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

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STATE OF WASHINGTON,

Respondent,

v.

STAYCEY DARRELL COLLINS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 17-1-00578-7

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BRIEF OF RESPONDENT

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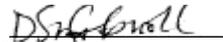
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether evidence discovered in the service of a search warrant should be suppressed because the warrant application failed to contain all material facts and failed to establish a nexus between the crime and the place to be search?

2. Whether the major violation of the uniform controlled substance act aggravating circumstance was properly applied to justify an upward departure from the standard range? (CONCESSION OF ERROR)

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Staycey Darrell Collins was originally charged by information filed in Kitsap County Superior Court with possession of controlled substance with intent to manufacture or deliver.<sup>1</sup> CP 1. Charging ended with a second amended information that alleged two counts of delivery of controlled substance, each with a major violation of the uniform controlled substance act special allegation, and one count of possession with intent, also with the major violation special allegation and a school-zone special allegation.

The trial court convened a CrR 3.6 hearing on Collins's motion to

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<sup>1</sup> Herein after "possession with intent."

suppress evidence. RP, 4/2/18, 2. The parties agreed to argue the issue based on documents submitted; no testimony was taken. Id.; RP, 11/4/18, 4 (matter submitted on the “four corners of the search warrant”). The trial court orally denied the motion. RP, 4/2/18, 12. The trial court entered written findings of fact and conclusions of law. CP 90-92. Two Complaint[s] for Search Warrant, one for Collins’s residence and one for his vehicle, are attached to the findings and conclusions. CP 94-115.

The jury was instructed on school zone enhancement and major violation of the uniform controlled substance act (UCSA) aggravating circumstance. CP 78-79; CP 80-82. Collins did not object to these instructions.

Collins was found guilty on all counts. CP 85-86. The jury found that each offense was a major UCSA violation. CP 87-89. The jury found that the crime of possession with intent was committed in a school zone. CP 89.

Collins had no felony history so each offense was given two points in light of the other two current offenses. CP 122. The trial court gave an exceptional sentence of 68 months by running the time on count II consecutive to counts I and II. CP 123. The trial court’s findings and conclusions for exceptional sentence indicate that the sentence was based on the jury’s finding of a major UCSA violation. CP 136.

## **B. FACTS**

Police had arrested a woman for delivering cocaine. 2RP 294. When arrested, she was in possession of two baggies containing suspected methamphetamine. 5RP 632. She cooperated with police and agreed to become an informant. 2RP 295. She chose a target from whom to buy cocaine. *Id.* Collins was the chosen target. 2RP 296-97.

As police watched, the informant contacted Collins via cellphone text asking to buy drugs. 2RP 297. Police arrayed themselves into surveillance positions near the arranged delivery location. 2RP 302. The informant was kept under constant surveillance. 2RP 302-03. Collins came, left, and the informant provided the police with the drugs that she purchased from Collins. 2RP 305. There were 3.7 grams of cocaine—commonly referred to as an “eight ball” or an eighth ounce. 2RP 306-307.

On the day of the first buy from Collins, the informant had been searched and marijuana and approximately 4.7 grams of methamphetamine had been found in her car. 3RP 384. This fact is not found in search warrant complaint. 3RP 385.

Later, police used the same informant for a second drug buy. 2RP 310. This time, detectives were stationed at Collins’s house for surveillance. 2RP 312. The informant was searched and given buy money and she contacted Collins. 2RP 312. Police observed Collins arrive at the

informant's house while the informant waited in her car. 2RP 317. The informant exited her car approached Collin's car and got in. 2RP 323-24. She got out and Collins left. 2RP 324-25.

Surveillance detectives followed Collins from his residence to the informant's house and back again to his residence. 2RP 327. The informant was searched and provided police with the purchased drugs. 2RP 328. This time the drugs weighed 3.5 grams. 2RP 329. Trial testimony related that Collins had stopped and contacted another person on his way to this second controlled buy. 3RP 472 *et. seq.* (Detective Manchester); 4RP 543 *et. seq.* (Detective Kirkwood).

Eventually, police served a search warrant on Collins's home and car. 2RP 331; 3RP 440. Under a bed, police found a bag and a sock. 3RP 447. In the bag were bundles of cocaine. 3RP 450. In the sock was a large amount of cash. 3RP 451.

In the car, police found several packages of suspected cocaine. 4RP 507. In a sandwich bag were individual packages containing cocaine. 4RP 509.

### III. ARGUMENT

#### A. THE NEXUS BETWEEN THE DRUG DEALING AND THE HOUSE SEARCHED WAS SUFFICIENT EVEN WHEN CONSIDERED WITH MATERIAL INFORMATION OMITTED FROM THE WARRANT APPLICATION.

Collins argues that there was an insufficient nexus between his home and his drug dealing to allow a search warrant for his home. He does not challenge the search of his car. This claim is without merit because there was a sufficient nexus and the addition of a fact omitted from the warrant complaint does not vitiate the nexus. Although Collins argues the nexus issue and the omission issue seriatim, they are intertwined in that the omission is asserted as an additional reason for finding a lack of nexus.

An issuing magistrate is accorded “great deference” and the standard of review is abuse of discretion. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (En Banc). But the trial court’s assessment of probable cause is a legal conclusion subject to de novo review. 165 Wn.2d at 182. This inquiry considers the whole of the information provided to the issuing magistrate. *State v. Dunn*, 186 Wn. App. 889, 896, 348 P.3d 791 *review denied* 184 Wn.2d 1004 (2015). The magistrate may make reasonable inferences from the facts and circumstances alleged. *Id.* And, common sense and experience may inform those reasonable

inferences. *State v. Thein*, 138 Wn.2d 133, 148-49, 977 P.2d 582 (1999)

Probable cause must be established by facts that allow a reasonable person to conclude that there is a probability of criminal activity. *See State v. Gentry*, 125 Wn.2d 570, 607, 888P.2d 1105 (1995). An affidavit for a search warrant should be evaluated in common sense manner, not hyper-technically, and any doubts are resolved in favor of the warrant. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003) (En Banc). There must be a nexus between the crime alleged and the items to be seized and between the items to be seized and the place searched. *Neth*, 165 Wn.2d at 183 *citing Thein*, 138 Wn.2d at 140.

The rule from *Thein* is “Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.” 138 Wn.2d at 147. Collins argues the absence of a nexus between the item to be seized and the place to be searched.

The facts present to the issuing magistrate included:

- the police operative (PO) provided police with identification information on Collins and the police were able to verify that information;
- using the PO, police made a controlled buy of cocaine from Collins, appropriately searching and surveilling the operative during the operation;

--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.

CP 94-104. The complaint for search warrant does not contain “generalized notions of the supposed practices of drug dealers.” *State v. G.M.V.*, 135 Wn. App. 366, 372, 144 P.3d 358 (2006) *review denied* 160 Wn.2d 1024 (2007), *citing Thein*, 138 Wn.2d at 147. The warrant is based on the facts asserted in the complaint. The warrant was “facially valid.” *See State v. Chenoweth*, 160 Wn.2d 454, 464, 158 P.3d 595 (2007).

The magistrate here had facts establishing two sales of narcotics. The magistrate knew that one of the deliveries involved Collins leaving from and returning to his residence. In *G.M.V.*, the nexus requirement was established by “a couple” of controlled buys with the dealer leaving and returning to the searched house on one occasion and returning to the house after the deal on another occasion. 135 Wn. App. at 369. Based on the facts in the warrant application, then, the issuing magistrate did not abuse his discretion by issuing the warrant.

But the question remains whether the additional fact that Collins stopped on his way to the second controlled buy changes the result. Detective Kirkwood was operating as a surveillance detective during the

second buy. 4RP 543-44. He was parked outside Collins's house. 4RP 544. Kirkwood observed Collins get in his car. 4RP 545. On the way to the arranged buy, Collins stopped. Id.

Collins stopped in a parking lot and met another person. 4RP 546. He was there for approximately two minutes and ended when the other person and Collins made a hand-to-hand exchange. Id. Based on training and experience, Detective Kirkwood believed this to have been a drug transaction. 4RP 547. Collins then proceeded to the deal the police had arranged. Id. After the deal, Detective Kirkwood and fellow officers followed Collins back to his residence. 4RP 549.

The same stop was described by Detective Manchester, who was also surveilling Collins's house. 3RP 472. Significantly, after this testimony, the defense did not ask the trial court to reconsider its prior CrR 3.6 ruling.

But the state agrees that the information about an intervening stop was material. Moreover, on this de novo review, it is not necessary for this court to remand for a *Franks* hearing. A *Franks* hearing may be had if the defense makes a preliminary showing that a material factual inaccuracy made either deliberately or by reckless disregard for the truth. *Chenoweth*, 160 Wn.2d at 469; *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). A defendant is then tasked with

establishing the allegation by a preponderance. *Id.* Here, however, the omitted facts are well established having been testified to under oath during the trial. A separate hearing would add nothing to the facts of this issue. There was a material omission. But the defense did not establish that that omission was done deliberately or in reckless disregard of the truth.

The defense fell short of establishing that the omission was “material falsehood[\*] or omission[\*] made recklessly or intentionally.” *Chenoweth*, 160 Wn.2d at 479 (alteration added). Such is not determined merely by the materiality of the omission itself. *Chenoweth*, 160 Wn.2d at 481. Here, the defense merely argued that there was an omission that was at the time of the argument unproven.

The defense mentioned the omitted fact in its CrR 3.6 argument. RP, 4/2/18, 4. The state conceded the fact: “The defendant stopped and made another drug deal before proceeding to this drug deal.” RP, 4/2/18, 9. The trial court ruled that it had insufficient information to warrant a *Franks* hearing. RP, 4/2/18, 12. But the trial court cordially invited the defense to raise the issue again if other information arose. *Id.* As noted, the defense never did. In fact, the defense had two opportunities to cross-examine the writer of the warrant complaint, Detective Janson, and did not develop reasons for the omission. 3RP 352-390; 4RP 652 *et. seq.*

Ultimately, probable cause to issue the warrant is reconsidered with the omitted fact included. *State v. Ollivier*, 178 Wn.2d 813, 847, 312 P.3d 1 (2013). Collins still twice delivered cocaine to the PO. Also, it appears to be a reasonable inference from the evidence that Collins received the PO's text message arranging the second drug deal while he was at the house. 3RP 469. Collins left his residence under circumstances where it is reasonable to infer that he was responding to the PO's request. His only stop on the route was to engage in what officers believed to be another sale of drugs. He returned directly to his house. With the application of experience and common sense, these facts allow a reasonable inference that the items sought would be in the house searched.

Moreover, nowhere in this record has the defense established that the omission was either intentional or in reckless disregard of the truth. The facially valid warrant should stand because the additional fact does not vitiate probable cause.

Finally, although this Court may find a lack of nexus for the search of the house, there is no such flaw in the search of the car; Collins admits that there was a sufficient nexus to search the car. Brief at 14. The drugs discovered in the car support the possession with intent conviction—Collins does not here challenge the sufficiency of the evidence on that charge. The drugs in the car also support the jury finding on the school

zone enhancement. Save for the state's concession below, since each of the convictions will stand even if evidence from the house search is suppressed, the matter should not be remanded on this issue.

**B. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AN ISSUE THAT WAS NOT SUPPORTED BY THE EVIDENCE AND BY USING CONVICTIONS ALREADY COUNTED IN CALCULATION OF THE STANDARD RANGE AS REASONS FOR AN EXCEPTIONAL SENTENCE.**

Collins next claims that the trial court erred by mis-instructing the jury on the existence of a major violation of the uniform controlled substance act aggravating circumstance. The state disagrees that the jury instruction was incorrect. However, the state concedes that the instruction was not supported by the record and that the application of the aggravator under the present circumstances was sentencing error.

The aggravating circumstance found in RCW 9.94A.535(3)(e)(i) refers to “the offense.”<sup>2</sup> It does not refer to “the offenses.” As instructed, the jury might have properly found that any of the three counts charged included three or more transactions. But the record shows that each

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<sup>2</sup> RCW 9.94A.535(3)(e) is also singular: “The presence of ANY of the following may identify a current offense as a major VUCSA:”

transaction was charged as a count. The record does not include any counts that included three transactions. Instruction #23 was not supported by the record on the three-transaction aggravator. When instructions were reviewed, the defense did not object to instruction #23. 5RP 723,

Further, the jury was instructed on both the three-transaction and sale or transfer of a substantial amount aggravators. CP 82. But the jury's verdicts do not differentiate between the two. CP 87, 88, 89. And the trial court findings and conclusions for exceptional sentence also fail to differentiate between the two alleged aggravating circumstances. CP 135-36.

Jury findings on aggravating circumstances are reviewed for sufficiency of the evidence. *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). Even in a light most favorable to the state, the aggravator cannot be found beyond a reasonable doubt. *See* RCW 9.94A.535(3) (requiring that an aggravating circumstance, other than criminal history, be found by a jury beyond a reasonable doubt).

Moreover, the trial court's finding of fact II. is erroneous because the jury could not have properly found that any of the three counts included the necessary three transactions. CP 136.

The ultimate problem in this record is that the trial court counted points for each offense and then used each of the already counted offenses

to establish the aggravator. CP 122-23. This double counting was error.  
*State v. Fisher*, 108 Wn.2d 419, 425-26, 739 P.2d 683 (1987).

The matter should be remanded for sentencing without the three-or-more-transactions aggravator.

#### IV. CONCLUSION

For the foregoing reasons, Collins's convictions should be affirmed and the matter remanded for resentencing without the aggravating circumstance.

DATED August 28, 2019.

Respectfully submitted,

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