

No. 50503-7

IN THE WASHINGTON STATE DIVISION II

State of Washington, Respondent

vs.

Charles W. Jones, Appellant

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. To the extent that the trial court refused to conduct a *Casal* hearing to determine the veracity of a confidential informant, Findings of Fact 1-7 regarding the motion to suppress are not supported by substantial evidence.
2. The trial court erred by refusing to conduct a *Casal* hearing to determine the veracity of a confidential informant.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a search warrant is supported solely by a confidential informant, and the defendant makes a minimal showing of inconsistency, must a trial court exercise its discretion to conduct an in camera hearing for the purposes of establishing the confidential informant's veracity?

STATEMENT OF THE CASE

In November 2016, a confidential informant (“CI”) contacted Officer Heilman of the Tacoma Police Department to report that a man later identified as Mr. Jones was selling black tar heroin from his motel room. Clerk’s Papers (CP) at 14-15. On November 14, 2016, Officer Heilman requested that the CI attempt to contact Mr. Jones about purchasing heroin. *Id.* The CI called a certain phone number in the presence of officers¹ and confirmed that the person on the other line had heroin available for purchase at the Calico Cat Motel. *Id.*

After the buy, the CI handed Officer Heilman “an amount” of heroin, stating that he or she had just purchased it from the individual later identified as Mr. Jones. *Id.* The CI also told the officer that the individual in the motel room had a pistol and that it was the CI’s knowledge that the individual in the motel room was a convicted felon. *Id.* Officer Heilman used these facts to receive a search warrant for room number four of the Calico Cat Motel. *Id.* After searching the room and arresting Mr. Jones, the State filed a ten-count information, charging various felonies. CP at 1-4.

¹ The warrant is silent on whether officers could hear what the person on the other end said to the CI.

Mr. Jones filed a motion to suppress the evidence found in the motel room. CP at 5-11. He filed a declaration under penalty of perjury, admitting that while he does use heroin, he does not deal heroin or any other controlled substance. CP at 105-06. In fact, his own personal dealer was arrested earlier that week and he did not have any drugs on November 14 to feed his own habit, much less sell to someone else. *Id.* He requested that the trial court conduct an in camera *Casal* hearing to determine the veracity of the confidential informant. CP at 5-11; CP at 69-73.

The State responded, arguing that Mr. Jones failed to establish that “Officer Heilman intentionally or recklessly made a material misstatement or omission in her affidavit in support of the search warrant at issue in this case.” CP at 32. The trial court agreed, finding that Mr. Jones did not “make a substantial preliminary showing that casts doubt on the veracity of the officers’ statements in their reports and in the Complaint for Search Warrant.” CP at 77. The court further found that Mr. Jones’s declaration is not “sufficient to cast doubt on the veracity of the material representations made by Officer Heilman in her Complaint for Search Warrant.” *Id.*

Following denial of the motion to suppress, Mr. Jones agreed to a stipulated facts trial, was found guilty, and now timely appeals the trial court’s denial of the motion to suppress. CP at 82-87; CP at 90-102; CP at 88-89.

ARGUMENT

This Court should reverse and remand because the trial court erroneously denied Mr. Jones his request for a *Casal* hearing after Mr. Jones made a minimal showing of inconsistency.

State v. Casal is directly on point and dispositive. 103 Wn.2d 812, 699 P.2d 1234 (1985). There, a CI had informed Seattle police that he or she was inside Casal's home in the preceding 24 hours and had observed a quantity of marijuana growing and packaged as if for sale. *Id.* at 814. Solely on this basis, Seattle police received a search warrant, executed it, confiscated various contraband, and charged Casal. *Id.* Casal then alleged that three weeks after his arrest, an individual named Randy Batham identified himself as the CI to Casal and further told Casal that he heard about the operation from someone in a tavern and reported the rumor to police, that Seattle police directed Batham to trespass onto Casal's property to search for evidence of the marijuana operation, and that Batham did trespass but did not see any marijuana plants. *Id.* Casal could not subsequently locate Batham again, but did submit a sworn affidavit relating the information Batham shared with him. *Id.* at 815.

Casal asked the trial court to hold an evidentiary hearing on whether the probable cause affidavit contained statements that were false or in reckless disregard for the truth and also asked that the court direct

police to disclose the whereabouts of Batham. *Id.* at 814. The trial court denied both motions. *Id.* at 815. The Court of Appeals held that a defendant cannot compel disclosure of an informant's identity to challenge statements made in a probable cause affidavit and that he would be entitled to an in camera hearing only if he could make a substantial showing that the informant's privilege had been waived. *Id.* Because he submitted only a self-serving affidavit with no corroborating evidence, Casal failed to make this substantial showing. *Id.*

The Washington Supreme Court began by acknowledging that under U.S. Supreme Court precedent, a defendant has a right to disclosure of a CI's identity if the CI is a material witness on the question of the defendant's guilt or innocence, but has no such right if the CI supplied information relating only to probable cause. *Id.* at 816 (citing *Roviaro v. United States*, 353 U.S. 53 (1957); *McCray v. Illinois*, 386 U.S. 300 (1967)). Bucking previous rulings from our own Courts of Appeals and federal circuit courts interpreting *McCray* as holding that disclosure of a CI's identity is virtually never required to establish probable cause, our supreme court held that "disclosure may be allowed where deemed necessary to assess the affiant's credibility or accuracy." *Id.* at 816-17.

The *Casal* court then went on to analyze the U.S. Supreme Court's decision in *Franks v. Delaware*. *Id.* at 817-18 (citing *Franks v. Delaware*,

438 U.S. 154 (1978)). In *Franks*, the Supreme Court held that a defendant is entitled to challenge a finding of probable cause if he or she makes a substantial preliminary showing that the affiant lied or acted in reckless disregard for the truth in obtaining the search warrant. *Id.* However, *Franks* concerned a challenge to the affiant's descriptions of what the affiant *personally observed*. *Id.* *Franks* specifically reserved judgment on the question of whether a defendant can compel the disclosure of a CI's identity to challenge an affiant's account of the informant's statements. *Id.* The *Franks* holding is inadequate on this point because in a typical *Franks* hearing where the defendant challenges the affiant's observations, the affiant's identity is revealed to the defendant, so the defendant can interview the affiant, perform an investigation, and then make the "substantial preliminary showing" required by *Franks*. *Id.* at 818. "Conversely, when the informant is confidential, the defendant lacks access to the very information that *Franks* requires for a threshold showing of falsity." *Id.*

To solve this problem, several courts have pointed to an in camera, ex parte hearing as the solution. *Id.* 818-19. An in camera hearing protects the interests of the State and the defendant; the State does not have to compromise secrecy, and the defendant is saved from what could be

serious police misconduct. *Id.* at 819. Since anonymity is preserved, the State has no legitimate objection to an in camera proceeding. *Id.*

Rejecting the Court of Appeals's imposition of an "exceedingly high burden," our supreme court instead held that a trial court must exercise its discretion to order an in camera hearing where "the defendant's affidavit casts a reasonable doubt on the veracity of material representations made by the affiant." *Id.* at 820. "Corroboration of the defendant's story is helpful, but not necessary. This rule is in accord with the rules enunciated by other courts . . . requiring only that defendant make a 'minimal showing of inconsistency' between what the affiant stated and what the defendant alleges to be true." *Id.* (citing *United States v. Brian*, 507 F. Supp. 761 (D. R.I. 1981)). The *Casal* court then reversed the conviction and remanded for an in camera hearing, noting that "if petitioner's story is the true version, probable cause did not exist for the search warrant since the affidavit contained no other information which could provide probable cause." *Id.*

Thus, the ultimate holding of *Casal* is that, in the context of probable cause for a search warrant, a trial court must conduct an in camera ex parte hearing to establish a CI's veracity when a defendant makes a minimal showing of inconsistency between the CI's statements

and what the defendant alleges to be true. Corroborating evidence is not necessary. A “self-serving” affidavit is sufficient.

The State and trial court applied the wrong standard. The State’s response briefing did not discuss *Casal* at all, and only cited it once in passing. Instead, the State argued that Mr. Jones had failed to make a substantial preliminary showing that Officer Heilman intentionally or recklessly made a material misstatement in support of the search warrant, citing the (inapplicable) *Franks* standard. In its conclusions of law, the trial court did cite *Casal*, but again applied the (inapplicable) *Franks* standard, noting that “[t]he burden is on the defendant to make a substantial preliminary showing that casts doubt on the veracity of the officers’ statements in their reports and in the Complaint for Search Warrant.” CP at 77. It went on to conclude that “[t]he court does not find that these allegations by the defendant are sufficient to cast doubt on the veracity of the material representations made by Officer Heilman in her Complaint for Search Warrant.” *Id.*

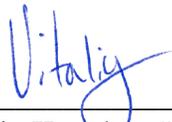
Here, Mr. Jones did not seek to challenge Officer Heilman’s representations or her veracity. He sought to challenge the representations or veracity of the CI through an in camera, ex parte hearing. The State and the trial court both misinterpreted Mr. Jones’s request as one for a *Franks* hearing and applied the wrong standard. Mr. Jones requested a *Casal*

hearing and he provided a minimal showing of inconsistency by alleging under oath that the facts could not be as the CI relayed them to Officer Heilman because Mr. Jones did not have any drugs to sell or consume on November 14, 2016. These allegations do not need to be corroborated. *Casal* mandates a hearing and the trial court erred when it failed to conduct an in camera, ex parte hearing to determine the veracity of the CI. This Court should reverse and remand for a *Casal* hearing.

CONCLUSION

Based on the foregoing, this Court should reverse and remand for a *Casal* hearing.

Respectfully submitted,

A handwritten signature in blue ink that reads "Vitaliy". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Vitaliy Kertchen #45183
Date: 9/28/17

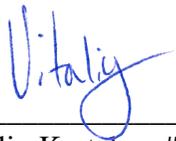
DECLARATION OF SERVICE

I, Vitaliy Kertchen, being of sound age and mind, declare that on 9/28/17, I served this document on the Pierce County Prosecutor by uploading it using the Court's e-filing application and emailing a copy of the document using that process to PCpatcecf@co.pierce.wa.us.

I also served this document on the appellant, Charles W. Jones, by mailing a copy of it to Charles W. Jones, Inmate #973149, Monroe Correctional Complex (TRU), PO Box 888, Monroe, WA 98272.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully submitted,



Vitaliy Kertchen #45183

Date: 9/28/17

Place: Tacoma, WA

KERTCHEN LAW, PLLC

September 28, 2017 - 12:51 PM

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