

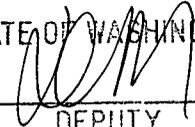
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No. 43409-1-II (Consolidated)

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

BY  DEPUTY

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STATE OF WASHINGTON, Appellant,

v.

LORENA KINNEY, Respondent,

and

DENNIS KINNEY, Respondent.

---

Appeal from the Superior Court of Pierce County  
The Honorable Judge Katherine M. Stolz

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**BRIEF OF RESPONDENT**

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**I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court abuse its discretion when it ordered disclosure of the informant's name and criminal history to counsel when the affiant's veracity had been questioned and the defense could not make a substantial showing that the affiant lied or acted recklessly without information about the confidential informant?
2. Did the trial court abuse its discretion when it ordered disclosure of the informant's name and criminal history to counsel where the confidential informant was a witness who was relevant, helpful and necessary for a fair determination of the case?
3. Did the trial court abuse its discretion by not holding an *in camera* review when there is no established procedure for determining whether to disclose an informant and no requirement that an *in camera* review be held prior to granting a defense request for disclosure?

**I. STATEMENT OF THE CASE**

1. Procedural Facts.

On June 6, 2011, the State charged Lorena Kinney, under cause number 11-1-02294-5, and Dennis Kinney, under cause number 11-1-

02295-3, with Unlawful Possession of a Controlled Substance with Intent to Deliver, Methamphetamine and Unlawful Manufacture of a Controlled Substance, Methamphetamine. (CP 1-2, 30-31).

On April 16, 2012, the court granted a motion to continue the trial date on each of these cases and ordered the State to make the CI available for an interview within two weeks. (CP 5, 35). The court discussed that the defendants were entitled to interview the CI because the CI had been in their home and seen things relevant to these charges, “According to [defense counsel], you know, the affidavit has referenced numerous times to the CI who has, apparently, been in their home and seen things, so they are entitled to interview this individual . . . .” (RP. 7).

On April 19, 2012, the State filed a written response, opposing disclosure of the CI. (CP 6-13, 36-43). On April 23, 2010, the trial court heard argument on the motions.

The State argued that there was no basis to order that the CI be disclosed. (RP. 11-14). The State also advised that it did not know where the CI was and had not had contact with the CI for over a year. (RP. 14).

At that time, defense counsel argued that they had evidence from their witnesses that the CI lied, or that the statements attributed to the CI in the affidavit were not truthful, “We have evidence that he lied. We have evidence from our witnesses, he lied.” (RP. 15). Defense counsel

further argued that they could not attack the credibility of the CI because they knew nothing about that person's criminal history or if that person had any motivation to lie, such as providing information in exchange for leniency on a criminal charge. (RP. 16). Defense counsel further argued that without information about the CI, the defendants would not be able to present a defense and it would violate the defendants' constitutional rights. (RP. 16).

The court held that the State had to produce the officer for an interview and provide defense counsel with the CI's identity and criminal history. (RP. 19-20). The court did not order that the CI be produced for an interview. Rather, the court indicated that if defense counsel still wanted to interview the CI, they would have to come back before the court and articulate sufficient reasons to need to interview the CI. (RP. 20).

On May 9, 2012, the court entered an order stating:

As the CI's whereabouts are unknown, the State shall produce the officer who worked with the CI in this case for a pretrial interview about the information provided to establish probable cause for the search warrant served in this case, and that the officer is ordered to reveal the name and criminal history of the CI.

(CP. 18-19, 56-7).

On May 9, 2012, the State filed a notice of discretionary review in each of these cases. (CP. 14-7, 44-7). This court granted discretionary

review.

This is the brief of respondent.

2. Facts of the Case.

On May 27, 2011, Deputy Shaffer presented a complaint for search warrant in each of these cases. (CP. \_\_ (Affidavit)<sup>1</sup>). In his affidavit, the officer included information provided by a confidential informant (CI). (CP. \_\_ (Affidavit)). According to the affidavit, the CI provided information about Dennis and Lorena Kinney selling drugs during an initial briefing; however, the affidavit does not give the date when the CI gave that information to the officer, what the basis for the CI's knowledge was or the timeframe of when the CI obtained that information. (CP. \_\_ (Affidavit)).

The officer stated in the affidavit that the CI had been inside the residence within 72 hours and had seen drugs in the residence packaged for sale. (CP. \_\_ (Affidavit)). In addition, the CI had made controlled purchases of controlled substances from both Dennis and Lorena Kinney; however, the dates and locations of those purchases are not included in the affidavit. (CP. \_\_ (Affidavit)).

The affidavit also contains additional information that the officer obtained. The officer learned that Dennis Kinney was a suspect in a

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<sup>1</sup> Respondent has filed a supplemental designation of clerk's papers to include the affidavit and search warrant at the time of filing this brief.

search warrant at the residence in 2005. (CP. \_\_ (Affidavit)). The officer also checked pharmacy logs and found that Dennis Kinney had purchased pseudoephedrine, although there is no information about what date(s) he had purchased pseudoephedrine. (CP. \_\_ (Affidavit)).

The officer also learned that Lorena Kinney was a suspect in a search warrant at the residence in 2005 and another investigation in 2008. (CP. \_\_ (Affidavit)). The officer also checked pharmacy logs and learned that Lorena Kinney made 33 purchases of pseudoephedrine dating back to 2009; however, there is no information about when the last purchase was made. (CP. \_\_ (Affidavit)). The officer also checked logs for purchases of dry ice and found purchases dating back to 2009; the most recent purchase was January 6, 2011. (CP. \_\_ (Affidavit)).

The officer also learned that Dennis and Lorena Kinney's son, Andrew Kinney, was arrested on May 24, 2011 at their residence and that he had made 27 purchases of pseudoephedrine dating back to 2009, as well as, a purchase of dry ice. (CP. \_\_ (Affidavit)).

On May 27, 2011, the search warrant was signed, allowing officers to search several buildings, a motor home and any vehicles registered to Dennis, Lorena or Andrew Kinney. (CP. \_\_ (Warrant)).

On June 3, 2011, police served a search warrant at the residence of Dennis and Lorena Kinney. (CP. 3, 32). According to the probable cause

statement, Dennis and Lorena Kinney were at the residence at the time the search warrant was served. (CP. 3, 32). Lorena Kinney admitted using methamphetamine; she said she only sold methamphetamine to her neighbor. (CP. 3, 32). Dennis Kinney admitted using methamphetamine and selling methamphetamine and that there might be some “cooking” in the motor home. (CP. 3, 32). Police located methamphetamine in the residence and Lorena’s purse, as well as evidence of manufacturing in the motor home. (CP. 3, 32).

## **I. ARGUMENT**

1. The Trial Court Did Not Abuse Its Discretion When It Ordered Limited Disclosure of the Confidential Informant to Counsel After Doubts Had Been Raised About the Affiant’s Veracity and When the Informant Was a Witness Essential to a Fair Determination of the Case.

The decision on whether to disclose a confidential informant (CI) is within the sound discretion of the trial court and determined on a case by case basis. An informant’s identity and the information they provide may be protected and kept secret. *See* RCW 5.60.060(5), CrR 4.7(f)(2). However, disclosure is required when a defendant’s need for the information outweighs the public’s interest in keeping the information confidential or disclosure is necessary to protect a defendant’s constitutional rights.

A “trial court’s decision to order or to refuse to order disclosure of

an informant's identity [is reviewed for] abuse of discretion.” *State v. Petrina*, 73 Wn. App. 779, 782, 871 P.2d 637 (1994).

a. *The Trial Court Properly Ordered Disclosure of the Informant Because the Defense Cast a Reasonable Doubt on the Veracity of the Affiant.*

i. A reasonable doubt was cast on the affiant’s veracity.

While there is no requirement that a confidential informant who only provides information for probable cause must be disclosed, there is also no prohibition on the informant’s identity being disclosed. Disclosure of a confidential informant who provided information only regarding probable cause “may be allowed where deemed necessary to assess the affiant's credibility or accuracy.” *State v. Casal*, 103 Wn.2d 812, 817, 699 P.2d 1234 (1985).

The United States Supreme Court held that a defendant is entitled to an evidentiary hearing to challenge a search warrant, “if he makes a ‘substantial preliminary showing’ that the affiant lied or acted in reckless disregard for the truth in obtaining the search warrant.” *Casal*, 103 Wn.2d at 817, citing *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978). This type of hearing is referred to as a *Franks* hearing.

The United States Supreme Court did not address the issue of whether a defendant can compel the disclosure of a confidential informant’s identity in order to challenge a search warrant. *Id.* Our

Supreme Court noted the difficulty a defendant faces in attempting to challenge a search warrant that is based on information provided by a confidential informant, as it is virtually impossible to make a “substantial preliminary showing” when you cannot investigate or interview the informant regarding the affiant’s statements. *Casal*, 103 Wn.2d at 818. “[W]hen the informant is confidential, the defendant lacks access to the very information that *Franks* requires for a threshold showing of falsity.” *Id.*

“A more reasonable rule requires the trial court to exercise its discretion to order an in camera hearing where the defendant's affidavit casts a reasonable doubt on the veracity of material representations made by the affiant.” *Id.* at 820.

[W]here a defendant presents information which casts a reasonable doubt on the veracity of material representations made by a search warrant affiant, and the challenged statements are the sole basis for probable cause to issue the search warrant, the trial court should exercise its discretion to conduct an in camera examination of the affiant and/or secret informant on the veracity issue.

*Id.* at 813.

In *Casal*, the Supreme Court laid out guidelines for the *in camera* review, which included producing the informant, disclosing the informant’s identity, allowing defense counsel to submit questions and having the hearing transcribed for appellate review. *Id.* at 821. “[I]f the

true informant cannot be found or if the prosecution declines to produce him, the evidence seized pursuant to the search warrant must be suppressed.” *Id.* at 822.

In *Casal*, police searched the defendant’s home based on a confidential informant’s tip, where the informant had been in the defendant’s home and witnessed marijuana being grown and packaged for sale. *Id.* at 814. The defendant filed an affidavit, stating that a person claiming to be the informant said that he told police there was a rumor that the defendant had a grow operation, that the police directed him to trespass on the defendants property, which he did and that the defense had subsequently been unable to locate the informant. *Id.* at 815. *Casal* requested an *in camera* hearing and that the informant’s location be disclosed. *Id.* The trial court denied the request, holding that the affidavit established probable cause on its face and that the public’s interest in keeping the informant confidential outweighed the defendant’s interest in disclosure. *Id.* Our Supreme Court held that the defendant had cast a reasonable doubt on the veracity of the officer’s affidavit and that there was no other basis for probable cause. *Id.* at 820. Therefore, it was error for the trial court to deny the defendant’s request for disclosure without holding an *in camera* review. *Id.* at 823.

In this case, the defendants asked to interview the CI, in part,

because they had information from their witnesses that the CI had lied. Defense counsel expressed the frustrations discussed in *Casal*, being unable to challenge the search warrant without being able to interview the CI and having no information about the CI's criminal history or any possible motive to lie. Without having information about the CI's criminal history or what the CI received in exchange for the information, defense counsel could not assess the CI's reliability; and without being able to question the CI about whether they gave false information to the officer, defense counsel would be unable to make a substantial showing that the affiant lied or acted in reckless disregard of the truth.

The trial court could have ordered the State to produce the CI and comply with the procedures recommended in *Casal*. *Id.* at 821. However, the State did not know the whereabouts of the CI and was not able to produce the CI for an *in camera* hearing. *Id.* Under *Casal*, the trial court would then be required to suppress the evidence and dismiss the case. *Id.* at 822. Instead, the trial court determined that the appropriate remedy was to interview the officer about the informant and disclose the informant's identity and their criminal history, only to counsel, to determine whether or not there was a need to interview the informant. The trial court properly used its discretion, ordering a limited disclosure to investigate the informant's veracity and determine whether there was a basis to pursue a

*Franks* hearing.

- ii. Probable cause was based solely on information provided by the informant.

The informant provided the only timely basis for probable cause. “The facts set forth in the affidavit must support the conclusion that the evidence is probably at the premises to be searched at the time the warrant is issued.” *State v. Lyons*, -- Wn.2d – (2012); *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). If the information is stale, then there is no longer probable cause to issue a search warrant. *Id.* If an affidavit does not include dates, it is impossible for a magistrate to determine whether or not information is stale. *Id.*

The additional evidence that the officer obtained includes the fact that there were prior investigations in 2005 and 2008, pseudoephedrine purchases were made between 2009 and some unknown date and that dry ice was purchased most recently on January 6, 2011, over four months prior to the affidavit. Furthermore, the affidavit referenced undated controlled buys that involved the CI.

Thus, the additional information is either untimely or does not provide any timeline with which a magistrate could determine probable cause. *See id.* The only information contained in the affidavit that could establish timely probable cause was provided by the informant:

Within the past 72 hours, the C/I was inside the residence at 5222 W. Tapps Dr E. in Bonney Lake Washington. While inside the residence, the C/I saw packaged methamphetamines in quantities for sale. The drugs were packaged in clear plastic baggies.

(CP. \_\_\_ (affidavit)).

Because the information allegedly provided by the CI was the sole basis for probable cause, it is essential that the CI's identity be disclosed.

b. *The Trial Court Properly Exercised Its Discretion By Ordering the Disclosure of the Informant's Identity Because it was Relevant, Helpful and Essential to a Fair Determination of the Case.*

Even if this court finds that the trial court abused its discretion by ordering disclosure to investigate the informant's credibility for purposes of a *Franks* hearing, the trial court properly ordered disclosure because the informant was a witness who was relevant, helpful to the defense and essential to a fair determination of the case. A trial court has discretion to order disclosure of a CI if a defendant's need for disclosure outweighs the public's interest in keeping the informant confidential. When the informant's identity is required for a fair determination of the case, disclosure is required.

“[N]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into

consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.”

If, after considering these factors, the court determines that the disclosure of an informant's identity or the contents of the communication are “relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause,” the court may require disclosure.

*State v. Atchley*, 142 Wn. App. 147, 155-6, 173 P.3d 323 (2007), *citing Roviario v. United States*, 353 U.S. 53, 62, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).

A criminal defendant has the right call witnesses on his or her behalf and to present a defense. U.S. CONST. AMEND. VI; WASH. CONST. art. I, § 22; *see also Petrina*, 73 Wn. App. at 784. “If a defendant establishes ‘a colorable need for the person to be summoned’, then the person is a material witness whose identity the State must disclose to allow the defendant to compel attendance.” *Id.* (internal citations omitted).

Failure to disclose . . . would prejudice the defendant, even if the trial court ‘believes the testimony could not benefit the accused. . . . [I]t does not matter whether the testimony of the informer would support the accused or not.’ In such a situation, the accused decides how to use or whether to use the disclosed information. The trial court cannot substitute its judgment for the defendant's as to the benefit of the testimony, or for the jury as to reliability of the testimony.

*Id.* at 785, *citing State v. Harris*, 91 Wn.2d 145, 149-50, 588 P.2d 720

(1978).

In *Atchley*, a concerned civilian informant contacted police and gave information about the defendant having a grow operation in his house. *State v. Atchley*, 142 Wn. App. at 152. Police did a background check and found no reason to believe the informant would provide false information. *Id.* The informant received no compensation and the information was not provided in relationship to any criminal case. *Id.* The officer also corroborated information provided by the informant, including making observations consistent with a grow operation at the defendant's house. *Id.* The trial court's decision to not disclose the informant was affirmed. *Id.* at 165.

However, in *Petrina*, which is very similar to this case, the court upheld a requirement to disclose the informant. In *Petrina*, an anonymous informant contacted police with information regarding Tony Petrina's drug activities, including activities that occurred at his father, Theron Petrina's, house and that the father was aware of the drug activity. *Petrina*, 73 Wn. App. at 780. Officers searched Theron Petrina's house, found drugs and charged him with possession of a controlled substance with intent to deliver. *Id.* at 782. Theron Petrina denied knowledge of the drugs in his home and requested that the informant's identity be disclosed. *Id.* The State objected, arguing that the informant was not helpful to the

defendant and the State did not intend to use the information provided by the informant at trial. *Id.* The trial court ordered the State to disclose the informant and denied the State's request for an *in camera* review. *Id.* at 787-8. The State refused to disclose the informant and the trial court dismissed the case; the decision was affirmed. *Id.*

In this case, the informant was a witness. On May 24, 2011, Dennis and Lorena Kinney's son, Andrew Kinney was arrested at their residence for unlawful possession of a controlled substance – methamphetamine. On May 27, 2011, the complaint for search warrant was filed. In the affidavit, the officer states that the confidential informant was at Dennis and Lorena Kinney's residence within the last 72 hours. The warrant authorized officers to search two trailers, a shed, and any vehicles registered to Dennis Kinney, Andrew Kinney or Lorena Kinney.

Unlike *Atchley*, there is no information included in the officer's affidavit regarding the CI's criminal history, whether the CI was paid for this information or provided the information in exchange for leniency on a criminal case.

The State argues that the officer did corroborate the information provided by the CI. However, the information provided by the officer in his affidavit relates to a 2005 and 2008 incident, undated purchases of pseudoephedrine and a purchase of dry ice over four months prior to the

search warrant. The officer also made some observations regarding two undated controlled buys involving the CI. As discussed above, the information obtained by the officer was insufficient to establish probable cause for a search warrant.

This case is indistinguishable from *Petrina*. In both cases, there was an anonymous CI that the defense had no information about, the CI was inside the residence and a potential witness who would be able to testify about any drugs or drug-related activity in the house, regardless of whether the State intends to call the CI as a witness or not. Also, in both cases the CI may have information regarding the son's involvement in any drug-related activities on the property.

The case law clearly establishes that whether or not a CI should be disclosed is within the sound discretion of the trial court and is determined on a case by case basis. If the trial court determines that disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause," the court may order disclosure. In this case, it is clearly relevant and essential to a fair determination of the case to know what role the son played in any drug related activities on the property versus the parents and, if the son was involved in drug-related activity, what knowledge the parents had. Dennis and Lorena Kinney are charged with unlawful possession with intent to deliver and unlawful

manufacturing. At least with regard to the manufacturing charge, the CI is a critical witness that likely has information about who all was involved in manufacturing or who had access to different parts of the property. Furthermore, manufacturing is an on-going crime and evidence of manufacturing was likely present at the time the CI was on the Kinney's property.

The trial court, in ordering disclosure, discussed that the CI had been in Mr. and Mrs. Kinney's home and seen things. (RP. 7). Based on the probable cause statement, search warrant and arguments of counsel, the trial court properly determined that the CI was a witness and that their identity was relevant, helpful and/or essential to a fair determination of the case.

This court can affirm the trial court's order on any basis supported by the record. *See State v. Bunner*, 86 Wn. App. 158, 161, 936 P.2d 419 (1997); *Ertman v. City of Olympia*, 95 Wn.2d 105, 108, 621 P.2d 724 (1980). The record clearly supports the trial court's order based on the CI being a relevant witness necessary to a fair determination of the case.

- c. *There Are No Established Procedures for Ruling on a Motion to Disclose an Informant; An In Camera Hearing is Not Required.*

While our Supreme Court indicated that *in camera* review is the preferred method for deciding whether or not to disclose an informant, there is no requirement that a court hold an *in camera* review. *Petrina*, 73 Wn. App. at 787; *see also State v. Harris*, 91 Wn.2d at 151. In fact, in *Petrina*, the State argued that the trial court erred by failing to hold an *in camera* review. *Id.* However, this court upheld the trial court's order. *Id.* This court stated, "*Roviaro* does not require the trial court to engage in any particular procedure before ruling on a disclosure motion." *Id.*

While it may be error to deny a defendant's motion to disclose a CI without an *in camera* hearing because a defendant's constitutional rights are at stake, the converse is not true because the State has no constitutional rights at stake. *Id.* This Court further stated, "In fact, we are not aware of any authority that requires a trial court to hold an *in camera* hearing before ordering disclosure of a confidential informant." *Id.* at 788.

The trial court was not required to hold an *in camera* review or follow any particular procedures before granting the defense request to disclose the informant's identity. Therefore, the trial court did not err by failing to conduct an *in camera* review. The trial court properly exercised its discretion and determined that the defendant's constitutional rights and

need for the informant's identity outweighed the State's interest in keeping the information confidential.

Furthermore, the trial court, in balancing the interests, ordered that the informant's identity be disclosed to counsel only, so that counsel could do a background check and interview the officer. The trial court did not order that the informant be interviewed and or that the informant's identity be disclosed to the public. The trial court properly weighed the competing interests and ordered limited disclosure.

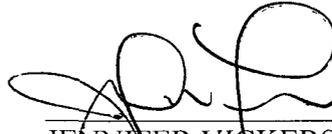
#### **IV. CONCLUSION**

In conclusion, the trial court did not abuse its discretion in ordering the limited disclosure of the informant's identity to counsel after the affiant's veracity was questioned. In addition, the informant was a witness and their disclosure was relevant, helpful and necessary for a fair determination of the case. Furthermore, there is no established procedure for determining whether disclosure of an informant is appropriate and no requirement that the trial court hold an *in camera* hearing.

For all these reasons, this court should affirm the trial court's order allowing limited disclosure of the informant's identity and criminal history to counsel.

Dated this 19<sup>th</sup> day of December, 2012.

Respectfully Submitted,

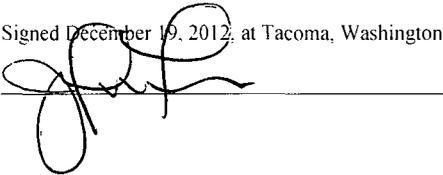


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Certificate of Service:

The undersigned certifies that on this day correct copies of this document were delivered to the office of the attorney of record for the State of Washington by hand. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Signed December 19, 2012, at Tacoma, Washington.



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