S. 410, *Aguilar*, 378 U.S. 108). This two part test requires the following determinations: 1) the informant must establish facts that explain how he obtained the information, and 2) the informant must be personally credible or his information reliable. See *State v. Olson*, 73 Wn.App. 348, 355, 869 P.2d 110, *rev. denied*, 124 Wn.2d 1029 (1994). Both prongs of the test must be met. *State v. Ibarra*, 61 Wn.App.695, 698, 812 P.2d 114 (1991). The court made no findings

that the informant was reliable or that the information was credible, or that the information provided by the informant was verified. The trial court made no finding regarding the reliability of the informant.

Additionally, Mr. Reichert did not admit to residing at the Sunde road residence. 3.5/3.6 RP 103. The Court's conclusion of law erroneously states that Mr. Reichert made that admission. In this case Officer Valley neither had a well founded suspicion that Mr. Reichert violated a term of his probation or conducted a reasonable search. It was not reasonable to search based on the informant tip and little information within the knowledge of Officer Valley prior to opening the door. Consequently, the trial court was in error in concluding that the search was lawful.

(E) The trial court erred when it entered conclusion of law VI because there was insufficient evidence to justify the search.

“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 93.

As previously argued, the fact that a vehicle registered to Mr. Reichert is not sufficient to make the search in this case reasonable, or a basis for a well founded suspicion that Mr. Reichert had violated a term of his probation. The information provided by the confidential informant did not provide an adequate basis for the search to be deemed

reasonable as previously argued. For the reasons previously discussed in this brief, the search was not lawful and the Court erred in concluding that the search in this case met the constitutional tests set forth in the case law described in this brief. Additionally, Mr. Reichert did not admit that he was living at the Sunde road residence. 3.5/3.6 RP 103.

(F) The trial court erred when it entered conclusion of law VII because in this case Officer Valley was not authorised under Washington law to conduct a warrantless entry and search of the residence.

Conclusions of Law No. VII states in part:

“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 authorised 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 93.

As preciously argued in this brief, Officer Valley did not have a well founded suspicion that a probation violation had occurred. For the sake of brevity, those arguments are not repeated here. It is anticipated the State may argue that the search was lawful because marijuana could be smelled on the porch according to the testimony of Officer Valley and Detective Birkenfeld. Although Officer Valley could be on the porch of the residence lawfully, Officer Valley went beyond what was permissible by opening the locked front door, swinging the door open as wide as it would

go, and reaching into the residence to close the door. Under the case of *State v. Myers*, 117 Wn.2d 332, 815 P.2d 761 (1991), a front porch to a residence is not a constitutionally protected area. Under the "open view" doctrine, "something that is detected by an officer's senses, from a nonintrusive vantage point, is in open view". *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). A seven factor test is to be used to determine whether an officer exceeded the scope of open view. Those factors are as follows: whether the officer: 1) spied into the house; 2) acted secretly; 3) approached the house in daylight; 4) used the normal, most direct access route into the house; 5) attempted to speak with the resident; 6) created an artificial vantage point; 7) made the discovery accidentally. *State v. Seagull*, 95 Wn.2d at 632.

In the case at hand, the marijuana was not in open view. As to the factors: law enforcement spied into the house because they used a key to open a door that had been shut and locked by Mr. Reichert. Mr. Reichert made efforts to keep the residence private. Law enforcement acted secretly. They took Mr. Reichert's keys without his consent and opened the door. Law enforcement did approach the house in the daylight, and used the normal access right to the home. They also attempted to speak with Mr. Reichert. Law enforcement did create an artificial vantage point by opening the locked door without the consent of Mr. Reichert. It was only after the door was opened without his consent that the marijuana

was smelled by Officer Valley and Detective Birkenfeld. The discovery was not made accidentally. On balance, the application of the factors indicate that the smell of marihuana was not in open view. This analysis supports concluding that the search was not reasonable and was unlawful.

(G) The trial court erred when it entered conclusion of Law VIII in denying the motion to suppress evidence because the search violated Mr. Reichert's Constitutional rights as the information available to the CCO was not sufficient to create a reasonable suspicion needed to justify the warrantless search and the scope of the search was not reasonable.

The trial court's conclusions of law VII is as follows:

Therefore, the Defendants' motions to suppress are hereby denied. CP 93.

As previously argued, the search was unlawful. Under the law of Washington, any unconstitutional search or seizure absolutely requires exclusion of all evidence found following the constitutional violation. *State v. Ladson*, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1979); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). "[A]ll subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppress. *State v. Ladson*, 138 Wn.2d at 359-60. Washington does not recognize a good faith exception to the exclusionary rule. *State v. Littlefair*, 129 Wn.App. 330, 334, 119 P.3d 359 (2005)

The warrantless search of the Sunde road residence conducted by Officer Valley violated the Fourth Amendment to the U.S. Constitution and Article 1, section 7 of the Washington State Constitution. The opening and closing of the door accompanied by a “sniff test” is in fact a search that cannot be justified even under the standard of reasonableness applicable to searches of probationers. As previously stated, probation officers can only perform a warrantless search when they have a well-founded suspicion that a probationer is violating a condition of probation. Without that well-founded suspicion, a search is unreasonable. *State v. Patterson*, 51 Wn.App. 202, 204-06, 208, 752 P.2d 945 (1988). As previously stated, the questions of whether a suspicion is reasonable or well-founded, the Court is to apply the analysis required of a *Terry* stop. Articulate suspicion is defined as a substantial possibility that criminal conduct has occurred or is about to occur. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Before a CCO may conduct a warrantless search based on a reasonable suspicion, the CCO must have a articulable and well-founded suspicion based on objective facts, that the person has committed a probation violation. Although a probationer has a diminished expectation of privacy, that privacy interest is diminished only to the extent required to ensure that the probation program is workable and public safety is not jeopardized. *State v. Simms*, 10 Wn.App. 75, 86, 516 P.2d 1088, *rev. denied*, 83 Wn.2d 1007 (1974); *State v. Patterson*, 51 Wn.App. 202, 752

P.2d 945 *rev. denied*, 111 Wn.2d 1006 (1988). The limitations on a probationer's diminished right to privacy will depend on the particular probationer involved, as well as the facts and circumstances surrounding the search.

It is undisputed that Mr. Reichert was on active probation for a misdemeanor. As a probationer, Mr. Reichert has a diminished expectation of privacy. However, Mr. Reichert could be subjected to a warrantless search only upon a well-founded suspicion that he violated a term of his probation. See *State v. Patterson*, 51 Wn.App at 205. The search in this case was not reasonable as previously argued and was beyond the scope of a search justified under an exception to the warrant requirement.

(H) The trial court erred when it entered conclusion of law IX because any statements made by Mr. Reichert were fruit of the poisonous tree and should have been suppressed.

Conclusions of Law No. IX states as follows:

“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 93.

Any statements of Mr. Reichert were made after the unlawful search and should therefore be dismissed under the fruit of the poisonous tree doctrine.

(I) State and Federal Constitutional Analysis.

The Washington State Constitution provides great protection to the privacy of citizens in their homes. *State v. Johnson*, 104 Wn.App. 409, 415, 16 P.3d 680, *review denied*, 143 Wn.2d 1024, 25 P.3d 1020 (2001); *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994) As stated previously in this brief, a hotel room is comparable to a private residence.

The Washington State Constitution provides more protection to privacy rights than the Fourth Amendment to the United States Constitution. *State v. Jones*, 146 Wn.2d 328, 45 P.3d 1062 (2001) It is well settled that Article I, Section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment. *State v. Jones*, 146 Wn.2d at 332, *referring to State v. Hendrickson*, 129 Wn.2d 61, 69, 917 P.2d 563 (1996); *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986); *State v. Williams*, 102 Wn.2d 733, 741-42, 689 P.2d 1065 (1984)

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

Article I, Section 7 Washington State Constitution

Under this provision, the State may not unreasonably intrude upon a person's private affairs. *State v. Borland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990); *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984)

The Court examines six factors in determining if the Washington State Constitution provides greater protection of privacy rights as outlined in *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986) The factors include an examination of the 1) textual language; 2) textual differences; 3) constitutional and common law history; 4) preexisting State law; 5) structural differences; 6) matters of particular state or local concern. *State v. Gunwall*, 106 Wn.2d at 61-62, 720 P.2d 808. Factors 1, 2, 3 and 5 have been previously considered. Washington State Constitution, Article 1, Section 7. Only factors four and six need to be examined as those factors require examination in light of the facts of a specific case. *State v. Russel*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994) *citing State v. Borland*, 115 Wn.2d at 576, 800 P.2d 112, *cert. denied*, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995)

An analysis of the fourth factor set forth in *Gunwall, supra*, demonstrates that the prior Washington case law has given significance to privacy interests of residences. Many Washington cases have held that Article I, Section 7 provides greater privacy protections than the Fourth Amendment. *See City of Seattle v. Mesiani*, 110 Wn.2d 454, 456, 755 P.2d 775 (1988) (*citing State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980); *State v. Young*, 123 Wn.2d at 188, 867 P.2d 593; *State v. Borland*, 115 Wn.2d at 578, 800 P.2d 1112; *State v. Gunwall*, 100 Wn.2d 814, 818, 676 P.2d 419 (1984); *State v. Chrisman*, 100 Wn.2d

814, 818, 676 P.2d 419 (1984) As specified in the case of *State v. Young*, 123 Wn.2d at 185, 867 P.2d 593 and *State v. Chrisman*, 100 Wn.2d at 820, 676 P.2d 419.

“In no area is a citizen more entitled to privacy than in his or her home. The closer offers come to intrusion into a checking, the greater the constitutional protection.” *Id.*

The case at hand concerns privacy interests in entering and subsequently searching a residence. An independent review of this matter under Article I, Section 7 is warranted.

The next step in the *Gunwall* analysis is of whether the privacy interest is a matter of State or local concern. *State v. Gunwall*, 106 Wn.2d at 620, 720 P.2d 808. This State has awarded its citizens a heightened protection against unlawful intrusions into private residences. *State v. Chrisman*, 100 Wn.2d at 822, 676 P.2d 419. As indicated in the case of *State v. Ferrier*, 137 Wn.2d at 114, the sixth factor of the *Gunwall* analysis suggests independent review of Article I, Section 7 when reviewing a claim of lack of consent to enter and subsequently search a residence. Consequently, it is evident that Article I, Section 7 of the Washington State Constitution provides greater protections of individual privacy rights than the United States Constitution. Therefore any interference with the right to privacy should be closely examined and Mr. Reichert should be given the broader protection provided by Washington State law as the cases previously cited in this brief indicate.

3. Insufficient Findings

Possession of Marijuana with Intent to Manufacture or Deliver charge is defined in RCW 69.50.401. In this case Mr. Reichert was charged as either a principal or as an accomplice.

In the case at hand, insufficient evidence was presented to find Mr. Reichert guilty of the charge of Possession of Marijuana with Intent to Manufacture or Deliver. The state alleged that Mr. Reichert was either a principle or an accomplice to Possession of Marijuana with Intent to Manufacture or Deliver.

In this case the evidence showed that Mr. Brandenburg was involved in selling marijuana, but failed to show that Mr. Reichert was involved in possession with intent to deliver. Mr. Reichert's defense was that he was not involved in drug transactions. In order to prove that Mr. Reichert committed the crime of possession of marijuana with intent to deliver, the state must prove that Mr. Reichert was involved in selling marijuana. See *RCW 69.50.401*. In order to prove Mr. Reichert was guilty as an accomplice the state must prove that with knowledge that his actions would promote or facilitate the commission of a crime, encourage or requests the other person to commit the crime, aids the other in planning or committing, *RCW 9A.08.020*

The state relied on the Mr. Reichert's possession in the residence, money, the "learn banking" references, the smell of marijuana in the

house and Mr. Reichert's safe, the cut baggie in a bathroom and the items found in the home to base a conviction upon. RP 603-620, 649-654 Mr. Brandenburg admitted that the marihuana found, bulletproof vests, pills were his and that he bought and sold drugs for a living. RP 569-572 There was no evidence suggesting that Mr. Reichert was involved in the drug trade other than his proximity to the drug related items. Mere proximity is not enough to establish a conviction as an accomplice. *State v. Ferreira*, 69 Wn.App. 465, 850 P.2d 541 (1993) *State v. Galisia* 119 Wn.2d 1003, 832 P.2d 487 (1992). There was insufficient evidence to base a conviction in this case. Mr. Reichert request this court vacate the conviction.

Those factors are not sufficient to establish an intent to deliver or to differentiate an intent to possession from an intent to deliver. Due process under both the Washington State and Federal Constitutions require that the state prove beyond a reasonable doubt every fact necessary to establish the essential elements of the crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970).

Consequently, there was insufficient evidence to establish that Mr. Reichert possessed with intent to deliver, even as an accomplice. If the evidence is not suppressed, the conviction should be overturned.

E. CONCLUSION

For the reasons cited above, Mr. Reichert respectfully requests the court to reverse the conviction entered in this matter.

RESPECTFULLY SUBMITTED this 28th day of July, 2009.

A handwritten signature in black ink, appearing to read 'Michelle Bacon Adams', written over a horizontal line.

MICHELLE BACON ADAMS
WSBA No. 25200
Attorney for Appellant

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IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
)	No. 08-1-00811-6
Plaintiff,)	
)	FINDINGS OF FACT AND CONCLUSIONS
v.)	OF LAW FOR HEARING ON CRR 3.5 AND
)	3.6
ROY EDWARD BRANDENBURG, JR.,)	
Age: 23; DOB: 08/19/1985,)	
)	
Defendant.)	
<hr/>		
STATE OF WASHINGTON,)	
)	No. 08-1-00812-4 ✓
PLAINTIFF,)	
)	FINDINGS OF FACT AND CONCLUSIONS
v.)	OF LAW FOR HEARING ON CRR 3.5 AND
)	3.6
JOSEPH ANDREW REICHERT,)	
AGE: 28; DOB: 07/06/1980,)	
)	
DEFENDANT.)	

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.⁴

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.



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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-

[Signature]

Attorney for Defendant

WSBA NO. *21821*

As to form only

Prosecutor's File Number-08-116300-5



COURT OF APPEALS
DIVISION II

09 JUL 28 PM 3:58

NO. 38954-1-II

STATE OF WASHINGTON
DEPUTY *Ka*

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

STATE OF WASHINGTON,

Respondent,

CERTIFICATION OF MAILING

v.

JOSEPH ANDREW REICHERT,

Appellant.

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Appellant's Brief in the above-captioned case hand-delivered or mailed as follows:

Copy Hand-Delivered To:

Mr. Randall Sutton
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-35
Port Orchard, WA 98366

Copy Mailed To:

Joseph Andrew Reichert
c/o Department of Corrections
1014 Bay Street, Suite 11
Port Orchard, WA 98366

DATED this 28th day of July, 2009, at Port Orchard, Washington.

Jeanne L Hoskinson
JEANNE L. HOSKINSON
Legal Assistant

09 JUL 28 PM 3:57

NO. 38954-1-II

STATE OF WASHINGTON

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

DEPUTY

STATE OF WASHINGTON,

Respondent,

CERTIFICATION OF MAILING

v.

JOSEPH ANDREW REICHERT,

Appellant.

I, MICHELLE BACON ADAMS, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Appellant's Brief in the above-captioned case hand-delivered or mailed as follows:

Original Hand-Delivered To:
Clerk of Court
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

DATED this day of July, 2009, at Port Orchard, Washington.



MICHELLE BACON ADAMS
WSBA No. 25200
Attorney for Appellant