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NO. 52506-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

STAYCEY COLLINS,

Appellant.

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

The Honorable Sally F. Olsen, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not suppressing evidence obtained during a residential search where the search warrant affidavit did not establish a sufficient nexus between the suspected criminal activity and the place searched.

2. The trial court erred in failing to grant appellant a hearing pursuant to Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed. 2d 667 (1978).

3. The trial court erred when it gave the jury an instruction that misstated the law as to an aggravating factor.

4. The trial court erred in entering findings of facts I and II (in so far as they suggest officers observed appellant go directly from his house to the second controlled buy), and conclusions of law III and IV. CP 90-92.

Issues Pertaining to Assignments of Error

1. Officers obtained a search warrant to search appellant's residence for evidence of drug dealing. The affiant pointed to two controlled buys of narcotics that took place away from the residence. In both instances, appellant arrived in his car. According to the affidavit, during the second controlled buy, the officers saw appellant leave his house, get into his car, and drive to

the controlled buy. There was no other information suggesting a connection between appellant's home and the suspected drug dealing, except that he returned home. Importantly, there was no evidence excluding appellant's vehicle as the location in which he stored the drugs provided at the controlled buys. Yet, a search warrant was issued for appellant's home. Appellant moved to suppress the evidence found in his residence on the ground there was an insufficient nexus between his residence and the alleged narcotics activity. The trial court denied his motion. Did the trial court err?

2. Appellant requested a Franks hearing on the grounds the search warrant affidavit contained a reckless omission of material fact. As an offer of proof, he asserted (and the State confirmed) officers had not observed appellant drive directly from his home to the second controlled buy. Instead, they observed appellant (1) leave his house and stop in a parking lot along the way, (2) meet an individual who got in his car and exchanged something (officers did not see who exchanged what), and (3) then drive to the controlled buy alone. The fact that that appellant stopped and met someone along the way was omitted from the warrant affidavit, so the affiant left the impression appellant drove

directly from his home to the controlled buy. This omitted fact was material as to whether there was a sufficient nexus between the residence and the alleged drug activity. Yet, the trial court denied appellant's request for a Franks hearing. Did the trial court err?

3. The State charged appellant with a sentencing aggravator, alleging the charges amounted to a major Violation of the Uniform Controlled Substances Act (VUCSA). One of the factors supporting this aggravator is whether the offense involved three or more transactions in which controlled substances were sold, transferred, or possessed with intent to do so. In this case, appellant was charged with three separate drug offenses, none of which involved three transactions. Yet, the instruction for the VUCSA aggravator suggested to the jury the three counts constituted one offense, and each count was merely a separate transaction relating to that single offense. Was this a misstatement of law requiring reversal of the special verdict?

B. STATEMENT OF THE CASE

1. Procedural History

On April 10, 2017, the Kitsap County prosecutor charged appellant Staycey Collins with one count of possession of a controlled substance with intent to deliver. CP 1-6. The

information was later amended, adding two more counts. CP 12-19. The prosecutor also added a major VUCSA aggravator to each count. Id. A jury found Collins guilty as charged. CP 85-89. Collins had no criminal history, but he was sentenced to serve 68 months. CP 121-31. He appeals. CP 116.

## 2. Substantive Facts

On March 20, 2017, officers arrested Tamara Churchill and, in exchange for leniency, enlisted her assistance in setting up a controlled drug buy involving Collins. RP 294-96. Churchill texted Collins seeking drugs. RP 297, 402. She arranged to meet Collins at her former residence. RP 301. Police followed Churchill to the location and observed Collins arrive in his car. RP 301-06. Collins reportedly sold cocaine to Churchill. RP 406, 436.

On March 23, 2017, officers arranged a similar controlled buy through Churchill. RP 409-10. This time some officers were watching Collins' residence when Churchill sent a text. RP 310-313, 468. They watched Collins leave his residence and get in his car. RP 468-69. They observed him drive away. RP 472. However, Collins did not go straight to meet Churchill. RP 472. Instead, Collins drove to a parking lot, where he met a man who got into his car and exchanged something hand-to-hand with Collins.

RP 470-72, 546. Officers could not see what was exchanged. RP 547, 574. They informed the other officers involved in the operation about this stop. RP 546-47. After the man exited the car, Collins proceeded to the location of the controlled buy. RP 472, 547. Collins again arrived at Churchill's former residence in his car and reportedly sold her cocaine. RP 317, 326, 328, 413.

On April 4, 2017, Officer Eric Janson sought two search warrants, one for Collins' car and one for his residence. CP 94-115. In the warrant affidavits, he stated:

Surveillance units advised that Staycey had emerged from his residence through a door in the carport and got into his black Chevy Impala and had left the area. Surveillance units followed Staycey.

The PO was given WestNET funds (cash), an amount consistent with the street value of 1/8 ounce of Cocaine. The PO was followed to the pre-arranged buy location and kept under constant surveillance until after the controlled buy was complete.

Surveillance units advised they were still following Staycey toward the prearranged buy location. Surveillance units then advised they were in the area of the pre-arranged buy location.

CP 100. Nowhere did Janson inform the magistrate that officers had observed Collins make the stop in the parking lot and exchange something with another person before proceeding to the controlled buy. CP 100.

Based on Janson's affidavit, both search warrants were issued and executed. RP 331, 439. Officers found a large amount of cocaine and paraphernalia consistent with drug dealing in Collins' house. RP 447-57.

Prior to trial, Collins moved to suppress the evidence found in his residence, arguing the affidavit did not establish a sufficient nexus between the residence and alleged drug activity. CP 28-31; RP (4/2/18) 2, 11. Collins also asked for a Franks hearing on the basis the officers had recklessly omitted the fact he had stopped and met another person on his way to the second controlled buy. CP 37-38; RP (4/2/18) 2, 11. The trial court denied both. CP 90-92; RP (4/2/18) 12.

C. ARGUMENT

I. THE TRIAL COURT ERRED IN NOT SUPPRESSING EVIDENCE FOUND IN APPELLANT'S RESIDENCE.

As to appellant's residence, the search warrant was improperly issued because the affiant failed to establish a nexus between suspected drug activity and the residence. Although the facts included in the affidavit established a nexus between Collins' car and suspected narcotics activity, the affiant failed to demonstrate a nexus between Collins' residence and suspected

narcotics activity. Hence, the warrant was issued upon an insufficient showing of probable cause, and the trial court erred when it did not suppress the evidence discovered in Collins' house.

Both the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution require probable cause to support the issuance of a search warrant. See, State v. Martines, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015) (Fourth Amendment); State v. Ollivier, 178 Wn.2d 813, 846, 312 P.3d 1 (2013) (article 1, section 7). "Probable cause exists when the affidavit in support of the search warrant 'sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.'" Ollivier, 178 Wn.2d at 846–47 (quoting State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003)). The Fourth Amendment requires that a search warrant must particularly describe the place, person, or things to be searched. State v. Eisele, 9 Wn. App. 174, 511 P.2d 1368 (1973); Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927).

"[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) (citing Wayne R. LaFave, Search and Seizure § 3.7(d), at 372 (3d ed.1996) (emphasis added)).<sup>1</sup> It is this second nexus – between the item and the place – which is at issue here.

Even if there is a reasonable probability that a person has committed a crime on the street, this does not alone establish probable cause to search a different property. State v. Dalton, 73 Wn. App. 132, 140, 868 P.2d 873 (1994). Probable cause to search a person’s home is also not established just because probable cause exists to search that person’s vehicle. Goble, 88 Wn. App. at 512. Where there are two possible locations for storing drugs (i.e. suspect’s car and suspect’s residence), and officers cannot make a direct connection between the drugs and the residence, probable cause is not established. Id. at 505-07.

Here, police had sufficient probable cause to merit a search of Collins’ car given that he drove to the controlled buys. However, officers did not observe a direct link between any drug activity and Collins’ house. Hence, there was not probable cause to search the

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<sup>1</sup> A trial court's legal conclusion of whether evidence meets the probable cause standard is reviewed de novo. In re Det. of Petersen, 145 Wn.2d 789, 800, 42 P.3d 952 (2002).

house.

The facts of this case are similar to those in State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999). There, officers discovered a marijuana business at one location. They also were provided information by several individuals that the supplier of the marijuana was Thein. Based on this information, and the officer's statement about what he believed to be the common habits of drug-dealers (such as storing drugs in their residence), a search warrant was issued for Thein's residence. Thein, 138 Wn.2d at 137-39.

On appeal, Thein challenged the trial court's denial of his motion to suppress the evidence seized at his residence due to a lack of nexus between the alleged criminal conduct and his residence. In response, the State argued that such nexus is established where there is sufficient evidence to believe a suspect is involved in drug dealing and the suspect resides at the place to be searched. Id. at 140-41. The Washington Supreme Court disagreed. Id. at 150-51. It held that in the absence of any statements by the affiant directly tying the defendant's home to suspected criminal activity, there was an insufficient nexus between the illegal drug activity and the place to be searched. Id. at 148-49, 151.

As in Thein, the affidavit here rested on evidence of drug activity taking place off the residential premises. The affiant alleged no facts suggesting Collins was dealing drugs in the residence or manufacturing drugs there. The affiant merely alleged that police observed Collins once leave his residence, get in his car, and engage in a drug transaction. Officers could only directly connect the drugs to one location – Collins' car.

Officers need to make a direct link between narcotics activity and a target residence (not just a car parked at the residence) before a warrant can properly be issued to search the residence. For example, in Goble, police learned Goble and Loraine Stamper resided at 206 1st Street, Morton, Washington. A confidential source told officers Goble often received illegal drugs through the mail. An officer contacted the United States Postal Inspector, who verified Stamper was currently renting P.O. Box 338. He asked the postmaster to watch for, and notify him of, any packages addressed to that box. Id.

A few weeks later, the same confidential source told police Goble had recently received a shipment of controlled substances. An officer asked the mail handling facility at Sea-Tac Airport to watch for, and notify him of, any packages addressed to P.O. Box

338 in Morton. Shortly afterward, the Sea-Tac mail facility advised that it was in possession of a package addressed to Goble at P.O. Box 338. After a drug dog alerted on the package, police obtained a valid federal search warrant for the package. When they executed the warrant, methamphetamine was found.

Officers then procured a search warrant to follow the package and, if officers observed the package at the residence, they could search Goble's residence. Officers observed Goble pick up the package and return to his residence, but they failed to see Goble actually enter the residence with the package. Thus, the officers only observed a direct link between the drugs and the car, not the residence. Despite this, the search warrant was executed, and methamphetamine was found in the home. Goble was charged with possession of methamphetamine with intent to deliver and convicted. Id.

On appeal, Gobel challenged the search warrant due to a lack of sufficient nexus between the suspected activity and the residence. The Court of Appeals agreed with Gobel and reversed. It explained:

When the magistrate issued the warrant, he had no information that Goble had previously dealt drugs out of his house, rather than out of a different

place (for example, a tavern, his car, or a public park). He had no information that Goble had previously stored drugs at his house, rather than in some other place (for example, his car, at his place of employment, at a friend's house, or buried in the woods). He had no information that Goble had previously transported drugs from the post office to the house, or that Goble had previously said he intended to do so. In sum, he had no information from which to infer, at the time he issued the warrant, that Goble would take the package from the post office to his house, or that the package would probably be found in the house when the warrant was executed.

Id. at 512.

The facts of this case are similar to those in Goble. In both cases, the link between the drugs and the defendant ended at the car, not at the residence. As in Goble, the magistrate here had no information that Collins stored or dealt drugs out of his residence, rather than a different place (i.e. his car). There were no observations establishing any drugs were taken into Collins' home. There was no statement Collins had been seen transporting drugs from the residence. Thus, as in Goble, the magistrate simply did not have enough facts known to him to establish probable cause to search Collins' residence.

The facts of this case stand in contrast to those in State v. G.M.V., 135 Wn. App. 366, 144 P.3d 358 (2006), the case the trial court relied upon when denying Collins' motion to suppress. CP

92. There officers observed a drug suspect leave the residence and directly meet with a confidential informant. They followed the suspect to the drug buy location and then back to the residence. A search warranted was issued for the house and, as a result, G.M.V. was arrested and charged with possession of the marijuana. Id., 135 Wn. App. at 369-79.

G.M.V. is distinguishable from the facts of this case, however. Unlike here, in G.M.V. there was no suggestion the suspect could be storing his drugs in a second location (i.e. a car), rather than in his residence. Importantly, there is no mention that the suspect ever left the residence and then got into a car to deliver the drugs. Indeed, the suspect was only 15 years old and presumably did not drive. Instead, the affidavit established the suspect went directly from his house to the first buy. Id.

Unlike in G.M.V., the affiant did not establish a direct link between Collins' house and the drug deal. According to the affidavit, officers observed Collins leave the residence, get in his car, and then go to the controlled buy. Thus, there were two locations where Collins was seen, but only one of which there was directly linked to the controlled buy (Collins' car). As such, the trial court erred when it relied on G.M.V. as a basis to concluded there

was a sufficient nexus. The record simply does not support this conclusion.

In sum, the affidavit failed to establish a sufficient nexus between Collins' residence and suspected drug dealing. Instead, it merely established a nexus between Collins' car and alleged narcotics activity. As shown above, the facts of this case are similar to those in Thein and Goble, and they are distinguishable from those in G.M.V. Based on this record, probable cause was not established as to Collin's residence. Because Collins' conviction in Count III was predicated upon evidence found at the residence, this Court should reverse that conviction and remand for resentencing.

II. THE TRIAL COURT ERRED WHEN IT DENIED COLLINS' MOTION FOR A FRANKS HEARING.

If this Court disagrees that the trial court erred in concluding there was a proper nexus to search Collins' residence, it must then consider the question of whether the trial court erred when it denied Collins' motion for a Franks hearing. As explained below, the affiant recklessly omitted the fact Collins did not go directly to the controlled buy from his home. This fact was material to determining whether there was a sufficient nexus between Collins' home and

the suspected drug activity (i.e. did he store the drugs at home, or did he get them along the way). From this record, the recklessness of this omission can be reasonably inferred. Hence, the trial court erred when it denied Collins' request for a Franks hearing.

Factual omissions in a warrant affidavit may invalidate the warrant if the defendant establishes, they are (1) material and (2) made in reckless disregard of the truth. Franks, 438 U.S. at 154-56; State v. Chenoweth, 160 Wn.2d 454, 478-77, 158 P.3d 595 (2007). This is a burden of production; proof by a preponderance of the evidence is not required until the Franks hearing itself. United States v. Glover, 755 F.3d 811, 820 (7th Cir. 2014). If the defendant makes a substantial preliminary showing of an intentional or reckless omission of a fact that is material to the question of probable cause, then the trial court must hold a Franks hearing. Ollivier, 178 Wn.2d at 847; State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992). As shown below, such a showing was made here.

Collins requested a Franks hearing. CP 37-38. He made an offer of proof that the officers observed him leave his house via his car, stop and exchange something with in an individual along the way, and then go to the controlled buy. RP (4/2/18) 4. The State

confirmed these facts. RP (4/2/18) 10. The affiant clearly omitted the fact that Collins did not go directly from his house to the controlled buy. CP 100. This omission of fact was material to the question of probable cause. Evidence is said to be material “when it logically tends to prove or disprove a fact in issue.” State v. Gersvold, 66 Wn. 2d 900, 902–03, 406 P.2d 318, 320 (1965). Materiality is judged not only on what the evidence shows but also from whatever inferences may sensibly be drawn therefrom. Id. Thus, in this case, any fact tending to logically prove or disprove a nexus between the suspected drug activity and Collins’ residence is material.

One need only look at the trial court’s actual findings to see the omitted fact was indeed material. The trial court relied on G.M.V. when it concluded there was a sufficient nexus to establish probable cause to search Collins’ residence. CP 92. However, as explained above, in G.M.V. there was no break in the link between the suspect leaving his home and going to the controlled buy. Here, there was a break in that link – but the magistrate was never told.

The magistrate needed to be informed officers saw Collins drive to a parking lot, meet another individual who entered his car,

and exchange something hand-to-hand before he arrived at the controlled buy. RP 472, 546-47. Indeed, given the caselaw cited above, the magistrate would likely have been concerned that this individual who got in the car provided Collins with the drugs he ultimately sold in the controlled buy rather than those drugs coming from Collins' residence. As such, this fact was material to the question of whether there was a nexus sufficient to establish probable cause to search Collins' home.

Moreover, this record provides sufficient circumstantial evidence to support a reasonable and, thus, permissible inference of reckless disregard for the truth. See, Glover, 755 F.3d at 821 (discussing how such an inference works when remanding for a Franks hearing). Well before the affidavit was produced, an officer who observed Collins stop in the parking lot reported this fact back to other officers running the investigation. RP 546-47. Case law and commonsense suggest officers need to show a direct link between the suspected drug activity and the home when seeking a warrant for a residential home, and officers may not keep from the magistrate facts known to police that show otherwise. It was unreasonable for the affiant to bury this fact.

The omission here deprived the magistrate of material information that undermines any suggested nexus between the drug deal and Collins' residence. Thus, the magistrate was deprived of a meaningful opportunity to exercise his discretion to draw favorable or unfavorable inferences from all the material facts. Given this, the record establishes a permissible inference of recklessness on the part of the affiant. Hence, the trial court erred in denying Collins's request for a Franks hearing. The remedy is to remand for a Franks hearing.

III. THE TRIAL COURT'S INSTRUCTION REGARDING THE VUCSA AGGRAVATOR WAS AN INCORRECT STATEMENT OF THE LAW.

The trial court misstated the law when it instructed the jury as to what it had to find before concluding the State proved a major VUCSA violation. This misstatement of the law was not harmless. As such, this Court should reverse the special verdict and remand for resentencing.

A jury instruction must correctly state the law. State v. Weaville, 162 Wn. App. 801, 806, 256 P.3d 426 (2011). Jury instructions are sufficient if they are readily understood, not misleading, and permit a party to argue its theory of the case to the jury. Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845

(2002). An instruction is misleading if it permits both an interpretation that is a correct statement of the law and an interpretation that is an incorrect statement of the law. Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 876, 281 P.3d 289 (2012). Instructional errors are presumed to be prejudicial. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

The Sentencing Reform Act allows for an aggravated sentence when the jury finds the crime constituted a major VUCSA violation. RCW 9.94A.535(3)(e) provides in relevant part:

The current offense was a major Violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

- (i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so; (or)
- (ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

In this case, the jury was instructed as follows:

A major trafficking Violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense. The presence of

any of the following factors may identify the offense charged in Count I, II, and III as a major trafficking violation:

Whether the offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so; or

Whether the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use.

CP 82 (Instruction No. 23). This is an incorrect statement of the law. Instruction 23 suggests counts I, II, III constitute a single offense (“the offense”). From this, the instruction misleads the jury to believe that each count is a separate transaction that contributes to “the offense.” Indeed, this is exactly how the State interpreted this instruction and presented the issue to the jury. RP 758.

However, each count was charged as a separate criminal offense. CP 1-6, 12-19. Indeed, each count was treated as a separate offense under the SRA for purposes of Collins’ offender score. CP 122. None of the counts involved three transactions. Thus, it was legally impossible for the jury to find a major VUCSA violation under RCW 9.94A.535(3)(e)(i) for any of the three separately charged counts. Yet, Instruction 23 suggests otherwise. This was an incorrect statement of the law.

This error here was not harmless. In order for an appellate court to hold that an erroneous jury instruction was harmless, the court must be convinced “beyond a reasonable doubt that the jury verdict would have been the same absent the error.” Weaville, 162 Wn. App. at 815.

In response, the State may point to the fact that there was another factor upon which the jury could have based its special verdict. However, the jury was never asked to identify which factor it was relying upon when it rendered that verdict. Hence, this Court cannot be certain beyond a reasonable doubt that the jury verdict would have been the same absent the erroneous instruction. As such, this Court should reverse the special verdict and remand for resentencing.

D. CONCLUSION

This Court should reverse appellant's conviction in Count III because it is supported by evidence that was obtained via an invalid search warrant. Alternatively, it should remand for a Franks hearing. Additionally, this Court should vacate the special verdict because it was predicated upon a misstatement of law.

DATED this 27<sup>th</sup> day of June, 2019

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Dana M. Nelson", written over a horizontal line.

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