

ORIGINAL

Nº. 39425-1-II

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

STATE OF WASHINGTON
Respondent,

v.

LAWRENCE M. HEMBD,
Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
OCT 14 2008
BY: [Signature] HEMBD

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 08-1-01032-3
The Honorable M. Karlynn Haberly, Presiding Judge

Eric Fong
WSBA No. 26030
Attorney for Respondent
569 Division, Ste. A
Port Orchard, WA 98366
(360) 876-8205

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	
1. May police officers obtain a warrant to search a residence for evidence of the act of possession of drug paraphernalia?	1
2. Did the police officers have sufficient facts to support the issuance of a warrant to search Mr. Hembd's home for evidence of possession of marijuana where the only knowledge police had regarding the likelihood tat marijuana would be found came from the statements of anonymous informants and Mr. Hembd's statement that he had smoked marijuana in his house two days previously?	1
3. May police officers use a drug sniffing dog to search for evidence without first obtaining a warrant specifically to use the dog as a sense-enhancing device?	2
4. Was there sufficient evidence to support the trial court's finding that "some of the individual's going to the defendant's home were known to be involved in narcotics" where no evidence was presented at the suppression hearing regarding the identity of people who visited Mr. Hembd's home?	2
5. Did the State present sufficient admissible evidence to convict Mr. Hembd of any crime where all incriminating evidence was unlawfully discovered and inadmissible?	2

C. STATEMENT OF THE CASE.....2

D. ARGUMENT

1. The trial court erred in denying Mr. Hembd’s motion to suppress where the complaint for the telephonic search warrant contained insufficient facts to support the issuance of the search warrant...9
 - a. *The trial court’s finding that some of the individuals who went to Mr. Hembd’s home were known to be involved in narcotics was not supported by facts in the record.12*
 - b. *The trial court erred in issuing the warrant to search for evidence of the crime of possession of drug paraphernalia since mere possession of drug paraphernalia is not a crime.....14*
 - c. *The facts presented to the issuing magistrate were insufficient to establish a nexus between Mr. Hembd’s residence and the crime of possession of marijuana.15*
 - d. *The facts given to the judge who issued the telephonic warrant were insufficient to establish the credibility or basis of knowledge of the anonymous informants whose tips were used to support probable cause to issue the warrant.....16*
 - e. *Because the initial warrant was issued without probable cause, all evidence discovered pursuant to that warrant was inadmissible.20*
2. The State presented insufficient admissible evidence to convict Mr. Hembd of any crime.....21

a. *The warrantless use of a drug dog to search the money found on Mr. Hembd exceeded the permissible scope of a search incident to arrest because it was an overly intrusive means of conducting the search....*22

b. *Mr. Hembd's statements were insufficient to establish the corpus of the crime of possession of methamphetamine with intent to distribute or manufacture*25

D. CONCLUSION26

TABLE OF AUTHORITIES

Page

Table of Cases

Federal Cases

<i>Aguilar v. State of Texas</i> , 378 U.S. 108, 84 S.Ct. 1509 (1964) .10, 11, 17	
<i>Spinelli v. United States</i> , 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).....	17
<i>United States v. Ventresca</i> , 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965).....	11
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	11-12

Washington Cases

<i>In re Pers. Restraint of Yim</i> , 139 Wn.2d 581, 989 P.2d 512 (1999).....	11
<i>Scott v. Trans-System, Inc.</i> , 148 Wn.2d 701, 64 P.3d 1 (2003)	13
<i>State v. Anderson</i> , 105 Wn.App. 223, 19 P.3d 1094 (2001).....	11
<i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 P.2d 832 (1999)	21
<i>State v. Bernal</i> , 109 Wn.App. 150, 33 P.3d 1106 (2001), <i>review denied</i> , 146 Wn.2d 1010, 52 P.3d 519 (2002)	25
<i>State v. Carter</i> , 5 Wn.App. 802, 490 P.2d 1346 (1971), <i>review denied</i> , 80 Wn.2d 1004 (1972)	21
<i>State v. Casto</i> , 39 Wn.App. 229, 692 P.2d 890 (1984), <i>review denied</i> , 103 Wn.2d 1020 (1985)	10

<i>State v. Dearman</i> , 92 Wn.App. 630, 962 P.2d 850 (1998), <i>review denied</i> 137 Wash.2d 1032 (1999)	23-24
<i>State v. Fisher</i> , 96 Wn.2d 962, 639 P.2d 743 (1982), <i>cert. denied</i> 102 S.Ct. 2967, 457 U.S. 1137. 73 L.Ed.2d 1355 (1982)	17
<i>State v. George</i> , 146 Wn.App. 906, 193 P.3d 693, 698 (2008)	14
<i>State v. Goble</i> , 88 Wn.App. 503, 945 P.2d 263 (1997)	15
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).	10, 18
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	22
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	13
<i>State v. Jackson</i> , 102 Wn.2d 432, 688 P.2d 136 (1984)	18
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999)	20
<i>State v. Lesnick</i> , 84 Wn.2d 940, 530 P.2d 243, <i>cert. denied</i> 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975).....	18
<i>State v. Lowrimore</i> , 67 Wn.App. 949, 841 P.2d 779 (1992)	14
<i>State v. McKenna</i> , 91 Wn.App. 554, 958 P.2d 1017 (1998).....	14
<i>State v. Maddox</i> , 152 Wn.2d 499, 98 P.3d 1199 (2004).....	11
<i>State v. Maxwell</i> , 114 Wn.2d 761, 791 P.2d 222 (1990)	10
<i>State v. Moore</i> , 161 Wn.2d 880, 169 P.3d 469 (2007)	22
<i>State v. Neeley</i> , 113 Wn.App. 100, 52 P.3d 539 (2002)	14
<i>State v. O’Bremski</i> , 70 Wn.2d 425, 423 P.2d 530 (1967).....	20, 25
<i>State v. Petty</i> , 48 Wn.App. 615, 740 P.2d 879, <i>review denied</i> 109 Wn.2d 1012 (1987)	10

<i>State v. Ross</i> , 106 Wn.App. 876, 26 P.3d 298 (2001), <i>review denied</i> , 145 Wn.2d 1016, 41 P.3d 483 (2002)	13
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	21
<i>State v. Seagull</i> , 95 Wn.2d 898, 632 P.2d 44 (1981)	10
<i>State v. Stephens</i> , 37 Wn.App. 76, 678 P.2d 832, <i>review denied</i> 101 Wn.2d 1025 (1984)	10, 11
<i>State v. Teal</i> , 152 Wn.2d 333, 96 P.3d 974 (2004)	21
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999)	10, 11
<i>State v. Wolken</i> , 103 Wn.2d 823, 700 P.2d 319 (1985)	18
<i>State v. Vangerpen</i> , 125 Wn.2d 782, 888 P.2d 1177 (1995)	25
<i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994)	23

A. ASSIGNMENTS OF ERROR

1. There was insufficient probable cause for the search warrants for Mr. Hembd's residence to issue.
2. The warrantless use of the drug dog exceeded the permissible scope of the search of the money found on Mr. Hembd incident to his arrest.
3. The State presented insufficient admissible evidence to convict Mr. Hembd of any crime.
4. Error is assigned to Finding of Fact on CrR 3.6 number 1, which reads:

That on September 16, 2008, Deputy Vangesen and Sergeant Bergeron contacted, the defendant, Lawrence Hembd, at his home in Port Orchard, Washington. Deputy Vangesen had received information from the defendant's neighbors that there was heavy short stay traffic from the defendant's residence. Some of the individuals going to the defendant's home were known to be involved in narcotics. The defendant had a history of assaulting officers. At the time of the contact, the defendant had a warrant for his arrest for driving while license suspended in the third degree.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. May police officers obtain a warrant to search a residence for evidence of the act of possession of drug paraphernalia?
2. Did the police officers have sufficient facts to support the issuance of a warrant to search Mr. Hembd's home for evidence of possession of marijuana where the only knowledge police had regarding the likelihood tat marijuana would be found came from the statements of anonymous informants and Mr. Hembd's statement that he had smoked marijuana in his house two days previously?

3. May police officers use a drug sniffing dog to search for evidence without first obtaining a warrant specifically to use the dog as a sense-enhancing device?
4. Was there sufficient evidence to support the trial court's finding that "some of the individual's going to the defendant's home were known to be involved in narcotics" where no evidence was presented at the suppression hearing regarding the identity of people who visited Mr. Hembd's home?
5. Did the State present sufficient admissible evidence to convict Mr. Hembd of any crime where all incriminating evidence was unlawfully discovered and inadmissible?

C. STATEMENT OF THE CASE

Factual and Procedural Background

On September 16, 2008, Kitsap County Sheriff's Officer Clinton Bergeron received a tip from "neighborhood people" that "possible drug activity" was occurring at Mr. Hembd's residence. RP 152-154; 4-8-09.¹ Officer Bergeron was working with the Kitsap County "knock and talk team" or "special investigations unit." CP 31-34, 47-53. The "knock and talk team" had information from neighbors of the residence at 4580 Laguna Lane, in Port Orchard, Washington, that the residence at 4580 Laguna Lane "had tons of short traffic stay, in and out, and this short traffic stay only went to the downstairs part of the residence." CP 31-34,

¹ The volumes of the report of proceedings are not numbered continuously. Reference to the report of proceedings will be made by giving the RP number followed by the date of the hearing being referenced.

47-53. The police believed that the residence was a split level house and that the lower level was occupied by Mr. Lawrence Hembd. CP 31-34, 47-53.

Officer Bergeron arrived at Mr. Hembd's residence accompanied by Deputies Vangesen and Gundrum. RP 154; 4-8-09. When the officers exited their patrol cars, a neighbor spoke with Deputy Vangesen. RP 154; 4-8-09. The unidentified neighbor told Deputy Vangesen that she believed that Mr. Hembd's residence was a drug house and she wanted the police to do something about it. CP 31-34, 47-53; RP 154; 4-8-09.

The officers approached Mr. Hembd's residence and observed a well-worn path in the grass on the side of the house. CP 31-34, 47-53; RP 154; 4-8-09. The path lead to the rear of the residence. RP 154; 4-8-09. The rear entrance of the residence was a sliding glass door with a blanket across the inside making it impossible to see inside the house. RP 155; 4-8-09. The officers knocked on the sliding door and a man named Tony opened the door. CP 31-34, 47-53; RP 155; 4-8-09. The police asked Tony if Mr. Hembd was home. CP 31-34, 47-53; RP 155; 4-8-09. Tony responded that Mr. Hembd was at home and the police asked Tony to have Mr. Hembd come to the door. CP 31-34, 47-53; RP 155; 4-8-09.

Mr. Hembd came to the door and the officers noticed that he was sweating profusely and that his hands were shaking. CP 31-34, 47-53; RP

155; 4-8-09. The police identified themselves and told Mr. Hembd that they were investigating the possibility of drug activity in his residence. CP 31-34, 47-53; RP 155-156; 4-8-09. Officer Bergeron informed Mr. Hembd that Officer Bergeron had information that drug activity was occurring at his house and that Mr. Hembd had large amounts of traffic in and out of his house. CP 31-34, 47-53. Mr. Hembd replied that he had lots of friends. CP 31-34, 47-53.

Officer Bergeron then asked Mr. Hembd if he owned a marijuana pipe and Mr. Hembd first said he did, then said "maybe." CP 31-34, 47-53; RP 156; 4-8-09. Officer Bergeron tried to get Mr. Hembd to clarify his statement about owning a marijuana pipe, but Mr. Hembd would only respond "maybe" when asked if he owned a marijuana pipe. CP 31-34, 47-53; RP 156; 4-8-09. Officer Bergeron then asked Mr. Hembd if he had any marijuana in his residence and Mr. Hembd said he did not. CP 31-34, 47-53; RP 156; 4-8-09. Officer Bergeron asked Mr. Hembd when Mr. Hembd had last smoked marijuana and Mr. Hembd told Officer Bergeron that he had last smoked marijuana two days ago inside his residence. CP 31-34, 47-53; RP 156; 4-8-09.

Officer Bergeron "explained" to Mr. Hembd that Officer Bergeron "needed" to get the marijuana pipe out of Mr. Hembd's residence because "that was what the neighbors were complaining about." CP 31-34, 47-53.

Mr. Hembd declined to let the officers conduct a warrantless search of his residence and instead offered to retrieve the marijuana pipe and bring it to the officers. CP 31-34, 47-53; RP 155; 4-8-09. The officers refused to let Mr. Hembd retrieve the marijuana pipe because Mr. Hembd had a history of crimes of assault involving police officers. CP 31-34, 47-53. Mr. Hembd had already told the police that there were no guns in the house, but had also told police that there were knives in the house and the police had observed several knives on the back deck of the house. CP 31-34, 47-53.

The officers were aware that there was an outstanding misdemeanor warrant for Mr. Hembd's arrest for driving with a suspended license. CP 31-34, 47-53; RP 155-158; 4-8-09. When Mr. Hembd refused to let the officers conduct a warrantless search of his residence, the officers arrested Mr. Hembd for the outstanding warrant. CP 31-34, 47-53; RP 155-158; 4-8-09. Without entering the home "at all," the police ordered the two other occupants of the lower portion of the home to exit the residence. CP 31-34, 47-53. After the two individuals exited the home, the police obtained a telephonic warrant to search Mr. Hembd's home evidence of the "crimes" of possession of marijuana and possession of drug paraphernalia. CP 15-28. Specifically, the warrant authorized the police to enter Mr. Hembd's home and search for: (1) drug paraphernalia,

specifically a marijuana pipe; (2) marijuana; and (3) evidence of dominion and control. CP 15-28.

After Officer Bergeron obtained the telephonic warrant, other police officers were called in to assist in the search of Mr. Hembd's home. RP 158-159; 4-8-09. During the search of Mr. Hembd incident to his arrest, police discovered \$707 in Mr. Hembd's pockets. RP 13; 2-9-09; RP 300; 4-9-09. The police requested that a drug dog respond to the scene in order to search the money found on Mr. Hembd's person and to assist in the search of Mr. Hembd's residence. RP 351-352; 4-13-09. City of Bremerton Police Sergeant Billy Renfro responded to Mr. Hembd's residence with canine officer Lance. RP 347-351; 4-13-09. Lance sniffed the money recovered from Mr. Hembd and Lance alerted on the money, indicating the presence of drugs. RP 354; 4-13-09.

Kitsap County Sheriff's Detective Chad Birkenfeld also responded to Mr. Hembd's residence to assist in the search. RP 11-12; 2-9-09. Upon entering and searching Mr. Hembd's residence, police observed numerous items of drugs paraphernalia in plain view, including a brown vial with crystal-like shards, a digital scale with residue, straws with residue, several methamphetamine pipes with residue, a marijuana pipe with residue, a bottle of alcohol, and hypodermic needles. RP 192-201; 4-9-09. After discovering these items, the police obtained an extension to the

search warrant permitting them to search the home for evidence of possession of methamphetamine and possession of methamphetamine with intent to distribute. CP 31-34, 47-53; RP 159; 4-8-09; RP 194; 4-9-09.

After the warrant extension had been obtained, police continued searching Mr. Hembd's residence and located small baggies containing white crystal-like residue, a partially empty bag of needles, several home made smoking devices made from a honey bottle and different jars, used hypodermic needles, and a metal lunch-box-type box with "drugs" written on the outside of it. RP 194-205; 4-9-09. Inside the box labeled "drugs," police found used needles and straws. RP 205; 4-9-09.

In the bedroom, police located ID cards with Mr. Hembd's name on them, including a Washington State ID card. RP 203; 4-9-09. In the drawers of the dresser in the bedroom, police located more needles and a brown wooden box. RP 206-207; 4-9-09. Inside the wooden box, police located one and two inch zipper baggies and a small case containing a spoon and cotton swabs. RP 207; 4-9-09.

In the bedroom, police located a safe. RP 215; 4-9-09. The police forced the safe open and found: a black digital scale; several vials of what appeared to be shards of methamphetamine; a syringe; two Altoids containers, one of which contained a bag of shards of methamphetamine and other smaller baggies; more baggies; a second scale; a bag with Mr.

Hembd's name written on it containing pill bottles which also had Mr. Hembd's name written on them; a pouch containing various used and unused needles; and an aluminum box which contained magazines addressed to Mr. Hembd and currency. RP 215-218; 4-9-09.

The evidence recovered from Mr. Hembd's residence was tested and was determined to contain 12.2 grams of methamphetamine. RP 282-288; 4-9-09.

Using a tape-wheel, Deputy Vangesen of the Kitsap County Sheriff's Office determined that it was 975 feet from Mr. Hembd's residence to a school bus stop located at the corner of Sedgwick and Brame streets. RP 312-313, 327; 4-9-09.

On September 17, 2008, Mr. Hembd was charged with one count of possession of methamphetamine with intent to manufacture or deliver. CP 1-4.

On November 20, 2008, Mr. Hembd moved to suppress all evidence obtained during the search of his home on the basis that the complaint for the telephonic search warrant contained insufficient facts to support the issuance of the warrant. CP 8-14.

On December 11, 2008, Mr. Hembd filed an Additional Motion to Suppress Evidence. CP 35-43.

On February 9, 2009, a hearing was held on Mr. Hembd's motions

to suppress. RP 3-98; 2-9-09. The trial court denied both motions to suppress. RP 94-97; 2-9-09.

On April 8, 2009, the charge against Mr. Hembd was amended to include the aggravating factor that Mr. Hembd committed the crime within 1,000 feet of a school bus stop. CP 93-96.

Trial in this matter also began on April 8, 2009. RP 152; 4-8-09.

On April 9, 2009, the trial court entered Findings of Fact and Conclusions of Law for the 3.6 hearing. CP 104-108.

On April 13, 2009, the jury found Mr. Hembd guilty of possession of methamphetamine with intent to manufacture and distribute and found that Mr. Hembd had done so within 1,000 feet of a school bus stop. RP 429; 4-13-09.

Notice of Appeal was filed on June 12, 2009. CP 198.

D. ARGUMENT

1. **The trial court erred in denying Mr. Hembd's motion to suppress where the complaint for the telephonic search warrant contained insufficient facts to support the issuance of the search warrant.**

The warrant clause of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution require that a search warrant be issued upon a determination of probable cause based upon 'facts and circumstances sufficient to establish a reasonable

inference' that criminal activity is occurring or that contraband exists at a certain location. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

An affidavit in support of a search warrant must set forth sufficient facts and circumstances to establish a reasonable probability that criminal activity is occurring or is about to occur. *State v. Petty*, 48 Wn.App. 615, 621, 740 P.2d 879, *review denied* 109 Wn.2d 1012 (1987). Affidavits are to be read as a whole, in a commonsense, nontechnical manner, with doubts resolved in favor of the warrant. *State v. Casto*, 39 Wn.App. 229, 232, 692 P.2d 890 (1984), *review denied*, 103 Wn.2d 1020 (1985).

Reasonableness is the key in determining whether a search warrant should issue. *State v. Gunwall*, 106 Wn.2d 54, 73, 720 P.2d 808 (1986). While deference is to be given to the magistrate's ruling and doubts are to be resolved in favor of the warrant's validity (*State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)), the deference accorded to the magistrate is not boundless. *State v. Maxwell*, 114 Wn.2d 761, 770, 791 P.2d 222 (1990). The review of a search warrant's validity is limited to the information the magistrate had when the warrant was originally issued. *Aguilar v. State of Texas*, 378 U.S. 108, 84 S.Ct. 1509, 1522 n.1 (1964); *State v. Stephens*, 37 Wn.App. 76, 80, 678 P.2d 832, *review denied* 101 Wn.2d 1025 (1984).

The affidavit must set forth more than mere conclusions. The underlying facts and circumstances leading to the conclusions must be included. Otherwise, the magistrate becomes no more than a rubber stamp for the police. *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 723; *State v. Stephens*, 37 Wn.App 76, 79, 678 P.2d 832, *review denied*, 101 Wn.2d 1025 (1984).

It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). An affidavit of probable cause must show “a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *Thein*, 138 Wn.2d at 140, 977 P.2d 582. The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999) (quoting *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)). However, mere speculation or an officer’s personal belief **will not** suffice. *State v. Anderson*, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001).

Where a search warrant issued without probable cause, evidence gathered pursuant to the search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v.*

Crawley, 61 Wn.App. 29, 808 P.2d 773, *review denied*, 117 Wn.2d 1009, 816 P.2d 1223 (1991).

Here, Officer Bergeron obtained the initial warrant to search Mr. Hembd's home for evidence of the crimes of possession of marijuana and possession of drug paraphernalia. The judge who issued the search warrant was made aware of the following facts prior to issuing the warrant: anonymous neighbors had noticed lots of people coming and going from Mr. Hembd's residence who went to the lower level of the residence and stayed for short periods of time; one neighbor believed Mr. Hembd's house was a "drug house"; there was a well worn path in the grass of Mr. Hembd's residence which led to the door to the lower level; Mr. Hembd admitted to owning a marijuana pipe; and that Mr. Hembd admitted that he had smoked marijuana in his home two days prior to the police arriving. CP 31-34, 47-53. For the reasons stated below, these facts were insufficient to support the issuance of a search warrant for Mr. Hembd's residence.

- a. *The trial court's finding that some of the individuals who went to Mr. Hembd's home were known to be involved in narcotics was not supported by facts in the record.*

Appellate courts review the trial court's decision after a CrR 3.6 hearing to determine whether substantial evidence supports the trial

court's findings of fact and whether those findings support the conclusions of law. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *State v. Ross*, 106 Wn.App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016, 41 P.3d 483 (2002). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d at 644, 870 P.2d 313 (*citing State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)). Appellate courts review the trial court's written conclusions of law de novo to determine whether the findings are supported by substantial evidence in the record and, if so, whether the conclusions of law are supported by those findings of fact. *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003). Unchallenged findings are verities on appeal. *Hill*, 123 Wn.2d at 644, 870 P.2d 313.

Here, In Finding of Fact for Hearing on CrR 3.6 number 1, the trial court found, inter alia, that, "Some of the individuals going to the defendant's home were known to be involved in narcotics." CP 104-108. However, there were no facts introduced in the 3.6 hearing or contained in the telephonic application for the search warrants which revealed the identity of anyone, aside from Mr. Hembd, suspected of going to Mr. Hembd's address. Further, beyond the unconfirmed suspicions of the anonymous informants, no evidence was presented as to what activities

were engaged in at Mr. Hembd's residence. There was simply no evidence in the record which would support the finding that individuals who had gone to Mr. Hembd's home were known to be involved in narcotics.

b. The trial court erred in issuing the warrant to search for evidence of the crime of possession of drug paraphernalia since mere possession of drug paraphernalia is not a crime.

“[N]o Washington statute criminalizes ‘possession of drug paraphernalia.’” *State v. George*, 146 Wn.App. 906, 193 P.3d 693, 698 (2008). *See also State v. Neeley*, 113 Wn.App. 100, 107, 52 P.3d 539 (2002) (“bare possession of drug paraphernalia is not a crime”); *State v. McKenna*, 91 Wn.App. 554, 563, 958 P.2d 1017 (1998) (“mere possession of drug paraphernalia is not a crime”); *State v. Lowrimore*, 67 Wn.App. 949, 959, 841 P.2d 779 (1992) (“RCW 69.50.412 does not, ipso facto, make possession of drug paraphernalia a crime”).

Search warrants allow police to enter an individual's home in order to search for evidence of a crime. A warrant cannot issue to permit the police to search for evidence of an act which is not a crime. At best, the police knew that Mr. Hembd had told them he had smoked marijuana two days prior to their questioning of him. The police had no facts to corroborate Mr. Hembd's claim that he had smoked marijuana, or that he even was in possession of a marijuana pipe. Mr. Hembd did not exhibit

any of the usual signs of having recently smoked marijuana, such as red eyes, droopy eyelids, or slow speech. Even if Mr. Hembd had consumed marijuana two days prior, or even immediately before the police arrived, the police still had knowledge of insufficient facts which would link Mr. Hembd's alleged marijuana pipe to the consumption of any marijuana. Mr. Hembd could have smoked the marijuana in a rolled cigarette or blunt, or could have borrowed a friend's marijuana pipe. The facts given to the judge who issued the telephonic warrant were insufficient to support a nexus between Mr. Hembd's residence and possession of drug paraphernalia.

c. The facts presented to the issuing magistrate were insufficient to establish a nexus between Mr. Hembd's residence and the crime of possession of marijuana.

[P]robable cause requires a nexus between the items to be seized and the place to be searched. That nexus must exist at the time the warrant issues. It is established if, when the warrant issues, the magistrate has information that would cause a reasonably prudent person to believe that the items to be seized will probably be found in the place to be searched **at the time the search is conducted**.

State v. Goble, 88 Wn.App. 503, 511, 945 P.2d 263 (1997) (emphasis added).

At the time police obtained a warrant to search Mr. Hembd's residence for evidence of possession of marijuana, the only facts the police

knew regarding Mr. Hembd's home and marijuana were that he claimed to have smoked marijuana in his home two days previously. The police did not note the odor of marijuana, burnt or otherwise, did not note the existence of any visible implements of marijuana cultivation, packaging, or consumption, and did not observe anyone exhibiting the signs of recent marijuana consumption.

In short, the police had no knowledge of any facts which would support a belief that evidence of possession of marijuana would be found in Mr. Hembd's residence on the day the search warrant was issued or when the search warrant was executed. Thus, the information presented to the judge who issued the warrant was insufficient to establish probable cause for the warrant to issue to search Mr. Hembd's residence for evidence of possession of marijuana.

d. The facts given to the judge who issued the telephonic warrant were insufficient to establish the credibility or basis of knowledge of the anonymous informants whose tips were used to support probable cause to issue the warrant.

Probable cause to issue the telephonic warrant was based, in part, on Officer Bergeron's report to the issuing judge that unidentified individuals who claimed to be the neighbors of Mr. Hembd had told police that there was a high volume of short-stay foot traffic going to and from Mr. Hembd's home and that he neighbors suspected Mr. Hembd's

residence was a drug house. CP 35-43, 47-53. However, Officer Bergeron did not identify who these informants were, did not provide the basis of their knowledge, and did not provide any facts from which the credibility of the informants could be determined.

The basic test for probable cause necessary for a judicial officer to issue a search warrant based on information obtained from an informant was established in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). Those requirements are: first, the affiant must set forth the underlying circumstances necessary to permit the magistrate issuing the warrant to independently determine that the informant had a factual basis for his allegations; and, second, the affiant must present sufficient facts so the magistrate may determine the credibility or the reliability of the informant. *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743 (1982), *cert. denied* 102 S.Ct. 2967, 457 U.S. 1137, 73 L.Ed.2d 1355 (1982).

To meet the *Aguilar-Spinelli* test, the credibility of the informant must be demonstrated and the mere statement that an informant is credible is not sufficient. *Fisher*, 96 Wn.2d at 965, 639 P.2d 743.

To satisfy the basis of knowledge prong, the informant must declare that he has personally seen the facts asserted and is passing along

firsthand knowledge. If the informant is relying on hearsay, the basis of knowledge prong can only be satisfied by sufficient information so that the hearsay establishes a basis of knowledge. *State v. Jackson*, 102 Wn.2d 432, 437-438, 688 P.2d 136 (1984); *See also State v. Gunwall*, 106 Wn.2d 54, 70-71, 720 P.2d 808 (1986) (the basis of knowledge prong requires the affidavit to recite the manner in which the informant gathered the information); *State v. Wolken*, 103 Wn.2d 823, 700 P.2d 319 (1985).

If the informant's tip fails under either prong, probable cause may still be established by independent police investigation which corroborates the tip to such an extent that it supports the missing elements of the *Aguilar-Spinelli* test. The independent police investigation must corroborate more than merely innocuous details. *State v. Jackson*, 102 Wn.2d at 438.

It is difficult to conceive of a tip more 'completely lacking in indicia of reliability' than one provided by a completely anonymous and unidentifiable informer, containing no more than a conclusionary assertion that a certain individual is engaged in criminal activity. While the police may have a duty to investigate tips which sound reasonable, (1) absent circumstances suggesting the informant's reliability, or some corroborative observation which suggests either (2) the presence of criminal activity or (3) that the informer's information was obtained in a reliable fashion, a forcible stop based solely upon such information is not permissible.

State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243, *cert. denied* 423 U.S.

891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975).

Here, Officer Bergeron's recitation of facts to the judge who issued the telephonic warrant twice referenced "neighbors" who had provided information to police, but is utterly void of any information as to the credibility of the informants or the factual basis of the informants' assertions.

The only fact uncovered by independent police investigation which corroborates any of the information provided by the anonymous informants is the fact that there appeared to be a path worn in Mr. Hembd's lawn leading to his back door. However, this is an innocuous fact which suggests nothing more than lack of care for his lawn on Mr. Hembd's part. The police did obtain a confession from Mr. Hembd that he had personally smoked marijuana in his home two days prior to the police knocking on his door, but this does not corroborate the informants' reports that Mr. Hembd's home was a "drug house."

The facts provided by Officer Bergeron to the judge who issued the telephonic search warrant were insufficient to establish either the credibility of the anonymous informants or the basis of the informants' knowledge that Mr. Hembd's home was a "drug house."

- e. *Because the initial warrant was issued without probable cause, all evidence discovered pursuant to that warrant was inadmissible.*

Generally, evidence seized during an illegal search is suppressed under the exclusionary rule. *See State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). In addition, evidence derived from an illegal search may also be subject to suppression under the fruit of the poisonous tree doctrine. *See State v. O'Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

Here, almost immediately after entering Mr. Hembd's residence pursuant to the warrant, police observed drug paraphernalia associated with methamphetamine and substances which appeared to be methamphetamine. Based on this evidence, the police obtained an extension to the initial warrant which authorized them to search for evidence of possession and delivery of methamphetamine. However, since probable cause did not exist to issue the initial search warrant, all evidence discovered pursuant to it was "fruit of the poisonous tree" and could not be used to support a finding of probable cause to issue the extension to the warrant. Likewise, all evidence discovered pursuant to the extension to the initial warrant was "tainted" and inadmissible.

Because the initial warrant was issued without probable cause, all

evidence discovered pursuant to the initial warrant and pursuant to the extension to the initial warrant was inadmissible and should have been suppressed.

2. The State presented insufficient admissible evidence to convict Mr. Hembd of any crime.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). Where a criminal defendant challenges the sufficiency of the evidence, appellate courts review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5

Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972). If there is insufficient evidence to prove an element, reversal is required and retrial is “unequivocally prohibited.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

As stated above, all evidence discovered inside Mr. Hembd’s residence pursuant to the search warrant was inadmissible and should have been suppressed. Had that evidence been suppressed, the only admissible evidence would have been the evidence uncovered by police before entry into Mr. Hembd’s home. Specifically, Mr. Hembd’s statements about having smoked marijuana in his residence two days prior to the police inquiry, the cash found in Mr. Hembd’s pockets, and the fact that Lance the drug dog alerted on the cash found in Mr. Hembd’s pockets. However, as will be discussed below, the search of the money with Lance exceeded the permissible scope of a search of Mr. Hembd incident to his arrest, and Mr. Hembd’s confession to smoking marijuana was insufficient to establish the corpus delicti of the crime of possession of methamphetamine with intent to deliver or manufacture.

- a. *The warrantless use of a drug dog to search the money found on Mr. Hembd exceeded the permissible scope of a search incident to arrest because it was an overly intrusive means of conducting the search.*

An officer who makes a lawful custodial arrest based on probable

cause may search the arrested person incident to that arrest. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007).

Where a law enforcement officer is able to detect something at a lawful vantage point through his or her senses, no unlawful search occurs under article I section 7 of the Washington Constitution and the evidence is admissible against the defendant even if the officer had no warrant to obtain the evidence. *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). However, a substantial and unreasonable departure from a lawful vantage point, or a particularly intrusive method of viewing, may constitute a search which exceeds the scope of the officer's authority and evidence obtained pursuant to the officer's actions may be inadmissible in court. *State v. Young*, 123 Wn.2d 173, 182-183, 867 P.2d 593 (1994).

For example, where police use an infrared thermal device to detect heat distribution patterns within a home that are not detectable by the naked eye or other senses, the surveillance was a particularly intrusive means of observation that exceeded allowable limits under article I, section 7. *Young*, 123 Wn.2d at 182-84, 867 P.2d 593.

In *State v. Dearman*, 92 Wn.App. 630, 962 P.2d 850 (1998), the court held that,

[l]ike an infrared thermal detection device, using a narcotics dog goes beyond merely enhancing natural human senses and, in effect, allows officers to "see through

the walls” of the home. The record is clear that officers could not detect the smell of marijuana using only their own sense of smell even when they attempted to do so from the same vantage point as Corky [the narcotics dog]. As in Young, police could not have obtained the same information without going inside the garage. It is true that a trained narcotics dog is less intrusive than an infrared thermal detection device. But the dog does expose information that could not have been obtained without the device and which officers were unable to detect by using one or more of their senses while lawfully present at the vantage point where those senses are used. The trial court thus correctly found that using a trained narcotics dog constituted a search for purposes of article 1, section 7 of the Washington Constitution and a search warrant was required.

State v. Dearman, 92 Wn.App. 630, 632, 962 P.2d 850, *review denied*, 137 Wn.2d 1032, 980 P.2d 1286 (1999) (citations omitted).

Here, the police could lawfully search Mr. Hembd incident to his arrest. However, the use of Lance to inspect the money found on Mr. Hembd was tantamount to the use of a “sense-enhancing device” to reveal information that the police could not otherwise obtain, specifically, whether or not there were traces of drugs on the money. The use of Lance to smell the money was an overly intrusive method of viewing the money found on Mr. Hembd. As such, similar to the use of a thermal detection device, a warrant was required for police to lawfully use Lance to inspect the money found on Mr. Hembd. Because the police did not obtain a warrant to use Lance, the use of Lance was unlawful, and the results of his

inspection of the money were inadmissible.

- b. *Mr. Hembd's statements were insufficient to establish the corpus of the crime of possession of methamphetamine with intent to distribute or manufacture.*

“Washington’s version of the corpus delicti rule requires that the State produce evidence, *independent of the accused’s statements*, sufficient to support a finding that the charged crime was committed by someone.” *State v. Bernal*, 109 Wn.App. 150, 152, 33 P.3d 1106 (2001), *review denied*, 146 Wn.2d 1010, 52 P.3d 519 (2002) (emphasis in original). A confession or admission, standing alone, is insufficient to establish the corpus delicti of a crime. *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995).

As stated above, evidence derived from an illegal search is subject to suppression under the fruit of the poisonous tree doctrine. *See State v. O’Bremski*, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

Had the trial court suppressed the evidence derived from Lance’s warrantless search of the money and the unlawful search of Mr. Hembd’s residence, the only evidence the State would have been able to present would be Mr. Hembd’s statements to the police regarding the marijuana. However, Mr. Hembd was not charged with any crime related to

marijuana or even the possession of drug paraphernalia. Mr. Hembd was charged with possession of methamphetamine with intent to distribute or manufacture. CP 93-96. Mr. Hembd's statements to the police were insufficient to establish the corpus delicti of the crime of possession of methamphetamine with intent to manufacture or deliver.

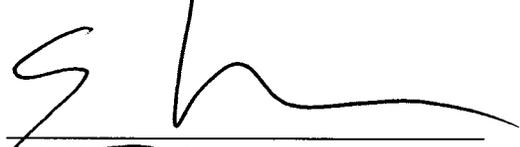
E. CONCLUSION

All evidence linking Mr. Hembd to the possession of methamphetamine was unlawfully discovered, inadmissible at trial, and should have been suppressed. Mr. Hembd's statements to police were insufficient to establish the corpus of the crime Mr. Hembd was charged with having committed.

For the reasons sated above, this court should vacate Mr. Hembd's conviction and remand for dismissal with prejudice.

DATED this 28 day of October, 2009.

Respectfully submitted,



Eric Fong, WSBA No. 26030
Attorney for Appellant

COURT OF APPEALS
DIVISION II

09 NOV -5 AM 11:35

STATE OF WASHINGTON
BY CA
DEPUTY

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 LAWRENCE MICHAEL HEMBD,)
)
 Appellant.)
 _____)

Appeal No. 39425-1-II
Superior Court No. 08-1-01032-3

DECLARATION OF MAILING

On this day I deposited in the United States Mail at Port Orchard, Washington, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

the original and one copy of the Brief of Appellant, and to

Mr. Randall Sutton
Attorney at Law
614 Division Street, MS-35
Port Orchard, WA 98366

Mr. Lawrence Michael Hembd
DOC #929692
Coyote Ridge Correction Center
P.O. Box 769
Connell, WA 99326-0769

a true copy of the Brief of Appellant.

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

Dated this 3rd day of November 2009, at Port Orchard, Washington.

Ann Blankenship
ANN BLANKENSHIP

ROVANG FONG & ASSOCIATES
569 DIVISION, SUITE A
PORT ORCHARD, WA 98366
TEL (360) 876-8205
FAX (360) 876-4745

11/3/09

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28