

28895-1-III  
Consolidated with No. 28896-0  
COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL S. SMITH, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

---

APPELLANT'S BRIEF

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**INDEX**

A. ASSIGNMENT OF ERROR.....1

B. ISSUES .....1

C. STATEMENT OF THE CASE .....1

D. ARGUMENT.....5

1. WHEN A SEARCH WARRANT APPLICATION IS  
BASED UPON ACCUSATIONS FROM INFORMANTS  
WHO HAVE CONVICTIONS FOR CRIMES OF  
DISHONESTY, BUT THE AFFIDAVIT FAILS TO  
INFORM THE JUDGE OF THESE CRIMES, THE  
COURT’S REFUSAL TO HOLD A *FRANKS*  
HEARING IS AN ABUSE OF DISCRETION .....5

E. CONCLUSION.....12

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

STATE V. ATCHLEY, 142 Wn. App. 147,  
173 P.3d 323 (2007) .....6

STATE V. CHENOWETH, 160 Wn.2d 454,  
158 P.3d 595 (2007) .....5

STATE V. COLE, 128 Wn.2d 262,  
906 P.2d 925 (1995) .....7

STATE V. COPELAND, 130 Wn.2d 244,  
922 P.2d 1304 (1996) .....6

STATE V. DOBBINS, 67 Wn. App. 15,  
834 P.2d 646 (1992) .....9

STATE V. GARRISON, 118 Wn.2d 870,  
827 P.2d 1388 (1992) .....6, 11

STATE V. LAIR, 95 Wn.2d 706,  
630 P.2d 427 (1981) .....7

STATE V. NEWTON, 109 Wn.2d 69,  
743 P.2d 254 (1987) .....9

STATE V. RAY, 116 Wn.2d 531,  
806 P.2d 1220 (1991) .....9

STATE V. SCHROEDER, 67 Wn. App. 110,  
834 P.2d 105 (1992) .....9

STATE V. TEAL, 117 Wn. App. 831,  
73 P.3d 402 (2003) .....9

STATE V. WOLKEN, 103 Wn.2d 823,  
700 P.2d 319 (1985) .....6

**FEDERAL CASES**

U.S. V. REEVES, 210 F.3d 1041 (C.A.9 (Or.) 2000).....8  
UNITED STATES V. HALL, 113 F.3d 157 (9th Cir.1997).....7, 9  
UNITED STATES V. MELING, 47 F.3d 1546 (9th Cir. 1995) .....8

**SUPREME COURT CASES**

AGUILAR V. TEXAS, 378 U.S. 108,  
84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).....7  
FRANKS V. DELAWARE, 438 U.S. 154,  
98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).....5  
ILLINOIS V. GATES, 462 U.S. 213,  
103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).....7  
SPINELLI V. UNITED STATES, 393 U.S. 410,  
89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).....7  
WILLIAMSON V. UNITED STATES, 512 U.S. 594,  
114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994).....9

**STATUTES**

RCW 9A.56.020(1).....9

A. ASSIGNMENT OF ERROR

1. The trial court abused its discretion by denying Mr. Smith's motion for a *Franks* hearing.

B. ISSUES

1. Where an affidavit for a search warrant is based primarily, if not entirely, upon assertions from informants who have convictions for crimes of dishonesty that are not disclosed in the application for the warrant, does the trial court err by denying the defendant's motion for a *Franks* hearing?
2. Where informants who have convictions of crimes of dishonesty provide the probable cause basis for issuing a search warrant, but the convictions are not disclosed to the judge deciding whether to issue the warrant, does a trial court abuse its discretion by denying the defendant's subsequent motion for a *Franks* hearing?

C. STATEMENT OF THE CASE

Benton County Sheriff's Office Deputy Scott Runge was investigating a burglary reported by Valerie Seabury. (CP 9) Ms. Seabury reported that her shop had been broken into, and several items were

missing. (CP 9) Over the next two days, Deputy Runge investigated the burglary, which included interviewing several people. Based upon the information provided by these people, Deputy Runge sought the assistance of Benton County Sheriff's Detective Lee Cantu, who submitted an Affidavit of Search Warrant. (CP 9-16)

Detective Cantu's application for a search warrant relies upon the stories told by Valerie Seabury and Randall Spanjer, who at first blush appeared to be the victims of a burglary. (CP 9-10) They reported to the police that certain items were taken from their shop, including a Harley Davidson motorcycle, large tool rollaway boxes, hand tools and power tools. (CP 9)

Ms. Seabury implicated Mica Jones as a suspect. (CP 10) Mr. Jones was interviewed at the county jail, and he implicated Kenneth Moore. (CP 10)

Ms. Seabury's son revealed that Ms. Seabury had a heroin habit, and the burglary was likely related to her friends. (CP 10) Ms. Seabury admitted that she had recently used heroin in the previous month with both Mr. Jones and Mr. Moore. (CP 10; 12) Ms. Seabury implicated a drug dealer by the name of "Mike." (CP 12)

The investigation at a pawnshop revealed that Mr. Moore had pawned items similar to those described as stolen. (CP 11) Mr. Moore eventually admitted he had the motorcycle and he knew the location of some of the stolen items. (CP 13)

Mr. Moore implicated a heroin dealer by the name of “long hair Mike.” (CP 13) He said “Mike” would accept stolen items in exchange for heroin, and he had traded some of Mr. Spanjer’s tools to Mike. (CP 13-15)

Detective Cantu discovered that “Mike” was Michael S. Smith, and he investigated Mr. Smith’s previous criminal record, which included a possession with intent to deliver conviction. (CP 15)

Based upon the accusations, principally from Valerie Seabury and Kenneth Moore, Detective Cantu applied for a telephonic search warrant for Mr. Smith’s home. (CP 15-16) The affidavit for the search warrant does not contain any information related to the criminal histories of any of the people interviewed by the police. (*See* CP 9-16)

The warrant was issued, and as a result of the discoveries during the search, Mr. Smith was charged with possession of heroin with the intent to deliver, possession of stolen property and unlawful possession of a firearm. (CP 1-2)

Prior to trial, Mr. Smith moved for a *Franks* hearing. (CP 3-7) The motion was based upon the fact that Detective Cantu's application for the search warrant failed to include any information related to the criminal histories of the informants. (CP 4) Mr. Smith provided the court with the extensive histories of all the people named in the affidavit. (CP 17-35)

The trial court denied the motion for the *Franks* hearing. The court ruled that Mr. Moore's pending charges did not have to be specifically provided to the magistrate, because the supporting facts for the theft charges in the current case were provided. (RP 8) The court did not address Mr. Moore's two convictions for stolen property trafficking and whether the failure to include those convictions would require a *Franks* hearing.

The court also noted that Ms. Seabury's previous convictions involving dishonesty were not disclosed, but the court ruled that those convictions were not "material" to the affidavit for the search warrant because the affidavit included a general implication that she committed crimes: "there is certainly information regarding Miss Seabury's criminal activity." (RP 8) The court also found that Ms. Seabury's contributions were not "material to form any basis for finding of probable cause in this

particular matter.” (RP 8) The court denied the motion for a *Franks* hearing. (RP 8)

Mr. Smith agreed to a stipulated facts trial. (CP 39-42) The court found him guilty, and he appeals. (CP 41; 63)

#### D. ARGUMENT

1. WHEN A SEARCH WARRANT APPLICATION IS BASED UPON ACCUSATIONS FROM INFORMANTS WHO HAVE CONVICTIONS FOR CRIMES OF DISHONESTY, BUT THE AFFIDAVIT FAILS TO INFORM THE JUDGE OF THESE CRIMES, THE COURT’S REFUSAL TO HOLD A *FRANKS* HEARING IS AN ABUSE OF DISCRETION.

The issuance of a search warrant is a “highly discretionary” act. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). Once issued, a warrant is entitled to a presumption of validity, and courts will give “great deference to the magistrate’s determination of probable cause” and resolve any doubts in favor of the warrant. *Id.*

A warrant may be invalidated, however, and the fruits of a search may be suppressed if the applying officer intentionally or recklessly omitted material information from the warrant affidavit. *Id.* A defendant challenging a warrant on this basis is entitled to an evidentiary hearing,

known as a “*Franks*”<sup>1</sup> hearing, if he makes a substantial preliminary showing of the omissions and their materiality.

An omission or misstatement is material if it was necessary to the finding of probable cause. *State v. Copeland*, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996). The affidavit supports probable cause even when the omitted information is considered, “the suppression motion fails and no hearing is required.” *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992). The denial of a *Franks* hearing is reviewed for abuse of discretion. *State v. Wolken*, 103 Wn.2d 823, 829-30, 700 P.2d 319 (1985).

“Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” *State v. Atchley*, 142 Wn. App. 147, 161, 173 P.3d 323 (2007). When relevant information is recklessly omitted from a search warrant affidavit, the test for probable cause is whether the affidavit with the omission inserted remains sufficient to support a finding of probable cause. *Garrison*, 118 Wn.2d at 873.

Here, the officers applied for a search warrant based solely upon critical information given to them by Ms. Seabury and Mr. Moore. When

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<sup>1</sup> *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

the existence of probable cause depends on information supplied by an informant, the two-prong *Aguilar-Spinelli*<sup>2</sup> test must be satisfied. *State v. Cole*, 128 Wn.2d 262, 287, 906 P.2d 925 (1995). The knowledge prong requires that the basis of the informant's information be established, and the credibility prong requires that the reliability of the informant be established. *Id.*

The fact that an informant has been convicted of other crimes does not necessarily destroy his or her credibility or reliability. Instead, the determination of whether information provided by an informant establishes probable cause is based on the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

But where an informant's past crimes involve dishonesty, the informant's credibility is severely impacted, and the failure to inform the magistrate of past crimes of dishonesty may invalidate a warrant. For example, in *United States v. Hall*, 113 F.3d 157 (9th Cir.1997), the trial court suppressed evidence because a police officer testifying at the search warrant hearing deliberately or recklessly failed to disclose that the informant's past crimes included making a false report to police. The reviewing court held that the information about this crime would

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<sup>2</sup> *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).

“doubtless have led to more skepticism and perhaps some questions had the magistrate known it.” *Id.* at 160.

The court dismissed the State’s argument that the magistrate knew of the informant’s serious crimes, and stated that “what most impeached [the informant’s] credibility was his false report to the police. That crime, more than his crimes carrying higher penalties, suggested the possibility that he would lie to the police to frame an innocent man.” *Id.* See also *United States v. Meling*, 47 F.3d 1546 (9th Cir. 1995) (omission of information regarding mental illness, and forgery and fraud convictions eliminated informant’s credibility).

“Any crime involving dishonesty necessarily has an adverse effect on an informant’s credibility. In the absence of countervailing evidence to bolster the informant’s credibility or the reliability of the tip, 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.” *U.S. v. Reeves* 210 F.3d 1041 (C.A.9 (Or.) 2000).

In assessing whether an offense constitutes a crime of dishonesty, courts analyze the elements of the offense, the date of the crime, and the type of crime and punishment imposed. *State v. Newton*, 109 Wn.2d 69, 71, 743 P.2d 254 (1987). Theft is considered a crime of dishonesty because it contains the element of intent to deprive another of his or her

property under RCW 9A.56.020(1). *State v. Schroeder*, 67 Wn. App. 110, 115-16, 834 P.2d 105 (1992), citing *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991) (“Crimes of theft involve stealing, and are clearly encompassed within the term dishonest.”).

A burglary committed or intended to accomplish theft is a crime of dishonesty. *State v. Dobbins*, 67 Wn. App. 15, 16, 834 P.2d 646 (1992). Additional crimes of dishonesty include taking a motor vehicle and forgery. *State v. Teal*, 117 Wn. App. 831, 843, 73 P.3d 402 (2003).

In opposing the *Franks* hearing, the State relied upon the fact that the informants had admitted their various roles in the current thefts, and the State concluded that the informants’ stories must be credible.

However, “the fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement’s reliability.” *Hall*, 113 F.3d at 159; quoting *Williamson v. United States*, 512 U.S. 594, 599-600, 114 S. Ct. 2431, 2435, 129 L. Ed. 2d 476 (1994) (“Once a person believes that the police have sufficient evidence to convict him, his statement that another person is more important to his criminal enterprise than he gains little credibility from its inculpatory aspect.”).

In this case, all of the informants had committed crimes of dishonesty<sup>3</sup>. But the two principal accusers, Ms. Seabury and Mr. Moore, both have extensive criminal histories, and both respective histories include crimes of dishonesty that directly implicate their credibility. Ms. Seabury, who initially claimed she was a victim, has a record containing the following crimes of dishonesty<sup>4</sup>: (1) third degree theft from November 30, 2006; (2) controlled substances violation – “false info” from November 20, 2006; (3) second degree theft from January 15, 2009; and (4) theft of a motor vehicle from January 5, 2009. (CP 19-20)

Mr. Moore’s crimes of dishonesty revealed by a review of his record include: (1) stolen property trafficking from February 11, 2009; (2) taking a vehicle without permission from January 15, 2009; and (3) stolen property trafficking from January 15, 2009. (CP 26)

In this case, the entire case rested upon the word of these informants. The only information outside of the stories told by Ms. Seabury and Mr. Moore was the receipt linking only Mr. Moore to

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<sup>3</sup> The alleged victim Randy Spanjer had two past convictions of taking a motor vehicle without permission (CP 22-23); Mica Jones, who implicated Mr. Moore, has several crimes of dishonesty, including: residential burglary from 11/24/04; third degree theft 11/24/04; forgery 1/24/97; theft 10/31/96; first degree theft 2/1/06; forgery 1/24/97 (CP 24-25); Michellé Krutsch’s record included multiple convictions of false reporting, forgery and theft. (CP 28-35)

<sup>4</sup> Ms. Seabury’s record also includes a stolen property trafficking charge from 2/12/09 that was presumably related to the current allegations. (CP 19) The detective’s affidavit was filed February 10, 2009. (CP 16)

pawning some of the stolen items. That evidence did not implicate Mr. Smith.

The probable cause was established solely upon Ms. Seabury and Mr. Moore's accusations. Without Mr. Moore pointing out Mr. Smith's house and providing information, the police had nothing to implicate Mr. Smith. The detective's failure to provide the judge with the evidence that his informants had been convicted of crimes of dishonesty was reckless. The detective ran the criminal history of Mr. Smith and provided that information to the judge, but failed to provide that same information on his informants.

When relevant information is recklessly omitted from a search warrant affidavit, the test for probable cause is whether the affidavit with the omission inserted remains sufficient to support a finding of probable cause. *Garrison*, 118 Wn.2d at 873.

In this case, no probable cause exists without the information provided by Mr. Moore and Ms. Seabury. The trial court's focus was too narrow – the court only looked at the pair's involvement in the current case. But the caselaw demands that the court review all past crimes of dishonesty because such crimes adversely reflect on the informant's credibility. The court abused its discretion in failing to grant a *Franks* hearing. Mr. Smith's conviction should be reversed.

E. CONCLUSION

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 if no evidence exists that bolsters the informant's credibility. In this case, the detective failed to inform the court of both the principal informants' respective crimes of dishonesty. No other evidence existed that bolstered their individual credibility. The trial court's denial of the motion for a *Franks* hearing was an abuse of discretion. Mr. Smith's conviction should be reversed.

Dated this 7th day of December, 2010.

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