SUPREME COURT NO. 98893-5

NO. 52506-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STAYCEY COLLINS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Sally F. Olsen, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Staycey Collins, the appellant below, asks this Court to review the decision referred to in Section B.

B. COURT OF APPEALS DECISION

Collins requests review of the Court of Appeal's decision in State v. Collins (52506-2-II) entered on August 4, 2020, and its denial of Collins' Motion to Reconsider entered on December 9, 2020.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Where a citizen is seen selling drugs solely from his car, and there is no evidence establishing he sold drugs from his house or stored drugs in his house, is there an insufficient nexus between the crime and his home to obtain a warrant to search the residence?

2. Where police seek a warrant to search a citizen's residence after observing him conduct a drug deal from his car at another location, is the fact that the citizen stopped somewhere after leaving his house on his way to the drug deal a material fact that must be disclosed by police in the warrant application?

3. Is it sentencing error for the trial court to impose an exceptional sentence pursuant to RCW 9.94A.535(3)(e)(i)[2] where the State

[1] The decision is attached as Appendix A and the ruling is attached as Appendix B.

charged the defendant with three separate drug offenses – none of which involved three or more transactions?

4. Did the Court of Appeals deny petitioner his right to full appellate review when it failed to address the State's concession of sentencing error?

D. RELEVANT FACTS

On March 20, 2017, officers arrested Tamara Churchill and enlisted her assistance in setting up a controlled drug buy involving Collins. RP 294-96. Churchill texted Collins seeking drugs. RP 297, 402. She arranged to meet Collins at her former residence. RP 301. Police followed Churchill to the location and observed Collins arrive in his car. RP 301-06. Collins sold cocaine to Churchill. RP 406, 436.

On March 23, 2017, officers arranged a similar controlled buy through Churchill. RP 409-10. This time officers were watching Collins' residence when Churchill sent a text. RP 310-313, 468. They watched Collins leave his residence and get into his car. RP 468-69. They observed him drive away. RP 472.

Collins did not go straight to meet Churchill. RP 472. Instead, Collins drove to a parking lot, where he met a man who got into his car

[2] RCW 9.94A.535(3)(e)(i) provides that if a single drug offense includes three or more transactions, it is a major violation of the Uniform Controlled Substances Act (VUCSA) thereby supporting an exceptional sentence.

and exchanged something hand-to-hand with Collins. RP 470-72, 546. Officers could not see what was exchanged. RP 547, 574. They informed the other officers involved in the operation about this stop. RP 546-47.

After the man exited the car, Collins proceeded to the location of the controlled buy. RP 472, 547. Collins arrived at Churchill's former residence in his car, reportedly sold her cocaine, and then returned home. RP 317, 326, 328, 413.

On April 4, 2017, Officer Eric Janson sought two search warrants, one for Collins' car and one for his residence. CP 94-115. In the warrant affidavits, he stated:

> Surveillance units advised that Staycey had emerged from his residence through a door in the carport and got into his black Chevy Impala and had left the area. Surveillance units followed Staycey.
>
> The PO was given WestNET funds (cash), an amount consistent with the street value of 1/8 ounce of Cocaine. The PO was followed to the pre-arranged buy location and kept under constant surveillance until after the controlled buy was complete.
>
> Surveillance units advised they were still following Staycey toward the prearranged buy location. Surveillance units then advised they were in the area of the pre-arranged buy location.

CP 100. Nowhere did Janson inform the magistrate that officers had observed Collins make the stop in the parking lot and exchange something with another person before proceeding to the controlled buy. CP 100.

Both search warrants were issued and executed. RP 331, 439. Officers found a large amount of cocaine and paraphernalia consistent with drug dealing in Collins' house. RP 447-57. Collins was charged with three separate drug offenses; two counts of delivery of a controlled substance and one count of possession with intent to deliver.[3] CP 12-19.

As indicated, Collins was charged with three separate transactions. CP 12-19. Yet, the prosecutor added aggravating circumstances to each count alleging a major violation of the uniform controlled substance act (VUSCA). Id.

Prior to trial, Collins moved to suppress the evidence found in his residence, arguing the affidavit did not establish a sufficient nexus between the residence and the alleged drug activity. CP 28-31; RP (4/2/18) 2, 11. Collins also asked for a Franks[4] hearing on the basis the officers had recklessly omitted the fact he had stopped and met another person on his way to the second controlled buy. CP 37-38; RP (4/2/18) 2, 11. His motions were denied. CP 90-92.

On appeal, Collins asserted there was an insufficient nexus between the drug deal and Collins' residence to support a search warrant. Brief of Appellant (BOA) at 6-14. The Court of Appeals disagreed,

[3] These were treated as three transactions for purposes of the exceptional sentence. CP 82.

[4] Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed. 2d 667 (1978).

stating there were grounds to conclude that some kind of evidence of drug dealing might be found in the house. Appendix A at 10.

Collins also asserted on appeal that the trial court erred in not holding a Franks hearing because Collins made a sufficient showing that the affiant omitted – with reckless disregard for the truth – the material fact that Collins stopped on his way to the second controlled buy and exchanged something with a different person while in the car. BOA at 14-18. In response, the State conceded the fact that Collins stopped along the way to the drug deal was material, but it claimed the omission was not reckless. Brief of Respondent (BOR) at 8-9.

The Court of Appeals declined to accept the State's concession. Appendix A at 12-13. It concluded the fact was not material because "[t]here is a reasonable inference Collins was delivering drugs to another customer rather than picking up a supply of drugs as Collins suggests." Appendix A at 13. It also suggested it was reasonable that other evidence of drug dealing might be found in the house based on the fact Collins returned there. Appendix A at 13. The Court of Appeals did not address the question of recklessness. Appendix at A at 13.

Finally, Collins asserted on appeal that the trial court erred when it erroneously instructed the jury on the elements of a major VUSCA offense. BOA at 15-17. The trial court gave an instruction that allowed

the jury to consider the three separately charged offenses collectively when determining whether there were three transactions supporting an exception sentence. CP 82. Based upon the jury's verdict, the trial court imposed an exceptional sentence. CP 122-23. Collins asserted the instruction was erroneous, and the trial court therefore erred when it relied on the jury's verdict as to the major VUSCA aggravator to support an exceptional sentence. BOA at 15-17.

In response, the State argued the instruction did not misstate the law and also pointed out Collins had not objected to it. BOR at 11. Ultimately, however, the State conceded sentencing error on alternative grounds, explaining the evidence was insufficient to support the aggravator which resulted in a double penalty. BOR at 11-13.

The Court of Appeals rejected Collins' challenge to his exceptional sentence because he did not address waiver in his briefing and because it concluded the instruction did not misstate the law. Appendix A at 1, 14-15. The Court of Appeals did not address the State's concession of sentencing error. Id.

Collins filed a motion to reconsider pointing out that the instructional error could be considered for the first time on appeal under RAP 2.5(a)(3) and asking that Court of Appeals to reconsider its analysis

of the instructional error.[5] MTR at 4-7. He also asked the Court of Appeals to consider the State's concession of sentencing error. MTR at 3-4. The Court of Appeals summarily denied this motion. Appendix B.

E. ARGUMENT IN SUPPORT OF REVIEW

I. THE DECISION BELOW CONFLICTS WITH PRIOR CASELAW ESTABLISHING THERE MUST BE A SUFFICIENT NEXUS BETWEEN SUSPECTED EVIDENCE OF CRIMINAL ACTIVITY AND A CITIZEN'S HOME BEFORE POLICE MAY SEARCH THAT HOME.

Review should be granted under RAP 13.4(b)(1) and (2) because the decision below conflicts with this Court's decision in State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999) and the Court of Appeals' decision in State v. Goble, 88 Wn. App. 503, 945 P.2d 263 (1997).

Both the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution require probable cause to support the issuance of a search warrant. State v. Martines, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015) (Fourth Amendment); State v. Ollivier, 178 Wn.2d 813, 846, 312 P.3d 1 (2013) (article 1, section 7). "Probable cause exists when the affidavit in support of the search warrant 'sets forth facts

[5] In the reply brief, appellate counsel did not address the State's concession or respond to the waiver issue raised by the State. However, both these issues were expressly addressed in Collins' Motion to Reconsider (MTR). Constitutional error may be raised for the first time on appeal in such a motion. Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986) (constitutional violation properly considered under RAP 2.5(a) even where raised for first time in motion for reconsideration).

and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.'" Ollivier, 178 Wn.2d at 846–47 (quoting State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003)).

"[P]robable cause requires a nexus between: (1) criminal activity and the item to be seized, and (2) between the item to be seized and the place to be searched." Goble, 88 Wn. App. at (citing Wayne R. LaFave, Search and Seizure § 3.7(d), at 372 (3d ed.1996) (emphasis added)). It is this second nexus – between the item and the place – which is at issue here.

Even if there is a reasonable probability that a person has committed a crime on the street, this does not alone establish probable cause to search a residence. State v. Dalton, 73 Wn. App. 132, 140, 868 P.2d 873 (1994) (citation omitted). Probable cause to search a person's home is also not established just because probable cause exists to search that person's vehicle. Thein, 138 Wn.2d, at 148-49, 151; Goble, 88 Wn. App. at 512. Where there are two possible locations for criminal activity such as a suspect's car or his or her residence, but officers cannot make a direct connection between the criminal activity and the residence, probable cause is not established. Id.

In State v. Thein, officers discovered a marijuana business at one location. They also were provided information by several individuals that the supplier of the marijuana was Thein. Based on this information and the officer's statement about what he believed to be the common habits of drug-dealers (such as storing drugs in their residence), a search warrant was issued for Thein's residence. Thein, 138 Wn.2d at 137-39.

On appeal, Thein challenged the trial court's denial of his motion to suppress the evidence seized at his residence due to a lack of nexus between the alleged criminal conduct and his residence. In response, the State argued that such a nexus is established where there is sufficient evidence to believe a suspect is involved in drug dealing and the suspect resides at the place to be searched. Id. at 140-41. This Court disagreed. Id. at 150–51. It held that in the absence of any statements by the affiant directly tying the defendant's home to suspected criminal activity, there was an insufficient nexus between evidence of the illegal drug activity and the place to be searched. Id. at 148-49, 151. As in Thein, the affidavit in Collins' case rested on evidence of drug activity taking place off the residential premises.

Officers need to make a direct link between narcotics activity and a target residence (not just a car parked at the residence) before a warrant can properly be issued to search the residence. For example, in Goble,

police learned Goble and Loraine Stamper resided at 206 1st Street, Morton, Washington. A confidential source told officers Goble often received illegal drugs through the mail. An officer contacted the United States Postal Inspector, who verified Stamper was currently renting P.O. Box 338. He asked the postmaster to watch for, and notify him of, any packages addressed to that box. Id.

A few weeks later, the same confidential source told police Goble had recently received a shipment of controlled substances. An officer asked the mail handling facility at Sea-Tac Airport to watch for, and notify him of, any packages addressed to P.O. Box 338 in Morton. Shortly afterward, the Sea-Tac mail facility advised that it was in possession of a package addressed to Goble at P.O. Box 338. After a drug dog alerted on the package, police obtained a valid federal search warrant for the package. When they executed the warrant, methamphetamine was found.

Officers then procured a search warrant to follow the package and, if officers observed the package at the residence, they could search Goble's residence. Officers observed Goble pick up the package and return to his residence, but they failed to see Goble actually enter the residence with the package. Thus, the officers only observed a direct link between the drugs and the car, not the residence. Despite this, the search warrant was executed, and methamphetamine was found in the home.

Goble was charged with possession of methamphetamine with intent to deliver and convicted. Id.

On appeal, Gobel challenged the search warrant due to a lack of sufficient nexus between the suspected activity and the residence. The Court of Appeals agreed with Gobel and reversed. It explained:

> When the magistrate issued the warrant, he had no information that Goble had previously dealt drugs out of his house, rather than out of a different place (for example, a tavern, his car, or a public park). He had no information that Goble had previously stored drugs at his house, rather than in some other place (for example, his car, at his place of employment, at a friend's house, or buried in the woods). He had no information that Goble had previously transported drugs from the post office to the house, or that Goble had previously said he intended to do so. In sum, he had no information from which to infer, at the time he issued the warrant, that Goble would take the package from the post office to his house, or that the package would probably be found in the house when the warrant was executed.

Id. at 512.

The facts of this case are similar to those in Goble. In both cases, the link between evidence of drug dealing and the defendant ended at the car, not at the residence. As in Goble, the magistrate here had no information that Collins stored or sold drugs out of his residence rather than a different place (i.e., his car). There were no observations establishing any drugs or proceeds of the sale were taken into Collins' home. There was no observation indicating Collins had been seen

transporting drugs from the residence. Thus, as in Goble, the magistrate simply did not have enough facts to establish probable cause to search Collins' residence.

On appeal, the Court of Appeals suggested that there was a sufficient nexus because Collins received a text setting up the deal and, thus, there was a reasonable inference that Collins' cell phone would be in the house. It also suggested there was a reasonable inference that money from the sale would also be found in the residence. This is a tenuous connection, however. Police did not see Collins take a cell phone or money into his house after the drug deal. Thus, this case is like Gobel in that officers did not observe enough to justify the search of Collins' home. The probable cause to searching ended with the car.

In sum, the Court of Appeals decision creates a conflict with Gobel and Thein. By extending those cases beyond their holdings, the Court of Appeals has made it easier for police to use crimes that occur on the street as a basis to engage in fishing expeditions into citizens' homes. The constitution protects against this. As such, review should be granted under RAP 13.4(b)(1) and (2).

II. REVIEW SHOULD BE GRANTED BECAUSE THIS CASE RAISES A SIGNIFICANT CONSTITUTIONAL QUESTION AS TO WHAT FACTS ARE "MATERIAL" IN THE CONTEXT OF FRANKS V. DELAWARE.

Franks hearings are an important tool in ferreting out police activity that crosses the line between constitutionally valid searches and illegal police overreach. As such, the interpretation of what constitutes a "material fact" for purposes of triggering a Franks hearing is a significant legal question under the federal constitution. Given this, review is merited under RAP 13.4(b)(3).

Factual omissions in a warrant affidavit may invalidate the warrant if the defendant establishes, they are (1) material and (2) made in reckless disregard of the truth. Franks, 438 U.S. at 154-56; State v. Chenoweth, 160 Wn.2d 454, 478–77, 158 P.3d 595 (2007). This is a burden of production; proof by a preponderance of the evidence is not required until the Franks hearing itself. United States v. Glover, 755 F.3d 811, 820 (7th Cir. 2014). If the defendant makes a substantial preliminary showing of an intentional or reckless omission of a fact that is material to the question of probable cause, then the trial court must hold a Franks hearing. Ollivier, 178 Wn.2d at 847; State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992).

Evidence is said to be material "when it logically tends to prove or disprove a fact in issue." State v. Gersvold, 66 Wn.2d 900, 902–03, 406 P.2d 318, 320 (1965). Materiality is judged not only by what the evidence shows but also by whatever inferences may sensibly be drawn therefrom. Id. In Collins' case, any fact tending to logically prove or disprove a nexus between evidence of suspected drug activity and Collins' residence was material.

Collins made an offer of proof that the officers observed him leave his house via his car, stop and exchange something with an individual along the way, and then go to the controlled buy. RP (4/2/18) 4. The State confirmed these facts. RP (4/2/18) 10. The affiant clearly omitted the fact that Collins did not go directly from his house to the controlled buy. CP 100. As explained above, this fact was material to the question of probable cause under Thein and Goble.

The State recognized the omitted fact was material; however, the Court of Appeals rejected its concession. Instead, it concluded the omitted fact was not material because the magistrate could have inferred that Collins was dealing drugs when he stopped in a parking lot along the way to the pre-arranged drug deal. Appendix A at 13. However, the magistrate could have just as easily found that this particular stop broke the link between any drug dealing and Collins' home. As such, the

omitted fact is a fact tending to disprove the nexus between the drug deal and Collins' home.

The Court of Appeals' approach to "materiality" sets too high a bar. Materiality does not require that the defendant show only one reasonable inference. It requires only that he show the omitted fact has a logical tendency to disprove probable cause. Hence, the Court of Appeals' decision erroneously sets a higher legal standard for defendants to meet before they may obtain a Franks hearing to challenge illegal police searches of homes. Thus, its analysis raises a significant question of law under the federal constitution. As such, review should be granted under RAP 13.4(b)(3).

III. WASHINGTON COURTS ARE MISCONSTRUING RCW 9.94A.535(3)(e)(i), WHICH IS RESULTING IN ERRONEOUS JURY INSTRUCTIONS AND UNSUPPORTED EXCEPTIONAL SENTENCES.

As explained below, both the trial court and the Court of Appeals have misconstrued the plain language of RCW 9.94A.535 (3)(e)(i), which resulted in Collins' erroneous exceptional sentence. Review by this Court should be granted so this misapplication of the sentencing statute does not persist in criminal cases and to correct an unjust sentence in Collins' case in particular.[6]

[6] A defendant may challenge a jury instruction on appeal the first time on appeal under RAP 2.5(a)(3). State v. Brown, 147 Wn.2d 330, 344, 58 P.3d 889(2002)

RCW 9.94A.535(3)(e)(i) states that a current offense qualifies as a major VUCSA if "The current offense involved at least three separate transactions." (emphasis added). Collins was charged with three separate drug offenses – none of which involved three transactions. Aggravating factors must be proved to the jury just as the elements of the underlying offense must be proved to the jury. State v. Gordon, 172 Wn.2d 671, 678, 260 P.3d 884 (2011). Yet, as instructed here, the jury was permitted to aggregate the transactions from three separate drug offenses for purposes of finding this aggravating sentencing factor. CP 82. This instruction flatly misled the jury as to what the law required to find a major VUSCA.

The State disagreed this case involved an instructional error, but it acknowledged the aggravator did not apply in Collins' case.

> The ultimate problem in this record is that the trial court counted points for each offense and then used each of the already counted offenses to establish the aggravator. CP 122-23. This double counting was error. State v. Fisher, 108 Wn.2d 419, 425-26, 739 P.2d 683 (1987).

BOR at 12-13. Ultimately, the State arrived at the same conclusion as Collins – the trial court errored in imposing the aggravated sentence – it just arrived at that conclusion by applying a different analytical lens. Id. In the end, both parties agreed that the matter needed to be remanded for resentencing without the aggravator. Id.

The Court of Appeals concluded otherwise. Without much analysis, it held that the jury instruction was consistent with the statute, despite the fact that it instructed the jury to aggregate the transactions of multiple offense (Counts I, II, and III) to reach the threshold number of transactions for triggering RCW 9.94A.535(3)(e)(i)'s application. Appendix A at 13, n. 3. Moreover, it made no mention of the State's concession as to sentencing error and double counting. Id.

The Court of Appeals decision is inconsistent with the plain language of 9.94A.535(3)(e)(i) and works an injustice under Washington's sentencing law. The Court of Appeals' application of RCW 9.94A.535(3)(e)(i) and the trial court's erroneous instruction demonstrate that, if left unchecked, Washington courts will likely continue to impose and uphold erroneous aggravated sentences under this sentencing factor. This kind of double penalty is inconsistent with the SRA and works a fundamental injustice and thereby violates due process. See, State v. Jones, 182 Wn.2d 1, 6, 338 P.3d 278 (2014) (recognizing sentences that are based on false information or are unsupported by the record implicate fundamental principles of due process). As such, this case raises both a significant constitutional question and an issue of substantial public importance that should be determined by this Court. Review is thus appropriate under RAP 13.4(b)(3) and (4).

IV. A DEFENDANT IS DENIED HIS CONSTITUTIONAL RIGHT TO FULL APPELLATE REVIEW WHEN THE COURT OF APPEALS FAILS TO CONSIDER A CONCESSION OF SENTENCING ERROR MADE BY THE STATE.

While appellate review is merely a privilege under the federal constitution, in Washington, it is a right. State v. Schoel, 54 Wn. 2d 388, 392, 341 P.2d 481 (1959). Indeed, as a general rule, the Washington Constitution guarantees criminal defendants the right to appeal "in all cases." State v. Delbosque, 195 Wn.2d 106, 125, 456 P.3d 806 (2020).

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed **and the right to appeal in all cases[.]**

Wash. Const. art. I, § 22 (emphasis added). Included in this right to appeal is the right to have the appellate court consider the merits of all the issues raised on appeal. State v. Rolax, 104 Wn.2d 129, 134-35, 702 P.2d 1185 (1985).

There are a few limited exceptions to Wash. Const. art. I, § 22; specifically, standard range sentences pursuant to the SRA are not appealable. RCW 9.94A.585(1). However, even RCW 9.94A.585(1) "does not bar a party's right to challenge the underlying legal conclusions

and determinations by which a court comes to apply a particular sentencing provision." State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Indeed, "appellate review is still available for the correction of legal errors or abuses of discretion in the determination of what sentence applies." Id.

The legal question presented here is whether a defendant is deprived of his constitutional right to appeal when the Court of Appeals upholds the defendant's sentence without first meaningfully considering the State's concession of sentencing error. This question needs to be resolved by this Court, and this case is the perfect vehicle to do so. An unequivocal concession of sentencing error was made here, and the Court of Appeals had an obligation to consider it to assure Collins his right to appellate review.[7]

In this case, justice demands that there be meaningfully consideration of the State's concession of sentencing error. The Court of Appeals has not done so. On this ground alone, review should be granted.

[7] Not only is such consideration constitutionally required, but it is also required under the jurisprudence of this Court. This Court has recognized it is the primary duty of Washington's appellate courts "to see that justice is done in the cases which come before [them], which fall within [their] jurisdiction." State v. Saintcalle, 178 Wn.2d 34, 71–72, 309 P.3d 326, 349 (2013), abrogated on different grounds by City of Seattle v. Erickson, 188 Wn.2d 721, 398 P.3d 1124 (2017) (Gonzales, J. concurring) (quoting O'Connor v. Matzdorff, 76 Wn.2d 589, 600, 458 P.2d 154 (1969) and citing RAP 1.2 and 7.3). Accordingly, this Court has "frequently recognized it is not constrained by the issues as framed by the parties" and will "reach issues not briefed by the parties if those issues are necessary for decision." Id. (citations omitted).

Review is also appropriate because this case raises a significant question under Washington's constitution regarding what suffices to meet the constitutional right to appellate review. Finally, there is a substantial public interest in having this Court determine just when appellate courts are not meeting their obligations under Wash. Const. art. I, § 22. As such, review is appropriate under RAP 13.4(b)(3) and (4).

F. CONCLUSION

For the reasons stated above, appellant asks this Court to grant review.

Dated this 6th day of January, 2020.

Respectfully submitted

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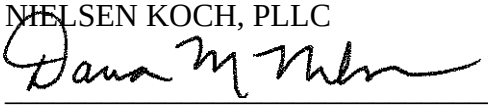

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APPENDIX A

Filed
Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STAYCEY DARRELL COLLINS, Appellant.	No. 52506-2-II UNPUBLISHED OPINION

LEE, C.J. — Staycey D. Collins appeals his convictions for two counts of delivery of a controlled substance and one count of possession with intent to manufacture or deliver. Collins argues that the trial court erred by denying his motion to suppress evidence found in his residence because the search warrant was not supported by probable cause. Alternatively, Collins argues that the trial court erred by denying his motion for a *Franks*[1] hearing regarding an omission from the search warrant affidavit. Collins makes similar arguments in his statement of additional grounds (SAG).[2] The trial court did not err by denying Collins' motion to suppress or the motion for a *Franks* hearing.

Collins also appeals his sentence, arguing the trial court's jury instructions regarding the charged aggravating circumstances were a misstatement of the law. Because Collins did not object

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[1] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

[2] RAP 10.10.

to the jury instructions, we do not consider this argument. Accordingly, we affirm Collins' convictions and sentence.

FACTS

A. MOTION TO SUPPRESS/*FRANKS* HEARING

On April 10, 2017, the State charged Collins with one count of possession of a controlled substance with intent to manufacture or deliver. On June 7, the State amended the information to include a school bus stop enhancement.

On September 17, 2018, the State filed a second amended information adding two counts of delivery of a controlled substance. And the State added an aggravated circumstance to all three counts, alleging that all the counts were major violations of the uniformed controlled substances act (VUCSA).

On January 25, 2018, before the State filed its second amended information, Collins filed a motion to suppress evidence found in Collins' home. Alternatively, Collins sought "leave to later request a *Franks* hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1985)." Clerk's Papers (CP) at 20. Collins argued that the search warrants authorizing the search of Collins' home and vehicle were not supported by probable cause because the facts alleged in the affidavits supporting the search warrant requests did not establish a nexus between the alleged criminal activity and the place to be searched.

Detective Eric Janson, a Kitsap County Sheriff's Office detective assigned to the West Sound Narcotics Enforcement Team (WestNET), applied for the search warrants. Probable cause for the warrants was based on two controlled buys that Detective Janson performed with a police informant.

Detective Janson described the first controlled buy as occurring during the week of March 20, 2017. Janson and another detective met with the informant prior to the controlled buy and searched the informant and the vehicle for drugs, money, or weapons. A small amount of marijuana was found and held until the controlled buy was completed. The informant arranged to meet Collins at a pre-arranged buy location via text message. The informant completed the controlled buy while under surveillance by police units. After the controlled buy was completed, the informant provided Detective Janson with 3.7 grams of cocaine and stated that Collins exchanged the cocaine for the pre-recorded money provided by the detectives.

The second controlled buy was also conducted during the week of March 20. For this controlled buy, Detective Janson arranged for a surveillance unit to follow Collins from his home to the buy location and then back to Collins' home. Prior to the controlled buy, the informant was searched for drugs, money, and weapons, and none were found. The informant again arranged to meet Collins at a pre-arranged location via text message. The assigned surveillance unit observed Collins leave his house, get into his vehicle, and drive to the controlled buy location. The controlled buy was conducted under police surveillance. After the controlled buy, Detective Janson recovered 3.5 grams of cocaine from the informant. The informant stated she obtained the cocaine from Collins in exchange for the pre-recorded buy money provided by the detectives. Surveillance units followed Collins from the controlled buy location to his residence, where they observed him exit the vehicle and go inside.

In the affidavits for search warrant, Detective Janson noted that the informant was working with the police in exchange for prosecutorial consideration. Detective Janson stated that much of the informant's information had been corroborated by independent sources and, to his knowledge,

the informant had not provided any false or misleading information to detectives. Detective Janson also noted that the informant struggled with narcotics addiction and had used narcotics in the past. Detective Janson disclosed the informant's criminal history of two prior drug convictions.

The search warrant requests sought authority to search Collins' residence for controlled substances, records related to the use and sale of narcotics, drug paraphernalia, money and proceeds from the sale of narcotics, financial records demonstrating how drug funds are utilized, telephone records related to co-conspirators or customers, and electronic equipment such as cell phones.

In support of his motion to suppress, Collins argued that the search warrant was not supported by probable cause because there was no allegation that anyone saw or knew of drugs or contraband being stored in Collins' house. Collins also argued that there was no established nexus between evidence of drug possession and Collins' home. And Collins claimed the search warrant was invalid because it was based on material misrepresentations and omissions by the police. However, Collins' motion did not include allegations regarding what misrepresentations or omissions were made or any allegations that the misrepresentations or omissions were intentional or reckless. In fact, Collins motion contains no factual allegations supporting the claim regarding misrepresentations or omissions.

At the suppression hearing, Collins asserted that he was observed making a brief stop to contact another individual on the way from his home to the controlled buy location. The State responded to Collins' assertion by arguing,

> The defendant stopped and made another drug deal before proceeding to this drug deal.

> So I don't know if the defense is trying to claim that per chance that's a *Franks* issue because they did raise *Franks* in their—in their—in their briefing. But it really would add to the probable cause if they had added that additional information. He made a very brief stop where according to the officer's training and experience, they would identify it as another drug deal. And then he went on to make this drug deal before returning directly to the residence.

Verbatim Report of Proceedings (VRP) (April 2, 2018) at 9. Collins disputed that it was a drug deal and instead characterized it as a short stay in a public parking lot. Collins presented no other facts regarding misrepresentations or omissions at the suppression hearing.

The trial court denied Collins' motion to suppress. In its oral ruling, the trial court concluded that the facts alleged in the search warrant affidavits supported a finding of probable cause. And the trial court stated,

> So with that in mind, in terms of the *Franks* issue—I mean I think the prosecution's analysis of the *Franks* issue is correct. I'm not going to prohibit the defendant from—if they have additional information—or come across additional information to present that. But as it stands with the information I have in front of me this morning, there would be insufficient basis for a *Franks* hearing at this time. But whether or not that information comes to light to the defense, they certainly aren't precluded from raising it again with additional information. But based on the information I have before me, there's insufficient facts to support a *Franks* hearing at this time.

VRP (April 2, 2018) at 12. In its written order, the trial court incorporated the affidavits supporting the search warrants. And the trial court made the following relevant conclusions of law,

> [III.] That a nexus existed between the defendant's criminal activity and the place to be searched, the defendant's home, even though the controlled buys did not take place at the residence. Under *State v. G.M.V.*, 135 Wn. App. 366, 144 P.3d 358 (2006), a nexus between the defendant's residence and his criminal drug dealing is established if Officers observe the defendant leave from and return to the residence after he sold drugs. In this case, the Officers conducted surveillance on the defendant's residence. Almost immediately after the informant notified the defendant that she wished to purchase drugs, the defendant left his home, drove to the area of the controlled buy, met with the informant, sold the informant cocaine,

> and then returned home. This is sufficient information to provide a nexus between the defendant's residence and his drug dealing activity.
>
> [IV.] That the defendant's request for a Frank's hearing is denied because the defendant has not alleged any omission or misrepresentations that would affect the Issuing Magistrate's determination of probable cause.

CP at 92. Collins did not renew his motion for a *Franks* hearing.

B. TRIAL

The case proceeded to a jury trial on Count I, delivery of a controlled substance (the first controlled buy), Count II, delivery of a controlled substance (the second controlled buy), and Count III, possession of a controlled substance with intent to deliver with a school bus stop enhancement. All three counts also included a major VUCSA aggravating circumstance allegation.

Detective Janson testified at the jury trial to the facts surrounding both controlled buys consistent with the facts presented in the search warrant affidavits as discussed above. Detective Janson also testified that, after the controlled buys were completed, a search warrant was served on Collins' residence. During that search, officers found cocaine and money in Collins' residence. Some of the cocaine was packaged in separately wrapped bags. The officers also found paraphernalia associated with the packaging and sale of drugs. The officers further found a large amount of cocaine during the search.

The trial court gave the jury the following instructions regarding the major VUCSA aggravating circumstance,

Instruction No. 21

> If you find the defendant guilty of Delivery of a Controlled Substance as charged in Count I and II, or Possession with intent to deliver a controlled substance as charged in Count III, then you must determine if any of the following aggravating circumstances exist:

> 1) Whether the crime was a major violation of the Uniform Controlled Substances Act
>
> . . .
>
> Instruction No. 23
>
> A major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense. The presence of any of the following factors may identify the offense charged in Count I, II, and III as a major trafficking violation:
>
> Whether the offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so; or
>
> Whether the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use

CP at 80, 82. Collins did not object to the trial court's jury instructions on the major VUCSA aggravating circumstance.

The jury found Collins guilty of all three counts. The jury also found a major VUCSA aggravating circumstance for all three convictions and that the possession of a controlled substance with intent to deliver was committed within one thousand feet of a school bus route stop.

Collins had no felony criminal history. Therefore, Collins' standard sentence range on the delivery of a controlled substance convictions was 12 months plus 1 day to 20 months and his standard sentence range on the possession of a controlled substance with intent to deliver conviction, including the school bus stop enhancement, was 36 to 44 months. Based on the major VUCSA aggravating circumstance found by the jury, the trial court imposed an exceptional sentence of 68 months confinement.

Collins appeals.

ANALYSIS

A. MOTION TO SUPPRESS

Collins argues that the trial court erred by denying his motion to suppress because the affidavit supporting probable cause "failed to establish a nexus between suspected drug activity and the residence." Br. of Appellant at 6. Although Collins concedes that there was sufficient probable cause to support the search of Collins' vehicle, he contends that there was not probable cause to search his residence because the "officers did not observe a direct link between any drug activity and Collins' house." Br. of Appellant at 8. However, because there were sufficient facts alleged in the affidavit to support the reasonable inference that the evidence the officer sought would be found in the residence, the trial court did not err in concluding that the warrant to search Collins' residence was supported by probable cause.

We review a trial court's determination of probable cause at a suppression hearing de novo. *State v. Dunn*, 186 Wn. App. 889, 896, 348 P.3d 791, *review denied*, 184 Wn.2d 1004 (2015). Our review is limited to the four corners of the document supporting probable cause. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The information is reviewed as a whole to determine whether a determination of probable cause is supported. *Dunn*, 186 Wn. App. at 896. And we review the supporting document "'in a commonsense manner, rather than hypertechnically.'" *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012) (quoting *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003)).

A search warrant may only issue upon a determination of probable cause "based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location." *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925

(1995). Probable cause exists as a matter of law if the supporting affidavit contains sufficient facts and circumstances to establish a reasonable inference that the defendant is probably engaged in illegal activity and that evidence of that illegal activity is at the location to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Therefore, "'probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). The nexus between the evidence to be seized and the place to be searched must be established by specific facts rather than by generalizations or conclusory predictions. *Thein*, 138 Wn.2d at 146-47.

Here, officers surveilling Collins during the second controlled buy observed that Collins was home at the time the text messages setting up the controlled buy were sent. The officers then observed Collins leave the house and drive to the controlled buy location. And the officers observed Collins go directly back to the residence. Detective Janson sought a search warrant to search the residence, not just for drugs, but also other evidence such as records, money, other proceeds from drug sales, electronic equipment such as cell phones, and drug paraphernalia. The fact that officers observed Collins in the house at the time the text messages were sent allows for the reasonable inference that Collins' cell phone would be found in the house when it was searched. Furthermore, when Collins returned to the residence directly after the controlled buy, there was a reasonable inference that Collins would have taken the money from the controlled buy into the house with him.

Collins asserts that case law stands for the proposition that if there are two places that drugs could be stored, officers must establish a direct link between the place to be searched and the drugs.

First, this argument is misplaced because the officers were not simply searching for drugs at the residence, they were searching for various types of evidence and, as explained above, there are facts that allow for the reasonable inference that evidence of drug crimes would be found at the residence. Second, Collins' argument fails because no such rule exists. Collins relies on *Thein* and *Goble* to support his argument. Neither cases establishes that the warrant here was not supported by probable cause.

Thein does not apply to this case because, in *Thein*, the affidavit supporting probable cause alleged no specific facts that applied to the defendant's residence. 138 Wn.2d at 138-39. Instead, the officers had evidence that the defendant was supplying drugs to a third party and sought a search warrant for the defendant's house based on the common habits and practices of drug dealers. *Id.* These types of generalizations are insufficient to establish probable cause. *Id.* at 147-48.

Here, however, the officers did not rely on generalizations regarding the common habits or practices of drug dealers to support the determination of probable cause. Instead, the officer directly observed Collins go from his residence to the controlled buy and back to his residence. Thus, unlike *Thein*, there were specific facts here that allowed for the reasonable inference that evidence of drug dealing would be found in Collins' residence.

In *Goble*, officers identified a package at a mail facility that contained methamphetamine addressed to the defendant's Post Office box. 88 Wn. App. at 505. An officer sought a search warrant for the defendant's home. *Id.* at 505-06. Because there was no evidence establishing the defendant was taking drugs from the post office box to his home, the magistrate granted the warrant only on the condition that the package is transported to the defendant's residence. *Id.* at 506-07. The officer observed the defendant pick up the package and walk toward his house. *Id.* at 507.

However, officers failed to observe the defendant actually enter the residence with the package. *Id.* The court held that the warrant was not supported by probable cause at the time it was issued because there were no facts that indicated that any evidence would be found at the defendant's home. *Id.* at 512. Instead, the facts only established that the defendant had drugs shipped to a Post Office box. *Id.* In fact, the magistrate recognized this deficiency by imposing a condition on the search warrant. *Id.* Therefore, there were not sufficient facts, at the time the warrant was issued, to allow for a reasonable inference that there was probable cause to search the home. *Id.* at 512-13. Nothing in *Goble* states that a "direct link" is required between the drugs and the residence if the defendant could also be storing drugs in a vehicle. Br. of Appellant at 11.

Here, unlike in *Goble*, surveillance officers had observed Collins leave his residence, go to the controlled buy, and return home. There were specific facts that allowed for the reasonable inference that the evidence officers sought was in Collins' residence. Thus, because there was a nexus between the evidence to be seized and the place to be searched, probable cause was established.

Because the warrants were supported by probable cause, the trial court did not err by denying Collins' motion to suppress. Accordingly, we affirm the trial court's order denying Collins' motion to suppress.

C. MOTION FOR *FRANKS* HEARING

1. Direct Appeal

Collins also argues that the trial court erred by denying his motion for a *Franks* hearing. Collins asserts that the fact that he made a stop in between the time he left his house and the time of the controlled buy constituted a material omission from the search warrant affidavit. The State

concedes that the omission in the affidavit supporting probable cause was material. For the reasons explained below, we reject the State's concession. Because the omission was not material to the finding of probable cause, the trial court did not err by denying the motion for a *Franks* hearing.

We review the trial court's denial of a *Franks* hearing for an abuse of discretion. *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985). Under the Fourth Amendment of the United States Constitution, omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are material and made in reckless disregard for the truth. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). To be entitled to a *Franks* hearing, the defendant must make a substantial preliminary showing that the affiant deliberately or recklessly made material misstatements in a search warrant. *State v. Chenoweth*, 160 Wn.2d 454, 478-79, 158 P.3d 595 (2007).

An omission is material if it was necessary to the determination of probable cause. *State v. Copeland*, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996). To establish materiality, the defendant "must show that probable cause to issue the warrant would not have been found if the omitted material had been included." *Id.*

The omission here was not material to the probable cause determination. Collins argues that leaving out the brief stop that he made on the way to the second drug buy eliminates the nexus between the criminal activity and his house. Br. of Appellant at 17 ("the magistrate would likely have been concerned that this individual who got in the car provided Collins with the drugs he ultimately sold in the controlled buy rather than those drugs coming from Collins' residence."). But this is incorrect.

Here, the stop on the way to the controlled buy was brief and the officers observed only a short exchange. There is a reasonable inference that Collins was delivering drugs to another customer rather than picking up a supply of drugs as Collins implies.

And it is undisputed that Collins returned directly home after he completed both controlled buys. In order to support probable cause to search the house there only needs to be sufficient facts to support a reasonable inference that some evidence of the criminal activity would be found in the house. Even if, as Collins implies, the stop indicates that there would be no drugs found in the house, it is entirely reasonable to infer that other evidence of drug dealing, such as records, money, or proceeds from drug sales, and Collins cell phone would be found in the house because Collins returned directly to the house after completing the controlled buy.

Because the affidavits establish probable cause to search Collins' residence, even with the additional fact considered, the omitted fact was not material to the determination of probable cause. Therefore, the State's concession that the omission was material is not well-taken and we reject it. The trial court did not abuse its discretion by determining that the omitted fact was immaterial to the determination of probable cause and did not warrant a *Franks* hearing.

2. Statement of Additional Ground (SAG)

Collins also raises in his SAG a multitude of additional facts he believes were improperly omitted from the warrant. However, none of the facts Collins relies on to support his claim were presented to the trial court at the motion for a *Franks* hearing.

We do not review issues raised for the first time on appeal. RAP 2.5(a). Because the evidence on which Collins relies was not before the trial court when it denied the motion for a *Franks* hearing, it is being raised for the first time on appeal.

However, RAP 2.5(a)(3) provides an exception for a "manifest error affecting a constitutional right." "Application of RAP 2.5(a)(3) depends on the answers to two questions: '(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?'" *State v. Grott*, 195 Wn.2d 256, 267, 458 P.3d 750 (2020) (quoting *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015)).

Here, a *Franks* hearing implicates protections guaranteed by the Fourth Amendment and, therefore, could be considered an error of constitutional magnitude. However, nothing in Collins' SAG claim provides any information that would show that the officers acted intentionally or with reckless disregard for the truth. *Chenoweth*, 160 Wn.2d at 478-79. And because intent or reckless disregard for the truth cannot be inferred from the omissions, nothing provided in Collins' SAG would entitle him to a *Franks* hearing. *Chenoweth*, 160 Wn.2d at 481. Therefore, the alleged error is not manifest and we decline to address it.

C. AGGRAVATING CIRCUMSTANCES

Collins argues that the trial court's jury instructions on the major VUCSA aggravating circumstance were a misstatement of the law. However, Collins did not object to the jury instructions and makes no argument as to why we should review the jury instructions for the first time on appeal. Accordingly, we decline to address Collins' argument.

"Generally, a party who fails to object to jury instructions below waives a claim of instructional error on appeal." *State v. Edwards*, 171 Wn. App. 379, 387, 294 P.3d 708 (2012); RAP 2.5(a). RAP 2.5(a)(3) provides an exception for a manifest error affecting a constitutional right. "Application of RAP 2.5(a)(3) depends on the answers to two questions: '(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party

demonstrated that the error is manifest?'" *Grott*, 195 Wn.2d at 267 (quoting *Kalebaugh*, 183 Wn.2d at 583).

Here, Collins' does not present any argument or authority supporting review of the major VUCSA aggravating circumstance instructions under RAP 2.5(a)(3). In fact, Collins' briefing fails to even acknowledge that Collins did not object to the jury instructions he now asserts are error. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290, *review denied*, 136 Wn.2d 1015 (1998). Because Collins has presented no reasoned argument to support review under RAP 2.5(a)(3), we decline to address Collins's assignment of error regarding the jury instructions.[3]

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[3] Even if we addressed the merits of Collins's assignment of error, his challenge to the jury instructions would fail. Collins argues that the language in Jury Instruction No. 23 misstated the law. The jury instruction stated,

> A major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense. The presence of any of the following factors may identify the offense charged in Count I, II, and III as a major trafficking violation:
>
> Whether the offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so[.]

CP at 82. This is consistent with the language of RCW 9.94A.535(3)(e) which states, in relevant part, that it is an aggravating circumstance supporting an exceptional sentence if,

> The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:
>
> (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so[.]

CONCLUSION

The trial court did not err by denying Collins's motion to suppress the evidence found in his residence or Collins's motion for a *Franks* hearing. And Collins waived his challenge to the trial court's jury instructions regarding the major VUCSA aggravating circumstance. Accordingly, we affirm Collins's convictions and sentence.

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.

, C.J.

Le , C.J.

We concur:

Maxa, J.

Maxa, J.

Cruser, J.

Cruser, J.

Accordingly, the jury instruction was not a misstatement of the law.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

December 9, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

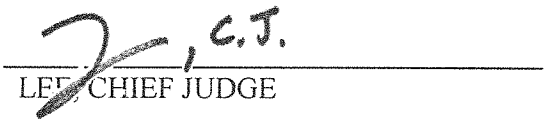
DIVISION II

STATE OF WASHINGTON, Respondent, v. STAYCEY D. COLLINS, Appellant.	No. 52506-2-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Staycey D. Collins, filed a motion for reconsideration of this court's unpublished opinion filed on August 4, 2020. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Maxa, Lee, Cruser



LEE, CHIEF JUDGE

NIELSEN KOCH P.L.L.C.

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