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Division I  
State of Washington

No. 73446-6-I

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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In the Matter of Search Warrant for:

13811 Highway 99, Lynnwood, WA

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**REPLY BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

I. POINTS AND AUTHORITIES ..... 1

    A. The City of Lakewood Has Standing to Pursue this Appeal. .... 2

    B. The Respondent’s Record-Based Issues are Without Merit. .... 5

    C. The Authorities Cited by the Aggrieved Parties for the Superior  
    Court’s Jurisdiction Are Inapt. .... 8

    D. The Warrant Was Properly Issued under RCW 2.20.030. .... 14

    E. An Evidentiary Hearing Was to Conclude that Det. Larson  
    Engaged in Misconduct Triggering Suppression. .... 17

CONCLUSION..... 20

CERTIFICATE OF SERVICE ..... 20

## TABLE OF AUTHORITIES

### Cases

<i>Avery v. Dep't of Soc. &amp; Health Servs. (In re B.T)</i> , 150 Wn.2d 409, 78 P.3d 634 (2003).....	7
<i>Cannabis Action Coal. v. City of Kent</i> , 180 Wn.App. 455, 322 P.3d 1246 (2014), <i>aff'd on other grounds</i> , 183 Wn.2d 219, 351 P.3d 151 (2015) ..	3
<i>City of Tacoma v. Mary Kay, Inc.</i> , 117 Wn.App. 111, 70 P.3d 144 (2003) .....	11
<i>Eller v. E. Sprague Motors &amp; R.V.'s, Inc.</i> , 159 Wn. App. 180, 244 P.3d 447 (2010) .....	6
<i>Franks v. Delaware</i> , 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978) .....	2, 17, 18, 19
<i>Guerra v. United States</i> , 645 F. Supp. 775 (C.D. Cal. 1986) .....	12
<i>Hous. Auth. of City of Everett v. Kirby</i> , 154 Wn. App. 842, 226 P.3d 222 (2010) .....	14
<i>King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 142 Wn.2d 543, 14 P.3d 133 (2000) .....	7
<i>Meier v. Keller</i> , 521 F.2d 548 (9th Cir. 1975) .....	12
<i>Sheets v. Benevolent &amp; Protective Order of Keglars</i> , 34 Wn.2d 851, 210 P.2d 690 (1949) .....	3
<i>Sherwin v. Arveson</i> , 96 Wn.2d 77, 633 P.2d 1335 (1981) .....	11
<i>State ex rel. Humiston v. Meyers</i> , 61 Wn.2d 772, 380 P.2d 735, 739 (1963) .....	7
<i>State ex rel. Schillberg v. Everett Dist. Justice Court</i> , 90 Wn.2d 794, 585 P.2d 1177 (1978) .....	4, 13
<i>State v. Alaway</i> , 64 Wn. App. 796, 828 P.2d 591 (1992) .....	3
<i>State v. Card</i> , 48 Wn. App. 781, 741 P.2d 65, 68 (1987) .....	12
<i>State v. Davidson</i> , 26 Wn. App. 623, 613 P.2d 564 (1980) .....	14, 15, 16
<i>State v. Haye</i> , 72 Wn.2d 461, 433 P.2d 884 (1967) .....	10, 11
<i>State v. Jefferson</i> , 79 Wn.2d 345, 485 P.2d 77 (1971) .....	11
<i>State v. Thomas</i> , 121 Wn.2d 504, 851 P.2d 673 (1993) .....	8, 9, 13
<i>State v. Uhthoff</i> , 45 Wn.App. 261, 724 P.2d 1103 (1986) .....	16
<i>Tamosaitis v. Bechtel Nat'l, Inc.</i> , 182 Wn. App. 241, 327 P.3d 1309 (2014) .....	7
<i>United States v. Scott</i> , 555 F.2d 522 (5th Cir. 1977) .....	19

**Statutes**

Chapter 10.16 RCW ..... 10  
RCW 10.105.010(1)..... 5  
RCW 10.105.010(5)..... 5  
RCW 10.105.010(6)..... 5  
RCW 2.20.030 ..... passim  
RCW 3.66.100 ..... 15, 16  
RCW 69.50.509 ..... 15, 16

**Other Authorities**

*Washington State Court of Appeals, Division I CLE “Briefly Speaking,”*  
available online at  
[http://www.courts.wa.gov/appellate\\_trial\\_courts/?fa=atc.display\\_divs&folderID=div1&fileID=briefWriting](http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.display_divs&folderID=div1&fileID=briefWriting) ..... 6

**Rules**

CrR 2.3 ..... 9  
CrRLJ 2.3 ..... 9, 13  
CrRLJ 2.3(e) ..... 13  
CrRLJ 3.2.1(g) ..... 10  
ER 201 ..... 7  
Fed. R. Crim. P. 41 ..... 11  
RAP 10.3..... 6  
RAP 3.1..... 2  
RAP 9.11..... 7

**Constitutional Provisions**

Wash. Const. Art. IV, § 12..... 10, 11  
Wash. Const. Art. IV, § 6..... 10, 11

## **I. POINTS AND AUTHORITIES**

Because the issues in this case are principally legal, Lakewood declines the invitation to engage in a point-by-point rebuttal of the “kitchen sink,” opposition lodged by the Respondents. Instead, properly focusing this issue on the legal points at hand, we address only the more salient points.

*First*, the procedural objections to Lakewood maintaining this appeal and the focus of Lakewood’s opening brief are ill-founded. Because the Respondents sought relief solely against Lakewood and in fact, not only failed to serve any prosecutor’s office with its materials but objected to the participation of the relevant prosecutor’s office, Lakewood is a proper party-appellant in this matter. With like effect, under the provisions of Title 10 RAP, Lakewood has given both this Court and the Respondents fair notice of both its claims of errors and the grounds therefor.

*Second*, the aggrieved parties never adequately address how the Snohomish County Superior Court has jurisdiction in this matter. Mere citations to the rule and the state constitution is inadequate. Rather, properly applying those statutes, court rules and relevant case law, leads to the singular conclusion that the court that issued the warrant is the initial arbiter of possession of materials seized under its warrant.

*Third*, the warrant in this case was properly issued. The proper focus in this case is on the application of RCW 2.20.030. The standard necessary to trigger issuance of the warrant under that statute is not demanding: upon a finding of probable cause, a court of limited jurisdiction may issue a warrant directed to an out-of-county target so long as it seeks evidence relevant to an offense which “is alleged to have occurred,” in the county wherein the warrant is issued. The Respondents advance an argument that is both hostile to the plain language of this statute and undermines the whole intent of this statute which is to enlarge the pool of magistrates whom may sign warrants.

*Finally*, the challenges to the warrant itself are not well-taken. This is so because among the superior court’s stated grounds was the determination that the warrant contained misstatements. To have properly adjudicated these matters, a hearing under *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978) was mandatory.

For these reasons, and those outlined in our opening brief, the decision below is wrong. It should be reversed.

A. The City of Lakewood Has Standing to Pursue this Appeal.

Only an aggrieved party may appeal. RAP 3.1. An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. *Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d

851, 855, 210 P.2d 690 (1949). Although the Respondents do not cite RAP 3.1, Lakewood is clearly an aggrieved party.

As this Court recently concluded, the fact that the respondents, sought and received affirmative relief against Lakewood, is sufficient to trigger Lakewood's standing to appeal. *Cannabis Action Coal. v. City of Kent*, 180 Wn.App. 455, 469 n.11, 322 P.3d 1246 (2014), *aff'd on other grounds*, 183 Wn.2d 219, 351 P.3d 151 (2015).

Independent of this analysis, Lakewood would still retain standing to appeal. Property seized under a search warrant triggers one of no fewer than three different analyses depending on what interests are at stake. The first, relates to *admissibility* of evidence. This remains in the sphere of a court hearing the criminal charges. The second, under Rule 2.3(e) relates to *possession* of the evidence; that is to say who retains custody of the item. The third relates to *ownership* of the item. Although related, these interests are distinct. *See e.g., State v. Alaway*, 64 Wn. App. 796, 798, 828 P.2d 591 (1992)(citing cases)(noting, "a court may refuse to return seized property no longer needed for evidence only if (1) the defendant is not the rightful owner; (2) the property is contraband; or (3) the property is subject to forfeiture pursuant to statute."). Lakewood's stake framed within a Rule 2.3(e) framework, is focused on these last two interests.

Lakewood maintains an interest in ensuring possession of the item pending the outcome of the criminal charge. As we noted in our opening brief, law enforcement holds the property at the sufferance of the court which issues the search warrant. *State ex rel. Schillberg v. Everett Dist. Justice Court*, 90 Wn.2d 794, 800, 585 P.2d 1177 (1978). However, in this case, a separate court wholly otherwise uninvolved with the criminal process has sought to involve itself with proceedings based in Pierce County and directed the return of the property. No party, much less, a party holding property pursuant to search warrant should find themselves in the position of facing dueling court obligations.

In this case, these concerns are heightened given the lack of notice to any other entity. This warrant was sought in connection with charges then-pending against Ms. Jones in Pierce County. No notice was supplied to the Pierce County Prosecutor's Office. And, when the Pierce County Prosecutor's Office sought reconsideration, not only was that application denied (CP 39-40); the respondents went so far as to seek sanctions against the Office, calling their filings a "sham submission." (CP 29).

The third interest, i.e., ownership is present in this case as well. Lakewood also initiated an asset forfeiture under chapter 10.105 RCW.

(CP 34-35).<sup>1</sup> Under RCW 10.105.010(1), property which was used in the commission of a felony, or which acquired in whole or part or otherwise traceable to the felony, is subject to forfeiture and seizure. If the seizing agency (here, Lakewood) can establish the statutory connection to the felony offense, the agency may retain the property for use. RCW 10.105.010(6). The premature and improper return of property prior to the outcome of criminal charges directly impacts and impairs Lakewood's ability to maintain this asset forfeiture proceeding.

B. The Respondent's Record-Based Issues are Without Merit.

To reach the outcome that Lakewood has forfeited review, the respondent "cherry picks," quotes out of context from the April 22, 2015 hearing. Our position before the Superior Court was that no findings of fact were appropriate. 4/22/2015 VRP 3. The root of this issue was because the court should have heard live testimony and live evidence to resolve those disputed issues which did arise. However, as the balance of that transcript reflects, we went through and outlined specific issues with specific findings.

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<sup>1</sup> These notices appear to be attached to a notice of removal which post-dates the April 10th Order. (CP 31). Whether this asset forfeiture matter was properly commenced or property removed to Snohomish County Superior Court is not before this Court. It is worth noting, however, that the removal appears to be defective. *Compare* CP 31 (upper left corner) *with* RCW 10.105.010(5).

In our opening brief, we renewed these challenges, assigning error to all of the findings. (Br. of App. at p. 1). The respondents make scant attempts to defend any single finding of fact, instead content to label them “verities.” Technical non-compliance with RAP 10.3 will not serve as an impediment to review where the nature of the challenge is clear from the identification of the issues and the appellant’s argument. *Eller v. E. Sprague Motors & R.V.'s, Inc.*, 159 Wn. App. 180, 188, 244 P.3d 447 (2010)(citations omitted). In the interests of brevity<sup>2</sup>, we highlighted the more factually flawed findings to illustrate the larger point: without a testimonial hearing, there was no basis for *any* findings. However, as the Superior Court was going to be issuing findings, given the short “turnaround” time between the filing and the hearing on this matter,<sup>3</sup> rather than repeat the same objections, we addressed specific findings.

If anything, the fact that the respondents assert non-compliance with RAP 10.3 and then contemporaneously seek judicial notice reinforces the core point: the findings are unsupported by any evidence. Rather than

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<sup>2</sup> See, *Washington State Court of Appeals, Division I CLE “Briefly Speaking,”* available online at [http://www.courts.wa.gov/appellate\\_trial\\_courts/?fa=atc.display\\_divs&folderID=div1&fileID=briefWriting](http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.display_divs&folderID=div1&fileID=briefWriting). The goal was to comply with point #9.

<sup>3</sup> The matter was filed on the afternoon of Friday, April 17, 2015, for a hearing the following Wednesday, April 22, 2015. (CP 30). The proof of service reflects a fax transmission on April 16<sup>th</sup>.

attempt to defend these findings, the respondents have attempted to prop up these findings after-the-fact.

As a legal matter, however, the respondents' attempts at judicial notice are improper. While this Court may take judicial notice of various submissions, the offering party must still demonstrate its relevancy. *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735, 739 (1963). The preferred approach would be to file a RAP 9.11 motion; “[e]ven though ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review.” *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 549 n.6, 14 P.3d 133 (2000). This rule applies to court filings, including orders following an evidentiary hearing, but a showing must nevertheless be made to demonstrate how the other filings bear on the current proceeding. *Avery v. Dep't of Soc. & Health Servs. (In re B.T)*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003). Until the respondents bring a proper RAP 9.11 motion, in lieu of a motion to strike and introducing extra complexity into this matter, the proper approach is for this Court to simply ignore the offending portions of the respondents' brief and the proposed exhibits for judicial notice. *Tamosaitis v. Bechtel Nat'l, Inc.*, 182 Wn. App. 241, 253, 327 P.3d 1309 (2014).

Here, Lakewood appealed the Superior Court's final order, and an after-the-fact findings of fact supporting that order. The nature of our challenges were two-fold: (1) that the Snohomish County Superior Court lacked the jurisdiction to decide this matter; and (2) even if it did, its findings of fact are unsupported because it erred by failing to conduct a proper testimonial hearing and its findings are wholly unsupported by anything approaching what could be recognized as evidence. The respondents have identified no impediment to a decision on the merits or an inability to brief this matter. The respondents' procedural arguments should be rejected.

C. The Authorities Cited by the Aggrieved Parties for the Superior Court's Jurisdiction Are Inapt.

The critical question posed at the Superior Court and before Court nevertheless remains: to what court is a Rule 2.3(e) motion for the return of property properly directed in the first instance? The answer ought to be straightforward: the court that issued the warrant. The respondents claim that the superior court has jurisdiction over this matter is incorrect and the authorities cited are out-of-place.

As we noted in our opening brief, and reiterate here, Lakewood's reading is borne out by precedent. Our Supreme Court already provided the answer in *State v. Thomas*, 121 Wn.2d 504, 851 P.2d 673 (1993). In

*Thomas*, our Supreme Court was forced to reconcile which time period applied to the return of a warrant for a controlled substance violation, which was issued by a court of limited jurisdiction, but the criminal case was prosecuted in superior court: the time period noted by rule, or the time period set forth by a statute. Apropos to the discussion for the case at bar, the Supreme Court addressed a threshold issue, via a footnote, quoted below in full:

Because the warrant was issued by the Everett District Court, CrRLJ 2.3 should control. The Court of Appeals' opinion, however, only refers to CrR 2.3. Both parties note that since the relevant provisions of the two rules are identical, the distinction makes no difference. It is important to note, however, that while CrRLJ 2.3 is similar to CrR 2.3 in that it commands the officer to search within 10 days of issuance, it differs in that it mandates the return of the warrant "within 3 court days", rather than merely "promptly".

121 Wn.2d at 508 n.2 (Emphasis added).

As our Supreme Court makes clear, the process associated with the court that issues the warrant should control. Although the relevant provisions of Rule 2.3 at issue in *Thomas* were identical, the specific part at issue in this case, i.e., Rule 2.3(e), differ. CrRLJ 2.3(e) makes clear that "[t]he motion shall be filed in the court which issued the warrant;" no comparable language is contained in the superior court counterpart.

To avoid this straightforward outcome, the respondents resort to the state constitution and the corresponding federal rule. We take them in turn.

Article IV, section 6 of the Washington Constitution provides that superior courts have jurisdiction “in all criminal cases amounting to felony.” From this limited language, the aggrieved parties conclude incorrectly that search warrants for felony offenses may only be issued by Superior Courts. This is also inconsistent with case law.

This cited language gives superior courts jurisdiction to try and adjudicate offenses charged as felonies. *State v. Hays*, 72 Wn.2d 461, 465, 433 P.2d 884 (1967). However, it does not mean that there is no room for courts of limited jurisdiction to be involved in possible felony matters. Those courts have such jurisdiction as the legislature may provide. Wash. Const. Art. IV, § 12.

The legislature has exercised its authority to give courts of limited jurisdiction a role in felony offenses. The search warrant authority conferred by RCW 2.20.030 is one such example. Additionally, district courts have the authority to conduct preliminary appearances and initial hearings on felonies. Chapter 10.16 RCW; CrRLJ 3.2.1(g). To hold, as the respondents suggest, the Court would have to declare both RCW 2.20.030 and the practice of holding felony preliminary appearances in

district court unconstitutional. But, the practice of making an initial appearance in district court is one of several “established, recognized and legally permissible methods for determining the existence of probable cause.” *State v. Jefferson*, 79 Wn.2d 345, 347, 485 P.2d 77 (1971). The primary hazard in reconciling Article IV, § 6 with § 12 is that the court of limited jurisdiction may not entrench upon the superior court’s role in adjudicating the felony charge on the merits. *Haye*, 72 Wn.2d at 469. The issuance of a search warrant does not entrench upon this authority.

This outcome is consistent with the notion that Article IV, § 6 is not self-executing. *City of Tacoma v. Mary Kay, Inc.*, 117 Wn.App. 111, 114-15, 70 P.3d 144 (2003). To seek redress under Section 6, the superior court’s jurisdiction is properly invoked with some filing, typically with a summons and complaint or other petition. *Id.* The problem in this case is that the jurisdiction of another court was already invoked when Det. Larson filed the complaint in support of the search warrant and the Lakewood Municipal Court issued the search warrant at issue. It is well-recognized that the “court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved.” *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981).

Reliance on Fed. R. Crim. P. 41 is equally inapt but indirectly supports Lakewood’s position. Although it is acknowledged that Rule

2.3(e) cases look to this federal rule for guidance, the federal rule is persuasive, but not binding. *State v. Card*, 48 Wn. App. 781, 786, 741 P.2d 65, 68 (1987). In this case, the federal rule does not aid the respondents. Under both the federal rule and the state court of limited jurisdiction versions of the rule, a specific court is set forth as the appropriate forum for the motion seeking return of property.

Federal Courts, interpreting Fed. R. Crim. P. 41, have held that in a Rule 41 proceeding, that no statute grants jurisdiction to this type of proceeding and the Rule itself is not an independent grant of jurisdiction. *Guerra v. United States*, 645 F. Supp. 775, 778 (C.D. Cal. 1986). Entertaining a motion in the court where the seizure occurs may be proper but only if there is no criminal prosecution pending. *Id.* But, where a criminal prosecution is pending, the motion is properly brought before the court where the criminal case is being heard. *Meier v. Keller*, 521 F.2d 548, 555 (9th Cir. 1975). The danger in having multiple courts act on the warrant is that it encourages forum shopping under the guise of a civil action, what is essentially a pretrial criminal motion. *Id.*, 521 F.2d at 555. The attempt to use a federal rule to engraft a forum, where the state rule already provides for one, should be rejected.

On these facts, both a Pierce County-based court and a Snohomish County-based court may have the authority to issue the warrant, but it

does not follow that a court situated in either county may direct the return of this property. But the respondent neither addresses (and consequently, fails to rebut) the line of case law that law enforcement holds the property at the sufferance of the issuing court. *Schillberg v. Everett Dist. Justice Court, supra*, 90 Wn.2d at 800. The respondents similarly fail to address the claims of first-in-time is first-in-line. And, most critically, the respondents fail to distinguish (or even cite) the rule-based reading contained in *Thomas, supra*, which provides the single strongest piece of clarity, even though earlier case law such as *Schillberg* amply established that the motion is properly brought before the issuing court.

This outcome is further consistent with a plain reading of the rules. Putting any issues pertaining to RCW 2.20.030 to the side, under the respondents' reading of these authorities, undercuts a plain reading of CrRLJ 2.3(e). Under the respondents' reading of these authorities, a superior court could always have the authority to act in the first instance on a motion for the return of property for an in-county court of limited jurisdiction. CrRLJ 2.3(e), by its own terms, mandates that "[t]he motion shall be filed in the court which issued the warrant." To give effect to the respondents' interpretation effectively reads this language out of the rule, regardless of location of the issuing court, where such warrant has been issued by any court of limited jurisdiction.

Because the Snohomish County Superior Court lacked the authority to rule on the Rule 2.3(e) motion, it would otherwise be unnecessary to address any other issues raised by the respondents. This is so because when a court lacks jurisdiction over a case, “dismissal without prejudice is the limit of what a court may do.” *Hous. Auth. of City of Everett v. Kirby*, 154 Wn. App. 842, 850, 226 P.3d 222 (2010)(citations omitted). For this reason, it was improper for the Snohomish County Superior Court to have acted on the motion. Out of an abundance of caution, however, we address two remaining claims presented by the respondents: the propriety of the warrant and probable cause to issue the warrant.

D. The Warrant Was Properly Issued under RCW 2.20.030.

The respondents place principal reliance upon this Court’s decision in *State v. Davidson*, 26 Wn. App. 623, 613 P.2d 564 (1980) for the proposition that the municipal court lacked the authority to issue an out-of-county warrant, and thus, the warrant is invalid and that Lakewood failed to meet its initial showing under a Rule 2.3(e) analysis. But for the enactment of RCW 2.20.030, the respondents might be correct. The enactment of RCW 2.20.030 now compels a different result and abrogates the *Davidson* holding.

In *Davidson*, this Court posed the question simply, “when does a district court have jurisdiction to issue a warrant to search premises located outside the county in which the court is located?” 26 Wn.App. at 624. This Court concluded that a district court lacks extra-territorial jurisdiction to issue a warrant and any such warrant would be improper.

In support of its claims that the warrant was valid, the State identified two statutes, RCW 3.66.100 and RCW 69.50.509. This Court rejected the States’ reliance on both statutes. Addressing the provisions of RCW 3.66.100, this Court noted simply that these provisions that process would be available only if the district court had the authority to hear the case, and because the crimes occurred outside the county for which the warrant was obtained, the out-of-county court lacked jurisdiction to issue the warrant. 26 Wn.App. at 625.

This Court also rejected the claim that RCW 69.50.509 was authority for the issuance of the warrant. Critical to this Court’s analysis, however, is a distinction between the *statutory* authority to issue a warrant, and the *procedural* authority governing the warrant. 26 Wn.App. at 627 (emphasis ours). In so holding, this Court held, “[t]he issuance of a search warrant may be a procedural matter subject to regulation by court rules, but the territorial limits of an inferior court’s authority to issue a warrant is jurisdictional and subject to the constitutional requirement that

it be defined by statute.” 26 Wn. App. at 627. For the purposes of *Davidson*’s analysis, RCW 69.50.509 did not clearly provide for statewide territorial jurisdiction and was silent on the issue. 26 Wn.App. at 626. This Court ultimately concluded that “the absence of legislation here creating territorial jurisdiction is an absolute bar to its exercise.” *Id.*, 26 Wn.App. at 628.

By contrast, in the case at bar, RCW 2.20.030 provides what RCW 3.66.100 or RCW 69.50.509 do not: express authority for statewide search warrant authority from a court of limited jurisdiction provided that the issuing court was located in “the county in which the offense is alleged to have occurred.” In view of the enactment of RCW 2.20.030, the result in *Davidson* is no longer good law.

The respondents’ attempt to harmonize RCW 3.66.100 with RCW 2.20.030 only adds additional confusion to what ought to be a seemingly straightforward statute. While RCW 3.66.100, by its express terms, applies only to district courts, these statutes can be harmonized on a more basic level. Post-*Davidson*, this Court has recognized that “RCW 3.66.100 is not so much a grant of criminal jurisdiction to the district court as an expansion of its criminal jurisdiction to the entire state for the issuance of process ...” *State v. Uthoff*, 45 Wn.App. 261, 265, 724 P.2d 1103 (1986)(Emphasis added). RCW 2.20.030, on the other hand, is a

specific grant of jurisdiction for a specific form of process. By its express terms (and contained in a one-sentence statute, no less), judges of courts of limited jurisdiction are expressly conferred with the authority to issue a search warrant for any person or evidence located anywhere within the state so long as they sit within the county in which the offenses is alleged to have occurred.

Here, the warrant was valid under RCW 2.20.030. It was issued by a Pierce County-based court to investigate crimes occurring in Pierce County, and in fact, prosecuted in Pierce County Superior Court. Under these circumstances, the Snohomish County Superior Court erred when it not only assumed authority over this matter, but then, invalidated the warrant and ordered the return of the property. Vacation of the Snohomish County Superior Court's order is the appropriate remedy.

E. An Evidentiary Hearing Was to Conclude that Det. Larson Engaged in Misconduct Triggering Suppression.

*Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978) and its progeny are clear: only once a challenger makes a substantial preliminary showing of reckless or intentional misstatements or omissions in a search warrant, an evidentiary hearing is necessarily required, and suppression may follow only after such a hearing. 438 U.S. at 155-56.

But as part of its decision, the Snohomish County Superior Court made the determination that Det. Larson made such misstatements/omissions. (CP 7-9, Findings of Fact 3-16; *see also*, CP 10, Concl. of Law 14). In *Franks v. Delaware*, *supra*, the Supreme Court explained that in order to be entitled to an evidentiary hearing,

the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

438 U.S. at 171.

This challenge falls far short of that required by *Franks*. The original motion sought the return of property based on two overarching arguments. (CP 121-123). Those arguments were that (1) the municipal court lacked the authority to issue the warrant; (2) the warrant lacked specificity as it related to (a) motor vehicles and (b) purses and a suitcase/valise. (*Id.*). In their application for the return of property, the respondents did not allege that the warrant application contained specific false statements or omissions made deliberately or with reckless disregard

for the truth; nor did it make the requisite offer of proof. It was only in response to Lakewood's production of the search warrant affidavit, that the respondents then attempted to argue specific issues with the affidavit, and then, only in a conclusory manner. (CP 96-97, ¶¶ 7-10).<sup>4</sup>

As observed by the Fifth Circuit Court of Appeals, "Every Circuit that has considered the issue has agreed that a movant must, at the very least, make a preliminary showing that some allegation in the affidavit is false before he is entitled to a hearing for the purpose of impeaching the affidavit." *United States v. Scott*, 555 F.2d 522, 528 (5th Cir. 1977)(collecting cases). Although Lakewood vigorously disputes that there were any such false statements, once the issue was raised, the *Franks* inquiry was necessary before the Superior Court proceeded to make such misconduct-based findings.

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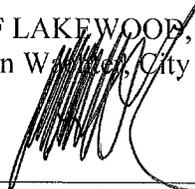
<sup>4</sup> It is worth highlighting that the original motion contained a copy of the warrant, but did not contain a copy of the affidavit. (CP 125-128).

**CONCLUSION**

Nothing raised by the respondents alter the result urged by Lakewood in this case, and if anything, it reinforces Lakewood's claims of error. This Court either vacate or reverse the decisions below.

DATED: November 12, 2015.

CITY OF LAKEWOOD,  
Heidi Ann W. [redacted], City Attorney

By:   
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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing on:

Tom P. Conom  
The Conom Law Firm  
7500 212th St SW Ste 215  
Edmonds, WA 98026-7618

By the following indicated method:

\* Via US Mail (postage prepaid)

The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

Executed at Lakewood, Washington this 12th day of November, 2015.

  
Max Bowie