

No. 47902-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Steven Hicks,**

Appellant.

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Pierce County Superior Court Cause No. 15-1-01914-9

The Honorable Judge Jack Nevin

**Appellant's Opening Brief**

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### **ISSUE AND ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Mr. Hicks's motion to suppress items obtained in violation of his right to be free from unreasonable searches and seizures under the Fourth Amendment.
2. The trial court erred by denying Mr. Hicks's motion to suppress items obtained in violation of his right to privacy under Wash. Const. art. I, § 7.
3. The trial court erred by granting the prosecutor's Motion to Reconsider.
4. The trial court erred by adopting Conclusion of Law No. 3.
5. The trial court erred by adopting Conclusion of Law No. 4.
6. The trial court erred by adopting Conclusion of Law No. 5.
7. The trial court erred by adopting Conclusion of Law No. 6.
8. The trial court erred by adopting Conclusion of Law No. 7.
9. The trial court erred by adopting Conclusion of Law No. 8.

**ISSUE:** A search warrant must be based on probable cause. Did the trial court err by refusing to suppress evidence seized following execution of a search warrant that was not based on probable cause?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Officers saw a man in a car, so they checked the records relating to that car. The owner of the vehicle, Steven Hicks, had an arrest warrant for an alleged violation of community custody. CP 5, 22. Mr. Hicks was on community custody for a drug offense. CP 5, 22.

Looking at a booking photo of Mr. Hicks, officers confirmed the man in the car was Mr. Hicks. CP 22. They stopped the car, and described Mr. Hicks as nervous and slow to turn off the vehicle. CP 5, 22. One of the officers saw a red nylon lunch-type bag in the car. CP 5, 22.

Mr. Hicks then drove off fast, and the officers took chase. CP 6, 22. They lost sight of the car, but later saw it in some bushes. Mr. Hicks was in the lake by the bushes, and officers arrested him when he came out. CP 6, 23.

At this point, the officers suspected that Mr. Hicks had contraband in his car. CP 6, 23. The red bag was no longer visible in the car, and the officers didn't find it in the area. CP 6, 23.

Mr. Hicks told the officers he tried to get away because he knew he had a warrant. CP 6, 24. He also declined to consent to a search of the car. CP 6, 23. One of the officers saw a Coke can with the top open

inside the car. RP 6. This officer said that he has previously seen fake cans like this, which people use to conceal contraband. CP 23.

Based on this information, the officers sought and obtained a search warrant for the car. CP 6, 22-24, 26-27.

Based on items found within the car, the state charged Mr. Hicks with Possession of Ammonia with Intent to Manufacture Methamphetamine and Possession of Methamphetamine with Intent to Distribute. CP 1-2. The state also charged Attempting to Elude. CP 2.

Mr. Hicks moved to suppress the evidence, arguing that the affidavit in support of the search warrant did not establish probable cause. CP 4-10.

The first hearing on the matter took place on July 14, 2015. At that hearing, the court heard argument and suppressed the evidence. RP (7/14/15) 10-12. In explaining his ruling, Judge Nevin addressed the Coke can in the car: "Can the top off a Coke can be something with a secret compartment, yeah. It can also be an empty Coke can. And there's not enough substance in this to draw that distinction." RP (7/14/15) 11.

The state moved to reconsider, and the court held another hearing. CP 28-44; RP (8/5/15) 13-37. The trial judge heard more argument, and concluded that the same facts earlier reviewed should not lead to

suppression. RP (8/5/15) 30-37; CP 45. The evidence was unsuppressed.  
CP 45.

Mr. Hicks requested discretionary review at the Court of Appeals,  
which was granted. CP 46-47.

### **ARGUMENT**

#### **THE TRIAL COURT IMPROPERLY DENIED MR. HICKS'S MOTION TO SUPPRESS EVIDENCE UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ART. I § 7.**

A. Standard of Review.

The validity of a search warrant is an issue of law reviewed *de  
novo*. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

B. A search warrant must be based on probable cause and must  
particularly describe the place to be searched and the things to be  
seized.

The fourth amendment protects against unreasonable searches and  
seizures. U.S. Const. Amend. IV.<sup>1</sup> Art. I, § 7 protects against disturbance  
of a person's private affairs or invasion of a person's home without  
authority of law. It provides stronger protection to individual privacy

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<sup>1</sup> The fourth amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

rights than does the Fourth Amendment.<sup>2</sup> *State v. Meneese*, 174 Wn.2d 937, 946, 282 P.3d 83 (2012). Under both constitutional provisions, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012).

An affidavit in support of a search warrant “must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). By itself, an inference drawn from the facts “does not provide a substantial basis for determining probable cause.” *Lyons*, 174 Wn.2d at 363-64. Conclusory statements of an affiant’s belief do not support a finding of probable cause. *Id.*, at 365.

Generalizations about what criminals generally do cannot provide the individualized suspicion required to justify the issuance of a search warrant. *Thein*, 138 Wn.2d at 147-148. Probable cause requires a nexus between criminal activity, the item to be seized, and the place to be searched. *Id.*, at 140.

C. The warrant here was not based on probable cause because the affidavit did not establish a nexus between the property searched

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<sup>2</sup> Accordingly, the six-part *Gumwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to art. I, § 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gumwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

and any evidence of criminal activity.

Evidence must be suppressed when a search warrant affidavit fails to establish a nexus between evidence of alleged criminal activity and the place to be searched. *Thein*, 138 Wn.2d at 140; *State v. McReynolds*, 104 Wn. App. 560, 570-71, 17 P.3d 608 (2000), *as amended on denial of reconsideration* (Jan. 30, 2001). Generalizations will not suffice to establish a nexus. *Thein*, 138 Wn.2d at 147-48. Thus, for example, “[a]n officer's belief that persons who cultivate marijuana often keep records and materials in safe houses is not, in our judgment, a sufficient basis for the issuance of a warrant to search a residence of a person connected to the grow operation.” *State v. Olson*, 73 Wn. App. 348, 357, 869 P.2d 110 (1994).

The affidavit in this case did not establish that evidence of criminal activity would be found in Mr. Hicks’s car. Instead, the facts provided to the magistrate showed only that Mr. Hicks had an arrest warrant for escape from community custody, that he was on supervision for a drug-related offense, that he had a red nylon lunch bag on his seat when stopped by police, that he fled the traffic stop,<sup>3</sup> that he abandoned his car and jumped in a lake to evade police, that the red bag wasn’t in the abandoned car, that he refused consent to search the car, and that an open coke-can

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<sup>3</sup> He explained that he fled because of the arrest warrant. CP 24.

safe rested on the car's floorboards. CP 22-24.

The officers didn't observe any controlled substances, paraphernalia, or other evidence of possession. Furthermore, the criminal activity they had grounds to suspect—escape from community custody, attempting to elude, and reckless driving—did not include offenses that would leave evidence inside the car.<sup>4</sup>

The officer's claim that coke can safes are "commonly used to conceal illegal contraband" is nothing more than generalized speculation of the type criticized by the *Thein* court. *Thein*, 138 Wn.2d at 147-48; *see also Olson*, 73 Wn. App. at 357.

The affidavit does not establish probable cause. The affiant failed to show a nexus between evidence of criminal activity and the car. Thus the trial court should have ordered the evidence suppressed. *Thein*, 138 Wn.2d at 147-48.

### **CONCLUSION**

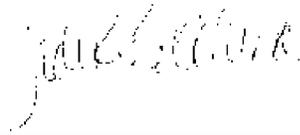
For the foregoing reasons, the trial court's order denying Mr. Hicks's motion to suppress must be reversed. The evidence must be suppressed and the case remanded to trial court.

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<sup>4</sup> Furthermore, the officers did not seek evidence of these offenses when they applied for the warrant. CP 21, 26-27.

Respectfully submitted on February 3, 2016.

**BACKLUND AND MISTRY**



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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Steven Hicks  
c/o Pierce County Jail  
910 Tacoma Ave S  
Tacoma, WA 98402

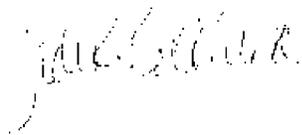
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney  
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 3, 2016.



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# BACKLUND & MISTRY

February 03, 2016 - 1:52 PM

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