No. 310701-III

IN THE COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

State of Washington, Respondent,

v.

Thomas R. Jones, Appellant

APPELLANT'S REPLY TO RESPONDENT'S BRIEF

David R. Hearrean
Attorney for Appellant
Thomas R. Jones
901 North Monroe, Suite 356
Spokane, WA 99201
509-324-7840
WSBA#17864

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A. REPLY ISSUES PRESENTED BY THE RESPONDENT

No. 1 – The Appellant objects to Respondent's statement that there was probable cause to issue the search warrant and there are no errors in the trial court's findings of fact from the defendant's suppression hearing.

The appellant first replies to respondent's brief by objecting to the respondent statement that there are no errors in the trial court's findings of fact from the defendant's suppression hearing and appears to claim that the findings of fact should be considered as verities of the case It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal. *In re Riley*, 76 Wn.2d 32, 33, 454 P.2d 820, *cert. denied*, 396 U.S. 972, 24 L. Ed. 2d 440, 90 S. Ct. 461 (1969); *Tomlinson v. Clarke, 118 Wash. 2d 498, 501 (Wash. 1992)*, 825 P.2d 706 (1992). **This court has held that this rule also applies to facts entered following a suppression motion.** *State v. Christian*, 95 Wn.2d 655, 656, 628 P.2d 806 (1981). **In the present case, Mr. Jones has objected and submitted specific assignment of errors to the numbered findings of fact and conclusions of law signed by the court, thus, the trial court's findings of fact should not be considered verities of the case.**

Next, the respondent summarily states that the record supports the findings of fact regarding the date the search warrant was signed as December 22, 2010. However, there was no evidence presented regarding this finding; only conclusions with no factual basis. The record clearly shows that the warrant was signed on December 10, 2010 while the affidavit in support was signed on December 22, 2010. The fact that the affidavit dated 12 days later contained time sensitive information is irrelevant to a search warrant being signed 12 days earlier. Finally, it is prejudicial that the search warrant was not served within the court ordered 10 day period and not supported by probable cause.

The respondent also argues that the only error an appellant can claim is lack of supported evidence. However, the appellant only argued error based upon lack of factual basis. The appellant argued numerous factual and legal errors based upon stale information, no specifics on dates, no specifics on corroboration required by law enforcement, lack of facts to support a legal conclusion and other throughout the listed errors and argument; some were not contested by the state.

The respondent claims that there were (4) four controlled buys. However, the legal definition of a "controlled buy" that is sufficient

for a search warrant must contain facts that the CI involved in the controlled buy was observed by law enforcement entering and exiting the residence which is the nexus of the search warrant. In the present case, the CI had .5 miles of areas to hide and gather tainted evidence; thus; there were no controlled buys since there was no constant control. This fact was recklessly or intentionally disregarded from the magistrate.

Finally, the state's and court's findings cannot support controlled buys since the findings lack the required fact; that to be considered a "controlled buy", law enforcement must have watched the CI exit the residence listed in the search warrant. However, the state recognizes this and now requests this court consider the record instead of the findings. (See resp. brief p.18). The appellant ask for the same consideration and find that the contested findings of fact are not verities of the case.

The respondent next argues that Officer Carman's information showed that Mr. Jones residence was the only residence down the .5 mile road. However, Officer Carman never corroborated this CI allegation in the affidavit in support of the search warrant. The legal requirement in Aguillar-Spinlli argued by the appellant was that Officer Carman or any other officers never corroborated this

allegation in the affidavit in support and it was only stated by the unnamed confidential informant. Contrary to the respondent's next allegation that the appellant's photos and motion corroborate the sole residence conclusionary statement, the respondent counters that there is sufficient evidence submitted (private investigator declaration and photos) showing that Mr. Jones' residence is not the "only possible residence" down the .5 mile road.

The respondent also claims that in State v. Lane, 56 Wn.App. 286 ((1989), law enforcement never watched the CI enter an apartment (see resp. brief fn. 1, p.23); however, the facts in that case clearly state that law enforcement not only watched the CI enter the apartment door (location specifically described) but also watched the dealer also enter specific apartment doors that were the nexus of the search warrant.[i] In the present case, law enforcement never observed the CI enter or exit any residence especially Mr. Jones'. The facts do not support the findings or conclusions. Additionally, the respondent's argument that the CI in Lane could not be viewed actually entering the residence which was the nexus of the search warrant is simply incorrect.

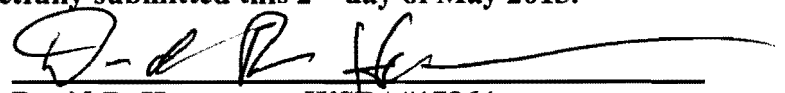
No. 2- The trial court abused its discretion by denying additional discovery and Franks hearing.

Respondent continually claims that the appellant wanted the CI's name in its discovery request. This is simply not true. Therefore, at least an in camera hearing with interrogatories should have been allowed. Additionally, the appellant presented ample evidence for a Franks hearing and dismissal. In the affidavit in support of the search warrant, law enforcement submitted at least reckless disregard for the truth when they stated that they watched the CI enter Mr. Jones' residence.

B. CONCLUSION

Based upon the above argument, the appellant respectfully asks the court to dismiss the charge.

Respectfully submitted this 2nd day of May 2013.



David R. Hearrean – WSBA#17864
Attorney for Appellant

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[1] 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.
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.