

79121-0

NO. 32402-4

FILED
COURT OF APPEALS
DIVISION II

05 SEP -6 PM 3:27

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY
DEPUTY
[Signature]

STATE OF WASHINGTON, RESPONDENT

v.

ROY LEN NEFF, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 02-1-05356-6

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
Kathleen Proctor
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	<u>RESPONDENT'S ASSIGNMENT OF ERROR</u>	1
1.	Did the trial court err in finding that the officer's initial entry into the garage was not exigent circumstances when officers had been unable to locate the source of a strong ammonia odor – a smell indicative of anhydrous ammonia, a toxic chemical – and when that smell seemed to be emanating from the garage?.....	1
B.	<u>ISSUES PERTAINING TO APPELLANT'S AND RESPONDENT'S ASSIGNMENTS OF ERROR</u>	1
1.	Should this court refuse to review defendant's claim of insufficient evidence as he validly waived his right to raise this issue in the trial court?	1
2.	Should the court reach the merits, was there sufficient evidence to support the trial courts determination that defendant was armed with a firearm during the commission of the crime?	1
3.	Did the trial court err in failing to find that exigent circumstances justified the officer's initial entry into the garage when officers were seeking the source of an ammonia smell that was consistent with a leaking tank of the toxic chemical anhydrous ammonia?.....	1
4.	Did the trail court properly find, under the independent source doctrine, that the search warrant affidavit was sufficient even after information obtained from the initial entry into the garage was redacted?.....	1
5.	Did the trail court properly admit evidence at trial that was obtained pursuant to a valid warrant?.....	2
C.	<u>STATEMENT OF THE CASE</u>	
1.	Procedures	2
2.	Facts	5

D. ARGUMENT 7

1. THIS COURT SHOULD REFUSE TO REVIEW
DEFENDANT’S CLAIM OF INSUFFICIENT EVIDENCE
AS HE WAIVED HIS RIGHT TO RAISE THIS ISSUE AS
PART OF A VALID PLEA AGREEMENT 7

2. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT
THE TRIAL COURT'S FINDING THAT DEFENDANT
WAS ARMED WITH A FIREARM..... 12

3. THE TRIAL COURT ERRED IN FINDING THAT THE
INITIAL ENTRY INTO THE LOCKED GARAGE WAS
NOT JUSTIFIED BY EXIGENT CIRCUMSTANCES ... 16

4. THE COURT PROPERLY FOUND THAT THE SEARCH
WARRANT WAS VALID EVEN AFTER THE
INFORMATION OBTAINED FROM THE INITIAL
ENTRY INTO THE GARAGE WAS REDACTED FROM
THE SUPPORTING AFFDAVIT 21

E. CONCLUSION..... 26

Table of Authorities

Federal Cases

<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).....	13
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 82 L.Ed.1461, 58 S. Ct. 1019 (1938)	8
<u>Murray v. United States</u> , 487 U.S. 533, 537, 101 L.Ed.2d 472, 108 S. Ct. 2529 (1988).....	22, 23, 24, 25, 26
<u>United States v. Johnson</u> , 994 F.2d 980 (2 nd Cir. 1993)	25
<u>United States v. Mulder</u> , 889 F.2d 239 (9 th Cir. 1989)	26

State Cases

<u>In re Pers. Restraint of Goodwin</u> , 146 Wn.2d 861, 871, 50 P.3d 618 (2002).....	7
<u>In re Personal Restraint of Breedlove</u> , 138 Wn.2d 298, 311, 979 P.2d 417 (1999).....	7
<u>State v. Bakke</u> , 44 Wn. App. 830, 834, 723 P.2d 534 (1986).....	18
<u>State v. Barrington</u> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988).....	13
<u>State v. Coates</u> , 107 Wn.2d 882, 735 P.2d 64 (1987).....	21, 22
<u>State v. Cockrell</u> , 102 Wn.2d 561, 689 P.2d 32 (1984).....	21
<u>State v. Cord</u> , 103 Wn.2d 361, 693 P.2d 81 (1985).....	21
<u>State v. Davis</u> , 117 Wn. App. 702, 711, 72 P.3d 1134 (2003).....	18, 19
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	13
<u>State v. Downey</u> , 53 Wn. App. 543, 545, 768 P.2d 502 (1989) ...	17, 18, 19
<u>State v. Gaines</u> , 154 Wn.2d 711, 116 P.3d 993 (2005).....	16, 21, 22, 26

<u>State v. Gocken</u> , 71 Wn. App. 267, 276-77, 857 P.2d 1074 (1993), <u>review denied</u> , 123 Wn.2d 1024, 875 P.2d 635 (1994)	17
<u>State v. Green</u> , 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).....	12
<u>State v. Gurske</u> , ___ Wn.2d ___, ___ P.3d ___ (2005) (also found at 2005 Wash. LEXIS 682)(Slip Opinion Case No 75156-1, filed August 25, 2005)	14, 15
<u>State v. Johnson</u> , 104 Wn. App. 409, 414, 16 P.3d 680, <u>review denied</u> , 143 Wn.2d 1024, 25 P.3d 1020 (2001).....	17
<u>State v. Johnson</u> , 94 Wn. App. 882, 892-93, 974 P.2d 855 (1999).....	14
<u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993)	12
<u>State v. Loewen</u> , 97 Wn.2d 562, 568, 647 P.2d 489 (1982).....	17
<u>State v. Lynd</u> , 54 Wn. App. 18, 22, 771 P.2d 770 (1989)	17
<u>State v. Maxwell</u> , 114 Wn.2d 761, 791 P.2d 223 (1990).....	21
<u>State v. McCullum</u> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	12
<u>State v. Mills</u> , 80 Wn. App. 231, 236-37, 907 P.2d 316 (1995)	14
<u>State v. Mollichi</u> , 132 Wn.2d 80, 89 n.4, 936 P.2d 408 (1997)	7
<u>State v. Perkins</u> , 108 Wn.2d 212, 216, 737 P.2d 250 (1987).....	7, 8
<u>State v. Phelps</u> , 113 Wn. App. 347, 357 57 P.3d 624 (2002)	8
<u>State v. Rempel</u> , 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990)	12
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	13
<u>State v. Schelin</u> , 147 Wn.2d 562, 567-568, 55 P.3d 632 (2002).....	14
<u>State v. Schelin</u> , 147 Wn.2d 562, 573-575, 55 P.3d 632 (2002).....	14
<u>State v. Spring</u> , ___ Wn. App. ___, 115 P.3d 1052 (2005)	26
<u>State v. Sweet</u> , 90 Wn.2d 282, 286, 581 P.2d 579 (1978).....	8

<u>State v. Thompson</u> , 151 Wn.2d 793, 802, 92 P.3d 228, 232 (2004)...	16, 17
<u>State v. Valdobinos</u> , 122 Wn.2d 270, 282, 858 P.2d 199 (1993)	13

Constitutional Provisions

Article I, Section 7 of the Washington State Constitution.....	21
Fourth Amendment to the United States Constitution.....	16

Statutes

RCW 69.50.511	25
RCW 70.105D.020(5).....	25
RCW 9.41.010	13
RCW 9.94A.510(3).....	13

A. RESPONDENT'S ASSIGNMENT OF ERROR.

1. Did the trial court err in finding that the officer's initial entry into the garage was not exigent circumstances when officers had been unable to locate the source of a strong ammonia odor – a smell indicative of anhydrous ammonia, a toxic chemical – and when that smell seemed to be emanating from the garage?

B. ISSUES PERTAINING TO APPELLANT'S AND RESPONDENT'S ASSIGNMENTS OF ERROR.

1. Should this court refuse to review defendant's claim of insufficient evidence as he validly waived his right to raise this issue in the trial court?

2. Should the court reach the merits, was there sufficient evidence to support the trial courts determination that defendant was armed with a firearm during the commission of the crime?

3. Did the trial court err in failing to find that exigent circumstances justified the officer's initial entry into the garage when officers were seeking the source of an ammonia smell that was consistent with a leaking tank of the toxic chemical anhydrous ammonia?

4. Did the trial court properly find, under the independent source doctrine, that the search warrant affidavit was sufficient even after information obtained from the initial entry into the garage was redacted?

5. Did the trial court properly admit evidence at trial that was obtained pursuant to a valid warrant?

C. STATEMENT OF THE CASE.

1. Procedure

On November 21, 2002, the Pierce County Prosecutor's office charged appellant ROY LEN NEFF, hereinafter "defendant," with two counts of unlawful manufacturing of a controlled substance (methamphetamine and marijuana), and unlawful possession of ammonia with intent to manufacture methamphetamine in Pierce County Cause No. 02-1-05356-6. CP 1-2. Two of these charges had enhancements for having a person under the age of eighteen on the premises. Id. The State later amended the charges adding a count of unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, a count of possession of a controlled substance with intent to deliver, and a count of unlawful possession of a firearm in the first degree. CP 34-37. The State alleged firearm enhancements on every count except the firearm charge. Id.

Defendant moved to suppress all evidence seized from his property during the execution of a search warrant alleging that the evidence in the supporting affidavit had been acquired unlawfully for a variety of reasons. CP 58-65. The suppression hearing was held before

the Honorable Ronald E. Culpepper on November 20, 24, and 25, 2003. 7RP 1-239.¹ The court denied the motion to suppress and later entered written findings. 7RP 173-199; CP 321-355.² The court found that the deputy who first entered defendant's property did so in his community caretaking function in trying to locate the source of a strong ammonia smell which posed a health hazard. CP 321-355. While lawfully on the property, the deputy saw items which were consistent with the presence of a methamphetamine lab. Id. The court found that the initial warrantless entry into the locked garage, which seemed to be the source of the smell, was unlawful. The court found that this entry could not be justified under the exigent circumstances exception because there was no objective evidence that a person might have been in the garage and overcome by the fumes. Id. However, the court found that when the information gleaned during this unlawful entry was excised from the affidavit, the remainder of the affidavit still established probable cause for the warrant. Id. The court upheld the warrant as valid; as all the evidence had been seized during the execution of the warrant, the court ruled it would be admissible at trial.

Id.

The trial was also before Judge Culpepper. 7RP 199. The parties

¹ The State will use the same designations for the verbatim report of proceedings as employed by Appellant. See Appellant's brief at p. 5, n. 1.

² The Court's Findings of Fact and Conclusions of Law from the suppression hearing are attached as Appendix A. This Appendix does not include all of the attachments to the written findings.

proceeded to impanel a jury. 8RP 119-124. Prior to the start of evidence the parties reached an agreement as to how the charges could be resolved short of a jury trial. The State agreed to file a second amended information reducing the charges to one count of manufacture of a controlled substance (methamphetamine), with a firearm enhancement, in exchange for defendant's agreement to proceed on a stipulated facts bench trial. 7RP 213-214, 219-229; CP 99-104, 105.³ As part of this agreement, defendant waived his right to challenge the sufficiency of evidence on appeal but preserved his right to challenge the court's ruling on the suppression motion. 7RP 224-225; CP 99-104. The court accepted defendant's stipulation. 7RP 229.

The court found defendant guilty based upon the stipulated facts and also found the firearm enhancement. 7RP 229-237. The court entered findings and conclusions on its determination of guilt. CP 158-320.⁴ The court set sentencing for January 16, 2004. 7RP 238.

Defendant failed to appear for his sentencing. SRP 2. Defendant agreed that the State could increase its sentencing recommendation from 114 months to 125 months in exchange for the State's agreement not to file bail jumping charges. SRP 2-4; CP 117. The court imposed a

³ A copy of the Stipulation and Agreement is attached as Appendix B.
⁴ The Court's Findings of Fact and Conclusions of law from the stipulated facts bench trial are attached as Appendix C This Appendix does not include all of the attachments to the written findings.

standard range sentence of 89 months, plus 36 months for the firearm enhancement, for a total period of confinement of 125 months, \$3,710 in court costs and fees, and 9-12 months of community supervision. SRP 12; CP 118-129.

Defendant filed a timely notice of appeal. CP 136-149.

2. Facts

The following is a summary of the court's findings on the suppression motion and bench trial. CP 158-320, 321-355.

On November 20, 2002, Pierce County Sheriff's Deputy Jones was en route to a suspicious vehicle call when he smelled a very strong odor of ammonia through his defroster vent. Deputy Jones stopped his car and got out. An extremely strong and overpowering odor of ammonia filled the area. Deputy Jones knew that ammonia was hazardous and harmful to anyone exposed to large quantities of it as it can cause respiratory problems or death. He was also aware from his training that leaking tanks can explode causing severe, freezing burns. In an effort to locate the source of the odor, he drove up the driveway of the defendant's residence. He noticed a woman and a child inside the house and knocked on the front door. The woman turned out to be defendant's wife. Deputy Jones explained that he was searching for the source of the odor and asked if he could look around the property for the source of the smell. She consented to him doing so.

As Deputy Jones came off the porch, defendant came around the side of the house and asked what was going on. Deputy Jones again explained that he was looking for the source of the ammonia smell and the health hazard it posed. Defendant indicated that he could smell it too and told the deputy that the previous residents had operated a methamphetamine lab on the property. Deputy Jones thought it likely that a tank of anhydrous ammonia had been left on the property and that it had started to corrode resulting in the "off-gassing." Defendant reacted in a concerned manner consistent with a desire to locate the source of the smell.

Deputy Jones began to search the property looking for an abandoned tank. While doing this he noticed a burn pile with pseudoephedrine blister packs. He also saw a bug sprayer with a yellowish and bluish liquid with rock salt in the bottom that was off-gassing. Deputy Jones recognized this as an HCL gas generator used in the manufacture of methamphetamine. At this point, Deputy Jones became concerned that there might be an active lab on the property and called for assistance from the Clandestine Lab team.

Deputy Fry arrived and he and Deputy Jones continued to look for the source of the smell. The odor seemed to be coming from the locked garage. The deputies recovered keys that the defendant had thrown on the ground and used them to unlock the door. Inside was a methamphetamine lab and a marijuana grow operation.

After making an initial assessment of the lab, the officers obtained a search warrant for defendant's property including the garage. The officers also got a destruction order for any hazardous material found during the search. The deputies executed the search warrant, gathering and documenting the evidence of the lab. The garage contained items that were consistent with an operating methamphetamine lab. The garage was protected by several surveillance cameras, with the monitor located inside the garage. Three guns were also found inside the garage.

D. ARGUMENT.

1. THIS COURT SHOULD REFUSE TO REVIEW DEFENDANT'S CLAIM OF INSUFFICIENT EVIDENCE AS HE WAIVED HIS RIGHT TO RAISE THIS ISSUE AS PART OF A VALID PLEA AGREEMENT.

A criminal defendant may, as part of plea agreement, waive constitutional and statutory rights, including rights under the SRA and the right to appeal. In re Personal Restraint of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999); State v. Perkins, 108 Wn.2d 212, 216, 737 P.2d 250 (1987); State v. Mollichi, 132 Wn.2d 80, 89 n.4, 936 P.2d 408 (1997). There are some limitations to this principle. A defendant may not waive or stipulate to a sentence not authorized by the Legislature. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 871, 50 P.3d 618 (2002) ("[i]mposition of a sentence which is not authorized by the SRA is a

fundamental defect which may justify collateral relief."'). Nor may a court extend or waive limitations on its subject matter jurisdiction. State v. Phelps, 113 Wn. App. 347, 357 57 P.3d 624 (2002) ("criminal statute of limitation is not merely a limitation upon the remedy, but is a limitation upon the power of the sovereign to act against the accused.'). A criminal defendant may waive certain appellate rights while retaining others. In Perkins, the defendant waived his right to appeal his conviction and a standard range sentence, but retained his right to appeal the imposition of any exceptional sentence. 108 Wn.2d at 218.

When the record indicates that, at least presumptively, a defendant has waived his right to an appeal, the focus of inquiry must become whether the waiver of that right was valid. Waiver is the intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed.1461, 58 S. Ct. 1019 (1938). The State has the burden of demonstrating that a defendant has made a voluntary, knowing, and intelligent waiver of the right to appeal. State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978).

In this case, just after the jury had been impaneled to hear defendant's trial, defendant entered into an agreement with the State to resolve his case with a stipulated facts bench trial on reduced charges. 7RP 217-219, CP 34-37, 105. The State reduced the charges defendant was facing from 6 felony counts, with 5 firearm enhancements, to one felony count with a firearm enhancement. CP 34-37, 105. In order to

accomplish this resolution, defendant completed a plea agreement document entitled "Stipulation to Facts Sufficient and Stipulated Bench Trial." CP 99-104 (see, Appendix A). The written stipulation included the following paragraph regarding defendant's right to appeal:

I am waiving the right to challenge the sufficiency of the evidence to support these convictions on appeal, while reserving the right to challenge the trial court's suppression hearing findings and conclusions of law.

CP 99-104 (see paragraph 1.2(e)). The written stipulation also stated that defendant was entering the stipulation freely and voluntarily and that his attorney had explained and discussed the entirety of the document with him. CP 99-104 (paragraphs 1.4 and 1.6).

Before discharging the jury, the court engaged defendant in a colloquy regarding the stipulation. 7RP 219-229. Defendant verified that he had reviewed the entire document with his attorney. 7RP 220. Defense counsel also verified that he had gone over every word on the document and discussed the case at length. 7RP 221. Defendant showed no misunderstanding about the nature of the trial rights he was giving up. 7RP 222-224. He also verified that he was entering the agreement "freely and voluntarily." 7RP 224. When the court got to the part addressing the appellate rights that defendant was giving up, the court misspoke (or misread) the relevant paragraph and asked if defendant understood that he was "*reserving the right to challenge sufficiency of evidence to support the*

conviction while reserving the right to challenge the suppression hearing findings and conclusions.” 7RP 224. At that point, defense counsel interrupted and asked if he had misunderstood the court with regard to what it had said about reserving the right to challenge the sufficiency of the evidence. 7RP 224. The court then correctly read the paragraph to indicate that the defendant was *waiving* the right to challenge the sufficiency of the evidence on appeal, but maintaining his right to challenge the suppression hearing ruling. 7RP 224-225. The prosecutor confirmed that that was the intent of the agreement. 7RP 225. Before accepting the stipulation, the court again verified that defendant wanted to enter into the agreement, that he was not subject to pressure or coercion, and that he had thoroughly gone over the document with his attorney. 7RP 228-229. This record shows a knowing, voluntary, and intelligent waiver of defendant’s right to challenge the sufficiency of the evidence on appeal. Having waived this right in the trial court as part of a plea agreement involving a reduction of charges and stipulated facts bench trial, defendant should be held to his agreement. This court should refuse to consider his claim of insufficient evidence to support the deadly weapon enhancement.

Defendant argues that the court should not find a waiver because the written stipulation discusses waiving the right to challenge the evidence supporting his “convictions” on appeal, but does not specify a waiver with regard to his enhancement. Appellant’s brief at p.25. But the

language of the agreement is unequivocal as to which appellate rights defendant is preserving. It expressly states that defendant is preserving his right to challenge the trial court ruling on the suppression motion and the right to appeal an exceptional sentence; other rights were waived. CP 99-104 (paragraphs 1.1(e)(g) and (j)); 7RP 213-214. In the agreement, defendant acknowledged that he could not appeal a sentence that imposed time for a firearm sentencing enhancement. Id. (paragraph 1.1(g)). The agreement reflects a general waiver of his right to appeal, except for the retention of the right on specific issues.

Defendant argues that the written agreement reflects a desire to preserve his right to challenge the sufficiency of the evidence. In making this claim, defendant points to paragraphs that indicate a desire to preserve the right to argue the issue in the trial court rather than to raise the issue on appeal. It is clear that the parties saw the agreement as waiving the right to challenge the evidence on appeal. When the court misspoke as to the terms of the agreement, stating defendant was preserving the right to challenge the evidence on appeal, defense counsel interrupted to clarify the record. 7RP 224. As part of the agreement, defendant acknowledged that the stipulated facts contained sufficient evidence to support a determination of guilt. CP 99-104 (paragraph 1.1(a)); RP 223. However, he did not stipulate that the court *should* find him guilty on the basis of such evidence. CP 99-104 (stricken paragraphs 1.2 and 1.5). In other words, the defendant took the position that the evidence allowed, but did

not demand, a finding of guilt. Under the agreement, defendant was free to argue to the trial court that it should not find him guilty of the crime or the enhancement. CP 99-104; 7RP 234-235. Defense counsel did argue that the court should not find the enhancement, but the court rejected this argument. 7RP 234-237. Under the agreement, defendant bound himself to abide by the decision of the trial court by waiving his right to appeal these factual determinations. This court should hold defendant to his agreement and refuse to review his claim of insufficient evidence.

2. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING THAT DEFENDANT WAS ARMED WITH A FIREARM.

The following argument is presented should this court disagree with the State's above argument regarding waiver.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990)(citing State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); and Jackson v. Virginia, 443 U.S. 307, 99

S. Ct. 2781, 61 L.Ed.2d 560 (1979)). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The legislature provided for firearm enhancements in RCW 9.94A.510(3)(formerly 9.94A.310), which states in the relevant part:

The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010...

Case law has provided the following definition of armed: A person is "armed" if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). In addition to the test announced in Valdobinos, when assessing the sufficiency of the evidence to support an enhancement in a constructive possession case, the Supreme Court has said there is also a nexus requirement: "Under a two-part analysis, there must be a nexus between the weapon and the defendant and between the weapon and the crime." State v. Schelin, 147 Wn.2d 562, 567-568, 55

P.3d 632 (2002). To meet this test, the courts have looked to whether the weapons were readily available and easily accessible at the time of the crime to establish this nexus. See State v. Schelin, 147 Wn.2d 562, 573-575, 55 P.3d 632 (2002), State v. Johnson, 94 Wn. App. 882, 892-93, 974 P.2d 855 (1999); State v. Mills, 80 Wn. App. 231, 236-37, 907 P.2d 316 (1995).

The Washington Supreme Court recently addressed the nature of what must be shown in a constructive possession case for a weapon to be “easily accessible and readily available.” State v. Gurske, ___ Wn.2d ___, ___ P.3d ___ (2005)(also found at 2005 Wash. LEXIS 682)(Slip Opinion Case No 75156-1, filed August 25, 2005). It stated:

This requirement means that where the weapon is not actually used in the commission of the crime, it must be there to be used. In adopting the ‘easily accessible and readily available’ test, we recognized that being armed is not confined to those defendants with a deadly weapon actually in hand or on their person. This is consistent with the legislature’s obvious intent to punish those who are armed during the commission of a crime more severely than those who are unarmed because of the risk of serious harm to others is greater....

....

The accessibility and availability requirement also means that the weapon must be easy to get to for use against another person, whether a victim, a drug dealer (for example), or the police. The use may be for either offensive or defensive purposes, whether to facilitate the commission of the crime, escape from the scene of the crime, protect contraband or the like, or prevent investigation, discovery, or apprehension by the police.

Gurske, ___ Wn. 2d at ___, (2005 Wash. LEXIS at *6-8).

In this case, the court found that defendant was manufacturing methamphetamine. 7RP 236-237; CP 158-320. This determination is not challenged on appeal. The evidence found at defendant's home showed the methamphetamine was manufactured primarily in the garage and that the defendant's wife did not have a key to the garage. This leads to the conclusion that the defendant had dominion and control over the garage and the items in it. The officers found numerous surveillance cameras with the viewing monitors located inside the garage. 7RP 233; CP 158-320. This shows that defendant was taking defensive precautions so that he could see anyone approaching the garage while he was inside of it. This also means that defendant would have advance warning and time to arm himself if he thought that person posed a threat. Three guns, all operable, were found inside the garage; two were found inside a safe that was in the floor underneath a desk, and one was in a tool belt that was hanging from the rafters. CP 158-320. Thus, there were three guns in the same room as the active methamphetamine lab. While two of the guns were inside a locked safe, defendant was the one with the ability to open the safe. As can be seen in the photographs⁵, the desk had a solid front such that it would provide some "cover" while he was opening the safe.

⁵ See Photograph No. 40 attached to Findings of Facts and Conclusions of Law on suppression motion. CP 321-355.

The safe also contained marijuana and methamphetamine, linking the contents of the safe to the unlawful activities in the garage. It would provide defendant with an accessible weapon if anyone tried to rob him of his methamphetamine.

It is not necessary to prove that anyone ever tried to rob defendant of his illegal product and that he defended himself with the guns, it is enough that the evidence leads to this conclusion that the guns were in this location because defendant intended that they be available for use, offensively or defensively. Defendant installed an elaborate surveillance system to protect his illegal lab; the presence of the three guns inside the lab also leads to the conclusion that they were part of the defendant's "defenses."

3. THE TRIAL COURT ERRED IN FINDING THAT THE INITIAL ENTRY INTO THE LOCKED GARAGE WAS NOT JUSTIFIED BY EXIGENT CIRCUMSTANCES.

The Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution prohibit unreasonable searches and seizures. State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005). While it has long been held that warrantless searches are per se unreasonable, there are exceptions to the warrant requirement. State v. Thompson, 151 Wn.2d 793, 802, 92 P.3d 228, 232 (2004). The

State bears the burden of showing a warrantless search falls within one of these exceptions. Id.

One exception is the emergency/exigent circumstances exception. State v. Johnson, 104 Wn. App. 409, 414, 16 P.3d 680, review denied, 143 Wn.2d 1024, 25 P.3d 1020 (2001). The emergency exception to the warrant requirement recognizes the community caretaking function of police officers; it exists so that officers can assist citizens and protect property. State v. Johnson, 104 Wn. App. at 414. The emergency exception justifies a warrantless entry when: (1) the officer subjectively believes that there is an immediate risk to health or safety; (2) a reasonable person in the same situation would come to the same conclusion; and (3) there is a reasonable basis to associate the emergency situation with the place searched. State v. Thompson, 151 Wn.2d at 802. State v. Gocken, 71 Wn. App. 267, 276-77, 857 P.2d 1074 (1993), review denied, 123 Wn.2d 1024, 875 P.2d 635 (1994). In assessing these factors, a court should consider whether the officer's acts were consistent with his claimed motivation, and whether they were reasonable in relation to the scene as it appeared to the officer at the time. State v. Loewen, 97 Wn.2d 562, 568, 647 P.2d 489 (1982); State v. Downey, 53 Wn. App. 543, 545, 768 P.2d 502 (1989); State v. Lynd, 54 Wn. App. 18, 22, 771 P.2d 770 (1989).

Washington courts have applied the emergency exception where "premises contain . . . objects likely to burn, explode or otherwise cause harm[.]" Downey, 53 Wn. App. at 544-45. Courts have applied the

exception to properties suspected of containing methamphetamine or other drug labs because of the unstable and dangerous properties of the chemicals and other materials used in these operations. State v. Davis, 117 Wn. App. 702, 711, 72 P.3d 1134 (2003); Downey, 53 Wn. App. at 544-47. In these types of situations, "[t]he need to protect or preserve life, avoid serious injury, or protect property in danger of damage justifies an entry that would otherwise be illegal absent an exigency or emergency." State v. Bakke, 44 Wn. App. 830, 834, 723 P.2d 534 (1986).

In this case the trial court found that the deputy was involved in a community caretaking function by searching for the source of the ammonia smell on defendant's property, but the court found that the entry into the locked garage was not justified because there "was no objective evidence [that] there was a person in the garage, nor any reason to believe a person was in danger of illness due to any odor coming from the garage." CP 321-355, Conclusion of Law No. IV. It is clear from the oral ruling that the trial court thought it necessary that there be objective evidence that someone was inside the garage before it would find exigent circumstances justifying entry. RP 176-178. Case law does not support the court's conclusion. The court erred in concluding that it was necessary to show that someone was in the garage before this situation constituted an emergency.

In State v. Downey, *supra*, officers confronted with an overpowering smell of ether entered a residence to "ensure that no one

was inside” because they “did not know whether someone incapacitated by the fumes remained inside Downey's residence.” Downey, 53 Wn. App. at 544-545. It does not appear from the opinion that anyone was found inside the house, yet the court still found an objective basis for exigent circumstances. Id. Similarly, in State v. Davis, supra, there is no indication that the police had any reason to believe that there was someone in the house from which noxious fumes were emanating when they entered and did a sweep of the house to check for people and to assess the volatility of the suspected methamphetamine lab on the premises. Davis, 117 Wn. App. at 711. These same principles should control the case now before the court.

Here the officers testified to the many dangers of anhydrous ammonia, including the possibility of explosion if a tank has become corroded and the dangers of such an explosion interacting with other solvents commonly found in a methamphetamine lab. 7RP 62, 63-64, 69-73, 75, 104-105. The court found both officers' testimony credible. CP 321-355, Finding of Fact XV. There was an objective basis to find that the odor of ammonia was a health hazard to anyone in the area, but particularly to someone in close proximity to the source of the fumes. Furthermore, the presence of the odor is consistent with leakage from a corroding tank. A corroded tank poses a risk of explosion which would release more toxic chemicals into the air and might inflict chemical burns on anyone in close proximity or cause damage to property. If the

corroding tank was in the vicinity of an active lab, there was an additional risk that it might precipitate further explosions of other chemicals used in the manufacturing process. The HCL gas generator and the remnants of cold medicine blister packs seen by the Deputy Jones provided objective evidence that there might be a lab with volatile chemicals on the premises. All of this information provided the court with objective facts that would have led a reasonable person to conclude that locating the source of the ammonia smell was an emergency situation. The court found that the deputy was properly engaged in a community caretaking function while looking around on defendant's property for the source of the ammonia smell. As the source of the smell remained undiscovered, the exigency still existed. When the deputies determined that the smell seemed to be coming from the garage, this provided the justification for entering the locked structure.

This court should reverse the trial court's conclusion that the first entry into the locked garage was not justified under the exigent circumstance exception to the warrant requirement. The information gleaned from this lawful entry could then be properly included in the affidavit for search warrant and considered by the issuing judge. Correcting this error would eliminate the need for the court to consider defendant's claims regarding the suppression hearing.

4. THE COURT PROPERLY FOUND THAT THE SEARCH WARRANT WAS VALID EVEN AFTER THE INFORMATION OBTAINED FROM THE INITIAL ENTRY INTO THE GARAGE WAS REDACTED FROM THE SUPPORTING AFFIDAVIT.

A search warrant based upon an affidavit containing illegally obtained information is not rendered invalid if the affidavit contains otherwise sufficient facts to establish probable cause independent of the illegally obtained information. State v. Maxwell, 114 Wn.2d 761, 791 P.2d 223 (1990); State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987); see also, State v. Cord, 103 Wn.2d 361, 693 P.2d 81 (1985)(court need not conduct a hearing on allegedly false statement in an affidavit for warrant if affidavit establishes probable cause independently of challenged statements) and State v. Cockrell, 102 Wn.2d 561, 689 P.2d 32 (1984) (fact that there was insufficient probable cause to search all areas listed in warrant did not invalidate warrant with respect to areas for which there was sufficient legal basis). The Washington Supreme Court has held that this application of this "independent source exception" complies with Article I, Section 7 of the Washington State Constitution. State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005).

The "independent source" doctrine⁶ allows the government to use evidence that it obtained both illegally and legally, as when evidence first

⁶ It is a corollary of the "inevitable discovery" doctrine which allows the government to use evidence that it obtained illegally but would have obtained legally in any event.

found in an illegal search is later rediscovered in a legal one. Murray v. United States, 487 U.S. 533, 537, 101 L.Ed.2d 472, 108 S. Ct. 2529 (1988).

In State v. Gaines, the Washington Supreme Court recently upheld admission of a rifle and other evidence that was initially discovered during an unlawful warrantless search of a locked automobile trunk. 154 Wn.2d at ___, 116 P.3d at 997.⁷ The items were not removed from the trunk at the time of the initial search, but were seized during a subsequent search with a warrant. The affidavit in support of the warrant was four pages in length; only one sentence reflected information gleaned during the illegal search. 116 P.3d at 996-997. The Washington Supreme Court upheld the trial court's denial of the motion to suppress. Relying upon Coates, the court found that the warrant still established probable cause after the illegally obtained information had been stricken. Id. at 998

Here the court found that the affidavit still established probable cause after excision of the illegally obtained information. Under Coates and Gaines the trial court properly found that the warrant was still valid. CP 321-355, Conclusion of Law VII. All of the evidence seized from the garage was seized during the execution of the warrant. Even if this court upholds the trial court's determination that the initial entry into the garage

⁷ At the time of submission, Westlaw had not yet inserted the pagination for the official Washington Reporter. The State has made reference to the Pacific Reporter instead.

was unlawful, the evidence in the garage was gathered during the execution of a valid search warrant. This evidence had an independent source that was not tainted by the illegal search.

Defendant does not challenge the trial court's determination that the redacted affidavit established probable cause to issue the warrant. Rather, defendant argues that Murray v. United States, *supra*, requires the trial court to find that law enforcement would have sought the warrant absent the illegal search before it can uphold a search on the basis of the independent source doctrine.

In Murray, federal agents investigating illegal drug trade entered a warehouse without a warrant and saw a large quantity of suspected marijuana. When the agents later applied for a warrant to search the warehouse, they did not mention any observations made during the illegal search in the affidavit. The warrant issued and the agents seized 270 bales of marijuana in the subsequent search. The trial court denied the motion to suppress and the Circuit Court of Appeals upheld that ruling. The United States Supreme Court agreed that the independent source doctrine would allow for the admission of evidence that was initially obtained unlawfully, but which was later obtained lawfully by a means free from any taint of the illegality. 487 U.S. at 541-542. The Court did remand the matter to the trial court for additional fact finding as to whether the warrant would have been sought absent the illegal search. 487 U.S. at 542-543. The court noted that this determination was necessary to show

that the subsequent lawful search with the warrant was based upon a genuinely independent source of information. Id. The court remanded because the trial court had not made a specific finding that the agents would have sought the warrant even if the illegal search had not occurred and the record was not sufficiently clear for the appellate court to draw such an inference. Id. at 543-544.

In this case, the record is clear that the warrant would have been sought even if the first entry into the garage had not occurred because of the ongoing health hazard from off-gassing ammonia and the risk to public safety from a possible methamphetamine lab. The record shows that the deputy who first encountered the ammonia smell was so concerned with the public health hazard it presented that he abandoned the call to which he had been responding in order to locate the source of the smell. 7RP 86-90. During his search of the property, Deputy Jones saw evidence that caused him to believe that there might be an active lab on the property. 7RP 98-101. Defendant's wife told one of the officers that defendant had been cooking "meth" in the garage and this information was used to obtain the warrant. CP 321-355, Finding No. XIII. Prior to the initial challenged entry into the garage, Deputy Jones sought out the assistance of a deputy on specialized duty to respond to drug labs. 7RP 41,104. Deputy Jones stated that he did not feel competent to draft an affidavit for a warrant and that was one of the reasons that he called for assistance. 7RP 120. This shows law enforcement was contemplating a warrant prior to the illegal

search occurring. The record shows no indication that the deputies were likely to leave the property until the source of the ammonia smell was located and eliminated. In the final paragraph of the search warrant affidavit, the affiant referred to the circumstances known or suspected about defendant's property and wrote:

These items present a serious safety and health hazard both to individuals and to the environment as defined in RCW 70.105D.020(5) and should be destroyed pursuant to RCW 69.50.511. If disposed of improperly, these items pose an explosion and fire hazard, or may contaminate the premises or environment, or may result in an uncontrolled release of toxic and/or irritant gases. This could pose a serious risk to the health and safety of our community.

CP 348. The issuing judge signed a destruction order for hazardous substances contemporaneously with the warrant. CP 354-355. This reflects an ongoing concern of law enforcement that existed prior to the illegal search and which would continue until the warrant and destruction order were executed. The only reasonable conclusion from the record in this case is that the officers would have sought the warrant for defendant's garage even if the initial entry into the garage had not occurred.

Unlike the record in Murray, this record is clear and any failure by the trial court to make an express finding on this point is harmless error. See, United States v. Johnson, 994 F.2d 980 (2nd Cir. 1993)(court is satisfied that record shows the decision to seek a warrant was not prompted by the illegal conduct; therefore, the trial court's admission of

evidence under independent source doctrine was proper), and United States v. Mulder, 889 F.2d 239 (9th Cir. 1989). It would appear that the Washington Supreme Court agrees with this analysis of Murray. Gaines, 116 P.3d at 998; *Cf.* State v. Spring, ___ Wn. App. ___, 115 P.3d 1052 (2005)(finding must be made by the trial court).

The evidence seized in defendant's garage was properly seized under a valid warrant and properly admitted at trial. Defendant's conviction for unlawful manufacturing of a controlled substance should be affirmed.

E. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the conviction and sentence entered below.

DATED: September 6, 2005

GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

FILED
COURT OF APPEALS
DIVISION II

05 SEP -6 PM 3:27

STATE OF WASHINGTON

BY _____
DEPUTY

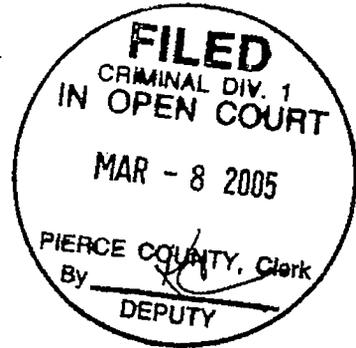
Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.6.05 
Date Signature

APPENDIX "A"

Findings of Fact and Conclusions of Law Regarding Defendant's Motion to Suppress



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

ROY LEN NEFF,

Defendant.

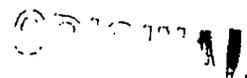
CAUSE NO. 02-1-05356-6

FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
DEFENDANT'S MOTION TO SUPPRESS

FINDINGS OF FACT

I.

On November 20, 2002, at approximately 4:50 p.m., Deputy Jones of the Pierce County Sheriff's Department was responding to a suspicious vehicle call in the 29700 block of 39th Avenue Court East, in Pierce County Washington. Deputy Jones turned his patrol car onto 301st Street, and was starting up the hill in approximately the 5300 block when a very strong odor of anhydrous ammonia entered his patrol vehicle through the defroster vent. Deputy Jones stopped his patrol vehicle and got out of the car. The air was cold and still, and the ammonia odor filled



the area. It was an extremely strong and overpowering odor of ammonia. The deputy spoke with an unidentified neighbor who also smelled the ammonia, and the neighbor pointed towards the defendant's residence as a possible source of the odor.

Deputy Jones is aware that ammonia is hazardous and can be harmful to persons exposed to large quantities of it. The deputy has been trained as a member of the Pierce County Clandestine lab team, and knows that high quantities of ammonia can cause respiratory problems, and even death. He is also aware that leaking tanks can explode causing severe freezing burn injuries. The deputy was aware of the possible contamination of, and injuries to persons at methamphetamine manufacturing sites.

II.

The deputy drove up the driveway to the defendant's residence. The driveway gate was open. Deputy Jones exited his patrol car and observed a woman with a small child inside the residence. The deputy walked around to the front porch and knocked on the front door, and defendant's wife Ms. Neff opened the door.

III.

The deputy explained to Ms. Neff he was trying to figure out the source of the of the hazardous ammonia odor. The deputy asked Ms. Neff if he could look around the property to see if the source was on the property. The deputy did not tell Ms. Neff she had a right to refuse the deputy permission to walk around the property. Ms. Neff consented to the deputy looking around the property for the source of the smell. When the deputy saw the child he was concerned for the safety of Ms. Neff and the child.

IV.

As Deputy Jones started to walk off the porch the defendant came around the side of the house and asked what was going on. The deputy explained that he was concerned about the off-gassing of ammonia in the area, and the health hazard associated with it. The defendant indicated that he smelled it too. The defendant advised the deputy that the previous residents had used the property for manufacturing methamphetamine and he had recovered several anhydrous ammonia tanks and disposed of them. Deputy Jones did not advise Mr. Neff that he could prohibit Deputy Jones from walking around the property. Neither defendant, nor Ms. Neff ever told Deputy Jones that he could not walk around the property.

V.

The deputy explained that there was a possibility that there was a tank that had just started to off-gas through corrosion and it should be located. The defendant reacted in a manner consistent with needing to find the source of the odor. Another person approached the deputy and the defendant, Mr. Rowands, who explained that he had a cold and could not smell anything. At this point the deputy was searching for the source of the anhydrous ammonia due to the health hazards, not a criminal investigation of the Neffs as suspects.

VI.

The three men then attempted to locate the source of the ammonia odor.

VII.

While looking for the source of the ammonia, the deputy observed a bug sprayer, and a burn pile between the garage and a shed. There was a mist coming out of the garden sprayer

which was missing the pump top. The garden sprayer was off-gassing, and there was a yellow and bluish liquid, and rock salt on the bottom of the sprayer. The deputy recognized the garden sprayer as an HCL gas generator, used for the off-gassing process of making methamphetamine. The burn pile contained pseudoephedrine pill blister packs. Pseudoephedrine pills are a primary ingredient for the manufacture of methamphetamine. The deputy had seen other burn piles like this one at other methamphetamine manufacturing sites. At this point the defendant and Mr. Rowlands attempted to distract the deputy's attention. At some point during his investigation, Deputy Jones suspected the existence of a methamphetamine manufacturing lab.

VIII.

At this time the defendant left the scene and the deputy had to tell an arriving deputy to bring him back to the property. Deputy Johnson brought the defendant back to the scene.

IX.

Deputy Fry arrived at the scene and donned his APR respirator mask. Deputy Fry and Deputy Jones continued to attempt to find the source of the anhydrous ammonia odor they continued to detect. There was no testimony regarding reports to dispatch of any illness or concern of anhydrous ammonia.

XI.

Deputy Jones re-contacted defendant after he was brought back to the scene by Deputy Johnson. Deputy Jones informed defendant he was not under arrest, but that he could not leave until they determined the source of the anhydrous ammonia odor. The defendant, as he was being put in a patrol car tossed a set of keys under the patrol car. Deputy Jones retrieved the keys and Deputy Fry used one of the keys to unlock the garage, believing the odor may be coming

from inside the garage. There were no sounds coming from or around the garage. There were no reports of anyone in or around the garage that would suggest there was anybody in the garage.

XII.

Deputy Fry entered the garage and located a methamphetamine manufacturing operation, as well as a marijuana grow operation.

XIII.

During the time that Deputy Jones was walking around the yard, Ms. Neff attempted to leave with her children. Deputy Jones told Ms. Neff she was not allowed to leave. Ms. Neff was detained in the back of Detective Crawford's unmarked police vehicle. Detective Crawford interviewed defendant's wife, Andrea Neff. Ms. Neff related that she is the defendant's wife and lived at the residence. Ms. Neff consented to giving Detective Crawford a taped statement, and a copy of that statement was admitted as Plaintiff's Exhibit No. 2. Appendix A.

XIV.

Detective Crawford applied for a search warrant for the property and that warrant was signed by a Pierce County Superior Court Judge. The application for the warrant has been entered into evidence as Plaintiff's Exhibit No. 1. Appendix B.

XV.

Deputy Jones was credible in his testimony. Detective Crawford's testimony was credible.

CONCLUSIONS OF LAW

I.

Deputy Jones acted with the law when he approached the house after smelling the anhydrous ammonia from the street.

II.

Deputy Jones acted within the law, as part of his community care taking responsibility when he walked around the property with Mr. Neff. Deputy Jones was not conducting a criminal investigation at this time, but attempting to locate potentially dangerous material. Because Deputy Jones was engaged in his community care taking function, and not investigating a crime. Because of this he was not required to inform Ms. Neff of her right to refuse consent, to him walking around the property in search of the source of the anhydrous ammonia odor.

We recently limited Ferrier to the kind of coercive searches the police employed there. State v. Bustamante-Davila, 138 Wn.2d 964, 983 P.2d 590 (1999). We rejected the contention that Ferrier was a "bright-line" rule required in every case where police obtain search authority by consent. Rather, "[t]his Court limited its holding in Ferrier to employment of a 'knock and talk' procedure." Id. at 980. The police officers in Bustamante-Davila accompanied a United States Immigration and Naturalization Service agent serving a deportation order on the defendant at the defendant's home. The court observed that the officers "merely accompanied the INS agent as backup, a standard practice in INS arrest and deportation matters." Id. at 980. At the defendant's door, the defendant consented to entry into his home, where eventually the INS agent and police officers spotted an illegally held rifle in plain view. The court found that "Petitioner did not consent to a search, but consented to entry into his home by the INS agent . . . Petitioner at least impliedly consented to entry by the local police officers accompanying the INS agent." Bustamante-Davila, 138 Wn.2d at 980-81.

State v. Williams, 142 Wn.2d 17, 26-27 (Wash., 2000)

III.

The evidence Deputy Jones observed while walking around the property was observed

while the deputy was undertaking his community care taking function. It is relevant that neither defendant nor Ms. Neff ever asked Deputy Jones to leave the property, nor did they express any desire other than to help the deputy find the source of the anhydrous ammonia odor.

IV.

Deputy Fry's entry into the garage was improper because there was no exigent circumstance which would have justified the entry into the locked garage. There was no objective evidence there was a person in the garage, nor any reason to believe a person was in danger of illness due to any odor coming from the garage.

V.

The statement Ms. Neff gave to Detective Crawford was properly included in the application for the warrant.

VI.

The following must be excised from warrant:

Any mention of marijuana; page 1, line 24; page 1, lines 25-26; page 1, line 32, striking "purchasing of marijuana or related growing equipment"; Page 2, line 7, strike references to marijuana;

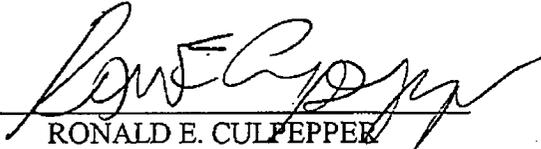
The following must be excised from the application for the warrant:

any mention of what was found in the garage; including page 5, line 25, through page six, line 8.

VII.

Because a search warrant is not rendered totally invalid if the affidavit contains sufficient facts to establish probable cause independent of the illegally obtained information, the search warrant in this case is valid. United States v. Christine, 687 F.2d 749, 758 (3d Cir. 1982); See also United States v. Fitzgerald, 724 F.2d 633 (8th Cir. 1983), cert. denied, 466 U.S. 950 (1984). Even without the offending material, the application for the search warrant contains sufficient information to believe that a crime was being committed. It would not have been an abuse of discretion for a magistrate to sign this warrant without the offending material. Because the warrant is valid, the evidence is admissible.

March 7, 2005


 RONALD E. CULPEPPER
 JUDGE

RONALD CULPEPPER

Presented by:

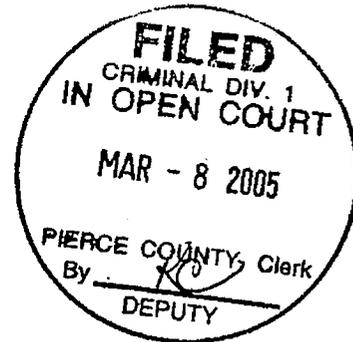


JOHN M. SHEERAN
 Deputy Prosecuting Attorney
 WSB # 26050

Approved as to Form:

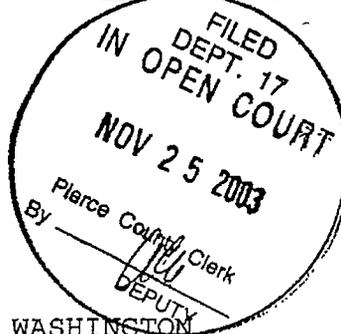


KENT W. UNDERWOOD
 Attorney for Defendant
 WSB # 27250



APPENDIX "B"

Stipulation Agreement



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

ROY LEN NEFF,

Defendant.

CAUSE NO. 02-1-05356-6

STIPULATION TO FACTS
SUFFICIENT AND STIPULATED
BENCH TRIAL

THIS MATTER coming on in open court, and it appearing that the defendant, ROY L. NEFF, is charged with the crime of UNLAWFUL MANUFACTURE A CONTROLLED SUBSTANCE, METHAMPHETAMINE, with a Firearm enhancement (see attached Second Amended Information) in the above entitled cause and that the parties have agreed to submit the case to the court based on the police reports, attached materials, the forensic reports, and the testimony and exhibits from the CrR 3.6 hearing; and that there will be no other evidence presented; and that the parties agree that there is sufficient evidence to support ^{a possible} ~~the~~ conviction of the defendant as charged in the second amended information.

1.1 STATEMENT OF DEFENDANT: I am the defendant in this case. I wish to submit the case on the record. I understand that:

(a) The judge will read the police reports, other attached

materials, the forensic reports, and consider the evidence from the CrR 3.6 hearing, and based upon that evidence, the judge will decide if I am guilty of the crime of Unlawful Manufacture a Controlled Substance, Methamphetamine; and determine whether there is sufficient evidence to support the firearm enhancement to that charge. I stipulate that there is sufficient evidence to support the charged offense and the firearm enhancement as charged in the Second Amended Information.

- (b) I have the right to be represented by a lawyer in this case. If I cannot afford to pay for a lawyer, one will be provided at no expense to me. If I proceed without a lawyer, I will be acting as my own lawyer, and there may be disadvantages to me that would not exist if I had a lawyer representing me. My Lawyers name is Kent Underwood.
- (c) I am giving up the following Constitutional rights: the right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed; the right to remain silent before and during trial, and the right to refuse to testify against myself; the right at trial to hear and question

witnesses who testify against me; the right at trial to testify and to have witnesses testify for me (these witnesses can be made to appear at no expense to me).

- (d) I am presumed innocent unless the charge is proven beyond a reasonable doubt or I plead guilty.
- (e) I am waiving the right to challenge the sufficiency of the evidence to support these convictions on appeal, while reserving the right to challenge the trial court's suppression hearing findings *and conclusions of law.*
- (f) The maximum sentence for each of the crimes is 20 years in prison and a \$20,000 fine.
- (g) The standard range sentence for a conviction of this offense, with my offender score, is 67-89 months in prison, plus 36 months for the Firearm Sentencing Enhancement. The sentence will also include 9-12 months of Community Custody to be served after I am released from jail. If the judge sentences me within the standard range, I cannot appeal that sentence.
- (h) I stipulate that based on my criminal history, which includes the following three convictions, none of which washout, nor constitute the same criminal conduct:

1997	Con. UDCS	Pierce County, WA
2002	UPCS	Pierce County, WA

2002 Unlaw.Poss.Fire,2nd Pierce Co., WA

That my offender score is three.

- (i) In addition to sentencing me to confinement, the judge will order me to pay \$500.00 as a victim's compensation fund assessment, and \$110 in court costs. The judge will also order me to pay a \$3,000 methamphetamine lab clean-up fee pursuant to RCW 69.50.401(a)(1)(ii). The judge also has the authority to impose fines or other legal financial obligations.
- (j) The judge may impose any sentence up to the high end of the standard range, no matter what the prosecuting authority or defense recommends. The judge can sentence the defendant to the maximum allowed by law (240 months) if the judge finds that compelling reasons exist to justify an exceptional sentence. I do have a right to appeal an exceptional sentence.
- (k) I understand that if the judge reads the police reports, the attached materials, and stipulated summation of the case, and finds me guilty of either or both crimes I will lose my right to possess firearms until I have that right restored by a court of record.
- (l) I understand that the offense charged in this stipulation includes a firearm enhancement. The firearm enhancement is mandatory, it must be served in total confinement, and must be run consecutively to any other

sentence and to any other enhancement.

(m) Because the crime charged has a firearm sentencing enhancement, it is a most serious offense, or strike as defined by RCW 9.94A.030, and if I have at least two prior convictions for most serious offenses, whether in this state, in federal court, or elsewhere, the crime for which I am charged carries a mandatory sentence of life imprisonment without the possibility of parole.

1.2 ~~The defendant stipulates that the police reports, attached materials, forensic reports, and the testimony and evidence submitted at the CrR 3.6 hearing provides sufficient evidence to support a finding of guilt, and supports a finding that defendant was armed with a firearm at the time of the offense.~~

1.3 The prosecuting authority has promised to make the following recommendations:

DOC

114 months in the ~~Pierce County Jail~~; 9-12 months community custody; DNA draw (which is mandatory upon conviction of a felony); \$100 DNA fee; \$500 Crime Victim Assessment; \$3000 Methamphetamine Clean-up fee; \$110 in court costs; no association with drug users, sellers or manufacturers, no possession of firearms, law abiding behavior, Restitution by later order of the court.

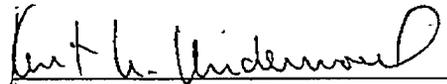
1.4 The defendant agrees that he enters this stipulation freely and voluntarily. No one has made any threats or promises to get the defendant to submit this case in this manner other than the above promises or recommendations by the prosecuting authority.

~~1.5 As part of this stipulation I am agreeing there are sufficient facts in the police reports to find me guilty beyond a reasonable doubt of Manufacture a Controlled Substance, Methamphetamine and of being armed at the time I committed the crime.~~

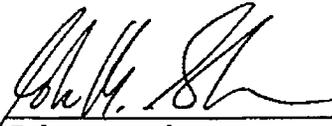
1.6 The defendant's attorney has explained to the defendant, and has fully discussed with the defendant, all of the above paragraphs and the corresponding consequences of proceeding with this stipulation.



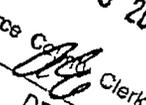
Roy Len Neff
Defendant



Kent Underwood
Defendant's Attorney
WSBA # 27250



John M. Sheeran
Deputy Prosecuting Attorney
WSBA# 26050

FILED
DEPT. 17
IN OPEN COURT
NOV 25 2003
Plance Court Clerk
By 
DEPUTY
11/25/2003
DATE



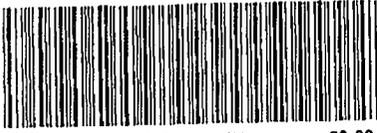
JUDGE

RONALD E. CULPEPPER

APPENDIX “C”

Findings of Fact and Conclusions of Law For Defendant's Stipulated Bench Trial

ORIGINAL



02-1-05356-6 22669555 FNFL 03-08-05

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

ROY LEN NEFF,

Defendant.

CAUSE NO. 02-1-05356-6

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR
DEFENDANT'S STIPULATED
BENCH TRIAL IN OPEN COURT

MAR 07 2005

Pierce County Clerk
By *[Signature]*

THIS MATTER having come on before the Honorable Ronald E. Colpepper, Judge of the above entitled court, for trial on the 28th day of November 25, 2003, upon an amended information charging the defendant with Unlawful Manufacturing of a Controlled Substance, Methamphetamine, while armed with a firearm; the defendant having been present and represented by attorney Kent Underwood, and the State having been represented by Deputy Prosecuting Attorney John M. Sheeran, and the court having reviewed the facts to which the parties stipulated, including all police reports, and exhibits submitted during the suppression hearing, and including all testimony from the suppression hearing, and inquired as to additional facts, and having considered the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law as required by CrR 6.1(d).

FINDINGS OF FACT

I.

On November 20, 2002, at approximately 4:50 p.m., Deputy Jones of the Pierce County Sheriff's Department was responding to a suspicious vehicle call in the 29700 block of 39th Avenue Court East, in Pierce County Washington. Deputy Jones turned his patrol car onto 301st Street, and was starting up the hill in approximately the 5300 block when a very strong odor of anhydrous ammonia entered his patrol vehicle through the defroster vent. Deputy Jones stopped his patrol vehicle and got out of the car. The air was cold and still, and the ammonia odor filled the area. It was an extremely strong and overpowering odor of ammonia. The deputy spoke with an unidentified neighbor who also smelled the ammonia, and the neighbor pointed towards the defendant's residence as a possible source of the odor.

Deputy Jones is aware that ammonia is hazardous and can be harmful to persons exposed to large quantities of it. The deputy has been trained as a member of the Pierce County Clandestine lab team, and knows that high quantities of ammonia can cause respiratory problems, and even death. He is also aware that leaking tanks can explode causing severe freezing burn injuries. The deputy was aware of the possible contamination of, and injuries to persons at methamphetamine manufacturing sites.

00-1-04960-0

II.

The deputy drove up the driveway to the defendant's residence, 5215 301st Street East. Defendant lived at this single family residence with his wife Andrea, and the couple's two children; 4 year old Cody Neff, and 2 year old DeCota Neff. The driveway gate was open. Deputy Jones exited his patrol car and observed a woman with a small child inside the residence. The deputy walked around to the front porch and knocked on the front door, and defendant's wife Ms. Neff opened the door.

III.

The deputy explained to Ms. Neff he was trying to figure out the source of the of the hazardous ammonia odor. The deputy asked Ms. Neff if he could look around the property to see if the source was on the property. Ms. Neff consented to the deputy looking around the property for the source of the smell. When the deputy saw the child he was concerned for the safety of Ms. Neff and the child.

IV.

As Deputy Jones started to walk off the porch the defendant came around the side of the house and asked what was going on. The deputy explained that he was concerned about the off-gassing of ammonia in the area, and the health hazard associated with it. The defendant indicated that he smelled it too. The defendant advised the deputy that the previous residents had used the property for manufacturing methamphetamine and he had recovered several anhydrous ammonia tanks and disposed of them.

00-1-04960-0

V.

The deputy explained that there was a possibility that there was a tank that had just started to off-gas through corrosion and it should be located. The defendant reacted in a manner consistent with needing to find the source of the odor.

VI.

While looking for the source of the ammonia, the deputy observed a bug sprayer, and a burn pile between the garage and a shed. There was a mist coming out of the garden sprayer which was missing the pump top. The garden sprayer was off-gassing, and there was a yellow and bluish liquid, and rock salt on the bottom of the sprayer. The deputy recognized the garden sprayer as an HCL gas generator, used for the off-gassing process of making methamphetamine. The burn pile contained pseudoephedrine pill blister packs. Pseudoephedrine pills are a primary ingredient for the manufacture of methamphetamine. The deputy had seen other burn piles like this one at other methamphetamine manufacturing sites. At this point the defendant and Mr. Rowlands attempted to distract the deputy's attention.

VII.

At this time the defendant left the scene and the deputy had to tell an arriving deputy to bring him back to the property. Deputy Johnson brought the defendant back to the scene.

00-1-04960-0

VIII.

Deputy Fry arrived at the scene and donned his APR respirator mask. Deputy Fry and Deputy Jones continued to attempt to find the source of the anhydrous ammonia odor they continued to detect.

IX.

Deputy Jones re-contacted defendant after he was brought back to the scene by Deputy Johnson. Deputy Jones informed defendant he was not under arrest, but that he could not leave until they determined the source of the anhydrous ammonia odor. The defendant, as he was being put in a patrol car tossed a set of keys under the patrol car. Deputy Jones retrieved the keys and Deputy Fry used one of the keys to unlock the garage, believing the odor may be coming from inside the garage.

X.

Deputy Fry entered the garage and located a methamphetamine manufacturing operation, as well as a marijuana grow operation.

XI.

Detective Crawford interviewed defendant's wife, Andrea Neff. Ms. Neff related that she is the defendant's wife and lived at the residence. Ms. Neff consented to giving Detective Crawford a taped statement.

XII.

Detective Crawford applied for a search warrant for the property and that warrant was signed by a Pierce County Superior Court Judge.

00-1-04960-0

XIV.

Deputy Jones was credible in his testimony. Detective Crawford's testimony was credible.

XV.

In the defendant's garage the Sheriff's department recovered more than one hundred items of evidence including: Toluene, muriatic acid, digital scales, surveillance cameras, used coffee filters with white powder, denatured alcohol, stripped lithium batteries, containers containing various colored liquids, documents in the defendant's name, propane tank containing anhydrous ammonia, bags of marijuana, funnels with white residue, a turkey baste with white residue, charred drug smoking pipes, a loaded Smith and Wesson .357 handgun, a Colt .45, a Davis model P.380 firearm.

XVI.

Many of the items in the garage were tested. They were found to contain pseudoephedrine, methamphetamine, and a by-product of the alkali metal/anhydrous ammonia method of methamphetamine manufacturing. Forensic testing revealed the firearms were operable. The Sheriff's Department found evidence of all three stages of the methamphetamine manufacturing process in the garage.

XVII.

Defendant's wife told Detective Crawford that the defendant had been manufacturing methamphetamine in the garage, and that he intended to stop making methamphetamine and start growing marijuana. Defendant told his wife that he was going to make methamphetamine to make money.

XVIII.

The methamphetamine manufacturing operation the deputies found in the garage was active and ongoing.

XIX.

On or about November 20, 2002, the defendant, Roy Neff, was manufacturing methamphetamine. At the time defendant was manufacturing methamphetamine, he was armed because the guns found in the garage were readily available for offensive or defensive purposes.

XX.

The trial was to the court. The parties stipulated to the facts. The reports to which the parties stipulated are attached to these findings and conclusions.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction over the parties and subject matter.

II.

That all relevant events occurred in Pierce County, Washington, on November 20, 2002.

00-1-04960-0

III.

That, on November 20, 2002, the defendant Roy Neff was manufacturing methamphetamine.

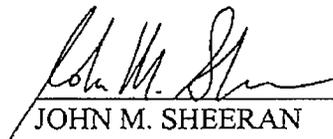
IV.

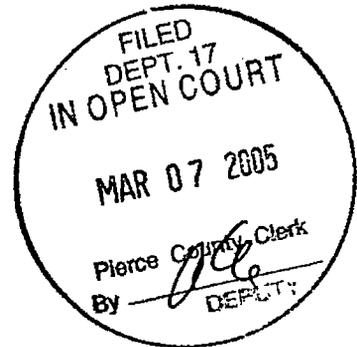
That Roy Neff is guilty beyond a reasonable doubt of the crime of Unlawful Manufacturing of a Controlled Substance, to wit Methamphetamine, as charged in the second amended information. That defendant was armed with a firearm while he was manufacturing methamphetamine.

January 21, 2005.

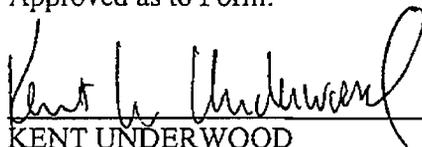

RONALD E. CULPEPPER
JUDGE

Presented by:


JOHN M. SHEERAN
Deputy Prosecuting Attorney
WSB # 26050



Approved as to Form:


KENT UNDERWOOD
Attorney for Defendant
WSB #27250