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STATE OF WASHINGTON *CR* Supreme Court No. _____
Court of Appeals No. 32030-8-III
(consolidated to No. 32029-4-III)

FILED
May 11, 2015
Court of Appeals
Division III
State of Washington

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Appellant,

vs.

STEVEN LONG,
Respondent/Petitioner.

APPEAL FROM THE COLUMBIA COUNTY SUPERIOR COURT
Honorable M. Scott Wolfram, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Steven Long, is the respondent below and asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division III, published opinion filed April 9, 2015, which found the search warrant supported by probable cause and vacated the orders of suppression and dismissal of charges. A copy of the opinion is attached as Appendix A.¹

III. ISSUE PRESENTED FOR REVIEW

In *Thein*, police officers obtained a search warrant for the defendant's residence based on their generalized conclusion that drug dealers commonly keep evidence of their illegal drug dealings in their homes.² This Court held that generalized statements in affidavits supporting a search warrant are insufficient, standing alone, to establish the probable cause needed to search a suspected drug dealer's residence.³ Should this Court grant review to determine whether in seeking a warrant to search for evidence of stolen property, law enforcement authorities may ignore *Thein*'s prohibition and rely upon generalized inferences to establish

¹ The current online version is found at *State v. Dunn*, No. 32029-4-III, 2015 WL 1590471 (Wash. Ct. App. Apr. 9, 2015).

² *State v. Thein*, 138 Wn.2d 133, 138-40, 977 P.2d 582 (1999).

a nexus between criminal activity and the suspect's residence and outbuildings?

IV. STATEMENT OF THE CASE

A. Procedure

Columbia County Undersheriff Lee Brown applied for a search warrant of Steven Long's home and outbuildings following a May 3, 2013, report of a truck abandoned on Ring Canyon Road. During the course of investigation, police discovered the truck and various other items of personal property had been stolen sometime between April 30 and May 3 from the home of the truck's owner on Robinette Mountain Road. Law enforcement officers were unable to find latent prints at the scene. CP 10–11, 20.

In the affidavit for search warrant, Undersheriff Brown listed the missing property reported by the homeowner as two ATVs, three generators, one rifle, two chainsaws, one box of movies, three pairs of binoculars, a tree planter, an alcoholic drink dispenser, and an air compressor. CP 9. He set forth additional facts showing that Long was seen driving the stolen truck on Hogeye Hollow Road the day before the truck was found and that an ATV (all-terrain vehicle) matching the

³ *Id.* at 148, 977 P.2d 582.

description of one of the two ATVs stolen from the home had been seen in the bed of the truck while Long was driving it. CP 10–11.

In the section of the affidavit designated for a description of the premises to be searched, Undersheriff Brown listed a single family manufactured home, garage, and wooden barn at 447 Hogeye Hollow Road in Columbia County. He described the buildings as approximately one-tenth of a mile from the intersection of Lower Hogeye Road and Hogeye Hollow Road. He described the premises as the residence of Steven Long. CP 9–11, 20–21. A copy of the Affidavit for Search Warrant is attached as Appendix B.

On May 7, 2013, Columbia County Sheriff's deputies executed the search warrant. CP 14–17. A number of items were seized from Long's home which are alleged to have been stolen in this burglary and another burglary, as well as drug paraphernalia and some evidence of marijuana cultivation. *Id.*

The State thereafter charged Long with seventeen (mostly) property crimes. CP 1–8. Prior to trial the court granted the motions of Long and co-defendant Casey Dunn to suppress the evidence seized on the basis the search warrant for Long's house was invalid because the supporting affidavit contained no facts to indicate that the criminal activity

being investigated was connected with the residence and outbuildings. CP 25–31; RP 4–7. The court entered findings of fact and conclusions of law in support of orders granting defendants’ motions to dismiss and dismissing the cases without prejudice. CP 18–19, 20–22. The State appealed. CP 23–24.

B. Published Division Three Decision.

After consideration without oral argument, the Court of Appeals issued a published decision on April 9, 2015. The court concluded there was a reasonable nexus between the missing items and Long’s residence to support the warrant. *Slip Opinion* at 2. The court acknowledged *Thein*’s holding that blanket inferences and generalities cannot be a substitute for the required showing of “reasonably specific ‘underlying circumstances’ that establish evidence of illegal activity will likely be found in the place to be searched in any particular case.” *Slip Opinion* at 8, citing *State v. Thein*, 138 Wn.2d 133, 147–48, 977 P.2d 582 (1999). It agreed that “[p]robable cause to believe a person has committed a crime does not necessarily give rise to probable cause to search that person’s home.” *Slip Opinion* at 8, citing *Thein*, 138 Wn.2d at 148 (internal citation omitted).

Division Three continued, “Nonetheless, it may be proper to infer that stolen property is at a perpetrator’s residence, especially if the

property is bulky, and if the perpetrator had an opportunity to return home before his apprehension by police. WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.7(d), at 381–84 (3d ed.1996) (cited in *State v. McReynolds*, 104 Wn. App. 560, 570, 17 P.3d 608 (2000)).” *Slip Opinion* at 9. The court determined *Thein*’s ruling does not limit the inferences that may be made in nondrug offenses. *Slip Opinion* at 10. Instead, general inferences from the specific facts will suffice if they “establish a reasonable nexus between the items to be seized and the place to be searched.” *Slip Opinion* at 11.

Division Three itemized the “specific facts” it deemed relevant: Long was seen driving a stolen truck containing a stolen ATV on Hogeys Hollow Road and Long’s residence is located on the same road. The court stated a general inference: “the items stolen were not inherently incriminating in the same way as narcotics, and many of the items were bulky and, therefore, likely to be hidden inside a building.” The court noted, “[t]he judge issuing the warrant was entitled to draw the reasonable inference that Mr. Long was driving to his residence with the missing property, and that the property would likely be found there.” *Slip Opinion* at 11. From this, the Court of Appeals concluded, “Specific facts support both that Mr. Long participated in the burglary and that the missing items

would likely be found at Mr. Long's home, garage, or barn. The search warrant therefore was supported by probable cause." The court vacated the orders of suppression and dismissal. *Slip Opinion* at 12. Long seeks review.

V. ARGUMENT IN SUPPORT OF REVIEW

Review should be granted in a matter of first impression to decide whether *Thein's* prohibition against relying upon generalized inferences to establish a nexus with the area to be searched is limited to drug crimes.

Normally the issuance of a search warrant is reviewed for abuse of discretion (*State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)) and deference is given to the issuing judge or magistrate. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). However, at the suppression hearing the trial court acts in an appellate-like capacity; its review, like that of the reviewing court, is limited to the four corners of the affidavit supporting probable cause. *State v. Neth*, 165 Wn. 2d 177, 182, 196 P.3d 658, 661-62 (2008) (citations omitted). "Although we defer to the magistrate's determination, the trial court's assessment of probable cause is a legal conclusion we review de novo." *Id.*

A search warrant should be issued only if the application shows probable cause that the defendant is involved in criminal activity and that

evidence of the criminal activity will be found in the place to be searched. *Thein*, 138 Wn.2d at 140. A finding of probable cause must be grounded in fact. *Id.* at 147. The affidavit should be evaluated in a commonsense manner, rather than hyper-technically. *Neth*, 165 Wn.2d at 182 (citations omitted). Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. *Thein*, 138 Wn.2d at 147; *see e.g.*, *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980) (“if the affidavit or testimony reveals nothing more than a declaration of suspicion and belief, it is legally insufficient”); *State v. Helmka*, 86 Wn.2d 91, 92, 542 P.2d 115 (1975) (“Probable cause cannot be made out by conclusory affidavits”); *State v. Patterson*, 83 Wn.2d 49, 52, 61, 515 P.2d 496 (1973) (record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant). Probable cause for a search requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched. *Thein*, 138 Wn.2d at 140.

A. The facts contained in the “four corners” of the search warrant affidavit simply connect Long with a stolen pickup truck.

The existence of probable cause is to be evaluated on a case-by-case basis. *Thein*, 138 Wn.2d at 149. Thus, the general rules must be

applied to specific factual situations. *Id.* In each case, “the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness” in order to support existence of probable cause. *Thein*, 138 Wn.2d at 149 (citation omitted). Here, the facts alleged in the search warrant affidavit are insufficient to establish the requisite nexus between the missing property and Long’s residence.

The facts contained in the “four corners” of the search warrant are straightforward. On May 3, 2013, a truck was reported abandoned on Ring Canyon Road. During the course of investigation, police discovered the truck and various other items of personal property had been stolen sometime between April 30 and May 3 from the home of the truck's owner, Mr. Zink, on Robinette Mountain Road. The missing property consisted of two ATVs, three generators, one rifle, two chainsaws, one box of movies, three pairs of binoculars, a tree planter, an alcoholic drink dispenser, and an air compressor. Law enforcement officers were unable to find latent prints at the scene. CP 9–11.

The day before the truck was found Long was seen driving the stolen truck on Hoge Hollow Road with an ATV in its bed matching the description of one of the two ATVs stolen from the home. CP 10–11. In the section of the affidavit designated for a description of the premises to

be searched, Undersheriff Brown listed a single family manufactured home, garage, and wooden barn at 447 Hogeye Hollow Road in Columbia County. He described the buildings as approximately one-tenth of a mile from the intersection of Lower Hogeye Road and Hogeye Hollow Road. He described the premises as the residence of Steven Long. CP 9-11, 20-21.

Viewed in a commonsense manner, the search warrant affidavit contains no facts which connect Long's residence to the fruits of alleged burglary beyond the mere fact that he lived there. In his affidavit Underheriff Brown does not even allege insufficient statements based on his training and experience, as found objectionable in *Thein*. The affidavit does not mention how far away the truck was seen from Long's residence or that the truck or other stolen property was seen at Long's property or that any observations were made by informants or other witnesses at the Long home and property. No mention is made of Long's home except as the description of the place to be searched. A handwritten note explaining this is Long's residence is insufficient under *Thein* and its progeny to provide the requisite nexus between the items stolen in the Zink burglary and Long's home. At best the facts set forth in the affidavit only establish a connection between Long and the stolen pickup.

B. The underlying facts contained in the “four corners” of the search warrant affidavit do not support a reasonable inference of criminal activity taking place at Long’s residence.

Even if there is a reasonable probability that a person has committed a crime on the street, this does not necessarily establish probable cause to search his home. *State v. Dalton*, 73 Wn. App. 132, 139–40, 868 P.2d 873 (1994) (uncorroborated informant’s tip that defendant was transporting drugs to an address in Alaska and no information given to issuing judge tying his home to controlled substances). As in *Dalton*, the affidavit here establishes a nexus only between Long and the stolen pickup. Compare with *State v. G.M.V.*, 135 Wn. App. 366, 144 P.3d 358 (2006) (finding probable cause established where warrant was issued to search the place where the defendant was observed leaving directly from, and returning directly to, before and after he sold drugs).

Similarly, probable cause to search a person’s home would not be established just because probable cause might exist to search some other place. See e.g. *State v. Goble*, 88 Wn. App. 503, 509, 512, 945 P.2d 263 (1997) (issuance of search warrant to search his home based on anonymous tip that defendant received drugs at his post office box and discovery of methamphetamine in a package addressed to his post office box was invalid where affidavit contained no information that he had previously dealt or

stored drugs at his home or that he intended to do so in the future). As in *Goble*, the search warrant affidavit here mentions no facts that connect Long's residence to the fruits of alleged burglary beyond the mere fact that he lived there.

Despite the lack of nexus contained in the search warrant affidavit, Division Three maintains *Thein* is distinguishable from this case. The court reasons the *Thein* standard to meet the required nexus does not apply to a case involving theft or burglary, citing as authority its own discussion in *State v. McReynolds*. *Slip Opinion* at 9–10.

In evaluating whether probable cause existed to search the defendant's home, the *McReynolds* court referenced footnote four cited in *Thein*, which noted that “[u]nder specific circumstances it may be reasonable to infer [evidence of a burglary] will likely be kept where the person lives.” *McReynolds*, 104 Wn. App. at 569 (citing *Thein*, 138 Wn.2d at 149 n.4). To help explain context of the reference made in *McReynolds*, it is necessary to look back to *Thein*.

The *Thein* Court emphasized the “existence of probable cause is to be evaluated on a case-by-case basis. Thus, general rules must be applied to specific factual situations. In each case, ‘the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of

reasonableness.” *Thein*, 138 Wn.2d at 149 (citations omitted; emphasis added).

Thus, in a footnote, the *Thein* court said it may be reasonable to infer that personal items of continuing utility that are not inherently incriminating may be at the suspect's residence if sufficiently linked to the crime and the defendant in the search warrant affidavit. *Thein*, 138 Wn.2d at 149 n. 4. The court cited *State v. Herzog*, 73 Wn .App. 34, 867 P.2d 648 (1994) as an example of underlying facts sufficient to establish a reasonable inference that certain items would be found at a defendant's home.

Herzog involved the rape of six women. At least three of the victims described the defendant as wearing a striped polo shirt. *Herzog*, 73 Wn. App. at 38-40, 867 P.2d 648. Based on detailed evidence, police arrested a suspect. After the arrest, police obtained a warrant to search the defendant's room for clothes and towels described by the victims. *Herzog*, 73 Wn. App. at 56, 867 P.2d 648. The evidence, therefore, connected specifically described personal items used repeatedly in the commission of multiple crimes to the defendant. In footnote 4, the *Thein* court concluded, “We do not find it unreasonable to infer these items were in the possession

of the defendant at his home. These were personal items of continuing utility and were not inherently incriminating. Under specific circumstances it may be reasonable to infer such items will likely be kept where the person lives. See Wayne R. LaFare, *Search and Seizure* § 3.7(d), at 381-85 (3d ed. 1996) (“Where the object of the search is a weapon used in the [commission of a] crime or clothing worn at the time of the crime, the inference that the items are at the offender’s residence is especially compelling, at least in those cases where the perpetrator is unaware that the victim has been able to identify him to police.”). See also *State v. Condon*, 72 Wn. App. 638, 644, 865 P.2d 521 (1993) [a particular weapon used in the commission of a crime].” *Thein*, 138 Wn.2d at 149 n. 4 (comment added).

Here, unlike in the *Herzog* case, there are no underlying facts sufficient to establish a reasonable inference that ATVs and generators and such items would be found at Long’s home. Long was never identified by Mr. Zink or even police as the burglar at Zink’s property. The alleged fruits of burglary are not “personal items of continuing utility”. And contrary to Division Three’s decision below, to be in possession of a recently missing ATV with camouflage packs and, presumably, its license or VIN numbers is no less inherently incriminating than to be in possession

of a drug pipe. Under the standard in *Thein* and *Herzog*, it is unreasonable to infer these items were in the possession of Long at his home simply because he lives there.

After the *Thein* decision, Division Three found probable cause lacking to search a defendant's home. In evaluating whether probable cause existed to search the home, the court in *State v. McReynolds* considered a different portion of the LaFave treatise than had been considered in *Thein* at footnote 4. There, Mr. LaFave commented: "Perhaps because stolen property is not inherently incriminating in the same way as narcotics and because it is usually not as readily concealable in other possible hiding places as a small stash of drugs, courts have been more willing to assume that such property will be found at the residence of the thief, burglar, or robber." *McReynolds*, 104 Wn. App. at 569–70 (citing *Wayne R. LaFave, Search and Seizure sec. 3.7(d)*, at 381–84 (3d ed.1996); see full quotation in *Slip Opinion* at 10.

The *McReynolds* court concluded that the affidavit in support of probable cause for a search warrant failed to establish a nexus between other crimes and the defendant's residence because the only evidence linking the defendant to another burglary was a pry bar found at the scene

of the defendant's arrest. The court stated that, “But the presence of this tool, without more, does not establish an inference that evidence of the earlier burglary or any other crime would be at the [defendant's residence].” *McReynolds*, 104 Wn. App. at 570.

Thus, while the *McReynolds* court considered the LaFave comment, it found the underlying facts did not meet the *Thein* requirement of a nexus between the items to be seized and the residence of the defendants. Inexplicably, Division Three has now determined in the same context of a burglary that the LaFave comment dispenses with *Thein*'s requirement of nexus.

Division Three's new position is untenable. It is evident from even a brief sampling of the cases cited by LaFave that a general inference that stolen property is at a perpetrator's residence is permissible only where the underlying facts have established a nexus.⁴ Thus, in *United States v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991),⁵ probable cause to issue a

⁴ See also *State v. Stone*, 56 Wn. App. 153, 158–59, 782 P.2d 1093 (1989) (search warrant provided probable cause to search suspect's vehicle and residence for stolen jewelry and cash where police observed car at scene of burglary and at suspect's residence, suspect had employed same method as previous burglaries, police observed suspect leave his residence and an officer observed jewelry in vehicle).

⁵ *Wayne R. LaFave, Search and Seizure* sec. 3.7(d), n. 210 (3d ed.1996).

warrant to search defendant's home for evidence of a jewelry store robbery was established by facts that a burgundy Cadillac was linked to the robbery and was registered in name of defendant's alias, items fitting description of stolen items were found in the Cadillac, evidence linked to the robbery and a catalog mailed to defendant's alias were found in the hotel room of defendant's associates, an associate had frequented defendant's residence, and the associate had been observed disposing of evidence of the robbery in a trash dumpster.

Similarly, in *United States v. Travisano*, 724 F.2d 341 (2d Cir. 1983),⁶ a magistrate had probable cause to issue a search warrant where a robbery occurred in the afternoon and by morning of the next day police had pinpointed their surveillance to one residence, and knew that the owner of the vehicle parked in front of the house lived there and that the vehicle was known to carry white vanity plates reading "Baby John" just as the vehicle involved in robbery had displayed.

Likewise, in *State v. Gathercole*, 553 N.W.2d 569 (Iowa 1996),⁷ the search warrant application established probable cause to issue a warrant to search the robbery suspect's residence, where the application

⁶ *Id.*

⁷ *Id.*

contained a physical description of the robber, provided that the description matched the suspect's description, contained a report about an occupied car parked with its lights off close to the robbery site at about the time of the robbery, and included a license number of the car, which established that it was owned by the defendant's wife.

The facts of the cases cited in LaFave's treatise comport with *Thein's* requirement that probable cause requires a nexus between the item to be seized and the place to be searched regardless of the nature of the crime. They demonstrate that underlying facts must establish a nexus before it is permissible to make a general inference that stolen property is likely to be found at a perpetrator's residence.

Here, the underlying facts contained in the "four corners" of the search warrant affidavit do not establish a nexus or explain why Undersheriff Brown believed the stolen items would be found at Long's home. The affidavit runs afoul of *Thein* because it does not allege a factual basis to support any reasonable inference of criminal activity taking place at Long's residence. The sighting of Long driving a stolen vehicle at an undisclosed location on Hogeye Hollow Road on one day, "without more, does not establish an inference that evidence of the earlier burglary or any

other crime would be at [Long's] property" five days later. *McReynolds*, 104 Wn. App. at 570. Because the search warrant affidavit does not set forth sufficient facts to support a reasonable nexus between the place to be searched and the items sought, the trial court properly granted respondents' motions to suppress.

VI. CONCLUSION

Because the case conflicts with decisions of this Court and the Court of Appeals and is an issue of substantial public interest that should be determined by this Court, review should be granted. RAP 13.4(b)(1), (2), (4); RAP 13.6.

Respectfully submitted on May 10, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 10, 2015, I mailed to the following, by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Mr. Long's petition for review:

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Division III**

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April 9, 2015

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CASE # 320294; CASE #320308
State v. Dunn; State v. Long
COLUMBIA COUNTY SUPERIOR COURT No. 131000151; No. 131000143

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

c: **E-mail** info copy Hon. Scott Gallina (Hon. William Acey's case)
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FILED
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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	No. 32029-4-III
)	(consolidated with
Appellant,)	No. 32030-8-III)
)	
v.)	
)	
CASEY J. LYNN DUNN,)	
)	
Respondent.)	PUBLISHED OPINION
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STATE OF WASHINGTON,)	
)	
Appellant,)	
)	
v.)	
)	
STEVEN RAY LONG,)	
)	
Respondent.)	

LAWRENCE-BERREY, J. — Witnesses saw Steven Long driving a pickup truck on Hogeve Hollow Road in Columbia County. In the bed of the truck was an ATV¹ with camouflage packs. The next day, after the same truck was found abandoned, a property owner reported that truck, an ATV with camouflage packs, and several other large items of personal property missing. Based on these facts, a judge issued a warrant to search for

¹ An ATV is a commonly used acronym for all terrain vehicle.

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the missing items at Mr. Long's home and adjacent buildings located on Hoge Hollow Road. The search uncovered stolen property and controlled substances. Mr. Long and his roommate Casey Dunn were charged with various offenses. Both defendants moved to suppress the evidence gathered in the search. The trial court granted the motions, concluding that the affidavit in support of the warrant failed to establish a reasonable nexus between the missing items and Mr. Long's residence. The State moved for findings that the cases could not proceed based upon the suppression orders, and the court entered such findings. The State appealed, and we consolidated both cases. We conclude that there was a reasonable nexus between the missing items and Mr. Long's residence to support the warrant. We therefore vacate the suppression orders and the orders of dismissal.

FACTS

Undersheriff Lee Brown investigated the circumstances surrounding an abandoned vehicle found on Ring Canyon Road in Columbia County. After his investigation, he set forth the following facts in his application for a search warrant.

On May 3, 2013, Undersheriff Brown was dispatched to investigate an abandoned vehicle in a ditch on Steve Shoun's property on Ring Canyon Road. While en route to the field, he called Mr. Shoun. Mr. Shoun said that he observed the same pickup truck on

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Hogeye Hollow Road the day prior when it almost ran his hired hand off the road. Mr. Shoun said that he saw Steven Long driving the pickup truck and that Mr. Long waved to him. Mr. Shoun also said that there was an ATV with camouflage packs in the bed of the pickup truck.

When Undersheriff Brown arrived at the scene, he observed a Dodge Ram pickup truck with a gray bed and a brown cab. The pickup truck was in the ditch with the rear of the truck sticking out. The ATV seen the previous day was no longer in the truck. Undersheriff Brown then called Mr. Shoun and asked him to come and verify that the pickup truck was the same one that he observed Mr. Long driving the previous day. Mr. Shoun and his hired hand arrived at the scene and verified that they both observed Mr. Long driving the same pickup truck. Mr. Long was employed by Mr. Shoun in 2010, and the hired hand had known Mr. Long for six or seven years. The truck was registered to Zackary Zink of Dayton. The vehicle was towed and placed in a storage yard.

At around 1:00 p.m., Undersheriff Brown met and spoke with Mr. Zink in the foyer of the sheriff's office. Mr. Zink said that the Dodge pickup truck in the storage yard belonged to him and had been at his property located at 628 Robinette Mountain Road. According to Mr. Zink, he last saw the pickup truck on Tuesday, April 30, 2013.

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Mr. Zink told Undersheriff Brown that he was going to his property to see if his cabin had been entered.

Around 3:30 p.m., Undersheriff Brown responded to a burglary at Mr. Zink's cabin on Robinette Mountain Road. When Undersheriff Brown arrived, Mr. Zink said that the back door was kicked in and the outbuildings had been entered. Mr. Zink also reported a shoe print on the door. Undersheriff Brown observed that the door was kicked in. He also dusted for latent prints, but found none.

Mr. Zink reported that property was missing from the cabin, including both his ATVs, his generators, and a rifle. Undersheriff Brown was advised that one of the ATVs had tannish colored camouflage packs on the back of it, which matched the description of the ATV seen by Mr. Shoun in the back of the pickup truck. Mr. Zink provided a list of missing property with serial numbers or other identifying characteristics.

In the affidavit, Undersheriff Brown listed the missing property reported by Mr. Zink. The property list included two ATVs, three generators, one rifle, two chainsaws, one box of movies, three pairs of binoculars, a tree planter, an alcoholic drink dispenser, and an air compressor.

Also in the affidavit, Undersheriff Brown listed the premises to be searched as a single family manufactured home, garage, and wooden barn at 447 Hogeeye Hollow Road

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in Columbia County. He described the buildings as approximately .1 mile from the intersection of Lower Hogeye Road and Hogeye Hollow Road. He described the premises as the residence of Steven Long.

Based on the above facts, a judge granted the search warrant. During a search of Mr. Long's home, officers found several items that Mr. Zink reported missing. Officers also found methamphetamine. Mr. Long was charged with second degree burglary, two counts of second degree theft, two counts of third degree malicious mischief, one count of residential burglary, three counts of second degree possession of a stolen vehicle, three counts of possession of a stolen vehicle, two counts of possession of stolen property, theft of a firearm, possession of methamphetamine, and manufacture of marijuana. Ms. Dunn, who lived at the home with Mr. Long, was charged with possession of methamphetamine, manufacture of marijuana, and second degree possession of stolen property.

Both Mr. Long and Ms. Dunn moved to suppress the evidence found in the search. The defendants argued that the warrant was not supported by probable cause because the affidavit failed to establish a reasonable nexus between the criminal activity and the place to be searched.

The trial court granted the defendants' motions. The court concluded that the search warrant did not set forth sufficient facts to support a reasonable nexus between Mr.

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Long's residence and the items sought in the search warrant; and, without a reasonable nexus, probable cause did not exist. The court therefore concluded that the warrant was not valid and suppressed all evidence gathered as a result of the warrant. The court entered findings, at the State's request, that the cases could not proceed without the evidence, and dismissed the cases without prejudice. The State appeals, contending that the trial court erred in suppressing the evidence, and requests vacation of the orders of dismissal.

ANALYSIS

The sole issue presented is whether there was a reasonable nexus between Mr. Long's home, garage, and barn and the items sought to be located so to support the search warrant.

A search warrant may only be issued upon a determination of probable cause. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists as a matter of law if the affidavit supporting the search warrant contains sufficient facts and circumstances to establish a reasonable inference that the defendant participated in criminal activity and that evidence of the crime is at a certain location. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

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“‘[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.’” *Id.* (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). A nexus must be established by specific facts. *Thein*, 138 Wn.2d at 145. “Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.” *Id.* at 147.

Generally, we review the validity of a search warrant for an abuse of discretion, giving great deference to the issuing judge. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, when a trial court assesses a search warrant affidavit for probable cause at a suppression hearing, we review the trial court’s conclusion on suppression de novo. *Id.*

Using de novo review, we determine whether the qualifying information as a whole amounts to probable cause. *State v. Emery*, 161 Wn. App. 172, 202, 253 P.3d 413 (2011) (quoting *In re Det. of Petersen*, 145 Wn.2d 789, 800, 42 P.3d 952 (2002)), *aff’d*, 174 Wn.2d 741, 278 P.3d 653 (2012). We consider only the information that was available to the issuing judge. *State v. Olson*, 73 Wn. App. 348, 354, 869 P.2d 110 (1994). “‘It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The [issuing judge] is entitled to make reasonable

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inferences from the facts and circumstances set out in the affidavit.’” *Emery*, 161 Wn. App. at 202 (alteration in original) (quoting *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004)).

The existence of probable cause is to be evaluated on a case-by-case basis. *Thein*, 138 Wn.2d at 149. Facts that would not support probable cause when standing alone can support probable cause when viewed together with other facts. *State v. Garcia*, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992). The application for a search warrant must be judged in the light of common sense, resolving all doubts in favor of the warrant. *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977).

Despite the deference given to the issuing judge, our precedent requires that probable cause be based on more than conclusory predictions. *Thein*, 138 Wn.2d at 147. Blanket inferences and generalities cannot be a substitute for the required showing of “reasonably specific ‘underlying circumstances’ that establish evidence of illegal activity will likely be found in the place to be searched in any particular case.” *Thein*, 138 Wn.2d at 147-48. Probable cause to believe a person has committed a crime does not necessarily give rise to probable cause to search that person’s home. *Id.* at 148 (quoting *State v. Dalton*, 73 Wn. App. 132, 140, 868 P.2d 873 (1994)).

Nonetheless, it may be proper to infer that stolen property is at a perpetrator's residence, especially if the property is bulky, and if the perpetrator had an opportunity to return home before his apprehension by police. WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.7(d), at 381-84 (3d ed. 1996) (cited in *State v. McReynolds*, 104 Wn. App. 560, 570, 17 P.3d 608 (2000)). "Judges looking for probable cause in an affidavit may draw reasonable inferences about where evidence is likely to be kept, including nearby land and buildings under the defendant's control." *State v. Gebaroff*, 87 Wn. App. 11, 16, 939 P.2d 706 (1997).

In *Thein*, police officers obtained a search warrant for the defendant's residence based on their generalized conclusion that drug dealers commonly keep evidence of their illegal drug dealings in their homes. *Thein*, 138 Wn.2d at 138-40. The Supreme Court held that generalized statements in affidavits supporting a search warrant are insufficient, standing alone, to establish the probable cause needed to search a suspected drug dealer's residence. *Id.* at 148. "Although common sense and experience inform the inferences reasonably to be drawn from the facts, broad generalizations do not alone establish probable cause." *Id.* at 148-49.

In *McReynolds*, our court addressed the boundaries of *Thein*. We recognized that inferences considered improper for drug crimes may be appropriate for crimes of theft,

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burglary, or robbery based on the nature of these offenses. *McReynolds*, 104 Wn. App. at 569-70. In support, we quoted LeFave's *Search and Seizure* treatise, also cited in *Thein*, stating,

Perhaps because stolen property is not inherently incriminating in the same way as narcotics and because it is usually not as readily concealable in other possible hiding places as a small stash of drugs, courts have been more willing to assume that such property will be found at the residence of the thief, burglar, or robber. It is commonly said that in such circumstances account may be taken of the 'type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property.' It is most relevant, therefore, that the objects are 'the sort of materials that one would expect to be hidden at [the offender's] place of residence, both because of their value and bulk,' and also that the offender 'had ample opportunity to make a trip home to hide' the stolen property before his apprehension.

McReynolds, 104 Wn. App. at 569-70 (alteration in original) (quoting LEFAVE, *supra*).

Thus, instead of expanding the *Thein* ruling to limit inferences made in nondrug offenses, the *McReynolds* court suggested a more limited reading of *Thein*. *McReynolds*, 104 Wn. App. at 570. We construed *Thein* to require a careful examination of the officer's affidavit, and the specific facts and circumstances therein, to determine whether it establishes a reasonable inference that evidence of criminal activity could be found at the place to be searched. *Id.*

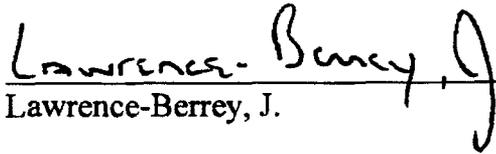
Here, the defendants argue that the facts in the affidavit do not establish a reasonable nexus between the items sought and Mr. Long's residence. We disagree. After reviewing the affidavit in its entirety, including Undersheriff Brown's account of the circumstances, the description of the premises to be searched, and the list of items to be seized, we conclude that the affidavit contains specific facts to establish a reasonable nexus between the items to be seized and the place to be searched.

Based on the facts and circumstances presented in the affidavit, it was reasonable to conclude that the missing items would likely be found at Mr. Long's residence on Hogeye Hollow Road. According to the affidavit, Mr. Long was seen in possession of a truck carrying an ATV. The truck belonged to Mr. Zink, and the ATV with camouflage packs matched Mr. Zink's description of one of his two missing ATVs. When witnesses observed Mr. Long with the truck and missing ATV, he was driving on Hogeye Hollow Road. According to the description of the premises to be searched, Hogeye Hollow Road is where Mr. Long's residence is located. Moreover, the items stolen were not inherently incriminating in the same way as narcotics, and many of the items were bulky and, therefore, likely to be hidden inside a building. The judge issuing the warrant was entitled to draw the reasonable inference that Mr. Long was driving to his residence with the missing property, and that the property would likely be found there.

No. 32029-4-III; No. 32030-8-III
State v. Dunn; State v. Long

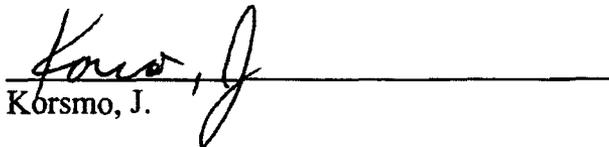
We conclude that the trial court erred in suppressing the evidence found in the search of Mr. Long's home, garage, and barn. Specific facts support both that Mr. Long participated in the burglary and that the missing items would likely be found at Mr. Long's home, garage, or barn. The search warrant therefore was supported by probable cause.

We vacate the suppression orders. Additionally, we vacate the orders of dismissal and remand for further proceedings.


Lawrence-Berrey, J.

WE CONCUR:


Siddoway, C.J.


Korsmo, J.

FILED

COLUMBIA COUNTY SUPERIOR COURT

MAY 09 2013

Lynne Leseman
Columbia County Clerk

And Clerk of the Superior Court

BEFORE William Acev; JUDGE

By _____ Deputy

Received at 8:35 am

STATE OF WASHINGTON)

NO. _____

v.)

AFFIDAVIT FOR SEARCH WARRANT

Steven R. Long , defendant)

The undersigned on oath states:

1. I am **Lee Brown** , **Under Sheriff** of the Columbia County Sheriff's Office.

2. That affiant states:

[] Evidence of a crime (describe):

[X] Contraband, the fruits of a crime, or things otherwise criminally possessed (consisting of):

A 2000 watt Honda Generator model number EU2000I, Serial #EAAJ2466140, 1 9500 watt Mighty Quip Generator model number EU9500, 1 Marlin lever action 30.30 rifle model # Glenfield 30 Serial # J-51487, 1 2007 black/silver Polaris Hawkeye ATV License #447769A, VIN #4XALH27A17B009859, 1 2004 green Bombadier Outlander ATV, license # 395315A VIN # 2BVEGSG144V000669, 1 green 4200 Homelite Generator, 1 045 Stihl chainsaw, 1 357 Husqvarna chainsaw, 2 red 5 gal gas cans with gas, 30-40 DVD movies in a single box, 2 pair of antique Paris binoculars, 1 tree planter with McCullock 10-10 motor, 1 drink carousel with 4 full fifths of assorted alcohol, 1 pair of Tasco binoculars 20x50, 1 SEARS air compressor with red tanks and a silver engine with a chunk of automotive bondo on the tank.

[] Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed (describe):

are concealed in **Columbia** County, Washington. In, on or about certain:

[X] Premises (describe):

AFFIDAVIT FOR SEARCH WARRANT
(CrR 2.3)

AFSW

9
APPENDIX B

A single family one story manufactured home which is tan in color with white trim located at 447 Hogeye Hollow Rd in the County of Columbia. Also present is a cinderblock garage with a silver metal roof located in front of the residence. There is also a weathered wooden barn on the north side of Hogeye Hollow Rd that belongs with the property. This residence and barn is approximately .1 miles from the intersection of Lower Hogeye Road and Hogeye Hollow Road.

THIS IS THE RESIDENCE OF STEVEN R LONG HLB

[] Vehicles (describe):

[] Person(s) (describe):

3. That affiant's belief is based upon the following facts and circumstances:

On May 3, 2013 I was dispatched to a report of an abandoned vehicle in the ditch on Steve Shoun's property on Ring Canyon Road. While enroute to the field I called Shoun on his cellphone and was told by him that he had observed the same pickup truck on Thursday, May 2, 2013 when it almost ran his hired hand off the road on Hogeye Hollow Road. Shoun told me that he had seen Steven Long driving the pickup and that Long had waved at him. I was also advised by Shoun that there was an ATV in the bed of the pickup which had cammo packs on it.

When I arrived, I observed a Dodge Ram pickup truck with a grey bed and a brown cab in the ditch with the rear of the pickup sticking out of the ditch, the pickup truck had Washington State License plate number B38538R. The pickup was registered to Zackary Zink of Dayton. The vehicle was recovered by Kyles Towing and placed in his storage yard. The ATV was not in the back of the pickup truck.

After the pickup was pulled out of the ditch I called Shoun on his cellphone and asked him to come to my location and verify that this was the pickup he had observed Steven Long driving on Thursday. Shoun and his hired hand arrived and verified that they had both observed Long driving that same pickup. Long was employed by Shoun in 2010 and the hired man has known Long for 6 or 7 years.

At approximately 1300 I made contact with the owner of the vehicle in the foyer of the Sheriff's Office. I was advised that the Dodge pickup that was at Kyles Towing was his and had been at his property located at 628 Robinette Mountain Road being used as a farm vehicle. I was told that the vehicle was not suppose to be off the property and that the last time he had seen it, it was parked next to a horse trailer on his property. According to Zink the last time he had observed the pickup was on Tuesday, April 30, 2013. Zink advised me that he was going to check his property and see if his cabin had been entered.

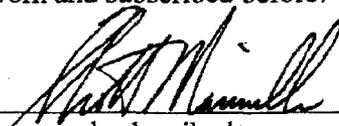
On May 3, 2013 at approximately 1440 hours I was advised to respond to the Zink cabin on Robinette Mountain Road for a report of a burglary. The property listed in this affidavit was provided by the Zink's who stated that the property was at the cabin and is now missing.

When I arrived I was met by Zink at the front gate and advised that the back door had been kicked in and the outbuildings had also been entered. While driving up to the cabin Zink told me that both his ATV's were gone as well as generators and a rifle. Zink also advised me that the door had a shoe print on it.

As we pulled up to the back door I observed that the door had been kicked in I dusted for latent prints but did not find any at all.

I was advised that one of the ATV's had tannish colored cammo packs on the back of it which matched the discription of the ATV in the back of the pickup truck.

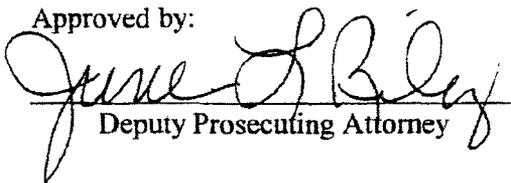
Sworn and subscribed before:

 ; Judge
Sworn and subscribed on:

5-6-13
date

Hayden 903 5-6-13
affiant

Approved by:


Deputy Prosecuting Attorney

If any additional facts are relied upon, they must be set forth and sworn to above.

GASCH LAW OFFICE

May 10, 2015 - 4:14 PM

Transmittal Letter

Document Uploaded: 320308-Petition for Review 5-10-15 Long, Steven Ray.pdf

Case Name: State v. Steven Ray Long

Court of Appeals Case Number: 32030-8

Party Represented: respondent-petitioner

Is This a Personal Restraint Petition? Yes No

Trial Court County: ____ - Superior Court # ____

Type of Document being Filed:

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Response/Reply to Motion: ____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: petition for review

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to rculwell@waprosecutors.org and Andrea@BurkhartandBurkhart.com.

Sender Name: Susan M Gasch - Email: gaschlaw@msn.com

GASCH LAW OFFICE

May 10, 2015 - 4:15 PM

Transmittal Letter

Document Uploaded: 320308-COA opinion 4-9-15 Appendix A to PFR.pdf
Case Name: State v. Steven Ray Long
Court of Appeals Case Number: 32030-8
Party Represented: respondent-petitioner
Is This a Personal Restraint Petition? Yes No
Trial Court County: ____ - Superior Court # ____

Type of Document being Filed:

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Response/Reply to Motion: ____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: petition for review Appendix A

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to rculwell@waprosecutors.org and Andrea@BurkhartandBurkhart.com.

Sender Name: Susan M Gasch - Email: gaschlaw@msn.com

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May 10, 2015 - 4:16 PM

Transmittal Letter

Document Uploaded: 320308-Affidavit for SW Appendix B to PFR.pdf

Case Name: State v. Steven Ray Long

Court of Appeals Case Number: 32030-8

Party Represented: respondent-petitioner

Is This a Personal Restraint Petition? Yes No

Trial Court County: ____ - Superior Court # ____

Type of Document being Filed:

- Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Response/Reply to Motion: ____
- Brief
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Electronic Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: petition for review Appendix B

Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to rculwell@waprosecutors.org and Andrea@BurkhartandBurkhart.com.

Sender Name: Susan M Gasch - Email: gaschlaw@msn.com