Court of Appeals No. 43585-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

STEVEN POWELL,

Defendant/Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 11-1-03893-1
The Honorable Ronald E. Culpepper, Presiding Judge

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I. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court erred in denying Mr. Powel's motion to suppress evidence obtained by search warrant.

II. SUPPLEMENTAL ISSUE PRESENTED

Did the trial court err in finding that the facts contained in the complaint for the search warrant for Mr. Powell's home contained facts sufficient to support a finding that evidence of a crime would be found in the home?

III. STATEMENT OF THE CASE

Factual and Procedural Background

Mr. Powell adopts and incorporates the factual and procedural background as set out in his Opening Brief.

IV. ARGUMENT

In his initial Opening Brief, Mr. Powell argues that review of the trial court's ruling on his motion to suppress the evidence found in his home, pursuant to the search warrant, is impossible since the trial court failed to enter written findings of fact and conclusions of law regarding its ruling. While Mr. Powell maintains that appellate review of the trial court's ruling is impossible without written findings of fact and conclusions of law, in an abundance of caution, should this court determine that the trial court's oral ruling is a sufficient basis to permit appellate review of the trial court's decision on Mr. Powell's motion to suppress, Mr. Powel submits the following additional argument.

The trial court erred in finding that the complaint for the warrant to search Mr. Powell's home contained facts sufficient to support an inference that evidence related to the crimes of first degree murder and kidnapping would be found in the home.

The warrant clause of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution require that a search warrant be issued 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. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

Probable cause exists where the search warrant affidavit sets forth "facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). Accordingly, "probable cause requires a nexus between [the] criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *State v. Goble*, 88 Wn.App. 503, 509, 945 P.2d 263(1997)).

Affidavits are to be read as a whole, in a commonsense, nontechnical manner, with doubts resolved in favor of the warrant. *State*

v. Casto, 39 Wn.App. 229, 232, 692 P.2d 890 (1984), *review denied*, 103 Wn.2d 1020 (1985). Reasonableness is the key in determining whether a search warrant should issue. *State v. Gunwall*, 106 Wn.2d 54, 73, 720 P.2d 808 (1986).

The review of a search warrant's validity is limited to the information the magistrate had when the warrant was originally issued. *Aguilar v. State of Texas*, 378 U.S. 108, 84 S.Ct. 1509, 1522 n.1 (1964); *State v. Stephens*, 37 Wn.App. 76, 80, 678 P.2d 832, *review denied* 101 Wn.2d 1025 (1984). While deference is to be given to the magistrate's ruling and doubts are to be resolved in favor of the warrant's validity (*State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)), the deference accorded to the magistrate is not boundless. *State v. Maxwell*, 114 Wn.2d 761, 770, 791 P.2d 222 (1990).

The affidavit must set forth more than mere conclusions. The underlying facts and circumstances leading to the conclusions must be included. Otherwise, the magistrate becomes no more than a rubber stamp for the police. *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965); *Stephens*, 37 Wn.App at 79, 678 P.2d 832.

It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. *Maddox*, 152 Wn.2d at 505, 98 P.3d 1199. The magistrate is entitled to make reasonable inferences

from the facts and circumstances set out in the affidavit. *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999) (quoting *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)). However, mere speculation or an officer's personal belief **will not** suffice. *State v. Anderson*, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001).

"Two different standards apply to review of a probable cause determination." *State v .Emery*, 161 Wn.App. 172, 201, 253 P.3d 413 (2011), *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012). First, appellate courts review the trial court's findings on "the events 'leading up to the stop or search'" for abuse of discretion. *Emery*, 161 Wn.App. at 201 (internal quotation marks omitted). Second, appellate courts review de novo the issuing judge's legal conclusion that the information in the probable cause affidavit, as a whole, amounts to probable cause. *Emery*, 161 Wn.App. at 202.

Whether facts set out in an affidavit are sufficient to conclude that probable cause exists is a question of law; thus, appellate review is de novo. *In re Det. of Petersen v. State*, 145 Wn.2d 789, 799–800, 42 P.3d 952 (2002). Review is limited to the four corners of the probable cause affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Facts standing alone that would not support probable cause can do so when viewed together with other facts. *State v. Garcia*, 63 Wn.App. 868, 875,

824 P.2d 1220 (1992). However, an officer's unsupported conclusions or speculations are not sufficient to support probable cause for a warrant to issue. *Thein*, 138 Wn.2d at 145–46, 977 P.2d 582.

Mr. Powell does not dispute "the facts leading up to the search." However, Mr. Powell does dispute that the "facts" contained in the complaint for the warrant were sufficient to create probable cause for the warrant to issue.

1. The facts contained in the complaint for the warrant were insufficient to support a nexus between the journals being sought and the crimes being investigated.

The complaint for the warrant to search Mr. Powell's home in contained in the record as Appendix A to the State's Response to Mr. Powell's motion to suppress. CP 51-61. The warrant for Mr. Powell's residence was issued on August 24, 2011. CP 64. At the time the warrant was issued, the police were investigating Joshua Powell, Mr. Powell's son, for first-degree murder and kidnapping involving his wife, Susan Powell. CP 52-54. At the time, Joshua Powell resided with Mr. Powell. CP 52-54.

The police sought to search Mr. Powell's residence in order to recover journals that had belonged to Susan Powell and that Joshua and Mr. Powell had disclosed to police were in their possession. CP 52-61.

Joshua Powell and Mr. Powell had also informed various media programs that he possessed these journals and had established a website where he published excerpts from the journals. CP 52-64. The warrant sought discovery of the journals themselves as well as digital media that might store copies of the journals. CP 52.

During the course of the investigation, the police located another journal written by Susan Powell at her place of employment. CP 58. This journal covered that dates of January 3, 2002, through October 26, 2009. CP 58. This journal indicates that Susan Powell was engaged to Joshua Powel when she was 19 years old. CP 58. The complaint for the warrant indicates that Susan Powell was born in 1981, so the earliest date she could have been married to Joshua Powell would have been 2000. CP 54, 58.

The complaint asserts that the murder, kidnapping, and obstruction of a public servant were committed on or about December 6, 2009. CP 52. The complaint for the warrant indicated that the journals in Mr. Powell's possession were written between 1997 and 1999. CP 8-9. The complaint for the warrant alleges that the journals would help the police in the investigation of the 2009 crimes "due to the fact that these journals are evidence and could provide further intelligence or investigative leads" (CP 60) and because Pierce County Sheriff's Detective Gary Sanders

> strongly believ[ed] the recovery of any and all information and or property belonging to Susan Powell [was] critical in the continued investigation of Susan Powell's Disappearance[and t]his additional evidence could lead to additional responsible parties and or eliminate persons of interest[and i]n addition the recovery of this evidence could solve the disappearance of Susan Powell and or lead investigators to specific location where Susan Powell could be recovered.

CP 61.

The complaint for the search warrant gives very little information regarding what the police believed the contents of the journals possessed by Joshua Powell to be. The only information contained in the complaint for the search warrant regarding what the police believed the contents of the journals to be is that "Steven Powell ha[d] announced to the media the importance of these journals to the investigation because Susan Powell describes her relationships with males prior to Joshua Powell; her sexual fantasies, and it shows how unstable Susan Powell really is." CP 60.

In sum, the complaint for the search warrant indicated that the journals the police wanted to seize were written roughly ten or more years before the crimes being investigated, contained discussions of Susan Powell's relationships with men before she met Joshua Powell (the suspect in the crimes being investigated), and the complaint stated Detective Sanders' personal belief that the journals were critical to the investigation because the journals **could** lead to addition suspects or clear

current suspects and the journals **could** solve the disappearance of Susan Powell without detailing how or why.

These claims in the complaint are nothing more than Detective Sanders' unsupported conclusions and speculations. As stated above, an officer's unsupported conclusions or speculations are not sufficient to support probable cause for a warrant to issue. *Thein*, 138 Wn.2d at 145–46, 977 P.2d 582. The complaint for the warrant contained no facts which established a nexus between the journals completed in the late 90s and the crimes committed in 2009. Nothing in the complaint for the warrant provided a shred of evidence to support the conclusion that the journals contained any information relevant to the investigation into the 2009 crimes. Detective Sanders' conclusory yet unsupported speculations were insufficient to create a nexus between the journals being sought and the 2009 crimes.

The complaint for the search warrant contained insufficient facts to support a reasonable inference that the journals contained information relating to the 2009 crimes. Thus, the complaint for the search warrant was insufficient to establish probable cause for the warrant to issue.

2. The trial court should have granted Mr. Powell's motion and suppressed all evidence discovered pursuant to the search of his home.

Where a search warrant issued without probable cause, evidence

gathered pursuant to the search must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Crawley*, 61 Wn.App. 29, 808 P.2d 773, *review denied*, 117 Wn.2d 1009, 816 P.2d 1223 (1991).

> When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Under article I, section 7, suppression is constitutionally required. We affirm this rule today, noting our constitutionally mandated exclusionary rule "saves article 1, section 7 from becoming a meaningless promise." Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence.

State v. Ladson, 138 Wn.2d 343, 359-360, 979 P.2d 833 (1999) (internal citations omitted).

Here, as discussed above, the complaint for the warrant contained insufficient facts to establish probable cause for the warrant to issue. Thus, all evidence discovered pursuant to the warrant was inadmissible at Mr. Powell's trial. The trial court erred in admitting the evidence discovered pursuant to the search warrant.

V. CONCLUSION

The remedy for an error in an evidentiary ruling is to remand the case for new trial where the inadmissible evidence is suppressed. *See State v. Thompson*, 151 Wn.2d 793, 808-809, 92 P.3d 228 (2004).

For the reasons stated above, this court should vacate Mr. Powell's convictions and remand his case for a new trial at which all evidence discovered pursuant to the warrant is suppressed.

DATED this 15th day of April, 2013.

Respectfully submitted,

/s/
Sherri Arnold, WSBA No. 18760
Attorney for Appellant

Certificate of Service:

The undersigned certifies that on April 15, 2013, she delivered by e-mail to the Pierce County Prosecutor's Office, pcpatcecf@pierce.wa.us, and by United States mailed to appellant, appellant, Steven C. Powell, DOC # 357992, Monroe Corrections Center, Twin Rivers Unit, Post Office Box 888, Monroe, Washington 98272 true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, April 15, 2013.

/s/
Norma Kinter

ARNOLD LAW OFFICE

April 16, 2013 - 12:55 PM

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Appellant's Supplemental Brief

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