No. 46685-6-II

IN THE STATE OF WASHINGTON

COURT OF APPEALS DIVISION II

STATE OF WASHINGTON, Respondent

v.

EXPY SANABRIA, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE JUDGE GAROLD JOHNSON

THE HONORABLE JUDGE FRANK CUTHBERTSON

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
509.939.3038

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

U.S. Supreme Court Cases

Statutes

Constitutional Provisions

Rules

I. ASSIGNMENTS OF ERROR

A. The Trial Court Violated Mr. Sanabria's Federal and State Constitutional Right To Self-Representation.

B. The Trial Court Erred By Denying The Defense Motion to Suppress Evidence.

C. The Trial Court Erred When It Made Finding of Fact 4: "The CI reported that 'X' resided in the City of Lakewood, Pierce County, Washington." (CP 131)

D. The Trial Court Erred When It Made Conclusion of Law 1:

> Based on the four corners of the warrant, there existed a sufficient nexus between the residence located at ….and the defendant's drug dealing activities. The court determined that the warrant alleged that the defendant left from and returned to the residence before and after he sold drugs to the confidential informant on two separate occasions. This is a nexus that establishes probable cause that the defendant had drugs in the residence." (CP 134).

E. The State Violated Discovery Rules When It Refused To Provide The Police Reports That Served As The Basis For A Warrantless Arrest.

F. The Trial Court Abused Its Discretion When It Denied The Defense Motion To Provide The Police Reports That Served As The Basis For A Warrantless Arrest.

G. The Trial Court Abused Its Discretion By Denying A Continuance So A Subpoenaed Witness Could Be Brought To Testify.

H. The Trial Court Erred When It Ruled The Police Officer Who Found The Incriminating Evidence Was Not A Material Witness.

I. The Trial Court Erred When It Imposed Legal Financial Obligations Without Inquiry Into Mr. Sanabria's Current or Future Ability To Pay the Imposed Fees.

ISSUES RELATED TO ASSIGNMENTS OF ERRORS

1. Where the defendant on two separate occasions unequivocally, knowingly and intelligently requests to proceed pro se in a timely way, was the denial for self-representation a violation of Mr. Sanabria's constitutional right under the 6th Amendment of the United States Constitution and Article 1, §22 of the Washington State Constitution, requiring reversal?

2. Whether the trial court erred by failing to suppress seized evidence when there was an insufficient nexus between the place to be searched and evidence of illegal activity, so that the search warrant affidavit did not establish probable cause to issue the warrant for the home?

3. Whether the State violated rules of discovery when it refused to provide discovery of the police reports that served as the basis for the warrantless search and seizure of Mr. Sanabria?

4. Whether the trial court erred by denying the motion to compel discovery of the police reports that served as the basis for the warrantless arrest and search of Mr. Sanabria ?

5. Whether the trial court erred when it denied a continuance so a law enforcement witness could be brought to testify and then ruled that officer, who found the incriminating evidence, was not a material witness ?

6. Whether the trial court erred when it did not make any inquiry into Mr. Sanabria's current or future ability to pay before imposing legal financial obligations.

II. STATEMENT OF FACTS

Sometime during the first week of November 2013, a confidential informant (CI) contacted Officer Jeff Martin[1] about making a methamphetamine purchase. The CI said the individual selling the drugs went by the name of "X", and drove a black 2004

[1] Officer Martin is a member of the Lakewood Police Department and at that time was assigned to the Tacoma FBI South Sound Gang Taskforce. (SSGTF).

Acura TL 4-door with beginning license plate numbers of '311'. The CI also believed that "X" possibly lived in the Lakewood area. He described "X" as a "stalky"(sic) Puerto Rican, about 5'10" tall. (CP 109). In an affidavit, Officer Martin reported that he did some research and found the name "Xavier Martinez" as the suspect, along with a date of his birth, record of recent arrests and felony convictions, and tattoo descriptions. (CP 109).

Officers from SSGTF arranged with the CI to conduct two controlled buys, sometime within the 72 hours preceding November 14. (CP 109-110). The CI placed a phone call to "X" who agreed to meet him. (CP 109-110).

Despite an absence of a record of officers having any knowledge of the actual identity of the person the CI intended to meet, or where he lived, or the registered owner of the vehicle, the affidavit stated "Officer Conlon located X's vehicle…parked in the driveway of a doublewide trailer addressed as…" (CP 109).

The State's later explanation for Officer Conlon's presence outside the doublewide mobile home that day was "Meanwhile, Lakewood Police Officer Sean Conlon *had discovered* X's vehicle

…parked in the driveway of a doublewide trailer addressed as…"[2] (CP 69). (Emphasis added).

Conlon watched as a Hispanic male left the front door and got into a black Acura. He followed the Acura to the meet location and then followed him on the return trip to the doublewide. (CP 109). The second buy operation, within the same 72 hours of November 14, was completed in the same manner. (CP 109-110). "X" was not arrested.

After the second buy, on November 14, Officer Martin showed the CI a copy of the driver's license photo of Xavier Martinez. The CI could not say whether that picture was a match for the person who had just sold him the drugs. (CP 109; 6/17/14 RP 10).

That same day, based on the above events, Martin prepared an affidavit requesting a search warrant. It requested authority to search the Acura and the interior of the doublewide trailer. (CP 108-111). Judge Orlando signed the warrant. (CP 111).

Around nine o'clock a.m. on November 20, 2013, Conlon and Martin stopped Mr. Sanabria as he drove the Acura toward the

---

[2] Production of the police reports that could possibly have detailed how Conlon "had discovered" the vehicle was objected to by the State and the Court ruled they were not necessary for discovery.

doublewide. (6/25/14 RP 355). Officers arrested and searched him. (CP 68; 6/25/14 RP 430). Officer Conlon removed two 1x1 inch baggies that looked to contain methamphetamine and $781 in various denominations from Mr. Sanabria's pockets. (6/25/14 RP 356). Officers found no evidence in the Acura. (6/25/14 RP 429).

Meanwhile, other officers entered the doublewide to search. (6/25/14 RP 366). Officers later learned Ms. Dany Ann[3] owned the Acura and Mr. Sanabria's mother owned the doublewide home. (6/23/14 RP 22, 23). Once inside, Ms. Ann told them they would find a lunch bag sized cooler with drugs in it. (6/25/14 RP 376).

Using the K-9 officer, Conlon located the bag. (6/25/14 RP 369, 436). No other officer was with him when it found it. (6/26/14 RP 546).

On the property sheet and at trial, Officer James said Conlon told him the cooler was found in the carport, but later changed the location to an interior storage room. (6/26/14 RP 527). The cooler contained three 1x1 baggies of suspected methamphetamine and a small scale. (6/15/14 RP 393). Officers also removed documents that had Mr. Sanabria's name on them; however, the property

---

[3] Ms. Ann was charged with possession of an uncontrolled substance and tried as a co-defendant with Mr. Sanabria. (6/17/14 RP 2).

report did not contain information about who found the documents or where they were found. (6/26/14 RP 529). Mr. Sanabria was charged with possession with intent to deliver. He was not charged with delivery of a controlled substance. (CP 177).

1. Request For Self-Representation

About a month after his arrest, on December 26, 2013, Mr. Sanabria sent a letter to the trial court, requesting appointment of new counsel. (CP 12-13). At the next hearing, January 10, Mr. Sanabria told the court he wanted to represent himself going forward. He asked the court to appoint standby counsel who was not his current counsel. (Jan. 10, 2014 RP 3). He had filed several motions with the court in anticipation of representing himself. (CP 8-11; 14-15;18-19).

Mr. Sanabria explained that he was seeing his attorney for the first time that morning, and did not believe he could get a fair trial. He had great concern about not getting to strategize or view any discovery. (1/10/14 RP 4-5).

Without questioning defense counsel Judge Cuthbertson asked if Mr. Sanabria had been to law school or understood the rules of evidence. (1/10/14 RP 4). When it was clarified, again, for the court that Mr. Sanabria wanted to represent himself, the court

said, "He wants to lawyer shop, I think….He wants Jeffrey Toobin or somebody from TV. I don't know what you want." (Jan. 10, 2014 RP 5-6).

The court had an on the record discussion with the State's attorney and then addressed Mr. Sanabria:

> "- - and, you know, I am not here to vouch for lawyers, okay? Ms. Melby has been here as long as, if not longer, than I have, okay? She takes a lot of concern and patience and care with her clients, okay? She doesn't give her clients short shrift. I mean, that's her reputation and we all know it. If you want to go pro se, I'll let you go pro se, but I'm going to ask Ms. Melby to remain as standby. I'm not letting you shop for standby counsel…" (1/10/14 RP 8).

The court ultimately denied the motion without prejudice. Mr. Sanabria agreed to take a week to think about his request. (1/10/14 RP 8-11).

Two weeks later, Mr. Sanabria filed a motion and affidavit in which he again asserted his right to proceed pro se. (CP 27). The requested hearing never occurred nor did the court rule on the motion.

On April 25, Mr. Sanabria sent another letter to the court, requesting appointment of a new attorney. (CP 147-151). On May 1, Mr. Sanabria again requested the court to appoint new counsel for him. (5/1/14 RP 6). He told the court that at this late date, he

could not represent himself, but did want new counsel. The court responded,

> "Okay. But we're not at the beginning. We're at the beginning of trial. That's the issue… The motion is denied. You get a lawyer at public expense. You don't get to lawyer shop. The cases in Washington are clear. You don't get to switch horses at the 11th hour right before trial, so I'm denying the motion." (5/1/14 RP 7).

Mr. Sanabria pointed out that he had asked the court in December for new counsel, and in January he twice requested to represent himself. He reminded the court that his first two motions were denied, and the second motion to represent himself had never been addressed by the court. (5/1/14 RP 8). The court did not appoint new counsel. The trial began June 23, seven weeks later.

2. CrR 3.6 Hearing and Ruling

Defense counsel moved to suppress all the evidence seized during the search of the mobile home. Specifically, counsel argued there was a failure to establish a nexus between the observed criminal activity and the premises to be searched. (4/14/14 RP 3-4).

Counsel pointed out the affidavit did *not* include (1) the name of the owner or renter of the doublewide; (2) any information as to the registered owner of the Acura; (3) information about the

registered owners of the other cars parked at or near the same mobile home; (4) information about the times at which the two controlled buys occurred, or how far apart in time they occurred ; (5) information that would have explained how officers happened to park outside that particular doublewide mobile home; (6) information about surveillance of the home; nor did it list Mr. Sanabria by name. (4/14/14 RP 3-4, 7).

Over defense objection, the court reasoned that despite no information that the doublewide was Mr. Sanabria's residence, or any surveillance other than the two undated occasions officers saw him leave and return to the doublewide, it was reasonable to infer "there was dealing going from inside the home in some fashion, or inside that residence." (4/14/14 RP 17-18). Findings of fact and conclusions of law were entered shortly thereafter[4]. (CP 131-135).

3. Discovery of Police Reports That Provided Probable Cause to Arrest Mr. Sanabria.

On March 11, defense counsel requested a copy of the police reports detailing the two drug transactions that allegedly served as probable cause for Mr. Sanabria's warrantless arrest.

[4] Defense filed a motion for discretionary review with the Court of Appeal which was denied. (CP 172).

(3/11/14 RP 7). The State objected and the court denied the motion, stating "[y]ou have access to the affidavit [for the search warrant], but the additional information about the other buys, basically the questions as to the officer's credibility in the affidavit…and the affidavit has already been determined by a judicial officer issuing the warrant. So I'm going to deny the motion." (3/11/14 RP 9-10).

On June 23, after defense counsel received discovery of the copy of the picture shown to the CI to identify "X", the defense requested a *Franks* hearing. It was not until the State had been directed to give the picture to the defense that defense counsel understood that officers showed the picture to the CI *after* the buys, not before them. Counsel argued that the judge who signed the warrant was led to believe that before the buys, police knew who the individual they were targeting was- which would mean they could look up driver license records, or tax records that would indicate where the targeted individual lived. (6/23/14 RP 36).

The court noted the affidavit specifically stated, "We watched as he proceeded back to quote, 'his', close quote, residence." The court went on "An implication being that they knew this was his residence…That turned out not to be the case

necessarily at this point. It may be in some respect a misrepresentation." (6/23/14 RP 51). The court ruled it was not an intentional misrepresentation, and it was immaterial whether officers knew the doublewide was "X"s residence. (6/23/14 RP 52). The court denied a Franks hearing. (6/23/14 RP 53).

The second issue was a motion to compel the State to provide the police report with respect to the controlled buys. (6/23/14 RP 69). An interview with Officer Martin revealed that officers arrested Mr. Sanabria based on the probable cause from the controlled buys; in other words, he was arrested and searched before officers found contraband in the doublewide. (6/23/14 RP 69). Defense counsel agreed that any information identifying the CI should be redacted. The State objected maintaining the reports "would lead to strategies, the techniques they use, the locations where they set these buys up. It would give information about the buy." (6/23/14 RP 70-71). The court again ruled the defense was not entitled to the police reports that were the basis for the arrest. (6/23/14 RP 73).

4. Officer Conlon

Officer Conlon was subpoenaed by the State and was

named on the State's witness list as late as June 18, 2014. (CP 34 4-347). On June 23, the State's attorney reported he learned Officer Conlon was going on vacation and would not be available to testify. Conlon was going to work to execute a search warrant on June 25th and then returning to his vacation. (6/23/14 RP 89;127). The State's attorney said:

> "—and I indicated prior to trial that I was trying to get a contnuance before we got sent here. I talked to Sara [court administarator] and said that I wanted a continuance because he wasn't available, and Judge Cuthbertson said they're sending us to trial."

(6/23/14 RP 127).

Sometime between June 18 and June 23 defense counsel was notified "an officer" was not available, but not which officer. (6/24/14 RP 171-72). On June 23, defense counsel learned it was Conlon. She subpoenaed and requested a continuance. (6/24/14 RP 163). Counsel argued to the court he was a material witness for the case. He was the individual who, without a witness, located the lunch cooler bag during the search. The officer who completed the property sheet listed it as having been found in the carport, but then changed it to an interior area of the doublewide. Counsel argued that without opportunity to cross-examine him, she could

not provide effective representation for Mr. Sanabia. (6/24/14 RP 163-64;172). The court denied the motion. (6/24/14 RP 173).

On June 23, defense counsel for Ms. Ann reported that his investigator called the Lakewood police department and learned Conlon was available and subpoenaed him to testify on June 25th. (6/23/14 RP 126-27). The following day, he reported to the court that he was again told by Lakewood police department that he was available to testify. (6/24/14 RP 162).

The State reported that Officer Conlon was on vacation (6/23/14 RP 127). The State said:

> "…I want Sean Conlon here. And I came back, and at every break I said I've been trying to contact him. Even in the hallway I told Jeff, have you contacted him? No. He's on vacation. He's coming for a warrant. I don't want to say the time of it, but he's going in for a warrant and then he's going back on his vacation. I'm trying to get him here, but all accounts right now he's not coming in. But I don't have to call all my witnesses. *If he's available to me I can call him. If he's not, he doesn't come in.* And I've been saying this from the beginning. (6/24/14 RP 341-42).

The record contains no information about a request for a continuance by the State. The court denied the defense motion to alert the jury that Officer Conlon had been subpoenaed but declined to obey it. Over defense objection the court ruled that Officer Conlon was not a material witness. (6/26/14 RP 524). In

later testimony, Officer Martin reported that Officer Conlon had been at work on the day he was called to testify. (6/25/14 RP 431).

5. Verdict and Sentencing

Mr. Sanabria was convicted of unlawful possession of a controlled substance with intent to deliver. (CP 286-87). The court imposed the statutorily mandated fees, and included a $500 court appointed attorney fee. (CP 329). Mr. Sanabria reminded the court he was indigent and the court responded, "Your challenge is actually - - and I'm sure counsel can talk to you about it, but I think your challenge to ability to pay LFOs are probably the timing.' (9/11/14 RP 693).

On December 16, 2014, Mr. Sanabria filed a motion to terminate the legal financial obligations (RCW 10.01.160(4)), citing no present or likely future ability to pay the LFOs and imposition of them would place an undue burden on the defendant and his family. (CP 350-353). The motion was denied. (CP 354). This appeal follows. (CP 319).

III. ARGUMENT

A. The Trial Court Violated Mr. Sanabria's Constitutional Right To Self-Representation.

1. Standard of Review

A request for pro se status is a waiver of a constitutional right to counsel, and denial is reviewed under an abuse of discretion standard. *In re Personal Restraint of Rhome,* 172 Wn.2d 654, 668, 260 P.3d 874 (2011). Discretion is abused if it is manifestly unreasonable, rests on facts unsupported by the record, or was reached by applying an incorrect legal standard. *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

2. Mr. Sanabria Had A Constitutional Right To Represent Himself.

The Sixth Amendment to the United States Constitution grants a criminal defendant the right to represent himself at trial. *Faretta v. California,* 422 U.S. 806, 816, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Similarly, Article 1, §22 of the Washington Constitution provides, in relevant part, "in criminal prosecutions the accused *shall* have the right to appear and *defend in person, or by counsel*..." unequivocally granting an accused the constitutional right to self-representation. (Emphasis added). *State . Kolocotronis,* 73 Wn.2d 92, 97, 436 P.2d 774 (1968); *State v. Silva,* 107 Wn.App. 605, 618, 27 P.3d 663 (2001).

Although courts are instructed to presume against the waiver of counsel, improper rejection of the right to self-representation

requires reversal. *State v Madsen,* 168 Wn.2d 496, 503-04, 229 P.3d 714 (2010). The grounds allowing a court to deny a defendant the right to self-representation are limited: the request must be unequivocal, timely, voluntary, and made with a general understanding of the consequences. *Id.* at 504-05. The relevant question in deciding whether to grant a motion for self-representation is not whether the defendant has the skill or ability, but rather, whether his waiver is valid. *Godinez v. Moran,* 509 U.S. 389, 400, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

Here, at the January 10th hearing, Mr. Sanabria unequivocally moved to represent himself. He told the court that he wanted to represent himself, he was frustrated with his attorney, and wanted standby counsel, but not his appointed attorney[5]. If the demand for self-representation is made well before trial and unaccompanied by a motion for a continuance, the trial court must grant the request as a matter of law. *State v. Barker,* 75 Wn.App. 236, 241, 881 P.2d 1051 (1994).

Moreover, the court is obliged to determine whether the defendant is waiving his right to counsel with "eyes open to the

[5] A court may appoint standby counsel if necessary. *State v. Fritz,* 21 Wn.App. 354, 363, 585 P.2d 173 (1978).

dangers and disadvantages of the decision." *State v. Hahn,* 106 Wn.2d 885, 726 P.2d 25 (1986). To make that determination, the court must discern whether the defendant knows the nature of the charges, the potential penalty, and the disadvantages of self-representation. Here, at no time did Judge Cuthbertson conduct the required colloquy . *Madsen,* 168 Wn.2d at 504; *Faretta at* 835; *City of Bellevue v. Acrey,* 103 Wn.2d 203, 209, 691 P.2d 957 (1984).

Rather, after asking Mr. Sanabria what law school he had attended, and if he knew the rules of evidence, the court somewhat dismissively said that Mr. Sanabria wanted a "TV lawyer". "A court may not deny pro se status merely because the defendant is unfamiliar with the legal rules." *Madsen,* 168 Wn.2d at 509. Simply put, the court did nothing to inquire whether the request was being voluntarily, unequivocally, intelligently and knowingly made.

Additionally, the court did not inquire of defense counsel about the alleged conflict. Instead, the court sought the opinion of the State's attorney, who discussed the delay in getting discovery to the defense. (1/10/14 RP 6-9).

The court may not deny a motion to proceed pro se without stating a reason that rests "on some identifiable fact." *Madsen,* 168

Wn.2d at 504-05. The court's denial of Mr. Sanabria's motion was not based on any identified fact, and was an abuse of discretion.

The court left the door open for Mr. Sanabria to make another request to proceed pro se. Two weeks after the initial denial, in a letter to the court, Mr. Sanabria again, unequivocally stated he was exercising his right to self-representation and requested a hearing. The hearing never occurred. The court was on notice Mr. Sanabria was exercising his constitutional right to self-representation and never made a ruling. Failure to make the ruling was the equivalent of a denial of the motion. This was an abuse of discretion. *Madsen,* 168 Wn.2d at 508

By May 1[6], the court and Mr. Sanabria believed the trial would be underway within a matter of days. At this hearing, Mr. Sanabria requested replacement of counsel, stating that his earlier request to proceed pro se had not been ruled on by the court, but the trial was now too close for him to represent himself. This time the court chastised Mr. Sanabria, for trying to change lawyers at the 11th hour.

[6] For a variety of reasons the trial was continued and did not begin for another 7 weeks.

The erroneous denial of a defendant's motion to proceed pro se requires reversal without any showing of prejudice. *Madsen,* 168 Wn.2d at 504; *Breedlove,* 79 Wn.App. at 110; *State v, Estabrook,* 68 Wn.App. 309, 317, 842 P.2d 1001, *rev. denied,* 121 Wn.2d 1024, 854 P.2d 1084 (1993). Denial of the constitutional right is prejudicial in itself. *Breedlove,* 79 Wn.App. at 110.

Mr. Sanabria respectfully asks the Court to reverse his conviction and order a new trial, at which he may assert the right to self-representation or accept assistance of counsel.

B. The Trial Court Erred By Denying The Motion to Suppress Evidence Found In The Doublewide.

When reviewing a suppression motion, the reviewing court determines if substantial evidence supports the findings of fact and if the findings support the conclusions of law. *State v. Dempsey,* 88 Wn.App. 918, 921, 947 P.2d 265 (1997). Mr. Sanabria challenges the trial court's finding of fact that the CI told officers that "X" lived in Lakewood. The record shows the CI stated he/she believed "X" *possibly* lived in Lakewood.

A magistrate's issuance of a search warrant is reviewed under an abuse of discretion standard. *State v. Maddox,* 152

Wn.2d 499, 509, 98 P.3d 1199 (2004). The trial court acts in an appellate-like capacity at a suppression hearing. *State v. Neth,* 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, a trial court's assessment of probable cause to support a warrant is a legal conclusion that is reviewed de novo. *State v. Chamberlin,* 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007). Mr. Sanabria challenges the court's conclusion of law, that a sufficient nexus existed between the item to be seized and the place to be searched. Conclusions of law are reviewed de novo. *State v. Eisfeldt,* 163 Wn.2d 628, 634, 185 P.3d 580 (2008).

Article I, §7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law. Wash. Const. Art. I, §7. "This constitutional protection is at its apex where invasion of a person's home is involved." *State v. Eisfeldt,* 163 Wn.2d 628, 635, 185 P.3d 580 (2008). Similarly, the Fourth Amendment to the U.S. Constitution provides the protection for people in their "persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

Search warrants are valid only if supported by probable cause. *State v. Thein,* 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause "requires a nexus between 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. Goble,* 88 Wn.App. 503, 509, 945 P.2d 263(1997).

The affidavit in support of a search warrant must set forth the facts and the circumstances sufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched. *Thein,* 138 Wn.2d at 140. "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." *Id.* at 147.

Here, when the officer drafted the affidavit and the judge signed the warrant, law enforcement knew they had twice seen, within a 72-hour window, an individual they believed to be Xavier Martinez. The individual left the doublewide, drove the Acura, and sold methamphetamine to a CI. It is what is *missing* from the affidavit that points to the lack of probable cause.

At the time of its preparation, officers did not know (1) the name of the owner or renter of the doublewide or who lived there; (2) did not know the registered owner of the Acura or the registered owner's address, even though an officer somehow managed to "discover" the Acura in the driveway; (3) the name of the individual they were targeting; or (4) where the targeted individual resided. There was no record of any surveillance to substantiate the individual they were targeting did more than visit someone at the doublewide during the short periods of time he was observed leaving from and returning to it.

This case is unlike the facts cited in *State v. G.M.V.,* 135 Wn.App. 366, 144 P.3d 358 (2006). In *G.M.V.,* there was a sufficient nexus: law enforcement knew the suspect sold drugs, they knew who owned the house, they knew the relationship between the suspect and the homeowners, and that the suspect regularly spent the night at that home. Rather, the facts at hand are similar to those in *Goble.*

In *Goble*, a confidential informant told police that Goble acquired illegal drugs through mail he picked up at his post office box. *Goble,* 88 Wn.App. at 504-05. Officers intercepted the package and then obtained a warrant for Goble's home. The plan

was to place the drug package back in the post office, maintain surveillance, and when Goble took it to his home, they would conduct the search. *Goble,* 88 Wn.App. at 505.

In reversing, the reviewing court held the affidavit provided "no information that Goble has previously dealt drugs out of his house rather than a different place (for example, a tavern, his car, or a public park)." *Thein,* 138 Wn.2d at 144. Here, the reasonable inference is there may be drugs in the Acura, but there was no information that drugs were being sold from the doublewide.

Probable cause to believe that a man has committed a crime on the street does not give rise to probable cause to search his home. *Thein,* 138 Wn.2d at 143, (citing *United States v. Ramos,* 932 F.2d 1346, 1351 (9th Cir. 1991). Rather, as the court in *Thein* reasoned, where there are other places that police could reasonably find the evidence sought, the nexus is weakened. *Thein,* 138 Wn.2d at 150. As in *Thein*, Mr. Sanabria asks this Court to reverse his conviction and remand with orders to suppress the evidence obtained from the doublewide.

C. The State Was Obligated To Provide Discovery Of Police Reports That Served As The Basis For Mr. Sanabria's Arrest and Search Incident To Arrest.

1. The Prosecutor Was Obligated To Disclose Relevant Material and Information Regarding The Specified Seizure Of Mr. Sanabria.

Mr. Sanabria contends the State was obligated to provide him the requested relevant material and information from the police reports that served as the basis for his warrantless arrest and search. CrR 4.7(c)(1) mandates that the State disclose any relevant material and information regarding: (1) specified searches and seizures." Under the discovery rules Mr. Sanabria was entitled to a copy of the police reports.

> "'It is long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are 'to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination and meet the requirements of due process…' *Yates,* 111 Wn.2d at 793,797, 765 P.2d 291 (1988)(quoting Criminal Rules Task Force,*Washington Proposed Rules of Criminal Procedure* 77 (West Pub.Co. ed 1971)). To accomplish these goals, it is necessary that the prosecutor resolve doubts regarding disclosure in favor of sharing the evidence with the defense."

State v. Dunivin, 65 Wn.App. 728, 733, 829 P.2d 799 (1992).

Here, at two different hearings defense counsel requested the police reports relating to the events that led to the probable cause to arrest Mr. Sanabria. Both times the State objected, arguing that the defense should have made a motion for a *Franks* hearing and that discovery of the police reports would (1) make the identity of the CI readily discernable and (2) the reports would reveal law enforcement techniques and strategies. Neither reason amounts to sufficient reason not to comply with CrR 4.7(c)(1) and furnish the defense with the police investigative file that led to the warrantless arrest.

Court rules for discovery provide that an informant's identity need not be disclosed where the identity is a prosecution secret and failure to disclose will not infringe upon the constitutional rights of the defendant. CrR 4.7(f)(2). Where the State is concerned about the identity of the CI being made public, the process for protection involves an in camera viewing by the court, and redaction of the name and identifying information from the file. *State v. Casals,* 103 Wn.2d 812, 818, 699 P.2d 1234 (1985); *State v. Mathiesen,* 27 Wn.App. 257, 259, 616 P.2d 1255 (1980). Here the defense offered the opportunity for redaction. The court denied

the request for the files without ever ruling on whether it should conduct an in camera hearing.

Moreover, if the State had concerns about preservation of secrecy of law enforcement techniques and strategies, it could easily have asked the court to conduct an in camera hearing. As the *Blackshear* court stated,

> "An in camera hearing serves to protect the interests of both the government and the defendant; "the Government can be protected from any significant, unnecessary impairment of … secrecy, yet the defendant can be saved from what could be serious police misconduct."

State v. Blackshear, 44 Wn.App. 587, 591, 723 P.2d 15 (1986) (quoting *United States v. Moore,* 522 F.2d 1068, 1073 (9th Cir. 1975).

Without the requested discovery, significant information that was related to probable cause for the arrest was absent: it remained unexplained how, with an incomplete license plate number, an incorrect name of the individual they were targeting, a vague physical description (stocky Hispanic with long brown hair), the felony and arrest record of the targeted individual that was *not* Mr. Sanabria, and information that the individual only possibly lived in Lakewood, Officer Conlon somehow managed to fortuitously

discover the Acura parked near the doublewide mobile home at the exact moment the CI called Mr. Sanabria's cell phone. The arrest was directly related to the later charge of intent to deliver. Mr. Sanabria was entitled to police files that were directly related to the search and seizure. *Blackwell,* 120 Wn.2d at 826 (quoting CrR 4.7(a)(4)).

2. Alternatively, The Trial Court Erred When It Denied Mr. Sanabria's Motion To Compel The Police Reports.

Without conceding anything in the above argument, Mr. Sanabria contends in the alternative that the trial court abused its discretion when it denied the motion to compel discovery of the police reports. Throughout the hearings, the issue of whether to conduct a *Franks* hearing based on questions about the affidavit for the search warrant was conflated with the issue of probable cause for the arrest that was made without a warrant. (4/14/14 RP 13; 6/23/14 RP 33; 3/11/14 RP 5). They were two separate issues, related, but distinct.

The scope of discovery is within the trial court's discretion and the trial court's discovery decision will not be disturbed absent a manifest abuse of that discretion. *State v. Yates,* 111 Wn.2d 793, 797, 765 P.2d 291 (1988). A manifest abuse occurs where the

court exercises its discretion on untenable grounds or for untenable reasons. *State v. Silva,* 72 Wn.App. 80, 83, 863 P.2d 597 (1993).

The Washington Supreme Court has held that the Fifth Amendment to the U.S. Constitution requires the State to disclose all evidence material to guilt or punishment. *State v. Boyd,* 160 Wn.2d 424, 434, 158 P.3d 54 (2007). Similarly, CrR 4.7(e)(1) provides: Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not covered in other sections. (a) [Prosecutor's Obligations], (c) [Additional Disclosures upon request and specification]; and (d)[Material held by others]. (bracketed material has been added).

If a defendant requests disclosure beyond that which the prosecutor is obliged to disclose, he must show that the requested information is material to the preparation of his defense. *State v. Mak,* 105 Wn.2d 692, 704, 718 P.2d 407, *cert. denied,* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). A bare assertion that a document may have information material to the defense is insufficient, the defendant must advance some factual predicate which makes it reasonably likely the requested information will bear

information that is material to his defense. *State v. Blackwell,* 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Here, the trial court abused its discretion when it denied Mr. Sanabria discovery of the CAD/police reports from the two controlled buys. The entire basis for his arrest and search *prior to* execution of the search warrant was the allegation of the two alleged buys. A lawful arrest must be based on probable cause that is, on the totality of facts and circumstances within the officer's knowledge *at the time of the arrest*. *State v. Carnahan,* 130 Wn.App. 159, 122 P.3d 187 (2005); *State v Potter,* 129 Wn.App. 494, 119 P.3d 877, *affirmed,* 156 Wn.2d 835, 132 P.3d 1089 (2005).

The only facts and circumstances within the officer's knowledge at the time of the arrest were the two controlled buys. The State was very clear that it was charging Mr. Sanabria with intent to deliver (rather than delivery) based on both the contraband found on his person and the contraband found in the doublewide. (6/23/14 RP 66). Mr. Sanabria had every right to the information about the probable cause for his arrest. The facts and events surrounding the buys make it reasonably likely the requested police reports would bear information material to Mr. Sanabria's defense.

The State's violation of the discovery rule and the trial court's abuse of discretion undermined the ability of Mr. Sanabria to present a complete defense regarding his arrest. Mr. Sanabria respectfully asks this Court to hold that his due process right to disclosure of evidence that may have been favorable and material to his guilt or innocence was violated, and to vacate the judgment and dismiss the charge, or alternatively, remand this matter for retrial.

D. The Trial Court Abused Its Discretion By Denying A Continuance so Officer Conlon Could Be Brought To Testify.

1. Standard of Review

The decision to grant or deny a continuance rests in the discretion of the trial court. *State v. Simonson,* 82 Wn.App.225, 231-32, 917 P.2d 599 (1996). However, denial of a continuance may effectuate a denial of fair trial and due process of law. *State v. Brett,* 126 Wn.2d 136, 220, 892 P.2d 29 (1995), *cert. denied,* 116 S.Ct. 931, 132 L.Ed.2d 858.

2. The Issued Subpoenas Obligated Officer Conlon To Appear As A Witness.

The State issued subpoenas to Officer Conlon on February 11, 2014 and June 11, 2014. (CP 344;345). Conlon was on the

State's witness list as late as June 18. (CP 346-47). Defense counsel relied on the subpoena and witness list. Once defense counsel for Mr. Sanabria was made aware that Conlon was going on vacation and would not testify, she also issued a subpoena for his testimony[7]. The front desk person at the police department accepted the subpoena on June 25. (CP 273).

Each issued subpoena contained the following language: "This subpoena, however, *remains in effect and imposes a continuing duty to appear* until you are discharged." (CP 344;345; 272-73). Under CrR 6.12(b), a witness subpoenaed for trial "is dismissed and excused from further attendance as soon as he has given his testimony in chief and has been cross-examined thereon." Thus, "a subpoena ordinarily imposes upon the summoned party a continuing obligation to appear until discharged by the court or by the summoning party. "*State v. Tatum,* 74 Wn.App. 81, 86, 871 P.2d 1123 (1994), *rev. denied,* 125 Wn.2d 1002 (1994).

Here, however, the prosecutor told the court:

> "…I want Sean Conlon here. And I came back, and at every break I said I've been trying to contact him. Even in the hallway I told Jeff, have you contacted him? No. He's on

[7] As noted in the statement of facts, defense counsel for Ms. Ann also issued a subpoena on June 23 for appearance on June 25. (6/23/14 RP 126-27)

> vacation. He's coming for a warrant. I don't want to say the time of it, but he's going in for a warrant and then he's going back on his vacation. I'm trying to get him here, but all accounts right now he's not coming in. But I don't have to call all my witnesses. *If he's available to me I can call him. If he's not, he doesn't come in.* And I've been saying this from the beginning. (6/24/14 RP 341-42).

The court responded:

> "All right. I'm now going to rely upon your experience, many, many years as a prosecutor. And you're convinced this will be done in time. This gentleman has a right to take his vacation. I do intend to have this happen as well."

(6/24/14 RP 341).

Both the State and the court were wrong. The witness was under a subpoena, had been listed as a witness, and as of June 24, had not been discharged. Moreover, Officer Conlon had been at work, not on vacation, on the morning of June 25.

The court was correct, law enforcement officers are entitled to take vacations, however, under Washington law, scheduled vacations of investigating officers justify a continuance. *State v. Grilley,* 67 Wn.App. 795, 799, 840 P.2d 903 (1992). Further, the unavailability of a material witness is a valid ground for a continuance where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant. *State v. Day,* 51

Wn.App. 544, 549, 754 P.2d 1021 (1988), *rev. denied* 111 Wn.2d 1016 (1988). There was no reason not to reschedule the trial until he returned from his vacation. The trial court erred when it denied the motion for a continuance.

3. Officer Conlon Was A Material Witness.

The right to compulsory attendance of a material witness is a fundamental element of due process and goes directly to the right to present a defense. *State v. Carlisle,* 73 Wn.App. 678, 679, 871 P.2d 172 (1994) (internal citations omitted). In denying the defense motion for a continuance to secure Officer Conlon as a witness, the court found that Conlon was not a material witness. (6/26/14 RP 523-24; 552). Under Washington law, the defendant carries the burden of showing materiality. "This burden has been described as establishing a colorable need for the person to be summoned." *State v. Smith,* 101 Wn.2d 36, 42, 677 P.2d 100 (1984). As argued at trial and on appeal, Mr. Sanabria has met that burden.

The warrant authorized officers to search inside the doublewide and the Acura to seize incriminating evidence. Officer Conlon was alone when he located the cooler because the K-9 alerted to the bag. (6/25/14 RP 436; 6/26/14 RP 519). However, the photograph of the bag showed it was in plain view. (6/26/14 RP

520). The property report, compiled by another officer, was based on what Conlon told him, and it showed the location of the lunch bag was changed from one area to another.

Officer Conlon was the only one who could answer questions about exactly where and how the evidence was found. Mr. Sanabria had the right to confront the witness and cross-examine to test his perception, memory, credibility and narrative powers. *State v. Paine,* 98 Wn.2d 140, 654 P.2d 77 (1982). Officer Conlon was a material witness and he was under subpoena. The trial court's ruling that he was not material was error and went directly to his right to present his defense. The denial of a motion to continue so Mr. Sanabria could secure his presence was also error.

E. The Trial Court Erred When It Imposed Legal Financial Obligations Without Inquiry Into Mr. Sanabria's Current or Future Ability To Pay the Imposed Fees.

RCW 10.01.160(3) requires the sentencing judge to consider a defendant's individual financial circumstances and make an individualized inquiry into his current and future ability to pay. In *State v. Blaizina,* the Washington Supreme Court held that the authorizing statute means "that the court must do more than sign a

judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must also reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, …such as incarceration and a defendant's other debts, including restitution, when determining a defendant's abiity to pay." *State v. Blazina,* No. 89028-5, *Slip Op.* at 11.

Here, Mr. Sanabria objected to the imposition of the legal financial obligations at his sentencing, reminding the court that he was indigent. The court responded:

> Your challenge is actually - - and I'm sure counsel can talk to you about it, but I think your challenge to ability to pay LFOs are probably the timing.' (9/11/14 RP 693).

Mr. Sanabria filed a motion several months later, citing no present or likely future ability to pay the LFOs and imposition of them would place an undue burden on the defendant and his family. (CP 350-353). The motion was denied. (CP 354).

Under *Blazina,* the court should have conducted the individualized inquiry. Mr. Sanabria asks this court to remand with

instructions to consider his individual circumstances and ability to pay any LFOs.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Sanabria respectfully asks this Court to reverse his conviction and dismiss the charge with prejudice. In the alternative, he asks this Court to reverse the conviction and remand for a new trial, with instructions to suppress evidence found in the doublewide.

Submitted this 9th day of April 2015.

s/ Marie Trombley, WSBA # 41410
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Expy Sanabria, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's was sent by first class mail, postage prepaid on April 9, 2015 to:

Expy Sanabria, 756513
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001

And by electronic service, per prior agreement between the parties to:

EMAIL: PCPatcecf@co.pierce.wa.us
Kathleen Proctor
Pierce County Prosecuting Attorney

s/ Marie Trombley, WSBA # 41410
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comcast.net

TROMBLEY LAW OFFICE

April 09, 2015 - 12:21 PM

Transmittal Letter

Document Uploaded: 3-466856-Appellant's Brief.pdf

Case Name: State v. Expy Sanabria
Court of Appeals Case Number: 46685-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Marie J Trombley - Email: marietrombley@comcast.net

A copy of this document has been emailed to the following addresses:

PCPatcecf@co.pierce.wa.us