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Court of Appeals  
Division II  
State of Washington  
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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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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

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

In his opening brief, appellant Staycey Collins asserts the search warrant affiant failed to establish a sufficient nexus between the suspected drug activity and the residence. Brief of Appellant (BOA) at 6-14. In response, the State essentially argues that because officers saw Collins leave and return from his residence at some point, there was a sufficient nexus. Brief of Respondent (BOR) at 6-7. However, the State's argument is predicated upon a misrepresentation of the record and is inconsistent with applicable case law.

The State recounts the facts in the warrant affidavit regarding the relevant controlled buy as follows:

-- using the PO, police made a second buy of cocaine from Collins, again appropriately searching and surveilling the operative and this time following Collins from his residence to the buy location and back to his residence.

BOR at 7. From this, the State suggests the warrant to search the home was facially valid. BOR at 7. However, the record does not establish the type of direct link between Collins' residence and the controlled buy that the State suggests in its brief. Indeed, the State

conveniently ignores the crucial fact that officers saw Collins go from his residence to his car, and the fact that Collins was observed to sell drugs to the PO from his car. CP 98, 100-01. As explained in detail in appellant's opening brief, the fact that Collins was only directly linked to his car is significant because the car was a location for storing the drugs that were sold and there were no other indications that drugs were stored at the house. BOA at 6-14.

Under existing case law, the fact that only the car was directly linked to the controlled buys is an essential factor for determining whether there is probable cause to search another location. 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. State v. Goble, 88 Wn. App. 503, 512, 945 P.2d 263 (1997). Instead, there must be statements from the affiant that directly tie a defendant's home to suspected criminal activity. State v. Thein, 138 Wn.2d 133, 148-49, 151, 977 P.2d 582 (1999). That did not exist here.

The affidavit established only a direct link between the suspected activity and Collins' car. CP 94-104. It established Collins went from his residence to his car, he drove his car to both buys, and he twice sold drugs to the PO from his car. The State offered no other observations or evidence remotely suggesting drug activity in the residence – such as seeing someone take drugs or suspicious packages to and from house; observing activity that suggested there was drug dealing at the house; witnessing known drug users or dealers frequenting the house; or obtaining information from an informant that drugs were stored or sold in the house. As such, the affiant did not establish a sufficient nexus between Collins' house and the suspected drug activity to establish sufficient cause to search the house.

Arguing to the contrary the State cites State v. G.M.V., 135 Wn. App. 366, 144 P.3d 358 (2006). BOR 7. However, as explained in appellant's opening brief, G.M.V. is factually distinguishable. There, the affiant established a direct link between the house and the controlled buy, and there was no evidence the suspect left the residence and got in a car (or went to some other location) before the buy. See, BOA at 13-14 (discussing this in detail). Hence, the State's reliance on G.M.V. is misplaced.

Finally, the State suggests that because Count III encompassed drugs found in the search of both Collins' residence and his car and because Collins does not challenge the search of the car on appeal, then the trial court's error in not suppressing the evidence found in Collins' house is harmless. BOR at 10-11. However, the State can only speculate that the jury would have found Collins guilty based only on the evidence found in the car. Indeed, the State charged Collins based on all evidence found on the day of the search. CP 47-48. Much of the evidence presented by the State in establishing Count III was found in the house. RP 446-57. The jury instructions did not ask the jury to differentiate between the drugs found in the car and those found at the residence. RP 76. Thus, one can only speculate as to whether the jury would have found Collins guilty beyond a reasonable doubt if it only had before the evidence found in the car. As such, reversal of Count III is the appropriate remedy.

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

In his opening brief, Collins asserts the trial court erred in not holding a Franks<sup>1</sup> hearing because Collins made a sufficient

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<sup>1</sup> Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L.Ed. 2d 667 (1978).

showing that the affiant omitted – with reckless disregard for the truth – the material fact that Collins stopped on his way to the second controlled buy and exchanged something with a different person while in the car. BOA 14-18. In response, the State concedes that this fact was material. BOR at 8-9. However, it claims the trial court correctly denied the motion because Collins did not establish the omission was reckless. BOR at 9. However, the record establishes the trial court never got to the question of recklessness, instead erroneously ruling that Collins failed to identify a material omission.

After the parties made a record establishing the affiant had omitted the fact Collins stopped along the way to second buy and exchanged something with another individual,<sup>2</sup> the trial court made the following finding:

...the defendant's request for a Frank's hearing is denied because the defendant has not alleged any omission or misrepresentation that would affect the Issuing Magistrate's determination of probable cause.

CP 92 (grammatical errors in original). Thus, the trial court ruled the omitted fact the parties had identified was not material. The State has properly conceded this was error. However, the State

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<sup>2</sup> RP (4/2/18) 4, 10.

incorrectly suggests this Court can still uphold the trial court's ruling on the ground that there was not sufficient evidence that the omission was made recklessly. As detailed in appellant's opening brief, the record supports an inference that the omission was recklessly made. BOA at 17.

The State also suggests Collins should have taken advantage of trial court's offer to readdress its Franks ruling based on facts that came out during trial in order to establish the omission was reckless. BOR at 9. However, it would have been utterly useless for defense counsel to stop the trial and establish recklessness where the trial court had already ruled that the omitted fact at issue was not material. The trial court's failure to accept the omitted fact as a material fact was erroneous, and this incorrect ruling made further efforts to argue the point pointless.

In sum, the trial court erred when it denied Collins' motion for a Franks hearing. The State admits the omitted fact was material. There are sufficient facts in the record from which recklessness could be inferred. Hence, this Court should remand for a Franks hearing as an alterative remedy.

B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this Court should reverse appellant's conviction in Count III. Alternatively, it should remand for a full Franks hearing. Finally, this Court should accept the State's concession (BOR at 11-13) and vacate the special verdict establishing a major VUCSA violation.

DATED this 5<sup>th</sup> day of September, 2019.

Respectfully submitted,

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