Supreme Court No. _____
Court of Appeals No. 31448-1-III

90857-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

RICHARD EDWARD FENTON,
Defendant/Petitioner.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Robert G. Swisher, Judge, Suppression Motion
Honorable Bruce A. Spanner, Judge, Trial

PETITION FOR REVIEW

SUSAN MARIE GASCH
WSBA No. 16485
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Petitioner

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I. IDENTITY OF PETITIONER

Petitioner, Richard Edward Fenton, the appellant below, asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Mr. Fenton requests review of the Court of Appeal's unpublished decision in *State v. Fenton* (2014 WL 4262704) (Division III) entered on August 28, 2014. A copy of the opinion is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

Whether a police-initiated controlled buy is sufficient to establish an unnamed informant's (1) basis of knowledge and (2) veracity and reliability under *Auilar*[1]*-Spinelli*[2] in order to support the issuance of a search warrant.

IV. GROUNDS FOR REVIEW

Review should be granted under RAP 13.4(b)(1) and (2) because the decision of the court below is in conflict with decisions of this Court and other divisions of the Court of Appeals.

V. RELEVANT FACTS

Search warrant and supporting affidavit. Kennewick Police Department Detective Juan Dorame enlisted an informant to purchase

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

suspected methamphetamine from the defendant, Richard Edward Fenton, under police supervision on one occasion in November 2010. CP 22.[3] The detective observed the informant make a call to the phone number 509-783-2583.

The confidential informant took prerecorded buy money to Mr. Fenton's apartment and returned with suspected methamphetamine. *Id.* The informant was searched by police before and after the purchase and officers observed her enter and leave the apartment. *Id.* According to Detective Dorame, several months earlier the informant provided information that Mr. Fenton "is and has been" selling methamphetamine from the residence and provided information at some time in the unspecified past that had led to several arrests and seizures of narcotics. *Id.* The detective did not reveal the name of the informant or whether she was being paid or had any criminal history or any details about the actual purchase or any follow-up investigation by police such as to whom the phone number belonged to or any results of possible surveillance of the apartment based upon the informant's claim of drugs being sold. *See Id.*

[3] The Affidavit for Search Warrant is found at CP 22–23. The Search Warrant is found at CP 20.

A search warrant for "Richard Edward Fenton (Thurman[4])", his apparent residence in Kennewick, and a cell phone with the phone number 509-783-2583 was issued by the Honorable Judge Tanner, Benton County District Court, on November 7, 2010. CP 20. The warrant permitted police to search the residence and person of Mr. Fenton. *Id.* Among other things the warrant authorized police to seize illegal controlled substances; "implements, furniture and fixtures" used in their manufacture, sale or possession; documents showing dominion or control over the premises, and the cell phone. *Id.*

Charges. The warrant was executed on November 12, 2010. CP 3. Based upon items seized and evidence obtained in two controlled buys, the Benton County Prosecutor charged Mr. Fenton with two counts of delivery of a controlled substance–methamphetamine and one count of possession with intent to manufacture/deliver a controlled substance. CP 1–2. After Mr. Fenton indicated his intent to go to trial, the information was amended to add the allegations that the crimes alleged in the two delivery counts occurred within 1000 feet of a school bus stop. CP 10–12; 2/16/11 RP 4; 8/29/12 RP 17; 2/15/13 RP 359–61.

[4] The reference "Thurman" is found in the search warrant and supporting affidavit, but does not appear anywhere else in the record below.

Denial of Mr. Fenton's motion to suppress evidence obtained pursuant to the search warrant. Prior to trial, Mr. Fenton moved to suppress the items seized pursuant to the search warrant and on this basis, to dismiss Count III. CP 16–28; 11/14/12 RP 17–27. The Honorable Robert G. Swisher denied Mr. Fenton's motion. 11/14/12 RP 25–27. Written "Findings, Conclusions, [sic] Denying Motion to Suppress" were entered. CP 130–31.

Jury trial, verdict and sentence. A mistrial was declared as to the first trial by the Honorable Bruce Spanner. CP 29–30.

At the second trial, the State presented evidence of two controlled buys of methamphetamine from Mr. Fenton that were made using Jolene Nichols as the confidential informant; evidence there were at least two school bus stops within 1,000 feet of Mr. Fenton's residence; and evidence obtained during execution of the search warrant at Mr. Fenton's apartment including methamphetamine, digital scales, "ledger" type notebooks and dominion paperwork. 12/5/12 RP 61–143, 152–261; 12/6/12 RP 272–98. Ms. Nichols testified at trial. 12/5/12 RP 161–79. Mr. Fenton did not testify.

The jury found Mr. Fenton guilty as charged of two counts of delivery of controlled substance–methamphetamine within 1,000 feet of a

school bus stop and one count of possession with intent to deliver a controlled substance. CP 108–11, 113. The court imposed concurrent sentences, for a total term of confinement of 64 months. CP 123.

On appeal, Division III agreed the trial court erred by imposing a variable term of community custody and the judgment sentence contains a scrivener's error that requires correction and remanded the matter for correction. The court concluded the State established both bases of the *Aguilar-Spinelli* test and affirmed the lower court's denial of Mr. Fenton's motion to suppress. *Slip Opinion*, filed August 28, 2014.

VI. ARGUMENT IN SUPPORT OF REVIEW

Mr. Fenton's rights under U.S. Const. Amend. 14 and Const. art. 1 § 7 were violated when his home was searched and items seized based upon a search warrant affidavit that did not establish the credibility of the unnamed informant or the basis of the informant's knowledge.

Division III determined the affidavit in support of search warrant met both prongs of the *Auilar-Spinelli* test based solely on the following

facts: "[T]he controlled buy was similar to the one in *Casto*[5]*:* the informant was 'searched before and after the controlled buy,' given pre-recorded buy money, 'kept under constant surveillance' as she entered and exited Mr. Fenton's apartment, and turned over a controlled substance after the buy." *Slip Opinion* at 8. As discussed below, because the affidavit did not demonstrate the informer's reliability on the basis of her credibility and/or knowledge, the search warrant was issued without probable cause in violation of Mr. Fenton's constitutional right to privacy.

Affidavits in support of search warrants are to be read as a whole, in a common sense, nontechnical manner, with doubts resolved in favor of the warrant. *United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); *State v. Partin,* 88 Wn.2d 899, 904, 567 P.2d 1136 (1977). A magistrate may issue a search warrant based on information received from an informant if the application establishes probable cause to believe that the items sought will be found in the place to be searched. "The support for issuance of a search warrant is sufficient if, on reading the affidavits, an ordinary person would understand that a violation existed and was continuing at the time of the application." *State v. Clay,* 7 Wn. App. 631, 637, 501 P.2d 603 (1972), *rev. denied,* 82 Wn.2d 1001 (1973).

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[5] *State v. Casto*, 39 Wn. App. 229, 233, 692 P.2d 890, 892 (1984), *rev. denied*, 13 Wn.2d 1029 (1985).

Washington courts apply the two-pronged *Aguilar-Spinelli* test. *State v. Jackson,* 102 Wn.2d 432, 688 P.2d 136 (1984); *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

The test requires the affidavit show facts and circumstances from which the magistrate can, independently of the officer seeking the warrant, evaluate the reliability of the manner in which the informant acquired the information (basis of knowledge) *and* the affidavit sets forth the underlying circumstances from which the officer concluded the informant was credible or the information reliable (personal credibility or veracity). *Jackson,* 102 Wn.2d at 435. Both the reliability of the manner by which the information was acquired and the reliability of the informant must be shown in an effort to determine *present* reliability. *See e.g., State v. Woodall,* 100 Wn.2d 74, 666 P.2d 364 (1983) (affidavit insufficient to establish veracity); *State v. Fisher,* 96 Wn.2d 962, 639 P.2d 743, *cert. denied,* 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.2d 1355 (1982); *State v. Partin, supra.* Conclusory assertions of reliability will not suffice. *State v. Casto,* 39 Wn. App. 229, 233, 692 P.2d 890, 892 (1984), *rev. denied,* 13 Wn.2d 1029 (1985). The credibility and the basis of knowledge prongs of the test are separate and both must be established in the search warrant

affidavit; a strong showing on one prong may not overcome a deficiency in the other. *Jackson,* 102 Wn.2d at 437, 441.

The affidavit in this case did not establish the informant's credibility. A search warrant affidavit must, within its four corners, establish the informant's credibility – why there are reasons to believe she is telling the truth. *Jackson,* 102 Wn.2d at 433. The veracity prong of the *Aguilar-Spinelli* test is met when the police present the magistrate with sufficient facts to determine the informant's credibility or reliability. *Id.* at 437. A heightened showing of credibility is required where the information comes from a paid or criminal informant; such informants may have an ulterior motive for making an accusation. *State v. Ibarra*, 61 Wn. App. 695, 699–700, 812 P.2d 114 (1991).

Division III cites correct authority that the veracity prong may be satisfied if the informant has a track record of providing accurate information to the police but wholly disregards the absence of facts sufficient to establish a track record. *Slip Opinion* at 6. Here, the supporting affidavit provides scant information about the informant. The detective summarily claims information the informant has provided in the past has led to several arrests and seizures of narcotics. CP 22. No details are given such as her criminal history or prior status and historical use as a

paid (mercenary) informant, or the recency of and in what manner the information provided in the past contributed to the "several arrests". The detective's conclusory statement hardly conveys a "track record" of supplying reliable specific information that may support a search warrant. *Jackson,* 102 Wn.2d at 437, 443–44 (informant provided highly reliable information about drug import operation); *State v. Munoz-Garcia*, 140 Wn. App. 609, 620, 166 P.3d 848 (2007) (officer had known informant for eight years, informant had no criminal history, informant signed written statement). In its opinion Division III does not address the lack of any showing the confidential informant had provided police with accurate information in the past. *Slip Opinion* at 6–7.

Problems in establishing an informer's credibility may be cured by independent police investigation that corroborates the suspect's involvement in criminal activity along the lines suggested by the informant. *Jackson,* 102 Wn.2d at 438. The informant's participation in a closely controlled "buy" under the supervision of law enforcement officers may provide that type of corroboration. *Casto*, 39 Wn. App. at 234–35. If, however, the controlled buy is initiated by law enforcement officers and not the informant, it only shows that the informant follows direction. *Id.* at 234; *State v. Steenerson*, 38 Wn. App. 722, 726, 688 P.2d 544 (1984).

Division III acknowledges police-initiated buys alone do not establish veracity. *Slip Opinion* at 6. Here, the affidavit does not show the informant had any kind of prior relationship with Mr. Fenton or his house. Nor does it establish the informant initiated the controlled buy at Mr. Fenton's house. Thus, as in *Steenerson*, the informant's purchase of suspected methamphetamine suggested only her cooperation with police and indicates very little about the informant's credibility and ability to accurately report facts while not under supervision. *Steenerson*, 38 Wn. App. at 726.

The detective apparently saw the informant dial a particular phone number (which the affidavit does not establish as belonging to Mr. Fenton) and listened as the informant spoke to an unnamed person. The detectives did not observe what happened between the time the informant entered and left the apartment. Further, the affidavit contains no statement by the informant that she purchased the methamphetamine from Mr. Fenton. It contains only the detective's assertion that he "conducted a controlled buy of methamphetamine from Richard Fenton." CP 22. In short, the single controlled buy referenced in the affidavit does not establish the methamphetamine was purchased from Mr. Fenton.

Thus, the fact of the controlled buy alone fails to corroborate the suspect's involvement in criminal activity along the lines suggested by the informant. *Jackson,* 102 Wn.2d at 438. As discussed *infra*, the affidavit fails to establish the informant's credibility or her reliability. Division III does not address the failure of the police-initiated buy to establish the confidential informant's veracity. *Slip Opinion* at 6–7.

The affidavit in this case did not establish the basis of the informant's knowledge. The remaining issue under *Aguilar-Spinelli* is whether the affidavit established the confidential informer's basis of knowledge. *Jackson,* 102 Wn.2d at 437. Generally, the informant "must declare that he personally has seen the facts asserted and is passing on first-hand information. *Id.* In *State v. Maddox*, 152 Wn.2d 499, 511, 98 P.3d 1199 (2004), for example, the affidavit showed the informant had known the suspect for five years and had purchased methamphetamine from him at least 35 times in the past four years.

Here, there is no assertion the confidential informant *ever* had any first-hand dealings with Mr. Fenton. CP 22. The affidavit does not demonstrate the informer had ever been inside Mr. Fenton's apartment. Although the informant identified a picture as that of Mr. Fenton and said he was the person who "is selling" drugs at the apartment, the affidavit

contains no facts to explain how and when the confidential informant knew Mr. Fenton or how she happened to "know" this information. *Id.*

In *Jackson*, the informant named two people as drug distributors and gave the address for one without showing the underlying basis for the statement. *Jackson*, 102 Wn.2d at 444. "This type of bare allegation is insufficient to meet the basis of knowledge prong." *Id.* Here, the affidavit does not contain even a bare allegation by the confidential informant that she had ever purchased a controlled substance from Mr. Fenton or knew someone who did. The affidavit simply contains no information to establish the informant's basis of knowledge and thus her reliability.

The police did little to follow up on the informer's information. They confirmed the address was connected with Mr. Fenton through a database (CP 22) but did not verify he was presently living at the apartment. Nor did they establish the phone number dialed by the informant was associated with Mr. Fenton. *See State v. Atchley*, 142 Wn. App. 147, 152–53, 173 P.3d 323 (2007) (police followed up on information from anonymous citizen informant, by, for example, confirming defendant owned and resided at address provided and owned similar vehicle). The police did not notice unusual levels of traffic at the property or observe Mr. Fenton purchase drug trafficking supplies. *See Id.*

(police went to residence and observed evidence of possible marijuana grow; confirmed suspect's vehicle had been seen at garden supply store where police had obtained information leading to arrests of others for marijuana manufacturing).

The controlled buy referenced in the affidavit does not overcome the deficiencies in showing the informant's basis of knowledge because the buy was at the direction of the police and the supervising officers could not confirm the informant at any time had actually interacted with Mr. Fenton at the apartment.

Mr. Fenton's conviction for possession with intent to deliver a controlled substance—methamphetamine must be reversed and dismissed. The affidavit for search warrant in this case provided information from a police informant but did not contain information to demonstrate the informant was credible and there was a basis for her knowledge. The fact there was a controlled buy failed to establish the credibility or knowledge prongs of the *Aguilar-Spinelli* test because the controlled buy was orchestrated by the police not the informant and shows only that the informant was able to follow the officers' directions. Moreover, the police observing the controlled buy could not confirm the informant had even interacted with Mr. Fenton.

Because the affidavit did not demonstrate the informer's reliability or the basis of her credibility and/or knowledge, the search warrant was issued without probable cause in violation of Mr. Fenton's constitutional right to privacy. The trial court erred by denying Mr. Fenton's motion to suppress all of the evidence seized pursuant to the search warrant. This court must reverse Mr. Fenton's conviction for possession of a controlled substance with intent to deliver. *Steenerson,* 38 Wn. App. at 723.

VII. CONCLUSION

For the reasons stated, Petitioner respectfully asks this Court to grant review.

Respectfully submitted on September 29, 2014.

s/Susan Marie Gasch, WSBA #16485
P. O. Box 30339
Gasch Law Office
Spokane WA 99223-3005
Telephone: (509) 443-9149
FAX: None
E-mail: gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 29, 2014, I mailed to the following, by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Mr. Fenton's petition for review and Appendix A:

Richard Edward Fenton (#929310)
Coyote Ridge Corrections Center
P. O. Box 769

E-mail: prosecuting@co.benton.wa.us
Andrew Kelvin Miller
Benton County Pros Office
7122 West Okanogan Place
Kennewick WA 99336-2359

s/Susan Marie Gasch, WSBA #16485
P. O. Box 30339
Gasch Law Office
Spokane WA 99223-3005
Telephone: (509) 443-9149
FAX: None
E-mail: gaschlaw@msn.com

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

August 28, 2014

E-mail
Brendan Michael Siefken
Andrew Kelvin Miller
Benton County Prosecuting Attorney's Off
7122 W Okanogan Pl, Box G
Kennewick, WA 99336-2359

Susan Marie Gasch
Gasch Law Office
PO Box 30339
Spokane, WA 99223-3005
gaschlaw@msn.com

Christopher Michael Hoxie
Attorney at Law
91506 E 83 Pr SE
Kennewick, WA 99338-1155
cmh226@law.georgetown.edu

CASE # 314481
State of Washington v. Richard Edward Fenton
BENTON COUNTY SUPERIOR COURT No. 101011769

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised.
RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

c: **E-mail** Hon. Bruce Spanner
c: Richard Edward Fenton
#929310
PO Box 769
Connell, WA 99326

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

STATE OF WASHINGTON,	)	No. 31448-1-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
RICHARD EDWARD FENTON,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Following a jury trial, Richard Fenton was convicted of two counts of delivery of a controlled substance within 1,000 feet of a school bus route and one count of possession with intent to manufacture or deliver a controlled substance. Mr. Fenton appeals, contending that the police lacked probable cause to obtain a search warrant authorizing the search of his apartment and that the lower court erred by not granting his motion to suppress. We conclude that the State established both bases of the *Aguilar-Spinelli*[1] test and affirm the lower court's denial of Mr. Fenton's motion to

[1] *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), *abrogated by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), *abrogated by Gates*, 462 U.S. 213, *but adhered to by State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136

suppress.

Mr. Fenton also asserts the trial court erred by imposing a variable term of community custody and that the judgment and sentence contains a scrivener's error that requires correction. We agree and remand to correct the judgment and sentence.

FACTS

On November 7, 2010, a Benton County Superior Court judge issued a search warrant based upon the following information contained in Kennewick Police Department Detective Juan Dorame's supporting affidavit:

> During the month of September (2010), CI #10-027 provided information that Richard "Rick" Fenton (Thurman), is and has been selling narcotics in the city of Kennewick. The CI has provided information in the past that I have corroborated, based on my investigations, and I, as well as other law enforcement officers in our area, have deemed the CI's information as credible. The information the CI has provided in the past has lead [sic] to several arrests and seizure of narcotics. This leads me to believe that the CI's information is credible and reliable. The CI has been in constant contact with me over the last several months.
>
> The CI stated that Richard Fenton has been selling Methamphetamine from a residence located at 108 N. Conway Street Apt. #B, Kennewick Washington, Benton County. I checked our local (I/Leads) database and located Richard Fenton living at 108 N. Conway Street #B. I showed the CI a photo of Fenton, without personal information attached to it and the CI confirmed that he was in fact the person that is selling Methamphetamine at the aforementioned location.

(1984).

> During the first three days of November (2010), I conducted a controlled buy of Methamphetamine from Richard Fenton at 108 N. Conway Street Apt. #B.
>
> During the controlled buy, I (along with other detectives from the Kennewick Police Department) met the CI at a pre-determined location. The CI was searched before and after the controlled buy and found to be clear of any drugs, money, or contraband. Before the buy I listened while the CI called Richard Fenton . . . and arranged to purchase Methamphetamine. I provided the CI pre-recorded buy funds (that were used to purchase the Methamphetamine) and the CI was kept under constant surveillance as the CI entered and exited 108 N. Conway Street #B. After the controlled buy, the CI provided us a small clear plastic zip lock baggie containing purported Methamphetamine that was purchased from Richard Fenton (Thurman). After the controlled buy, the purported Methamphetamine was field tested and it tested presumptive positive for Methamphetamine.
>
> Based on the aforementioned information I believe there is probable cause to believe that Richard Fenton (Thurman) is selling narcotics (Methamphetamine) from his apartment (108 N. Conway Street Apt. #B). I believe that the crime of Methamphetamine possession/delivery has and is occurring at 108 N. Conway Street Apt. #B and evidence of these crimes could be located at 108 N. Conway Street Apt. #B and also be located on his person.

Clerk's Papers (CP) at 22-23.

When officers served the warrant at Mr. Fenton's apartment, they found methamphetamine in several separate bags, packaged marijuana, drug paraphernalia, drug ledgers, and scales. The State charged Mr. Fenton with two counts of delivery of a controlled substance (methamphetamine) within 1,000 feet of a school bus route and one

count of possession with intent to manufacture or deliver a controlled substance.

Mr. Fenton moved to suppress the evidence, arguing the search warrant was invalid because the affidavit failed to establish the informant's reliability. The trial court denied the motion, concluding the affidavit was legally sufficient to establish the informant's reliability. The jury found Mr. Fenton guilty as charged. At sentencing, the court imposed a standard range sentence and a variable term of community custody.

ANALYSIS

Probable Cause. Mr. Fenton attacks the validity of the warrant on the ground that the informant was unreliable. Specifically, he maintains that the warrant fails to set forth facts that establish the informant's veracity and basis of knowledge as required by *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

We review issuance of a search warrant for an abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). In so doing, we give great deference to the issuing judge's determination of probable cause. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). Accordingly, we will generally resolve doubts about the existence of probable cause in favor of the validity of the search warrant. Both on appeal and before the trial court at the suppression hearing, review of the issuance is "limited to

the four corners of the affidavit supporting probable cause." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Moreover, although we defer to the issuing judge's determination, the trial court's assessment of probable cause on a motion to suppress is a legal conclusion we review de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007).

Probable cause exists if the State sets forth facts and circumstances which, if believed, lead a neutral and detached person to conclude that more probably than not, evidence of a crime will be found if a search takes place. *In re Det. of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002).

When determining probable cause to arrest on an informant's tip, Washington courts apply the *Aguilar-Spinelli* test. *State v. Salinas*, 119 Wn.2d 192, 199-200, 829 P.2d 1068 (1992). Under that test, the State must establish the informant's: (1) basis of knowledge and (2) veracity and reliability. *State v. Tarter*, 111 Wn. App. 336, 340, 44 P.3d 899 (2002). "Both the reliability of the manner by which the information was acquired and the reliability of the informant must be shown in an effort to determine *present* reliability." *State v. Casto*, 39 Wn. App. 229, 234-35, 692 P.2d 890 (1984) (emphasis in original). Conclusory assertions of reliability will not suffice. *Id.*

Mr. Fenton first challenges the informant's veracity. He argues the statements in the affidavit failed to provide information about the informant's criminal history or details of her involvement in previous controlled buys. He argues, "[t]he detective's conclusory statement hardly conveys a 'track record' of supplying reliable specific information that may support a search warrant." Br. of Appellant at 9. He also maintains that under *State v. Steenerson*, 38 Wn. App. 722, 688 P.2d 544 (1984), police-initiated buys do not demonstrate an informant's reliability. Relying on that case, he argues that because the affidavit does not establish that the informant initiated the controlled buy, "[t]he informant's purchase of suspected methamphetamine suggested only her cooperation and indicates very little about [her] credibility and ability to accurately report facts while not under supervision." Br. of Appellant at 10-11.

Mr. Fenton's reliance on *Steenerson* is misplaced. While he is correct that police-initiated buys alone do not establish veracity, it is well settled that the veracity prong may be satisfied if the informant has a track record of providing accurate information to the police. *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984); *Salinas*, 119 Wn.2d at 200. In *State v. Fisher*, the court stated, "it is almost universally held to be sufficient if information has been given which has led to arrests and convictions." *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743 (1982).

Moreover, a properly conducted controlled buy makes an informant a credible source of information. 1 WAYNE LAFAVE, *Search & Seizure* § 3.3(b) at 512 (1978); *Casto*, 39 Wn. App. at 234-35. In *Casto*, the informant reported to police that he could purchase drugs in the defendant's residence. Police then arranged for the informant to make a purchase with marked bills and searched the informant for drugs before the transaction. Police maintained surveillance on the informant before he entered the residence. Upon searching him when he emerged, police found drugs. In concluding these facts established the informant's reliability, the court 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.

Casto, 39 Wn. App. at 234 (emphasis in original). Thus, under *Casto*, the credibility prong is established through the showing that the confidential informant had provided police with accurate information in the past.

Mr. Fenton also challenges the informant's basis of knowledge, contending the affidavit fails to establish that the informant had any firsthand dealing with Mr. Fenton or had been inside his apartment. Generally, the "basis of knowledge" prong requires a

showing that the informant has personal knowledge or is passing on firsthand information. *Jackson*, 102 Wn.2d at 437. *Casto* disposes of Mr. Fenton's contention. As just discussed, under *Casto*, a showing of a properly executed controlled buy satisfies the basis of knowledge prong. Here, the controlled buy was similar to the one in *Casto*: the informant was "searched before and after the controlled buy," given prerecorded buy money, "kept under constant surveillance" as she entered and exited Mr. Fenton's apartment, and turned over a controlled substance after the buy.

Under these facts, the affidavit meets both prongs of the *Aguilar-Spinelli* test. Consequently, the trial court correctly denied Mr. Fenton's suppression motion.

The showing of probable cause was sufficient under the *Aguilar-Spinelli* test. Accordingly, the trial court properly denied the motion to dismiss.

Sentencing Issues. Mr. Fenton next argues that the trial court sentenced him to a variable range of community custody in violation of RCW 9.94A.701 because the length of his community custody depended on the amount of early release time he earned. The State concedes error. We accept the State's concession and remand for a correction of Mr. Fenton's sentence consistent with this opinion.

A trial court may only impose a sentence authorized by statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). We review the legality of a

sentence de novo. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Under RCW 9.94A.701, "a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing." *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).

Here, the court imposed the following sentence of community custody:

> (A) The defendant shall be on community placement or community custody for the longer of:
> (1) the period of early release. RCW 9.94A.728(1)[,] (2); or
> (2) the period imposed by the court, as follows:
> Counts one, two and three for 12 months.

CP at 123.

Under *Franklin*, the court could only sentence Mr. Fenton to a finite community custody term of 12 months. Accordingly, we remand to the trial court to issue a corrected judgment and sentence consistent with this opinion.

Mr. Fenton also contends that the judgment and sentence contains a scrivener's error, pointing out that it states that the date of count 2 was November 1, 2010, whereas the evidence established that the date of the offense was November 5, 2010. The State again concedes error. We accept the State's concession. The remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for

correction. *In re Pers. Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005) (citing CrR 7.8(a)); *see* RAP 7.2(e).

The trial court erred by imposing a variable term of community custody and incorrectly stating the date of count 2. We, therefore, affirm the convictions but remand to the trial court to issue a corrected judgment and sentence consistent with this opinion.

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.

Lawrence-Berrey, J.

WE CONCUR:

Korsmo, J.

Fearing, J.

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Transmittal Letter

Document Uploaded:	314481-Petition for Review 9-29-14 Fenton, Richai
Case Name:	State v. Richard Edward Fenton
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- ☐ Personal Restraint Petition (PRP)
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Comments:

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Comments:

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