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NO. 50449-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MARVIN BRANHAM,

Appellant.

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

The Honorable Erik S. Rohrer, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The search warrant affidavit failed to establish probable cause to search appellant's vehicle.

2. Evidence seized pursuant to the unlawfully issued search warrant should have been suppressed.

Issues pertaining to assignments of error

Appellant was convicted of possession of methamphetamine with intent to deliver based on evidence seized from his vehicle pursuant to a search warrant. The search warrant affidavit detailed two transactions with an informant in appellant's home 11 weeks earlier, but it contained no facts connecting the vehicle to be searched with any criminal activity or with the evidence to be seized. Where the affidavit does not contain facts to establish a reasonable inference that evidence of illegal drug activity would be found in appellant's vehicle at the time the warrant issued, must evidence seized pursuant to the warrant be suppressed?

B. STATEMENT OF THE CASE

1. Procedural History

On June 17, 2015, the Clallam County Prosecuting Attorney charged appellant Marvin Branham with two counts of delivery of a controlled substance and one count of possession with intent to

manufacture or deliver a controlled substance. CP 90. Branham filed a CrR 3.6 motion to suppress evidence, arguing that the warrants authorizing search of his residence and car were not supported by probable cause. CP 50-85. The trial court denied the motion. CP 35-38. The case proceeded to a trial on stipulated facts as to the possession with intent charge, and the court found Branham guilty. CP 29-34. It dismissed the two delivery charges and imposed a Drug Offender Sentencing Alternative sentence on the remaining count. CP 19. Branham filed this timely appeal. CP 13.

## 2. Substantive Facts

On June 12, 2015, Detective Brian Knutson applied for a warrant to search Marvin Branham's residence, stating he believed there was probable cause to believe delivery of a controlled substance (methamphetamine) had been or was about to be committed on the premises. CP 61. In the probable cause narrative in the warrant affidavit, Knutson explained that he started working with an informant on March 19, 2015. The informant had a considerable criminal history which called his<sup>1</sup> credibility into question, so Knutson required him to check in with the sheriff's office three times a day and complete numerous controlled buys. CP 62.

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<sup>1</sup> The informant's identity is not disclosed. The pronouns "he," "his," and "him" will be used to refer to the informant for the sake of clarity.

The informant named Branham as a methamphetamine dealer in the area, saying he had been friends with Branham for about ten years and Branham had been dealing methamphetamine for three to four years. CP 63. The informant told Knutson that Branham gets his resupply of methamphetamine once a week, and he had personally accompanied Branham to Tacoma about ten times between August 2014 and February 2015 to resupply. CP 63. The informant described Branham's residence and address and said Branham usually conducts methamphetamine deals from within his residence. He said Branham keeps his methamphetamine supply in a blue Tupperware container and usually has about one pound of methamphetamine on him at any time. CP 63. The informant said that Branham works at an auto shop and does not sell methamphetamine while he is at work. CP 63. The informant identified several vehicles that Branham owns or uses. CP 63-64.

Knutson had the informant conduct controlled buys of methamphetamine from Branham on March 25 and March 26, 2015. Both transactions occurred at Branham's residence. CP 64-66. On March 29, 2015, the informant attempted to purchase methamphetamine from Branham, but Branham said he did not have any methamphetamine to sell. CP 66. The informant again attempted to purchase methamphetamine from Branham on April 9, 2015. Branham was smoking

methamphetamine and told the informant to take a hit, but the informant declined. Branham refused to sell the informant methamphetamine. CP 67.

On June 12, 2015, the informant told Knutson that he had stolen some methamphetamine from Branham's residence about two weeks earlier and sold it, because Branham owed him money. The informant said he had talked to Branham about the theft, and everything was fine. CP 67.

Knutson asked for authority to search Branham's residence for methamphetamine, drug paraphernalia, and evidence of drug dealing, saying there was probable cause to believe such evidence would be found. CP 67-69. The search warrant was issued. CP 60.

In a second affidavit, Knutson sought authority to search a white Cadillac used by Branham for evidence of delivery of a methamphetamine. CP 73. Knutson repeated the information in the first affidavit and also explained that he had asked the informant what type of vehicle Branham was driving. The informant said that Branham's Toyota truck was recently stolen and he was now driving the white Cadillac. Knutson said that on June 10, 2015, he drove by Branham's workplace and saw the Cadillac parked out front. Later that day another detective saw Branham drive the Cadillac from his workplace to his home. Based

on this information Knutson felt there was probable cause to believe Branham had dominion and control over the Cadillac and requested authority to search it subsequent to Branham's arrest. CP 81. The court issued the warrant to search the Cadillac. CP 85.

Branham was charged with two counts of delivery of methamphetamine based on the controlled buys and one count of possession with intent to deliver methamphetamine based on the evidence found in the Cadillac. CP 90-93. He moved to suppress the evidence seized pursuant to the warrant, arguing that the information regarding the controlled buys was too stale to support a finding of probable cause that evidence of a crime would be found in his residence or vehicle. He also argued there was no probable cause to search the Cadillac because the alleged facts did not establish a nexus between the vehicle and the suspected criminal activity. CP 50-59.

The trial court heard argument from the parties and reviewed the warrant affidavits. RP 15-47. It ruled that the warrants were supported by probable cause and denied the motion to suppress. CP 35-38. Branham thereafter waived his right to a jury trial and entered a stipulation as to facts set forth in police reports and probable cause statements. He stipulated that the substance found in eight baggies in the trunk of the Cadillac was methamphetamine and that he possessed that

methamphetamine with intent to deliver. CP 32-34. Based on the stipulated facts the court found Branham guilty of possession of methamphetamine with intent to deliver. CP 29-31.

C. ARGUMENT

THE SEARCH WARRANT WAS NOT SUPPORTED BY PROBABLE CAUSE, AND EVIDENCE SEIZED PURSUANT TO THE UNLAWFULLY ISSUED WARRANT MUST BE SUPPRESSED.

A search warrant may only issue on a showing of probable cause. U.S. Const. amend, IV; Wash. Const. art. I, § 7. The warrant must be supported by an affidavit which identifies particularly the place to be searched and the persons or things to be seized. *Id.* On appeal the validity of a search warrant is reviewed de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Issuance of a warrant is reviewed for abuse of discretion. Deference is given to the magistrate’s probable cause decision, but that deference is not unlimited. *State v. Lyons*, 174 Wn.2d 354, 362, 275 P.3d 314 (2012). The reviewing court “cannot defer to the magistrate where the affidavit does not provide a substantial basis for determining probable cause.” *Id.* at 363.

“To establish probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be

found at the place to be searched.” *Id.* at 359. “Further, these facts must be current facts, not remote in point of time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the person or premises to be searched at the time the warrant is issued.” *State v. Spencer*, 9 Wn. App. 95, 97, 510 P.2d 833 (1973). “The facts set forth in the affidavit must support the conclusion that the evidence is probably at the premises to be searched at the time the warrant is issued.” *Lyons*, 174 Wn.2d at 360 (citing *State v. Partin*, 88 Wn.2d 899, 903, 567 P.2d 1136 (1977)).

It is not enough for the warrant affidavit “to set forth that criminal activity occurred at some prior time. The facts or circumstances must support the reasonable probability that 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). Tabulation of the intervening number of days is one factor to be considered, along with the nature and scope of the suspected criminal activity. *Id.* at 460-61. The affidavit must raise a reasonable inference that the evidence is currently to be found at the place to be searched. *State v. Smith*, 60 Wn. App. 592, 602, 805 P.2d 256 (1991); *see also State v. Maddox*, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004) (information in affidavit not stale if it “supports a commonsense

determination that there is continuous and contemporaneous possession of the property intended to be seized.”)

In *Higby*, this Court held that the information presented in a warrant affidavit was too remote to establish probable cause to believe marijuana was on the premises at the time of the search. *Higby*, 26 Wn. App. at 459. The affidavit stated that an informant told police he had purchased marijuana at Higby’s home about two weeks prior to the affidavit, police observed a considerable amount of two- to three-minute visits to the residence, and an informant reported seeing the packaging and sale of ground leafy vegetable matter by Higby in her home six months earlier. *Id.* at 460. This information was insufficient to establish probable cause to search two weeks after the last reported sale of marijuana. *Id.* at 461 (citing *Spencer*, 9 Wn. App. at 97 (two separate controlled buys, the last 61 days prior to warrant, insufficient to establish probable cause)). By contrast, in *State v. Hall*, 53 Wn. App. 296, 766 P.2d 512 (1989), there was probable cause to search the defendant’s residence based on information that an extensive grow operation had been observed two months earlier, because it was reasonable to believe the grow operation was still in existence. *Hall*, 53 Wn. App. at 300.

Here, the warrant affidavit describes two controlled buys of methamphetamine occurring at Branham’s residence 11 weeks earlier. CP

64-66. Two subsequent attempts at controlled buys were unsuccessful, with Branham saying he did not have any methamphetamine to sell and declining to sell to the informant. CP 66-67. The affidavit also indicates that the informant claimed to have accompanied Branham on trips to Tacoma to pick up his supply of methamphetamine. These trips were even more remote in time, and there was no corroboration of this information. CP 63. The affidavit contains the informant's description of Branham's residence and where Branham stores methamphetamine within the residence, and his explanation that Branham conducts methamphetamine deals from his residence but not at his work place. CP 63. In addition, the affidavit indicates that the informant claimed to have stolen methamphetamine from Branham's residence about two weeks earlier. Again, there was no corroboration of this claim. CP 67.

A second warrant affidavit repeats all the above information and also identifies a white Cadillac currently being used by Branham. The informant had said Branham started using the Cadillac recently when his truck was stolen, but no specific date was given. Officers had observed Branham with the truck within two days of the warrant affidavit. CP 81.

These affidavits fail to set forth facts to support a reasonable probability that criminal activity was occurring at the time the warrant was issued. While evidence of a marijuana grow operation would be expected

to be present weeks after it was observed, given the time it takes for plants to mature, the affidavits in this case asserted that Branham resupplied weekly when he was dealing. Thus, the controlled buys occurring 11 weeks prior to the affidavits were too remote in time to support probable cause to believe evidence of methamphetamine delivery would currently be found. The only information that Branham had resupplied at any point after the controlled buys was the uncorroborated claim from the informant that he had stolen methamphetamine from Branham and sold it, but even that information was at least two weeks old. The affidavits do not set forth facts which support the conclusion that the evidence being sought was probably at the premises to be searched at the time the warrants were issued.

Even if the information about the controlled buys conducted in Branham's residence was not too remote in time, however, the warrant affidavits did not establish probable cause, because there was no nexus between the evidence of drug activity sought and the white Cadillac. “[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting *State v. Goble*, 88 Wash.App. 503, 509, 945 P.2d 263 (1997)).

A finding of probable cause must be grounded in facts specifically tying the items to be seized to the place to be searched. *Thein*, 138 Wn.2d at 147. Neither affidavit in this case contained any specific facts tying the white Cadillac to the suspected criminal activity or the evidence to be seized.

The affidavits state that the informant said Branham went to Tacoma weekly to pick up supplies of methamphetamine, and he had accompanied Branham about ten times between August 2014 and February 2015. CP 63. The second affidavit indicates that the informant said Branham had recently been using the white Cadillac because his truck had been stolen, and officers had observed Branham using the Cadillac in the past two days. CP 81. There was no information as to how long Branham had been using that vehicle and no observation of any drug activity in that car, however. Without that specific information, a reasonable person could not infer that evidence of delivery of methamphetamine would be found in the Cadillac.

The State argued below that there was probable cause to search the Cadillac based on the inference that, as an experienced drug dealer, Branham would keep his methamphetamine with him when he went to work, and he used the Cadillac to drive to work. RP 45. This argument involves nothing more than generalizations about the common habits of

drug dealers with no specific facts linking the vehicle to be searched to any illegal activity. In *Thein* the Supreme Court held that it is impermissible to substitute this type of generalization for “the required showing of reasonably specific ‘underlying circumstances[.]’” *Thein*, 138 Wn.2d at 147 (rejecting argument that it is reasonable to infer evidence of drug dealing will likely be found in the homes of drug dealers). Rather, “probable cause to search a certain location must be based on a factual nexus between the *evidence* sought and the *place* to be searched.” *Id.* at 148 (emphasis in original).

The State also suggested that since Branham’s residence had been burglarized recently, it was commonsense to conclude he would store methamphetamine in his car. RP 19, 22. This is speculation founded on the informant’s uncorroborated allegation of burglary. Moreover, the affidavit indicates that Branham was driving the Cadillac because his truck had been stolen, negating any inference that he would consider his vehicle a safe place to store substances. Something more than this nonsensical “commonsense” argument is needed to establish a nexus between this car and the suspected criminal activity. “Although common sense and experience inform the inferences reasonably to be drawn from the facts, broad generalizations do not alone establish probable cause.” *Thein*, 138 Wn.2d at 148-49.

Neither is the probable cause finding supported by speculation that Branham used this vehicle in conducting drug activity, because he had previously used a different vehicle for that purpose. A search warrant affidavit must contain more than conclusory predictions, speculation, suspicion, or personal belief. *Thein*, 138 Wn.2d at 147; *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992); *State v. Anderson*, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001).

The only specific facts about the Cadillac contained in the affidavits are that Branham started driving it “recently” after his truck was stolen, and officers had observed him drive it home from work two days prior to the warrant affidavit. Neither these facts nor the circumstances surrounding the informant’s past interactions with Branham give rise to a reasonable inference that evidence of criminal activity would be found in the Cadillac at the time the warrant was issued. “Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.” *Thein*, 138 Wn.2d at 147.

The search warrant affidavits failed to establish probable cause, the warrant to search the Cadillac was unlawfully issued, and the evidence illegally gained as a result must be suppressed. *See Thein*, 138 Wn.2d at

151. Because the charge against Branham rests solely on evidence which must be suppressed, the charge must be dismissed.

D. CONCLUSION

For the reasons addressed above, evidence seized pursuant to the unlawful search warrant must be suppressed, and the charge against Branham must be dismissed.

DATED December 22, 2017.

Respectfully submitted,



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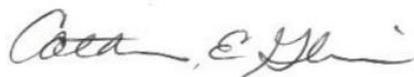
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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in  
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I certify under penalty of perjury of the laws of the State of Washington  
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Catherine E. Glinski  
Done in Manchester, WA  
December 22, 2017

**GLINSKI LAW FIRM PLLC**

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