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NO. 54426-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JOHN E. CANALES,

Appellant.

BRIEF OF APPELLANT,
JOHN E. CANALES

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY
THE HONORABLE MICHAEL H. EVANS, JUDGE

STEPHANIE TAPLIN
Attorney for Appellant
Newbry Law Office
623 Dwight St.
Port Orchard, WA 98366
(360) 876-5567

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I. INTRODUCTION

On October 15, 2019, Longview Police executed a search warrant on John Canales's person and a garage associated with him. Mr. Canales also gave permission to search two RVs on the property. On his person, police found 0.5 grams of methamphetamine and \$810 in cash. In the RVs, police found 16.1 grams of heroin in a duffle bag, a small amount of suspected heroin in a plastic container, pipes for smoking methamphetamine, marijuana, and unused small plastic baggies. Police did not find any scales, pay/owe sheets, ledgers, or bagged drugs. The search warrant was based on information from a confidential informant, a drug user with pending criminal matters. Mr. Canales's attorney did not challenge the validity of this warrant.

The state charged Mr. Canales with possession of methamphetamine and possession with intent to deliver heroin. A jury convicted him of both charges. At sentencing, Mr. Canales argued that the state should have charged him with a different offense, attempted sale of heroin, which carried a mandatory sentence of two years. The sentencing court rejected this argument and sentenced Mr. Canales to 108 months incarceration.

This case was replete with errors. The state presented insufficient evidence to support possession with intent to deliver heroin. Specifically, the state failed to establish corpus delicti for this crime and failed to present

evidence of dealing beyond the quantity of heroin found. Mr. Canales's attorney was also ineffective by failing to challenge the validity of the search warrant. Finally, the state exceeded its discretion by charging Mr. Canales under the general statute, possession with intent, instead of the specific statute, attempted sale of heroin. This Court should reverse.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The state failed to prove corpus delicti of possession with intent to deliver heroin.

Assignment of Error 2: The state failed to prove intent to deliver heroin.

Assignment of Error 3: Mr. Canales was denied effective assistance of counsel because his attorney failed to challenge the validity of the search warrant.

Assignment of Error 4: The state exceeded its discretion by charging Mr. Canales with possession with intent to deliver instead of attempted sale of heroin.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Did the state present sufficient evidence to corroborate Mr. Canales's incriminating statements under the corpus delicti rule when the evidence presented was more consistent with innocence than guilt?

Issue 2: Was there sufficient evidence to support Mr. Canales's conviction for possession with intent to deliver when the only additional evidence of

this offense was cash in his wallet and plastic baggies found in a different RV?

Issue 3: Was Mr. Canales denied effective assistance of counsel when his attorney failed to challenge the validity of a search warrant based on the statements of a criminal informant?

Issue 4: Did the state exceed its discretion by charging Mr. Canales with possession with intent to deliver, under a general statute, instead of attempted sale of heroin, under a special statute, when these offenses are concurrent?

IV. STATEMENT OF THE CASE

On October 11, 2019, the Longview Police Department sought and obtained a search warrant regarding John Edward Canales. CP 11-17. The warrant authorized search of a garage associated with Mr. Canales, as well as his person. *Id.* Police were looking for evidence of drug dealing. *Id.*

The search warrant was based in large part on statements from a confidential informant. CP 7-8. This informant used methamphetamine and heroin in the past. CP 7. They were “working with the Longview Police Street Crimes Unit in exchange for leniency in a pending criminal matter.” *Id.* The affidavit for the search warrant described the informant’s previous controlled buys and knowledge of drug dealing in Cowlitz County. *Id.*

According to the confidential informant, in early October 2019, they were a guest at a garage associated with Mr. Canales. CP 7-8. The informant reported that they observed Mr. Canales with more than an ounce of suspected methamphetamine. CP 8. They said that they saw Mr. Canales weigh and sell some of this suspected methamphetamine. *Id.*

Police executed the search warrant of the garage on October 15, 2019. RP at 243. Two RVs were also parked on the property, but they were not within the scope of the search warrant. RP at 221. Prior to executing the warrant, police surveilled the property for several hours. RP at 243-44. Det. Sarah Brent observed many people coming and going. RP at 243. She also saw Mr. Canales moving between the garage and the RVs carrying a black backpack and a red and black duffel bag. RP at 245.

After serving the search warrant, police realized that Mr. Canales was no longer at the property. RP at 218. Police pulled him over north of the address and searched him pursuant to the warrant. RP at 218-19. They found a small quantity of suspected methamphetamine in his pants pocket. RP at 219. Subsequent testing confirmed that this was 0.5 grams of methamphetamine. RP at 272, 278. Police also confiscated his wallet, which contained \$810 in cash. RP at 250. Mr. Canales said that he was saving up this money. RP at 252.

After detaining Mr. Canales, police transported him back to the property being searched. RP at 219. Officers spoke with Mr. Canales about the RVs on the property. RP at 220. According to police, Mr. Canales confirmed that they were under his control and that he was living in one of the RVs. *Id.* Mr. Canales gave consent to search the RVs. RP at 221.

In the first RV, police found suspected heroin in a red and black duffel bag, pipes used to smoke methamphetamine, and marijuana. RP at 221-22. Subsequent testing confirmed that the substance in the duffel bag was heroin weighing 16.1 grams. RP at 277, 278. Police testified that this quantity was consistent with dealing rather than personal use. RP at 226. In the second RV, police found a small quantity of suspected heroin in a rubber container and small plastic baggies. RP at 222. According to police, these baggies were consistent with how drugs are packaged for sale. RP at 222-23. Police did not find any bagged drugs in the RVs, did not find scales, and did not find any ledgers or pay/owe sheets. RP at 224-25.

Det. Luis Hernandez was present when police found the duffel bag and brought it outside in front of Mr. Canales. RP at 252. According to Det. Hernandez, Mr. Canales seemed surprised that the heroin was in the duffel bag. *Id.* Mr. Canales also spoke with Det. Brent while at the scene. RP at 245. He asked why he was under arrest, and she told him that it was for possession with intent, because over an ounce of heroin indicates

dealing. RP at 246. Mr. Canales allegedly said that it was a half-ounce, not an ounce. *Id.* It is unclear from the record whether this conversation occurred before or after Mr. Canales saw the heroin from the duffel bag with Det. Hernandez. *Id.*

The state charged Mr. Canales with two counts: (1) possession with intent to deliver heroin, and (2) possession of methamphetamine. CP 3-4. Initially, the case proceeded to trial on January 16, 2020. RP at 7. However, juror responses during voir dire resulted in a mistrial. RP at 63-73. The case went to trial for a second time on January 28, 2020. RP at 81.

Before trial, Mr. Canales's attorney did not challenge the validity of the search warrant. His attorney did attempt to exclude information about the circumstances leading to the search warrant from the jury, arguing that it was more prejudicial than probative. RP at 8-14, 82-93, 193-98.¹ The state opposed this motion, arguing that excluding all information about the search warrant chopped up the narrative of what occurred and made the actions of law enforcement seem arbitrary. RP at 86-88. The trial court disagreed that the facts about the search warrant were prejudicial because police did not find contraband in the initial search of the garage. RP at 92-93. However, the court agreed to exclude questions about the crime being

¹ Initially, the parties considered a stipulation about the circumstances surrounding the search warrant, but they could not reach an agreement. RP at 8-14.

investigated and limit the scope to the fact that Mr. Canales was named as a subject of the search warrant. RP at 197-99.

At trial, the state presented testimony from Detectives Matthew Hartley, Sarah Brent, and Luis Hernandez; Officer Brian Durbin; and Olivia Ross, a forensic scientist with the Washington State Patrol Crime Lab. RP at 215, 231, 247, 254, 268. During closing arguments, the prosecutor argued that the amount of money found in Mr. Canales's wallet when he was arrested was consistent with selling about 11 grams of heroin. RP at 310-11. Mr. Canales's attorney argued that he was guilty of possession, but the state did not prove intent to deliver. RP at 313.

The jury convicted Mr. Canales of both possession with intent to deliver heroin and possession of methamphetamine. CP 81, 83; RP at 326-27. Sentencing occurred on February 24, 2010. RP at 339. Mr. Canales requested an exceptional downward sentence of two years. CP 84-86. He argued that the state improperly charged him with possession with intent to deliver under RCW 69.50.401 when it should have charged him with a more specific offense, attempted sale of heroin per RCW 69.50.410. RP at 339-42. Sale of heroin carries a mandatory sentence of two years' incarceration. CP 85. The trial court disagreed and denied his request. RP at 350-53. The court sentenced Mr. Canales to 108 months incarceration and 12 months community custody. RP at 353. Mr. Canales appeals. CP 108-121.

V. ARGUMENT

Numerous errors denied Mr. Canales a fair trial in this case. The state presented insufficient evidence to establish corpus delicti for possession with intent to deliver. The state did not present sufficient evidence to prove this offense beyond a reasonable doubt. Mr. Canales's attorney was ineffective by failing to challenge the validity of the search warrant. Finally, the state exceeded its discretion by changing Mr. Canales under a general statute when a more specific statute applied. This Court should reverse and remand.

A. **The State Failed to Establish Corpus Delicti for Possession with Intent to Deliver.**

At trial, the state relied on Mr. Canales's statements to law enforcement to argue for his guilt. RP at 246. However, the evidence at trial was insufficient to establish corpus delicti of possession with intent to deliver heroin. Other than Mr. Canales's statements, the only evidence of intent to deliver was the quantity of heroin found, the presence of unused plastic baggies in a different trailer, and the cash found on Mr. Canales's person. This evidence could not establish corpus delicti because the state cannot rely solely on the quantity of drugs found, and the baggies and cash were more consistent with innocence than with dealing drugs.

1. Under the corpus delicti rule, a confession alone cannot support a criminal conviction.

“Corpus delicti means the ‘body of the crime.’” *State v. Brockob*, 159 Wn.2d 311, 327, 150 P.3d 59 (2006) (internal quotations omitted). To prove corpus delicti, the state must prove that a crime occurred. *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). A defendant’s incriminating statement alone cannot establish corpus delicti; the state must present independent corroborating evidence. *State v. Cardenas-Flores*, 189 Wn.2d 243, 258, 401 P.3d 19 (2017).

Under the corpus delicti rule, “an uncorroborated confession is insufficient evidence to sustain a conviction as a matter of law.” *Id.* at 257 (quoting *State v. Gorgan*, 158 Wn. App. 272, 275, 246 P.3d 196 (2010)). This rule exists to prevent unjust convictions based solely on false confessions. *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). Corpus delicti may be raised for the first time on appeal. *Cardenas-Flores*, 189 Wn.2d at 247.

Appellate courts review de novo whether sufficient corroborating evidence exists to satisfy corpus delicti. *State v. Green*, 182 Wn. App. 133, 143, 328 P.3d 988 (2014). In making this determination, courts view the evidence in the light most favorable to the state. *Aten*, 130 Wn.2d at 658. The corroborating evidence by itself need not be sufficient to support a

conviction; it must only support a logical and reasonable inference that the charged crime has occurred. *Id.* at 656. Many jurisdictions have adopted the more relaxed corpus delicti rule used by federal courts—but Washington has specifically declined to do so. *Brockob*, 159 Wn.2d at 328 (citing *Aten*, 130 Wn.2d at 662-63).

In Washington, the corpus delicti rule is more stringent in three respects. First, to establish corpus delicti, “the evidence must independently corroborate, or confirm, a defendant’s incriminating statement.” *Id.* at 328-29 (emphasis in original). It is insufficient to merely show that the incriminating statement was trustworthy. *Id.* at 328. Second, this independent evidence must corroborate “not just a crime but the specific crime with which the defendant has been charged.” *Id.* at 329 (emphasis in original). Third, in Washington the independent evidence ““must be consistent with guilt and inconsistent with a[] hypothesis of innocence.”” *Aten*, 130 Wn.2d at 660 (quoting *State v. Lung*, 70 Wn.2d 365, 372, 423 P.2d 72 (1967)). Evidence fails to establish corpus delicti if it supports “reasonable and logical inferences of both criminal agency and noncriminal cause.” *Id.* In other words, “if the evidence supports both a hypothesis of guilt and a hypothesis of innocence, it is insufficient to corroborate the defendant’s statement.” *Brockob*, 159 Wn.2d at 330 (citing *Aten*, 130 Wn.2d at 660-61).

2. The state failed to establish corpus delicti because the evidence in this case was consistent with Mr. Canales's innocence.

Here, the state charged Mr. Canales with possession with intent to deliver heroin. CP 3-4. However, it failed to prove corpus delicti for this offense. To establish corpus delicti, the state must present evidence of “at least one additional factor, suggestive of intent.” *State v. Whalen*, 131 Wn. App. 58, 63, 126 P.3d 55 (2005). Evidence that is consistent with “both a hypothesis of guilt and a hypothesis of innocence” is insufficient to establish corpus delicti. *Brockob*, 159 Wn.2d at 330. To be suggestive of intent, the evidence must corroborate “not just *a crime*” but “*the specific crime*” charged—here, possession with intent to deliver a controlled substance. *See id.* at 329.

In other words, the evidence must corroborate not just any crime, or even any drug-related crime, but specifically intent to deliver heroin. *See id.* Evidence that is equally consistent with intent to deliver and personal use does not meet this threshold. *See id.* at 330. Possession of a large quantity of drugs alone, even more than the amount for typical personal use, is not sufficient to establish corpus delicti. *State v. Hotchkiss*, 1 Wn. App.2d 275, 281, 404 P.3d 629 (2017).

In this case, the state failed to meet the “one additional factor, suggestive of intent” test. *See Whalen*, 131 Wn. App. at 63. Instead, the

state's evidence was at least as consistent with mere possession as it was with intent to deliver. First, the state relied on the quantity of heroin to argue that Mr. Canales was dealing. RP at 224, 226, 240-41. But as explained above, a large quantity of drugs, without more, cannot establish corpus delicti. *Hotchkiss*, 1 Wn. App.2d at 281.

Second, the state argued that the cash found in Mr. Canales's wallet and the small plastic baggies found in the second RV proved that Mr. Canales was dealing. RP at 222-23, 304, 310. This evidence does not establish corpus delicti because the baggies and the cash were not connected in any way to the heroin found in the duffel bag.

This lack of proximity distinguishes the present case from *State v. Hotchkiss*, 1 Wn. App.2d 275. In that case, police searched Mr. Hotchkiss's residence. *Hotchkiss*, 1 Wn. App.2d at 277. They found a locked safe containing a large quantity of methamphetamine and over \$2,000 in cash. *Id.* Mr. Hotchkiss admitted that the drugs and cash were his, and that he was selling methamphetamine. *Id.* However, at trial he testified that the cash was from collecting rent. *Id.* at 278. Mr. Hotchkiss argued that the state failed to prove corpus delicti of possession with intent to deliver because he provided an innocent explanation for the cash found in the locked safe. *Id.*

The Court of Appeals disagreed. *Id.* at 282. The Court acknowledged that “possession of a controlled substance standing alone cannot constitute sufficient corroborating evidence of an intent to deliver.” *Id.* at 281 (citing *State v. Cobelli*, 56 Wn. App. 921, 925, 788 P.2d 1081 (1989); *Whalen*, 131 Wn. App. at 63). Corpus delicti requires “at least one additional factor, suggestive of intent.” *Id.* at 281 (quoting *Whalen*, 131 Wn. App. at 63). The Court found that the large quantity of cash, found in a locked safe with a large amount of methamphetamine, was sufficient evidence to establish corpus delicti of intent to deliver. *Id.* at 281-82.

Here, unlike in *Hotchkiss*, the cash and the plastic baggies were not near the large quantity of heroin found in the duffel bag. This heroin was found in the first RV. RP at 221. The cash was found in Mr. Canales’s wallet, when he was pulled over away from the scene. RP at 250. Unlike in *Hotchkiss*, Mr. Canales immediately gave an innocent explanation for this cash: he had been saving it up for some time. RP at 252.

That leaves just the plastic baggies. Allegedly, plastic baggies can be used to package drugs for sale. RP at 222-23. However, these baggies were found in the second RV, not in the first RV with the duffel bag of heroin. RP at 221-22. The baggies were not found near a scale or pay/owe sheets because none were found in this search. RP at 224-25. There is no evidence that the plastic baggies contained drug residue. RP at 222, 224.

In short, the state presented no evidence that Mr. Canales used the baggies to package drugs.

Absent some connection between the baggies and selling heroin, small plastic baggies alone cannot establish corpus delicti of intent to deliver. Otherwise, practically every household in Washington has evidence “suggestive of intent” to deal drugs in our kitchen cupboards. Most people carry cash as well, and it is not uncommon to carry a large quantity of cash if a person has saved up for a purchase. Because this evidence “supports both a hypothesis of guilt and a hypothesis of innocence,” it is insufficient to establish corpus delicti of intent to deliver heroin. *Brockob*, 159 Wn.2d at 330 (citing *Aten*, 130 Wn.2d at 660-61). This Court must reverse.

B. Insufficient Evidence Supported Mr. Canales’s Conviction for Possession of Heroin with Intent to Deliver.

The state also presented insufficient evidence to convict Mr. Canales of possession with intent to deliver heroin beyond a reasonable doubt. Similar to the corpus delicti standard, in order to convict beyond a reasonable doubt, the state cannot rely on possession of drugs alone. It must also prove at least one additional factor, suggestive of intent to deliver. The state failed to meet this burden.

1. In order to convict, “at least one additional fact” must support an intent to deliver.

“The State must prove every element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (quoting *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). To determine whether sufficient evidence supports a conviction, courts view the evidence in the light most favorable to the state and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182, 185 (2014).

A claim of insufficient evidence admits the truth of the state’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The elements of possession of a controlled substance with intent to deliver are (1) unlawful possession (2) with intent to deliver (3) a controlled substance. RCW 69.50.401(1). A fact finder may infer an intent to deliver where the evidence shows both possession and facts suggestive of a sale.

State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994). Evidence of an intent to deliver must be sufficiently compelling that “the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *Delmarter*, 94 Wn.2d at 638.

Mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995). At least one additional fact must exist, suggesting an intent to deliver. *See State v. Lane*, 56 Wn. App. 286, 297-98, 786 P.2d 277 (1989) (one ounce of cocaine, large amount of cash, and scales sufficient to establish intent to deliver); *State v. Simpson*, 22 Wn. App. 572, 575-76, 590 P.2d 1276 (1979) (large amount of uncut heroin, balloons filled with heroin, a cut balloon, and an unusual amount of lactose supported inference of intent to deliver).

Washington cases where intent to deliver was inferred all require at least one additional factor, beyond possession. Several cases resulted in reversal when an additional factor was not found. For example, in *State v. Brown*, a conviction for possession with intent to deliver was reversed and remanded where the accused had no weapon, no substantial sum of money, no scales or drug paraphernalia, the cocaine was not separately packaged, and officers had not observed any actions suggesting delivery. 68 Wn. App.

480, 485, 843 P.2d 1098 (1993). In *Cobelli*, officers observing Mr. Cobelli in “an area known for frequent drug transactions” and confiscated several baggies of marijuana adding up to 1.4 grams. 56 Wn. App. at 923. This evidence was insufficient to support the inference of intent to deliver. *Id.* at 924-25. In *State v. Davis*, police discovered six baggies of packaged marijuana, two baggies of seeds, a film canister containing marijuana, a baggie with marijuana residue in it, and a box of sandwich baggies. 79 Wn. App. 591, 595-96, 904 P.2d 306 (1995). The Court of Appeals reversed, holding that this evidence was insufficient to establish that “Mr. Davis had bought or sold marijuana or was in the business of buying or selling.” *Id.* at 595.

In other words, Washington courts have recognized that the quantity of drugs, the presence of large amounts of cash, and the nature of packaging, among other circumstances, can support an inference of possession with intent to deliver. *See Simpson*, 22 Wn. App. at 575-76. As explained below, the state failed to meet its burden of proving one additional factor suggestive of intent in this case.

2. The state failed to prove intent to deliver beyond a reasonable doubt in this case.

Here, no rational trier of fact could find beyond a reasonable doubt that Mr. Canales possessed heroin with intent to deliver. This Court should

reverse because the state failed to prove an additional factor establishing intent to deliver. *Brown*, 68 Wn. App. at 485.

As in *Brown*, *Davis*, and *Cobelli*, the quantity of heroin found in the RV cannot prove intent to deliver. Even if this amount was more than typical for personal use, “[m]ere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver.” *State v. O’Connor*, 155 Wn. App. 282, 290, 229 P.3d 880 (2010).

This other evidence in this case also does not support an intent to deliver. Washington cases where intent to deliver was inferred from the possession of a quantity of drugs all involved at least one additional factor, although most included several additional factors. See *State v. Llamas-Villa*, 67 Wn. App. 448, 451, 836 P.2d 239 (1992) (possession of cocaine, heroin, a handgun, and \$3,200 sufficient to establish intent to deliver); *Simpson*, 22 Wn. App. 575-76 (possession of a large amount of uncut heroin, balloons with heroin, a cut balloon, and an unusual amount of lactose found in the oven sufficient to establish intent to deliver); *Hagler*, 74 Wn. App. at 236 (large amount of cocaine and \$342 sufficient to establish intent to deliver); *Lane*, 56 Wn. App. at 297-98 (one ounce of cocaine, large amount of cash, and scales sufficient to establish intent to deliver).

The state pointed to the cash found on Mr. Canales's person as evidence of intent to deliver. RP at 310. Possession of a large amount of cash can be circumstantial evidence of dealing. *See, e.g., State v. Johnson*, 94 Wn. App. 882, 898, 974 P.2d 855 (1999) (heroin in bags and balloons, gun in home, evidence that defendants were attempting to destroy evidence, and \$8,034 in a safe was sufficient evidence to establish intent to deliver); *State v. Campos*, 100 Wn. App. 218, 223-24, 998 P.2d 893 (2000) (large amount of cocaine, cell phone, page, ledger labelled "snow" in Spanish, and \$1,750 was sufficient evidence to prove intent to deliver). In most cases, such as *Campos*, *Johnson*, *Llamas-Villa*, and *Lane*, many factors in addition to cash were also present, such as packaged drugs, firearms, scales, pay/owe sheets, or ledgers. Those additional factors were not present in this case. RP at 224-25.

In a few cases, courts have found that cash and drugs alone can establish intent to deliver. In *State v. Lopez*, police arrested the defendant after he made a controlled buy from an officer and an informant. 79 Wn. App. at 758-59. Police found a large quantity of cocaine packaged in 14 bindles, as well as over \$800 in cash. *Id.* at 769. Similarly, in *State v. Hagler*, police arrested a juvenile and found a large quantity of cocaine, along with \$342 in cash. 74 Wn. App. at 236.

The present case is distinguishable from both *Lopez* and *Hagler*. In both of those cases, the totality of the circumstances showed that the cash, an otherwise common and innocuous item, was evidence of dealing. In *Lopez*, both the cash and the drugs were found on the defendant's person, and the drugs were packaged for sale in 14 bindles. 79 Wn. App. at 759. In *Hagler*, the cash and drugs were also found in close proximity: in the defendant's pocket and around the driver's seat of the car he was driving when arrested, respectively. 74 Wn. App. at 233. The *Hagler* Court also noted that \$342 in cash was a large sum to be in the hands of a juvenile. *Id.* at 236-37.

Here, unlike in *Lopez* and *Hagler*, there was not evidence that the cash was connected to dealing drugs. The cash was found in Mr. Canales's wallet, away from the RVs and nowhere near the duffel bag with heroin. RP at 250. It is not illegal or unusual for adults to have cash on their persons. An otherwise innocuous item, unconnected to drug sales, cannot be evidence sufficient to establish intent to deliver.

This case is also distinguishable from cases like *Lopez* and *Simpson* because police did not find packaged drugs. In *Simpson*, police found clear evidence that the defendant was packaging drugs for sale. 22 Wn. App. 575-76. Police found balloons filled with heroin, a cut balloon, and a large amount of lactose used for cutting heroin. *Id.* Here, the state established

no connection between the small plastic baggies and the large quantity of heroin. Heroin was not packaged in the baggies, there was no evidence of residue on or near the baggies, police found no scales or ledgers, and the baggies were not even located in the same RV as the duffel bag with heroin. RP at 221-24. This case is similar to *Davis*, where the defendant was arrested with six baggies of marijuana, two baggies of seeds, a film canister containing marijuana, a baggie with marijuana residue in it, and a box of sandwich baggies. 79 Wn. App. 595-6. In that case, the Court found insufficient evidence of intent to deliver. *Id.*

As explained above, without any connection to drugs, common innocuous items like plastic baggies or cash cannot establish intent to deliver. Police did not find any scales, used packaging materials, pay/owe sheets, or ledgers in this case. The state failed to present corroborating evidence of intent to deliver. Instead, the evidence presented showed innocence as strongly as it showed guilt. This Court should reverse because possession of plastic baggies or cash, without a connection to illicit activity, cannot sustain a conviction for intent to deliver heroin.

C. Trial Counsel was Ineffective by Failing to Challenge the Validity of the Search Warrant.

This Court should also reverse because Mr. Canales received ineffective assistance of counsel. This case began when police obtained a

search warrant. The warrant was based on statements from a confidential informant with questionable credentials. Despite this, trial counsel failed to challenge the validity of the warrant.

Every criminal defendant has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A claim of ineffective assistance presents a mixed question of fact and law reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. Both requirements are met here.

- 1. Counsel's performance was deficient when reasonable trial counsel would have challenged the validity of the search warrant.**

Reasonable trial counsel would have challenged the validity of this search warrant. Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705,

940 P.2d 1239 (1997). Generally, courts assume that trial counsel is effective. *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (1999). However, a defendant overcomes this presumption by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *Id.*

Here, Mr. Canales was detained pursuant to the search warrant obtained by police. CP 11-17; RP at 219. A search of his person revealed a small amount of methamphetamine and cash. RP at 219, 250. At the very least, a successful challenge to the warrant would have excluded these items. *See State v. Rothenberger*, 73 Wn.2d 596, 600, 440 P.2d 184 (1968) (exclusionary rule applies to “fruit of the poisonous tree,” meaning evidence obtained as a direct or indirect result of a violation of the warrant requirement).

After detaining him, police brought Mr. Canales back to the property being searched. RP at 219. After *Ferrier* warnings, Mr. Canales consented to search of the two RVs. RP at 220. In the RVs, police found a large quantity of heroin, drug paraphernalia, and alleged packaging materials. RP at 221-23. Although Mr. Canales consented to this search, his consent was a direct result of his illegal detention pursuant to an invalid warrant, and thus these items would also be excluded. *See State v. Mayfield*, 192 Wn.2d 871, 875, 901, 434 P.3d 58 (2019) (defendant’s consent, given during an

unlawful seizure, did not “sever[] the causal connection between official misconduct and the discovery of evidence,” even after *Ferrier* warnings).

In other words, successfully challenging the search warrant would have resulted in suppression of basically all of the evidence against Mr. Canales in this case. As explained below, the trial court likely would have granted this suppression motion. Under these circumstances, counsel had no tactical reason to fail to challenge the validity of this search warrant and thus performed deficiently. *See State v. Reichenbach*, 153 Wn.2d 126, 130-31, 101 P.3d 80 (2004) (counsel performed deficiently by failing to move to suppress illegally seized methamphetamine, which was critical evidence presented by the state).

2. Counsel’s deficient performance prejudiced Mr. Canales.

Counsel’s failure to move to suppress prejudiced Mr. Canales. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A “reasonable probability” is lower than a preponderance but more than a “conceivable effect on the outcome.” *Strickland*, 466 U.S. at 693-94. It exists when there is a probability “sufficient to undermine confidence in the outcome.” *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

To prove prejudice, a defendant must show that the trial court would likely have granted the motion to suppress. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Suppression of evidence from a search warrant is a mixed question of law and fact. *State v. Vasquez*, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001). Appellate courts review factual determinations for substantial evidence and review questions of law de novo. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006); *City of College Place v. Staudenmaier*, 110 Wn. App. 841, 846, 43 P.3d 43 (2002).

Before a magistrate issues a search warrant, there must be an adequate showing of “circumstances going beyond suspicion and mere personal belief that criminal acts have taken place and that evidence thereof will be found in the premises to be searched.” *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981) (internal quotations omitted). Probable cause for a search “requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched.” *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008).

When the existence of probable cause depends on an informant’s tip, courts apply the *Aguilar-Spinelli* test to determine the reliability of the informant.² *State v. Ibarra*, 61 Wn. App. 695, 698, 812 P.2d 114 (1991)

² *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).

(citing *State v. Jackson*, 102 Wn.2d 432, 433, 688 P.2d 136 (1984)). Under that test, an informant's tip can furnish probable cause for an arrest if the state establishes (1) the basis of the informant's information and (2) the credibility of the informant or the reliability of the informant's information. *Id.*; *Jackson*, 102 Wn.2d at 435.

Courts label these two prongs the knowledge prong and the veracity prong. *Jackson*, 102 Wn.2d at 437. The "veracity" prong evaluates the informant's "track record," including whether he has provided accurate information to the police in the past. *Id.* The "basis of knowledge" prong evaluates the reliability of the informant's asserted knowledge—law enforcement "must explain how the informant claims to have come by the information in this case." *Id.* Generally, both prongs of the *Aguilar-Spinelli* test must be present to establish probable cause. *Id.*

Here, the informant allegedly witnessed Mr. Canales possessing and selling drugs shortly before the warrant was issued. CP 7-8. These facts likely establish the knowledge prong of the *Aguilar-Spinelli* test. However, the affidavit fails to establish the veracity prong, that the informant provided accurate information.

When evaluating the veracity prong, different rules apply depending on whether the informant is a criminal informant or a private citizen. *Ibarra*, 61 Wn. App. at 699. Either way, when the informant's identity is

unknown to the magistrate, there exists concern that the information may be coming from an “anonymous troublemaker.” *Id.* at 699-700. That concern can be mitigated when the informant is truly a citizen informant who is not involved in criminal activity or motivated by self-interest. *Id.* at 700.

In short, criminal informants are considered less trustworthy and more likely motivated by self-interest. *State v. Rodriguez*, 53 Wn. App. 571, 576, 769 P.2d 309 (1989). Here, the confidential informant was admittedly a criminal. The informant was working with the police “in exchange for leniency in a pending criminal matter,” they admitted to “us[ing] methamphetamine and heroin in the past,” and they were familiar with drug dealing practices. CP 7. This undercuts the informant’s reliability by raising the possibility that they provided information for self-serving reasons. *Ibarra*, 61 Wn. App. at 700.

The criminal informant’s reliability was not rehabilitated in this case, either. Statements against penal interest may favor reliability. *State v. Hett*, 31 Wn. App. 849, 851, 644 P. 2d 1187 (1982). Here, however, the informant did not admit to any criminal activity and did not make any admissions against penal interest. CP 7-8. They only implicated Mr. Canales, saying that they saw him handle drugs and “conduct a drug transaction.” CP 8. The affidavit is written such that the purchaser of the

drugs is unclear and thus does not implicate the informant in illegal activity.
CP 7-8.

The informant's identity also cannot rehabilitate their statements. When the police and the magistrate know the identity of the informant, courts can relax the necessary showing of reliability. *State v. Atchley*, 142 Wn. App. 147, 162, 173 P.3d 323 (2007). However, when police know the identity of the informant, but the magistrate does not, there is a raised burden to show reliability. *Id.* The affidavit must contain "background facts to support a reasonable inference that the information is credible and without motive to falsify." *Id.* (quoting *State v. Cole*, 128 Wn.2d 262, 287-88, 906 P.2d 925 (1995)).

Here, it appears that the identity of the criminal informant was unknown to the magistrate. CP 5-17. Additionally, the affidavit contained only a generic statement about the informant's track record, stating that the informant made controlled buys in the past and previously provided reliable information. CP 7. The affidavit provides no further details about these past cases. *Id.* On the other hand, the affidavit contains ample motivation to falsify information. The informant has a pending criminal matter, where leniency depends on turning over other people. *Id.* They are embedded in the drug community in Cowlitz County and presumably know the major

players, raising the possibility that they are naming people based on resentment or retaliation. *Id.*

Finally, the criminal informant's statements were not corroborated by police in any way. Independent corroboration by police officers can rehabilitate an otherwise unreliable informant tip. *Jackson*, 102 Wn.2d at 438. Here, however, police took the informant at their word that Mr. Canales was selling drugs. They did not conduct a controlled buy, did not have corroboration from multiple sources, and did not surveil Mr. Canales until after the warrant was issued. *See State v. Casto*, 39 Wn. App. 229, 234, 692 P.2d 890 (1984) (controlled buy can "provide the facts and circumstances necessary to satisfy both prongs of the [*Aguilar-Spinelli*] test for probable cause"); *State v. Berlin*, 46 Wn. App. 587, 592, 731 P.2d 548 (1987) (probable cause found where three different confidential informants reported criminal activity); *Cole*, 128 Wn.2d at 269-70, 288 (independent police investigation, including surveillance of the defendant's home, corroborated the information provided by the confidential informant).

If challenged, the trial court likely would have invalidated this warrant. As explained above, this ruling would have resulted in suppression of essentially all of the evidence against Mr. Canales. His trial attorney prejudiced Mr. Canales by failing to challenge the validity of this warrant, denying him effective assistance of counsel. *See Reichenbach*, 153 Wn.2d

at 137, 101 P.3d 80 (2004) (counsel failure to move to suppress illegally seized methamphetamine was prejudicial).

D. The State Exceeded its Discretion by Charging Mr. Canales with Intent to Deliver Instead of Attempted Sale of Heroin.

This Court should also reverse because the state exceeded its discretion when charging Mr. Canales. When conduct violates more than one criminal statute, the state generally can elect which statute it wishes to charge. However, there are limitations on this discretion. Where conduct violates both a special and a more general statute, courts presume that the Legislature intended only the special statute to apply. *State v. Datin*, 45 Wn. App. 844, 845-46, 729 P.2d 61 (1986). In other words, “when a general and a special statute are concurrent, the special statute applies, and the defendant may only be charged under the special statute.” *State v. Jendrey*, 46 Wn. App. 379, 381-82, 730 P.2d 1374 (1986).

This rule of construction only applies when the statutes are “concurrent,” meaning that “the general statute will be violated in each instance in which the special statute has been violated.” *Id.* It is not relevant that the special statute may contain additional elements not contained in the general statute. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). The special statute will supersede the general “[s]o long as it is not possible

to commit the special crime without also committing the general crime.”
Id. at 583.

Here, Mr. Canales was charged with violating RCW 69.50.401, or possession with intent to deliver heroin. CP at 3-4. This statute states: “Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401(1). “To deliver” is defined as “the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.” RCW 69.50.101(i).

However, the state should have charged Mr. Canales with attempted sale of heroin in violation of RCW 69.50.410, which states: “Except as authorized by this chapter it is a class C felony for any person to sell for profit any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana.” RCW 69.50.410(1). “To sell” is defined as “the passing of title and possession of a controlled substance from the seller to the buyer for a price whether or not the price is paid immediately or at a future date.” RCW 69.50.410(1)(a).

These statutes are concurrent because any violation of the special statute, sale of heroin, necessarily violates the general statute, possession with intent. To “sell” per the special statute is a more confined version of

to “deliver” in the special statute. If a defendant has attempted to sell heroin, he has attempted to “manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401(1).

Because these statutes are concurrent, the special statute—attempted sale of heroin—applies, “and the defendant may only be charged under the special statute.” *Jendrey*, 46 Wn. App. at 381-82. This distinction matters because the offenses carry different sentences. For possession with intent to deliver under RCW 69.50.401, Mr. Canales’ sentencing range was 60 to 120 months, and the court imposed a sentence of 108 months incarceration. However, for attempted sale of heroin, RCW 69.50.410 mandates a two-year sentence for a first offense. RCW 69.50.410(3)(a).

The state exceeded its discretion by charging Mr. Canales with possession with intent to deliver under the general statute, RCW 69.50.401, instead of with attempted sale of heroin the special statute, RCW 69.50.410. This Court should reverse his possession with intent conviction and remand. *See Shriner*, 101 Wn.2d at 583.

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VI. CONCLUSION

For the foregoing reasons, Mr. Canales respectfully requests that this Court reverse his convictions and remand.

RESPECTFULLY SUBMITTED this 6th day of August, 2020.



STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant,
John E. Canales

No. 54426-1-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On August 6, 2020, I electronically filed a true and correct copy of the Brief of Appellant, John E. Canales, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Aila Rose Wallace
Cowlitz County Prosecutor's
Office
312 SW 1st Ave, Rm 105
Kelso, WA 98626-1799

(X) via email to:
WallaceA@co.cowlitz.wa.us,
appeals@co.cowlitz.wa.us

John E. Canales
DOC # 996117
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

(X) via U.S. mail

SIGNED in Tacoma, Washington, this 6th day of August, 2020.



STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant,
John E. Canales

NEWBRY LAW OFFICE

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Address:

623 DWIGHT ST

PORT ORCHARD, WA, 98366-4619

Phone: 360-876-5477

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