**43297-8-II**

**COURT OF APPEALS, DIVISION II**
**OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

**JOHN R. GARDNER, JR.**
Appellant

43297-8-II

On Appeal from Grays Harbor County Superior Court
Cause number 11-1-00343-7

The Honorable Gordon Godfrey

# BRIEF OF APPELLANT

**Jordan B. McCabe, WSBA No. 27211**
**Attorney for Appellant, John R. Gardner, Jr.**

McCABE LAW OFFICE
PO Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

## CONTENTS





McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

## I. AUTHORITIES CITED

### Washington Cases





McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

**Washington Statutes**



**Federal Cases**





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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

**Constitutional Provisions**



**Treatises**





McCABE LAW OFFICE
P.O. BOX 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

## II. ASSIGNMENTS OF ERROR AND ISSUES

A. ***Assignments of Error***:

1. The trial court's findings are not supported by substantial evidence and do not support the conclusions of law.

2. The trial court erroneously upheld a search warrant that was issued without probable cause.

3. The trial court erroneously denied Appellant's *Franks*[1] challenge to the warrant affidavit based on false information recklessly or intentionally included in the affidavit.

4. The *Franks* hearing court relied on impermissible inferences in violation of the appearance of fairness doctrine.

5. At Appellant's bench trial on a single count of possession of methamphetamine, the evidence was insufficient to prove constructive possession by means of dominion and control over the premises where drugs were found.

7. At Appellant's bench trial for possession, the court erroneously admitted and considered evidence of uncharged offenses contrary to ER 404(b).

B. ***Issues Pertaining to Assignments of Error***.

1. Appellant assigns error to the following findings.

A. Suppression

Statement of disputed facts: Did Frank Wirshup tell law enforcement that he had seen methamphetamine in Gardner's motel room and that he had purchased methamphetamine from Gardner in the past? CP 64.

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[1] *Franks v. Delaware*, 438 U.S. 1354, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).



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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

Finding as to Disputed Facts. Frank Wirshup told law enforcement that he had seen methamphetamine in Gardner's motel room and had purchased methamphetamine from Gardner in the past and signed a written statement to that [e]ffect. CP 64.

B. Bench Trial

Finding 1, CP 74. The defendant was originally charged with possession with intent to deliver.

Finding 2, CP 74-75. Appellant was residing in the motel room when the police executed the search warrant.

Finding 3, CP 75. The parties stipulated to the admissibility of the methamphetamine.

Finding 3, CP 75. While executing the warrant, the officers found "packaging material … , a scale… , drug paraphernalia … .

Finding 3, CP 75. While executing the warrant, "the officers found heroin and oxycodone that the defendant has not been charged with."

2. The evidence was insufficient prove that Appellant exercised dominion and control over the motel room where drugs were found.

3. The search warrant affidavit failed to establish that hearsay statements from three informants met the *Aguilar Spinelli* test for basis of knowledge and credibility.

4. The affidavit failed to establish a basis of knowledge for the primary informant.

5. The affidavit failed to establish the primary informant's credibility

6. The affidavit failed to establish a basis of knowledge for the secondary informants.

7. The affidavit failed to establish the secondary informants' credibility.


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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

***Issues, cont.***

8. The trial court failed to adequately address Appellant's Franks motion.

9. The court violated the appearance of fairness doctrine by basing its *Franks* ruling on impermissible inferences.

10. After striking the objectionable material, the affidavit is insufficient to support a search warrant.

11. The trial court admitted irrelevant and prejudicial evidence in violation of ER 404(b).



McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

## III. STATEMENT OF THE CASE

***Summary***: Appellant John R. Gardner, Jr. was present in a two-bedroom suite at a Hoquiam motel when police executed a search warrant and found methamphetamine. Gardner was originally charged with possession with intent to deliver methamphetamine. On the day of trial, the State elected to proceed on a single count of simple possession. Gardner waived a jury and was convicted following a bench trial.

On appeal, Gardner challenges the sufficiency the evidence presented at trial to prove actual or constructive possession of methamphetamine found during the search. Specifically, Gardner contends that the State failed to establish his dominion and control over the premises where the drugs were found.

Gardner contends the trial court erroneously denied his motion to suppress physical evidence obtained under a search warrant that was issued without probable cause. Specifically, the warrant affidavit did not meet either prong of the *Aguilar-Spinelli* test for any of the three informants upon whose hearsay the magistrate relied. The affidavit demonstrated neither a basis of knowledge nor the informants' credibility under the particular circumstances.

Gardner challenges the sufficiency of the affidavit to support a warrant if the objectionable material is excised.



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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

Gardner also contends the trial court erroneously denied his *Franks* motion to void the warrant based on the affiant's reckless or intentional omission of pertinent information from the affidavit. Gardner challenges the trial court's impartiality.

Finally, Gardner challenges the trial court's erroneous ER 404(b) ruling whereby the court admitted and relied upon irrelevant and highly prejudicial evidence of uncharged offenses.

***Facts***: On August 26, 2011, Hoquiam police patrol sergeant Jeremy Mitchell obtained a warrant to search Room 9 at the Snore and Whisker Motel in Hoquiam, Washington, based on an affidavit that included the following facts. CP 17-22.

On August 24, 2011, Frank Wirshup, a homeless resident of Hoquiam, stole a $34 tool from an Ace Hardware store. CP 20; 1/25 RP 3. On the following day, August 25th, the police viewed a store surveillance video recognized Wirshup. It was not until the day after that, on August 26th, that Mitchell tracked Wirshup to his tent in the woods and arrested him. CP 20; 1/25 RP 3. Wirshup admitted stealing the tool on August 24 and said he had sold it to a person called Jonny Five at Room 9 of the Snore and Whisker Motel. 1/25 RP 3-4. Without explanation, Officer Mitchell claimed he knew "Jonny Five" was a nickname for Appellant, John R. Gardner. CP21; 1/25 RP 4.


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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

Mitchell alleged that Wirshup signed a written statement that he saw some methamphetamine in the motel room along with a digital scale and packaging materials, that he had bought meth from "Jonny Five" in the past, and that he had personal knowledge that he sold meth to others. CP 20. The affidavit asserts that Wirshup signed a written statement. CP 21. But the affidavit does not state any basis for this knowledge, such as when and where or how Wirshup had engaged in or witnessed any such transaction. CP 20.

Mitchell claimed to have typed up a statement for Wirshup because he could not read or write. 1/25 RP 5. He conceded that he knew Wirshup could not read and that Wirshup reminded him of this when he instructed Wirshup to read the statement and sign that it was correct. Instead of reading the statement to Wirshup, however, Mitchell simply instructed Wirshup to do his best. 1/25 RP 26, 28-29. Later, Wirshup provided a sworn statement to the defense investigator in which he denied having told the police he saw any drugs. CP 7, para 11; CP 16. Wirshup testified that he is a heroin addict and has no interest in methamphetamine. 1/25 RP 24.

In addition, Mitchell failed to mention in the affidavit that Wirshup had several convictions for crimes of dishonesty. Mitchell claimed he did not think this was relevant. 1/25 RP 7.


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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

The affidavit alleged that Mitchell had received corroborating information from two police informants. One, Officer Dayton, claimed to have investigated Gardner for suspected drug activity in the past. 1/25 RP 4. Currently, however, other than observing what he deemed an excessive number of visitors, Dayton's investigations had come to naught. The second police informant, Detective Bradbury, provided hearsay information regarding his own fruitless investigation of Gardner. CP 21.

Finally, the affidavit stated that one week earlier, on August 19, 2011, Mitchell had investigated a parking violation at the Snore and Whisker, and that Gardner had told him he occupied Room 9. 1/26 RP 4. The affidavit did not claim that Mitchell had any evidence that Gardner rented Room 9. CP 21.

A judge issued a search warrant based on this affidavit. CP 25.

Mr. Gardner was present in Room 9 when the police executed the warrant. They broke down the door with a battering ram, immediately arrested Gardner, then searched the room.1/31 RP 48-49. In a second bedroom, they found a baggy of methamphetamine in a laundry hamper. 1/31 RP 56, 71. In the main bedroom were a set of digital scales and some small baggies. 1/31 RP 52-54. Nowhere in the entire suite did police find a single item of evidence connecting Mr. Gardner with the


McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordan.mccabe@yahoo.com

premises. 1/31 RP 65. They did find identification for a person called Carmella Brooks, a known methamphetamine addict. 1/31 RP 63.

Gardner moved to suppress the physical evidence based on lack of probable cause for the warrant. He also filed a *Franks* motion, claiming that the warrant affidavit included reckless or intentional material omissions and falsehoods. CP 5-23.

Gardner was tried on a single count of possession of methamphetamine. CP 51. The court admitted the methamphetamine and also the packaging materials and scales. 1/31 RP 41-42. Gardner was convicted following a bench trial of one count of possessing methamphetamine and received a standard range sentence. CP 78, 80.

He filed this timely appeal.

## IV. ARGUMENT

### THE TRIAL COURT'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

ISSUE 1. THE FOLLOWING FACTS ARE NOT SUPPORTED BY THE RECORD.

A. ***Suppression Findings***

Statement of disputed facts: Did Frank Wirshup tell law enforcement that he had seen methamphetamine in Gardner's motel room and that he had purchased methamphetamine from Gardner in the past? CP 64.


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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

This grossly oversimplifies the disputed facts. Gardner filed a broad challenge to the warrant for lack of probable cause. Suppression Motion CP 5, 8. It was the defendant's position that "the Affidavit for search Warrant failed to establish probable cause to issue the Search warrant for various reasons [] discussed below." CP 8, para. 14.

Gardner admitted merely that Officer Mitchell alleged that Wirshup gave a written statement, not that Wirshup did so or that the statement included any particular fact. CP 6, para 6. Gardner also challenged the failure of the warrant affidavit to include any evidence establishing Wirshup's veracity as required by *Aguilar-Spinelli* where, as here, a warrant affidavit relies solely on hearsay. CP 7, 9.

Gardner further claimed that Mitchell ran a background check on Wirshup, then recklessly or deliberately omitted criminal history that affirmatively demonstrated Wirshup's inherent lack of credibility. CP 7, para. 10; CP 13, para. B. Gardner also challenged Mitchell's failure to advise the magistrate of circumstances establishing a motive for Wirshup to provide false information. CP 7, para. 10. Moreover, even supposing *arguendo* that Wirshup did claim to have observed illegal activity in Room 9, Gardner disputed whether Wirshup's self-interest in currying


McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

favor with Mitchell diminished confidence in his credibility. CP 12, para. ii.

Gardner challenged the admission of evidence unrelated to the possession of methamphetamine charge. Please see Issue 11.

Gardner also challenged the sufficiency of Mitchell's affidavit to establish that Gardner exercised dominion and control over the premises on August 26, 2012, the date the warrant was sought. CP 7, para. 12. Please see Issue 2.

The suppression court did not enter any findings on these disputed facts. CP 64. If the trial court does not enter a finding on a disputed fact, this Court must presume the party with the burden of proof failed to sustain its burden on the issue. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

> Sole Finding as to Disputed Facts. Frank Wirshup told law enforcement that he had seen methamphetamine in Gardner's motel room and had purchased methamphetamine from Gardner in the past and signed a written statement to that [e]ffect. CP 64.

The record does not support this finding.

CrR 3.6 suppression findings must be supported by substantial evidence in the record. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Substantial evidence is sufficient evidence to persuade a rational, fair-minded person of the truth of the finding. *State v. Hill*, 123 Wn.2d


McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

641, 644, 870 P.2d 313 (1994). Here, the State failed to meet even a preponderance of the evidence standard.

Gardner's evidence included a statement written and signed by Mr. Wirshup under penalty of perjury refuting Officer Mitchell's unsupported claims in the affidavit. CP 7, para. 11; CP 16. This shifted the burden to the State to produce some sort of substantial evidence that Wirshup said what Mitchell said he did, such as by putting the alleged writing into evidence. The State produced nothing except Mitchell's bald assertions. Therefore, Gardner successfully demonstrated by a preponderance of the evidence that the dispositive allegation in Mitchell's affidavit was false. Accordingly, the allegation attributed to Wirshup should have been stricken and the warrant vacated.

B. ***Bench Trial Findings***

> Finding 1, CP 74. The defendant was originally charged with possession with intent to deliver.

This is true, but completely irrelevant to any fact at issue. CP 51 (amended Information); Conclusion 2, CP 76 (elements of possession). The trial court should have disregarded it entirely and this Court should do likewise. Instead, the court hand-wrote and initialed the finding regarding the pre-amendment Information. CP 74. This demonstrates that the trial court was unable to distinguish between facts relevant to the charged


McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

offense of possession and extraneous facts regarding the uncharged offense of intent to deliver. The failure of the fact-finder to grasp this distinction is prejudicial on its face.

> Finding 2, CP 74-75. Gardner was residing in the motel room when the police executed the search warrant.

The record does not support a finding that Gardner resided in the room. Neither the warrant affidavit nor anything produced by the State in the suppression proceedings or at the bench trial includes a shred of evidence that Gardner paid rent, or that a single identifying item was found in the room to prove that he resided there. All the police knew was that Gardner "was associated with the room." Finding 2, CP 75.

First, being "associated" with premises is insufficient to establish constructive possession. Second, even residing at the searched premises is insufficient. The dispositive question before the fact finder was whether Gardner exercised dominion and control over the room. Evidence of that was entirely lacking. Please see Issue 2.

> Finding 3, CP 75. The parties stipulated to the admissibility of the methamphetamine.

This is directly contrary to the entire record. The defense consistently challenged the admissibility of all the physical evidence because the search warrant lacked probable cause. CP 5-25 (Motion to Suppress & for Franks Hearing). On the day of trial, the defense


McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

unambiguously informed the court of its intent to hold the State to the burden of proving each element beyond a reasonable doubt. RP 46. The defense stipulated merely that the crystalline substance found in the laundry hamper was methamphetamine. 1/31 RP 77.

> Finding 3, CP 75. While executing the warrant, the officers found "packaging material … , a scale… , drug paraphernalia … .

This is evidence solely of intent to deliver. It is completely immaterial to the charge the State had to prove, i.e., simple possession. It was highly prejudicial and subject to exclusion under ER 404(b). See Issue 11.

> Finding 3, CP 75. While executing the warrant, "the officers found heroin and oxycodone that the defendant has not been charged with."

As with the finding based on erroneously admitted evidence of the uncharged offense of intent to deliver, the finding based on possession of uncharged substances is immaterial and highly prejudicial. Moreover, unlike the intent evidence, which the trial court erroneously deemed relevant, the trial court actually perceived both the lack of relevance and the extreme prejudice of the 'other substance' evidence and instructed the State to exclude the evidence. (RP 42).

Inexplicably, however, the court wrote in this finding and initialed it. This demonstrates that this evidence affected the verdict.


McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

## 2. THE EVIDENCE IS INSUFFICIENT TO ESTABLISH GARDNER'S DOMINION AND CONTROL OVER THE PREMISES BEYOND A REASONABLE DOUBT.

Following the bench trial, the court concluded that the State had proved beyond a reasonable doubt that Gardner had dominion and control over Room 9 at the Snore and Whisker Motel. Conclusion 4, CP 76. Neither the evidence nor the court's findings, however, are insufficient to support this conclusion.

To obtain a criminal conviction (by contrast with a search warrant), due process requires the State to prove the essential elements of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Accordingly, a challenge to the sufficiency of the evidence is of constitutional magnitude and can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995); *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560 (1979).

To survive a sufficiency challenge, the evidence when viewed in the light most favorable to the verdict must be sufficient to enable a rational trier of fact to find the elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980); *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). "A


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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordan.mccabe@yahoo.com

claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Nevertheless, when evaluating the sufficiency of the evidence, the reviewing court may not rely on guess, speculation, or conjecture. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001). The same standard applies regardless of whether the case is tried to a jury or to the court. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003), citing *State v. Little*, 116 Wn.2d 488, 491, 806 P.2d 749 (1991).

***No Proof of Possession***. Possession of a controlled substance may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession occurs when an item is physically in the personal custody of the person charged. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Since Gardner did not have a controlled substance on his person at the time of his arrest, the conviction rested on the alternative ground of constructive possession.

In order to establish constructive possession, the evidence must be sufficient to prove that the accused exercised dominion and control either of the contraband or of the premises where contraband was found. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); *State v. Spruell*, 57 Wn. App. 383, 387, 788 P.2d 21 (1990). The reviewing court looks at the


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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 • jordan.mccabe@yahoo.com

totality of the circumstances to determine whether substantial evidence establishes circumstances from which a jury could reasonably infer constructive possession. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Where dominion and control over the premises is established, there is a rebuttable inference that he also has dominion and control over items within the premises. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997).

Mere proximity to contraband is insufficient to establish constructive possession, however. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). That is, constructive possession of a controlled substance cannot be predicated upon the accused's mere presence on the premises where drugs are found. *State v. Davis*, 16 Wn. App. 657, 659, 558 P.2d 263 (1977). There must be a showing of dominion and control of the premises themselves. *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971).

Dominion and control of premises may be inferred from such circumstances as payment of rent or possession of keys. *Davis*, 16 Wn. App. at 659. But mere proof of temporary residence or knowledge of the presence of controlled substances are not sufficient to show dominion and control of the premises. *Davis*, 16 Wn. App. at 659, citing *Callahan*, 77 Wn.2d at 29-31.


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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

In *Callahan*, for example, the evidence was insufficient to convict the defendant of constructive possession of drugs found on a houseboat based on the defendant's mere presence on the premises, notwithstanding his immediate proximity to the contraband. There, as here, the State produced no evidence that the accused had of dominion and control of the premises where drugs were found. This was so, despite evidence that Callahan was staying on the houseboat. There simply was no evidence that he was paying the rent or otherwise manifesting dominion and control over the residence. Therefore, the evidence was insufficient to support a conviction for constructive possession of drugs that were in plain sight on and around a table where the defendant was sitting when the police raided the boat. *Callahan*, 77 Wn.2d at 31.

Likewise here, the State made no attempt to establish that Gardner was the individual who rented the room, that he possessed a key, or that he maintained a single identifiable personal possession there. The court found merely that Gardner was "associated with" the room. Even supposing a rational trier of fact could have found that Gardner told Officer Mitchell on August 19th that he was staying there (see Finding 2, CP 74-75), this still is not good enough.

While the evidence may arguably have been sufficient to satisfy the threshold showing of probable cause for a search warrant, it falls far


McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

short of proof beyond a reasonable doubt that Gardner exercised dominion and control over the premises sufficient to establish constructive possession of contraband found therein.

The State could easily have obtained evidence identifying the person who rented the room from the motel management. The fact it did not do so, combined with the complete absence of a single item of identifying evidence connecting Gardner to the room, strongly suggests that the requisite proof does not exist.

As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

The Court should reverse Gardner's conviction for possession of methamphetamine and dismiss the prosecution.

ISSUE 3: THE WARRANT AFFIDAVIT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE.

Wash. Const. art. 1, § 7 and the Fourth Amendment to the U.S. Constitution protect the right of the people to be free from unreasonable searches and seizures. Government incursions into a person's private affairs may be conducted only under authority of law. Subject to a few narrowly construed exceptions, no search is lawful without a warrant. Evidence seized during illegal searches and evidence derived from illegal


McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

searches is subject to suppression under the exclusionary rule. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005).

A search warrant for premises may be issued by a neutral magistrate only upon a showing of probable cause. Probable cause may be established by an affidavit that particularly identifies the place to be searched and items to be seized. U.S. Const. amend. IV; Wash. Const. art. I, § 7. The affidavit must set forth sufficient facts to convince a reasonable person that evidence of criminal activity can be found at the place to be searched. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). In reviewing the sufficiency of the affidavit, the Court inquires whether an ordinary person reading the affidavit would understand that a criminal violation (a) had occurred, and (b) was continuing at the time the search warrant application was presented to the magistrate. *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743, *cert. denied*, 457 U.S. 1137, 102 S. Ct. 2967, 73 L. Ed. 2d 1355 (1982).

This Court reviews the validity of a search warrant for abuse of discretion, *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 86, *cert. denied*, 449 U.S. 873, 101 S. Ct. 213, 66 L. Ed. 2d 93 (1980). The Court engages in a commonsensical, rather than hypertechnical, review, resolving any doubts in favor of the warrant's validity. *Fisher*, 96 Wn.2d at 964-65. The Court affords great deference to the magistrate's determination of


McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

probable cause. *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). But, while the magistrate's determination of probable cause is entitled to considerable deference, the Court "cannot defer to the magistrate where the affidavit does not provide a substantial basis for determining probable cause." *State v. Lyons*, 174 Wn.2d 354, 363, 275 P.3d 314 (2012).

Aguilar-Spinelli Test. When an affidavit purports to demonstrate probable cause by means of hearsay information, the constitutional criteria for sufficiency are measured by the *Aguilar-Spinelli* test.[2] *Partin*, 88 Wn.2d at 903. The test has two prongs. Hearsay from an informant will be deemed sufficient to establish probable cause to support the issuance of a search warrant only if the warrant affidavit demonstrates both the informant's basis of knowledge and his veracity. *State v. Jackson*, 102 Wn.2d 432, 443, 688 P.2d 136 (1984).

Basis. First, the issuing magistrate must determine that each informant's conclusions are trustworthy by evaluating the basis for the allegations in light of the sources of the informant's knowledge and all the underlying circumstances. *Partin*, 88 Wn.2d at 903.

Veracity. In addition, the affidavit must include sufficient facts upon which the magistrate can determine either the informant's inherent

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[2] *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).


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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

credibility or his reliability under the circumstances. *State v. Duncan*, 81 Wn. App. 70, 76, 913 P.2d 1090 (1996). If the police know the informant, they may establish his known credibility. Otherwise, the affidavit must establish facts and circumstances surrounding the information that reasonably support an inference that the informant is telling the truth. *State v. Rodriguez*, 53 Wn. App. 571, 574, 769 P.2d 309 (1989).

A magistrate issued a warrant to search Room 9 at the Snore and Whisker motel based on hearsay information from three informants: Frank Wirshup, Officer Dayton, and Detective Bradbury.[3] CP 20-21. As discussed below in Issues 4 — 7, none of the informants met both prongs of the *Aguilar-Spinelli* test for reliability of information from informants.

Gardner challenged the validity of this warrant and moved to suppress all resulting evidence.

## ISSUE 4. THE AFFIDAVIT DID NOT ESTABLISH WIRSHUP'S BASIS OF KNOWLEDGE.

Assuming for the sake of argument that Wirshup observed an unspecified quantity of methamphetamine on August 24, this information was too stale to constitute a sufficient basis of knowledge to establish probable cause to search a domicile on August 26.

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[3] Mitchell did not provide the given names of the police informants.



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P.O. Box 7424, Bellevue, WA 98008
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***First Time on Appeal***. Gardner's counsel did not address the staleness issue at the suppression hearing. This Court will consider an issue for the first time on appeal, however, if it is a manifest error affecting a constitutional right. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a)(3). "The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." *Kirkman*, 159 Wn.2d at 926-27, quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Here, Gardner contends the trial court erroneously admitted evidence obtained when the police broke down his door and searched his domicile without probable cause. This is a manifest error affecting a constitutional right. Gardner was prejudiced by the error because the prosecution rested entirely upon the erroneously admitted evidence.

In addition, the Court will address an issue where failure to broach the issue at trial can be characterized as ineffective assistance of counsel. *State v. Soonalole*, 99 Wn. App. 207, 215, 992 P.2d 541 (2000). Specifically, defendants are entitled to relief under the Sixth Amendment when trial counsel fails to assert a claim for relief that might have altered the outcome. *Lafler v. Cooper*, ___ U.S. ___ , 132 S. Ct. 1376, 1381, 182


McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

L. Ed. 2d 398, WL 932019 (2012), citing *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Failing to argue to suppress crucial physical evidence for lack of probable cause based on the staleness of the information in the warrant affidavit is such a failure.

***Wirshup's Information Was Stale***. A magistrate issuing a search warrant must be able to infer from the facts in the affidavit that an offense is presently being committed at the time the warrant is issued. *Lyons*, 174 Wn.2d at 364-65. That is, the magistrate must be satisfied, based on the circumstances of each case, that the information in the affidavit is not too stale to support a warrant. *Lyons*, 174 Wn.2d at 361.

At issue in *Lyons* was a marijuana grow operation, which might reasonably be expected to be present even after a considerable lapse of time. *Lyons*, 174 Wn.2d at 361. By contrast, a "now-you-see-it-now-you-don't" activity likely would not be in evidence after a couple of days. *Id.*

Possession of crystals on a counter-top or a cheap contraband tool fall into the latter category. Wirshup stole a $34-dollar tool at noon on August 24, 2011, and took it to the motel for food money, where he allegedly observed what he took to be methamphetamine. Ace Hardware did not report the theft until 4:30 p.m. on August 25th. CP 20. Officer Mitchell did not track Wirshup down and arrest him in the woods until the day after that, on August 26th, which is the date of the warrant application.


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Moreover, the affidavit does not suggest the quantity of methamphetamine Wirshup saw, whether a couple of hits or a sack-full. CP 20. Accordingly, there was no reason to suppose the police would find evidence of it after 52 minutes, let alone the 52 hours that elapsed here.

Had the store personnel reported the shop-lift immediately, permitting the police immediately to view the tape, locate and interview Mr. Wirshup, and submit the affidavit to a magistrate the same day, a staleness argument could reasonably be refuted. *See, e.g., Partin*, 88 Wn.2d at 902–03 (valid warrant for evidence of possession issued same day as informant's observation). Even if these steps had been taken the next day, staleness still might plausibly be disputed. By day three, however, Wirshup's observation was too stale to serve as a basis of knowledge of information justifying the issuance of a warrant to break down the door of a domicile and search the premises for drugs.[4] There was simply no reason to assume that any evidence of possession either of drugs or a stolen tool would be found in Room 9 at 4:30 p.m. on August 26, more than 52 hours after Wirshup visited the room.

The remedy is to suppress all evidence obtained pursuant to the defective warrant, reverse Gardner's conviction for possession, and dismiss the prosecution with prejudice.

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[4] The police employed a battering ram when Gardner did not open the door within ten seconds. 1/31 RP 49.



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P.O. Box 7424, Bellevue, WA 98008
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ISSUE 5. THE AFFIDAVIT DID NOT ESTABLISH WIRSHUP'S CREDIBILITY.

The usual method of establishing the veracity of hearsay from an informant is to demonstrate a proven track record. *State v. Taylor*, 74 Wn. App. 111, 116, 872 P.2d 53, *review denied*, 124 Wn.2d 1029 (1994). Officer Mitchell did not attempt to do that here. The affidavit does not claim that Wirshup had previously provided any information, reliable or otherwise.

If the informant does not have a proven track record, veracity may be determined by a combination of other factors. *State v. Lair*, 95 Wn.2d 706, 710, 630 P.2d 427 (1981). No such combination of factors is present here.

Reliability may be indicated if the identity of the informant is known. *Lair*, 95 Wn.2d at 709-10. Wirshup's identity and his history were known to Mitchell, but Mitchell chose not to disclose to the magistrate what he knew about Wirshup, namely that Wirshup was known to the police as a petty thief and a liar. Far from indicating credibility, Mitchell's familiarity with Wirshup, had it been disclosed forthrightly to the magistrate, would have seriously discredited Wirshup's credibility.

Next, Officer Mitchell falsely claimed in the affidavit that Wirshup's statements were against his penal interest. CP 21.


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The fact that an informant's statement is against his penal interest may be an indicator of reliability. *Lair*, 95 Wn.2d at 710-11. The rationale for attributing credibility to such a statement to a police officer is that admitting criminal activity invites prosecution, so that it is reasonable to infer that the statement is truthful. *Id.*, citing 1 W. LaFave, SEARCH AND SEIZURE § 3.3, at 522-35 (1978).

Here, the State claimed that Wirshup's statement was against his penal interest. CP 29. This is false. There is no reason to believe Wirshup's statement to Mitchell.

First, Wirshup could not have denied stealing the $34 tool because he was videotaped doing so. Thus, he did not expose himself to prosecution by owning up because he was already under arrest and in police custody. Rather, it would decidedly enhance his penal interest to curry favor with Mitchell by helping with other ongoing investigations. Wirshup's overall circumstances suggest that this is precisely what Wirshup was doing.

Likewise, claiming he had bought drugs from Gardner in the past did not expose Wirshup to prosecution. Unless he was currently found in possession of drugs, there was no way Mitchell could prosecute Wirshup for a controlled substance violation arising out of a vague allegation that


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he was on the receiving end of a hypothetical delivery some time in the past. Delivery is a crime. Receiving is not, absent proof of possession.

Wirshup's statement to Mitchell was not against his penal interest. It increased his chances of lenient treatment in his current offense. This turned out to be the case, because Mitchell merely issued Wirshup some sort of citation and released him. 1/25 RP 13.

## ISSUE 6. THE AFFIDAVIT DID NOT ESTABLISH A BASIS OF KNOWLEDGE FOR THE HEARSAY STATEMENTS OF DAYTONOR BRADBURY.

The general rule is that hearsay from secondary informants must also be tested against the *Aguilar-Spinelli* criteria. *See, e.g., Lair*, 75 Wn.2d at 409. But gaps in the primary informant's *Aguilar-Spinelli* credentials may be compensated by independent corroborating evidence. *Rodriguez*, 53 Wn. App. at 574, citing *Jackson*, 102 Wn.2d at 433, 438. As such, the court may consider hearsay or conclusory statements from another reliable informant for the purpose of corroborating information given by an informant whose reliability has not been established, even though the corroborating informant's conclusory statements do not satisfy the *Aguilar-Spinelli* standards. *Lair*, 75 Wn.2d at 712. The operative term here, however, is a reliable corroborating informant.


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P.O. Box 7424, Bellevue, WA 98008
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The warrant affidavit at issue here names two secondary informants, officers Dayton and Bradbury. Mitchell included hearsay statements by both these officers, presumably to corroborate Wirshup's alleged observations on August 24th.

Since the officers' statements are hearsay, they are subject to *Aguilar-Spinelli*. *Lair*, 95 Wn.2d at 709. Gardner's challenge to this hearsay testimony could have been clearer, but defense counsel challenged the value of so-called corroborating evidence that merely recites innocuous or easily predictable facts. CP 9. Gardner also challenged the sufficiency of the affidavit to address circumstances suggesting self-interest or motive to falsify. CP 11. Neither officer can be deemed a reliable informant under either the basis of knowledge or the veracity prong of the *Aguilar-Spinelli* test.

The affidavit informs the magistrate that investigations of Gardner by Dayton and Bradbury had met with remarkably limited success. Detective Bradbury's case had fallen through some months prior, in April of that year. Likewise, Officer Dayton currently had Gardner under surveillance but had established no more than what he deemed excessive short-stay foot traffic. CP 21.

Thus, by the plain language of the affidavit, neither of these informants claimed to know anything about any evidence of any crime in


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P.O. Box 7424, Bellevue, WA 98008
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Room 9 at the relevant time. To the contrary, both had failed to assemble enough evidence of criminal activity over the course of an entire year even to keep an investigation going, let alone to establish probable cause for a warrant.

The failure of the basis of knowledge evidence leaves Wirshup's allegations uncorroborated. Accordingly, his hearsay statements should be stricken from the affidavit and the warrant should be vacated.

ISSUE 7. THE AFFIDAVIT DID NOT ESTABLISH THE CREDIBILITY OF DAYTON OR BRADBURY UNDER THE PARTICULAR CIRCUMSTANCES OF THIS WARRANT.

In addition to the complete absence of any basis of knowledge regarding current circumstances in Room 9, the credibility of the two police informants is by no means self-evident.

The affidavit does not claim that Dayton or Bradbury had given reliable information in the past. CP 21. Perhaps a magistrate might reasonably infer this. But a track record for truthfulness is only one factor to consider in determining the reliability of a particular informant's statement under the prevailing circumstances.

Quite apart from the inherent credibility of a source of information, it is still appropriate to ask whether the information was furnished under circumstances giving reasonable assurances of trustworthiness. If not, the


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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

information cannot be deemed reliable, notwithstanding source's bona fides for credibility.

Here, as with Mr. Wirshup, the statements of Officers Dayton and Bradbury are so clearly self-serving as to overwhelm any presumption of inherent credibility. Both officers had been striving for an extended period[5] — utterly without success — to prosecute Gardner for narcotics violations. Both had a strong desire to search Room 9, but neither had been able to come up with probable cause. Piggybacking their undocumented suspicions and hunches onto Wirshup's two-day-old allegations does not enhance either the basis or veracity of this hearsay information.

## ISSUE 8. THE TRIAL COURT FAILED TO UNDERTAKE AN ADEQUATE *FRANKS* REVIEW OF THE WARRANT.

The trial court erroneously decided Gardner's *Franks* motion "on the four corners" of the affidavit: "The court adopts and incorporates by this reference as though fully set forth the affidavit in support of search warrant attached hereto as the factual basis upon which the court decided the motion to suppress and upon which the conclusions of law are based." CP 63. This is contrary to *Franks*.

[5] At least since October, 2010. CP 21.



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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

The validity of a warrant is premised on the good faith of the affiant and the integrity of his oath or affirmation. *Franks*, 438 U.S. at 164. Thus, when the integrity of a warrant affidavit is challenged, the court should consider the veracity of all included statements by police officers. *See, e.g.*, *Franks*, 438 U.S. at 164, note 6 (double hearsay passed through a non-testifying government agent was not immune from scrutiny.) An inquiry into the validity of the affiant's allegations is essential because a warrant "is issued in an *ex parte* hearing where the magistrate's only check on the affiant's veracity is a search for internal inconsistency in his statement." Steven M. Kipperman, INACCURATE SEARCH WARRANT AFFIDAVITS AS A GROUND FOR SUPPRESSING EVIDENCE, 84 Harv. L. Rev. 825, 830 (1971) (cited in *Franks*, 438 U.S. at 168, note 7.)

In the matter before this Court, the weakness of the hearsay in the supporting affidavit is compounded by evidence that Officer Mitchell himself had a personal incentive to search Gardner's room that pre-existed the alleged visit by Mr. Wirshup on August 24. Mitchell had paid a surprise visit to Gardner one week earlier, on August 19, 2012, allegedly because a vehicle was improperly parked at the motel. CP 21. The vehicle did not belong to Gardner. 1/31 RP 66. Since the police would not ordinarily track down a citizen to discuss a random parking violation


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P.O. BOX 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

in the vicinity of a motel he was staying at, this incident strongly suggests a pretext to investigate Gardner.

Moreover, the *Franks* motion included evidence establishing plausible grounds to question whether Wirshup's alleged statement was everything that Officer Mitchell professed it to be. Mitchell said he typed a statement for Wirshup because Wirshup told him he could neither read nor write. He then invited Wirshup to read the typed statement to confirm that it was accurate. Then, when Wirshup reminded Mitchell that he could not read, instead of reading the statement aloud, Mitchell simply told Wirshup to do his best and sign it anyway.

Most significantly, for reasons not explained in the record, Mitchell did not attach the alleged written statement to the affidavit. This is contrary to the procedural rule that requires evidence in support of probable cause to be preserved so it can be reviewed for compliance with constitutional limitations. CrR 2.3(c). It is puzzling under the circumstances that Officer Mitchell would not have included the written statement by Wirshup with the affidavit and that the State elected not to preserve such a statement in the record.

The superior court had before it all the circumstances surrounding the issuance of this search warrant. At minimum, a court reviewing a warrant should ask whether the information from each informant was


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P.O. Box 7424, Bellevue, WA 98008
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"furnished under circumstances giving reasonable assurances of trustworthiness." *Lair*, 95 Wn.2d at 710. Accordingly, once Gardner challenged Mitchell's good faith and reliability in a *Franks* motion, the superior court was obliged to inquire.

At minimum, the court should have examined the written statement attributed to Wirshup and ensured it was placed in the record for review by this Court. We know that Mr. Wirshup was an illiterate heroin addict, while Officer Mitchell was highly educated, familiar with official terminology, and presumably in full command of his faculties. Judicial scrutiny of the language used in the statement likely would have resolved any question about its authenticity.

Instead, the *Franks* court ignored Officer Mitchell's omission of facts and circumstance that, if disclosed to the magistrate, would have cast serious doubt on the sufficiency of the affidavit to establish probable cause to issue this warrant.

The warrant affidavit omitted the following pertinent facts.

- Wirshup had a record for crimes of dishonesty.
- Mitchell wrote the statement attributed to Wirshup and obtained what he knew was a worthless signature.

Had the magistrate been apprised of this information, he might have seriously questioned the sufficiency of Mitchell's affidavit.


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The superior court's failure to fairly consider the evidence constituted a manifest abuse of discretion.

The remedy is to strike those parts of the affidavit purporting to establish probable cause to suspect drug activity.

ISSUE 9. THE SUPPRESSION COURT BASED ITS RULING ON IMPERMISSIBLE INFERENCES CONTRARY TO THEAPPEARANCE OF FAIRNESS.

A judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). Evidence of a judge's actual or potential bias constitutes a violation of the "appearance of fairness" doctrine. *State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992). A fair trial implies among other things that the court exclude all evidence that has no material bearing on the case. *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946).

An appearance of fairness violation is a constitutional error that Gardner asks the Court to address for the first time on appeal. Judicial conduct violates the constitution if the court's biased attitude can reasonably be inferred from the nature or manner of the court's comments. *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999). Moreover,


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RAP 2.5(a) authorizes this Court to address an issue where justice so demands. *State v. Russell*, 171 Wn.2d 118, 122, 149 P.3d 694 (2011). As a matter of fundamental fairness, the Court should address this issue. A challenge by defense counsel to the trial court's firmly held personal beliefs may have aroused the court's resentment and exposed the defendant to bench that was hostile as well as prejudiced.

The determination of probable cause requires the court to make a practical commonsense decision, taking into account all the circumstances set forth in the affidavit and drawing commonsense inferences." *Lyons*, 174 Wn.2d at 362, quoting *Maddox*, 152 Wn.2d at 509. But, while judge magistrate may "give a commonsense reading to facts set forth and to draw inferences from them," he may not "reach for external facts" and "build inference upon inference in order to create a reasonable basis" to issue a warrant. *Lyons*, 174 Wn.2d at 362.

Here, the State set up a false dilemma by arguing that the *Franks* court either had to affirm the warrant or find that the police affiant committed perjury based solely on the say-so of Mr. Wirshup. CP 33. This led the court to cross the line between legitimate commonsense inferences and clear evidence of bias. The court introduced considerations that have no material bearing on the case by injecting its own preconceived notions of character and veracity based upon social status


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and economic circumstances. Such views are inappropriate in a Washington courtroom, and it appears that the judge's personal beliefs led to a decision based upon impermissible inferences.

The court delivered a rambling monologue to the effect that a neutral magistrate could make a valid inference that superior court judges eat at four star restaurants while homeless people and those living in motel rooms do not. Based on that inference, the court opined that a magistrate could further infer that judges likely eat better quality food than people on the bottom rung of the economic ladder. 1/25 RP 35-39.

> Now [] when you are a neutrally detached magistrate, we don't live in vacuums. Ask yourself a question. Where are you going tonight for dinner? I think I am going to go to the Four Seasons downtown Seattle, or to the Palomino. Not a problem. I am not in a vacuum. The Four Seasons, hey, that is four or five stars. The Palomino, great food; everybody wants to eat there, or better yet, I am going to dinner at Burger King. Well, you know what? They don't serve the greatest meals at Burger King in my opinion.
>
> So let's take a look at the difference when you are a neutrally detached magistrate looking at these affidavits, because we don't live in a vacuum. Officer comes in and says, well, they are going down to the Burger King for dinner. Well, I know what they are not going to be eating. [If] they are going to the Four Seasons for dinner, I know what they are going to be eating, and I know the difference in the price tag.
>
> Why am I saying something like that? When you are a neutrally detached magistrate, you are dealing with common sense and experience also.


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1/25 RP 35-36.

The only conceivable point to this revealing discourse is to illustrate what the court deems is an equally reasonable inference — that homeless people and people who live in motels may reasonably be presumed to lie, while police officers tell the truth. The court essentially made that statement flat out on the record:

> Today, can I find that this officer intentionally left things out? You can go ad infinitum with things that are left out of warrants, but, has it been a reckless disregard of the truth? In other words, is this cop going to lie to the judge and try to hide something or blow one by them? Nope. No. Motion denied. Thank you. We are done.

1/25 RP 39.

This can only be read as an expression of the court's belief that police officers are presumed never to mislead magistrates in the matter of warrant affidavits. This is directly contrary to *Franks*, which reversed a trial court ruling that the veracity of sworn statements offered by a police officer to procure a search warrant are not susceptible to challenge. *Franks*, 438 U.S at 155.

The defendant's burden is merely to show by a preponderance that the affidavit includes deliberate falsehoods or reckless disregard for the truth. *Franks*, 438 U.S. at 155-56. When Gardner produced Wirshup's written denial of having made a statement implicating Gardner in a drug


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offense, and the State failed to produce the alleged statement in support of Mitchell's claim to the contrary, the preponderance of the evidence weighed against the affidavit. Accordingly, the court should have excised the challenged material, and, since the remaining allegations were not sufficient to establish probable cause, voided the search warrant and suppressed the fruits of the search. *Franks*, 438 U.S. at 156.

Reversal is required.

## ISSUE 10. SUSPECTED POSSESSION OF STOLENPROPERTY WORTH $34 IS NOT SUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR A WARRANT TO INVADE A DWELLING.

The State argued that the affidavit supported issuance a warrant even without any drug evidence, based solely on Wirshup's claim to have delivered a stolen tool worth $34. 1/25 RP 33. This is wrong. Excising the statements regarding the presence of drugs would have left the affidavit utterly insufficient to justify issuing a search warrant for a $34 tool.

First, Wirshup's claim to have delivered the stolen tool to Gardner suffers from the same staleness problem as his alleged claim to have seen drugs two days prior. Second, the mere presence of a tool in Mr. Gardner's room could not constitute evidence even of a gross misdemeanor without proof that it was the particular tool Wirshup stole.


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Third, possession of stolen property worth less than $750 is possessing stolen property in the third degree. RCW 9A.56.170(1). Possessing stolen property in the third degree is a gross misdemeanor. RCW 9A.56.170(2). The police may not prosecute a gross misdemeanor unless it was committed in the presence of an officer. RCW 10.31.100. Accordingly, suspicion that Gardner possessed a single item two days prior was insufficient to support a warrant to invade a home.

And finally, the scope of the warrant far exceeded that necessary to find a single tool. It permitted the police to search for implements for the possession, manufacture and distribution of controlled substances; documents regarding dominion and control of the premises; computers, floppy disks, cell phones, video tapes and photographs, letters, money and financial records, tax records, and weapons. Warrant 1-2.

The search warrant was unlawful and the evidence obtained subject should have been suppressed.

## ISSUE 11. THE TRIAL COURT ADMITTED AND RELIED UPON EVIDENCE THAT WAS IMMATERIAL AND PREJUDICIAL IN VIOLATION OF ER 404(b).

When a trial court's evidentiary rulings are at issue, this Court initially conducts a de novo review to determine whether the court correctly applied the law. If so, then the Court reviews the admission of a


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particular item of evidence for abuse of discretion. *State v. Tharp*, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591 (1981). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds. *State v. Gonzalez-Hernandez*, 122 Wn. App. 53, 57, 92 P.3d 789 (2004).

The Amended Information charges Gardner with simple possession of methamphetamine. CP 51. Nevertheless, over a defense objection, the trial court granted the State's motion in limine to admit evidence of trafficking. RP 41-42. This was reversible error. The presence of packaging material and scales was completely irrelevant to any element of simple possession, and was not admissible for any legitimate purpose.

The Sixth Amendment and Wash. Const. art. 1, § 22 require that defendants be informed of the nature and cause of the accusation against them. *State v. Taylor*, 140 Wn.2d 229, 236, 996 P.2d 571(2000). The doing of another criminal act, not a part of the charged offense, is not admissible as evidence of the criminal act charged unless it is relevant and necessary to prove an essential ingredient of the crime charged. ER 404(b); *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

Defense counsel objected to the admission of evidence of intent to deliver as a violation of ER 404(b). Counsel made clear that the basis for


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Gardner's objection was that the packaging material, other substances, etc., were evidence of uncharged wrongful acts and as such should be excluded as immaterial and prejudicial. RP 41. It was error for the court to admit evidence of intent to deliver. The fact that the court personally added these facts to the findings demonstrates that the evidentiary ruling was highly prejudicial.

The State argued that this evidence was admissible under the res gestae exception to ER 404(b). CP 44. This permits the court to admit evidence of other misconduct where it is 'a link in the chain of an unbroken sequence of events surrounding the charged offense ... in order that a complete picture be depicted for the jury.' *State v. Acosta*, 123 Wn. App., 424, 442, 98 P.3d 503 (2004).This exception does not apply here. Res gestae evidence must not only be relevant to a material issue, but its probative value must outweigh its prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997).

Here, the elements of possession of methamphetamine are actual or constructive possession of methamphetamine. The State was not required to prove knowledge, intent to commit additional offenses, possession of another substance, or anything else. Accordingly, this evidence was completely irrelevant. It was not admissible for any legitimate purpose and was offered solely for its prejudicial effect.


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In arguing to admit evidence of additional uncharged offenses, the State relied heavily upon *State v. Jordan*, 79 Wn.2d 480, 487 P.2d 617 (1971). CP 45; RP 41. That case is distinguishable.

Like Gardner, the defendant in *Jordan* was charged with simple possession. But Jordan's theory of the defense was that he possessed the drugs lawfully and pursuant to a valid prescription. The nature of the defense was the only reason why the reviewing court held that evidence of the defendant's physical condition and indisputable evidence of his unlawful drug use was admissible to refute that defense. *Jordan*, 79 Wn.2d at 482-483.

The *Jordan* court cites additional circumstances in which it is permissible to admit evidence of uncharged crimes. For instance, if charged and uncharged offenses are so integrally related that it is virtually impossible to prove one without reference to the others. *State v. Priest*, 132 Wash. 580, 232 P. 353 (1925). Or where two victims were robbed in the same transaction, evidence referring to the uncharged robbery was not inadmissible. *State v. Conroy*, 82 Wash. 417, 144 P. 538 (1914). And finally, in *State v. McDowell*, 61 Wash. 398, 112 P. 521 (1911), three boys were present during the charged assault of one of them, and one of the other boys was permitted to testify that, immediately after the charged


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P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

crime and at the same place, the defendant attempted to commit a similar indecent act upon him. *McDowell*, 61 Wash. 402-03.

Here, by contrast, possession of methamphetamine is a completed crime, that can without any difficulty be proved without reference to evidence of any uncharged conduct.

Under different circumstances, the State might claim that this error was harmless since the case was tried to the bench and not to a jury, because judges are presumed to ignore irrelevant evidence. That does not apply to this particular bench, however. The court thought the packaging material and other delivery paraphernalia were relevant to the charge of possession of methamphetamine. This is clear from the court's comments from the bench and from the findings of fact which include the court's hand-written findings regarding the evidence of intent to deliver charge and also the presence of other substances Gardner was not charged with possessing. RP 42; Finding 1, CP 74; Finding 3, CP 75.

Reversal is required.


McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

## VI. CONCLUSION

The Court should reverse Mr. Gardner's conviction and dismiss the prosecution with prejudice.

Respectfully submitted this August 28, 2012.

Jordan B McCabe

Jordan B. McCabe, WSBA No. 27211
Counsel for John R. Gardner, Jr.



McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that opposing counsel was served with this Appellant's Brief electronically via the Division II portal: wleraas@co.grays-harbor.wa.us.

A hard copy was also mailed, U.S. first class postage prepaid, to:

John R. Gardner, Jr., DOC # 939710
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

Jordan B McCabe Date: August 28, 2012

Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington



McCabe Law Office
P.O. Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

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