89916-9

Court of Appeal No. 310701-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

THOMAS ROGER JONES, Appellant.

PETITION FOR REVIEW

David R. Hearrean, WSBA #17864
Attorney for Appellant,
THOMAS ROGER JONES
davidhearrean@gmail.com
PO Box 10630
Spokane, WA 99209
(509) 324-7840

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

The appellant, Thomas Jones, by and through his attorney asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The appellant requests that this court review the entire decision of the Court of Appeals filed on January 14, 2014. A copy of the decision is in the Appendix at pages A-1 through A-10.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals erred when it upheld the Superior Court of Pend Oreille County, State of Washington, action in cause no. 10-1-00077-4 by entering the findings of fact and conclusion of law (CP 81-84, 215-222) over Thomas Jones objections for the April 21, 2011 and September 29, 2011 CrR 3.6 suppression hearing. [April 21, 2011 PT Conf. RP 38-47; September 29, 2011 Motion RP 69-86; CP 81-84, 215-222, 88-128].

2. The Court of Appeals erred when it upheld the Superior Court of Pend Oreille County, State of Washington, action in cause no. 10-1-00077-4 on September 29, 2011 and October 12, 2011 by denying Thomas Jones motion to suppress and dismiss all charges based on the search warrant dated before affidavit was signed. (CP 28-32, 18-26, 42-50). [September 29, 2010 Motion RP 69-86].

3. The Court of Appeals erred when it upheld the Superior Court of Pend Oreille County, State of Washington, action in cause no. 10-1-00077-4 in denying Thomas Jones motion to suppress and reconsideration [CP 11-33, 88-128]. [March 9, 2011 Motion RP 20-34; September 29, 2011 Motion RP 69-86; CP 11-33, 88-128, Exhibit 1].

4. The Court of Appeals further erred when it upheld the Superior Court of Pend Oreille County, State of Washington, action in cause no. 10-1-00077-4 by denying Thomas Jones motion for additional discovery and request for a Franks hearing and dismissal. (CP 106). [March 9, 2011 Motion RP 20-34; August 11, 2011 PT Conf. RP 58-61; September 29, 2011 Motion RP 69-86; CP 11-33, 88-128, 215-222].

5. The Court of Appeals erred when it upheld the Superior Court of Pend Oreille County, State of Washington, action in cause

no. 10-1-00077-4 T on July 19, 2012 in entering the verdict of guilty to all counts on stipulated facts. [July 19, 2012 Verdict and Sentencing RP 87-124; CP 232-238, 276-285].

D. STATEMENT OF THE CASE

1. Factual Background. On or about December 10, 2010, about 230, the Honorable Pend Oreille County District Court Judge and Superior Court Commissioner Phillip Van de Veer signed a search warrant authorizing the search and seizure of property on premises described as a Brown in color two story stick framed house which is located at 481 Hope.Road, Newport WA 99156 and search and detain Jones, Thomas Roger DOB 03/11/52 WMA, 5'08"; 140 lbs. (CP 28-33). On or about December 22, 2010 at 230, the Honorable Commissioner Phillip Van de Veer reviewed and signed an Affidavit in Support of the Search Warrant. (CP 18-26, 42-50). On December 23, 2010, Officer Carman and other members of the Pend Oreille County Sheriff's office arrived at the 481 Hope Road residence in Newport, WA and served and executed the search warrant (CP 28-33) and searched and arrested Thomas Jones. (CP 240-241). During the searches, methamphetamine, oxycodone, scales, packaging material, an old rifle and pistol, and other evidence were seized and based on this

seized evidence Thomas Jones was arrested for Possession of a Controlled Substance, methamphetamine, with Intent to Deliver, and Unlawful Possession of a Firearm in Second Degree. (CP 3-5, 239-260).

After receiving the police reports that outlined the evidence as the basis of the charges (CP 3-5, 239-260) and the search warrant information (CP 18-32, 42-50), the sole basis of the search warrant was an unidentified CI statements and involvement in (4) four alleged controlled buys under direction of officer affiant Carman of the Pend Oreille County sheriff's office. (CP 18-32). During a short defense interview, officer affiant Carman refused to answer questions regarding the (4) four buys used as a basis for the search warrant and also refused to supply the police reports (CP 104, 106). However, he admitted that the officers never observed the CI enter or exit Thomas Jones' residence located at 481 Hope Road, Newport, WA and only kept visual contact with the CI until the CI entered the 20 acres and drive down a .5 mile road. (CP 105). In fact, officer affiant Carman stated that he or the other officer never entered Thomas Jones' property or walked down the .5 mile road. They could not view the CI at any time after the CI entered the property gate toward the .5 mile road during the alleged

buys. (CP 105). Officer Carman admitted that he had not had any prior contact with the CI and that during the execution of the search warrant, he never left the plowed driveway or go into the other buildings in the area. He also verified that there are other residences along Hope Road. (CP 105-106). Defense Investigator Hanson also verified that there were several other buildings that could be occupied or used as residences all around the 481 Hope Road residence and she presented a video and pictures of this fact. Additionally, the 481 Hope Road residence listed in the search warrant was not visible from the affiant officer's point of surveillance which was not mentioned in the search warrant affidavit. There were also numerous buildings, trailers and campers located all around the 481 Hope Road residence which also was not mentioned in the search warrant affidavit. (CP 109, 113-125, 190-204, 206-211, Exhibit 1and 101). Finally, Officer Carman stated that the CI contract was confidential and the CI was either working off charges or working for money. (CP106).

E. ARGUMENT

In a criminal case, an error of constitutional magnitude involving a significant constitutional right is presumed prejudicial, and requires reversal on appeal unless the prosecution establishes

such error was harmless beyond a reasonable doubt. State v. Spotted Elk, 109 Wn. App. 253, 261, 34 P.3d 906 (2001); State v. Miller, 131 Wash. 2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). Therefore, this court should grant review since the Court of Appeals erred as described below and a significant question of law under the Constitution of the State of Washington or of the United States is involved plus this petition involves a substantial public interest that should be determined by the Supreme Court, all as described below. Additionally, the decision of the Court of Appeals is in conflict with several decisions of the Supreme Court as cited in this petition.

The Court of Appeals Erred by Concluding that a Warrant Can Never be Presented or Approved before the Affidavit-Assignment of Error for Findings of Fact No. 1 (CP 81-84)

There has been no evidence presented that the District Court Judge reviewed and signed the search warrant on December 22, 2010. Mr. Jones disagrees with the Court of appeals' conclusion that a warrant cannot be entered before the affidavit. The Affidavit for the search warrant was dated for December 22, 2010; (CP 18-26, 42-50) however, the search warrant was clearly dated for December 10, 2010 (CP 28-32) and no evidence was

presented to show otherwise except for mere conclusionory statements. Mr. Jones also claims that the theory is flawed that just because both the affidavit and warrant were finally filed with the court on December 30, 2010, no warrant could be filed before presenting the affidavit. Therefore, this date of the search warrant of December 22, 2010 is not supported by the record.

Assignment of Error for Findings of Fact No. 3 (CP 81-84)

The CI alerted the officers that drugs could be found in Thomas Jones' residence; however, this finding should also include the fact that the officers never personally corroborated this fact by surveillance or personal action of any kind like drive to the residence and knock on the door and/or look at and inside the numerous buildings and trailers to see if someone else lives on the property. Additionally, the CI never stated a date or time when these incidents he describes in 1-10 (CP 44-45) were observed or told to him. The only date even close to a date is the single statement in no. 2 which only claims that the CI was on the property "in the past and within the last (2) two months" which is an innocuous statement which is stale and contains little current value. The Honorable Judge Baker did acknowledge in her oral ruling that the officers "haven't corroborated much of any of it...(CI

statements)...except for innocuous facts". [March 9, 2011 Motion RP 29-30, 32-33].

Court of Appeals Erred by Allowing the Pend Oreille County Court to Misapply *Lane* and Allow Unsupervised Controlled Buys-There Was No Nexus Between Drugs And Jones' Residence

Thomas Jones also claims that the Court of Appeals erred by allowing the Honorable Pend Oreille County Superior Court Judge Baker to change the legal definition of a "controlled buy" and misapplying the ruling in *State v. Lane* 56 Wn. App. 286; 786 P.2d 277; 1989 and ruling that Lane is analogous to the present case. The facts in *Lane* clearly demonstrate that the officers actually watched the CI and suspect enter and exit certain doors or apartments that were the nexus of the search warrant and located within the apartment complex. However, in the present case, Officer Carman never saw the CI enter and exit the nexus residence and in fact never even viewed the residence. There was no close surveillance to prevent the CI from obtaining the drugs from the woods and *Lane* is not analogous with this case. In fact Lane states what should have been done in the present case and what was not done in the present case, i.e., close observation of CI

entering and exiting the nexus residence where the search warrant authorizes.

Franks Hearing Should Have Granted and Discovery Given-Law Enforcement Should Never be Allowed to Benefit from Misleading and Reckless Disregard for the Truth-Assignment of Error for Findings of Fact No. 4,5,6,8,9; Conclusions of Law 1,2,4,6 and 7 (CP 81-84)- states that basically the CI made (4) four controlled buys on certain dates and that these buys were sufficient to establish the CI's reliability and satisfy both prongs of *Aguilar-Spinelli* and that the facts and buys in this case were analogous to *State v.Lane*, 56 Wn. App. 286; 786 P.2d 277; 1989. However, the procedure or control used by the affiant officer does not meet the legal definition of "controlled buy" in the terms of relaxing the required probable cause for a search warrant. (**properly controlled buy may be the "underlying circumstance" indicating credibility).** State v. Steenerson, 38 Wn. App. 722, 726, 688 P.2d 544 (1984)(emphasis added). The affiant officer never observed the CI at any time enter and exit the targeted residence of the search warrant, therefore, the alleged buys cannot meet the definition of "controlled buys" since it was not properly controlled and observed. However, the Court of Appeals

minimized the officer misleading statement in the affidavit for the search warrant by ruling "When information was deliberately or recklessly excluded from an affidavit, a court is to add the information to the warrant and determine if probable cause still exists."

In the present case, the sole basis of the search warrant is the alleged (4) four controlled buys which the prosecution claims could satisfy both prongs of the Aguilar-Spinelli test. However, only a properly conducted controlled buy that meets the true legal definition of a "controlled Buy" can arguably satisfy both prongs of the Agilar-Spinelli test.[1] Therefore, in order to be a "proper controlled buy" as defined by law, law enforcement must have survielled the CI enter and exit the residence which is the nexus of the search warrant. Here, the affiant officer misrepresents the material fact that the CI was watched each time entering the targeted residence. The affidavit contains such statements as the affiant officer "watched the CI drive to Tom Jones' residence" (CP

---

[1] "Properly executed, a controlled buy can thus provide the facts and circumstances necessary to satisfy *both* prongs of the test for probable cause." *State* v. *Lane,* 56 Wash.App.286,293,786 P.2d. 277 (1989) (emphasis added). "In a 'controlled buy,' an informant claiming to know that drugs are for sale at a particular place is given marked money, searched for drugs, and observed while sent into the specified location." *Lane,* 56 Wash.App. at 293.(emphasis added). See also footnote 2.

45). Mr. Jones wants to emphasize that the sworn statement does not state toward Tom Jones' residence but again stated "to" Tom Jones' residence. However, the affiant Officer Carman clearly verified in a very brief and limited defense interview that no officer involved (including himself) in the (4) four alleged control buys saw the CI enter or exit the residence which was the nexus of the search warrant. In fact, Officer Carman verified that he and the other officer were positioned at an undisclosed location where they could not even see the residence which was the nexus of the search warrant. (CP 105). After this statement in the affidavit for search warrant, the affiant officer then proceeded to write that he "observed the CI enter and exit Tom Jones' property located at 481 Hope Road Newport, WA" which places emphasis on the above statement that he watched the CI drive to Tom Jones' property. If a magistrate reads that the "affiant officer watched the CI **drive to a residence**" then next stated that he "watched the CI enter and exit the property", this would appear to say that the officer watched the CI enter and exit the residence since the officer swore under oath that he watched the CI drive to Tom Jones' residence. This is a material statement that misrepresents that total officer control was on the CI at all times when in fact it was not. Mr. Jones disagrees

with the trial courts justification that it was not misrepresentation since the next paragraph substitutes "property" in place of "residence" and it is "assumed" that the magistrate knows the area around Hope Road. [September 29, 2011 Motion RP 76-77, 78-86]. [March 9, 2011 Motion RP 29-30, 32-33; CP 51]. Also, the officer affiant made only a conclusionory statement that the CI was reliable (CP 23); however, he later stated that he had no contact with the CI prior to the buys. (CP 107). Additionally, the officer affiant stated that the CI stated that only Thom Jones residence was located at the end of a .5 mile road when the officer affiant later stated that there are other residences along Hope Road and while serving the search warrant, he never left the plowed driveway area and did not go inside the other buildings located around the (20) twenty acre property of Thomas Jones. (CP 106). [March 9, 2011 Motion RP 20-34; August 11, 2011 PT Conf. RP 58-61; September 29, 2011 Motion RP 69-86; CP 11-33, 88-128, 215-222]. Therefore, Mr. Jones alleges that these statements are at least reckless disregard for the truth and very material to this case. Therefore, a *Franks* hearing and additional discovery should have been granted and/or the case dismissed.

Additionally, the prosecutor's own proposed findings that were entered also do not list the required finding of fact that law enforcement surveilled the CI exit the defendant's residence or even property. Plus, these findings of fact need to also include the fact that the affiant officer or any other officer never surveilled the CI enter or exit Thomas Jones' residence. In fact, when the CI left the point of sight of the officers, the officers could not see or view the residence located at 481 Hope Road, Newport, WA from their viewpoint during all (4) four alleged buys. Additionally, the findings of fact should include that the .5 mile road contains curves and is located deep in a heavily woody area where lots of locations exist to hide any type of goods in bushes, under rocks and elsewhere. There are also several buildings and trailers located down the same road. There are also places on this road where the CI could stop and the officers could not see or view from their point of view since they never stepped on Thomas Jones' property. (CP 104-106, 109, 113-125, 190-204, 206-211, Exhibit 1and 101). The Honorable Judge Baker also stated in her oral ruling that "the officers who sought the warrant didn't disclose that it was a heavily wooded area....and can be fatal to a search warrant when it isn't disclosed..." and that she "did have a little bit of um concern I

guess is the word about whether or not the officers had provided um the negative um, the negative information about the wooded area..." [March 9, 2011 Motion RP 29-30, 32-33]. The Court of Appeals accepted the Honorable Judge Baker's conclusionary statements that it did not matter that law enforcement never watched the CI enter and exit the nexus residence of the search warrant as long as the CI presented drugs.

The search warrant affidavit must also establish a nexus between the criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched. *State* v. *Thein,* 138 Wn.2d 133, 140,977 P.2d 582 (1999). Thus, without observing the informant enter and exit the home of Mr. Jones, there are not sufficient reliable facts to establish a nexus between the drugs and the home. Probable cause requires a nexus between criminal activity and the item to be seized as well as a nexus between the item to be seized and the place to be searched. *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997). The nexus between the items to be seized and the place to be searched must be grounded in fact. *Thein,* 138 Wn.2d 146-47. Without 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. Conclusory statements are insufficient. *Id.*

These objections and additions to the findings of fact and conclusions of law have been constantly noted on the record in motions, attachments, declarations, oral argument and other to demonstrate that these alleged (4) four buys at issue in the current case were not analogous to the apartment complex and control/observation by the affiant officer of the CI in *State v. Lane*, [March 9, 2011 Motion RP 19-34, CP 11-33] [April 21, 2011 PT Conf. RP 38-51; CP 52-58, 81-84, CP 88-125, 171, 172-202, 203-205, 206-211, 214, Exhibit 1 and 101][September 29, 2011 Motion RP 69-86; CP 215-222]. The affiant officer in *Lane* actually watched the CI enter and exit the targeted apartment. *Lane* also emphasized that the affiant officer viewed a known drug dealer exit the same apartment the CI entered and enter a second apartment numbered 405 and return to the same apartment. Immediately afterwards the officer watched the CI exit this same apartment with the drugs[2]. Lane at 289, 293-294. In the current case, the CI was

[2] The *Lane* facts are: The affidavit recited that Detective Barnes then observed "a short Mexican male,...." exit the door entered by the informant. This person went into the lower apartment, numbered 405, which the affidavit described as being just to the right of the main entrance. Detective Barnes also saw this same man return to the upper apartment. *Lane* at 289.

never watched by the affiant officer enter any resident or building or anything solid as in *Lane*. It is believed that the *Lane* court decision would have been different if the facts were similar to the present case in that the officers only observed the CI travel down a curved .5 mile road covered with large trees and brush (heavily wooded) so the CI travel could not be watched and the officers could not watch the CI enter the apartment which could not be viewed from the location of the officers controlling the buys. *Lane* is not analogous with this case. Therefore, only "properly executed" controlled buy(s) can thus provide the facts and circumstances necessary to satisfy both prongs of the test for probable cause. 1 W. LaFave, Search and Seizure § 3.3(b), at 512 (1978); *State v. Jansen*, 15 Wn. App. 348, 549 P.2d 32, review denied, 87 Wn.2d 1015 (1976). See *State v. Steenerson*, 38 Wn. App. 722, 688 P.2d 544 (1984). *Lane* at 289. Improperly executed buys whether the number is five or ten in which law enforcement can only watch the CI travel down a long road without seeing where or what he is

---

Specifically, the police strip searched the informant before he went into the apartment and determined that he was not carrying a controlled substance on his person; when he emerged from the apartment, he had cocaine in his possession, but he did not have the buy money which the police had furnished him; the police surveilled the apartment while the informant was there, thus reducing the possibility that the informant obtained the cocaine from a source other than from within the apartment; and, finally, the police had surveilled the two apartments for some time and observed known drug dealers and users go in on several occasions. *Lane* at 293-294.

doing is innocuous and worthless since the results are predictable. "Merely verifying 'innocuous details', commonly known facts or easily predictable events should not suffice to remedy a deficiency in either the basis of knowledge or veracity prong." State v. Jackson, 102 Wn.2d 432, 438, 688 P.2d 136 (1984). These findings of fact and conclusions of law which Mr. Jones assigns error and objects, were the sole reason and justification for the Honorable Judge Baker's decision that the CI was credible and the *Lane* court was the legal authority cited; however, the Lane court made it clear that police surveillance of the apartment reduced the possibility that the CI obtained the drugs from other than the apartment. *Lane* at 293-294. In the present case, the CI was not surveilled by the police entering the residence and in fact, the police could not even see the residence; therefore, this lack of surveillance cannot prevent the CI from obtaining the drugs elsewhere other than 481 Hope Road. For argument's sake, this would be true even if this was the only residence at the end of the long .5 mile woody driveway. As the Honorable Judge Baker stated, "highly unlikely....that the um product (drugs) would be uh obtained by this CI from any place other than the one and only residence on this, on the driveway"**...."barring somebody hiding the, the goods in the**

woods" but *Lane* tells us that as long as it's close surveillance and this, I think, is analogous to *Lane*,..." (emphasis added) [March 9, 2011 Motion RP 30-31][March 9, 2011 Motion RP 19-34, CP 11-33]. There was no close surveillance to prevent the CI from obtaining the drugs from the woods and *Lane* is not analogous with this case. In fact Lane states what should have been done in the present case and what was not done in the present case, i.e., close observation of CI entering and exiting the nexus residence where the search warrant authorizes. Thus, the findings of fact and conclusions of law should reflect this fact and the legal definition of what a controlled buy consist of[3] since only a properly executed controlled buy(s) can satisfy both prongs of *Aguilar-Spinelli. It is clear, close p*olice surveillance and corroboration were extremely lacking in this case.

Finally, the Honorable Judge Baker also ruled in the oral decision that the residence at 481 Hope Road was the only "**potential**" residence at the end of the .5 mile road. (emphasis added) [March 9, 2011 Motion RP 30-31]. The Court of Appeals erred by adding facts not in the record to support Judge Baker's

---

[3] A controlled buy can establish an informant's reliability:
In a "controlled buy," an informant claiming to know that drugs are for sale at a particular place is given marked money, searched for drugs, and **observed while sent into the specified location**. *Lane* at 293. (Emphasis added).

ruling. However, the true facts that should be added are that there are several other "potential" residences at the end of the .5 mile road. (CP 88-125, 171, 172-202, 203-205, 206-211, 214, Exhibit 1 and 101). Officer Carman admitted that he had not had any prior contact with the CI and that during the execution of the search warrant, he never left the plowed driveway or go into the other buildings in the area. He also verified that there are other residences along Hope Road. (CP 105-106).

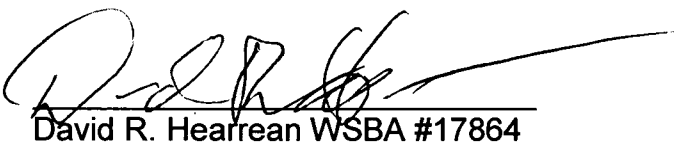
F. CONCLUSION

Based upon the foregoing points and authorities, the appellant, Mr. Thomas Jones, respectfully requests this court accept review of the Court of Appeals decision as described above and that his conviction, as well as the judgment and sentence, which were entered in this matter, be reversed and the underlying charge be dismissed with prejudice. Finally, if the court finds that any single listed error as stated above is harmless error or does not amount to the required resultant prejudice for reversal, the cumulative effect of the above listed errors should amount to reversal error under the cumulative error doctrine. Lastly, this court should grant review since the Court of Appeals erred as described

above and a significant question of law under the Constitution of the State of Washington or of the United States is involved plus this petition involves a substantial public interest that should be determined by the Supreme Court. Additionally, the decision of the Court of Appeals is in conflict with several decisions of the Supreme Court as cited above. The Court of Appeals ignored the prior rulings that a controlled buy must be a controlled buy as defined by law. Otherwise, law enforcement will consider a controlled buy as just watching from the police station window as the CI drives toward a residence after being searched and supplied with money. The claim that law enforcement and CI did this same procedure even ten times should never substitute for a legal controlled buy. No search warrant should be upheld based in part on assumption that the magistrate knows something about certain property including location and description/surroundings. Mr. Jones asks this court to find that the trial court was "wrong on appeal".

DATED this 13th day of February, 2014.

Respectfully submitted:



David R. Hearrean WSBA #17864
Attorney for Appellant,
THOMAS ROGER JONES

Appendix

FILED
JAN 14, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. THOMAS ROGER JONES, Appellant.	)	No. 31070-1-III
	)	UNPUBLISHED OPINION

KORSMO, C.J. — Thomas Roger Jones challenges the trial court's rulings on his motions to suppress and to hold a *Franks*[1] hearing. The trial court properly rejected his contentions. We affirm his convictions for possession with intent to manufacture or deliver methamphetamine, two counts of second degree unlawful possession of a firearm, and possession of oxycodone.

FACTS

After using an informant to make four controlled purchases from Mr. Jones's rural Pend Oreille County residence, law enforcement officers obtained a search warrant for the premises. The search revealed a large amount of methamphetamine along with packaging material, scales, cash, two guns, and some oxycodone. One charge was filed for each of the two drugs and for both guns. Apparently deciding not to reveal the

[1] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

identity of the informant, the prosecution did not file charges relating to any of the four deliveries recited in the affidavit.

The defense moved to suppress all evidence, arguing that the warrant was misdated, the controlled buys were not properly conducted, and that a *Franks* hearing was necessary to address information that was omitted from the warrant affidavit. The matter proceeded to telephonic argument without testimony. In the course of its analysis, the trial court ruled that no *Franks* hearing was necessary because even if the disputed information was read into the warrant, probable cause still existed. The motion was denied.

Mr. Jones ultimately submitted his case to the court as a stipulated trial. The court found him guilty as charged. After a standard range sentence was imposed, he timely appealed to this court.

ANALYSIS

Mr. Jones presents three arguments. He contends first that several of the court's findings, including the finding related to the signing of the warrant, are not supported by the record. He also argues that the controlled buys were not properly conducted and that a *Franks* hearing was necessary. We address those three arguments in that order.

Factual Findings

Mr. Jones argues that the trial court erred in finding that the magistrate signed the search warrant on December 22, 2010, instead of the December 10, 2010, date indicated on that document. He also argues that seven other findings lack support in the record.

Well settled standards govern this challenge. The conclusions of law entered following a suppression hearing are reviewed de novo. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Factual findings are reviewed for substantial evidence, i.e., evidence sufficient to convince a rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings are treated as verities on appeal. *Id.*

The search warrant was signed by Judge Philip Van de Veer and dated December 10, 2010. The first finding of fact entered after the suppression hearing indicates that Judge Van de Veer signed the warrant on December 22, 2010. Mr. Jones argues that this first finding is not supported by the evidence in the record. We disagree.

Both the affidavit in support of the warrant and the search warrant itself bore the same caption: "SW 12-22-2010." The affidavit was signed and dated December 22, 2010, by both the detective and Judge Van de Veer, who subscribed the detective's signature. The search warrant itself bears the judge's signature with the handwritten date of December 10, 2010. The affidavit details the four controlled buys made by the

informant and describes the last two of them as occurring on December 16 and December 21, 2010.

Based on this conflicting information, the trial court concluded that Judge Van De Veer simply made a scrivener's error when writing down December 10 on the search warrant. The record supports this determination. The warrant and the affidavit were presented together; one bears the December 22nd date while the other was signed using December 10th as the date. The affidavit refers to events occurring after December 10th.

The evidence strongly suggests that the December 10th date was a simple mistake made when the judge signed the warrant. The trial court did not err in concluding that the December 10th date was a simple scrivener's error.[2] Substantial evidence supports the trial court's ruling.

Mr. Jones also attacks the court's findings of fact 3-9. These findings largely relate to the controlled buys described in the search warrant affidavit. The affidavit provides factual support for each of the challenged findings. They, therefore, are all supported by substantial evidence. Mr. Jones also argues that some of the findings are misleading or inadequate. Those concerns reflect his legal arguments which we address next.

---

[2] A clerical error does not invalidate a warrant. *State v. Wible*, 113 Wn. App. 18, 25-26, 51 P.3d 830 (2002) (involving similar misdating issue).

The trial court did not err in entering the challenged findings from the suppression hearing.

Adequacy of the Controlled Buys

Mr. Jones next argues that the search warrant lacks probable cause because the controlled buys were not properly conducted. The magistrate was free to credit the information and did not err in determining that probable cause existed.

Probable cause to issue a warrant is established if the supporting affidavit sets forth "facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity." *State v. Huft*, 106 Wn.2d 206, 209, 720 P.2d 838 (1986). The affidavit must be tested in a commonsense fashion rather than hypertechnically. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). The existence of probable cause is a legal question which a reviewing court considers de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007). However, "[g]reat deference is accorded the issuing magistrate's determination of probable cause." *State v. Cord*, 103 Wn.2d 361, 366, 693 P.2d 81 (1985). Even if the propriety of issuing the warrant were debatable, the deference due the magistrate's decision would tip the balance in favor of upholding the warrant. *State v. Jackson*, 102 Wn.2d 432, 446, 688 P.2d 136 (1984). In light of the deference owed the magistrate's decision, the proper question on review is whether the magistrate *could* draw the connection, not whether he or she *should* do so.

Washington continues to apply the former *Aguilar-Spinelli*[3] standards to assess the adequacy of a search warrant affidavit. *Jackson*, 102 Wn.2d at 446.[4] As applied in Washington, probable cause based upon an informant's information requires that an affidavit establish both the informant's reliability and basis of knowledge. *Id.* at 443. Where one or both of those factors is weak, independent police investigation can supply corroboration. *Id.* at 445.

Police frequently use informants to make controlled purchases of controlled substances. A properly conducted controlled buy makes an informant a credible source of information. *E.g., State v. Casto*, 39 Wn. App. 229, 234-35, 692 P.2d 890 (1984). The reason was explained:

> In a "controlled buy," an informant claiming to know that drugs are for sale at a particular place is given marked money, searched for drugs, and observed while sent into the specified location. If the informant "goes in empty and comes out full," his assertion that drugs were available is proven, and his reliability confirmed. Properly executed, a controlled buy can thus provide the facts and circumstances necessary to satisfy *both* prongs of the test for probable cause.

Id. (citations omitted; emphasis in original).

---

[3] *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

[4] Federal courts now apply a totality of the circumstances test in evaluating the sufficiency of a search warrant. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

Mr. Jones contends that the police did not conduct a proper controlled buy, thus the warrant failed to establish probable cause. Like the trial judge, we believe his arguments go more to the weight of the evidence rather than rendering the affidavit deficient.

The gist of Mr. Jones's argument is that the officers could not see the informant go into the residence because it was one-half mile down the roadway from the public access. He argues that because the officers could not see the informant the entire way, there is no guarantee that he might not have stopped somewhere along the road and met up with someone else. As the trial court recognized, this court dealt with an urban version of this problem in *State v. Lane*, 56 Wn. App. 286, 786 P.2d 277 (1989).

In *Lane* the officers observed their informant enter the main entrance of an apartment complex. The informant then went up the stairs and entered one of the apartments where the drug transaction then took place. *Id.* at 289. Although the officers could not see which apartment the informant entered, this court still found that the controlled buy was properly conducted. *Id.* at 293-94.

Mr. Jones attempts to distinguish *Lane* on the basis that there, unlike his case, the officers could at least see the informant enter the apartment building while in his situation the informant might have stopped anywhere along the half-mile driveway. The trial court thought this situation was actually stronger than *Lane* since there were no other residences located along the driveway. We agree. We also note, however, that Mr.

Jones's argument emphasizes the wrong aspect of the *Casto* test. As noted in *Casto*, the critical fact is that the informant went in empty and came out full, thus verifying the report that drugs could be purchased and rendering the informant reliable. 39 Wn. App. at 234. Where the informant was getting his drugs was less important than the fact that he was supporting his claim that he could get them. *Id.* at 235. Here, the informant supported his report four times. Ample probable cause existed.

The trial court properly denied the motion to suppress.

Franks Hearing

Mr. Jones also argues that the trial court erred in not conducting a *Franks* hearing to address information he believes should have been included in the warrant affidavit. In particular, he argues that the affidavit should have stated that officers could not see the informant enter the residence and should have included the informant's criminal history. We agree with the trial court that probable cause would have existed even with this information included in the affidavit. There was no need to conduct a *Franks* hearing.[5]

In limited circumstances, the information contained in or omitted from a search warrant can be challenged. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). When information was deliberately or recklessly excluded from

[5] Mr. Jones also made a related request for discovery concerning the controlled buys in order to support his *Franks* argument. In view of our decision that no hearing was necessary, we need not address the discovery request.

an affidavit, a court is to add the information to the warrant and determine if probable cause still exists. *Id.* at 171-72. If there is still probable cause, the motion will be denied.[6] *Id.* at 172. If there no longer is probable cause, then the challenger is entitled to a hearing to attempt to establish the contention that the information was known to police and required to be included in the affidavit. *Id.*

The trial judge ruled that including the additional information in the warrant did not vitiate probable cause. *Lane* is controlling in support of that ruling.

We have previously discussed the issue of whether or not the police needed to see the informant enter the Jones residence. As noted, the *Lane* court faced the same problem. Although police could see the informant enter the front door of an apartment complex, they could not see which apartment the informant then entered. Probable cause still exists if the fact that surveying officers could not see the informant enter the Jones residence is read into the affidavit in this case. The critical fact was that the informant came back with the controlled substances that he said he could purchase. There was no need to conduct a hearing on this issue.

Similarly, *Lane* disposes of the argument that the informant's criminal history needed to be disclosed to the issuing magistrate. There we concluded that the magistrate was not misled by the omission of the informant's criminal history since it was the

[6] The same approach applies to false information that was deliberately or recklessly included in the affidavit. 438 U.S. at 171-72.

court's "common experience" that an informant "has had prior contact with the criminal justice system." 56 Wn. App. at 295. That common experience has not changed in the quarter century since *Lane* was filed.

Neither allegation negated probable cause. The trial court correctly denied the request for a *Franks* hearing.

The court's factual findings are supported by the record. The affidavit established probable cause to search the Jones property. Accordingly, the trial court properly denied the motion to suppress.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, C.J.

WE CONCUR:

Kulik, J.

Siddoway, J.