

66443-3 ORIGINAL

66443-3

No. 66443-3-I
King County Superior Court No. 09-1-05551-0 KNT

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

RENE J. SANTIAGO,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Cheryl Carey, Judge

APPELLANT'S OPENING BRIEF

David B. Zuckerman
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-1595

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I.
ASSIGNMENTS OF ERROR

- 1) The trial court erred in concluding that officers lawfully entered Rene Santiago's¹ home on February 28, 2008, prior to obtaining a search warrant. In that regard, Rene challenges the following findings and conclusions:
 - a) The trial court's apparent conclusion that the initial entry into the home was not a "search."
 - b) Conclusion of Law 2, which includes that the sole purpose of the initial entry into the home was a welfare check on Rene's daughter, L.S.
 - c) Conclusion of Law 5, which includes that Anthony Santiago gave the officers consent to enter the home.
 - d) Finding of Fact 1, which states that the CPS referral included an allegation that Rene had taken his daughter into a "locked room" with him while he was packaging methamphetamine.
 - e) Finding of Fact 2, which states that the CPS referral included concerns about "possible domestic violence in the home."

¹ Because several of the participants share the same last name, they will be referred to by their first names to avoid confusion. No disrespect is intended.

- f) Findings of Fact 3 and 5, to the extent they state or suggest that the sole reason that law enforcement accompanied the CPS worker to the home was for safety concerns rather than investigation of a crime.
 - g) “Finding of Fact” 8 states that Anthony “invited the officers inside the house.” This finding is mislabeled and should actually be reviewed as a conclusion of law. It is also erroneous.
 - h) Finding of Fact 12, to the extent it suggests that Anthony ever consented to the search of the house.
 - i) To the extent the trial court may have considered “community caretaking” as an alternative justification for the initial entry into the house, it erred because the appropriate legal standards were not met.
 - j) The trial court erred in failing to suppress the evidence obtained from the initial, warrantless entry.
- 2) The police obtained a warrant in reliance on information obtained during the warrantless entry. The trial court should have suppressed the evidence obtained during the search pursuant to the warrant because, without the illegally obtained evidence, there was no probable
-

cause to support the warrant. Rene challenges Conclusions of Law 1, 6 and 7 to the extent they suggest that the warrant was valid.

- 3) The trial court erred in admitting Anthony's DOL records into evidence.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a warrantless entry into a home a "search" for purposes of the Fourth Amendment and article I, section 7 of the Washington Constitution?
2. Did Anthony "consent" to a search when he walked into the house and the officers followed him in?
3. In the absence of an emergency, did the "community caretaking" exception to the warrant requirement justify the warrantless entry into the home?
4. After entering the home and arresting one occupant for possession of methamphetamine, the police obtained a warrant and seized the key evidence used against Rene at trial. Must the evidence be suppressed because, without the illegally obtained evidence, the warrant was not supported by probable cause?

5. Were Anthony's DOL records improperly admitted to impeach his credibility?

**III.
STATEMENT OF THE CASE**

A. PROCEDURAL HISTORY

On February 29, 2008, police searched Rene Santiago's house and found drugs and other times in a box in master bathroom. On August 11, 2009, Rene was charged with possession of methamphetamine with intent to deliver. CP 1-6. Rene filed two motions to suppress with various supporting materials. CP 7-68, 69-76. After holding a suppression hearing on September 27, 28, 29 and 30, 2010, the trial court denied the motion. 3RP 386-87; Supp. CP² ___ (Dkt. 89, Findings of Fact & Conclusions of Law, March 11, 2011). After a trial on November 2, 3 and 4, 2010, a jury found the defendant guilty. On December 20, 2010, Rene was sentenced to 12 months and one day. CP 102-09. Rene filed a timely notice of appeal on December 20, 2010. CP 110-19.

² Supp. CP refers to the Supplemental Designation of Clerk's Papers, which was filed with the King County Superior Court Clerk today.

B. FACTS RELATING TO SUPPRESSION HEARING

In 2008, Rene Santiago owned a home and lived at 1812 South 245th Place, Des Moines, Washington, with his wife Ruby Santiago and their two-year-old daughter, L.S. Rene's brother Anthony Santiago lived in an extra bedroom. Supp. CP ___ (Court's Finding of Fact 7). At that time, Rene had been an aircraft mechanic with Alaska Airlines for 9 years. Mechanics are routinely tested for drugs and Rene had always passed. CP 43-45. Ruby resides in the United States under an immigrant visa. She made statements to various people that she wished to get Rene in trouble so she could stay in the United States even after divorcing him. CP 22-27, 43-45, 48-58.

Around the beginning of 2008, Des Moines detective Robert Tschida received an anonymous tip concerning drug sales at the Santiago house, forwarded to him from the Drug Enforcement Agency (DEA). Tschida followed up on the DEA tip by going to the house and watching it for drug activity, but he did not observe any. 1RP 82-83. At the time, Tschida was a member of a task force focusing on drug dealers. 1RP 78.

On February 26, 2008, Child Protective Services (CPS) investigator Tabitha Pomeroy received a referral concerning L.S. 2RP 142-43, 151-52. A caller had reported concerns about L.S., the child of

Rene and Ruby Santiago. According to the caller, “the mother reports that she has seen methamphetamine in the home.” On one occasion, the mother said she saw Rene sorting methamphetamine into little bags while the child was in the room. “The mother has not reported any physical abuse by the father against her and their daughter.” Pretrial Ex. 2 at p. 3. Pomeroy explained that her agency must respond to a referral within 24 hours in emergency situations, and within 72 hours for non-emergencies. 2RP 144-45. Based on the information provided, CPS categorized the risk to the child in this case as “moderate” which meant that the investigation was “non-emergent.” 2RP 155. *See also* Pretrial Ex. 2. Pomeroy explained that she will respond in even less than 24 hours if the child is injured or in other serious peril. The 72-hour response time is used in cases such as this one where there is no immediate threat. 2RP 178. The CPS referral form includes the following question: “Is there a risk factor which places the child in danger of imminent harm?” The answer to that question is listed as “No.” Pretrial Ex. 2 at p. 8.

Pomeroy then contacted the Des Moines police because drug use and other criminal activity was alleged. She faxed them a copy of the referral report. 2RP 151-53. Pomeroy frequently requests police support

with her investigations for two reasons: to ensure her own safety and to investigate crimes. 2 RP 149-50.

Detective Mike Thomas of the Des Moines police received the CPS referral on February 26, 2008. 1RP 58; Pretrial Ex. 1. Thomas works for the “investigation unit” which deals with CPS referrals only if they involve potential crimes. 1RP 50-51. Thomas explained that when a situation is emergent and the child is in imminent risk, a patrol officer will usually respond with CPS to remove the child within hours of receiving the report; they will not wait two days as in this case. 1RP 64-65.

Thomas referred the matter to Detective Tschida. He testified that he chose Tschida because of his experience investigating drug cases. 1RP 63. Similarly, in his written report, Thompson stated that he referred the matter to Detective Tschida because “Det. Tschida investigates drug crimes.” Pretrial Ex. 1 at p. 1. “Det. Tschida agreed to meet with Tabitha Pomeroy *and investigate this complaint.*” *Id.* (emphasis added).

Pomeroy faxed a copy of her report directly to Tschida on February 27, 2008. 2 RP 156-57. The two spoke with each other on the same day. 1RP 88, 121. Tschida and Pomeroy went to the Santiago house on the evening of February 28, 2008, along with two officers, two detectives and a sergeant. Tschida brought so many people with him because he was

concerned about “possible drug implications” at the house. 1RP 90-91. Tschida acknowledged that he did not have probable cause to obtain a warrant based on what he knew at the time. 1RP 123.

According to Tschida, when the team approached the house, Anthony Santiago opened the garage door. Tschida explained: “we’re here to check on the child and then talk to Ruby.” 1RP 95. Anthony then “turned around and walked into the house.” *Id.* Tschida interpreted that movement as an invitation for the officers to enter the house. *Id.* “We followed in the door and we just walked right in.” 1RP 96. *See also* 1RP 117. He could not recall Anthony saying anything at the time or holding the door open for the officers. 1RP 95, 98. Tschida never claimed that Anthony made any gesture indicating that the officers should enter. Tschida did not inform Anthony that he could refuse to allow them to search, limit the scope of consent, or revoke consent at any time. 1RP 117-18.

Similarly, Officer Dominic Arico confirmed that Tschida asked Anthony if Ruby was inside and Anthony said yes. Anthony then turned his back on Tschida and started walking into the garage and the officers followed him in. 3RP 315-16, 334. No officer testified that he told

Anthony the officers wished to *enter* the house in order to speak with Ruby and confirm that L.S. was alright.

Arico did not see anything in the house or garage that would raise safety concerns. 3RP 339-40. The officers did not draw their weapons because the entry was not high-risk. 1RP 97.

Soon after the police entered, Pomeroy and Officer Jimenez began speaking with Ruby in a hallway near the garage. 1RP 96, 100. Tschida could not recall observing any problems with the child, L.S. 1RP 123-25.

When Tschida first entered the house, he saw a woman on the couch later identified as Teri Tindal.³ She started pushing something into the couch cushions. Tschida was concerned she was trying to hide something or retrieve a gun. Tschida had her stand up and Officer Arico retrieved the bag she had stuffed in the couch, which proved to contain a pipe and a baggy of methamphetamine. Tindal was arrested for possession of methamphetamine. 1RP 97-101. According to Tschida, Anthony asked the police to leave after they arrested Tindal. 1RP 103-04. Anthony then called his attorney, Eric Schurman, who spoke with Tschida and asked him to leave the house. Tschida and Anthony then went outside. 1RP 105-07.

Officer Jimenez testified that he entered the house through the front door. He did not claim that anyone invited him in. 2RP 191-93. He found Ruby and the child in no danger, and began speaking with Ruby. 2RP 205-06.

Anthony's version was quite different. He testified that about six officers approached the home on February 28 and showed their badges. They walked into the garage without permission. Anthony asked if they had a search warrant and raised his hands to block them, but they walked right by. 2RP 244-46. Anthony immediately called his lawyer, Eric Schurman. 2RP 246-49. Because Schurman was on speakerphone, the officers heard Schurman tell them not to enter the house. 2RP 262. Tschida said that he did not need to talk to the lawyer. 2RP 270. Had the officers simply asked Anthony to have Ruby come outside with her baby, he would have done so. 2RP 249-50.

Attorney Eric Schurman confirmed that he received a call from Anthony around the time the officers came to the home. Schurman asked if Anthony had consented to a search and Anthony said he had not. Schurman encouraged Anthony to hand the phone to the officers and could hear Anthony trying to do that. 2RP 272-75. When Anthony called a

³ Tindal was Anthony's girl friend. 3RP 343.

second time, Schurman did manage to speak with an officer. The officer's tone was hostile and he threatened to arrest Schurman for obstructing. 2RP 276-78.

Ruby told Officer Jimenez that she had seen Anthony and Rene using drugs, packing drugs and selling drugs in the house. 1RP 108.

Based on his observations regarding Tindal and the information provided by Ruby, Tschida promptly obtained a search warrant while the other officers guarded the house. App. 1 (copy of search warrant affidavit).⁴ When he returned with the warrant, the officers searched the house. 1RP 113-15. As discussed below, that search resulted in the primary evidence against Rene at trial.

The prosecutor's written response to the defense suppression motion includes the following: "The State does not intend to argue that the officers' entry into the Defendant's home was supported by consent or the emergency doctrine." CP 80.⁵ Rather, the prosecutor maintained that

⁴ An unredacted copy of the search warrant affidavit was admitted as Pretrial Exhibit 5 and considered by the trial court. During the jury trial, however, the document was removed, heavily redacted, and then admitted as Trial Exhibit 15. An agreed motion is currently pending before the superior court to settle the record by filing the unredacted affidavit as Pretrial Exhibit 12. Counsel will then file a supplemental designation of record so that the exhibit is properly before this Court. It was not possible to resolve this matter prior to filing the opening brief because opposing counsel was on vacation.

⁵ According to the State, a prior prosecutor previously made the same stipulation orally. 3RP 305.

“community caretaking” justified the warrantless entry into the home, with no requirement of an emergency. CP 84-86. During the suppression hearing, the same prosecutor confirmed again that there “wasn’t consent to search.” 3RP 299. She later changed her mind. 3RP 305. At the close of the suppression hearing, she mentioned the “emergency exception” while acknowledging that “I don’t think the facts fit very well.” 3RP 368. She did not claim there was any emergency in this case. 3RP 368-69. The prosecutor also suggested that a separate “community caretaking exception” applied. 3RP 369-70. Other than relying on Anthony’s “consent”, however, the prosecutor’s primary position seemed to be that there was no search at all prior to issuance of the search warrant. 3RP 370.

Although it is difficult to tell from the written findings, it appears that the trial court may have accepted the prosecutor’s position that the only “search” that took place was the one following issuance of the warrant. In her written findings, the trial court began her conclusions of law by stating that “[t]he defendant bears the burden of proving that a search conducted pursuant to a search warrant was improper.” Supp. CP ___ (Dkt. 89, Conclusion of Law 1). The final Conclusion of Law states: “The search of the defendant’s home was conducted pursuant to a search warrant. Therefore, the court does not find an illegal search.” Supp. CP

___ (Dkt. 89, Conclusion of Law 7). The court did not expressly address the fact that the search warrant was based on information obtained through the warrantless search of the house. The court did make some statements, however, that appear to be justifications for the warrantless entry. It found that Anthony “gave law enforcement and CPS limited consent to enter the home to check on the welfare of L.S.” Supp. CP ___ (Dkt. 89, Conclusion of Law 5). Apparently in furtherance of that conclusion, the court also stated that the police were not required to inform residents of their right to refuse entry because the purpose of the visit was a welfare check rather than a “knock and talk.” Supp. CP ___ (Dkt. 89, Conclusion of Law 2). The court did not expressly address in its written findings whether there was some alternative justification for the initial entry. In its oral findings, however, the court stated that entry into the home was made pursuant to the community caretaking function and was reasonable under the circumstances. 3RP 386. The written findings state that “the court incorporates by reference its oral findings and conclusions, the evidence presented, and the oral and written arguments of the parties.” Supp. CP ___ (Dkt. 89 at p. 4). Appellant will therefore address whether “community caretaking” could provide an alternative basis for the search.

C. TRIAL TESTIMONY

The only evidence of guilt presented against Rene at trial was the items seized from his bedroom. No witnesses testified that they observed him using or selling drugs.

At trial, Detective Tschida described his encounter in the home with Tindal, including her arrest for possession of methamphetamine. 5RP 648-49. He also described the evidence found in the later search pursuant to a search warrant. The police found a box in the vanity of the master bathroom. It contained some bags of methamphetamine, scales, and packaging materials. 5RP 655-59. Neither the box nor its contents were tested for fingerprints. 5RP 699. The house contained no items associated with methamphetamine manufacturing. 5RP 702-04.

The police also found over \$3,000 in cash in a safe. 5RP 674-75. They also found some guns, all of which were legally possessed. 5RP 611-12, 638. Although they were specifically looking for logs, ledgers, receipts or IOUs indicative of drug dealing, they found none. 5RP 614-16, 692-95. In Anthony's room, the police found some methamphetamine pipes with residue and some empty baggies. 5RP 679-80, 701.

Rene testified that in February, 2008, he was working the "graveyard" shift as an aircraft mechanic for Alaska Airlines. He had held

that job for nine years. Both the airline and the Port of Seattle require random drug testing. 6RP 795. Rene's brother Anthony was in a drug rehab program when Rene permitted him to move in. Anthony had nowhere else to go at the time. Anthony's girlfriend Teri Tindal, whom Rene did not know well, would stay in Anthony's room. 6RP 796-97, 799-800. Rene was aware that Anthony's friends would come over while Rene was at work, but they would leave when he returned home. 6RP 798. After the search of his house, Rene insisted that Anthony move elsewhere. 6RP 796.

Rene denied possessing any drugs. He had never seen the box found in his bathroom, or its contents. 6RP 799; 811-13. He agreed that the cash was his. Rene explained that it was quite common in the Philippines, where he grew up, to keep cash in the home. 6RP 797.

Anthony Santiago and Teri Tindal agreed that they would invite people over to the house at night, and that those people had access to the bathroom in the master bedroom. 6RP 770-72; 787. Although Tindal denied responsibility for the box found in the master bathroom, she conceded that she could hear an argument in the garage going on for about three minutes before the police entered the house. 6RP 768-69. She also acknowledged that the police arrested her for methamphetamine

possession when she tried to hide a bag containing methamphetamine behind the living room couch. 6RP 769-70. Anthony confirmed that Rene kicked him out of the house after the search. 6RP 787-88.

Detective Tschida conceded that Tindal, Anthony, or someone else could have moved the box containing methamphetamine into Rene's bathroom. 5RP 697.

Some additional facts are discussed below under the relevant section of argument.

IV. SUMMARY OF ARGUMENT

The recent Washington Supreme Court decision in *State v. Schultz*, 170 Wn.2d 746, -- P.3d -- (Jan. 13, 2011) – decided after the trial in this case – resolves any question regarding the legality of the search of Rene's home. First, *Schultz* explains that a citizen does not truly “consent” to police entry into his home by mere acquiescence. Here, under the version of facts most favorable to the State, Anthony came to the door when several officers approach. When the officers told him they wished to speak with Ruby and check on the welfare of L.S., Anthony turned his back on the officers and walked into the house without saying a word. The officers immediately followed him in. It is questionable whether the

conduct in this case rises even to the level of acquiescence since there is no proof that Anthony knew until after the fact that the officers were following him into the house.

Second, *Schultz* confirms that the police may not enter a home for “community caretaking” purposes unless there is an imminent threat of substantial injury. In this case, CPS and the police conceded that there was no emergent need to check on the welfare of Rene’s daughter.

The lead detective conceded that he did not have probable cause for a warrant until he entered the house, arrested one of the occupants for possession of methamphetamine, and interviewed Ruby. Because that information was illegally obtained, the search warrant was invalid and the key evidence seized during the second search must be suppressed. Since there was no evidence of guilt without that evidence, this Court should remand for dismissal.

In the alternative, the Court should reverse because Anthony’s DOL records were improperly admitted to impeach his and Rene’s testimony that Rene kicked Anthony out of the house after the search.

V. ARGUMENT

A. STANDARD OF REVIEW

A trial court's factual findings will be upheld if they are supported by "substantial evidence." *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). Legal conclusions are reviewed de novo. *State v. Smith*, 165 Wn.2d 511, 516, 199 P.3d 386 (2009).

Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." "[T]he closer officers come to intrusion into a dwelling, the greater the constitutional protection." *State v. Ferrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998) (citation and internal quotation marks omitted). The best source of "authority of law" is a warrant. *See State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007); *Ferrier*, 136 Wn.2d at 115-19. "However, there are a few jealously and carefully drawn exceptions to the warrant requirement." *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004) (citation and internal quotations marks omitted). "When the State asserts an exception authorizes its intrusion into private affairs, it bears the heavy burden of establishing that the exception applies." *State v. Schultz*, 170 Wn.2d 746, para. 12⁶, -- P.3d -- (Jan. 13, 2011).

⁶ As of the writing of this brief, page citations are not available.

B. ANY EVIDENCE FOUND IN THE HOME SHOULD HAVE BEEN SUPPRESSED AS FRUITS OF AN ILLEGAL SEARCH

1. The Officers' Warrantless Entry Into the Home was a "Search," Regardless of Their Purpose

Under the Fourth Amendment, a "search" occurs whenever law enforcement intrudes into a place where a defendant had a reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). While this test may be difficult to apply in some cases, there has never been any question that a citizen has a reasonable expectation of privacy in his own home. "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (citation and internal quotations omitted). *See also, Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999) (social worker's entry into home to interview victim of alleged child abuse was an unconstitutional search). Thus, unless a valid exception to the warrant requirement applied, the warrantless entry into Rene's home was an illegal search.

It follows with greater force that the warrantless entry was subject to the protections of the Washington Constitution. Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his

home invaded, without authority of law.” (Emphasis added). “It is now settled that article I, section 7 is more protective than the Fourth Amendment, and a *Gunwall* analysis is no longer necessary.” *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003). Citizens in this State always have a privacy interest in “activities occurring within the confines of the home, [] which [they are] entitled to keep from disclosure absent a warrant.” *State v. Young*, 123 Wn.2d 173, 184, 867 P.2d 593 (1994). Thus, “[t]he heightened protection afforded state citizens against unlawful intrusion into private dwellings places an onerous burden upon the government to show a compelling need to act outside of our warrant requirement.” *Young*, 123 Wn.2d at 186 (internal quotation marks and citation omitted). *See also, State v. Browning*, 67 Wn. App. 93, 96, 834 P.2d 84 (1992) (warrantless entry into home by building inspector constituted a search).

Nevertheless, the trial court in this case failed to acknowledge that the initial entry into Rene’s home was a search.

2. Anthony’s Conduct did not Amount to Consent to Enter Rene’s Home

As noted above, Detective Tschida, Officer Jimenez, and Anthony Santiago gave three different versions of the officers’ entry into the home.

The trial court apparently accepted Tschida's version, which was the one most favorable to the State. Even under that version, however, Anthony's conduct does not amount to "consent" to search as a matter of law.

As a preliminary matter, the trial court's findings on this issue must be addressed. The court stated under Finding of Fact 8 that "Anthony Santiago invited the officers inside the house." Supp. CP ____ (Dkt. 89, Finding of Fact 8). The court then stated under Conclusion of Law 2 that "Anthony Santiago gave law enforcement and CPS limited consent to enter the home to check on the welfare of L.S." Supp. CP ____ (Dkt. 89 at Conclusion of Law 2). However, whether the issue is phrased as "consent" or as an "invitation" it is not a finding of fact but a legal conclusion. *Cf. Grundy v. Brack Family Trust*, 151 Wn. App. 557, 567 n.7, 213 P.3d 619, *review denied*, 168 Wn.2d 1007, 226 P.3d 781 (2009) (trial court's finding that a party violated a duty of care not to intrude on another's property should have been labeled as a conclusion of law rather than a finding of fact). Conclusions of law mislabeled as findings of fact are reviewed *de novo*. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986); *Alexander Myers & Co., Inc. v. Hopke*, 88 Wn.2d 449, 565 P.2d 80 (1977).

It is undisputed that Anthony never said anything to the officers that could be considered an invitation or consent to enter. Similarly, there

was no suggestion that he made any gesture, such as a wave of the hand, to indicate that the officers should enter.⁷ Rather, even under the version of facts most favorable to the State, Anthony merely turned and walked into the house after the officers said they would like to check on the welfare of L.S. Whether that amounts to consent for the officers to enter is a legal conclusion drawn from the facts.

It is also an erroneous legal conclusion. That is clear from the very recent decision of the Washington Supreme Court in *State v. Schultz*, *supra*, which involves facts remarkably similar to those in this case.⁸ In *Schultz*, the police received a telephone call from a resident of an apartment complex about a male and female yelling. When the officers arrived, they heard a man and woman talking with raised voices. When the officers knocked on the door, Schultz, the female, appeared agitated and flustered. She at first denied anyone else was there, but when an officer said she heard a male voice, Schultz called for Robertson. “Schultz then stepped back, opened the door wider, and Officer Malone followed Schultz inside.” *Id.* at para. 3. Schultz’s version was more favorable to

⁷ If the court intended Finding of Fact 8 to mean that Anthony *did* expressly invite the officers into the home, then the finding is clearly not supported by substantial evidence.

⁸ The trial court did not have the benefit of the *Schultz* decision at the time of the suppression hearing.

her but “[u]nder either version, it appears that neither officer requested permission to enter the apartment, nor did the officers inform Schultz or Robertson that they could refuse a search. Neither Schultz nor Robertson asked the officers to leave, nor attempted to prevent their entry.” *Id.* at para. 4. The trial judge found that the defendant “acquiesced” to the entry and noted that “Schultz did not object.” *Id.* After questioning the two for a while, the officers noted a handgun and a marijuana pipe and ultimately found more narcotics. *Id.* at para. 7. “Schultz then revoked her consent for a search” and the officers sought and received a search warrant. *Id.* at para. 8.

In reversing the trial court, the Supreme Court emphasized the sanctity of the home under the Washington Constitution.

Schultz contends the officers’ entry into her apartment violated article I, section 7 of the Washington Constitution, which provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Under our constitution, the home enjoys a special protection.

Id. at para. 11 (citations and internal quotations omitted). “Protection from searches without authority of law may be waived by meaningful, informed consent. When the State asserts an exception authorizes its intrusion into private affairs, it bears the heavy burden of establishing that the exception applies.” *Id.* at para. 12 (citations omitted).

The Court concluded that Shultz's "silent acquiescence" could not waive her right to be free from a warrantless intrusion into her home. *Id.* at para. 17. "Individuals do not waive this constitutional right by failing to object when the police storm into their homes. Nor do they waive their rights when the police enter their homes without their consent just because they are too afraid or too dumbfounded by the brazenness of the action to speak up." *Id.*

The facts of this case are even stronger than in *Schultz* because it does not appear that Anthony even "acquiesced" in the officers' entry. No officer claimed that Anthony opened the door wider, as Schultz did, before they came in. In fact, the officers did not even claim that Anthony was in a position to see them enter. Rather, the testimony of officers Tschida and Arico was that they told Anthony they would like to check on L.S. and talk with Ruby, and that he then turned his back on them and walked into the house without saying a word. The officers then immediately followed him in. *See* section III(B), above. Thus, the State had no proof that Anthony was even aware that the officers were entering the house until after the fact.

Further, the officers did not claim that they told Anthony they needed to enter the house (and in fact they did not) in order to accomplish

their stated goals. Anthony would likely have understood them to be asking him to bring Ruby and L.S. outside. Thus, even by the officers' testimony, there was no clear indication that Anthony understood that the officers *wished* to enter the house, much less that he authorized them to do so.

Thus, the officers' entry into the house was not supported by Anthony's "consent."

3. "Community Caretaking" did not Provide an Independent Basis for Entering the Home

As discussed above, the trial prosecutor believed that "community caretaking" provided an alternative basis for the officers' warrantless entry into the home, even though there was no emergency. The trial court apparently agreed. This reasoning is flawed because warrantless entries into the home invariably require a true emergency, even when the police are motivated by community caretaking rather than investigation of a crime. Although the federal and state courts have sometimes differed in the terminology used in such settings, they are quite consistent regarding the fundamental principles.

The notion of a "community caretaking exception" to the warrant requirement stems from *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct.

2523, 37 L.Ed.2d 706 (1973). In that case, a Chicago police officer named Dombrowski was arrested for DUI while visiting Wisconsin. The Wisconsin police believed that Chicago officers were required to keep a service revolver with them at all times. When they could not find a revolver on Dombrowski's person, they searched the car for it because it would endanger the public if it fell into the wrong hands. They then found evidence tying Dombrowski to a murder. The Supreme Court held that the search of Dombrowski's vehicle was permissible because it was the result of a police officer's community caretaking function, "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441. The Court stressed that its decision was based in large part on the distinction between searches of motor vehicles and dwelling places. The Court noted that "the result might be the opposite in a search of a home." *Cady*, 413 U.S. at 440.

It appears that the U.S. Supreme Court has relied on the community caretaking function to uphold warrantless searches in only two other cases, both of which involved automobiles. *See Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). The

Opperman court explained that “warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not.” *Opperman*, 428 U.S. at 367 (other citations omitted). Citizens have a lower expectation of privacy in automobiles because “automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements.” *Id.* at 368. As the *Opperman* court pointed out, the Supreme Court has expressly rejected such reasoning regarding searches of buildings.

In *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), and *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967), the Court held that a warrant was required to effect an unconsented administrative entry into and inspection of private dwellings or commercial premises to ascertain health or safety conditions.

Id. at 367 n. 2.

In contrast, the Supreme Court has upheld the warrantless search of a home under the “emergency aid exception” to the warrant requirement. *Michigan v. Fisher*, -- U.S. --, 130 S.Ct. 546, 175 L.Ed.2d 410 (2009). Under this exception, officers “may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” *Id.* at 548, quoting *Brigham City v.*

Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). The Court, however, has found warrantless home searches unreasonable in the absence of a true emergency. *Thompson v. Louisiana*, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984).

The Third Circuit recently canvassed decisions throughout the circuits and concluded that all have rejected the notion that “community caretaking” can ever justify a warrantless entry into a home in the absence of an emergency. *Ray v. Township of Warren*, 626 F.3d 170 (3rd Cir. 2010). While the Sixth and Eighth Circuits have used the phrase “community caretaking” in the context of a home search, they are actually applying “what appears to be a modified exigent circumstances test, with perhaps a lower threshold for exigency if the officer is acting in a community caretaking role.” *Ray*, 626 F.3d at 176.

Similarly, Washington courts have at times used the phrase “community caretaking” to apply to both “situations involving . . . emergency aid” and “routine checks on health and safety.” *State v. Acrey*, 148 Wn.2d 738, 749, 64 P.3d 594 (2003) (citations and internal quotations omitted). “The emergency aid function, as contrasted to routine checks on health and safety, involves circumstances of greater urgency and *searches resulting in greater intrusion.*” *Id.* at 750 n.39 (citations and internal

quotations omitted; emphasis added). The courts must “cautiously apply the community caretaking function exception because of a real risk of abuse.” *Id.* at 750. (citations and internal quotations omitted). This exception can apply to a “routine stop for a safety check,” but only if it is “necessary and strictly relevant to performance of the noncriminal investigation.” *Id.*

In *Acrey*, police officers responded to a 911 call reporting several young boys fighting in a commercial area of Seattle after midnight. Although the officers determined that the boys were only playing, they were concerned for the boys’ safety since there were no residences or open businesses in the area and the boys were far from home. They detained the boys only long enough to contact their parents and determine the parents’ wishes. *Id.* at 743-44. The Court found that minimal intrusion to be reasonable. *Id.* at 753-54.

As the *Acrey* court noted, “greater intrusions” – even when made for the purpose of community caretaking – can be justified only under the “emergency aid exception.” As discussed above, there is no greater intrusion upon personal liberty than an entry into the home.

To be sure, Washington courts have sometimes used the phrase “community caretaking” rather than “emergency aid” when analyzing

searches of a home. That may account for the prosecutor's and judge's confusion in this case. A careful reading of the cases, however, shows that – regardless of terminology – the Washington courts have invariably required a true emergency before permitting a warrantless entry into a home. *See, e.g., State v. Thompson*, 151 Wn.2d 793, 92 P.3d 228 (2004) (applying “community caretaking exception” to search of trailer and finding that it was not satisfied because there was no “immediate need for assistance for health or safety concerns”); *State v. Hos*, 154 Wn. App. 238, 225 P.3d 389, *review denied*, 109 Wn.2d 1008, 234 P.3d 1173 (2010) (court finds that “community caretaking exception” justified entry into house when deputy could see through window that defendant appeared to be unconscious or dead and could not be roused by loud yelling or knocking); *State v. Williams*, 148 Wn. App. 678, 201 P.3d 371, *review denied*, 166 Wn.2d 1020, 217 P.3d 336 (2009) (applying “community caretaking function” to search of hotel room, but concluding that the search was illegal because no one in the room “was in immediate danger”); *State v. Ibarra-Raya*, 145 Wn. App. 516, 187 P.3d 301 (2008) (applying “emergency exception” to search of house and finding no true emergency existed); *State v. Link*, 136 Wn. App. 685, 697, 150 P.3d 610, *review denied*, 160 Wn.2d 1025, 163 P.3d 794 (2007) (although officer

was investigating a crime that could endanger the children in an apartment, “he was not rendering immediate aid to protect their well-being,” and therefore no exception to the warrant requirement applied); *State v. White*, 141 Wn. App. 128, 168 P.3d 459 (2007) (applying “community caretaking exception” to search of an irrigation room but noting that the exception is satisfied only if “the claimed emergency was not simply a pretext for conducting an evidentiary search”); *State v. Schlieker*, 115 Wn. App. 264, 62 P.3d 520 (2003) (applying “emergency exception” to search of a trailer and finding that it was not satisfied because the claimed emergency was a pretext); *State v. Menz*, 75 Wn. App. 351, 880 P.2d 48 (1994), *review denied*, 125 Wn.2d 1021, 890 P.2d 463 (1995) (applying “emergency exception” to search of a house for a domestic violence victim); *State v. Downey*, 53 Wn. App. 543, 768 P.2d 502 (1989) (finding that “emergency exception” justified warrantless entry into a home where there was imminent danger of an explosion).

Any doubt about the correct analysis under article I, section 7 was laid to rest in *State v. Schultz*, 170 Wn.2d 746, -- P.3d -- (Jan. 13, 2011), which is discussed above in regard to consent. The Court explained that searches of a home purportedly made for purposes of community

caretaking are properly analyzed under the “emergency aid exception.” *Id.* at para. 13.

Under this court’s cases, to justify intrusion under the emergency aid exception, the government must show that “(1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched.” *Id.* (citing *Kinzy*, 141 Wash.2d at 386-87, 5 P.3d 668). The Court of Appeals has suggested three more factors: (4) there is an imminent threat of substantial injury to persons or property; (5) state agents must believe a specific person or persons or property are in need of immediate help for health or safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search. *State v. Lefler*, 142 Wash. App. 175, 181, 183, 178 P.3d 1042 (2007) (citing *State v. Lawson*, 135 Wash. App. 430, 437, 144 P.3d 377 (2006) (specific persons and imminent threat); *State v. Ladson*, 138 Wash.2d 343, 349, 979 P.2d 833 (1999) (pretext)). We agree.

Id. at para. 13. “[T]he failure to meet any factor is fatal to the lawfulness of the state’s exercise of authority.” *Id.* at para. 22 n.5.

4. The Emergency Aid Exception to the Warrant Requirement does not Apply Here

In this case, there seems to be no dispute that the officers’ initial entry into the Santiago home fails at least two elements of the *Schultz* test: (4) that there is an imminent threat of substantial injury to persons or property; and (5) that state agents must believe a specific person or

persons or property are in need of immediate help for health or safety reasons. The State conceded below that it could not prove that an emergency existed, and the trial court made no findings to support an “imminent threat” or a need for “immediate help.” In fact, as discussed above in section III(B), CPS and the police expressly acted with the understanding that the situation was “non-emergent” and that the child was *not* in danger of “imminent harm.” Because factors 4 and 5 are not satisfied, the search of the home was invalid.

Although the test under the Fourth Amendment is not quite as strict, the result would be the same in this case. “Circumstances involving the protection of a child's welfare . . . may present an exigency permitting warrantless entry, but only if the officer reasonably believes that someone is in *imminent* danger.” *Ray v. Township of Warren*, 626 F.3d 170, 177 (3rd Cir. 2010) (emphasis in original; internal quotation marks and citation omitted). *See also, Calabretta v. Floyd*, 189 F.3d 808, 813-14 (9th Cir. 1999) (warrantless entry of police and social worker into home to check on welfare of child was unconstitutional absent “reason to fear imminent harm”).

Because the failure of any *Schultz* factor invalidates the search, there is likely no need to address the remaining factors. In an excess of

caution, however, Rene does challenge the applicability of factor 6⁹: “the claimed emergency is not a mere pretext for an evidentiary search.”

Earlier cases involving community caretaking have noted that police involvement under this exception must be “totally divorced from the detection, investigation or acquisition of evidence relating to the violation of the criminal statute.” *State v. White*, 141 Wn. App. at 141, quoting *State v. Houser*, 95 Wn.2d 143, 151, 622 P.2d 1218 (1980). Here, the officers’ actions and statements show that at least one of their motives was to conduct a criminal investigation into methamphetamine sales.

As discussed above, Detective Tschida had been investigating the Santiago home for a month or two *prior* to the CPS involvement. After receiving an anonymous tip of methamphetamine sales from DEA, he conducted surveillance on the house but was unable to gather any evidence to support the tip. Then, when CPS requested assistance in conducting a welfare check on L.S., the matter was miraculously assigned to the same detective. Both Detective Thompson and CPS social worker Pomeroy acknowledged that the police involvement was not merely to support and protect Pomeroy but also to investigate drug crimes.

⁹ Santiago is thereby challenging Conclusion of Law 2 and, to the extent they support that conclusion, Findings of Fact 3 and 5.

It is true that the trial court found the officers were present solely to ensure safety rather than to investigate crimes. As noted above, findings of fact are generally upheld if supported by “substantial evidence.” In view of the significant privacy concerns with warrantless searches, however, the appellate courts have treated trial court findings regarding the officers’ motives with a measure of skepticism. For example, in *State v. Schlieker*, 115 Wn. App. 264, 62 P.3d 520 (2003), the trial court entered a factual finding that officers entered a trailer out of concern for the safety of Schlieker and another man. *Id.* at 271. This Court disagreed. “[T]he deputies’ actions following their entry, coupled with their knowledge up to that point, do not satisfy us that the claimed emergency was more than a pretext for conducting an evidentiary search.” *Id.* See also, *State v. Ibarra-Raya*, 145 Wn. App. 516, 522, 187 P.3d 301 (2008) (appellate court must consider “whether the officer’s acts were consistent with his or her claimed motivation.”), quoting *State v. Downey*, 53 Wn. App. 543, 545, 768 P.2d 502 (1989). Thus, this Court should find that the sixth *Schultz* factor is not satisfied in this case.

As noted above, Detective Tschida testified at trial about his observations of Tindal and the drugs seized from her. That evidence should have been suppressed because it was based on an illegal search of

the house. In addition, as discussed below, the evidence obtained through the search warrant should have been suppressed because the search warrant was the fruit of the illegal entry.

5. The Search Warrant Affidavit is Invalid Because it was Based on Information Illegally Obtained During the Prior Search

“Generally, evidence seized during an illegal search is suppressed under the exclusionary rule.” *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005) (citation omitted). “In addition, evidence derived from an illegal search may also be subject to suppression under the ‘fruit of the poisonous tree doctrine.’” *Gaines*, 154 Wn.2d at 717 (citations omitted). Unlike the Fourth Amendment, article I, section 7 focuses on the rights of the individual rather than on the reasonableness of the government action and is thus not subject to the good faith or inevitable discovery exception to the exclusionary rule. *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009) (rejecting inevitable discovery doctrine under article I, section 7); *State v. Afana*, 169 Wn.2d 169, 184, 233 P.3d 879 (2010) (rejecting good faith doctrine under article I, section 7). Rather, the exclusionary rule is mandatory under our state constitution because it “saves article I, section 7 from becoming a meaningless promise. . . . Exclusion provides a remedy for the citizen in question and

saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence.” *State v. Ladson*, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999) (citations omitted).

When information procured through a violation of article I, section 7 is included in a search warrant application later used to seize evidence of a crime, that illegally obtained information must be stricken from the warrant application and the court must then determine whether the remaining information provides probable cause to issue the warrant. *Gaines*, 154 Wn.2d at 719-20. “This remedy finely balances the rights of the accused with society’s interest in prosecuting criminal activity and ensures that the State is placed in neither better nor worse position as a result of the officers’ improper actions.” *Gaines*, 154 Wn.2d at 720.

In this case, Detective Tschida conceded that he did not have probable cause to obtain a warrant prior to his warrantless entry into Rene’s house. His concession was appropriate. The detective had an anonymous tip, forwarded to him through DEA, that drug dealing was taking place in the house.

In determining whether information provided by an informant establishes probable cause to issue a search warrant, Washington applies the two-part test set forth in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Under the *Aguilar-*

Spinelli test, the reliability of an informant is established by showing “underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; [basis of knowledge prong] and ... underlying circumstances from which the officer concluded that the informant was credible or his information reliable [veracity prong].” *State v. Jackson*, 102 Wash.2d 432, 435, 688 P.2d 136 (1984).

State v. Smith, 110 Wn.2d 658, 662-63, 756 P.2d 722 (1988), *cert. denied*, 488 U.S. 1042, 109 S.Ct. 867, 102 L.Ed.2d 991 (1989).

Here, Tschida had no idea what the informant based his tip on and had no ability to judge the informant’s credibility. In fact, Tschida’s surveillance of the house tended only to disprove the informant’s claims. The subsequent tip to CPS added little. Although some additional detail was provided, the tip was still anonymous so Tschida could not evaluate the caller’s credibility. *Cf. State v. Jackson*, 102 Wn.2d 432, 442, 688 P.2d 136 (1984) (anonymous tip will provide probable cause for warrant only if “sufficiently supplemented by independent police investigation” confirming its accuracy).

After entering the house, however, the officers actually seized some methamphetamine and obtained a statement from Ruby. The seizure of methamphetamine tended to confirm Ruby’s claim that Rene was dealing drugs in the house.

Thus, because the search warrant was the fruit of the unlawful entry into the house, any evidence seized pursuant to the search warrant should have been suppressed.

6. Certain Other Factual Findings are Not Supported by Substantial Evidence

Rene challenges certain additional factual findings of the trial court, although they may not be critical to the result.

Finding of Fact 1 states, among other things, that the CPS referral included an allegation that Rene had taken his daughter into a “locked room” with him while he was packaging methamphetamine. In reality, the referral does claim that Rene packaged methamphetamine in the presence of his daughter, but does not state that he did so in a locked room. *See* Pretrial Ex. 2. Ruby made the allegation of the locked room *after* the search of the house. *See* App. 1.

Finding of Fact 2 states that the CPS referral included concerns about “possible domestic violence in the home.” In fact, the referral states: “The mother has not reported any physical abuse by the father against her and their daughter. The referent believes there is emotional abuse of the mother by the father.” Pretrial Ex. 2 at p. 3. There is no allegation that Rene was violent towards anyone.

C. DOL RECORDS CONCERNING ANTHONY SANTIAGO WERE IMPROPERLY ADMITTED INTO EVIDENCE

After the defense presented its case, the prosecutor sought to present copies of Anthony's driver's license and registration, which still listed his address as Rene's house. 6RP 825-26. Supp. CP ___ - ___ (Trial Exs. 19-20). Defense counsel objected that the prosecutor had failed to question Anthony about his records during his testimony. 6RP 833-35; 840. The court overruled the objection. 6RP 840-41.

The State apparently viewed the DOL records as a prior inconsistent statement of Anthony regarding where he lived. ER 613(b) ("Extrinsic Evidence of Prior Inconsistent Statement of Witness") states:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

There are two problems, however, with relying on this rule. First, Anthony never made a statement at trial that could be inconsistent with the driving records. On cross-examination, the prosecutor asked Anthony where he was currently living. He began to name a street number but then faltered, apparently forgetting the full address. The prosecutor immediately dropped the subject. 6RP 788. She never directly asked Anthony whether he currently lived at Rene's house. *See* 5D Wash. Prac.,

Handbook Wash. Evid. ER 613, comment (3)(b) (2010-11 ed.) (“If a witness has not yet testified, or refuses to testify about a particular matter, the witness's prior out-of-court statements are inadmissible because there is no testimony to impeach.” (citation omitted)). This principal applies when, as here, the witness claims a lack of memory. *Id.* at comment (5)(c).

Second, the State did not give Anthony a chance to explain whatever statements he may have made to DOL, as required by the rule. *See also, State v. Horton*, 116 Wn. App. 909, 916-17, 68 P.3d 1145 (2003) (counsel must call inconsistent statements to witness’s attention, give her an opportunity to explain, and arrange for her to remain in court when extrinsic evidence is presented). Presumably, Anthony would have explained that he did not bother to contact DOL about his change of address after Rene kicked him out of the house.

Alternatively, the State might argue that the DOL records were admissible under ER 608(b) (“Specific Instances of Conduct”).

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another

witness as to which character the witness being cross-examined has testified.

The State cannot rely on this rule for admission of the DOL records, however, because they are “extrinsic evidence.” *State v. Barnes*, 54 Wn. App. 536, 540, 774 P.2d 547 (1989) (if witness denies the specific instance of conduct on cross-examination, the inquiry is at an end; the cross-examiner must “take the answer” of the witness). At most, the State could have asked Anthony whether he told the DOL that he lived at Rene’s house. Regardless of his answer, it could not have followed up by presenting the DOL records.

While Anthony’s DOL records might seem to be a small matter, the State’s closing argument turned them into a major issue. The prosecutor reminded the jurors that it was their job to judge the credibility of witnesses. 6RP 866. She then argued that the DOL records proved that both Rene and Anthony were liars and should not be believed about anything.

Remember yesterday the Defendant testified that after the drugs were located in his home, he threw his brother out of the house. And Anthony testified that he was also thrown out of the house after the drugs were located in his brother’s bedroom. And remember yesterday when the State asked Anthony for his address, Anthony couldn’t give you his address. And the reason why is because Anthony’s still living at the Defendant’s home on 245th in Des Moines. So when Anthony got up there yesterday and took

the witness stand, swore to tell you the truth, he didn't tell you the truth and neither did the Defendant.

6RP 867.

In his argument, defense counsel pointed out that many people do not update their addresses with DOL when they move, and that might be particularly true of a drug addict. 6RP 893. In rebuttal, the prosecutor once again argued forcefully that the records showed that Anthony was lying. 6RP 899-900.

Well, the thing is, the reason why that's important, why that evidence is important is because those two weren't being honest with you. The Defendant wasn't being honest with you, and Anthony wasn't being honest with you. And when you assess the credibility of those witnesses, I want you to think about that. That's why that's important.

6RP 900.

It is true, as the prosecutor argued, that the credibility of Anthony and Rene was central to the case. Because the prosecutor improperly impeached their credibility, this Court should reverse. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (evidentiary error is not harmless if, within reasonable possibilities, it affects the trial's outcome).

VI.
CONCLUSION

Because the search of Rene's home was unlawful, the Court should rule that the seized evidence should have been suppressed. Because there was no other evidence that could support guilt, the Court should remand with instructions to dismiss. In the alternative, the Court should reverse because of the improper admission of Anthony's driving records and remand for a new trial.

DATED this 4th day of April, 2011.

Respectfully submitted,



David B. Zuckerman, WSBA #18221
Attorney for Rene J. Santiago

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on the following:

Appellate Unit
King County Prosecutor's Office
516 Third Avenue, W554
Seattle, WA 98104

Mr. Rene Santiago #346156
Larch Corrections Center
15314 NE Dole Valley Road
Yacolt, WA 98675-9531

April 4, 2011
Date

Michael A. Schueler
Michael Schueler

2011 APR -5 10:10 AM
KING COUNTY COURTHOUSE
SEATTLE, WA

FILED

FEB 28 2008

South Div - Burien
King County District Court

STATE OF WASHINGTON) NO: **KEN001958**
ss
COUNTY OF KING)

AFFIDAVIT FOR SEARCH WARRANT

The undersigned on oath states: I believe that;

- (X) Evidence of the Crime of Violation of the Uniform Controlled Substances Act,
- (X) Contraband, the fruits of the crime, or things otherwise criminally possessed, and
- () Weapons or other things by means of which a crime has been committed or reasonably about to be committed, and
- () A person for whose arrest there is probable cause, or who is unlawfully restrained is/are located in, on or about the following described premises, vehicle or person:

Location:

1812 S 245th Pl, Des Moines, Washington. A single story house tan in color and a 1997 Chevy Suburban license 208TEG registered to Anthony Santiago

That my beliefs are based on the following;

That I, R. K. Tschida am a fully commissioned Detective for the Des Moines Police Department assigned to the Investigation Unit. I have been a Police Officer for approximately 19 years and I have investigated approximately 100 narcotics cases both as a lead investigator or co- investigator involving cocaine, marijuana, methamphetamine, heroin, and prescription narcotics. I have previously been assigned as a general detective for the City of Des Moines, the DEA MET team, the DEA HIDTA task force, and am currently assigned to a multi agency street crimes unit focusing on street level narcotics dealers in the city of Des Moines and City of SeaTac Washington. I have received in excess of 200 hours of Criminal Investigations training from the Washington State Criminal Justice Training Center, Western States Information Network and a variety of other host trainers. This training has included, but is not limited to, criminal investigations, surveillance techniques, sting operations, one party consent, crime scene investigations, interviewing techniques, drug investigator, financial asset removal, and clandestine lab tech.

My awareness of drug trafficking practices, as well as my knowledge of drug use and distribution techniques as set forth in this affidavit arise from the following: (a) my involvement in prior drug investigations and searches during my career as a law enforcement officer, as previously described; (b) my involvement on a number of occasions in debriefing confidential informants as cooperating individuals in prior investigations, as well as what other agents and

police officers have advised me when relaying the substance of their similar debriefing, and the results of their own investigations, and other intelligence information provided through other law enforcement agencies.

Officer Clem Jimenez has been a police officer for the Port of Seattle Police for over Nineteen years. Has work as a Detective five of these years. He is Filipino and grew up speaking Tagalog in his home along with English and speaks it on an everyday basis.

Supportive Evidence Regarding Scope of Search

Individuals involved in the distribution of controlled substances and the collection of the related proceeds frequently maintain addresses and telephone numbers of drug trafficking associates and customers. These records are maintained in secure places where the individuals have ready access to them, including on their person, in their residences, in their vehicles, and in storage facilities under their control.

Individuals involved in the distribution of controlled substances and the collection of the related proceeds frequently maintain records, in some form, of their unlawful drug trafficking and money laundering activities, including books, records, notes, receipts, ledgers, balance sheets, bank records, money orders, and other documents evidencing such activity. These records are often created in code. These records include debts and collections involving drugs and money from the transportation, acquisition and distribution of drugs.

Individuals involved in the distribution of controlled substances frequently maintain paraphernalia for packaging, weighing and distribution of their illegal drugs in such secure locations. The paraphernalia often includes, but is not limited to, scales, plastic bags and diluting/cutting agents, chemicals, mixing agents, items used to mask the odor or presence of narcotics, and to transport controlled substances. (d) Individuals involved in the distribution of controlled substances and the collection of the related proceeds frequently maintain records, books, receipts, notes, ledgers, money orders, IOU's, buyer/seller lists, travel documents, and other papers, relating to the transportation, ordering, possession, sale and distribution of controlled substances, in such secure locations. When computers are present, such drug trafficking information has also been known to be stored on such computers.

Individuals involved in the distribution of controlled substances and the collection of the related proceeds sometimes take or cause to be taken photographs and video recordings of themselves, their associates, their property and their illegal product, and store those items at premises within their security and control.

Individuals involved in the distribution of controlled substances and collection of the related proceeds often maintain communication devices such as cellular phones, radios, pagers, phone answering machines, blackberries, person digital assistants, and scanners in furtherance of their illicit activities and those devices frequently have in their memories the phone numbers of other traffickers and messages from other traffickers.

Individuals involved in the distribution of controlled substances and the collection of the related proceeds often maintain amounts of money, financial instruments, jewelry and valuables that are proceeds of or intended to be used to facilitate drug transactions.

Individuals involved in the distribution of controlled substances and the collection of the related proceeds often maintain weapons, including guns and ammunition, at secure locations such as their premises and in their vehicles, in order to protect their illegal drug enterprise.

Individuals involved in the distribution of controlled substances and the collection of the related proceeds generate criminal profit and attempt to legitimize those profits through money laundering activities. To accomplish this task, these individuals often utilize businesses and business records, including false and fictitious business records, accounts in foreign and domestic banks, securities, cashier's checks, money drafts, letters of credit, brokerage houses, real estate shell corporations, and business fronts; and sometimes transfer to third persons or purchase in another person's name, real and personal property.

Since the Government's efforts at seizing and forfeiting drug-related assets have been widely publicized in the news media and by word of mouth, individuals involved in the distribution of controlled substances often place assets in the name(s) of others to avoid detection, seizure, and forfeiture of those assets by government agencies. Even though those assets are in another person's name, drug traffickers continue to use the assets and exercise dominion and control over them.

Individuals involved in the distribution of controlled substances often will establish and/or use a business as a "front" in order to provide them with ostensible legitimate income and as a conduit for the payment of expenses related to the illegal enterprise, the purchase of needed equipment and supplies, and the disbursements of proceeds from their illegal endeavors. It is common that such business "fronts" maintain records of these transactions at the business premises.

The courts have recognized that unexplained wealth is probative evidence of crimes motivated by greed such as trafficking in illegal controlled substances.

Through my training and experience and conversations with other law enforcement officers, I know that persons engaged in the purchase, sale, and distribution of controlled substances, and those who aid and abet such activities, generally tend to maintain items pertaining to such drug trafficking activities at their homes and that the Ninth Circuit has held that it reasonable to search such locations for evidence of their criminal activity. See *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993); *United States v. Hernandez-Escargaga*, 886 F.2d 1560, 1567 (9th Cir. 1989); and *United States v. Fannin*, 817 F.2d 1379, 1381-82 (9th Cir. 1987).

It is also typical for individuals who distribute illegal controlled substances, and who aid and abet such activity, to maintain items related to their activity (including contraband, drugs, the proceeds of drug sales, records of drug transactions, and other papers) in locations under their dominion and control, including on their persons, in their garages, outbuildings, curtilages, vehicles, and other locations commonly referred to as "stash houses." This is not only so that they have ready access to them, but also to conceal them from law enforcement.

The illegal distribution of controlled substances is an activity that occurs over months and/or years. Persons involved in the trafficking of controlled substances over a period of time typically obtain and distribute drugs on a regular basis, much as a distributor of a legal commodity would purchase inventory for sale. Similarly, drug traffickers will maintain an inventory of controlled substances that will fluctuate in size depending upon the demand for and the available supply of the product. It has been my experience that drug traffickers keep records of their illegal activities not only for the period of their trafficking violations, but also for a period of time extending beyond the time during which the trafficker actually possesses/controls the controlled substances, to include a period of several months, due to the continuing nature of their illicit business and their repeated need to contact their criminal associates and to refer back to such transactions and customers. I am aware that the Ninth Circuit has held that "with respect to drug trafficking, probable cause (to search) may continue for several weeks, if not months, since the last reported instance of drug trafficking." *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986); and *United States v. Foster*, 711 F.2d 871, 878 (9th Cir. 1983) (last known instance of drug trafficking three months prior, not "stale"). This is especially true where the affidavit in support of the search warrant shows a widespread, ongoing narcotics operation as in the instant investigation. See, *Hernandez-Escargaga*, 886 F.2d 1560 (9th Cir. 1989).

In addition to drug trafficking items, it is common to find evidence of unlawful drug usage at the residences of drug traffickers, and it is common for the drug user to keep paraphernalia, such as syringes, pipes, spoons, containers, straws, razor blades, and other items which are associated with the use of controlled substances.

Individuals involved in the distribution of controlled substances often have at such secure locations items associated with the manufacture of controlled substances, such as manufacturing equipment and chemicals, including "cutting" materials, and microwave ovens.

Individuals involved in the distribution of controlled substances often have false identification documents and identification documents in the names of others, or items used in creating same, in furtherance of their unlawful drug trafficking activities.

Individuals involved in the distribution of controlled substances use various locations to serve different functions so that customers, thieves, and law enforcement personnel do not learn about any one location where large quantities of drugs, money, and/or other drug related assets are stored. Therefore, one or more locations are often used to store lesser amounts of narcotics, money, and/or drug related assets, and additional locations are used to meet customers and/or are used as "safe-houses" or "stash houses."

Individuals involved in the distribution of controlled substances use various locations to sell narcotics. They set up in apartments of associates, stand on street corners, or rent hotel/motel rooms for this purpose.

Individuals involved in the distribution of controlled substances, not unlike most Americans, now store documents and records in electrical, electronic, or magnetic form (such as floppy diskettes, hard disks, ZIP disks, CD-ROMs, memory calculators, pagers, and personal digital assistants such as Palm Pilot computers and removable memory cards).

Investigation

On 02-27-08 I was contacted by Tabitha Pomeroy who is a Child Protective Services investigator for the Washington Department of Social and Health Services. She had received a referral indicating that a child by the name of Leanna Santiago, a two year old female, living at 1812 S 245th pl S., Des Moines, Washington might be endanger of exposure to illegal narcotics specifically methamphetamine. The referral said that Leanna's father, Rene Santiago, had taken Leanna into a locked bedroom with him while he was packaging methamphetamines. The referent could smell the odor of burning plastic while this was going on. The referent had also said that the drugs where kept in the bathroom vanity. The referent also said that Ruby Santiago spoke very little English and that her first language was Tagalog a Philippine dialect.

I had received information prior form the Drug Enforcement Administration (DEA) about this same address. DEA had received an anonymous tip that there were sales of methamphetamine from 1812 S. 245th Place S, Des Moines, Washington.

On 02-28-08 I accompanied Mrs. Pomeroy and other members of the Des Moines Police department to assist her in checking on the welfare of Leanna Santiago. I also had Port of Seattle Officer Jimenez come with me because I knew from prior investigations he spoke Tagalog.

As we walked up the drive the garage door opened and I saw a male who later identified himself as Anthony Santiago. I identified myself and told him we where there to check on the welfare of Rubies child. He invited us in the house and I spoke with him while Officer Jimenez spoke with Ruby Santiago. While I was walking in the door I saw a female, later identified as Tindole, Teri D 07-15-86, sitting on the couch. When she saw me she stuffed something between the cushions of the couch. I had Officer Arico remove her from the coach and check it for officer safety. Officer Arico handed me a felt type bag with a draw string closure. As he handed it to me I could see that it had some weight to it. I felt the bag and could feel a round hard object that ended with a larger attached piece. I was concerned that there might be a gun inside and opened the bag. I immediately saw a bag containing several smaller one inch square bags with a crystalline substance inside. At the bottom I found a glass narcotics smoking pipe which turned out to be the hard object I had felt. I also found a small electronic scale. I tested a sample of one of the bags following WSP Crime Lab protocols using a NIK brand field test kit "A" and "U". They tested positive for the presents of amphetamines and methamphetamines respectfully. The baggies had been sealed with either a flame or heat sealer. This would be consistent with the referents comment about smelling burning plastic. Tindole was arrested and removed from the residence.

Anthony Santiago said he lived in the house and asked us to leave. At the same time Officer Jimenez was speaking to Ruby Santiago in Tagalog. Anthony Santiago tried to speak to her in an intimidating manor. I asked Officer Jimenez to have Ruby Santiago speak to us outside so I could honor Anthony Santiago's request.

Officer Jimenez said Ruby Santiago told him that her husband, Rene Santiago, and Anthony Santiago sells drugs and is afraid of them and what they might do to her if she speaks to the police. She said they sell small bags of drugs and seals them up with a sealing device in small Ziploc bags. She said Rene Santiago has locked himself in the bedroom with their two year old daughter while doing this. She has seen Rene Santiago and his brother Anthony Santiago packaging drugs and smoking drugs in other parts of the house too. She said Rene Santiago usually stores the drugs in the back of their bedroom vanity. She said that Anthony Santiago lives with her and Rene Santiago and helps pay some of the bills. He has full access to the house and her husband has access to Anthony Santiago's bedroom.

While standing outside the house Anthony Santiago said he wanted to leave and I told him he could leave at anytime. He said, "I know but I need my car". He pointed to a burgundy Chevy Suburban parked in the driveway and said that it was his. The Suburban had the license plate of 208TEG on it and is registered to Anthony Santiago.

Based on the above, I believe that evidence of the crime of Violation of the Uniform Controlled Substances Act is located at 1812 S 245th Pl, Des Moines, Washington. A single story house tan in color and a 1997 Chevy Suburban license 208TEG registered to Anthony Santiago. And that a search warrant be issued directing that a search of said place be conducted and that any evidence and/or fruits of the crime of Violation of the Uniform Controlled Substance Act, specifically Methamphetamine and/or any pre-cursor chemicals used in the manufacturing of the drug, be seized, together with evidence relating to occupancy and/or ownership of said place; evidence relating to drug operations and wealth acquired by drug traffickers; and any evidence relating to writings, paraphernalia, moneys, firearms, pagers, and cellular phones associated to the use and/or sale of controlled substances be seized.

[Signature]
Affiant

DETECTIVE, DES MOINES POLICE Agency, Title
and Personnel Number

Subscribed and sworn to before me this 28 day of February, 2008

Judge [Signature]

Issuance of Warrant Approved: Dan Satterberg

By _____
Deputy Prosecuting Attorney, Bar #