No. 50503-7

96562-5

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

State of Washington, Respondent

vs.

Charles W. Jones, Appellant

Petition for Review to the Washington Supreme Court

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IDENTITY OF PETITIONER

Charles W. Jones, appellant, petitions the Washington Supreme Court for review.

COURT OF APPEALS DECISION

The Court of Appeals, Division II, affirmed the trial court's denial of Mr. Jones's motion for a *Casal* hearing and to suppress evidence. This occurred via unpublished opinion on October 9, 2018. The Court of Appeals also denied Mr. Jones's motion for reconsideration.

ISSUES PRESENTED FOR REVIEW

Where a search warrant is based solely on information supplied by a confidential informant, and the defendant makes a minimal showing of inconsistency between the affidavit used to support the warrant and what the defendant alleges to be true, must the trial court conduct an in camera hearing to establish the affiant's veracity?

STATEMENT OF THE CASE

In November 2016, a confidential informant ("CI") contacted Officer Heilman of the Tacoma Police Department to report that a man later identified as Mr. Jones was selling black tar heroin from his motel room. Clerk's Papers (CP) at 14-15. On November 14, 2016, Officer Heilman requested that the CI attempt to contact Mr. Jones about purchasing heroin. *Id.* The CI called a certain phone number in the presence of officers and confirmed that the person on the other line had heroin available for purchase at the Calico Cat Motel. *Id.*

After the buy, the CI handed Officer Heilman "an amount" of heroin, stating that he or she had just purchased it from the individual later identified as Mr. Jones. *Id.* The CI also told the officer that the individual in the motel room had a pistol and that it was the CI's knowledge that the individual in the motel room was a convicted felon. *Id.* Officer Heilman used these facts to receive a search warrant for room number four of the Calico Cat Motel. *Id.* After searching the room and arresting Mr. Jones, the State filed a ten-count information, charging various felonies. CP at 1-4.

Mr. Jones filed a motion to suppress the evidence found in the motel room. CP at 5-11. He filed a declaration under penalty of perjury, admitting that while he does use heroin, he does not deal heroin or any

other controlled substance. CP at 105-06. In fact, his own personal dealer was arrested earlier that week and he did not have any drugs on November 14 to feed his own habit, much less sell to someone else. *Id.* He requested that the trial court conduct an in camera *Casal* hearing to determine the veracity of the confidential informant and/or the affiant. CP at 5-11; CP at 69-73.

The State responded, arguing that Mr. Jones failed to establish that "Officer Heilman intentionally or recklessly made a material misstatement or omission in her affidavit in support of the search warrant at issue in this case." CP at 32. The trial court agreed, finding that Mr. Jones did not "make a substantial preliminary showing that casts doubt on the veracity of the officers' statements in their reports and in the Complaint for Search Warrant." CP at 77. The court further found that Mr. Jones's declaration is not "sufficient to cast doubt on the veracity of the material representations made by Officer Heilman in her Complaint for Search Warrant." *Id.*

Following denial of the motion to suppress, Mr. Jones agreed to a stipulated facts trial, was found guilty, and appealed to the Court of Appeals, Division II. CP at 82-87; CP at 90-102; CP at 88-89. The Court of Appeals issued an unpublished opinion on October 9, 2018, affirming the trial court's rulings and Mr. Jones's conviction. The court later denied a motion for reconsideration. Appendix.

ARGUMENT

The Washington Supreme Court should grant review because the Court of Appeals is in conflict with this Court's *Casal* decision and this case involves an issue of substantial public interest.

Two relevant considerations in granting review are whether the Court of Appeals decision is in conflict with a decision of the supreme court and whether the case presents an issue of substantial public interest. RAP 13.4(b). Here, the Court of Appeals decision is in conflict with this Court's decision in *State v. Casal*, 103 Wn.2d 812, 699 P.2d 1234 (1985). In the thirty-three years since *Casal*, this Court has never had any meaningful discussion on the rules announced in that case. According to LexisNexis, this Court has only cited *Casal* approximately seven times since 1985, all in passing. The Court of Appeals has not issued a meaningful, published opinion regarding *Casal* since 1988. *State v. White*, 50 Wn. App. 858, 751 P.2d 1202 (1988). This case presents the Court with an excellent opportunity to revisit the issue and decide the future of confidential informant cases in Washington state.

A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue. *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Confidential informants are an important tool for law enforcement.

Casal, 103 Wn.2d at 815, 699 P.2d 1234. Confidential informants are so important they even have their own evidentiary privilege. RCW 5.60.060(5); CrR 4.7(f)(2). Given law enforcement's historical and continued reliance on informants, this case presents an issue of substantial public interest.

Mr. Jones is entitled to reversal of his conviction and remand because the search warrant was based exclusively on information supplied by the informant and Mr. Jones made a minimal showing of inconsistency.

In *Casal*, a CI had informed Seattle police that he or she was inside Casal's home in the preceding twenty-four hours and had observed a quantity of marijuana growing and packaged as if for sale. 103 Wn.2d at 814, 699 P.2d 1234. Solely on this basis, Seattle police received a search warrant, executed it, confiscated various contraband, and charged Casal. *Id.* Casal then alleged that three weeks after his arrest, an individual named Randy Batham identified himself to Casal. *Id.* Bantham further told Casal that he heard about the operation from someone in a tavern and reported the rumor to police, that Seattle police directed Batham to trespass onto Casal's property to search for evidence of the marijuana operation, and that Batham did trespass but did not see any marijuana plants. *Id.* Casal could not subsequently locate Batham again, but did

submit a sworn affidavit relating the information Batham shared with him. *Id.* at 815.

Casal asked the trial court to hold an evidentiary hearing on whether the probable cause affidavit contained statements that were false or in reckless disregard for the truth and also asked that the court direct police to disclose the whereabouts of Batham. *Id.* at 814. The trial court denied both motions. *Id.* at 815. The Court of Appeals held that a defendant cannot compel disclosure of an informant's identity to challenge statements made in a probable cause affidavit and that he would be entitled to an in camera hearing only if he could make a substantial showing that the informant's privilege had been waived. *Id.* Because he submitted only a self-serving affidavit with no corroborating evidence, Casal failed to make this substantial showing. *Id.*

This Court began by acknowledging that under U.S. Supreme Court precedent, a defendant has a right to disclosure of a CI's identity if the CI is a material witness on the question of the defendant's guilt or innocence, but has no such right if the CI supplied information relating only to probable cause. *Id.* at 816 (citing *Roviaro v. United States*, 353 U.S. 53 (1957); *McCray v. Illinois*, 386 U.S. 300 (1967)). Bucking previous rulings from our own Courts of Appeals and federal circuit courts interpreting *McCray* as holding that disclosure of a CI's identity is

virtually never required to establish probable cause, this Court held that "disclosure may be allowed where deemed necessary to assess the affiant's credibility or accuracy." *Id.* at 816-17.

The *Casal* court then went on to analyze the U.S. Supreme Court's decision in *Franks v. Delaware*. *Id.* at 817-18 (citing *Franks v. Delaware*, 438 U.S. 154 (1978)). In *Franks*, the United States Supreme Court held that a defendant is entitled to challenge a finding of probable cause if he or she makes a substantial preliminary showing that the affiant lied or acted in reckless disregard for the truth in obtaining the search warrant. *Id.* However, *Franks* concerned a challenge to the affiant's descriptions of what the affiant *personally observed*. *Id. Franks* specifically reserved judgment on the question of whether a defendant can compel the disclosure of a CI's identity to challenge an affiant's account of the informant's statements. *Id.* The *Franks* holding is inadequate on this point because in a typical *Franks* hearing where the defendant challenges the affiant's observations, the affiant's identity is revealed to the defendant, so the defendant can interview the affiant, perform an investigation, and then make the "substantial preliminary showing" required by *Franks*. *Id.* at 818. "Conversely, when the informant is confidential, the defendant lacks access to the very information that *Franks* requires for a threshold showing of falsity." *Id.*

To solve this problem, several courts have pointed to an in camera, ex parte hearing as the solution. *Id.* at 818-19. An in camera hearing protects the interests of the State and the defendant; the State does not have to compromise secrecy, and the defendant is saved from what could be serious police misconduct. *Id.* at 819. Since anonymity is preserved, the State has no legitimate objection to an in camera proceeding. *Id.*

Rejecting the Court of Appeals's imposition of an "exceedingly high burden," this Court instead held that a trial could must exercise its discretion to order an in camera hearing where "the defendant's affidavit casts a reasonable doubt on the veracity of material representations made by the affiant." *Id.* at 820. "Corroboration of the defendant's story is helpful, but not necessary. This rule is in accord with the rules enunciated by other courts . . . requiring only that defendant make a 'minimal showing of inconsistency' between what the affiant stated and what the defendant alleges to be true." *Id.* (citing *United States v. Brian*, 507 F. Supp. 761 (D. R.I. 1981)). The *Casal* court then reversed the conviction and remanded for an in camera hearing, noting that "if petitioner's story is the true version, probable cause did not exist for the search warrant since the affidavit contained no other information which could provide probable cause." *Id.*

Thus, the ultimate holding of *Casal* is that where a CI supplies exclusive probable cause for a search warrant, a trial court must conduct an in camera hearing to establish the affiant's veracity when the defendant makes a minimal showing of inconsistency between the affidavit and what the defendant alleges to be true. Corroborating evidence is not necessary. A "self-serving" affidavit is sufficient.

The State and trial court applied the wrong standard. The State's response briefing did not discuss *Casal* at all, and only cited it once in passing. Instead, the State argued that Mr. Jones had failed to make a substantial preliminary showing that Officer Heilman intentionally or recklessly made a material misstatement in support of the search warrant, citing the (inapplicable) *Franks* standard. In its conclusions of law, the trial court did cite *Casal*, but again applied the (inapplicable) *Franks* standard, noting that "[t]he burden is on the defendant to make a substantial preliminary showing that casts doubt on the veracity of the officers' statements in their reports and in the Complaint for Search Warrant." CP at 77. It went on to conclude that "[t]he court does not find that these allegations by the defendant are sufficient to cast doubt on the veracity of the material representations made by Officer Heilman in her Complaint for Search Warrant." *Id.*

The Court of Appeals dismissed Mr. Jones's challenge because an in camera hearing is only required if Mr. Jones's affidavit casts "a reasonable doubt on the veracity of material representations made by the affiant." Appendix at 5. Because Mr. Jones's "affidavit challenges the credibility of the informant, rather than the veracity of the affiant officer," the Court of Appeals affirmed the trial court's denial. *Id.*

But in the context of a CI case, this distinction is without a difference. The trial court must ultimately conduct an in camera examination of the CI in order to establish the veracity of the affiant. The issue becomes one of semantics instead of substance. The Court of Appeals decision also misses the entire core of *Casal*'s holding, which is to allow a defendant some minimal opportunity to confront the veracity of the affiant when a CI is involved and the defendant makes a minimal showing of inconsistency between the affidavit and what the defendant alleges to be true. Mr. Jones established this minimal inconsistency through his affidavit. If his version of events is true, then there was no probable cause for the search warrant because he did not sell any controlled substance to the CI as stated in the affidavit of probable cause. An in camera examination of the CI is necessary under *Casal* to make this determination.

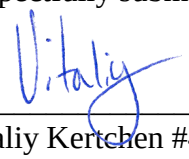
The Court of Appeals decision ignores this and renders *Casal* meaningless because the defendant can already challenge the affiant's veracity as to the affiant's personal observations through a standard *Franks* hearing. The defendant always knows the identity of the affiant and can interview him or her as part of the pretrial investigation process. There would be no need to hold an in camera hearing for the affiant. The entire purpose of the rule announced by this Court in *Casal* is to allow a defendant in Mr. Jones's position an opportunity to challenge the affiant where the affiant's testimony hinges on information supplied by a CI. Were the Court of Appeals's decision published, it would essentially amount to an improper abrogation of this Court's precedent.

The search warrant in Mr. Jones's case was based exclusively on information supplied by a CI. Mr. Jones has made a minimal showing of inconsistency between the information supplied by the CI and what Mr. Jones alleges to be true. Mr. Jones has met the elements of *Casal* and the trial court is therefore required to perform an ex parte, in camera hearing to establish the CI's veracity. The holdings by the trial court and the Court of Appeals to the contrary are in error and this Court must reverse and remand.

CONCLUSION

Based on the foregoing, the Washington Supreme Court should accept review because the Court of Appeals decision conflicts with supreme court precedent and this case presents an issue of substantial public interest.

Respectfully submitted,



Vitaliy Kertchen #45183
Date: 11/21/18

DECLARATION OF SERVICE

I, Vitaliy Kertchen, being of sound age and mind, declare that on 11/21/18, I served this document on the Pierce County Prosecutor by uploading it using the Court's e-filing application and emailing a copy of the document using that process to PCpatcecf@co.pierce.wa.us. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully submitted,

Vitaliy Kertchen #45183
Date: 11/21/18
Place: Tacoma, WA

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

October 9, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHARLES JONES, JR., Appellant.	No. 50503-7-II UNPUBLISHED OPINION

BJORGEN, J. — Charles Jones Jr. appeals his convictions of four counts of first degree unlawful possession of a firearm, two counts of unlawful possession of a short-barreled shotgun, and one count of unlawful possession of a short-barreled rifle. Jones appeals from the trial court's denial of his request for a *Casal*[1] hearing and motion to suppress evidence obtained after the execution of a search warrant. He argues that the trial court erred by denying his request for an in camera hearing pursuant to *Casal*.

We hold that the trial court did not err and affirm Jones' convictions.

FACTS

On November 14, 2016, Officer Hannah Heilman met with a confidential informant (CI) in order to make a controlled purchase of heroin from a suspect known as "CJ." Clerk's Papers (CP) at 45. The CI met with the suspect and returned with an amount of heroin. Based on this

[1] *State v. Casal*, 103 Wn.2d 812, 699 P.2d 1234 (1985).

interaction, Heilman submitted an affidavit for a search warrant in order to search the motel room where "CJ" was staying. The affidavit stated in part:

> In November of 2016, Your Affiant was contacted by Confidential and Reliable Informant #1000 [(CI)]. . . . CI stated he/she knew an individual to be dealing narcotics, specifically black tar Heroin, in the Pierce County area. CI stated he/she could arrange to conduct a controlled purchase from an individual known to CI as "CJ".
>
> On [November 14, 2016] I was assisted by members of the Tacoma Police Special Investigations Unit as we requested CI to attempt to contact "CJ" for a controlled purchase of Heroin. Officer Mettler and I met with CI in the City of Tacoma. We conducted a search of both CI's person and her/his vehicle. No contraband was recovered in the search. I then issued CI an amount of US Currency from Special Investigations funds. CI then made a phone call in Your Affiant's presence to arrange a controlled purchase with "CJ" who was staying [at a nearby motel]. . . . "CJ" told CI that he had Heroin available for purchase.
>
> . . . .
>
> CI was kept under constant surveillance as she/he made their way [to "CJ's" motel room]. Surveillance then observed CI enter ["CJ's" motel room]. The door [to the room] was open.
>
> After a short amount of time surveillance observed CI exit [the motel room].
>
> CI was kept under constant surveillance as we met at a pre-determined location. I then met with CI who turned over an amount of Heroin. CI stated he/she had just purchased it from "CJ". A second search of CI, including his/her vehicle, was conducted and no contraband was located.
>
> CI stated that "CJ" had a pistol at the foot of his bed. CI stated that "CJ" is a convicted felon as CI knows he has served time in prison.
>
> Your Affiant believes a person suspected to be "CJ" is involved in the unlawful delivery of a controlled substance, RCW 69.50.401.
>
> The substance was later field tested and tested positive for Heroin. The Heroin was placed into the TPD [Tacoma Police Department] property room as evidence.

> Your affiant knows through her training and experience [that] the drug trafficking organizations go to great length to hide their drugs and profits to include using residences, stash houses, businesses, and vehicles. Your affiant believes that "CJ" is selling/trafficking narcotics out of [a motel room] in Tacoma Washington.

CP at 14-15.

The superior court issued a search warrant based on the information contained in the affidavit. Law enforcement officers executed the warrant and arrested Jones. They recovered several firearms during the execution of the search warrant, including prohibited short-barreled firearms and crossbows, along with heroin, crack cocaine, and scales.

On April 12, 2017, Jones filed a motion requesting the trial court to conduct a hearing pursuant to *Casal* and to suppress evidence recovered during the execution of the search warrant. Jones submitted an affidavit with his motion that stated:

> 1. I am Charles William Jones, the defendant in the above entitled case number.
> 2. I have reviewed the evidence with my attorney including the "Complaint for Search Warrant."
> 3. That document provides information that I delivered heroin to a confidential informant at [November 14, 2016] at [a motel].
> 4. I did not deliver heroin, or any other controlled substance, to anyone on that day. I know this with certain[t]y because I did not have my own personal use drugs as my source had been arrested earlier that week. I was not even aware of the "chunk" of crack cocaine and heroin in the room or I would have consumed them myself.

CP at 106.

The trial court denied Jones' motion, as well as his motion for reconsideration on the same issue. On May 22, the State filed an amended information charging Jones with four counts of first degree unlawful possession of a firearm, two counts of unlawful possession of a short-barreled shotgun, and one count of unlawful possession of a short-barreled rifle. The State and Jones agreed to stipulated facts and the trial court adjudicated Jones guilty.

On June 23, Jones appealed the trial court's denial of his requests for a *Casal* hearing and to suppress evidence recovered during the execution of the search warrant.

ANALYSIS

Denial of *Casal* Hearing and Suppression of Evidence

Jones argues that the trial court erred by declining to hold a *Casal* hearing and by denying his motion to suppress evidence. We disagree.

In *Casal*, our Supreme Court considered "the circumstances under which a defendant is entitled to an in camera hearing on the issue of a search warrant affiant's veracity regarding statements allegedly made by a secret informant." *State v. Casal*, 103 Wn.2d 812, 813, 699 P.2d 1234 (1985). The court held that a trial court must exercise its discretion and conduct an in camera hearing of the affiant and/or secret informant "where the defendant's affidavit casts a reasonable doubt on the veracity of material representations made by the affiant." *Id.* at 819-20. Although corroboration of the defendant's story is helpful, corroboration is not necessary. *Id.* at 820. A defendant need only "make a 'minimal showing of inconsistency' between what the affiant stated and what the defendant alleges to be true." *Id.*.

We review the trial court's decision to not hold a *Casal* hearing for an abuse of discretion. *Id.* at 823. A trial court abuses its discretion if its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *Id*. A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, reaches an outcome that is outside the range of acceptable choices, such that no reasonable person could arrive at that outcome. *Id*.

Jones argues that he "did not seek to challenge Officer Heilman's representations or her veracity. He sought to challenge the representations or veracity of the CI." Br. of Appellant at 8. In his reply brief, Jones maintains that "[a] *Casal* hearing establishes the credibility of the *confidential informant*, not the affiant." Appellant's Reply Br. at 2. However, in order to merit an in camera hearing under the standards established in *Casal*, Jones' affidavit must "cast[] a reasonable doubt on the veracity of material representations *made by the affiant*." 103 Wn.2d at 820 (emphasis added).

Jones' affidavit certainly denies that he delivered controlled substances as alleged. However, the affidavit does not make a "'minimal showing of inconsistency'" between what the CI allegedly told Heilman and what Heilman attested to in her affidavit in support of the search warrant. *Id.* at 820 (quoting *United States v. Brian*, 507 F. Supp. 761 (1981)). Therefore, we determine that the trial court did not abuse its discretion by declining to hold a *Casal* hearing because Jones' affidavit challenges the credibility of the informant, rather than the veracity of the affiant officer.

Jones' motion to suppress evidence was based on the argument that the trial court erred in denying his request for a *Casal* hearing. Because the trial court did not err in denying Jones' request for a *Casal* hearing, it also did not err in denying Jones' motion to suppress.

CONCLUSION

The trial court did not err in declining to hold a hearing under *Casal* or in denying Jones' motion to suppress. Therefore, we affirm Jones' convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, J.
Bjorgen, J.

We concur:

Lee, A.C.J.
Lee, A C.J.

Melnick, J.
Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

November 20, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHARLES JONES, JR., Appellant.	No. 50503-7-II ORDER DENYING MOTION FOR RECONSIDERATION

The appellant has filed a motion for reconsideration of the opinion filed on October 9, 2018. After review, it is hereby

ORDERED that the motion for reconsideration is denied.

Jjs.: Bjorgen, Lee, Melnick

FOR THE COURT:

Bjorgen, J.

KERTCHEN LAW, PLLC

November 21, 2018 - 10:52 AM

Transmittal Information

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