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Court of Appeals No. 53401-1-II

In the  
*Court of Appeals of the State of Washington*  
Division Two

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STATE OF WASHINGTON,  
Respondent,  
v.  
JOHN WAYNE VINTON,  
Appellant.

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**APPELLANT'S OPENING BRIEF**

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Appeal From Pierce County Superior Court No. 18-1-00573-8

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**I. IDENTITY OF APPELLANT**

The Appellant is John Wayne Vinton (“Mr. Vinton”).

**II. ASSIGNMENTS OF ERROR**

- A. The Trial Court abused its discretion in refusing to hold a *Franks* hearing in violation of Mr. Vinton’s Fourth Amendment and Art. I, § 7 rights.
- B. Defense counsel was ineffective in violation of Mr. Vinton’s Sixth Amendment and Art. I, § 22 rights for failing to offer any independent evidence in support of a *Franks* hearing and perform such pre-trial discovery that he could put on any defense to the charges at trial.

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. Did Mr. Vinton make a substantial preliminary showing of inaccurate and material misrepresentations or omissions in Detective Darby’s affidavits sufficient to warrant a *Franks* hearing?
- 2. Did trial counsel’s performance fall below an objective standard of reasonableness by failing to offer any independent evidence in support of a *Franks* hearing and perform such pre-trial discovery that he could put on any defense to the charges at trial?
- 3. Was Mr. Vinton prejudiced by trial counsel’s deficient performance?

**IV. STATEMENT OF THE CASE**

Mr. Vinton was initially charged on February 9, 2018 with one count of unlawful possession of a controlled substance with intent to deliver (the “Unlawful Possession Charge”) and four counts of unlawful possession of a firearm in the first degree based on prior conviction of a serious offense (the “Firearm Charges”). (CP 6-8). On January 23, 2019,

the day of trial, the State filed an Amended Information that included the Unlawful Possession Charge and only four of the Firearm Charges (the “Charges”). (CP 89-91).

Evidence to support the Unlawful Possession Charge and the Firearm Charges was obtained pursuant to two separate search warrants. The first search warrant was obtained on February 3, 2018 from Judge Buttorff by email at 12:05 hours (the “First Search Warrant”) based on a search warrant affidavit of Detective Darby (the “First Darby Affidavit”). (CP 51-64). The First Search Warrant authorized a search at Mr. Vinton’s address at 2924 South Mason Street and a light colored 2002 Chevy suburban bearing Washington license plate 774 ZTZ (the “Suburban”), which was registered to Mr. Vinton. Id. Members of the Sherriff’s Department executed the First Search Warrant on February 8, 2018 at approximately 17:15 hours. (CP 26). On February 8, 2018, the date that the police executed the First Search Warrant, a second search warrant was obtained from Judge Buttorff (the “Second Search Warrant”) for a white Chevy Silverado, license plate SHO1058, registered to Jessica Vinton (the “Silverado”). (CP 65-76). Unlike the First Search Warrant, the application for the Second Search Warrant was not time-stamped. Id. The Second Search Warrant was also based on a

search warrant affidavit from Detective Darby (the “Second Darby Affidavit”). Id.

Both the First and Second Darby Affidavit and respective search warrant applications relied on information obtained from a confidential informant (the “Confidential Informant”) at sometime within the past 72 hours. (CP 51-76). The Confidential Informant’s identity was not disclosed, and neither the First or Second Darby Affidavit described the relationship between the Confidential Informant and Mr. Vinton or how the Confidential Informant obtained or knew the information on which Detective Darby relied in the First and Second Darby Affidavit. Id.

Further, the Confidential Informant information in the First and Second Darby Affidavit and respective warrant applications was nearly identical and differed only in arrangement on the paper and the substitution of the Silverado for the Suburban. Id.

On November 21, 2018, Mr. Vinton’s Counsel filed a *Motion to Suppress Evidence Obtained by Search Warrant* (the “Motion to Suppress”), requesting a *Franks* hearing based on material misrepresentations and/or omissions in the First and Second Search Warrant Affidavits and asserting that the Confidential Informant information relied on in the First and Second Darby Affidavit did not establish probable cause in accordance with the two-prong *Aguilar-*

*Spinelli* test. (CP 20). Mr. Vinton's Counsel asserted at the hearing that Mr. Vinton alleged that the Sheriff's Department executed their search of the Silverado before applying for and obtaining the Second Search Warrant. (1 VRP 31).

On November 21, 2018, the Trial Court held a pre-trial conference, at which Mr. Vinton's Counsel requested a continuance, asserting that he had not yet conducted any witness interviews. (CP 40).

On January 23, 2019, the Trial Court denied the Motion to Suppress and the request for a *Franks* hearing. (1 VRP 50). In denying the request for a *Franks* hearing, the Trial Court noted that Mr. Vinton's Counsel had not provided any declaration or affidavit supporting a preliminary showing of material misrepresentations and/or omissions in the First or Second Darby Affidavit. (1 VRP 32). The Trial Court also granted, among other things, the State's Motion in Limine precluding Mr. Vinton from putting on any evidence regarding other suspects, due to the failure of Mr. Vinton's Counsel to provide any basis therefor to date through pre-trial discovery or motion. (CP 135). Mr. Vinton's Counsel did not object to the State's last-minute amendment of the charges against Mr. Vinton. (VRP 3-4). Additionally, Mr. Vinton's Counsel entered into a stipulation (the "Stipulation") that stipulated to

Mr. Vinton's prior serious offenses, a necessary element of the remaining Firearm Charges. (1 VRP 11-13; CP 157).

At trial, Mr. Vinton's Counsel did not call any defense witnesses, other than Mr. Vinton, did not offer a single piece of evidence, and did not object to any evidence offered by the State. (1 VRP 5; 1 VRP 9; CP 212-218).

The jury returned a verdict of guilty on all the Charges. (CP 201-210; 213).

#### V. STANDARD OF REVIEW

A trial court's determination that probable cause exists for issuance of a warrant is reviewed for abuse of discretion. State v. Clark, 143 Wash. 2d 731, 748 (2001). Similarly, a trial court's denial of a request for a Franks hearing is reviewed for abuse of discretion. State v. Wolken, 103 Wn.2d 823,829-30,700 P.2d 319 (1985).

Ineffective assistance of counsel is a mixed question of law and fact. Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052 (1984). Because claims of ineffective assistance of counsel present mixed questions of law and fact, appellate courts review them de novo. See, e.g., In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601, 604 (2001); State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000); State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). "Ineffective

assistance of counsel is a fact-based determination, and we review the entire record in determining whether a defendant received effective representation at trial.” State v. Carson, 184 Wn.2d 207, 215-16, 357 P.3d 1064 (2015).

## **VI. ARGUMENT**

### **A. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO CONDUCT A *FRANKS* HEARING.**

#### **1. The Darby Affidavits Contained Intentional or Reckless Misrepresentations and Omissions that Required a *Franks* Hearing.**

Under the Fourth Amendment and Article I, Section 7 of the Washington Constitution, factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (a) material and (b) made in reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); State v. Chenoweth, 160 Wash.2d 464, 472 (2007); State v. Cord, 103 Wash.2d 361, 366-67, 693 P.2d 81 (1985). A showing of mere negligence or inadvertence is insufficient. Franks, 438 U.S. at 171, 98 S.Ct. 2674; Chenoweth, 160 Wash.2d at 472; State v. Seagull, 95 Wash.2d 898, 908, 632 P.2d 44 (1981). If the accused makes this preliminary showing, and at an evidentiary hearing establishes the allegations by a preponderance of the evidence, the material misrepresentation will be stricken from the affidavit and a determination made whether, as modified,

the affidavit supports a finding of probable cause. Franks, 438 U.S. at 171, 98 S.Ct. 2674. If the affidavit fails to support probable cause, the warrant will be held void and evidence obtained pursuant to it excluded. Id. The *Franks* test for material misrepresentations also applies to allegations of material omissions. United States v. Martin, 615 F.2d 318 (5th Cir.1980); Cord, 103 Wash.2d at 367, 693 P.2d 81.

Here, a preliminary showing that material misrepresentations and omissions was made to the Trial Court in the mere fact that the Second Darby Affidavit failed to show a time-stamp or offer any type of police report or call evidence showing the time on February 8, 2018 at which the Second Search Warrant was obtained in relation to execution of the search of the Silverado. (VRP 14-50; CP 65-76). Mr. Vinton's Counsel asserted that the reason for this material omission was that Detective Darby did not submit the Second Darby Affidavit and obtain the Second Search Warrant until after pulling over and searching the Silverado that Mr. Vinton was driving on February 8, 2018. (VRP 31). Further, the similarity between the Confidential Informant information contained in the First Darby Affidavit and the Second Darby Affidavit, and essentially the change of Suburban to Silverado, supports the fact that this omission was intentional and material—intended to cover-up the fact that an illegal search of the Silverado occurred prior to obtaining a warrant for such search. (VRP 14-

31; CP 51-76). As a result, a *Franks* hearing should have occurred so that Mr. Vinton could have testified, as well as Detective Darby, as to the order of events and reason for omissions and misrepresentations.

## **2. The Trial Court's Abuse of Discretion Caused Harm.**

The harmfulness of the Trial Court's abuse of discretion in not permitting a *Franks* hearing and denying the Motion to Suppress is unquestionable here. All of the physical evidence obtained by the State and put on at trial was obtained from the First and Second Search Warrants—without those, no physical evidence showing a controlled substance or firearms would have been established. (CP 26-27; CP 51-76; CP 212-217).

## **B. MR. VINTON WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO PROVIDE ANY INDEPENDENT EVIDENCE IN SUPPORT OF A *FRANKS* HEARING AND TO CONDUCT PRE-TRIAL DISCOVERY SUCH THAT HE COULD PUT ON A DEFENSE.**

“Under the sixth amendment to the United States Constitution and art. I, § 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings.” *In re Davis*, 152 Wn.2d 647, 672, 101 P.3d. 1, 16 (2004). The right to counsel is constitutionally guaranteed at all critical stages of a criminal proceeding. *Mempa v. Rhay*, 389 U. S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P. 2d 210

(1987).

To successfully challenge the effective assistance of counsel:

Petitioner must show that ‘(1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

In re Davis, 152 Wn.2d at 672-73. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” In re Crace, 174 Wn.2d 835, 840, 280 P.3d 1102, 1105 (2012) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

“Appellate review of counsel’s performance starts from a strong presumption of reasonableness.” State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776, 777 (2011) (citing State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)). An appellant can “rebut this presumption by proving that his attorney’s representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.” In re Davis, 152 Wn.2d at 673 (citing Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (citing Strickland, 466 U.S. at 688-89). “The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” Id.

**1. Mr. Vinton's Counsel's failure to provide any independent evidence for a *Franks* hearing and to conduct pre-trial discovery fell below an objective standard of reasonableness for defense counsel.**

Mr. Vinton's Counsel failed to satisfy an objective standard of reasonable for defense counsel where he failed to provide any independent evidence, as noted by the Trial Court, to support a *Franks* hearing that likely would have led to the suppression of all physical evidence against Mr. Vinton in this case. (VRP 31-32; 50; CP 25). The law was well-established that Mr. Vinton had a duty to make a preliminary showing of a material misrepresentation or omission by Detective Darby in order to obtain a *Franks* hearing, and evidence was necessarily needed to make that preliminary showing. Any reasonable counsel would have provided an affidavit/declaration from Mr. Vinton to support the assertions that Mr. Vinton's Counsel made to the Trial Court, but which the Trial Court would not consider as evidence. (VRP 31-32; 50).

Further, Mr. Vinton's Counsel failed to satisfy an objectively-reasonable standard of conduct for defense counsel where he failed to perform any pre-trial discovery such that he could put on a defense to the Charges. Mr. Vinton's Counsel admitted at a pre-trial conference in November that he was not ready for trial and had not conducted any witness interviews. (CP 40). At trial, Mr. Vinton's Counsel failed to propose jury instructions, to provide a witness list or call any defense

witnesses, other than Mr. Vinton, and to object to any piece of evidence presented by the State. (1 VRP 5; 1 VRP 9; CP 212-218). The Trial Court granted the State's Motion in Limine regarding all evidence of other suspects, based on Mr. Vinton's Counsel's failure to provide any basis for another suspect through pre-trial discovery or motion. (CP 135). Because Mr. Vinton's Counsel agreed to a Stipulation that established the essential element of prior serious offense for the remaining Firearm Charges, Mr. Vinton was essentially left without a defense. (1 VRP 11-13; CP 157).

**2. Mr. Vinton was prejudiced by defense counsel's deficient performance.**

Mr. Vinton was prejudiced by his Counsel's deficient performance in that had Mr. Vinton's Counsel provided an affidavit from Mr. Vinton asserting that the Second Search Warrant was obtained during and/or after a search of the Silverado was conducted on February 8, 2018, a preliminary showing would have been made for a *Franks* hearing. That *Franks* hearing would have likely led to suppression of all the physical evidence presented by the State at trial. Further, the failure of Mr. Vinton's Counsel to perform any pre-trial discovery, taken together with the Stipulation he entered, effectively led to an inability for Mr. Vinton to mount any defense. Indeed, Mr. Vinton's Counsel did not mount a defense, offering no evidence, objecting to no evidence, and presenting no witnesses, other than Mr. Vinton.

## VII. CONCLUSION

For the reasons stated herein, Mr. Vinton's Constitutional rights were violated where he was denied a *Franks* hearing on the First and Second Darby Affidavits. Further, Mr. Vinton was prejudiced by defense counsel's constitutionally deficient performance. Therefore, Mr. Vinton respectfully requests that this Court reverse the jury verdict.

Respectfully submitted this 6th day of January, 2020.

LAW OFFICE OF COREY EVAN PARKER

*Corey Evan Parker*  
\_\_\_\_\_  
Corey Evan Parker, WSBA #40006  
Attorney for Appellant, John Wayne Vinton

**CERTIFICATE OF SERVICE**

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on January 6, 2020, I caused to be served the document to which this is attached to the parties listed below in the manner shown below:

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**LAW OFFICE OF COREY EVAN PARKER**

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