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Supreme Court No.: 95943-9
Court of Appeals No.: 34591-2-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIPASA UILIATA,

Petitioner.

PETITION FOR REVIEW

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

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND THE DECISION BELOW 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 2

1. A 'concerned citizen' who wanted to conduct controlled buys contacted the police with information and conducted controlled buys on unknown dates leading to a warrant to search Uiliata's home 2

2. Although the State sought sentencing enhancements for proximity to a school bus route stop, it failed to show the distance between the stop and the offense, the existence of the stop on the date of the offense, and that the stop was for a 'school bus' 5

D. ARGUMENT 6

1. **The opinion below conflicts with *State v. Clayton* and *State v. Jones*, both published Court of Appeals decisions, in affirming the school bus route enhancements despite insufficient evidence that possession occurred within 1,000 feet of the school bus route stop** 6

2. **The Court should accept review and hold a warrant application that lacks particularity as to the date of controlled buys and the source or veracity of a confidential informant's information cannot justify an intrusion into an individual's home** 11

   a. The warrant application must be supported by probable cause 12

   b. The affidavit provided no means for the magistrate to ascertain whether drugs were likely to be possessed for distribution in the house on March 24 when the warrant was issued 12

c. The affidavit also provided inadequate information on the source of the confidential informant's information and his veracity 15

d. On either ground, the warrant is deficient and the evidence found during the resulting search must be suppressed 18

E. CONCLUSION 18

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Cole, 128 Wn.2d 262, 906 P.2d 925 (1995)................................ 16

State v. Helmka, 86 Wn.2d 91, 542 P.2d 115 (1975)............................... 16

State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984) 15, 16

State v. Lyons, 174 Wn.2d 354, 275 P.3d 314 (2012)............ 13, 14, 15, 16

State v. Mejia, 111 Wn.2d 892, 766 P.2d 454 (1989)............................... 18

State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977)............................. 14

State v. Stubbs, 170 Wn.2d 117, 240 P.3d 143 (2010) 8

State v. Thein, 138 Wn. 2d 133, 977 P.2d 582 (1999)............................. 14

Washington Court of Appeals Decision

State v. Bodine, No. 47906-1-II, 196 Wn. App. 1013,
2016 WL 5417398 (Sept. 27, 2016) 10

State v. Clayton, 84 Wn. App. 318, 927 P.2d 258 (1996).................. 7, 8, 9

State v. Franklin, 49 Wn. App. 106, 741 P.2d 83 (1987) 17

State v. Hatcher, 3 Wn. App. 441, 475 P.2d 802 (1970) 14

State v. Ibarra, 61 Wn. App. 695, 812 P.2d 114 (1991).................... 17, 18

State v. Johnson, 94 Wn. App. 882, 974 P.2d 855 (1999)........................ 14

State v. Jones, 140 Wn. App. 431, 166 P.3d 782 (2007) 7, 8, 9

U.S. Supreme Court Decisions

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509,
12 L. Ed. 2d 723 (1964).. 12, 15

Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584,
21 L. Ed. 2d 637 (1969).. 15

Constitutional Provisions

Const. art. I, § 7 .... 1, 11, 12

U.S. Const. amend. IV 11, 12

Statutes

RCW 69.50.435 .... 5, 6, 7, 10

Rules

GR 14.1 .... 9, 10

RAP 13.4 .... passim

Other Authorities

WAC 392-142-100 11

WAC 392-143-010 11

WPIC 50.63 11

A. <u>IDENTITY OF PETITIONER AND THE DECISION BELOW</u>

Tipasa Uiliata's article I, section 7 rights were violated when the police used a deficient warrant and seized unauthorized items. Then, the prosecution presented insufficient evidence of the presence of any school bus stop on the date of the offense, of a school bus stop within 1,000 feet of the site of the offense, or that the route was for a school bus as defined in the statute. Nevertheless, the Court of Appeals affirmed Uiliata's convictions and enhanced sentence. Uiliata petitions this Court to grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals in *State v. Uiliata*, No. 34591-2-III, filed May 3, 2018. A copy of the opinion is attached as an appendix.

B. <u>ISSUES PRESENTED FOR REVIEW</u>

1. In two published opinions, the Court of Appeals has held the prosecution must show the actual distance between a protected area and the site of the crime to uphold an enhancement that doubles the sentence. However, in the opinion below, the court inferred that the distance between the school bus route stop and the front bedroom of the house where drugs were found was less than 1,000 feet—even though the evidence at trial did not show the distance from the property line to the bedroom or from the bus stop to the bedroom. Further, the opinion affirms the enhancements despite the lack of evidence that the bus stop existed on

the date of the offense and the lack of showing that the stop was for a school bus, as that term is defined in the statute. Should this Court accept review because the decision below conflicts with two published Court of Appeals decisions and review is in the substantial public interest? RAP 13.4(b)(2), (4).

2. To justify an intrusion into the privacy of an individual's home, this Court has held a warrant application must provide specific information to satisfy a neutral and detached magistrate's assessment that the specified contraband will likely be at the location on the date of the search. Should the Court accept review and hold the warrant was unauthorized here where the affidavit was stale and unspecific with regard to timing, the basis of the confidential informant's knowledge was not set forth, and the confidential informant's veracity was not supported? RAP 13.4(b)(1), (3), (4).

C. STATEMENT OF THE CASE

1. A 'concerned citizen' who wanted to conduct controlled buys contacted the police with information and conducted controlled buys on unknown dates leading to a warrant to search Uiliata's home.

A "concerned citizen" contacted Detective Frank Randall of the Klickitat County Sheriff's Office to provide him with "local drug

information." CP 21. The "concerned citizen" was also eager to "do some controlled buys." *Id*.

Sometime between March 20 and March 24, 2016, Randall asked this informant to make two controlled purchases of drugs from the residence of Roger Neal at 1021 Dallesport Road. CP 21-22. Randall provided the informant with recorded money for the purchase, and then sent the informant to the residence. *Id*. Randall could not see or hear the confidential informant once he went inside. *Id*. Five to ten minutes later, the informant emerged, met Randall at an undisclosed location, and produced small quantities of methamphetamine. *Id*.; RP 145-46. The informant told Randall that, in addition to Roger Neal, Tipasa Uiliata was at the residence during the informant's purchases. CP 22.

On March 24, Randall applied for a search warrant for 1021 Dallesport Road. CP 21-24. In the application, Randall provided little information on the confidential informant. *See id*. His affidavit states:

On or about the week of March 13-19, 2016, I was a contacted by a concerned citizen wanting to provide me with local drug information and possible do some controlled buys. The concerned citizen provided me with information that I knew to be true and had for most of their adult life been exposed to drugs in Klickitat County and surrounding areas. There was no doubt in my mind that the concerned citizen's knowledge and information was good. I signed the concerned citizen up as a Confidential Reliable Informant (CRI) based on my interview of the subject. The CRI was given a number of CRI 20-10 and will further be referred to by that number.

CP 21. Randall's affidavit then recited that the confidential informant assisted with the two controlled drug purchases "on our about the week of March 20-24, 2016," that Tipasa Uiliata is a fugitive from Oregon "considered to be armed and dangerous," and that "a search warrant is warranted right away to protect the citizens." CP 21-22. Randall also recited some of his law enforcement experience and general understanding of controlled substance dealing. CP 22-23.

Judge Rick Hansen issued a warrant authorizing a search of 1021 Dallesport Road, including all rooms, storage areas, surrounding grounds, trash areas, garages and outbuildings. CP 25. The warrant authorized the seizure of particular property, including controlled substances, but did not include firearms. CP 25-26.

On March 25, a dozen police officers searched 1021 Dallesport Road, seized Neal and several others, including Uiliata, who was outside the residence, and seized dozens of items, including eight firearms, personal paperwork and photographs, digital scales, Ziploc bags, heroin and methamphetamine. CP 27-30; RP 148-66, 170-71, 176-84, 188-89, 194.

2. Although the State sought sentencing enhancements for proximity to a school bus route stop, it failed to show the distance between the stop and the offense, the existence of the stop on the date of the offense, and that the stop was for a 'school bus'.

Uiliata was charged with two counts of possession with intent to deliver controlled substances (one count relating to the heroin and the other to the methamphetamine) and three counts of unlawful possession of a firearm. CP 1-14, 39-42. The State alleged the two possession counts were committed within 1,000 feet of a school bus route stop. CP 39-42; RCW 69.50.435(1)(c).

Before trial, he moved to suppress the evidence because the warrant was stale as to the dates provided and lacked particularity for the firearms seized. CP 15-30; RP 6-14. The motion was denied. RP 9, 12, 14.

At trial, the State presented the testimony of Mike Murphy, the director of transportation for the Lyle School District. He testified some undefined school bus stop existed on the date of his testimony, but did not offer evidence as to whether the stop existed on the date of the offense, four months earlier, and did not state whether the bus met the definition of a school bus in RCW 69.50.435. *See* RP 197-99. He also did not measure the distance between the site of the offense (a bedroom) to the bus stop. *See* RP 201-02, 208.

Uiliata was convicted as charged, including on sentence-doubling enhancements for each of the possession counts occurring within 1,000 feet of a school bus route stop. CP 124-30. The court sentenced Uiliata to 144 months' confinement. CP 263-73. The Court of Appeals affirmed. Slip Op. at Appendix.

D. ARGUMENT

1. **The opinion below conflicts with *State v. Clayton* and *State v. Jones*, both published Court of Appeals decisions, in affirming the school bus route enhancements despite insufficient evidence that possession occurred within 1,000 feet of the school bus route stop.**

The opinion conflicts with two published Court of Appeals decisions in holding that the prosecution presented sufficient evidence that the possession occurred within 1,000 feet of a school bus route stop even though there was no evidence of the measurement from the stop to the bedroom where the drugs were possessed. Review should be granted under RAP 13.4(b)(2).

The State alleged that the two counts of possession with intent to distribute were committed within 1,000 feet of a school bus route stop. CP 39-42; RCW 69.50.435(1)(c). Therefore, the State had to prove beyond a reasonable doubt that Uiliata possessed the controlled substances within 1,000 feet of a school bus route stop. *State v. Stubbs*, 170 Wn.2d 117, 123,

240 P.3d 143 (2010). If it satisfied its burden, Uiliata's sentence could be increased by up to double the standard range term of imprisonment. RCW 69.50.435(1).

The enhancement applies only if the possession occurs within 1,000 feet of the bus route stop. RCW 69.50.435(1)(c); *State v. Clayton*, 84 Wn. App. 318, 322, 927 P.2d 258 (1996). In *Clayton*, the Court of Appeals confirmed the State must show that the school-related property was within 1,000 feet of the location of the offense. *Clayton*, 84 Wn. App. at 321-22. The Court of Appeals reversed the enhancement because the evidence only showed measurement to the property line and to the outside of the house. *Id*. In *State v. Jones*, the Court of Appeals agreed with *Clayton*, to hold the prosecution could not simply rely on evidence estimating the distance from the bus stop to the location of the offense. *State v. Jones*, 140 Wn. App. 431, 436-38, 166 P.3d 782 (2007). If the "actual distance" from the stop to the locus of the crime is "unclear," the prosecution fails to satisfy its burden, and the enhancement cannot be applied. *Id*. at 438.

Here, the controlled substances were shown to have been possessed in the front bedroom of the house at 1021 Dallesport Road. RP 148-54, 157-59, 180-81. Under the statute, and as interpreted by *Clayton*, the evidence must show that bedroom to be within 1,000 feet of the bus

route stop. *Clayton*, 84 Wn. App. at 321-22 (where crime was committed in bedroom of a house, measurement must be conducted to that site). The State's witness, however, only measured from the property line of 1021 Dallesport Road. RP 201-02, 208. No evidence showed the distance from the property line to the front bedroom of the home.[1]

As the Court of Appeals held in *Clayton*, a measurement to the property line is insufficient where the offense occurred within a particular location on the property, not on its border with the street. 84 Wn. App. at 322. Likewise, in *Jones*, the court "decline[d]" to infer an unmarked diagram showed a 90 degree angle or take judicial notice of the Pythagorean theorem. 140 Wn. App. at 437. Yet, in conflict with these opinions, the court below held the evidence was sufficient by "inferring" the distance from the edge of the property line to the front bedroom of the trailer home where the drugs were found. Slip Op. at 16.

> Uiliata lived in a trailer house in the town of Dallesport. From this evidence, the State asks us to infer that Uiliata lived on a lot small enough so that all parts of the trailer house would be within 859 feet of the middle of the front edge of [the] property line. This distance is equivalent to almost three football fields. We believe that such an inference is justified.

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[1] For example, Exhibit 16, a drawing of the home, specifically states it is "not to scale" and Exhibit 17, a drawing of the area, also does not indicate distances. *See also* RP 195-96 (Randall's testimony as he marks street names on exhibit).

Id. The Court of Appeals' willingness to infer evidence not in the record here cannot be squared with its unwillingness to do so in *Clayton* and *Jones*. Although the opinion attempts to distinguish *Clayton* based on the greater distance involved here, the court fails to even cite to *Jones*. *Compare* Slip Op. at 15-16 *with* Appellant's Op. Br. at 30 (directing the court to *Jones*, 140 Wn. App. at 437-38).

The Court should accept review and hold, as in *Clayton* and *Jones*, the prosecution fails to present sufficient evidence to support a sentencing enhancement where the record is "devoid of any evidence of the measurement to the exact site where the crimes occurred." *Jones*, 140 Wn. App. at 437 (quoting *Clayton*, 84 Wn. App. at 322).

Further, the evidence below was insufficient on two additional bases. First, the State failed to prove the bust stop existed on the date of the offense. The State's witness testified only that a bus stop existed on the date of his testimony. RP 197-98 (testifying in the present tense). The State presented no evidence to show that those same school bus route stops, or any others, existed on March 25, 2016, the date of the possession offenses. Under the plain language of the statute and an unpublished Court of Appeals opinion citable under GR 14.1, the school bus route stop must

have existed at the time of the possession. *State v. Bodine*, No. 47906-1-II, 196 Wn. App. 1013, 2016 WL 5417398, *2 (Sept. 27, 2016).[2]

Second, the State failed to prove the stop was for a school bus, which is a specifically defined term under RCW 69.50.435. RCW 69.50.435(6)(b) provides,

> "School bus" means a school bus as defined by the superintendent of public instruction by rule which is owned and operated by any school district and all school buses which are privately owned and operated under contract or otherwise with any school district in the state for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system.

RCW 69.50.435(6)(b).

The school district director of transportation simply testified using the words "school bus." RP 197-99. The State did not ask the witness whether the school district owned and operated the buses or whether they were operated under contract or otherwise with any school district in the state for the transportation of students. *See* RCW 69.50.435(6)(b). The State did not show that the buses utilizing the stop had seating capacity of more than ten persons including the driver, that they were regularly used

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[2] This unpublished decision is cited as persuasive authority pursuant to GR 14.1. The conflict between the opinion below and the unpublished opinion in *Bodine* compels review in the substantial public interest. RAP 13.4(b)(4).

to transport students to and from school or in connection with school activities, or that they met the requirements of the school bus specifications manual published by the superintendent. WAC 392-142-100(4); WAC 392-143-010; WPIC 50.63 (School bus – definition).

These failings also merit review by this Court in the substantial public interest. RAP 13.4(b)(4).

2. The Court should accept review and hold a warrant application that lacks particularity as to the date of controlled buys and the source or veracity of a confidential informant's information cannot justify an intrusion into an individual's home.

Article I, section 7 commands that, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The Fourth Amendment likewise protects individuals from intrusions into their persons and property. U.S. Const. amend. IV. The Court should accept review and hold the search and seizure conducted in Uiliata's home were unconstitutional invasions into his private affairs where the affidavit supporting the application provided inadequate basis to ascertain the veracity or source of the confidential informant's information or that drugs would be present in the home on the date issued. RAP 13.4(1), (3), (4).

a. The warrant application must be supported by probable cause.

A warrant to search a home can only be issued for probable cause. U.S. Const. amend. IV; Const. art. I, § 7. It is well-settled that "[t]he warrant must be supported by an affidavit that particularly identifies the place to be searched and items to be seized." *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). An affidavit establishes probable cause only if it sets forth "sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched." *Id*. Because the determination of probable cause must be made by a neutral and detached magistrate, and not by "police officers in the field," the grounds must be set forth specifically enough that the magistrate can independently judge the truthfulness of the conclusions reached in the affidavit. *Id*. at 359-60.The magistrate must perform her neutral and detached function, and not serve merely as a rubber stamp for the police. *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

b. The affidavit provided no means for the magistrate to ascertain whether drugs were likely to be possessed for distribution in the house on March 24 when the warrant was issued.

The facts set forth in the affidavit must support the conclusion that the evidence is probably at the premises to be searched at the time the warrant is issued. *Lyons*, 174 Wn.2d at 360 (citing *State v. Partin*, 88

Wn.2d 899, 903, 567 P.2d 1136 (1977)). “[I]nformation that is not sufficiently grounded in fact is inherently unreliable and frustrates the detached and independent evaluative function of the magistrate.” *State v. Thein*, 138 Wn. 2d 133, 146-47, 977 P.2d 582 (1999).

With respect to dates and times, the affidavit must be specific enough that the magistrate can determine whether it is probable that a search would reveal the suspected criminal activity or evidence. *Lyons*, 174 Wn.2d at 360-61. Whether an affidavit is stale depends upon the time between the known criminal activity and the affidavit and the scope of the suspected activity. *Id*. at 361. As the Court stated previously, it “should go without saying that the magistrate cannot determine whether observations recited in the affidavit are stale unless the magistrate knows the date of those observations.” *Id*.

The affidavit in this case was insufficient. It set forth information pertaining to the two controlled buys that Detective Randall conducted with the confidential informant. Yet, it did not indicate the date or dates on which the two buys occurred. *See* CP 21-24; *Lyons*, 174 Wn.2d at 361 (when informant observed criminal activity and when affiant received the information are critical for determining staleness). The affidavit does not specify whether the two buys occurred on the same day or on different days. CP 21-24. It simply attested that the buys occurred “on or about the

week of March 20-24, 2016." CP 21-22. The reviewing magistrate, Judge Rick Hansen, could not perform his constitutionally prescribed function to evaluate the affidavit for probable cause without the pertinent dates. *See State v. Jackson*, 102 Wn.2d 432, 436-37, 688 P.2d 136 (1984); *Lyons*, 174 Wn.2d at 361-62.

Dates were particularly important here because law enforcement suspected simple drug dealing. CP 21-26. Quantities of drugs may be sold, used or otherwise disposed of within a short period of time. *See State v. Hatcher*, 3 Wn. App. 441, 447, 475 P.2d 802 (1970) (noting State's position that narcotics evidence is easily disposable); *State v. Johnson*, 94 Wn. App. 882, 887-89, 974 P.2d 855 (1999) (noting possibility of quick destruction of drugs and related evidence). Further, drugs and supplies are frequently moved by those selling them. CP 22-23. Thus, four days is a substantial, material passage of time when one is searching for evidence of simple drug dealing. In contrast, evidence of a marijuana grow operation, for instance, would be difficult, costly and time-consuming to dismantle; thus probable cause could be found over a much longer period. *Lyons*, 174 Wn.2d at 361 (probable cause might exist for marijuana grow operation after "passage of a substantial amount of time").

Moreover, the affidavit in no manner indicates that drugs were likely to be present at the residence on March 24 when the warrant issued

or March 25 when it was executed. *See* CP 21-24; *Lyons*, 174 Wn.2d at 361-62 (affidavit missing critical timing information could still establish probable cause if recency can be inferred from other facts and circumstances in the affidavit). The confidential informant did not indicate he saw drugs other than the small quantities he purchased and necessarily took with him. "Probable cause cannot be made out by conclusory affidavits." *State v. Helmka*, 86 Wn.2d 91, 92, 542 P.2d 115 (1975).

c. <u>The affidavit also provided inadequate information on the source of the confidential informant's information and his veracity.</u>

When a warrant application depends on an informant's tip, the affidavit must demonstrate (1) the basis of the informant's information and (2) the informant's credibility. *Jackson*, 102 Wn.2d at 433; *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar*, 378 U.S. 108.

If an affidavit is based upon information from a confidential informant, "the affidavit must contain background facts to support a reasonable inference that the information is credible and without motive to falsify." *State v. Cole*, 128 Wn.2d 262, 287-88, 906 P.2d 925 (1995).

In *Cole*, this Court found a warrant affidavit sufficient where it included sufficient information about the informant and the basis for his or her knowledge.

> In this case, the Gaddy affidavit included the following facts about the informant: (1) the informant lived in the neighborhood of the house that was the subject of the requested search; (2) the informant lived in that neighborhood for several years; (3) the informant worked in the community; (4) the informant had extended family who lived in the community; (5) the informant did not have a criminal record; (6) the informant came forward voluntarily; (7) the informant did not request compensation; and (8) Gaddy knew the informant's identity. (Clerk's Papers at 75.) According to the affidavit, the informant's information was quite specific, describing appearances of automobiles and persons, their activities, and even the license plate numbers of the vehicles. (Clerk's Papers at 75, 77.) The affidavit also described subsequent investigation by police officers that corroborated the information given by the informant, including the suspicious appearance of the residence, a pattern of visitation to the residence consistent with drug-related activities, and a link between the vehicles reported by the informant and observed by officers and persons with prior convictions for narcotics violations. (Clerk's Papers at 75–80.)

Id. at 288.

In *Mejia*, the following information in the affidavit was sufficient to support the informant's veracity:

> Your affiant believes that the confidential informant is reliable for the following reasons: Informant has been known to your affiant for SIX months. He has completed FOUR controlled buys under your affiant's direction and supervision, in each instance purchasing controlled substances. Further, informant has been given information regarding drug trafficking which has been verified through other investigations conducted by the City-County Narcotics Unit. Informant has never provided your affiant with information which has been found to be false.

State v. Mejia, 111 Wn.2d 892, 894, 897, 766 P.2d 454 (1989).

None of the information present in *Cole* or *Mejia* is contained in the affidavit here. *See* CP 21-24. The affidavit provides no information pertaining to how the confidential informant garnered his information. *See State v. Ibarra*, 61 Wn. App. 695, 812 P.2d 114 (1991) (affidavit insufficient where it supplies no factual, underlying information, does not indicate how informant gained knowledge, and contains only self-serving statements). In other words, the magistrate could not test the basis of the informant's information.

Also, the affidavit provides only conclusory attestations of the informant's credibility. CP 21. Detective Randall attests, the informant "provided me with information that I knew to be true . . . There was no doubt in my mind that the concerned citizen's knowledge and information was good." *Id*. These unsupported conclusions are even more bare than the "generic recitation" found insufficient in *State v. Franklin*, 49 Wn. App. 106, 85-86, 741 P.2d 83 (1987) (finding insufficient the officer's "personal opinion that the informant was an upstanding citizen since the informant had no criminal record, was motivated by a desire to thwart crime, and requested anonymity because of fear of retribution").

Although the affidavit here also contains a recitation of two controlled buys conducted with the confidential informant, the

dependability of those controlled buys relates directly to the veracity of the confidential informant. While the affiant explains the procedures he used to conduct the controlled buy, the confidential informant operated independent of the police and out-of-view when he went into the residence at 1021 Dallesport Road. The accuracy of the information obtained in the controlled buy, therefore, depended on the veracity of the confidential informant. This critical information is missing from the affidavit supporting the warrant.

d. On either ground, the warrant is deficient and the evidence found during the resulting search must be suppressed.

When the affidavit presented to the magistrate fails to support a finding of probable cause, any resulting warrant was improperly issued and the evidence obtained as a result of the subsequent search must be suppressed. *See e.g.*, *Ibarra*, 61 Wn. App. at 703. The Court should accept review and hold the evidence seized must be suppressed because the affidavit was stale and unspecific with regard to timing, the basis of the confidential informant's knowledge is not set forth, and the confidential informant's veracity is not supported.

E. CONCLUSION

The Court should accept review because the Court of Appeals opinion conflicts with its own prior decisions regarding the sufficiency of

the evidence for the school bus route enhancement. The Court should also grant review and hold the warrant application lacked particularity, did not show drugs were likely to be present on the date of the search, and failed to provide reliable information regarding the confidential informant on which the justification for the search depended.

DATED this 31st day of May, 2018.

Respectfully submitted,

s/ Marla L. Zink_______________
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Washington Appellate Project
Attorney for Petitioner

APPENDIX

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MAY 3, 2018
In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 34591-2-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
TIPASA LESUMI UILIATA,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, C.J. — Tipasa Uiliata appeals after his convictions for three counts of first degree unlawful possession of a firearm and two counts of possession of controlled substances with intent to deliver, with the latter counts enhanced because they occurred within 1,000 feet of a school bus route stop. He claims various errors entitle him to relief: (1) two purported errors in the search warrant require the firearms and the controlled substances to be suppressed, (2) neither the warrant nor exigent circumstances permitted seizure of the firearms so the firearms must be suppressed, (3) because there is no record of the trial court's in camera inquiry of the confidential informant, the matter must be remanded for a new inquiry, (4) there is insufficient evidence to prove the school bus route stop enhancements so dismissal of the enhancements is required, and (5) two

scrivener's errors require remand for correction.

The State disagrees with Uiliata's first four arguments, but concedes that remand is required to correct the two scrivener's errors. We agree and remand for correction of the two scrivener's errors but otherwise affirm.

FACTS

Detective Frank Randall of the Klickitat County Sheriff's Office was contacted by a concerned citizen who wanted to provide local drug information and was eager to do controlled buys. Detective Randall enlisted him as a confidential informant (CI). The CI conducted two controlled buys at Roger Neal's residence, a trailer house on Dallesport Road in the town of Dallesport. Both times, the CI purchased $20 worth of methamphetamine. Uiliata was present in the trailer house for both purchases.

On March 24, 2016, Detective Randall applied for a search warrant to search the trailer house. The affidavit appended to the application stated the above facts. It also stated the two controlled drug purchases occurred "[o]n or about the week of March 20-24, 2016," that Uiliata was a wanted fugitive from Oregon for controlled substance deliveries and that he was considered to be armed and dangerous. Clerk's Papers (CP) at 21. The magistrate issued the warrant authorizing law enforcement to search the trailer house and to seize controlled substances, evidence of conspiracy, evidence of dominion

and control, and computer programs and storage disks evidencing drug distribution or currency expenditures.

On March 25, 2016, law enforcement executed the search warrant. Uiliata fled through the back of the trailer house, but was quickly apprehended and arrested. Detective Randall searched the trailer house for items specified in the search warrant. He found paperwork in the front bedroom evidencing that the bedroom belonged to Uiliata. In that bedroom, he also found methamphetamine, heroin, a digital scale, small plastic "baggies" and three firearms—a shotgun in the closet, and two handguns on the bed.

On March 28, 2016, the State charged Uiliata with five felonies: three counts of first degree unlawful possession of a firearm, one count of possession with intent to deliver a controlled substance—heroin, and one count of possession with intent to deliver a controlled substance—methamphetamine. In addition, the State charged enhancements on the two controlled substance counts, alleging that those crimes occurred within 1,000 feet of a school bus route stop.

PROCEDURE

Suppression motions denied

Uiliata moved to suppress the seized substances and firearms. He argued that the warrant was stale because it failed to state the specific dates of when the drugs were

purchased by the CI. The court rejected this argument. Uiliata also argued that the officers should have obtained a second search warrant before seizing the firearms. The court similarly rejected this argument.

In camera inquiry not recorded

Uiliata sought to compel the disclosure of the CI's identity. He argued that he needed to cross-examine the CI at trial on whether the CI purchased methamphetamine from him during the two controlled buys. Uiliata's trial theory was that Neal was selling drugs, not him, and that the CI was biased against him. Citing *State v. Petrina*, 73 Wn. App. 779, 871 P.2d 637 (1994), Uiliata asked the trial court to conduct an in camera inquiry to determine whether the CI's identity should be disclosed. The State countered that the CI's identity was not relevant because it intended to rely solely on the items found in Uiliata's bedroom to prove the charges.

The trial court determined that Uiliata had made a sufficient preliminary showing to conduct an in camera inquiry of the CI. The court, however, failed to make any record of the inquiry. Because of this, there is no record of what questions the trial court asked

and what responses the CI gave.[1]

We glean some insight into the trial court's inquiry from its oral ruling:

> I inquired of the confidential informant—to determine whether he had any biases against Mr. Uiliata, whether—what the source of his information was, and other matters, and made a determination after that hearing that based on my understanding of how the prosecutor will use him as a witness, that in fact there is no need to pierce the privilege by the defendant or the defense lawyer to know who he is or to get him in court.
>
> The [S]tate will be—merely relying on [Detective Randall's] affidavit to get the officers into the house and everything will flow from that. There won't be any—any statements whatsoever made by the confidential informant—There will be nothing said by the officer about what the informant said.

Report of Proceedings (RP) at 45-46. After denying disclosure, the trial court entered a written order. The trial court's order clarified that it would "allow testimony of the CI's actions but [would] not allow any hearsay statements to be solicited by the State." Clerk's Papers (CP) at 92.

Summary of trial testimony and verdict

The two-day jury trial commenced on July 6, 2016. The State called Roger Neal. In exchange for favorable treatment by the State, Neal testified that people he did not

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[1] In appendix C of his opening brief, Uiliata attached a motion to supplement the record, together with various e-mails of the Klickitat County court administrator and trial counsel. These e-mails establish that no record of the trial court's inquiry could be found and that the trial court met in its chambers with the CI and the State. The State does not object to Uiliata's motion to supplement, which we grant.

know often came to his front door and asked for Uiliata. These people would then enter Uiliata's bedroom, close the door, and leave soon after. Neal further testified that on a couple occasions, he facilitated the sale of methamphetamine by taking money given to him by people who came to his residence and giving the money to Uiliata in exchange for methamphetamine.

The State also called Detective Randall. He described the procedures for the two controlled buys at Uiliata's residence. He also described the items he later seized at the residence, including the firearms, controlled substances, digital scale, and small plastic baggies found in Uiliata's bedroom.

The State called two witnesses to testify about the distance between where the offenses occurred and the nearest school bus route stops. The first witness was the director of transportation for the Lyle School District, the school district for the town of Dallesport. The witness identified two bus route stops that were within 1,000 feet of Uiliata's residence on Dallesport Road: one at the intersection of Dallesport Road and Williams Street, and the other at the intersection of Dallesport Road and Cypress Street.

The second witness was a facilities technician for Klickitat County. He testified that he used a wheel attached to his car to measure the distances between Uiliata's property and the two intersections identified by the director. His measurement began at

the sidewalk adjacent to the middle of the trailer house and continued to the middle of the identified intersections. The technician testified that the distance between the boundary of Uiliata's property and the intersection of Dallesport Road and Cypress Street was 141 feet, and the distance between the boundary of Uiliata's property and the intersection of Dallesport Road and Williams Street was 511 feet.

The jury found Uiliata guilty of the charged offenses and found that the bus route stop enhancements applied. The trial court entered a judgment of conviction and sentenced Uiliata. He timely appealed.

ANALYSIS

1. THE SEARCH WARRANT WAS PROPERLY ISSUED

a. The information was not stale

Uiliata first contends that because the search warrant affidavit contained a five-day range of dates, March 20-24, the information in it was too stale to issue a warrant. We disagree.

Probable cause to issue a warrant is established if the supporting affidavit sets forth "facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity." *State v. Huft*, 106 Wn.2d 206, 209, 720 P.2d 838 (1986). This court tests the affidavit in a common sense rather than hyper-technical manner. *State*

v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). The existence of probable cause is a legal question that a reviewing court reviews de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007). However, we afford great deference to the issuing magistrate's determination of probable cause. *State v. Cord*, 103 Wn.2d 361, 366, 693 P.2d 81 (1985).

Facts supporting the issuance of a search warrant must support the conclusion that the evidence is probably at the premises to be searched at the time the judge issues the warrant. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012). Common sense is the test for staleness of a search warrant affidavit's information. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). Accordingly, the issuing judge must determine whether the passage of time between the officer's or informant's observations and the application for a warrant "is so prolonged that it is no longer probable that a search will reveal criminal activity or evidence, i.e., that the information is stale." *Lyons*, 174 Wn.2d at 360-61. The issuing judge determines staleness based on the totality of the circumstances. *Id.* at 361.

Here, the investigation took place during a five-day period and law enforcement applied for the warrant on the fifth day. We hold that the magistrate and the trial court were correct in holding that this period of time did not render the information in the

affidavit stale. *See State v. Perez*, 92 Wn. App. 1, 8-9, 963 P.2d 881 (1998) (holding that waiting three or four days after the last controlled buy in a continuing drug operation did not render the warrant invalid).

b. Independent police work corroborated the CI's credibility

Uiliata argues that the affidavit provides conclusory statements as to the informant's credibility and does not give sufficient information to the magistrate to make a probable cause determination. The State responds that the two controlled buys sufficiently corroborated the CI's credibility. We agree.

Although abandoned in the federal system, under Washington law, courts still evaluate an informant's reliability under the two-pronged *Aguilar/Spinelli* test. *State v. Jackson*, 102 Wn.2d 432, 436, 438, 688 P.2d 136 (1984) (citing *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), *abrogated by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), *but adhered to by Jackson*, 102 Wn.2d 432). Under this approach, to create probable cause the officer's affidavit must establish (1) the reliability of the informant's basis of knowledge, and (2) the veracity of the informant. *Jackson*, 102 Wn.2d at 435. If the informant's tip fails under either prong, "probable

cause may yet be established by independent police investigatory work that corroborates the tip . . . ." *Id.* at 438.

Here, the two controlled buys corroborated the informant's claim that he could procure drugs from where Uiliata lived. Even though Detective Randall's affidavit contained conclusory statements about the informant's veracity, the controlled buys satisfy both prongs of the *Aguilar/Spinelli* test. *See State v. Casto*, 39 Wn. App. 229, 234, 692 P.2d 890 (1984) (properly executed controlled buy conducted by CI generally satisfies both prongs of the *Aguilar/Spinelli* test).

2. THE FIREARMS WERE PROPERLY SEIZED

Uiliata next argues that the trial court erred when it denied his motion to suppress the eight[2] firearms. Uiliata argued below and on appeal that neither the search warrant nor exigent circumstances permitted the firearms to be seized. We disagree with his argument.

If officers discover an item immediately recognizable as contraband during their search, the item is subject to seizure under the plain view doctrine. *State v. Temple*, 170 Wn. App. 156, 164, 285 P.3d 149 (2012). In order for an item to be immediately

[2] We limit our analysis to the three firearms found in Uiliata's bedroom. He was not charged with firearm offenses relating to the five firearms found outside his bedroom.

recognizable as contraband, the officer need not possess certain knowledge that the item is contraband. *State v. Gonzales*, 46 Wn. App. 388, 400, 731 P.2d 1101 (1986). Rather, the test is whether, "considering the surrounding circumstances, the police can reasonably conclude that the [item is] incriminating evidence." *State v. Hudson*, 124 Wn.2d 107, 118, 874 P.2d 160 (1994).

Here, Detective Randall testified he knew that Uiliata was precluded from possessing firearms and that he found three firearms in Uiliata's bedroom during his search for items specified in the search warrant. We conclude that the trial court properly denied Uiliata's motion to suppress the three firearms.

3. FAILURE TO RECORD UNNECESSARY IN CAMERA HEARING WAS HARMLESS ERROR

Uiliata argues that the trial court erred in failing to create a record of the in camera inquiry with the CI. He claims that the failure to create a record prevents effective appellate review and thus requires a new in camera inquiry.

Before addressing Uiliata's argument, we must first discuss when an in camera inquiry of a CI is and is not warranted.

> An in camera inquiry by a court into the nature of a confidential informant's information is a proper means of determining whether compulsory disclosure of the informant's identity is required to protect the constitutional rights of the accused. The court is authorized to conduct an in camera [inquiry] under CrR 4.7(h)(6).

> An in camera [inquiry] is necessary when the defendant makes an initial showing that the confidential informant may have evidence that would be relevant to the defendant's innocence. An in camera [inquiry] will not be conducted, however, if the defendant's contention that the informant may have relevant information is based upon speculation.

12 ROYCE A. FERGUSON, WASHINGTON PRACTICE SERIES: CRIMINAL PRACTICE AND PROCEDURE § 2512 (3d ed. 2004).

Conversely, a defendant does not have a constitutional right to disclosure of an informant's identity when the information provided by the informant relates only to probable cause and not to guilt or innocence. *State v. Selander*, 65 Wn. App. 134, 138 n.1, 827 P.2d 1090 (1992) (citing *McCray v. Illinois*, 386 U.S. 300, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967)). In that event, an in camera inquiry is not warranted.

The State concedes that the trial court erred by not recording its inquiry with the CI. The State argues that Uiliata cannot show how this error prejudiced him. Specifically, the State argues that the information provided by the CI was used only to obtain probable cause for the search warrant and that Uiliata was not charged with crimes relating to the two controlled buys.

To determine whether an in camera inquiry was warranted, we now turn to the two reasons Uiliata sought disclosure of the CI's identity. Uiliata first argued that disclosure was required to establish that the CI purchased methamphetamine from Neal, not him.

We do not believe that this would be a sufficient reason for disclosure. Even had the CI purchased methamphetamine from Neal, Uiliata was not charged for crimes relating to those prior purchases. Instead, Uiliata was charged based on the items law enforcement found in his bedroom: methamphetamine, heroin, small plastic baggies, and a digital scale. We conclude that Uiliata's first argument for obtaining an in camera inquiry was insufficient.

Uiliata also argued that disclosure of the CI's identity was necessary to establish bias against him. We do not believe that this would be a sufficient reason for disclosure either. Even if the CI was biased against Uiliata, this bias does not account for the controlled substances, small plastic baggies, and digital scale found in Uiliata's bedroom. Uiliata does not contend that the CI snuck into the trailer house and planted these items in his bedroom. Uiliata's second argument for obtaining an in camera inquiry was also insufficient.

Because an in camera inquiry was not warranted, the lack of a record does not prejudice Uiliata. We conclude that Uiliata is not entitled to a new in camera inquiry.

4. SUFFICIENT EVIDENCE FOR SCHOOL BUS ROUTE STOP ENHANCEMENT

Uiliata claims the State failed to produce sufficient evidence that he committed the drug offenses within 1,000 feet of a school bus route stop.

When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* In a challenge to the sufficiency of the evidence, circumstantial evidence and direct evidence carry equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

RCW 69.50.435(1)(c) states that a defendant is subject to a school bus route stop sentencing enhancement if he or she violates RCW 69.50.401 by delivering a controlled substance "[w]ithin one thousand feet of a school bus route stop designated by the school district."

a. Temporal requirement sufficiently established

Uiliata argues that the State provided insufficient evidence that either of the two school bus route stops identified by its witnesses existed on the date of the offense, March 25, 2016. While this is true, the testimony of the State's school bus stop witnesses occurred on July 6, 2016. A trier of fact could reasonably infer from the director's

testimony that the two identified school bus route stops were for the most recent school year.

b. Distance requirement sufficiently established

Uiliata argues that the location of the charged offenses was his bedroom, not the sidewalk adjacent to his property line. Uiliata argues that the State's proof was therefore insufficient to establish the 1,000 foot proximity between his bedroom and either school bus route stop.

In *State v. Clayton*, 84 Wn. App. 318, 927 P.2d 258 (1996), we reviewed the evidentiary sufficiency of a school zone enhancement. There, the State was required to prove that the defendant manufactured marijuana within 1,000 feet of a school playground. *Id.* at 321. The State established that the distance between a school playground and the edge of the property where defendant's offense occurred was 926 feet. *Id.* at 322. The State also established that the distance between the edge of the subject property and the house where the offense occurred was 30 feet. *Id.* We held that the terminus of the 1,000 foot measurement must be the actual site where the offense occurred, not the property line or the house. *Id.* at 321-22. Because the State failed to present such evidence, we reversed the enhancement. *Id.* at 322-23.

The State argues that *Clayton* is distinguishable. We agree. In *Clayton*, the 1,000 foot terminus extended only 74 feet[3] into the property, which might not include all rooms within the house. Whereas here, the 1,000 foot terminus extends 859 feet[4] into the property.

Uiliata lived in a trailer house in the town of Dallesport. From this evidence, the State asks us to infer that Uiliata lived on a lot small enough so that all parts of the trailer house would be within 859 feet of the middle of the front edge of his property line. This distance is equivalent to almost three football fields. We believe that such an inference is justified. We conclude that the State presented sufficient evidence for a rational trier of fact to have found beyond a reasonable doubt that the distance between where the offense occurred and the closest school bus route stop was within 1,000 feet.

c. Definitional requirement established

Uiliata argues that the State presented insufficient evidence that the route stop was for a school bus, as defined by statute.

RCW 69.50.435(6)(b) defines "school bus" as:

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[3] 1,000 feet minus 926 feet.

[4] 1,000 feet minus 141 feet.

> [A] school bus . . . owned and operated by any school district and all school buses which are privately owned and operated under contract . . . for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system.

Here, the State presented the testimony of the school district transportation director. Admittedly, the school district transportation director testified repeatedly about "bus stops," not *school* bus stops. RP at 198. Nevertheless, given the nature of the witness's employment and the requirement that the State is entitled to the benefit of all reasonable inferences from the record, we conclude that the school district director's testimony concerned school bus route stops, not municipal bus route stops.

In sum, we conclude that the State presented sufficient evidence to prove the school bus route stop enhancements beyond a reasonable doubt.

5. UNDISPUTED SCRIVENER'S ERRORS

The judgment and sentence contains two scrivener's errors that should be corrected on remand. First, the judgment and sentence provides the wrong statutory citation for the unlawful possession of a firearm offenses. The judgment lists RCW 6.41.040 but the correct provision is RCW 9.41.040.

Second, the judgment indicates the offenses were committed while Uiliata was on community placement or community custody. However, the sentencing court specifically found the offenses were not committed while on supervision.

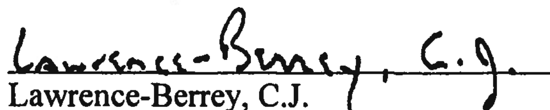
These errors are undisputed by the State. We direct the trial court to correct these two errors on remand.

6. APPELLATE COSTS

In a separate motion, Uiliata requests that we deny the State an award of appellate costs in the event the State substantially prevails. We deem the State the substantially prevailing party. If the State seeks appellate costs, we defer the award of appellate costs to our commissioner in accordance with RAP 14.2.

Affirmed, but remanded to correct scrivener's errors.

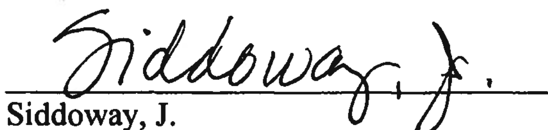
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Lawrence-Berrey, C.J.

WE CONCUR:

Korsmo, J.



Siddoway, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TIPASA UILIATA, Petitioner.	)))))))))	COA NO. 34591-2-III

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MAY, 2018, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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