SUPREME COURT NO. 95758-4

Court of Appeals No. 34478-9-III

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

FELIPE HERNANDEZ-GONZALEZ, Petitioner

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

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I. IDENTITY OF PETITIONER

Petitioner Felipe Hernandez-Gonzalez, through his attorney, Marie Trombley, requests the relief designated in Part II.

II. COURT OF APPEALS DECISION

Mr. Gonzalez seeks review of the unpublished decision by the Court of Appeals issued on March 20, 2018, affirming the Klickitat County Superior Court judgment and sentence. A copy of the decision by the Court of Appeals is attached.

III. ISSUES PRESENTED FOR REVIEW

A. Does a search warrant that fails to specify the crime under investigation, does not include the affidavit or incorporate it by reference, and authorizes a broad search of papers, mail, financial records, bills, photographs, telephone/address books in order to show the identity of the person in dominion and control of the premises a de facto general exploratory warrant that violates the state and federal constitutionally mandated particularity requirement?

B. Where a second search warrant is based on an unconstitutional search, does Washington law require any seized evidence to be suppressed?

C. Does Washington law direct a reviewing Court to correct a sentenced where the trial court exceeds its authority by imposing a fine under RCW 69.50.430(2) where the defendant is indigent and there is no evidence there was a prior violation?

IV. STATEMENT OF THE CASE

During the first week of February 2016, Officer Randall of the Klickitat County Sheriff's Office recruited David Studer, an inmate of an Oregon jail, to work as a confidential informant. RP 53; Exh. 1 p.3. Studer said he could buy methamphetamine from a Hispanic male named "Felipe" who lived at the Spring Street Trailer Park in Klickitat County. Exh. 1 p.4.

On February 9, 2016, officers drove Studer to just outside of the trailer park, searched him, gave him buy money and sent him in to make a purchase. Upon return, officers searched him and found a small quantity in a baggie and a piece of white crystal substance, which had come from the alleged drug purchase, in the coin pocket of his blue jeans. RP 60. Studer contended he had not opened the baggie, protesting that it was untied when he got it. The officer told him that next time he needed to make sure that drugs did not spill into his pocket. Exh. 1 p.4-5.

The following day the officer again drove Studer to make a controlled buy. RP 62. Randall had obtained a copy of Mr. Hernandez-

Gonzalez's driver's license, which had been renewed a day earlier. Exh. 1 p. 5; RP 62; 84. The license included his photo and the same physical address. RP 62; 84-85. Studer confirmed the photo was of Mr. Hernandez-Gonzalez. RP 62.

They waited in the driveway until a younger Hispanic male drove a Subaru Legacy with an Oregon license plate into the driveway space. Mr. Hernandez-Gonzales got out of the passenger seat and both he and the younger male entered the residence. Exh. 1 p.6. Studer completed the second controlled buy. RP 64. Nine days later, February 19th, Studer participated in a third controlled buy. Exh. 1 p.7.

On March 1, 2016, for the second time, Oregon officers caught Studer stealing some of the heroin he had been sent to purchase. Exh. 1 p. 7-8; RP 55. Randall stopped using Studer as a confidential informant because he was untrustworthy. RP 55.

Fourteen days after the last controlled buy in Washington, and three days after learning of Studer's theft of the heroin, Randall prepared an affidavit for a search warrant. RP 68. The affidavit provided information about the controlled buys and lack of veracity of the confidential informant. The affidavit read:

> It is now my intent to apply for a search warrant to be able to show domianship (sic) and control by Felipe E. Gonzalez Hernandez (sic) and/or Ernesto Hernandez Lopez of 580 NE Spring Street # 6.

Exh. 1 p.8.

It began:

1. The affiant believes that:

   EVIDENCE OF A CRIME:
   CONTRABAND, THE FRUITS OF A CRIME, OR THINGS OTHERWISE CRIMINALLY POSSESSED:
   Items or articles of personal property tending to show the identity of person(s) in ownership dominion or control of said premises and/or vehicle(s) including but not limited to keys, canceled mail envelopes, rental agreements and receipts, utility and telephone bills, telephone/address books, photographs, gas receipts, insurance papers, notices from governmental agencies, and the like.
   Financial records of person(s) in control of the premises including tax returns, bank accounts, loan applications, income and expense records, safe deposit keys and records, property acquisition and notes.

   Computer equipment, programs, storage disks and printouts, evidencing the distribution of controlled substances, the expenditure of currency or currency equivalents.

   WEAPONS OR OTHER THINGS BY MEANS OF WHICH A CRIME HAS BEEN COMMITTED OR REASONABLY APPEARS ABOUT TO BE COMMITTED:

Exh. 1 p.1-2.

The basis for probable cause to search for weapons:

> Through training and experience: I also know drug dealers use various vehicles to facilitate their ongoing criminal enterprise. The reason for this is to frustrate law enforcement's ability to determine who is going where, and when. The vehicles used are both containers and movers of controlled substances and will often contain cash, records, and weapons.

Exh. 1 p.9.

The search warrant issued by Judge Hansen of the East Klickitat County District Court[1] that same day read:

Upon the sworn affidavit of F.R. Randall made before me, it appears that there is probable cause to believe that:

1. Evidence of a crime, or
2. Contraband, the fruits of the crime or things otherwise criminally possessed or
3. Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.

are under the control of in the possession of some person(s) and are concealed in or on certain premises, vehicle(s) or person(s) within KLICKITAT COUNTY, STATE OF WASHINGTON, hereinafter described.

YOU ARE COMMANDED TO:

1. SEARCH SAID PREMISES, VEHICLE OR PERSON SPECIFICALLY DESCRIBED AS FOLLOWS:
   The premises, including all rooms, storage areas, surrounding grounds, trash areas, garages and outbuildings assigned to or part of the residence and/or building located at 580 NE Spring Street # 6, White Salmon, Washington, County of Klickitat.
   The residence and/or building is believed to be presently occupied by Felipe E. Gonzalez-Hernandez and or Ernesto Hernandez Lopez.
2. SEIZE THE FOLLOWING PROPERTY:
   Items or articles of personal property tending to show the identity of person(s) in ownership, dominion or control of said premises and/or vehicle(s) including but **not limited to** keys, canceled mail envelopes, rental agreements and receipts, utility and telephone bills, telephone/address books, photographs, gas receipts, insurance papers, notices from governmental agencies, and the like.

[1] The search warrant is not considered a clerk's paper and not numbered, but was made part of the record by ruling of the Commissioner of Division 3 Court of Appeals on 3/9/17. The search warrant was filed with the Court on 3/16/17.

Financial records of person(s) in control of the premises including tax returns, bank accounts, loan applications, income and expense records, safe deposit keys and records, property acquisitions and notes.
Computer equipment, programs, storage disks and printouts, evidencing the distribution of controlled substances, the expenditure of currency or currency equivalents.

3. Safely keep the property seized.
4. Return this warrant to the undersigned judge within (03) as following execution of this warrant. The return must include an inventory of all property seized. A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises and/or vehicle property is taken. If no person is found in possession a copy and receipt shall be conspicuously posted at the place where the property is found.

(Bold added).

On March 8th, eighteen days after the last controlled buy, officers entered Hernandez-Gonzalez's home. RP 10. Randall testified the purpose of the warrant was to "retrieve documents to show that Mr. Gonzalez-Hernandez actually resided at that residence." RP 68.

Upon entry Randall observed a set of scales on the kitchen table, plastic bags, and "a little plastic bag that had a white crystal substance in it." RP 12. Randall applied for a second search warrant because "my search warrant was for paperwork on dominion and control, not for the controlled substances." RP 14; 71.

The second affidavit did not include information about the confidential informant's theft of the drugs in Oregon. Judge Baker, of the

West Klickitat County District Court authorized the second warrant[2]. That warrant contained the boilerplate language of "it appears that there is probable cause to believe that evidence of a crime, or contraband, the fruits of a crime, or things otherwise criminally possessed, or weapons or other things by means of which a crime has been committed." Like the first warrant, this one also did not identify the crime being investigated.

Officers recovered two bags of methamphetamines, one off the kitchen table and the other from a kitchen pantry. RP 89-90. He testified the amounts, 19.1 grams and 2.3 grams, seemed "more than what a normal person would use or keep on them, if all they were was a user." RP 92; 106-107.

Klickitat County prosecutors charged Mr. Hernandez-Gonzalez with one count of possession of a controlled substance- methamphetamine, with intent to deliver. CP 9-10.

In a pretrial hearing, defense counsel moved for a *Franks* hearing. Counsel asked the court to determine whether omitting information in the second affidavit regarding Studer's lack of credibility negated probable cause. RP 22. The court denied the motion, finding the second warrant

[2] The second warrant is also not considered a clerk's paper and is not numbered. It was made part of the record on ruling of the Commissioner of the Court of Appeals on 3/9/17.

was issued based on the officer's observations of items in plain view. RP 26. Despite prompting by the judge, defense counsel raised no objections to the first affidavit or search warrant. RP 23.

The jury found Mr. Hernandez-Gonzalez guilty of the crime of intent to deliver a controlled substance. RP 156; CP 54. His offender score was zero. The court imposed a two thousand dollar fine under RCW 69.50.430. CP 57. Mr. Hernandez-Gonzalez made a timely appeal. CP 62-71.

In its decision, the Court of Appeals held the second search warrant was not invalidated by the overbroad first warrant. The Court agreed the first warrant failed to identify a crime and did not include the affidavit or its incorporation by reference. However, the Court went on to reason the invalid portions of the warrant could be severed and entry was authorized because the remainder described a search and seizure for items related to "distribution of controlled substances." *Slip Op.* *4-5. This appears to be on the basis of the boilerplate reference to "computer equipment, programs, storage disks and printouts, evidencing the distribution of controlled substances, the expenditure of currency or currency equivalents."

The Court concluded that "law enforcement's entry into the trailer was lawful and that the items viewed on the kitchen table permitted law enforcement to apply for the second search warrant." *Slip Op.* * 5.

The Court also determined it would not consider the violation of the statute authorizing imposition of the $2000 fine because Mr. Hernandez Gonzalez did not object. *Slip Op.* * 6. The statute authorizes the fine for non-indigent offenders and the State did not present any evidence of a previous violation of the controlled substances act.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b)(3), this case presents a significant question of law under our state and federal constitutions, specifically, Washington Constitution Article 1 § 7, and United States Constitution Fourth Amendment. Article 1 § 7 provides a more rigorous and broader protection of privacy rights by guaranteeing that no person shall be disturbed in his private affairs, or his home invaded, without authority of law. *State v. Young,* 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

Review should also be granted under RAP 13.4(b)(2). The ruling by the Court of Appeals in this matter conflicts with this Court's ruling in *State v. Riley,* 121 Wn.2d 22, 26, 846 P.2d 1365 (1993) and rulings by the Court of Appeals in *State v. Higgins,* 136 Wn.App. 87, 92, 147 P.3d 649 (2006) and *State v. Keodara,* 191 Wn.App. 305, 364 P.3d 777 (2015), and

State v. Higgs, 177 Wn.App. 414, 311 P.3d 1266 (2013), and *State v. Besola,* 184 Wn.2d 605, 359 P.3d 799 (2015).

A. The Decision By The Court of Appeals Conflicts With Decisions By The Washington Supreme Court And The Court of Appeals.

In *Riley,* this Court held that a warrant authorizing the seizure of "fruits, instrumentalities and/or evidence of a crime," followed by a list of items that might fit the description was overbroad because it did not limit the seizure by stating the crime under investigation. *Riley,* 121 Wn.2d at 26.

In *Besola,* the Court held that a citation to the statutory definition of the crime under investigation was insufficient to meet the particularity requirement of the Fourth Amendment. *Besola,* 184 Wn.2d at 614.

In *Higgins,* the Court held that a general description of "certain evidence of a crime, to-wit: 'Assault 2nd DV' RCW 9A.36.021" was insufficient because it automatically allowed for seizure of items for which there was no probable cause. *Higgins,* 136 Wn.App. at 93.

In this case, neither the first or second affidavits or warrants limited the search by stating any crime under investigation. Rather, the first warrant authorized search and seizure of items for which there was no probable cause.

Probable cause requires a nexus between criminal activity and the items to be seized. *Higgs,* 177 Wn.App. at 426. Under *Higgs,* a search for evidence of dominion and control is supported where there is probable cause to search the premises where contraband is found. *Higgs,* 177 Wn.App. 414. Searching for evidence of dominion and control does not precede and support probable cause for search of evidence of a crime.

Here, the officer specifically testified the team was authorized to search only for items showing dominion and control. RP 68. The need to search for items of dominion and control puzzling is puzzling and misleading, as the officers had a copy of Mr. Hernandez-Gonzalez's very recently renewed driver's license, his phone number, the license plate and VIN to his truck, and had already taken the informant to the house three times.

The first warrant authorized search and seizure of items which are inherently innocuous and not associated with any crime: "keys, canceled mail envelopes, rental agreements and receipts, utility and telephone bills, telephone/address books, photographs, gas receipts, insurance papers, notices from government agencies", and "financial records including tax returns, bank accounts, loan applications, income and expense records, safe deposit keys and records, property acquisitions and notes." (Search Warrant E. Klickitat District Court.).

In reality, the warrant authorized officers to conduct a "general, exploratory rummaging" through every drawer, cabinet, closet, computer file, glove compartment, key fob, photo album, bag, and envelope found on the property or in the vehicle, under the guise of looking for items of dominion and control. *State v. Perrone,* 119 Wn.2d 538, 545, 834 P.2d 611 (1992). The warrant authorized seizure of items legally possessed, and nothing suggested that evidence of the unnamed crime would be found within those items. *Keodara,* 191 Wn.App. at 317.

Probable cause justifying a search warrant requires not only a reasonable belief that a crime has occurred or is occurring, but that *the item sought is evidence of that crime. State v. Goble,* 88 Wn.App. 503, 509, 945 P.2d 263 (1997). Because neither the affidavit nor the warrant identified the crime under investigation, the need of the officer to search for "computer equipment, programs, storage disks and printouts evidencing the distribution of controlled substances, the expenditure of currency or currency equivalents[3]" was not established. Finally, the facts of the alleged small drug buys, without more, did not support probable cause that officers would find computer printouts or spreadsheets detailing sales of drugs.

[3] (Search Warrant E. Klickitat District Court p.3).

The second warrant was issued based on an unconstitutional search. Under Washington law, "[W]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *State v. Kennedy,* 107 Wn.2d 1, 4, 726 P.2d 445 (1986). This exclusion of evidence has as "its paramount concern" the protection of an individual's article I, §7 right of privacy. "It accomplishes this by closing the courtroom door to evidence gathered through illegal means", "examining the legality of each link in the causal chain and not merely the last." *State v. Eserjose,* 171 Wn.2d 907, 919, 259 P.3d 172 (2011). The lack of probable cause and overbroad first warrant resulted in an unconstitutional search. The items recovered under the second warrant should have been suppressed.

B. The Trial Court Acted Without Authority When It Imposed A $2000 Fine On An Indigent Defendant.

A court may only impose a sentence that is authorized by statute. *In re Carle,* 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). In this case, the Court of Appeals declined to review the erroneous imposition of the fine because Mr. Hernandez-Gonzalez did not object during sentencing.

The right to challenge a sentencing condition is not waived by a failure to object at the trial court. *State v. Paine,* 69 Wn.App. 873, 850 P.2d 1369, *rev. denied*, 122 Wn.2d 1024, 866 P.2d 39 (1993)). A

sentenced imposed without statutory authority can be addressed for the first time on appeal, and a reviewing court has the power and duty to grant relief when necessary. *Id.* at 883-84.

RCW 69.50.430 provides that adult offenders convicted of a felony violation under specified drug laws must be fined in addition to any other fine or penalty imposed. RCW 69.50.430(1) requires the court to impose a fine of one thousand dollars **unless** the court finds the offender to be indigent. RCW 69.50.430(2) requires a fine of two thousand dollars to be imposed for any subsequent violation of any of the specified drug statutes, with the proviso that the court should not impose the fine on an indigent offender.

Mr. Hernandez-Gonzalez was found indigent by the trial court. Supp. CP 86. He was found indigent and appointed counsel on appeal. CP 72-85. The court should not have imposed the additional fine of $2000 on an indigent defendant. CP 57.

The $2000 fine authorized under RCW 69.50.430(2) is to be imposed for offenders for whom this is a subsequent violation. The State presented no evidence of prior drug convictions and the offender score was zero. CP 55. This Court should remand this matter for vacation of the fine.

VI. CONCLUSION

Based on the foregoing facts and authority, Mr. Hernandez-Gonzalez respectfully asks this Court to accept review of his petition.

Submitted this 19th day of April 2018.

Marie Trombley

Marie J. Trombley, WSBA 41410
Attorney for Petitioner

APPENDIX A

Renee S. Townsley
Clerk/Administrator

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March 20, 2018

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CASE # 344789
State of Washington v. Felipe Ernesto Hernandez-Gonzalez
KLICKITAT COUNTY SUPERIOR COURT No. 161000250

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 (unless filed electronically). 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** Info. Copy to Hon. Randall C. Krog (Hon. Brian Altman's case)
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. FELIPE ERNESTO GONZALEZ-HERNANDEZ, Appellant.	))))))))))	No. 34478-9-III UNPUBLISHED OPINION

LAWRENCE-BERREY, A.C.J. — Felipe Gonzalez-Hernandez[1] appeals his conviction for possession of methamphetamine with intent to deliver. He primarily argues that his conviction should be reversed and his case dismissed because the State unconstitutionally seized evidence. We disagree with this and other arguments and affirm.

[1] Although the appellant is referred to as both Gonzalez-Hernandez and Hernandez-Gonzalez throughout the record, we refer to him as Gonzalez-Hernandez in the present appeal.

FACTS

In 2016, Frank Randall worked as a narcotic's detective for the Klickitat County Sheriff's Office. In early February, he approached an inmate about working as a confidential informant. To protect his identity, we will refer to the inmate as John Smith. Smith agreed to work as a confidential informant and told Detective Randall that he knew a possible dealer by the name of Felipe.

On February 9, Smith went with Detective Randall to purchase narcotics from Felipe. They drove to where Smith believed Felipe lived, a trailer on Spring Street in White Salmon, Washington. Following protocols for controlled buys, Smith purchased methamphetamine from Felipe in the trailer.

Immediately following the buy, a small piece of methamphetamine was found in Smith's pocket. Smith claimed the bag that contained the methamphetamine was open when he put it in his pocket.

Detective Randall investigated who Felipe might be. He obtained a copy of a Washington State Department of Licensing (DOL) license of a Felipe who supposedly lived at the trailer address.

On February 10, Detective Randall again met with Smith. Detective Randall showed the DOL license to Smith. Smith confirmed that the picture of Felipe on the license was the same person from whom he had purchased the methamphetamine. The name of the person, according to the license, was Felipe Gonzalez-Hernandez.

That day, Smith completed another controlled buy from Felipe in the trailer. Detective Randall saw Felipe and visually confirmed that Felipe was the person pictured on the DOL license. On February 18, Smith completed a third controlled buy from Felipe in the trailer.

On March 1, Detective Randall learned that Smith had pinched, or attempted to steal, drugs from an unrelated buy. This caused him to stop using Smith as a confidential informant.

On March 4, Detective Randall applied for a search warrant to search the subject trailer. The primary purpose for the warrant was to obtain evidence of dominion and control. In the application, Detective Randall disclosed that a piece of methamphetamine was found on Smith after the February 9 buy and that Smith had recently pinched drugs from an unrelated buy. On March 4, a judge authorized the requested search warrant. The warrant authorized the sheriff's department to search for and seize the following items in the trailer:

> Items or articles of personal property tending to show the identity of person(s) in ownership dominion or control of said premises and/or vehicles(s) including but not limited to keys, canceled mail envelopes, rental agreements and receipts, utility and telephone bills, telephone/address books, photographs, gas receipts, insurance papers, notices from governmental agencies, and the like.
>
> Financial records of person(s) in control of the premises including tax returns, bank accounts, loan applications, income expense records, safe deposit keys and records, property acquisition and notes.
>
> Computer equipment, programs, storage disks and printouts, evidencing the distribution of controlled substances, the expenditure of currency or currency equivalents.

Search Warrant signed by Judge Rick Hansen (Mar. 10, 2016) at 2-3. The warrant did not list the crime being investigated, nor did it expressly incorporate Detective Randall's affidavit.

On March 8, Detective Randall executed the search warrant. Felipe, later identified as Felipe Gonzalez-Hernandez, was present. Detective Randall saw scales, bags, and a bag containing methamphetamine on the kitchen table. He arrested Gonzalez-Hernandez, advised him of his *Miranda*[2] warnings, and placed him in custody. Detective Randall stopped his search and applied for a warrant to search for illegal drugs.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The application contained Detective Randall's observations of the drugs and drug paraphernalia he saw when he executed the first search warrant. The application contained the exact information as the prior application, with one exception: It omitted the paragraph that disclosed Smith had pinched drugs from an unrelated buy. On March 8, a judge authorized the second search warrant.

Detective Randall returned to the residence and executed the second search warrant. Law enforcement seized bags, scales, cell phones, cash, firearms, and 19.1 grams of methamphetamine. The State charged Gonzalez-Hernandez with possession of a controlled substance with intent to deliver.

Procedure

Prior to trial, defense counsel challenged the second search warrant. Defense counsel argued that evidence seized based on that warrant should be suppressed because Detective Randall withheld information crucial to Smith's lack of veracity. The trial court denied the motion reasoning that Detective Randall's observations of the drugs and drug paraphernalia inside the trailer, rather than Smith's veracity, were central to the issuance of the second search warrant.

The trial court asked whether the first search warrant might be invalidated on the basis that Detective Randall withheld information about Smith. Defense counsel

responded that the first application did not omit the information. Defense counsel conceded that the judge reviewing the first application had the opportunity to consider Smith's lack of veracity when determining whether to issue the first search warrant.

On the morning of trial, the State sought to admit evidence of the three controlled buys. The State argued that the three prior buys were evidence of intent. Defense counsel argued that the prior buys were inadmissible under ER 404(b) as evidence of prior bad acts. The trial court explained its reasoning on the record. The trial court found that the evidence of the prior buys was relevant to show intent to deliver and that admission of the evidence was not outweighed by its unfair prejudice. The trial court therefore ruled that the evidence would be admissible. During closing, the State argued that the prior controlled buys helped establish that Gonzalez-Hernandez had the intent to distribute methamphetamine.

The jury found Gonzalez-Hernandez guilty of the charged crime. At sentencing, the trial court asked Gonzalez-Hernandez about his ability to work following his release. Gonzalez-Hernandez answered that he would have a job waiting. The trial court then assessed legal financial obligations (LFOs), including a $2,000 fine under

RCW 69.50.430. The amount of the fine was due to it being Gonzalez-Hernandez's third VUCSA[3] offense.

Gonzalez-Hernandez appealed.

ANALYSIS

A. THE SECOND WARRANT WAS NOT INVALIDATED BY THE OVERBROAD FIRST WARRANT

Gonzalez-Hernandez raises at least two unpreserved challenges to the first search warrant: (1) Smith's reliability was not sufficiently established, and (2) the warrant was overbroad and permitted an exploratory search. He then argues, because the officers were not lawfully in the trailer when they observed the methamphetamine and other paraphernalia, the second search warrant was invalid.

Citing RAP 2.5(a)(3), Gonzalez-Hernandez argues that we should review these unpreserved challenges because they involve manifest errors affecting a constitutional right. In the alternative, he argues his trial counsel provided ineffective assistance by not raising these arguments. Where the underlying arguments on appeal are deficient, it is sometimes more expedient to dispose of deficient arguments than to inquire whether reviewability is even appropriate. This is such a case.

[3] Violation of the Uniform Controlled Substances Act, chapter 69.50 RCW.

1. It was unnecessary to establish Smith's reliability

Gonzalez-Hernandez next argues that Smith's reliability was not established in the first search warrant, and it therefore should be invalidated.

Although abandoned in the federal system, under Washington law, courts still evaluate an informant's reliability under the two-pronged *Aguilar-Spinelli* test. *State v. Jackson*, 102 Wn.2d 432, 436, 438, 688 P.2d 136 (1984) (citing *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), *abrogated by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), *but adhered to by Jackson*, 102 Wn.2d 432). Under this approach, to create probable cause the officer's affidavit must establish (1) the reliability of the informant's basis of knowledge, and (2) the veracity of the informant. *Jackson*, 102 Wn.2d at 435. If the informant's tip fails under either prong, as Smith's likely would here, "probable cause may yet be established by independent police investigatory work that corroborates the tip . . . ." *Id.* at 438.

Here, three controlled buys corroborated Smith's claims that Gonzalez-Hernandez sold methamphetamine. The basis of the first warrant was not grounded in Smith's claim that he could buy methamphetamine from Gonzalez-Hernandez. It was grounded in the three controlled buys during which Smith purchased methamphetamine from inside

Gonzalez-Hernandez's trailer. And because the first search warrant was properly issued, the second search warrant is not rendered infirm.

2. The first warrant was overbroad

The Fourth Amendment to the United States Constitution provides that "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." This amendment was designed to prohibit "general searches" and to prevent "'general, exploratory rummaging in a person's belongings. . . .'" *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (quoting *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)). Similarly, article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

These constitutional provisions impose two requirements for search warrants. First, a warrant can be issued only if supported by probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and the evidence of the crime can be found at the place to be searched." *State v. Thein*, 138 Wn.2d 133, 140,

977 P.2d 582 (1999). Probable cause requires a nexus both between criminal activity and the item to be seized and between the item to be seized and the place to be searched. *Id.*

Second, "a search warrant must be sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty." *State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997). The degree of particularity "varies according to the circumstances and the type of items involved." *Id.* The particularity requirement serves the dual functions of "limit[ing] the executing officer's discretion" and "inform[ing] the person subject to the search what items the officer may seize." *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993).

Thus, a warrant can be overbroad either because (1) it fails to describe with particularity items for which probable cause exists, or (2) it describes, particularly or otherwise, items for which probable cause does not exist. *State v. Maddox*, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), *aff'd*, 152 Wn.2d 499, 98 P.3d 1199 (2004). Here, the first warrant was invalid based on the second type of overbroad challenge. The second paragraph of the first warrant under "SEIZE THE FOLLOWING PROPERTY" permitted unrestricted seizure of financial records. Search Warrant signed by Judge Rick Hansen (Mar. 10, 2016) at 2. Also, a portion of the third paragraph under the same heading was not qualified by the language "evidencing the distribution of controlled substances."

Search Warrant, *supra*, at 3. To the extent that the first search warrant was not restricted to evidence of dominion or control or evidence of distribution of controlled substances, the first warrant was overbroad. Had the first warrant specified the crime under investigation or had it expressly incorporated Detective Randall's affidavit, the limitations would be obvious and the first warrant would not have been overbroad. *See Riley*, 121 Wn.2d at 27-29.

3. Entry into the trailer was permitted by the valid portions of the first warrant

"Under the severability doctrine, infirmity of parts of a warrant requires the suppression of evidence seized pursuant to that part of the warrant but does not require suppression of anything seized pursuant to valid parts of the warrant." *Maddox*, 116 Wn. App. at 806 (internal quotation marks omitted). In *Maddox*, we set forth five requirements that must be met for a court to uphold a seizure on the basis of severability doctrine:

> First, the warrant must lawfully have authorized entry into the premises. . . .
>
> Second, the warrant must include one or more particularly described items for which there is probable cause. . . .
>
> Third, the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole. . . .
>
> Fourth, the searching officers must have found and seized the disputed items while executing the valid part of the warrant (i.e., while

> searching for items supported by probable cause and described with particularity). . . .
>
> . . . .
>
> Fifth, the officers must not have conducted a general search, i.e., a search in which they "flagrantly disregarded" the warrant's scope. . . .

Id. at 807-08.

Here, all five requirements are met. First, the warrant was lawful in that probable cause supported the search of the trailer for dominion and control, and distribution of controlled substances. Second, the warrant described with particularity a number of items related to dominion and control, and distribution of controlled substances. Third, the valid portions of the warrant were significant portions of the overall warrant. Once inside the trailer, law enforcement saw the methamphetamine and paraphernalia on the kitchen table. At that point, law enforcement ceased the search and applied for a second search warrant. Because of this, the fourth requirement is satisfied, in that the portions of the warrant that were overbroad did not lead to the seizure of evidence. Fifth, the officers did not engage in a general search. We conclude that law enforcement's entry into the trailer was lawful and that the items viewed on the kitchen table permitted law enforcement to apply for the second search warrant.

B. NO ERROR IN ADMITTING EVIDENCE OF THE THREE CONTROLLED BUYS

Citing ER 404(b), Gonzalez-Hernandez argues that the trial court erred in admitting evidence of the three controlled buys. He claims that the sole purpose of the evidence was to show his propensity to commit the current offense. We disagree.

Whether a trial court erred in admitting evidence in violation of ER 404(b) is reviewed for abuse of discretion. *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). When a court admits prior bad acts under ER 404(b), it must (1) determine the purpose for which the evidence is offered, (2) determine the relevance of the evidence, and (3) balance on the record the probative value of the evidence against its prejudicial effect. *State v. Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995).

Here, the trial court determined that evidence of the three controlled buys was relevant. The three controlled buys, all one month prior to the charged offense, were relevant because they showed that Gonzalez-Hernandez intended to sell the methamphetamine found in his trailer instead of merely using it for himself. The court then determined that the evidence was not more prejudicial than it was probative. The court reasoned that the State was not offering the evidence to prove the character of the defendant but, instead, was offering it to show intent to distribute.

The cases cited by Gonzalez-Hernandez all involve situations where the State attempted to admit prior unrelated crimes of the defendant. Br. of Appellant at 27, 29 (citing *State v. Holmes*, 43 Wn. App. 397, 400, 717 P.2d 766 (1986) (two prior juvenile burglary convictions were independent offenses) and *State v. Wade*, 98 Wn. App 328, 989 P.2d 576 (1999) (two prior convictions occurred 10 months and 14 months prior to present offense)). But here, the controlled buys were related to the crime. The three controlled buys, all within one month of the charged offense, were highly probative of what Gonzalez-Hernandez intended to do with the methamphetamine. Accordingly, we hold that the trial court did not abuse its discretion when it admitted evidence of the three controlled buys.

C. EFFECTIVE ASSISTANCE OF COUNSEL

Gonzalez-Hernandez claims that his defense counsel was ineffective by failing to challenge the first search warrant and by failing to request a limiting instruction to the ER 404(b) evidence. We disagree.

To demonstrate ineffective assistance of counsel, a defendant must show that defense counsel's representation was deficient and the deficient performance prejudiced the defendant. *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008) (acknowledging that Washington has adopted the standards from *Strickland v. Washington*, 466 U.S. 668,

104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *Hicks*, 163 Wn.2d at 486; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Brousseau*, 172 Wn.2d 331, 352, 259 P.3d 209 (2011). If a party fails to satisfy one prong of the test, we need not consider the other prong. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

1. No prejudice for failing to challenge the first search warrant

We first address whether failing to challenge the first search warrant constituted ineffective assistance of counsel. As noted above, the first search warrant was overbroad, but the permissible portions of the warrant permitted lawful entry into the trailer and application for the second warrant. For this reason, trial counsel's failure to challenge the first search warrant did not prejudice Gonzalez-Hernandez.

2. Legitimate trial strategy for not requesting a limiting instruction

We next address whether failing to request a limiting instruction about the three prior drug buys constituted ineffective assistance of counsel.

We strongly presume that defense counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). "To rebut this presumption, the

defendant bears the burden of establishing the absence of any '*conceivable* legitimate tactic explaining counsel's performance.'" *Id.*

Here, Gonzalez-Hernandez was entitled to an instruction that told the jury that evidence of the three drug buys was admitted for the limited purpose of establishing intent. Such an instruction arguably would have further reminded the jury of this harmful evidence. Because the decision not to request a limiting instruction had a conceivable tactical basis, we reject Gonzalez-Hernandez's argument that his counsel was ineffective.

D. PANEL DECLINES TO CONSIDER UNPRESERVED CLAIM OF ERROR

Gonzalez-Hernandez contends that the trial court erred in imposing the $2,000 fine under RCW 69.50.430(2). He argues the trial court found him indigent for purposes of appeal and that the $2,000 fine cannot be imposed on indigent defendants.

Gonzalez-Hernandez did not object to the $2,000 fine during sentencing. RAP 2.5(a) provides that an appellate court may refuse to review any claim of error not raised in the trial court. Although this rule has exceptions, Gonzalez-Hernandez does not claim that his argument falls within any of the exceptions. A majority of this panel declines to review this unpreserved claim of error.

E. APPELLATE COSTS

Gonzalez-Hernandez requests that we deny the State an award of appellate costs in the event the State substantially prevails. The State has wholly prevailed. If the State seeks appellate costs, we defer the award of appellate costs to our commissioner in accordance with RAP 14.2.

Affirmed.

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

Lawrence-Berrey, A.C.J.

WE CONCUR:

Korsmo, J.

Pennell, J.

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Felipe Hernandez-Gonzalez, 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 Petition for Review was sent by electronic service on April 19, 2018 to:

Felipe Hernandez-Gonzalez
c/o Marie Trombley: marietrombley@comcast.net

And also by electronic service (by prior agreement between the parties) to:
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April 19, 2018 - 3:07 PM

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