

No. 42298-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Aaron Hudspeth,

Appellant.

Thurston County Superior Court Cause No. 11-1-00182-6

The Honorable Judges Gary Tabor and Paula Casey

Appellant's Reply Brief

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ARGUMENT

I. THE SEARCH WARRANT WAS OVERBROAD.

A search warrant is overbroad if it authorizes seizure of particular items for which there is no probable cause. *State v. Higgins*, 136 Wash.App. 87, 91-92, 147 P.3d 649 (2006). A warrant is also overbroad if it fails to describe the things to be seized with sufficient particularity. *Id.* When a warrant authorizes seizure of materials protected by the First Amendment, the particularity requirement “is to be accorded the most scrupulous exactitude.” *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965).

Here, the affidavit only provided probable cause to search Mr. Hudspeth’s residence for methamphetamine and two handguns.¹ Ex. 1, pp. 5-7. It did not establish probable cause to search for anything else.

Respondent appears to contend that an affidavit establishing probable cause to search a residence for one item is sufficient to authorize a search for almost any item. *See* Brief of Respondent, p. 13. This is incorrect: Respondent’s position ignores the problem of overbreadth. *See Higgins*, at 91-92.

¹ Of course, the officers conducting the search would be entitled to seize any contraband or evidence discovered in plain view. *See, e.g., State v. McKague*, 143 Wash.App. 531, 539, 178 P.3d 1035 (2008) (applying “plain view” exception).

A warrant is overbroad unless the affidavit establishes probable cause to seize all items of a particular type described in the warrant. *Higgins*, at 91-92. In this case, the affiant requested and received permission to search for notes, records, ledgers, and electronic media; however, the affidavit's probable cause statement did not even mention such items. Ex. 1 pp. 1, 3-7; Ex. 4. The affiant also requested and received permission to search for money, negotiable instruments, other "proceeds," assets acquired from proceeds, personal property subject to seizure, and weapons (in addition to the two handguns). Ex. 1, Ex. 4. The affidavit's probable cause statement did not mention these items either. Ex. 1, pp. 3-7.

Respondent does not address the absence of probable cause. Brief of Respondent, pp. 13.² The absence of argument on this point may be treated as a concession. *See In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009).

The warrant in this case also failed the particularity requirement. A warrant is overbroad on particularity grounds unless it (1) provides

² Although Respondent does not do so explicitly, the argument seems to rely on a general position that a person dealing drugs likely has notes, records, etc. that relate to the enterprise. But the Supreme Court has prohibited searches based on generalizations of this sort. An affiant's knowledge of the habits of drug dealers in general does not provide probable cause in individual cases. *See State v. Thein*, 138 Wash.2d 133, 977 P.2d 582 (1999).

objective standards allowing executing officers to differentiate between those items that are subject to seizure and those that are not, and (2) includes the most particular description possible in light of the information available at the time the warrant was issued. *Higgins*, at 91-92. The description is inadequate if a violation of personal rights is likely. *State v. Reep*, 161 Wash.2d 808, 814, 167 P.3d 1156 (2007).

Here, the warrant authorized a search for and seizure of written materials (or images), but did not describe such materials with scrupulous exactitude (as required by the First Amendment). *Stanford*, at 485. Instead, it allowed the police to rummage through *any* writings, computer files, or other electronic media, on the off chance they *might* find something incriminating. The description made a violation of personal rights more than just likely—it made it inevitable. *Reep*, at 814.

Respondent erroneously suggests that the First Amendment is not implicated.³ Brief of Respondent, p. 17. But the problem presented by this warrant is that it authorizes the police to rummage indiscriminately through items that *are* protected by the First Amendment, including *any*

³ Even if Respondent is correct, the warrant is still overbroad, given the absence of probable cause and the lack of particularity.

written material and the entire contents of any computers (or other electronic media).⁴

Nor did the warrant provide police with a particular basis to distinguish between the physical objects to be seized and those not subject to seizure. There was no way for officers to tell if any money, assets, or other personal property were derived from the sale of drugs. Ex. 4. Contrary to Respondent’s assertion, the particularity problem was not cured by the inclusion of language referencing illegal activity. Brief of Respondent, pp. 15-16.

Instead, the warrant’s ostensibly limiting language gave the police absolute authority to seize anything—or everything—that might possibly have been paid for with drug money. In other words, the warrant was a general warrant, the very evil which the Fourth Amendment and its state counterpart were designed to address. *See, Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (“[T]he specific evil [addressed by the particularity requirement] is the ‘general warrant’

⁴ Furthermore, the language intended to limit the officers’ discretion to seize written and computer materials was broad enough to permit seizure of a great deal of protected information. The language restricted seizure to materials “evidencing the acquisition, manufacture and/or distribution of controlled substances, as well as sources, customers, and/or other conspirators... [and] records evidencing income from sales of controlled substances and/or the acquisition, possession or re-sale of assets purchased with proceeds of sales of controlled substances...” Ex. 4. Relying on this language, police might seize a list of invitees to a birthday party, or a ledger showing stock trades involving money inherited from a deceased relative.

abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.”)

The warrant was overbroad because it authorized police to search for and seize specific items for which the affidavit did not supply probable cause. *Higgins*, at 91-92. It was also overbroad because it did not provide objective standards allowing the executing officers to differentiate between those items that were subject to seizure and those items that were not. *Id.* Furthermore, because of the complete absence of *any* information relating to any of the items (except the methamphetamine and the two firearms), the government was not able to provide the most particular description possible in light of the information available at the time the warrant was issued. *Id.*

Because the search warrant was overbroad, it was invalid. *Higgins*, at 91-92. Respondent does not—and, under the circumstances, cannot—argue in favor of severability. *See, e.g., State v. Perrone*, 119 Wash.2d 538, 557, 834 P.2d 611 (1992). The evidence must be suppressed, and the case dismissed with prejudice. *Id.*

II. THE TRIAL JUDGE FAILED TO ADEQUATELY INQUIRE INTO THE EXTENT OF THE CONFLICT BETWEEN MR. HUDSPETH AND HIS ATTORNEY.

A trial court abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*,

310 F.3d 1231, 1248-1250 (10th Cir, 2002). In this case, Mr. Hudspeth made serious allegations of incompetence and failure to communicate. CP 29; RP (6/13/11) 4-5. His attorney did not dispute these allegations.⁵ RP (6/13/11) 5-6. In light of Mr. Hudspeth’s serious allegations, the trial judge should have asked the “specific and targeted questions” necessary to resolve the issue. *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 776-779 (9th Cir. 2001).

Respondent erroneously claims that the inquiry was adequate. Brief of Respondent, p. 21. Even if the inquiry were deemed adequate, the undisputed facts established grounds for appointment of new counsel. *See* Appellant’s Opening Brief, pp. 16-19. Thus Respondent’s argument does not support the trial judge’s decision.

Furthermore, concern that the trial would be delayed does not excuse the failure to appoint new counsel. Brief of Respondent, p. 21. First, Mr. Hudspeth filed his written motion on May 19, 2011 – a full month before the start of trial. CP 29. Second, the prosecution did not make a record of any prejudice that would result from delay.⁶ *See* RP

⁵ Instead, counsel told the court he’d filed his suppression brief (although not, apparently, in a timely fashion) and claimed that he was prepared for trial. RP (6/13/11) 5-6.

⁶ Furthermore, the prosecution witnesses at trial included only law enforcement and crime lab personnel. *See* RP (6/21-6/22/11) *generally*. These witnesses were unlikely to disappear if the case were continued.

(6/13/11) *generally*. Third, scheduling considerations or issues of convenience cannot trump an accused person’s constitutional rights: “Courts must not sacrifice constitutional rights on the altar of efficiency.” *State v. Madsen*, 168 Wash.2d 496, 509, 229 P.3d 714 (2010) (addressing request to proceed *pro se*).

By forcing Mr. Hudspeth to go to trial with an attorney he distrusted, the trial court infringed Sixth Amendment right to counsel.⁷ *State v. Cross*, 156 Wash.2d 580, 132 P.3d 80 (2006). His conviction must be reversed. *Id.*

III. MR. HUDSPETH WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Hudspeth rests on the argument set forth in his Opening Brief.

IV. THE PROSECUTION FAILED TO PROVE THAT MR. HUDSPETH WAS “ARMED.”

The prosecution was required to prove that Mr. Hudspeth was “armed with a firearm.” RCW 9.94A.533. At trial, the evidence did not establish that either firearm was “easily accessible and readily available

⁷ Without citation to authority, Respondent asserts that Hudspeth’s admission that he liked his attorney somehow cured any problems. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007). Apparently, Respondent believes that a request for new counsel must be founded on personal dislike.

for use for either offensive or defensive purposes.” *State v. Brown*, 162 Wash.2d 422, 431, 173 P.3d 245 (2007). Nor did the prosecution prove a “nexus between the defendant, the crime, and the weapon.” *Id.* Respondent’s contention to the contrary is without merit. *See, e.g., State v. Valdobinos*, 122 Wash.2d 270, 858 P.2d 199 (1993).

Accordingly, the firearm enhancements must be vacated. *Id.*

V. THE FIREARM ENHANCEMENTS WERE IMPROPERLY IMPOSED.

Before a firearm enhancement may be imposed, the prosecution must properly charge the enhancement. *In re Personal Restraint of Delgado*, 149 Wash.App. 223, 232, 204 P.3d 936 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)). The Supreme Court has held that an Information charging commission of a crime while armed “with a deadly weapon, to wit: a handgun” does not charge a firearm enhancement. *State v. Recuenco*, 163 Wash.2d 428, 431, 436, 180 P.3d 1276 (2008). Instead, this language reflects the prosecutor’s choice “to charge the lesser enhancement of ‘deadly weapon.’” *Id.*, at 436.

In this case, as in *Recuenco*, the charging document unambiguously alleged that Mr. Hudspeth “was armed with a deadly weapon, to wit: a firearm.” CP 2.⁸

Contrary to Respondent’s assertion, the charging language does no more than specify the type of deadly weapon charged; it does not erase the deadly weapon enhancement and substitute a firearm enhancement. *See* Brief of Respondent, pp. 34-35.

Respondent cites the charging document’s reference to RCW 9.94A.533(3) as proof that firearm enhancements were charged. Brief of Respondent, p. 34. This argument is misplaced. It is the operative language of the Information that is important; not the citation to a particular statutory authority. *See, e.g., State v. Naillieux*, 158 Wash.App. 630, 645, 241 P.3d 1280 (2010). Furthermore, the reference to the deadly weapon statute undermines any claim that RCW 9.94A.533(3) provided notice or had any substantive effect on the enhancement charged.

Respondent’s argument focuses exclusively on notice. Brief of Respondent, p. 34. But notice is only part of the issue. Of equal (or even greater) importance is determining which enhancement the state actually

⁸ The Amended Information also references RCW 9.94A.825, which deals with deadly weapon enhancements. As the statute makes clear, a firearm is a kind of deadly weapon. RCW 9.94A.825. It is not inappropriate to specify the deadly weapon at issue, as was done in this case and in *Recuenco*.

charged. An accused person cannot be tried for an offense (or enhancement) not charged. *Recuenco*; see also *State v. Irizarry*, 111 Wash.2d 591, 592, 763 P.2d 432 (1988).

By unambiguously alleging that Mr. Hudspeth was armed with a “deadly weapon,” the prosecution charged a deadly weapon enhancement. CP 2. The fact that a firearm qualifies as a deadly weapon—and that the Amended Information includes language specifying the particular deadly weapon that Mr. Hudspeth is alleged to have used—does not change the enhancement charged. *Recuenco, supra*. Had the charging document alleged that he committed the offenses “while armed with a firearm,” the result would be different.

Likewise misplaced are Respondent’s arguments regarding the failure to object in the trial court. A firearm enhancement cannot be imposed if it is not charged. *Recuenco*. This is true whether the error was raised in the trial court or in the Court of Appeals. *Id.*

Accordingly, the enhancements must be vacated and the case remanded to the trial court. *Recuenco*.

CONCLUSION

Mr. Hudspeth's convictions must be reversed, the evidence suppressed, and the case dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on March 17, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 17, 2012.



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BACKLUND & MISTRY

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