

FILED
COURT OF APPEALS

OBJECT OF PETITION

DATE
BY *[Signature]*

NO. 33724-0-II
Cowlitz Co. Cause NO. 01-1-00972-6

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS R. CLINE,

Appellant.

BRIEF OF RESPONDENT

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I. FACTUAL HISTORY

The state accepts Appellant's factual history for purposes of this appeal.

II. PROCEDURAL HISTORY

The state accepts Appellant's procedural history for purposes of this appeal except that the affidavit in support of the search warrant should be considered in its entirety rather than just the "key portions" Appellant cites, for purposes of the *Aguilar-Spinelli* and *Franks* arguments.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY DECLINED TO SUPPRESS EVIDENCE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT BECAUSE THE AFFIDAVIT ESTABLISHED PROBABLE CAUSE.

Good reason for the issuance of a search warrant does not necessarily mean proof of criminal activity but merely probable cause to believe it may have occurred. *State v. Gunwall*, 106 Wn.2d 54, 73, 720 P.2d 808 (1986).

A magistrate asked to issue a search warrant is entitled to draw reasonable inferences from the facts and circumstances related, *State v. Maffeo*, 31 Wn.App. 198, 200, 642 P.2d 404 (1982), and the question of probable cause to issue a search warrant should not be viewed in a hyper technical manner, *State v. Remboldt*, 64 Wn.App. 505, 510, 827 P.2d 282 (1992), but reasonably and with common sense, resolving doubts in favor of the warrant. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

State v. Gebaroff, 87 Wn.App. 11, 15, 939 P.2d 706 (1997).

“Great deference is accorded the issuing magistrate’s determination of probable cause.” *State v. Cord*, 103 Wn.2d 361, 366, 693 P.2d 81 (1985). “We accord great deference to the issuing magistrate’s determination of probable cause and resolve any doubts in favor of the validity of the warrant.” *State v. Olsen*, 73 Wn. App. 348, 354, 869 P.2d 110 (1994). Probable cause to investigate a particular location is furthered by investigative corroboration. *See State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); *State v. Murray*, 110 Wn.2d 706, 711, 757 P.2d 487 (1988).

Affidavits for search warrants are presumptively valid. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978). In reviewing for a finding of probable cause the court “consider[s] whether the affidavit on its face contained sufficient facts for a finding of probable cause. Issuance of a search warrant is a matter of judicial discretion, and reviewing courts give great deference to the magistrates determination of probable cause, reviewing that determination for an abuse of discretion.” *State v. O’Neil*, 74 Wn. App. 820, 824, 879 P.2d 950 (1994) *citing State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)(*O’Neill*, was overruled on other grounds by *State v. Thein*, 138 Wn. 2d 133, 977 P.2d 522 (1999)).

Doubts about validity are resolved in favor of the warrant. *State v. Chasengnou*, 43 Wn. App. 379, 387, 717 P.2d 285 (1986).

In the present case, the magistrate was presented with more than sufficient information to establish probable cause. First, the property owner, Mr. Gaynor, contacted the police to complain about the defendant and his wife's activities on the property. Mr. Gaynor told Deputy Schallert that he'd allowed the defendant and his wife to park their motor home on his property. He also told Deputy Schallert that he was familiar with the odor of methamphetamine manufacture because he'd been around methamphetamine labs in the past. Mr. Gaynor smelled that odor when the defendant opened the door to the motor home. In fact, Detective Johnston confirmed that Mr. Gaynor's criminal history included convictions for drug offenses. Mr. Gaynor also told Deputy Schallert that he knew the defendant's wife had a warrant for her arrest.

Second, Detective Johnston and the other deputies made a number of observations when they first arrived at the property. Deputy Baumann heard slamming cupboards and observed the defendant coming from the bathroom area of the motor home. When the detectives arrived, the defendant identified himself while his wife provided detectives with a false name. Both refused to provide consent to search the motor home and denied that a methamphetamine lab was inside the motor home.

While at the property, Detective Johnston noticed a brown paper bag sitting in the bed of a pick-up truck, directly outside the door of the motor home. Within the bag, Detective Johnston observed a bottle of Heet gasoline antifreeze, two cans of starting fluid and two cans of what appeared to be acetone. Also in the bag were two bottles containing a large amount of condensation and coffee filters. Because methamphetamine labs are by their very nature toxic, Detective Johnston did not attempt to investigate further. Detective Johnston also observed chemicals (Red Devil Lye) consistent with the manufacture of methamphetamine through the unobstructed windows of the motor home and a pyrex dish on the counter. One of the containers of Red Devil Lye was partially concealed under clothing on the couch of the motor home.

It is important to note that Detective Johnston is familiar with clandestine methamphetamine labs from his training and experience, which is set out in the search warrant. Although Detective Johnston does not discuss the many different methods of methamphetamine manufacture, a plain reading of his training and experience would certainly lead the magistrate to conclude that Detective Johnston had a basis of knowledge as to the clandestine manufacture of methamphetamine, including what precursor chemicals are utilized during the process. Detective Johnston indicates in the body of the affidavit, following his observations at the

property, that all of the items he observed he has seen within other clandestine methamphetamine labs that he has investigated. Additionally, he notes that these items are consistent with at least two methods of manufacture, the red phosphorous method and the anhydrous ammonia/alkaline metal method. Finally, the fact that these items are found directly outside the motor home certainly indicates that they came from the motor home. There is simply no other reasonable explanation. There is also no reasonable explanation for coffee filters to be found in a bag of solvents, if they are to be used for their primary purpose.

The totality of the information available to Detective Johnston clearly indicated that manufacturing was taking place within the motor home at 294 Sauer Road. When one evaluates Mr. Gaynor's statements to Deputy Schallert in conjunction with Detective Johnston's observations, there is no other reasonable conclusion to be reached other than manufacture within the motor home.

1. The affidavit sufficiently establishes the informant's reliability.

As to informant credibility, informants fall into four categories: (1) The informant is wholly anonymous, even to the police, (2) the informant's identity is known to the police, but not revealed to the magistrate, (3) The informant's identity, name and address is disclosed to

the magistrate, (4) the eyewitnesses to a crime summon police and the exigencies are such that ascertainment of the information of the informants would be unreasonable. See *State v. Northness*, 20 Wn. App. 551, 555, 582 P.2d 546 (1978). An identified informant has a relaxed standard as to reliability. *Id.* at 558. Additionally, the second category of informant has two subheadings: criminal/professional informants and private citizens. *Id.* at 555. An affidavit for search warrant based upon an informant must establish the basis of the information and the credibility of the informant. *State v. Jackson*, 102 Wn.2d 432, 433, 688 P.2d 136 (1984).

Statements against penal interest are considered highly relevant to probable cause analysis. *State v. Lair*, 95 Wn. 2d 706, 711, 630 P. 2d 427 (1981); *State v. O'Connor*, 39 Wn. App. 113, 119, 692 P. 2d 208 (1984); *State v. Patterson*, 37 Wn. App. 275, 679 P. 2d 416 (1984). Admissions against interest are indicia of an informant's veracity. *State v. Hett*, 31 Wn. App. 849, 852, 644 P. 2d 1187 (1982).

Here, the informant's name and date of birth along with the fact that he owned the property at 294 Sauer Road was revealed to the magistrate. To that extent, he is presumptively reliable and this Court should employ a more relaxed standard as to his credibility. While it is true that Mr. Gaynor had criminal convictions and had no established track record as an informant, he is not automatically unreliable.

Mr. Gaynor's statements to Deputy Schallert contain a number of details that only an individual who is being forthright with the police would know. Mr. Gaynor told Deputy Schallert that two individuals that he knew as Doug and Virginia asked if he would allow them to park their motor home on his property. Although Mr. Gaynor didn't know their last names, he was told that Virginia had warrants and was trying to avoid contact with the police because of warrants for her arrest. Mr. Gaynor told Deputy Schallert that he could smell a methamphetamine lab when the door to the motor home was opened about a half hour after it arrived. Mr. Gaynor described it as a strong ether smell. Mr. Gaynor went on to say that he was familiar with the smell of methamphetamine labs because he's been around them in the past and has been to prison for methamphetamine. When confronted by Mr. Gaynor about "cooking dope" on his property, the defendants indicated that they "can't move it now" and closed the door. Mr. Gaynor was certain that the defendant and his wife were making methamphetamine based on the smell. Mr. Gaynor also told Deputy Schallert that he did not observe anything related to the manufacturing of methamphetamine because he was not allowed inside the motor home. Mr. Gaynor provided consent for the deputies to search the property and evict the defendants.

First and foremost, Mr. Gaynor made statements against his penal interest to Deputy Schallert. When Mr. Gaynor told Deputy Schallert that he was aware that “Virginia” had warrants for her arrest and was avoiding the police, he essentially confessed to rendering criminal assistance or harboring a fugitive. This fact alone heightens Mr. Gaynor’s credibility. Additionally, Mr. Gaynor’s admission to Deputy Schallert that he’s been around methamphetamine labs in the past strongly suggests that he may have participated in the manufacturing process. Few people involved in the manufacture of methamphetamine are merely passive observers to the process, given its toxic nature. To that extent, this statement could also be viewed as a statement against penal interest.

Second, Mr. Gaynor’s statement regarding having “been to prison for methamphetamine” was corroborated by the criminal history check obtained by Detective Johnston. While it is true that Detective Johnston phrased it in the affidavit as “violations of the uniform controlled substances act”, this is not unusual given that criminal history reports typically do not indicate what substance the individual was convicted of possessing, manufacturing or delivering.

Third, Mr. Gaynor told Deputy Schallert that Doug and Virginia were staying on his property in a motor home. As Detective Johnston noted in the affidavit, when the deputies arrived, they observed a motor

home and first contacted an individual named Doug. Also, Mr. Gaynor told Deputy Schallert that Virginia was avoiding contact with the police because she had warrants for her arrest. Detective Johnston corroborated this information in two ways. When contacted at the scene, Virginia identified herself as “Suzanne Lee Lindquist” and provided a date of birth, both of which were later determined to be a false. Virginia was finally identified as “Virginia Ann Starry” and it was determined that she had felony warrants for her arrest. Mr. Gaynor could not have known this information unless he’d had extensive contact with the defendant and his wife. The fact that Ms. Starry provided a false name also suggests that she had more to hide than merely a warrant for her arrest.

Fourth, Detective Johnston corroborates, to the extent possible, that methamphetamine manufacture is likely taking place on the property, given the items he located in the truck and observed in the motor home. Detective Johnston swore in his affidavit that the Red Devil Lye, white pyrex dish, cooler, fan, coffee filters, Heet, starting fluid, and apparent acetone observed in the motor home and truck, were all consistent in his training and experience with methamphetamine manufacturing. Finally, Mr. Gaynor only tells Deputy Schallert about the smell and his conversation with the defendant. Mr. Gaynor says that he was not allowed inside the motor home and as such could not observe any items related to

the manufacturing of methamphetamine. This begs the question: if Mr. Gaynor was the unreliable individual that the defendant seeks to make him, why would he have not told a better story and included some additional observations?

While no investigation is perfect and more can always be done, the above information when viewed with deference to the magistrate these are not merely innocuous details, but rather facts that establish Mr. Gaynor's credibility. Regardless of defendant's assertions, there is simply no credible evidence from which to conclude that Mr. Gaynor was simply trying to cause trouble or involved in the manufacturing process that was later discovered.

Defendant also complains that the police did not perform enough background investigation to determine what Mr. Gaynor's reason for being at the property was when he contacted the defendant. Mr. Gaynor told Deputy Schallert that he went to speak with the defendant at the property when he noted the odor of a methamphetamine lab. How it was Mr. Gaynor came to be on his own property is not particularly relevant to this analysis. It is certainly not unusual for a property owner to be at property he owns or to want to speak with people that he is allowing to park a motor home on that property. Additionally, although Detective Johnston did not run a title search to ascertain that Mr. Gaynor actually

recorded the deed to the property, he did tell Deputy Schallert that the property belonged to him and provided written consent to search. Clearly, the magistrate could reasonably infer from this information that Mr. Gaynor owned the property. The information in the affidavit sufficiently established Mr. Gaynor's reliability.

2. The affidavit sufficiently establishes the informant's and Detective Johnston's basis of knowledge regarding clandestine methamphetamine labs.

“Although great deference is accorded the issuing magistrate's determination of probable cause, the affidavit must still inform the magistrate of the underlying circumstances that led the officer to conclude that informant obtained the information in a reliable manner.” *State v. Ibarra*, 61 Wn. App. 695, 701-702, 812 P.2d 114 (1991). According to the Court of Appeals in *Ibarra*, supra, there are three ways that so-called “basis of knowledge” can be demonstrated in an affidavit:

(1) that the observer had the necessary skill, training or experience to identify the controlled substance, (2) that the observer provided enough firsthand, factual information to an individual who possesses the necessary skill, training or experience to identify the controlled substance, or (3) that the observer provided enough firsthand factual information to the magistrate so that the magistrate could independently determine that the informant had a basis for the allegation that a crime had been committed.”

Id. at 702 (citations omitted). Personal observations of controlled substances within residences have frequently provided probable cause to

search. See *State v. Huff*, 33 Wn. App. 304, 306-307, 654 P.2d 1211 (1982) (Informant observed quantity of marijuana in residence 60 hours prior to issuance, information not stale); *State v. Olson*, 32 Wn. App. 555, 556, 648 P.2d 476 (1982) (Informant personally observed quantity of marijuana in residence); *State v. Myers*, 35 Wn. App. 543, 548, 667 P.2d 1142 (1983), *Affirmed* 102 Wn.2d 548, 689 P.2d 38 (1984) (Informant observes “quantity of material thought to be by the informant heroin” at residence on day before affidavit, sufficient for probable cause); *State v. Haywood*, 38 Wn. App. 117, 121, 684 P.2d 1337, *review denied* 102 Wn.2d 1018 (1984) (Reliable informant observed quantity of L.S.D. at a residence within last 60 hours sufficient for probable cause).

In this case, unlike *Ibarra*, *supra*, the magistrate was confronted with an identified informant, not an anonymous concerned citizen. Although Mr. Gaynor does not go into great detail as to his background and experience regarding manufacturing methamphetamine, he provides more than conclusory statements regarding his observations. Mr. Gaynor told Deputy Schallert that he had been around methamphetamine labs, been to prison for methamphetamine, and that because of that experience, he is familiar with the smell of methamphetamine. He described the smell as being a strong ether smell. Anyone associated with criminal manufacture of methamphetamine and who had been to prison for

methamphetamine would be able to describe such an odor. While Detective Johnston does not explicitly corroborate Mr. Gaynor's statement about the smell, implicit in his reasoning for not investigating the paper bag found immediately outside, is the toxic nature of clandestine methamphetamine labs. It is common knowledge that those who investigate and dismantle clandestine methamphetamine labs wear protective clothing and breathing apparatuses because of the toxic fumes/smells normally associated with such labs.

Furthermore, Mr. Gaynor also indicated that he confronted the defendant and his wife about the smell, telling them that he gave them permission to park their motor home on the property, not to "cook dope" on the property. The defendant's response to Mr. Gaynor's admonition was "we can't move it now." This statement is essentially a tacit admission on the part of the defendant that he and his wife were manufacturing methamphetamine on the property. Mr. Gaynor had a strong basis of knowledge that was presented to the magistrate. The magistrate could have reasonably inferred Mr. Gaynor's basis of knowledge from his firsthand observations and the defendant's tacit confession to him.

Detective Johnston also presented a sufficient basis of knowledge to the magistrate as to his experiences with clandestine methamphetamine

labs. Specifically, in the “boiler plate” portion of the affidavit, Detective Johnston discusses his training and knowledge of clandestine methamphetamine labs. The affidavit listed Detective Johnston’s relevant training to include 80 hours of DEA Basic Drug Enforcement, 16 hours of Washington State Narcotics Investigators Association Drug Investigations, 40 hours of DEA Clandestine Laboratory Investigation/Safety Certification, 24 hours of DEA Team Site/Safety Officer Certification for Clandestine Laboratories, and a lab fingerprinting class. Through these trainings, and outlined in the search warrant affidavit, Detective Johnston even manufactured methamphetamine in a laboratory setting. Although he does not name any particular method in the boilerplate he describes with sufficient detail many of the required ingredients and the glassware needed to manufacture methamphetamine. Much of that found in the boilerplate is common knowledge given the recent media attention to methamphetamine manufacture.

Detective Johnston goes on in the body of investigative portion of the affidavit to specifically describe his observations while at 294 Sauer Road. He goes on to note that each and every one of the items he observed while at Mr. Gaynor’s property was consistent with two methods of methamphetamine manufacture based upon his training and experience. Detective Johnston further informs the magistrate that he has personally

observed each of these items in other clandestine methamphetamine labs during past investigations. The magistrate had more than enough information regarding Detective Johnston's basis of knowledge and firsthand observations to conclude that a clandestine methamphetamine lab was being operated at 294 Sauer Road.

3. The affidavit sufficiently corroborates the informant's observations.

Appellant erroneously complains that there was insufficient corroboration by the police of Mr. Gaynor's statements to the police, namely that all the police did was corroborate Mr. Gaynor's criminal history. As noted above, the police did more than take Mr. Gaynor's word for it with respect to this case. Most of what Mr. Gaynor shared with Deputy Schallert was corroborated, including: two people named Doug and Virginia, Ms. Starry's felony warrant status, Mr. Gaynor's criminal history and ownership of the property. When viewed as a whole, these details are not merely innocuous details.

The only thing that Detective Johnston was not able to corroborate was the strong chemical odor that Mr. Gaynor discussed with Deputy Schallert. This is not particularly significant considering that the affidavit is silent as to what time of day Mr. Gaynor contacted Deputy Schallert. Simply put, by the time Detective Johnston and his team reached Sauer

Road, late in the evening on 9-22-01, it was entirely possible that the defendant had ceased production for the day and that any odors had since dissipated. More importantly, the defendant can't have it both ways. Either Detective Johnston did not have the requisite basis of knowledge as methamphetamine labs or he was well trained, had a basis of knowledge, could have smelled the same odor that Mr. Gaynor and concluded that methamphetamine was being manufactured. Appellant's analysis also largely ignores the items found directly outside the motor home in the bed of the truck and the defendant's tacit admission to Mr. Gaynor that he was manufacturing methamphetamine.

B. A HEARING PURSUANT TO *FRANKS V. DELAWARE* WAS NOT REQUIRED.

Affidavits for search warrants are presumptively valid. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978). In *Franks v. Delaware*, 438 U.S. 154, 155-56, 57 L.Ed. 2d 667, 98 S.Ct. 2674 (1978), the United States Supreme Court held that where:

Defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

“The *Franks* test for material misrepresentation applies to allegations of material omissions.” *State v. Garrison*, 118 Wn. 2d 870, 872, 827 P. 2d 1388 (1992) citing *State v. Cord*, 103 Wn. 2d 361, 367, 693 P. 2d 81 (1985). “Allegations of negligence or innocent mistakes are insufficient.” *Franks*, supra, at 171. “Washington courts have consistently held that misstatements or omissions in affidavits supporting search warrants may only affect a warrant’s validity if they are (1) material and (2) made deliberately or recklessly.” *State v. O’Connor*, 39 Wn. App. 113, 116-17, 692 P. 2d 208 (1984), *review denied*, 103 Wn. 2d 1022 (1985). For recklessness to be shown, it must be proven that the affiant “ ‘in fact entertained serious doubts as to the truth’ of facts or statements in the affidavit.” *Id.* citing *United States v. Davis*, 617 F. 2d 677 (D.C. Cir.1979), *cert. denied*, 445 U.S. 967, 100 S.Ct. 1658, 64 L.Ed.2d 243 (1980). Doubts of this caliber can be demonstrated by “(1) actual deliberation on the part of affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.” *Id.* For a misstatement or omission to be material, it must be “necessary to the finding of probable cause.” *State v. Gentry*, 125 Wn. 2d 570, 604, 888 P. 2d 1105 (1995), *cert. denied*, 516 U.S. 843 (1995). The mere fact that a

material fact is omitted, does not establish recklessness. *State v. Garrison*, supra, at 873. “If these requirements are not met, the inquiry ends.” *Id.* at 873.

“If these requirements are met, and the false representation or omitted material is relevant to the establishment of probable cause, the affidavit must be examined. If the relevant false representations are the basis of attack, they are set aside. If it is a matter of deliberate or reckless omission, these omitted matters are considered as part of the affidavit. If the affidavit with the matter deleted or inserted remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. However, if the altered content is insufficient, defendant is entitled to an evidentiary hearing.”

Id.

The burden rests with the defendant to prove, by a preponderance of evidence that an intentional misrepresentation or a reckless disregard for the truth on the part of the affiant exists. *State v. Hashman*, 46 Wn. App. 211, 729 P. 2d 651 (1986), *review denied*, 108 Wn. 2d 1021 (1987).

The Appellant complains that Detective Johnston intentionally or with reckless disregard for the truth omitted relevant facts, specifically the full extent of Mr. Gaynor’s criminal history, the fact that Detective Johnston confirmed Mr. Gaynor’s criminal history, that the pick-up truck in the bed of which precursor chemicals were found belonged to Mr. Gaynor; and Mr. Gaynor’s recantation at trial of the statements he made to Deputy Schallert.

With respect to Mr. Gaynor's criminal history, it is not at all unusual for the NCIC (III or "triple I") report that is available to law enforcement to not be complete. Often, misdemeanor convictions (such as criminal impersonation) do not appear on the "triple I." There is simply no evidence that Detective Johnston knew that Mr. Gaynor was convicted of criminal impersonation or whether this information was contained in the "triple I" available to Detective Johnston in 2001.

More to the point, the "triple I", as noted above, does not always list the substance an individual is convicted of manufacturing, possessing or delivering. Were the trial court to have found that the defendant had met his preliminary burden and order an evidentiary hearing, the State would have elicited testimony from Detective Johnston that at the time, he was unable to confirm exactly the substance Mr. Gaynor was convicted of manufacturing, possessing or delivering. Even if Detective Johnston was able to confirm the substance for which Mr. Gaynor was convicted, that information is simply not critical to a finding of probable cause. Detective Johnston confirmed to the extent possible that Mr. Gaynor had been convicted of controlled substance offenses.

Appellant also claims that Detective Johnston's failure to include Mr. Gaynor's convictions for robbery 2 (1986) and TMVWOP (1985). First, it is unclear whether Detective Johnston was aware of these

convictions when he initially ran Mr. Gaynor in 2001. Second, it should be noted that these convictions in 2001 were 15 and 16 years old respectively. Under ER 609's ten-year limitation, these convictions would not even be admissible against Mr. Gaynor at trial. It is difficult to see what relevance 15-16 year old convictions have on the present case. Even if these convictions were added to the affidavit, the underlying facts reported by Mr. Gaynor remain ultimately unchanged, as does the magistrate's finding of probable cause.

Defendant also alleges that Detective Johnston knew at the time he prepared the search warrant that the pick-up truck on the property belonged to Mr. Gaynor. A careful reading of Detective Johnston's trial testimony does not support his allegation. (Exhibit 4). Detective Johnston indicated at trial that officers ran the plate while at the scene and were not able to obtain any information, as the plate was not current. When questioned further about his knowledge regarding the ownership of the truck, the following exchange took place:

Q: You subsequently learned, though it belong [sic] to Mr. Chad Gaynor?

A: I've since been told that.

The clear implication from this line of questioning is that Detective Johnston learned after the search warrant was served that the truck

belonged to Mr. Gaynor. Unless the defendant can show that Detective Johnston knew this fact at the time he prepared the search warrant, the fact that he may have later gained additional information is irrelevant to this inquiry. Even if Detective Johnston had known who owned the truck, the critical piece of information is where the items in the truck were located in relation to the motor home and Detective Johnston's observations from outside the motor home.

In short, the defendant simply failed to show that Detective Johnston omitted information necessary to a finding of probable cause or that he deliberately presented the magistrate with false information. The defendant was not entitled to an evidentiary hearing.

C. TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL AFTER ONE JUROR AND ONE ALTERNATE JUROR POTENTIALLY OBSERVED THE DEFENDANT ESCORTED TO THE COURTROOM BY A JAILER AND AFTER A JAILER STOOD NEAR THE DEFENDANT AT THE WITNESS STAND AS HE TESTIFIED.

The defendant's due process rights were not violated by the possible observations by one juror and one prospective juror. Neither were his due process rights violated by the jailer's standing near the defendant when he took the witness stand to testify. Appellant relies heavily on the holding in the Division III case, *St. v. Gonzalez*, 129 Wn.App. 895, 120 P.3d 645 (2005). However, this reliance is misplaced

as the facts of the case at hand are clearly distinguishable. In *Gonzalez*, the trial court gave a jury instruction that specifically alerted the jury to the defendant's in-custody status. The instruction went so far as to explain that the defendant must not have been able to post bail and that therefore he would be transported by jail staff in handcuffs per the jail's policy. In *Gonzalez*, the record did not show that the jury ever actually observed the defendant in shackles either in the courtroom or a back hallway. In fact, the jury instruction was intended to be prophylactic. Despite the lack of jurors' physical observations of the defendant's custody, Division III of the Washington State Court of Appeals found that the preemptive instruction merely created the problem that it purported to solve.

The facts of the present case do not include such a prophylactic jury instruction. In fact, there was no instruction regarding the possible observation by one juror and one alternate juror in the hallway requested by defense counsel. Neither was a curative instruction regarding the positioning of the jailer during the defendant's testimony requested. While curative instructions in both cases may very well have been appropriate, none were requested. Curative instructions have been held sufficient to overcome any prejudice that might have otherwise arisen from inadvertent observations of defendants in shackles. *State v. Rodriguez*, 146 Wash.2d 260, 45 P.3d 541 (2002) citing *State v. Ollison*,

68 Wash.2d 65, 69, 411 P.2d 419 (1966) and *State v. Early*, 70 Wash.App. 452, 853 P.2d 964 (1993). If a curative instruction would be sufficient where a defendant was actually seen by jurors in shackles, certainly the same would have been sufficient in the present case where there is no allegation that the defendant was seen in shackles.

The Washington Supreme Court has applied an abuse of discretion standard in reviewing the trial court's denial of a mistrial. *Rodriguez* citing *State v. Hopson*, 113 Wash.2d 273, 284, 778 P.2d 1014 (1989). A reviewing court should find abuse of discretion only when “no reasonable judge would have reached the same conclusion.” *Id.* (quoting *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 667, 771 P.2d 711 (1989)). A trial court's denial of a motion for mistrial will only be overturned when there is a “substantial likelihood” that the error prompting the mistrial affected the jury's verdict. *Rodriguez* citing *State v. Russell*, 125 Wash.2d 24, 85, 882 P.2d 747 (1994) (quoting *State v. Crane*, 116 Wash.2d 315, 332-33, 804 P.2d 10 (1991)). Trial courts “should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *Rodriguez* quoting *State v. Mak*, 105 Wash.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), quoted in *Hopson*, 113 Wash.2d at 284, 778 P.2d 1014.

The Washington Supreme Court in *Rodriguez*, notes with approval that in this division's case, *State v. Gosser*, 33 Wash.App. 428, 435, 656 P.2d 514 (1982), the defendant moved for a mistrial contending that his right to a fair trial was prejudiced when several jurors observed his shackles being removed outside the courtroom. Like the defendant in the present case, Gosser did not request a curative instruction and could point to nothing other than the jury's brief view of him in shackles to support his contention that only a new trial would cure the prejudice. The court affirmed the trial court's denial of the motion for mistrial. The Washington State Supreme Court in *Rodriguez* also reaffirmed its earlier position from *State v. Sawyer*, where members of the jury observed a deputy handcuffing the defendant at the end of the first day of trial. The court in *Sawyer* held that the prompt admonition to the jury the following day cured the error, and affirmed the denial of motion for mistrial. *Rodriguez* citing *State v. Sawyer*, 60 Wash.2d 83, 371 P.2d 932 (1962).

The Washington State Supreme Court in *Rodriguez* also cites the Division I case *State v. Russell*, 33 Wash.App. 579, 588, 657 P.2d 338 (1983), with approval, where a deputy sheriff stopped the defendant as he was attempting to join his attorney at a sidebar. The defendant in *Russell*, as in the present case, contended the sheriff's deputy's actions created a prejudicial inference that the defendant was dangerous. Also like the

present case, the defendant in *Russell* did not request a cautionary instruction but instead moved for a mistrial. The Court of Appeals in *Russell* affirmed the trial court's denial of the motion, holding that when an error can be obviated by jury instruction, the error is waived by failing to request such an instruction.

The sheriff's deputy stopping the defendant from approaching the bench for a sidebar in *Russell* must be at least as serious in the eyes of jurors as the jailer escorting and standing relatively near the defendant during his testimony in the present case. Because the Washington Supreme Court in *Rodriguez* recognized the *Russell* facts as prejudice that could have been cured with a curative instruction, a curative instruction would have been appropriate in the present case as well. Because Douglas Cline failed to propose a curative instruction, any error was waived.

Cline has not shown a substantial likelihood that the error affected the jury's verdict. There is nothing in the record that suggests the defendant was so prejudiced that nothing short of a new trial could have insured him a fair trial. According to the Washington State Supreme Court in *Rodriguez*, the standard is not harmless error beyond a reasonable doubt as Appellant suggests, but rather whether the defendant has been so prejudiced that nothing short of a new trial could insure that the defendant would be tried fairly. *Rodriguez FN 2*. This distinction is crucial because

as in *Rodriguez*, this court is being asked to decide whether a motion for mistrial was improperly denied. It has not been asked to decide whether a court improperly ordered a jailer to stand near the defendant during testimony or to walk the defendant where he could be seen by jurors. No such court orders were made. Error, if any, could have been cured by jury instructions. Cline has failed to show that that the error, if any, affected the jury's verdict.

Substantial evidence certainly existed to convict including components of a methamphetamine lab in the trailer defendant was found in, along with further evidence of methamphetamine manufacturing in the adjacent truck including methamphetamine base. Additionally, there is nothing in the record to suggest that jurors were actually affected by the jailer's positioning near the defendant. The record is also silent regarding whether the juror and alternate juror in the back hall actually realize they had seen the defendant with the jailer. There is certainly nothing in the record to suggest that one or both of those jurors let that possible observation affect their verdicts or even told the other jurors about their observations. Defendant was not denied a fair trial by the trial court's denial of his motion for a mistrial.

D. THE TRIAL COURT IMPROPERLY FAILED TO LIMIT THE TOTAL SENTENCE TO THE STATUTORY MAXIMUM OF TEN YEARS

The state concedes that the trial court improperly failed to limit the total sentence to the statutory maximum of ten years. In reviewing the record including the lack of doubling enhancements or prior manufacturing or delivery convictions, the state concludes, as has Appellant, that the proper maximum sentence is 120 months. Given potential good time the defendant will earn in prison, an actual sentence over ten years even as currently sentenced seems highly unlikely. Nonetheless, the judgment and sentence should be remanded for an amendment to include that the actual time in custody plus community custody shall not exceed 120 months.

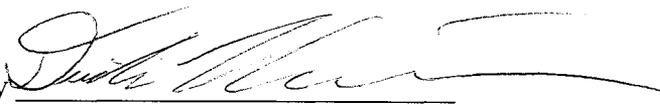
IV. CONCLUSION

The trial court correctly denied defendant's motion to suppress evidence because the affidavit in support of the search warrant provided probable cause. The defendant did not meet his burden to prove by a preponderance of evidence that an intentional misrepresentation or a reckless disregard for the truth on the part of the affiant existed and thus a *Franks* hearing was not required. The trial court did not improperly deny defendant's motion for a mistrial where defendant failed to show a substantial likelihood that the error, if any, affected the jury's verdict and

that nothing short of a new trial could have insured him a fair trial. Finally, the trial court improperly sentenced the defendant to a term that could conceivably amount to more than the ten-year statutory maximum. This court should affirm the decisions of the trial court with one exception. The defendant should be remanded for clarification of the judgment and sentence to reflect that the defendant not spend more than 120 months total in custody to include community custody.

Respectfully submitted this 23rd day of October, 2006

SUSAN I. BAUR
Prosecuting Attorney

By 
DUSTIN RICHARDSON
WSBA 34094
Deputy Prosecuting Attorney
Representing Respondent

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COURT OF APPEALS

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DIVISION II

STATE OF WASHINGTON,)	STATE OF WASHINGTON
)	BY _____
Respondent,)	EMILY
v.)	NO. 33724-0-II
)	01-1-00972-6
DOUGLAS RAY CLINE,)	AFFIDAVIT OF MAILING
Appellants.)	

AUDREY J. GILLIAM, being first duly sworn, on oath deposes and says: That on October 23, 2006, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

JOHN A. HAYS
ATTORNEY AT LAW
1402 BROADWAY
LONGVIEW, WA 98632

each envelope containing a copy of the following documents:

1. Brief of Respondent
2. Affidavit of Mailing.

Audrey Gilliam

SUBSCRIBED AND SWORN to before me this October 23, 2006.

Julie S. D'Souza
Notary Public in and for the State
of Washington residing in Cowlitz
Co. My commission expires: 10-19-09