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

STATE OF WASHINGTON,

Respondent,

v.

MARVIN BRANHAM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00231-6

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the court properly exercised discretion when it found probable cause to the search of Branham's residence and white Cadillac for illegal drug activity based upon the search warrant affidavit as a whole?
2. Whether the facts supporting probable cause in the affidavit for the search warrant were not stale because it showed illegal drug activity by a known drug dealer over a three to four year period and which involved large amounts of methamphetamine and was corroborated by two controlled buys?

II. STATEMENT OF THE CASE

On June 12, 2015, Clallam County Sheriff's Detective Brian Knutson applied for and was granted search warrants CCSO 15-538-BC and CCSO 15-539-BC. CP 60, 85. The search warrants were executed and about one pound of methamphetamine was found in Branham's vehicle. CP 30, 92. The State filed an information charging Branham with two counts of delivery of methamphetamine and one count of possession with intent to deliver methamphetamine. CP 91-92. Branham moved to suppress the evidence on the basis that there was no probable cause for the search warrants. CP 50.

The search warrants were based upon affidavits of probable cause submitted by Clallam County Sheriff's Department Detective Brian Knutson. Search warrant no. 15-538-BC (CP 60) authorized a search of Branham's

trailer residence at 115 N. Lilac Ave., Port Angeles and was supported by Affidavit for Search Warrant no. 15-538-BC. CP 60–69. Search warrant no. 15-539-BC (CP 85) authorized a search of Branham’s white Cadillac and was supported by Affidavit for Search Warrant no. 15-539-BC. CP 73–84. The affidavits for the warrants are identical (except for paragraph VI (CP 69, 81)) and set forth facts as stated below.

Detective Knutson utilized SOI 15-01 (herinafter “informant”) to conduct controlled buys of controlled substances. CP 74. The informant was working for law enforcement under a contract and between March 20, 2015 and April 30, 2015, and routinely checked in with Det. Knutson as required. During that time, the informant conducted a total of nine controlled buys and completed the working portion of the informant’s contract. CP 74.

Prior to the entry of the informant’s contract, Det. Knutson interviewed the informant and the informant provided detailed information regarding the location of a stolen firearm. CP 74. Det. Knutson was able to corroborate the informant’s information because he had recovered the firearm that the informant was talking about. CP 74.

Det. Knutson stated that on March 20, 2015, he interviewed the informant regarding their personal knowledge of drug activity in the Sequim and Port Angeles area. CP 75. The informant provided the following information:

The informant mentioned that Branham was a methamphetamine dealer in Port Angeles. The informant had known Branham for about 10 years and stated that Branham sells methamphetamine and had

been dealing for about 3 or 4 years.

Branham gets his resupply of methamphetamine once every week.

The informant went with Branham on 2/13/15 to Emerald Queen Casino in Tacoma where Branham purchased \$15,000 worth of methamphetamine.

The informant told Det. Knutson that between Aug. 2014 and Feb. 2015, the informant went with Branham to Emerald Queen Casino about 10 times for Branham to get his resupply of methamphetamine.

The informant stated that Branham usually deals methamphetamine from his trailer at 116 N. Lilac Ave. in Port Angeles. The informant stated that they saw Branham sell methamphetamine to somebody on 2/22/15. Branham keeps his methamphetamine in a blue vacuum-sealed Tupperware container.

Branham receives EBT cards, firearms, and cars as a form of payment when Branham delivers methamphetamine.

Branham owns several vehicles including but not limited to a Blue GMC Yukon, a silver Isuzu rodeo, a white Toyota Truck, and red two door Jeep.

The informant stated that Branham usually has about one pound of methamphetamine on him at any given time.

CP 75-76.

On Mar. 25 and 26 in 2015, the informant conducted two successful controlled purchases of methamphetamine from Branham. CP 76-78. Each operation included a post and pre buy search and no contraband was found on

the informant. *Id.* In each instance the informant followed specific instructions for each operation and purchased methamphetamine which later tested positive for methamphetamine. *Id.* The informant was wearing an authorized wire on the Mar. 25 controlled buy and Det. Knutson heard Branham speaking during the transaction. CP 77. The informant asked, "How much for 120" and Branham responded "Half a gram." CP 77. The informant told Det. Knutson that Branham weighed the methamphetamine on a digital scale. CP 77.

On June 12, 2015, the informant admitted to Det. Knutson to stealing two ounces of methamphetamine from Branham while at Branham's trailer about 2 weeks prior. CP 79 (paragraph I). Since that time, the informant and Branham talked about the theft and the informant stated everything was fine between them. *Id.*

Det. Knutson asked the informant what kind of vehicle Branham was driving. The informant stated that Branham's truck was stolen recently and Branham was driving a white Cadillac. CP 81. Det. Knutson saw a white Cadillac parked in front of Branham's place of work on June 10, 2015. OPNET Det. Mike Grall also reported that on June 10, 2015, he saw Branham drive the white Cadillac from his work to his home at 116 N. Lical Ave. CP 81.

The information stated above and additional facts not outlined in this brief were provided in the application for the search warrants which were granted on June 12, 2015. CP 60, 85. The warrants were executed on June 16, 2015. CP 30. Officers found about one pound of methamphetamine in

Branham's white Cadillac.

Branham moved to suppress the evidence on the basis that the search warrant was invalid because it was based in stale information and did not support the search of the vehicle. CP 50, 51-53.

The trial court, in its Memorandum Opinion and Order, denied the motion to suppress. CP 35. The trial court set forth relevant facts from the informant as follows:

1. The informant has known and been friends with Br. Branham for about 10 years.
2. Mr. Branham has dealt methamphetamine in Port Angeles for approximately three to four years.
3. Mr. Branham replenishes his methamphetamine supply every week.
4. Mr. Branham drives a vehicle to the Tacoma area to purchase methamphetamine.
5. Between August 2014 and February 2015, the informant accompanied Mr. Branham when he purchased methamphetamine about 10 times.
6. On February 13, 2015, the informant accompanied Mr. Branham in a white Ford truck when he purchases two pounds of methamphetamine worth \$15,000 in the Tacoma area.
7. Mr. Branham works in the automotive business and does not sell methamphetamine at work.
8. Mr. Branham owns several vehicles, including, but not limited to a blue GMC Yukon, a silver Isuzu Rodeo, a white Toyota Truck, and a red two-door Jeep.
9. Mr. Branham takes various items of value in exchange for methamphetamine, including vehicles.

10. On March 25, 2015, in Port Angeles, the informant paid \$120 for 2.9 grams of methamphetamine from Mr. Branham.
11. On March 26, 2105, in Port Angeles, the informant the informant paid \$60 for 1.2 grams of methamphetamine from Mr. Branham.
12. On March 29, 2015, in Port Angeles, the informant attempted to purchase methamphetamine from Mr. Branham. On March 29th, Mr. Branham said he didn't have any methamphetamine to sell. On April 9, 2015, Mr. Branham told the informant to "take a hit" of the methamphetamine Mr. Branham was smoking and the informant refused. The informant believed Mr. Branham refused to sell to him/her because/he did not "take a hit" as directed. The informant explained it is not uncommon for drug dealers to refuse to sell to someone refusing to get high, due to lack of trust.
13. On June 12, 2015, the informant stated that about two weeks ago s/he stole two ounces of methamphetamine from Mr. Branham while at his trailer.
14. On June 12, 2015, the informant stated that Mr. Branham's white Toyota truck had been stolen and that Mr. Branham was currently driving a white Cadillac Fleetwood.

CP 35-36.

The court also set forth facts in the affidavit relevant to its analysis:

1. The informant had known mr. Branchma for about 10 years;
2. Mr. Branham had been selling methamphetamine over the course of 3-4 years;
3. Mr. Branham routinely uses a vehicle to drive to the Tacoma area to resupply his methamphetamine;
4. On April 9, 2015, Mr. Branham smoked methamphetamine in the presence of the informan and told the inforamt to "take a hit" of the methamphetamine; and
5. Mr. Branham had methamphetamine in his home as recently as about May 30, 2015, when the informant stole two ounces of

methamphetamine from him.

CP 37.

III. ARGUMENT

“When reviewing the denial of a suppression motion, [we] determine ... whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law.” *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

Because Branham does not challenge any of the trial court's findings of fact, they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Conclusions of law from an order pertaining to the suppression of evidence are reviewed de novo. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002); *see also State v. Carneh*, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

“Generally, we review the validity of a search warrant for an abuse of discretion, giving great deference to the issuing judge.” *State v. Dunn*, 186 Wn. App. 889, 895–96, 348 P.3d 791 (2015) (citing *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008)). “However, when a trial court assesses a search warrant affidavit for probable cause at a suppression hearing, we review the trial court's conclusion on suppression de novo.” *Id.*

“Using de novo review, we determine whether the qualifying information as a whole amounts to probable cause.” *Id.* (citing *State v.*

Emery, 161 Wn. App. 172, 202, 253 P.3d 413 (2011) (quoting *In re Det. of Petersen*, 145 Wn.2d 789, 800, 42 P.3d 952 (2002)), *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012)). “We consider only the information that was available to the issuing judge.” *State v. Olson*, 73 Wn. App. 348, 354, 869 P.2d 110 (1994).

A. THE AFFIDAVIT AS A WHOLE SUPPORTS A FINDING OF PROBABLE CAUSE OF CRIMINAL DRUG ACTIVITY JUSTIFYING THE WARRANT TO SEARCH BRANHAM’S RESIDENCE AND VEHICLE.

“Probable cause is established if the affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004) (citing *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)). “In determining probable cause, the magistrate makes a practical, commonsense decision, taking into account all the circumstances set forth in the affidavit and drawing commonsense inferences.” *Maddox*, 152 Wn.2d at 509 (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

“It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The [issuing judge] is entitled to make reasonable inferences from the facts and circumstances set out in the

affidavit.” *State v. Emery*, 161 Wn. App. 172, 202 P.3d 413 (2011) (quoting *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004)).

“Just as importantly, the information collected here ‘must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.’” *State v. Lyons*, 160 Wn. App. 100, 105, 247 P.3d 797 (2011) *overruled on other grounds in State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012) (citing *United States v. Cortez*, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)). “We evaluate an affidavit ‘in a commonsense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant.’” *Id.* at 360 (quoting *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003) (Jackson II)).

1. There was probable cause to search Branham’s residence.

Here, there was probable cause to believe that Branham had engaged in illegal drug activity at his trailer over a prolonged period of time spanning three to four years. This is based on the information provided by both the Informant and Detective Knutson’s own observations and investigation.

The informant’s reliability was extensively explored and established on the first page of the affidavit. The informant successfully conducted 9 controlled buys. The informant checked in consistently with Det. Knutson while working for law enforcement. The informant provided information about a stolen firearm which Det. Knutson recovered. The affidavit shows a history of the informant providing reliable information to law enforcement.

This information included details about the defendant’s illegal drug

activity over the course of 3 to 4 years. The informant's information gets more detailed regarding the defendant's activity from Aug. 2014 through Feb. 2015. During that time, the informant went with Branham on 10 occasions to Emerald Casino (CP 63, 75) which over 100 miles away for Branham to resupply. Finally, the informant's information was corroborated by two successful controlled buys on Mar. 25 and Mar. 26, 2015.

During the two separate controlled buys the defendant delivered methamphetamine to the informant out of his trailer residence at 116 N. Lilac Ave. in Port Angeles. On both occasions the informant was checked before and afterward to make sure the informant did not possess any contraband. Further, the suspected controlled substances from both controlled buys tested positive for Methamphetamine.

These are facts sufficient to cause a reasonable person to believe that multiple drug offenses had been committed by Branham at his residence and that Branham was involved in an ongoing criminal enterprise. Therefore, the warrant to search for evidence of illegal drug activity at Branham's trailer is supported by probable cause and this Court should affirm the conviction.

2. There was probable cause to search Braham's white Cadillac.

The affidavit for the search of the Cadillac points out that Branham resupplies by purchasing larger quantities of methamphetamine on a weekly basis. The informant stated that Branham has about a one lb of meth on him at any given time. The informant went with Branham to Emerald Queen Casino in Tacoma and witnessed Braham resupply on 10 different occasions

between Aug. 2014 and Feb. 2015. Furthermore, Branham accepts vehicles as payment for methamphetamine. Braham got a white Cadillac after his Toyota truck was stolen. This information was confirmed as Branham was seen driving the Cadillac two days prior, June 10, 2015, by Detective Grall.

A reasonable inference may be made that there would be evidence of illegal drug activity in the defendant's white Cadillac considering how long and consistently the defendant has been engaging in illegal drug activity (three-four years) and that he uses a vehicle to resupply with methamphetamine in Tacoma or elsewhere on a weekly basis and that the defendant accepts vehicles as payment for methamphetamine, and that the defendant was driving a Cadillac he recently obtained because his Toyota truck was stolen. Vehicles are an integral part of Branham's criminal drug activity and, as observed by detectives and pointed out by the informant, the white Cadillac was the vehicle of Branham's choice after the white Toyota was stolen.

This is a common sense inquiry and the affidavit for the search warrant as a whole amounts to probable cause. *Dunn*, 186 Wn. App. at 895-96. Thus the court did not abuse its discretion and any doubts of its validity should be resolved in favor of a finding of probable cause.

Therefore, the conviction should be affirmed.

**B. BRANHAM'S LONG TERM CONTINUOUS
DRUG DEALING PREVENTED THE
WARRANT FROM BECOMING STALE.**

“Common sense is the test for staleness of information in a search warrant affidavit.” *State v. Maddox*, 152 Wn.2d at 505–06 (citing *State v. Petty*, 48 Wn. App. 615, 621, 740 P.2d 879 (1987)); *see also State v. Lyons*, 174 Wn.2d at 360 (quoting *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003) (Jackson II)) (“We evaluate an affidavit ‘in a commonsense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant.’”).

The magistrate makes this determination based on the circumstances of each case. *Sgro v. United States*, 287 U.S. 206, 210–11, 53 S.Ct. 138, 77 L.Ed. 260 (1932). Among the factors for assessing staleness are the time between the known criminal activity and the nature and scope of the suspected activity. *See, e.g., Andresen v. Maryland*, 427 U.S. 463, 478 n. 9, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); *State v. Petty*, 48 Wash.App. 615, 621, 740 P.2d 879 (1987).

Lyons, 174 Wn.2d at 361.

“The tabulation of the number of days is not the deciding factor; rather, it is only one circumstance to be considered with all the others, including the nature and scope of the suspected activity.” *State v. Hall*, 53 Wn. App. 296, 300, 766 P.2d 512, 515 (1989) (citing *State v. Hett*, 31 Wn. App. 849, 852, 644 P.2d 1187, *review denied*, 97 Wn.2d 1027 (1982) (finding it reasonable to believe an established marijuana grow still existed two months after the informant was last in the defendant’s home to purchase marijuana).

A delay between observed criminal activity and the issuance of a

warrant does not necessarily render the warrant presumptively stale, especially when a known drug dealer is involved and continuing activity can be inferred from the facts presented in the affidavit for the warrant. *See, e.g., United States v. Jeanetta*, 533 F.3d 651, 655 (8th Cir.), *cert. denied*, 129 S. Ct. 747 (2008) (“two week period between the controlled buy and issuance of the warrant did not render the informant's information presumptively stale”); *United States v. Formaro*, 152 F.3d 768, 771 (8th Cir. 1998) (“[T]he two and one-half weeks lapse did not negate the existence of probable cause”) (quoting *United States v. LaMorie*, 100 F.3d 547, 552 (8th Cir. 1996)); *United States v. Ortiz*, 143 F.3d 728, 732-33 (2d Cir. 1998) (“In investigations of ongoing narcotics operations, ‘intervals of weeks or months between the last described act and the application for a warrant [does] not necessarily make the information stale.’”)(quoting *Rivera v. United States*, 928 F.2d 592, 602 (2d Cir. 1991)); *see also United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) (“With respect to drug trafficking, probable cause may continue for several weeks, if not months, of the last reported instance of suspect activity.”) (quoting *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986)); *State v. Perez*, 92 Wn. App. 1, 963 P.2d 881 (1988), *review denied*, 137 Wn.2d 1035 (1999) (4-day interval with known drug dealer sufficient to defeat a staleness challenge); *State v. Bittner*, 66 Wn. App. 541, 547, 832 P.2d 529 (1992), *review denied*, 120 Wn.2d 1031, 847 P.2d 481 (1993) (because the affidavit did not state that the defendant was a known drug dealer and the single, unobserved transaction was not corroborated by any other evidence, a one-week delay rendered the warrant

invalid); *State v. Higby*, 26 Wn. App. 457, 460, 613 P.2d 1192 (1980) (one sale of a small amount of marijuana did not establish probable cause to search two weeks later).

Here, the delay between the last observance of criminal drug activity and the application of the warrant was about two weeks. The informant told Det. Knutson on June 12, 2015, that the informant had stolen methamphetamine from Branham's trailer just two weeks prior. Statements against penal interest made to a law enforcement officer are considered more reliable. *See State v. Lair*, 95 Wn.2d 706, 711, 630 P.2d 427 (1981) (citing *State v. Johnson*, 17 Wn. App. 153, 561 P.2d 701 (1977) *abrogated on other grounds in Horton v. California*, 496 U.S. 128, 128, 110 S. Ct. 2301, 2303, 110 L. Ed. 2d 112 (1990); *United States v. Harris*, 403 U.S. 573, 581, 91 S.Ct. 2075, 2080, 29 L.Ed.2d 723 (1971)) ("Statements against penal interest are not often made lightly and may support an inference of reliability.").

Furthermore, this is not a case where there was only a single instance of delivering a controlled substance from an unknown drug dealer. This case is about a *known drug dealer* who was *continuously engaged* in the sale of drugs for *three to four years*. The affidavit points to the defendant's consistent illegal drug activity over a prolonged period of time. It is reasonable under these circumstances to conclude that the defendant's illegal drug activity was still ongoing in June 2015. It would be unreasonable to believe that the defendant's drug activity suddenly ceased after March 2015.

Branham cites to *State v. Higby*, 26 Wn. App. 457, 460, 613 P.2d 1192 (1980) to support his argument that the information in the affidavit was

stale and therefore the warrant to search the vehicle was invalid. *Higby* is distinguishable from the facts of this case and does not support Branham's argument.

In *Higby*, the Court held that the search warrant was invalid on the basis that "[a] single observation of possible marijuana activity 6 months in the past, combined with one small marijuana sale 2 weeks in the past and observations of marginally suspicious activity at unspecified times is insufficient to establish a reasonable belief that marijuana will be found on the premises at the time of the search." *Higby*, at 462–63.

Higby lies at the other end of the spectrum from the instant case where the affidavit for the search warrant shows that Branham was engaged in long term continuous and voluminous methamphetamine dealing. Branham's drug dealing activity spanned over three to four years and included multiple buys, multiple long distance re-supply trips, and involved large amounts of methamphetamine. *Higby* does not apply to these facts.

Therefore, the information in the affidavit was not stale and the Court should affirm the conviction.

IV. CONCLUSION

The affidavits as a whole show that Branham was engaged in dealing methamphetamine for three to four years and had an established practice of using his vehicles to travel to Tacoma to resupply on a weekly basis. This

was personally observed by a an informant who was a friend of Branham and who admitted to stealing methamphetamine from Branham's residence just two weeks prior to the issuance of the warrant. The informant's information was also corroborated by two controlled buys and observation by detectives that Branham was driving a white Cadillac after his Toyota truck was stolen.

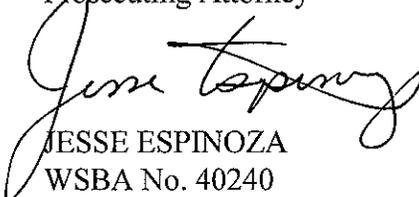
Based on all the above information in the search warrant affidavit, and reasonable inferences, the trial court had substantial evidence before it to conclude that there was probable cause to issue the search warrant.

For the foregoing reasons, the Court should affirm the conviction.

Respectfully submitted this 20th day of February, 2018.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney

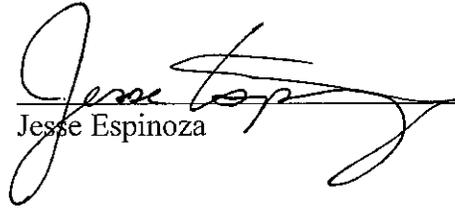


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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Catherine E. Glinski on February 20, 2018.

MARK B. NICHOLS, Prosecutor


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