

No. 41934-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONOVAN HERTWIG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary Tabor, Judge
The Honorable Christine Pomeroy, Judge
Cause No. 10-1-00823-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the affidavit for the telephonic search warrant sufficiently established the credibility of the person providing the information and provided the basis for that person's knowledge.

2. Whether the officer obtaining the search warrant intentionally or recklessly excluded material information which undermines the finding of probable cause.

3. Whether defense counsel was ineffective for failing to argue to the court that the affidavit for the search warrant recklessly or intentionally omitted material facts or contained inaccuracies.

4. Whether Officer Haggerty's stop of Hertwig in his truck was a pretextual traffic stop.

5. Whether the court properly admitted evidence of Hertwig's prior drug convictions as impeachment evidence under ER 609.

6. Whether statements of the confidential informant, who did not testify, were hearsay statements which implicate the Confrontation Clause.

B. STATEMENT OF THE CASE.

The State accepts Hertwig's statement of the substantive and procedural facts, with clarifications that will be made in the argument section of this brief.

C. ARGUMENT.

1. Janice Carr was an informant because she was a participant in the crime. The affidavit provided an adequate basis for the issuing judge to assess her credibility and the basis for the information she provided.

A search warrant must be based upon probable cause, which is defined as “the existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a man of ordinary caution to believe the accused is guilty of the indicated crime. It is only the probability of criminal activity and not a prima facie showing of it which governs the standard of probable cause.” State v. Clark, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001) (citing to State v. Seagull, 95 Wn.2d 898, 906-07, 632 P.2d 44 (1981)). The issuing magistrate may draw reasonable inferences from the facts set forth in the affidavit, and his or her determination is given great deference. Clark, 143 Wn.2d at 748. The magistrate’s decision will be reversed only on a showing of abuse of discretion. The affidavit for the search warrant is to be read in a commonsense manner, and any doubts should be resolved in favor of the warrant. Id. A search warrant is entitled to a presumption of validity. State v. Wolken, 103 Wn.2d 823, 827-28, 700 P.2d 319 (1985). It is a “deliberately deferential” standard of review. State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

Probable cause may be based upon evidence that would be inadmissible at trial, such as hearsay, a confidential informant’s tip,

or other “unsrutinized” evidence. Chenoweth, 160 Wn.2d at 475. Probable cause is more than suspicion or speculation, but less than certainty. Id. at 476.

The United States Supreme Court, in Illinois v. Gates, 103 S. Ct. 2317, ___ U.S. ___, 76 L. Ed. 2d 527 (1983), adopted a “totality of the circumstances” test to evaluate the basis for a search warrant under the Fourth Amendment. The Washington Supreme Court declined to apply that test and found that article 1, § 7 of the Washington constitution requires that this state adhere to the *Aguilar-Spinelli*¹ test abandoned in Gates. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984). The *Aguilar-Spinelli* test requires that the affidavit for a search warrant provide information by which the issuing magistrate can evaluate the credibility of the informant as well as the facts and circumstances on which the informant bases his information, commonly referred to as the veracity prong of the test and the basis of knowledge prong. Even if the information cannot pass either of the two prongs of the *Aguilar-Spinelli* test, probable cause may be established by independent police investigation which corroborates the information

¹ Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964); Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969).

sufficiently to supply the missing elements of the *Aguilar-Spinelli* test. Jackson, 102 Wn.2d at 437-38.

In Hertwig's case, the search warrant was obtained telephonically and is contained in the transcript of Officer Haggerty's oral application to Judge Pomeroy, which Hertwig has attached to his opening brief as Appendix A.

The term "informant" is used in two ways—to refer to any person who provides any information, and to a person such as CI 311 in this case, who acts as an agent for the police and is called a confidential informant. Hertwig has not challenged the information provided by CI 311, only that provided by Janice Carr.

a. Carr's credibility.

Hertwig argues that Carr was a drug dealer, not a citizen informant, and thus cannot be considered presumptively credible. He maintains that Officer Haggerty did not provide enough information for Judge Pomeroy to be able to assess her credibility. Appellant's Opening Brief at 24-26. On the contrary, the affidavit supplied more than sufficient information to assess credibility.

These facts were before the judge issuing the search warrant: the police were working with a confidential informant, identified as Number 311, to buy methamphetamine. CI 311 was

given pre-recorded buy money, searched thoroughly, and he then went to the Grand Mound park and ride. Appellant's Appendix A at 2-3. Carr met CI 311 at the park and ride; she made phone calls to Hertwig. She drove to Hertwig's residence and drove back to the park and ride, where she was "taken down." Carr was seen by officers driving into Hertwig's property and followed back to the park and ride. She was searched and methamphetamine was found in her possession. Also in her possession was pre-recorded money. Carr was advised of her *Miranda*² warnings and she gave a tape-recorded statement explaining that she had purchased the meth from Hertwig and sold it to CI 311. Appendix A at 3-4. While all these people were still at the park and ride, a dark colored, lowered truck that was seen by Officer Malloy leaving Hertwig's residence drove by. Haggerty stopped it and identified Hertwig as the driver. Hertwig was taken to the park and ride, where he was arrested after Carr gave her statement. He was searched and in his pocket was found pre-recorded buy money. Carr told Haggerty she had purchased the meth from Hertwig, and that he went to an outbuilding to obtain it. Appendix A at 4-5.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

Hertwig claims that the affidavit “obscures and minimizes” the fact that Carr was arrested. Appellant’s Opening Brief at 24. It is difficult to believe that a judge would not understand that Carr had been arrested when told that she had been “taken down,” searched, given *Miranda* warnings, and then she had given a statement incriminating herself. Even if these facts do not explicitly demonstrate that Carr was arrested, they certainly permit the reasonable inference that she was. Clark, 143 Wn.2d at 748. Contrary to Hertwig’s claim, there is nothing in this affidavit that leads to the conclusion that Carr was working for the police.

Hertwig argues that there is no explanation about how Carr came into contact with CI 311. However, the affidavit contains the information that CI 311 was given pre-recorded money to buy meth, he was met by Carr, Carr made telephone calls to Hertwig, Carr left the park and ride, drove to Hertwig’s residence, and returned with meth and some of the buy money. It’s unlikely a judge would be naïve enough not to understand that Carr was the target of CI 311’s activities.

Carr admitted to buying the meth from Hertwig and returning to the park and ride with the intent of selling it to CI 311. Appendix A at 3-4. An admission against penal interest by a named

informant is sufficient to establish veracity. State v. O'Connor, 39 Wn. App. 113, 120, 692 P.2d 208 (1984) (citing to State v. Hett, 31 Wn. App. 849, 852, 644 P.2d 1187, *review denied* 97 Wn.2d 1027 (1982)).

“[E]ven if nothing is known about the informant, the facts and circumstances under which the information is furnished may reasonably support an inference that the informant is telling the truth.” [State v. Lair, 95 Wn.2d 706, 711, 630 P.2d 427 (1981)] Thus, although corroboration may be a factor in the veracity determination, Washington courts have never considered it a prerequisite to a reasonable inference of truthfulness. See State v. Patterson, 83 Wn. 2d 49, 56, 515 P.2d 496 (1973).

O'Connor, 39 Wn. App. at 120. The fact that the informant is named makes her more reliable because she has reason to think her admission will be used against her. Id. The fact that Carr was under arrest, and, as argued above, the judge would clearly have understood her status, weighs in favor of finding her credible. A person who knows the police have evidence to charge her with a crime “will not lightly undertake to divert the police down blind alleys.” Id. at 121.

A victim of a crime is considered reliable when giving information about it because he is an “eye-witness” to that crime. United States v. Maher, 442 F.2d 1172, 1174-75, (9th Cir., 1971).

Here Carr was as much an eye-witness as a victim would be, and that fact weighs in favor of finding her credible.

In addition, Haggerty was able to give the judge information about the police investigation which corroborated Carr's statements. She could be believed about buying the meth from Hertwig because officers saw her drive onto his property and leave again. She was followed to the park and ride. When searched, she had meth and some buy money in her possession. Hertwig had more of the pre-recorded buy money. If she had claimed to have obtained the meth from some other person, *that* would have triggered credibility concerns.

Hertwig cites to Maher for the argument that because Carr was not a "true citizen informant" the specificity of her information could not support her reliability. Appellant's Opening Brief at 25. In Maher, the informants were the victim and another identified woman who had personal knowledge of the crime. While the court discussed the specificity of the information as a basis for reliability, nowhere does it even suggest that a person who is not a "true citizen informant" must be of suspect reliability no matter how specific his information. Maher, 442 F.2d at 1174-75.

b. Basis of Carr's knowledge.

Much of the above argument and authorities apply to Hertwig's claim that there is nothing in the affidavit to establish Carr had first-hand knowledge of Hertwig or the location of methamphetamines and marijuana on his property. Appellant's Opening Brief at 26. A plain reading of the affidavit shows otherwise. Carr met with CI 311 and made some phone calls to Hertwig. Carr's vehicle was observed driving to Hertwig's residence and she was followed when she returned to the park and ride. She was searched and meth was recovered from her. She had buy money in her purse. When Hertwig was arrested, he had some of the buy money in his pocket. Carr told Haggerty that she had driven to Hertwig's house and bought meth from him, and that he went to an out building next to the house to get the meth. Because Carr spoke on the phone to Hertwig and personally obtained the meth from him, it is obvious that she had first-hand knowledge about him as pertains to the charges against him, and that information was corroborated by the independent observations of the officers.

Carr's statements are far more than the "bare allegation" that was found insufficient in Jackson, 102 Wn.2d at 444. But even if

they were insufficient, the other information obtained by the officers corroborated what she told them. “Even though the informant’s tip fails to satisfy the basis of knowledge prong, probable cause may yet be established by independent police investigatory work that corroborates the tip to such an extent that it supports the missing element.” Id. at 445. The affidavit in this case included the information that Carr had made a series of phone calls to Hertwig, she drove to his house, she drove back to the park and ride, and was caught with pre-recorded buy money and meth, the very substance the police were expecting her to obtain. Finding the pre-recorded buy money in Hertwig’s pocket further corroborated that Carr knew what she was talking about.

Hertwig maintains that Carr did not buy the meth at the direction of the police or confirm that Hertwig interacted with her. Appellant’s Opening Brief at 28. His position apparently is that a search warrant may be issued only upon proof beyond a reasonable doubt. That is not the standard. “Probable cause requires more than suspicion or conjecture, but it does not require certainty.” Chenoweth, 160 Wn.2d at 476. Chenoweth, in discussing the standard to be applied when information in the affidavit is incorrect or missing, referred to a “catch-22 situation for

the police: requiring police to thoroughly investigate the accuracy of an affidavit, a feat impossible to do without a warrant.” Id.

Hertwig argues that the police investigation in his case merely corroborated “public or innocuous facts” and cites to Jackson. Appellant’s Opening Brief at 30. However, watching Carr drive to Hertwig’s house and return to the park and ride, finding meth and buy money in her possession and buy money in Hertwig’s pocket, are hardly innocuous facts, given that these things occurred while a pre-arranged drug deal was being conducted by CI 311.

The affidavit in this case provided ample information from which the judge could reasonably find probable cause to search Hertwig’s residence and out buildings. There was no abuse of discretion.

2. There were no omissions from the affidavit for the search warrant which negated Carr’s credibility. Probable cause was established.

Hertwig argues that because Haggerty did not tell the issuing judge that Carr had cooperated with the police in order to obtain favorable treatment, this was an intentional or reckless omission which undermined the finding of probable cause. He is wrong for several reasons.

In Chenoweth, 160 Wn.2d 454, the Supreme Court discussed extensively the issue of omissions or inaccuracies in the affidavit for a search warrant. In that case, a named informant called the Lynden Police Department and reported that Chenoweth was operating a methamphetamine lab and gave an address. A detective from the drug task force contacted the informant, who gave further information. A telephonic search warrant was obtained. Id. at 458-59. The judge was told that the informant had a conviction for delivery of a drug. It was later learned that the informant had convictions for several crimes of dishonesty, had been a paid informant for another police department but was no longer used because of concerns about his reliability, had made unsubstantiated allegations that his attorney accepted cocaine as payment for services, was angry with Chenoweth for failing to return his car and wanted the police to help him retrieve it, expected to be paid for his information about Chenoweth, and the prosecutor who assisted in obtaining the search warrant had, four years before, charged him with intimidating a witness. Id. at 460-61.

After conducting hearings on these allegations, the trial court found that had the judge known these facts he would not have

found probable cause. However, because the police and the prosecutor had not acted recklessly, Chenoweth's motion to suppress was denied. That decision was affirmed by the Court of Appeals and the Supreme Court. Id. at 458, 461.

Under the Fourth amendment, a defendant must establish that omissions or inaccuracies are both material and made in reckless disregard for the truth. Id. at 462, citing to Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed 2d 667 (1978) and State v. Cord, 103 Wn.2d 361, 366-67, 693 P.2d 81 (1985). "A showing of mere negligence or inadvertence is insufficient." Chenoweth, 160 Wn.2d at 462.

The Chenoweth court exhaustively examined the application of article 1, § 7 of the Washington constitution to omissions or inaccuracies in an affidavit for a search warrant, and reached the same result. "[O]nly material falsehoods or omissions made recklessly or intentionally will invalidate a search warrant." Chenoweth, 160 Wn.2d at 478-79. Washington courts have consistently applied the standard set forth in Franks. Id. at 470. Chenoweth had argued for a negligence standard, rather than recklessness or intent, but the court had this to say:

A tolerance for inaccuracy is inherent to the concept of probable cause. Probable cause may be based on hearsay, a confidential informant's tip, and other unscrutinized evidence that would be inadmissible at trial. . . . A negligence standard goes too far in requiring police to assure the accuracy of information presented and is inconsistent with the concept of probable cause, which requires not certainty but only sufficient facts and circumstances to justify a reasonable belief that evidence of criminal activity will be found. . . . In evaluating whether probable cause supports the search warrant, the focus is on what was known at the time the warrant issued, not what was learned afterward. . . . The fact that the affiant's information later turns out to be inaccurate or even false is of no consequence if the affiant had reason to believe those facts were true. . . . [I]nsistence on the accuracy of an affidavit poses a catch-22 situation for police; requiring police to thoroughly investigate the accuracy of an affidavit, a feat impossible to do without a warrant. . . .

Id. at 475-47, internal cites omitted.

Hertwig maintains that Carr was cooperating with the police in order to obtain favorable treatment, thus making her a "citizen informant." Appellant's Opening Brief at 37-38. Based upon what Haggerty knew at the time he sought the search warrant, that is certainly not the case, and even adding in information obtained later, it still is not true.

Haggerty had never spoken with Carr before June 1, 2010. [03/07/11 RP 29] CI 311 had told him that Carr was willing to facilitate a buy of meth from Hertwig. [03/07/11 RP 9-10] After she

was arrested at the park and ride, Haggerty asked for her cooperation and told her he would ask for consideration at her trial, and that the police had been known to use informants based on prior arrests. He told her he could get this on her side. [03/07/11 RP 32, 34] Carr was not a "signed-up" informant and was told that if she cooperated Haggerty would perhaps put in a good word for her. She was arrested but not taken to jail, and charges against her were forwarded to the prosecutor's office. [03/07/11 RP 32, 46] She called Haggerty the next day and was told that charges would be forwarded to the prosecutor. She testified that he told her that if she cooperated things would be easier for her, but no specific promises were made. At the time she handed over the drugs to Haggerty at the park and ride, she did not know she would get immunity. [RP 121]³

It was not until Carr took the witness stand on March 14, 2011, that the prosecutor granted her immunity from charges pertaining to the purchase of meth from Hertwig. [RP 98-101] There is no evidence whatsoever that on the evening of June 1, 2010, at 11:43 p.m., when Haggerty made his affidavit to the judge, that Carr was cooperating in exchange for leniency regarding her

³ Unless another date is given, references to the verbatim report of proceedings are to the four-volume trial transcript of March 14-17, 21, and 28.

own charges. In fact, she had not told them anything that they had not observed themselves, or could reasonably infer from what they observed.

By no stretch of the imagination can Carr be considered a professional informant working off charges by providing information. It is not surprising that Haggerty did not mention her cooperation to the judge because so far there hadn't been any, there had been no promises, and, in fact, the tenor of the conversation referred to above would seem to indicate Haggerty was thinking in terms of Carr assisting in future drug deals, not handing over Hertwig as the supplier of the drugs she had purchased. Everybody already knew that. Even if the judge had known that Haggerty had made statements that he would put in a good word for Carr if she cooperated, it would have made no difference to the determination of probable cause. The evidence that was presented was so strong that knowing Carr was cooperative would have added nor subtracted nothing.

Hertwig argues that Carr would have said anything, true or not, that she thought would help her, especially if it would implicate someone else. Appellant's Opening Brief at 39-40. That might be true if she were offering the name of someone not already a

suspect, if the officers had not watched her drive to Hertwig's house and back, if there were not pre-recorded buy money in Hertwig's pocket. But Carr told them nothing that they could not readily corroborate, as argued at length in the prior section of this brief.

Finally, courts have disagreed that a person caught committing a crime is likely to falsely implicate others to deflect attention from himself. The court in O'Connor quoted 1 W. LaFave, *Search and Seizure* § 3.3 at 528-29 (1978) for the following:

[O]ne who knows the police are already in a position to charge him with a serious crime will not lightly undertake to divert the police down blind alleys. Thus, where the circumstances fairly suggest that the informant 'well knew that any discrepancies in his story might go hard with him,' that is a reason for finding the information reliable. In such a situation, it is the "clearly apprehended threat of dire police retaliation should he not produce accurately" more so than the admission of criminal conduct which produces the requisite indicia of reliability.

O'Connor, 39 Wn. App. at 121. "Thus, the reliability attached to admissions against penal interest may be greater in post-arrest situations because the arrestee admitting the crime risks disfavor with the prosecution if he lies." Id. Contrary to Hertwig's assertions, Carr's position as an arrested criminal weighs more in favor of her credibility than against it.

Further, as argued above, the judge could not have failed to understand that Carr had been arrested. A judge can certainly be presumed to know that a person who has been “taken down,” searched, and given *Miranda* warnings is under arrest.

a. Lack of Findings of Fact and Conclusions of Law.

Following a suppression hearing, a court is directed to enter written findings of fact and conclusions of law. CrR 3.6(b). In this case, findings and conclusions were not entered. Hertwig relies primarily on State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998), for his argument that without such findings and conclusions an appellate court cannot review the issues presented. Appellant’s Opening Brief at 41. However, Head dealt with CrR 6.1(d), which requires findings and conclusions to be entered following a bench trial. In that case it is true that the oral opinion is not binding, Id. at 622, but a verdict is substantially different than an interlocutory ruling on the admissibility of evidence. The court in Head found that the appropriate remedy for a violation of CrR 6.1(d) was remand for entry of findings and conclusions. Id. at 624. Reversal is appropriate only where the defendant can show prejudice. Id.

The issue in Hertwig’s case is a violation of CrR 3.6(b). Reviewing courts have found the failure to enter findings and

conclusions, either timely or at all, to be reversible error only when the record is otherwise unclear or the defendant is in some way prejudiced. Findings and conclusions were not entered until some time after trial in State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991). There the court said that “while adherence to the requirements of CrR 3.6 is the safest course, the purpose of CrR 3.6 is to have a record made and that purpose has been served here.” Id. at 95. In State v. Smith, 68 Wn. App. 201, 842 P.2d 494 (1992), the court reversed the conviction because there were no written findings and conclusions, and the record was too confusing for the reviewing court to be sure what the trial court had found. Id. at 208. In State v. Cruz, 88 Wn. App. 905, 946 P.2d 1229 (1997), the record was also insufficient to permit review. Id. at 908. A late entry of findings and conclusions was held not to be error in State v. Nelson, 74 Wn. App. 380, 393, 874 P.2d 170 (1994).

A number of cases have held that as long as the record is adequate for review, the failure to enter findings and conclusions at all is not grounds for reversal. See State v. Stock, 44 Wn. App. 467, 477, 722 P.2d 1330 (1986) (The trial court gave its reasons on the record and Stock was not prejudiced.); State v. Smith, 67 Wn. App. 81, 87, 834 P.2d 26 (1992), *overruled in part on other*

grounds, State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011) (The trial court's oral decision was more than adequate to permit review of its rulings and the error was harmless.); State v. Apodaca, 67 Wn. App. 736, 739, 839 P.2d 352 (1992), *overruled in part on other grounds*, State v. Mierz, 72 Wn. App. 783, 866 P.2d 65 (1994) ("Because the court's oral opinion is comprehensive, we do not remand for entry of findings."); State v. Pulido, 68 Wn. App. 59, 62-63, 841 P.2d 1251 (1992) (The claim was purely one of law and written findings and conclusions would be superfluous.); State v. Riley, 69 Wn. App. 349, 352-53, 848 P.2d 1288 (1993) (Failure to enter findings and conclusions is harmless error where the trial court's oral findings are adequate to permit review.); State v. Smith, 76 Wn. App. 9, 17, 882 P.2d 190 (1994) (Failure to enter written findings and conclusions pursuant to CrR 3.6 is harmless error if the record is so clear that entering the findings and conclusions would be a "mere formality.")

In Hertwig's case, the oral ruling of the court was very clear. [03/07/11 RP 58-65] Any written findings and conclusions entered at this stage of the proceedings will obviously have to be made from that oral ruling, and thus not only would written findings and conclusions be identical to the record already before this court, but

the defendant is not prejudiced because they would be identical. Any error in failing to enter written findings of fact and conclusions of law is harmless.

3. Defense counsel was not ineffective for failing to argue to the trial court that the affidavit for the search warrant contained reckless or intentional errors or omissions of material facts. There was no basis for such an argument and it is not ineffective assistance of counsel to fail to make an incorrect argument.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). First, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 090, 639 P.2d 737 (1982).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure

defense counsel functions in a manner “as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which “make[s] the adversarial testing process work in the particular case.” Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Second, prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to

address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first].” Strickland, 466 U.S. at 697.

It is not ineffective counsel to refuse to present a defense not warranted by demonstrable facts. State v. Lottie, 31 Wn. App. 651, 655, 644 P.2d 707, 710 (1982).

Because there were no reckless or intentional errors or omissions in the affidavit for the search warrant, there was no basis upon which to seek a hearing as described in Franks v. Delaware. It is apparent from the record that defense counsel conducted a thorough and vigorous defense, and that if he thought a Franks hearing was appropriate he would have sought one. Even had counsel brought a Franks motion it would have been denied, and therefore Hertwig was not prejudiced by his failure to do so. Counsel was not ineffective.

4. Officer Haggerty did not make a traffic stop of Hertwig, and therefore it cannot be pretextual. Haggerty stopped him for investigation of unlawful delivery of a controlled substance, not for any traffic

infraction or crime other than that for which he was arrested.

Hertwig fills several pages of his brief with argument that Haggerty conducted a pretext stop when he stopped the truck Hertwig was driving and which passed the park and ride where the arrest of Carr was occurring. He cites to many cases which hold that an officer may not make a stop for a traffic violation when the real reason for the stop is to investigate some crime or obtain some information about the defendant. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999), is the most often cited case. The State has no dispute with the law as Hertwig presents it.

The State does dispute that Haggerty made a traffic stop, if that term is defined as pulling over a vehicle which has committed some sort of traffic violation. He never claimed that he did. At the suppression hearing, Haggerty testified that he was at the park and ride with Carr, who told him that she had purchased the meth from Hertwig. Malloy advised him that an older model, lowered Chevy truck with a loud exhaust, registered to Hertwig, had left the Hertwig residence headed toward the park and ride. Haggerty saw it drive past. He got in his unmarked police car, pulled in behind the truck, and conducted a traffic stop by activating the emergency lights on

his car. Haggerty identified Hertwig, had him step from the truck, handcuffed him, and advised him he was being detained on suspicion of delivery of meth. [03/07/11 RP 20-21]

At trial, Haggerty testified that when Carr returned to the park and ride from Hertwig's house, she was arrested and handcuffed. While Haggerty was speaking with her, Malloy advised that a lowered truck was leaving Hertwig's driveway. Haggerty knew Hertwig owned a dark colored '79 Chevy, and when he saw the truck drive by the park and ride, Haggerty got in his unmarked patrol vehicle, followed the truck, activated his emergency lights, and stopped the truck. Hertwig was driving. He was asked to step out of the truck and was told he was being detained on suspicion of delivery of a controlled substance. He was handcuffed and Haggerty took him back to the park and ride. [RP 91-95, 297-98]

Nowhere in any of his testimony did Haggerty say that he stopped Hertwig for any kind of traffic violation. Presumably he used the term "traffic stop" to mean he pulled over a moving vehicle using his emergency equipment. There is zero evidence that Haggerty saw a traffic violation, even though he saw a traffic violation, or stopped Hertwig for any reason other than he was suspected of selling methamphetamine to Carr. When a police

officer detains a person for investigation of a crime, and only for that reason, there is no pretextual stop.

Hertwig does not identify in his brief any pretext. He argues that the totality of the circumstances indicate Haggerty's motive was to investigate Carr's allegation that Hertwig sold her the meth. Appellant's Opening Brief at 52. He is exactly right. The officer would not have stopped the truck if he had not suspected Hertwig of selling meth to Carr. When an officer detains a person to investigate a crime it does not become a pretextual traffic stop just because the detention was made while the suspect was driving a vehicle.

This court has recently held in State v. Quezadas-Gomez, 40162-1-II (December 20, 2011), that this very situation does not constitute a pretext stop. In that case, the police officer stopped the vehicle the defendant was driving because he was a suspect in a drug delivery, and the police were unsure of his real name. The purpose of the stop was to determine his actual name. Probable cause to arrest already existed. The court held the stop to be legally justified.

Hertwig does not argue that Haggerty did not have a reasonable suspicion of criminal activity which would justify a *Terry*⁴ stop. None of the evidence or statements made by Hertwig should have been suppressed.

5. The trial court properly admitted evidence of Hertwig's prior drug convictions as impeachment evidence under ER 609. Even if this court finds the evidence should not have been admitted, it was harmless error.

Hertwig testified in his own defense. During the State's cross-examination, out of the presence of the jury, the trial court heard argument about the admissibility of Hertwig's prior drug convictions under ER 609. That rule permits evidence that a witness has been convicted of a felony within the last ten years (or less than ten years has elapsed since the witness was released from confinement for a felony), even if the conviction did not involve dishonesty or a false statement, as long as the court determines that the probative value of the evidence is outweighed by the prejudice to the party against whom it is offered. Here the court found the prior drug convictions to be probative and that the probative value outweighed the prejudicial effect. The court based

⁴ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)

that on Hertwig's testimony that he did not provide any drugs to Carr, they weren't his drugs, and they were his girlfriend's drugs. [RP 457, 458] The court found that the convictions were relevant, probative, and went to Hertwig's credibility. [RP 457-61]

The purpose of impeachment evidence is to give the jury information with which to evaluate a witness's credibility. "Prior convictions admitted under ER 609 must therefore have some relevance to the defendant's ability to tell the truth." State v. Calegar, 133 Wn.2d 718, 723, 947 P.2d 235 (1997). Obviously, when a defendant is denying possessing or delivering controlled substances, knowing that he had prior convictions for those same offenses helps the jury evaluate his credibility. While generally speaking prior convictions for drug offenses do not go to a person's general credibility, State v. Cochran, 102 Wn. App. 480, 486-87, 8 P.3d 313 (2000), under the circumstances in this case Hertwig's prior convictions did speak to his credibility about the crime for which he was on trial.

Hertwig cites extensively to State v. Hardy, 133 Wn.2d 701, 946 P.2d 1175 (1997), which held that evidence of prior drug convictions were inadmissible in that case. But Hardy was being tried for second degree robbery, and there was no evidence that

prior drug convictions were in any way relevant. Here Hertwig was on trial for the identical crime he was denying having committed. Those prior convictions very much speak to the credibility of his testimony.

a. Harmless error.

The trial court's rulings under ER 609 are reviewed for abuse of discretion. State v. Rivers, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996). If an appellate court finds error, it then reviews it under the nonconstitutional harmless error standard. Calegar, 133 Wn.2d at 727. That standard is whether, within reasonable probabilities, the outcome of the trial would have been different without the error. Id.

It is unlikely that the outcome of Hertwig's trial would have been different had the jury not known of his prior drug convictions. The evidence against him was very strong. When the police set up the controlled drug buy, Hertwig was a suspect. Before the actual buy, officers went to property neighboring that of Hertwig and observed the layout as much as possible, including obtaining maps of the area. [RP 52-55] They obtained photos of Hertwig and a list of vehicles registered to Hertwig at that address. [RP 54] The confidential informant, CI 311, was searched, including his vehicle,

and he was given \$245 of prerecorded buy money. [RP 66] Officers saw Carr arrive at the park and ride where CI 311 was waiting, and because the informant had a Bluetooth in his ear and kept his phone line open, Haggerty was able to hear everything that happened in CI 311's presence. [RP 71-72] Carr left the park and ride and was seen driving to Hertwig's residence, where she remained for several minutes. [RP 76-78] Haggerty followed her car back to the park and ride where CI 311 gave the prearranged signal that the drug deal was completed, and she was arrested. [RP 80-82] CI 311 turned over a blue cough drop bag containing another bag which held 3.5 grams of a substance that Haggerty recognized as methamphetamine. The inner bag was a two by three inch zip-lock baggie with a pattern of red lips on it. [RP 83] While the police were dealing with Carr and CI 311 at the park and ride, Haggerty was notified that a vehicle registered to Hertwig was leaving his residence. Haggerty saw it drive past the park and ride; he followed and stopped the vehicle. Hertwig was driving. [RP 92-93]

Hertwig was told he was being detained for investigation of delivery of a controlled substance, handcuffed, placed in Haggerty's patrol car, and taken to the park and ride. [RP 95] Carr identified

him as her supplier. [RP 160] Hertwig was placed under arrest and searched. In his pocket Haggerty found \$230 of the prerecorded buy money. [RP 160-162] Carr had \$15 of the buy money in her possession, as well as some meth and marijuana. [RP 118, 166] Hertwig told Haggerty that he had given Carr the marijuana, even though Carr had told Haggerty that he had not, and that he had one ounce of marijuana in the freezer in his shop and one ounce of meth on his workbench. [RP 120, 176-77].

Haggerty obtained a telephonic search warrant for Hertwig's house and out buildings. [RP 179] During that search officers found cash, ten oxycodone tablets, marijuana, and drug paraphernalia. The marijuana was packaged in a small zip-lock bag covered with red lips. [RP 188] Also located were a digital scale and more than 100 unused, empty zip-lock baggies with red lips on them. [RP 227] Haggerty testified that he did not recall ever seeing baggies like that and that they were very uncommon. [RP 197-98]

The evidence against Hertwig was so overwhelming that even if it were error to admit the evidence of his prior drug convictions, it was harmless.

6. Statements made by the confidential informant were not offered for the truth of the matter asserted, and therefore do not implicate the Confrontation Clause. Even if this court finds error, it was harmless.

During direct examination of Officer Haggerty, the prosecutor asked this question and received this answer:

Q: Describe how it was that you came to start an investigation, who you were working with, just kind of the general background of how you got this case started.

A: I was approached by a gentleman—we use the number in our reports CI 311. That gentleman came to me with some knowledge and some information about a person who he told me he could buy narcotics from.

[RP 44] Defense counsel objected and when the prosecutor asked to be heard, the jury was excused. The prosecutor explained he was not offering this testimony to prove the truth of the matter asserted but to explain how the investigation commenced. It was immaterial whether the information from the CI was true or not. [RP 45] His questions would be limited to the names the CI provided, and then Haggerty would explain how the investigation proceeded. [RP 46] The court found that it was not hearsay because it was offered only to explain why Haggerty focused on those two individuals. [RP 47] When the jury returned and testimony resumed, this exchange took place:

Q: Now, when you met with the confidential informant 311, I've referred to him as Justin, he gave you some information regarding targets of your investigation?

A: Yes.

Q: What were the names of the targets he gave you?

MR. BLAIR: Objection.

THE COURT: Overruled.

A: Janice Carr and Donovan.

Q: Did he have a last name?

A: At that time, no.

[RP 52-53]

Hertwig argues that this statement of the confidential informant is testimonial hearsay which violates the Confrontation Clause, and cites to, among other cases, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). However, statements that were not offered for the truth of the matter asserted are not hearsay, and the Crawford court specifically excluded them from a Confrontation Clause analysis. Crawford, 541 U.S. at 59 n. 9; State v. Moses, 129 Wn. App. 718, 732, 119 P.3d 906 (2005).

In State v. Mason, 127 Wn. App. 554, 126 P.3d 34 (2005), *affirmed on other grounds* 150 Wn.2d 910, 162 P.3d 396 (2007), the victim had made a number of statements to several people,

including police officers and a victim advocate, before he disappeared under circumstances indicating that he had been murdered. A detective who searched Mason's home related statements the victim had made to explain why he seized particular items—for example, the detective testified that he seized a roll of duct tape because the victim had told him that Mason had duct taped his ankles, wrists, and face. Id. at 565-66. The court held that it was not error to admit that testimony because it was not offered for the truth of the matter asserted. "In this context, the statements were not admitted so that [the victim] could bear witness against Mason." Id. at 566.

In the same way, the statement at issue here was not offered so that CI 311 could bear witness against Hertwig, but so that Haggerty could explain why he conducted his investigation the way that he did. The court did not err in permitting the statement.

Even if it were error, however, it would be harmless. An error under Crawford is subject to a constitutional harmless error analysis and is harmless if, beyond a reasonable doubt, the jury would have reached the same result had it not heard the disputed statement. Mason, 127 Wn. App. at 565. In this case it would be harmless for two reasons. One, as argued above, the evidence

was so overwhelming that the jury would have convicted even if they had not heard the names offered by CI 311. Second, had Haggerty simply testified that CI 311 contacted him and given him information, and then described his investigation, it would not take much imagination for the jurors to deduce that Hertwig and Carr were the people named by the confidential informant. Further, Carr's testimony led to that same conclusion. Because the challenged testimony did not provide any substantive evidence that would not have been otherwise before the jury, even if admitting it was error, it was harmless.

D. CONCLUSION.

For all the reasons argued above, the State respectfully asks this court to affirm Hertwig's convictions.

Respectfully submitted this 30 day of February, 2012.



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Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, on all parties or their counsel of record on the date below as follows:

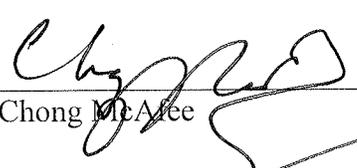
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(via e-file)

--AND--

PETER B. TILLER, ATTORNEY FOR APPELLANT
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 3d day of February, 2012, at Olympia, Washington.



Chong McAfee

THURSTON COUNTY PROSECUTOR

February 03, 2012 - 12:55 PM

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