73035-5

FILED
Oct 09, 2015
Court of Appeals
Division I
State of Washington

No. 73035-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALLEN BUMANGLAG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Washington Supreme Court Cases

Washington Court of Appeals Cases

Other Cases

Constitutional Provisions

A. ARGUMENT

Through his counsel's failure to bring a meritorious motion to suppress, Mr. Bumanglag was deprived of his constitutional right to effective assistance of counsel.

In violation of the state and federal constitutions, Allen Bumanglag was deprived of his right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22. Despite a meritorious argument that the warrant used to search the house lacked probable cause, Mr. Bumanglag's counsel did not file a motion to suppress. This resulted in the admission of key evidence and the jury finding Mr. Bumanglag guilty of the charges.

To prove ineffective assistance of counsel, the defendant must establish both deficient performance and resulting prejudice. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The State argues that Mr. Bumanglag cannot establish either prong because a motion to suppress would have been properly denied. Br. of Resp't at 11-20. The State is wrong.

1. There was not probable cause to believe that evidence of identity theft would be found at the residence.

Warrants must be supported by probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "The affidavit in support of the search warrant must adequately show circumstances which go beyond suspicion and mere personal belief that evidence of a crime will be found

on the premises to be searched." State v. Rangitsch, 40 Wn. App. 771, 780, 700 P.2d 382 (1985). There must be a nexus between the item to be seized and the place to be searched. Thein, 138 Wn.2d at 140. Further, merely arresting someone for a crime or being associated with crime does not authorize the police to search a person's home. Id. at 148; see United States v. Rodgers, 656 F.3d 1023, 1028-29 (9th Cir. 2011) (probable cause to arrest passenger does not necessarily supply probable cause to search vehicle).[1]

Here, the warrant authorized the police to search the premises of 7319 16th Avenue S.W. for evidence of identity theft. Ex. 3 ("Affidavit for Search Warrant") (attached as appendix in Opening Brief). The affidavit, however, neglected to state who owned or resided at these premises. Ex. 3. Rather, it recounted that evidence associated with identity theft had been recovered at the premises over a year earlier, resulting in charges against "multiple suspects located inside the residence." Ex. 3 at 3. It stated that two of the suspects from that incident, Mr. Felipe and Mr. Dacome, were seen leaving the residence during the afternoon. Ex. 3 at 3-4. It further recounted that law

[1] In the opening brief, counsel mistakenly cited to an unpublished portion of a published opinion in support of this proposition. Br. of App. at 12 (citing State v. Espey, 184 Wn. App. 360, 371, 336 P.3d 1178 (2014)). Counsel apologizes for this mistake.

enforcement may have found evidence of identity theft on Mr. Bumanglag and Ms. Tacardon, who also left the residence the same afternoon. Ex. 3 at 3-5. The affidavit states that law enforcement had only started their surveillance of the area that afternoon in the hopes of finding Mr. Felipe and Mr. Dacome. Ex. 3 at 3.

These facts did not supply probable cause to issue a warrant to search the residence for evidence of identity theft. There needed to be a more direct connection linking the residence to evidence of identity theft. See Thein, 138 Wn.2d at 147 ("Absent 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."). That evidence of identity theft may have been found on Mr. Bumanglag and Ms. Tacardon would not have justified searching their home, yet alone the last house they stepped out of.

Mr. Dacome and Mr. Felipe, who were also seen stepping out of the house the same afternoon, also did not provide an adequate link. No fresh evidence of identity theft was recounted as to these two. Ex. 3 at 3-5. Moreover, like Mr. Bumanglag and Ms. Tacardon, they might have simply been visitors at the residence. See Ex. 3 at 3 (recounting that surveillance of area was set up during the afternoon). As for evidence related to identity theft being discovered at the residence over a year

before, this information did not supply a basis to believe there was currently evidence of identity theft inside. See State v. McReynolds, 104 Wn. App. 560, 569, 17 P.3d 608 (2000) (recounting that passage of time diminishes likelihood that stolen items will be found at suspect's residence, vehicle, or place of business).

2. The State unfairly recounts the facts in the affidavit.

In resisting this analysis, the State exaggerates, if not misrepresents, the affidavit. The State asserts that the affiant, Detective Christiansen "attested to an intimate familiarity" with the residence. Br. of Resp't 14. Actually, he merely attested to once executing a warrant at the residence over a year before. Ex. 3 at 3.

The State asserts that Mr. Dacome and Mr. Felipe "were part of the large group of suspects involved in the operation." Br. of Resp't at 14. But Detective Christiansen did not attest to an "operation" or that a there was a "large group of suspect." Instead, Detective Christensen vaguely recounted that charges were filed against "multiple suspects located inside the residence" over a year before. Ex. 3 at 3.

Continuing to exaggerate or misrepresent the affidavit, the State asserts that Mr. Felipe was "a known group member," that Mr. Dacome was a "known member of the ID-theft group," and that the house was "known for organized identity theft." Br. of Resp't at 14. Detective

Christensen did not attest to these assertions. Ex. 3. Neither did the Detective aver that the house was the "headquarters of a large, organized group of identity thieves." Br. of Resp't at 15. He simply recounted that evidence of identity theft was recovered in the house in February 2013 and that two of the suspects were Mr. Dacome and Mr. Felipe. Ex. 3 at 3. This does not establish the house as an "organized identity theft ring" or a "known identity-theft headquarters." Br. of Resp't at 16.

Consistent with the law, this Court should stick to the four corners of the affidavit and disregard the State's exaggerated and misleading account of the affidavit. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (review of whether the search warrant was properly issued is limited to the four corners of the affidavit offered to establish probable cause).

3. There was not an adequate nexus to establish that evidence of identity theft would be found at the residence.

The State misunderstands the argument concerning the lack of a sufficient nexus. Mr. Bumanglag is not arguing that an affidavit must always allege who lives at a residence to establish probable cause to search the residence. Br. of Resp't at 18. The point is that the affidavit does not supply facts to believe that evidence of identity theft would be found at the residence. See Zurcher v. Stanford Daily, 436 U.S. 547, 556,

98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978) ("The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."). If the affidavit had stated that Mr. Bumanglag or the others lived at the residence, this would have tended to show a link. Alternatively, if the police had observed Mr. Bumanglag (or someone else) leave the residence, conduct a fraudulent transaction, and return to the residence, it might be reasonable to conclude that evidence of identity theft would be found there. Cf. State v. G.M.V., 135 Wn. App. 366, 372, 144 P.3d 358 (2006) ("The warrant was to search the place [the suspect] left from *and* returned to before *and* after he sold drugs. This was a nexus that established probable cause that [the suspect] had drugs in the house.") (emphasis added). But the facts here are different.

The State argues the nexus in this case is "at least as strong as in G.M.V., and miles away from Thein." Br. of Resp't at 19. But G.M.V. is materially distinguishable because police saw a person leave a residence, engage in an illegal transaction, and return to the same residence. G.M.V., 135 Wn. App. at 372. In contrast, this did not happen here.

As for Thein, despite the nexus being inadequate, there at least the affiant identified the residence as belonging to the suspect. Thein, 138

Wn.2d at 138. Here, if the affidavit had identified the residence as such, the nexus problem would not be so severe. Cf. State v. Dunn, 186 Wn. App. 889, 899, 348 P.3d 791 (2015) (adequate nexus to search defendant's home because it was reasonable to believe stolen items would be at the defendant's home).

Even ignoring this problem, the affidavit does little more than make the conclusory assertion that, based on "training and experience," evidence of identity theft would be found at the premises. Ex. 3 at 4-5. This is inadequate. Thein, 138 Wn.2d at 148-49 (broad generalized conclusions by law enforcement officer are inadequate to establish probable cause). Contrary to the State's assertion, Thein is not limited to cases involving drug crimes. See, e.g., State v. Nordlund, 113 Wn. App. 171, 183-84, 53 P.3d 520 (2002) (affiant's generalized assertion that sex offenders keep records of their crimes on their computers insufficient to establish probable cause to search the defendant's computer) (citing Thein, 138 Wn.2d at 147-50).

B. CONCLUSION

The affidavit failed to provide a sufficient nexus. There was not probable cause to believe that evidence of identity theft would be found at the residence. If counsel had challenged the search warrant, the evidence obtained from the residence would have properly been excluded. This key evidence was used to convict Mr. Bumanglag on all the identity theft counts and prejudiced him in his defense on the charge of taking a motor vehicle without permission. Accordingly, this Court should reverse Mr. Bumanglag's convictions for ineffective assistance of counsel. For the reasons stated in the opening brief, the conviction for taking a motor vehicle in the second degree and one of the convictions for identity theft (count two), should be dismissed for insufficient evidence.

DATED this 9th day of October, 2015.

Respectfully submitted,

s/ Richard W. Lechich
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Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73035-5-I
v.	)	
	)	
ALLEN BUMANGLAG,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] ALLEN BUMANGLAG 310578 LARCH CORRECTIONS CENTER 15314 DOLE VALLEY RD YACOLT, WA 98675	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF OCTOBER, 2015.

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