

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD JESS HARSH, II,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44994

EDWARD JESS HARSH, II,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44995

**FILED**

**JUL 06 2006**

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. B. Bloom*  
CHIEF DEPUTY CLERK

These are consolidated appeals from judgments of conviction, pursuant to pleas of guilty of two counts of burglary and two counts of possession of stolen property. Appellant's plea agreement preserved the right to appeal the district court's ruling denying a motion to suppress evidence. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Search and seizure of Harsh's truck

A law enforcement officer may stop a person and conduct a brief investigation when the officer has a reasonable, articulable suspicion that a crime has been committed, is being committed, or is about to be committed.<sup>1</sup>

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<sup>1</sup>See NRS 171.123; Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

Detective Paszek was assigned to a commercial burglary where numerous pieces of commercial equipment and tools were stolen. Detective Paszek obtained information from a secret witness that "Ed" was the man on a Circus Circus surveillance video parking a stolen truck from the burglary; that "Ed" lived at the Fireside Inn; that authorities had found a stolen thirty-foot box truck at the Fireside Inn; and a manager or employee of the Fireside Inn confirmed that a man named "Ed" lived in units 112 and 113. During surveillance of "Ed's" motel rooms, Detective Paszek then saw a man matching Ed's description exit one of the rooms. The man got into a brown truck, the same color truck the secret witness said "Ed" possessed, with an attached trailer heavily loaded with property.

Here, Detective Paszek stopped Harsh based on a reasonable, articulable suspicion that Harsh was an individual that had been involved in one of the Reno-Sparks commercial burglaries. Consequently, Detective Paszek had authority to stop and detain Harsh and seize his truck for up to sixty minutes pursuant to NRS 171.123(4).<sup>2</sup>

"[O]nce a detention exceeds the sixty-minute time limit under NRS 171.123, the detention ripens into a de facto arrest for which probable cause is necessary."<sup>3</sup> Further, "the fact that the officers did not believe there was probable cause and proceeded on a [temporary

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<sup>2</sup>See also Segura v. United States, 468 U.S. 796, 812-13 (1984) (under federal law, there is no set time limit on law enforcement's ability to seize and detain property, so long as the police have probable cause to seize and detain the property, and so long as they act diligently in obtaining a search warrant).

<sup>3</sup>State v. McKellips, 118 Nev. 465, 473, 49 P.3d 655, 661 (2002).

detention] rationale would not foreclose the State from justifying [a person's] custody by proving probable cause.”<sup>4</sup>

Harsh was pulled over by Detective Paszek at approximately 3:00 p.m. Pursuant to NRS 171.123(4), the officers were required to release both Harsh and his truck by 4:00 p.m., or the continued detention would ripen into a de facto arrest and seizure which must have been supported by probable cause. Harsh was released and was free to leave before sixty minutes had elapsed. However, the officers detained Harsh's truck beyond the sixty-minute period.<sup>5</sup> Therefore, the officers only needed probable cause to seize Harsh's truck.

When reviewing the district court's determination of probable cause, “[t]he duty of a reviewing court is simply to determine whether there is a substantial basis for concluding that probable cause existed,” and the reviewing court should review the district court's finding of probable cause for an abuse of discretion.<sup>6</sup>

Probable cause for a search and seizure exists “where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime

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<sup>4</sup>Id. at 472, 49 P.3d at 660 (quoting Florida v. Royer, 460 U.S. 491, 507 (1983)).

<sup>5</sup>Harsh actually did leave the scene not long after he was told he was free to go.

<sup>6</sup>Doyle v. State, 116 Nev. 148, 158, 995 P.2d 465, 472 (2000).

will be found.”<sup>7</sup> “Whether probable cause is present to support a search warrant is determined by a totality of circumstances.”<sup>8</sup>

In addition to the investigation leading to Harsh’s initial stop, several commercial burglaries had also occurred in Reno. A number of Reno officers who responded to Harsh’s traffic stop had been briefed on the types of equipment stolen in the Reno burglaries, particularly the burglary of Pacific West.<sup>9</sup> When Officer Hobensack arrived on the scene, testimony indicates that Detective Paszek informed him of the events leading up to Harsh’s stop, including the fact that Detective Paszek had an anonymous tip that Harsh was involved in a Sparks commercial burglary. A number of Reno officers testified that they could see through the camel-colored netting covering the bed of Harsh’s truck,<sup>10</sup> and could recognize equipment and tools that generally matched the descriptions of stolen equipment from recent commercial burglaries in Reno. Officer Hobensack testified that the equipment looked suspicious and he contacted another officer who

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<sup>7</sup>Ornelas v. U.S., 517 U.S. 690, 696 (1996).

<sup>8</sup>Doyle, 116 Nev. at 158, 995 P.2d at 471.

<sup>9</sup>The district court appeared to find that the officers’ testimony was credible. After reviewing the record, we agree with the district court.

<sup>10</sup>The record leaves little doubt that the officers could look through netting in the sunlight without manipulating it. We reject Harsh’s arguments that the officers’ “ocular” views through the netting constituted warrantless searches. The stolen equipment was in plain view from the vantage point of any passer-by who chose to approach the truck and look through the netting. While Harsh may have had a subjective expectation of privacy in the contents of the bed of his truck, he did not have an objective expectation of privacy from prying eyes. In comparison, Harsh had an objective expectation of privacy in his truck trailer, which was covered by a non-translucent material.

had a list of the stolen equipment, and the two officers went over the list of equipment stolen in the Reno burglaries. After discussing the list of stolen equipment with the other officer, Officer Hobensack was convinced that Harsh's truck contained at least some of Pacific West's stolen equipment.

Officer Hobensack testified that he then contacted Mr. Vieira of Pacific West at approximately 3:30 p.m. Mr. Vieira described the stolen equipment over the phone, and also said that Pacific West's equipment and tools were readily identifiable by powder-blue spray paint that he used to mark the equipment. Officer Hobensack noticed that some of the equipment in the back of Harsh's truck was marked with powder-blue spray paint.

In light of the aforementioned chain of events leading up to the seizure of Harsh's truck, we hold that under the totality of the circumstances, probable cause existed to search and seize Harsh's truck when the officers saw suspicious tools and equipment through the camouflaged netting and Officer Hobensack confirmed the description of Pacific West's stolen equipment with Mr. Vieira over the phone. Officer Hobensack spoke with Mr. Vieira less than sixty minutes after Detective Paszek stopped Harsh, therefore, probable cause existed to search and seize Harsh's truck before the statutory sixty-minute detention period expired.

Consequently, the district court did not err in finding that the officers' seizure of Harsh's truck beyond sixty minutes was reasonable.

#### Search warrant for Harsh's truck

Harsh contends that the search warrant for his truck was invalid. A search warrant is valid if it is: (1) issued upon probable cause and includes a statement of probable cause on its face or by an

incorporated affidavit, (2) supported by oath or affirmation, and (3) particularly describes the places to be searched and the things to be seized.<sup>11</sup> “The linchpin of a warrant, however, is the existence of probable cause.”<sup>12</sup>

As noted in the preceding section, the officers had probable cause to search and seize Harsh’s truck. Therefore, the search warrant was supported by adequate probable cause. As for the requirement that probable cause be included on the face of the warrant or attached via affidavit, we held in State v. Gameros-Perez “that search warrants . . . issued under NRS 179.045(2) need not contain a statement of probable cause or have the probable cause statement physically attached to the warrant.”<sup>13</sup> The officers properly obtained a telephonic search warrant pursuant to NRS 179.045(2), which negates the requirement for a statement of probable cause on the face of the warrant.

Harsh further contends that the detective failed to sign the statement that was attached to the warrant and incorporated by reference, and that; therefore, the statement was not made under oath or affirmation to support the warrant. A search warrant may be obtained telephonically, as provided under NRS 179.045(2):

In lieu of the affidavit required by subsection 1, the magistrate may take an oral statement given under oath, which must be recorded in the presence of the magistrate or in his immediate vicinity by a certified court reporter or by

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<sup>11</sup>See State v. Allen, 119 Nev. 166, 170, 69 P.3d 232, 235 (2003).

<sup>12</sup>Id.

<sup>13</sup>119 Nev. 537, 540, 78 P.3d 511, 513 (2003).

electronic means, transcribed, certified by the reporter if he recorded it, and certified by the magistrate. The statement must be filed with the clerk of the court.

Therefore, in lieu of an affidavit, a police officer may make an oral statement under oath over the telephone, so long as it is duly recorded in the presence of the magistrate, and filed with the court.

The record shows that the police complied with this process in obtaining the truck warrant. One of the detectives read a pre-prepared statement, under oath, over the phone to the magistrate, which was duly recorded, and subsequently filed with the court. The oath requirement was satisfied when the statement was read under oath and recorded in the presence of the magistrate. Therefore, the detective's signature on the written statement was unnecessary.

As for describing the things to be searched and seized with sufficient particularity, a warrant must particularly describe "the place or places to be searched, and the person or persons, and thing or things to be seized."<sup>14</sup> "The standard of review for the specificity of a warrant is de novo."<sup>15</sup>

Requiring specificity serves a dual purpose. First, the requirement prevents fishing expeditions, limiting searches to the suspected criminal activity. Second, specificity "assures the individual whose property is searched or seized of the lawful

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<sup>14</sup>Nev. Const. art. 1, § 18.

<sup>15</sup>U. S. v. Wong, 334 F.3d 831, 836 (9th Cir. 2003).

authority of the executing officer, his need to search, and the limits of his power to search.”<sup>16</sup>

“Without a sufficiently specific warrant, we consider the search warrantless.”<sup>17</sup> To determine specificity, the court examines “both the warrant’s breadth and particularity.”<sup>18</sup> The court should “consider one or more of the following” factors to determine specificity:

(1) whether there was probable cause to seize particular items in the warrant, (2) whether the warrant sets out objective standards by which executing officers can determine which items are subject to seizure, and (3) whether the government could have described the items more particularly when the warrant was issued.<sup>19</sup>

Search warrants that describe property to be seized in generic terms are disfavored, however, “[w]arrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible.”<sup>20</sup>

The search warrant for Harsh’s truck described the property to be seized with sufficient particularity. The truck warrant described the type of items stolen from Pacific West, particularly the items the police could identify by looking through the netting into the bed of the truck, “namely, tools, including but not limited to a 20-ton jack, a Stihl 650

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<sup>16</sup>U. S. v. Meek, 366 F.3d 705, 715 (9th Cir. 2004) (quoting Groh v. Ramirez, 540 U.S. 551 (2004)).

<sup>17</sup>Id.

<sup>18</sup>Wong, 334 F.3d at 836.

<sup>19</sup>Id. at 836-37.

<sup>20</sup>United States v. Spilotro, 800 F.2d 959, 963 (1986).

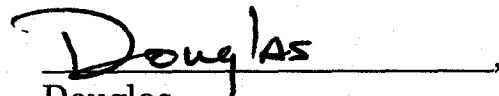


cement cut-off saw and diamond blade power quip 3500 Generator, multi-outlet power box, [and] a weed burner in original packaging[.]” The officers had probable cause to believe that Harsh’s truck contained stolen tools and equipment from at least one commercial burglary.

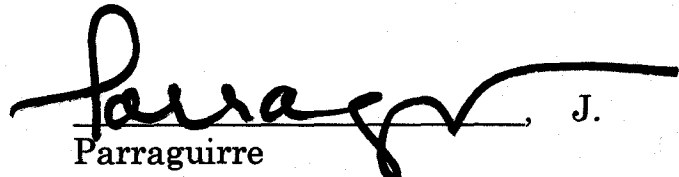
Consequently, we hold that the search warrant for Harsh’s truck was valid as a matter of law.

As for Harsh’s remaining contentions, we hold that they are without merit. The district court did not abuse its discretion in denying Harsh’s motions to suppress. Accordingly, we

ORDER the judgments of conviction AFFIRMED.

 \_\_\_\_\_, J.  
Douglas

 \_\_\_\_\_, J.  
Becker

 \_\_\_\_\_, J.  
Parraguirre

cc: Hon. Janet J. Berry, District Judge  
Attorney General George Chanos/Carson City  
Richard F. Cornell  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk