NO. 98315-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

COREY DEAN HARRIS, Respondent

FROM THE COURT OF APPEALS DIVISION II

CAUSE NO. 51539-3

CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01492-3

ANSWER TO PETITION FOR REVIEW

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III. STATEMENT OF THE CASE

Respondent does not dispute the Statement of Facts set out in the Petition for Review, although some material and dispositive facts are omitted, and will be set out and documented in the arguments below.

References to the Clerk's Papers in this Answer are identified by "CP" and the Bates stamp number affixed by the Superior Court Clerk to the lower right hand corner of each document.

IV. ARGUMENTS

1. ARGUMENTS IN RESPONSE TO ISSUE NUMBER ONE

A. The State waived its independent source argument by not raising it in the suppression hearing.

The Court of Appeals in this matter decided that the independent source issue was properly raised and preserved in the Trial Court. Respondent prevailed on appeal, and therefore had no basis to seek review of that issue. In this proceeding however, Respondent renews his argument, made in the Court of Appeals. Issue Number One is not properly before any appellate court. It was not briefed at the Trial Court level, was not raised or argued at the suppression hearing, was not supported by any evidence, and was therefore waived. State v. Scott, 110 Wn.2d 682, 757 P.2d 492 | (1988), State v. Lord, 117 Wn.2d 829, 822 P.2d 177, (1991). The Respondent, Defendant below, filed a 52 page Motion to Suppress, CP 25-76, two weeks before the suppression hearing.

The State waited until the afternoon before the hearing, and served the Respondent with a miniscule reply, but failed to file it with the Court. This Honorable Court can only guess at what arguments were made by the State in its unfiled, untimely pleading, but review of Respondent's rebuttal memorandum, filed in the Trial Court and part of this record, CP 78-102, answers the question. The Reply addresses only the issues of consent and "plain view," both of which have been abandoned by current counsel for the State.

There were only two issues litigated and decided at the suppression hearing in this matter: (1) the validity of the consent to enter the storage building; and (2) compliance with the Knock and Announce statute, RCW 10.31.040. The Trial Court correctly determined that the issue of validity of the consent to enter was dispositive, and the State, through Deputy Prosecutor Randy St. Clair, acquiesced in that determination. The Court stated at the beginning of the hearing:

> "If I find the first entry was not valid, the information of finding the track loader in there would never have been had. You have to take that out. You could never have gotten the warrant.
>
> MR. BENNETT: Right.
>
> MR. ST. CLAIR: And, similarly, we'd agree, Your Honor, that if you found against us on the validity of the warrant, then further testimony on plain view would not matter either. RP p. 6, lines 14-22.

At no point in the course of the suppression hearing did the Deputy Prosecutor argue the issues now raised on appeal. The Deputy Prosecutor presented no evidence as to the independent source rule. The controlling Rule of Appellate Procedure is:

> " RULE 2.5
> CIRCUMSTANCES WHICH MAY AFFECT
> SCOPE OF REVIEW
>
> (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the Trial Court…"

The deputy prosecutor, 18 days after conclusion of the suppression hearing, when the Order of Suppression was entered, admitted that he had not raised the severability issue during the suppression hearing, <u>because he had not even thought of it until after the suppression hearing:</u>

> "MR. ST. CLAIR: Actually, the State has an issue… I actually thought about it a day or two after, Your Honor did not make any findings or we didn't do a severability analysis." RP p. 116, l. 20-23.

Of course, "we didn't do a severability analysis" because the deputy prosecutor acquiesced in the Court's analysis that the consent issue was dispositive. At the hearing to enter Findings of Fact and Conclusions of Law, held on January 30, 2018, the deputy prosecutor

- Filed no argument in writing,

- Presented no argument as to the requirements of the independent source doctrine,
- Cited no authority,
- Proposed no written Findings of Fact and Conclusions of Law,
- Failed to request reconsideration,
- Failed to move to reopen the evidence, and
- Presented no offer of proof to support an independent source analysis.

While it is true that an error can be preserved if raised at a time when the error can be corrected, State v. Wicke, 91 Wn. 2d 638, 642, 591 P. 2d 542 (1979), that rule surely contemplates that some effort is made to adequately preserve the issue. In Wicke, the Court stated: " In Wicke's case, had (the error) been brought to the Trial Court's attention as late as a motion for a new trial, valuable appellate court time could have been conserved." (Emphasis added). Here, the deputy prosecutor should have moved for a "new trial" in the form of reconsideration or to reopen the evidence

Merely reciting, in effect, that "Hey, I just thought of something new that didn't occur to me before," with no effort to brief the point, seek reconsideration, seek to reopen the evidence, nor to make an offer of proof to support the claim is truly inept, and should not be rewarded.

B. Application of the independent source doctrine is unsupported by the evidence.

In State v. Spring, 128 Wn. App. 398, 403, 115 P.3d 1052 (2005) the State did make the severability/independent source argument at the suppression hearing, and was successful. In that case, police received information from a hotel employee that there was an active methamphetamine lab in a motel room. A supervisor for the police testified at the hearing that "the plan" was to go to the motel, interview the employee as to her observations, and then apply for a search warrant. When they went to the hotel, however, they encountered the Defendant, Spring, in the parking lot, who admitted that methamphetamine was being cooked in the room. He was arrested, without being given Miranda rights, Miranda v. Arizona , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and then gave consent for the police to search his truck. Evidence was found in the truck which was referenced in an affidavit for a warrant to search the motel room.

The Trial Court, in a suppression hearing, ruled that the evidence from the truck and the "un-Mirandized" admissions after arrest were unlawfully obtained, and excised them from the search warrant affidavit. The Trial Court held that the balance of the affidavit was sufficient for probable cause to issue the search warrant. The independent source issue was addressed in the suppression hearing. The State not only raised the issue, but presented proof that "the plan" all along was to seek a search

warrant based upon the employee's observations. The encounter with the defendant, Spring, was fortuitous and not the motivating factor to seek the warrant. The decision in Spring quotes and relies upon Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988). In Murray, federal agents stopped some trucks leaving a warehouse, and found marijuana inside the trucks. They unlawfully entered the warehouse and saw marijuana therein. They obtained a search warrant for the warehouse, but did not include their unlawful observations in the affidavit. They later conducted a search of the warehouse under the warrant and seized evidence.

> "The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." 487 U.S. 533, at 542.

What is significant here is that in Spring, (1) the issue of independent source was raised and argued at the suppression hearing, (2) in Spring, the unlawfully gathered evidence was not part of the original investigative plan at all, but was completely fortuitous, and (3) if the decision to seek a search warrant was "prompted" by the unlawful observations, then the independent source doctrine would not apply.

In the Petition for Review, the State has spent an inordinate amount of time arguing that the Court of Appeals erred in following the so-called "dicta" announced by the U.S. Supreme Court in Murray, and the Court of Appeals in Spring, which posits a subjective evaluation of whether or not the magistrate would have issued the search warrant without the Constitutionally offensive content.

This argument is wasted, because it is superfluous. It is undisputed that the State must demonstrate that the affiant Deputy Sheriff, in the absence of his Constitutional blunder, would have sought a search warrant anyway, based only upon the other content of the search warrant. Yet, as was the basis of the Court of Appeals' decision, the State made no record. The State presented no evidence to support its supposedly preserved issue.

For this reason, and this reason standing alone, the Court of Appeals was correct in denying the appeal. The burden of proof rests heavily upon the guilty shoulders of the State when seeking to justify a search under a warrant that is patently invalid. In the absence of some showing that the Deputy was not motivated to seek a warrant by his unlawful observations, that burden is not met

2. ARGUMENTS IN RESPONSE TO ISSUE NUMBER TWO

A. The State is not entitled to remand for an additional suppression hearing.

Remand for an evidentiary hearing is not appropriate, where the State had ample opportunity to present such evidence at the Trial Court level and declined to do so.

Additionally, the affidavit for search warrant, CP 51-55 itself answers the question. Deputy Fields recites:

> "Based on the GPS location provided by the victim and the matching Caterpillar with the removed VIN number located in the out building, I believe there is probable cause to search the building…"

This statement demonstrates that the deputy's decision to seek a warrant was prompted by his suspicions being corroborated by his actual observations. Most significantly, Deputy Field's step-by-step investigative plan is clearly set out in his affidavit. He received inaccurate, unreliable information from an unknown informant, through Officer Maloney; he then talked to the unproven informant, and before relying solely upon that informant and his negative track record, sought to, and succeeded in corroborating the new information by personal observations.

The State failed to address the issue of the deputy's subjective intent at any time; however at the entry of Findings and Conclusions, the following exchange occurred on the record:

> "MR. BENNETT: When I interviewed -- and, again, this is because I didn't make the complete record because they waived the severability by saying that, you know, it's the entry that controls everything.

> In his interview with me, Fields admitted, I didn't have probable cause. I had suspicion, but just -- no. Based on the -- on this GPS, I didn't have probable cause.
>
> That's what he told me in an interview."
>
> RP p.127, line 7-19.

Obviously, Deputy Fields would not have sought a search warrant with an affidavit reciting that "I do not believe that I have probable cause, but instead I only have (reasonable) suspicion."

While a Defendant, who is protected by the Federal and State Constitutions, can sometimes raise an issue for the first time on appeal if it involves manifest error affecting a constitutional right, State v. Sublett, 176 Wn.2d 58, 292 P.3d 715, (2012), the State enjoys no such right.

B. As a matter of law, the evidence presented by the State at the suppression hearing fails to establish that the Search Warrant affiant would have sought a warrant without the illegally obtained information.

In support of its argument that this court must remand the case for further evidentiary proceedings, the State submits that whether or not the law enforcement officer would have sought a search warrant without the offending content is an issue of fact, and cannot be decided by the appellate court. Respondent disagrees, at least in a case where, as here, there is absolutely no evidence presented by the party with the burden of proof. A party with the burden of proof cannot simply claim "There is an

issue of fact" without pointing to something in the record to support that claim. Here there is, as the Court of Appeals correctly held, nothing in the way of any record to raise the issue. Not only is any issue of fact unproven; one is not even raised.

Even in the Spring decision, relied upon by Petitioner on the remand issue, the Court of Appeals, while remanding for entry of a finding as to whether the police were motivated by illegally acquired evidence to seek a search warrant stated at footnote 24, 128 Wn. App 407: "Spring contends he is entitled to a new evidentiary hearing on this issue. We leave this question to the Trial Court."

3. ARGUMENTS ON DISPOSITIVE ISSUES RAISED IN, BUT NOT DECIDED BY THE COURT OF APPEALS

1. The Probable Cause Issue

A. After excision of the information unlawfully obtained, the affidavit for search warrant fails to establish probable cause for issuance of the search warrant.

As conceded by the State, there is no preference given to the warrant issued below. State v. Ollivier, 178 Wn. 2d 312 P.3d 1 (2013) State v. Eisfeldt 163 Wn. 2d 628, 185 P. 3d 580 (2008.) In a case where the issue is properly presented or preserved, the sufficiency of the redacted affidavit is examined *de novo* by the reviewing court. The Trial Court judge, despite the fact that the State failed to timely raise the issue of

independent source relating to the affidavit in this case, held that the affidavit, even with excision, was fatally defective. The Trial Court judge acted well within his discretion to reject it, especially in the absence of any argument by the State to support it at the suppression hearing.

The affidavit was based upon unreliable information. First, a person claiming to be an "Officer Maloney," unknown to Deputy Fields, relayed hearsay from an undisclosed, unidentified informant. "Officer Maloney" was not the informant; he was merely the conduit; his hearsay is entitled to no presumption of reliability usually afforded to police officers. That information consisted of this:

> "I was contacted by Officer Maloney and he stated they had a Caterpillar stolen Friday night. He said the Caterpillar is equipped with a GPS tracking system and it might be in the area of 18228 NE 72d Avenue. I checked the area and was unable to locate it and could not find an address matching and did not see the Caterpillar outside any property."

The source of Maloney's information is not revealed. No track record of reliability is provided for the informant. Nor is the basis of knowledge of either Maloney or his anonymous source. Neither prong of the Aguilar-Spinelli test is satisfied, see Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509; 12 L.Ed.2d 723 (1964), and Spinelliev. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969), and State v. Jackson, 102 Wn.2d 432, 688 P. 2d 136 (1984).

To compound matters, the reliability of the anonymous source, and the alleged "GPS device" is disproven in the affidavit itself. No Track Loader was found at the address, and the address did not even exist. The "track record" established as to Maloney, his informant and the GPS device established unreliability.

Next, Deputy Fields states in his affidavit:

> "On 03/21/2017 I was again dispatched to 18228 NE 72d Avenue. I contacted Mark Rickabaugh via telephone who is the owner of the stolen Caterpillar. He provided me with pictures and GPS locations of where the Caterpillar had been. He stated the last update he received showed the Caterpillar in and near an outbuilding. I was able to match the photos to Google maps and found the address to be 18110 NE 72d Avenue…"

Here, an informant is identified with a name, however, again there is no information establishing prior reliability. Assuming that Rickabaugh was the anonymous informant who provided information to Officer Maloney, all that an issuing magistrate would know is that Rickabaugh and/or the GPS device had provided false, inaccurate information in the past. Mr. Rickabaugh provided Deputy Fields "…with pictures and locations where the Caterpillar had been. He stated the last update he received showed the Caterpillar in and near an outbuilding."

There is no indication as to when these claimed observations were made or when the "last update" had occurred. Deputy Fields did not

bother to establish when that last update occurred, and therefore the issuing magistrate would also lack any such knowledge. In this case, the affidavit establishes no fact to justify a finding of reliability. As noted above, the only information provided as to prior reliability was negative. There is no information in the affidavit as to the brand, model, age, effective range, condition, or currency of software of said device.

In the Court of Appeals, The State seemed to argue that whenever someone claims that "a GPS device" shows a location of an object, that amounts to probable cause that the object will be found at the location claimed. None of the cases cited by Petitioner, State v. Jackson, 150 Wn. 2d 251, 76 P. 3d 217 (2003), U.S. v. Jones, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed. 2d. 911 (2012), and U.S. v. Lopez-Lopez, 282 F.3d 1 (2002), There was no issue, and therefore no discussion in any of the cases as to whether or not a GPS device, especially such as Mr. Rickabaugh's, previously shown to be unreliable, could be the basis of a finding of probable cause. It should be noted that Respondent is not arguing that GPS evidence has not received general acceptance in the scientific community, or that it is not admissible in evidence, if a proper foundation is laid. The argument here is that this affidavit is so bereft of any showing of reliability of this particular device, which had provided false and inaccurate information the day before, that the Trial Court judge deciding the

suppression hearing did not err in declining to find probable cause on these facts. A reasonable judge, reviewing this affidavit, could and did, find a lack of probable cause to issue the warrant.

2. The Knock and Announce Issues

A. The State failed to prove compliance with the knock and announce rule, RCW 10.31.040

RCW 10.31.040 provides:

> "Officer may break and enter.
>
> To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his or her office and purpose, he or she be refused admittance."

In this case, Deputy Fields entered the locked, secure building twice; each time preceded by the simple statement: "Sheriff's Office." RP p. 25, line 25, p. 26, line 1. Findings of Fact and Conclusions of Law CP 106, paragraphs 20-24.

The second time he entered, with an invalid search warrant, he repeated his truncated, ineffectual attempt to knock and announce, by again stating: "Sheriff's Office," and nothing else, Findings of Fact and Conclusions of Law CP 107, paragraphs 30-34. This procedure is a clear violation of the knock and announce statute. State v. Beason, 13 Wn. App. 183, 534 P.2d 44 (1975). Neither at the trial level, nor in the Court of

Appeals has the State argued that there was compliance with RCW 10.31.040. Deputy Fields failed to comply with RCW 10.31.040 upon both entries. This is significant, because even if the Supreme Court rules that there was probable cause for issuance of the search warrant upon independent source grounds, all of the evidence still must be suppressed for violation of the knock and announce rule on the second entry when the warrant was executed.

B. The State waived any argument that compliance with RCW 10.31.040 would have been a "useless act" by not raising it at the suppression hearing or upon entry of Findings of Fact and Conclusions of Law.

The State's new theory on the knock and announce violation, presented for the first time on appeal, is that it would have been a "useless act" for Deputy Fields to comply with the statute. This argument is not properly before the Court. The argument that the State was excused from complying with the statute (twice) because it was later discovered that the building was unoccupied, was not briefed at the Trial Court level, was not raised at the suppression hearing, was not even mentioned when Findings of Fact and Conclusions of Law were entered, and was therefore waived. State v. Scott, 110 Wn.2d 682, 757 P.2d 492 | (1988), State v. Lord, 117 Wn.2d 829, 822 P.2d 177, (1991).

Review on the "useless act" exception to the knock and announce rule should be denied, and the Trial Court's ruling on this issue should be affirmed.

C. The State has failed to prove that compliance with RCW 10.31.040 would have been a "useless act."

As has become a pattern, for the first time on appeal and without evidentiary support the State contends that compliance with RCW 10.31.040 would be a useless act, because in hindsight, the storage building was not occupied by any other persons.

The State fails to address the essential element of the useless act doctrine, that is, that the deputy knew with certainty that the building was unoccupied. There is nothing in the record created by the State to indicate that Deputy Fields knew, upon either entry, that the building was unoccupied. Again, this gap in the record is attributable to the State, for failing to raise the issue in a timely manner (or ever, prior to appeal.)

The Washington Supreme Court has placed a significant qualification upon invocation of the "useless act" exception to RCW 10.31.040 in State v. Coyle, 95 Wn.2d 1, 621 P.2d 1256 (1980):

> "Compliance is a "useless gesture," and is therefore not necessary, "when it is evident from the circumstances that the authority and purpose of the police is already

> known to those within the premises." 2 W. LaFave, *supra*, § 4.8(f), at 137; *accord, e.g., Ker v. California*, 374 U.S. 23, 55, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963) (Brennan, J., dissenting); *State v. Campbell*, 15 Wn. App. 98, 101-02, 547 P.2d 295 (1976). State v. Coyle, 95 Wn. 2d at 11 (Emphasis added)

This qualification emphasizes the facts known to the officer at the time of the entry, as opposed to after-acquired knowledge.

> "We agree with the clear majority of courts, including the United States Supreme Court, that noncompliance may not be excused unless the police are **"virtually certain"** the occupants are aware of their presence, identity, and purpose prior to their entry." (emphasis added) State v. Coyle, *supra*, 95 Wn. 2d at 11.

The State presented no evidence that Deputy Fields was "virtually certain" that compliance with the statute would be a useless act. He had no knowledge as to whether potential occupants were already aware of his presence, identity and purpose, nor whether there were occupants at all. In these circumstances, he was required to comply with the statute, rather than dispense with compliance and hope for the best. His failures, if not corrected, will inevitably lead to tragedy in the future. A rule establishing that compliance with RCW 10.31.040 is unnecessary if it is later discovered that the structure is unoccupied completely defeats the purpose of the rule. Police and occupants are not protected by an after acquired knowledge rule. For example, in State v. Schimpf, 82 Wn. App. 61, 914 P.2d 1206 (1996), Division 3 of the Court of Appeals applied a "useless

act" analysis where police looked into an empty, enclosed backyard, and entered it by opening a gate. The police knew there was no-one in the back yard to whom a demand could be directed. The court in Schimpf cited cases from other jurisdictions which relied upon the fact that the police knew that no-one was present to receive a knock and announce salutation:

> "Courts in other jurisdictions have reached the same conclusion in similar circumstances. In People v. Mayer, 188 Cal. App. 3d 1101, 233 Cal. Rptr. 832 (1987), "there was no one in the back yard at the time to receive the notice."233 Cal. Rptr. at 838.
>
> And, in State v. Sanchez, 128 Ariz. 525, 627 P.2d 676 (1981), "[I]t was apparent to the officers that the yard within the chain link fence and outside the house was vacant." 627 P.2d at 680." State v. Schimpf, 82 Wn. App at 65, 66.

These words from Coyle, *supra*, make eminent sense:

> "The nonoccurrence of either violence or property damage is a felicitous fortuity, and cannot constitute an after-the-fact justification which excuses the unannounced entry. Coyle *supra* 95 Wn. 2d at 12.

In briefing before the Court of Appeals, the State argued that the holdings in Coyle and Schimpf had been overruled by State v. Cardenas, 146 Wn. 2d 400, 47 P.3d 127 (2002) and Richards v. Wisconsin, 520 U.S. 385, 394, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997) because the Richards court had used the phrase "reasonable suspicion" when discussing that the

knock and announce procedure can be dispensed with where compliance is "dangerous or futile" or could lead to destruction of evidence. The Cardenas opinion cites two other cases, State v. Richards, 136 Wn. 2d 361, 962 P.2d 118 (1998) and State v. Myers, 102 Wn.2d 548, 554, 689 P.2d 38 (1984). None of the cases cited above involve a nonconsensual entry in the absence of exigent circumstances demonstrating danger to the officers or destruction of evidence. None of the cases approved a watered down test of knowledge in the absence of exigent circumstances. Nor has any case expressly overruled the Washington standard stated in Coyle, supra, or even discussed the difference between Washington's virtual certainty test and a reasonable suspicion test.

V. CONCLUSION

The State has failed to preserve any of its arguments, and waived them by failing to brief or present them to the Trial Court. Further, Respondent submits that the issues raised by Appellant, if heard by the Appellate Court, lack merit. Respondent prays for an opinion affirming the Court of Appeals decision in this matter.

Respectfully submitted the 16 day of April, 2020

Roger A. Bennett WSBA 6536
Attorney for Respondent

NO. 98315-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CAUSE NO. 51539-3

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PROOF OF SERVICE

I declare under penalty of Perjury and RCW 9A.72.085 that I served a copy of the Answer to Petition for Review, and a Notice of Appearance on Aaron Bartlett, Deputy Prosecuting Attorney for Clark County, by depositing the same into the US Mail, postage prepaid and addressed to 1013 Franklin Street, Vancouver, WA 98660, on April 16, 2020.

Signed at Vancouver, Washington on April 16, 2020

Roger A. Bennett, WSBA 6536
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