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DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JASON GREGORY EISFELDT, Appellant

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR.

Assignments of Error.

1. The Court erred in entering Findings of Fact #2, 7, 8, 10, 11, 16, 17, 18, and all of the Conclusions of Law. The complete Findings of Fact are fully set forth in the appendix attached hereto.

2. The Court erred in ruling that the scope of the permission to enter the premises, given to the landlord's agent by one of the tenants, allowed the landlord's agent to proceed to a different area of the house and invite the police into that different area of the house.

3. The Court erred in ruling that the landlord's agent and police had authority to look into and search a garbage bag that had been located in the garage of the premises.

4. The Court erred in finding that the four corners of the affidavit in support of the search of the residence located at 5015 21st Avenue SE, Lacey, Washington, was sufficient to grant a search warrant and the Court erred in finding probable cause for the search warrant, once the affidavit was presented.

5. The Court erred in ruling that the search warrant for the search of the house located at 1601 Eastside Street SE, Olympia, Washington, established probable cause for the issuance of a search warrant for that residence and that there was a sufficient nexus between alleged criminal activity at 5015 21st Avenue SE, Lacey, Washington, and the residence at 1601 Eastside Street SE, Olympia, Washington.

Issues Pertaining to Assignments of Error.

1. Can the Court issue an order denying a motion to suppress based on its findings of fact when those findings of fact are inconsistent with, and at times directly contrary with the evidence presented to the Court, both during the motion to suppress and in the affidavits presented to the magistrate for the search warrants?

2. Does a landlord of a leased premises, who has been given a limited purpose to enter the residence have the authority to exceed that limited purpose and go into other areas of the house, and upon discovering what he believes to be contraband in other areas of the house, invite the police into those areas of the house to search for and find the contraband?

3. Once the landlord's agent had looked into a closed garbage bag, which had no relation to his purpose for being in the residence, does he then have the authority to give the police permission to also look into that garbage bag, which had been located in a closed and sealed garage, and find contraband therein?

4. Were the four corners of the affidavit in support of the search at the residence located at 5015 21st Avenue SE, Lacey, Washington, sufficient to support the issuance of a search warrant for that residence? Did the search warrant affidavit contain probable cause for the issuance of a search warrant for that residence?

5. Did the second affidavit for a search warrant contain sufficient information upon which probable cause could be based to issue a search warrant for the residence located at 1601 Eastside Street SE, Olympia, Washington? Is the identity of the owner of 1601 Eastside Street SE, Olympia, Washington, as being the same person who leased the premises at 5015 21st Avenue SE, Lacey, Washington, and the finding of a power bill in his 21st Street address, addressed to that individual for power at the Eastside Street address sufficient nexus under State v. Thein, to establish

probable cause for a search of the residence at 1601 Eastside Street SE, Olympia, Washington?

STATEMENT OF THE CASE

Facts of this case come from primarily two sources, the affidavits in support of the two search warrants (CP 37-44; CP 45-61) and the testimony before the Court at the Motion to Suppress hearing on August 23, 2004. (RP 1-60) The Defendant challenges the constitutionality of two searches and the seizure of evidence as a result of two different house searches. One search was of the residence located at 5015 21st Avenue SE, Lacey, Washington (hereinafter referred to as House No. 1), and the second search was a residence at 1601 Eastside Street SE, Olympia, Washington (hereinafter referred to as House No. 2).

On August 5, 2003, the Thurston County Narcotics Task Force received a call from a Michael Piper, who advised the task force that he had been in House No. 1, and had discovered what he believed to be marijuana and some other suspicious circumstances. (RP 12, L 9-18; RP 40, L 18-25; RP 41, L 1-25; RP 42, L 1-6; CP 41-42; Ex 1)

Apparently, approximately five weeks earlier, the tenant of the home, owned by an individual by the name of Walt Cox, had called Mr. Piper, who is Mr. Cox's foreman, and advised him that he needed some repairs in the living room because there had been a diesel spill. (CP 41-42; Ex 1) On August 5, 2004, Mr. Piper responded and he gained entry through a key left under the carpet by an individual by the name of Jason. (RP 13-14; 15)

Mr. Piper advised the task force that he entered the living room and immediately noticed the damage. (RP 13) The house was also void of any furnishings. (CP 41; RP 15, L 23-25; RP 16, L 1-6; Ex 1) He then proceeded through the house into the garage area, reportedly to ventilate the house and went to open the main garage doors when he discovered that it had been sealed. (CP 41; RP 13-14; Ex 1) He was able to break the seals and open the garage doors. (CP 41) He then noticed a garbage bag in the garage, which he opened and peered inside. (RP 14, L 5-14; CP 41; Ex 1) It was at that point that he discovered some heavy gauge wiring, some mylar reflective material, and what he believed to be marijuana. He then called the Task Force. (CP 41-42; Ex 1)

The Task Force responded and Mr. Piper took them into the garage and showed them what he had found. (CP 42; Ex 1) The garage was an attached garage.

The task force observed, in the garbage bag, what they believed to be material that was consistent with marijuana, as well as the heavy gauge wiring, and mylar reflective material. (RP 17, L1-11; CP 42; Ex 1) They also noted where the doors had been sealed and, although one detective repeatedly testified, both in the affidavit for the search warrant and at the hearing itself, that the windows of the garage were also sealed, it was later stipulated that there were, in fact, no windows at all in the garage. (RP 16, L 10-21)

At that point, the officers decided to apply for a search warrant, which they did with the Honorable Kip Stiliz, Judge of the Thurston County District Court, utilizing the above information. (CP 37-44; Ex 1; RP 19, L 11-25)

Once the search warrant was granted, they searched the remainder of the house and, although they did not find any marijuana, they found numerous conditions that they believed were consistent with a marijuana grow

having previously been in the house. They also found some materials in the house that identified all three defendants, Jason Eisfeldt, James Wege, and Ben Charles. The officers found several documents evidencing the purchase of materials and equipment that they believed were frequently used in marijuana grow operations. (RP 20-21; CP 45-61; Ex 2)

One of the documents found at House No. 1 at the time of the search was a bill from Puget Sound Energy dated June 23, 2003, addressed to the Defendant Wege, for power consumption at House No. 2. (CP 54, L 25-28) This was the only direct connection they found between the two residences. Once they discovered the power bill, they drove by House No. 2 and observed a Chevy pick-up truck, later determined to be owned by the Defendant Wege, whose address, at that time, was given as 8833 Rainier Road SE, Olympia, Washington. That was determined to be the address of his parents. (CP 57, L 12-16; Ex 2)

The Task Force subsequently discovered that Mr. Wege had apparently purchased House No. 2, in April of 2003. (CP 58, L 4-8; Ex 2) It was further the officer's opinion that power records found in House No. 1, for House No. 2, were higher than what the officer believed they should have

been, and were higher than what the previous owner had consumed during the same period of the year. (CP 58, L 16-20; Ex 2)

Essentially, based on that information, they applied for and obtained a search warrant to search House No. 2. (RP 20-21)

On August 28, 2003, the search warrant was executed at House No. 2, and the officers discovered marijuana plants, equipment utilized for growing marijuana, and various documents and records. (RP 21, L 22-25; RP 22, L 1-8)

SUMMARY OF ARGUMENT

The Appellant contends that the landlord's agent, Mr. Piper, did not have authority to go into the sealed garage and open the garage or open the garbage bag located in the garage, and then invite the police into the garage and to also look into the garbage bag, containing suspected marijuana. In addition, the search warrant for House No. 1 did not contain sufficient information to provide probable cause for the issuance of the search warrant for that residence, and there was insufficient probable cause for the issuance of the search warrant for House No. 2, as there was

no nexus between House No. 1 and House No. 2, or the criminal activity in House No. 1 and House No. 2.

ARGUMENT

I. THE ENTRY OF CERTAIN FINDINGS OF FACT WERE NOT SUPPORTED BY THE EVIDENCE.

The Court made critical mistakes in entering its Findings of Fact and Conclusions of Law in that it specifically entered portions of Findings of Fact that were directly inconsistent with the evidence presented. This then, formed at least a portion of the basis for incorrect conclusions and an unsupportable decision. In Finding of Fact 2, the Court suggests that the lease for the Defendant Wege of the premises located at House No. 1, may have been terminated at some point. However, that is completely inconsistent with the evidence presented. In the telephonic affidavit presented for the search warrant, Detective Elkins, who also testified at the hearing, indicated to Judge Stiliz: "Mr. Wege still had custody of the residence and was currently paying rent for the residence." (CP 42; Ex 2) It is hard to imagine, from that, how the judge may have formed the opinion that the lease may have been terminated.

Even the Court in its oral ruling at the day of the suppression hearing, August 23, 2004, stated: "...and there is no evidence here that the landlord has vacated the tenancy and abandoned the premises so that the permission has passed from the tenant to the landlord, and therefore Mr. Piper, whether he is the agent of the tenant or the agent of the landlord..." (RP 113)

This also is one of the problems with Finding of Fact 7, because the Court's Finding of Fact 7 indicates that Mr. Piper entered the premises and found them, apparently, abandoned. It is submitted that these two Findings of Fact led the Court to enter Conclusion of Law 3, which states in pertinent part: "It also appears that the tenant had abandoned the premises since they were completely vacant of such items as all clothing, furniture, appliances, bedding, etc., and only some miscellaneous documents, the damage and the garage contents remained. There is no evidence when the lease legally terminated but it is clear the tenant was no longer actually residing there." (CP160)

Detective Elkins told Judge Stilz, in the affidavit for the search warrant: "Upon entry into the residence, it was apparent that the renter was not

home at the time and that he had all of his furniture and so forth, personal belongings within the residence, possibly moved and stored in another location for the repair due to the damage regarding the diesel fuel.” (CP 41; Ex 1)

Unfortunately, whether or not the tenant was physically residing in the premises is not the issue, but whether he had a valid lease and the right to privacy in that residence. It should not go without notice by this Court that there was no argument by the State that the premises had been abandoned, nor was there any evidence to support the abandonment of the premises. For the Superior Court to suggest that the premises may have been abandoned, was an effort to bootstrap support for the position that the Defendant’s Constitutional Rights were not violated.

The Court clearly committed error in entering the portion of Finding of Fact 8, which indicated: “In order to safely begin repair, Piper looked for a way to ventilate the premises.” (CP 60) There was never any testimony presented about whether or not the condition of the premises was safe with or without ventilation. In fact, according to the testimony and evidence, the call had come in about the diesel spill some five weeks prior to the entry of the premises by Mr. Piper. It was apparently safe enough to

ignore for five weeks. There also was no evidence as to why Mr. Piper had to go to the garage and open up the garage to ventilate the living room when, it would appear, that opening doors and windows in the living room would have sufficed.

In Finding of Fact 10, the Court acknowledges that Mr. Piper had to force open the overhead garage door and then indicates that upon entry of the light, “saw what they believed to be marijuana, some unusual heavy duty wiring, and an open garbage bag lying loose and open. Looking at the garbage bag, Piper found mylar reflective material and drying marijuana stems and leaves. Other “suspicious” material was present, which is more fully listed as part of Exhibit 2 in the affidavit of August 27, 2003, presented to Judge Stiliz.” (CP 60) This Finding of Fact is simply contrary to the evidence presented, both in the affidavit for the search warrant and the testimony at the 3.6 Hearing. It is significant because the finding infers that the garbage bag was open and assumes that Piper had the right to be in the garage, which certainly is not conceded. He and the police, therefore, would have had the marijuana in plain view.

First of all, in the telephonic affidavit for the search warrant, Detective Elkins reported to Judge Stiliz: “Upon opening the door, they all, Mr.

Piper also noticed a garbage bag that was laying on the floor within the garage. *Upon opening the garbage bag, he saw a large amount of green vegetable matter, which he believed was marijuana.*” (emphasis supplied)
(CP 41; Ex 1)

Further, Detective Elkins reported that because of Mr. Piper’s suspicions after having gone into the garage and seeing the doors, and he indicated windows, sealed and finding the heavy duty wiring, *he looked into the garbage bag*, again inferring that the garbage bag was closed. (emphasis supplied) (RP 14 lines 1-14) Later, in his testimony, Detective Elkins testified: “And there was a garbage bag, and inside the garbage bag - - it was actually open when he looked, *where he had opened it*, and inside was a bucket and some dry marijuana - - consisted of shake is what we call it.” (emphasis supplied) (RP 17 lines 2-5)

Consequently, it would appear that the evidence presented is only consistent with the fact that Mr. Piper had to actually open the garbage bag to find the mylar material and the marijuana inside. It is not clear on what facts the Superior Court Judge based his findings that Mr. Piper found “an open garbage bag lying loose and open.” (CP 60) That simply is not supported by any of the evidence.

Again, even the Court's oral ruling indicates that Mr. Piper looked into the garbage bag wherein the Court states: "...then he begins to look around and he sees this garbage bag, which he looks into..." (RP 110)

The Court indicated in Finding of Fact 11 that Mr. Piper: "Upon recognizing marijuana Piper called Sgt. Doug Price..." (CP 60) There is no evidence that Mr. Piper either specifically recognized what he saw to be marijuana, or that he had any experience or training whatsoever in being able to identify marijuana or distinguishing marijuana from oregano, tomato plants, or any other type of plant. According to the telephonic affidavit in support of the search warrant, the Detective reports to the Judge that Mr. Piper: "Upon opening the garbage bag, he saw a large amount of green vegetable matter which he believed was marijuana." (CP 41) In addition, Detective Elkins testified at the 3.6 Hearing that Mr. Piper looked in the garbage bag and found what he thought was marijuana. (RP 14) In fact, at the hearing, the best Detective Elkins could testify to is that the green vegetable matter was "consistent with marijuana." (RP 33)

Consequently, there was no clear identification by anyone that the material found inside the garbage bag, after opening the garbage bag, was in fact,

marijuana. On the one hand, Mr. Piper saw what he believed to be marijuana, yet there is no indication that he has any experience whatsoever in identifying marijuana, and on the other hand, Detective Elkins, who has a great deal of experience in identifying marijuana by feel, smell, and sight, indicated in his affidavit, that what he saw was “consistent with marijuana.” There simply was neither any testimony nor, more importantly, indication in the affidavit that the green vegetable matter was in fact, recognized as marijuana. Even the Deputy Prosecuting Attorney, David Bruneau, asked Detective Elkins in referring to the garbage bag: “And that bag had marijuana shake in it, or what appeared to be marijuana shake in it? Answer yes.” (RP 37 lines 4-6)

The Court erred and misconstrued the evidence in entering Findings of Fact 16, 17, and 18. The Court simply makes conclusory statements that are not supported by the evidence. It is not clear what the court is referring to in Findings of Fact 16 when the Court indicates that the matters found at House No. 1, yielded evidence that indicated there were co-conspirators involved with what appeared to be a marijuana grow operation. Or, how that information, whatever it was, led officers to request a search warrant for House No. 2. The problem is, there was no evidence that connected any criminal activity from House No. 1, to House

No. 2. The Court, in Findings of Fact 17, makes the conclusory statement that “that warrant was supported by evidence discovered on August 5, 2003, through August 27, 2003.” A closer reading of the affidavit in support of the search warrant for House No. 2, (CP 45-61) and the testimony at the hearing reveals no such evidence. With respect to Findings of Fact 18, the Court indicates that: “principally, because all counsel agree that if search warrant #03-60 (House No. 1; Ex 1) is valid, that search warrant #03-73 (House No. 2; Ex 2) is valid.” That is absolutely false. Counsel never agreed that search warrant #03-73 (House No. 2) would rise or fall on the validity of search warrant #03-60 (Ex 2) (House No. 1). In fact, a great deal of briefing was spent on the fact that even if the search warrant for House No. 1 was supported, there was not a sufficient nexus to House No. 2 to support a search warrant for that residence. It is simply baffling, what in the record supports that finding.

The significance of that finding, however, is that the Court then did not have to rely on the evidence to support the search for House No. 2, since there really was not any.

II. THE SEARCH OF THE RESIDENCE AT 5015 21ST AVENUE SE, LACEY, WASHINGTON, (HOUSE NO. 1) WAS A VIOLATION OF

BOTH THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION
AND ARTICLE 1, SECTION 7 OF THE WASHINGTON STATE
CONSTITUTION.

A) Warrantless Searches Are Unreasonable And Therefore Invalid.

The Fourth Amendment to the Constitution of the United States states as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Article 1, Section 7 of the Washington State Constitution, states as follows:

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Payton v. New York, 455 U.S. 573, 63 LE.2d 639, 100 Sup. Ct. 1371

(1980), provides us with guidance as to the monumental importance of the

Fourth Amendment, when the United States Supreme Court indicated:

“...as the Court reiterated just a few years ago, the ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed...we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort.

“It is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.” 455 US, at 586.

B) Michael Piper Did Not Have Authority to Enter the Garage or Give Consent to the Police to the Search of the Garage at 5015 - 21st Avenue SE, Lacey, Washington (House No. 1).

Although it is clear that a search without a warrant and/or without probable cause is invalid under the Fourth Amendment to the United States Constitution, it may be valid if there is a proper voluntary consent to the search. *Schenckloth v. Bustamonte*, 412 US 218, 366 LE 854, 93 Sup. Ct. 2041 (1973).

The first issue is whether or not Michael Piper who, as the agent of the landlord, had authority to invite the police into the defendant’s residence for the purpose of showing the police what he believed to be criminal activity, i.e. evidence of a marijuana grow operation. There is no question that the officers entered the residence and the garage, observed the garbage bag, looked into the garbage bag and observed heavy gauge wire, mylar and suspected marijuana, as well as the other conditions of the garage, without a search warrant.

It is also undisputed that this residence was leased to the defendant, James Wege, and that he had a valid lease at the time of the invasion. In addition, evidence was discovered that the defendants Charles and Eisfeldt had been living at that residence.

According to what Mr. Piper told the Task Force, he was there in response to a month-old request, by the tenant, and defendant, James Wege, that there had been a diesel fuel spill in the living room. There is no dispute as to those facts.

Mr. Piper went into the living room, observed the damage, and then, proceeded into the garage area. Despite the Court's findings, there is no question that Mr. Wege had, between he and his landlord, the right to exclusive possession of the residence. There is also no question that Mr. Piper had permission to be in the residence for the sole and distinct purpose of cleaning a diesel fuel spill on the living room carpet. It is submitted that, that does not mean, by implication, or otherwise, that Mr. Piper had the ability to roam freely throughout the remainder of the residence simply because he had permission to be there to clean a diesel fuel spill on the living room carpet. There is no evidence that Mr. Piper

was given permission by Mr. Wege, to invite anyone else into the residence other than who may be necessary to clean the carpet.

It follows that Mr. Piper did not have the authority to intrude into the garage, much less, invite the police into the residence or the garage.

To be valid, a consensual search requires that a voluntary consent be made by one having the authority to consent and that the search must be limited to the scope of the consent. *Bustamonte, supra*; *State v. Rodriguez*, 65 Wn. App. 409, 828 P.2d 636 (1992) and 11 U. Puget Sound L Review, 411, Section 510 at 551 (1988). Further, the State has the burden of establishing valid consent or other exception to the warrant requirements. *State v. Mathe*, 102 Wn.2d 537, 688 P.2d 859 (1984).

One of the often cited cases in the lack of the ability of a landlord to consent to the search of premises occupied by the tenant, is *State v. Christian*, 95 Wn.2d 655, 628 P.2d 806 (1981). Although, in that case, the court affirmed the validity of the search, the Court warned:

“Although a landlord may not consent to a search and seizure on behalf of a tenant where the tenant is in undisputed possession of the property...”

In that case, the search was affirmed, because the court found that,

basically, the defendant had vacated the premises, and the time for his vacation of the premises had passed.

Subsequently, in State v. Mathe, supra, the police came to the house owned by James Hartz, believing the defendant to be a resident there. The police went to the house to see if the landlord, and owner of the house, would grant them permission to search the house. The Superior Court determined that the landlord had given such permission, and the officers proceeded to the bedroom occupied by the defendant, found the defendant, and searched the bedroom. Since there was no dispute that the bedroom was used exclusively by the petitioner and his girlfriend, the landlord did not have the authority to consent to the search of the bedroom.

While it is true, under certain circumstances, the landlord may have the ability to search the premises of the defendant, those circumstances are when the landlord has joint or common authority over the premises, and the premises is not therefore in the exclusive possession of the tenant.

United States v. Matlock, 415 U.S. 164, 39 LE.2d 242, 94 Sup. Ct. 988 (1974). The Matlock court cited in Frazier v. Cupp, 394 U.S. 731, 740, 22 LE.2d 684, 89 Sup. Ct. 1420 (1969) in stating:

“...the consent of one who possesses common authority over

premises or effects is valid as against the absent, non-consenting person with whom that authority is shared.”

In the present case, although the defendants were absent, Mr. Piper did not have common authority over the premises.

As has been stated, Mr. Piper’s authority was limited to the specific purpose of cleaning the diesel fuel spill on a section of the living room carpet, consequently it cannot be said, that the landlord, in this case, or Mr. Piper specifically, had any common authority over the entire premise in question and therefore, as a general principal, the landlord would not have had the ability to give consent to law enforcement to search the residence or the garage prior to obtaining a warrant.

There have been a number of cases where attempts to carve out exceptions to the rule have been made, however, without success. In *United States v. Brown*, 961 Fed.2d 1039 (2nd Cir.), the defendant rented a portion of the basement from the landlord who also resided in the house. At times, Mr. Brown would use too much electricity, which would cause the electrical power in the entire residence to short circuit. On those occasions, and when Brown was not at home, the landlord would enter the apartment, using her key, and turn off lights, appliances, etc., to restore power to the

remainder of the house.

On one such occasion, when the landlord entered the defendant's apartment, she observed two weapons in plain view and called the police. The landlord took the police to the apartment in the basement, and the police opened the door and the landlord directed the officers to where the two guns had been observed which were then seized by the officers. In addition, a gun that was also in plain view was seized. One of the guns was an Uzi that was unlawful. The 2nd Circuit reversed the conviction and suppressed the evidence.

In *United States v. Whitfield*, 939 Fed.2d 1071 (D.C. Cir), the defendant had been a janitor for a company that cleaned a Brinks facility and was suspected of stealing \$40,000 from the facility. Without seeking a search warrant, two agents went to the residence of the defendant, and were met at the door by the defendant's mother, who was also the defendant's landlord. After some discussion, the defendant's landlord and mother gave the agents permission to search the room, and they found much of the money that had been stolen in the defendant's clothing. The court determined that not only did the landlord not have authority to give permission to search the room, the agents did not have a reason to believe

that she did. The court underscored that it is the burden of the State to establish the third party's authority to consent to a search.

There are two cases that are factually close to the present case. In State v. Rose, 75 Wn. App. 28, 876 P.2d 925 (1994), (reversed for other reasons) the defendant had a written lease and also an oral agreement wherein the landlord was entitled to use part of the garage for storage. In addition, the landlord agreed to perform maintenance on the property such as mowing the grass and cutting brush, and was not required to give the defendant notice before entering the property for those purposes.

On October 28, 1991, the landlord served the defendant with an eviction notice and required him to vacate within thirty (30) days and the defendant agreed to leave by the end of November. His rent was paid through the month of November. On November 18th, the landlord came on the premises to store some items and noticed that the mobile home on the property was in a state of disrepair. He walked around to assess the condition and upon approaching the shed noticed the odor of what he believed to be marijuana. The landlord reported his suspicions to the police and a deputy of the Snohomish County Sheriff's Office arrived at the scene and was advised that the landlord had access to the property

because of the shared storage and maintenance tasks he performed. The two walked together to the shed, which was found to be locked, and from there, the detective could smell marijuana and noticed electricity lines and a garden hose running into the shed. The detective walked back to the mobile home looking into a back window as he did. He walked to the front of the home, went up the steps, and knocked on the door. He looked into the living room through a window and could see marijuana packaging materials and a grams scale.

The court reaffirmed the rule that in general, a landlord does not have authority to consent to search the property in possession of a tenant. Since the defendant's tenancy had not yet expired, the *Christian* case, *supra*, was not applicable. Of paramount importance to the present case, the *Rose* court stated:

“A tenant does not lose his or her expectation of privacy where a landlord is permitted to enter the premises for certain specified reasons. The limited right of entry reserved for a landlord does not translate into a general waiver of constitutional protections by the defendant.” 75 Wn. App. at 34.

The court then emphasized the restrictions that were placed on the landlord's access to the premises and determined that while the landlord had permission to enter the premises for legitimate purposes, he had no authority to consent to a police search on the property. The State Supreme

Court reversed the decision in Rose, but not on the basis cited above. (128 Wn.2d 388)

Finally, in United States v. Warner, 843 Fed.2d 401 (9th Cir.), evidence obtained for a warrantless search of a garage leased to the defendant, permitted by the landlord was suppressed.

In that case, the defendant rented the residence and garage and it was agreed between the defendant and the landlord that the landlord would have permission to enter the premises in the defendant's absence to make certain repairs and mow the lawn. The landlord entered the garage to obtain a power source for his electric drill to make necessary repairs, and observed a number of boxes containing chemicals. He compiled a list of the chemicals that he had observed.

Later, the landlord went to the property to mow the lawn and noticed a pungent chemical smell and called the police. A police officer arrived at the landlord's house and the two went together to the property rented by the defendant and knocked on the door but there was no answer. As they started down the driveway, the landlord showed the officer the list of chemicals he had made a few weeks earlier and the officer believed that

some of those chemicals were used in the manufacturing of illegal drugs and that they may also pose a risk of explosion.

The officer asked the landlord to use his key to open the garage, which he did and they entered and observed the boxes of chemicals which were partially covered by tarps. The officer called the fire department and the narcotics division of the police department. The police seized the items from the garage and the house despite the fact that no warrant was ever issued.

At the hearing, the officer testified that he did not obtain a warrant because he believed that no warrant was necessary if a landlord consented to the entry. The court found, however, that landlords:

“do not have the authority to waive the Fourth Amendment warrant requirement by consenting to a search of premises inhabited by a tenant who is not at home at the time of the police call. The security of the tenant’s residence is not dependent solely upon the discretion of landlords.” 843 Fed.2d at 403.

The Ninth Circuit looked at three (3) factors. The Court stated:

“We have looked at three (3) in determining when a third party may effectively consent to a search of another’s property. The factors are:

- (1) Whether a third party has an equal right of access to the premises searched;
- (2) Whether the suspect is present at the time the third party

consent is obtained; and,

(3) If so, whether the suspect actively opposes the search....here the latter two factors are not implicated because of the suspect's absence. Thus, the issue of consent depends upon whether the landlord had an actual right of access to the property.

The landlord in this case did not have any right of access for most purposes. As noted by the District Court, 'at best' the landlord had permission to enter the property for the limited purpose of making specified repairs and occasionally mowing the lawn.'" 843 Fed.2d at 403.

In the present case, as in the Warner case, Mr. Piper may have had authority to enter the premises for the limited purposes of making specific repairs. However, he did not need to be in the garage to make the repairs in the living room, and secondly, even if he had the right to be in the garage, under Warner and the other cases cited, he did not have authority to grant permission to law enforcement to search the garage without a warrant.

C. Neither Mr. Piper Nor Law Enforcement Had The Authority To Search The Garbage Bag Located In The Garage.

Even if we assume, arguendo, that Mr. Piper had the right to be in the garage, there is nothing about cleaning the carpet in the living room or ventilating the living room that would give him the right to be in the garage and to look into the garbage bag located in the garage, much less,

to give the police permission to look in that same garbage bag.

It is well settled in this state that one maintains their right of privacy even in their garbage. *State v. Rodriguez*, 65 Wn. App. 409, 828 P.2d 636 (1992), and *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990). In the *Boland* case the Washington State Supreme Court specifically found that Article 1, Section 7 of the Washington State Constitution impliedly provides that a person has a reasonable expectation of privacy in their garbage. In that case, the defendant's garbage was in his garbage can, sitting on the curb, with an expectation that it would be picked up by the garbage collector. The court determined that under those circumstances, he had a reasonable expectation of privacy in that garbage, and it was an unlawful search and seizure for the police to remove the garbage can and search the garbage.

In the present case, the garbage had not even made it out of the dwelling possessed by the defendants. The garbage was in a garbage bag, in a garage that according to officers was sealed and inaccessible except by entry through the residence. There simply was no authority for Mr. Piper to be in that garbage bag or for him to give police officers permission to search the contents of that garbage bag.

Consequently, even if this court were somehow to rule that Mr. Piper did have the authority to give the police officers consent to search the garage, that consent cannot possibly cover the contents of the garbage bag.

D. The Search Warrant And The Information Provided Therein, Were Not Sufficient To Create Probable Cause For The Issuance Of A Search Warrant On House No..1.

1. The Search Warrant On Its Face Did Not Establish Probable Cause For Authorization Of The Issuance Of A Search Warrant For House No. 1.

On August 5, 2003 at approximately 1619 hours, the Task Force was put in contact with a Judge of the Thurston County District Court for purposes of obtaining a search warrant for House No. 1. (CP 37-44) The following pertinent information was provided to the Court for purposes of obtaining a search warrant:

“1) On August 5, 2003, the Task Force received a telephone call from Mike Piper, a representative for the owner of the property, Walt Cox.

“2) Mr. Piper explained to the Task Force that approximately five weeks ago, the renter of the property and the suspect, James Wedge, had complained and requested Mr. Piper’s company do

some repair work on the rental property.

“3) Apparently there had been some damage to the living room floor where some diesel fuel had been spilled.

“4) Arrangements were made to have the repairs made on the date of the telephone call to Judge Clifford L. Stilz.

“5) On that date, Mr. Piper responded to the residence and gained entry with a key provided by the owner.

“6) Upon entry, it was apparent that the renter was not home and much of his personal belongings were gone.

“7) There was obvious damage to the living room floor as well as the odor of diesel fuel.

“8) Mr. Piper and/or his employees went to the garage area and noticed that the garage door was sealed with a foam seal and the entire door and all of the windows had been so sealed.

“9) This was an attached garage.

“10) Mr. Piper indicated that he had to force the garage door open by breaking the seal.

“11) Inside the garage Mr. Piper noticed a garbage bag lying on the floor and upon opening the garbage bag he saw a large amount of green vegetable matter which he believed was marijuana.

“12) He also saw within the garbage bag silver mylar and heavy gauge wiring.

“13) Because of these particular items and the sealant, he contacted the Task Force for assistance.

“14) Detective Elkins, Sergeant Price, and Detective Stahle went to the residence where they met Mr. Piper.

“15) Mr. Piper took them into the garage to show them what he had found.

“16) It was the officers’ opinion that the garage had been used for a grow operation because of the sealant, according to what he indicated to Judge Stilz.

“17) The garbage bag was also shown to the officer who expressed to Judge Stilz that the matter inside, “was consistent with marijuana and also the mylar is consistent with, reflective material to use for the grow operation where the reflection of light and heat. Also, the heavy gauge wire is also commonly used for ah, the wiring of the regular electric equipment, the timers, the ah, the ballastos, the lights, et cetera.”

“18) He further advised Judge Stilz that Mr. Wedge still had custody of the residence and was currently paying rent for the residence.

“19) After a conversation with Deputy Prosecuting Attorney Dave Bruneau, the call was made for the application for the search warrant.”

The Washington State Supreme Court in *State v. Patterson*, 83 Wn.2d 49,

515 P.2d 496 (1973) set the standard for what the sufficiency of an

affidavit for a search warrant must be. That Court stated:

“Reasonableness is the key ingredient in the test for the issuance of a search warrant. That is precisely what the Federal Constitution says and our State Constitution necessarily implies. Do the documents or testimony supporting the warrant give a fair-minded, independent judicial officer, on considering all of the facts and circumstances set before him on oath or affirmation, good reason to issue the warrant?

Good reason for the issuance of a search warrant does not necessarily mean proof of criminal activity but merely probable cause to believe it may have occurred...suspicion, belief and guess alone are not enough...the affidavits or complaint must go beyond mere conclusions that illegal activities are or have been going on in

the premises to be searched...and mere assertions that the applicant for the warrant harbors a suspicion or belief that articles relevant to prove such activity will be found there are insufficient.” 83 Wn.2d at 52. See also *State v. Cole*, 128 Wn.2d 262, 906 P.2d 925 (1995), and *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999).

In the present case, even if the search of the garage and subsequently the garbage bag was appropriate, which certainly is not conceded, it is submitted that the facts presented in the search warrant do not constitute a sufficient basis for probable cause. Clearly, the affidavit for the search warrant presents a great deal of speculation and opinion about what things are used for, there really is no positive assertion that anyone directly observed illegal activity. There is “belief” that the green vegetable matter was marijuana and that the condition of the garage may have been consistent with there having been a marijuana grow operation in the garage. There was no equipment in the garage that was utilized for a marijuana grow.

While the observations of law enforcement officers are considered a reliable basis for the issuance of a search warrant, *State v. Matlock*, 27 Wn. App. 152, 616 P.2d 684 (1980), those observations must, again, relate to facts and not just speculation and opinion. The problem in *Matlock* was that the officer had identified the plant as marijuana, but there was no

evidence that the officer had the training and ability to so identify the plant as marijuana. In the present case, we have both the problem the Court faced in *Matlock* and the opposite. On the one hand, we have Mr. Piper who indicates that he believes it to be marijuana, yet there is no indication as to any experience or training he had to identify marijuana, and on the other hand, we have the officer not identifying it as marijuana, but simply indicating that it was consistent with marijuana. That is even a far cry from those cases where the officers smelled the marijuana in the car or smelled the marijuana from outside of a building. Here, he literally had the marijuana in his hands and could not advise the Court that it was, in fact, marijuana.

2. The Information In Support Of The Search Warrant Was Stale.

One aspect of this case that should not be overlooked is that Mr. Piper actually got the call from Mr. Wege, with respect to the repairs, some five weeks prior to the date he actually arrived at the house and the search was conducted. What he saw in the living room, as described to the officers was that the place was pretty empty of furnishings and personal belongings, and clearly, the garage was empty of just about everything but the garbage bag. Although the garbage bag with the green vegetable

matter was present in the garage, and if what the officers saw in the garage was evidence of a grow operation, at best, it was evidence of a grow operation that had long since been abandoned, perhaps by as much as five weeks previously. What then was present in the garage, as relayed to Judge Stiliz, that would be evidence of a crime currently being committed in the remainder of the house.

As the court stated in *State v. Higby*, 26 Wn. App. 457, 613 P.2d 1192 (1980):

“It is not enough, however, to set forth that criminal activity occurred at some prior time. The facts or circumstances must support the reasonable probability that the criminal activity was occurring at or about the time the warrant was issued.” 26 Wn. App. at 460.

That case went on to determine that the sale of a small quantity of marijuana did not provide probable cause to search a house two weeks after the sale. In the present case, at best, it was believed there had been an abandoned grow operation in the residence, as indicated, as much as five weeks earlier.

As the court stated in *State v. Spencer*, 9 Wn. App. 95, 510 P.2d 833, (1973):

“An affidavit supporting a search warrant must be sufficiently comprehensive to provide the issuing magistrate with facts from which he can independently conclude there is probable cause to believe the items sought were at the location to be searched...further, these facts must be current facts, not remote in point of time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the person or premises to be searched at the time the warrant is issued.” 9 Wn. App. at 97.

Finally, the Court in *State v. Petty*, 48 Wn. App. 615, 740 P.2d 879 (1987)

indicated that:

“The amount of time between the known criminal activity and the issuance of the warrant is only one factor and should be considered along with all of the other circumstances, including the nature and scope of the suspicious criminal activity.” 48 Wn. App. at 621.

In the present case, by the officer’s own admissions it would appear that they believed the house had previously been used for a grow operation but they found no evidence of a present grow operation, other than the fact that the empty garage was still sealed. Their report of chains hanging from the ceiling in the garage is clearly indicative of something having been removed from the garage, whether it was marijuana cultivation apparatus or not, is a matter of speculation. What we do know is that by all intents and purposes, whatever had once been in the house had long since been removed.

III. THE SEARCH OF HOUSE NO. 2 WAS UNCONSTITUTIONAL
AS THERE WAS INSUFFICIENT NEXUS BETWEEN THE ALLEGED
CRIMINAL ACTIVITY DISCOVERED AT HOUSE NO. 1, AND
HOUSE NO. 2.

After conducting a search on House No. 1, the Task Force sorted through the items discovered in House No. 1, and conducted a superficial investigation until August 27, 2003, when they applied for a search warrant for House No. 2. There was no basis for the search warrant for House No. 2.

As indicated, there was some information discovered in House No. 1, as a result of the inappropriate search, that identified the three defendants as having either been there or having had their documents there. According to the affidavit in support of the search warrant for House No. 2, the detectives indicate that at House No. 1, they found a power bill addressed to the Defendant Wege for power consumed by the residence at House No. 2. Between the search of House No. 1 and House No. 2, the Task Force also learned that Mr. Wege had purchased House No. 2 in April of 2003. The detectives also drove by House No. 2 and observed a pick-up truck, which they later identified as a pick-up truck belonging to the Defendant

Wege, and discovered that his residence was listed as the address of his parents and was neither House No. 1, nor House No. 2.

Finally, it was the Task Force's opinion, without providing any back-up documentation, that the power consumed at House No. 2 was higher than it should have been, and higher than what had been utilized by the previous occupant, over the same period of time. That was the basis of the information provided in the affidavit, with respect to House No. 2, in support of the request for a search warrant for House No. 2.

There does not appear to be anything else, according to the affidavit for the search warrant for House No. 2, found at House No.1, that connects any illegal activity to House No. 2. It is simply the officer's opinion that whatever grow operation may have existed in House No. 1, was moved to House No. 2.

While it appears from the documents found at House No. 1 that various items that the officers believed were used in the alleged grow operation at that address were shipped to addresses other than House No. 1 address, however, what is interesting and of paramount importance is that none of those items were shipped to or in any way associated with House No. 2.

In addition, the search of the premises at House No. 1 was done on August 5, 2003, and provided no current information. It was clear to officers at the time, that the residence had basically been cleared out and they learned from the neighbors that there had not been any activity there in over a month. They then obtained the search warrant on or about August 28, 2003 for House No. 2 but based in large part, on the stale information they had obtained from House No. 1. In fact, none of the receipts found at House No. 1 are subsequent to May 2003. The officers essentially had no information about a grow operation subsequent to May, 2003 at the time they obtained the search warrant in late August, 2003 for House No. 2.

While omitting the sites referred to, the court in *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999) stated:

“A search warrant may issue only upon a determination of probable cause...an application for a warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate...probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched...accordingly, ‘probable cause requires a nexus between criminal activity and the item to be seized and also a nexus between the item to be seized and the place to be searched.’” 138 Wn.2d at 141.

In other words, there must be a nexus between the grow operation and what the officers are intending to be seized, as well as a nexus between what they are intending to seize and the place to be searched. It is submitted that the Task Force has failed miserably to establish a connection between the marijuana grow operation at House No. 1, if one existed at all and House No. 2.

In *Thein*, there was considerably more evidence than exists in the present case. In *Thein*, two controlled buys were conducted at the South Brandon residence from the suspect McKone. McKone was arrested at that residence and police discovered a half-pound of marijuana and associated packaging materials also belonging to McKone. They found several copies of money orders from McKone to defendant Thein, with a notation of "rent."

Police also found in the McKone residence, other materials associated with the cultivation of marijuana. While they were in the process of searching the McKone residence, a neighbor told the detectives that McKone's source of marijuana was a white male, approximately 40 years of age and who drove a black Lexus and periodically appeared at the South Brandon address. Subsequently, another woman arrived at the

McKone address to purchase marijuana, and indicated to officers that McKone's landlord was a man named Steve and he was a supplier of McKone's marijuana. She further indicated that the basement area of the South Brandon residence was controlled exclusively by Steve, and he drove a black Lexus. The police informant subsequently told the officers that McKone got his marijuana from his landlord who drove a black Lexus.

The detectives then learned the identity of the defendant Thein and his address. His name was Steven Thein. He was the registered owner of a 1994 Toyota Pick-up (Toyota Pick-up parts had been found at the South Brandon residence) and a 1994 black Acura Legend.

The affidavits for the search warrants relayed all of that information together with a copy of the affidavit for the search at the South Brandon residence, and then included much of the same language that we have in the present affidavit relating to the officers beliefs and what is commonly done by drug growers, etc., etc. The officers then concluded that they believed that Thein was currently involved in the manufacture and distribution of marijuana and a warrant was issued for the search of his residence.

The court went through a detailed analysis of the law with respect to establishing a nexus between one criminal activity, a defendant, and the defendant's residence. The court discussed *State v. Dalton*, 73 Wn. App. 132, 868 P.2d 873 (1994), *State v. Olson*, 73 Wn. App. 348, 869 P.2d 110 (1994), and *State v. Goble*, 88 Wn. App. 503, 945 P.2d 263 (1997). It is submitted that the present case has far less of a nexus to Residence No. 2 than do the facts of those other cases.

After the exhaustive study of the law as mentioned, the Washington State Supreme Court indicated:

“We disagree with the Court of Appeals that the evidence and information gathered at South Brandon, and the reasonable inferences drawn therefrom, establishes a nexus between illegal drug activity and Their's Austin Street residence. Indeed, in our review of the record we find no incriminating evidence linking drug activity to the Austin Street home. The only evidence linked to the Austin Street residence is innocuous: A box of nails and vehicle registration. Thus, even assuming Their was McKone's “supplier” none of the evidence found at South Brandon or any of the information supplied by the informants linked this activity to the Austin Street residence.

We also disagree with the Court of Appeals reasoning that since no grow operation was found at South Brandon, it was likely marijuana “would be found at the other place Their controlled-his home.” ...the court's conclusion is not drawn from any independent evidence linking Their's supposed drug dealing to his Austin Street residence (e.g., no observations of him leaving the Austin Street residence with packages, no sealed windows, no

power records, no other suspicious activity at Austin Street). As such, the court's conclusion amounts to a generalized conclusion that drug dealers are likely to keep evidence of illegal drug dealing in their homes.

Nor do we find it reasonable to infer evidence is likely to be found in a certain location simply because police do not know where else to look for it." 138 Wn.2d at 150.

That language, in its entirety, could directly be applied to the present case.

The difference is, however, that the officer's found marijuana in the Brandon house, had direct reports from informants and neighbors that Thein was involved in that marijuana, yet even with those facts, that was totally insufficient according to our Supreme Court. In the present case, we do not have those two elements. We do not specifically have a grow operation at House No. 1. We have what the officers believe was once a grow operation, but nothing else. As in *Thein*, we do not have any suspicious activity at the House No. 2 nor do we have any factual indication that marijuana or illegal activity is involved at House No. 2.

Consequently, the affidavit on its face, in failing to establish the appropriate nexus, is insufficient for the issuance of a warrant and the evidence obtained at 1601 Eastside Street SE, Olympia, Washington (House No. 2), should be suppressed.

CONCLUSION

Based upon the foregoing arguments and authorities, the decision of the
Thurston County Superior Court should be reversed.

Dated this 25th day of January, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rick Cordes", written over a horizontal line.

RICK CORDES
Attorney for Appellant

APPENDIX

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8 **SUPERIOR COURT OF WASHINGTON**
9 **FOR THURSTON COUNTY**

10 STATE OF WASHINGTON,)
11)
12 Plaintiffs,)
13 vs.) NOs. 03-1-01636-9
14) 03-1-01642-3
15 JASON GREGORY EISFELDT, and) 03-1-01658-0
16 JAMES STEPHEN WEGE, and) FINDINGS OF FACT AND
17 BENJAMIN KENNETH CHARLES,) CONCLUSIONS OF LAW
18) PERTAINING TO CrR 3.6
19 Defendants.)
20)
21)
22)
23)
24)
25)
26)

18 This matter came on for hearing on August 23, 2004. The State was
19 represented by David H. Bruneau, a senior deputy prosecuting attorney. Jason
20 Eisfeldt was represented by attorney Rick Cordes, Benjamin Charles was
21 represented by attorney Robert Quillian, and James Wege was represented by
22 attorney Michael Kovach. The three hearings in the three cases were combined for
23 one hearing though the agreement of counsel.
24

27 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**
28 **PERTAINING TO CrR 3.6**

CHRONOLOGICAL PROCEDURE

In Eisfeldt and Wege the original Informations were filed September 2, 2003, and the Charles Information was filed September 4, 2003. The procedure has been confusing with many verbally agreed to joint hearings and continuances of both trial and pre-trial hearings.

On September 10, 2003, arraignment was held in all three matters and each were set for trial on December 1, 2003 with an omnibus hearing set for October 16, 2003.¹ After several more continuances of both trial and omnibus hearings a CrR 3.6 hearing was set for February 23, 2004². In preparation for that hearing Mr. Cordes filed a Memorandum of Authorities on February 19, 2004. On February 23, 2004 all the parties agreed to continue the trial and all hearings.

On February 26, 2004, defendant Eisfeldt moved to suppress certain evidence. On June 15, 2004, the state filed a Memorandum of Authorities addressing the suppression issues and the underlying search warrants which had been issued.

On August 23, 2004, the case came up for hearing on a 'routine' docket call and the court learned for the first time that there would be a contested hearing, with witnesses and that two Memorandums had been earlier filed and then defendant Charles filed a third Memorandum at the start of the hearing. Counsel for Wege and Charles indicated on the record that they were relying on the Memorandum filed, and arguments advanced, on behalf of Eisfeldt. After some discussion this

¹ On that date the state filed a supplemental certification of probable cause and an amended Information.

² Although not heard by this court apparently at one point there was a motion for severance filed by defendant Wege on December 9, 2003, and set for hearing on December 15, 2003. The court denied the motion to sever on that date.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PERTAINING TO CrR 3.6

1 court agreed to take the hearing, read the memorandums, reviewed the exhibits,
2 and listened to the testimony. The court denied the motion to suppress.

3 On September 3, 2004, Eisfeldt filed a Motion for Reconsideration. On
4 September 13, 2004, the court denied, by written Order, carried in a letter of that
5 date, the Motion for Reconsideration. On September 22, 2004, the state noted up
6 presentation of proposed findings and conclusion for September 27, 2004. On
7 September 23, 2004, defendant Wege filed objections to the State's proposed
8 findings and conclusions. The court has also received a bench copy, though the
9 court file doesn't include originals, of defendant Eisfeldt's objections to the state's
10 proposed findings and conclusions along with his own proposed findings and
11 conclusions.
12

13 The court reviewed the proposed findings and conclusions, along with the
14 objections, and in open court, at a hearing of September 27, 2004, and after
15 comparing the proposed findings and objections that had been filed ruled it must
16 reject the presentation as not congruent with the court's oral ruling and ordered that
17 a transcript of the earlier hearing be produced.

18 On January 10, 2005, the parties appeared without notice and presented an
19 AGREED STIPULATION OF FINDINGS OF FACT AND CONCLUSIONS OF
20 LAW RESULTING IN A VERDICT OF GUILTY. Sentencing has been set for
21 February 22, 2005.
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27 FINDINGS OF FACT AND CONCLUSIONS OF LAW
28 PERTAINING TO CrR 3.6

-- Page 3 of 10 --

Richard D. Hicks, Judge
Washington State Superior Court
Thurston County, Department 4
2000 Lakeridge Dr. SW
Olympia, WA 98502
(360) 786-5560

1 **EVIDENCE CONSIDERED**

2 At the hearing on August 23, 2004, the court admitted four exhibits:

- 3 1. Search Warrant #03-60 and supporting material regarding a residence
- 4 at 5015 21st Ave. S.E., Lacey, Washington; and
- 5 2. Search Warrant #03-73 and supporting material regarding a residence
- 6 at 1601 Eastside St. S.W., Olympia, Washington; and
- 7 3. Search Warrant #03-74³ and supporting material regarding a residence
- 8 at 9233 Quinault Dr. NE; and
- 9 4 Addendum to Search Warrant # 03-74

10 The court than took the testimony of:

- 11 1. Ben Michael Elkins, Detective with TCSO;
- 12 2. Doug Price, Sergeant with WSP; and
- 13 3. Justin Eisfeldt, defendant's brother (called but did not testify).
- 14
- 15

16 **FINDINGS OF FACT**

17 1. On August 5, 2003, Walter Cox and CPI, corporation, owned a
18 residence at 5015 21st Avenue, Lacey, Washington and had leased the premises to
19 defendant James Wege.

20 2. Although it was clear these owners had leased the premises to
21 defendant James Wege, there was no evidence as to when this lease was initiated
22

23 _____
24 ³ This search warrant and material comprising exhibits 3 and 4 were the subject of a colloquy between counsel at the
25 start of the hearing. All counsel agreed that that if the court struck down search warrants #03-60 and #03-73 that
26 search warrant #03-74 should also fall. However, the parties did not agree that if search warrants #03-60 and #03-73
were upheld that #03-74 should also be upheld.

27 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**
28 **PERTAINING TO CrR 3.6**

1 or when it was terminated.⁴ It is deducted from the elemental facts inducted that
2 Wege was the tenant at the time the damage to the premises occurred and that he,
3 or someone on his direction, initiated the call for repair. However, the sworn
4 testimony to Judge Stilz, admitted in this hearing by stipulation, is that Wege
5 phoned the owners to have repair work done. This is sensible since only Wege, or
6 those in concert with him, had knowledge of the damage that had occurred and that
7 repair should be made.

8 3. Sometime in July 2003, Wege, or those in concert with him, called the
9 owners and reported that there had been a spill of diesel fuel on the premises which
10 had caused damage and needed to be repaired.

11 4. On August 5, 2003, Piper, a contractor, routinely employed by the
12 owner/landlord Walter Cox, appeared at the premises to performing the necessary
13 repair work at 5015 21st Avenue, SE, Lacey, Washington. Piper did not learn
14 whether he was called in by the tenant asking for repairs through Wege's request to
15 the owner, or directly by the owner, but he was also a foreman for the owner.
16

17 5. Michael Piper was provided a key to enter the premises by "Jason,"⁵
18 who he understood to be the tenant, and who had instructed the key would be
19 under the door carpet where it in fact was located.

20 6. Piper had permission of the tenant Wege, who left, or under his
21 direction was left, the key to enter; and in addition the permission of the owner
22 Cox to enter and repair the premises.

23 _____
24 ⁴ However, we know from the application for the second search warrant issued for the 1601 Eastside St. premises
that law enforcement had a copy of the lease agreement.

25 ⁵ Although it can be determined beyond a reasonable doubt (which is not required in this kind of hearing) that
26 "Jason" is defendant Jason Eisfeldt that is more likely than not the only sensible conclusion.

27 FINDINGS OF FACT AND CONCLUSIONS OF LAW
28 PERTAINING TO CrR 3.6

1 7. When Piper entered the premises he found them apparently
2 abandoned, or, in any case, vacant. There was no furniture, no clothing, no
3 dressers, no bedroom stuff and just appeared to be abandoned but with extensive
4 damage to the living room carpet and floor, in fact the carpet had been lifted up
5 and the floor damaged and a strong odor of diesel fuel.

6 8. In order to safely begin a repair Piper looked for a way to ventilate the
7 premises from the fumes and went to the garage to open the garage door in order
8 effect a ventilation.

9 9. The garage had no windows.⁶ Piper and his workers found the
10 overhead garage door not only closed but sealed shut with a hardened foam
11 substance. They recognized this as highly unusual.

12 10. Piper and his workers had to force open the overhead garage door
13 over the driveway, breaking the foam seal and upon the entry of light saw what
14 they believed to be marijuana, some unusual heavy duty wiring, and an open
15 garbage bag lying loose and open. Looking at the garbage bag Piper found Mylar
16 reflective material and drying marijuana stems and leaves. Other 'suspicious'
17 material was present which is more fully listed as part of Exhibit #2 in the affidavit
18 of August 27, 2003, presented to Judge Stiliz.

19 11. Upon recognizing marijuana Piper called Sergeant Doug Price of the
20 WSP whom he knew socially, meaning he had no professional relationship with
21 Sergeant Price on this or any other occasion, and who he had met when purchasing
22
23

24 _____
25 ⁶ It wasn't 'lost' on the court that Detective Elkins testified in court and to Judge Stiliz that windows were also
26 sealed.

27 FINDINGS OF FACT AND CONCLUSIONS OF LAW
28 PERTAINING TO CrR 3.6

1 a house from Walt Cox and explained to Sergeant Price where he was and what he
2 had seen.

3 12. Sergeant Doug Price, WSP, and Detective Ben Elkins, TCSO, arrived
4 at the house in response to Piper's call and Piper showed them what he had seen in
5 the opened garage. Upon first arriving at the premises and meeting with Piper the
6 officers had not yet applied for a search warrant. The officers knew Piper was not
7 the owner but believed he had been called to the property by the tenants. They also
8 knew Walt Cox was the owner/landlord.

9 13. In the garage, which the officers were led to by Piper, either through
10 the open front door or through the open overhead garage door, the officers saw
11 marijuana 'shake' (in a large plastic bag), heavy gauge electrical wiring, and Mylar
12 reflective material. They also could confirm that the large garage door had been
13 shut with foam sufficiently secure to prevent light and odors from leaving the
14 premises leading the officers to infer a marijuana growing operation had been
15 present at the premises.

16 14. Upon first entering the garage, being led there by Piper, the officers had
17 not yet applied for a search warrant.

18 15. Based on what Piper had showed them, supplemented by their own
19 observations made more significant by their prior training and experience,
20 Detective Elkins called the Thurston County Prosecutor's office and under their
21 direction applied for and was granted a search warrant admitted as Exhibit #1
22 (included the admission of the supplemental materials attached).
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27 FINDINGS OF FACT AND CONCLUSIONS OF LAW
28 PERTAINING TO CrR 3.6

1 16. After the issuance of the search warrant, Exhibit #1, the officers did a
2 more thorough search of 5015 21st Avenue which then yielded evidence that
3 indicated that there were co-conspirators involved in what appeared to be a
4 'marijuana grow' operation.

5 17. The evidence found at 5015 21st Avenue led officers to request a search
6 warrant for a second residence at 1601 Eastside St. in Olympia, on August 27,
7 2003, at a residence owned by defendant James Wege. This search warrant and the
8 accompanying material was admitted as Exhibit #2. That warrant was supported
9 by evidence discovered on August 5, 2003, through August 27, 2003.

10 18. The court incorporates all the facts found in the admitted Exhibits in
11 support of its ruling, in lieu of separately setting them out here herein, principally
12 because all counsel agree that if Search Warrant #03-60 is valid that Search
13 Warrant #03-73 is valid. This includes various documents that identified the
14 defendants, surveillance of the defendants' movements in relation to the
15 residences, power records and so on. The same stipulation and agreement does not
16 extend to Search Warrant #03-74 in the same way.

17 19. Based on evidence discovered at 1601 Eastside St. in Olympia a third
18 search warrant was applied for and granted at a residence of 9233 Quinalt Dr. NE,
19 Lacey, Washington. These Exhibits #3 and #4 were admitted but subject to later
20 argument as to their relevancy.
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27 FINDINGS OF FACT AND CONCLUSIONS OF LAW
28 PERTAINING TO CrR 3.6

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CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and subject matter of this case.

2. The search of the residence at 5015 21st Avenue SE, Lacey, Washington, did not violate either the Fourth Amendment of the United States Constitution or Washington Constitution, Article 1, § 7, since Michael Piper was called to the premises by both the tenant, Wege, and the landlord Cox to do repair work. This joint consent is an exception to the warrant requirement. The tenant did not have sole or undisputed possession of the leased premises. At best Wege, by calling in requesting repairs, assumed the risk that the landlord would enter and have the repairs made. This was not an entry pursuant only to the invitation of the landlord Cox.

3. It also appears that the tenant had abandoned the premises since they were completely vacant of such items as all clothing, furniture, appliances, bedding, etc. and only some miscellaneous documents, the damage, and the garage contents remained. There is no evidence of when the lease legally terminated but it is clear the tenant was no longer actually residing there.

4. Although ostensibly a constitutionally protected area, Piper saw both contraband and incriminating alterations to the premises in plain view. He was invited into the constitutionally protected area by both the tenant and the landlord. Based on Piper's information law enforcement had sufficient grounds under the Aguilar-Spinelli test to immediately obtain a search warrant grounded on his reliability and basis for knowledge. That would have been the most reliable course

27 FINDINGS OF FACT AND CONCLUSIONS OF LAW
28 PERTAINING TO CrR 3.6

1 of action. However, when they responded to Piper's call, apparently to corroborate
2 what he had said on the phone, responding without first seeking the warrant, they
3 also saw in plain view the contraband and incriminating alterations from either the
4 curtilage outside the now open overhead garage door as they approached or within
5 the garage at the invitation of Piper to come to the premises.

6 5. At the time the officers finally, sought a search warrant after
7 corroborating the information that Piper had first called and then showed them,
8 they had not searched any further than what Piper had already revealed and what
9 they could see in plain view. The scope of the government initial search did not
10 exceed the scope of Piper's private search (*sic.*) and what could be seen in plain
11 view. *State v. Dold*, 44 Wn. App. 519 (1986) and *State v. Clark*, 48 W. App. 850
12 (1987). . It is similar, but not identical, to the *Silver Platter Doctrine*. At no time
13 did Piper act as a state agent and at all times was merely a private citizen
14 informant.
15

16 6. The second warrant is also constitutionally valid for all the above
17 reasons plus the additional evidence found in the record attached to Exhibit 2, and
18 Search Warrant #03-73. The parties do not dispute that these two warrants rise or
19 fall together.

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21 Dated: ^{April} February 1, 2005

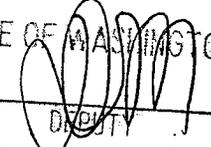
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23 RS/Richard D. Hicks
24 Richard D. Hicks, Judge
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27 FINDINGS OF FACT AND CONCLUSIONS OF LAW
28 PERTAINING TO CrR 3.6

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

JASON G. EISFELDT,

Appellant.

No. 33242-6-II

DECLARATION OF SERVICE

I, LORI A. HOLT, declare and state as follows:

I am over the age of eighteen years, a resident of the State of Washington, and am the Legal Assistant to the Attorney for the Appellant in this matter. I hereby certify that I sent a copy of the Appellant's Brief to David Bruneau, Thurston County Prosecutor's Office, via ABC Legal Messenger on the 26th day of January, 2006. Attached to this Declaration of Service is a copy of the ABC Legal Messenger slip indicating that he did receive the foregoing documents on the 26th day of January, 2006. In addition, a copy was sent to the Appellant, Jason G. Eisfeldt, at his address of: 6520 - 7th Avenue SE, Tumwater, Washington 98512.

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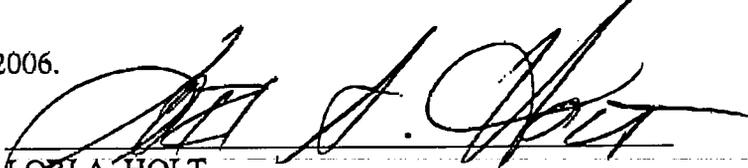
DECLARATION OF SERVICE - 1

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1ST day of February, 2006.


LORI A. HOLT