

41237-3-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

State of Washington
Respondent

v.

RANDALL W. MONTGOMERY
Appellant

41237-3-II

Wahkiakum County Superior Court Cause Number 07-1-00041-6

The Honorable Michael J. Sullivan

BRIEF OF APPELLANT

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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The trial court failed to enter adequate suppression Findings and Conclusions. Appellant challenges all suppression findings and conclusions, wherever they may be found. Of the written findings actually filed, Appellant assigns error to the following:

Finding 2.2, CP 144. The magistrate issuing search warrants for the Montgomery home could reasonably have found from the affidavits that Montgomery “tended” plants in the woods.

Finding 2.3, CP 145. Montgomery looked around for something specific.

Finding 2.8, CP 295. The shed was within the curtilage.

Item 4, CP 222. The shed is 65-85 feet away from the home but is still within the curtilage.

2. The trial court upheld search warrants for Appellant’s home without probable cause and based on inadmissible evidence.

3. The evidence is insufficient to support the convictions for Counts I and II.

4. The court admitted incriminating statements obtained in violation of Const. art. 1, § 7 and the Fourth Amendment

5. The court violated Appellant’s right to present complete defense and violated Const. art. 1, §§ 3 & 22, U.S. Const Amendments 5, 6, & 14, & CrR 4.7(a)(3) & (f)(2), by withholding the identity of a witness whose evidence tended to negate guilt.

6. The Court violated the confrontation clauses of art. 1, § 22 and the Sixth Amendment by admitting a crucial witness's testimonial statements.
7. The court denied Appellant a speedy trial in violation of Const. art 1, § 22 and the Sixth Amendment.
8. The court routinely permitted untimely and prejudicial substitutions of counsel.
9. The State vindictively penalized Appellant for exercising his right to a jury trial, in violation of Const. art. 1, § 22 and the Sixth Amendment.
10. The evidence is insufficient to convict Appellant for a school bus stop violation.
11. The school bus stop enhancement statute is unconstitutional as applied.
12. It was reversible prosecutorial misconduct to tell the jury that a gut feeling is as good as an abiding belief.
13. The cumulative weight of error requires reversal

B. Issues Pertaining to Assignments of Error

1. Is the lack of adequate CrR 3.5 and CrR 3.6 findings sufficiently prejudicial to require reversal?
2. Did the the trial court uphold search warrants for Appellant's home without probable cause based on alleged possession in the woods?
3. Did the suppression court rely on inadmissible evidence?
4. Was the evidence insufficient to prove possession with intent to deliver based on a video of Appellant picking less than 40 grams off a single marijuana plant?

5. Did the court admit incriminating statements in violation of Const. art. 1, § 7 and the Fourth Amendment?
6. Did the court prevent Appellant from presenting a complete defense in violation of Const. art. 1, §§ 3 & 22, U.S. Const Amendments 5, 6, & 14, & CrR 4.7(a)(3) & (f)(2), by withholding the identity and excluding the direct testimony of a witness whose evidence tended to negate guilt?
7. Did the court violate *Crawford* and the confrontation clauses of art. 1, § 22 and the Sixth Amendment by admitting the testimonial statements of the excluded witness?
8. Did the court deny Appellant a speedy trial in violation of Const. art 1, § 22 and the Sixth Amendment?
9. Did the court routinely permit untimely substitutions of counsel contrary to the court rules and in violation Appellant's constitutional speedy trial rights and his Sixth Amendment right to the effective assistance of counsel?
10. Did the prosecutor vindictively penalize Appellant for exercising his right to a jury trial, contrary to Const. art. 1, § 22 and the Sixth Amendment?
11. Was the evidence insufficient to convict Appellant of committing a drug offense within 1000 feet of a school bus stop?
12. Is the school bus stop statute unconstitutional as applied?
13. Did the prosecutor commit misconduct by telling the jury a gut feeling is as good as an abiding belief?
14. Does the cumulative weight of error require reversal?

III. STATEMENT OF THE CASE

Substantive Facts: On September 7, 2007, Wahkiakum County Sheriff's Deputy Gary Howell obtained warrants to search Appellant Randall W. Montgomery's home and outbuildings. CP 8-16; 22-30. The supporting affidavits contain five pages of single-spaced boilerplate about the habits of large-scale drug traffickers and the following specific facts:

On August 12, 2007, a bear hunter saw a white Toyota pickup stop in the woods. A male carried two jugs up a clay bank, then drove out of sight, stopping twice more before driving out of earshot. Sheriff's deputies searched the area and found 11 marijuana plants in three groups of two, three, and six plants. They set up a video camera on the adjacent roadway and a second on one plant near a spur road. CP 13-14; 1/7/2008 RP 14.¹ Howell viewed the videos on September 7. The tapes from September 5 showed Montgomery's orange pickup stop on the roadway. Montgomery approached the on-camera plant, pulled a few bits off it, put them into the pocket of his shorts, and left. CP 14.

Howell claimed he recognized Montgomery in the video because he had "been involved" in several traffic stops. CP 14; 28. He also implied that he directly observed Montgomery and "managed to get a

¹ The verbatim reports of proceedings span three years. Individually paginated motion hearings are cited with date and page number. The trial is in three continuously paginated volumes designated RP.

photograph” of him “tending to the plants.” This was based solely on the video of Montgomery picking the bits of material from a single plant. CP 14; 1/7/07 RP 18. The magistrate never saw any video. 5/5/08 RP 16.

The affidavit describes Montgomery’s clothing and asserts that these clothes and plant material are likely to be found in Montgomery’s home. CP 14. Despite connecting Montgomery only to a single plant, a hand-written note asserts that 11 plants are more than is usual for personal use. CP 14. The magistrate found this created probable cause to search Montgomery’s family home, curtilage, and an outbuilding. CP 31. In addition to growing or packaged marijuana and packaging and processing paraphernalia the warrant authorizes the police to search for:

“personal books, letters, papers, notes, pictures, photographs, video and/or audio cassette tapes, or documents relating names, addresses, telephone numbers, and/or other contact/identification information”; cash and financial records; and evidence of ownership of the residence, including “cancelled mail, deeds, leases, rental agreements, photographs, personal telephone books, utility and telephone bills, statements, identification documents, and keys.” Also computers and associated equipment, including disks.

In other words, the Montgomery family’s whole life. The clothing is appended as the last item on the list. CP 15; 32. (The same magistrate also did the trial and sentencing. RP.)

Officers executed the warrant at 8:10 p.m. on September 7, 2007. CP 28. Nobody was home, so they forced entry. 5/17/08 RP 44. They

found various items consistent with personal use of marijuana and methamphetamine and some common gardening supplies. 1/7/07 RP 24; 5/17/10 RP 43-44; RP 287.

Darkness fell during the search, and Howell noticed light shining through a crack around the door of a small shed. He approached it and smelled growing marijuana. CP 28. He prepared a second affidavit and obtained a warrant to search the shed. CP 27-28. The second warrant authorizes a search of the shed and the residence. CP 18. The list of property to be seized from the shed is the same as from the residence, with the addition of several guns found in the residence. CP 28-29. With the second warrant signed, Howell radioed ahead to authorize his men to open the shed. 5/17/10 RP 48. When Howell arrived, the shed had already been opened. Inside were several growing marijuana plants. The returns and inventories for the two warrants are identical. CP 33, 35.

Inadmissible Statements: Before leaving to get warrant #2, Howell told Deputy Mike Wright he had probable cause to arrest Montgomery on unspecified drug charges. 5/17/10 RP 48. Wright spotted the orange truck and arrested Montgomery based on the information from Howell. Wright handcuffed him and put him in the back of his patrol car. 1/7/08 RP 86, 90. Howell drove by and stopped and searched the truck. 1/7/08 RP 47. A small amount of vegetable matter and a pipe was later

suppressed pursuant to *Gant*.² CP 31; 6/1/10 RP 30. Howell interviewed Montgomery at the Sheriff's Office at 12:45 a.m. (September 8.) Montgomery admitted he was in the woods 3-4 days prior and that he occasionally used methamphetamine. 1/7/08 RP 29. These statements were used against him at trial. RP 126-27.

Charges: Montgomery was charged with three counts of possession with intent to manufacture or deliver marijuana, RCW 69.50.401. Count I was for the videoed plant at the spur road. Count II was for plants near the clay bank. Count III was for the plants in the shed. CP 186-88. He was also charged with Count IV, possession of methamphetamine, RCW 69.50.4013, and Count V, use of paraphernalia found in his home. RCW 69.50.412. CP 188-89. Counts VI and VII related to material in his vehicle, and were dropped. 5/21/10 RP 39.

Suppression: Montgomery challenged the validity of the search warrants and the legality of his arrest and moved to suppress all the physical evidence and his statements. Citing *Thein*,³ Montgomery challenged the nexus between the woods and his residence. 1/7/08 RP 101. The State claimed the warrant was solely to search for clothes in the video. 1/7/07 RP 102. The defense replied that (a) the clothes were not

² ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

³ *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999).

needed to identify Montgomery in the video; and (b), the warrant was for a lot more than clothes and was overbroad. 1/7/08 RP 104.

Probable Cause: In reviewing the warrants, the court recognized that the first warrant was dispositive. CP 89. Then in a bizarre twist, the court upheld the warrant based completely fabricated facts:

The Defendant was observed via video to plant marijuana plants near a logging road. He was observed to drive more than once to this location, remove plants from some pots or containers and plant these plants into the soil. The Court finds that it is reasonable to assume that the potted plants seen in the Defendant's vehicle, removed from the Defendant's vehicle and planted in the earth must have been grown somewhere. It is also reasonable to assume that the plants were grown to their transplanting stage at some property that would be owned, and presumably, controlled by the Defendant.

The Defendant argues that the plants' location inside the Defendant's vehicle is not sufficient to establish a nexus to the Defendant's residence is rejected [sic]. Not only plants were found in the Defendant's vehicle, but they were in containers and they were transplanted from the containers into the ground close to a logging road.

CP 89-90. Based on this fictional scenario, the court found probable cause to search any premises under Montgomery's control. CP 90. The judge thought Montgomery's defense was that searching his property was unreasonable because he might have obtained the imaginary plants at an independent nursery. The court then struck down this straw man on the grounds it was not supported by facts within the four corners of the

affidavit. CP 90.⁴ The court ruled that the imaginary plants on a video the magistrate never saw and that were never alleged in the warrant affidavit established the requisite nexus between suspected criminal activity in the woods and Montgomery's home and the items identified in the affidavit. CP 90. The court later conceded that this memorandum opinion was unfounded. 5/3/10 RP 3-4.

For the purposes of suppression, the parties stipulated to facts that the magistrate could reasonably have found based on the affidavit. CP 100-01. The court ignored these and eventually issued a new ruling that the magistrate could have found that plucking and pocketing bits from a single plant constituted "tending" multiple plants. 5/5/08 R 30, 34; CP 91.⁵ As this became less and less tenable, the court ordered a Franks hearing at which it could view the video to supplement the affidavit. 5/5/08 RP 38, 42, 50. Please see Issues 2 & 3.

The new opinion includes only narrative-style findings that the warrant affidavits were sufficiently specific and "state facts sufficient to satisfy both knowledge and veracity requirements" (whatever that means,) and constituted probable cause for both warrants. Item 1, CP 221-23.

⁴ (!) Thereafter, Montgomery never could be convinced that this was simply an inexcusable error and that the judge had not seen an exculpatory video of cultivation by someone else. 6/1/10 RP 7-9, 13.
⁵ The May 5, 2008, hearing is but one example of the court's arguing the State's case. See also 8/25/08, RP 11-24; 3/17/09 RP 11.

Identity of Informant: Montgomery moved to compel disclosure of the hunter. CP 129. The defense explained that this eye-witness was crucial on issues of guilt and innocence. 7/21/08 RP 2-4, 8/25/08 RP 2-3, 10-11, 13, 16. The State claimed the evidence was relevant, if at all, solely to establish probable cause. 7/21/08 RP 4; 8/25/08 RP 7-9, 10,20-21, 31. The State proposed to present the hunter's evidence through a police witness via a hearsay exception. 8/25/08 RP 23. This is what eventually happened. RP 260-63.

The court failed to see the relevance of someone else's having cultivated the plants because this did not disprove the possibility of a consortium of cultivators. 8/25/08 RP 11-12, 18, 24. The prosecutor thought Howell's mention of the hunter's report in the warrant affidavit somehow precluded the court from admitting eye-witness testimony. 8/25/08 RP 29. The court rejected Montgomery's prima facie showing of relevance, denied the motion to compel disclosure, and summarily denied a motion to reconsider. CP 136, 142; 3/23/09 RP 10-11.

Speedy Trial: These proceedings span several years.

The suppression issues were resolved by May, 2008, but defense counsel requested more time to prepare for trial, having focused solely on suppression since being appointed in February. 5/19/08 RP 2.

Montgomery waived speedy trial until the end of the year. The the sole

reason suggested is the court's busy schedule. 5/19/08 RP 2. The court reset trial for September 2-3, but used the year-end waiver for repeated delays. 8/25/08 RP 32. The judge reasoned: "Mr. Montgomery's not going anywhere ... so I'm not concerned about that." 7/21/08 RP 8.

Finally, Montgomery announced he would not waive any more. 8/25/08 RP 34. With no further pretrial matters pending, the court set trial for December 9-10, 2008. 8/25/08 RP 34-35. On November 10, counsel and the court were set to go with trial. 11/10/08 RP 2. But two weeks later, the defense asked for a continuance, with no explanation other than "in the interest of justice." The prosecutor explained he had unspecified personal issues.⁶ Montgomery again waived until March 31, 2009, but the court docket was already booked, so he extended the waiver til June 1, 2009, at the court's request. 11/24/08 RP 2-4. Trial was set for April 13-14, 2009. Both counsel agreed that was fine. 11/24/08 RP 5.

On March 12, 2009, the court continued again to indulge the State's chief witness, Gary Howell, who had scheduled himself for training on the April 13-14 trial dates. CP 137-38; 3/17/09 RP 2-6. Howell had learned of the training three weeks before. Only then did the prosecutor notify him about the trial. 3/17/09 RP 15. It was not the practice of the Sheriff's Office and prosecutor to coordinate regarding

⁶ The defense moved for several continuances to accommodate the State.

trainings. They assumed conflicting trials would take a back seat. 3/17/09 RP8-9. The prosecutor pointed out that Montgomery had waived til June 1, and argued he was not prejudiced by a further delay. 3/17/09 RP 3.

The State falsely represented that Montgomery joined in the motion to continue. CP 137. But the defense objected that the State should decide whether Howell's testimony or training was more important and pick one. Montgomery did not want to sign more waivers. 3/17/09 RP 6-7. The court speculated that the security of Wahkiakum County might be jeopardized unless Howell received this training. 3/17/09 RP 11. The training was a one-time deal, and only Howell could do it. 3/17/09 RP 6, 8, 13, 14. The court granted the continuance and postponed trial until May 20-21, 2009. CP 139; 3/17/09 RP 20.

On April 20, 2009, the court granted Montgomery's oral motion for new counsel. The court found no conflict of interest, but accepted counsel's unexamined claim that unspecified "comunication and relationship issues" had arisen. 4/20/09 RP 7-9.

The court appointed Daniel Morgan but allowed Morgan to quit in October because he unilaterally felt relations had broken down. Montgomery disagreed. 4/20/09 RP 13; 10/12/09 RP 5, 6, 7. The court reset trial for December. 10/12/09 RP 19. This had to be continued because the judge had forgotten to appoint new counsel. 10/26/09 RP 2.

After a Herculean odyssey, the court finally found a willing lawyer in Christopher Wade but allowed him to quit six weeks later to take a job as a prosecutor. 11/9/09 RP 2; 12/21/09 RP 2-3.

In January, 2010, Brian Berkenmeier appeared for the defense, but was allowed to withdraw in March. 1/25/10 RP 2.3/4/10 RP 15. Finally Donald Blair was appointed and an aborted trial commenced on June 1, 2010. A mistrial was declared when the jury pool was contaminated. 6/1/10 RP 36-37, 48.

Finally, a jury trial took place August 30 – September 2, 2010 on Counts I, II, III, IV and V of the amended information. The jury found Montgomery guilty on all counts.

At sentencing, the prosecutor blamed Montgomery for the mismanagement of the prosecution.

In light of the total circumstances, the State recommends 30 months incarceration and Mr. Montgomery would not be out on appeal pending this appeal. We have been going since 2007. To have drug it to this point and then another two to four years on appeal would make it a three and maybe five to six years from the time of the act to the time of actual imposition of sentence. The State would submit that the time has run out on Mr. Montgomery and that it's time for him to go to jail.

9/27/10 RP 5. Based on Montgomery's lack of criminal history, the defense requested a standard first-offender sentence of 45 days on each count. 9/27/10 RP 6. Instead, the court imposed 2 months on Count II

and IV and 26 months on Count III. 9/27 RP 12. The court acknowledged that Montgomery met all statutory requirements for an appeal bond but invoked the catch-all provision that further delay in punishment would diminish its effectiveness. 9/27/10 RP 8-9, 15.

Montgomery filed timely notice of appeal. CP 291.

Additional facts are cited in the context of the arguments.

IV. ARGUMENT

1. THE CrR 3.5 AND CrR 3.6 FINDINGS ARE INADEQUATE.

As a preliminary matter, various suppression proceedings took place over almost three years in this case. The trial court entered a few spotty CrR 3.6 findings, and no CrR 3.5 findings.

CrR 3.6 requires the court to enter written findings and conclusions at the conclusion of the hearing. CrR 3.6. CrR 3.5 requires the court to enter written findings of disputed and undisputed facts, its conclusions as to the facts, and its conclusions as to admissibility of the challenged statements. CrR 3.5.

The Court of Appeals will reverse if an appellant is prejudiced by the lack of appropriate findings and conclusions. *State v. Glenn*, 140 Wn. App. 627, 640, 166 P.3d 1235 (2007). Reversal is also appropriate where

the lack of findings causes actual prejudice or prevents effective appellate review. *State v. Head*, 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1998).

Here, such findings as were entered appeared many months after the hearings. This prejudiced Montgomery because of the revolving door policy regarding substitutions of defense counsel combined with the perpetually shifting sands underlying the court's rulings (please see Issue 9). Also, appellate counsel and the Court have to hack their way through 1 ½ thousand pages of transcripts to glean the final version of the court's inconsistent and contradictory findings.

The court characterized its findings as not "exhaustive."

Unnumbered final item, CP 223. That is an understatement. The written findings are so inadequate as to require reversal.

2. THE SEARCH WARRANT AFFIDAVIT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE TO SEARCH THE HOME.

Montgomery moved to suppress the fruits of the search of his dwelling and outbuildings on the grounds that (a) the warrants were issued without probable cause to believe evidence of a crime would be found there and (b) even if probable cause could be found, the scope of the warrants⁷ was overbroad. CP 54-82.

⁷ The sole basis for the 2nd search warrant was evidence discovered while executing the first warrant. CP 28. Therefore, if the first warrant

The Fourth Amendment provides in part: “The right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation.” U.S. Const. amend. IV. Our state constitution likewise provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7.

(a) ***The Affidavits Did Not Establish a Nexus:*** A search warrant is constitutionally invalid unless the supporting affidavit establishes probable cause to conclude that the subject is involved in criminal activity of which evidence will be found in the place to be searched. *Thein*, 138 Wn.2d at 140. The magistrate’s probable cause determination is fact-based and balances the competing interests law enforcement against the protected privacy rights of individuals. *State v. Neth*, 165 Wn.2d 177, 182-83, 196 P.3d 658 (2008). By contrast, the suppression court’s assessment of probable cause when reviewing a challenge to a search warrant is a legal conclusion that this Court reviews de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007). Most importantly, the reviewing court is strictly limited to the four corners of the

falls, the fruits of the second warrant also must be suppressed. 1/7/08
RP

probable cause affidavit. *Neth*, 165 Wn.2d at 182; *Wong Sun v. United States*, 371 U.S. 471, 481-82, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Here, as in *Thein*, the probable cause affidavits consisted largely of boilerplate about common habits of drug traffickers, supplemented with a snattering of facts. *Thein*, 138 Wn.2d at 136. The question presented is whether the facts alleged here are sufficient to authorize the government to invade and search a Washington family's home.

Probable cause to enter and search a dwelling requires more than mere suspicion that evidence of a crime may be found there. *Neth*, 165 Wn.2d at 183. A clear nexus must link specific criminal activity with the particular items to be seized, as well as linking those items to the place to be searched. *Thein*, 138 Wn.2d at 140.

Here, the defense argued that the affidavits failed to establish any nexus between a small amount of material picked from a single plant in the woods and anything that might be found in the dwelling. 1/7/08 RP at 102, citing *Thein*. The State claimed the nexus was a cap, T-shirt and shorts worn by Montgomery in the video, which, if found in his home would prove he was the person in the video. Also, trace evidence of possession might be found in the pocket of the shorts. 1/7/08 RP 102. The defense replied that the State did not need the clothes to identify

Montgomery because the video did that.⁸ Moreover, if clothing was the only nexus, then the warrant authorizing a search of just about everything in the home, with clothing appearing as item K, was egregiously overbroad. Because the clothes were a pretext, all fruits of the home search should be suppressed. 1/7/08 RP 104.

It is well settled linking a person to an outdoor grow operation is not probable cause to search for evidence of trafficking in the home unless specific facts establish that such evidence is likely to be found there. *Thein*, 138 Wn.2d at 141, 145. *Thein* cites with approval this Court's holding in *State v. Olson*, 73 Wn. App. 348, 357, 869 P.2d 110 (1994), that "standing alone, an officer's belief that grow operators hide evidence at other premises under their control does not authorize a warrant to search those places." *Thein*, 138 Wn.2d at 143. Even if the magistrate has evidence that the suspect is a drug dealer, probable cause to search his residence does not automatically follow. *Thein*, 138 Wn.2d at 145.

Significantly, *Thein* holds that searching a home for clothing as evidence of a drug offense committed elsewhere is not justified. *Thein*, 138 Wn.2d at 149, n.4. The State based its defense of the warrants on this footnote which distinguishes circumstances where a clothing nexus with a dwelling might exist. Where, for example, serial sexual assault victims

⁸ As Howell admitted at trial. RP 348.

described a distinctive article of their attacker's clothing. *Thein*, 138 Wn.2d at 149, n.4.

Here, the evidence arguably connected Montgomery to a single plant in the woods. There was not probable cause to believe he he was cultivating anything in the woods, let alone in his home.

(b) ***The Warrant Information Was Stale***: The information in affidavit was too stale to justify a home invasion to search for evidence of material pocketed three days before.

Common sense governs the staleness inquiry. The reviewing court considers the nature and scope of the known criminal activity, the amount of time between that activity and the issuance of the warrant, and the nature of the items to be seized. *State v. Maddox*, 152 Wn.2d 499, 505-06, 98 P.3d 1199 (2004). The focus of the inquiry is whether evidence is likely still to be found on the premises. *State v. Johnson*, 17 Wn. App. 153, 156, 561 P.2d 701 (1977).

Here, the suspected criminal activity is characterized as possession of marijuana with intent to deliver. CP 14. But only a single plant was videotaped, and the known criminal conduct was merely pocketing a small amount of material. CP 14; 28. This could not not justify searching a dwelling because, even if the pocket were found, it likely would not retain any evidence that could span a three-day gap.

(c) *The Affidavits Exaggerated the Evidence:* The first affidavit asserts: “Given the number of plants found growing which is eleven plants. From my training this is more plants than a person would need for personal use.” CP 14. Howell’s eleven plants were found in exactly three growing sites with two, three, and six plants respectively, accounting for all the alleged grow sites. But the bear hunter reported that someone in a small white Toyota pickup or 4-Runner, not a full-size orange Chevrolet, delivered apparent cultivation material to one site and stopped at two others, suggesting that someone other than Montgomery was tending these plants. CP 13-14, 27-28. The State never once in three years so much as hinted that Montgomery ever drove a white truck, and the warrant affidavit links him solely with a full-sized orange pick-up.

In summary, the warrant affidavit was insufficient on its face to support a warrant to invade and search Montgomery’s home. All evidence obtained pursuant to the warrant should have been suppressed. The remedy is to reverse the convictions for Count III, IV, and V, and Counts I and II to the extent they relied on that evidence.

3. THE COURT CONSIDERED INADMISSIBLE EVIDENCE REGARDING PROBABLE CAUSE.

At the outset, the defense objected to basing probable cause on evidence beyond the four corners of the warrant affidavits. The court

unequivocally agreed. 1/7/07 RP 11. But a superfluous Franks⁹ hearing enabled the court to shoe-horn into its review process testimony from Howell and the video — neither of which were before the issuing magistrate. This was error.

In reviewing a warrant challenge, the court may hold a Franks hearing if the defendant requests one and makes a substantial preliminary showing that the warrant affidavit — knowingly and intentionally or with reckless disregard for the truth — either included false statements or omitted exculpatory material. 438 U.S. at 155-56. If exculpatory information was thus improperly excluded, the affidavit must be read with the additional information to determine whether probable cause still exists. *State v. Garrison*, 118 Wn.2d 870, 872-73, 827 P.2d 1388 (1992).

Here, the magistrate did not see the surveillance video. 5/5/08 RP 16. And the suppression court correctly ruled that (a) it could not uphold a warrant for the home unless it found that the magistrate reasonably read the phrase “tending the plants” in the affidavit as meaning cultivating multiple plants; and (b) it must review the magistrate’s determination based solely on the evidence the magistrate saw. 5/5/08 RP 16, 34, 48, 65, 70, 72. At one point, the court announced it was inclined to suppress the warrants because the four corners of the affidavit did not show that Howell

⁹ *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

used the term “tending” to mean grooming more than one plant. 5/5/08 RP 47-49. This may have been a ruse to get the prosecutor to support the court’s wish for a Franks hearing based on its sua sponte speculation that the video might show that Howell omitted exculpatory material, in which case a Franks hearing would permit the judge to review the video. 5/5/08 RP 36. In other words, the court wanted a Franks hearing to determine whether there was any reason to hold a Franks hearing.

Both parties opposed this. The State argued that the defense had not alleged reckless disregard for the truth. 5/5/08 RP 36. The defense urged the court to stick to the four corners of the affidavit. 5/5/08 RP 37.

The judge insisted that someone needed to request a Franks hearing so he could see the video to decide whether Howell could possibly have intended the term “tending the plants” not merely as a rhetorical device exaggerating the picking of a few bits from a single plant as specifically alleged in the affidavit, but rather as alleging other conduct involving additional plants not explicitly alleged in the affidavit. If the video showed this was conceivable, the court felt itself bound to rule that this is how the issuing magistrate read the affidavit and to accord great deference to that “determination.” CP 38. 5/5/08 RP 39.

The prosecutor admitted that the video showed only a single plant but claimed it would show Montgomery doing more than pulling bits off

that plant. 5/5/08 RP 49-50. If the video came in, the State wanted additional testimony from Howell to elicit his subjective knowledge that there was another plant off-camera. 5/5/08 RP 50-51. Defense counsel argued that Howell knew only what was on the video which the court could see for itself. The court agreed that what was on the video was the sum total of Howell's knowledge. 5/5/08 RP 51.

Defense counsel accommodated the court and made an oral motion to admit the video on the grounds it contained exculpatory evidence omitted from the affidavit. 5/5/08RP 39-41. The State objected that this was beyond the four corners.¹⁰ 5/5/08 RP 42. Bringing the argument full circle, the State urged the court to supplement the inadmissible video with the essential affidavit: "No. He's got the Affidavit saying that he's tending the plants so you get to consider the Affidavit as well." 5/5/08 RP 52. With the circle thus completed, the court court held its Franks hearing, departed from the affidavits, considered the video and Howell's testimony, and affirmed the warrants. 5/5/08 RP 72-73; 5/8/08 RP 55-57.

The Franks procedure is designed to safeguard the defendant's rights. The court abused it here to Montgomery's prejudice. The criminal conduct alleged in the affidavit consisted solely of his wandering up to a

¹⁰ Both parties and the court argued the video and Howell's testimony when the implications favored them. Otherwise, they played the "four corners" trump card. 5/5/08 RP 5, 37, 39, 42, 50, 55, 72. Ultimately, they ended up where they started. 5/5/08 RP 70.

plant in the woods and picking a few bits off it before wandering away again. The court recognized that this was facially insufficient to support a warrant for a full-on invasive search of the dwelling and outbuildings. And evidence implicating Montgomery in a “grow operation” was non-existent and arguably affirmatively contradicted, in the affidavit.

In addition to the Franks fiasco, the court briefly considered (again *sua sponte*) severing the premises search and finding probable cause solely to search Montgomery himself and the orange pickup. 5/5/08RP 42. Again, both counsel objected to this, arguing staleness; that the warrant was to search, not arrest; and that the search of the residence preceded the arrest. 5/5/08 RP 43-44. The court finally agreed that probable cause to arrest arose from the premises search. 5/5/08 RP 46.

This Franks proceeding was entirely at the behest of the court. The defense never accused Howell of intentional misconduct or reckless disregard, and the court never considered the possibility. The judge simply wanted the video and Howell’s testimony to justify finding grounds to invoke the great deference standard and affirm the warrants. By assuming the role of prosecutor, the court bent over backward to create an argument to benefit the State, notwithstanding the State’s opposition.¹¹

¹¹ Not surprisingly, Montgomery began to feel persecuted. This looked less like a judicial fact-finding than a prosecutors’ brain-storming session.

The search warrant was invalid and the convictions based on evidence derived from it must be reversed.

4. THE EVIDENCE IS INSUFFICIENT TO SUPPORT COUNTS I, & II FOR POSSESSION OF 11 PLANTS IN THE WOODS.

The sufficiency of the evidence may be challenged for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably to be drawn from it. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

As discussed in Issues 2 & 3, the evidence from the woods was insufficient to support a search of the home, so that the evidence from the home and shed was poisoned fruit, inadmissible for any purpose. Without that, the evidence from the woods supports only a single charge of simple possession of less than 40 grams.

As to Counts I and II, moreover, the fruits of the search warrants constituted "other bad acts" evidence, the sole relevance of which was to present the incident in the woods as an act in conformity therewith.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

therewith.” ER 404(b). Such evidence is prohibited because it “carries too much weight with the jury so that they prejudge a person with a bad general record and deny him a fair opportunity to defend against the particular charge.” *State v. Herzog*, 73 Wn. App. 34, 49, 867 P.2d 648, *review denied*, 124 Wn.2d 1022 (1994), quoting *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed. 168 (1948). “There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial, and such testimony should only be admitted when clearly necessary to establish the essential elements of the charge which is being prosecuted.” *State v. Smith*, 103 Wash. 267, 268, 174 P. 9 (1918).

Here, the sum total of the evidence establishing an offense in the woods is the video showing Montgomery picking a few bits off a single plant near a spur road. Before hearing this, however, the jury was overwhelmed with a couple of volumes of testimony detailing evidence recovered from the residence and shed. But that evidence bore not the slightest relevance to the alleged offenses in the woods, other than to show propensity. Had the jury not been convinced by the extraneous bad acts evidence¹² of Montgomery’s propensity to cultivate marijuana plants, is

¹² Extraneous, that is to the alleged acts in the woods.

unlikely the actual evidence from the woods could have persuaded them that the video showed anything more than misdemeanor possession.

Where other acts evidence is admitted, the defense should request a limiting instruction. *State v. Russell*, ___ Wn.2d ___, ___ P.3d ___, filed February, 2011, Slip Op. at 3. But the absence of a limiting instruction does not add to the probative value of the other acts evidence or diminish its prejudicial effect. Relevance and prejudice determinations as contemplated by ER 401 and 403 are separate from ER 404(b) considerations. *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 430 (1991). A reasonable jury would ask what other acts evidence has to do with the particular crime they are considering. Had these jurors done that, they could not have failed to notice that the evidence supporting Counts I and II did not prove the elements. The remedy is to reverse and dismiss.

5. MONTGOMERY'S INCRIMINATING STATEMENTS WERE INADMISSIBLE UNDER CONST. ART 1, § 7 AND THE FOURTH AMENDMENT.

The court admitted Montgomery's incriminating statements to Deputy Wright following his arrest on September 7, 2007. This was error because the statements were poisoned fruit of the unlawful arrest.

A conviction cannot rest on statements obtained as a result of police conduct that violates art. 1, § 7 and the Fourth Amendment, because

the confession is infected with illegality and must be suppressed. *State v. Byers*, 88 Wn.2d 1, 6, 559 P.2d 1334 (1977); *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *Wong Sun*, 371 U.S. at 488.

Montgomery's Arrest Was Unlawful: Detention without probable cause is unlawful under the Fourth and Fourteenth Amendments. *Dunaway v. New York*, 442 U.S. 200, 207, 99 S. Ct. 2248, 2254, 60 L. Ed. 2d 824 (1979). The analysis is essentially the same under Const. art.1, § 7. *State v. Grande*, 164 Wn.2d 135, 142, 187 P.3d 248 (2008).

Here, warrant #1 was executed at 8:10 p.m. CP 28. Then Howell told Wright he had probable cause to arrest Montgomery. 5/17/10 RP 48. This was before Wright left to investigate a suspicious vehicle. 1/7/08 RP 86. After Wright left, Howell left to get warrant #2 for the shed. 5/17/10 RP 48. The prosecutor first expressed a confused notion that Wright could “stop the vehicle for a drug search to come under the *Gant* exception” based on the fellow-officer rule. 8/19/09 RP 26. In other words, an investigative stop. This is wrong.

An officer conducting an investigative stop must be able to point to “specific and articulable facts” that give rise to a reasonable suspicion that the subject is then, or is about to be, engaged in criminal activity. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). No Washington case

has extended the fellow officer doctrine to permit investigative stops based on mere suspicion entertained by somebody else. Wright knew of no facts justifying this stop.

An officer may make a warrantless arrest if the police as a whole possess probable cause. *State v. Maesse*, 29 Wn. App. 642, 646-47, 629 P.2d 1349 (1981). But Washington has not extended the fellow officer rule to the misdemeanor context. RCW 10.31.100 requires the officer to be present when a misdemeanor is committed. *State v. Ortega*, 2011 WL 359144, ___ Wn. App. ___, ___ P.3d ___ (2011) Slip Op. at 4. Nothing in this case suggests a statutory exception.

Ultimately, the court recognized, and the State did not dispute, that probable cause to arrest Montgomery was based solely on evidence discovered in the residence pursuant to warrant #1. 5/5/08 RP 46. Therefore, even if Wright could somehow justify arresting Montgomery based on Howell's knowledge of contraband discovered while executing warrant #1, that warrant was not supported by probable cause and the search of Montgomery's home was unlawful. Therefore, the arrest was the fruit of a search and seizure violation. Therefore, his statements to the police following his arrest were fruit of the poisonous tree.

Following the CrR 3.5 proceedings, the court reserved its ruling, saying only that he would admit the statements if they were not coerced.

5/17/10 RP at 140. No findings were ever entered. Montgomery's statements came in during trial. RP 351; 482-83.

The remedy is to reverse the convictions for Counts I, II, and IV, based on his admissions about being in the woods and occasionally using methamphetamine.

6. THE COURT VIOLATED ART. 1, §§ 3 & 22, AMENDMENTS 5, 6, & 14, AND CrR 4.7(a)(3) & (f)(2), BY WITHHOLDING THE IDENTITY OF A WITNESS WHOSE EVIDENCE TENDED TO NEGATE GUILT.

Precluding the defense from eliciting direct testimony from the hunter while under oath and subject to cross examination was a massive violation of Montgomery's trial rights.

As a starting point, the discovery rules require the State to turn over all material in its possession that tends to negate guilt. CrR 4.7(a)(3). Specifically, the State may not withhold an informant's identity if doing so infringes upon a defendant's constitutional rights. CrR 4.7(f)(2).

A defendant's constitutional rights include the right to present all admissible evidence that is relevant to a complete defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S. Ct. 2449, 124 L. Ed. 2d 665 (1993). Const. art 1. § 22 and the Sixth Amendment guarantee him the right to compel the attendance at trial of witnesses in his favor.

Const. art. 1 § 3 and the Fifth Amendment also guarantee that no person may be deprived of his liberty without due process of law.

The essence of due process is the right to “a fair opportunity to defend against the State’s accusations.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). That means the right to offer a defense and the testimony of witnesses. *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). The constitutional guarantees of “a meaningful opportunity to present a complete defense,” require the admission of relevant defense evidence absent a legitimate state interest. *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006).

A defendant may not demand the identity of a witness whose information relates solely to probable cause and is not relevant to an issue of guilt or innocence. *State v. Casal*, 103 Wn.2d 812, 816, 699 P.2d 1234 (1985). But sufficiently relevant defense evidence trumps even the most compelling State interest in secrecy. *Jones*, 168 Wn.2d at 720-21. And suppressing favorable evidence that is material to guilt violates due process. *Benn v. Lambert*, 283 F.3d 1040, 1052 (9th Cir. Wash. 2002); *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* mandates disclosure where the defense establishes that the evidence

sought is exculpatory and that failure to disclose it would result in prejudice. *Benn*, 283 F.3d at 1052-53. Once the defense makes a prima facie showing of relevance, the information cannot be withheld unless the State's interest in excluding it outweighs the defendant's need. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). "Even minimally relevant evidence is admissible." ER 401; *Darden*, 145 Wn.2d at 621.

CrR 4.7(f)(2) protects the State's interest in effective law enforcement. *Roviaro v. United States*, 353 U.S. 53, 59, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). But no State interest is compelling enough to exclude highly probative defense evidence. Where, as here, evidence goes to the heart of the defense, barring it violates the Sixth Amendment. *Jones*, 168 Wn.2d at 720. Fundamental fairness defeats the so-called informant's privilege disclosure "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." *Roviaro*, 353 U.S. at 60-61. The identity of an informant will always be essential to a fair trial where, as here, the informant witnessed the actual crime. *State v. Atchley*, 142 Wn. App. 147, 156, 173 P.3d 323 (2007).

Here, a week or so before the alleged offense, the hunter witnessed a white Toyota pickup or 4-Runner stop in a wooded area and saw a man carry jugs into the brush. He heard the Toyota stop twice more, for a total of three stops. Upon investigation, police found precisely three small

grow sites. The only vehicle connected to Montgomery was an orange full-size Chevrolet.

The sole value of this information to the State was to establish probable cause for a warrant to search Montgomery's premises based on his presence in the vicinity of eleven plants. CP 14, 136. But the information also is manifestly relevant to the defense to establish Montgomery's innocence. The fact that another suspect was cultivating all three sites at the relevant time tends to support Montgomery's claim that he merely picked a few buds opportunistically from a randomly encountered plant.

Evidence connecting another suspect with the charged crime is particularly relevant and is admissible if it establishes a train of facts or circumstances clearly pointing to someone other than the defendant as the guilty party. *State v. Maupin*, 128 Wn.2d 918, 928, 913 P.2d 808 (1996). The evidence must create a clear nexus between the other suspect and the criminal activity. *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993), *review denied*, 123 Wn.2d 1031, 877 P.2d 694 (1994). The bear hunter's evidence satisfies these criteria.

When evaluating 'other suspect' evidence, the critical inquiry is the strength of the state's case: if the evidence against the defendant is strong enough, or if evidence pointing to a third party is only weakly

logically connected to the central issues, it is proper to exclude it. *Holmes*, 126 S. Ct. at 1734. But if the State's evidence is circumstantial, the defendant gets to introduce circumstantial evidence of his own to show someone else did it. *State v. Clark*, 78 Wn. App. 471, 479, 898 P.2d 854 (1995).

Here, the State's evidence that Montgomery was cultivating plants was worse than merely circumstantial — it was entirely speculative. He picked a few bits from a single plant in a public place. Had they been offered by defense counsel and subject to cross examination, rather than coming in as hearsay from Howell, the hunter's observations may well have led the jury — or one juror — to question the sufficiency of the evidence against Montgomery.

Where the defense makes an initial showing that an informant is an essential witness, the trial court may hold an in camera hearing to inquire whether the State's interest in maintaining secrecy can overcome the defense interest in the testimony of an eyewitness. *State v. Vazquez*, 66 Wn. App. 573, 581, 832 P.2d 883 (1992); *State v. Vargas*, 58 Wn. App. 391, 396, 793 P.2d 455 (1990); *Roviaro*, 353 U.S. at 62.

Here, the court should have ordered disclosure under threat of dismissing the charge. *Roviaro*, 353 U.S. at 61. Instead, the court attempted to weigh the evidence and failed to “connect the dots” of

relevance. 8/25/08 RP 12, 18-19, 25, 26. But relevant defense evidence need not constitute absolute proof of innocence. It is sufficient that it provides “a piece of the puzzle.” *Bell v. State*, 147 Wn.2d 166, 182, 52 P.3d 503 (2002). Specifically, any evidence that may be to any degree exculpatory is admissible. *State v. Cross*, 156 Wn.2d 580, 630, 132 P.3d 80 (2006).

Moreover, only jurors, not judges, get to weigh the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). No judge may infringe upon a criminal defendant’s constitutional right to present a complete defense that includes all relevant admissible evidence. *Taylor v. Illinois*, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

Montgomery had the constitutional right to subpoena the hunter and cross examine him to elicit any evidence that someone other than Montgomery was cultivating these plants. The remedy is to reverse and dismiss the conviction on Counts I and II.

7. THE HUNTER’S TESTIMONIAL STATEMENTS VIOLATED THE CONFRONTATION CLAUSES OF ART. 1, § 22 AND THE 6TH AMENDMENT.

The Confrontation Clauses of art. 1, § 22 and the Sixth Amendment exclude testimonial hearsay from criminal trials unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68,

124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A confrontation violation is a manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

Statements are testimonial if the declarant would reasonably expect them to be used prosecutorially. *Crawford*, 541 U.S. 36, 52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This includes statements volunteered to the police by bystanders. *Davis v. Washington*, 547 U.S. 813, 822, n.1, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Having successfully suppressed the hunter's direct testimony, the State could have limited evidence of the investigation to direct testimony from the deputies that they found marijuana plants in the woods. Instead, the State elicited the hunter's testimonial statements as hearsay from Deputy Howell to prove that Montgomery did not merely pick bits of a single plant, but was tending 11 plants.¹³

The hunter's statements were unquestionably testimonial. Montgomery had the right to compel the appearance of this person, put him under oath, and test the extent and accuracy of his observations by cross examinations.

¹³ Defense counsel apparently made a strategic decision not to challenge this unmitigated hearsay in order to extract whatever potentially exculpatory evidence he could by any means possible.

The erroneous admission of testimonial hearsay requires reversal unless the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005); *State v. Shafer*, 156 Wn.2d 381, 395, 128 P.3d 87 (2006). This error clearly was not harmless. The defense needed to cross examine this witness to determine whether what he witnessed was cultivation of marijuana, and whether the person he saw was Montgomery. Reversal is required

8. THE COURT DENIED MONTGOMERY A SPEEDY TRIAL.

Stretching this prosecution over three years violated the mandate of the U.S. and state constitutions that criminal trials be timely. U.S. Const. amend. VI; Const. art. 1, § 22. The analysis under both is substantially the same. *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). The constitutional speedy trial period is not fixed but expires after “a reasonable time.” *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997). The right is relative, and the essential ingredient is not speed but orderly expedition. *State v. Poulos*, 31 Wn. App. 241, 243, 640 P.2d 735 (1982).

The primary burden to assure that criminal cases are brought to trial is on the court and the prosecutor. *Barker v. Wingo*, 407 U.S. 514,

529, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *State v. Jenkins*, 76 Wn. App. 378, 383, 884 P.2d 1356 (1994), *review denied*, 126 Wn.2d 1025 (1995). But the trial court is ultimately responsible. CrR 3.3(a). Simple mismanagement is sufficient to require reversal if it is egregious enough. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

The right to a speedy trial is triggered when charges are filed or the defendant is arrested, whichever comes first. *State v. Iniguez*, 143 Wn. App. 845, 855, 180 P.3d 855, *review granted*, 164 Wn.2d 1025 (2008). Four factors determine whether constitutional rights have been violated: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant. *Barker*, 407 U.S. at 530. The court weighs the conduct of both the prosecution and the defense. *Barker*, 407 U.S. at 529-30.

Length of Delay: Close to three years. This is an important factor, but it is not the only important factor. The complexity of the charges and the presence of eyewitness testimony are also important. *Iniguez*, 167 Wn.2d at 292, citing *Barker*, 407 U.S. at 531 & n.31.

The charges here were not complex. They were simple possession with intent offenses. This weighs in favor of a speedy trial. *Iniguez*, 167 Wn.2d at 283, citing *Barker*, 407 U.S. at 531. Eye-witness testimony also was an important factor. (Or would have been if the court had recognized

Montgomery's Sixth Amendment right to compel the hunter's testimony.) Moreover, the impairment of liberty imposed on an accused while he is released on bail, while less of a factor than incarceration, is nevertheless substantial. *U.S. v. Loud Hawk*, 474 U.S. 302, 311, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986).

Reasons for Delay: A major contributor to the delay was the numerous withdrawals of counsel. But most of Montgomery's lawyers departed due to factors beyond his control. Moreover, "the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Saunders*, 153 Wn. App. 209, 216, 220 P.3d 1238 (2009), quoting *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). A judge should deny a discretionary motion if fundamental rights are affected. *Michielli*, 132 Wn. 2d 229, 239-40, 937 P. 2d 587 (1997) (amendment of charges.) Here, as in *Saunders*, the trial court abused its discretion by granting every continuance motion that came before it. *See, Saunders*, 153 Wn. App. at 216.

Smaller counties may face different challenges than larger counties in the matter of bringing criminal defendants to trial. But "the court must, nonetheless, try [the defendant] within a reasonable time." Routine court congestion is no excuse. *Vermont v. Brillon*, 129 S. Ct. 1283, 1293, 173 L. Ed. 2d 231 (2009).

Additional constitutional implications of the unrestricted turnover of defense counsel are discussed below in Issue 9.

Waivers: One need not demand a speedy trial to preserve his Sixth Amendment right to a speedy trial. *State v. Wernick*, 40 Wn. App. 266, 271-72, 698 P.2d 573 (1985); *Barker*, 407 U.S. at 525-27. Still, whether the defendant asserted his right to a speedy trial is a factor the Court considers. *Wernick*, 40 Wn. App. at 271-72. Montgomery signed waiver after waiver until finally even his patience snapped.

The record must show that a waiver was done intelligently, voluntarily and with an understanding of the consequences. *State v. Perkins*, 108 Wn.2d 212, 215, 737 P.2d 250 (1987). The reviewing court indulges every reasonable presumption against the waiver of fundamental rights. *United States v. Allen*, 831 F.2d 1487, 1498 (9th Cir. 1987), quoting *Glasser v. United States*, 315 U.S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680 (1942).

We do not know the degree to which Montgomery's waivers were knowing and intelligent, because the court never conducted a colloquy with Montgomery on the record. Every postponement was characterized as unavoidable for various reasons. We do not know if Montgomery was informed of the consequences either of acquiescing to these delays or of not doing so. We do not even know that he was told that refusing to waive

was an option and that it was not his problem but the government's either to bring him to trial or dismiss the charges.

Prejudice: The longer the delay, the stronger the presumption of prejudice. *State v. Lackey*, 153 Wn. App. 791, 800, 223 P.3d 1215 (2009), citing *Doggett v. United States*, 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). But a showing of a sufficiently unjustified and egregious delay can warrant relief even in the absence of specifically identifiable prejudice, because excessive delay compromises the reliability of a trial in ways that cannot be proven or even clearly identified. *Doggett*, 505 U.S. at 655-56, 657. Here, the record makes clear that the court saw no reason to exert itself to move things forward unless the defendant was in custody. 7/21/08 RP 8.

Balancing all the factors, the three-year delay denied Montgomery's fundamental right to a timely trial. The remedy is to reverse and dismiss with prejudice. *Iniguez*, 167 Wn.2d at 282.

9. THE COURT ARBITRARILY PERMITTED
UNTIMELY SUBSTITUTIONS OF COUNSEL.

The court maintained a revolving door through which defense counsel routinely was permitted to withdraw without good cause, with trial dates pending, long after constitutional speedy trial considerations

precluded substitution. Montgomery cannot be blamed for the court's mismanagement.

A defendant does not have an unfettered right to choose his lawyer. *State v. Roberts*, 142 Wn.2d 471, 516, 14 P.3d 713 (2000). Absent exceptional circumstances, the court should deny a defendant's untimely and unwarranted request for new counsel and require counsel to remain on the case. *State v. Bandura*, 85 Wn. App. 87, 97-98, 931 P.2d 174 (1997).

The court rules are in accord. CrR 3.1(b) and (e) require continuity of representation and do not permit defense counsel to withdraw absent a showing of good cause: "A lawyer initially appointed shall continue to represent the defendant through all stages of the proceedings unless a new appointment is made by the court following withdrawal of the original lawyer pursuant to section (e)." CrR 3.1(b)(2). Section (e) is dispositive here. It provides that, once a criminal case is set for trial, "no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown." CrR 3.1(e); *Roberts*, 142 Wn.2d at 516, note 16.

Once a trial date is set, the court must inquire into the factors weighing for and against substitution. CrR 3.1(e). A motion to substitute counsel cannot be decided arbitrarily. *Roberts*, 142 Wn.2d at 516. The

court in *Roberts*, for example, inquired into the reasons the lawyer-client relationship was not working. *Roberts*, 142 Wn.2d at 516.

Here, the court did not inquire into specifics, but accepted “in the interest of justice” as a reason to allow attorney Heywood to withdraw a year into the case after numerous trial dates had been set.

Likewise, attorney Morgan stated that unspecified hassles with Montgomery’s family had caused the lawyer-client relationship to break down. 10/12/09 RP 5, 8, 11. Montgomery did not agree and did not want to change counsel. 10/12/09 RP 5, 6, 7. But, instead of denying the motion and instructing Morgan simply to exclude the family from consultations, the court allowed Morgan to withdraw and misdirected a lecture on the authority of attorneys in the matter of bothersome relatives to Montgomery. 10/12/09 RP 13-14; 11/09/09 RP 5. And, far from conducting a good cause inquiry as required by CrR 3.1, the court instead instructed Morgan not to disclose any specifics. “I don’t need to go there.” 10/12/09 RP 11. The court thought unspecified good cause meant unfettered judicial discretion. 10/12/09 RP 10-11.

The court repeatedly mischaracterized the voluntary withdrawals as “disqualifications” in order to trigger CrR 3.3(c)(2)(vii), which allows the speedy trial clock to be reset without the waiver otherwise required by CrR 3.3(c)(2)(i). 4/20/09 RP 10; 10/12/09 RP 12, 16. (The prosecutor

and judge thought CrR 3.3 allowed a new commencement date any time new counsel was appointed. 11/09/09 RP 14). Montgomery was prejudiced by being denied the opportunity to assert his speedy trial right, is a factor the Court considers on a constitutional “speedy” challenge.

It was the court’s practice to grant 90+% of motions by counsel to withdraw. 10/12/09 RP 4. The court apparently was unaware of the existence of CrR 3.1, because when the judge belatedly resorted to consulting the rules in October, 2009, he thought the operative rule was former RPC 1.15 (then as now actually RPC 1.16), which instructs counsel to withdraw if discharged, unless section (c) applies. RPC 1.16(a)(3). 10/12/09 RP 8-9. Section (c) did in fact apply. It requires counsel to comply with applicable law and to comply with the court’s order to continue representation notwithstanding good cause to terminate. RPC 1.16(c). For appointed counsel in criminal proceedings, that would be CrR 3.1. The court did not read section (c). 10/12/09 RP 8-10. And, as discussed, an indigent criminal defendant cannot “discharge” his lawyer without permission of the court.

On December 21, 2009, with trial set for February 1, Judge pro tem Goelz allowed Morgan’s replacement, Wade, to withdraw to take a job with the prosecutor’s office. Judge Goelz clearly was directed by Judge Sullivan, who was casting about for a replacement. Accordingly,

although Goelz knew the rules barred withdrawal after trial was set, he nevertheless released Wade without so much as inquiring whether the job offer could be held open for six weeks it would have taken to complete the trial. 11/09/09 RP 20; 12/21/09 RP 2-3. Two weeks later, the court had yet to find a replacement for Wade, and the February trial date was stricken. 01/04/10 RP 3-4.

This was manifest constitutional error. Besides denying Montgomery a timely trial, these substitutions also constructively deprived him of the effective assistance of counsel. Each defense lawyer filed and argued suppression and discovery motions upon which the court reserved its ruling. Then, with every substitution the judge scrapped the previous proceedings and waited to see if the new lawyer would pursue those motions. Mr. Wade, for example, inquired about the status of previous discovery motions. 11/09/09 RP 18. The court had not ruled on them. 11/09/09 RP 7. The court responded, “I don’t need to go there today. That’s — you know — going to be your call on what motions you want to raise.” 11/09/09 RP 18. By November 23, 2009, nobody knew what motions were before the court. 11/23/09 RP 2.¹⁴ The court appears to have decided not to reconsider any previous rulings. 11/23/09 RP 3. The State further confused the defense CI disclosure motion by filing a

¹⁴ Mr. Wade had yet to read the file. 11/23/09 RP 9.

discovery motion of its own. 11/09/09 RP 10. Thereafter, any reference to a discovery motion was about the State's motion. 11/23/09 RP 9; 2/1/10 RP 2, e.g. The court never did rule on the motion to reconsider its refusal to order the State to disclose the informant. This prejudiced Montgomery by ham-stringing his defense.

After Wade, the court eventually appointed Brian Berkenmeier and set a new trial date of April 12-14, 2010. 1/25/10 RP 11. Unfortunately, back in November, Montgomery had waived only until April 4, 2010. 11/23/09 RP 10. Berkenmeier had then encouraged him to extend the waiver, which caused a mutual loss of trust between attorney and client. 2/1/10 RP 2-3. Berkenmeier assured the court Montgomery not been uncooperative. 3/4/10 RP 5-7. The court nevertheless blamed Montgomery for losing several lawyers by creating conflict about how to proceed. 3/4/10 RP 10-11. The court allowed Berkenmeier to withdraw. 3/4/10 RP 15.

Montgomery was prejudiced by the trial court's failure to assert its authority and perform its duty to uphold the constitution and enforce the court rules. This was a major contributing factor to the egregious violation of the constitutional mandate to provide a timely trial.

The remedy is to reverse and dismiss with prejudice. *Iniguez*, 167 Wn.2d at 282.

10. MONTGOMERY WAS PENALIZED FOR DEMANDING A JURY TRIAL.

Art. 1, § 22 and the Sixth Amendment guarantee the right to trial by jury. Inducing a defendant not to “contest in full measure” the charges against him “chill[s] the exercise of basic constitutional rights” and is unlawful. *U.S. v. Jackson*, 390 U.S. 570, 582, 88 S. Ct. 1209, 20 L. Ed. 2d. 138 (1968). It is not the prerogative of the prosecutor to grant or withhold approval of a defendant’s exercise of his trial rights. *State v. Martin*, 94 Wn.2d 1, 5, 614 P.2d 164 (1980) (right to plead guilty unhampered by prosecutor’s preferences.) It constitutes vindictiveness for a prosecutor to act against a defendant for exercising a his rights. *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006); *United States v. Meyer*, 810 F.2d 1242, 1245-46 (D.C.Cir.1987). Prosecutorial vindictiveness may be actual or presumed. *Korum*, 157 Wn.2d at 627. “A presumption of vindictiveness arises when the circumstances support “a realistic likelihood of vindictiveness.” *Id.* Here, the circumstances strongly suggest vindictiveness.

Defense attorney Blair stated in open court that the prosecutor would not agree to an appeal bond unless Montgomery gave up his right to a jury and submitted to disposition on stipulated facts. Neither the prosecutor nor the court demurred. 6/1/10 RP 15. Montgomery

demanded trial by jury, and the sentencing court duly denied an appeal bond at the prosecutor's request, despite an affirmative finding that not a single statutory reason existed to deny bond other than the vague catch-all provision about diminishing the effectiveness of punishment. 9/27/10 RP 15-16. Montgomery posed no danger to the community and was not a flight risk. He was free on bond during the three years of this prosecution and never missed a court date. 9/27/10 RP 6-8. Moreover, it was obvious on the face of this prosecution that Montgomery had meritorious issues for appeal. The fact that the defendant exercised his right to a jury trial is not a legitimate consideration.

It was misconduct for the prosecutor to condition the possibility of release pending on appeal on Montgomery's forgoing his fundamental right to have the facts determined by a jury. Moreover, the court was in derogation of its duty by condoning the prosecutor's arrogation of judicial power to decide whether to grant or withhold an appeal bond and thus allowing the court to be complicit in penalizing Montgomery's exercise of his right to a jury.

11. THE EVIDENCE IS INSUFFICIENT TO
SUPPORT THE SCHOOL BUS STOP
ENHANCEMENT.

Punishment is enhanced for a drug offense within 1000 feet of a school bus stop, if and only if the State proves the alleged school bus stop

was so designated by the school district on the date of the alleged offense. RCW 69.50.435(1)(c).

Here, the school district transportation supervisor testified that all stops in rural areas were redesignated each school year. RP 13-18. That included the stop alleged here. RP 59. The deadline for designating stops was October 31, 2007. No witness could date the designation closer than that. RP 18. But the offenses were alleged on September 7, 2007.

Accepting the truth of the State's evidence, the essential elements of RCW 69.50.435 were not proven and the enhancements cannot stand.

12. THE SCHOOL BUS STOP ENHANCEMENT
IS UNCONSTITUTIONAL AS APPLIED.

On these facts, increasing Montgomery's sentence under RCW 69.50.435 proximity to a school bus stop constituted overreaching and violated equal protection.

Wash. Const. art. 1, § 12 and the Fourteenth Amendment guarantee like treatment to people similarly situated with respect to the legitimate purpose of a law. An equal protection claim will succeed if the defendant is situated similarly to other people in a class and the legitimate purposes of the law do not justify different treatment. *State v. Coria*, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). An equal protection challenge to RCW 69.50.435 is reviewed under the rational relationship test. *Id.*

Enhancing penalties for drug offenses near school bus routes is rationally related to the legitimate goal of keeping drugs away from schoolchildren. *Coria*, 120 Wn.2d at 169. But the enhanced penalty must make sense under the particular circumstances.

For example, applying a similar federal law to drug offenders on a train stopped at a station that was near a school was “overreaching.” *U.S. v. Coates*, 739 F. Supp. 146, 153 (S.D.N.Y., 1990) (interpreting 21 U.S.C. § 845a, and cited in *Coria*, 120 Wn.2d at 165.) “To charge a schoolyard count in these circumstances stretches the scope of the statute beyond logical and acceptable bounds.” *Coates*, 739 F. Supp. at 153.

This principle applies here.

Montgomery, lives in a rural area, but his offense was identical to that of an urban residential marijuana grower. City bus routes collect children from neighborhoods with greater than a 1000 foot radius. In rural communities, by contrast, every stop is located where a particular family’s driveway meets the road. Only that family’s children use the stop. Therefore, as in *Coates*, the enhancement makes no sense here, because Montgomery’s shed was 323 feet away from the bus stop but less than 85 feet from the residence. Thus, the sole affected child was not exposed to drug activity at the bus stop — she was actually distanced from it.

Therefore, enhancing Montgomery's penalty does not advance the legitimate purpose of the law. The Court should vacate the school bus stop enhancement and remand for resentencing.

13. IT WAS PROSECUTORIAL MISCONDUCT TO
TELL THE JURY A GUT FEELING
CONSTITUTES AN ABIDING BELIEF.

Prosecutorial misconduct is prejudicial error that denies the defendant a fair trial. *State v. Fisher*, 165 Wn.2d 727, 757, 202 P.3d 937 (2009). The Court will reverse without a contemporaneous objection if the conduct is flagrant and ill-intentioned and it appears substantially likely that the misconduct affected the verdict. *State v. Belgarde*, 110 Wn.2d 504, 516, 755 P.2d 174 (1988).

Misleading the jury as to the reasonable doubt standard — specifically the meaning of “abiding belief” — is flagrant and ill-intentioned misconduct for which the remedy is to reverse. *State v. Johnson*, 158 Wn. App. 677, 686, 243 P.3d 936 (2010).

Here, the prosecutor began his closing argument by gutting the meaning of “reasonable doubt.” He said when the jurors heard a piece of evidence, “the State would submit that in your gut when you have that feeling that that is pretty good evidence as to what happened here, you have an abiding belief in the truth of the charge.” And, “If you feel in

your gut that Mr. Montgomery is guilty of the charge, the State would submit that's the abiding belief standard." RP 467-68.

This was particularly likely to affect the verdicts in this case because it increased the likelihood that the jury would convict on Counts I and II by relying on gut feelings based on propensity evidence from the house rather than actual evidence of criminal conduct in the woods.

The error was sufficiently flagrant to warrant reversal.

14. THE CUMULATIVE WEIGHT OF ERROR REQUIRES REVERSAL.

"The right to a fair trial is a fundamental liberty." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). The cumulative error doctrine applies where the weight of numerous errors denied the defendant a fair trial, and reversal may be warranted even if some errors standing alone can be deemed harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Prejudice is presumed where, as here, the court loses sight of basic constitutional concepts and the principles underlying criminal procedure. *See, United States v. Cronin*, 466 U.S. 648, 656-57, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

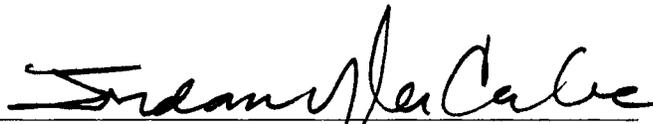
The court's failure to assert the requisite judicial authority over the proceedings and flouted basic constitutional principles kept Montgomery

in prosecutorial limbo for three years on charges that should have been dismissed at the outset for lack of probable cause.

IV. **CONCLUSION**

For these reasons, the Court should reverse the convictions, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this April 7, 2011.


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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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