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No. 53645-5-II

**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Brian Glaser,

Appellant.

Reply Brief of Appellant Brian Glaser

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1. Introduction

The police investigation in this case was full of errors and overreach. The trial court correctly suppressed some evidence, but fell short of what was required to protect Glaser's rights. At the time of the warrant applications to search Glaser's truck and home, there was insufficient untainted information to establish probable cause for the searches. Additionally, the officers violated the inventory requirements of CrR 2.3(d), prejudicing Glaser's ability to defend himself.

The State's attempts to justify its own errors and those of the trial court fall flat. The State fails to demonstrate how the untainted information in the search warrant applications demonstrates any probability that Glaser was at the crime scene or participated in the murder. The warrants were not supported by probable cause. The State's arguments on the inventory seek only to evade the prejudice standard established in *Linder*, but *Linder* remains good law and is the only standard applicable in this case. Under *Linder*, Glaser was prejudiced and the evidence should have been suppressed.

This Court should reverse the conviction and the trial court's denial of the motion to suppress; should suppress the evidence obtained from the truck and the residence; and should remand for a new trial or other appropriate proceedings.

2. Reply Argument

2.1 The Court should apply de novo review to the issues presented in this case.

Glaser’s opening brief argued that the proper standard of review in this case is de novo. **Br. of App.** 6-7 (citing, *e.g.*, *In re Detention of Petersen*, 145 Wn.2d 789, 799-801, 42 P.3d 952 (2002)). The State argues, in error, that the abuse of discretion standard applies. **Br. of Resp.** 11-12.

Petersen supersedes all of the authorities cited by the State. The State’s cases on the standard of review are all from the 1990s, prior to the *Petersen* decision in 2002. In *Petersen*, our Supreme Court reviewed the “admittedly muddled” prior case law on the standard of review for probable cause determinations. *Petersen*, 145 Wn.2d at 799. At the conclusion of this review, the court held that while a magistrate’s determination of the reliability or credibility of a confidential informant is entitled to deference, the question of whether certain factual information establishes probable cause “must be reviewed de novo.” *Id.* at 801.

The first issue presented in Glaser’s appeal—whether the untainted facts in the search warrants gave rise to probable cause—falls squarely under *Petersen*’s mandate of de novo review. The original warrants have already been found infirm because they contained improper information. This Court is not

called upon to review those original warrants. Thus, there is nothing for this Court to give deference to. In analyzing the “independent source doctrine” to determine whether the untainted information supports a finding of probable cause, this Court is reviewing a hypothetical warrant with only the untainted information, and deciding “the legal issue whether the qualifying information as a whole amounts to probable cause. As to this legal conclusion, de novo appellate review is necessary.” *Petersen*, 145 Wn.2d at 800.

The second issue presented in Glaser’s appeal—whether evidence should have been suppressed due to the officers’ violation of the inventory requirements of CrR 2.3(d)—is also subject to de novo review. As noted in Glaser’s opening brief, conclusions of law relating to suppression of evidence are reviewed de novo. **Br. of App.** 6 (citing *State v. Betancourth*, 190 Wn.2d 357, 363, 413 P.3d 566 (2018)). This Court has previously applied de novo review to the question of whether a violation of the inventory requirements of CrR 2.3(d) required suppression of evidence. *E.g.*, *State v. Linder*, 190 Wn. App. 638, 643, 360 P.3d 906 (2015). The State appears to agree. **Br. of Resp.** 19-20.

2.2 This Court should reverse the trial court’s denial of Glaser’s motion to suppress the fruits of the search of his house as fruit of the poisonous tree.

2.2.1 The trial court should have stricken the fingerprint evidence because the warrant affidavit failed to establish Detective Grant’s qualifications as a fingerprint examiner.

Glaser argued in his opening brief that there was insufficient evidence to establish the qualifications of Detective Grant to conclude that the fingerprints found at the scene of the crime were a match to Glaser. **Br. of App.** 10-12. An officer expressing a professional opinion in a warrant affidavit must first set forth their qualifications—the necessary skill, training, or experience to show that the opinion is more than merely a personal belief. **Br. of App.** 10 (citing *State v. Olson*, 74 Wn. App. 126, 872 P.2d 64 (1994); *State v. Ibarra*, 61 Wn. App. 695, 812 P.2d 114 (1991)). Glaser argued that the stated qualifications of Detective Grant were not a sufficient basis for his proffered opinion. **Br. of App.** 11-12.

The State’s argument is fundamentally flawed because it relies on the wrong standard of review. **Br. of Resp.** 13. The State claims that Glaser’s argument is “contrary to the established standard of review,” apparently referring to the abuse of discretion standard that the State erroneously argued for at **Br. of Resp.** 11. But, as shown above, the State has apparently

ignored the clarification of the standard provided in *Petersen*. The question of whether Detective Grant's stated qualifications give rise to probable cause is a legal determination properly reviewed de novo.

While the State is correct in arguing that this Court should review the untainted facts in a commonsense manner, there is no commonsense interpretation of Detective Grant's stated qualifications that would demonstrate that he was qualified to compare and match the fingerprint to Glaser. An officer's "particular expertise" is critical to the probable cause analysis. *State v. Remboldt*, 64 Wn. App. 505, 510, 827 P.2d 282 (1992). Absent a showing that the officer "had the necessary skill, training or experience" to offer a particular opinion, the warrant affidavit will be insufficient to establish probable cause. *State v. Matlock*, 27 Wn. App. 152, 155–56, 616 P.2d 684 (1980).

The State glosses over the deficiencies in Detective Grant's stated qualifications, claiming that Glaser's reading is "hypertechnical." But the State fails to demonstrate any commonsense reading of the qualifications that would establish Detective Grant's qualifications to compare and match the fingerprints to Glaser.

Detective Grant attended a “scientific basic fingerprints course.” CP 264-65.¹ There is no commonsense understanding of what this means, what topics it covered, or whether it included any practical training in obtaining, comparing, or matching fingerprints. The affidavit does not explain any further. The most commonsense interpretation of the description as a “basic fingerprints” course would be that it informed the officer of the basic scientific principles behind fingerprint evidence but **not** the more advanced topic of how to match a sample to a suspect.

There is also no commonsense understanding of what Detective Grant might have learned from “24 hours at the Biometric Technology Center of the FBI” or from “40 hours at the Michigan State forensic lab.” The Court cannot simply assume the conclusion that the State desires.

Under de novo review, this Court must be independently convinced—without deference to the trial court or the original magistrate—that Detective Grant’s stated qualifications are sufficient to support his opinion. There is nothing in Detective Grant’s statement that demonstrates that he was qualified to match the fingerprints to Glaser.

¹ Glaser’s opening brief cited to the trial court’s findings of fact for the description of Detective Grant’s qualifications. The full statement of qualifications in its original form, from the transcript of the oral request for the search warrant, is found at CP 264-65.

The State also attempts to rely on Detective Grant's description of the methodology he used to arrive at his opinion. The warrant application stated, "Detective Mike Grant was able to use his training and experience and ... was able to compare the fingerprints on the truck to Brian Glaser's fingerprints. And using the loops and the ridges, was able to find that it matched Brian Glaser's fingerprints." CP 265. This simplistic (and arguably incorrect, see CP 317) description of the methodology—"using the loops and the ridges"—does nothing to demonstrate that Detective Grant was actually qualified to take a proper sample or make a proper match.

In *Matlock*, this court held, "the fatal flaw in this affidavit is the lack of any information to support his claim the plants he saw were marijuana. Absent some showing that Officer Richart had the necessary skill, training or experience to identify marijuana plants on sight, the affidavit was insufficient to establish probable cause for the issuance of a search warrant." *Matlock*, 27 Wn. App. at 155–56. Here, there is no commonsense reading of the statement of qualifications that would demonstrate that Detective Grant actually had the necessary skill, training, or experience to match the fingerprints on the truck to Brian Glaser. This Court should hold that Detective Grant's stated qualifications were insufficient to create probable cause.

This alleged fingerprint evidence was how the officers placed Glaser at the scene of the crime to establish the necessary nexus between the crime and Glaser's truck and residence. CP 265 ("And using the loops and the ridges, was able to find that it matched Brian Glaser's fingerprints. And we were able to place Brian at the scene that day."). Without a fingerprint match, there was not probable cause to connect Glaser to the crime scene. The search warrant for Glaser's truck was not supported by probable cause. All evidence from that search should have been suppressed.

2.2.2 After striking all improper information, there was not probable cause to search Glaser's house.

Glaser's opening brief summarized the untainted information that remains in the search warrants for Glaser's truck and his residence, arguing that the remaining information failed to establish probable cause for either search. **Br. of App.** 13-14 (truck), 15-16 (residence). The State's brief sets forth its own version of the untainted information. **Br. of Resp.** 16-17 (truck), 17-18 (residence).

The untainted information in the warrant application for Glaser's truck fails to place Glaser at the crime scene. "To establish probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability the

defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched.” *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). There must be a nexus between the crime and the place to be searched. In this case, that necessary nexus can only be established if the untainted information available at the time placed Glaser at the crime scene. It does not.

At the time the officers applied for the warrant to search Glaser’s truck, they had evidence of a potential motive for Glaser, but they could not place him at the scene without the fingerprint match. They knew only that Glaser “was associated with” a Nissan pickup truck; that “a gray-colored pickup” with a lift or crane in the back had been seen at Glaser’s home; and that “a pickup truck with a lift in the back” had been seen at the crime scene around 1:30pm the day of the crime. CP 263-64.

This is not enough for a reasonable person to conclude that Glaser was probably there and probably involved in the murder. The truck at the scene might not have been Glaser’s. Someone else might have driven the truck there. The person might have left the scene before the murder.

While there may have been enough there to prompt further investigation to determine whether Glaser was present and may have had any involvement in the crime, it is not in itself sufficient to create probable cause to believe that Glaser

was probably involved in the crime or that evidence of the crime was likely to be found in the truck or at Glaser's house.

The State's brief fails to separately analyze the truck warrant. The State does not explain how the untainted information in the truck warrant could create probable cause to search the truck. Because the truck warrant was not supported by probable cause, this Court should reverse the conviction and the trial court's denial of the motion to suppress, should suppress all evidence obtained from Glaser's truck, and remand for a new trial.

At the time the officers applied for the warrant to search Glaser's house, the additional, untainted evidence they had obtained still did not create probable cause to search Glaser's house. The officers had learned that Glaser had been away from the house for a time and returned at 3:26pm and that Glaser had access to firearms and ammunition in the home. CP 278. The mud found on the floor of Glaser's truck cannot be considered because the truck warrant was not supported by probable cause. There was no information indicating where Glaser had been that afternoon or whether he had taken the truck. The additional information in this warrant still did not place Glaser at the crime scene. A reasonable person still could not conclude that Glaser was probably involved in the murder.

The State's brief fails to explain how the untainted information places Glaser at the crime scene, instead simply stating its conclusion and apparently relying on the deferential standard of review that Glaser has already shown to be erroneous. Under the required de novo review, the warrants for the truck and the house were not supported by probable cause. The Court should reverse the conviction and the trial court's denial of the motion to suppress, should suppress all evidence obtained from Glaser's truck and home, and remand for a new trial.

2.3 This Court should reverse the trial court's denial of Glaser's motion to suppress the fruits of the search of his house due to the State's violations of CrR 2.3(d).

Glaser argued in the alternative that even if the warrants were supported by probable cause, the evidence obtained in the search of his home should have been suppressed because the officers violated the inventory requirements of CrR 2.3(d). **Br. of App. 16-22** (citing, *e.g.*, *State v. Linder*, 190 Wn. App. 638). Glaser argued that he is entitled to the remedy of suppression of the evidence because the inaccurate inventory caused him prejudice—that is, no other remedy short of suppression could cure the violation. *See Linder*, 190 Wn. App. at 651-52.

The State is wrong when it argues that Glaser was not prejudiced by the violation. Rather than face the precedent

established in *Linder*, the State searches other jurisdictions for a different standard of prejudice. **Br. of Resp.** 24-27. These outside decisions are not the law in Washington. *Linder* is the law in Washington. No Washington decision, published or unpublished, has called it into question.

The *Linder* court explained that suppression of evidence is required as a consequence for “violation of a ministerial court rule,” “where no other remedy is available for enforcement of the statutory requirements.” *Linder*, 190 Wn. App. at 643-44. The *Linder* court distinguished prior cases—now being cited by the State—in which no such prejudice was found. *Id.* at 646-49. The *Linder* court then explained the limited situations in which an unwitnessed inventory would not be prejudicial:

In the seven Washington decisions relied on by the State, almost all of the searches were conducted in a manner that satisfied the purpose, if not the letter, of the procedure required by the rule. In many cases, the violations could be cured after the fact. As a result, no prejudice to a right of the defendant was demonstrated.

Here, by contrast, an officer’s unwitnessed inventory would appear to be nonprejudicial **only if the trial court found the inventory to be accurate** despite the violation, and substantial evidence supported that finding (thus satisfying the purpose of the rule), **or if the violation could be remedied after the fact.** Neither is the case here.

Linder, 190 Wn. App. at 651 (emphasis added).

The inventory here was unquestionably inaccurate, which the officers admitted at trial. Contrary to the State's arguments (**Br. of Resp.** 28), the inaccuracy of the inventory **supports** a finding of prejudice under *Linder*.

The twofold violations of the rule could not be remedied after the fact. There is no remedy for the fact that nobody was paying any attention to the inventory prepared by Detective Peffer, violating the witness requirement. There was also no other remedy for the inaccuracies in the inventory. "The inventory omits some items that were collected, and the description of some items listed lack specificity as to avoid confusion." CP 633-34 (Finding of Fact #8). The most important item taken from the house—the alleged murder weapon—was nowhere to be found in the warrant inventory.

The absence of the backpack and the firearm from the inventory suggests that they were not actually seized pursuant to the warrant. It would seem that they were, in fact, seized as part of the unlawful interrogation that preceded the warrant search. If that is true, the backpack and the firearm should have been suppressed along with everything else that was discovered as part of the interrogation.

That they were not suppressed, based on the officers' later testimony that they actually did seize the items as part of the search, is one example of the prejudice Glaser suffers as a result

of the inaccurate inventory. What remedy does Glaser have to resolve the contradiction between the inventory and the officers' later testimony, except to challenge the credibility of the officers? This is precisely the prejudice identified by the court in *Linder*: “The sergeant’s violation could not be cured after the fact, for, as the trial court concluded, a defendant’s only recourse would be to deny the accuracy of the inventory in opposition to the word of a police officer, and ‘[f]rom common experience, this places defendant at a disadvantage.” *Linder*, 190 Wn. App. at 651.

Even if the items were actually seized pursuant to the warrant, as the officers later testified, Glaser is left with the same problem. His only recourse was to challenge the credibility of the officers. Contrary to the State’s arguments, the fact that Glaser attempted to do so does not cure the prejudice, it illustrates it.

The fact that there were multiple officers who testified about the backpack and firearm does not reduce the prejudice. The problem is still the same: Glaser’s only recourse was to challenge their credibility, which put him at a distinct disadvantage, just as in *Linder*.

The State cites only two cases, both of them unpublished, that supposedly distinguish *Linder*. The State would like the Court to believe that these cases suggest that *Linder* should not apply here, but in fact the cases have no bearing on *Linder*’s

standard of prejudice or on this case because they do not involve violation of the inventory requirements.

In *State v. Whitford*, 7 Wn. App. 2d 1042, 2019 WL 480465 (2019) (unpublished), the alleged violation was an officer's failure to give the defendant a copy of a search warrant before extracting a blood sample pursuant to that warrant. *Whitford*, at *3. The court did not question *Linder's* prejudice standard, but simply found that it did not apply in that case.

In *State v. Pleasant*, 11 Wn. App. 2d 1001, 2019 WL 5448900 (2019) (unpublished), the defendant argued that he was prejudiced when multiple officers who participated in the search and inventory did not actually sign the inventory as witnesses. *Pleasant*, at *3. The court did not question *Linder's* prejudice standard, but found that there was no prejudice where it was clear that three officers participated in completion of the inventory. *Id.* at *4. In contrast, here the trial court correctly found that only one officer—Detective Peffer—participated in the inventory, in violation of CrR 2.3(d).

Linder is the law in Washington. Under *Linder*, a defendant is prejudiced where there is no remedy short of suppression that can cure the violation. *Linder*, 190 Wn. App. at 651. An inaccurate, unwitnessed inventory prejudices the defendant by placing them at an unfair disadvantage in defending against the physical evidence that would be used

against them at trial if not suppressed. *Id.* This is precisely the prejudice that Glaser suffered in this case. The State fails to show how this case is any different from *Linder*.

Because Glaser was prejudiced by the inaccurate, unwitnessed inventory in this case, the physical evidence obtained in the search—especially the backpack and firearm that were omitted from the inventory—should have been suppressed. This Court should reverse the conviction and the trial court’s order, suppress the evidence, and remand for a new trial.

3. Conclusion

Once all improper information is excised from the warrant applications to search Glaser’s truck and his home, they are not supported by probable cause. Glaser was prejudiced by the officers’ violations of CrR 2.3(d), under *Linder*. This Court should reverse the conviction and the trial court’s denial of the motion to suppress; should suppress the evidence obtained from the truck and the residence; and should remand for a new trial or other appropriate proceedings.

Respectfully submitted this 23th day of September, 2020.

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I certify, under penalty of perjury under the laws of the State of Washington, that on September 23, 2020, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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