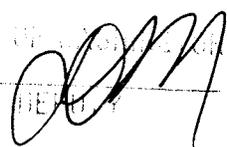


COURT OF APPEALS
DIVISION II
COBEC 25 01/11/15
STATE OF WASHINGTON
BY: 

NO. 37839-6-II

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

STATE OF WASHINGTON,

Respondent,

vs.

JOSE CHAVEZ GABRIEL,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it refused to suppress evidence the police seized pursuant to a search warrant issued in violation of Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, because it was not supported by probable cause.

2. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against him for offenses and enhancements unsupported by substantial evidence.

3. The trial court violated the defendant's right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it allowed a witness to testify that someone else told him that there was a school bus stop in front of a particular house.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it refuses to suppress evidence the police seize pursuant to a search warrant issued in violation of Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, because it is not supported by probable cause?

2. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment against that defendant for offenses and enhancements unsupported by substantial evidence?

3. Does a trial court violate a defendant's right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if it allows a witness to testify that someone else told him that there was a school bus stop in front of a particular house when that is the only evidence to support the imposition of a school bus stop enhancement?

STATEMENT OF THE CASE

Factual History

At about 6:00 a.m. on December 18, 2007, members of the S.W. Washington SWAT Team, in conjunction with members of the Clark-Skamania County Drug Task Force executed a search warrant at 20413 50th Avenue in the area of the City of Ridgefield in Clark County. RP 137-141, 196-197. The area around this house is primarily farmland. RP 142-143. Upon entry, the officers encountered a lone Hispanic male by the name of Noe Rosas sleeping in the front room. RP 161-162. During the execution of the warrant, the police found a black bag containing 10 to 11 ounces of marijuana in the living room. RP 258-259, 247-258, 370. Inside one of the bedrooms, the officers found a Mexican birth certificate and a Mexican identity card with the defendant's name on them lying on the floor. RP 313-315. They also found \$2,000.00 cash sitting on a shelf in the same bedroom, along with other items of financial information in various persons' names lying about the house. RP 183-184, 327-338, 400-403, 409-419. These documents with other names on them included a birth certificate, money orders, utility bills to the house at 20413 50th Avenue, a past due utility notice, and a receipt from Jiffy Lube. *Id.*

Inside the kitchen, the officers found the following items: (1) a large amount of cash and a loaded .25 caliber handgun in a drawer to the left of the

kitchen sink, RP 176-178, 201; (2) a baggie containing about 11 ounces of methamphetamine in a drawer, 515-518; (3) some open cans of “MSM” in a kitchen cabinet above the counter, RP 186, 376-378; (4) two scales and a cell phone in a cabinet above the counter, RP 180, 274-276; (5) baggies with powder residue in a drawer to the left of the sink, RP 178-179, 198. MSM is an animal food supplement sold at feed stores and can be used to “cut” or mix in with methamphetamine to increase the apparent volume of the drug. RP 149-153. Inside the laundry room next to the kitchen, the officers found seven empty MSM cans in the garbage. RP 163, 181-182. A number of the MSM cans in the kitchen and in the garbage in the laundry room had the defendant’s fingerprints on them. RP 657-689. There were also unidentified fingerprints on the MSM cans and on the .25 caliber pistol. RP 694-699, 713.

At the same time of the execution of the search warrant at 20413 50th Avenue outside Ridgefield, members of the Cowlitz-Wahkiakum County Drug Task Force were executing a search warrant at 228 25th Avenue, apartment 102, in Longview. RP 523. Upon entry into that house, the officers found one Caucasian female by the name of Wendy Robinson, 3 small children, a Hispanic male by the name of Rodrigo Rodriguez, and the defendant Jose Chavez Gabriel. RP 523-526. During their search, the officers found a jacket with \$4,000.00 cash in it lying on the couch. RP 526. Mr. Rodriguez stated that the jacket and the money belonged to him. *Id.* The

police found no controlled substances, MSM, or any other items of evidentiary value on anyone's person, or in the house. RP 542.

In fact, there are a number of feed stores in Clark and Cowlitz Counties that sell MSM of the brands and quantities found in the house on 50th outside Ridgefield, including a store in Longview by the name of L & J Feed. RP 433-477. By law, these stores keep a log of those persons who purchase MSM, and the log of MSM sales from L & J Feed showed that a woman by the name of Wendy Robinson had purchased MSM from the store on three occasions: 10/8/07, 10/23/07, and 11/14/07. RP 458-459. In fact, the manager of MSM remembered selling MSM to Wendy Robinson in the past. RP 460-462. The manager also stated that her store carried MSM of the brands and quantities found in the house on 50th, although she could not tell whether those particular cans had come from L & J Feed. RP 439-442.

Procedural History

By information filed prior to January 3, 2008, the Clark County Prosecutor charged the defendant Jose Chavez Gabriel in Juvenile Court with possession of methamphetamine with intent to deliver, unlawful possession of a firearm, and possession of over 40 grams of marijuana. CP 1. The defendant was then 17-years-old. Following a hearing, the juvenile court declined jurisdiction on the defendant and remanded him to the Superior Court for prosecution as an adult. *Id.* Thus, on January 8, 2008, the Clark

County Prosecutor charged the defendant in adult court with possession of methamphetamine with intent to deliver while armed with a firearm and within 1,000 feet of a school bus stop, and conspiracy to possess methamphetamine with intent to deliver. CP 4-5.

Prior to trial, the defense moved to suppress all of the evidence the police had seized at the 50th Avenue address near Ridge field, arguing that the affirmation given in support of the warrant did not establish probable cause. RP 6-23. On March 12, 2008, the parties came before the court for argument on the motion. RP 3-4. Following this argument, the court denied the motion, finding that the affidavit given in support of the warrant did establish probable cause sufficient to justify the issuance of the warrant. RP 31-40.

On March 18, 2008, six days after the motion to suppress, the prosecutor filed an amended information adding a count of possession of marijuana with intent to deliver while armed with a firearm and within 1,000 feet of a school bus stop. CP 58-59. Two weeks later, on April 1, 2008, the prosecutor filed a second amended information adding a count of possession of over 40 grams of marijuana, a count of being an alien in possession of a firearm, and a count of illegal possession of a firearm. RP 63-65. The state also charged Noe Rosas with the same offenses in the same information. *Id.* At a hearing on April 10, 2008, eleven days before trial, the state moved for

permission to proceed on the two amended informations it had filed, and moved to join the defendant's trial with that of Noe Rosas. RP 48-94. The defense objected to the joinder and to the filing of both informations, arguing that the late filings prevented the defense from adequately preparing for trial on the added charges. *Id.*

Ultimately, the court denied the motion for joinder, granted the state permission to proceed on the March 19th amendment, but denied the motion to also allow the April 1st amendment. RP 94-98. Thus, on April 21, 2008, the defendant alone went to trial before a jury on charges of possession of methamphetamine with intent to deliver and possession of marijuana with intent to deliver, both charges carrying firearm and school zone enhancements, and conspiracy to possess methamphetamine and marijuana with intent to deliver. RP 94-98, 120-123.

During trial, the state called 18 witnesses over three days of testimony. CP 136-712. These witnesses testified to the facts set out in the preceding *Factual History*. See *Factual History*. In addition, during trial, the state called Paul Bardzik, the Director of Transportation for the Battleground School District. RP 623. When the state asked him how and when bus stops were established, he explained that a private company named Laidlaw contracted with the school district to provide bussing services, and Laidlaw ultimately decided where the bus stops would be with him approving their

decisions. RP 623-626. The state then asked the witness whether or not there was a school bus stop at 20413 50th Avenue outside Richfield, the defense objected that his knowledge on this fact was provided by Laidlaw and hearsay. *Id.* At this point, the court allowed the defense to *voir dire* the witness on his personal knowledge concerning this fact. RP 635-654. Following this questioning, the defense renewed its objection. *Id.* However, the court overruled the objections and allowed Mr. Bardzik to testify that there was a bus stop at 20413 50th Avenue outside Richfield as of December 18, 2007. RP 654.

After the state presented its evidence and closed its case, the defense rested without calling any witnesses and moved to dismiss all charges for want of substantial evidence. RP 714-739. The court granted the motion as to the marijuana charge, but denied the motion as to the methamphetamine and the conspiracy charges. *Id.* Following instruction and argument, the jury returned verdicts of “guilty” on both counts, and special verdicts that the defendant or an accomplice committed count I while armed with a firearm and within 1,000 feet of a school bus stop. CP 139-142. The court later sentenced the defendant to 135 months on Count I, which was 51 months from the range of 51 to 68 months with 60 months added for the firearm enhancement and 24 months added for the school zone enhancement. CP 161-176. The defendant thereafter filed timely notice of appeal. CP 177.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT REFUSED TO SUPPRESS EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT ISSUED IN VIOLATION OF WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT, BECAUSE IT WAS NOT SUPPORTED BY PROBABLE CAUSE .

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, search warrants may only be issued upon a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582, 585 (1999); *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). In order for the judge, rather than the requesting officer, to make that determination, the affidavit must state the underlying facts and circumstances so that the judge can make a “detached and independent evaluation of the evidence.” *Id.* “Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched at the time the warrant is to be executed.” *Id.*

In the case at bar, the defense argues that affidavit given in support of the search warrant fails to establish probable cause for two reasons: (1) it fails to establish a basis from which the magistrate could conclude that the alleged drugs would still be in the place to be searched at the time the police were

going to execute the warrant, and (2) it fails to establish the confidential informant's capacity to identify methamphetamine. The following presents these two arguments:

(1) The Affidavit Fails to Establish Probable Cause to Believe That the Methamphetamine the Informant Claimed He/She Saw Would Still Be in the House When the Police Executed the Search Warrant.

As part of the reliability requirements under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment, an affidavit or sworn statement given in support of a request for a search or arrest warrant must set out a time basis for the information provided so the issuing magistrate can satisfy himself or herself that the information is not stale. *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677, 103 S.Ct. 3405 (1984). The amount of time that must pass before information establishing probable cause becomes stale depends upon the nature and scope of the claimed criminal activity. *State v. Johnson*, 17 Wn.App. 153, 156, 561 P.2d 701 (1977); *State v. Hett*, 31 Wn.App. 849, 644 P.2d 1187 (1982).

For example, in *State v. Higby*, 26 Wn.App. 457, 613 P.2d 1192 (1980), the defendant was charged with maintaining a dwelling for the sale of controlled substances after the police executed a search warrant at his home and found marijuana. The affidavit given in support of the warrant stated that an informant had been in the house two weeks previous and had

purchased marijuana from the defendant. Following conviction, the defendant appealed, arguing that the search warrant was defective because the information the confidential informant provided was stale. In addressing this question, the Court of Appeals first set out the rule that a showing of prior criminal activity was not sufficient to establish current probable cause. The court stated:

It is not enough, however, to set forth that criminal activity occurred at some prior time. The facts or circumstances must support the reasonable probability that the criminal activity was occurring at or about the time the warrant was issued. Tabulation of the intervening number of days is not the final determinant of probable cause, but is only one factor considered along with all the other circumstances including the nature and scope of the suspected criminal activity.

State v. Higby, 26 Wn.App. at 461 (citations omitted). *Cf. State v. Smith*, 39 Wn.App. 642, 694 P.2d 660 (1984) (month-old evidence of 100 to 150 three to four foot marijuana plants and an extensive marijuana grow operation was held sufficiently timely to support probable cause.)

The court then went on to invalidate the warrant, holding that information of what appeared to be a single sale of a small amount of marijuana some two weeks previous was insufficient to establish current probable cause to believe that more marijuana could be found at the defendant's house. By contrast, in *State v. Payne*, 54 Wn.App. 240, 773 P.2d 122 (1989), the defendant was charged with growing marijuana following the

execution of a search warrant. However, the trial court suppressed all of the evidence seized on the basis that the information provided by the informant in the supporting affidavit was stale at the time the magistrate authorized the search. In the supporting affidavit, the informant had claimed that he had been in the house in question about three weeks ago, and that he had seen about 11 trays about three foot by six foot in size, a number of three foot marijuana plants in each tray, and a grow light over each tray. The state appealed the suppression.

On review, the Court of Appeals reversed, stating as follows on the staleness issue:

We disagree with the trial court's conclusion the information was too stale to establish probable cause. A marijuana grow operation is hardly a "now you see it, now you don't" event. A magistrate may look at all the circumstances, including the nature and scope of the suspected criminal activity. Here, the informant reported an extensive grow operation, involving approximately 11 4 by 6 foot trays, lights and fans. These facts clearly indicate the criminal activity was ongoing, and the issuing magistrate could reasonably infer the operation was continuing at the time.

State v. Payne, 54 Wn.App. at 247.

In the case at bar, Detective Josannah Hopkins of the Clark-Skamania Drug Task Force presented his affidavit to a Clark County District Court Judge requesting a warrant to search the house at 20413 N.E. 50th Avenue in Ridgefield. CP 15-20. While his affidavit runs four pages of single space type, Detective Hopkins did not claim that he had a personal knowledge

about anything that had happened in the residence. Rather, all of this information concerning alleged drug dealing out of the house came solely from an unidentified person he called a “confidential reliable informant (CRI).” According to Detective Hopkins, the informant claimed the following concerning drug activity at the house on 50th Avenue.

In this official capacity, I was contacted by a confidential reliable informant (CRI) who advised, that, within the past 72 hours and prior to the presentation of this affidavit for a search warrant, he/she had been an invited guest into the home of a subject that he/she knows as “Pinto.” While in this home, the CRI observed what he/she recognized to be methamphetamine. Further, the CRI stated that he/she observed more than two to four ounces of this substance in this home. I know from my experience that two to four ounce[s] of methamphetamine is more than a personal use amount. The CRI has known Pinto for at least four months and has known him to live in the above address for at least 2 months. The CRI described “Pinto” as a Hispanic male in his 20’s.

Further, the CRI has informed me that he/she is aware that “Pinto” has used numerous vehicles for transactions and to transport methamphetamine.

While in the company of the CRI, and under his/her direction, Detectives of the Clark/Skamania Drug Task Force drove to the location in question. The CRI pointed out the residence with the address 20413 N.E. 50th Ave. Ridgefield, WA 98642.

A check through ER Mapping, a system available to CSDTF detectives that enables us to learn of the current utility subscriber to residences, I learned that the utilities are set up in the name of Pablo Chavez. It is undetermined to the extent of Pablo Chavez Gabriel’s involvement. I have been unable to verify the identity of “Pinto” at this time.

CP 17.

The problem with this recitation is obvious from a careful review of the following two sentences, which are the only claims of criminality at the residence in question:

While in this home, the CRI observed what he/she recognized to be methamphetamine. Further, the CRI stated that he/she observed more than two to four ounces of this substance in this home.

CP 17.

This vague claim by the informant leaves two critical questions unanswered: questions that must be answered in order to establish probable cause. They are: (1) where and under what circumstances in the house did the informant see the alleged two to four ounces of methamphetamine, and (2) who was then exercising control over the alleged two to four ounces of methamphetamine? The reason that the officer's statement in the affidavit must answer these questions is that the ultimate question for the magistrate to determine is whether it is more likely than not that the police will find evidence of a crime when they execute the warrant, even though that contraband was in the location at some prior time. As the *Higby* court states: "It is not enough, however, to set forth that criminal activity occurred at some prior time." *Higby, supra*. This principle can be illustrated by adding what is missing in the affidavit in this case. The following gives two possible additions to the affidavit on opposite sides of the spectrum.

(1) Alternative One: "The informant told me that the homeowner

was in actual physical possession of the methamphetamine, and stated that he always maintained at least this much in the house in order to sell to his/her regular customers.

(2) Alternative Two: “The informant told me that he had seen a friend of the homeowner in the residence in possession of the methamphetamine, and that when the homeowner saw the drug, he ordered the friend to leave his house and never return while he was in possession of drugs.”

To the extent that the actual state of affairs in this case was closer to the first alternative, then the magistrate was justified in assuming that the contraband would still be in the home when the police executed the search warrant. However, to the extent the actual state of affairs in this case was closer to the second alternative, then the magistrate was not justified to assume that the contraband would still be in the home when the police executed the search warrant. The problem with the affidavit in the case at bar is that it says absolutely nothing concerning the circumstances in which the informant claimed to have seen the methamphetamine.

The officer giving the affidavit obviously saw this problem, and tried to fix it by stating that in his training and experience the informant saw more than a “user” amount of methamphetamine. Thus, the officer quite reasonably hoped the magistrate would conclude that the drugs would not be consumed in a short space of time. However, the officer’s knowledge of this requirement acts as a negative pregnant with admission that the real state of affairs is closer to the second alternative suggested above. With no positive

statement in the affidavit concerning the circumstances under which the informant claimed to have seen the drugs, the magistrate was simply left to speculate that the drugs would still be present in the home at the time the police executed the warrant. While probable cause may be based upon reasonable inferences drawn from the facts, it cannot be based upon speculation. Thus, in the case at bar, the affirmation fails to establish probable cause.

(2) The Affidavit Fails to Establish a Basis from Which the Magistrate Could Conclude That the Confidential Informant Had the Capacity to Properly Identify Methamphetamine.

It has long been the law in this State that information provided by an informant may be used to establish probable cause. *See generally*, R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 401, 460 (1988). However, before such information may be considered, the State has the burden of proving both the informant's basis of knowledge, as well as the informant's reliability. *Aguilar v. Texas*, 378 U.S. 108, 114, 12 L.Ed.2d 773, 729, 84 S.Ct. 1509, 1514 (1964); *Spinelli v. United States*, 394 U.S. 410, 415-16, 21 L.Ed.2d 637, 643, 89 S.Ct. 584, 589 (1969).

While the United States Supreme Court no longer strictly follows the dual tests of *Aguilar-Spinelli* as a requirement of the Fourth Amendment, the Washington State Supreme Court continues to apply these tests as part of the heightened protection afforded by Art. 1, § 7 of the Washington State

Constitution. *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984). The *Aguilar-Spinelli* “veracity” and “basis of knowledge” tests apply regardless of the type of informant involved, and even apply in situations in which the person supplying the information qualifies as a “citizen informant.” *State v. Woodall*, 100 Wn.2d 74, 666 P.2d 364 (1983); *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743, *cert. denied*, 457 U.S. 1137 (1982); *State v. Northness*, 20 Wn.App. 551, 582 P.2d 546 (1978).

As was just stated, the police must establish an informant’s basis of knowledge before the informant’s claims may be used to establish probable cause sufficient to support the issuance of a search warrant. *State v. Sieler*, 95 Wn.2d 43, 47-48, 621 P.2d 1272 (1980). This requirement is usually met if the informant was an eyewitness to the criminal activity. *See Utter*, §2.1(a) (1988). However, when the informant claims to have seen controlled substances, the police must also establish that the informant has the requisite expertise in the identification of the particular controlled substances he or she claimed to identify in the form in which the informant claimed to see it, even when the informant is a police officer. *State v. Matlock*, 27 Wn.App. 152, 616 P.2d 648 (1980).

For example, in *State v. Matlock*, *supra*, a police officer went to visit his sister in Colville. While at his sister’s house he saw a marijuana plant growing in the neighbor’s window. The Colville police later obtained a

search warrant based upon this information, searched Defendant's house, and seized the marijuana. Defendant was later convicted and appealed. The Court of Appeal reversed, stating as follows:

Notwithstanding the credibility or veracity which might be attached to [the] Officer's position, the fatal flaw in this affidavit is the lack of any information to support his claim the plants he saw were marijuana. *See Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964). Absent some showing that [the] Officer had the necessary skill, training or experience to identify marijuana plants of sight, the affidavit was insufficient to establish probable cause for the issuance of a search warrant. The affidavit is insufficient; seizure was improper. Therefore, the conviction must be reversed.

State v. Matlock, at 155-56 (footnote omitted).

The requirement from *Matlock* that the police demonstrate the informant's expertise in the identification of the controlled substance allegedly seen was subsequently reaffirmed in *State v. Ibarra*, 61 Wn.App. 695, 812 P.2d 114 (1991). In this case, the police obtained a search warrant based upon a officer's affidavit stating that a confidential informant had seen cocaine in the defendant's house, and that he or she "knew" what cocaine was. Defendant moved to suppress the evidence seized upon execution of the warrant, and the trial court denied the motion. Defendant was later convicted, and appealed, arguing, *inter alia*, that the affidavit failed to set out the informant's expertise in the identification of cocaine. In addressing this issue, the court first noted:

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 the informant obtained the information in a reliable manner. In our opinion, the affidavit must show either (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. In short, the affidavit must contain more than the informant's personal belief that what he or she observed was a controlled substance; it must also set forth the underlying facts upon which the belief was premised.

State v. Ibarra, 61 Wn.App. at 701-02.

Following this recitation of the rule, the court reversed the conviction and remanded to the trial court with instructions to grant the motion to suppress. The court based this ruling upon its finding that the police officer's affidavit failed to set out how the informant came by his or her information. Neither did the affidavit explain how the informant had sufficient expertise in the identification of the cocaine the informant claimed he or she saw. Thus, the court found that under the requirement of *Aguilar-Spinelli*, the affidavit failed to establish probable cause.

In the case at bar, Detective Hopkins was well aware of the requirement that he show a basis from which the magistrate could conclude that the informant could properly identify methamphetamine. In fact, on the bottom of page three of his affirmation he states:

As to the CRI's basis of knowledge, the CRI is able to recognize methamphetamine on site based on his/her years of being involved in the drug culture.

CP 17.

The problem with this statement is that it is conclusory in the same manner that the claim in *Matlock* was conclusory. This informant was no more able to identify methamphetamine simply by "years of being involved in the drug culture" than was the police officer in *Matlock* able to identify marijuana simply because of his years of being a police officer. Thus, in the case at bar, the trial court erred when it found that the officer's affidavit established the informant's expertise in the identification of methamphetamine. This court should reverse the trial court's decision, vacate the defendant's conviction, and remand the case with instructions to grant the motion to suppress.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT AGAINST HIM FOR OFFENSES AND ENHANCEMENTS UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670

P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560

(1979).

As a review of the case in *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996), reveals, evidence that is just as consistent with non-criminal means as criminal means does not constitute substantial evidence. The following examines this case. In *Aten, supra*, the defendant was convicted of the second degree manslaughter of a four-month-old child who had died while in her care. Although the original medical examination indicated that the child died of SIDS, the defendant later confessed on a number of occasions that she had placed her hands on the mouth and nose of the child to keep her from crying, thereby causing the child's death.

At trial, the state offered the testimony of the medical examiner, who opined that the child's death could have been caused by SIDS, and could have been caused by manual suffocation as described by the mother. Either was equally as likely. The trial court then admitted the defendant's confession, holding that the state had adduced the "some evidence" necessary to prove a corpus and allow the admission of the defendant's statements. The jury convicted.

Defendant appealed her conviction, arguing that the court had erred in admitting her confessions, because the state failed to prove the *corpus delicti* of the crime. After a careful and detailed review of the *corpus delicti* rule and the evidence presented in the case, the Court of Appeals agreed with

the defendant's argument and reversed, finding that the confession was improperly admitted, and that absent the confession, substantial evidence did not support the conviction. The court stated the following on this latter issue.

Evidence may lead to a reasonable inference of criminality, or it may lead to a reasonable inference of innocence. But evidence that simply fails to rule out criminality or innocence does not reasonably or logically support an inference of either. It would be speculative to conclude from the autopsy report that Aten was criminally negligent.

State v. Aten, 79 Wn.App. at 91.

Following this decision, the state sought and obtained further review. However, the Washington Supreme Court agreed with the Court of Appeals, and affirmed the Court of Appeals' decision to vacate the conviction and dismiss the charges. The Supreme Court stated the following concerning the absence of substantial evidence.

Respondent argues the State did not present sufficient evidence at trial to sustain a conviction or to be presented to a trier of fact. In reviewing the sufficiency of evidence in a criminal case, the question is whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant."

Admitted at trial were Respondent's statements that she suffocated the infant. She had also indicated she was only trying to calm Sandra, but did not intend to kill her. Dr. Schiefelbein testified the autopsy revealed the infant died of SIDS. But he also hesitatingly stated he might possibly make a reasonable and logical inference the infant died from suffocation when considering the infant's history. Viewing that evidence in the light most favorable to the State, it still can not be concluded there was sufficient evidence at trial for a

rational trier of fact to find beyond a reasonable doubt that Respondent caused the child's death through criminal negligence. The corpus delicti issue permeates any conclusion on sufficiency of the evidence. That is the critical issue in this case.

State v. Aten, 130 Wn.2d at 666-67 (footnotes omitted).

As both the Court of Appeals and the Supreme Court explain in *Aten*, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. The exact same situation exists in the case at bar. The following lists the sum total of all of the evidence the state produced to tie the defendant to the drug activity that was occurring at the 50th Avenue house:

(1) The police found a Mexican birth certificate and Mexican identity card bearing the defendant's name on the floor of one of the bedrooms, although with various pieces of paperwork in the names of other people, including at least one other Mexican birth certificate,

(2) Some of the partially filled MSM cans in the kitchen had the defendant's fingerprints on them and some of the empty MSM cans in the trash in the laundry room also had the defendant's fingerprints on them, and

(3) On the same day the police executed the warrant at the house on 50th in Richfield, other officers executed a warrant at a house on 21st in Longview. These other officers found the defendant in the presence of a woman who had on prior occasions purchased MSM from a store in Longview, and in the presence of a man who had \$4,000.00 cash in his jacket pocket.

The problem with this evidence is that it is just as consistent, if not more consistent, with the defendant's innocence that it is with the defendant's guilt. While the fingerprint evidence shows that at some point in time the

defendant handled the MSM cans, there is no evidence from which a reasonable jury could conclude either when the defendant touched those cans, or what his intent was in doing so. In fact, his presence in a house with the female who had previously purchased MSM indicates that he might well have simply helped her transfer the cans from her car to the house in Longview, or helped her take the cans from the house and put them in her vehicle without having any idea of their identity or purpose.

Similarly, the presence of what appears to be the defendant's birth certificate and federal identity card in the house on 50th does not even suggest that he was actually ever in the house, particularly given the location in which the police found these documents. A birth certificate is, by any view, one of the most important documents that a person possesses. One does not usually leave such a document ever laying about, much less leave it tossed on the floor of a bedroom. Thus, the circumstances in which the police found the documents suggests that the defendant did not know where the documents were. Rather, these circumstances suggest that someone took the documents without the defendant's permission and treated them accordingly.

In this case, the defendant may well have been a temporary occupant at the Longview address who helped the female who lived there move around some MSM cans that she purchased, and she or another person take two of his important documents without his permission. Given the rampant identity

theft that is occurring in our society, this might well have been the case. The point is that the evidence the state presented against the defendant is just as consistent with innocence as it is with guilt. As the court clarifies in *Aten*, this does not constitute substantial evidence that the defendant committed a crime either as an accomplice or as a principle. Thus, the trial court erred when it entered judgment upon both verdicts in this case.

III. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO CONFRONTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ALLOWED A WITNESS TO TESTIFY THAT SOMEONE ELSE TOLD HIM THAT THERE WAS A SCHOOL BUS STOP IN FRONT OF A PARTICULAR HOUSE.

The Sixth Amendment provides that a person accused of a crime has the right “to be confronted with witnesses against him.” Similarly Article 1, § 22 of the Washington State Constitution states that “[i]n criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face.” While case law indicates that analysis is similar under both clauses, five justices of our Supreme Court have concluded that Article 1, § 22 is more protective of a defendant’s confrontation rights than the Sixth Amendment. *State v. Foster*, 135 Wn.2d 441, 474-484, 957 P.2d 712 (1998) (See concurrence/dissent opinion of Alexander, J., at 474-481, dissenting opinion of Johnson, J. at 481-484).

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d

177 (2004), the United States Supreme Court had occasion to reevaluate the scope of the confrontation clause in relation to the admission of a prior hearsay statement made by a witness who did not testify in the case. In this case, the state charged the defendant with assault after he confronted and stabbed the complaining witness during an argument about the defendant's wife, who was present during the incident. The defendant argued self-defense. In order to rebut this claim, the state attempted to call the defendant's wife. When the defendant successfully exercised his privilege to prevent her testimony, the state moved to admit her statements to the police after the incident under the argument that they undercut the claim of self-defense. The defense objected that such statements were inadmissible hearsay and violated the defendant's right to confrontation.

The state countered that the statements fell under the hearsay exceptions of statements against penal interest because, at the time the wife made the statements, she was also a suspect in the assault. The state further argued that the statements did not violate the defendant's confrontation rights because under the decision in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the statements bore "adequate 'indicia of reliability'".

The court granted the prosecutor's motion, ruling that the statements did qualify as "statements against penal interest," and that under *Ohio v. Roberts*, there was no confrontation violation because the statements bore

sufficient indicia of reliability. The defendant was subsequently convicted, and he appealed. The Court of Appeals reversed, finding insufficient indicia of reliability, but the Washington Supreme Court disagreed and affirmed the conviction. The defendant thereafter obtained review before the United States Supreme Court.

In its opinion the Supreme Court first made an extensive review of origins of the legal principle of confrontation, noting that the “right to confront one’s accusers is a concept that dates back to Roman times.” The court then examined the common law origins of the right to confrontation, particularly in relation to the “infamous political trials” such as the treason trial of Sir Walter Raleigh in 1603 in which he was convicted largely upon the admission of an alleged co-conspirator’s statement, in spite of Sir Walter Raleigh’s call that he be confronted by his accuser. Based largely upon the abuses perceived in these trials, the common law courts recognized that in criminal trials a defendant should be afforded the right to confront and cross-examine the witnesses called against him.

In *Crawford*, the court noted that the one exception allowed under the common law involved the admission of prior testimony given by a witness under circumstances in which the defendant was afforded the right to confrontation at the prior hearing. In this one exception, the common law found no confrontation denial in admitting the prior testimony if the witness

was no longer available.

In addition to the limitations that the confrontation clause places on the admission of hearsay, under ER 802, hearsay “is not admissible except as provided by these rules, by other court rules, or by statute.” Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase “other than one made by the declarant while testifying at the trial or hearing” includes an out of court statement made by an in court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). This restriction arises from the “unwillingness to countenance the general use of prior prepared statements” as substantive evidence. *See* Advisory Committee’s Note to Federal Rules of Evidence 801(d)(1).

In this case the defense repeatedly objected to Paul Bardzik’s testimony concerning his conversations with Laidlaw employees in which the Laidlaw employees told Mr. Bardzik where they had decided to place school bus stops. As Mr. Bardzik testified, he did not create the bus stops. Rather, Laidlaw did. While he ultimately approved their actions, he did not claim that he had ever been to the bus stop in question in this case, and he did not claim to have personal knowledge that it was used as a bus stop. Thus, his

testimony was not that there was a bus stop in front of the house on 50th, rather, he testified that Laidlaw told him that there was a bus stop at that location. Under ER 801, 802, and 803, this evidence was hearsay and inadmissible because the state did not identify any exception to the warrant requirement that allowed for its admission. In addition, since the evidence of the bus stop originated with a Laidlaw employee that the state did not call as a witness, the admission of this evidence violated the defendant's right to confrontation under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

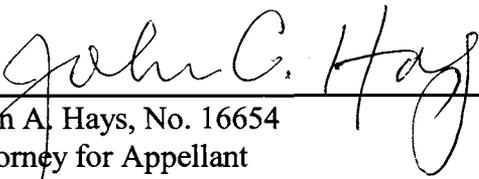
The denial of the right to confrontation is an error of constitutional magnitude and requires a new trial unless the State can prove that the error was harmless beyond a reasonable doubt. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). An error is harmless beyond a reasonable doubt if untainted evidence properly admitted at trial was so overwhelming that it necessarily leads to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). In this case the state cannot meet this burden because absent the inadmissible hearsay there was no evidence at all concerning the location of the alleged school bus zone or when it was created. Thus, in the case at bar, the trial court erred when it denied the defendant's objection to a witness testifying to what a Laidlaw employee told him concerning the placement of a particular school bus stop.

CONCLUSION

The trial court erred when it denied the defendant's motion to suppress evidence because the affidavit given in support of the search warrant did not establish probable cause. In addition, the trial court erred when it entered judgment of conviction against him for offenses unsupported by substantial evidence. Finally, the trial court erred when it imposed a school bus stop enhancement because there was no properly admissible evidence presented on that location of the bus stop.

DATED this 18th day of December, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

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

STATE OF WASHINGTON,
Respondent,

**CLARK CO. NO: 08-1-00052-4
APPEAL NO: 37829-6-II**

vs.

AFFIDAVIT OF MAILING

**GABRIEL, Jose Chavez
Appellant**

STATE OF WASHINGTON)
) vs.
COUNTY OF CLARK)

CATHY RUSSELL, being duly sworn on oath, states that on the **18th day of DECEMBER, 2008**, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

**ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668**

**JOSE CHAVEZ GABRIEL #318232
GREENHILL CORRECTION CENTER
375 S.W. 11TH
CHEHALIS, WA 98532**

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

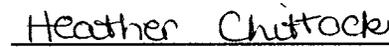
DATED this **18TH** day of **DECEMBER, 2008**.



CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 18th day of **DECEMBER, 2008**.





NOTARY PUBLIC in and for the
State of Washington,
Residing at: **LONGVIEW/KELSO**
Commission expires: 11-04-2009

AFFIDAVIT OF MAILING - 1

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