Supreme Court No. _____
Court of Appeals No. 57671-6-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.

MICHAEL WAYNE PICKERING,
Petitioner.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner, Michael Pickering, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Pickering seeks review of the unpublished opinion of the Court of Appeals in cause number No. 57671-6-II, 2024 WL 4853687, filed November 21, 2024. A copy of the decision is in Appendix A at pages A-1 through A-15.

C. ISSUE PRESENTED FOR REVIEW

Should this Court grant review where the search warrant was unconstitutionally overbroad where it authorized seizure of "any and all firearms," where specific descriptions of the stolen firearms were known to the police and could have listed with particularity?

D. STATEMENT OF THE CASE

Grays Harbor County Deputy Sheriff Edward Welter sought a warrant to search a house located at 2416 Simpson

Avene in Aberdeen, Washington, owned by Michael Pickering and Todd Pickering. Clerk's Papers (CP) at 7-10, 26-43. The affidavit sought to search the location for evidence of unlawful possession of a firearm in violation of RCW 9.41.040, stemming from the theft of approximately seven firearms from a house located at 185 Johns River Road in Aberdeen. CP at 7-10, 26-43.

The warrant authorized law enforcement to search Pickering and Todd's residence for evidence of the [crime of Unlawful Possession of a Firearm], including:

• Rifles chambered in .243 caliber, .257 caliber, .308 or .300 caliber a 17HMR hunting rifle and a AR Style Shot gun.

• Any and all firearms

• Evidence of dominion and control of the place searched including mail, receipts, identification, bills, rental agreements, licensing documents and other personal property whose owner/possessor may be readily determined.

CP at 47.

Two rifles were found in Pickering's room: a "Ruger M77 300 Win Mag ... w/ scope" and a "Savage Axis 223 ... w/scope."

CP at 44. The search also uncovered firearm-related paraphernalia including ammunition, magazines, and a firearm cleaning kit. Law enforcement also recovered "[i]ndicia for Michael Pickering." CP at 44.

The following findings and conclusion pertain to this appeal:

FINDINGS OF FACT

....

No. 13.

The Court held that the Defense argument that the level of description of the firearms listed in the warrant was not specific enough was hyper technical.

No. 14.

Specificity was not an issue and was met because of the nature of the charges being Unlawful Possession of a Firearm and the warrant asked to look for firearms.

....

CONCLUSIONS OF LAW

....

No. 5.

A ["]description is valid if it is as specific as the circumstances and the nature of the activity, or crime, under investigation permits." [*State v.] Perrone*, 119 W[n].2d [538,] 547, 834 P.2d 611 [1992]; *State v. Riley*, 121 W[n].2d 22, 27-28, 846 P.2d 1365 (1993).

CP at 180-83.

The state charged Pickering with two counts of possession of a stolen firearm, two counts of first degree unlawful possession of a firearm, and two counts of unlawful possession of a firearm in the second degree. CP 1-5. The prosecutor alleged that on June 3, 2021, Mr. Pickering knowingly possessed a Ruger M77 Mark II 300 Win Mag and Savage Axis .223, knowing that the guns had been stolen, and that Mr. Pickering had previously been convicted of a felony. CP at 1-5.

Pursuant to CrR 3.6, Pickering moved to suppress the evidence obtained pursuant to the search warrant. Pickering argued that the search warrant was not particular enough because law enforcement had a written report from the Hoquiam theft and,

thus, could have described the firearms to be seized with more particularly, but they failed to do so. Defense counsel argued that police knew with specificity the guns stolen from the Johns River house based on a written statement by the owner of the stolen weapons, dated June 8, 2022, listing each of the guns stolen with precise detail. RP at 5-6; CP at 24-25.

Counsel argued that the search warrant affidavit failed to conform with the particularity requirement of the Fourth Amendment, and that "while the affidavit describes with particularity items [Kevin] Stoken claimed David Pickering and Todd Pickering possessed in his presence at specific times, the firearms reported as stolen three weeks earlier were not specifically describe[d] in the affidavit even though the alleged victim of the burglary described them in writing submitted to police on June 8, 2022, nor did not Stoken give an exact description of them of them." CP at 22.

Counsel argued that the search for the firearms was not authorized by warrant authority due to lack of specificity that was known to the affiant. RP at 6, CP at 22. The trial court denied

the motion to suppress. RP at 12; CP at 362-64.

Pickering agreed to a stipulated facts trial. RP at 17-32; CP at 82, 178, 179. The court found him guilty of two counts of possession of a stolen firearm and two counts of unlawful possession of a firearm in the second degree. RP at 27.

On direct review Pickering appealed his convictions for two counts of possession of a stolen firearm and two counts of second degree unlawful possession of a firearm, arguing that the trial court erred by denying his CrR 3.6 motion to suppress evidence seized pursuant to an overbroad search warrant. ***State v. Pickering***, 2024 WL 4853687 at *1.

By unpublished opinion filed November 21, 2024, the Court of Appeals, Division II, affirmed the convictions. See unpublished opinion, ***Pickering***, 2024 WL 4853687 at *1, *6. Pickering relies on the facts as presented in the Court's Opinion and as contained in his Brief of Appellant at 9-23.

Pickering petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review because the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; is in conflict with a published decision of the Court of Appeals. RAP 13.4(b)(1), (2).

1. The search warrant is overbroad.

Defense counsel moved to suppress evidence under CrR 3.6, contending the warrant was overbroad. RP at 7, 8; CP at 19-47. The State opposed the motion, arguing the warrant suffered from no invalidity and no evidence should be excluded. RP at 7-8; CP at 57-62. The trial court denied Mr. Pickering's motion to suppress evidence, ruling the warrant was supported by probable cause, and noted that probable cause was not challenged. RP at 9-10. The search warrant in this case authorized search of the house at the Simpson Avenue address and further authorized

police to search for firearms, including:

> rifles chambered in .243 caliber, .257 caliber, .308 or .300 caliber a 17HMR hunting rifle and an AR Style Shot gun. Any and all firearms.

CP at 46-47.

The court found that the description "gun" in the warrant was sufficiently specific, and the "fact that law enforcement didn't exactly get correct all of the calibers of all the of the weapons, that is immaterial." RP at 11.

The court's ruling, however, overlooks that law enforcement, already had in their possession a high level of detail available regarding the missing weapons—provided to police by the Johns River house burglary victim in his written statement on June 8, 2022. CP at 24-25. Instead of incorporating that level of specificity, however, the warrant merely called for the search for generic "any and all firearms," when the specific descriptions of the stolen guns were available and known to the police. The

warrant is an example of a forbidden "general warrant" that permitted law enforcement to conduct an exploratory search of the house for weapons. Because the search warrant was unnecessarily broad, it violated Pickering's right to privacy under the Fourth Amendment and article I, section 7.

Article 1, § 7 of the state constitution provides that searches conducted by law enforcement require authority of law, by virtue of its language stating "[n]o person shall be disturbed in his private affairs ... without authority of law." Const. art. 1, § 7. The United States Constitution protects the people from unreasonable searches and seizures, and provides that no warrants may issue except when they are based on a showing of probable cause, and "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

"Specificity has two aspects: particularity and breadth. Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope

of the warrant be limited by the probable cause on which the warrant is based." ***United States v. Towne***, 997 F.2d 537, 544 (9th Cir. 1993) (quoting ***In re Grand Jury Subpoenas Dated Dec. 10, 1987***, 926 F.2d 847, 856-57 (9th Cir. 1991)).

The particularity requirement is designed to prevent "'general, exploratory rummaging in a person's belongings.'" ***State v. Perrone***, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (quoting ***Andresen v. Maryland***, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)). The language of the warrant is to be construed in a "commonsense, practical manner, rather than in a hypertechnical sense." ***Perrone***, 119 W,.2d at 549.

In this case, the Court of Appeals found that the particularity requirement was fulfilled because Pickering had prior felony convictions and he had not had his firearm rights restored and he was therefore precluded from possessing any firearms. ***Pickering***, slip op. at 10. The Court found that the crime being investigated was unlawful possession of a firearm and

therefore the broad category of "[a]ny and all firearms" is appropriate where any firearms Pickering possessed were inherently contraband due to his criminal history. ***Pickering***, slip op. at 10 (citing ***State v. Chambers***, 88 Wn.App. 640, 644, 945 P.2d 1172 (1997)). The Court's ruling, however, overlooks the purpose of the requirement for particularity. "The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." ***Maryland v. Garrison***, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed. 2d 72 (1987). The purpose of the requirement to describe particularly "the place to be searched" and the "things to be seized" is to make a general search "impossible and prevent[ ] the seizure of one thing under a warrant describing another." U.S.

Const. amend. IV; ***Marron v. United States***, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927). The other purpose of the particularity requirement is to eliminate "the danger of unlimited discretion in the executing officer's determination of what to seize" and to prevent the issuance of a warrant "on loose, vague, or doubtful bases of fact." ***Perrone***, 119 Wn.2d at 546, (citing ***United States v. Blakeney***, 942 F.2d 1001, 1026 (6th Cir. 1991); The Fourth Amendment requires particularity "[a]s to what is to be taken[;] nothing is left to the discretion of the officer executing the warrant." ***Marron***, 275 U.S. at 196, 48 S.Ct. 74. " '[T]he warrant must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.' " ***Perrone***, 119 Wn.2d at 546 (quoting ***United States v. Cook***, 657 F.2d 730, 733 (5th Cir. 1981)).

Mr. Pickering is certainly not the only person who is the subject of a search warrant who is prohibited from owning firearms. Under the Court's reasoning that a broad search warrant

naming "any and all firearms" where more specific information would have the effect of riding roughshod over ***Perrone*** and ***Andresen v. Maryland*** in cases where the subject has lost his or her firearms rights. In other words, if the person is known by the police to have lost his firearms rights, the court would be able to ignore ***Perrone*** and ***Andresen*** with impunity when authorizing a search for firearms when more specific information is available.

The trial court's error in admitting the seized "guns" regardless of their origin and where specific descriptions and calibers of the stolen guns were available and known to police requires reversal of the convictions.

For the foregoing reasons, this Court should accept review and remand to the trial court with the direction to vacate the conviction.

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F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

Certificate of Compliance: This document contains 2109 words, excluding the parts of the document exempted from the word count by RAP 18.17.the petition exempted from the word count by RAP 18.17.

DATED: December 18, 2024.

Respectfully submitted,
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CERTIFICATE OF MAILING

The undersigned attorney for the Appellant, hereby certifies that one copy of the supplemental brief was e-filed by JIS Link to Mr. Derek M. Byrne, Court of Appeals, Division 2, Norma J. Tillotson, Grays Harbor County Prosecuting Attorney's office, and a copy was mailed to Michael Pickering, Appellate, postage pre-paid on December 18, 2024, at the Centralia, Washington post office addressed as follows:

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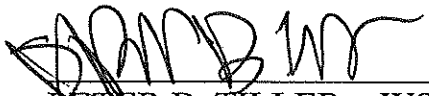
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 18, 2024.

Dated: December 18, 2024.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

Filed
Washington State
Court of Appeals
Division Two

November 21, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL WAYNE PICKERING, Appellant.	No. 57671-6-II UNPUBLISHED OPINION

LEE, P.J. — Michael W. Pickering appeals his convictions on two counts of possession of a stolen firearm and two counts of second degree unlawful possession of a firearm, arguing that the trial court erred by denying his CrR 3.6 motion to suppress evidence seized pursuant to an allegedly overbroad search warrant. Pickering also challenges the imposition of the crime victim penalty assessment (CVPA) on his judgment and sentence. The State agrees that the CVPA should be stricken.

Given the circumstances and underlying offenses, the search warrant was sufficiently particular; thus, the trial court did not err by denying Pickering's motion to suppress. We affirm Pickering's convictions. However, we reverse the CVPA and remand to the trial court with instructions to strike the CVPA from Pickering's judgment and sentence.

Officer Welter asked Stoken about the sale of a firearm to David.[1] Stoken explained that after receiving the stolen firearms, he arranged to meet David at the home of Todd and Michael Pickering. It was there that Stoken sold David one of the stolen firearms. Officer Welter asked Stoken whether he had seen other guns in the home, and Stoken said "he had seen . . . Pickering with a .308, a .243 and a .257." CP at 104. Stoken also said that Pickering "admitted to obtaining the firearms in a residential burglary approximately 2-3 weeks prior." CP at 104. When Stoken was asked specifically about the June 8 burglary in Hoquiam, "Stoken confirmed again that [Pickering] told him [Pickering] had committed the burglary." CP at 105. Officer Welter confirmed that the calibers of the rifles Stoken saw in Pickering's possession were "consistent" with those from the Hoquiam burglary. CP at 105.

Officer Welter asked Stoken if Pickering, Todd, or David stored firearms in the residence and if so, the basis of Stoken's knowledge. Stoken responded, "'[Y]es there's guns in the house. How do I know, because they hunt.'" CP at 104. Stoken also reported seeing a firearm in Todd's room, explaining that he was confident in his description of the firearm because Pickering "had told [Stoken] about it and he had discussed obtaining ammo for [it]." CP at 105. Finally, Stoken reported that the firearm he sold to David "was sitting on the floor when" Stoken left the residence. CP at 105.

[1] Multiple persons involved in this case have "Pickering" in their surname. Todd Pickering is the brother of the appellant, Michael Pickering. David Murray-Pickering is Michael Pickering's nephew. To avoid confusion, we refer to Todd and David by their first names and to the appellant by his last name. We mean no disrespect.

The State charged Pickering with two counts of possession of a stolen firearm (counts 1 and 2), two counts of first degree unlawful possession of a firearm (counts 3 and 4), and two counts of second degree unlawful possession of a firearm (counts 5 and 6).

C. MOTION TO SUPPRESS

Pursuant to CrR 3.6, Pickering moved to suppress the evidence obtained pursuant to the search warrant. Pickering argued that the search warrant was not particular enough because law enforcement had a written report from the Hoquiam theft and, thus, could have described the firearms to be seized with more particularly, but they failed to do so. The State responded that there was a clear connection between the alleged crime of unlawful possession of a firearm and the evidence sought. The trial court denied Pickering's motion and entered written findings of fact and conclusions of law. The following findings and conclusion pertain to this appeal:

FINDINGS OF FACT

. . . .

No. 13.

The Court held that the Defense argument that the level of description of the firearms listed in the warrant was not specific enough was hyper technical.

No. 14.

Specificity was not an issue and was met because of the nature of the charges being Unlawful Possession of a Firearm and the warrant asked to look for firearms.

. . . .

CONCLUSIONS OF LAW

. . . .

No. 5.

ANALYSIS

A. SEARCH WARRANT

1. Legal Principles

Under the federal constitution, a search warrant must describe "the place to be searched, and the persons or things to be seized" with particularity. U.S. CONST. amend. IV. Our state constitution requires a particular description of the items to be seized.[4] *State v. Martines*, 184 Wn.2d 83, 92-93, 355 P.3d 1111 (2015). The particularity requirement protects individuals from general searches and "the danger of unlimited discretion in the executing officer's determination of what to seize." *Perrone*, 119 Wn.2d at 546; *see also State v. Askham*, 120 Wn. App. 872, 878, 86 P.3d 1224 ("The purpose of the particularity requirement is to prevent the State from engaging in unrestricted 'exploratory rummaging in a person's belongings' for any evidence of any crime." (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971))), *review denied*, 152 Wn.2d 1032 (2004).

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[4] In his brief, Pickering relies on *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014), to argue that "'[i]t is well-established that article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections.'" Br. of Appellant at 10 (quoting *Hinton*, 179 Wn.2d at 868). However, in *Hinton*, our Supreme Court addressed whether law enforcement conducted an impermissible search by reading the defendant's text messages *without* a search warrant. 179 Wn.2d at 865-66. Because no warrant issued, there was no particularity issue for the court to address in *Hinton*. Thus, *Hinton* does not support Pickering's argument that the particularity requirement under our state constitution is different from the requirement imposed by the U.S. Constitution.

To the extent Pickering argues that article I, section 7 of the Washington Constitution requires more exacting particularity than the Fourth Amendment of the U.S. Constitution, he fails to cite any applicable case supporting that proposition, and this court need not address it. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

Pickering assigns error to findings of fact 13 and 14 and conclusion of law 5, all of which found or concluded that the warrant was sufficiently particular.

Generally, we review challenged findings of fact to determine if they are supported by substantial evidence and review challenged conclusions of law de novo. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). However, we review de novo whether a search warrant satisfies the particularity requirement. *State v. Reep*, 161 Wn.2d 808, 813, 167 P.3d 1156 (2007); *see also State v. Clark*, 143 Wn.2d 731, 753, 24 P.3d 1006 ("Whether a warrant meets the particularity requirement of the Fourth Amendment is reviewed de novo."), *cert. denied*, 543 U.S. 1000 (2001). Thus, here, we review de novo whether the challenged search warrant was sufficiently particular.

2. Search Warrant Was Sufficiently Particular

Pickering argues that the search warrant was overbroad, violating his right to privacy under the state and U.S. constitutions. Specifically, Pickering contends that because law enforcement could have described the guns they sought with more particularity but instead sought "'any and all firearms,'" the warrant was "a forbidden 'general warrant' that permitted law enforcement to conduct an exploratory search of [Pickering's] house for weapons." Br. of Appellant at 18-19 (quoting CP at 47). We disagree.

Given the circumstances of the underlying crime, the search warrant's description of property to be seized fulfilled the purposes of the particularity requirement.[5] Because Pickering

[5] As Pickering acknowledges, because Officer Welter's declaration was not physically attached to the search warrant application, nor did the warrant incorporate Officer Welter's declaration by reference, the declaration is irrelevant to the particularity issue. *See Higgins*, 136 Wn. App. at 92 ("That the affidavit was attached to the warrant is irrelevant because the warrant did not incorporate the affidavit by reference."), *and Riley*, 121 Wn.2d at 29-30 (clarifying that an affidavit can cure an overbroad warrant only if it is both attached to the warrant and incorporated by

Pickering's dominion and control of the firearms; thus, the search warrant was sufficiently particular.

Pickering argues that the search warrant here is analogous to a warrant this court invalidated in *Higgins*. We disagree.

In *Higgins*, the search warrant authorized seizure of "'certain evidence of a crime, to-wit: Assault 2nd DV RCW 9A.36.021.'" 136 Wn. App. at 90 (internal quotation marks omitted) (quoting Record). *Higgins* held the search warrant was overbroad because RCW 9A.36.021 includes six ways to commit second degree assault; thus, the warrant authorized a search for evidence of crimes for which there was no probable cause. *Id.* at 91-94.

Higgins is distinguishable because assault and unlawful possession of a firearm are qualitatively different crimes. While there are several different ways to commit second degree assault, a person commits the crime of unlawful possession of a firearm "if the person owns, accesses, has in the person's custody, control, or possession, or receives any firearm after having previously been convicted . . . of any" felony. *Compare* RCW 9A.36.021 *with* RCW 9.41.040. In other words, the single action criminalized by RCW 9.41.040 is the possession of a firearm after having been convicted of a felony, whereas the second degree assault statute criminalizes several different actions and defines them all as the same crime. RCW 9A.36.021. The only difference between first degree and second degree unlawful possession of a firearm (RCW 9.41.040(1) and (2)) is the degree of the crime, which turns on a defendant's criminal history; both require a felony conviction. Thus, unlike in *Higgins*, there was no need to "differentiate between items subject to seizure and those that were not" because Pickering's criminal history made *any* firearm in his possession subject to seizure. 136 Wn. App. at 93.

because of Pickering's criminal history, any firearms in the home[6] would constitute evidence of the crime of unlawful possession of a firearm.

Pickering's argument rests on a "'hypertechnical'" testing of the search warrant, and we interpret warrants "'in a commonsense, practical manner.'" *Besola*, 184 Wn.2d at 615 (quoting *Perrone*, 119 Wn.2d at 549). Here, had law enforcement only included the firearm descriptions they had from the Hoquiam burglary, they may well have been precluded from seizing any other firearms they might have discovered in executing the search warrant—firearms that Pickering was legally precluded from possessing due to his criminal history. Because the search warrant described the items to be seized "as specific[ally] as the circumstances and the nature of the activity under investigation permit[ted]," the search warrant was not overbroad. *Perrone*, 119 Wn.2d at 547.

B. CVPA

Pickering argues, and the State concedes, that the CVPA should be stricken from Pickering's judgment and sentence. We accept the State's concession.

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[6] Possession may be actual or constructive. The State may establish constructive possession by showing the defendant had dominion and control over the firearm. . . .

> Courts have found sufficient evidence of constructive possession, and dominion and control, in cases in which the defendant was . . . the owner of the premises . . . where contraband was found.

State v. Chouinard, 169 Wn. App. 895, 899-900, 282 P.3d 117 (2012) (internal citations omitted), *review denied*, 176 Wn.2d 1003 (2013). The owners of the home searched were Todd and Michael Pickering.

CONCLUSION

The search warrant was sufficiently particular. Therefore, we affirm Pickering's convictions. However, we reverse the CVPA and remand to the trial court with instructions to strike the CVPA from Pickering's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, P.J.

We concur:

Glasgow, J.

Che, J.

THE TILLER LAW FIRM

December 18, 2024 - 1:44 PM

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