

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ROBERT K. RATHBUN,

Appellant.

No. 38520-1-II

UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Robert Rathbun guilty of one count of unlawful possession of methamphetamine in violation of RCW 69.50.4013(1), and the trial court sentenced him to 24 months confinement followed by 9 to 12 months community custody. Rathbun appeals his conviction, challenging the trial court’s denial of his motion to suppress, arguing that probable cause did not support the initial warrant authorizing the search of his residence which led to a second search warrant and seizure of the methamphetamine underlying these charges. We disagree and affirm.

Facts

Rathbun does not assign error to the trial court’s findings of fact, therefore they are verities for purposes of this appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Those facts conclusively establish that Grays Harbor County Sheriff’s Detective Keith Peterson

was investigating the theft of custom cabinetry when he lawfully entered the carport on Rathbun's property to inquire about Rathbun's neighbor. After seeing a shotgun and shells in the open drawer of a dresser in the carport and learning that Rathbun, a convicted felon, was not authorized to lawfully possess firearms, Peterson sought and obtained a search warrant to search Rathbun's residence for any other firearms, firearm parts, or ammunition and indicia of dominion and control over the residence. The search warrant was executed on April 23, 2008. While executing the search warrant, controlled substances and drug paraphernalia were found. An amended search warrant was then obtained to search for controlled substances. Methamphetamine was found in the residence and Rathbun and a lady friend were charged with possession of methamphetamine.

Rathbun assigns error only to the trial court's conclusion of law 7 which reads,

Once Peterson had determined that Mr. Rathbun was a convicted felon, the presence of the shotgun and shotgun shells in the dresser drawer gave him probable cause, i.e., sufficient facts for a reasonable person to conclude that Mr. Rathbun was involved in criminal activity, to obtain a search warrant to search the residence to see if any other firearms or firearm related items were in the residence.

Clerk's Papers (CP) at 7.

He does not assign error to conclusion of law 8 which reads,

Once Peterson was executing the search warrant and discovered controlled substances and drug paraphernalia, he had probable cause to obtain a further search warrant to search for those items.

CP at 8.

On appeal, Rathbun does not dispute that, after finding the methamphetamine during the initial search, Peterson had probable cause to obtain a further search warrant. Rather, he argues that probable cause did not support the initial search warrant, therefore Peterson was not in a

place he was entitled to be when he found the methamphetamine and the court should have granted his motion to suppress the drugs as the product of an illegal search and dismissed the charge against him for lack of evidence.

Discussion

Both the federal and state constitutions protect individuals from unreasonable searches. U.S. Const. amend. IV; Wash. Const. art. I, § 7. Therefore, a search warrant must be supported by probable cause that “criminal activity is occurring or that contraband exists at a certain location.” *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002).

Probable cause is established where an affidavit supporting a search warrant provides sufficient facts such that a reasonable person would conclude that there is a probability that the defendant is engaged in criminal activity. *Vickers*, 148 Wn.2d at 108; *see also State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Facts that, standing alone, do not support probable cause may provide probable cause when viewed together with other facts. *Cole*, 128 Wn.2d at 286. If there are doubts as to the existence of probable cause, they may be resolved in favor of issuing a search warrant. *Vickers*, 148 Wn.2d at 108-09. Where a search warrant is issued, the defendant bears the burden of establishing that the search was unreasonable. *State v. Hopkins*, 113 Wn. App. 954, 958, 55 P.3d 691 (2002). A magistrate exercises judicial discretion in determining whether to issue a warrant. *Vickers*, 148 Wn.2d at 108. Appropriate deference is afforded the magistrate’s findings on reliability and credibility. *In re Det. of Petersen*, 145 Wn.2d 789, 800, 42 P.3d 952 (2002). The magistrate may draw commonsense inferences from facts presented in an affidavit and need not examine the affidavit in a hypertechnical manner. *State v. Creelman*, 75 Wn. App. 490, 494, 878 P.2d 492 (1994). After reviewing the factual determination of the magistrate

judge, the appellate court will review de novo whether the qualifying information, as a whole, amounts to probable cause. *Peterson*, 145 Wn.2d at 800.

Here, Detective Peterson filed a seven-page declaration in support of his initial request for a search warrant for Rathbun's residence, a single-wide manufactured home. Judge Stephen E. Brown approved the warrant application on April 22, 2008, and it was served the next day. Peterson's declaration included the following,

On 04/17/08 at approximately 1500 hours, I attempted to contact a suspect of a theft of cabinet and possession of stolen property (see case # 08-3125). The suspect was identified as a female named Bobbie. Her residence was described as a mobile home behind and to the south of the first blue residence on N. Blockhouse across from Murray Place. This residence was identified as 50 N. Blockhouse Road (a mobile home).

It did not appear that anybody was home. I knocked on the door but received no answer. In an attempt to possibly see if neighbors observed anything unusual, like cabinets being moved into 50 N. Blockhouse, I went to another mobile home located at 47 N. Blockhouse Road. I drove up the driveway which does not bear any 'No Trespassing' signs and does not have a gate. I parked in the driveway and walked up to the front door. There was an open carport directly next to and attached to the north end of the mobile [home]. While approaching the residence, I observed one of the same types of custom cabinets I had already recovered sitting in the carport, partially covered by a tarp. These cabinets are new, custom made, high end, clear fir pieces without the drawers or cabinet fronts.

While standing outside and looking into the carport, I also noted that there was an older dresser under the same carport on the opposite side. The drawer was pulled almost all the way out and I could clearly observe without entering the carport area that there was a shotgun and several shotgun shells in the drawer. The area where I observed these items were [sic] impliedly open to the public-being directly next to and visible by anyone visiting the residence. The shotgun was unsecured and nothing would have prevented anyone walking up to the residence from retrieving and loading it.

I ran a vehicle registration of a pickup truck parked at the residence which indicated that Robert Rathbun was the current owner. I know Robert Rathbun from previous contacts and believed him to be a convicted felon. I knocked on the door numerous times and did not receive any response. I left the residence and drove down the road and waited for any possible vehicle traffic to either residences. Approximately five minutes later, I observed a truck pull into the driveway at 47 N. Blockhouse Road. I followed the truck in and noted that whoever got out of the truck left the front door to the residence open and went

inside. I approached the residence and observed Rathbun inside from my position on the front porch and I requested to speak to him. I contacted him on the porch. I advised him why I was there and believed that stolen cabinets were in his carport. Rathbun was not in custody and was not restrained in any way. I asked him where he had received the cabinets and, at first, he would not say but then told me that he had received the cabinets from the next door neighbors which live at 50, the residence of a female named "Bobbie". He said that he had received the cabinets on 04/17/08 in the morning when Bobbie had asked him to move them from her house to their property.

I asked Rathbun if there were any other cabinets inside the residence and he stated that there were not. I requested to walk through the residence just to verify this and Rathbun stated that he would allow me to check for the cabinets. I walked inside the residence and noted that there were other individuals inside including a female named Rebecca McCullough who was in the back bedroom lying on the bed. Rathbun walked quickly ahead of me as we walked down the hall and I observed him take something off the top of the bed and put it underneath the mattress. I then contacted McCullough. I asked her if she lived here too and she advised that she did. I requested that they come outside so that I could speak to them more about the cabinets. No cabinets were located inside the residence. I checked Dispatch for warrants for both subjects and located warrants for McCullough including a misdemeanor warrant out of Aberdeen Police Department as well as Tacoma Police Department. She was listed as a convicted felon. Robert Rathbun also had a misdemeanor warrant for [driving with license suspended] 3rd Degree and he also was listed as a convicted felon.

Based on the shotgun being in a place that was very visible with the drawer open in the carport, both subjects were placed into custody for being convicted felons in possession of a firearm. They were transported to the County Jail and booked on those charges. I arranged again with County Roads to have the cabinets removed from the carport. It should be noted that Rathbun stated that he did not know they were stolen and, if they were, he would want them removed. There were three pieces of cabinetry as well as a cultured marble sink which were all taken to the county shop. The weapon and ammunition were seized.

I also photographed and seized the cabinets and firearm along with several shotgun rounds. The shotgun was identified as a Harrington Richardson 12 gauge, serial number AZ500321. The weapon was not loaded, however the shotgun shells were in the same drawer. Deputy Warnock arrived and transported Rathbun and McCullough to the County Jail where they were booked on Felon in Possession of a Firearm charges. I later attempted to obtain latent prints from the weapon without success.

While still at the residence, a female arrived in a vehicle and stated that her name was Roberta "Bobbie" Mashek. Mashek said she lived next door at 50 N. Blockhouse Road. I told her that I would need to speak with her and asked permission to check her residence for anymore cabinetry. She agreed and I followed her over to the residence. I walked through and did not locate any other

items of evidentiary value.

I then asked Mashek if I could obtain a statement from her regarding the events leading up to today. Mashek agreed. She was not placed in custody in any way or restrained from leaving. I advised her it was a voluntary statement and I did not read her the *Miranda*¹ warnings. I told her I was not taking her to jail and she was not being arrested. She stated she understood and told me that she knows a woman named Lynn who lives in Elma across from the high school and that she had known Lynn from another girl named Amber. Lynn told Mashek that she had some things at her residence that she was trying to sell, including a marble sink. Mashek was in the process of renovating her mobile home and was interested in the sink that Lynn was going to sell for \$35.00.

Lynn also told Mashek that she knew of some cabinets for sale. Mashek stated that she was interested in the cabinets but had no idea they were stolen. Approximately a week after the conversation with Lynn about the cabinets, Bonnie [sic] came home and saw there were three separate pieces of cabinets on her driveway. She stated this was approximately five days prior to this interview. Mashek stated that she figured Lynn would call her about the purchase price or talk to her about the cabinets but she stated that she had not talked to her. She told me that on 04/16/08 she was driving through Elma on Main Street and had passed the house she knew belonged to Lynn when she observed police officers standing outside and the same type of cabinets being loaded onto a truck and being removed from the property. She stated, at this point, she began calling around and talked to somebody who said that Lynn had been arrested for Possession of Stolen Property and that stolen items were being removed from the house. She also said that she heard from this person that a male subject nicknamed 'Red' had gotten into trouble for it and that Steve was also involved in the theft. I later showed her pictures of Perry Vicars who she identified as Red and a photo of Steven Boyce who she identified as Steve. She heard that the cabinets had been given to Lynn by Red and/or Steve and she assumed that Steven Boyce was the person who brought the cabinets to her house, although she said she had no basis of knowledge for this.

She also told me that after hearing the things about Lynn and the other subjects that she panicked and decided to ask the next door neighbors, Robert Rathbun and Becky, to keep the items in their carport or somewhere at their property. She stated that she knows that she should have called someone about it but she was afraid of getting into trouble. I obtained a written statement from Mashek and reviewed it with her. She agreed with the statement and signed in the appropriate places.

I checked in local records and located several contacts for Rathbun and McCullough. Mc[C]ullough has been arrested on numerous occasions for Theft 1st and 2nd degree, Forgery, and [Violation of the Uniform Controlled Substance Act (VUCSA)] related charges. Rathbun has been arrested on VUCSA, Theft of a Motor Vehicle, and Theft of a Firearm charges.

I believe that other evidence of Felon in Possession of a Firearm charges

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

will be located inside the residence as well as in the carport or other areas of the property. I know that subjects who possess firearms commonly keep them inside their residences. They will also keep ammunition for the weapons inside their residences and/or firearm parts, cleaning kits and other items related to firearms.

CP at 33-38.

Rathbun argues that the affidavit in support of the search warrant rested on the generalization that people commonly keep firearms and ammunition in their residences and that, under *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999), Detective Peterson's affidavit was insufficient to support a finding of probable cause to issue a warrant to search his residence. But as the trial court noted, probable cause was established when Peterson saw the shotgun and shells in the open dresser drawer in Rathbun's carport:

[T]here must be a nexus between the criminal activity and the items to be seized. Well, probable cause exists if the affidavit supporting the search warrant presents facts sufficient for the Court to reasonably infer that criminal activities occurred. That's all. And what - so Detective Peterson now has two people at this residence who he has determined are convicted felons, who have a shotgun with ammunition next to it in a dresser drawer in the carport, and they're in possession of what the detective believes is a stolen [kitchen] cabinet. Clearly there were sufficient facts to allow the issuing magistrate, in this case Judge Brown, to infer that criminal activity had . . . occurred. And so the next part of the test in the nexus is whether or not the place to be searched is reasonably related to the criminal activity. And when - when Detective Peterson obtained probable cause to arrest Mr. Rathbun for being a felon in possession of a firearm, because the firearm was located at his residence, was in the carport, may not have been inside the four walls of the mobile home, that certainly gave him probable cause to believe that there may be other evidence of criminal activity related to firearms in the home, or ammunition, evidence of ownership of the firearm, other firearms, the list would be much longer than what I've just delineated.

But - the search warrant was properly issued, I believe that the facts [are] sufficient to justify it.

Report of Proceedings (July 15, 2008) at 40-41.

We agree with the trial court that Detective Peterson's affidavit amply established

probable cause supporting the issuance of the initial search warrant and the trial court did not err by denying Rathbun's motion to suppress the methamphetamine found during that search and seized by authority of a subsequent warrant.

Probable 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. *Thein*, 138 Wn.2d at 140. Rathbun contends that the warrant affidavit lacks information sufficient to demonstrate a nexus between the firearms possessed illegally and Rathbun's residence. We disagree.

Read in its entirety, in addition to the detective's general statement regarding his knowledge of the habits of those illegally possessing firearms, the affidavit clearly stated that Detective Peterson saw a shotgun and shells in the open dresser drawer in the carport of a residence believed to belong to a convicted felon, Rathbun. As a convicted felon, Rathbun was prohibited from possessing firearms. Former RCW 9.41.040 (2005). Evidence that the mobile home was Rathbun's residence and its contents, as well as the contents of the mobile home's carport, would also be evidence that Rathbun constructively possessed the shotgun and ammunition. *See State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969) (actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods). When, as here, there is direct information connecting the items (shotgun in carport) with the place (mobile home) and the convicted felon (Rathbun), the object-place nexus is clear. *See* 2 Wayne R. LaFave, *Search and Seizure* § 3.7(d), at 415-18 (4th ed. 2004). The warrant affidavit clearly establishes the presence of the weapon and Rathbun's convicted felon status as well as probable cause to believe

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that the mobile home is Rathbun's residence. Thus, there is probable cause to believe that evidence of Rathbun's dominion and control over the mobile home and its carport is likely to be found in the mobile home. Probable cause supports the search warrant and the trial court did not err in denying Rathbun's suppression motion. Accordingly, we affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, P.J.

VAN DEREN, J.