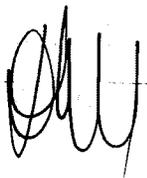


No. 41129-6-II

11 JUN 2015
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BY: 

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

STATE OF WASHINGTON, Respondent

v.

DAVID WALDECK, Appellant

APPEAL FROM THE ORDER OF THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR
WAHKIAKUM COUNTY

RESPONDENT'S BRIEF

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I. FACTS

On February 18, 2010, Wahkiakum County sheriff's deputy Det. Mike Balch was on duty in Wahkiakum County when he saw a car that registered on his radar as speeding. RP 5. He pulled the vehicle over. RP 7. The driver was the defendant, David Waldeck. RP 10. His passenger was Joseph Loudin. RP 13. As the deputy conducted the ordinary business of a traffic stop, he noted that "the obvious odor of green or grown marijuana" was coming from Waldeck's vehicle. Id. Waldeck said the vehicle was his but he had not finished paying for it. RP 41.

As Det. Balch was pulling Waldeck over, Michael Lee Savant, a local resident, was driving the same road. RP 47. He saw Waldeck's vehicle come around a corner, and as it did, its passenger door opened and Savant watched as "some articles were tossed out of the vehicle" as it moved at a "rapid pace." Id. When Savant saw Det. Balch's vehicle was pursuing Waldeck's, he "turned around and come back and made contact with -- with

Officer Balch and told him that they had tossed items out of the vehicle back down the road to the west.” RP 48.

Det. Balch called Deputy Gary Howell to the scene to accompany Savant and find the items thrown from Waldeck’s car. RP 12. Among the items Howell and Savant recovered from the side of the road were a Hide-A-Can (a storage device built to resemble beverage cans; this one looked like a can of Red Bull energy drink) containing a cellophane baggie with drug residue in it (RP 24, 36) and a box of distinctive design containing a syringe, digital scales, a plastic baggie with residue, and a spoon with a cotton ball stuck to it (RP 36, 72, 75). The officers arrested Waldeck and Loudin, impounded the car, got a search warrant, and searched it. RP 13. During the search of Waldeck incident to his arrest, the officers found he was carrying a syringe. RP 37.

Pursuant to the warrant, the officers opened the trunk of the vehicle and found more Hide-A-Cans, including another Red Bull Hide-A-

Can. RP 18. They also found a large box of the same design as the small one that Savant helped them find on the side of the road. RP 38. That box contained scales (RP 17) with residue on them that proved to be heroin (RP 101), a glass pipe, some cell phones, and a pair of safety deposit box keys that Waldeck claimed as his own and signed for as owner when he received them back from the sheriff's office. RP 87-88.

After unsuccessful challenges to the arrest and warrant were heard on June 7, 2010, at which time Savant's name was withheld from Waldeck on grounds of "informant's privilege," see infra, Waldeck went to jury trial on August 16 of that year. He was convicted of Possession of Heroin and timely appealed.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The identity of citizen informant Michael Savant was properly withheld from the defendant until his testimony was required for jury trial; then it was revealed within

plenty of time for the defense to prepare for his testimony.

Waldeck's rights were not violated.

2. Probable cause supported the search warrant herein.
3. The affidavit the police gave the magistrate was accurate.
4. Waldeck did not make the case for an unwitting possession instruction but he received one anyway; the instruction he got was more than what was required.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Waldeck's "Issue pertaining" asks the circular question whether it is required to produce the name of a witness

when it is required to produce the name of a witness.

The answer to the question is yes, but in this particular case, Waldeck has not established that he was entitled to Savant's name any sooner than he got it.

2. Waldeck's "Issue pertaining" asks the circular question whether a trial court errs in erroneously failing to suppress. The answer to the question is yes, but in this particular case, Waldeck has not established that the trial court erred.
3. Waldeck's "Issue pertaining" asks the question whether the trial court should suppress when a search warrant contains misrepresentations. The answer to the question is not necessarily, but we need not reach the issue since the record shows no misrepresentations.

4. Waldeck's "issue pertaining" asks whether a defendant is denied a fair trial if denied an unwitting possession instruction "when that defense is both factually and legally available." The answer to the question is not necessarily, so long as the instructions permit the defendant to argue his theory of the case, but we need not reach the issue since the defense was not factually available and the trial court gave an unwitting possession instruction anyway.

IV. ARGUMENT

1. The Identity of the Citizen Witness was Concealed Legally and Disclosed at the Appropriate Time

Waldeck takes the State to task for failing to reveal the identity of Mike Savant, the passerby whose information led to probable

cause to search Waldeck's car and find drugs. The standard of review in these cases is as follows:

“Our analysis begins with the proposition... that the State has a qualified privilege not to disclose the identity of confidential informants, and that disclosure is required only when the informant's identity is relevant and helpful to the defense or essential to a fair determination of the charge. See Roviaro v. United States, 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); State v. Thetford, 109 Wash.2d 392, 396, 745 P.2d 496 (1987); CrR 4.7(f)(2); RCW 5.60.060(5). Generally, the preferred procedure for making this determination is an in-camera hearing. “No hearing is necessary, however, if the accused's reasons for seeking the informant's testimony are only speculative, though the hearing judge should take into consideration the difficulty of explaining in a vacuum why the testimony is crucial.” State v. Cleppe, 96 Wash.2d 373, 382, 635 P.2d 435 (1981); see State v. Fredrick, 45 Wash.App. 916, 921, 729 P.2d 56 (1986) (no error in denying motion for in camera hearing).”

State v. Salazar, 59 Wash. App. 202, 214, 796 P.2d 773, 780 (1990).

The privilege referred to in Salazar is memorialized in CrR

4.7(f)(2):

Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

The witness, Mike Savant, was not produced at the CrR 3.6 hearing on June 7, 2010. Savant did appear and testify at trial on August 16, 2010. RP 8/16/10, 46 et. seq. Savant's identity was revealed to the defense on or before July 30, 2010, when it appeared in the State's omnibus materials. CP 121. This is more than two weeks before trial; the appellant makes no argument that this was insufficient time to prepare for his testimony.

Note that "where the informant provided information relating only to probable cause rather than the defendant's guilt or innocence,

disclosure of the identity of an informant is not required.” State v. Atchley, 142 Wash.App. 147, 156, 173 P.3d 323 (2007) (citations omitted). Thus, the defense had less right to identify Savant in the 3.6 hearing than in the subsequent trial (and the legal standard for disclosure was different).

With this background, we may assess Waldeck’s three arguments regarding the timing of the revelation of Savant’s identity.

1. “Under the plain language of the court rule, the state was not entitled to claim an informant’s privilege for a person [Savant] the state intended to and did call as a witness at trial.” Appellant’s Brief, 18.

Remember, Savant’s identity was disclosed to the defense at least 16 days before trial. CP 121. It was at the earlier 3.6 hearing that his identity was kept secret. At the time, concealing Savant’s identity was perfectly legal under even Waldeck’s interpretation of the court rule.

What Waldeck is saying is that the moment Savant testified at trial, it retroactively became illegal to have concealed his identity at the 3.6 hearing. This argument makes the laws and cause and effect run backwards.

Court rules are interpreted using the canons of statutory construction. State v. Carson, 128 Wash.2d 805, 812, 912 P.2d 1016 (1996). Thus, the first priority is to effectuate the intent of the drafter. State v. Tejada, 93 Wn.App. 907, 911, 971 P.2d 79 (1999). Strained and unrealistic interpretations should be avoided. Id.

The State submits that it is strained, unrealistic, and contrary to the intent and policies behind the informant's privilege to argue that legally calling a witness at trial has any affect upon legally withholding a witness's identity at an earlier 3.6 hearing.

There are any number of reasons the State may wish to avoid early revelation of the identity of an informant. Perhaps the informant is undercover and early revelation of his or her identity would endanger his or her life. Perhaps the informant is a private citizen who fears reprisal and needs to be assured that the State will not reveal his or her identity until and unless absolutely necessary. Among the important policies served by the so-called “informer’s privilege” is “the free flow of information to law enforcement.” State v. Stansbury, 64 Wash.App. 601, 604, 825 P.2d 347 (1992).

“Unquestionably, the State has a legitimate interest in protecting confidential informants. State v. Casal, 103 Wash.2d 812, 815, 699 P.2d 1234 (1985); see also Roviario v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (acknowledging the importance of both criminal discovery and confidential informants and setting forth procedures for protecting both).” State v. Moen, 150 Wash.2d 221, 231, 76 P.3d 721 (2003).

The interpretation of CrR 4.7(f)(2) urged by Waldeck is counterintuitive, contra-logical, and does not address any of the important policies that brought the rule about. This court should not follow such an interpretation.

So we move on to Waldeck's next contention:

2. "In the case at bar, the trial court abused its discretion when it failed to perform any type of balancing test when the defense asked the two police officers to identify the informant."

This argument appears to spring from the remarks in Roviaro, supra, that the judge balances competing policies in determining whether an informant's identity should be disclosed. But neither Roviaro nor its progeny in this state require a detailed, on-the-record review of a list of factors in the manner of, say, State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Waldeck cites no precedent to such effect.

Appellant does not deny that there was argument on the question whether to disclose Savant's identity at the 3.6 hearing. RP of 6/7/10, 16-17. At that argument, the only grounds on which the defense urged disclosure were, "it makes it impossible for us to, one, verify Detective Balch's statements as to what he was advised by this third party, but also for us to independently evaluate the credibility of this third party. Mr. -- or Detective Balch includes in his report that this person is, you know, a known person of a certain character worthy of believability but it's kind of self-serving when you're drafting a Warrant [sic] to say that about an individual. It would be nice if we could verify that this person even exists." Id. This is the exact sort of argument that can only be characterized as "speculative" under Cleppe, supra. If it were possible to prevail with an argument of this type, there would for practical purposes be no "informant's privilege" and CrR 4.7(f)(2) would be a dead letter.

See, e.g., Atchley, supra, where, as here, the informant whose identity was kept secret was an unpaid citizen informant whose word “was not the sole basis for probable cause to issue the search warrant.” Atchley, 142 Wn.App. at 157. The Atchley court held that under those circumstances it was unnecessary for an in camera hearing to be held before the motion to disclose the informant was denied. As there, so here.

Note also that the trial court did not foreclose the possibility it would order disclosure if the issue was fleshed out more. Its response to the defense motion was that it would allow the defense “to ask some more general questions,” but would not grant the motion for disclosure “at this time.” RP of 6/7/10, 17. This is not the response of a trial court that failed to exercise its discretion. It is the response of a trial court that had weighed the evidence disclosed at the hearing thus far – which turned out to be all the evidence there was – and found it wanting.

On to Waldeck's final contention:

3. [T]here was a substantial difference between what [Savant] actually told the officer (that the passenger had opened the door and discarded trash) and what the officer put in the affidavit (that the informant told him that "they," meaning the driver and the passenger, had discarded the containers with drugs in them. Thus, while the defense did not provide an affidavit putting the officer's statements in the affidavit in question, the trial testimony of the informant did put the officer's statements in the affidavit in question." [Lack of closing parenthesis in original.]

This argument is based on selective citation to the record and contorted interpretation of what is cited. What it should be based on, for starters, would be any citation to authority. No authority is cited. Another useful basis would be citation to the record. But the above recitation of Waldeck's argument is complete and lacks citation to the record. This means the State had to hunt through the affidavit for search warrant, the 3.6 hearing, and the records of trial in an attempt to determine from which of these sources Waldeck draws inspiration for each assertion.

We can start here. Waldeck claims in his brief that Savant “actually told the officer... that the passenger had opened the door and discarded trash.” Brief of Appellant, 19. But, this is false. Savant testified, “I observed a [sic] eastbound white vehicle come around the curb at me and the passenger door come open and some articles were tossed out of the vehicle.” RP 47. He did say, “I figured they were dumping trash.” Id. But he described what he told the officer as follows: “I turned around and come back and made contact with -- with Officer Balch and told him that they had tossed items out of the vehicle back down the road to the west.” RP 48. In other words, Waldeck takes Savant’s statement about what he at first thought was happening and confuses Savant’s initial impression with both (a) what Savant told the officer, and (b) reality.

Next, Waldeck would have us believe that when the Affidavit for Search Warrant says that the people in the car dumped items out of the passenger side while their vehicle was in motion, what the

affiant must have meant was that all of the occupants of the car were in the passenger seat on the passenger side. But “Search warrants are to be tested and interpreted in a common sense, practical manner, rather than in a hypertechnical sense. See United States v. Turner, 770 F.2d 1508, 1510 (9th Cir.1985), cert. denied, 475 U.S. 1026, 106 S.Ct. 1224, 89 L.Ed.2d 334 (1986).” State v. Perrone, 119 Wash. 2d 538, 549, 834 P.2d 611, 617 (1992). In his affidavit for search warrant, the officer states, “a local resident, and former law enforcement officer I know and used to work with, drove up to my location and told me that he had seen the people throw something from the passenger side of the car... just before I pulled them over.” Exhibit A. Any reading of those words that puts Waldeck in his passenger’s lap and nobody driving the car, is the most strained and hypertechnical interpretation it is possible to make.

Considering that the appellant misrepresented both what Savant said at trial and what the detective said Savant said in the affidavit, it is evident the appellant has not made even an initial showing that

there was a conflict between what was said at trial and what was said in the affidavit. Moving on from there, we get to the legal problem: the appellant has made no attempt whatsoever to argue, or to cite authority for, the proposition that when a search warrant affidavit is contradicted at trial, that retroactively invalidates the warrant. Even if Savant had flatly contradicted his reported statements in the search warrant, the appellant has made no showing that this has any legal consequence (other than to serve as fodder for cross-examination).

Without supporting argument or authority, “an appellant waives an assignment of error,” Bercier v. Kiga, 127 Wash.App. 809, 824, 103 P.3d 232 (2004), review denied, 155 Wash.2d 1015, 124 P.3d 304 (2005), 127 Wash.App. at 824, 103 P.3d 232 (citing Smith v. King, 106 Wash.2d 443, 451-52, 722 P.2d 796 (1986)); and “We need not consider arguments that are not developed in the briefs for which a party has not cited authority.” Bercier, 127 Wash.App. at 824, 103 P.3d 232 (citing State v. Dennison, 115 Wash.2d 609, 629, 801 P.2d 193 (1990)).

Collins v. Clark County Fire Dist. No. 5, 155 Wash. App. 48, 96, 231 P.3d 1211, 1236 (2010), as corrected on denial of reconsideration (Apr. 20, 2010).

Here, there is not even an assignment of error to accompany this factually baseless and legally unsupported argument. RAP 10.3(a)(4). This court should disregard it entirely.

2. Probable Cause Existed; Suppression is Inappropriate

Waldeck again confuses the reader with lack of adequate citation to the record, but the gravamen of his argument seems to be set out in his brief at 22: “In the case at bar, Deputy Balch’s affidavit set out the fact that the officer smelled cut marijuana from inside the passenger compartment of the vehicle. While this statement would normally be sufficient to establish probable cause to believe that there was cut marijuana in the car, in the case at bar, it did not establish probable cause to believe that this was a crime since the

deputy knew that the defendant had a Washington State Medical Authorization Card to possess and use marijuana.”

First, the idea that a medical marijuana card negates probable cause for a search warrant was specifically and exhaustively debunked in State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010). What merit appellant’s argument may ever have had, it lost a year and a half ago.

Even had they not foundered on the law, appellant’s arguments would have foundered on the facts. First, he is incorrect about which officer had any knowledge of a marijuana card. It was Deputy Howell, not Detective Balch. RP of 6/7/10 (3.6 hearing), 34-35. More importantly, however, the testimony Deputy Howell gave was that Waldeck “very possibly” had a medical marijuana card. Id. In the absence of actual knowledge there was a medical marijuana card (and with it being undisputed that no one showed such a card at the scene), and with the additional information that

the occupants of the vehicle had suspiciously dumped items as they were being pulled over, it is hard to conceive of any court determining that the magistrate here erred in finding probable cause for a warrant even if the Fry case had been decided the reverse of the way it actually was. Doubts are, after all, to be resolved in favor of the warrant. State v. Chenoweth, 127 Wash. App. 444, 455, 111 P.3d 1217, 1223 (2005) aff'd, 160 Wash. 2d 454, 158 P.3d 595 (2007).

The appellant himself cedes, supra, that only the issue of the possible medical marijuana card stands in the way of a determination of probable cause. But even in the absence of Fry, supra, it is well established that the possibility a person is innocent of crime is not an impediment to a probable cause determination. “[P]robable cause is not negated merely because it is possible to imagine an innocent explanation for observed activities...” State v. Fore, 56 Wash. App. 339, 344, 783 P.2d 626, 629 (1989).

This analysis also answers appellant's argument that since items were dumped from the car, there was no probable cause to search the car, which appellant states as follows: "The conclusion to be drawn... is that the only drugs present in the car were those drugs in the passenger's possession and that he had abandoned those drugs... In addition, the fact that the drugs were in containers indicates that the defendant was unaware that this passenger was even possessing the drugs." Appellant's Brief, 23. It is nice of the appellant to tell us what conclusion to draw, but what we are supposed to be doing is deferring to the magistrate, not the appellant. State v. Neth, 165 Wash. 2d 177, 182, 196 P.3d 658, 661 (2008). In that spirit, we should also remember that

Probable cause requires more than suspicion or conjecture, but it does not require certainty. Good reason for the issuance of a search warrant does not necessarily mean proof of criminal activity but merely probable cause to believe it may have occurred.

State v. Chenoweth, 160 Wash. 2d 454, 476, 158 P.3d 595, 606 (2007) (citations omitted).

It would not hurt to also remember that what appellant claims is the only and inescapable conclusion – that all contraband had left the automobile – turned out to be entirely wrong. The search warrant bore fruit, the appellant was arrested, convicted, and now appeals. This puts a damper on the appellant’s assessment of probabilities.

3. So-Called Omitted Facts are Products of Reification

Appellant restates his claims that there was irrefutable proof he had a medical marijuana card and that the officers said he was sitting in his passenger’s lap throwing things out the window while his vehicle was in motion with no one driving; this time in the context of “material omissions” from the search warrant. As noted supra, these claims cannot survive an objective reading of the record. Actual testimony was that it was possible appellant had a medical marijuana card, and a fair reading of the record does not bear out

the physics- and topology-straining interpretation that appellant attempts to stamp onto the officers' statements.

4. Unwitting Possession Instruction

To back up the claim that Waldeck was entitled to an instruction on unwitting possession in that Waldeck did not know what he possessed, his brief states that he elicited testimony that he had “just purchased” the car in the trunk of which the drugs were found. Appellant’s Brief, 28. He does not cite to the record to support this allegation. Instead, he hints that the information came through cross-examination of a police officer. *Id.* But the only information the State can find in cross-examination regarding the length of time Waldeck possessed the vehicle comes from Detective Mike Balch, who said, “The only -- the only objective information I have [regarding the length of time Waldeck had the vehicle]is the release of interest in the vehicle document that was

signed back in November of '09. I talked to [Waldeck]. He said he was purchasing but had not totally boughten [sic] the vehicle.” RP 40-41. Since the stop occurred on February 18, 2010, Waldeck had likely had the vehicle any amount of time from two and a half to three and a half months – plenty long enough to be held accountable for something in the trunk. So, again, the appellant’s argument is built upon an unsound factual basis.

Appellant goes on to claim, without argument or citation to authority, that because this is what is colloquially known as a “residue case,” he is automatically entitled to an unwitting possession instruction on the grounds he did not appreciate the nature of the substance. Appellant’s Brief, 28.

The court need take no notice of argument by fiat. Collins v. Clark County Fire Dist. No. 5, supra. But if it does, the court should take into account the full factual context. Scales with dust on them was not all the evidence against Waldeck. He had a syringe in his

pocket when arrested. RP 37. Syringes were found in the case that had been thrown from his car, along with traditional heroin fixings: baggies with crystal powder, digital scales with residue, a spoon with a cotton ball. RP 56, 72. Items matching those thrown from his car were found in the trunk of his car – Hide-A-Cans; a case that was the same design as the case in his trunk. RP 18, 38.

This court reviews a challenge to a trial court's refusal to give a jury instruction for abuse of discretion. Stiley v. Block, 130 Wash.2d 486, 498, 925 P.2d 194 (1996); State v. Winings, 126 Wash.App. 75, 86, 107 P.3d 141 (2005). Unwitting possession must be proved by a preponderance of the evidence. State v. Balzer, 91 Wash.App. 44, 67, 954 P.2d 931 (1998). A defendant in a criminal case is “entitled to have the trial court instruct upon its theory of the case if there is evidence to support the theory.” State v. Hughes, 106 Wash.2d 176, 191, 721 P.2d 902 (1986). A trial court errs by not instructing the jury on the defense of unwitting possession only when evidence supporting the defense

is adduced at trial. State v. May, 100 Wash.App. 478, 482-83, 997 P.2d 956 (2000).

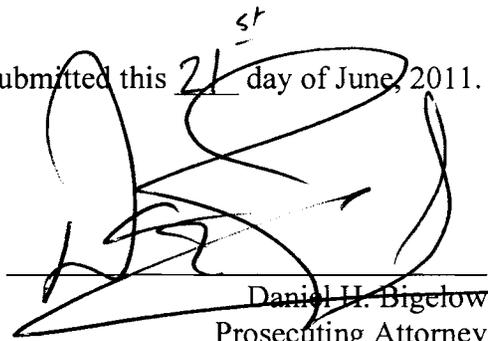
Under these circumstances, with the defendant so well connected through physical evidence to drugs and the digital scales, it was well within the discretion of the trial court to determine that he had not advanced sufficient evidence that he did not know the powder on the scales was a drug: certainly not with the scanty argument suggested by the appellant, without citation to authority, that since the quantity of drugs was small, he was entitled to an instruction as a matter of course. Considering the months Waldeck had the automobile, it was generous of the court to have found sufficient evidence to give any unwitting possession instruction.

V. CONCLUSION

Appellant's search and seizure arguments are defeated by a cursory reading of the record herein. He has proved neither error nor

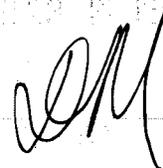
prejudice in either his claim of instructional error or his claim that Savant's testimony at trial retroactively made the concealment of his identity at the suppression hearing illegal. The trial court herein did not err, and David Waldeck was properly convicted.

Respectfully submitted this 21st day of June, 2011.

A handwritten signature in black ink, appearing to read 'D. Bigelow', is written over a horizontal line. The signature is stylized and somewhat illegible.

Daniel H. Bigelow
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CERTIFICATE

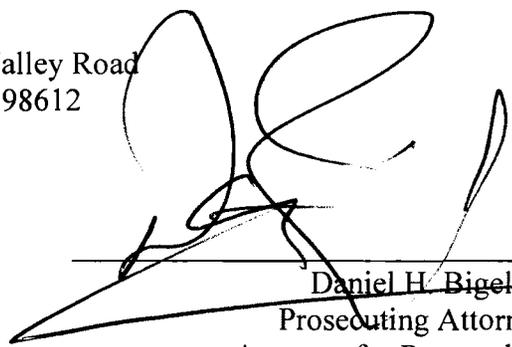
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I certify that I mailed a copy of the foregoing Respondent's Brief to the following addresses, postage prepaid , on June 21st, 2011.

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