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Court of Appeals
Division II
State of Washington
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NO. 54069-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

NICOLAS CLARK,
Appellant.

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

The Honorable John Fairgrieve, Judge

REPLY BRIEF OF APPELLANT

LISE ELLNER, WSBA No. 20955
SPENCER BABBITT, WSBA No. 51076
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090

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A. INTRODUCTION

Appellant Nicholas Clark accepts this opportunity to reply to the state's opening brief. Mr. Clark requests that this court refer to his opening brief for a recitation of the relevant facts and other issues not addressed in this brief.

B. ARGUMENT IN REPLY

Mr. Clark challenges the state's assertion that it may add facts to the first affidavit in support of a second warrant that were not presented to the trial court in support. The state in its brief improperly culled information from the first and second affidavits in support of two separate warrants in an attempt to establish probable cause for the first warrant when none existed.

"In reviewing a probable cause determination in support of a warrant, the information [the court] may consider is the information that was available to the issuing magistrate." *State v. Olson*, 73 Wn. App. 348, 354, 869 P.2d 110 (1994). That information, including the warrant affidavit and any attachments, must set out objective facts and circumstances that "would lead a neutral and detached person to conclude that more probably than not, evidence of a crime will be found" in the place to be

searched. See *In re Det. of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002).

Under the Fourth Amendment, 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. *State v. Chenoweth*, 160 Wn.2d 454, 462, 158 P.3d 595 (2007); *Franks v. Delaware*, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *State v. Cord*, 103 Wn.2d 361, 366–67, 693 P.2d 81 (1985).

Here, the initial warrant sought subscriber information and relied on an affidavit that did not provide probable cause. This issue is presented in the appellants opening brief. The state in its response brief combined facts from the first and second affidavits in support of two warrants in an attempt to establish probable cause for the first warrant. This is impermissible under *SCord*, 103 Wn.2d at 367 and *Franks*, 438 U.S. at 155-56.

The facts the state added to its second affidavit are not reviewable for the purposes of determining the validity of the initial search warrant. *Olson*, 73 Wn. App. at 354 (appellate review of warrant is limited to information provided to the issuing judge). The

initial warrant allowed the state to identify Mr. Clark as a suspect through his internet provider (IP) address. RP 147. Thus, if that affidavit was deficient, the state's subsequent seizure of Mr. Clark's electronic devices constitutes fruit of the poisonous tree. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005) (any evidence derived from an illegal search is fruit of the poisonous tree). The state's brief is misleading because it is not limited to the information in the first affidavit that was presented to the original magistrate who issued the first warrant.

The original affidavit also did not include an assertion that the girl showed signs of physical trauma near her vagina or go into detail on how the detective surmised her age. CP 198-99. All of these details were added to the state's second affidavit after Mr. Clark filed a motion to suppress and dismiss in the trial court. CP 112.

Mr. Clark's appeal involves two separate warrants secured by two affidavits that include different facts. This court must review the first warrant using only the facts presented to the issuing magistrate to determine the adequacy of that warrant without reference to information obtained and used for the second warrant.

Olson, 73 Wn. App. at 354. Those facts are not contained within the state's brief. Mr. Clark requests that this court review the language from the original affidavit contained in his opening brief to evaluate the validity of the initial search warrant.

C. CONCLUSION

The state's opening brief omits crucial differences between the first and second search warrant affidavits. Mr. Clark respectfully requests that this court review each warrant independent of the other using only the information presented to the issuing judge or magistrate.

DATED this 13th day of August 2020.

Respectfully submitted,

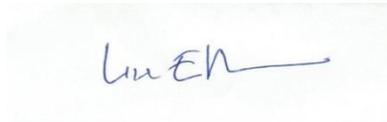


LISE ELLNER, WSBA No. 20955
Attorney for Appellant



SPENCER BABBITT, WSBA No. 51076
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Clark County Prosecutor's Office CntyPA.GeneralDelivery@clark.wa.gov and Nicolas Clark/DOC#418966, Coyote Ridge Corrections Center, PO Box 769 Connell, WA 99326 a true copy of the document to which this certificate is affixed on August 13, 2020. Service was made by electronically to the prosecutor and Nicholas Clark by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

Signature

LAW OFFICES OF LISE ELLNER

August 13, 2020 - 11:13 AM

Transmittal Information

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