No. 44166-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WARREN L. LEMMON,

Appellant.

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

The Honorable Amber L. Finlay

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

Evidence obtained pursuant to a search warrant for Mr. Lemmon's property was wrongly admitted, when the search warrant affidavit was not supported by probable cause.

1. The trial court erroneously applied the "totality of circumstances" test, rather than the *Aguilar-Spinelli*[1] test, when it reviewed the affidavit in support of probable cause to search Mr. Lemmon's property based on a confidential informant.

Where, as here, a confidential informant provides the basis for probable cause to issue a search warrant, the affidavit in support of the warrant must establish both the basis of the informant's knowledge and the reliability of the informant. *State v. Jackson*, 102 Wn.2d 432, 433, 688 P.2d 136 (1984).

> The appropriate analysis under the Washington Constitution on which defendant relies, is the *Aguilar-Spinelli* 2-prong test. This requires that facts and circumstances be shown from which the magistrate can, independently of the officer seeking the warrant, evaluate the informant's basis of knowledge and personal credibility or veracity. Both the reliability of the manner by which the information was acquired and the reliability of the informant must be shown in an effort to determine present reliability. Conclusory assertions of reliability will not suffice; and our determination of reliability, though limited to the record, will not be limited by the officer's interpretation of any grounds for reliability asserted in the affidavit itself.

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[1] *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).

State v. Casto, 39 Wn. App. 229, 232-33, 692 P.2d 890 (1984). The two prongs are separate and both must be established in the affidavit for the search warrant; a strong showing on one prong will not overcome a deficiency in the other. *Jackson*, 102 Wn.2d at 437, 441. If either prong is not established, the search warrant is deficient and any evidence obtained pursuant to the defective warrant must be suppressed. *State v. Lyons*, 174 Wn.2d 354, 368, 275 P.3f 314 (2012).

Here, the court erroneously applied the "totality of the circumstances" standard of review, rather than the *Aguilar-Spinelli* test adhered to in Washington. CP 24 (CrR 3.6 Conclusion of Law 3). In *Jackson*, the Court compared the *Aguilar-Spinelli* test to the more lenient Fourth Amendment "totality of the circumstances" test, adopted in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). 102 Wn.2d at 435-37. The "totality of circumstances" test merely uses the two prongs of *Aguilar-Spinelli* as general factors or guidelines for evaluating the reliability of an informant, whereas the *Aguilar-Spinelli* test requires each prong be independently satisfied. *Id.* at 435-36. The Court specifically rejected the federal "totality of the circumstances" test, and ruled the greater privacy protections, embodied in Article I, section 7, require the search warrant affidavit must establish both the reliability and the basis of knowledge of the informant. *Id.* at 443.

The State argues the court applied the *Aguilar-Spinelli* test, on the grounds that the court referenced *Aguilar-Spinelli* in its oral ruling and its written conclusions of law. Br. of Resp. at 6. But this argument ignores the fact that the court also referenced the totality of the circumstances in both its oral ruling and its written conclusions of law. "In determining the reliability of the confidential informant, the Court looks at the totality of the information set forth in the affidavit." CP 24 (Conclusion of Law 3). "[T]he court looks at the totality of the information *as well as* looking at just what is established for the basis and reliability – basic knowledge and reliability of the informant." RP 15 (emphasis added).

The State refers to Conclusion of Law 1, in which the court indicated it assessed the confidential informant's reliability based solely on the information contained in the search warrant affidavit. Br. of Resp. at 6. However, both the *Aguilar-Spinelli* test and the "totality of the circumstances" test are limited to the four corners of the affidavit. *See Gates*, 462 U.S. at 226; *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). This point is inapposite.

The trial court improperly conflated the *Aguilar-Spinelli* test with the "totality of the circumstances" test, in violation of Article I, section 7 of the Washington State Constitution.

2. The search warrant affidavit did not establish the informant's reliability.

A trial court's determination regarding the sufficiency of the search warrant affidavit is a conclusion of law that is reviewed *de novo*. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). A heightened showing of reliability is required where the magistrate does not know the identity of the informant or the informant is a professional informant, because such informants are more likely to provide information "colored by self-interest." *State v. Ibarra*, 61 Wn. App. 695, 699, 812 P.2d 114 (1991).

The search warrant affidavit did not provide the necessary heightened showing of credibility. The identity of the informant remained confidential. CP 57-59. *See State v. Franklin*, 49 Wn. App. 106, 110, 741 P.2d 83 (1987) ("[A]nonymity of a citizen informant may be one factor for finding no showing of reliability." (Emphasis in original)). The assertion that the informant's information was corroborated by "multiple reliable sources" was simply the detective's conclusion and provided no information for an independent evaluation. CP 57. *See State v. Woodall*, 100 Wn.2d 74, 77, 666 P.2d 364 (1983) ("'Reliable' ... is a mere conclusion of the affiant which could mean a number of things."). The informant's description of Mr. Lemmon's property was an innocuous fact

that merely indicated familiarity with the property. CP 58. *See Jackson*, 102 Wn.2d at 438 ("Corroboration of public or innocuous facts only shows that the informer has some familiarity with the suspect's affairs."). The assertion that the informant had provided information in "in the past" which led to "several" arrests and charges was too vague as to distance in time, the circumstances under which that information was provided, the number of arrests and charges, and whether the information resulted in any convictions. CP 58. *Cf. State v. Taylor*, 74 Wn. App. 111, 119, 872 P.2d 53 (1994) (informant "had a 2 ½ year track record of providing accurate information which led to numerous arrests and drug-related convictions."). The alleged controlled buy was improperly executed and, therefore, did not provide independent corroboration to the informant's reliability. CP 58. *Cf. State v. Bertrand*, 165 Wn. App. 393, 396 n.2, 267 P.3d 511 (2011) (In a controlled buy, "[t]he informant ... purchases drugs while under police surveillance....")

The information elicited at the subsequent *Franks*[2] hearing is properly before this Court. The State argues the information may not be considered because that information was not before the magistrate. Br. of Resp. at 12-14. This argument misconstrues the purpose of a *Franks* hearing, which is to establish whether the affiant made a material omission

[2] *Franks v. Delaware*, 438 U.S. 154, 98 S.C. 2674, 57 L.Ed.2d 667 (1976).

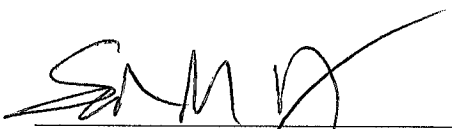
or misrepresentation that must be excised. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). At the CrR 3.6 hearing, the court stated, "[I]f this was a situation where there were multiple residences in the area, the Court would suppress, but that's not the case. That's not the information provided to the issuing magistrate, not to this court." RP 18. At the subsequent *Franks* hearing, however, the defense introduced evidence that there were two other driveways and another road near the intersection where the informant was left, and it was "possible" the informant went to another residence in the area. RP 98. On this record, therefore, this Court may properly rule that the trial court should have excised reference to the improperly executed controlled buy and considered only the remaining assertions in the search warrant affidavit.

B. CONCLUSION

A reviewing court "will not defer to a magistrate's decision if the information on which it is based is not sufficient to establish probable cause." *State v. Perez*, 92 Wn. App. 1, 4, 963 P.2d 881 (2002). Here, the references to the alleged controlled buy should have been excised and the remaining information was insufficient to establish the informant's reliability. For the foregoing reasons, and the reasons set forth in the Brief of Appellant, Mr. Lemmon respectfully requests this Court reverse his convictions for possession with intent to deliver a controlled substance and unlawful possession of a controlled substance.

DATED this 20th day of September 2013.

Respectfully submitted,



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