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Division II  
State of Washington  
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NO. 53845-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

PATRICK DENNIS,

Appellant.

---

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

---

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

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

*a. The probable cause determination is reviewed de novo.*

As explained in the opening brief, the search warrant here was not supported by probable cause because the affidavit failed to establish the veracity of the informant. App. Br. at 5-19. The State incorrectly claims this question is reviewed for abuse of this discretion. Resp. Br. at 3. While this standard of review applies to the trial court's assessment of which facts to credit, whether the warrant should be granted – that is, whether probable cause exists – is reviewed de novo. *In re Detention of Petersen*, 145 Wn.2d 789, 799-801, 42 P.3d 952, 959 (2002) (citing *Ornelas v. United States*, 517 U.S. 690, 695-99, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)).

*b. The veracity prong is not satisfied merely because an informant is named and provides contact information.*

To prevent violations of constitutional privacy protections, an informant's statements used to support a

search warrant must establish (1) that the informant has a factual basis for his or her allegations, and (2) that the information is reliable and credible. *State v. Jackson*, 102 Wn.2d 432, 436-38, 688 P.2d 136 (1984); U.S. Const. amend. IV; Const. art. I, § 7; see *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

When the basis of knowledge prong of the *Aguilar-Spinelli* test is met, but the veracity prong is not met, probable cause only exists where independent corroboration of criminal activity was made. *State v. Murray*, 110 Wn.2d 706, 711-12, 757 P.2d 487 (1988) (citing *State v. Huft*, 106 Wn.2d 206, 209-10, 720 P.2d 838 (1986); *Jackson*, 102 Wn.2d at 436-38); accord *State v. Mejia*, 111 Wn.2d 892, 896-97, 766 P.2d 454 (1989) (citing *State v. Gunwall*, 106 Wn.2d 54, 70-73, 720 P.2d 808 (1986); *Jackson*, 102 Wn.2d at 437). An informant's firsthand observation cannot overcome a credibility deficiency; "[a] liar could allege first-hand knowledge in great

detail as easily as could a truthful speaker.” *Jackson*, 102 Wn.2d at 441.

The prosecutor suggests the veracity requirement can be waived merely because the informant disclosed his identity and his contact information and a basis of knowledge was provided. Resp. Br. at 5-6 (citing *State v. Ibarra*, 61 Wn. App. 695, 699, 812 P.2d 114 (1991); *State v. Tarter*, 111 Wn. App. 336, 44 P.3d 899 (2002)); *see also State v. Ollivier*, 178 Wn.2d 813, 850-51, 312 P.3d 1 (2013).

However, Supreme Court precedent does not support this proposition. In *Chenoweth*, the informant was not only named “but also agreed to come to the police station for an interview” and “made statements against his penal interest.” *State v. Chenoweth*, 160 Wn.2d 454, 483, 158 P.3d 595, 610 (2007). Similarly, in *Lair*, the named informant made his statements to a private citizen, the statements were against his own penal interest, and his statements were corroborated by another informant whose reliability was established. *State v. Lair*, 95 Wn.2d 706, 709-13, 630 P.2d 427 (1981). And in

*Chamberlin*, the statement was an admission against the informant's own penal interest and was made both under the formality of a recorded interview as well as under the penalty of perjury in court. *State v. Chamberlin*, 161 Wn.2d 30, 42, 162 P.3d 389 (2007).

*Ollivier* suggests the naming of a "citizen informant" creates a rebuttable presumption of reliability. *Ollivier*, 178 Wn.2d at 850. If this were the test, the informant's reliability would be rebutted by the informant's numerous felony convictions showing criminal dishonesty and his apparent motive to spite Mr. Dennis, which makes the informant not a "citizen informant." *See State v. Cole*, 128 Wn.2d 262, 287, 906 P.2d 925 (1995); *State v. Rodriguez*, 53 Wn. App. 571, 575, 769 P.2d 309 (1989); App. Br. at 9-14.<sup>1</sup> But this is not the test. This concept has its origins in the "totality of the circumstances" test created by *Illinois v. Gates*, 462 U.S. 213,

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<sup>1</sup> A "citizen-informant" is "[a] witness who, without expecting payment and *with the public good in mind*, comes forward and volunteers information to the police or other authorities." Informant, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). It is not one who is "motivated by self-interest." *Cole*, 128 Wn.2d at 287.

238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). *See* Ariel C. Werner, *What's in A Name? Challenging the Citizen-Informant Doctrine*, 89 N.Y.U.L. Rev. 2336, 2353 (2014). This Court does not assess whether probable cause supported a warrant using the totality of the circumstances test. *Jackson*, 102 Wn.2d at 436-43.

Accordingly, this Court's opinions typically also require more than the informant's mere identity and a basis of knowledge to find the veracity requirement has been met. *E.g.*, *State v. McCord*, 125 Wn. App. 888, 893, 106 P.3d 832 (2005); *Rodriguez*, 53 Wn. App. at 575-76. An informant's identity is merely one consideration in determining whether the person is truly a citizen informant. *Rodriguez*, 53 Wn. App. at 576.

Here, unlike *Chenoweth*, *Lair*, and *Chamberlin*, the informant did not make statements against his penal interest, under the penalty of perjury, to a private citizen, in a formal interview setting, or in another way that bolstered his apparent reliability. The veracity prong may not be waived

merely because he was open about his identity and claimed a basis of knowledge. *See Jackson*, 102 Wn.2d at 441.

*c. As the informant has been convicted of numerous crimes of dishonesty and had a motive to spite Mr. Dennis, the police were obligated to corroborate his claims with non-innocuous facts.*

If an informant being named is a positive consideration in assessing the veracity prong, having convictions of crimes of dishonesty is a negative consideration rebutting any presumption of reliability credited to citizen informants. *See United States v. Elliott*, 322 F.3d 710, 716 (9th Cir. 2003). All crimes of dishonesty “necessarily ha[ve] an adverse effect on an informant’s credibility” and thus necessitate the provision of “additional evidence ... ‘to bolster the informant’s credibility or the reliability of the tip.’” *Id.* (quoting *United States v. Reeves*, 210 F.3d 1041, 1045 (9th Cir. 2000)).

The prosecution claims “[a]ny adverse effect of prior convictions also must be balanced against the details provided regarding the informant’s basis of knowledge.” Resp. Br. at 9 (citing *State v. Northness*, 20 Wn. App. 551, 557-58, 582 P.2d 546 (1978)). But *Northness* does not address this issue; the

informant in that case was not alleged to have a criminal record of any kind and in fact asserted her desire to remain law-abiding as a reason for her report. *Northness*, 20 Wn. App. at 553, 557-58. Further, the State's view of how the *Aguilar-Spinelli* test operates is flawed. Its view effectively conflates the basis of knowledge and veracity prongs and is unequivocally incorrect. *See, e.g., Jackson*, 102 Wn.2d at 437.

The two prongs must be independently satisfied. *Id.* Inadequacies in one cannot be shored up by pointing to the claims supporting the other; the way to shore up inadequate evidence of veracity is through corroboration of non-innocuous facts. *Id.* at 438. The State seems to be attempting to turn the analysis into a totality of the circumstances test, which this Court does not employ when assessing whether probable cause supported a warrant, given the strong privacy protections of our constitution. *Jackson*, 102 Wn.2d at 439; Const. art. 1, § 7.

Without corroboration, “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." *Elliott*, 322 F.3d at 716 (quoting *Reeves*, 210 F.3d at 1045).

Here, the informant had numerous convictions within ten years of his report to the police. CP 32, 46, 56-57. These include four felony convictions for crimes of dishonesty, three convictions for felony drug possession or delivery, and one misdemeanor conviction for lying to a public servant (with an incident date ten years and 25 days before his report). *Id.* He also had a conviction for felony malicious mischief and "numerous misdemeanor convictions for domestic violence." *Id.* This criminal history, with five convictions for being criminally dishonest, "is fatal to the reliability of the informant's information." *Elliott*, 322 F.3d at 716. Without corroboration of criminal activity, the informant's information is unreliable and the affidavit does not support probable cause. *See id.*; *Jackson*, 102 Wn.2d at 437-38.

Further, an informant's apparent motive to "to spite [the] defendant," further undercuts the informant's reliability.

*Rodriguez*, 53 Wn. App., at 576 (quoting 1 Wayne R. LaFave, *Search and Seizure* § 3.4, at 718–20 (2d ed. 1987)); see *State v. Duncan*, 81 Wn. App. 70, 78, 912 P.2d 1090 (1996). An affidavit for a warrant must provide background facts to 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 (1987).

Here, the informant was reporting an alleged crime by a man who happened to be alone in a hotel room with the informant’s purported wife. CP 1, 46. This supports an inference that the informant may have had a motive “to spite [Mr. Dennis].” *Rodriguez*, 53 Wn. App. at 575. This does not establish that the informant is credible, with no motive to lie. See *Berlin*, 46 Wn. App. at 591.

*d. As the warrant was not supported by probable cause, reversal and suppression is required.*

Given his criminal history of dishonesty and his motive to try to harm Mr. Dennis, the informant is not shown to be reliable and the evidence cannot satisfy the requirements of the *Aguilar-Spinelli* veracity prong. The police did nothing to

investigate the informant's claims to corroborate more than innocuous or stale details, which the State does not contest. *See* CP 34; CP 46-47.

The warrant was not supported by probable cause. *See Jackson*, 102 Wn.2d at 437. 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 in denying Mr. Dennis a *Franks* hearing because the omission of the informant's numerous convictions was material, given the paucity of information supporting the informant's veracity.**

If this Court does not order the evidence suppressed, it should remand for a *Franks* hearing. App. Br. at 19-22.

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 v. Delaware*, 438 U.S. 154, 154-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *Chenoweth*, 160 Wn.2d at 478-77; U. S. Const. amend. IV; Const. art. I, § 7.

The police's affidavit in support of a warrant omitted information of numerous felony convictions, including four

felonies for crimes of dishonesty. CP 32, 46, 56-57. The police also omitted one misdemeanor for lying to a public servant, which would typically be a police officer, such as the officer who wrote the affidavit. CP 46, 59. As the State concedes, the trial court found this omission to be made in reckless disregard for the truth. RP 36-37; Resp. Br. at 11.

The State incorrectly argues these reckless omissions were not material. It misleadingly analogizes this to a case where this Court found omissions of criminal history were not material or misleading. *See* Resp. Br. at 11-12 (citing *State v. Lane*, 56 Wn. App. 286, 294, 786 P.2d 277 (1989)). That case is vastly different from this one, because in *Lane*, there were strong indicia of reliability not present here. *See Lane*, 56 Wn. App. at 289, 293-95. First, in *Lane*, the informant was known to the police and was working with them to make controlled drug buys. *Id.* at 289. The informant was strip-searched before the buy, provided money, and observed entering the building, while the police waited outside. *Id.* When the informant returned, he no longer had the money, but he now

possessed narcotics. *Id.* Further, the police corroborated suspicious activity occurring in one of the apartments in question. *Id.*

The *Lane* Court found the information in the affidavit to be highly reliable, as the police watched the informant obtain drugs from a specific place at a specific time. *Id.* at 293-94. The police’s independent corroboration of apparent drug activity – which was “more than ‘innocuous details,’” corroborated the informant’s information and “support[ed] his veracity.” *Id.* at 294. Additionally, people doing controlled buys for the police often – or likely always – have criminal histories. *Id.* at 295. Courts would reasonably presume such history and thus “the magistrate was not misled.” *Id.* Consequently, the omission was not material. *Id.*

Mr. Dennis’s case is nothing like *Lane*. *See id.* at 289, 293-95. The informant was not obtaining physical evidence while under observation, having undergone strip searches before and after. *Cf. id.* The police did not corroborate the informant’s claim with recent observations of criminal or

suspicious activity. *Cf. id.* The police did disclose one felony conviction to the trial court, suggesting that the one conviction was all there was to find. CP 46; *cf. id.*

There is no reason a court reviewing the affidavit would assume the informant had numerous felony convictions for crimes of dishonesty within the past ten years. *See* CP 32, 46-47, 55-59; *cf. Lane*, 56 Wn. App. at 295. The magistrate would have been misled, and this was material; “[b]y reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw.” *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985).

The trial court ruled that while recklessly made, the omission was not material, because it would find probable cause even when knowing the informant’s criminal history for crimes of dishonesty. CP 71; RP 36-37.

However, this was in error, as “[a]ny crime involving dishonesty necessarily has an adverse effect on an informant’s credibility” and thus requires an additional showing to bolster credibility. *Elliott*, 322 F.3d at 716. No such additional

showing – such as a track record of accurate information, independent corroboration, or a controlled buy – was made. *See* CP 44-49. In fact, the informant’s credibility was further weakened by his apparent motive “to spite [Mr. Dennis]” for staying in a hotel room with the informant’s wife. *Rodriguez*, 53 Wn. App. at 575; *see Duncan*, 81 Wn. App. at 78; CP 36.

The informant’s extensive history of criminal dishonesty and other crimes is material to the determination of probable cause under *Franks*, given the lack of other information to support the informant’s veracity. *See Elliott*, 322 F.3d at 716; *Berlin*, 46 Wn. App. at 591; *Rodriguez*, 53 Wn. App. at 575-76.

Remand for a *Franks* hearing is required, so that Mr. Dennis may have an opportunity to establish the warrant should be held void. *See Franks*, 438 U.S. at 156.

## B. CONCLUSION

The warrant affidavit lacked probable cause. This Court should reverse Mr. Dennis’s conviction and order

suppression of the illegally seized evidence. In the alternative,  
this Court should reverse and remand for a *Franks* hearing.

Submitted this 20th day of July 2020.

A handwritten signature in black ink, appearing to read 'M. Falk', written in a cursive style.

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

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

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