

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION _____

COURT OF APPEALS
OF THE STATE OF WASHINGTON
CLERK OF COURT
STATE OF WASHINGTON
BY *JM*
APR 13 2009

STATE OF WASHINGTON,)
)
Respondent,)
)
v.)
)
Pino Ibarra,)
)
Appellant.)

389096
No. 08-1-01035-7
STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW
RAP 10 10

I, Pino Ibarra, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

The Confidential Informant (Jesus Santos Reyes) made statement to the Narcotics Task Force that he had done his controlled buy at, Apt. # 14 + ⁻¹³⁻¹⁵⁻ Informant also stated to Narcotics Task Force that Apt. # 14 was the place that the Defendant used for his Drug Storage and that Nobody occupied or lived in Apt. # 14.

Additional Ground 2

The Confidential Informant tells the Narcotics Task Force that he had done controlled buy at, Apt. # ¹⁴ 13, 15 + from the Defendant.

Additional Ground 3

On 1-12-09 the Original day of trial, the Defendants Attorney, moved a Motion to Dismiss case to the Court and was Denied by the Court as the Confidential Informant was not present at Court to testify. Court Date was rescheduled.

Additional Ground 4

Confidential Informant makes statement he had called the Defendant on his Cell phone. The Task Force takes Defendants Cell phone for Evidence but no record check was ever made to the cellphones Records.

"Additional Ground 5"

A search WARRANT for Apt. # 7 & 14 was obtained by the Cowlitz County Narcotics Task Force. A search was conducted for the search & seizure of All & Any Drugs and/or paraphernalia that was to be found During the search. While the search was conducted, No Drugs or paraphernalia

"continued Additional"
Ground 5

were found to support the statements &
Alligations that were made by the
Confidential Informant in this case, CASE #
being, #08-1-01035-7

The Task Force Did in fact find two white
males at Apt. #14 who were staying at the
Apartment.

If there are additional grounds, a brief summary is attached to this statement.

Date: 4-7-09 Signature: P. L. Ferrara

A Brief Summary to Support, "Additional Grounds"

The Confidential Informant states that he did a controlled buy from the Defendant at,
Apt. #'s + 14, 13, 15 + □

When asked again he stated he did controlled buy from the defendant at Apt. #¹⁴13, 15 + □, in which that makes the Confidential Informant doing ~~just~~³ controlled buys from the Alleged Defendant in which he had done none.

The Confidential Informant stated to the Narcotics Task Force that Apt. #14 was occupied by nobody, but that it was in fact the place and/or Apt. where the Alleged Defendant used to store his Drugs.

When the Task Force obtained their search warrants for Apt. # ~~7+14~~, they (Narcotics Task Force) searched and found "NO" Drugs nor paraphernalia nor anything that would tie or link the Defendant to ever being at Apt. #'s ~~7~~, 13, 14, 15 or □ in which leaves the Confidential Informant's statements and testimonies to be untrue + incorrect, making the Confidential Informant a non-credible witness to this case, # being, # 08-1-01035-7.

When the Task Force searched Apt. # 14, (the Alleged Drug Storage) they learned that not only was

there any Drugs or paraphernalia found but, there was two white males occupying the Apt. in which were unaware of who the Defendant was when asked. Again the Statement of the Confidential Informant has been proved non-credible.

On January 12, 09 the Day of Trial, the Confidential Informant never showed (Appeared), which infact the case should have been Dismissed when the Defendants Attorney filed a Motion to Vacate Sentence. Instead the Judge Denied.

Why then was the task Force and Prosecuting Attorneys able to collect an illegal immigrant, (With a Felony Record & Charges pending) from a different Country and give him a 90 day Visa to be in the United States when he himself again has shown he (Confidential Informant) himself Does Not obey the Laws of 1) Illegally being in the United States and 2) committing felonies in the United States? Was it because he made an "Agreement to testify", to get a lesser Sentence?

Was it because the Task Force, infact needed a conviction from a person without a record and the help from a convicted person with felonies pending and a felony record? The Task Force has alone now made there witness a non-credible witness.

After the Confidential Informant was found

and brought back to the United States the Confidential Informant met with the Attorney of the Defendant. After the Defendants Attorney Questioned the Confidential Informant on 1-24-09 and gave statement to the Attorney; two days later 1-26-09 (Monday) the day of the re-scheduled trial the Defense Attorney asked the same questions he asked the Confidential Informant 1-24-09 and the Confidential Informant gave the Defense Attorney a different answer than he gave on the 24th which was only two days prior.

Was that because when the Confidential Informant met with the prosecutor on 1-25-09 (Sunday) he was told by the prosecutor what he needed to say so the state of Washington could get a guilty plea/conviction possibly on a innocent man who has no criminal record.

Again the Confidential Informant has once again discredited himself but also now has purged himself from Task Force Statement to Testimonie in the Court of Washington in which neither storie collaborates with each other.

Now I would like to say that the Confidential Informant has now under oath committed perjury in the courts of the state of Washington and has been allowed to do so by the →

prosecuting attorneys office and the Task Force of Cowlitz County, that represent the state of Washington.

Definition of: "UNLAWFUL" (A rule established by authority, society or custom that is prohibited by Law).

Definition of: "perjury", (To give false or misleading testimony while under oath).

It is "UNLAWFUL" to knowingly/willingly commit perjury in any court of the Law in-which only LEAVES not only the Confidential Informant to knowingly and willingly committ a felony but the prosecutors office and the Cowlitz County Narcotics Task Force as well committing felonies by allowing and willingly having acknowledgment in letting this crime happen in the State of Washington's Honorable + Respected Court.

It's called accessory to commit a crime which is a CLASS C felony in the state of Washington.

Before I close this letter I have two last things I would like to say AND

Direct. one is,

Definition of: "Accessory"; (One who aids or abets a lawbreaker in the commission of a crime but is not present at the time of the crime).

And number two is everything I have said in this statement of Additional Arounds for REVIEW and my attached Brief is true and correct to the best of my knowledge.

Sincerely,

X.
D.O.C. #
signature:

Additional Ground 1 continued;

All of the evidence and testimony from the detectives down to the confidential informant led the police to believe that the deliveries were completed in *Apartment 14*. RP 68-88.

Please disregard the (brief) which states that the apartment searched was # 14. Page 6

This is not the case. As the Court can see in the trial minutes from the first trial that

The State dismissed two other deliveries with prejudice, because the informant and the 'Lapel cam' had shown that all of the deliveries occurred in 'Apartment 14'.

However, the police went to serve the warrant and discovered that no hispanics

lived in apartment 14. SEE Detective Hammers' testimony. RP 72-75, 87-88.

(Complaint and Affidavit for Search warrant) Case No. A08-11511

The affidavit presented by Detective Jason Hammer was initially prepared on September 5th 2008. Which was shortly after the two FRESH deliveries were to have occurred.

This is the time that the detective prepared to meet with the magistrate.

The Court can plainly see the prejudice created through this falsehood.

HERE is the proof. Sworn affidavit by Det. Jason Hammer

The apartment number on the AFFIDAVIT is #7. SEE page 1. Affidavit (SEARCH.)

JUNE 13, 2008 PAGE 7

" CI followed Pino Ibarra to apartment 14 where Pino Ibarra sold the CI cocaine.

The CI confirmed the s/he had gone to apartment number 13 on the previous buy

But was sure that they went into apartment number 14 this time." RP 169

June 20, 2008 CI told detective that S/he went into APARTMENT 14. SEE page 8 (search)

September 4, 2008 CI purchased cocaine. September 5, 2008 detective dates affidavit.

SEE page 11

September 10, 2008 Cocaine purchased. These two deliveries were dismissed WITH prejudice.

September 11, 2008 Detectives state that they went to apartment 14.

All evidence and testimony refer to Apartment 14. Where is the evidence or probable cause to go into Apartment # 7? SEE page 9. Affidavit for search warrant.

Additional Ground 1 continued:

Now the detective cannot say that he went to the judge or magistrate to get a warrant.

I was already arrested and no testimony in trial ever showed that the police stopped everything and went to get or proceeded to gain a telephonic warrant.

Detective Hammers' testimony is actually a RED flag. Detective Hammer states under oath " I issued the warrant." Everyone is aware the police have no judicial authority to issue warrants. They do, however, have power to serve a warrant. RP 68 , 70

The record is clear that the police tried to search apartment 14 then searched apartment 7. They even asked Sheila Soto the apartment manager if they could have her let them into apartment # (7).

WHY would the police go to Apartment 14 first then find out about apartment 7 and then go get a warrant from the magistrate?

Detective Hammer states that he 'accidentally left the original' at apartment #7.

So, the only warrant in the record is a un-signed warrant. SEE Warrant page 1-2 Case#-- A08-11511.

**THE STATE OF WASHINGTON v. ETENHOFER
DIVISION TWO
119 Wn. App. 300;79 P.3d 478;2003**

After the court determines that probable cause exists, it shall issue a warrant or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched. Wash. Super. Ct. Crim. R. 2.3(c). This command exposes three relevant points. First, it establishes that the rule is sequentially ordered. The probable cause determination, which may be based on a written or telephonic affidavit, occurs before warrant issuance, not at the issuance phase. Thus, the telephonic procedures do not apply during the issuance phase. Second, it directs the issuance of a warrant, which under any reasonable construction requires a physical document. Third, it requires the affixation of the authorizing court's signature. A signature cannot

be affixed to an oral authorization in a manner consistent with the rule. Although simplistic, these points show that the procedure prescribed in Rule 2.3(c) has a written warrant as its end-product.

The Washington Supreme Court intended a written, signed warrant when it enacted Wash. Super. Ct. Crim. R. 2.3(c). The requirement does not vanish when officers use the telephonic affidavit procedure. In such a situation, after the court determines that probable cause exists, the officers must affix the authorizing court's signature to a properly executed, written warrant.

Rules guiding the warrant procedure are ministerial and reversal, therefore, does not follow as a matter of course. A ministerial mistake is grounds for invalidation of a search warrant only if prejudice is shown. But where a defendant's constitutional rights against unreasonable searches are violated, which renders the search invalid as a matter of law, prejudice need not be shown. Absent an exception, warrantless searches are invalid as a matter of law under the state and federal constitutions.

No person shall be disturbed in his private affairs, or his home invaded, without authority of law. Wash. Const. art. I, § 7. This provision, which is more protective of individual liberties than the Fourth Amendment, U.S. Const. amend. IV, requires a warrant or recognized exception to the warrant requirement.

Wash. Rev. Code 10.79.040 makes it unlawful for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided. The statute implements Wash. Super. Ct. Crim. R. 2.3, as that rule is the clearest statement on the warrant procedures. But Wash. Rev. Code 10.79.040 is also of constitutional magnitude. With respect to the entering and search of a private dwelling house or place of residence, 10.79.040 implements Wash. Const. art. I, § 7. Thus, the warrant requirements evident in Wash. Super. Ct. Crim. R. 2.3, Wash. Rev. Code 10.79.040, and Wash. Const. art. I, § 7 are interrelated, and each must be interpreted with reference to the dictates of the others.

The prejudice is clear.

Ineffective assistance of counsel:

State v. Randy J. Sutherby,
165 Wn.2d 870;204 P.3d 916

Holding that the defendant committed only one act of possession of depictions of a minor engaged in sexually explicit conduct and that defense counsel at trial provided ineffective assistance by failing to seek severance of the possession charges from the child rape and child molestation charges, the court affirms the decision of the Court of Appeals and remands the case to the trial court for further proceedings.

To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (applying two-prong test of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We presume counsel is effective, and the defendant must show there was no legitimate strategic or tactical reason for counsel's action. Id. at 335.

The evidence seized in the illegal search was used against me in trial. It was used to Tie me into Apartment number 14. Which this should have been objected to also because the receipts and identification did not have my name PINO J. IBARRA on any of the documents.

As the record does reflect we tried more than once to get the discovery from the State.

The documents seized show ISMAEL CUEVAS, from apartment 7, as the LESSOR.

However, the jury was allowed to believe that they were my receipts. RP 68-71

Which John A. Hays my appeal attorney has falsely proclaimed in (brief of appellant) 6

That these "receipts show defendant was lessor of the apartment." Not TRUE.

Clearly this is testimony with no foundation or truth.

The police had only stale information regarding apartment 14. The police had no

Probable cause to search apartment 7, as the court properly dismissed two of the charges

WITH prejudice concerning this same informant Jesus Santos-Reyes (CI).

Franks v. Delaware, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978), the Supreme Court held that where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Franks, at 155-56. If, at the hearing, the defendant establishes his allegations by a preponderance of the evidence, the material misrepresentation will be stricken from the affidavit. If the affidavit then fails to support a finding of probable cause, the warrant will be held void and the evidence excluded. The *Franks* test for material misrepresentations has also been extended to material omissions of fact. *United States v. Martin*, 615 F.2d 318 (5th Cir. 1980); *United States v. Park*, 531 F.2d 754, 758-59 (5th Cir. 1976).

I would respectfully request that the case at bar be remanded for further proceedings which will allow me to receive a fair trial and the opportunity to challenge the warrant.

COWLITZ COUNTY DISTRICT/SUPERIOR COURT IN AND FOR
THE STATE OF WASHINGTON

STATE OF WASHINGTON

Plaintiff,

Juan Carlos Jacobo Ibarra
Pino Jobo Ibarra
1262 12th Avenue #7, Longview WA 98632

Green 1997 Jeep Cherokee WA 340UER

Defendant,

Case No. A08-11511

Search Warrant

2008 SEP 15 PM 4:47
FILED
DISTRICT COURT

To: THE SHERIFF OR ANY CONSTABLE OF COWLITZ COUNTY

COMPLAINT HAVING BEEN MADE ON OATH BEFORE ME BY Detective Jason C. Hammer, that he has reason to believe and does believe that in/on the residence located at 1262 12th Avenue #7 Longview, Washington described as a brick two story apartment building that houses the Cowlitz Drive School on the ground floor. There are ground floor entry doors on the west and north sides of the building that allow access to the apartment's that are on the second floor. 1262 is clearly visible above the west facing door. The building sits on the corner of Hudson Street and 12th Avenue, Longview WA. And in green 1997 Jeep Cherokee WA 340UER There is now being concealed evidence of the conspiracy to distribute cocaine and marijuana including but not limited to; cocaine, marijuana, pre-recorded US currency used in controlled purchase of narcotics, documents, written ledgers, electronically stored records, photographs, phone records, computer records and proceeds of narcotic trafficking.

Which is evidence of VUCSA. I am satisfied that there is probable cause to believe that the said property is being concealed or kept in or on the residence and property and that grounds for application for issuance of the search warrant exist.

THEREFORE, You are hereby ordered to search the residence and vehicles described for the following property;

- a. Controlled substances, to wit; Cocaine and Marijuana.
- b. paraphernalia for using, packaging, processing, weighing and distributing controlled substances, including but not limited to scales, sifters, grinders, containers, plastic bags or materials

used to contain controlled substances;

c. personal books, letters, papers, notes, pictures, photographs, video and/or audio cassette tapes, or documents relating names, addresses, telephone numbers, and/or other contact/identification information relating to the possession, processing, or distribution of controlled substances;

d. books, records, receipts, notes, letters, ledgers, and other papers relating to the possession, processing, or distribution of controlled substances;

e. cash, U.S. currency, foreign currency, financial instruments, and records relating to income and expenditures of money and wealth from controlled substances including but not limited to money orders, wire transfers, cashier's checks or receipts, bank statements, passbooks, checkbooks, and check registers;

f. items of personal property which tend to identify the persons(s) in residence, occupancy, control or ownership of the premises that is the subject of this warrant, including but not limited to canceled mail, deeds, leases, rental agreements, photographs, personal telephone books, utility and telephone bills, statements, identification documents, and keys;

g. weapons, including but not limited to firearms, ammunition, knives, clubs, swords, martial arts devices, chemical irritants, explosives and electric "stun guns;"

h. computers and associated data processing equipment including disks, memory sticks, digital recording devices and other digital storage technology.

i. pre-recorded US currency used during controlled purchase of narcotics.

If the above listed property be found to seize it, leaving a copy of this warrant, and prepare a written inventory of the property seized and return this warrant, and the property seized before me or before some other magistrate or court having cognizance of the case.

This search warrant shall be served within the next 10 days.

Dated this 11th day of September, 2008 .

MAGISTRATE

ORIGINAL ACCIDENTLY LEFT AT 1262 12th #7.
ORIGINAL WAS SIGNED BY JUDGE KOSS ON 09-11-08
DET. J. HAMMER 9-12-08

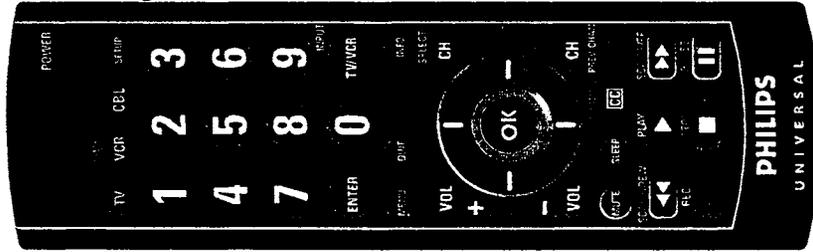
7/18/08
 SP 58172
 Howard
 862874L008

PHILIPS

SRU2103/27

Owner's Manual

1262 12th Ave Apt 14
 Longview WA 98632



RECEIPT

DATE 7-10-08 No. 63

FROM Ismael Cuevas Segun DOLLARS

FOR RENT
 FOR 1262 17th #14

ACCT.		<input checked="" type="radio"/> CASH	FROM	TO
PAID	<u>605</u>	<input type="radio"/> CHECK		
DUE		<input type="radio"/> MONEY ORDER	BY <u>Sheila</u>	

RECEIPT

DATE 7-10-08 No. 042722

FROM Ismael Cuevas Segun DOLLARS

FOR RENT
 FOR 1262 17th #14

ACCT.		<input checked="" type="radio"/> CASH	FROM	TO
PAID	<u>440</u>	<input type="radio"/> CHECK		
DUE		<input type="radio"/> MONEY ORDER	BY <u>Sheila</u>	

RECEIPT

DATE 9-2-08 No. 686203

RECEIVED FROM Ismael Cuevas 525 DOLLARS

FOR RENT
 FOR 1262 12th #14

ACCOUNT		<input checked="" type="radio"/> CASH	FROM	TO
PAYMENT	<u>525</u>	<input type="radio"/> CHECK		
		<input type="radio"/> MONEY ORDER	BY <u>Sheila</u>	

Armando
 503 468 9349
 45 Pier #2, Bldg A.
 Astoria Or

ADDITIONAL GROUND 2

Insufficient evidence to prove school bus stop enhancement:

At trial the testimony of the detective did not prove the enhancement beyond a reasonable doubt.

My appellate attorney mentions two deficiencies in the States evidence. (Brief page 18)

However, there is a third and vital deficiency which is the measurement must begin at the critical point of the delivery. Detective Jason Hammer is not clear on exactly where he began the measurement nor is he clear on where he concluded the measurement.

(State v. Clayton 84 Wn.App. 318; 927 P.2d 258 (1996) Div. Three

The court held that the terminal [point] for the school zone enhancement must be the actual site where the offense was committed. The court found that there was insufficient evidence to uphold the enhancement where the officer measured the distance from the school playground to the defendant's [property] fence and determined it to be 926 feet 10 inches. Id. The record was "devoid of any evidence of the measurement to the exact site where the crimes occurred." Id. The crime occurred in a room within the defendant's house. Id. at 320.)

U.S. V. Johnson, 310 U.S. APP. D.C. 249 46 F.3d 1166 (D.C. Cir 1995)
(insufficient evidence that the defendant possessed a controlled substance within 1,000 feet of a school when the only measurement made was from the school to a point five feet up the walkway of the defendants home.)

In the case at bar, the detective testified that he did not even know where the school bus stop was located. Also, the detective testified that he started from the *street*, as he began to measure. RP 165-170

The detective also testified that he measured to the door of the 'community house'. Which has nothing to do, at all, with the school bus stop. RP 168

At no point does Detective Hammer explain with any clarity the intersections and the route he took, to get to the site that he concluded from. RP 165-170

(State V. Jones 140 Wn.App. 431; 166 P.3d 782 (2007) DIV. TWO:

The appellate court reversed the sentence enhancement for being within 1,000 feet of a school bus stop and remanded the case for resentencing.

Enough uncertainties remain after the officer's testimony to foreclose a rational Conclusion beyond a reasonable doubt that the offenses took place within 1,000 Feet of a school bus stop. Because there were no direct measurements between the school Bus stop and the home, no measurement of the driveway or the house's bedroom, and no evidence *showing the angle of the street intersection, the actual distance is unclear.* REVERSED)

ADDITIONAL GROUND THREE

The State after the alleged relationship, between the juror and the informant surfaced, requested a mistrial.

My attorney, did not ask me if I wanted to continue, with the remaining jurors.

I did want to continue with the original trial. I did not at all, understand or know that I had a right to move forward: as the STATE, was the party *requesting* the mistrial.

My attorney Mr. Daniel Morgan should have notified me of my right to proceed.

Date: 9/2/09

Signature: *D Morgan*