

No. 49593-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL WALTER WOOD,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-05119-1
The Honorable Gretchen Leanderson, Judge

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

Pierce County Sheriff's Deputies observed one confirmed drug transaction between Michael Wood and a confidential informant. (CP 24) After this transaction, Deputies observed Wood conduct several brief meetings in his car with other individuals. (CP 24) Then Deputies followed Wood as he drove home. (CP 25) On another undisclosed date, Deputy Kory Shaffer observed Wood leave his home, drive to a public parking lot, and briefly meet with another individual in a manner that Shaffer thought, but did not confirm, was a drug transaction. (CP 25) Wood has prior convictions for unlawful possession of a controlled substance. (CP 24-25) The trial court concluded that these facts were "sufficient to establish the probability" that evidence of drug dealing would be found inside Wood's home. (CP 33)

II. ARGUMENT & AUTHORITIES

A search warrant should be issued only if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

The State first argues that there was probable cause to

conclude that evidence of drug dealing would be found in Wood's residence because he was seen leaving from and returning to his residence before and after actual and "perceived" drug transactions. (Brief of Resp. at 9, 10, 11-12, 14) However, neither Deputy Shaffer nor the other Deputies ever observed Wood leave and return to his residence before and after one single transaction.

Rather, on one occasion Deputy Shaffer saw Wood leave his residence and meet with an individual in a Fred Meyer parking lot. (CP 25) Deputy Shaffer "perceived," but never confirmed, that this meeting was a drug transaction.¹ (Brief of Resp. at 11, 12; CP 25) On another occasion, Deputies observed Wood conduct one confirmed drug transaction, then meet a few more people in what Deputy Shaffer again "perceived" but did not confirm were drug transactions, then drive home. (CP 24-25)

The State also asserts that "going to one's home after a drug delivery creates a reasonable inference that drug are stored there." (Brief of Resp. at 10) But this assertion is not true, as this Court's recent opinion in State v. Blye, 196 Wn. App. 1037, 2016 WL

¹ Deputy Shaffer believed this was a drug transaction because he saw money in Wood's hand. (CP 25) But possession of "[i]nnocuous objects that are equally consistent with lawful and unlawful conduct do not constitute probable cause to search." State v. Neth, 165 Wn.2d 177, 185, 196 P.3d 658 (2008).

6216250 (2016) demonstrates.² In Blye, Bremerton police officers used a confidential informant to conduct two controlled drug buys targeting Perry Blye's roommate, Joanne McFarland. Both transactions occurred in McFarland's car, and McFarland was seen driving back to the mobile home she shared with Blye after each transaction. Bremerton police applied for a search warrant of the mobile home. Blye, 2016 WL 6216250 at *1-2.

In addition to the controlled buys, the affiant detective cited Blye's reputation as a drug dealer, and his professional knowledge that "people who possess or distribute controlled substances will hide the drugs and proceeds of sales in their homes." The judge issued a warrant, and officers executing the warrant found a significant amount of heroin. Blye, 2016 WL 6216250 at *1-2.

The trial court denied Blye's motion to suppress, and Blye was convicted of possession of a controlled substance with intent to deliver. On appeal, this Court held that the trial court erred in ruling that the warrant affidavit was sufficient to establish probable cause and in failing to suppress the evidence derived from the search of

² Blye is an unpublished opinion and therefore has no precedential value and is not binding on any court, but is cited only for such persuasive value as this Court deems appropriate. See GR 14.1; Crosswhite v. Washington State Dep't of Soc. & Health Servs., 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

the residence:

[A] person's return to his or her home after engaging in illegal activity does not, by itself, establish probable cause that illegal activity will be found in the person's home. The evidence that McFarland went home after selling the drugs, by itself, shows only that she did not have the drugs when she returned to the residence. Police never observed McFarland leave [her] residence and drive to either of the controlled buys. Without more, the evidence set out in the affidavit failed to establish a sufficient link between the distribution of drugs and the residence.

Blye, 2016 WL 6216250 at *5 (citing State v. G.M.V., 135 Wn. App. 366, 372, 144 P.3d 358 (2006) (warrant affidavit established sufficient probable cause to search home when officers observed suspect leave from and return to residence after he sold drugs)).

The State also argues that Wood's return to his home, coupled with evidence of his prior drug convictions and the "reasonable inference" that drug dealers store drugs in their homes, establishes a nexus. (Brief of Resp. at 10, 14-15) But the Blye Court also rejected this argument, noting:

[Blye's] prior drug offenses do not sufficiently link the two controlled buys with the residence [and] generalized statements about drug dealers also fail to establish probable cause to believe that drugs were stored at the residence. Criminal histories and generalized habits of drug dealers can certainly support a probable cause determination, but they cannot supply the principal evidence needed to connect one's drug activities to his or her home.

2016 WL 6216250 at *5. The facts contained in Deputy Shaffer's affidavit are very similar to those contained in the Blye affidavit, and both fail to establish a nexus between the suspected drug activities and the home to be searched.

The State also relies on State v. G.M.V., 135 Wn. App. 366, 369, 144 P.3d 358 (2006), United States v. Hollis, 490 F.3d 1149, 1152 (9th Cir. 2007), and United States v. Garcia-Villalba, 585 F.3d 1223 (9th Cir. 2009). (Brf. of Resp. 11-12, 13-14) But those cases are easily distinguishable. In G.M.V., unlike in this case, the defendant's boyfriend left the residence to conduct a controlled drug transaction then immediately returned to the residence. 135 Wn. App. at 372.

In Hollis, the defendant was observed returning to his residence immediately after a controlled drug transaction, and the search warrant affidavit stated that police also found wrapping paper contaminated with cocaine and a digital scale with cocaine residue inside Hollis' car. 490 F.3d at 1152. On appeal, Hollis challenged the search of his residence, but only on the grounds that it failed to establish the confidential informant's reliability. The appellate court was not asked to address, and did not address, whether these facts established a nexus between the suspected

criminal activity and Hollis' residence. 490 F.3d at 1153.

And in Garcia-Villalba, law enforcement agents conducted wiretap and physical surveillance of a suspected drug trafficking organization. 585 F.3d at 1233-34. Agents observed the suspects engaged in numerous drug transactions, overheard the suspects repeatedly refer to their stash house after receiving orders for narcotics, and saw the suspects arrive at the stash house immediately after hearing on the wiretap of impending drug transactions. 585 F.3d at 1233-34. Unlike the facts contained in the affidavit in this case, these assertions directly connected the drug trafficking operation to the stash house.

Finally, the State contends that the warrant can be upheld because it also allowed the Deputies to search for the recorded buy money and the Deputies "knew" the buy money would be inside Wood's home. (Brief of Resp. at 16-18) This argument should be rejected because there are no facts contained in the affidavit that would give rise to a reasonable belief that the recorded buy money would still be in the home.

"It is not enough ... to set forth that criminal activity occurred at some prior time. The facts or circumstances must support the reasonable probability that the criminal activity was occurring at or

about the time the warrant was issued.” State v. Higby, 26 Wn. App. 457, 460, 613 P.2d 1192 (1980) (quoting Sgro v. United States, 287 U.S. 206, 77 L. Ed. 260, 53 S. Ct. 138, 85 A.L.R. 108 (1932)). The question of “staleness thus involves not only duration, but the probability that the property in question would be retained.” State v. Young, 62 Wn. App. 895, 903, 802 P.2d 829, 835 (1991).³

Wood did not go directly home after the controlled buy, and up to three days passed between the buy and the application for the warrant (another 10 days passed before the warrant was even executed). (CP 24-25; 1RP 88) Wood had ample opportunity to spend or otherwise dispose of the money he received from the confidential informant, so the probability that the recorded buy money was still in Wood’s home was extremely low. And nowhere in Deputy Shaffer’s affidavit does he claim that the recorded money used in the controlled buy was likely to be in Wood’s home. There are simply no facts to support a finding of probable cause to search Wood’s residence based on the potential presence of the recorded buy money alone.

The affidavit failed to establish probable cause to believe that Wood kept drugs or items associated with drug dealing in his

³ Opinion modified on reconsideration, 62 Wn. App. 895, 817 P.2d 412 (1991).

house, or that such evidence would probably be found in his house when the warrant was executed. The warrant was issued without sufficient probable cause, and the search of Wood's home was therefore illegal. All of the items recovered from Wood's residence during the search, and any evidence obtained as a direct result of that search, should have been suppressed. Wong Sun v. United States, 371 U.S. 491, 501, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

III. CONCLUSION

The trial court erred in ruling that the warrant affidavit was sufficient to establish probable cause and in failing to suppress the evidence derived from the search of Wood's residence. All evidence seized from Wood's home during the search, including the various controlled substances and the firearm, should have been suppressed. And Wood's convictions on all charges related to these items should be reversed and dismissed.

DATED: June 9, 2017



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CERTIFICATE OF MAILING

I certify that on 06/09/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Michael W. Wood, DOC# 266610, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.

Stephanie Cunningham

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