

NO. 35083-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID BROWN,

Appellant.

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COURT OF APPEALS  
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 04-1-00822-9

BRIEF OF RESPONDENT

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DATED April 13, 2007, Port Orchard, WA *[Signature]*  
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## I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the court below abused its discretion in finding that the warrant application established probable cause when the informant's reliability was established by a number of well recognized factors, including the fact that the informant: (1) was a named informant; (2) made statements against his penal interest; (3) made the statements after he had been arrested and Mirandized; (4) provided detailed and specific information; and, (5) provided information about a number of facts which the detectives were able to independently corroborate?

2. Whether the trial court abused its discretion in finding that the omission of the informant's exact criminal from the warrant application was not a material omission when the State: (1) described the informant's criminal history in some detail by stating that the informant had "numerous thefts, burglaries, and car prowls" for which he had been sent to prison; and, (2) described that the informant was under arrest for burglary (and provided the facts relating to that charge as well as other similar burglaries) and also described the informant's involvement in other non-charged criminal activity including possession of stolen property and methamphetamine?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

David Brown was charged by third amended information filed in Kitsap County Superior Court with four counts of unlawful possession of a firearm in the first degree. CP 114. Following a stipulated facts trial, the trial court found Brown guilty of all four counts. CP 123, RP 5/22/06 at 7. The trial court then imposed a standard range sentence. CP 149. This appeal followed.

### **B. FACTS**

Prior to trial, Brown filed a motion to suppress the firearms that the police had seized during the execution of a search warrant. CP 14. Brown argued, inter alia, that the application for the warrant was insufficient because there was no showing that the informant mentioned in the application was reliable, and because the State failed to adequately inform the court concerning the informant's criminal history. CP 14-17.

The search warrant at issue on this appeal concerned Brown's residence and was issued on May 17, 2004. The application for the search warrant included information provided to law enforcement by an informant named Paul Bickle. Bickle had been arrested a few days earlier in connection with a burglary, and on May 17, the police had obtained a search warrant for a storage unit associated with Mr. Bickle, and the affidavit concerning this

earlier warrant was incorporated into the application for the May 19<sup>th</sup> warrant application regarding Brown's residence.

The facts surrounding the search warrants issued below are as follows:

*i. May 17<sup>th</sup> Search Warrant for Bickle's storage unit.*

On May 17, 2004 Judge Leila Mills signed a search warrant authorizing the search of a storage unit at the Mile Hill Mini Storage in Port Orchard. CP 67. This search warrant was supported by a written complaint for a search warrant signed by Detective Ron Trogdon. CP 63-66.

The complaint stated that on May 14, 2004 Deputies were dispatched regarding a suspicious vehicle, as the reporting party had seen a U-Haul truck driving around and then heard "construction noises" coming from a neighboring house that was under construction. CP 63. The reporting party had seen someone walking around the house carrying a flashlight, but knew that the construction crew had already left the house for the day and that they did not usually work at night by flashlight. CP 63. When the deputies arrived, they observed that the chain blocking the driveway had been damaged and driven over, and a U-Haul truck was parked in the driveway. CP 64. A deputy approached the house and saw a white male fleeing from the back deck of the residence. A K-9 unit responded, and the subject, Paul Bickle, was subsequently taken into custody. CP 64.

Deputies returned to the house and determined that it had been forcibly entered, and that the suspect had been in the process of removing an exterior window with a saw. CP 64. In addition, a bag of tools was located inside the house that had not been there when the construction crew had secured the house. CP 64.

The complaint also noted that this burglary was very similar to several other recent burglaries in south Kitsap County, including a burglary on April 29, 2004 where another residence under construction was forcibly entered and a vehicle was used to remove a refrigerator, range, dishwasher and microwave. CP 64. That same residence was also burglarized on May 2, 2004, and 3 ceramic sinks, 2 showerheads, and one toilet were taken. CP 64. On May 3, 2004 another residence under construction was burglarized, and multiple items were taken including 1000 square feet of flooring, 9 cabinets, 3 sinks, 2 toilets, 9 boxes of tile, a chandelier, a bar light and a medicine cabinet. CP 64.

When Mr. Bickle was arrested he had in his possession a business card for "Mile Hill Mini Storage" which was located at 4172 Mile Hill Drive in Port Orchard. CP 65. The back of the card had a notation reading "Unit #F56" and a gate code. CP 64. A detective responded to the Mini Storage and confirmed that unit F56 had been rented by a female named Melissa Askren and that she had been accompanied by a male. CP 64. Ms. Askren

also listed authorized access of the unit to Angela Askren. CP 64.

The managers of the storage facility also were able to give a description of the male who was present with Askren when she rented the unit, and that description matched Bickle. CP 65. In addition, the storage unit had a padlock on it that used a very distinctive folding key, and Bickle had such a key on his key ring at the time of his arrest. CP 65-66.

Detective Duckworth knew of Melissa and Angela Askren, and had previously interviewed Mr. Bickle and Angela Askren together regarding other thefts from construction sites, one of which Mr. Bickle had admitted to being involved in. CP 65. Detective Duckworth was also aware that Mr. Bickle and Angela Askren were involved in a romantic relationship. CP 65.

Another detective, Detective Trogdon, was also aware that “Bickle and Askren are boyfriend and girlfriend from a case [he had] worked involving numerous thefts, burglaries, and car prowls several years ago for which Paul Bickle was arrested and sent to prison.” CP 65.

Based on the affidavit, Judge Mills signed the Search Warrant authorizing the search of the storage unit. CP 68.

***ii. May 19, 2004 Search Warrants.***

On May 19, 2004, at approximately 8:30 am, a deputy prosecuting attorney and Detective Trogdon presented two oral applications for search warrants before Judge Mills. CP 71-88. A transcript of this oral application

for a search warrant was provided to the trial court below. CP 71-88.

At very beginning of the hearing, the prosecutor asked the court to incorporate the written complaint from the May 17 search warrant for the storage unit in Port Orchard. CP 72. Detective Trogdon was sworn in, and stated that when the detectives served the May 17th search warrant for the storage unit connected to Mr. Bickle, they found “Mack tools sets,” other “Mack” equipment, acetylene torches, bottles, regulators, hoses, and hose reels that are used in a shop environment for dispensing various automotive-type liquids and things associated with that type of work. CP 72-74. These items appeared to be the content of a machine shop or automotive or heavy equipment repair shop. CP 74.

Detective Trogdon also relayed that some time after his arrest, Mr. Bickle had requested to speak with detectives regarding his arrest. CP 74. Mr. Bickle was brought to the Sheriff’s office from the jail, and was advised of his Miranda rights, which he waived. CP 74-75. The detectives spoke with Bickle about the items found in the mini storage, and Bickle advised the detectives that he had obtained the items from a subject by the name of David Brown who lived on Fircrest Drive, and that Mr. Brown had told him that the items were stolen from a business in Kent. CP 75.

After Bickle provided this information regarding the stolen items, the detectives investigated Bickle’s claims. CP 75. The detectives contacted the

Kent Police Department, who advised that a recent theft had indeed occurred at Modern Machinery and Tool, which was located at 22431 83<sup>rd</sup> Avenue South in Kent. CP 75. The owner of this business was then contacted, and the owner faxed over a list of items that had been stolen and the detectives were able to verify that the items found in the storage unit were the same items stolen from the business in Kent. CP 75-76.

During the application for the search warrants, Detective Trogdon also testified that he had spoken with Mr. Bickle the previous day, May 18, and that Mr. Bickle indicated that David Brown lived at 2582 Fircrest Drive Southeast in Port Orchard. CP 77. Mr. Bickle was asked how he had acquired the items found in the storage unit, and Mr. Bickle stated that David Brown had contacted him and asked him if he could store some tools for him and told him that he would need to rent a U-Haul in order to haul the tools that he wanted to have stored. CP 77-78. Bickle further stated that in exchange for storing these tools, Mr. Brown agreed to provide him with methamphetamine. CP 78.

Mr. Bickle stated that he then had a friend named Adam Cookson rent a U-Haul for this purpose. CP 78. Again, the detectives investigated Bickle's claims, and were able to verify this information with U-Haul. CP 78.

Mr. Bickle stated that he then drove the rented truck over to Brown's residence where the stolen items were loaded from Brown's garage into the

truck. CP 78-79. Mr. Bickle asked Brown about where the items had come from, and Brown told him that he had stolen them from a place in Kent. CP 79. Mr. Bickle further explained to the detectives that this conversation took place on May 13<sup>th</sup> or 14<sup>th</sup>. CP 79.

Mr. Bickle also indicated that he had known Brown for quite some time, and that Brown had been a supplier of methamphetamine to him in the past. CP 79. Mr. Bickle also indicated that he had been at Brown's house several times, and during those visits he had seen firearms, including as semi-automatic handguns as well as assault-type rifles, which he further described as AK-47s. CP 79-80.

Detective Trogdon also testified that the detectives had found during their investigation that Brown was a convicted felon and was prohibited from owning or possessing firearms. CP 80.

Mr. Bickle also told the detectives that Brown had two storage units located behind a 7-Eleven at Jackson and Lund. CP 80-81. Mr. Bickle also indicated that he had been to those storage units within the last month and had seen numerous firearms stored there. CP 81.

Again, after Bickle provided this information regarding the storage units, the detectives investigated Bickle's claims. Detectives went to that storage unit and confirmed that Brown indeed did have two storage units (numbers H530 and H532) at that location, which is known as Port Orchard

South Storage and is located at 3282 Southeast Lund Avenue. CP 80-81.

Mr. Bickle also indicated that Brown had told him about the house on JM Dickenson road (the house Bickle was burglarizing when he was arrested) and had instructed Mr. Bickle to go there and retrieve items from the residence using the U-Haul truck. CP 82.

Detective Trogdon also testified that Mr. Bickle was facing criminal charges of Burglary in the Second Degree with respect to the burglary of the residence on JM Dickenson Road. CP 83. When asked if any promises had been made to Mr. Bickle which could have caused him to provide this information about Brown, Detective Trogdon replied, "No, there has not." CP 83. Detective Trogdon explained that Mr. Bickle had asked what might be able to be done for him based on the information that he provided, and Detective Trogdon explained to Mr. Bickle that, "it depended upon the scope of the information that he gave and what the prosecutor felt about that." CP 84.

Judge Mills then asked several clarifying questions.

- Q. Then I need to also make sure I heard this. So far as the two storage units being referenced, and those are numbers H532 and H530, did you indicate that those units were verified to belong to Mr. Brown through Detective Rodrigue's work?
- A. Yes
- Q. And also, you mentioned the verification of Bickle's credibility was based upon information that he had provided concerning equipment that was stolen from Kent?
- A. Yes.

- Q. You made inquiries to the Kent Police Department; is that right?
- A. Detective McCrillis, who was with me yesterday, and through the actual business in Kent.
- Q. And that information you got from Detective McCrillis, did that verify the items were stolen from Mr. Standard's business?
- A. Yes.
- Q. And Mr. Standard's business, is that located in Kent?
- A. Yes, it is.

Judge Mills then authorized a search of Mr. Brown's residence at 2583 Fircrest Drive, Port Orchard, and a search of Port Orchard Self Storage, 3282 Southeast Lund Avenue, Units H530 and H532 in Port Orchard. CP 86.

In the court below, Brown filed a motion arguing that the warrant for Brown's residence was not supported by probable cause. CP 14. The trial court denied Brown's motion. RP (1/25) 2-4.

### III. ARGUMENT

- A. THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE WARRANT APPLICATION ESTABLISHED PROBABLE CAUSE BECAUSE THE INFORMANT'S RELIABILITY WAS ESTABLISHED BY A NUMBER OF WELL RECOGNIZED FACTORS, INCLUDING THE FACT THAT THE INFORMANT: (1) WAS A NAMED INFORMANT; (2) MADE STATEMENTS AGAINST HIS PENAL INTEREST; (3) MADE THE STATEMENTS AFTER HE HAD BEEN ARRESTED AND MIRANDIZED; (4) PROVIDED DETAILED AND SPECIFIC INFORMATION; AND, (5) PROVIDED INFORMATION ABOUT A NUMBER OF FACTS WHICH THE DETECTIVES WERE ABLE TO INDEPENDENTLY CORROBORATE.**

Brown argues that the warrant application failed to establish probable cause because it did not demonstrate the reliability of the informant, Paul Bickle. App.'s Br. at 8. This claim is without merit because the issuing magistrate did not abuse its discretion in finding that the application established probable cause, as there were numerous facts that supported a finding that Mr. Bickle was reliable.

The warrant clause of the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution require that a search warrant be issued upon a determination of probable cause based upon "facts and circumstances sufficient to establish a reasonable inference"

that criminal activity is occurring or that contraband exists at a certain location.” *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002), citing *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); *State v. Patterson*, 83 Wn.2d 49, 58, 515 P.2d 496 (1973); and CrR 2.3. Probable cause is established when an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity. *Vickers*, 148 Wn.2d at 108, citing *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981).

A magistrate exercises judicial discretion in determining whether to issue a warrant. That decision is reviewed for abuse of discretion, and a reviewing court generally accords great deference to the magistrate and views the supporting affidavit for a search warrant in the light of common sense. *Vickers*, 148 Wn.2d at 108, citing *Seagull*, 95 Wn.2d at 907, and *Cole*, 128 Wn.2d at 286. Doubts concerning the existence of probable cause are generally resolved in favor of issuing the search warrant. *Vickers*, 148 Wn.2d at 109, citing *Cole*, 128 Wn.2d at 286; *Young*, 123 Wn.2d at 195; and *Seagull*, 95 Wn.2d at 907.

In addition, probable cause for a search warrant may be based on information from an informant. *See Cole*, 128 Wn.2d at 287. Under what is

typically referred to as the *Aguilar-Spinelli* test, an affidavit using an informant's tips to establish probable cause must establish both the basis of the information and the credibility or reliability of the informant. *State v. Gaddy*, 152 Wn.2d 64, 71, 93 P.3d 872 (2004). Although the United States Supreme Court has rejected the *Aguilar-Spinelli* test for the 'totality-of-the-circumstances' test outlined in *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), Washington courts adhere to *Aguilar-Spinelli*. *State v. Gaddy*, 152 Wn.2d 64, 71 n. 2, 93 P.3d 872 (2004). The *Aguilar-Spinelli* strictures, however, are "aimed primarily at *unnamed* police informers." *State v. O'Connor*, 39 Wn. App. 113, 120, 692 P.2d 208 (1984) (emphasis in original).

**1. *The fact that an informant is named in the affidavit creates either a presumption of reliability, or, at a minimum, is a factor that, in combination with other factors, can support an inference of reliability***

As mentioned above, the *Aguilar-Spinelli* strictures are "aimed primarily at *unnamed* police informers." *State v. O'Connor*, 39 Wn. App. 113, 120, 692 P.2d 208 (1984). For this reason, named citizen informants are generally presumed to be reliable. *State v. Wible*, 113 Wn. App. 18, 24, 51 P.3d 830 (2002); *State v. Gaddy*, 152 Wn.2d 64, 72-73, 93 P.3d 872 (2004); *State v. Franklin*, 49 Wn. App. 106, 109, 741 P.2d 83, 85 (1987). Similarly, if the identity of an informant is known (as opposed to being anonymous or a professional informant), the necessary showing of reliability is relaxed

because there is less risk of the information being a rumor or irresponsible conjecture which may accompany anonymous informants. *Gaddy*, 152 Wn.2d at 72-73; citing *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986), and *State v. Northness*, 20 Wn. App. 551, 557, 582 P.2d 546 (1978).

Other Washington courts, however, have formulated a different analysis, and have indicated that the presumption of reliability does not apply to “criminal or professional informants,” and at least one Washington court has stated that if the named informant “was a participant in the crime under investigation or has been implicated in another crime and is acting in the hope of gaining leniency,” then the presumption of reliability does not apply. *See, State v. Rodriguez*, 53 Wn. App. 571, 576, 769 P.2d 309 (1989). This language from the *Rodriguez* decision, however, is dicta, as the informant in that case was not named, and the court ultimately held that the credibility prong of the *Aguilar-Spinelli* test was satisfied, in part, because the description of the informant in the affidavit made the informant readily identifiable and the circumstances did not diminish the presumption of reliability. *Rodriguez*, 53 Wn. App. at 577.

Not all Washington cases agree, however, with this dicta in *Rodriguez* and, as outlined below, other Washington cases have reached a different conclusion and have held that the fact that an informant may also be under suspicion does not “vitiating the inference of reliability.” *See, State v.*

*Chenoweth*, 127 Wn. App. 444, 454, 111 P.3d 1217 (2005); *State v. Northness*, 20 Wn. App. 551, 558, 582 P.2d 546 (1978), citing *United States v. Banks*, 539 F.2d 14 (9<sup>th</sup> Cir 1976); *United States v. Darensbourg*, 520 F.2d 985 (5<sup>th</sup> Cir (1975); *United States v. Rueda*, 549 F.2d 865 (2d Cir. 1977).

In *State v Northness*, 20 Wn. App. 551, 582 P.2d 546 (1978) for instance, a search warrant was granted based on information provided by a named informant who stated that her roommates had a large quantity of marijuana. *Northness*, 20 Wn. App. at 552-53. In discussing the issue of the informant's credibility under the *Aguilar-Spinelli* test, this court stated that such inquiries usually fall into one of four categories:

Category 1: The informant remains wholly anonymous, even to the police.

Category 2: The informant's identity is known to the police, but not revealed to the magistrate. Different rules for establishing credibility must be applied, depending upon whether the informant is (1) a "criminal" or professional informant, or (2) a private citizen.

Category 3: The informant's identity (name and address) is disclosed to the magistrate.

Category 4: The situation described in *State v. Chatmon*, 9 Wn. App. 741, at page 748, n. 4, 515 P.2d 530, at page 535 (1973) as follows: "Where eyewitnesses to crime summon the police, and the exigencies are such (as in the case of violent crime and the imminent possibility of escape) that ascertainment of the identity and background of the informants would be unreasonable, the 'reliability' requirement might be further relaxed. *Cf. State v. Morsette*, 7 Wn. App. 783, 502 P.2d 1234 (1972)."

*Northness*, 20 Wn. App. at 555. This court then held that the informant in *Northness* was a “category 3 informant” as she had been named in the affidavit, and stated that, at that time, there appeared to be no Washington cases dealing with the credibility of a named informant; thus making *Northness* a case of first impression. *Northness*, 20 Wn. App. at 555. The court then noted that, as it was impossible in such a case to show a “track record,” evidence of past reliability was not required. *Northness*, 20 Wn. App. at 556. Rather, the court adopted the rule enunciated by the Supreme Court of Colorado, which stated that,

We believe, and hold, that the constitutional safeguards (federal and state) are met when the affidavit supporting an arrest warrant or search warrant contains the name and address of the citizen-informant who was a witness to criminal activity and includes a statement of the underlying circumstances.

*Northness*, 20 Wn. App. at 558, quoting *People v. Glaubman*, 175 Colo. 41, 485 P.2d 711, at page 717 (1971). The court then held that because the information provided by the informant was based on her personal observations, the first prong of the *Aguilar-Spinelli* test was met, and that those same details should have been found sufficient “to support the reasonable inference that [the informant], as an identified citizen informant, was reliable, thus satisfying the second prong of *Aguilar-Spinelli*.” *Northness*, 20 Wn. App. at 558. Furthermore, the court also stated that this inference

was valid even though the witness was arguably self-interested and was potentially under suspicion as she was a co-possessor of the premises.

Specifically, the court stated,

Finally, with respect to defendant Fias we are not unmindful of the possibility that [the informant] may have been motivated by self interest, i.e., a desire to exculpate herself from criminal liability as co-possessor of the premises wherein the marijuana was kept. However, the fact that an identified eyewitness informant may also be under suspicion in this case because of her initial contact has been held not to vitiate the inference of reliability raised by the detailed nature of the information and the disclosure of the informant's identity.

*Northness*, 20 Wn. App. at 558, citing *United States v. Banks*, 539 F.2d 14 (9<sup>th</sup> Cir 1976); *United States v. Darensbourg*, 520 F.2d 985 (5<sup>th</sup> Cir (1975); *United States v. Rueda*, 549 F.2d 865 (2d Cir. 1977).

Subsequent Washington cases have followed these holdings in *Northness*, and have cited it for the proposition that the fact that the informant may also be under suspicion does not “vitate the inference of reliability raised by the detailed nature of the information and the disclosure of the informant’s identity.” See, for example, *State v. Riley*, 34 Wn. App. 529, 533, 663 P.2d 145 (1983)(“The fact that an identified eyewitness informant may also be under suspicion does not vitiate the inference of reliability raised by the detailed nature of the information and the disclosure of the informant’s identity.”); *State v. Chenoweth*, 127 Wn. App. 444, 454,

111 P.3d 1217 (2005), *citing Northness*, 20 Wn. App. at 588 (*citing United States v. Banks*, 539 F.2d 14, 17 (9th Cir.1976) (fact that named, untested, non-professional informer was under investigation based on suspicion of being involved in drug traffic was immaterial to question of reliability of informant where he voluntarily provided detailed eyewitness report of defendant's drug dealing); *United States v. Darensbourg*, 520 F.2d 985, 988 (5th Cir.1975) (affidavit providing name and address of 15 year-old informant and detailed information about robbery evidence sufficient to demonstrate reliability); *United States v. Rueda*, 549 F.2d 865, 869 (2d Cir.1977) (no need to show past reliability where informant is in fact a participant in the very crime at issue));

Even assuming, however, that the fact that an informant is named does not create a presumption of reliability if the informant is a criminal suspect, the naming of the informant must still be considered as a factor in determining reliability even if it does not, on its own, create a presumption of reliability. For instance, even the *Rodriguez* case mentioned above and cited by the appellant stated that the fact that an informant is named “is one factor which may be weighed in determining the sufficiency of an affidavit.” *Rodriguez*, 53 Wn.App at 576.

In the present case, therefore, the fact that Mr. Bickle was named either creates a presumption of reliability, or, at the least, is a factor that is to

be weighed in determining Mr. Bickle's reliability. Furthermore, even putting aside the inference of reliability that occurs when the informant's identity is provided, there are a number of factors present in the case at bar that Washington courts have previously recognized as factors that can demonstrate an informant's reliability.

**2. *Statements made against an informant's penal interest support an inference of reliability***

For instance, "It is well settled in Washington that admissions against penal interest are a relevant factor in probable cause determinations under the *Aguillar/Spinelli* test" and are relevant indicia of an informant's veracity. *State v. O'Connor*, 39 Wn. App. 113, 119, 692 P.2d 208 (1985), citing *State v. Lair*, 95 Wn.2d 706, 711, 630 P.2d 427 (1981); *State v. Patterson*, 37 Wn. App. 275, 679 P.2d 416 (1984); *State v. Hett*, 31 Wn. App. 849, 852, 644 P.2d 1187, review denied, 97 Wn.2d 1027 (1982); *State v. Lair*, supra, 95 Wn.2d at 710-11, 630 P.2d 427; *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971); See also *State v. Estorga*, 60 Wn. App. 298, 304, 803 P.2d 813 (1991). This is due to the fact that statements against penal interest are not often made lightly and, therefore, support an inference of reliability. See *Lair*, 95 Wn.2d at 710-11 (because informant who admits criminal activity to police officer faces possible prosecution, statements raising such a possibility may support an inference of reliability as such statements are "not often made lightly").

In the present case, Mr. Bickle made numerous statements that were against his penal interest. First, when asked by the detectives about the items found in the storage unit, Mr. Bickle said that he had obtained the items from Brown's garage and that Brown had told him that the items were stolen. CP 75, 79. In addition, Mr. Bickle stated that in exchange for storing the items, Brown would provide him with methamphetamine. CP 78. Mr. Bickle also admitted that he had known Brown for quite some time and that Brown had previously supplied him with methamphetamine, and that on a number of his visits to Brown's home he had observed firearms. CP 79. Mr. Bickle also admitted he had been at the residence on JM Dickenson Road (the house Mr. Bickle was burglarizing when he was arrested) to retrieve items from the house using the U-Haul truck, and that he had done this at the suggestion of Brown. CP 82. In short, it is clear that in his discussion with the detectives after his arrest, Mr. Bickle made numerous statements against his penal interest outlining his involvement in numerous crimes and his relationship to Brown, and further explained that he had been to Brown's house numerous times in relation to the crimes he mentioned (such as possession of stolen property and possession of methamphetamine) and that on these visits he had also observed firearms at the residence.

Although Brown concedes that Mr. Bickle in the present case made a number of statements that were against his own penal interest, Brown argues

that Mr. Bickle's statements about the firearms in Brown's residence did not implicate the informant's own penal interests. App.'s Br. at 11-12. Brown's argument, however, takes an unnecessarily narrow view and misses that point that "the facts and circumstances under which the information is furnished may reasonably support an inference that the informant is telling the truth." *O'Connor*, 39 Wn. App. at 120, quoting *State v. Lair*, 95 Wn.2d at 710. Furthermore, the statements made by the informant in the present case are indistinguishable from the types of statements made by the informant in *O'Connor*, which the court held were statements against penal interest.

In *O'Connor*, the police made a controlled purchase of a stolen cassette player from William Lance. *O'Connor*, 39 Wn. App. at 115. Lance eventually admitted to the police that he had been receiving stolen property from O'Connor and had been selling property for O'Connor for over a year. *O'Connor*, 39 Wn. App. at 115. These statements mirror Mr. Bickle's statements in the present case where he stated that he had been to Brown's home to pick up stolen property and to obtain methamphetamine. CP 75, 79, 82.

The informant in *O'Connor* then went on to tell the police that O'Connor had told him that several items in his apartment were stolen in residential burglaries, and the informant had specifically observed a "Sony Trinitron colored TV and a set of Klipch stereo speakers" at O'Connor's

residence. *O'Connor*, 39 Wn. App. at 115, 123 n.2. The court in *O'Connor* ultimately concluded that, “In summary, we have a detailed statement against penal interest by a named informant,” and that the “facts and circumstances here provided the magistrate with a reasonable basis upon which to issue the warrant.” *O'Connor*, 39 Wn. App. at 123. The *O'Connor* court also noted that it was significant that the informant had been given Miranda warnings, as the warnings made the person aware of the potential that his statements could be used against him. *O'Connor*, 39 Wn. App. at 123

Under the analysis proposed by Brown, the statements made by the informant in *O'Connor* regarding the stolen property he observed in O'Connor's residence would not technically be against the informant's own penal interest; rather, they would only affect O'Connor's penal interests since the informant did not indicate that he had any involvement with these items other than the fact that he saw them. The court in *O'Connor*, however, did not take such a narrow view, and held that the informant in that case had made statements against his penal interest. *O'Connor*, 39 Wn. App. at 123. This conclusion makes sense, as the statements all were made during the course of one conversation made after an arrest, and after Miranda warnings, during which the suspect made numerous statements against his own penal interest. Similarly, in the present case, Mr. Bickle made numerous statements against his own penal interest during a post arrest conversation with law

enforcement regarding stolen property and his dealings with Brown. When the conversation is viewed in its proper context, it is clear, as was the case in *O'Connor*, that Mr. Bickle made statements against his penal interest and that this fact reasonably supported an inference that he was telling the truth.

Finally, regarding Brown's argument that the statements concerning the firearms were not technically against Mr. Bickle's own penal interest, a similar "technical" argument was raised by the defense and rejected by the court in *State v. Estorga*, 60 Wn. App. 298, 302-05, 803 P.2d 813 (1991). In *Estorga*, after police discovered marijuana and amphetamines in his home, a named informant agreed to provide information about a marijuana grow operation in exchange for a written agreement not to prosecute him for the drugs found in his home or for his involvement in the grow operation. *Estorga*, 60 Wn. App. at 302-05. The warrant affidavit contained the informant's statement, but had no other information about the informant's reliability. *Estorga*, 60 Wn. App. at 303. On appeal, one of the defendants argued that the informant's statement against penal interest lent nothing to his credibility because the informant had no reason to believe that his statements would ever be used against him as the informant would be immune from prosecution if police discovered the grow operation; or if the police discovered no operation, the State could not prosecute because it could not establish the corpus delicti. *Estorga*, 60 Wn.App at 303. This court,

however, rejected the defense argument and concluded that the circumstances established a strong motivation for the informant to be truthful and satisfied the requirement that the informant be credible. *Estorga*, 60 Wn. App. at 305. The court questioned whether the informant had been in a position to recognize the niceties of the defense argument that he was not at risk if his information did not result in the actual seizure of the grow operation, since contraband had already been found at the informant's own residence, and stated that,

But even if he was [aware of the niceties of the defense argument], the argument ignores the fact that he could have been charged and prosecuted for the crime of possession based on the contraband seized at his residence. Motivation to tell the truth was evident.

*Estorga*, 60 Wn. App. at 305.

In the present case, Mr. Bickle's statements concerning the firearms were made in the context of a larger conversation outlining his involvement with Brown and the possession of stolen property and drugs. The statements, therefore, can be properly characterized as statements against Mr. Bickle's penal interest. In addition, even if this court were to undertake a hypertechnical examination of the penal interests involved regarding the firearms, the admission by Mr. Bickle that he had seen the guns at Brown's house would itself be circumstantial evidence that would place Mr. Bickle at Brown's home and thereby circumstantially tie him to the stolen property that

originated from Brown's garage. Thus even under a hypertechnical analysis, the specific statements about the guns were arguably against his penal interest even when viewed in a vacuum and out of context. Such a hypertechnical analysis, however, is not supported under the law and should not be utilized in this case. Rather, Bickle's statement to the detectives, when viewed in its proper context, was simply a statement against his penal interest in which he outlined in some detail his involvement in numerous crimes with Brown.

**3. *The fact that informant is under arrest is a factor demonstrating reliability***

In addition, Washington courts have held that the fact that an informant was under arrest at the time he made his statements is also relevant to veracity, since lying to the police would bring their disfavor. *O'Connor*, 39 Wn. App. at 121, citing *State v. Bean*, 89 Wn.2d 467, 471, 572 P.2d 1102 (1978); See also, *State v. Lopez*, 70 Wn. App. 259, 265, 856 P.2d 390 (1993), review denied, 123 Wn.2d 1002 (1994) ("The fact that an informant provides information following arrest has been recognized as an indicia of his credibility"). The court in *O'Connor* explained that the potential for criminal charges enhances an informant's motivation to be truthful with the police because:

One who knows the police are already in a position to charge him with a serious crime will not lightly undertake to divert the police down blind alleys. Thus, where the circumstances fairly suggest that the informant "well knew that any discrepancies in his story might go hard with him," that is a

reason for finding the information reliable. In such a situation, it is the “clearly apprehended threat of dire police retaliation should he not produce accurately” more so than the admission of criminal conduct which produces the requisite indicia of reliability.

*O’Connor*, 39 Wn. App. at 121, quoting 1 LAFAVE, SEARCH AND SEIZURE, §3.3 at 528-29 (1978). See also, *Lopez*, 70 Wn. App. at 265 (“motivation to be truthful with the police is enhanced by the existence of a pending charge,” citing *O’Connor* and quoting the above mentioned passage from LAFAVE).

In the present case, Mr. Bickle requested to speak with the detectives after his arrest, and was brought from the jail to the Sheriff’s office for this purpose. CP 74-75. The fact, therefore, that Mr. Bickle provided the information following his arrest is another, recognized, indicia of his credibility.

**4. *The amount and kind of detailed informant given may also enhance an informant’s reliability***

In addition, the amount and kind of detailed information given by an informant may also enhance his reliability. *O’Connor*, 39 Wn. App. at 122, citing *State v. Patterson*, 37 Wn. App. 275, 278, 679 P.2d 416 (1984); *State v. Jessup*, 31 Wn. App. 304, 318, 641 P.2d 1185 (1982); *State v. Hett, supra*, 31 Wn. App. at 852, 644 P.2d at 1187.

In *O’Connor*, the court noted that the informant had given a fairly detailed statement to the police, named a specific person at a specific residence, gave the date, and described by brand name certain items located at

the residence. *O'Connor*, 39 Wn. App. at 122-23. The court noted that other Washington cases that had been concerned with the veracity of an informant had listed the detailed nature of the informant's information as an indicia of reliability. *O'Connor*, 39 Wn. App. at 122, citing *State v. Patterson*, 37 Wn. App. 275, 278, 679 P.2d 416 (1984); *State v. Hett*, 31 Wn. App. 849, 852, 644 P.2d 1187 (1982).

In the present case, Mr. Bickle gave a statement containing details similar to the informant's statement in *O'Connor*. Specifically, Mr. Bickle stated that he had seen firearms at Brown's residence over the last two months, provided the address, and gave a description of the firearms in which he described the firearms as assault-type rifles (which he further described as AK-47s) as well as semi-automatic handguns. CP 77, 79-80. These specific references, along with Mr. Bickle's other more general statements, support a finding of reliability. *O'Connor*, 39 Wn. App. at 123.

**5. *The fact that an informant has provided other information that the police are able to independently corroborate supports an inference of reliability***

While it is true that the existence of a proven "track record" of reliability reasonably supports an inference that he informant is presently telling the truth, a "track record" is not a necessary condition for a finding of reliability. *State v. Lair*, 95 Wn.2d 706, 710-11, 630 P.2d 427 (1981), citing *United States v. Harris*, 403 U.S. 573, 580-84, 91 S. Ct. 2075, 2080-82, 29 L.

Ed. 2d 723 (1971). Rather,

In the event an informant cannot demonstrate a record of truthfulness, the second prong of the *Aguilar-Spinelli* test may be satisfied if the magistrate is provided sufficient facts to determine that the informant's information on the specific occasion is reliable.

*Lair*, 95 Wn.2d at 710. Furthermore,

Even knowing nothing about the inherent credibility of a source of information, we may still ask, “Was the information furnished under circumstances giving reasonable assurances of trustworthiness?” If so, the information is “reliable,” notwithstanding the ignorance as to its source's credibility.

*Lair*, 95 Wn.2d at 710, citing *Thompson v. State*, 16 Md.App. 560, 566, 298 A.2d 458 (1973).

Corroboration, therefore, is not a prerequisite to a finding of reliability, but when corroboration of significant facts does occur, as it did in the present case, this is an additional factor that supports a finding of reliability. In addition, the corroboration need not necessarily relate only to prior information given in the distant past, but rather, can concern information given near in time to, or contemporaneously with, the information used in the affidavit at issue.

For instance, in *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984), the Washington Supreme Court held that the fact that the informant had recently provided “highly reliable” information concerning another suspect was sufficient to satisfy the credibility prong of *Aguillar-Spinelli*.

*Jackson*, 102 Wn.2d at 443. This was true even though the evidence this other “accurate information” was provided contemporaneously, or nearly contemporaneously, with the information concerning the defendant. In *Jackson*, the informant had told law enforcement that a suspect named Stern was a marijuana dealer. *Jackson*, 102 Wn.2d at 433-44. The informant had also stated that individuals named “Walter” and “Larry” were Stern’s principal distributors, and said that Walter lived at a residence at 12509 Sunrise Drive. *Jackson*, 102 Wn.2d at 434.

On the basis of this information, the officers first obtained a search warrant of Stern’s residence, and this warrant was served on March 9, 1981. *Jackson*, 102 Wn.2d at 434. Authorities found about 5,000 pounds of marijuana (some of which was in garbage bags) and \$140,000 in cash. *Jackson*, 102 Wn.2d at 434. Earlier in the day, but prior to the search of Stern’s residence, federal agents saw a BMW registered to Larry Corby at Stern’s residence and saw a man matching Mr. Corby’s description place a large plastic bag (similar to the bags that were later found in Sterns containing marijuana) in the trunk. *Jackson*, 102 Wn.2d at 434. Approximately an hour after the BMW left Stern’s residence, it was seen parked at the residence at 12509 Sunrise Drive. Based on this information, a search warrant was obtained for the Sunrise Drive residence, and this warrant was served the next day, March 10, 1981. This search of Walter Jackson’s

residence also resulted in the recovery of marijuana and cash, which resulted in the charges at issue in *Jackson*.

On appeal, the defendants in *Jackson* argued that search warrant of their residence was invalid. *Jackson*, 102 Wn.2d at 435. The court, however, held that the credibility prong of *Aguillar-Spinelli* was satisfied through the showing that informant was named and had provided the investigators with highly reliable information about Stern's drug operation. *Jackson*, 102 Wn.2d at 443. The court stated,

The fact that Howell had provided accurate information about other facets of Stern's drug trafficking operation lends credence to his assertion that Walter Jackson was a drug distributor. Generally, when an informant is right about some material things, he can be regarded more probably right about other, unverified facts.

*Jackson*, 102 Wn.2d at 433-44. The court's finding is significant in that it does not rely on a lengthy track record involving unrelated matters, or even appear to require information provided on different occasions. Rather, it appears from the timing of the warrants in *Jackson*, that the informant provided all of the information contemporaneously or nearly contemporaneously. The court's focus, therefore, was not on the timing of the information, but on the fact that a portion of the information provided by the informant had turned out to be true: namely, the information regarding Mr. Stern. This fact, the court held, gave credence to the informant's

allegations concerning another individual (the defendant Jackson). *Jackson*, 102 Wn.2d at 443-44.

In short, although a “track record” is not always required because such a requirement is not always feasible, the fact that the informant has previously provided correct information is nonetheless a relevant and persuasive factor regarding credibility because when an informant is right about some material things, he can be regarded more probably right about other, unverified facts.

In the present case, the detectives were able to independently corroborate several facts provided by Mr. Bickle. First, the detectives were able to confirm Mr. Bickle’s assertion that the stolen machine shop items given to him by Brown had come from a burglary in Kent. CP 75-76. Next, Mr. Bickle claimed that, at the request of Brown, he had a friend rent a U-Haul truck to haul the stolen items from Brown’s garage. CP 78. Again, the detectives were able to confirm this information through U-Haul. CP 78. Next, with respect to Mr. Bickle’s claims that Brown rented several storage units where Mr. Bickle had seen stolen property and firearms, the detectives were again able to independently confirm that Brown did indeed have two storage units at the location described. CP 80-81. In short, the detectives were able to independently confirm numerous details that Mr. Bickle had provided, and the corroboration of these details serves as an additional factor

supporting a finding of reliability. Although Mr. Bickle did not have a “track record” with respect to unrelated cases (as might be the case with a paid informant), the detectives were nevertheless able to confirm much of the information provided by Mr. Bickle. Although this “track record” of sorts may not have been sufficient to establish reliability on its own, it was, nonetheless, an additional factor to be considered in determining Mr. Bickle’s credibility and weighed strongly in favor of a finding of reliability.

In the present case, Mr. Bickle’s statements used in support of the search warrant were made after Mr. Bickle was arrested and in custody in connection with a burglary. In addition, Mr. Bickle had been advised of his *Miranda* warnings, and made statements against his penal interest, (including statements regarding the storage of stolen property, the fact that he did so in exchange for methamphetamine, and the fact that he had obtained methamphetamine from Brown in the past). Mr. Bickle also gave detailed information concerning the types of firearms he had observed in the Brown’s residence. All of these factors are relevant to the evaluation of Mr. Bickle’s credibility and veracity. In addition, Mr. Bickle had previously given information concerning the fact that the stolen items were from a theft in Kent, that Brown owned several storage units, and that Mr. Bickle had rented a U-Haul through a friend, all of which had been confirmed by law enforcement, thus bolstering Mr. Bickle’s credibility.

In short, Mr. Bickle was a named informant. This fact either creates a presumption of reliability on its own, or, at a minimum is a factor to be considered in a reliability determination. In addition, there were multiple, court-recognized, factors which also supported a finding of reliability or credibility. Given all of these facts, the issuing court did not abuse its discretion in issuing the warrant.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE OMISSION OF THE INFORMANT'S EXACT CRIMINAL HISTORY FROM THE WARRANT APPLICATION WAS NOT A MATERIAL OMISSION BECAUSE THE APPLICATION: (1) DESCRIBED THE INFORMANT'S CRIMINAL HISTORY IN SOME DETAIL BY STATING THAT THE INFORMANT HAD "NUMEROUS THEFTS, BURGLARIES, AND CAR PROWLS" FOR WHICH HE HAD BEEN SENT TO PRISON; AND, (2) DESCRIBED THAT THE INFORMANT WAS UNDER ARREST FOR BURGLARY (AND PROVIDED THE FACTS RELATING TO THAT CHARGE AS WELL AS OTHER SIMILAR BURGLARIES) AND ALSO DESCRIBED THE INFORMANT'S INVOLVEMENT IN OTHER NON-CHARGED CRIMINAL ACTIVITY INCLUDING POSSESSION OF STOLEN PROPERTY AND METHAMPHETAMINE.**

Brown next claims that the trial court erred in finding that the listing of Mr. Bickle's exact criminal history was "material." App.'s Br. at 1, 12-13.

This claim is without merit because the trial court did not abuse its discretion

in finding that the omitted information was not material when the State described Mr. Bickle's criminal history in some detail, indicated that the criminal history involved a number of crimes of dishonesty for which Mr. Bickle had been sent to prison, and provided information concerning Mr. Bickle's involvement in a pending burglary and other non-charged criminal activity.

In the court below, Brown argued briefly that the State's failure to list Mr. Bickle's complete criminal history was a material omission pursuant to *Franks v. Delaware*, 438 U.S. 1354, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). CP 16-17. The trial court, however, held that any omission was not material, as the issuing magistrate was generally aware of Mr. Bickle's criminal history involving crimes of dishonesty (including crimes for which he had been sent to prison), and that the exact date and number of convictions, therefore, was not material. RP (1/25) 3-4.

The *Franks* test for material misrepresentations applies to allegations of material omissions. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985); *State v. Garrison*, 118 Wn.2d 870, 872-73, 827 P.2d 1388 (1992), *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). In determining materiality, the challenged information must be *necessary* to the finding of probable cause. *State v. Taylor*, 74 Wn. App. 111, 117, 872 P.2d 53, *review denied*, 124 Wn.2d 1029 (1994). It is not enough to

say that the information tends to negate probable cause. *State v. Taylor*, 74 Wn. App. 111, 117, 872 P.2d 53, *review denied*, 124 Wn.2d 1029 (1994). If the facts were relevant, the court must delete the false or misleading information or insert the omitted information. *State v. Taylor*, 74 Wn. App. at 117. If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails. *Garrison*, 118 Wn.2d at 873; *Taylor*, 74 Wn. App. at 117.

In *State v. Lane*, 56 Wn. App. 286, 294-95, 786 P.2d 277 (1989) the defendant challenged a search warrant, claiming the State failed to mention the confidential informant's criminal history. The court, however, upheld the search warrant, holding that,

Here, the affidavit supports a finding of probable cause even if the omitted information is added. Given our common experience that a person who is in a position to set up a controlled buy often has had prior contact with the criminal justice system, we hold the magistrate was not misled. Thus, we need not decide whether the informant's criminal record was deliberately or recklessly omitted.

*State v. Lane*, 56 Wn. App. at 295; *See, also, State v. Taylor*, 74 Wn. App. 111, 118, 872 P.2d 53 (1994) (where although the defense asserted a material omission due to the failure to include the informant's criminal history, the court concluded the even if the detective had deliberately or recklessly omitted the informant's history, "his criminal status was not material to a finding of probable cause").

In the present case, Brown argues that the actual number of Mr. Bickle's prior convictions is more telling than the "non-specific information presented to the issuing court." App.'s Br. at 14. While the State did not outline the exact charges and cause numbers of Mr. Bickle's prior offenses, the State did provide the Court with significant information concerning Mr. Bickle's criminal history.

First, the State outlined the fact that Mr. Bickle had just been arrested for, and charged with, burglary in the second degree. CP 83. In addition, the facts of this offense were presented to the court in the original written complaint. CP 63-64. The complaint also noted that the facts from this offense were also similar to a number of other recent burglaries with similar fact patterns. CP 64. The complaint was presented to Judge Mills on May 17, and was incorporated into the oral applications for the search warrants on May 19. CP 72.

Second, the original written complaint stated in no uncertain terms that Detective Duckworth was familiar with Mr. Bickle, and had previously interviewed him regarding other thefts from construction sites (including one theft that Mr. Bickle had admitting he was involved in). CP 65.

Third, in the original written complaint Detective Trogdon stated that he was familiar with Mr. Bickle from previous contacts and that he had worked a previous case "involving numerous theft, burglaries, and car prowls

several years ago for which Paul Bickle was arrested and sent to prison.” CP 65.

While Mr. Bickle’s exact criminal record was not provided, the record clearly shows that the State was not attempted to hide the fact that the informant had previous, as well as pending, crimes of dishonesty. Rather, the record outlines Mr. Bickle’s past involvement with numerous burglaries, thefts, and car prowls, as well as his current involvement with numerous burglaries as well as possession of stolen property and methamphetamine. The trial court, therefore, did not abuse its discretion in finding that the omission of the exact criminal history was not material since the State had provided a substantial amount of detailed information to the issuing court outlining Mr. Bickle’s current and prior involvement in crimes of dishonesty.

Furthermore, even if Brown had been able to demonstrate that the failure to list the exact number of prior convictions and their cause numbers was a material omission, the remedy would be to have the material omissions added to the warrant application to see if the warrant application which included the material omissions would still establish probable cause. Given the large amount of information given to the issuing court regarding the Mr. Bickle’s criminal history, Brown cannot show that the inclusion of the exact criminal history information would have had any meaningful upon the ultimate conclusion of the issuing court. Rather, Mr. Bickle’s involvement in

past and present crimes was clearly outlined for the issuing court, and the trial court, therefore, appropriately concluded that the only thing the issuing court did not have was the “cause numbers and the actual conviction dates and information.” RP (1/25) 4. As the issuing court was well aware of Mr. Bickle’s involvement in crimes of dishonesty, the trial court concluded that “the exact data, the numbers of convictions and the like, would not be material to the necessary determination as to whether Mr. Bickle was a credible or reliable informant.” RP (1/25) 4. Given all of the information provided to the issuing court, the trial court did not abuse its discretion in reaching this conclusion.

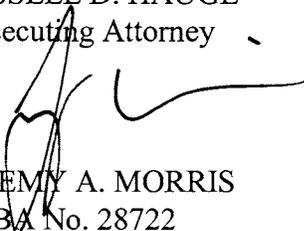
#### IV. CONCLUSION

For the foregoing reasons, Brown’s conviction and sentence should be affirmed.

DATED April 13, 2007.

Respectfully submitted,

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