FILED
NOV 28 2005
CLERK OF SUPREME COURT
STATE OF WASHINGTON

NO. 77700-4
Cowlitz Co. Cause NO. 02-1-01358-6

SUPREME COURT OF STATE OF WASHINGTON

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
05 NOV 28 AM 7:49
BY C. J. HERRITT
CLERK

STATE OF WASHINGTON,

Respondent,

v.

DANNY WAYNE EVANS,

Appellant.

~~BRIEF OF RESPONDENT IN~~ RESPONSE TO PETITION FOR REVIEW

SUSAN I. BAUR
Prosecuting Attorney
HEIKO P. COPPOLA/WSBA 26073
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

TABLE OF CONTENTS

Page

I. IDENTITY OF RESPONDENT. 1

II. COURT OF APPEALS DECISION. 1

III. ISSUES PRESENTED FOR REVIEW. 1

1. DID THE TRIAL COURT PROPERLY DENY PETITIONER'S MOTION TO SUPPRESS EVIDENCE UNDER THE DOCTRINE OF ABANDONMENT, WHERE THE PETITIONER (1) DENIED OWNERSHIP OF THE BRIEFCASE; (2) INDICATED HE DID NOT KNOW THE OWNER OF THE BRIEFCASE AND; (3) STATED HE WAS UNABLE TO PROVIDE CONSENT TO SEARCH THE BRIEFCASE BECAUSE HE DID NOT OWN THE BRIEFCASE? 1

IV. STATEMENT OF THE CASE. 2

V. ARGUMENT WHY REVIEW SHOULD BE DENIED. 2

1. Sgt. Tate properly seized the abandoned briefcase located within the Petitioner's vehicle. 3

V. CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Cooper v. State, 186 Ga. App. 154, 366 S.E. 2d 815 (1988) 5

Nation v. State, 556 S.E. 2d 196 (Ga. Ct. App. 2001) 5

People v. Cameron, 73 Misc.2d, 342 N.Y.S.2d 773 (1973) 4, 6

People v. Jacob, 608 N.Y.S.2d 508 (1994) 5

Robles v. State, 510 N.E. 2d 660 (Ind. 1987) 4, 6

Stanberry v. State, 105 Md. App. 200, 659 A.2d 333 (1995) 5

State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990) 8

State v. Carter, 127 Wn.2d 836, 904 P.2d 290 (1995) 8

State v. Casey, 59 N.C. App., 296 S.E.2d 473 (1982) 4

State v. Goodman, 42 Wn. App. 331, 771 P.2d 1057 (1985) 6

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) 8, 9

State v. Heuther, 453 N.W. 2d 778 (N.D. 1990) 5, 6

State v. Huffman, 169 Ariz. 465, 820 P.2d 329 (1991) 5

State v. Linville, 190 Or. App. 185, 78 P.3d 136 (2003) 5

State v. Nelson, 76 Or. App. 67, 708 P.2d 1153 (1985) 5

State v. Ray, 164 Or. App. 145, 990 P.2d 365 (1999) 5

State v. Reynolds, 144 Wn.2d 282, 27 P.3d 200 (2001) 3, 4

State v. Velasquez, 994 S.W.2d 676 (Tex. Crim. App. 1999) 5

State v. Whitaker, 58 Wn. App. 851, 795 P.2d 182 (1990) 3

State v. Zaitseva, 13 P.3d 338 (Idaho 2000) 5

United States v. Piaget, 915 F.2d 138 (5th Cir. 1990) 5

United States v. Thomas, 12 F.3d 1350 (5th Cir. 1994) 5

Other Authorities

CrR 3.6 1

RAP 13.4(b) 2, 10

I. IDENTITY OF RESPONDENT.

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests the Washington State Supreme Court deny discretionary review of the August 23, 2005, published Court of Appeals Ruling Affirming Judgment, Number 31451-7-II, a copy of which is attached hereto and incorporated by reference herein as Exhibit "A". The Court of Appeals decision terminated review of this matter.

II. COURT OF APPEALS DECISION.

The Court of Appeals correctly decided this matter, ruling that the trial court properly denied Petitioner's motion to suppress under CrR 3.6 because Petitioner had abandoned the property prior to law enforcement's seizure of the item.

III. ISSUES PRESENTED FOR REVIEW.

1. **DID THE TRIAL COURT PROPERLY DENY PETITIONER'S MOTION TO SUPPRESS EVIDENCE UNDER THE DOCTRINE OF ABANDONMENT, WHERE THE PETITIONER (1) DENIED OWNERSHIP OF THE BRIEFCASE; (2) INDICATED HE DID NOT KNOW THE OWNER OF THE BRIEFCASE AND; (3) STATED HE WAS UNABLE TO PROVIDE CONSENT TO SEARCH THE BRIEFCASE BECAUSE HE DID NOT OWN THE BRIEFCASE?**

IV. STATEMENT OF THE CASE.

The published opinion of the Court of Appeals accurately recounts the facts in this matter. For the purposes of this response, the State concurs with the factual statement presented by Petitioner with one exception, namely: Petitioner did not object to Sgt. Tate's seizure of the briefcase until after the seizure was effected. (Verbatim Report of Proceedings for October 1, 2003 hereinafter "RP2" 61-62).

V. ARGUMENT WHY REVIEW SHOULD BE DENIED.

Under RAP 13.4(b) a petition for review will be accepted by the Washington Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a decision of another Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should deny review because the issue presented does not meet the above criteria. Petitioner raises issues that were properly covered and decided in the published Court of Appeals Ruling Affirming Judgment and Sentence of August 23, 2005.

1. Sgt. Tate properly seized the abandoned briefcase located within the Petitioner's vehicle.

"Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under Article I, Section 7 of our state constitution." *State v. Reynolds,* 144 Wn.2d 282, 287, 27 P.3d 200 (2001). "However, property cannot be deemed voluntarily abandoned (and thus subject to search if a person abandons it) because of unlawful police conduct." *Id.* (citations omitted).

> Consequently, where a defendant abandoned property and that property was subsequently searched, the defendant may assert a constitutionally protected privacy interest only upon a showing that he or she *involuntarily* abandoned the property in response to illegal police conduct. To establish that the abandonment was involuntary, a defendant must therefore show two elements: "(1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment."

Id. at 288 citing *State v. Whitaker,* 58 Wn. App. 851, 853, 795 P.2d 182 (1990).

Once the Petitioner denied ownership of the briefcase, indicated that he did not know to whom the briefcase belonged and that he "couldn't" give Sgt. Tate permission to search the briefcase, he can be determined to have voluntarily abandoned the property. Petitioner never retracted his abandonment and implied to Sgt. Tate that he was not truly the owner of the briefcase by stating in response to a request to open the

briefcase that he "couldn't" provide permission. This statement clearly suggested that the Petitioner could not give permission to search the briefcase because he was not the owner. The Petitioner also noted that he did not know to whom the briefcase belonged. Given these facts, under the *Reynolds* court's analysis, Sgt. Tate was entitled to seize the briefcase without a warrant.

Moreover, it was only after the Petitioner denied ownership of the briefcase, that Sgt. Tate informed the Petitioner the he suspected the briefcase contained evidence of methamphetamine manufacture and trafficking.

In order for the Petitioner to retain any type of privacy interest in the abandoned briefcase, he would have to show that the abandonment was conditioned on illegal police conduct and that there was a causal relation between the illegal conduct and the abandonment. The Petitioner has made no such assertion here (nor is there any to be made) and, as such, cannot prevail.

Petitioner asserts that mere denial of ownership is insufficient to constitute abandonment of property. Petitioner correctly notes that there are no Washington cases dealing specifically with this issue. In support of this notion, he cites *Robles v. State,* 510 N.E. 2d 660 (Ind. 1987); *People v. Cameron,* 73 Misc.2d, 342 N.Y.S.2d 773 (1973), *State v. Casey,* 59

N.C. App., 296 S.E.2d 473 (1982) and *State v. Heuther,* 453 N.W. 2d 778 (N.D. 1990). All of these cases essentially held that a mere denial of ownership was insufficient to constitute abandonment of the property seized and searched by the police.

It is important to note, however, that most courts dealing with this specific issue, as the trial court noted in its written opinion following the suppression hearing (CP 36), take the position that denial of ownership of items within a vehicle constitutes abandonment and forfeiture of a reasonable expectation of privacy. *United States v. Piaget,* 915 F.2d 138 (5th Cir. 1990); *United States v. Thomas,* 12 F.3d 1350 (5th Cir. 1994); *State v. Huffman,* 169 Ariz. 465, 820 P.2d 329 (1991); *Cooper v. State,* 186 Ga. App. 154, 366 S.E. 2d 815 (1988); *Nation v. State,* 556 S.E. 2d 196 (Ga. Ct. App. 2001); *State v. Zaitseva,* 13 P.3d 338 (Idaho 2000); *Stanberry v. State,* 105 Md. App. 200, 659 A.2d 333 (1995); *People v. Jacob,* 608 N.Y.S.2d 508 (1994); *State v. Nelson,* 76 Or. App. 67, 708 P.2d 1153 (1985); *State v. Ray,* 164 Or. App. 145, 990 P.2d 365 (1999); *State v. Linville,* 190 Or. App. 185, 78 P.3d 136 (2003); *State v. Velasquez,* 994 S.W.2d 676 (Tex. Crim. App. 1999).

In applying the majority holding of abandonment, the trial correctly noted in its written opinion that "...these cases would hold that he [Petitioner] has forfeited his reasonable expectation of privacy.

Similarly, by representing that he did not know the identity of the owner of the briefcase, he cannot claim a bailment situation. Had the defendant simply remained silent, or refused to identify the owner, the result would be different. However, by expressly denying that the briefcase belonged to him, and by expressly stating that he did not know to whom the briefcase belonged, the property was abandoned." Trial Court's Ruling at 2 (CP 36).

Petitioner also cites *State v. Goodman,* 42 Wn. App. 331, 771 P.2d 1057 (1985), for the proposition that Washington Courts have aligned themselves with the position taken by *Robles,* supra, *Cameron,* supra, *Casey,* supra, and *Huether,* supra, namely that merely denying ownership is insufficient to constitute abandonment. In *Goodman,* the police searched the locked trunk of the defendant's vehicle and located a suitcase that had been taken in a burglary. The defendant and driver of the vehicle denied ownership of the suitcase then indicated to the police that the suitcase belonged to his passenger. The passenger initially denied ownership but then indicated that he found the suitcase by the side of the road. On appeal the State argued that the defendant lacked standing to challenge the search of the suitcase. The Court of Appeals disagreed, pointing to the doctrine of automatic standing, noting "the mere denial of ownership does not eliminate standing" (citation omitted). The Court

went on to say without further analysis or reference to the record, "the State's assertions of voluntary abandonment and police exercise of community caretaking function are without factual support." This final statement is clearly dicta and should not be relied upon as a statement that "...shows allegiance with the jurisprudence described above." Court of Appeals Brief of Appellant at 12.

Moreover the facts of the present case are clearly much more substantial in nature than those in the cases Petitioner cites. In the present case, Petitioner did not respond when asked for the key to the briefcase. When asked if the briefcase belonged to him Petitioner stated that he didn't own the briefcase and wasn't sure who did. When Sgt. Tate informed Petitioner that he believed the briefcase contained evidence related to drug manufacturing and sale, Petitioner indicated that he *couldn't* give Sgt. Tate permission to look in the briefcase. (The clear implication of Petitioner's statement was that he was unable as opposed to unwilling to give permission to search the briefcase). Sgt. Tate then seized the briefcase and informed the defendant that he would be applying for a warrant to search it. The defendant objected to the seizure. Sgt. Tate reiterated that he intended to apply for a search warrant, and that the lawful owner could pick up the briefcase from the police station.

These facts certainly support the State's position that the briefcase was voluntarily abandoned by Petitioner prior to being seized by Sgt. Tate. It is important to note that unlike the cases cited by Petitioner, there were three clear statements that proved abandonment: (1) denial of ownership; (2) denial of knowledge as to the true owner; and (3) inability (as opposed to refusal) to give consent to search. The Court of Appeals in its published opinion essentially adopted the above analysis as its holding, correctly deciding Sgt. Tate's actions were clearly appropriate and justified. The Court of Appeals also noted in its published opinion at Footnote 11, that prior to opening the briefcase, Sgt. Tate obtained a search warrant.

In further support of his Petition for Review, Petitioner undertakes an analysis pursuant to *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986). Petitioner essentially contends, examining factors 4 and 6, that because citizens in Washington enjoy a constitution that is more protective then the U.S. Constitution, that this Court should accept review in this matter, citing *State v. Carter,* 127 Wn.2d 836, 904 P.2d 290 (1995) and *State v. Boland,* 115 Wn.2d 571, 800 P.2d 1112 (1990). Neither of these cases stands for this proposition. Rather the purpose of *Gunwall* factors, "are aimed at (1) suggesting to counsel where briefing might appropriately be directed in cases wherein they are urging independent state

constitutional ground; and (2) helping insure that if this court does use independent state constitutional grounds in a given situation, it will consider these criteria to the end that our decision will be made for well founded legal reasons and not by merely substitution our notion of justice for that of duly elected legislative bodies or the United States Supreme Court." 106 Wn.2d at 62-63.

Petitioner examines *Gunwall's* fourth and sixth factors, namely: "previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional grounds" and whether the matter is "local in character or does there appear to be a need for national uniformity?" 106 Wn.2d at 61-62. In evaluating these factors, it is important to note that other than Division 2's published opinion on the matter, there is no additional law, either statutory or case, that deals with exactly the issue before this Court in the present case. This issue is apparently one of first impression in Washington. Moreover, the fact that Washington continues to adhere to the doctrine of automatic standing, does little to further Petitioner's contention that this Court should grant review in this case or that there is a previously established body of state law. Automatic standing is merely a mechanism that allows defendants charged with a possessory offense to challenge the circumstances leading to the search and seizure of a particular item. In the

present case, the Court of Appeals acknowledged in its opinion that the doctrine of automatic standing was applicable to this case.

With respect to the sixth factor, it is absurd to suggest that subject matter in this case is uniquely local in character. While the Washington constitution is certainly more protective than the federal constitution in many respects, in this case, the majority of states have found abandonment where an individual disavows knowledge/ownership of an item that is subsequently seized by the police. It is likewise absurd to suggest, as Petitioner does in this case, that an individual has a privacy right in an item that he denies owning, also denies knowing the true owner and then "cannot" consent to a search because he is not the true owner of the property. This is simply not the "significant question of law under the Constitution of the State of Washington or the United States..." that was envisioned by RAP 13.4(b)(3).

V. CONCLUSION

This Court should deny this Petition for Discretionary Review. The Court of Appeals properly decided the issue presently before this Court. Furthermore, Petitioner does not meet the criteria established in RAP 13.4(b) for further consideration of this issue by this Court.

Respectfully submitted this 22ND day of November 2005.

Susan I. Baur
Prosecuting Attorney

By: _____
Heiko Philipp Coppola, WSBA #26073
Deputy Prosecuting Attorney
Representing Respondent

Exhibit "A"

FILED
COURT OF APPEALS
DIVISION II

05 AUG 23 AM 8:40

STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANNY WAYNE EVANS, Appellant.	No. 31451-7-II PUBLISHED OPINION

HOUGHTON, J. -- A jury convicted Danny Evans of manufacturing methamphetamine and unlawful possession of methamphetamine with intent to deliver. He appeals, arguing that the trial court erred when it (1) denied his motion for a *Franks*[1] hearing, (2) determined that denial of ownership constitutes abandonment, and (3) sentenced him under former RCW 69.50.401(a)(1)(ii) (2002). He further argues that the prosecutor elicited a comment on his exercise of his right to remain silent. We affirm the conviction, but vacate the sentence and remand for resentencing.

[1] *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) (stating that the court must hold an evidentiary hearing when the defendant makes a substantial preliminary showing that the affiant knowingly, intentionally, or with reckless disregard for the truth included in his affidavit a false statement that was necessary to the finding of probable cause).

FACTS

On October 23, 2002, police officers arrested Gary Lindsey for second degree attempted burglary. In exchange for leniency, Lindsey offered information about Evans, his methamphetamine dealer.

Detective Michael Cowan filed an affidavit, requesting a search warrant for a home and detached structure at 1101 Cowlitz Way. He also requested a search warrant for Evans, the property's owner.

The affidavit described Lindsey's interactions with Evans:

> Lindsey told me he has purchased crystal methamphetamine from a Dan Evans and "Scott" [an accomplice] who "cook", manufacture methamphetamine using the "red-P" method in a small . . . dwelling/structure located behind Evans' residence at 1101 Cowlitz Way. . . . Lindsey told me that on the evening of 10/21/2002 he went to this dwelling/structure behind 1101 Cowlitz Way to purchase methamphetamine. He contacted Scott at the dwelling and purchased $20 worth of methamphetamine. During this contact Lindsey asked to use the bathroom. Scott let Lindsey into the dwelling/structure to use the bathroom. Lindsey said he observed 4-5 metal cans he thought contained "Acetone", 3-4 off green in color "Ball" Mason jars of the quart size. He said he had supplied these jars to Evans earlier. Lindsey described the jars as having a clear to yellowish liquid into [sic] them. Lindsey said one of the jars had [two] separate layers of an unknown liquid inside. Lindsey stated Scott was boiling an unknown substance that "looked like water" in [a] Corning cook ware [sic] sauce pan "breaking pills down" which he pulled out of the stove. Lindsey stated he saw a dark red in color substance in coffee filers and a jar.

Clerk's Papers (CP) at 118.

Further, Cowan explained that "Lindsey is aware that if the information provided is not correct, he will not receive leniency for his pending felony charge." CP at 119. He also indicated that Lindsey's information corroborated his investigation on other charges. But he did not list Lindsey's prior convictions for six counts of forgery and two counts of second degree theft.

Task Force members executed the warrants at 1101 Cowlitz Way, where they observed a residence and a detached, converted garage.

When entering the residence, the police detected a noticeable chemical odor. The police arrested Evans as he left the residence and then placed him in a patrol car. Cowan read him the *Miranda*[2] advisements.

Officers discovered evidence of methamphetamine production in the garage. They found a hot plate, gas mask, filters, Red Devil lye, butane, a bag of flares, and a condenser tube hose. Testing revealed Evans's fingerprints on two flasks and a condenser tube. The officers also recovered a container with layers of clear, colorless liquids. Later tests confirmed that the item contained methamphetamine base.

Bryan Kerr was present during the search. Officers learned that Kerr rented the residence. In his interview with Sergeant Kevin Tate, Kerr explained that Evans generally carried a briefcase.[3] Tate "had the impression that this [briefcase] was part of the business that Dan Evans was involved in," specifically, the "[m]ethamphetamine drug dealing business." Report of Proceedings (RP) (Taped) at 53.

Tate observed a truck parked in the driveway. Inside, he saw the briefcase Kerr described. Evans was the truck's registered owner. After confirming that Evans had been given *Miranda* warnings, Tate began interviewing him. Evans stated that "[I don't] want to talk about

---

[2] *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (holding that custodial statements are inadmissible unless officers warn the individual of the following: (1) he has the right to remain silent, (2) any statement may be used against him, (3) he has the right to an attorney, and (4) he may waive those rights).

[3] This information comes from Tate's suppression hearing testimony. Kerr did not testify at the hearing. But in his trial testimony, Kerr vehemently denied making this statement.

any details. . . . [T]he police are gonna do what the police are gonna do, and I don't want to talk about it."[4] RP (Taped) at 56.

Tate then asked permission to search the truck. He explained that the truck was not included in the search warrant but that Evans could give consent. Evans asked what Tate wanted to search. Tate stated that he wanted to "search the passenger compartment of the car." RP (Taped) at 58. Evans gave Tate consent to perform a "limited search" of the truck, provided that he could be present. RP (Taped) at 59.

In the back seat of the truck, Tate saw the briefcase. It was locked. He asked whether the briefcase belonged to Evans and whether he had a key. Evans stated that he did not own the briefcase, that he did not know the owner, and that he could not give permission to open the briefcase because it did not belong to him.

Tate seized the briefcase, telling Evans that he would apply for a search warrant. Evans objected, saying, "I don't want you to do that. I didn't give you permission for that." RP (Taped) at 62-63. Tate then stopped searching the truck.

After a drug-sniffing dog gave a positive "hit" on the briefcase, Tate obtained a search warrant. Inside, he found a bank foreclosure notice for the residence at 1101 Cowlitz Way, red phosphorous, and scales. The briefcase also contained a white crystal substance, later identified as methamphetamine hydrochloride.

The State charged Evans with manufacture of methamphetamine (count I) and unlawful possession of methamphetamine with intent to deliver (count II).

---

[4] At a CrR 3.5 hearing, the court determined that the police advised Evans of his rights, he understood and selectively exercised those rights, and police honored his choices. Thus, it ruled admissible all relevant statements.

Evans moved to suppress the evidence found in the briefcase. He also filed a motion to suppress all evidence obtained through the search warrant, arguing that the supporting affidavit did not meet the *Aguilar-Spinelli*[5] reliability prong. He then moved for a *Franks* hearing, claiming that the affiant deliberately omitted material facts regarding Lindsey's prior convictions for crimes of dishonesty. The court denied the motions.

At trial, Tate testified that Evans received *Miranda* warnings. Then the prosecutor and Tate discussed Evans's further questioning and his responses.

Outside the jury's presence, Evans moved for dismissal without prejudice or a mistrial, claiming that the prosecutor solicited a comment on Evans's exercise of his right to remain silent. The trial court denied the motion.

The jury convicted Evans of manufacturing methamphetamine "as charged in Count I" and of unlawful possession of methamphetamine with intent to deliver "as charged in Count II." Count I charged him with manufacturing methamphetamine "contrary to [former] RCW 69.50.401(a)(1)," and count II charged him with possession of methamphetamine with intent to deliver "contrary to [former] RCW 69.50.401(a)." CP at 1, 2.

In a posttrial motion, Evans (1) renewed his two motions to suppress, (2) asked the court to treat the two counts as the same criminal conduct in sentencing, and (3) argued that the court

---

[5] This test derives from two United States Supreme Court cases: *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). Although the United States Supreme Court has rejected the *Aguilar-Spinelli* test for the "totality-of-the-circumstances" test, *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), Washington courts adhere to *Aguilar-Spinelli*. *State v. Gaddy*, 152 Wn.2d 64, 71 n.2, 93 P.3d 872 (2004). Under the *Aguilar-Spinelli* test, an affidavit establishes probable cause if it sets forth the informant's basis of knowledge and veracity. *Gaddy*, 152 Wn.2d at 71.

could not sentence him under former RCW 69.50.401(a)(1)(ii) because the jury verdict did not specifically identify the unlawful substance.

The trial court denied the renewed motions to suppress. It then determined that the two counts were the same criminal conduct. It sentenced Evans to 60 months, a term within his standard range.[6]

He appeals.

ANALYSIS

I. *Franks* Hearing

Evans first contends that the trial court erred when it denied his motion for a *Franks* hearing. He asserts that Cowan recklessly omitted a material fact, Lindsey's prior convictions for crimes of dishonesty. He argues that these prior convictions were material because they undercut the indicia of reliability required by *Aguilar-Spinelli.*

At the defendant's request, the court must hold a *Franks* hearing if the defendant makes a preliminary showing that the affiant included a false statement knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to a finding of probable cause. 438 U.S. at 155-56; *State v. Vickers*, 148 Wn.2d 91, 114, 59 P.3d 58 (2002). The *Franks* rule extends to material omissions. *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992).

"'[A]llegations of negligence or innocent mistake are insufficient.'" *Garrison*, 118 Wn.2d at 872 (quoting *Franks*, 438 U.S. at 171). Rather, the defendant must support the

[6] The judgment and sentence does not explicitly state whether the trial court sentenced Evans under former RCW 69.50.401(a)(1)(ii) or (iii). But its calculation of Evans's standard range indicates that it sentenced him under subsection (ii).

allegations with an offer of proof. *Garrison*, 118 Wn.2d at 872. If the defendant makes the requisite preliminary showing and establishes the allegations at the hearing by a preponderance of the evidence, the trial court includes the omitted material in the affidavit to determine whether it supports a finding of probable cause. *State v. Chenoweth*, 127 Wn. App. 444, 111 P.3d 1217, 1223 (2005). If the modified affidavit fails to support probable cause, the search warrant is invalid and all evidence obtained through the warrant is excluded. *Chenoweth*, 111 P.3d at 1223-24.

In his motion for a *Franks* hearing, Evans asserted that Cowan "chose to omit" Lindsey's prior convictions for six counts of forgery and two counts of second degree theft. CP at 27. Additionally, he claimed the following:

> Herein we have established that specific omissions of fact have been made by the police in the application for this search warrant. Lindsey at the same time that he was being vouched for to the magistrate as a credible and reliable source was known to the police and the Prosecuting Attorney of this county as a repeatedly convicted thief. He was known to the police and the prosecuting attorney to be actively stained by findings of criminal falsehood.

CP at 45.

The trial court denied this motion, explaining that Evans failed to make the requisite preliminary showing:

> Some of the matters raised by the defense might negate probable cause. Both the informant's criminal history and pending CCSO investigation (by Deputy Merkle) are relevant to the probable cause inquiry. However, while counsel presents a persuasive argument that Officer [sic] Cowan . . . could have known and maybe should have known of these matters, the offers of proof do not rise to the level of intentional or reckless disregard. While a defendant's criminal history is always available to the police and prosecutors, it is not *per se* reckless not to run that criminal history (NCIC) and to fail to present it to the magistrate.

CP at 53. Further, the trial court ruled that even if Evans had met the preliminary showing, his argument would still fail:

> [T]his Court does not find that any of the omitted information was "necessary" to probable case [sic]. Stated differently, even had the information been included in the affidavit, the affidavit information would have been sufficient to establish probable cause. The magistrate was aware that the informant had been involved in criminal activity and was seeking leniency. In addition, any informant who personally observed and even assisted in the manufacturing of methamphetamine would have had close ties to the drug world and would most likely have a criminal history. The informant's criminal history cuts both ways and cannot be said to vitiate probable cause.

CP at 53-54.

Here, Evans argues that Cowan "chose to omit" information regarding Lindsey's reliability. As the trial court correctly noted, while Cowan "could have known and maybe should have known" of Lindsey's criminal history, "the offers of proof do not rise to the level of intentional or reckless disregard." CP at 53. At most, Evans's assertions support a finding of negligence. But allegations of negligence fail to meet the preliminary showing. *Garrison*, 118 Wn.2d at 872. Accordingly, the trial court properly denied Evans's motion for a *Franks* hearing.

II. Abandonment

Evans next contends that the trial court improperly denied his motion to suppress the evidence found in the briefcase.[7]

After a suppression hearing, we examine whether substantial evidence supports the trial court's challenged findings of fact and, in turn, whether the findings support the conclusions of

[7] The trial court ruled that Evans had automatic standing to challenge the seizure. Because it failed to provide argument or citation to authority, the State appears to concede this issue. *See* RAP 10.3(a)(5), (b) (respondent's brief must contain "argument in support of the issues presented for review, together with citations to legal authority"). Regardless, we agree with the trial court that Evans has automatic standing. *See State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002) (to claim automatic standing, the defendant must be (1) charged with an offense that involves possession as an essential element; and (2) in possession of the item at the time of the challenged search or seizure).

law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), *review denied*, 149 Wn.2d 1025 (2003). We treat unchallenged findings of fact as verities on appeal, we and review conclusions of law de novo. *State v. Stevenson*, ___ Wn. App. ___, 114 P.3d 699, 706 (2005).

Here, Evans did not assign error to any finding of fact. Instead, he challenges the trial court's legal conclusion that his denial of ownership constituted abandonment, allowing the officer to seize the briefcase.

The Fourth Amendment of the United States Constitution protects the "right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures." Article I, section 7 of the Washington Constitution guards against unlawful searches and seizures, providing greater protection than the Fourth Amendment. *State v. Hendrickson*, 129 Wn.2d 61, 69-70 n.1, 917 P.2d 563 (1996). Constitutional protections do not extend to abandoned property unless the abandonment is the product of police coercion or other unlawful police action. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.6(b), at 670, 683 (4th ed. 2004); *see also State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2001).

Washington courts have examined the abandonment doctrine. *See e.g. Reynolds*, 144 Wn.2d at 287 (officers may search voluntarily abandoned property without raising constitutional concerns). But our courts have not analyzed whether one can disclaim property but still challenge a later search, where the disclaimed property remained in an area where one has a reasonable expectation of privacy.[8]

---

[8] Here, this area is the truck.

Other jurisdictions are split on this issue. The majority of courts have held that a person abandons the property with a disclaimer of ownership made in response to a police inquiry.[9]

For example, in *State v. Huffman*, 169 Ariz. 465, 820 P.2d 329, 331 (1991), the Arizona Supreme Court held that "denial of ownership, when questioned [by police], constitutes abandonment." A police officer recognized Huffman, who had an outstanding arrest warrant, as Huffman rode in a in a car. *Huffman*, 820 P.2d at 330. After obtaining the driver's consent to search the car, an officer found a key to the Willow Motel. *Huffman*, 820 P.2d at 330. Both Huffman and the driver denied ownership of the key. *Huffman*, 820 P.2d at 330. In the motel room, the police found cocaine and other drug paraphernalia. *Huffman*, 820 P.2d at 330.

The Arizona Supreme Court held that Huffman "denied any interest in the key to the motel room, thereby relinquishing any expectation of privacy." *Huffman*, 820 P.2d at 330. It noted that denial of ownership, coupled with police inquiry, constitutes abandonment. *Huffman*, 820 P.2d at 331.

In contrast, other jurisdictions have determined that denial of ownership, in response to police inquiry, is not abandonment.[10] For example, in *State v. Huether*, 453 N.W.2d 778, 780

---

[9] *See, e.g.*, *Nation v. State*, 252 Ga. App. 620, 556 S.E.2d 196 (2001) (when defendant denied ownership of the item searched, he had no legitimate expectation of privacy in the item); *State v. Zaitseva*, 135 Idaho 11, 13 P.3d 338 (2000) (passenger denied ownership of a bag after police inquiry, thereby abandoning her reasonable expectation of privacy); *People v. Williams*, 223 A.D. 745, 637 N.Y.S.2d 465 (1996) (when defendant disavowed ownership of a bag, he abandoned the item); *State v. Linville*, 190 Or. App. 185, 78 P.3d 136 (2003) (where police lawfully stopped vehicle and questioned passenger about ownership of cigarette packet, passenger's denial of ownership constituted abandonment).

[10] *See, e.g.*, *State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982) (airline passenger who denied ownership of bag in response to police questioning retained a reasonable expectation of privacy); *People v. Cameron*, 73 Misc.2d 790, 342 N.Y.S.2d 773 (1973) (denial of ownership is not proof of intent to abandon).

(N.D. 1990), an officer stopped Huether for speeding and detected the odor of alcohol. Huether consented to the officer's search for open containers. *Huether*, 453 N.W.2d at 780. The officer saw a small paper bag pushed partly under the front seat. *Huether*, 453 N.W.2d at 780. Later tests confirmed that the bag contained amphetamine hydrochloride, a controlled substance. *Huether*, 453 N.W.2d at 780. Huether denied ownership of the bag and knowledge of its contents. *Huether*, 453 N.W.2d at 780. The North Dakota Supreme Court held that Huether did not abandon his reasonable expectation of privacy when he disclaimed ownership. *Huether*, 453 N.W.2d at 781-82.

Evans cites a case from our court to support his contention. In *State v. Goodman*, a police officer observed two suspicious men drive down the street, stop, turn off the lights, and open the trunk. 42 Wn. App. 331, 333, 711 P.2d 1057 (1985), *review denied*, 105 Wn.2d 1012 (1986). One man exited the car and returned with a suitcase, placing it in the trunk. *Goodman*, 42 Wn. App. at 333. The officer stopped the vehicle and asked about the suitcase. *Goodman*, 42 Wn. App. at 333. Both men denied ownership. *Goodman*, 42 Wn. App. at 333.

When examining whether the defendant had standing, this court noted that the "State's assertions of voluntary abandonment . . . are without factual support." *Goodman*, 42 Wn. App. at 335. The *Goodman* court did not face the issue before us and its comments regarding abandonment are dicta.

We are persuaded by the majority view. When a defendant disavows ownership of an item in response to police questioning, he abandons any privacy interest in that item. Here, when Evans denied (1) ownership of the briefcase, (2) knowledge of the owner, and (3) ability to authorize its opening, he relinquished any expectation of privacy. This constitutes abandonment,

regardless of any expectation of privacy in the truck, for which he consented to a limited search.[11]

III. Comment on the Right to Remain Silent

Evans further contends that the State violated his right to remain silent when it elicited testimony regarding his exercise of this right.

The Fifth Amendment of the United States Constitution states, in part, that no person "shall be compelled in any criminal case to be a witness against himself." In a similar provision, article I, section 9 of the Washington Constitution reads: "[n]o person shall be compelled in any criminal case to give evidence against himself." Washington courts give the same interpretation to both clauses. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

The right to remain silent applies in both pre- and post-arrest situations. *Easter*, 130 Wn.2d at 243. The State cannot portray the exercise of this right as substantive evidence of guilt. *State v. Romero*, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002).

Accordingly, the State cannot seek comments on a defendant's silence to infer guilt. *Easter*, 130 Wn.2d at 236. "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Subject to the rules of evidence, introduction of nontestimonial evidence such as demeanor and conduct is proper. *Easter*, 130 Wn.2d at 243. And "a mere reference to silence which is not a 'comment' on the silence is not reversible error absent a showing of prejudice." *Lewis*, 130 Wn.2d at 706-07.

[11] Moreover, we note that the officers obtained a search warrant before opening the briefcase.

At trial, Tate testified about his interview with Evans. He explained that Evans received the *Miranda* advisements. The prosecutor then asked Tate the following questions:

> Q . . . [D]id you ask Mr. Evans . . . any questions regarding [a] clandestine methamphetamine lab?
>
> A Yeah, I started to ask some of those questions. I asked about, "You know, we're processing a lab here, . . . do you want to talk to me about that?" I asked some of those type questions. I also asked about knowledge issues.
>
> Q Okay. What . . . exactly did he tell you with respect to . . . [the] search that was being conducted at that time?
>
> A . . . [H]e didn't answer specifically . . . about those other than to say we're going to do what we're going to do.
>
> Q Okay.
>
> A Meaning police, you know, you guys are going to do . . . what we're going to do.

II RP (Trial) at 178.

Defense counsel lodged a timely objection. Outside the jury's presence, he moved for dismissal without prejudice or a mistrial. The court took the matter under advisement, stating, "I was quite surprised at the direct examination of Sgt. Tate as it relates to what the defendant said because Sgt. Tate said essentially -- . . . I mean, there were red flags for me as soon as the question was asked -- essentially said he didn't answer questions." II RP (Trial) at 216-17.

In an oral ruling, however, the trial court denied the motion. After reviewing the transcript, the court explained, "the wording is key. He didn't answer that question specifically, he said, X. That is different than saying: He didn't answer the question. I think it is different enough to avoid the problem." III RP (Trial) at 295. We agree with the trial court.

Here, Tate's testimony does not amount to a comment on the exercise of the right to remain silent. Tate did not testify that Evans refused to answer questions. Rather, he stated that Evans merely said, "you guys are going to do . . . what we're going to do." II RP (Trial) at 178.

Although this may portray Evans as recalcitrant, the State did not use the statement as substantive evidence of guilt. Evans's argument fails.

IV. Former RCW 69.50.401

Finally, Evans contends that the trial court erroneously sentenced him under former RCW 69.50.401(a)(1)(ii),[12] where the verdict did not specifically identify the controlled substance. He further argues that when the trial court, rather than the jury, identified the controlled substance for sentencing purposes, it violated his right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Former RCW 69.50.401 provides, in relevant part:

> (a) Except as authorized by this chapter, it is unlawful for any person to manufacture . . . or possess with intent to . . . deliver, a controlled substance.
>
> (1) Any person who violates this subsection with respect to:
>
> . . . .
>
> (ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisonment for not more than ten years . . . .
>
> (iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years.

---

[12] Recently, the Legislature significantly amended RCW 69.50.401. Effective July 24, 2005, the statute reads, in relevant part:

> (1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
>
> (2) Any person who violates this section with respect to:
>
> . . . .
>
> (b) Amphetamine, including its salts, isomers, and salts of isomers, or *methamphetamine, including its salts, isomers, and salts of isomers*, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years . . . .
>
> (c) Any other controlled substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW;

RCW 69.50.401 (emphasis added).

We recently addressed interpretation of former RCW 69.50.401(a)(1)(ii) and (iii) in *State v. Morris*, 123 Wn. App. 467, 472-73, 98 P.3d 513 (2004). There, we held that the language of former RCW 69.50.401(a)(1)(ii) is "unambiguous," such that "its prohibition only covers methamphetamine in its pure form, its base" and not "methamphetamine hydrochloride." *Morris*, 123 Wn. App. at 474; *cf. State v. Cromwell*, ___ Wn. App. ___, 112 P.3d 1273, 1275 (2005) (Division One opinion disagreeing with *Morris*, concluding that "the Legislature intended to penalize the possession with intent to deliver . . . of . . . methamphetamine in *any* form more harshly than the possession with intent and delivery of any other controlled substances listed in the Schedules").

Our Supreme Court addressed a similar issue in *State v. Goodman*, 150 Wn.2d 774, 83 P.3d 410 (2004), a case that pre-dates the *Blakely* decision. By amended information, the State charged Goodman with "'possess[ion of] a controlled substance with intent to deliver, to wit: meth.'" *Goodman*, 150 Wn.2d at 779 (quoting *Goodman* CP at 26). On appeal, Goodman claimed that the amended information lacked an essential element, the identity of the controlled substance. *Goodman*, 150 Wn.2d at 784, 786.

Citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000),[13] the Court held that "the identity of the controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant."[14] *Goodman*, 150 Wn.2d at 785-86.

---

[13] In *Apprendi*, the United States Supreme Court held that "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

[14] Goodman challenged the adequacy of the charging document for the first time on appeal. *Goodman*, 150 Wn.2d at 787. Because the necessary facts appeared in the charging document

This conclusion comports with the United States Supreme Court's holding in *Blakely*. As defined in *Blakely*, the "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. ____, 124 S. Ct. at 2537 (emphasis omitted).

Here, the State introduced evidence of the methamphetamine base found in the garage and methamphetamine hydrochloride found in the briefcase. But the verdict forms did not ask the jury to identify the particular substance underlying the convictions. Rather, the jury convicted Evans of manufacturing methamphetamine "as charged in Count I" and of possession of methamphetamine with intent to deliver "as charged in Count II." But count I charged him with manufacturing methamphetamine "contrary to [former] RCW 69.50.401(a)(1)" and count II charged him with possession of methamphetamine with intent to deliver "contrary to [former] RCW 69.50.401(a)."

We cannot discern whether the jury premised the convictions on methamphetamine base, methamphetamine hydrochloride, or both substances. Under *Blakely*, the trial court invaded the province of the jury when it sentenced Evans under former RCW 69.50.401(a)(1)(ii) because this necessarily involves a factual finding that Evans manufactured and unlawfully possessed methamphetamine *base* with intent to deliver.[15] Accordingly, we vacate Evans's sentence and remand for resentencing.

---

and because Goodman suffered no actual prejudice, the Court affirmed his conviction. *Goodman*, 150 Wn.2d at 790.

[15] The trial court sentenced Evans to 60 months, a term within the statutory maximum for purposes of former RCW 69.50.401(a)(1)(iii). But when convicted under subsection (iii), Evans's standard range changes.

In sum, we affirm the conviction, but vacate the sentence and remand for resentencing.

Houghton, J.

We concur:

Morgan, J.

Quinn-Brintnall, C.J.

For both charges, Evans had an offender score of zero and a seriousness level of VI. *See* former RCW 9.94A.515 (2002) (classifying the "[m]anufacture . . . or possess[ion] with intent to deliver narcotics from Schedule I or II" as a crime with a seriousness level of VI); RCW 69.50.206(d)(2) (classifying "[m]ethamphetamine, its salts, isomers, and salts of its isomers" as Schedule II drugs). Accordingly, Evans has a standard range of 12 to 14 months. RCW 9.94A.510. The imposition of a 60 month sentence violates Evans's Sixth Amendment right to a jury trial.