

NO. 46304-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT/CROSS-RESPONDENT

v.

ALFRED G. BURTON, RESPONDENT/CROSS-APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh

No. 12-1-02167-0

**REPLY BRIEF OF APPELLANT
&
BRIEF OF CROSS-RESPONDENT**

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

1. May the defendant challenge the Findings of Fact from the *Franks* hearing where he did not object to them below or assign error to them in his brief?
2. Did the trial court abuse its discretion in denying the defendant's motion based on *Franks v. Delaware*?

B. STATEMENT OF THE CASE.

The statement of the case is detailed in the State's Opening Brief.

C. ARGUMENT.

PART 1. RESPONSE TO CROSS-APPELLANT'S BRIEF.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION BASED ON *FRANKS v. DELAWARE*.

- a. The defendant fails to challenge the Findings of Fact from the *Franks* hearing.

The findings of fact entered following the *Franks*¹ hearing are unchallenged. Unchallenged findings of fact are verities on appeal. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006); *see also Cowiche*

¹ *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

Here, the defendant made some objections to the *Franks* findings at the presentment. He objected to ¶ 3 on p.2. 2 RP 5. This was corrected to his satisfaction. 2 RP 6, CP 34. After that, the defendant agreed to the Findings. 2 RP 7.

The defendant's objections to the Conclusions were limited to ¶ 2. 2 RP 7. That Conclusion was changed to his satisfaction. *Id.*, CP 35.

Conclusion 3 is a factual finding which necessitates a finding of credibility, not a conclusion of law. Findings of fact are determinations of "whether evidence shows that something occurred or existed." *State v. Niedergang*, 43 Wn. App. 656, 658, 719 P.2d 576 (1986). Conclusions of law are determinations "made by a process of legal reasoning from facts in evidence." *Id.*, at 658–659. Credibility determinations are the province of the trial court and will not be disturbed on appeal. *State v. Radcliffe*, 139 Wn. App. 214, 220, 159 P.3d 486 (2007), *aff'd*, 164 Wn.2d 900, 194 P.3d 250 (2008).

Regardless of its label as a legal conclusion or factual finding, the appellate court reviews a finding of fact as what it actually is, a factual finding. *State v. Ross*, 141 Wn.2d 304, 309, 4 P.3d 130 (2000); *see also State v. Marcum*, 24 Wn. App. 441, 445 601 P. 2d 975 (1979) (quoting

State v. Pierce, 23 Wn. App. 664, 669, 597 P. 2d 1383 (1979)). Therefore, the trial court's determination of credibility cannot be reviewed by this Court.

- b. The trial court's conclusions of law for the *Franks* hearing are supported by the findings of fact.

Factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (a) material and (b) made in reckless disregard for the truth. *Franks*, 438 U.S. at 155–156; *State v. Chenoweth*, 160 Wn.2d 454, 478–77, 158 P.3d 595 (2007); *State v. Cord*, 103 Wn.2d 361, 366–367, 693 P.2d 81 (1985). Therefore, a trial court's decision in a *Franks* hearing is highly factual. 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. *Chenoweth*, 160 Wn.2d at 476; *see also State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). The trial court does not scrutinize the warrant affidavit for evidence of negligent omissions or misstatements. *Chenoweth*, 160 Wn.2d at 477. A trial court's denial of a *Franks* hearing is reviewed for abuse of discretion. *See State v. Wolken*, 103 Wn.2d 823, 829, 700 P.2d 319 (1985).

The court makes legal conclusions that the affiant did not act in reckless or intentional disregard for the truth. *Id.*, at 480-481. Where the court finds that the affiant is telling the truth, the only proper conclusion of law can be to deny the defendant's motion. That is what occurred in the present case. The trial court did not err.

PART 2. REPLY TO CROSS-RESPONDENT'S BRIEF

1. RCW 69.51A ONLY PROVIDES AN AFFIRMATIVE DEFENSE.

The defendant's argument that SB 5073 changed the nature of the affirmative defense (Def. Brf. at 29ff.) is contrary to law. As the State points out (State's Opening Brf. at 12) the Court of Appeals has held that, after the 2011 amendments to the MUCA, qualifying patients and designated providers are entitled only to an affirmative defense. *See State v. Reis*, 180 Wn. App. 438, 322 P.3d 1238 (2014); *State v. Ellis*, 179 Wn. App. 801, 327 P. 3d 1247 (2014). *See also State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010).

2. THE LEGALITY OF COLLECTIVE GARDENS IS NOT AT ISSUE IN THIS CASE.

The defendant writes at length about the legitimacy and public policy of the MUCA. The Legislature has authorized collective gardens

under RCW 69.51A.085. The State does not contest this. The law provides members of a collective garden with an affirmative defense.

The issues in this case are whether there was probable cause for the court to issue a search warrant, and whether RCW 69.51A.085 or the MUCA negated probable cause and police investigations into compliance with RCW 69.51A. Issues at trial may include whether the defendant complied with RCW 69.51A.085 and could even raise the affirmative defense.

3. THE COURT SHOULD NOT CONSIDER
DEFENDANT’S ARGUMENTS WHICH ARE
NOT SUPPORTED BY THE RECORD.

The defendant asserts that Green Path maintained records and never had more than ten patients. Def. Brf. at 39. He further states that Green Path maintained copies of patients’ documents. Def. Brf. at 41. However, there is no citation to the record, or even reference to which witness, if any, established this. A party is required to cite to the record in support of arguments or statements of facts. *See In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998); RAP 10.3(a)(5) and (6).

As the Supreme Court pointed out in *Lint*, this rule is not merely a “technical nicety.” *Id.*, at 532. The existence, validity, and display of these alleged records were important to the initial investigation and the

development of probable cause for the search warrant. Indeed, the warrant authorized search for the records.

The defendant claimed that the business possessed the records, but refused to show them to the officers. CP 50. He described a “revolving-style” membership where members only existed when they were present in the business. CP 50. Therefore, as the officers pointed out in their warrant affidavit (CP 50) and the State has argued in its Opening Brief (at 44) there were no members in the “collective” when the officers went to do the records check.

In order to possess any marijuana for medicinal reasons under RCW 69.51A.085, Green Path needed to have at least one current member. The defendant and Green Path cannot now claim that they had records were none were provided. Where a person is arrested for unlawful possession of oxycodone, producing a prescription at the suppression hearing is too late to use it to challenge the arrest and search. This Court should reject the defendant’s argument.

4. EVEN ASSUMING THAT THE *SHUPE* LEGAL FICTION IS VALID, THE DEFENDANT FAILED TO COMPLY WITH IT.

In *State v. Shupe*, 172 Wn. App. 341, 289 P. 3d 741 (2012), Division III of the Court of Appeals created the “revolving membership”

system now embraced by the medical marijuana business. The State has criticized the decision and its precedential authority. Opening Brf. at 40-42. However, even if *Shupe* is valid, there was probable cause to believe that the defendant violated the law.

In order to possess any marijuana for medicinal reasons under RCW 69.51A.085, Green Path needed to have at least one current member. In order to possess 72 oz. of marijuana, Green Path needed at least three current members. *See* RCW 69.51A.085(1)(c). The record and the affidavit for search warrant showed that, at the time police were present, Green Path had no members. Indeed, under their system, there were only as many members as were present in the store at any one time. So, the amount of marijuana they could legally possess depended on the number of members present in the store at the current time.

D. CONCLUSION.

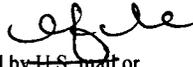
The trial court erred in finding the search warrant invalid and suppressing the evidence. The State respectfully requests that the decision of the trial court be reversed, and the case remanded for trial.

DATED: April 1, 2015.

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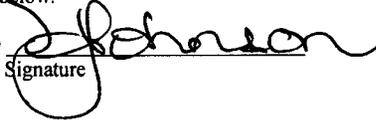


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4/1/15 
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PIERCE COUNTY PROSECUTOR

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