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NO. 51872-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN THORNTON,

Appellant.

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

The Honorable Timothy L. Ashcraft, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED WHEN IT DID NOT SUPPRESS THE EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT THAT WAS NOT SUPPORTED BY PROBABLE CAUSE.

In his opening brief, appellant Steven Thornton asserts the trial court erred when it did not suppress the guns found in the storage unit, because (1) the informant was not established as reliable under the Aguilar-Spinelli[1] test, and (2) without the informant's information, the affidavit failed to establish a nexus between the items to be seized (firearms and stolen property) and the storage unit. Brief of Appellant (BOA) at 9-18. In response, the State claims (1) the Aguilar-Spinelli test was satisfied, and (2) even without the informant's statements, the affiant independently corroborated the informant's information. Brief of Respond (BOR) at 7-13. As shown below, the State is incorrect.

a. Because the Aguilar-Spinelli Requirements were not met, probable cause must be established based solely on the affiant's independent observations.

In his opening brief, appellant asserts the trial court's order shows it did not find the informant reliable and, thus, it relied solely on the affiant's independent observations. BOA at 10-14 (citing CP

[1] Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969)).

267). In response, the State ultimately comes to the same conclusion. BOR at 10-13.

If the State is relying on an informant to establish probable cause, the informant's reliability must be established under the two-prong Aguilar-Spinelli test. State v. Jackson, 102 Wn.2d 432, 436, 438, 688 P.2d 136 (1984). Under this approach, to establish probable cause based on an informant's tip, an officer's affidavit must establish (1) the reliability of the informant's basis of knowledge, and (2) the veracity of the informant. Jackson, 102 Wn.2d at 435.

The trial court did not find the State met its burden of showing reliability and instead relied solely on "the warrant affiant's own observations." CP 267. Thornton explained in his opening brief why the trial court would disregard the affiant's statements pointing to (1) the judge's personal augmentation of the defendant's reliability by adding facts to the warrant that were never adopted by the affiant, and (2) the lack of facts establishing the veracity prong. BOA at 12-14.

In response, the State does not substantively respond to appellant's argument regarding the judge augmenting the affidavit or the veracity prong. BOR at 10-11. And, it offers only a

conclusory claim that both prongs of the Aguillar-Spinelli test were met, but no analysis of the veracity prong to support this. BOR at 10-11. Instead, the State grounds its substantive argument in the affiant's independently observed facts. BOR at 11-13. Hence, the State appears ultimately to agree that the proper approach to this case is to review the affidavit without considering the information provided by the informant. Id.

b. The affiant's independent observations did not establish the necessary nexus between the items to be seized and the storage unit.

As explained in appellant's opening brief, without the informant's information, the facts in the search warrant affidavit fail to establish a nexus between the storage unit and suspected stolen property. BOA at 15-18. The State responds not by addressing the specific issues raised by appellant, but only by regurgitating a laundry list of alleged facts without any actual analysis. BOR at 11-13. In other words, the State is essentially throwing alleged facts at the Court and asking it to do the work of (1) teasing out which alleged facts are relevant to nexus issue, and (2) responding to appellant's legal argument as to why these alleged facts are not sufficient to establish a nexus. Id. As explained below, however, the alleged facts the State points to do not establish the necessary

nexus.

"[P]robable cause requires a nexus between: (1) criminal activity and the item to be seized, and (2) between the item to be seized and the place to be searched." State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (citation omitted). Even if there is a reasonable probability that a person has committed a crime in one location, this does not necessarily give rise to probable cause to search a different property. State v. Dalton, 73 Wn. App. 132, 140, 868 P.2d 873 (1994). Innocuous facts that do not show a nexus between the item to be seized and the location to be searched are insufficient to establish probable cause. State v. Olson, 73 Wn. App. 348, 350, 869 P.2d 110 (1994).

Here, the germane question is whether there was a nexus between the alleged illegal property (guns and stolen dirt bikes) and the location (the storage unit). To answer this, it is necessary to look at the warrant affidavit and focus on what the affiant alleged to independently know about the storage locker. In his opening brief, Thornton carefully identified the relevant facts and discussed why they do not show a nexus. BOA at 15-18.

In its regurgitation of alleged facts, the State points to two more facts about the storage unit that merit some attention –

Thornton's statement that he shared the storage unit with others and his statement that someone else was the primary renter of the unit. BOR at 12. These facts pertain to the storage unit. However, they do not help establish the necessary nexus because they are essentially innocuous facts. There is nothing to indicate that one would find stolen property in the unit just because he shares a locker and was not the primary renter. Without the informant's background information, these facts do not tie the storage unit to stolen property.

In sum, the record does not establish the necessary nexus between the storage unit and the suspected stolen property. BOA at 16-18. Hence, this Court should hold the trial court erred when it denied Thornton's motion to suppress with respect to the firearms found in the storage unit.

2. THE POLICE SEARCH OF THE LOCKED GUN SAFES EXCEEDED THE SCOPE OF THE WARRANT.

In his opening brief, Thornton asserts the search of the locked gun safes found in the storage unit exceeded the scope of the warrant because the record shows the safes were excluded by negative implication. BOA at 18-21. In response, the State claims (1) this cannot be raised for the first time on appeal and (2) as a

matter of policy, the Court should ignore the exclusion by implication rule when it comes to locked safes. BOR at 14-23.

a. Thornton's challenge to the scope of the warrant may be raised for the first time on appeal.

The State claims RAP 2.5 prohibits this Court from considering this issue for the first time on appeal. BOR at 14-21. As shown below, the State is incorrect.

In general, appellate courts do not address claims of error raised for the first time on appeal. RAP 2.5(a). However, RAP 2.5(a)(3) provides an exception to this general rule where an appellant can show a manifest error affecting a constitutional right. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). To show manifest error, an appellant must demonstrate actual and identifiable prejudice to his constitutional rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

To demonstrate actual prejudice in this context, Thornton must show the trial court would have excluded evidence in response to a suppression motion raising these claims and that such exclusion would have had a practical or identifiable consequence at trial. State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995); Gordon, 172 Wn.2d at 676. Thus, to

determine whether Thornton has made this threshold showing, this Court necessarily must preview the merits of his alleged error. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); see also, State v. Witkowski, No. 49708-5-II, 2019 WL 211651, at *5 (unpublished Jan. 15, 2019) (applying this same analysis when reviewing the merits of a challenge to a suppression order raised for the first time on appeal).

This matter is also appropriate for review because an adequate record is fully formed. State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998). The question of whether warrant excluded by negative inference the safes is answered by looking solely at the written record – specifically the search warrant affidavit and the warrant. BOA at 20; see, State v. Witkowski, 3 Wn. App.2d 318, 330-31, 415 P.3d 639 (2018), review denied, 191 Wn.2d 1016, 426 P.3d 747 (2018) (demonstrating that this is an issue that merely requires review of the affidavit and warrant). Hence, this issue is appropriate for review by this Court.

The State complains that it has been "deprived of the ability to put forth any relevant evidence and legal theories" pertaining to Thornton's challenge to the scope of the warrant under the negative implication doctrine. BOR 21. However, the evidence needed to

determine the scope issue consists entirely of two written documents (the affidavit and the warrant), and nothing is stopping the State from fully setting forth its legal theories. Hence, the State is not prejudiced, and review of the merits is appropriate given the record is fully developed. Contreras, 92 Wn. App. at 313.

b. The warrant excluded by negative implication the gun safes.

In his opening brief, Thornton explained the warrant issued here excluded by negative implication a search of the gun safes. BOA at 18-20. In its response, the State suggests that, because officers are generally permitted to search containers in a premise that might hold the evidence to be seized, a judge cannot exclude locked safes from a warrant. BOR at 22-23. The State is mistaken. See, Witkowski, 3 Wn.App.2d at 330-31 (explaining the exclusion by negative inference doctrine would have properly applied had the warrant affidavit specified gun safes as a place to be searched but the warrant did not); State v. Llamas-Villa, 67 Wn. App. 448, 452, 836 P.2d 239 (1992) (showing similar reasoning).

The State also claims that as a matter of policy this Court should not apply the exclusion by negative implication doctrine to gun lockers because this "would often render searches impossible

for the simple reason that officers do not have extra sensory perception (ESP) and typically do not know in advance of service of the warrant the circumstances they will find in the place to be search." BOR at 22. This claim is nothing more than hyperbole.

Police can, and often do, need to expand the scope of a warrant based on new information obtained while executing a search. However, instead of just ignoring the constraints placed in the search warrant (like the officers did here), the officers need to go back to the judge with an affidavit and seek an addendum expanding the warrant's scope. See, e.g., Witkowski, 3 Wn. App.2d at 322 (setting forth just such facts). The officers here did not need ESP, they just needed to comply with well established warrant requirements and ask the judge to expand the scope of the warrant before they proceeded to search the locked safes.

As to the substance of Thornton's argument, the State provides no response. BOR at 22-23. Apparently, it is conceding that a comparison of the affidavit and the search warrant shows exclusion of the safes by negative implication. In light of this and the argument put forth in appellant's opening brief, this Court should hold the search of the gun safes exceeded the scope of the warrant.

c. The state failed to present sufficient evidence establishing Thornton possessed property he knew to be stolen.

In his opening brief appellant explains the State failed to provide sufficient evidence Thornton knew the guns and the dirt bike were stolen. BOA at 21-25. In response, the State continues to point to facts that are arguably consistent with his alleged possession of the guns and dirt bike but are not proof he knew the guns were stolen. BOR at 27-28.

"Bare possession of stolen property is insufficient to justify a conviction." State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284 (2010). Thus, it is the State's burden to prove not only possession but also knowledge by offering proof of inculpatory circumstances from which the jury might conclude the defendant possessed the goods knowing them to be stolen. State v. Khlee, 106 Wn. App. 21, 24, 22 P.3d 1264 (2001). The evidence the State points to does not meet this standard. BOR 27-18.

The State first states: "defendant lied several times in order to cover up the fact that he had stolen firearms in the storage unit. This was circumstantial evidence proving he knew the firearms were stolen." BOR at 27. Even if we accept arguendo Thornton lied to cover up there were firearms in the storage unit – this is still

not proof beyond a reasonable establishing that he knew the guns were stolen. The reasonable logical inference the State seeks to draw is that Thornton lied because he was trying to conceal his wrongdoing (i.e. guilty conscience). But this still does not establish beyond a reasonable doubt that Thornton knew that the guns were stolen because it was illegal for him to be in possession of any gun. So, his alleged guilty conscience does not equate to knowledge the guns were stolen. To this end, the State's argument is thus logically flawed.

The State next points to Thornton's alleged lying about there being no gun in the truck. Id. However, the same logical flaw exists – this only shows generalized guilt. The State also points to Thornton allegedly lying about the combination to the gun safe, but this again suffers from the same logical flaw. Id.

Next, the States points to the fact Thornton rented a storage unit with others, with Steven Sands being the primary renter. BOR at 28. From this it concludes "Defendant clearly didn't want to use his own name because he knew the unit was full of stolen firearms and other things he couldn't legal possess." Id. However, even if one accepts the premise that Thornton was trying to hide the fact he used the storage unit, it does not logically follow that Thornton

knew the guns were stolen. Thus, this suffers from the same logical flaw.

The State duplicates its arguments in the context of the dirt bike. BOR at 29-30. However, at best, it merely points to a generalized guilty conscience. It does not point to any evidence from which the jury could reasonably infer Thornton knew the dirt bike was stolen.

In sum, the law requires the State prove beyond a reasonable doubt, not just that Thornton knowingly possessed the stolen dirt bike and firearms, but also that he knew they were stolen. Even looking at the evidence in the light most favorable to the State, at best the evidence the State points to proves only Thornton's bare possession of the stolen guns, not that he knew they were stolen. The State offered no particular inculpatory circumstances from which the jury could logically infer Thornton knew these items were stolen (i.e. scratched out serial or VIN numbers, fake ownership documents, inculpatory statements, punched out ignitions, disguising the items differently than those that were not stolen, punched out ignition). See, BOA at 22-25 (discussing this in detail). Thus, on this record, it cannot be said

the State met its burden of proving beyond a reasonable doubt Thornton knew any of the items were stolen.

B. CONCLUSION

For the forgoing reasons and those set for in Thornton's opening brief, this Court should reverse his convictions as specified in his opening brief.

DATED this 11th day of June, 2019.

Respectfully submitted,

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