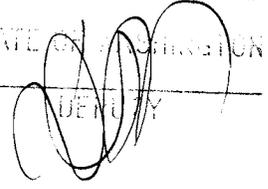


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STATE OF WASHINGTON  
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Court of Appeals No. 41519-4-II  
Cowlitz County No. 03-1-00997-8

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**TERRY WINTERSTEIN**

**Appellant.**

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**BRIEF OF APPELLANT**

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**ASSIGNMENTS OF ERROR**

**A. ASSIGNMENTS OF ERROR ..... 1**

**I. THE TRIAL COURT ERRED BY NOT HOLDING AN EVIDENTIARY HEARING..... 1**

**II. MR. WINTERSTEIN DID NOT RECEIVE DUE PROCESS AND A FAIR HEARING. .... 1**

**III. BASED ON THE INFORMATION AVAILABLE TO THE CCO PRIOR TO THE SEARCH, THERE WAS NOT PROBABLE CAUSE TO BELIEVE THAT MR. WINTERSTEIN RESIDED AT 646 ENGLERT RD. .... 1**

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1**

**I. THE TRIAL COURT ERRED WHEN IT DENIED MR. WINTERSTEIN’S REQUEST FOR A NEW EVIDENTIARY HEARING TO DETERMINE WHETHER THE CCO HAD PROBABLE CAUSE TO BELIEVE MR. WINTERSTEIN LIVED AT 64 ENGLERT RD..... 1**

**II. MR. WINTERSTEIN WAS DENIED DUE PROCESS AND A FAIR HEARING WHEN THE TRIAL COURT DECIDED, BEFORE HEARING ARGUMENT ON THE MOTION, THAT HE WOULD DENY THE MOTION AND THEREBY FAILED TO EXERCISE HIS DISCRETION..... 1**

**III. BASED ON THE INFORMATION AVAILABLE TO THE CCO PRIOR TO THE SEARCH, THERE WAS NOT PROBABLE CAUSE TO BELIEVE THAT MR. WINTERSTEIN RESIDED AT 646 ENGLERT RD. .... 1**

**C. STATEMENT OF THE CASE..... 1**

**A. FIRST POST-TRIAL MOTION TO SUPPRESS..... 1**

**B. SECOND MOTION TO SUPPRESS ..... 15**

**D. ARGUMENT..... 18**

**I. THE TRIAL COURT ERRED WHEN IT DENIED MR. WINTERSTEIN’S REQUEST FOR A NEW EVIDENTIARY HEARING TO DETERMINE WHETHER THE CCO HAD PROBABLE CAUSE TO BELIEVE MR. WINTERSTEIN LIVED AT 646 ENGLERT RD..... 18**

**II. MR. WINTERSTEIN WAS DENIED DUE PROCESS AND A FAIR HEARING WHEN THE TRIAL COURT DECIDED, BEFORE HEARING ARGUMENT ON THE MOTION, THAT HE WOULD DENY THE MOTION AND THEREBY FAILED TO EXERCISE HIS DISCRETION..... 19**

**III. BASED ON THE INFORMATION AVAILABLE TO THE CCO PRIOR TO THE SEARCH, THERE WAS NOT PROBABLE CAUSE TO BELIEVE THAT MR. WINTERSTEIN RESIDED AT 646 ENGLERT RD. .... 22**

**E. CONCLUSION..... 26**

## TABLE OF AUTHORITIES

### **Cases**

<i>Ben-Neth v. The Indeterminate Sentence Review Board</i> , 49 Wn.App. 39, 740 P.2d 855 (1987).....	25
<i>Brinegar v. United States</i> , 338 U.S. 160, 69 S.Ct. 1302 (1949).....	27
<i>Cuevas v. De Roco</i> , 531 F.3d 726 (2008) .....	28, 29
<i>State ex rel. Brown v. Board of Dental Examiners</i> , 38 Wash. 325, 80 P. 544 (1905).....	25
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005) .....	25
<i>State v. Hatchie</i> , 161 Wash.2d 390, 166 P.3d 698 (2007).....	27, 28
<i>State v. Terrovona</i> , 105 Wash.2d 632, 716 P.2d 295 (1986).....	27
<i>State v. Winterstein</i> , 140 Wn.App. 676, 166 P.3d 1242 (2008).....	19
<i>State v. Winterstein</i> , 167 Wn.2d 620, 220 P.3d 1226 (2009). 19, 20, 22, 23, 27	
<i>United States v. Howard</i> , 447 F.3d 1257 (2006) .....	28

### **Rules**

CrR 7.8 (b) (2).....	8
CrR 7.8 (b) (3).....	8

**A. ASSIGNMENTS OF ERROR**

**I. THE TRIAL COURT ERRED BY NOT HOLDING AN EVIDENTIARY HEARING.**

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**I. THE TRIAL COURT ERRED WHEN IT DENIED MR. WINTERSTEIN'S REQUEST FOR A NEW EVIDENTIARY HEARING TO DETERMINE WHETHER THE CCO HAD PROBABLE CAUSE TO BELIEVE MR. WINTERSTEIN LIVED AT 64 ENGLERT RD.**

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**III. BASED ON THE INFORMATION AVAILABLE TO THE CCO PRIOR TO THE SEARCH, THERE WAS NOT PROBABLE CAUSE TO BELIEVE THAT MR. WINTERSTEIN RESIDED AT 646 ENGLERT RD.**

**C. STATEMENT OF THE CASE**

**A. FIRST POST-TRIAL MOTION TO SUPPRESS<sup>1</sup>**

The house that was the subject of this warrant and the initial warrantless search by DOC clearly bore the address of 646 Englert Road.

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<sup>1</sup> This portion of the statement of the case is taken from Mr. Winterstein's original Brief of Appellant, filed in *State v. Winterstein*, 140 Wn.App. 676, 166 P.3d 1242 (2008).

CP 131. A motorhome (RV) near the house bore the address of 646 ½ Englert Road. CP 131.

The warrantless search was conducted by Corrections Officer Kris Rongen and two other officers from DOC. RP Vol. II (6-28-05), 130. The DOC officers also took officers from the Clark-Skamania Drug Task Force and the Cowlitz Wahkiakum Drug Task Force because he had been informed by Clark-Skamania that they believed there was a methamphetamine lab at 646 Englert Road. RP Vol. II (6-28-05) 130-131. Officer Rongen made the initial entry. RP Vol II (6-28-05) 131. In one of the bedrooms of the residence, which the DOC officers knew did not belong to Mr. Winterstein and was later determined to be Mr. Soderlind's, the officers observed items that they believed indicated the presence of a meth lab. RP Vol. II (6-28-05), 139, 264, Trial RP Vol. II, 183. This observation was made from the threshold of the door. RP Vol. II (6-28-05), 201.

Trial counsel for Mr. Soderlind, John Hays, filed a motion to suppress on behalf of Mr. Soderlind. CP 156. This motion was based on Mr. Hays' belief, based on conversations with Mr. Soderlind, that Mr. Winterstein had changed his address with DOC prior to the search on February 6<sup>th</sup>, 2003. CP 156. Mr. Hays interviewed Kris Rongen in an attempt to verify the information given to him by Mr. Soderlind. CP 157.

Mr. Rongen told him that Mr. Winterstein had come to DOC and changed his address using the Kiosk computer on February 6<sup>th</sup>, 2003, the same day as the search. CP 157. Mr. Rongen said there was no way to tell whether Mr. Winterstein visited the Kiosk before or after the search, and stated he had no way of knowing about the change of address because it happened on the same day. CP 157. Mr. Coppola, the deputy prosecutor, later informed Mr. Hays' that Mr. Rongen had confirmed for him that Mr. Winterstein changed his address on February 6<sup>th</sup>, 2003. CP 157. Based on this information, Mr. Hays' abandoned his suppression motion and advised Mr. Soderlind to accept the State's plea offer, which he did. CP 158. Mr. Northrip, trial counsel for Mr. Winterstein, had consulted extensively with Mr. Hays about the State's representations regarding the date on which Mr. Winterstein changed his address with DOC. CP 134. Mr. Northrip also received discovery from the State, in the form of a report from CCO Rongen, stating affirmatively that according to DOC records, Mr. Winterstein did not change his address with DOC until February 6<sup>th</sup>, 2003. CP 135. Based on the State's representations, Mr. Northrip, like Mr. Hays, abandoned a pre-trial motion to suppress. CP 135.

On December 20<sup>th</sup>, 2004, Mr. Winterstein proceeded to trial on the charge of manufacturing methamphetamine. After closing arguments

were completed in the trial, Mr. Northrip, and deputy prosecutor Heiko Coppola were reviewing the exhibits that had been admitted prior to them being submitted to the jury. CP 137. Exhibit 122 had been labeled “misc. documents.” CP 137. Within these documents was a billing statement dated January 13<sup>th</sup>, 2003, addressed to Mr. Winterstein at 646 ½ Englert Road. CP 137. (Exhibit 4). This document had never been provided to either Mr. Hays or Mr. Northrip during discovery, and proved that the prior representations of the deputy prosecutor and DOC were in fact misrepresentations, whether intentional or not. CP 137-138.

Following Mr. Winterstein’s conviction, both Mr. Winterstein and Mr. Soderlind made motions under CrR 7.8. Mr. Winterstein moved for relief from judgment under CrR 7.8 (b) (2) (3) and (5), allowing relief from judgment based on newly discovered evidence and based on the misrepresentation of an adverse party, as well as Mr. Winterstein’s constitutional right to be free from unreasonable searches and seizures. CP 130. The State stipulated that this document showing that Mr. Winterstein had changed his address with DOC at least as early as January 13<sup>th</sup>, 2003, constituted newly discovered evidence as contemplated by CrR 7.8 (b) (2). Because the newly discovered evidence pertained to a suppression issue, the successful litigation of which would have required dismissal of the State’s case, all parties agreed that Mr. Winterstein and

Mr. Soderlind would litigate their respective motions in the form of a suppression motion. RP Vol. II (6-28-05), 109. All parties stipulated that if the Court agreed that CCO Rongen lacked the legal authority to enter 646 Englert Road to look for Mr. Winterstein, based on Mr. Winterstein's prior change of address, then all evidence observed during the course of this warrantless entry and seized in the subsequent search warrant should have been suppressed and that relief from judgment and dismissal of the cases was required. *Id.* This motion was heard before the Honorable James Warme on June 28<sup>th</sup>, 2005. It should be noted at this point that no findings of fact and conclusions of law were entered following this motion, so this entire statement of the case is based upon the Report of Proceedings, the Clerk's Papers and Exhibits.

The Court took testimony at the June 28<sup>th</sup> motion from CCO Kris Rongen, and Cowlitz-Wahkiakum Task Force Detective Tim Watson. CCO Rongen testified that he is a community corrections officer who was previously assigned to the Longview office. RP Vol. II (6-28-05), 119. On February 6<sup>th</sup>, 2003, Mr. Winterstein was a probationer under his supervision. *Id.* at 120. Rongen testified that probationers will meet with an intake officer, who reviews the conditions of supervision with the probationer, before they are assigned to a field officer (such as Rongen). *Id.* at 121. When an offender meets with the field officer, the CCO will

again review the same written conditions with the offender that was provided to him by the intake officer. *Id.* The Court admitted exhibit 8, entitled “Standard Conditions,” which was the document of written conditions given to Mr. Winterstein when he was placed on probation. *Id.* at 123, Exhibit 8.

These written conditions required, among other things, that the probationer secure written permission from the CCO before leaving the state; that the offender must remain within the geographical area as directed by the Department of Corrections; that the offender obtain written permission from the CCO before traveling outside of the county in which he resides; and *notify* the community corrections officer before change of residence or employment. RP Vol. II (6-28-05) 164, Exhibit 8. Rongen testified that he told Mr. Winterstein, as he tells all of his probationers, that prior to changing his address, he would need to come in and talk with him (Rongen) and get his permission (i.e. Rongen would have to “pre-approve the address). *Id.* at 124.

CCO Rongen also explained the Kiosk device at the Longview DOC office. He testified this is a machine which can do numerous things, such as take an impression of an offender’s hand, so that they can get a receipt showing they were there, and that an offender can change his address using this machine. *Id.* at 126. This Kiosk also might be referred

to as the Genie. Id. at 159. He testified however, that under *his* conditions, an offender must meet with him and get permission to change his address before he could utilize the Kiosk to change his address. Id. at 126-127. When asked if changing one's address with the Kiosk met DOC's requirements, Rongen testified that the Kiosk simply doesn't meet *his* requirements as a CCO. Id. at 213-214. He conceded, however, that he is an employee of DOC, that his authority as a community corrections officer is derived from the authority given to him by DOC, and that he has no greater authority than DOC. Id.

Rongen admitted that he instructs his probationers to use the Kiosk, and that the Kiosk specifically allows a probationer to notify a community corrections officer of a change of address:

Mr. Hays: "And, in fact, the Kiosk specifically allows a probationer to do a change of address; does it not?"

Rongen: "To notify an officer of a change of address."

Mr. Hays: "To notify an officer of a change of address, that-that's specifically what the Kiosk-what a person is allowed to do at the Kiosk, to notify?"

Rongen: "Correct."

Id. at 168.

Mr. Northrip: “And the Department of Corrections has a machine in place, in the lobby of where you work?”

Rongen: “Correct.”

Mr. Northrip: “That allows people to change their address, correct?”

...

Rongen: “That it gives them the opportunity to change their address on the machine? Correct.”

Mr. Northrip: “And give notice to their CCO that they’ve done so?”

Rongen: “Correct.”

Mr. Northrip: “And that machine, the DOC machine, does not require them, before they do that, to get personal approval from you or anybody else?”

Rongen: “The machine? No.”

Id. at 214.

Revealing his disdain for the Kiosk, CCO Rongen testified there is “no merit” to a change of address done at the Kiosk. Id. at 220. He stated: “...[T]o base my supervision off what a computer is asking somebody, instead of a face-to-face contact, that’s not sufficient enough. That face-to-face contact is what generates my rapport; my understanding...where the violation behavior is, things of that nature. So I’m not gonna base information off the Kiosk reporting.” Id. at 221. Rongen then grudgingly

conceded that offenders are allowed to change their address at the Kiosk, and that the Department encourages offenders to use it. Id. at 221-223.

CCO Rongen admitted that he has access to any information an offender puts into the Kiosk from the computer at his desk. Id. at 168, 219. Although he wouldn't open up that particular program on a daily basis, he would normally open it up before he went out to do a field contact. Id. at 127-128. He did not explain why, in spite of the fact he was aware an offender could change his address using the Kiosk, he did not check the database prior to the search on February 6<sup>th</sup>, 2003. Id. at 186-187.

CCO Rongen was asked when he first became aware of Mr. Winterstein's change of address, and he claimed it was March 18<sup>th</sup>, 2003. Id. at 171. Mr. Hays, counsel for Mr. Soderlind, confronted CCO Rongen with exhibit 3, which was a violation report generated by his office for Mr. Winterstein dated February 13<sup>th</sup>, 2006. That report bore the address of 646 ½. Exhibit 3. Notably, none of the violations alleged was for failure to notify his community corrections officer of a change of address. Exhibit 3. The report states it was submitted by Kris Rongen. Exhibit 3, RP Vol. II (6-28-05), 174. It was signed, however, by an officer named Brad Phillips. Exhibit 3, RP Vol. II (6-28-05), 175. This document was sworn under penalty of perjury. Exhibit 3. Rongen testified that this

report would be generated off a computer program called Wizard, which is a component of the Kiosk Genie. Id. at 184. When asked if it was known, at the time this report was generated, that Mr. Winterstein's address was 646 ½ Englert Road, Rongen replied "By the computer. By the officer? No." Id. at 185. Unbelievably, Rongen then testified: "When I create a document such as this, that's based off of the computer, do I look at the stuff? *Not at all*. This is the only thing I have to change manually is who the report is going to, and that's the Judge." Id. at 185. In other words, Rongen would not, as a matter of practice, read a report that he declares to be true under penalty of perjury and submits to the court.

With regard to the incident on February 6<sup>th</sup>, 2003, CCO Rongen conceded before he went to Englert Road, he had met with the officers from both the Clark-Skamania and Cowlitz-Wahkiakum task forces at the Woodland Police Department early in the morning for a raid planning meeting. Id. at 204-205. The Task Force officers had informed Rongen, in seeking his help, that they believed there was a meth lab at 646 Englert Road, but that they didn't have enough evidence to obtain a search warrant. Id. 203-204. When he arrived at 646 Englert Road, he knocked on the door and announced himself. Id. at 131. At the same time, the door "came open." Id. When he entered, he went down the hallway to where the bedrooms were located. Id. He ordered the other people in the

residence to have a seat in the living room. Id. Another officer went into the bedroom they believe to belong to Mr. Winterstein. Id. One of the people he encountered in the house was Sunshine O'Connor, who he believed was Mr. Winterstein's girlfriend. Id. at 132. Rongen asked her where Mr. Winterstein was and whether he still lived there. Id. at 132-133. Both counsel for the defense objected. Id. at 133. When asked by the Court why he asked Ms. O'Connor if Mr. Winterstein still lived there, Rongen stated that it was for the purpose of verification, "just one more additional thing." Id. at 136. He testified that he works off the OBTS, or Offender Based Tracking System, with DOC. Id. at 136. "All of my information in there, and I have to go to the supervisor and get approval, and on that is his correct address of 646, not 646 ½. So, based on that, based on his violation of failing to report, that's the address I went to, and that's the address I knew he resided at. So it's just one more additional thing." Id. Rongen was never asked why, if he had no actual knowledge that Mr. Winterstein had changed his address to 646 ½ Englert Road, he felt it necessary to ask Ms. O'Connor if Mr. Winterstein still lived there as a means to establish that his address was 646 Englert Road, not 646 ½ Englert Road.

Both Mr. Soderlind and Mr. Winterstein objected to Rongen's testimony about what Ms. O'Connor told him as hearsay. Id. at 133. The

Court ruled that the comment fell within an exception to the hearsay rule because it was a “spontaneous answer to a question about a present, then-existing condition, and it has relevance to the issue of whether he was actually living there.” Id. at 136. The Court stated “I think it’s a combination of spontaneous--spontaneous declaration and present-sense impression. Is he living there now? Yes. It has some indicia of reliability.” Id. at 137. Once the objection was overruled, Rongen testified Ms. O’Connor replied yes, that Mr. Winterstein was still living there. Id. at 137.

Rongen testified he then went to the bedroom he believed to be Mr. Winterstein’s and “verified Mr. Winterstein’s room as being how I recollected from my last visit there...” Id. at 138. Again, Rongen was not asked why it was necessary to perform this verification when he had no reason to believe, according to him, that Mr. Winterstein had changed his address. Later, Rongen contradicted this testimony and testified that it was DOC Officer Matua who went into the bedroom believed to be Mr. Winterstein and that he asked Matua if “everything was set up the way it was the last time we were here visiting.” Id. at 202. While looking in the area of the bedrooms, Rongen looked into another bedroom (later determined to be Mr. Soderlind’s) and saw a scale with white residue on it, a jar of what appeared to be red phosphorous, and a meth pipe. Id. at

139. He then backed out and informed the Task Force officers of his discovery, and they subsequently obtained a search warrant. *Id.* at 141. Mr. Winterstein was not there at the time the DOC officers entered 646 Englert Road. *Id.* at 202, 209.

Detective Watson of the Cowlitz-Wahkiakum Narcotics Task Force testified on behalf of the State. He testified that after he obtained a search warrant, he entered the motorhome which bore the address of 646 ½ Englert Road. *Id.* at 248. He testified it did not appear that anyone was living there. *Id.* No contraband was found in the motorhome. *Id.* at 252. Detective Watson testified on cross-examination that although it would have been awkward to move around the motorhome due to the large number of boxes within it, one could nevertheless do so. *Id.* at 253. He also conceded that someone could have slept there, in spite of its messy condition. *Id.* at 253.

The Court heard argument from the parties. Mr. Northrip and Mr. Hays argued that CCO Rongen had notice of Mr. Winterstein's change of address prior to February 6<sup>th</sup>, 2003, and that Mr. Winterstein had complied with the requirement that he notify his community corrections officer prior to changing his address. *Id.* at 259-279. The defense argued that Rongen, based upon the violation of failure to report, had the authority to enter only Mr. Winterstein's home and to search for Mr. Winterstein in particular.

Id. at 260-261, 270. Rongen did not have the authority to conduct a warrantless search of someone else's home, or to search for evidence of a crime. Id. at 270-271. Mr. Northrip concluded by noting the specious nature of the State's position:

It is difficult for me to conceive that the State is actually making the argument that you cannot impute information from a DOC Kiosk to the DOC officer. The argument I'm hearing is that this Court should not impute the knowledge in the Kiosk to the officer. It's a DOC device. It's a DOC office. They put it in there for people to put this information in it. They don't- the ability to change this is it means that Mr. Winterstein, or anybody else, could put in this change of address information. They allow that to happen. And then to argue that you can't impute that knowledge to them? Imagine that there had been evidence of a violation in there that they were using that to go arrest somebody. Would they suddenly--would they credit a Defense argument that oh, that Kiosk is actually a third party contractor, you know, DOC really doesn't have that information, so you weren't allowed to go arrest this person. Can you imagine- it's just hard for me to sit here and listen to that.

Id. at 290.

The Court denied the motion of both defendants for relief from judgment. The Court agreed with both defense counsel that Mr. Winterstein was not required to get permission from CCO Rongen before he changed his address, and was permitted to utilize the Kiosk to do so. Id. at 291-292. The Court, however, was ultimately persuaded by information gathered by Rongen *after* the warrantless entry into 646

Englert Road, and ruled that Rongen had the lawful authority to conduct this warrantless entry and search because he had acted in good faith:

The Department had notice of his attempted change of address. Mr. Rongen had notice of his last approved, apparently, address. And this is a key finding here. 646 ½ was not his address, he lived at 646. The change of address to 646 ½ was a ruse. Now, I say that because when Mr. Rongen went to the house in February, Mr. Winterstein's room was the same as it had been when he'd been there in January. When he asked the girlfriend if Mr. Winterstein still lived in the house, the girlfriend said "yes." Mr. Soderlind testified [at Mr. Winterstein's trial], he said Mr. Winterstein still lived in the house, and the detective said nobody was living in the motor home. It was a ruse. So when the officer goes there, *acting in good faith*, to his actual address without knowing that the Defendant has attempted to change his address by way of a ruse, is he bound by it? I don't think so. I don't think he is bound by a ruse.

Id. at 292-293.

#### **B. SECOND MOTION TO SUPPRESS**

The Court of Appeals affirmed the denial of Mr. Winterstein's motion to suppress. *State v. Winterstein*, 140 Wn.App. 676, 166 P.3d 1242 (2008). The Supreme Court reversed the Court of Appeals, holding that the appropriate standard to be applied to the question of whether a probationer actually lives at a particular residence is probable cause, and holding that the inevitable discovery doctrine is *not* available in Washington.<sup>2</sup> *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009).

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<sup>2</sup> Justice Johnson, in his concurring opinion, characterized the inevitable discovery holding as "dictum." This characterization defies logic. The invalidation of the inevitable discovery doctrine was an explicit part of the holding of the Court. It was not

The Supreme Court ordered the case remanded to the Cowlitz County Superior Court for a “new suppression hearing.” *Winterstein* at 636.

The parties convened to discuss the parameters of the new suppression hearing on May 28<sup>th</sup>, 2010. RP 10. At that time, Judge Warne remarked that the Supreme Court had already determined that there was probable cause to believe Mr. Winterstein lived at 646 Englert Rd., apparently referring to the opinion (which was the *concurring*, not majority opinion) by Justice Johnson. RP 11. Judge Warne then remarked, before a single argument had been made, “Of course there was probable cause.” RP 12. The prosecutor readily agreed, appearing excited at the prospect of having to go no further. RP 12. Fortunately Mr. Mulligan, counsel for Mr. Winterstein, did not see fit to roll over and argued that Mr. Winterstein was entitled to a new, full suppression hearing. RP 12-13. Mr. Mulligan even pointed out that Mr. Winterstein might like to testify at the new hearing. *Id.* Judge Warne denied Mr. Mulligan’s request, stating that in his view, when the Supreme Court remanded for a “new suppression hearing,” the Court meant that Judge Warne should simply apply the probable cause standard to the record that existed. RP 13. Judge Warne also remarked that in his opinion, this case no longer made any difference to Mr. Winterstein because the only thing

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the product of a side discussion. That Justice Johnson disliked the holding does not render it dicta.

that could change was the “record.” RP 15. The prosecutor then speculated, without any evidence to support the opinion, that Mr. Winterstein “may have abandoned his arguments.” RP 16.<sup>3</sup>

The second hearing before Judge Warne took place on August 6<sup>th</sup>, 2010. Report of Proceedings. At the outset, it was clear Judge Warne had a poor recollection of the facts. RP, p. 18-19. It was clear he believed that CCO Rongen only went to the house at 646 Englert *after* first going to the motohome at 646 ½, investigating, and concluding it was not a residence. RP 18-19, 38. That is incorrect. Judge Warne fixated on a passage in the concurring opinion (which he continually referred to as the “dissent”) in which Justice Johnson stated that if the majority had explicitly required CCO Rongen to have checked the relevant database (the one used by offenders to change their address) in order to find that he had probable cause, he would have dissented. RP 55, 59, 60. Judge Warne appeared to believe this was the holding of the Court rather than non-binding thoughts by a concurring Justice. *Id.* Judge Warne appeared to believe that the Court specifically held that Rongen was *not* required to check the relevant database, which is not correct. *Id.* See *Winterstein* at 630 (The information known to the officer must be reasonably

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<sup>3</sup> Because this statement of the prosecutor was highly improper, Appellate Counsel feels compelled to correct the record: Mr. Winterstein cares very much about this case, and has kept in regular contact with Appellate Counsel throughout the pendency of this case.

trustworthy. Only facts and knowledge available to the officer at the time of the search should be considered).

Judge Warne then denied the motion. RP 60. This timely appeal followed. CP 11.

#### **D. ARGUMENT**

##### **I. THE TRIAL COURT ERRED WHEN IT DENIED MR. WINTERSTEIN'S REQUEST FOR A NEW EVIDENTIARY HEARING TO DETERMINE WHETHER THE CCO HAD PROBABLE CAUSE TO BELIEVE MR. WINTERSTEIN LIVED AT 646 ENGLERT RD.**

In remanding this case to the trial court, the Supreme Court explicitly stated that the remand was for a new suppression hearing. The Court stated:

We reverse and remand to the trial court for a new suppression hearing with instructions that the probable cause standard applies and the inevitable discovery doctrine does not.

*State v. Winterstein*, 167 Wash.2d 620, 636, 220 P.3d 1226 (2009).

Notably, the Court did not say it was remanding for further *argument* on the motion, nor did it authorize the Court to consider only the existing record. The Court ordered a “new suppression hearing.” *Id.* The use of the word “new” irretrievably suggests that the Court ordered a new full hearing. Mr. Winterstein’s trial counsel demanded a new full evidentiary hearing, arguing that he needed to examine the operative witness (CCO

Rongen) and develop the record with a view toward the correct standard of review—probable cause.

There is no case on point which addresses this. This Court will have to apply fresh eyes to the exact wording used by the Supreme Court—“We reverse and remand to the trial court for a *new suppression hearing...*” (Emphasis added). Mr. Winterstein asks this Court to reverse the trial court an order a full, evidentiary suppression hearing with testimony from CCO Kris Rongen.

**II. MR. WINTERSTEIN WAS DENIED DUE PROCESS AND A FAIR HEARING WHEN THE TRIAL COURT DECIDED, BEFORE HEARING ARGUMENT ON THE MOTION, THAT HE WOULD DENY THE MOTION AND THEREBY FAILED TO EXERCISE HIS DISCRETION.**

From the outset of this truncated hearing, the trial court implied that he was planning to deny Mr. Winterstein’s motion because that is what Justice Johnson told him to do. The judge was bemused by what he interpreted as “the Court” telling him what to do on remand, ignoring the fact that Justice Johnson wrote a concurring opinion, *not* the majority opinion. Justice Johnson was not speaking for the Court. At no time did the majority opinion instruct Judge Warne on the result he should reach, and his fixation on the concurring opinion was strange, to say the least.

The trial court was required to exercise his discretion and consider the motion anew, applying the correct standard of law. If that is not what

was contemplated by the Supreme Court, there was no point in remanding the case. The Supreme Court could have simply determined on its own that probable cause existed. By making up his mind before even conducting this so-called hearing, the judge rendered this hearing a farce. Mr. Winterstein never had a chance.

The trial court abused its discretion in denying Mr. Winterstein's motion because it failed to exercise discretion. While the trial court certainly paid lip service to serious argument, posing hypothetical questions to the parties, at the end of the day it was clear that the judge had predetermined that he was going to deny Mr. Winterstein's motion, believing that to be what the Supreme Court wanted him to do.

An abuse of discretion may arise from the manner of the exercise of discretion or from the result of the exercise. *Ben-Neth v. The Indeterminate Sentence Review Board*, 49 Wn.App. 39, 42, 740 P.2d 855 (1987), citing *State ex rel. Brown v. Board of Dental Examiners*, 38 Wash. 325, 328, 80 P. 544 (1905). "The court held that gross abuse or in avoidance of its duty was not an abuse of discretion, but rather the failure to exercise any discretion at all." *Id.* See also *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (holding that in the DOSA setting, every defendant is entitled to ask the trial court for meaningful consideration of his request and that a party may challenge a trial court's

failure to exercise any discretion where the trial court categorically denies a DOSA sentence).

By failing to exercise his discretion, the trial judge, in effect, denied Mr. Winterstein his due process right to a hearing because the hearing itself was a farce. In its response to Mr. Winterstein's motion to suppress, the State cited to facts relied upon by Judge Warne in the first motion to suppress which he was expressly prohibited from relying upon, namely facts that were learned *after* the unlawful entry into the home at 646 Englert Road. See State's Response to Motion at CP 6. The "findings of fact and conclusions of law" entered after this farcical hearing were cynical at best. They contained no findings of fact at all, but rather one conclusion of law couched as a finding of fact and two orders couched as conclusions of law.<sup>4</sup> CP 8-9. The only party who seemed to take this motion seriously was Mr. Winterstein (and his counsel). Contrary to Judge Warne's assertion that the outcome of this hearing made no difference to Mr. Winterstein (see RP, p. 8), having a conviction for manufacturing methamphetamine on his record, based on evidence gathered after an illegal search, actually matters to him.

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<sup>4</sup> Unbelievably, it took the State *four months* to draft and enter this three sentence document, despite repeated inquiries by appellate counsel to the prosecutor about the status of this case.

Judge Warne abused his discretion when he failed to exercise his discretion and accord Mr. Winterstein a true hearing on his motion.

**III. BASED ON THE INFORMATION AVAILABLE TO THE CCO PRIOR TO THE SEARCH, THERE WAS NOT PROBABLE CAUSE TO BELIEVE THAT MR. WINTERSTEIN RESIDED AT 646 ENGLERT RD.**

Probable cause requires more than suspicion or conjecture, but it does not require absolute certainty. When evaluating probable cause we look to “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); *see also State v. Terrovona*, 105 Wash.2d 632, 643, 716 P.2d 295 (1986) (“Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.”).

*State v. Hatchie*, 161 Wash.2d 390, 404, 166 P.3d 698 (2007). In this case, the Supreme Court held that the trial court should review not only the facts known to CCO Rongen, but the facts *available* to him; it held that the information actually known to him must be reasonably trustworthy. *Winterstein* at 630. In *Hatchie*, *supra*, the Court found probable cause, albeit just barely, where the police went to a home they believed was the residence of a person for whom they were searching but where the person turned out to be merely a guest in the home. *Hatchie* at 405. While looking for him in the home, they found evidence of methamphetamine manufacturing in plain view. *Id.* at 393-94. The

homeowner, Hatchie, was subsequently prosecuted for the crime. *Id.* The Supreme Court found probable cause where there were two cars registered to Mr. Hatchie's guest in the driveway and front yard, police had seen him returning to the home after drug buys, and a neighbor said the guest lived at the home, while another neighbor said he had frequently seen the guest at the house. *Id.* at 405.

In *United States v. Howard*, 447 F.3d 1257, 1268 (2006), the Ninth Circuit held:

We therefore hold that the police do not have probable cause to believe that a parolee lives at an unreported residence when: (1) visits to the parolee's reported address suggested that the parolee continued to reside there; (2) the police watched the address in question for a month and did not see the parolee there; (3) no credible witnesses had seen the parolee at the address in question for some time before the search; (4) the parolee did not have a key to the residence in question; and (5) neither the parolee nor his purported co-resident admitted to his residence there.

Later, in *Cuevas v. De Roco*, 531 F.3d 726 (2008), the Ninth Circuit again applied the standard of probable cause and again found probable cause lacking where the officers had gone to a prior address of probationer and entered it, detained the man, woman and children living there for forty minutes, searched it, only to find out later that the person associated with the probationer who previously lived at the house had sold it to a new family that had no connection to probationer. The Court stated that had the officers done a basic investigation, to include pulling up property

records, they would have seen that the house was owned by new people. The Court stated, inter alia, “So, despite some confusion as to the formulation of the standard, we have long held that there must be strong evidence to think that a parolee resides at an address before the address can be searched without a warrant.” *Cuevas* at 736.

Like the officers in *Cuevas*, CCO Rongen did *no investigation* at all into where Mr. Winterstein lived. CCO Rongen had last known for certain that Mr. Winterstein lived at 646 Englert Rd. back in November of 2002, a full three months before going out to Englert Rd. CCO Rongen knew that offenders are permitted by DOC to change their address using the Kiosk, but he chose not to access that database because he was angry at DOC’s policy of allowing offenders to change their address this way, or with the rules of probation which only required Mr. Winterstein to notify DOC of his address change, not seek permission in advance. He didn’t consider these policies valid, even though his employer did. Despite his disagreement with DOC’s policy on address changes, it was objectively unreasonable for CCO Rongen to fail to access the most relevant database of any which were available to him, namely the database which would inform him that an offender had changed his address. This information was more than just “available” to him; it was sitting on his computer and

could be accessed with a few key strokes. The State should not be shielded by CCO Rongen's willful resistance to information.

Of course, the events of February 6, 2003 were never about Mr. Winterstein's probation violation. The probation violation was a pretext to get drug task force officers into the house at 646 Englert Rd. CCO Rongen attended *a raid planning meeting* with task force officers. He was not acting in his capacity as a CCO looking for a probationer who had failed to report, he was acting to provide pretext for his friends in law enforcement to get into the house at 646 Englert Rd. Checking the information from the Kiosk would be fatal to the whole mission if he were to find that Mr. Winterstein had moved. So he chose plausible deniability and relied on objectively stale information to enable his colleagues to search 646 Englert Rd. Judge Warme was fond of talking about Mr. Winterstein's supposed ruse, totally ignoring the ruse engaged in by CCO Rongen and the Task Force.

Here, the State should not profit from the willful refusal of CCO Rongen to access the *most relevant* information he possessed about Mr. Winterstein's address. This information was more than just available to him; it was the type of information that no reasonable person would resist. CCO Rongen did not have probable cause to believe Mr. Winterstein lived at 646 Englert Rd. when DOC knew he had changed his address to 646

and ½ Englert Rd., and where that information was readily available to CCO Rongen on his desktop computer. More importantly, of all the information available to CCO Rongen, the information from the Kiosk was the *most relevant* to this inquiry. This trial court erred in holding there was probable cause and Mr. Winterstein asks this Court to reverse and dismiss Mr. Winterstein's conviction.

**E. CONCLUSION**

Mr. Winterstein's conviction should be reversed and dismissed.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of January, 2011.

  
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ANNE M. CRUSER, WSBA No. 27944  
Attorney for Mr. Winterstein

**CERTIFICATE OF MAILING**

I, Anne Cruser, certify that on 1/7/11 I placed this document in the mails of the United States, addressed to: (1) Susan Baur, Cowlitz County Prosecutor; (2) David Ponzoha, Clerk, Court of Appeals, Division II; (3) Mr. Terry Winterstein, 353 Maranatha Rd., Kelso, WA 98626.

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DIVISION II