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Division II
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NO. 53845-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK DENNIS,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Relying on a tip made from an informant with a lengthy history of crimes of dishonesty and a motive to spite Patrick Dennis, the police sought and received a warrant to search Mr. Dennis's residence for evidence of narcotics.

This warrant lacked probable cause because it did not establish the informant's veracity and the police did not corroborate the informant's allegation.

Additionally, the warrant was obtained despite material omissions in the application. The court was required to conduct a *Franks* hearing.

The required evidentiary hearing along with the absence of probable cause should have led the court to suppress the fruits of the unlawful warrant.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it found the government established probable cause to authorize a search warrant.
2. The trial court erred in concluding the veracity prong of *Aguilar-Spinelli* had been met. (CP 71, conclusion of law 2).

3. The trial court erred in making in concluding both prongs of *Aguilar-Spinelli* would be met if the informant's prior crimes of dishonesty were included in the warrant affidavit. (CP 71, conclusion of law 3).

4. Because of the government's reckless omission of material facts in the warrant application, the trial court erred when it did not order a *Franks* hearing.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To establish probable cause where the police rely on claims made by an informant, the affidavit in support of the search warrant must establish the veracity of the informant or corroborate the information. The affidavit failed to establish the informant's credibility where suspicious circumstances signaled the informant's motive to falsify allegations and his past crimes of dishonesty indicated a potential to do so. The police failed to corroborate the alleged criminal activity. Because the warrant lacked probable cause, was suppression required?

2. Where a defendant makes a substantial preliminary showing that an omission in the affidavit in support of a search warrant was material and made with reckless disregard for the truth, the federal and Washington constitutions require an evidentiary hearing at the defendant's request. Mr. Dennis established material omissions in the affidavit pertaining to the informant's credibility were material and made with reckless disregard for the truth. Did the trial court err when it failed to hold a *Franks* hearing?

D. STATEMENT OF THE CASE

After receiving a tip that Patrick Dennis was in possession of narcotics, the police sought a search warrant. CP 46. The affidavit in support of the warrant identified the informant by name and birth date, and explained the informant's wife had been in a motel room with Mr. Dennis. *Id.* The informant claimed that when he picked his wife up at the motel, he saw two bags of narcotics inside the room with Mr. Dennis. *Id.*

The informant disclosed he had a prior conviction for selling drugs to explain his ability to identify what he saw. *Id.* The police officer looked up the informant's criminal history. *Id.* In the affidavit, the officer included a single drug dealing conviction the informant had disclosed. *Id.* But the officer omitted everything else from the informant's lengthy criminal history. *Id.*; see CP 32, 55-59. That history included at least four felony and one misdemeanor crimes of dishonesty:

- Taking a motor vehicle without permission,
- Trafficking stolen property,
- Identity theft,
- Extortion, and
- False statement to a public servant.

CP 55-59.

The search based on this warrant yielded evidence of narcotics. The State charged Mr. Dennis with two counts of simple possession of a controlled substance. CP 3-4.

Mr. Dennis moved to suppress the fruits of the warrant. CP 31-59. He noted the informant's veracity was not established. *Id.* He pointed out the police had not

corroborated the tip. *Id.* Finally, he argued the officer's omission of the informant's criminal history was material and made in reckless disregard for the truth. *Id.*

The trial court denied the motion to suppress. RP 37; CP 70-71. The court orally found the police had not corroborated the tip and that the omission was made recklessly. RP 36-37. Nonetheless, the court found the informant's credibility was established and the omissions were not material. RP 36-37; CP 70-71.

Mr. Dennis was convicted of both counts at a stipulated facts bench trial.

E. ARGUMENT

- 1. The search warrant was not supported by probable cause because the affidavit failed to establish the veracity of the informant.**

The Washington Constitution commands that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. The Fourth Amendment likewise protects individuals from intrusions into their persons and property. U.S. Const.

amend. IV. The police violated these provisions by seeking a warrant on insufficient information; the resulting search was unconstitutional.

a. The Aguilar-Spinelli test requires evidence of both a factual basis and veracity.

Because of concerns for reliability, information received from an informant is carefully scrutinized. *State v. Mickle*, 53 Wn. App. 39, 41, 765 P.2d 331, 332 (1988) (citing *State v. Huft*, 106 Wn.2d 206, 209, 720 P.2d 838 (1986)). Police must establish (1) that the informant has a factual basis for his allegations, and (2) that the information is reliable and credible. *State v. Jackson*, 102 Wn.2d 432, 443, 688 P.2d 136 (1984); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

The two prongs of the *Aguilar-Spinelli* test must be independently satisfied. *Jackson*, 102 Wn.2d at 437. If one element of the test is lacking, probable cause may only be established by independent corroboration by the police supporting the missing prong of the test. *Id.* at 438.

Whether probable cause existed is a legal conclusion of law this Court reviews de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007).

Here, the informant provided a factual explanation of what he saw, how he saw it, and why he knew what it was. CP 46. Mr. Dennis does not contest the informant's history of drug dealing, his personal knowledge about drugs, or that he claimed a form of factual basis. CP 34. However, there was no evidence to establish the informant's reliability. Further, the police did not investigate the informant's claims to corroborate more than innocuous details. *See* CP 34; CP 46-47. Either step is required when relying on allegations of an informant. *Jackson*, 102 Wn.2d at 437.

b. There was no evidence to establish the informant's veracity.

The search warrant affidavit must contain information that establishes the informant's truthfulness. *State v. Lair*, 95 Wn.2d 706, 709, 630 P.2d 427 (1981). The veracity prong is satisfied in either of two ways: (1) the informant's credibility may be established through demonstrating the person's "track

record,” or (2) if nothing is known about the informant, the facts and circumstances surrounding the information conveyed may reasonably support an inference that the informant is telling the truth. *Id.* at 709–10.

In *Lair*, the Court found several facts supported an inference the named but previously unknown informant was telling the truth. *Id.* at 710-12. The informant made his statements to a private citizen, not a police officer, and the statements were against his own penal interest. *Id.* at 709-13. Additionally, his statements were corroborated by another informant whose reliability was established. *Id.* at 711-12.

Credibility cannot be presumed simply because the identity of the informant is included in a search affidavit. *State v. Duncan*, 81 Wn. App. 70, 78, 912 P.2d 1090 (1996); *State v. Rodriguez*, 53 Wn. App. 571, 575-76, 769 P.2d 309 (1989). The informant’s identity is merely one consideration in determining whether the informant is truly a citizen informant. *Rodriguez*, 53 Wn. App. at 576; *State v. McCord*, 125 Wn. App. 888, 893, 106 P.3d 832 (2005).

Further, to establish the reliability of a citizen informant, the police must provide background facts that support a reasonable inference the informant is credible and without motive to lie. *State v. Berlin*, 46 Wn. App. 587, 591, 731 P.2d 548, 550 (1987) (citing *State v. Chatmon*, 9 Wn. App. 741, 748, 515 P.2d 530 (1973)). A “citizen informant” is only one “who is not involved in the criminal activity or motivated by self-interest.” *State v. Cole*, 128 Wn.2d 262, 287, 906 P.2d 925 (1995).

The credibility of an informant cannot be presumed when there is an “apparent motive to falsify.” *State v. Rodriguez*, 53 Wn. App. 571, 575, 576, 769 P.2d 309 (1989) (quoting 1 Wayne R. LaFare, *Search and Seizure* § 3.4, at 718–20 (2d ed.1987)). A claim of firsthand observation cannot overcome a credibility deficiency; “[a] liar could allege firsthand knowledge in great detail as easily as could a truthful speaker.” *Jackson*, 102 Wn.2d at 441.

An appearance of self-interest or “to spite [the] defendant,” undercuts the informant’s reliability. *Rodriguez*,

53 Wn. App. at 575 (quoting 1 LaFare, *Search and Seizure*, at 718–20); see *State v. Duncan*, 81 Wn. App. 70, 78, 912 P.2d 1090, 1095 (1996).

Finally, “[a]ny crime involving dishonesty necessarily has an adverse effect on an informant’s credibility.” *United States v. Elliott*, 322 F.3d 710, 716 (9th Cir. 2003). (quoting *United States v. Reeves*, 210 F.3d 1041, 1045 (9th Cir.2000)). Consequently, if an informant has past convictions for crimes of dishonesty, “additional evidence must be included in the affidavit ‘to bolster the informant’s credibility or the reliability of the tip.’” *Id.* (quoting *Reeves*, 210 F.3d at 1045). Otherwise, “an informant’s criminal past involving dishonesty is fatal to the reliability of the informant’s information, and his/her testimony cannot support probable cause.” *Id.* (quoting *Reeves*, 210 F.3d at 1045).

In *Duncan*, the Court held the warrant affidavit, based on a named informant’s tip, did not satisfy the veracity prong of the *Aguilar-Spinelli* test. *Duncan*, 81 Wn. App. at 78. The fact of a “domestic dispute” the same day “colored her

information with self-interest” *Id.* at 78. Reports made “merely to spite the defendant ... diminishe[d] the presumption of reliability.” *Id.* (quoting *Rodriguez*, 53 Wn. App. at 575). This “militate[d] against a conclusion that [the informant was] a citizen informant.” *Id.* Further, the police had not verified the informant’s “identity, address, phone number, employment, residence or length of residence, or family history.” *Id.* at 77 (citing *State v. Wilke*, 55 Wn. App. 470, 479, 778 P.2d 1054 (1989)).

Here, because the informant had no track record with the police, the police needed to establish facts and circumstances to reasonably support an inference the informant was telling the truth. CP 46; *Lair*, 95 Wn.2d at 709–10. But the warrant affidavit fails to explain the informant’s credibility or reliability.

Although the informant’s name and birthdate is known, this is not enough to presume reliability. *McCord*, 125 Wn. App. at 893; *Duncan*, 81 Wn. App. at 77; *Rodriguez*, 53 Wn. App. at 576.

The affidavit does not provide any additional indicia of reliability. CP 46; *see Lair*, 95 Wn.2d at 719-13. First, the statement was made directly to a police officer, not a private individual. CP 46; *see Lair*, 95 Wn.2d at 710-11. Moreover, it was not statement against penal interest; while the informant claimed to be a former drug dealer, he had already been prosecuted for his most recent criminal acts and claimed he no longer participated in such activities, so he was not facing new charges. CP 46; *see Lair*, 95 Wn.2d at 710-11. Additionally, unlike in *Lair*, here, there was no corroboration by a reliable source of the informant's incriminating statements. *See* CP 46-47; *Lair*, 95 Wn.2d at 711-12.

Other factors undercut any conclusion the informant was reliable. The informant reported that his own wife was in the same motel room as Mr. Dennis, which colors his information with self-interest. CP 1, 46; *Duncan*, 81 Wn. App. at 78; *Rodriguez*, 53 Wn. App. at 575. That his wife was at a motel with another man provides an added reason for the police to suspect self-interest in the informant reporting that

man. CP 46; *see Duncan*, 81 Wn. App. at 78. This diminishes a finding of reliability. *Duncan*, 81 Wn. App. at 78.

The police did not ascertain background facts that might have permitted an inference the informant was credible and without motive to falsify. *See Berlin*, 46 Wn. App. at 591. As in *Duncan*, they did not even verify the informant's "address, phone number, employment, residence or length of residence, or family history." *Duncan*, 81 Wn. App. at 77.

Additionally, though they confirmed the informant told the truth when he stated he had been convicted of selling narcotics, the police disregarded the informant's extensive criminal history, not mentioning his multiple felony and misdemeanor convictions for crimes of dishonesty such as theft, trafficking stolen property, extortion, false statement, as well as additional drug dealing and domestic violence. CP 32, 56-59.

The police did nothing to rebut the informant's criminal history or his apparent motive and likelihood to lie. *See Elliott*, 322 F.3d at 716; *Duncan*, 81 Wn. App. at 78;

Rodriguez, 53 Wn. App. at 575. The informant was not a citizen informant; it was likely he was “involved in the criminal activity or motivated by self-interest.” *Cole*, 128 Wn.2d at 287. The affidavit included no additional evidence to bolster his credibility and reliability. *See* CP 46. Thus, his “criminal past involving dishonesty is fatal to the reliability of [his] information, and his ... testimony cannot support probable cause.” *Elliott*, 322 F.3d at 716.

The veracity prong was not established. *See Jackson*, 102 Wn.2d at 433; *Duncan*, 81 Wn. App. at 78. The informant’s tip cannot be used to support probable cause. *See Elliott*, 322 F.3d at 716.

c. The police corroborated only innocuous facts.

If an informant's tip fails under either prong, the warrant fails unless independent police investigation corroborates the tip to such an extent that it supports the missing elements of the test. *Jackson*, 102 Wn.2d at 438. “Corroborating evidence offered to remedy a deficiency in either prong of the *Aguilar-Spinelli* test ‘should point to

suspicious activities or indications of criminal activity along the lines suggested by the informant.” *State v. Murray*, 110 Wn.2d 706, 712, 757 P.2d 487 (1988) (quoting *State v. Huft*, 106 Wn.2d 206, 210, 720 P.2d 838 (1986)). “Corroboration of the informer’s report is significant only to the extent that it tends to give substance and verity to the report that the suspect is engaged in criminal activity.” *Id.*

Verification of mere innocuous details, commonly known facts, or easily predictable events do not suffice to remedy a deficiency in either the basis of knowledge or veracity prongs. *State v. Young*, 123 Wn.2d 173, 195–96, 867 P.2d 593 (1994); *Jackson*, 102 Wn.2d at 438. Probable cause exists only if the tip, as corroborated, is as trustworthy as a tip which would pass the *Aguilar-Spinelli* test without independent corroboration. *Murray*, 110 Wn.2d at 712.

In *Young*, the affidavit to search for evidence of a marijuana grow operation did not satisfy either one or both prongs of the *Aguilar-Spinelli* test. *Young*, 123 Wn.2d at 195. The police corroborated the address and phone number

supplied by the informant and found high electricity bills and covered basement windows. *Id.* at 195-96. These “innocuous facts [did] not necessarily indicate criminal activity.” *Id.* at 196 (citing *Huft*, 106 Wn.2d at 211).

In *Duncan*, the police corroborated the informant’s claim the defendant had visited a storage unit on a specific date. *Duncan*, 81 Wn. App. at 78. The confirmation of this innocuous information was insufficient to corroborate the informant’s tip. *Id.*

Stale information cannot serve as corroboration to support a finding of probable cause. *See State v. Lyons*, 174 Wn.2d 354, 360-61, 275 P.3d 314 (2012). Information used must be recent enough to make it probable a search will reveal criminal evidence. *Id.* at 361. This Court must consider “the time between the known criminal activity [and the search] and the nature and scope of the suspected activity.” *Id.*

In *State v. Higby*, 26 Wn. App. 457, 460-61, 613 P.2d 1192 (1980), this Court held a two-week delay between a

marijuana sale and the execution of a search was too long for the information not to go stale.

Here, the affidavit shows the police corroborated the innocuous fact of the address where surveillance officers saw Mr. Dennis enter and leave two rooms of the motel “multiple times.” CP 46. The affidavit references a previous investigation over four months before and does not clarify whether this surveillance was part of that investigation or the result of the tip. CP 46. Either way, this merely innocuous information cannot provide the necessary corroboration to correct the missing veracity prong under *Aguilar-Spinelli*. See *Young*, 123 Wn.2d at 195; *Jackson*, 102 Wn.2d at 433; *Duncan*, 81 Wn. App. at 78. The police must corroborate *criminal* activity. *Murray*, 110 Wn.2d at 712.

The affidavit described a previous investigation of Mr. Dennis, where controlled substances were recovered from the same address and Mr. Dennis was arrested. CP 46. That arrest occurred four months and two days before issuance of the warrant in this case. CP 46, 50. Confirmation of the

presence of a drug over four months earlier is insufficient to corroborate the unreliable tip under *Aguilar-Spinelli*; in *Higby*, two weeks was too long. *Higby*, 26 Wn. App. at 460-61.

The trial court agreed with Mr. Dennis that the prior investigation did not support a finding of probable cause. RP 36. A suspect's prior convictions, if included in the affidavit, are insufficient on their own to find probable cause, but may be considered as one of many in that analysis. *State v. Sterling*, 43 Wn. App. 846, 851, 719 P.2d 1357 (1986).

However, no cases appear to permit a magistrate to consider the inclusion of prior arrests as a factor in finding probable cause to support a warrant. *See State v. Tarter*, 111 Wn. App. 336, 341, 44 P.3d 899 (2002); *Duncan*, 81 Wn. App. at 78-79.

The police did not corroborate any criminal activity recent enough to shore up the unreliable informant's insufficient tip. *See Jackson*, 102 Wn.2d at 438; *Murray*, 110 Wn.2d at 712. The affidavit did not provide any corroboration to correct the lack of evidence of the informant's veracity.

d. Because probable cause did not exist to support the warrant, reversal and suppression is required.

Given the informant's lack of a track record and the lack of background or accompanying information to rebut the implications of his self-interest and criminal dishonesty, his tip fails the veracity prong of the *Aguilar-Spinelli* test. The police's corroboration of only innocuous and stale information do not support a finding of probable cause that controlled substances were presently in Mr. Dennis's possession. This Court should reverse Mr. Dennis's conviction and order the evidence found pursuant to the warrant to be suppressed.

2. The trial court erred when it denied Mr. Dennis's request for a Franks hearing.

Absent certain exceptions, police must obtain a warrant based upon probable cause from a neutral and disinterested magistrate before embarking on a search. *Franks v. Delaware*, 438 U.S. 154, 164, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); U. S. Const. amend. IV; Const. art. I, § 7.

Factual omissions in a warrant affidavit invalidate the warrant if the defendant establishes that they were material

and 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).

“By reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw. To allow a magistrate to be misled in such a manner could denude the probable cause requirement of all real meaning.” *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985).

If the defendant makes a substantial preliminary showing of an intentional or reckless omission of facts material to the question of probable cause, the court must hold a *Franks* hearing. *State v. Ollivier*, 178 Wn.2d 813, 847, 312 P.3d 1 (2013). This substantial preliminary showing requires a lesser burden of proof than the preponderance of the evidence required in the *Franks* hearing. *State v. Thetford*, 109 Wn.2d 392, 402-03, 745 P.2d 496 (1987).

Here, the officer looked up the informant’s criminal history. CP 46. But he did not tell the court about the informant’s many convictions. CP 46, 55-59. The officer did

not mention the informant's extortion and theft convictions.

Id. The officer did not even bother to tell the court the informant was previously convicted of lying to a public employee, possibly a police officer. *Id.* Instead, the officer only revealed one of multiple prior drug delivery convictions. *Id.*

The trial court properly found this failure to disclose was "reckless conduct on the part of the police." RP 36-37. However, the court concluded that if this omitted criminal history was included in the probable cause determination, given the age of the offenses, they would not materially change the probable cause determination. RP 37. The pointed to the fact the convictions were from several years earlier. *Id.* However, this ignores the fact that "[a]ny crime involving dishonesty necessarily has an adverse effect on an informant's credibility." *Elliott*, 322 F.3d at 716. A past history of dishonesty requires an additional showing to bolster credibility and consequently this history is material to the determination of probable cause under *Franks*. *See id.*; *Berlin*, 46 Wn. App. at 591; *Rodriguez*, 53 Wn. App. at 575-76.

The omissions in the affidavit were substantial and constituted sufficient evidence to warrant a *Franks* hearing. *Ollivier*, 178 Wn.2d at 847. This Court should hold the trial court erred in refusing to conduct a *Franks* hearing despite agreeing the police recklessly withheld information that should be deemed critical to the warrant. Remand for a *Franks* hearing is required, so that Mr. Dennis may have an opportunity to establish the warrant should be held void. *Franks*, 438 U.S. at 156.

F. CONCLUSION

The warrant affidavit lacked probable cause. The trial court erred when it did not hold a *Franks* hearing. This Court should reverse Mr. Dennis's conviction and order suppression of the illegally seized evidence.

Submitted this 2nd day of April 2020.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 53845-8-II
v.)	
)	
PATRICK DENNIS,)	
)	
Appellant.)	

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