

NO. 49926-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANNY RAY POTTS,

Appellant.

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

The Honorable Michael Evans, Judge, and
The Honorable Marilyn Haan, Judge

CORRECTED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Danny Potts' motion to suppress evidence where the affidavit for search warrant failed to establish probable cause by failing to set forth facts necessary to establish either the basis of knowledge or the veracity of the informant, and because the information was stale.

2. The trial court erred in entering finding of fact number 6 in the CrR 3.6 Findings of Fact and Conclusions of Law in the motion to suppress.¹ Clerk's Papers (CP) 113.

3. The trial court erred in entering finding of fact number 7 in the CrR 3.6 motion to suppress. CP 113.

4. The trial court erred in entering finding of fact number 8 in the CrR 3.6 motion to suppress. CP 113.

5. The trial court erred in entering finding of fact number 9 in the CrR 3.6 motion to suppress. CP 113.

6. The trial court erred in entering Conclusions of Law 2, 3, 4, 5, 6, and 8 in the CrR 3.6 motion to suppress. CP 113-14.

7. Mr. Potts received ineffective assistance of counsel.

8. Trial court erred when it denied the defendant's motion to suppress

¹The Findings of Facts and Conclusions of Law on Defendant's Motion to Suppress, entered December 19, 2016, are found at Attachment A.

evidence the police obtained in violation of the knock and announce rule under RCW 10.31.040 and in violation of the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment.

9. There was insufficient evidence to support the appellant's conviction for possession of methamphetamine with intent to deliver.

10. There was insufficient evidence to support the appellant's conviction for possession of heroin with intent to deliver.

11. The trial court committed reversible error by denying the appellant's motion to exclude the untested substance entered in Exhibit 20A.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the search warrant affidavit failed to establish probable cause by failing to set forth facts necessary to establish the basis of knowledge of the informant? Assignment of Error 1.

2. Whether the search warrant affidavit failed to establish probable cause by failing to set forth facts necessary to establish the veracity of the informant? Assignment of Error 1.

3. An affidavit in support of a search warrant must set forth sufficient facts and circumstances to establish a reasonable probability that criminal activity is occurring or is about to occur. Was a search warrant

unconstitutionally stale where it referred to a quarter ounce of methamphetamine allegedly seen by the informant at the house ten to twelve days earlier, and where the affidavit for search warrant failed to set forth sufficient facts to establish criminal activity was ongoing. Assignment of Error 1 and 6.

4. If defense counsel failed to preserve the issues of veracity and basis of knowledge of the confidential informant for review, was Mr. Potts denied the effective assistance of counsel? Assignment of Error 7.

5. Whether the affidavit for search warrant failed to establish probable cause because the information was stale? Assignment of Error 1.

6. Does a trial court err if when it refuses to suppress evidence the police obtained after violating the knock and announce rule under RCW 10.31.040, and after violating a defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment? Assignment of Error 7 and 8.

7. Did the State prove beyond a reasonable doubt that Mr. Potts intended to deliver methamphetamine and heroin as alleged in Counts 1 and 2? Assignments of Error 9 and 10.

8. Did the trial court err in denying the motion to exclude the untested substance in a baggie entered in Exhibit 20A where the crime lab technician did not testify regarding the appearance or comparability to a tested substance which was determined to be methamphetamine? Assignment of

Error 11.

C. STATEMENT OF THE CASE

1. Procedural facts:

Seth Libbey, an officer with the Longview Police Department, obtained a search warrant for a house located 288 26th Avenue in Longview, Washington, attached as Attachment B. Suppression Exhibit 1. In his affidavit in support of the warrant, Detective Libbey asserted a confidential informant, known as "X," reported that he or she was invited to the residence by Danny Potts, and while there, "X" observed a substance he or she recognized as a quarter ounce of methamphetamine. Exhibit 1. The affidavit was dated November 6, 2015, and stated that "X" entered the house under the direction of law enforcement within seventy-two hours of preparation of the affidavit. Exhibit 1. The warrant was signed by Cowlitz County District Court Judge Koss, apparently on November 6, 2015,² and officers executed the search warrant for the house and seized items that resulted in charges on November 12, 2015.

Danny Potts was charged in Cowlitz County Superior Court with possession of a methamphetamine with intent to deliver (Count 1), and possession of heroin with intent to deliver (Count 2), contrary to RCW 69.50.401(2)(b). He was also charged with possession of ecstasy (Count 3), and

²The search warrant was dated October 5, 2015 and then lined out, with the date November 6 interlineated. Exhibit 1 at 7.

possession of benzodiazepine (Count 4), contrary to RCW 69.50.4013(1). CP 3-5.

a. *CrR 3.6 suppression hearing*

The case came on for CrR 3.6 suppression motion on September 19, 2016. 1Report of Proceedings³ (RP) at 36-114; CP 8-9. The motion sought to invalidate the search warrant used by Longview police to enter the residence at 288 26th Avenue in Longview, based on the date of the search warrant, which Mr. Potts argued was October 9, 2015, and which was crossed out and the date November 6 inserted in place of the original date. CP 8-9. A copy of the affidavit and warrant were entered as Exhibit 1 at the suppression hearing. Mr. Potts also argued that the police violated the “knock and announce” rule when executing the warrant on November 12, 2015.

Seth Libbey, a detective with the Longview police department, testified regarding execution of the search warrant at Mr. Potts’ residence at 228 26th Avenue in Longview, Washington. 1RP at 40-64. Detective Libbey stated that he knocked on the door and announced “Longview Police, search warrant” and did not receive a response. 1RP at 45. According to police, after about fifteen seconds and without having received a response, police

³The record of proceedings consists of the following transcribed hearings: 1RP - February 4, 2016, April 7, 2016, April 26, 2016, May 10, 2016, May 31, 2016, June 6, 2016, August 15, 2016, August 18, 2016, September 19, 2016 (suppression hearing), October 6, 2016, and October 27, 2016; 2RP - November 1, 2016 (jury trial, day 1); 3RP - November 4, 2016 (jury trial, day 2); 4RP - November 2, 2016 (jury trial, day 3); 5RP - November 2, 2016 (jury trial, day 3); and 6RP - December 6, 2016 (sentencing), December 19, 2016,

used a battering ram to attempt to force the front door open. 1RP at 46. After hitting the door multiple times, the police were unable to knock open the door. 1RP at 46-47. Police heard voices saying they were coming to open the front door. 1RP at 48. Det. Libbey stated that they stopped use of the ram and Mr. Potts opened the door. 1RP at 48.

Detective Brian Durbin testified that after Det. Libbey yelled that Longview police were there, he rammed the door twice without success. 1RP at 69. He said that he heard yelling from inside the residence but could not hear what was being said. 1RP at 69. He used the ram two more times without being able to force open the door, and at the point the door opened and the detectives entered the house. 1RP at 69.

Sgt. Langlois testified that during the initiation of the entry process, more than fifteen seconds elapsed from announcing their presence without receiving an answer, at which time he directed Dep. Durbin to start using the battering ram. 1RP at 80.

Desiree Rickards was located in the master bedroom near the bathroom when police entered. 1RP at 49. Det. Libbey stated that she indicated that she had tried to flush drugs that were found in the bathroom. 1RP at 49. She stated that she was told to flush the drugs by Mr. Potts. 1RP at 49.

The search warrant, which was admitted as Exhibit 1, appears to have been signed by Judge Koss on November 6, 2015. 1RP at 51. Det. Libbey

and December 22, 2016.

stated that a date was crossed off after the language “subscribed and sworn to before me this” with the original date of October 9th lined out and changed to November 6. IRP at 52-53. Det. Libbey stated that the date was changed because he left the “old date” on the affidavit, and that Judge Koss had added the date of November 6 at the time he signed the warrant. IRP at 52.

Tanner Daggy was inside the house at the time the police executed the search warrant. IRP at 86. Mr. Daggy was on the couch and heard loud banging, looked out the window and saw police. IRP at 87. He stated that he told Mr. Potts that police were at the door, and Mr. Potts opened the door asked if they had a warrant, and the police rushed into the house. IRP at 87. Mr. Daggy said that the police handcuffed everyone in the house. IRP at 88. He stated that he was held for about half an hour, at which point all the younger people in the house were released, and he left. IRP at 89. He said that about a minute passed between banging on the door to Mr. Potts opening the door for the police. IRP at 89.

Mr. Potts said that no one knocked on the door and that no one said “Longview Police” until the third hit from the battering ram. IRP at 96. After the banging started he went to the door and tried to unlock it, but they rammed it and he jumped out of the way and said: “stop and I’ll let you in.” IRP at 97. He stated that they stopped and then he opened the door and asked if they had a warrant. IRP at 98. He stated that he repeatedly asked if they had a warrant and was finally told “we’ll get one.” IRP at 98. Mr. Potts stated that he was

not served with a warrant at any time during the search. 1RP at 99. He stated that when he saw a copy of the warrant, the date October 6 was crossed out on the copy he received. Suppression Hearing, Ex. 2. Mr. Potts stated that he did not tell his girlfriend Desiree Rickards to flush drugs. 1RP at 103.

The court found that the police did not violate the knock and announce rule, stating:

[t]he Court does believe that the knock and announce was properly followed, based on the Court finds the officer did announce or identity—indentify (sic) announce their purpose, demand to be admitted into the residence, announced the purpose of their need to enter the residence and were not, at least immediately, admitted into the residence.

1RP at 110. The court also found that the warrant was not stale:

[a]ny gap in time between the last reported criminal activity and the search warrant and when the search warrant was executed was minimal. Given the timing of events, the nine-day delay which under this scenario is not unreasonable.

1RP at 112.

The court later entered findings of fact and conclusions of law on December 19, 2016. CP 112-14.

b. CrR 3.5 hearing

Before taking trial testimony, the court held a CrR 3.5 hearing on November 1, 2016.

Detective Libbey testified that he participated in the execution of search warrant at the house on November 12, 2015. 2RP at 237. He stated

that when he entered the house with his gun drawn, the first person he saw was Mr. Potts. 2RP at 238. He ordered Mr. Potts to the ground and handcuffed him. 2RP at 238. Det. Libbey helped detain people in the house and also saw Ziploc baggies floating in a toilet bowl in the bathroom. 2RP at 239. He returned the entry area where Mr. Potts was detained and introduced himself. 2RP at 240. He stated that “[b]asically [Mr. Potts] said if anything was found in the residence that it was his.” 2RP at 241. Det. Libbey said that he stopped him and administered his constitutional warnings. 2RP at 241-44. He stated that after being given warnings, Mr. Potts said he understood his rights and reaffirmed that he “claimed everything in the house.” 2RP at 250.

Detective Libbey talked with Desiree Rickards and then returned to Mr. Potts and asked him if it was true that he told her to “flush the dope” down the toilet, and he said confirmed that he did. 2RP at 252. The court ruled that *Miranda* did not initially apply because there was no question posed to him. 2RP at 263. He stated that the post-*Miranda* statements were admissible and no there was no coercion, no show of force, no threats made and no re-invocation of the right to remain silent. 2RP at 263.

The court ruled in limine that no mention was allowed of how the search warrant was obtained or information was received from a confidential informant. 2RP at 267.

c. Pro se motion to reconsider

Mr. Potts filed a *pro se* motion for reconsideration of the court’s

ruling denying the CrR 3.6 motion to suppress on November 1, 2016, the first day of trial. 2RP at 132; CP 115-17. The court found that motion for reconsideration had to be filed ten days after the decision was made and the motion was untimely. 2RP at 133. In addition, to the *pro se* motion, the defense requested to know the identity of informant and when the informant was interviewed or contacted by police, in order to determine the validity of the warrant. 2RP at 136. Judge Evans found that because the court had already found the warrant to be valid, the identity of the informant or date the informant was contacted by police would not be relevant to the trial and denied the request. 2RP at 139.

Following conviction, Mr. Potts again argued for reconsideration of court's ruling denying suppression of the warrant. The motion was denied by Judge Evans at sentencing on December 19, 2016. 5RP at 728-29.

d. Verdict and sentencing:

The jury found Mr. Potts guilty of possession with intent to deliver methamphetamine and heroin, and possession of ecstasy and benzodiazepine as charged. 5RP at 698; CP 151-56.

Mr. Potts had an offender score of "3" and standard range of 20 to 60 months. 6RP at 711. Defense counsel argued for twenty months and the State asked for a sentence at the top of range, arguing that the

methamphetamine was actually in excess of thirty grams including an untested substance in a baggie admitted in Exhibit 20A. 6RP at 712. The court imposed a sentence of 50 months in counts 1 and 2, finding both counts are the same criminal conduct. 5RP at 716. Mr. Potts was sentenced to 12 months for counts 3 and 4, which were also found to be the same criminal conduct. 5RP at 716; CP 155. The court imposed legal financial obligations including \$500.00 for victim assessment, \$200.00 in court costs, and a \$100.00 felony DNA fee. CP 157.

The case came on for entry of findings of fact, on December 19, 2016, at which time Mr. Potts asked for reconsideration of the ruling denying the motion to suppress due to an invalid warrant. 6RP at 729. After hearing brief argument, the court reiterated that the prior ruling of the court would stand. 6RP at 729.

The matter came on for entry of the judgment and sentence on December 22, 2016. 6RP at 733-739; CP 151. Mr. Potts stated that he filed *pro se* a request for Drug Offender Sentencing Alternative (DOSA) through a kite sent from the Clark County Jail. 6RP at 734. Defense counsel stated that Mr. Potts was eligible for prison-based DOSA. The Court denied the request for DOSA, stating that the “quantities found within the home are in excess or exceed normal user amounts.” 6RP at 736-37.

Timely notice of appeal was filed December 29, 2016. CP 131. This appeal follows.

2. Trial testimony:

The matter came on for trial on August 30, August 31, and September 1, 2016, the Honorable Michael Evans presiding. 1RP at 19-195; 2RP at 199-392; 3RP 397-578; 4RP 582-652; 5RP at 658-706; 6RP at 707-740.

Members of the Longview police department executed a search warrant at 288 26th Avenue in Longview on November 12, 2015. Police struck the door multiple times using a battering ram but were not successful in breaking it open. 2RP at 291-92, 3RP at 329. Sgt. Langlois testified that someone inside the house said that they were coming to the door, and the police stopped using the ram. 3RP at 330. The door was opened by Mr. Potts and police entered the house and handcuffed everyone in the residence, which included Desiree Rickards and Tanner Daggy. 2RP at 293; 3RP at 359. In the bathroom Longview police detective Brian Durbin found three plastic baggies containing a white crystalline and brown tar-like substance in the toilet bowl. 2RP at 295.

In the bedroom Det. Durbin found on a desk a closed circuit monitor with a camera pointing at the front porch of the house. 2RP at 298, 303. Det. Durbin found an Altoid tin on the desk that contained a white substance, plastic baggies that match the baggies found in the toilet, and a digital scale with white crystal residue on it. 2RP at 298. In the master bedroom he also found a blue pill in a baggie identified as ecstasy and a green pill identified as benzodiazepine. 2RP at 298; 3RP at 347, 348, 404. Det. Durbin testified that the room was Mr. Potts' bedroom. 2RP at 304.

Det. Durbin and Sgt. Langlois stated that plastic bags and the scale were indicative of drug trafficking. 2RP at 304; 3RP at 339-40. Police found mail addressed to Ray Potts and Desiree Rickards at the residence. 3RP at 341.

Exhibit 20-A contained two of the baggies that Deputy Durbin said were found in the toilet. The court found that although only one bag was tested, both baggies were admissible. 3RP at 378, 393. John Dunn of the Washington State Patrol Crime Lab weighed and tested the contents of one of the baggies, but did not weigh or test the substance in the second baggie. 3RP at 376, 390, 408. Mr. Dunn testified that the bag that was tested contained 13.7 grams of methamphetamine. 3RP at 371, 390, 403. He described the material in the baggie he tested as a "crystalline material," but did not testify that he compared the material to the substance in the untested baggie. 3RP at 407, 408.

Mr. Dunn testified that a brown substance in a baggie entered as Exhibit 21-A tested positive for heroin and weighed 4.9 grams. 3RP at 404. He stated that the blue pill found during the search tested positive for MDMA, which is also known as ecstasy, and that the green pill contained clonazepam. 3RP at 404.

Detective Libbey testified regarding the forms of packaging commonly used for tracking methamphetamine and the quantity of drugs that are seen in "user amounts." 3RP at 412-15. He stated that a "user amount" would commonly be .2 grams of methamphetamine and heroin. 3RP at 415. He

testified that for “dealer amounts” of methamphetamine, drug dealers commonly use Ziploc baggies. 3RP at 415.

Detective Libbey testified that on November 12, 2015, he pounded on the door at the house at 288 26th Avenue in Longview and loudly announced that police were there to serve a search warrant. 3RP at 421-22. He stated that after the initial knock and announce no one answered the door, and so another officer attempted to break open the door using the battering ram. 3RP at 422-23. The ram was misapplied and hit the door frame instead of the door itself. 3RP at 432. After the officer hit the door frame with the ram multiple times, Det. Libbey stated that he heard someone in the house talk about opening the door and then the door opened. 3RP at 423. He entered the house with his gun out and facing downward. 3RP at 424. Mr. Potts was standing near the front door and was then handcuffed. 3RP at 425. Other people in the house were running from door, and officers handcuffed them as well. 3RP at 426. In the bathroom adjoining the master bedroom, Det. Libbey found two baggies in the toilet. 3RP at 427. On a desk in the master bedroom police found a monitor showing video of the front door of the residence. 3RP at 427. After everyone in the house was handcuffed, Det. Libbey returned to the area near the front door where Mr. Potts was being detained. 3RP at 428. After introducing himself, he stated that Mr. Potts said that anything found in the house was his. 3RP at 428. Det. Libbey read Mr. Potts his *Miranda* warnings, and Mr. Potts confirmed that anything in the house was his responsibility and also that the

police must be there because they had performed drug buys from the house. 3RP at 429. Det. Libbey stated that Mr. Potts said that he shared the master bedroom with Desiree Rickards. 3RP at 430.

Det. Libbey stated that Ms. Rickards said that she tried to flush the drugs found in the toilet bowl. 3RP at 437. Det. Libbey stated that he spoke with Ms. Rickards and then returned and asked Mr. Potts if he had directed her to flush drugs down the toilet, and stated that Mr. Potts said that he had told her to do so. 3RP at 431-32. Mr. Potts and Ms. Rickards were taken into custody and the other people in the house were released. 3RP at 446.

Tanner Daggy, who is the nephew of Mr. Potts, was at the house at the time of the search warrant. 4RP at 504. He heard loud banging from the front door and Mr. Potts went to the front door. 4RP at 506. He stated that he did not hear police announcing their presence. 4RP at 517-18. He stated that his uncle said to the police, "stop and I'll open the door." 4RP at 508. He stated that his uncle asked police about a warrant, and that he said "anything that you find is mine." 4RP at 510. He testified that his uncle did not say anything about flushing drugs down the toilet. 4RP at 510.

Linda Sorenson, who is Mr. Potts' sister and mother of Tanner Daggy, testified that she was also present at the house when the police arrived. 4RP at 521-22. She stated that she had been there visiting her brother and Ms. Rickards and were going to prepare dinner. 4RP at 522, 527. She said that she was at the house for approximately 20 to 30 minutes and was in the back

bedroom and was looking for a cigarette when she heard banging at the front door. 4RP at 522. She saw police at the front door on the video monitor located in the bedroom. 4RP at 423. She stated that she heard police say "Longview police." 4RP at 523, 538. She said that Desiree Rickards was going to the bathroom at the time police arrived. 4RP at 524. Ms. Sorenson said that she did not hear Mr. Potts yell anything to Ms. Rickards. 4RP at 525. After she was detained and taken to the living room, she stated that she heard Mr. Potts ask if they had a search warrant and that police responded "no, but we're getting one." 4RP at 530, 548. Ms. Sorensen was not arrested and walked back to her house, which is located nearby. 4RP at 536.

Desiree Rickards testified that she, her daughter, her daughter's boyfriend, and Mr. Potts live at the house, and friends of her daughter were also at the house on November 12. 4RP at 552. She stated that she had just come into the living room when she heard the banging sound, and went back to the bedroom to look at the video monitor. 4RP at 555. She stated she went back to the living room and said "the police are here," and Mr. Potts got out of his chair and went to front door and opened the door. 4RP at 556. She said that there was no announcement that it was the police. 4RP at 556. Ms. Rickards acknowledged that she tried to flush methamphetamine and in the master bedroom bathroom, and said that she was using the drugs at the time. 4RP at 557. She denied that Mr. Potts told her to flush the drugs. 4RP at 559-60, 560-61, 582. She stated that Mr. Potts repeatedly asked police about a

search warrant. 4RP at 573. She stated that police did not provide a warrant to them. 4RP at 574. She stated that they were both aware of drugs in the house, but denied that she and Mr. Potts were selling drugs. 4RP at 577. She stated that they had larger amounts so that they would not have to make multiple trips to buy drugs for their personal use. 4RP at 583.

Det. Libbey confirmed during rebuttal that the police had no evidence of controlled buys or delivery of drugs from the house. 4RP at 619. Det. Libbey stated the police left a copy of the search warrant and return on warrant after the search was completed. 4RP at 613.

Mr. Potts testified they were having a normal day and had friends and family over at the house at the time of the search. 4RP at 585. He stated that he heard a “crash” at the front door, but did not hear the police yelling at that time. 4RP at 586. He heard another crash and then heard “Longview Police.” He yelled to the police that he would open the door. 4RP at 587. He stated that he opened the door and that police came through the door with guns drawn and ordered him to the floor. 4RP at 588. He stated that he asked if they had a warrant but that no one gave him a copy. 4RP at 589. Mr. Potts testified that police told him that Ms. Rickards was going to jail for drugs, and he said that if there were any drugs in the house, they were his. 4RP at 589. He testified that he said this because he did not want his girlfriend to go to jail. 4RP at 592.

Mr. Potts denied that he told Det. Libbey that he told his girlfriend to

flush the drugs and denied that he made statements that the police must have conducted controlled buys of drugs at the house. 4RP at 590, 592. He acknowledged that he was using drugs at the time, but denied that they were selling drugs. 4RP at 592, 597, 601. He said that the scale found in the bedroom was for buying drugs to make sure he was getting the correct amount and that he bought drugs once a month for his personal use. 4RP at 595. He said that he had \$600 that he had gotten from a cash machine earlier that day to buy a truck. 4RP at 593. Mr. Potts testified that the money seized was later returned to him by the Longview Police Department. 4RP at 594.

D. ARGUMENT

1. **THE COMPLAINT AND AFFIDAVIT FOR SEARCH WARRANT FAILED TO ESTABLISH PROBABLE CAUSE BY FAILING TO SET FORTH FACTS NECESSARY TO ESTABLISH EITHER THE BASIS OF KNOWLEDGE OR THE VERACITY OF THE INFORMANT AND BECAUSE THE INFORMATION WAS STALE**

- a. *A search warrant must be supported by facts and circumstances that establish probable cause to believe a crime is being committed and evidence of that crime will be found at the location to be searched.*

The federal and state constitutions protect citizens from unreasonable searches and seizures. U.S. Const. amend. IV; Washington Const. art. I, sec. 7. A search warrant may issue only upon a showing of probable cause, commonly

established by facts asserted in an affidavit in support of the warrant. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Probable cause exists if a reasonable, prudent person would understand from the facts asserted in the affidavit that criminal activity is occurring and that evidence of the activity will be found at the place to be searched when the warrant is executed. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The search warrant affidavit must set forth specific facts and circumstances sufficient for a magistrate to independently determine the existence of probable cause.

When evaluating the issuance of a search warrant based upon an informant's tip, Washington follows the *Aguilar-Spinelli* test. *State v. Jackson*, 102 Wn.2d 432, 435-443, 688 P.3d 136 (1984). "Under that test, to establish probable cause for issuance of a search warrant based upon an informant's tip detailed in an affidavit, the affidavit must demonstrate the informant's (1) basis of knowledge and (2) veracity." *Vickers*, 148 Wn.2d at 112 (citing *Jackson*, 102 Wn.2d at 435). If either or both prongs of the *Aguilar-Spinelli* test are not met, "probable cause may yet be satisfied by independent police investigation corroborating the informant's tip to the extent it cures the deficiency." *Id.* (citing *Jackson*, 102 Wn.2d at 438). The two prongs are separate and both must be established in the affidavit for the search warrant; a strong showing on one prong will not overcome a deficiency in the

other. *Jackson*, 102 Wn.2d at 437, 441. If either prong is not established, the search warrant is deficient and any evidence obtained pursuant to the defective warrant must be suppressed. *State v. Lyons*, 174 Wash.2d 354, 368, 275 P.3d 314 (2012).

A trial court's review of a search warrant is limited to the four corners of the affidavit asserting probable cause. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The trial court's determination regarding the sufficiency of the affidavit is a conclusion of law that is reviewed de novo. *Id.*; *State v. Chamberlin*, 161 W.2d 30, 40-41, 162 P.3d 389 (2007).

Although a trial court's determination is afforded deference, a reviewing court "will not defer to a magistrate's decision if the information on which it is based is not sufficient to establish probable cause. *State v. Perez*, 92 Wn. App. 1, 4, 963 P.2d 881 (2002).

b. Basis of knowledge prong

When a confidential informant provides the basis for probable cause to issue a search warrant, the affidavit in support of the warrant must establish both the basis of the informant's knowledge and the reliability of the informant. *Jackson*, 102 Wn.2d at 433.

To satisfy the "basis of knowledge" prong, the informant's information must go beyond a mere unsupported conclusion, belief, or suspicion that illegal

activities are occurring or will occur. *State v. Thompson*, 13 Wn. App. 526, 529, 536 P.2d 683 (1975).

The information must inform the magistrate that evidence of a crime can be found in the place to be searched and it must be based on facts the magistrate can evaluate. *Thein*, 138 Wn.2d at 148.

Here, there is no basis of knowledge shown by the informant other than conclusory statements that “X” was “invited” into the house and saw a baggie that “X” believed to be methamphetamine and that a glass smoking device was in the house. Attachment B, at 2. No details are given regarding the relationship between X and Mr. Potts, why he or she was invited to the house, and no allegation is made that methamphetamine was being distributed.

c. Veracity prong

The affidavit for search warrant is also flawed because it fails to sufficiently explain the informant’s credibility or reliability. See *Jackson*, 102 Wn.2d at 435 (citing *Aguilar*, 378 U.S. at 114) (setting forth the requirements for establishing the veracity prong).

A heightened showing of reliability is required where, as here, the magistrate does not know the identity of the informant, or the informant is a professional informant, because such informants are more likely to provide information “colored by self-interest.” *State v. Ibarra*, 61 Wn.App. 695, 699,

812 P.2d 114 (1991); accord *State v. Rodriguez*, 53 Wn. App. 571, 575-77, 769 P.2d 309 (1989).

To establish the veracity prong of the *Aguilar-Spinelli* test, “the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.” *Jackson*, 102 Wn.2d at 435 (citing *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964)). “The most common way to satisfy the ‘veracity’ prong is to evaluate the informant’s ‘track record’, i.e., has he provided accurate information to the police a number of times in the past?” *Id.* at 437. “If the informant’s track record is inadequate, it may be possible to satisfy the veracity prong by showing that the accusation was a declaration against the informant’s penal interest.” *Id.*

Here, however, the search warrant affidavit provided minimal specific information about the informant. First, Detective Libbey asserted the informant, referred to as “X,” reported that he or she invited to 288 26th Avenue in Longview and “observed a substance he/she recognized as methamphetamines.” Attachment B. Exhibit 1 at 1. The affiant also wrote “X is working with the Longview Police Department Street Crimes Unit in exchange for leniency in a criminal matter which he/she was previously involved in.” The affidavit states that “X” has done one controlled buy, but the

alleged “buy” was not conducted at the subject house. Last, the affiant states that “X” has provided information for two narcotic search warrants. This thin track record of “X” cited by affiant is insufficient for probable cause.

Furthermore, the details regarding the exterior of the house by Detective Libbey does not serve to support the statements of “X,” because the details regarding the house are innocuous and easily observable by anyone passing the subject house.

d. Staleness

Information is not stale for probable cause purposes if the facts and circumstances in the affidavit support a commonsense determination that there is a continuing and contemporaneous possession of the evidence intended to be seized. *State v. Maddox*, 152 Wn. 2d at 505-06. Here, the affidavit for search warrant was made “72 hours” after “X” allegedly was invited into the house and saw methamphetamine. Attachment B, Exhibit 1, at 2. This allegation contained in the affidavit does not support a commonsense determination that Mr. Potts was unlikely to be in continuing and contemporaneous possession of methamphetamine described in the warrant. Given the fact that methamphetamine is easily consumed and easily transferable undermines the probability that the drugs described by “X” will be present as long as 12 days

after “X” allegedly saw the drugs in the house.⁴ See *Andresen v. State*, 24 Md. App. 128, 172, 331A.2d 78 (Md. 1975), aff’d, 427 U.S. 463, 49 L. Ed. 2d 627, 96 S. Ct. 2737 (1976) (discussion of variables in considering staleness)

The affidavit for search warrant did not detail an ongoing investigation of a methamphetamine operation or that methamphetamine was being sold in the premises or its vicinity during the relevant period, but was limited to a single contact with Mr. Potts. The affidavit provides no assertion that the methamphetamine allegedly seen by “X” would be present ten to twelve days later or that there is reason to suspect ongoing criminal activity at the house, and is therefore insufficient information from which to reasonably infer the continued presence of the drugs listed in the search warrant.

Based on the foregoing, the information did not provide current probable cause to search the premises.

2. MR. POTTS WAS PREJUDICED AS A RESULT OF HIS TRIAL COUNSEL’S FAILURE TO PROPERLY PRESERVE THE ISSUE RELATING TO THE BASIS OF KNOWLEDGE AND VERACITY OF THE INFORMANT IN THE SEARCH WARRANT AFFIDAVIT

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States

⁴Nine days from November 6 to November 12, 2015, and an additional

Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

Should this court find that trial counsel waived or invited the error claimed and argued in the preceding section of this brief by failing to

period of a maximum of 72 hours described in the affidavit.

properly argue the veracity and knowledge prongs of *Aguilar-Spinelli* in the information in the affidavit for search warrant, then both elements of ineffective assistance of counsel have been established. First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to present the argument set forth in the preceding section. And had counsel done so, the motion to suppress would have been granted under the law set forth therein.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *Leavitt*, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to properly argue the staleness of the information the affidavit for search warrant, the motion to suppress would have been granted for the reasons articulated in the preceding section, with the result that there would have been insufficient evidence to convict Mr. Potts of the charged offenses.

Counsel's performance was thus deficient, which was highly prejudicial to Mr. Potts, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to

reversal of his convictions.

3. THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE OBTAINED IN VIOLATION OF THE KNOCK AND ANNOUNCE RULE UNDER RCW 10.31.040.

The knock-and-wait rule is part of the constitutional requirement that search warrants be reasonably executed. *State v. Alldredge*, 73 Wn. App. 171, 175, 868 P.2d 183 (1994), citing, *State v. Myers*, 102 Wn.2d 548, 552, 689 P.2d 38 (1984); *State v. Coyle*, 95 Wn.2d 1, 6, 621 P.2d 1256 (1980). Under RCW 10.31.040, officers seeking to enter a house to execute an arrest warrant or search warrant must first knock and announce the presence and purpose.

The statute provides:

RCW 10.31.040. Officer may break and enter. To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other enclosure, if, after notice of his office and purpose, he be refused admittance.

Absent exigent circumstances, an officer's failure to comply with this statute during the execution of a search warrant requires suppression of the evidence seized. *State v. Hartnell*, 15 Wn.App. 410, 550 P.2d 63 (1976). In addition, the "knock and announce" rule as set out in RCW 10.31.040 is not

merely a rule of statutory creation. Rather, it derives from the common law and constitutes a legislative statement of privacy rights also guaranteed under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. *State v. Coyle*, 95 Wn.2d 1, 621 P.2d 1256 (1980); *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963).

In order to comply with the rule, the police must, prior to any non-consensual entry, (1) announce their identity, (2) demand admittance, (3) announce the purpose of their demand, and (4) be explicitly or implicitly denied admittance. *Coyle*, 95 Wn.2d at 6; *State v. Edwards*, 20 Wn. App. 648, 651, 581 P.2d 154 (1978). The police do not comply with the rule merely by announcing their identity and purpose as they enter. *State v. Ellis*, 21 Wn. App. 123, 589 P.2d, 428 (1978); *State v. Lowrie*, 12 Wn. App. 155, 528, P.2d 1010 (1974).

The “knock and announce” rule has three main purposes: (1) to reduce the potential for violence to both police and occupants arising from an unannounced entry; (2) to prevent destruction of property; and (3) to protect the occupants’ right to privacy. *Coyle*, 95 Wn.2d at 5. Our courts require “strict compliance with the rule” unless the state can meet its burden to “demonstrate that one of two exceptions to the rule applies: exigent circumstances or futility of compliance.” *State v. Richards*, 87 Wn.App. 285, 941 P.2d 710 (1997). The remedy for an unexcused failure to comply with these requirements is the suppression of any physical evidence or statements obtained by means of the

entry. *Coyle*, 95 Wn.2d at 14; *Edwards*, 20 Wn. App. at 651. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999).

In the case at bar, the police did not comply with the statute. The question presented by these facts is whether the officers knocked first before using the ram, and whether they were impliedly "denied admittance," where the officers waited, at most, fifteen seconds before entering the home and where Mr. Potts testified that he was trying to open the door when the police used the ram.

Eighteen year old Tanner Daggy testified that he heard "loud banging" at the front door and looked out the window and saw police. 1RP at 87. The evidence shows that Mr. Potts was near the front door at the time police began either knocking or using the battering ram. Mr. Daggy testified that his uncle went to the front door and that he did eventually tell the police that he was going to open the door. 1RP at 87. Mr. Potts stated that he was standing within a foot of the door when the banging started, and he did not hear any yelling or warnings given by the police. 4RP at 585-86. He stated that he yelled at whomever was outside to "give me a minute and I'll open the door," and it was only after that he heard police yell "Longview police." 4RP at 587.

Mr. Potts' argument that the police failed to announce their presence and did not give any warning prior to using the ram is supported by the

undeniable fact that he did in fact open the door for the police. 4RP at 587. The court's findings that supporting hearing are not supported by the facts adduced at the hearing and reiterated at trial. Findings of fact 9 and 10 do not accurately reflect that Mr. Potts voluntarily opened the front door to allow the police to enter, a fact that Det. Libbey acknowledged at the hearing. 1RP at 48; CP 113. Det. Libbey stated that he heard voices inside the house and "it sounded like they were coming to open the door." 1RP at 47. The facts presented at the hearing show an incorrectly performed entry into the house and indicate that if an announcement was given, it was given simultaneously with or after the deputy used the ram. The facts do not show compliance with the "knock and announce" rule under Washington law.

4. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION FOR POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE

Without conceding that police lawfully obtained the incriminating items, Mr. Potts contends there was insufficient evidence to support the element of intent to deliver in counts 1 and 2.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068

(1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To prove Mr. Potts guilty of possession with intent to deliver under RCW 69.50.401(a)(1)(ii), the State was required to show three elements: (1) unlawful possession; (2) with intent to deliver; and (3) a controlled substance, in this case methamphetamine in count 1 and heroin in count 2.

Accordingly, in addition to possession of a controlled substance, at least one other factor must be present to support an inference of intent to deliver. *State v. McPherson*, 111 Wn. App. 747, 759, 46 P.3d 284 (2002). The finding of intent to deliver "must logically follow as a matter of probability from the evidence." *Id.* (quoting *State v. Campos*, 100 Wn.App. 218, 222, 998 P.2d 893 (2000) (citing *State v. Davis*, 79 Wn.App. 591, 594, 904 P.2d 306 (1995))).

The quantity or packaging of a controlled substance are insufficient to show an intent to deliver. *Id.*; see also, *State v. Davis*, 79 Wn. App. 591, 904 P.2d 306 (1995); *State v. Hutchins*, 73 Wn. App. 211, 868 P.2d 196 (1994).

State v. Brown, 68 Wn.App. 480, 843 P.2d 1098 (1993) is instructive.

In *Brown*, police observed a juvenile drinking beer on public sidewalk with a friend in a “high narcotics area.” *Brown*, 68 Wn. App. at 481. After a brief police pursuit, Brown dropped \$400 worth of crack cocaine to the ground. *Id.* at 482. He was later charged with possession of cocaine with intent to deliver. *Id.* Although police had not observed any activity consistent with a drug sale, one officer testified that the amount of cocaine recovered was too much for personal use and that “this [was] definitely possessed with the intent to deliver.” *Id.* The *Brown* Court found the evidence insufficient to support a finding of intent to deliver beyond a reasonable doubt and remanded the case for entry of a conviction for simple possession. *Id.* at 485.

In *Davis*, the defendant was found with a total of 19 grams of marijuana in individually wrapped baggies, two baggies of marijuana seeds, a box of sandwich baggies, a marijuana pipe, and a number of knives. 79 Wn. App. at 593-96. An officer testified that a marijuana user was unlikely to have the amount of marijuana with the type of packaging found on the defendant. *Id.* At 593. The appellate court disagreed, finding the amount of marijuana and packaging to be consistent with personal use. *Id.* at 596. The Court found the evidence insufficient to suggest an intent to deliver absent other indicia of such an intent, for example, a large amount of money or scales. *Id.* at 595. The case was remanded for entry of a conviction for simple possession. *Id.* at 596.

In *Hutchins*, the defendant was found with 393 grams of wet marijuana. 73 Wn. App. at 213. One officer testified about the street price for the amount

of marijuana found on the defendant and explained that the marijuana could be repackaged and sold for approximately twice the purported purchase price. *Id.* at 214. The Court stated:

When . . . testimony of a profit motive is presented with no evidence other than bare possession of a quantity of marijuana, its admission is little more than an attempt to bootstrap a simple possession charge into the more serious offense of possession with intent to distribute.

Id. at 215.

Finding no corroborating evidence of an intent to deliver other than the officer's opinions about potential profits, the Court reversed the conviction. *Id.* at 215, 218.

Washington cases have upheld convictions for possession with intent to deliver only where substantial corroborating factors supported a finding of an intent to deliver. In *State v. Hagler*, 74 Wn. App. 232, 233, 872 P.2d 85 (1994), police stopped a speeding car driven by Hagler, a juvenile, who made furtive gestures as the police approached and then gave the officers a false name. *Id.* When police removed him from the car, they observed suspected rock cocaine inside the car and some falling from Hagler's lap. *Id.* Police recovered 24 rocks of suspected cocaine, weighing 2.8 grams, from the scene. *Id.* Police also observed \$342 in an open pocket of Hagler's clothing. *Id.* At trial, an officer testified that in his opinion, 24 rocks of cocaine was inconsistent with

personal use. *Id.* at 234. Given the amount of cocaine and the amount of cash possessed by the juvenile, this Court affirmed Hagler's conviction for possession with the intent to deliver. *Id.* at 236. See also *State v. Lane*, 56 Wn. App. 286, 297, 786 P.2d 277 (1989) (informant's tip, \$850 in cash, scales, one ounce of cocaine, and officer testimony indicating one ounce enough for eight typical sales sufficient to support finding of intent to deliver); *State v. Lopez*, 79 Wn. App. 755, 758-59, 768-69, 904 P.2d 1179 (1995) (large amount of cocaine, some broken into small bindles, \$826 in cash immediately following a controlled buy of \$1000 of cocaine, and officer testimony about packaging and typical sales amounts sufficient to support intent to deliver conviction).

In this case, there was no substantial corroborating evidence to support the charge that Mr. Potts possessed methamphetamine and heroin with the intent to deliver, requiring reversal of his convictions. Unlike cases such as *Hagler*, *Lane*, and *Lopez*, no prior delivery was witnessed, no address books or accounting books were discovered, no cutting agents and no prepackaged narcotics ready to sell were discovered. Mr. Potts was found with only twelve grams of tested methamphetamine and five grams of heroin, which, despite the State's assertion, is a relatively small amount for cases involving alleged distribution, and is more consistent with personal use. The weight of the evidence demonstrates that the drugs were intended for personal use only. This is particularly true because Mr. Potts and Ms. Rickards claimed "co-

ownership” of the drugs found in the house, implying that both of them would also be consuming the methamphetamine and heroin. 5RP at 578, 601.

Furthermore, there was indicia of personal use found during the search that was not collected by the police. A loaded glass pipe used for smoking methamphetamine was found in Ms. Rickards’ bra when she was taken to jail and other pipes were present in the house, which were not seized. 5RP at 564. She also testified that there was foil in the apartment used for smoking heroin, which also was not collected by police. 5RP at 581. These typical personal use items were essentially ignored by law enforcement during its search.

The prosecution only presented physical evidence of \$650.00, an electronic scale, and plastic baggies. Mr. Potts explained that the money was for the anticipated purchase of a used pick-up truck. 5RP at 593. An electronic scale is not solely indicative of an intent to deliver drugs, since purchasers also have scales to make sure the quantity of drugs they purchased was delivered, and Mr. Potts testified that the scale found during the search was used when he purchased drugs to ensure he was not cheated. 5RP at 595.

Without more, particularly without evidence of a previous drug sales, the methamphetamine and heroin discovered in the house combined with \$650, the scale, and baggies are insufficient evidence to prove beyond a reasonable doubt that Mr. Potts intended to deliver the methamphetamine and heroin discovered. *Cf. State v. Wade*, 98 Wn. App. 328, 340-41, 989 P.2d 576 (1999) (nine rocks weighing 1.3 grams not indicative of intent to distribute).

In the absence of sufficient evidence of each of the elements of the crime charged, a guilty verdict may not stand. *State v. Spruell*, 57 Wn.App. 383, 385, 788 P.2d 21 (1990). In this case, the State failed to prove Mr. Potts possessed methamphetamine and heroin with the intent to deliver. The State's evidence showed possession of drugs, but the indicia of any intent to deliver was simply the same as any user or purchaser of the drugs as well. The proper remedy for this error is reversal and remand. See *Wade*, 98 Wn. App. at 342.

5. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EXHIBIT 20A BECAUSE THE STATE FAILED TO ESTABLISH THE UNTESTED BAG CONTAINED A CONTROLLED SUBSTANCE.

The state charged Mr. Potts in count 1 with possession with intent to distribute methamphetamine. CP 58. Exhibit 20A consisted of two bags of suspected drugs, only one of which was tested. The trial court erred in admitting over defense objection the untested bag contained in Exhibit 20A because the State failed to prove the baggie contained methamphetamine, and failed to present adequate circumstantial evidence to prove that the substance in the baggies appeared to be similar to the methamphetamine in the bag that was tested. Crime lab technician John Dunn testified on direct examination that he had examined one of the bags found in the toilet and determined that it contained methamphetamine, but did not examine the second bag. 3RP at 392-95.

A toxicologist may provide random sampling testimony, indicating a

tested substance is most likely similar to an untested substance. See *State v. Caldera*, 66 Wash.App. 548, 832 P.2d 139 (1992). In *Caldera*, Division 1 held that “scientific testing of a random portion of a substance that is consistent in appearance and packaging is reliable and supports a finding that the entire quantity is consistent with the test results of the randomly selected portion.” *Caldera*, 66 Wn.App. at 550. The testimony regarding the untested sample, however, must be based on the foundation that the tested and untested materials appeared similar. *Id.*

In this case, the untested bag admitted in Exhibit 20A, however, does not satisfy this standard. In *State v. Crowder*, 196 Wn.App. 861, 385 P.3d 275 (2016), the defendant’s conviction for marijuana delivery to minors was reversed with prejudice where Division 3 found that the State failed to establish a link between the tested substance and the substance that was consumed by minor, where at the time of a police search, at least four pill bottles were located inside Crowder's garage, each of which was the potential sources of the substance distributed by Crowder. *Crowder*, 196 Wn.App. at 871. Only the contents of one of the four bottles was tested, and the court found the evidence was insufficient to establish that the substance that Crowder provided to two minors had the same THC concentration level required to prove the substance was marijuana, which was required in order to prove distribution of a controlled substance based on random sampling where the toxicologist did not compare the substance tested to that consumed by the minors. *Crowder*, 196

Wn.App. at 871.

In this case, John Dunn testified that he tested and weighed the contents of one bag, but did not test the other. 3RP at 392. He did not compare the contents of the two samples, a foundational requirement announced in *Caldera* and *Crowder*.

The error of admitting the unknown substance into evidence was not harmless error. Erroneous admission of evidence is reviewed under the unconstitutional harmless error standard. The test for harmlessness is whether, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

The State presented very little evidence supporting its contention that Mr. Potts intended delivery. As noted in section 4, above, there were no controlled buys using a confidential informant, no pre-measured bags, and no records showing amounts sold. Exhibit 20A, however, consisted not only of the tested 13 grams, but of the untested substance as well. The State's case was based primarily on the sheer volume of the tested methamphetamine and untested unknown substance, which was critical to State's assertion that Mr. Potts had a large amount of drugs for delivery, not personal use. The prejudice generated by admission of the untested bag is overt; the jury was confronted with a second bag which the State implied was also methamphetamine. 5RP at 688. The deputy

prosecutor relied on this evidence during closing argument:

She told you that there was an ounce of methamphetamine there, approximately twenty-eight grams. But the Defense wants you to believe that because that second bag wasn't tested, that you should just completely disregard it. And yet his own witness tells you that that was methamphetamine that was in that bag that she tried to flush. An ounce of methamphetamine. Thirteen hundred dollars worth of drugs.

SRP at 688.

There was not overwhelming evidence regarding the element of delivery against Mr. Potts and the prosecution cannot meet its heavy burden of proving that any reasonable jury would have found him guilty of possession with intent to deliver in count 1 absent admission of the untested bag in Exhibit 20-A. The prosecution therefore cannot satisfy the harmless error standard. This Court should so hold and should reverse.

6. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

If Mr. Potts does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. At sentencing, the court imposed fees, including \$500.00 victim assessment and \$100.00 felony DNA collection fee. The trial court found him indigent for purposes of this appeal. There has been no order finding Mr. Potts' financial condition has improved or is likely to improve. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's

financial condition has improved to the extent that the party is no longer indigent.”

This Court has discretion to deny the State’s request for appellate costs. Under RCW 10.73.160(1), appellate courts “may require an adult offender convicted of an offense to pay appellate costs.” “[T]he word ‘may’ has a permissive or discretionary meaning.” *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review, “unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in “compelling circumstances.” *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, the Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Potts’ indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

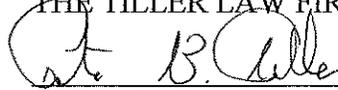
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///

E. CONCLUSION

For the foregoing reasons, Mr. Potts respectfully requests this Court reverse his convictions and remand for a new trial.

DATED: September 28, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

ptiller@tillerlaw.com

Of Attorneys for Danny Potts

CERTIFICATE OF SERVICE

The undersigned certifies that on September 18, 2017, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Erin Christine Jany, Grays Harbor Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

Ryan Paul Jurvakainen
Cowlitz County Prosecutor's Office
312 SW 1st Ave. Rm 105
Kelso, WA 98626-1799
Jurvakainen.ryan@co.cowlitz.wa.us

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Danny Ray Potts
DOC # 229555
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 28, 2017.



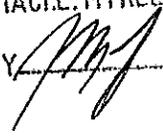
PETER B. TILLER

ATTACHMENT A

FILED
SUPERIOR COURT

2016 DEC 19 PM 2 47

COWLITZ COUNTY
STACIL MYKLEBUST, CLERK

BY 

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

DANNY RAY POTTS,

Defendant,

) NO. 15-1-01301-4

)
) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW
) ON DEFENDANT'S MOTION
) TO SUPPRESS

On September 19, 2016, the Honorable Marilyn Haan, Superior Court Judge, presided over the defendant's motion to suppress. The court heard arguments of counsel, considered the evidence presented, and found the following:

Findings of Fact

1. On November 6, 2015, Cowlitz County District Court Judge Koss approved a request for a search warrant filed by Longview Police Department Street Crimes Unit Detective Seth Libbey. The search warrant authorized law enforcement to enter and search the residence located at 288 26th Ave, Longview, WA, and to locate Danny Potts, the defendant.
2. The probable cause detailed in the search warrant affidavit was based upon information received from a confidential informant within 72 hours of the affidavit and search warrant being filed with Judge Koss.
3. The search warrant affidavit was dated November 6, 2016. The search warrant was initially dated October 9, 2016. When signing the search warrant, Judge Koss corrected the date to November 6, 2016.



- 1 4. The search warrant was executed on November 12, 2015. Det. Libbey was
2 accompanied by other Longview Police Department Street Crimes Unit detectives,
3 including Detective Brian Durbin and Sergeant Marc Langlois.
- 4 5. Det. Libbey knocked on the front door of the residence and announced in a loud voice
5 that the Longview Police Department was at the residence with a search warrant and
6 for the occupants to come to the door. Det. Libbey could hear people inside of the
7 residence moving around as he awaited a response.
- 8 6. When none of the occupants came to the door, Det. Libbey again knocked and
9 announced the law enforcement's presence. Again, the occupants failed to come to the
10 door and allow the detectives access.
- 11 7. Det. Libbey knocked and announced a third time. The occupants again failed to
12 acknowledge Det. Libey and did not allow the detectives access to the residence.
- 13 8. Det. Libbey's knock and announce attempts lasted approximately fifteen seconds. Sgt.
14 Langlois authorized the use of force to enter the residence. Det. Durbin began to strike
15 at the door with a ram in order to gain access. Det. Durbin did not strike the door
16 properly; instead, the ram was striking the door frame.
- 17 9. After approximate three strikes of the ram, the detectives heard a person yelling at the
18 detectives from within the residence. The door was then opened and the detectives
19 were able to access the residence.
- 20 10. The defendant was found just inside of the front door. Based upon his location at the
21 time the door was opened, the detectives believed that the defendant was the person
22 who unlocked the door and allowed the detectives to enter.

23 **Conclusions of Law**

- 24 1. The October 9, 2015 date on the search warrant was a scrivener's error. Judge Koss
25 properly crossed that date out and listed the correct date when signing the warrant.
2. The detectives properly conducted the knock and announce procedure prior to
attempting to utilize force in order to gain entry into the house.
3. During each of Det. Libbey's three knock and announce attempts, he announced law
enforcement identity, announced law enforcement's purpose, demanded admittance,
announced the purpose of their demand, and was implicitly denied admittance.
4. The knock and announce procedure was properly done to attempt to reduce the
possibility of violence towards the occupants, destruction of property, and to protect
the occupants' right to privacy.

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5. Based upon the lack of response, the detectives attempted use of force to enter the residence was justified.
 6. Based upon the nature of the alleged criminal activity, including the nature and scope of the suspected activity, it was still probable that evidence of criminal activity would be found within the residence at the time the search warrant was executed.
 7. The execution of the warrant was not done beyond the ten day time limit.
 8. The warrant was not stale.
 9. The motion to suppress is denied.

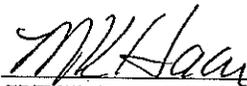
9

10

DATED this 19th day of December, 2016.

11

12



SUPERIOR COURT JUDGE

13

14 Presented by:

Approved as to form:

15

16 

SEAN M. BRITAIN
WSBA #36804
Deputy Prosecuting Attorney

17 

IAN MAHER
WSBA #47512
Attorney for Defendant

ATTACHMENT B

**DISTRICT COURT OF WASHINGTON
FOR COWLITZ COUNTY**

STATE OF WASHINGTON,

Plaintiff

vs.

288 26th Avenue
Longview, WA
Tan with white trim
Residence with detached garage
&
Danny Ray Potts
DOB 10/14/1952
White male w/black hair
Hazel eyes, 5' 7" and 175 lbs

Defendant

No.

**COMPLAINT AND AFFIDAVIT
FOR SEARCH WARRANT**

STATE OF WASHINGTON)

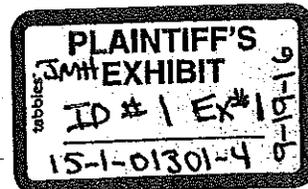
: ss

County of Cowlitz)

I, Seth H. Libbey, after being duly sworn on oath, depose and say that I am a commissioned Police Officer with the Longview Police Department in Longview, Washington and have been so employed since February 2009. I am currently a Detective assigned to the Longview Police Department Street Crimes Unit. The Street Crimes Unit is tasked with the investigation of narcotics violations, firearms violations, gang-related crimes, intelligence gathering, and special surveillance duties. As a result of these investigations, I have made over 100 arrests involving the use of controlled substances and associated paraphernalia. I have further seized over 1000 grams of illegal narcotics and \$50000 in currency from narcotics sales.

I have had numerous phases and courses of police training. I graduated from the Washington State Law Enforcement Training Academy in Burien, Washington in July 2009, which included a course of instruction in narcotics recognition and narcotics law enforcement. I am a graduate of the Drug Enforcement Administration's basic drug investigator's course at Camp Murry Washington in April 2012.

I was contacted by a confidential informant, hereby referred to as X. The contact was in reference to methamphetamine being sold at 288 26th Avenue in Longview WA, Cowlitz County, by a male known as "Danny Potts." X identified "Danny Potts" via known photo as Danny Ray Potts DOB 10/14/1952, a white male with black hair and hazel eyes, about 5' 7" tall and weighing about 175 lbs. X stated he/she was invited into 288 26th Avenue in Longview WA, and observed a substance he/she recognized as methamphetamines. X is working with the Longview Police Department Street Crimes Unit in exchange for leniency in a criminal matter which he/she



was previously involved in. X has provided information into the local distribution of controlled substances, which has been corroborated by other sources. X stated he/she has used methamphetamine, heroin, cocaine and marijuana. X advised that he/she is familiar with numerous illicit drugs and their packaging. Based on X's acquaintances and drug history, he/she is familiar with how drug transactions are arranged and completed.

X has performed 1 "controlled buys" for the Street Crimes Unit in the past. X was sent in to purchase a controlled substance from a pre-identified target suspect. X was searched for money or contraband before and after the transaction and each time no money or contraband was located. X was issued marked funds for the purchase of the controlled substance, contacted the suspect, and then returned to Street Crimes Detectives with the previously agreed amount of controlled substance. The controlled substance received, field tested positive as the substance that X had been asked to purchase from the pre-identified target suspect.

X has also provided information for two narcotics search warrants. At time of service the information provided by X was confirmed and statements made by him/her were confirmed.

Within the last seventy – two hours and operating under the direction of Longview Police Street Crimes Detectives, X travelled to 288 26th Avenue. X was invited in and he/she observed a substance that appeared from his/her knowledge and previous drug history to be consistent with about a 1/4 ounce of methamphetamine. X described the substance as white crystal substance that he/she had observed before and stated the material was familiar from his/her past history with illegal narcotics. X stated he/she recognized the substance to be methamphetamine. X observed the substance packaged in plastic Ziploc style bag. I have spoken to X in the past regarding approximating drug weights and know he/she is able to accurately approximate weights of illegal narcotics through his/her visual observations. X has prior experience with methamphetamine. Some of X's experience has been documented in his/her own criminal history.

X advised the residence was under POTTS' control. Local records show 288 26th Avenue as POTTS address. X advised the Methamphetamine was in POTTS control during the period of his/her observation. X advised POTTS indicated the substance was methamphetamine.

X advised seeing a glass pipe in the residence. X stated the pipe was glass with a round bulb at one end. He/she stated it was a "meth pipe." I know from my training and experience that the depiction and terminology provided by X is consistent with a pipe used to smoke methamphetamines. X stated the pipe pipes contained a white crystal residue that X recognized as methamphetamines residue.

I have personally seen the one story home at 288 26th Avenue. The home is in the 200 block of 26th Avenue, in Longview Washington. The residence is on the east side of 26th Avenue. The home is tan in color with white trim and has a covered front porch on the west side of the building. The numbers "288" are displayed to the right of the front door.

I have observed the residence in person. I collected a photograph of the residence located at 288 26th Avenue and attached it below. X identified POTTS from a photograph recovered from local records. I attached the photograph below.



I believe that the identity of X needs to be kept secret because his/her usefulness would cease immediately if he/she was identified. In addition, I have heard that people who cooperate with the police would be harmed or otherwise injured if their identities are known.

Wherefore, I pray that a search warrant be issued (a copy of which is attached hereto and incorporated by reference herein) to any peace officer in Cowlitz County, Washington, commanding him to search the above-described residence located at 288 26th Avenue, Longview, Cowlitz County, Washington and the person of Danny Ray Potts DOB 10/14/1952, a white male with black hair and hazel eyes, about 5' 7" tall and weighing about 175 lbs.

There is now being concealed or kept certain property, to wit:

- a. Controlled substances including, but not limited to **methamphetamine**.
- b. Paraphernalia for using, packaging, processing, weighing and distributing controlled substances, including, but not limited to scales, funnels, sifters, grinders, containers, plastic bags or materials used to contain controlled substances, heat-sealing devices, diluents/dilutants, and the like;
- c. Personal books, letters, papers, notes, pictures, photographs, video and/or audio cassette tapes, computers, palm pilots, cell phones, pagers or documents relating names, addresses, telephone numbers, and/or other contact/identification information relating to the possession, processing, or distribution of controlled substances;
- d. Books, records, receipts, notes, letters, ledgers, and other papers relating to the possession, processing, or distribution of controlled substances;
- e. Cash, U.S. currency, foreign currency, financial instruments, and records relating to income and expenditures of money and wealth from controlled substances including, but not limited to money orders, wire transfers, cashier's checks or receipts, bank statements, passbooks, checkbooks, and check registers;
- f. Items of personal property which tend to identify the person(s) in residence, occupancy, control or ownership of the premises that is the subject of this warrant, including, but not limited to canceled mail, deeds, leases, rental agreements, photographs, personal telephone books, utility and telephone bills, statements, identification

documents, and keys;

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at a place where the property is found.

This warrant will be served within 10 days from the time it is signed by the judge. The search warrant is incorporated by reference to this affidavit.

[CHECK IF SUBMITTING BY ELECTRONIC DEVICE] This declaration was submitted to the issuing judge or magistrate using an electronic device that is owned, issued, or maintained by the below-identified criminal justice agency.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge, information and belief.

Signed this 6th day of November, 2015, at

Longview, Washington.

Law Enforcement Officer's Signature

 / 3L43

Law Enforcement Officer's Full Name

Detective Seth H. Libbey

Agency Badge/Serial or Personnel Number

3L43

Agency Name

Longview Police Department

SUBSCRIBED AND SWORN to before me this ^{6th}7th day of November, 2015.



JUDGE

Distribution if warrant obtained in person—Original (Court Clerk); 1 copy (Prosecutor), 1 copy (Officer).

Distribution if warrant obtained telephonically—If search warrant was obtained telephonically, this complaint must be read in its entirety to the judge. The judge *should* place the officer under oath prior to the reading. Original (Prosecutor); 1 copy (Officer).

Distribution if warrant obtained by e-mail—If search warrant was obtained by e-mail, this entire complaint must be sent to the judge for the judge to read. A printout of all e-mails related to this warrant must be distributed with the warrant. Original (Prosecutor); 1 copy (Officer).

DISTRICT COURT OF WASHINGTON
FOR COWLITZ COUNTY

STATE OF WASHINGTON,

Plaintiff)

vs.)

288 26th Avenue)

Longview, WA)

Tan with white trim)

Residence with detached garage)

&)

Danny Ray Potts)

DOB 10/14/1952)

White male w/black hair)

Hazel eyes, 5' 7" and 175 lbs.)

Defendant)

No.

SEARCH WARRANT

TO: THE SHERIFF OR ANY CONSTABLE OF COWLITZ COUNTY

Complaint having been made on oath before me by Seth H. Libbey, that he has reason to believe and does believe that evidence of the crimes of possession, delivery or conspiracy to deliver a controlled substance can be found at 288 26th Avenue, Longview, Cowlitz County, Washington and the person of Danny Ray Potts DOB 10/14/1952, a white male with black hair and hazel eyes, about 5' 7" tall and weighing about 175 lbs. The attached affidavit for search warrant (Exhibit A) is incorporated herein by reference.



There is now being concealed or kept certain property, to wit:

- a. Controlled substances including, but not limited to Methamphetamine.
- b. Paraphernalia for using, packaging, processing, weighing and distributing controlled substances, including, but not limited to scales, funnels, sifters, grinders, containers, plastic bags or materials used to contain controlled substances, heat-sealing devices, diluents/dilutants, and the like;
- c. Personal books, letters, papers, notes, pictures, photographs, video and/or audio cassette tapes, computers, palm pilots, cell phones, pagers or documents relating names, addresses, telephone numbers, and/or other contact/identification information relating to the possession, processing, or distribution of controlled substances;

d. Books, records, receipts, notes, letters, ledgers, and other papers relating to the possession, processing, or distribution of controlled substances;

e. Cash, U.S. currency, foreign currency, financial instruments, and records relating to income and expenditures of money and wealth from controlled substances including, but not limited to money orders, wire transfers, cashier's checks or receipts, bank statements, passbooks, checkbooks, and check registers;

f. Items of personal property which tend to identify the person(s) in residence, occupancy, control or ownership of the premises that is the subject of this warrant, including, but not limited to canceled mail, deeds, leases, rental agreements, photographs, personal telephone books, utility and telephone bills, statements, identification documents, and keys;

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at a place where the property is found.

I am satisfied that there is probable cause to believe that the said property is being concealed or kept in/on the described home at 288 26th Avenue, Longview, Cowlitz County, Washington and the person of Danny Ray Potts DOB 10/14/1952, a white male with black hair and hazel eyes, about 5' 7" tall and weighing about 175 lbs and that grounds for application for issuance of this search warrant exist.

Therefore, you are hereby ordered to search the above named home at 288 26th Avenue, Longview, Cowlitz County, Washington and the person of Danny Ray Potts DOB 10/14/1952, a white male with black hair and hazel eyes, about 5' 7" tall and weighing about 175 lbs. for the described property specified, serving this warrant, and if the property be found to seize it, leaving a copy of this warrant, and prepare a written inventory of the property seized, and return this warrant and the property seized before me or before some other magistrate or court having cognizance of this case.

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at a place where the property is found.

This warrant will be served within 10 days from the time it is signed by the judge. The search warrant is incorporated by reference to this affidavit.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge, information and belief.

Signed this 6th day of November, 2015, at

Longview, Washington.

Law Enforcement Officer's Signature

Law Enforcement Officer's Full Name

Agency Badge/Serial or Personnel Number

Detective Seth H. Libbey

3L43

Agency Name

Longview Police Department

SUBSCRIBED AND SWORN to before me this 6th day of November, 20 15.

[Handwritten Signature]

JUDGE

Distribution if warrant obtained in person—Original (Court Clerk); 1 copy (Prosecutor), 1 copy (Officer).
 Distribution if warrant obtained telephonically—If search warrant was obtained telephonically, this complaint must be read in its entirety to the judge. The judge *should* place the officer under oath prior to the reading. Original (Prosecutor); 1 copy (Officer).
 Distribution if warrant obtained by e-mail—If search warrant was obtained by e-mail, this entire complaint must be sent to the judge for the judge to read. A printout of all e-mails related to this warrant must be distributed with the warrant. Original (Prosecutor); 1 copy (Officer).

STATE OF WASHINGTON)
) ss
 COUNTY OF COWLITZ)

I certify that I received the attached warrant on the 6th day of NOVEMBER 20 15,
 and have executed it as follows: On 11/12, 20 15 at 1727 o'clock — M., I searched the
RESIDENCE described in the warrant and left a copy of said warrant. ON KITCHEN ISLAND
W/OBTAINED WARRANT
 Attached is an inventory of property taken pursuant to the execution of the search warrant.

DATED this 12th day of NOVEMBER, 20 15.

by *[Handwritten Signature]* / 32113
 Officer

STATE OF WASHINGTON,

Plaintiff)

vs.)

288 26th Avenue)
Longview, WA)
Tan with white trim)
Residence with detached garage)
&)
Danny Ray Potts)
DOB 10/14/1952)
White male w/black hair)
Hazel eyes, 5' 7" and 175 lbs.)

Defendant)

No.)

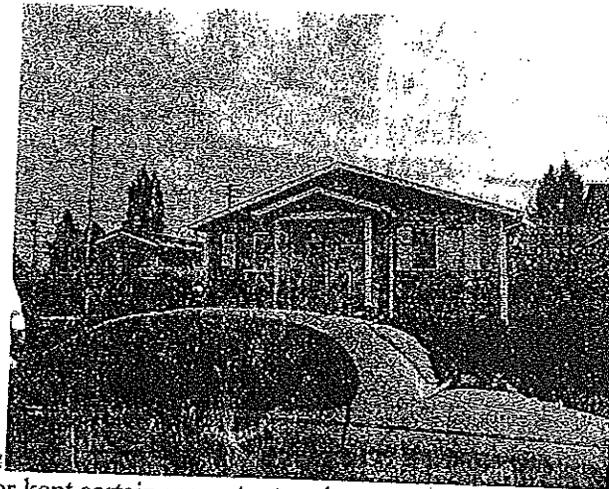
SEARCH WARRANT

Original

Copy of Search
Warrant
for
Danny Potts

TO: THE SHERIFF OR ANY CONSTABLE OF COWLITZ COUNTY

Complaint having been made on oath before me by Seth H. Libbey, that he has reason to believe and does believe that evidence of the crimes of possession, delivery or conspiracy to deliver a controlled substance can be found at 288 26th Avenue, Longview, Cowlitz County, Washington and the person of Danny Ray Potts DOB 10/14/1952, a white male with black hair and hazel eyes, about 5' 7" tall and weighing about 175 lbs. The attached affidavit for search warrant (Exhibit A) is incorporated herein by reference.



DEFENDANT'S
JMH EXHIBIT
ID# 2 Ex#2
15-1-01301-4

There is now being concealed or kept certain property, to wit:

- a. Controlled substances including, but not limited to Methamphetamine.
- b. Paraphernalia for using, packaging, processing, weighing and distributing controlled substances, including, but not limited to scales, funnels, sifters, grinders, containers, plastic bags or materials used to contain controlled substances, heat-sealing devices, diluents/dilutants, and the like;
- c. Personal books, letters, papers, notes, pictures, photographs, video and/or audio cassette tapes, computers, palm pilots, cell phones, pagers or documents relating notes, addresses, telephone numbers, and/or other contact/identification information relating to the possession, processing, or distribution of controlled substances;

d. Books, records, receipts, notes, letters, ledgers, and other papers relating to the possession, processing, or distribution of controlled substances;

e. Cash, U.S. currency, foreign currency, financial instruments, and records relating to income and expenditures of money and wealth from controlled substances including, but not limited to money orders, wire transfers, cashier's checks or receipts, bank statements, passbooks, checkbooks, and check registers;

f. Items of personal property which tend to identify the person(s) in residence, occupancy, control or ownership of the premises that is the subject of this warrant, including, but not limited to canceled mail, deeds, leases, rental agreements, photographs, personal telephone books, utility and telephone bills, statements, identification documents, and keys;

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at a place where the property is found.

I am satisfied that there is probable cause to believe that the said property is being concealed or kept in/on the described home at **288 26th Avenue, Longview, Cowlitz County, Washington** and the person of **Danny Ray Potts DOB 10/14/1952, a white male with black hair and hazel eyes, about 5' 7" tall and weighing about 175 lbs** and that grounds for application for issuance of this search warrant exist.

Therefore, you are hereby ordered to search the above named home at **288 26th Avenue, Longview, Cowlitz County, Washington** and the person of **Danny Ray Potts DOB 10/14/1952, a white male with black hair and hazel eyes, about 5' 7" tall and weighing about 175 lbs.** for the described property specified, serving this warrant, and if the property be found to seize it, leaving a copy of this warrant, and prepare a written inventory of the property seized, and return this warrant and the property seized before me or before some other magistrate or court having cognizance of this case.

A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises property is taken. If no person is found in possession, a copy and receipt shall be conspicuously posted at a place where the property is found.

This warrant will be served within 10 days from the time it is signed by the judge. The search warrant is incorporated by reference to this affidavit.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge, information and belief.

Signed this 6th day of November, 2015, at

Longview, Washington.

Law Enforcement Officer's Signature

Law Enforcement Officer's Full Name

Detective Seth H. Libbey

THE TILLER LAW FIRM

September 28, 2017 - 3:13 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49926-6
Appellate Court Case Title: State of Washington, Respondent v. Danny Ray Potts, Appellant
Superior Court Case Number: 15-1-01301-4

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Corrected Brief of Appellant

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