

NO. 74974-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ELIAS VAN VRADENBURG,

Appellant.

FILED
Aug 31, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Richard T. Okrent, Judge
The Honorable Linda C. Krese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in denying appellant's CrR 3.6 motion to suppress evidence.

Issue Pertaining to Assignment of Error

Whether the court erred in failing to suppress evidence because the affidavit in support of the search warrant failed to establish timely probable cause that evidence of the crime would be found in the location to be searched?

B. STATEMENT OF THE CASE

1. Procedural History.

The Snohomish County prosecutor charged appellant Elias Van Vradenburg with one count of possession of a controlled substance for an incident that occurred September 24, 2015. CP 168-69.

Van Vradenburg waived his right to a jury trial. 2RP¹ 2-7. The trial court found Van Vradenburg guilty following a stipulated bench trial. Supp. CP ____ (sub no. 30, Stipulation for Bench Trial on Agreed Documentary Evidence, dated 2/5/16); CP 30, 50-165; 3RP 3.

Van Vradenburg was sentenced to 12 months imprisonment. The court also sentenced Van Vradenburg to 12 months of community

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP – July 9, 2015; 2RP – February 5, 2016; 3RP – March 28, 2016.

custody. CP 31-44; 3RP 8-9. The trial court waived all non-mandatory legal financial obligations (LFOs). CP 38; 3RP 11. Van Vradenburg timely appeals. CP 4-24.

2. Suppression Facts.

On June 22, 2014, Rhonda Douglas² and William Owens were in a car that collided with a Nissan Rogue in Snohomish, Washington. Rhonda and Owens believed the Rogue was blocking their path. In response, the driver of the Rogue allegedly pointed a gun at them before driving away. Owens and Rhonda reported that the driver of the Rogue was a man named “Malakai.” A third passenger in the car did not recognize the Rogue or the driver. Rhonda believed that “Malakai” also went by “Eli.” Rhonda provided police with a potential address for “Malaki’s” home. Police did not locate the car or house. Supp. CP ____ (sub no. 14, Motion to Suppress Evidence, dated 6/19/15); Supp. CP ____ (sub no. 17, State’s Memorandum of Law in Opposition to Defendant’s Motion to Suppress, dated 7/6/15) at 16-17.

The case proceeded without any further investigation until August 24, 2014. Rhonda mentioned the case again while speaking with police on an unrelated matter. Rhonda then took police to “Malaki’s” address.

² To avoid confusion, this brief will refer to Rhonda and Shandra Douglas by their first names. No disrespect is intended.

Police observed a Nissan Rogue parked in the driveway of the house. The Rogue was registered to Van Vradenburg's wife. Van Vradenburg's department of license address matched the address of the house. Rhonda identified Van Vradenburg in a photograph as the person who had allegedly pointed the gun at her. Supp. CP ____ (sub no. 14, Motion to Suppress Evidence, dated 6/19/15); Supp. CP ____ (sub no. 17, State's Memorandum of Law in Opposition to Defendant's Motion to Suppress, dated 7/6/15) at 18.

In the ensuing weeks, police conducted surveillance on the home. Van Vradenburg was seen entering and leaving the home and Rogue several times. After another sixteen days had passed, police interviewed Rhonda and Owens on September 10, 2014. Both identified Van Vradenburg as "Malaki" when presented with a department of licensing photo. Supp. CP ____ (sub no. 14, Motion to Suppress Evidence, dated 6/19/15); Supp. CP ____ (sub no. 17, State's Memorandum of Law in Opposition to Defendant's Motion to Suppress, dated 7/6/15) at 18-19.

Police also interviewed Rhonda's daughter, Shandra Douglas, on September 10, 2014. Shandra has a criminal history and was arrested for theft on June 14, 2014. Detective M. Barker described Shandra as "well-known" drug user and "known associate" of Van Vradenburg. Shandra represented that she had ridden in the Rogue with Van Vradenburg on

several occasions, and most recently on September 5, 2014. Shandra said Van Vradenburg was always armed with a pistol that he kept in the driver's door pocket of the Rogue. Shandra did not identify the make, model, or type of pistol kept in the Rogue. Supp. CP ___ (sub no. 14, Motion to Suppress Evidence, dated 6/19/15); Supp. CP ___ (sub no. 17, State's Memorandum of Law in Opposition to Defendant's Motion to Suppress, dated 7/6/15) at 19.

Shandra also represented that she had spent time in Van Vradenburg's house where she saw the same pistol along with "another non-descript pistol in various areas of the home." Shandra did not identify a specific time or date that she had been in the house or observed the pistols. She did state the occurrences had been since the June incident. Supp. CP ___ (sub no. 14, Motion to Suppress Evidence, dated 6/19/15); Supp. CP ___ (sub no. 17, State's Memorandum of Law in Opposition to Defendant's Motion to Suppress, dated 7/6/15) at 19.

Barker included this information in his affidavit for search warrant filed on September 15, 2014. Barker represented in his affidavit that based on his training and experience firearms are generally not discarded due to their value. Barker further stated that based on his training and experience, firearms are typically stored in a vehicle or a residence. Supp. CP ___ (sub no. 14, Motion to Suppress Evidence, dated 6/19/15); Supp.

CP ___ (sub no. 17, State's Memorandum of Law in Opposition to Defendant's Motion to Suppress, dated 7/6/15) at 19-20. A judge signed the warrant on September 15, 2014, authorizing a search of the Nissan Rogue, the house, and any locked containers within the house within 10 days of the warrant being issued. Supp. CP ___ (sub no. 17, State's Memorandum of Law in Opposition to Defendant's Motion to Suppress, dated 7/6/15) at 22-23.

On September 22, 2014, Barker filed an addendum affidavit for search warrant "seeking to expand the scope of the search timeframe and location of the search on the vehicle[.]" Supp. CP ___ (sub no. 17, State's Memorandum of Law in Opposition to Defendant's Motion to Suppress, dated 7/6/15) at 24. Barker represented in the addendum that he had collected a statement from a Kirkland Police Department officer who had witnessed Van Vradenburg "making mechanical modifications to the dashboard, interior, and exterior panels of the vehicle[.]" Barker did not identify a specific time or date on which he had spoken with the officer, or when the officer had seen the alleged modifications occurring. Barker stated that based on his training and experience, the modifications were likely created for purposes of "secreting contraband (including firearms)." Supp. CP ___ (sub no. 17, State's Memorandum of Law in Opposition to Defendant's Motion to Suppress, dated 7/6/15) at 24-25.

Barker requested an extension of 10 days from the addendum to execute the search warrant. A judge signed the addendum warrant on September 22, 2014, authorizing a search of the Nissan Rogue within 10 days of the warrant being issued. Supp. CP ____ (sub no. 17, State's Memorandum of Law in Opposition to Defendant's Motion to Suppress, dated 7/6/15) at 26-27.

Police executed the search warrant on September 24, 2014. After entering the house, officers saw evidence of controlled substances and drug paraphernalia. CP 170-73. In response, police left the house and prepared a second addendum seeking authorization to seize any controlled substances and paraphernalia in the house. Supp. CP ____ (sub no. 17, State's Memorandum of Law in Opposition to Defendant's Motion to Suppress, dated 7/6/15) at 28-32. Methamphetamine and heroin were discovered during a search of Van Vradenburg's house pursuant to the new search warrant. CP 170-73. No guns were found during the search of the house or Rogue. 1RP 8.

Van Vradenburg moved to suppress this evidence due to lack of probable cause supporting the warrant. Supp. CP ____ (sub no. 14, Motion to Suppress Evidence, dated 6/19/15); 1RP 2. The suppression hearing involved argument based on the briefing of the parties and supporting documentation. No witnesses were called during the suppression hearing.

Van Vradenburg argued there was no nexus between the alleged assault and the house, the reliability of Shandra was not established and the police investigation did not otherwise corroborate her tip, and the warrant was stale. Supp. CP ____ (sub no. 14, Motion to Suppress Evidence, dated 6/19/15); 1RP 2-6, 809.

The trial court denied the suppression motion, concluding that it had “to give deference to the prior judicial officer’s determination that there was probable cause in the warrants.” 1RP 9. In its oral ruling, the trial court explained:

The question is, how do I deal with Ms. Shandra, who is the informant in this case? Is she reliable? And she was an informant that was used for the first time. She is testifying, she is saying that there was a gun, and that she had seen the gun habitually, and that’s a very specific item. The gun does not – it’s not something that’s going to dissolve away.

And she saw it in the car, in the house, habitually. Although I have to say that she can’t pinpoint every single date or even as much as a range of date as perhaps the defense would like, but clearly she’s reliable. Looking at that, looking at the *Tarter*^[3] case, gives further indicia of reliability. So I think the *Aguilar-Spinelli*^[4] test has been met here and I’ll deny the defense motion at this time. That will be the order of the court.

³ 111 Wn. App. 336, 44 P.3d 899 (2002).

⁴ *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).

IRP 10.

The trial court did not enter written findings of fact and conclusions of law pursuant to CrR 3.6.⁵

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THE SEARCH WARRANT FOR VAN VRADENBURG'S HOUSE WAS UNSUPPORTED BY PROBABLE CAUSE

The search warrant affidavit did not establish probable cause to search Van Vradenburg's residence.⁶ First, the reliability of the informant was not established and the police investigation did not otherwise

⁵ The rule provides:

(a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

⁶ In addition to the initial search warrant, two search warrant addendums were issued in this case. Van Vradenburg's challenge concerns the search warrant issued on September 15, 2014 and the search warrant addendum issued on September 22, 2014.

corroborate the informant's tip. Second, the affidavit does not establish the requisite nexus between the alleged assault and the place to be searched. Finally, the warrant was stale. The warrant therefore did not satisfy the requirements of article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. The trial court erred in failing to suppress the evidence found in the residence.

a. Standard of Review

A search warrant must not issue unless there is probable cause to conduct the search. U.S. Const. amend. IV; Wash. Const. art. I, § 7; State v. Lyons, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). “To establish probable cause, the affidavit must set 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.” Lyons, 174 Wn.2d at 359. In determining whether the supporting affidavit establishes probable cause, review is limited to the four corners of the affidavit. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). “When adjudging the validity of a search warrant, we consider *only* the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested.” State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988).

The issuance of a search warrant is generally reviewed for abuse of discretion. Neth, 165 Wn.2d at 182. While deference is owed to the magistrate, that deference is not unlimited. Lyons, 174 Wn.2d at 362. No deference is given “where the affidavit does not provide a substantial basis for determining probable cause.” Lyons, 174 Wn.2d at 363.

When reviewing the denial of a suppression motion, no deference is owed to the trial court where, as here, the factual record consists solely of documents. State v. Neff, 163 Wn.2d 453, 461-62, 181 P.3d 819 (2008). The trial court’s conclusions of law and its application of law to the facts are reviewed de novo. State v. Meneese, 174 Wn.2d 937, 942, 282 P.3d 83 (2012); State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). The trial court’s assessment of probable cause is therefore reviewed de novo. Neth, 165 Wn.2d at 182.

Here, the trial court failed to enter either written findings and conclusions, or a written order setting forth its reasons for denying the motion to suppress. CrR 3.6(a). Since these findings do not exist, the trial court’s oral decision is the only available basis for the verdict.

b. The Aguilar-Spinelli Test Is Unsatisfied.

When the existence of probable cause depends on an informant’s tip, the affidavit in support of the warrant must establish the basis of the informant’s information as well as the veracity of the informant under the

Aguilar-Spinelli test. State v. Jackson, 102 Wn.2d 432, 433, 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)). To satisfy both parts of the Aguilar-Spinelli test, the affidavit must state circumstances from which the issuing magistrate “may draw upon to conclude the informant was credible and obtained the information in a reliable manner.” State v. Vickers, 148 Wn.2d 91, 112, 59 P.3d 58 (2002).

The level of evidence necessary to establish the reliability prong of Aguilar-Spinelli depends on whether the informant is a professional or a citizen informant. State v. Northness, 20 Wn. App. 551, 556-57, 582 P.2d 546 (1978). Evidence of past reliability is not strictly required where the informant is a disinterested citizen. Northness, 20 Wn. App. at 556. However, police need a heightened reliability when the witness is interested. When police receive information from an uninvolved witness or victim of a crime, the necessary showing of credibility is relaxed. Northness, 20 Wn. App. at 556-57.

The court’s decision in State v. Duncan⁷ is instructive regarding the applicability of this “relaxed” burden. There, a search warrant was

⁷ State v. Duncan 81 Wn. App. 70, 72-73, 912 P.2d 1090, rev. denied, 130 Wn.2d 1001, 925 P.2d 988 (1996).

issued for a storage unit rented to Duncan based on an affidavit supplied by Detective Mike Merryman. Duncan, 81 Wn. App. at 72. The search warrant affidavit included the following information:

Meda K. Hansen, Mr. Duncan's girl friend, told Officer Guyer about a domestic dispute. She said that two hours earlier she had accompanied Mr. Duncan to Irwin Storage. There, Ms. Hansen saw Mr. Duncan take approximately 14 ounces of marijuana from the storage unit. Mr. Duncan told Ms. Hansen that the storage unit contained 20 pounds of marijuana. A fight started because of the marijuana; Mr. Duncan pulled her hair. Officer Guyer saw red marks on Ms. Hansen's face and loose hair. The Yakima Police Department received a report of an assault at 6:06 p.m. Ms. Hansen lied about her name. Her real name is Sara DaVee. Officer Guyer spoke to Betty Arnold, Irwin Storage's manager. She confirmed that Mr. Duncan rented a unit and that his code showed entry into the facility at 5:59 p.m. and exit at 6:03 p.m.

Detective Merryman also said that a prior investigation targeted Mr. Duncan resulting in Mr. Duncan's arrest for growing a large quantity of high quality marijuana. Based on this information, a judge issued a search warrant for the storage unit that Mr. Duncan rented. The police found approximately 19 ounces of marijuana.

Duncan, 81 Wn. App. at 72-73.

Significantly however, the Duncan court found DaVee's reliability had not been established. Duncan, 81 Wn. App. at 78. The Court concluded that naming an informant is not alone a sufficient basis on which to credit the informant and is only one factor in determining the affidavit's sufficiency. As the Court explained, "the informant's

identification is merely a consideration in determining whether the informant is truly a citizen informant.” Duncan, 81 Wn. App. at 78.

The Court rejected the argument that establishing DaVee’s identity was enough to presume her reliability. The Court pointed to other facts which militated against a conclusion that DaVee was a true citizen informant. First, police did not check DaVee’s identity, address, phone number, employment, residence or length of residence, or family history. Duncan, 81 Wn. App. at 77. More significantly, the Court of Appeals concluded that the earlier domestic dispute involving DaVee colored her information with self-interest. Duncan, 81 Wn. App. at 78 (citing Rodriguez, 53 Wn. App. at 575, 769 P.2d 309 (indicating when a citizen reports accusations to the police merely to spite the defendant, it diminishes the presumption of reliability)). Even with admission of other records corroborating Duncan’s storage facility, the Court concluded that insufficient corroboration existed to establish the Aguilar-Spinelli veracity prong. Duncan, 81 Wn. App. at 78.

Like Duncan, here the fact that Shandra was identified by name as the informant is not enough to establish her reliability. Shandra's status as a "well-known narcotic user," and three arrests for theft⁸, including one less than 90 days before her interview with police, colored her information with self-interest. A well-known criminal, such as Shandra, involved in a pending criminal charge or investigation of her own, has various incentives for providing information to police in an effort to be as helpful as possible. Significantly, there is also no indication that Shandra had ever previously provided reliable information to police.

In concluding that Shandra was "clearly" reliable, the trial court relied upon State v. Tarter, 111 Wn. App. 336, 44 P.3d 899 (2002). 1RP 10. A factual comparison between Tarter and this case demonstrates why the trial court's reliance was misplaced.

Tarter rented a hotel room from the Santillaneses and paid them in cash. Although there were only supposed to be two occupants, motel staff saw at least four people staying in the room. Numerous other people came and went from the room. Twenty calls came in for Tarter's room in the

⁸ Crimes involving theft are relevant to determining an individual's veracity in other contexts, such as to impeach their trial testimony under ER 609(a)(2), because theft contains the element of intent to deprive another of his or her property, and that intent involves dishonesty. State v. Schroeder, 67 Wn. App. 110, 115, 834 P.2d 105 (1999).

span of one hour. The Santillaneses saw people leave the motel room and go across the street to a truck stop to meet with other people. The Santillaneses called police and reported everything they had observed. Police discovered that Tarter had a local address and multiple prior arrests for controlled substances. A search of her hotel room revealed drugs. Tarter, 111 Wn. App. at 338-39.

On appeal, Tarter argued the trial court erred by denying her motion to suppress the drug evidence. In particular, Tarter challenged the reliability of the Santillaneses veracity. Tarter, 111 Wn. App. at 339-40. Division Three concluded the Santillaneses veracity was adequately established because the Santillaneses were named citizens, owners and operators of the motel, and provided detailed firsthand accounts of what they observed. Tarter, 111 Wn. App. at 340.

Unlike Tarter, here Shandra's "firsthand details" of what she observed in Van Vradenburg's house lacks any real specificity. For example, although she reported seeing a gun in Van Vradenburg's car and house, she could not identify the make, model, or type of gun she saw. She also did not provide any dates on which she saw the alleged gun. In short, unlike Tarter, Shandra provided police with information that could not be independently corroborated.

Insufficient facts established Shandra as a reliable citizen informant, unmotivated by self-interest. As a result, Shandra was not entitled to a presumption of reliability, and police were required to establish her veracity⁹ through corroboration. The police failed to do so.

c. The Informant Information Is Not Sufficiently Corroborated To Establish Probable Cause.

If an informant's tip fails under either or both parts of the Aguilar-Spinelli test, "probable cause may yet be established by independent police investigatory work that corroborates the tip to such an extent that it supports the missing elements of the Aguilar-Spinelli test." Jackson, 102 Wn.2d at 438. "The independent police investigations should point to suspicious activity, *'probative indications of criminal activity along the lines suggested by the informant.'*" Id. at 438 (quoting United States v. Canieso, 470 F.2d 1224, 1231 (2d Cir. 1972)).

Here, the affidavit for search warrant points to no probative indications of criminal activity at the house. Rather, police surveillance merely corroborated that Van Vradenburg likely lived at the address identified by Rhonda, and drove and rode in a Nissan Rogue parked at the

⁹ The most common way to satisfy the "veracity" prong is to evaluate the informant's "track record", i.e., whether the informant provided accurate information to the police a number of times in the past. State v. Lair, 95 Wn.2d 706, 710, 630 P.2d 427 (1981) (reliability established where informant had given information previously, which led to arrests and was substantiated from other sources).

house. Police did nothing more than corroborate innocuous details that anyone with even a superficial knowledge of Van Vradenburg could have known. Jackson, 102 Wn.2d at 438.

The addendum affidavit for search warrant filed on September 22, 2014, similarly fails to establish criminal activity at the house. The addendum indicates that a Kirkland police officer saw Van Vradenburg making modifications to the interior of his car in his driveway and garage. Absent from the addendum however, is any indication when these “modifications” were allegedly made by Van Vradenburg, or observed by Kirkland police. Moreover, innocuous facts susceptible to innocent explanation do not support probable cause. See, e.g., State v. Huft, 106 Wn.2d 206, 211, 720 P.2d 838 (1986) (increased electrical consumption and bright light emitting from basement window insufficient to corroborate tipster information; probable cause did not support search warrant for marijuana grow operation in basement of home); State v. Young, 123 Wn.2d 173, 195-96, 867 P.2d 593 (1994) (abnormally high electrical consumption and fact that basement windows were always covered does not support a finding of probable cause to search a residence for marijuana grow operation). Working on the interior of one’s car is insufficiently probative to show involvement in an alleged criminal

activity, and insufficient to establish probable cause to separately search Van Vradenburg's house.

These innocuous facts do not cure the Aguilar-Spinelli deficiency. The trial court erred in finding that Shandra was a reliable informant and that the information she provided to police sufficiently established the probable cause necessary to search the house.

- d. The Search Warrant Also Fails For Lack Of Nexus Between The Criminal Activity And The Place To Be Searched: There Was No Probable Cause To Believe Evidence Of The Assault Would Be Found In The Van Vradenburg Residence.

Even if the affidavit established probable cause to believe Van Vradenburg committed the assault, the search warrant still fails for lack of a nexus between the crime and the Van Vradenburg residence. Again, search warrants are valid only if supported by probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause to search “requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” Thein, 138 Wn.2d at 140 (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). The affidavit in support of the warrant must set forth facts and circumstances sufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched. Thein, 138 Wn.2d at 140.

A warrant to search for evidence in a particular place must be based on more than generalized belief of the supposed practices of the type of criminal involved. Id. at 147-48. Rather, the warrant must contain specific facts tying the place to be searched to the crime. Id. “Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.” Id. at 147.

The warrant to search Van Vradenburg’s residence fails for lack of nexus. The affidavit did not establish probable cause that evidence of the assault was at the residence. The standard is whether there is probable cause to believe contraband will be found in the specific place to be searched. Thein, 138 Wn.2d at 140. “The affidavit in support of the search warrant must be based on more than suspicion or mere personal belief that evidence of the crime will be found on the premises searched.” Vickers, 148 Wn.2d at 108. “Probable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for the suspect’s home.” United States v. Ramos, 923 F.2d 1346, 1351 (9th Cir. 1991), overruled on other grounds by United States v. Ruiz, 257 F.3d 1030 (9th Cir. 2001). Here, the only evidence linking the gun to Van Vradenburg’s residence is the unspecific and undated observations of Shandra and the detective’s assertions that based on his training and

experience, guns are not discarded and typically kept in the owner's car or home. This generalized assertion based on "training and experience" is precisely what is disallowed by Thein.

In Thein, the Washington Supreme Court held there was insufficient nexus between evidence that a person engaged in drug dealing and the fact that the person resided in the place searched. Thein, 138 Wn.2d at 150. The affidavit in that case contained specific information tying the presence of narcotics activity to a certain residence, but not the address to be searched pursuant to the warrant. Id. at 136-138, 150. The affidavit also contained generalized statements of belief, based on officer training and experience, about drug dealers' common habits, particularly that they kept evidence of drug dealing in their residences. Id. at 138-39. The affidavit expressed the belief that such evidence would be found at the suspect's residence. Id. at 139. The Court held such generalizations do not establish probable cause to support a search warrant for a drug dealer's residence because probable cause must be grounded in fact. Id. at 146-47.

Similarly, in State v. McReynolds, the Court of Appeals found probable cause lacking to search the defendants' home when the police caught the defendants at the scene of the burglary. 104 Wn. App. 560, 570, 17 P.3d 608 (2000), rev. denied, 144 Wn.2d 1003, 29 P.3d 719 (2001). The question was whether there was a basis for inferring evidence

of other crimes would be at the defendants' residence. McReynolds, 104 Wn. App. at 570. A pry bar stolen along with a large quantity of other tools several weeks earlier was found at the scene near one of the suspects. Id. at 566, 570. Yet the affidavit failed to establish a nexus between any criminal act and the defendants' residence. Id. There was no reasonable inference grounded in specific fact that the defendants' residence would contain evidence of a prior crime, even though the defendants were connected with a large amount of property stolen several weeks earlier. Id.

In McReynolds, the defendants' involvement in a burglary was not enough to establish probable cause to believe evidence of that burglary would be found in the defendants' residence. In Thein, a generalized belief that criminals keep evidence of their crimes at their residence was not enough to establish probable cause to search the residence in the absence of particular facts.

Similar considerations guide the analysis here. The affidavit contains no observation that Van Vradenburg transported the gun to his house after the alleged assault. Moreover, a person's return to a home after purportedly engaging in illegal activity does not, by itself, mean that evidence of that illegal activity will be found in that person's home. See State v. Dalton, 73 Wn. App. 132, 140, 868 P.2d 873 (1994) ("Probable

cause to believe a man has committed a crime on the street does not necessarily give rise to the probable cause to search his home.””) (quoting Commonwealth v. Kline, 234 Pa. Super. 12, 17, 335 A.2d 361 (Pa. 1975)).

Facts, not generalized beliefs about the habits of criminals, are needed to show the nexus between criminal activity and a home. Thein, 138 Wn.2d at 150. The facts in the affidavit do not establish that Van Vradenburg kept the alleged gun at his residence rather than in a different place. See Goble, 88 Wn. App. at 512 (defendant’s picking up package containing narcotics at post office box did not support search warrant for his residence because there was no evidence that he would take the package back to his residence rather than to another location; search warrant of residence not supported simply because suspect might take package containing narcotics from post office back to residence).

What remains to possibly show a nexus between the assault and the place to be searched is the fact that Shandra reported seeing a gun in Van Vradenburg’s house. As set forth in section C. 1. b., supra, Shandra provided no information that it was the same gun involved in the alleged assault. She could not even identify the make, model, or type of gun she saw. Shandra also provided no dates on which she supposedly saw the gun in the house. Information insufficiently grounded on fact to ensure reliability will not suffice to establish a nexus between the place to be

searched and suspected illegal activity. Thein, 138 Wn.2d at 147. Specific facts in the supporting affidavit must establish the nexus between the item to be seized and the place to be searched. Id. at 145. The affidavit here lacks specific facts tying the residence to the crime.

The magistrate must not serve merely as a rubber stamp for the police. State v. Klinker, 85 Wn.2d 509, 517, 537 P.2d 268 (1975); State v. Trasvina, 16 Wn. App. 519, 524, 557 P.2d 368 (1976), rev. denied, 88 Wn.2d 1017 (1977). No deference is owed to the magistrate's decision to issue the warrant because "the affidavit does not provide a substantial basis for determining probable cause." Lyons, 174 Wn.2d at 363. The trial court erred in concluding otherwise.

e. The Warrant Was Stale.

Even if the affidavit somehow demonstrates a nexus between the alleged crime and Van Vradenburg's residence, probable cause is still lacking because the warrant was stale. Probable cause must be timely. Lyons, 174 Wn.2d at 357. Facts used to support probable cause "must be current facts, not remote in point of time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the person or premises to be searched at the time the warrant is issued." State v. Spencer, 9 Wn. App. 95, 97, 510 P.2d 833 (1973). Stale search

warrants violate article I, section 7 and the Fourth Amendment. Lyons, 174 Wn.2d at 357, 359.

The issue of staleness arises due to the passage of time between the informant's observations of criminal activity and presentation of the affidavit to the magistrate. Lyons, 174 Wn.2d at 360. "The magistrate must decide whether the passage of time 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." Id. at 360-61. This is a fact-specific inquiry, but factors include the time between the known criminal activity and the nature and scope of the suspected activity. Id. at 361.

The trial court rejected the defense argument that the warrant was stale, concluding "the gun does not – it's not something that's going to dissolve away." 1RP 10. It is true that durable items and other substances such as drugs are different when it comes to the duration of their existence. No doubt the gun remained in existence at the time of the search. The relevant question is *where* it existed in light of the fact that more than 90 days passed between the time of the alleged crime and execution of the search warrant.

The critical time frame for establishing timely probable cause is when the criminal activity is observed. Lyons, 174 Wn.2d at 361. As the Washington Supreme Court recognized in Lyons, a "magistrate cannot

determine whether observations recited in the affidavit are stale unless the magistrate knows the date of those observations.” Id. In this case, over three months days passed between the occurrence of the incident involving the gun and execution of the search warrant. Moreover, Shandra’s statements to police do not indicate any specific date on which she allegedly saw the gun inside Van Vradenburg’s house.

In determining staleness, the tabulation of the number of days is not the sole factor, but is one circumstance to be considered. Lyons, 174 Wn.2d at 361; State v. Hall, 53 Wn. App. 296, 300, 766 P.2d 512, rev. denied, 112 Wn.2d 1016 (1989). For example, in the context of a marijuana growing operation, probable cause might still exist despite the passage of a substantial amount of time. Lyons, 174 Wn.2d at 361 (citing State v. Payne, 54 Wn. App. 240, 246, 773 P.2d 122 (“[a] marijuana grow operation is hardly a ‘now you see it, now you don’t’ event”), rev. denied, 113 Wn.2d 1019, 781 P.2d 1321 (1989); Hall, 53 Wn. App. at 299–300 (two months between date of informant's observations of marijuana grow and issuance of warrant not too long)). The location of a gun is not akin to a marijuana grow operation. A gun is inherently mobile. Nothing in the affidavit shows evidence the gun allegedly involved in the assault would be found in the house – a place that was not even involved in the crime

itself – more than twelve weeks after the crime occurred. The trial court erred in concluding the warrant was not stale.

f. The Evidence Must Be Suppressed.

A search conducted pursuant to a warrant unsupported by probable cause violates article I, section 7 and the Fourth Amendment. Lyons, 174 Wn.2d at 357, 359. The exclusionary rule mandates suppression of evidence obtained as a result of an unlawful search. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Evidence of the methamphetamine and heroin obtained from the search must be therefore be suppressed.

Without the evidence obtained from the search, there is no basis to sustain the possession of a controlled substance conviction. The charge must be dismissed. See State v. Kinzy, 141 Wn.2d 373, 393-94, 5 P.3d 668 (2000) (no basis remained for conviction where motion to suppress evidence should have been granted), cert. denied, 531 U.S. 1104 (2001); State v. Valdez, 167 Wn.2d 761, 778-79, 224 P.3d 751 (2009) (same).

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Van Vradenburg was entitled to seek review at public expense, and therefore appointed appellate counsel. CP 1-3. If Van Vradenburg does not prevail on appeal, he asks that no costs of

appeal be authorized under title 14 RAP. State v. Sinclair¹⁰ (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant’s brief). RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State’s request for costs. Sinclair, 192 Wn. App. at 388.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Van Vradenburg’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees. CP 38; 3RP 11.

Without a basis to determine that Van Vradenburg has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

¹⁰ State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, rev. denied, 185 Wn.2d 1034, ___ P.3d ___ (2016).

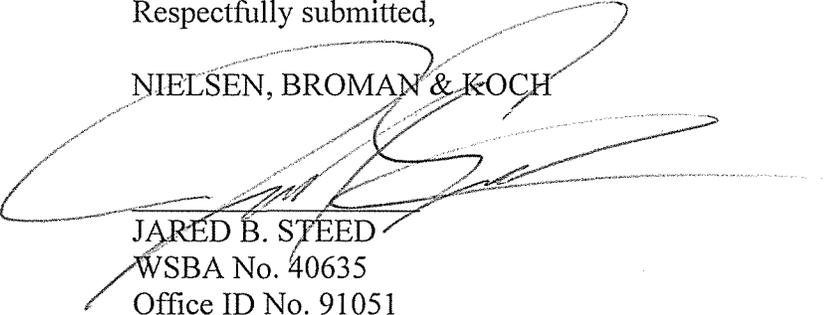
D. CONCLUSION

For the reasons set forth, Van Vradenburg requests that this Court reverse his conviction and dismiss with prejudice. This Court should also decline to impose appellate costs against Van Vradenburg.

DATED this 30th day of August, 2016.

Respectfully submitted,

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