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**SUPREME COURT**  
**STATE OF WASHINGTON**  
**5/6/2020**  
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**NO. 98498-1**

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON**

**Respondent**

**v.**

**DHENA RAYNE ALBERT**

**Petitioner**

**PETITION FOR REVIEW**

**JAMES J. SOWDER**  
**WSBA# 9072**  
**Attorney for Petitioner**  
**1600 Daniels Street**  
**P. O. Box 27**  
**Vancouver, WA 98666-0027**  
**(360) 695-4792**

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### **A. Identity of Petitioner**

Petitioner, DHENA RAYNE ALBERT, requests this court to accept review of the Court of Appeals, Division II decision terminating review designating Part B of this petition.

### **B. Court of Appeals Decision**

The Court of Appeals, Division II in an unpublished opinion affirmed the trial court's orders and Petitioner's conviction. The decision was filed April 7, 2020. A copy of the decision is in the Appendix at pages A1-A13.

Petitioner requests this Court to review the Court of Appeals decision affirming the trial court's order and Petitioner's conviction.

Specifically, (1) did the trial court err in denying Petitioner's request for a Franks v. Delaware hearing to review the basis of the confidential informant's statements as related by the affiant of the search warrant? (2) did the trial court err in denying Petitioner's request for a continuance? (3) did the trial court err in denying Petitioner's motion to suppress the evidence seized with a search warrant? (4) did the trial court err in denying Petitioner's motion for new trial or in the alternative arrest of judgment? (5) did the trial court err in setting the appeal bond at four million dollars? (6) did Appellant's brief fail to adequately preserve certain assignments of error and/or inadequately brief them? (a) was trial counsel's

performance deficient because of the state's disclosure of the incriminating video only a few hours before Petitioner was to testify; Petitioner did not make any argument how trial counsel's performance was deficient? (b) did the trial court properly exercise its discretion to impose a sanction against the State for late disclosure of the incriminating video? (c) did the court abuse its discretion in denying Petitioner's request for continuance?

### **C. Issues Presented for Review**

1. Does disclosure of material inculpatory evidence after the close of the State's case and just prior to the Petitioner taking the witness stand render Petitioner's counsel ineffective and entitle Petitioner to a continuance? The evidence was a video surveillance device showing Petitioner at a table with an ounce of methamphetamine on it after she had presented a defense of lack of knowledge of any methamphetamine on the premises?
2. Is trial counsel rendered ineffective by late disclosure of a video, described above, in terms of devising a trial strategy and in giving advice on accepting the State's plea offer require a new trial or at least an opportunity for Petitioner to accept the State's last plea offer? Lafler v. Cooper, 566 U.S. 156 (2012) required as a remedy for failure of counsel to investigate the immigration consequences of a

plea offer that the case be remanded to give the defendant the opportunity to accept the previously offered plea bargain.

3. Was Petitioner denied effective assistance of counsel, guaranteed by the Sixth Amendment of the United States Constitution and Article 1, § 22 of the Washington State Constitution because a video surveillance device was seized from the apartment Petitioner shared with her boyfriend, defense repeatedly requested release of the surveillance device to Petitioner, and the state's discovery of the video was made available to Petitioner after the closing of the State's case and just prior to Petitioner testifying? Did Petitioner receive ineffective assistance of counsel due to counsel's inability to review the contents of the video before trial? In the context of this case a showing of deficient performance by not providing counsel the facts needed to advise Petitioner on the merits of the plea offer versus going to trial.

4. Did the trial court mistakenly follow a bright line rule that a Franks hearing could not be granted when evidence was provided that the CRI was not truthful to the affiant in his/her statements establishing probable cause? Petitioner presented substantial evidence through cell phone records that she was not at the apartment when the CRI reported having contact with Petitioner. Disclosure of the informant and records of his/her contacts at the apartment would have provided evidence

rebutting the argument she was selling the drugs in the apartment and would have shown the affiant was reckless in his disregard for the truth and intentional misrepresentation.

5. Was setting Petitioner's appeal bond at four million dollars a denial of Petitioner's right to post an appeal bond without substantial evidence to support the trial court's ruling?

#### **D. Statement of the Case**

Petitioner was convicted of Count 1-Possession of a Controlled Substance with Intent to Deliver and Count 2-Unlawful Possession of a Firearm (CP 122). Petitioner was sentenced to 170 months with the Department of Corrections. Pretrial, Petitioner received a plea bargain offer for 92 months and rejected it.

A search warrant was executed at the residence Petitioner shared with her boyfriend, Cruz Gutierrez (CP 63). Petitioner worked at a nearby restaurant as a waitress. Petitioner and David Tovar were present when the warrant was executed. The police seized approximately 800 grams of methamphetamine and 3 handguns (CP 63.113).

The search warrant affidavit stated the CRI reported he/she had purchased methamphetamine in the past but the affiant does not even give a general time frame as to when or where this occurred. The affiant stated a controlled buy was

conducted at the residence within seventy-two hours prior to the request for the search warrant. The CRI was not a citizen informant. The CRI provided information for a favorable recommendation on a pending criminal charge. The affiant only made minimum conclusionary statements supporting the CRI's reliability.

A motion to suppress and disclosure the informant, pursuant to Franks v. Delaware was filed and the court heard argument (CP 30, RP 29-41). Petitioner presented evidence of her cell phone records and cell tower analysis showing Petitioner was not at the residence a substantial period of time within the last 72 hours prior to the execution of the search warrant (RP 367-379, Exhibit 97; Declaration of Gary Rice).

Petitioner filed a motion to return the surveillance device seized during the execution of the search warrant on November 22, 2017. The State advised law enforcement was not able to gain access to the video because the device was password protected. The court granted additional time for the state to open the device for inspection (CP 123, RP 123.50)

Petitioner renewed the motion on May 2, 2018. The state advised defense counsel he could pick up the surveillance device from VPD Evidence Unit. Trial commenced on May 7, 2018. At readiness hearing on May 2, 2018, Petitioner filed



a motion to continue the trial (CP 65). The state advised it had ordered software to open the surveillance device. Petitioner requested a continuance to allow additional time to view the video; the state was not opposed. The court denied the continuance (RP Vol. 1, Page 41-44, 44.10).

Trial began on May 7, 2018 (RP 109-367). Petitioner was ready to testify when the state provided the video in court (RP 396-397.25). The court and the parties viewed the video outside the presence of the jury. It showed the Petitioner inside the residence sitting at a table with what appeared to be an ounce of methamphetamine. Petitioner requested the video be excluded. The court ruled it was admissible only for impeachment. Petitioner's defense was that she had no knowledge controlled substances was being sold at the apartment. Petitioner declined to testify given such testimony would be undermined by newly discovered evidence (RP 399.24).

Petitioner filed a motion for new trial or in the alternative arrest of judgement. The court denied the motion at sentencing (CP 109, RP 440-447).

Petitioner argued her case did not meet the factors for a "no bail hold" as listed in RCW 10.73.040 and RCW 9.95.062. The court noted Petitioner did not meet such factors but the court believed Petitioner would flee if substantial bail was not set. The court set bail at four million dollars, well beyond Petitioner's capacity

to post bond (RP 466.16, CP 130). Accelerated review of the bail amount was denied.

### **E. Argument Why Review Should be Accepted**

The issue of the state's late discovery of inculpatory evidence is significant under the Constitution of the State Washington and the Constitution of the United States as it affects effective assistance of counsel in preparation of trial strategy and advising Petitioner of the benefit of accepting the plea offer versus the risk of going to trial.

**Pertinent Case Law:** Lafler v Cooper, 566 U.S. 156 (2012) concerning ineffective assistance of counsel for failure to advise of immigration consequences in accepting a plea bargain offer.

State v. Drath, 7 Wn. App. 255 (2018) concerning ineffective assistance of counsel for failure to provide the correct sentencing range. The court ruled it was prejudicial to making an informed decision to go to trial.

State v. Estes, 188 Wn.2d 450 (2017) the court ruled effective assistance of counsel includes assisting defendant in making an informed decision as to whether to plead guilty or go to trial by making a reasonable evaluation of the evidence. Mr. Estes did not know he was facing a life sentence, if convicted and there was a

reasonable probability he may have accepted the plea offer if he knew a conviction after trial would be a sentence of life without parole.

State v. A.N.J. 168 Wn.2d 91(2010) held counsel, at a minimum, must reasonably evaluate the evidence against the accused and the likelihood of conviction if the case proceeds to trial so the defendant can make a meaningful decision as to whether or not to plead guilty. A.N.J. accepted a plea bargain with a special sex offender sentencing alternative (SSOSA) after spending less than an hour discussing the case with counsel.

The trial court denied Petitioner's motion for continuance at readiness hearing on May 7, 2018, where defense requested additional time to review the surveillance video if the state acquired the software needed to unlock the device. The court abused its discretion affecting Petitioner's right to effective assistance of counsel and as such it was significant pursuant to the Constitution of the State of Washington and the United States Constitution which guarantees effective assistance of counsel. The state did not oppose the continuance. Although, the exact contents of the video were unknown, it had a high potential for exculpatory, impeachment, or inculpatory evidence given it was a surveillance video of a reputed drug house. Petitioner used due diligence in her repeated attempts to obtain the surveillance device.

The late disclosure of the video evidence and the court's failure to grant a continuance to allow the State additional time to open the device so the parties could view the video is a significant question of law under the Constitution of the State of Washington and the Constitution of the United States because it prejudiced Petitioner's right for discovery of all exculpatory and impeachment evidence as recognized in Brady v. Maryland, 373 U.S. 83 (1963), United States v. Bagley, 473 U.S. 479 (1984) and CrR 4.7.

There is no bright line rule dividing and distinguishing if the affiant or the informant lied or acted in reckless disregard for the truth in a challenge to the affidavit supporting a search warrant. The trial court and the Court of Appeals decision did not give sufficient weight to case law requiring disclosure or at least an in-camera interview of the informant where it appears identifying the informant will be helpful in the determination of guilt or innocence.

**Pertinent Case Law:** State v. Harris, 44 Wn. App. 401, at 405 (1986), State v. Casal, 103 Wn.2d 812, State v. Petrina, 73 Wn. App. 779, at page 882 (1994), and Rovario v. United States, 353 U.S. 53 (1957) held there is no bright line rule. The assertion of such a bright line rule is a significant question of law under the Constitution of the United States and the Constitution of the State of Washington. It is also an issue of substantial public interest that should be

determined by the Supreme Court, otherwise a defendant cannot acquire evidence to show the affiant was lying or acting in reckless disregard for the truth. This is particularly so when the affidavit is made up of conclusionary statements by the officer based on his or her training and experience.

In Harris, the defendant presented several witnesses to support the argument the informant could not have seen a sale of narcotics in his home twenty four hours prior to the issuance and execution of the search warrant. The court recognized the informant privilege is not absolute. Disclosure of the informant's identity is allowed if disclosure is relevant and helpful to the defense and essential to a fair determination of the cause, at page 405. The case is stronger for disclosure when it appears likely that identifying the informant will be helpful in the determination of guilt or innocence.

In State v Casal, 103 Wn.2d 812 (1985) the court ordered an in-camera hearing where the defendant's affidavit asserted, based on an alleged conversation with the informant, that the affidavit supporting the search warrant contained material misrepresentations by the affiant. The court in Casal held where the defendant presents information which casts a reasonable doubt on the material representations made by the search warrant and the challenged statements are the sole basis for the probable cause to issue the search warrant, the trial court should

exercise its discretion to conduct an in-camera examination of the affiant and/or secret informant on the veracity issue, p 813.

State v. Petrina, 73 Wn. App. 799 (1994) held a defendant's request for disclosure raises constructional issues of fundamental fairness and due process, at page 783. A defendant's Sixth Amendment right to compel attendance of a witness who could materially aid his or her defense is affected by nondisclosure and failure to hold an in-camera interview. If a defendant establishes "a colorable need" for a person to be disclosed the person is a material witness and the state must disclose, at page 784.

The affidavit for the search warrant is attached to petitioner's motion to suppress (CP 63) and the courts findings of fact and conclusions of law re; CrR 3.6 hearing and order denying motion to suppress (CP 113). A review would show the basis for the probable cause is the controlled buy. There is no other corroboration.

Petitioner's declaration of counsel containing her cell phone records (CP 66) along with Petitioner's declaration establish a need for disclosure of the informant or at least an in-camera interview to secure evidence to support her contention she was not at the residence at the time of the controlled buy. Cell phone tower analysis of Petitioner's location was presented by defense investigator, Gary Rice (RP 367-379, CP 69); it is also attached to Petitioner's appellate brief. The

affiant observing the controlled buy should have surveillance videos and/or records noting if appellant was there or not. If the records cannot confirm she was there, then the affidavit was made in reckless disregard for the truth. Reckless, because the affiant has no basis to trust the CRI's statement that Petitioner was there during the controlled buy.

As to the appeal bond issue, Petitioner was denied bail when the trial court set bail at four million dollars. There was no basis to deny bail when Petitioner appeared at all court appearances.

#### **F. Conclusion**

Petitioner requests that this Court accept her case for review and (1) find the trial court erred in denying Petitioner's motion for new trial or in the alternative arrest of judgment which allowed the trial court an opportunity to correct errors of law alleged in appellant's brief; (2) find that petitioner adequately preserved and briefed the assignments of error, particularly ineffective assistance of counsel and denial of the Franks hearing as part of her motion to suppress; (3) find the trial court abused its discretion by denying Petitioner's motion for continuance, denying the motion for new trial or in the alternative arrest of judgment, denying Petitioner's motions to suppress and grant a Franks hearing and either disclose the informant for an interview or conduct an in-camera interview of the informant.

A trial court has abused discretion if the decision is manifestly unreasonable or rests on facts unsupported in the record or reached by applying the wrong legal standard; Washington Supreme Court, State v Curry, Jr, No. 94681-7, filed August 16, 2018; Goggle v. Snow, 56 Wn. App 499 (1990); Judicial Discretion, The National Judicial College, 1991.

The question is whether discretion is exercised on untenable grounds for untenable reasons given the purpose of the trial courts discretion. It would not take much time or effort to hold an in-camera hearing. Failure to do so because the case was old, by the trial court's judgment, is not a strong enough reason. The age of the case appeared to be a driving force in the trial court's reasoning. The trial court was focused on clearing the case from its trial calendar. It became obvious by the time the surveillance video contents were discovered, just before Petitioner was to testify, that continuances and motions for mistrial were futile. Allowing admission of the surveillance video, even if only for impeachment, effectively terminated Petitioner's case because her defense was that she was not there in the apartment dealing drugs. There was no tenable reason not to completely exclude the evidence or grant the motion for new trial. Almost all the witnesses were law enforcement and available for another trial and/or the video of their testimony in the first trial could be used. Requiring a new trial would have enforced the requirement that the

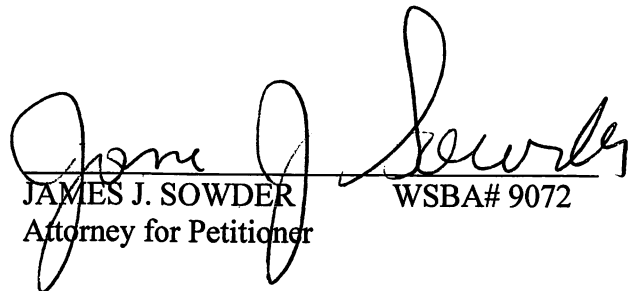


state provide exculpatory impeachment evidence and inculpatory evidence. The state should not be allowed, even negligently, to sandbag defense just before Petitioner testifies.

Petitioner would request this court to order a new trial with and order for an in-camera review or disclosure of the informant or in the alternative remand the case for Petitioner to accept the plea bargain offer due to the state's late disclosure of inculpatory evidence which denied her effective assistance of counsel.

Dated this 4 day of May, 2020.

Respectfully submitted,

  
JAMES J. SOWDER WSBA# 9072  
Attorney for Petitioner

# APPENDIX

April 7, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DHENA RAY ALBERT,

Appellant.

No. 51930-5-II

UNPUBLISHED OPINION

SUTTON, J. —Dhena Albert appeals her convictions for possession with intent to deliver a controlled substance—methamphetamine, and unlawful possession of a firearm in the first degree.<sup>1</sup> The Vancouver Police Department obtained information from a confidential, reliable informant (CRI) about Albert’s sale of methamphetamine and used the CRI to arrange a controlled buy of methamphetamine from Albert at her residence between August 16 and 18, 2017. The police department then obtained a search warrant and seized evidence from Albert’s residence, including a surveillance device and a handgun with a loaded magazine in a safe.

The State charged Albert with possession with intent to deliver a controlled substance—methamphetamine—and unlawful possession of a firearm in the first degree, and a third charge that was later dropped. Pretrial, Albert filed a motion for a *Franks*<sup>2</sup> hearing and a motion for a trial continuance to view the surveillance device seized by the police. The court denied these

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<sup>1</sup> Albert had prior felony convictions and could not possess a firearm.

<sup>2</sup> *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

motions. A jury found Albert guilty of both charges. Albert filed a post-trial motion for a new trial and/or arrest of the judgment, which the court denied. Based on a pending federal charge, and after Albert filed a motion for an appeal bond, the court set bail at four million dollars.

Albert argues that the trial court erred by denying her pretrial motion for a *Franks* hearing and her motion for a continuance. She also argues that the trial court erred by denying her motion to suppress the evidence seized during the search, denying her motion for a new trial or alternatively, to arrest judgment, and setting her appeal bond at four million dollars.

We hold that the trial court did not err by denying Albert's request for a *Franks* hearing because she failed to meet her burden of proof for a *Franks* hearing, and the trial court did not err by denying Albert's motion for a continuance related to the surveillance device. We decline to decide the remainder of Albert's assignments of error because she either failed to adequately preserve these issues or failed to adequately brief them. Thus, we affirm the trial court's orders and Albert's convictions.

## FACTS

### I. BACKGROUND INFORMATION

The Vancouver Police Department obtained and executed a search warrant on August 25, 2017, for an apartment in Vancouver where Albert allegedly resided. The warrant was based on the affidavit by Vancouver Police Detective Chadd Nolan. In his affidavit, Detective Nolan described his reason to believe that two individuals, including Albert, were selling methamphetamine out of the residence at that location. His belief came from information from a CRI. This CRI informed the police that he or she knew that Albert sold methamphetamine from her residence. The CRI positively identified Albert from a photograph and provided substantial

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information about Albert. The CRI described the way that Albert communicates with her customers, the way that she measures the methamphetamine for sale, and that the CRI had previously purchased methamphetamine from Albert on numerous occasions using cash. Detective Nolan searched Albert's driver's license and discovered that her address matched the address given by the CRI.

Based on this information, Detective Nolan set up a controlled buy with the CRI, whereby the CRI would buy methamphetamine from Albert under Detective Nolan's supervision. Detective Nolan stated that the controlled buy occurred between August 16 and August 18, 2017. Prior to the purchase, Detective Nolan thoroughly searched the CRI for any controlled substances and provided the CRI with prerecorded currency with which to purchase the methamphetamine. The officers watched the CRI as the CRI entered Albert's residence, and they continued to watch the residence until the CRI left. After the CRI left the residence, the CRI met the officers at a predetermined location.

The CRI presented Detective Nolan with a substance that Detective Nolan recognized as methamphetamine. The substance was field tested and tested positive for methamphetamine. The CRI informed Detective Nolan that Albert had a safe where she kept her methamphetamine and money. The CRI also informed Detective Nolan that Albert had pipes commonly used for smoking methamphetamine, a scale, and packaging material. The police then obtained a search warrant for Albert's residence, and during the search, the police found a handgun with a loaded magazine in a safe. They seized the gun, drug evidence, and Albert's cell phone. Albert has a prior conviction for a serious offense and was not lawfully allowed to possess a firearm.

The CRI cooperated with the Vancouver Police Department in exchange for “favorable consideration on a criminal charge.” Clerk’s Papers (CP) at 101. Detective Nolan was forthcoming in his affidavit about the CRI’s history with drug abuse and prior criminal history.

The State charged Albert on August 29, 2017, with (1) one count of possession of a controlled substance with intent to deliver—methamphetamine, with enhancements for being within 1000 feet of a school bus route, while armed with a firearm, and it being a major violation of the Uniform Controlled Substances Act,<sup>3</sup> (2) one count of unlawful possession of a firearm in the first degree,<sup>4</sup> and a third charge which was later dismissed.

## II. PRETRIAL MOTIONS

### A. MOTION FOR A *FRANKS* HEARING AND RELATED MOTIONS

Pretrial, Albert filed a motion for a *Franks*<sup>5</sup> hearing, a supporting declaration, and a summary of her whereabouts and cellphone usage on the days of the alleged controlled buy by the CRI. Albert also filed a motion to seal her declaration and a motion to obtain sealed records documenting the CRI’s allegations. Albert argued that the affidavit for the search warrant was unreliable because “the affiant does not give a date or time” that the CRI bought the methamphetamine from Albert, the affidavit does not say who observed the controlled buy, and Albert was not at her residence for a substantial period of time between August 16 to August 18, 2017.

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<sup>3</sup> Ch. 69.50 RCW.

<sup>4</sup> RCW 9.41.040(1)(a).

<sup>5</sup> *Franks*, 438 U.S. 154.

Albert's counsel informed the trial court that he had Albert's cell phone data, including her text messages, extracted with the assistance of a private investigator to establish her whereabouts during the three-day period the CRI had bought from her. From this information, Albert's counsel determined that Albert was not at home for substantial periods of time during that time period based on the exhibits he had prepared and attached to the motion. When the court asked Albert's counsel whether he was arguing that the affiant, Detective Nolan, either lied or recklessly disregarded the truth, Albert's counsel stated, "Whether it's his reckless disregard of the truth or the informant's, I'm not sure that line is that bright." Verbatim Report of Proceedings (VRP) at 33.

The trial court found that Albert did not meet her preliminary burden of proof for a *Franks* hearing.

There isn't anything in any of these affidavits which would allow the [c]ourt to find that the officer had some information which indicated the [CRI] is not telling . . . the truth about what happened during this controlled buy, and having that information [Detective Nolan] either disregarded it, [or] intentionally omit it, or having the information he [didn't] care whether it's true or not . . . . The defendant has to show . . . by a preponderance of the evidence that the affiant either intentionally misrepresented something or recklessly disregarding the truth. So, the focus was not what the affiant knew at the time they did the affidavit, and I have nothing in this information that would allow me to find that they had anything other than what they put in the affidavit.

VRP at 37-38 (internal quotation marks omitted). The court denied Albert's motions for a *Franks* hearing, for disclosure of the CRI and the logs and records of the CRI, and to seal her declaration, but it granted Albert's motion for the return of the surveillance device.

**B. MOTIONS TO SUPPRESS VIDEO DATA FROM SURVEILLANCE DEVICE AND FOR A CONTINUANCE**

Albert also filed a pretrial motion to suppress the video from the surveillance device, which was seized during the execution of the search warrant. She also filed a motion for a continuance to view the surveillance device, believing it may contain exculpatory evidence confirming that she was not at home for substantial periods of time during the three-day period of the controlled buy. The court denied the motion for a continuance, stating, "I haven't heard that there is in fact any exculpatory evidence, just the possibility that there might be. There ha[s] been ample time to try to develop the things that are suggested." VRP at 44. Trial began on May 7, 2018. On May 8, the State informed Albert that she could pick up the surveillance device and review the surveillance device.

**C. TRIAL COURT RULING-USE OF SURVEILLANCE DEVICE VIDEO DATA IN REBUTTAL**

During trial, the officers were finally able to gain access to the data contained in the surveillance device but only after the State had rested its case. Once they did gain access by using special software, the video data showed Albert sitting in her kitchen on August 22, 2017, three days prior to the execution of the search warrant, next to a large bag of methamphetamine and a large scale. The trial court ruled that because of the late disclosure, the State could not use the video data in its rebuttal, but that it could be used as impeachment evidence if Albert chose to testify. Albert did not testify, and she rested her case.

The jury found Albert guilty on both counts. During trial, Albert had not been detained. Following her conviction, the trial court remanded her into custody pending sentencing with bail set at \$750,000.



D. POST-TRIAL MOTIONS

Post-trial, the State moved to hold Albert without bail based on information it had received from the Federal Bureau of Investigation (FBI). The FBI had informed the State that it had served a search warrant on Albert two days after her trial concluded. The State was concerned that because Albert was then facing a federal criminal charge, she may have more incentive to flee pending sentencing. Based on this concern, the State requested a no-bail hold. The court granted the State's request.

Albert then filed a motion for discovery regarding the state's evidence of the FBI's search warrant and a motion for discovery of the surveillance device. Albert argued that the FBI allegedly had information of where she had been living and for how long, which was relevant to her request for a *Franks* hearing.

Albert also filed a motion for a new trial, or in the alternative, a motion for arrest of the judgment, arguing that there was insufficient evidence and that the court erred by denying her motion to suppress evidence and her motion for an in-camera interview of the CRI. The court denied both motions.

That same day, the court sentenced Albert to 170 months of confinement and 12 months of community custody. It also heard Albert's motion for an appeal bond. The court set bail at four million dollars.

As pointed out by counsel in his motion on the appeal bond, a no-bail hold is inappropriate unless I find one of four things that are laid out in a case of this type. I cannot find any of them, although I will find that I think [Albert] is likely to flee if she's not held on a substantial bond, but a stay doesn't regard unreasonable trauma to the victims, haven't dealt with legal financial obligations, and wouldn't unduly diminish a deterrent effect of punishment. So, based upon all that, I set bail at four million dollars.

VRP at 466.

Albert appeals.

### ANALYSIS

Albert argues that the trial court erred by denying her request for a *Franks* hearing and her motion for a continuance, and also makes several other assignments of error. We hold that the trial court did not err by denying Albert's request for a *Franks* hearing or by denying Albert's motion for a continuance. However, we decline to decide Albert's other assignments of error because those issues were either not preserved at the trial court, or they were inadequately briefed and thus, we affirm the trial court's orders and Albert's convictions.

#### I. *FRANKS* HEARING

Albert argues that the trial court erred by denying her motion for a *Franks* hearing because she provided evidence to establish that she was not at the residence for a substantial period of time during the period of the controlled buy. We hold that the trial court did not err by denying Albert's motion for a *Franks* hearing.

In *Franks*, the United States Supreme Court held that the Fourth Amendment requires a trial court to conduct an evidentiary hearing upon the defendant's request if the defendant makes a substantial preliminary showing that an affiant deliberately or recklessly made material misstatements in a search warrant affidavit. 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). "Allegations of negligence or innocent mistakes are insufficient." *Franks*, 438 U.S. at 171. Rather, to be entitled to a *Franks* hearing, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Franks*, 438 U.S. at 171.

Albert's counsel informed the court that he used Albert's cell phone records to establish her whereabouts during the three-day period that the CRI purported to have bought methamphetamine from her. Her counsel prepared this information with assistance from a private investigator. Counsel argued that this information demonstrated that Albert was not at home for substantial periods of time during that three-day time period. When the court asked Albert's counsel whether he was arguing that Detective Nolan, the affiant, either lied or recklessly disregarded the truth, Albert's counsel stated, "Whether it's his reckless disregard of the truth or the informant's, I'm not sure that line is that bright." VRP at 33.

The court reviewed Detective Nolan's affidavit for the search warrant which detailed the CRI's allegations, knowledge of Albert, and the controlled buy that occurred between August 16 and August 18, 2017. Detective Nolan described how the CRI knew Albert and described the controlled buy in great detail. He admitted that the CRI is a known drug user and that the CRI "has provided this information . . . for favorable consideration on a criminal charge." CP at 101.

The trial court found that Albert did not meet her preliminary burden of proof for a *Franks* hearing. Albert did not present any evidence to show that Detective Nolan had information which indicated that the CRI was not telling the truth. Instead, Albert focused on whether the CRI lied, but she failed to make a substantial showing that Detective Nolan either lied or recklessly disregarded the truth in his affidavit, as required for a *Franks* hearing. *Franks*, 438 U.S. at 171.

Because Albert failed to meet her preliminary burden, we hold that the trial court did not err by denying her motion for a *Franks* hearing.

## II. MOTION FOR A CONTINUANCE

Albert argues that the trial court erred by denying her motion for a continuance. She argues that a continuance was necessary due to the prejudicial nature of the surveillance device; that the denial of a continuance forced a trial, terminating her ability to testify; and that the denial “created a structural inherent ineffective assistance of counsel in that [Albert]’s trial counsel was unaware of the video showing [Albert] sitting in the apartment next to an ounce of methamphetamine[.]” Br. of Appellant at 14. Albert also argues that a continuance was necessary because her trial counsel was unaware of the surveillance device video which showed her sitting next to a large brick of methamphetamine, and if he had known about it, he would have likely advised her to take the State’s plea offer. We hold that the trial court did not err by denying Albert’s motion for a continuance.

### A. PREJUDICE FROM DENIAL OF A CONTINUANCE

Under CrR 3.3(f)(2), the court may continue the trial “when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” We review a trial court’s decision to deny a motion for a continuance for abuse of discretion. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). We will not disturb the trial court’s decision “unless there is a clear showing it is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *Kenyon*, 167 Wn.2d at 135 (internal quotation marks omitted) (quoting *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005)).

Here, one week before trial, Albert requested a trial continuance to access the contents of the surveillance device, believing it may corroborate her argument that she was not home for substantial periods of time during the period of the controlled buy. At the time of her motion, she

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had not yet seen the video data contained on the surveillance device. The trial court denied the motion, saying “I haven’t heard that there is in fact any exculpatory evidence, just the possibility that there might be. There ha[s] been ample time to try to develop the things that are suggested.” VRP at 44.

During trial, the officers still could not gain access to the data contained in the surveillance device until after the State rested its case. Once they did gain access by using special software, the surveillance device showed Albert sitting in her kitchen on August 22, 2017, three days prior to the execution of the search warrant, next to a large bag of methamphetamine and a large scale. The court ruled that the State could not use the device as rebuttal evidence, but that it could use it as impeachment evidence if Albert chose to testify, which she declined to do.

#### B. INEFFECTIVE ASSISTANCE OF COUNSEL

A claim that counsel was ineffective is a mixed question of law and fact that we review de novo. *State v. Jones*, 183 Wn.2d 327, 338, 352 P.3d 776 (2015). The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). In *Strickland*, the United States Supreme Court set forth a two-prong inquiry for reversal of a criminal conviction based on ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. Under the *Strickland* test, the defendant bears the burden to show (1) counsel’s performance was deficient and (2) counsel’s deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim. *Strickland*, 466 U.S. at 700.

We do not determine whether Albert's trial counsel's performance was deficient because she fails to make any argument explaining how her trial counsel's performance was deficient. RAP 10.3(a)(6). Because Albert fails to make any showing of deficient performance, we do not determine whether Albert was prejudiced. *Strickland*, 466 U.S. at 700.

C. CRR 4.7 VIOLATION

The State has the obligation to provide the defendant with certain material and information within the State's knowledge, possession, or control. CrR 4.7(a). CrR 4.7(h)(2) imposes on the State a continuing duty to disclose certain evidence to the defense, stating:

Continuing Duty to Disclose. If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

"Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). "Exclusion or suppression of evidence or dismissal for a discovery violation is an extraordinary remedy and should be applied narrowly." *State v. Vance*, 184 Wn. App. 902, 911, 339 P.3d 245 (2014).

Here, the State provided the defense with the surveillance device as soon as it was available, once the officers were able to gain access to it after the State rested its case. Once the device was provided, the trial court ruled that because of the late disclosure, the State could not use the device in its rebuttal, but that it could be used as impeachment evidence if Albert chose to testify, which she did not do. We hold that the court properly exercised its discretion to impose a

sanction against the State for its late disclosure, and did not abuse its discretion by denying Albert's request for a continuance.

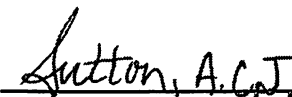
III. ADDITIONAL ASSIGNMENTS OF ERROR-NOT PRESERVED OR INADEQUATELY BRIEFED

Albert makes a number of other assignments of error. *See* assignments of error 1, 3, 5, 8, and 9. However, Albert makes no argument nor cites authority associated with these assignments of error. Therefore, we decline to decide these issues on the merits. RAP 10.3(a)(6) (a brief must contain "[t]he argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record"), 10.3(g); *see also State v. Harris*, 164 Wn. App. 377, 389 n. 7, 263 P.3d 1276 (2011) (assignment of error waived where appellant failed to present supporting argument and legal authority).

CONCLUSION


We affirm the trial court's orders denying Albert's motions for a *Franks* hearing and for a continuance, and thus, we affirm the 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.

  
SUTTON, A.C.J.

We concur:

  
MAXA, J.

  
GLASGOW, J.

**JAMES J. SOWDER**

**May 04, 2020 - 1:05 PM**

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**Appellate Court Case Title:** State of Washington, Respondent v. Dhena Rayne Albert, Appellant  
**Superior Court Case Number:** 17-1-01893-7

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