

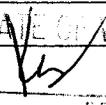
NO. 39160-1-II

FILED
COURT OF APPEALS
DIVISION II

10 MAR 23 PM 4:39

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON

BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

DAVID DICKJOSE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 07-1-06241-8

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Stephen Trinen
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Whether the probable cause declaration contained sufficient facts that would support the issuing magistrate to find that the informant and middleman were each reliable?..... 1

2. Whether the probable cause declaration contained sufficient facts that would permit the issuing magistrate to find that the defendant delivered methamphetamine and that evidence related to the crime would probably be found at the defendant's residence? 1

3. Whether even if the court were to hold the warrant was unlawful, the defendant's remedy is limited to the suppression of the evidence that was the fruit of the warrant, and therefore likely only affects one of the four counts charged? 1

4. Whether the court's findings after the suppression hearing invaded the province of the jury when they were only applicable to the determination of whether the warrant was valid and the evidence obtained under it was admissible and are irrelevant as to the ultimate question of guilt? 1

B. STATEMENT OF THE CASE 1

1. Procedure..... 1

2. Facts 2

C. ARGUMENT..... 11

1. THE PROBABLE CAUSE DECLARATION TO THE WARRANT CONTAINED SUFFICIENT FACTS TO PERMIT THE ISSUING MAGISTRATE TO FIND THAT BOTH THE INFORMANT AND MIDDLEMAN WERE RELIABLE..... 11

2.	PROBABLE CAUSE SUPPORTED THE WARRANT WHERE THE FACTS IN THE WARRANT ESTABLISHED THAT DICKJOSE PROBABLE COMMITTED A CRIME AND A NEXUS BETWEEN THAT CRIME AND DICKJOSE'S RESIDENCE THAT JUSTIFIED A SEARCH.....	20
3.	EVEN IF THE COURT WERE TO CONCLUDE THE WARRANT WAS DEFECTIVE, THE ONLY REMEDY IS SUPPRESSION OF THE EVIDENCE THAT WAS NOT OTHERWISE LAWFULLY OBTAINED	25
4.	ANY DEFICIENCIES IN THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE MOOT WHERE THEY ARE HARMLESS BECAUSE THEY ONLY APPLY TO THE SUPPRESSION HEARING	26
D.	<u>CONCLUSION</u>	29-30

Table of Authorities

State Cases

<i>Hoke v. Stevens-Norton, Inc.</i> , 60 Wn.2d 775, 778, 375 P.2d 743 (1962)	27
<i>Neil F. Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc.</i> , 68 Wn.2d 172, 174, 412 P.2d 106 (1966).....	27
<i>Rickert v. Pub.Disclosure Comm'n</i> , 161 Wn.2d 843, 847, 168 P.3d 826 (2007)	27
<i>State v. Atchley</i> , 142 Wn. App. 147, 161, 173 P.3d 333 (2007)	14, 15
<i>State v. Casto</i> , 39 Wn. App. 229, 232, 692 P.2d 890 (1984)	12
<i>State v. Cole</i> , 128 Wn.2d 262, 286, 906 P.2d 925 (1995)	11, 13, 14, 15, 16, 20
<i>State v. Dobyys</i> , 55 Wn. App. 609, 619, 779 P.2d 746, <i>review denied</i> , 113 Wn.2d 1029, 784 P.2d 530 (1989).....	16
<i>State v. Estorga</i> , 60 Wn. App. 298, 304-05, 803 P.2d 813 (1991)	16
<i>State v. Feeman</i> , 47 Wn. App. 870, 737 P.2d 704 (1987)	11
<i>State v. Fisher</i> , 96 Wn.2d 962, 639 P.2d 743 (1982).....	11, 16
<i>State v. G.M.V.</i> , 135 Wn. App. 366, 372, 144 P.3d 358 (2006).....	14
<i>State v. Gaines</i> , 154 Wn.2d 711, 116 P.3d 993 (2005).....	25
<i>State v. Helmka</i> , 86 Wn.2d 91, 93, 542 P.2d 115 (1975)	12
<i>State v. Jackson</i> , 102 Wn.2d 432, 435, 688 P.2d 136 (1984).....	14, 15
<i>State v. J-R Distribs., Inc.</i> , 111 Wn.2d 764, 774, 765 P.2d 281 (1988)...	11
<i>State v. Lair</i> , 95 Wn.2d 706, 711, 630 P.2d 427 (1981)	16
<i>State v. Ludvik</i> , 40 Wn. App. 257, 698 P.2d 1064 (1985)	17

<i>State v. Luther</i> , 157 Wn.2d 63, 78, 134 P.3d 205 (2006)	27
<i>State v. Maxwell</i> , 114 Wn.2d 761, 791 P.2d 223 (1990)	13, 20, 21
<i>State v. Mejia</i> , 111 Wn.2d 892, 766 P.2d 454 (1989).....	17, 18, 19, 22
<i>State v. Nelson</i> , 152 Wn. App. 755, 773-74, 219 P.3d 100 (2009).....	13
<i>State v. Neth</i> , 165 Wn.2d 177, 182, 196 P.3d 658 (2008).....	12, 13, 26
<i>State v. Olson</i> , 73 Wn. App. 348, 869 P.2d 110, <i>review denied</i> , 124 Wn.2d 1029 (1994).....	17
<i>State v. Partin</i> , 88 Wn.2d 899, 904, 567 P.2d 1136 (1977)	12, 16
<i>State v. Remboldt</i> , 64 Wn. App. 505, 510, 827 P.2d 505, <i>review denied</i> , 119 Wn.2d 1005 (1992).....	13
<i>State v. Tarter</i> , 111 Wn. App. 336, 340, 44 P.3d 899 (2002)	15
<i>State v. Thein</i> , 138 Wn.2d 133, 140, 977 P.2d 582 (1999).....	13, 14
<i>State v. Walcott</i> , 72 Wn.2d 959, 962, 435 P.2d 994 (1967).....	12, 21
<i>State v. Wilke</i> , 55 Wn. App. 470, 477, 778 P.2d 1054, <i>review denied</i> , 113 Wn.2d 1032, 784 P.2d 531 (1989).....	15
<i>State v. Woodall</i> , 100 Wn.2d 74, 76, 666 P.2d 364 (1983).....	16
<i>State v. Yokley</i> , 139 Wn.2d 581, 596, 989 P.2d 512 (1999)	12
<i>State v. Young</i> , 123 Wn.2d 173, 195, 867 P.2d 593 (1994).....	11, 17
 Federal and Other Jurisdictions	
<i>Aguilar v. Texas</i> , 378 U.S. 108, 114, 84 S. Ct. 1509, 1513, 12 L. Ed. 2d 723 (1964).....	15
<i>Spinelli v. United States</i> , 393 U.S. 410, 413, 89 S. Ct. 584, 587, 21 L. Ed. 2d 637 (1969).....	15
<i>United States v. Ventresca</i> , 380 U.S. 102, 13 L.Ed.2d 684, 85 S. Ct. 741 (1965).....	12

Rules and Regulations

CrR 3.6.....26

ER 104(a)..... 18

ER 1101(c)(1).....18

ER 1101(c)(3).....18

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the probable cause declaration contained sufficient facts that would support the issuing magistrate to find that the informant and middleman were each reliable?

2. Whether the probable cause declaration contained sufficient facts that would permit the issuing magistrate to find that the defendant delivered methamphetamine and that evidence related to the crime would probably be found at the defendant's residence?

3. Whether even if the court were to hold the warrant was unlawful, the defendant's remedy is limited to the suppression of the evidence that was the fruit of the warrant, and therefore likely only affects one of the four counts charged?

4. Whether the court's findings after the suppression hearing invaded the province of the jury when they were only applicable to the determination of whether the warrant was valid and the evidence obtained under it was admissible and are irrelevant as to the ultimate question of guilt?

B. STATEMENT OF THE CASE.

1. Procedure

On December 14, 2007, the State charged David Dickjose with four counts, three of which were for unlawful delivery of a controlled

substance, methamphetamine; and a fourth count of possession of a controlled substance with intent to deliver, methamphetamine. CP 1-3. The charges were based on incidents that occurred on August 23, 2007 through December 13, 2007. CP 1-3

On April 7, 2009, the defendant filed a motion to suppress evidence, claiming that there was an insufficient nexus between the alleged criminal activity and the defendant's address. CP 9. *See generally*, CP 6-11. The court conducted a suppression hearing and denied the motion. CP 37; RP 41, ln. 9 to p. 42, ln. 5.

Before trial could take place, the defendant filed this appeal seeking discretionary review, and review was granted. *See*, CP 30.

2. Facts

Because this case involves a challenge to the probable cause to support the warrant in this case, the following facts are taken verbatim from the probable cause declaration to the search warrant, which declaration was sworn and subscribed by Lakewood Police Officer Sean Conlon¹ Only that portion relevant to the issues on appeal have been included. It can be found at CP 22-25. Because of the limited number of

¹ The defense failed to attach a copy of the probable cause declaration to the warrant to either its memorandum in support of the motion, or to enter it into evidence as an exhibit at the motion hearing. However, a copy was attached as an appendix to the State's Response memorandum, and it is to that attachment the State relies for a record of the declaration.

pages, and the fact that each of the three separate undercover drug transactions is separated by a boldface heading, further citations to the clerk's papers will be omitted.

Probable Cause Declaration

On 08-24-07 at about 1900 hours I was assigned to the Lakewood Police Department Special Operations Unit. I met with Reliable CI 07026 to conduct a controlled buy of Methamphetamine from a dealer known as David Dickjose. The CI has known S/Dickjose for several years and knows he deals Methamphetamine. The CI has first hand knowledge that Dickjose has been a Meth cook in the past.

Earlier in the day the CI told me where Dickjose lived and that he recently purchased a silver Dodge Pickup, [unclear]fted with rims. I drove to Dickjose's house and saw the pickup parked in the rear of the residence.

I strip searched the CI and issued him pre recorded buy funds. I also searched the vehicle with nothing found. I followed the CI as he drove his own vehicle.

We went to the 5400 Block of S Warner to meet with another person, Kenny Gross. Kenny called Dickjose and told him he wanted a half ounce of Methamphetamine. Dickjose agreed and said he was in the area. The CI got into his vehicle and drove a short distance away as I followed. The CI told me that Dickjose was on his way. Officers stated

that they saw a Silver Dodge Pickup, WA #B84621C pull up in front of Gross's residence and Gross get into the passenger side. At one point the driver got out and went to the back door of his truck then got back in. A short time later Dick Jose [sic] drove off as Officers, Brown, Crommes, Hamilton, Sgt. Estes and Det Punzalan followed.

I followed the CI back to the 5400 block of Warner. Gross walked up to the CI as he exited his vehicle. I saw Gross hand the CI a brown paper bag and then part ways. I followed and met up with the CI a short distance away. The CI handed me a paper bag containing 14.1 grams of Methamphetamine.

I again strip searched the CI and searched the CI's vehicle with nothing found.

We then followed Dickjose for a few hours, during which time he made several short stops contacting different individuals consistent with narcotics trafficking. We continued keeping him under constant surveillance and followed Dickjose until he returned to his residence at 18111 41st Av E.

On 10-25-07 at about 1600 hrs I met with reliable CI 07026 to conduct a controlled buy of Methamphetamine from a dealer he knows as David Dickjose. We previously purchased Methamphetamine from

Dickjose on 08-24-07. CI 07026 was strip searched and issued pre recorded buy funds.

We met up with Kenneth Gross at 72nd and Pacific Av. CI 07026 gave Gross the pre recorded buy funds. Gross left S/B on Pacific Av as offices followed however a few blocks away officers lost sight of Gross.

I followed the CI as he drove N/B. The CI informed me Gross told him he was going to meet with Dickjose and he would meet the CI back at his residence at 5421 S Warner.

I followed the CI as he pulled in front of 5421 S Warner and went inside. About 30 minutes later Gross returned to his residence and went inside. During this time Officer Brown was on surveillance at Dickjose's residence. Dickjose returned to his residence in a time consistent with meeting up with Gross.

A few minutes later the CI exited Gross's residence and left to a predetermined meet location. The CI handed me 12 grams of suspected Methamphetamine which I later filed-tested with positive results.

The CI and his vehicle were again searched with nothing found.

On 12-05-07 at about 1600 hrs I was assigned to the Lakewood Police Department Special Operations Unit. Was [unclear] with Reliable CI 07026 to conduct a controlled buy of Methamphetamine from a dealer known as David Dickjose. The CI has known S/Dickjose for

several years and we have recently purchased Methamphetamine from him on 08-24-07 and 10-24-07. The CI has to go through Kenny Gross to get the Meth from Dickjose.

We were also aware Dickjose has many vehicles.

I strip searched the CI and issued him/her pre recorded buy funds. I also searched the vehicle with nothing found. I followed the CI as he/she drove his own vehicle.

We went to 5421 S Warner to meet with Kenny Gross. En-route the CI called Gross. Gross stated that he called Dickjose and told him he wanted a half ounce of Methamphetamine. Dickjose agreed and said he was in the area.

Officers were staged in the area and saw Gross leave his residence. Officers followed and saw him meet up with a white Mercedes WA plate, URDARTZ. Det. Punzalan saw Gross briefly contact the driver of the Mercedes at the Mercedes driver's window. Gross then returned to his vehicle and drove back to his residence. Det Punzalan's description of the driver of the Mercedes was consistent with Dickjose.

The CI pulled in front of 5421 S Warner and went inside. The CI gave Gross the pre recorded buy funds and returned to his vehicle.

The CI got into his vehicle and drove a short distance away as I followed. The CI told me that Gross called Dickjose and he was on his

way. A few minutes later Officers saw a White Mercedes pull up in front of Gross's [unkown]idence and Gross get into the passenger side. A short time later Gross exited went back to his house. The Mercedes drove off as Officers, Crommes, Hamilton, Sgt Estes, Det Jordan and Det Punzalan followed. I was parked down the street and recognized the driver, Dickjose as he drove past.

I followed the CI back to the 5400 block of Warner. Gross walked up to the CI as he exited his vehicle and approached the porch. They did a brief hand to hand transaction. The CI got into her/his vehicle and drove off. I followed and met up with the CI a short distance away. The CI handed me a [sic]13.2 grams of Methamphetamine.

I again strip searched the CI and searched the CI's vehicle with nothing found.

Officers advised they lost sight of the Mercedes for a very brief period and then again located it.

We then followed the Mercedes as it pulled into the driveway of 313 S 67th ST. Dickjose went inside for a few minutes, then exited and left. I pulled up along side the Mercedes again, saw Dickjose was driving. We then followed him directly to his residence at 18111 41st Av E, where he parked and went inside.

Affiant's Training and Experience

Your affiant, Sean P. Conlon, being first sworn on oath, deposes and says that: I have been a police Officer for over eight years. I am a duly commissioned Officer with the Lakewood Police Department, and I am currently assigned to the Special Operations Section and a member of the Metro Clan Lab Team. I have been a member of the Lakewood Police Department since October of 2004.

Prior to coming to Lakewood I was with the Tacoma Police Department for 1 year. While in Tacoma I worked the high crime, high narcotic areas of Hilltop with several dozen narcotic arrests.

Prior to Tacoma I was employed with the Seattle Police Department for five years and 1 month. While with Seattle PD I worked the high crime, high narcotic areas of the South Precinct. My last two years I was assigned to the South Precinct Anti Crime Team.

I have been involved in over 2000 narcotic investigations to include, Buy/bust operations, order up of narcotics, the service of over 1000 search warrants, undercover buys, surveillance and patrol investigations. I have purchased narcotics while a police officer in an undercover role.

In addition to street experience, I have received formal training in narcotics enforcement. I have had the six month/880 hr basic law enforcement academy given by WSCJTC. I have attended the Seattle Police Anti Crime Team training, which included writing and serving narcotic search warrants, drug traffic loitering, certification in the field-testing of controlled substances, and narcotics recognition. I have also attended the WA State Clandestine Lab operator's course and I am state certified. I have had Clan Lab, Narcotics and drug recognition training with the DEA. I have assisted DEA with a wire intercept operation, monitoring several phone lines on a large scale narcotics distribution ring. I have attended the Basic narcotics investigator's course, which included drug recognition and symptomatology, drug identification, field-testing, the development and management of informants, surveillance operations and search warrant preparation and service. I have also attended the High risk event planning course and narcotic concealment/trafficking courses with the DEA. I have attended the 240 hr Narcotic K9 training. I am currently assigned as a narcotics K9 handler with my partner K9 "Phelan". I have also testified in Pierce County Superior Court as a Narcotics expert.

Based on my training and experience I am familiar with controlled substances, how they are manufactured, packaged, stored, transported and sold.

I know that evidence/records of illegal Narcotic sales are frequently kept in the residence and vehicles that the Narcotics dealers are using.

I know that Narcotics dealers frequently sell different controlled substances to keep up with the demand of their various cliental.

I know that Narcotics dealers frequently keep firearms in there [sic] residences and or vehicles to avoid detection from law enforcement.

I have become very educated, trained and experienced with the terms, trends, habits, commonalities, methods and idiosyncrasies surrounding illicit narcotics possession, use, distribution, manufacture, business and culture. Based on my training and experience, and upon the training and experience of knowledgeable Law Enforcement Offices with whom I associate, I recognize that the listed items of evidence are material to the investigation or prosecution of the above described felonies for the following reasons:

IT IS THE AFFIANT'S BELIEF that due to the aforementioned circumstances; that "David Dickjose, Kenneth Gross" and others as yet unidentified are engaged in the possession and distribution of METHAMPHETAMINE, a controlled substance as described by TITLE

69 of the REVISED CODE of WASHINGTON; a FELONY and your affiant hereby requests that a search warrant be signed for the search of the listed location and vehicles for further evidence in the listed crimes.

C. ARGUMENT.

1. THE PROBABLE CAUSE DECLARATION TO THE WARRANT CONTAINED SUFFICIENT FACTS TO PERMIT THE ISSUING MAGISTRATE TO FIND THAT BOTH THE INFORMANT AND MIDDLEMAN WERE RELIABLE.

When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982). A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). *See also, State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) ("Generally, the probable cause determination of the issuing judge is given great deference."); *State v. J-R Distributions, Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988) ("[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant."). Hypertechnical interpretations should be avoided when reviewing search warrant affidavits. *State v. Feeman*, 47 Wn. App. 870, 737 P.2d 704 (1987). The magistrate is entitled to draw

commonsense and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Doubts are to be resolved in favor of the warrant. *State v. Casto*, 39 Wn. App. 229, 232, 692 P.2d 890 (1984) (citing *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977)).

[W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

State v. Walcott, 72 Wn.2d 959, 962, 435 P.2d 994 (1967)(quoting, with approval from *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed.2d 684, 85 S. Ct. 741 (1965)).

In reviewing probable cause, the court looks to the four corners of the search warrant itself. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Probable cause to search is established if the affidavit in support sets forth facts sufficient for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. *State v. Maxwell*, 114

Wn.2d 761, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

Additionally, when evaluating the determination of probable cause: “The experience and expertise of an officer may be taken into account... In fact, what constitutes probable cause is viewed from the vantage point of a reasonably prudent and cautious police officer.” *State v. Remboldt*, 64 Wn. App. 505, 510, 827 P.2d 505, *review denied*, 119 Wn.2d 1005 (1992).

Because this court reviews the magistrate’s determination of probable cause and decision to issue the warrant for abuse of discretion, the trial court’s assessment of probable cause is an issue of law that is reviewed *de novo*. *State v. Nelson*, 152 Wn. App. 755, 773-74, 219 P.3d 100 (2009). *See also, Neth*, 165 Wn.2d at 182. This court essentially stands in the same position as the trial court when it conducts its review. Accordingly, the trial court’s determination after the suppression hearing is largely moot on appeal, as are the trial court’s findings and conclusions.

Probable cause for a search warrant requires two nexuses: first, a nexus between criminal activity and the item to be seized; and second, a nexus between the item to be seized and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). A warrant to search for

drugs in a particular location must contain specific facts tying the place to be searched to the crime. *State v. G.M.V.*, 135 Wn. App. 366, 372, 144 P.3d 358 (2006)(citing *Thein*, 138 Wn.2d at 147). Therefore, it is not sufficient if a warrant relies on generalized beliefs about the habits of drug dealers. *G.M.V.*, 135 Wn. App. at 372. However, it is sufficient if the warrant declaration contains information that the dealer left from or returned to a location before or after selling drugs. *G.M.V.*, 135 Wn. App. at 372.

The defense claims the probable cause declaration did not contain sufficient facts to permit the court to independently determine the reliability of the informant and the middleman. Br. App. 12-13.

When an affidavit in support of a search warrant contains information provided by an informant, the constitutional criteria for determining probable cause is measured by the two-prong *Aguilar-Spinelli* test. *State v. Atchley*, 142 Wn. App. 147, 161, 173 P.3d 333 (2007); *Cole*, 128 Wn.2d at 287. Although the *Aguilar-Spinelli* test has subsequently been abandoned under federal law in favor of a totality of the circumstances test, Washington still adheres to the *Aguilar-Spinelli* test. *See State v. Jackson*, 102 Wn.2d 432, 435-439, 688 P.2d 136 (1984); *Cole*, 128 Wn.2d at 287.

To satisfy that test, the officer requesting the warrant must show that (1) the informant obtained the information in a reliable way (“basis of

knowledge” prong), and (2) the informant is credible or the information is reliable (“reliability” prong). *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 1513, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 413, 89 S. Ct. 584, 587, 21 L. Ed. 2d 637 (1969).

In order to satisfy the “basis of knowledge” prong, “the affiant must explain how the informant claims to have come by the information and the informant must declare that he personally has seen the facts asserted and is passing on firsthand information.” *State v. Atchley*, 142 Wn. App. 147, 163, 173 P.3d 323(2007); citing *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984) (internal quotations omitted).

In order to satisfy the “reliability” prong, the affiant must show that the informant or the informant’s information is credible. The “reliability” prong of the *Aguilar-Spinelli* test is relaxed when the informant is a citizen named in the affidavit to the warrant. *State v. Tarter*, 111 Wn. App. 336, 340, 44 P.3d 899 (2002). If the citizen is not named in the warrant, but known to the police, the affidavit must “contain background facts to support a reasonable inference that the information is credible and without motive to falsify.” *Cole*, 128 Wn.2d at 287-288 (citing *State v. Wilke*, 55 Wn. App. 470, 477, 778 P.2d 1054, review denied, 113 Wn.2d 1032, 784 P.2d 531 (1989)). If sufficient background information is provided, “the informant may be credible even though the

affidavit does not state specifically why the informant wishes to remain anonymous.” *Cole*, 128 Wn.2d at 288 (citing *State v. Dobyms*, 55 Wn. App. 609, 619, 779 P.2d 746, *review denied*, 113 Wn.2d 1029, 784 P.2d 530 (1989)).

On the other hand, statements against penal interest may have some indicia of reliability. *State v. Lair*, 95 Wn.2d 706, 711, 630 P.2d 427 (1981). Furthermore, greater reliability may be attached to admissions against penal interest in post arrest situations because the arrestee admitting the crime risks disfavor with the prosecutor if he lies. Potential risk of disfavor is heightened and consequently a higher motive to be truthful exists where the information is given in exchange for a promise of leniency. *State v. Estorga*, 60 Wn. App. 298, 304-05, 803 P.2d 813 (1991).

It is not sufficient for the officer in the probable cause declaration to merely provide a conclusory statement that the informant is reliable. *See, State v. Woodall*, 100 Wn.2d 74, 76, 666 P.2d 364 (1983). However, information that the informant’s tips have proved accurate in the past is sufficient to show the informant’s reliability. *State v. Fischer*, 96 Wn.2d 962, 965, 639 P.2d 743 (1982); *State v. Partin*, 88 Wn.2d 899, 903, 567 P.2d 1136 (1977).

Further, if a tip given by an informant is deficient on one or both prongs of the *Aguilar-Spinelli* test, the deficiency may be cured by independent police investigation that corroborates the tip. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). See *State v. Olson*, 73 Wn. App. 348, 869 P.2d 110, review denied, 124 Wn.2d 1029 (1994) (anonymous informant's tip, along with increased power usage and "plain sniff" by police cured deficiencies in *Aguilar-Spinelli*); see also *State v. Ludvik*, 40 Wn. App. 257, 698 P.2d 1064 (1985) (substantial foot traffic and exchange of bag for money cured deficiencies in *Aguilar-Spinelli*).

It is also worth noting that in a drug transaction involving a middleman, the middleman's non-assertive conduct that is observed by officers is not subject to an *Aguilar-Spinelli* reliability analysis. *State v. Mejia*, 111 Wn.2d 892, 766 P.2d 454 (1989). In *Mejia*, the informant arranged to purchase drugs from a source through a middleman, the middleman was observed by the police leaving the informant, entering the defendant's location and returning to the informant. The court in *Mejia* held the *Aguilar-Spinelli* test did not apply to the middleman's non-assertive conduct that was observed by the officers. *Mejia*, 111 Wn.2d at 901. *Aguilar-Spinelli* does, however, apply to a middleman's statements to an informant.

Here, Gross obtained the drugs from the defendant, told the informant he had done so, and then delivered the drugs to the informant.

In his brief the defendant also refers to Gross's statements as hearsay. However, the rules of evidence do not apply to search warrants. ER 1101(c)(3). Nor do they apply to preliminary questions of fact for determining the admissibility of evidence under ER 104(a). ER 1101(c)(1). This is in part because in the warrant context, *Aguilar-Spinelli* performs a similar function to the hearsay rule. *Mejia*, 111 Wn.2d at 899.

Here, the declaration contains numerous facts that would permit the issuing magistrate to independently determine the informant was reliable. For this reason, the declaration satisfies the reliability and veracity prongs under *Aguilar-Spinelli*.

As to the first transaction on August 24, 2007, the declaration indicates that Officer Conlon met with the informant to conduct a controlled buy of methamphetamine from a dealer known as David Dickjose. The declaration states that the informant has known Dickjose for several years and knows he deals methamphetamine. The informant advised the officer that he had first hand knowledge that Dickjose has manufactured meth in the past ("been a meth cook"). The informant also advised officers that Dickjose had recently purchased a vehicle. The officer drove by Dickjose's residence and confirmed that the vehicle was

there. These facts are all relevant to the informant's basis of knowledge, and also provides some independent confirmation and observation by the officer.

Then informant arranged to buy the methamphetamine from Dickjose through a middleman, Gross. Officers observed Dickjose arrive and make contact with Gross. The informant was then able to obtain methamphetamine. These facts are sufficient to permit the issuing magistrate to find that the informant was credible. Moreover, the officers also observed the informant engage in the transaction, and observed Dickjose arrive and leave. The officers also searched the informant before and after the transaction and no other methamphetamine was found either time.

These facts are all direct officer observations that independently confirm the informant's claims, and thus the informant's credibility. Consistent with the court's holding in *Mejia*, the officer's observations of the middleman's nonassertive conduct also provide an independent basis supporting probable cause.

This information was sufficient to support the issuing magistrate to find that the informant was reliable. The informant identified a source from which methamphetamine could be obtained, and the informant was in fact able to obtain methamphetamine from that source.

Similarly, during the first transaction, Gross said he called Dickjose, told him he wanted a half ounce of methamphetamine, and that Dickjose agreed and said he was in the area. Officers then observed Dickjose show up, Gross briefly contacted Dickjose, after which Dickjose drove off, and then Gross delivered methamphetamine to the informant. Independent police observation was able to confirm that Gross was in fact credible and reliable.

The first controlled buy established that both the informant and Gross were reliable. Accordingly, the defendant's challenge to the informant's and middleman's credibility is without merit and should be denied.

2. PROBABLE CAUSE SUPPORTED THE WARRANT WHERE THE FACTS IN THE WARRANT ESTABLISHED THAT DICKJOSE PROBABLE COMMITTED A CRIME AND A NEXUS BETWEEN THAT CRIME AND DICKJOSE'S RESIDENCE THAT JUSTIFIED A SEARCH.

As indicated in section 1 above, this Court reviews the issuing magistrate's determination of probable cause for abuse of discretion with great deference being accorded to the issuing magistrate. *Cole*, 128 Wn.2d at 286. In its review, this Court limits itself to the four corners of the warrant document. *Maxwell*, 114 Wn.2d 761, 791. All reasonable inferences are drawn in favor of the warrant, with any doubtful or

marginal cases being determined in accordance with the preference in favor of the validity of the warrant. *Walcott*, 72 Wn.2d at 962.

The defense challenges the sufficiency of the declaration to support probable cause on two bases. First, the defense claims there was insufficient information to permit the magistrate to infer that Dickjose delivered methamphetamine. Br. App. 11 ff. Second, the defense claims there was not sufficient information to establish a nexus between the deliveries and Dickjose's residence. Br. App. 13-17.

Probable cause to search is established if the affidavit in support sets forth facts sufficient for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. *Maxwell*, 114 Wn.2d at 769.

Both defense claims that the evidence is insufficient are without merit. The facts supporting each argument are discussed separately.

a. There Were Sufficient Facts That Would Permit The Court To Determine That Dickjose Delivered Methamphetamine.

For the third transaction on December 5, 2007, the informant called the middleman, Gross, to arrange to buy methamphetamine. Gross called the informant back to say that he had called Dickjose and wanted a half ounce of methamphetamine, and that Dickjose agreed and said he was in the area. Officers observed Gross leave his residence and contact the

driver of a Mercedes at the window. Officer Conlon observed Dickjose driving the Mercedes as he left the transaction. Gross then returned to his residence, at which point the informant paid him the pre-recorded buy money. Gross subsequently completed a hand to hand transaction with the informant. Officers followed Dickjose and observed him to return to his home address, making only one short stop before doing so.

This transaction alone supplied a reasonable basis to believe that Dickjose delivered methamphetamine. As the court in *Mejia* noted, "...an affidavit need not establish proof of criminal activity, but merely probable cause to believe it occurred." *Mejia*, 111 Wn.2d at 901.

In the second transaction on October 25, 2007, the informant contacted Gross, who told the informant he was going to meet Dickjose and would then meet the informant back at Gross's residence. After about 30 minutes, Gross returned to his own residence and the informant completed the methamphetamine transaction. Surveillance that had been sitting on Dickjose's home address was able to confirm that he had returned to his home address in a time consistent with his meeting up with Gross. A few minutes after Gross returned to his house, the informant left it and returned to the officers with methamphetamine.

Prior to the controlled buy on August 24, 2007, the informant advised Officer Conlon that Dickjose had recently purchased a Dodge pickup with rims. Earlier in the day on August 24, prior to the transaction, Officer Conlon went to Dickjose's home address and confirmed the

vehicle was present. The informant was searched before the transaction and then contacted Gross. Officers observed the silver pickup previously observed at Dickjose's house arrive and contact Gross, at which point Dickjose and Gross interacted and Gross then completed the transaction with the informant. The informant then returned to the officers with methamphetamine.

The informant told officers that he knew Dickjose dealt methamphetamine. The methamphetamine was purchased from Dickjose through a middleman, Gross. For each transaction, Gross advised the informant that he had contacted Dickjose. In the third transaction in December, Gross advised the informant that he called Dickjose and told him that he wanted a half-ounce of methamphetamine, and that Dickjose agreed and was in the area. None of the transactions could be completed until Gross made contact with Dickjose. Each time, Dickjose contacted Gross relatively quickly after the informant had informed Gross of his desire to buy methamphetamine. From these facts, the issuing magistrate could reasonably infer that Dickjose was delivering methamphetamine on each of the specified dates.

While the December 5, 2007, transaction alone was sufficient to support probable cause to believe Dickjose delivered methamphetamine, when all the facts and inferences from all three transactions are taken together and construed in favor of the validity of the warrant, the issuing

magistrate could easily find that Dickjose was involved in the delivery of methamphetamine.²

b. There Was A Sufficient Nexus To Connect Dickjose's Residence To The Deliveries.

In the third transaction in December, officers witnessed Gross contact the driver of a white Mercedes who matched the description of Dickjose. As he drove away from the scene, Officer Conlon recognized the driver as Dickjose. Dickjose then drove to a house and briefly went inside, then left and returned to his residence where he parked and went inside.

In the second transaction in October, the informant gave Gross the pre-recorded buy funds and left. Gross said he was going to meet with Dickjose and would meet with the informant back at Gross's residence. Gross then returned to his own residence about thirty minutes later. Gross then delivered methamphetamine to the informant. Meanwhile, surveillance at Dickjose's residence confirmed that he returned to his residence in a time frame consistent with his meeting with Gross.

In the first transaction in August, Officer Conlon went by Dickjose's house earlier in the day and saw a silver pickup truck parked there. For the transaction, Dickjose arrived for the transaction in the same truck.

² It is worth noting that legally Dickjose is equally guilty for delivering the cocaine to Gross directly, or for delivering it to the informant indirectly via Gross as an accomplice.

Based upon the facts contained in the probable cause declaration, the issuing magistrate could find that there was a reasonable possibility that evidence of the crime of delivery could be found at Dickjose's residence, to include either more methamphetamine for additional transactions or pre-recorded buy money from the informant. Accordingly, the issuing magistrate did not abuse his discretion when he issued the warrant. A nexus to Dickjose's residence is established and the validity of the warrant should be affirmed.

3. EVEN IF THE COURT WERE TO CONCLUDE THE WARRANT WAS DEFECTIVE, THE ONLY REMEDY IS SUPPRESSION OF THE EVIDENCE THAT WAS NOT OTHERWISE LAWFULLY OBTAINED.

Even if the court were to hold that the warrant was not valid, the only relief the defendant is entitled to is the suppression of only that evidence that was obtained as a result of the warrant and was not otherwise obtained on some lawful basis. Independent of the search warrant, the officers had probable cause to arrest Dickjose for the deliveries. Therefore, any evidence found on his person or in plain view at the time of his arrest would have been admissible under the independent source doctrine. *See, State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993 (2005).

Presumably most, if not all, of the evidence in counts I through III was not obtained as a result of the warrant. Where the deliveries occurred prior to the issuance of the warrant, the evidence relevant to those counts would not be the fruit of the warrant. Even if the defendant were to prevail as to all his claims, it only affects one of the four counts. Accordingly, discretionary interlocutory review was improvidently sought.

4. ANY DEFICIENCIES IN THE FINDINGS OF FACT
AND CONCLUSIONS OF LAW ARE MOOT WHERE
THEY ARE HARMLESS BECAUSE THEY ONLY
APPLY TO THE SUPPRESSION HEARING

The State acknowledges that the format of the findings and conclusions approved by the court was not ideal. The court and parties apparently used a template for standard findings and conclusions after a motion to suppress under CrR 3.6. Even though the suppression hearing in this case was heard pursuant to CrR 3.6, the standard template for findings and conclusions is inapplicable because when reviewing the adequacy of probable cause to support the issuance of a warrant, the trial court sits as a court of review, in what is analogous to an appellate function. See, *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). As a result, when reviewing a warrant the trial court is not acting as a fact finder and should not properly make findings of fact. Moreover, this

Court reviews any of the trial court's conclusions of law *de novo*. So the trial court's conclusions of law are also of no consequence once the review takes place on appeal.

Here, the trial court entered a number of findings of fact. Those findings properly should have been phrased not as findings, but rather as conclusions as to whether there was sufficient evidence in the probable cause declaration to permit the trial court to make such findings. The court can still deem them as such insofar as it has authority to treat findings and conclusions as what they truly are regardless of how they have been designated. A finding of fact that is erroneously denominated as a conclusion of law will be treated as a finding of fact and vice versa. *Rickert v. Pub. Disclosure Comm'n*, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)). See, *Hoke v. Stevens-Norton, Inc.*, 60 Wn.2d 775, 778, 375 P.2d 743 (1962); See also, *Neil F. Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc.*, 68 Wn.2d 172, 174, 412 P.2d 106 (1966) (stating that where conclusions of law are incorrectly denominated as findings of fact, the court still treats them as conclusions of law).

Nonetheless, any mistake is harmless for two reasons. To the extent the trial court itself made such findings based on the probable cause declaration, those findings essentially stand for the proposition that there

was sufficient evidence to permit the magistrate who issued the warrant to at least make equivalent findings. Indeed, if anything the error did not prejudice the defendant but rather favored him insofar as the trial court's findings may not have gone as far as the full extent of the inferences the issuing magistrate could have made in favor of the warrant.

Moreover, the entry of the superfluous findings in no way prejudices the defendant because, insofar as they are treated as findings of fact, they are of no consequence within the context of this court evaluating the sufficiency of the information within the warrant itself. This Court can ignore them as a nullity. Additionally, the findings were issued only in support of the suppression motion, and had no force or effect outside the determination of the suppression issues. To the extent that the entry of the findings was error, it was a harmless one because the findings have no force or effect either in the context of the determination of the suppression hearing, or in any other aspect of the case. Where this Court will now rule on the suppression issue independently and *de novo*, the findings entered will become moot, and a nullity.

Nor do the findings invade the province of the jury, because nothing in the record suggests they were going to be imposed on the jury, or that the court was going to substitute its conclusions based on the

probable cause declaration for the jury's conclusions as to guilt based on the evidence at trial.

Finally, the defendant asks for no relief based upon the court's alleged error of invading the province of the jury. He merely claims the court wrongfully invaded the province of the jury. Where no relief is sought for the error, and any error is both moot and harmless, the Court should give the defendant no relief on this issue even if it were to hold the entry of the findings was error.

D. CONCLUSION.

The warrant contained sufficient facts to permit the issuing magistrate to find that the informant and the middleman were each reliable. The warrant contained sufficient facts to permit the issuing magistrate to find that Dickjose delivered methamphetamine and that evidence of the crime was likely to be found at his residence. Where the

trial court entered findings of fact regarding the probable cause declaration, any error was moot and a nullity, and therefore does not entitle the defendant to any relief.

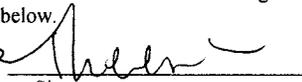
DATED: March 23, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3.23.10 
Date Signature

FILED
COURT OF APPEALS
DIVISION III
10 MAR 23 PM 4:40
STATE OF WASHINGTON
BY 
DEPUTY