

FILED

AUG 30 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 29754-3-III

STATE OF WASHINGTON, Respondent,

v.

JEFFREY SCOTT NORMAN, Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

Jeffrey Scott Norman was involved in a hotly contested divorce and custody dispute with his ex-wife's family when his ex-wife's daughter made allegations of sexual abuse against Norman. He was arrested without a warrant and without a finding of probable cause after police interviewed the alleged victim, K.H. There was no physical evidence of abuse, no witnesses to the abuse, and nothing that corroborated K.H.'s story. At the subsequent probable cause hearing, the prosecuting attorney provided sworn testimony about the investigation that omitted critical information known to law enforcement that tended to establish that the alleged victim's report was not credible.

Without a hearing, and without further inquiry, the Superior Court summarily denied Norman's motion. The trial court erred in failing to conduct an evidentiary hearing on Norman's motion when Norman made a *prima facie* showing that the prosecutor omitted critical information about the investigation in support of his application for probable cause. Because Norman's affidavit sets forth facts that would establish grounds for relief from the judgment under CrR 7.8(b)(3), summary denial of the motion, without more, was in error. The denial should be reversed and the case remanded for an evidentiary hearing on Norman's allegations of prosecutorial misconduct.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Norman's motion for dismissal on the grounds of governmental misconduct without a hearing, when Norman presented a prima facie case that the facts were misrepresented to the court at the probable cause hearing and that the prosecuting attorney improperly vouched for the reliability and credibility of an informant in violation of *Aguilar-Spinelli*.
2. The trial court erred in finding that there was no evidence of government misconduct when Norman's evidence demonstrated that the prosecuting attorney failed to disclose material evidence to the court that had a direct bearing on the reliability and credibility of the complaining witness.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a defendant establish grounds for relief from judgment under CrR 7.8(b)(3) by presenting evidence that the State arrested him without a warrant or a probable cause determination, misrepresented the facts of the investigation to the court, and substituted the prosecuting attorney's reliability

and credibility for the complaining witness's to bypass the requirements of *Aguilar-Spinelli*?

2. Does evidence of prosecutorial misconduct exist when the sworn testimony and pleadings before the court establish that the prosecuting attorney failed to disclose to the court in requesting a determination of probable cause that (1) the alleged victim's younger brother, who slept in the bunk bed directly above where the alleged abuse occurred, saw or heard nothing being done to the alleged victim; and (2) the alleged victim's description of a pornographic videotape that Norman allegedly forced her to watch was directly controverted by the seizure of the videotape described during a search of Norman's home and the discovery that the videotape contained no pornographic material?

IV. STATEMENT OF THE CASE

On April 19, 2005, K.H., the alleged victim in this case, reported to her aunt that Jeffrey Scott Norman, her step-father, had sexually abused her. CP 132. Stevens County Sheriff's detective Fran Lynn interviewed K.H. on May 3, 2005, at which time K.H. detailed multiple specific acts of

sexual misconduct against her. CP 133-34. She also described Norman forcing her to watch a pornographic movie that was on a videotape marked with a piece of tape that read, "Stevie Ray Vaughn." CP 134. Detective Lynn also interviewed Norman's son, Z.N., who confirmed that Norman sometimes slept with K.H. on the lower bunk of a bed while Z.N. slept on the upper bunk, but Z.N. denied that he ever saw or heard Norman doing anything to K.H. in the bunk. CP 135.

Norman was arrested on May 4, 2005. CP 162. Apparently, no arrest warrant was obtained. CP 168. However, the day after Norman's arrest, Detective Lynn obtained a search warrant to search Norman's home for pornographic videos, including the videotape that K.H. described, to assist in "verifying" her disclosure. CP 136. Several videos were seized from Norman's home, including the "Stevie Ray Vaughn" video described by K.H.; however, none of the videos contained pornographic material. CP 141, 143.

The trial court held a probable cause hearing on May 5, 2005. CP 116. At the hearing, the prosecuting attorney, Jerry Wetle, was placed under oath to testify about the basis for the charge. CP 118. Wetle testified that K.H. had reported the abuse to her mother, which was factually incorrect. CP 118. In fact, Detective Lynn had testified under

oath that K.H. had reported the abuse to her aunt. CP 132. Wetle also described the sexual allegations that K.H. had made to Lynn, but omitted the facts that Z.N., who was present at the time of the alleged abuse, denied seeing or hearing anything and the fact that K.H. had reported that Norman had a “Stevie Ray Vaughn” videotape that contained pornographic material he would show her. CP 118-19. Based on Wetle’s testimony, the trial court found probable cause to hold Norman on charges of rape of a child. CP 120-21.

Subsequently, on May 9, 2005, Wetle filed an affidavit of probable cause in which he repeated K.H.’s sexual allegations, this time adding that K.H. told the investigators about Norman buying a pornographic video that he would make her watch. CP 108-09. Wetle did not disclose to the court that K.H. had described a specific videotape, that was marked with the words “Stevie Ray Vaughn” on a tape label. Wetle also did not disclose to the court that on May 5, 2005, police had searched Norman’s home, located the subject videotape, and discovered that it did not contain pornographic material. And, again, Wertle did not disclose to the court that Z.N., K.H.’s younger step-brother, had denied seeing or hearing any evidence of abuse that allegedly took place on a bunk bed directly beneath him.

Norman was ultimately convicted of two counts of child molestation and three counts of rape of a child. CP 7. His convictions were affirmed on appeal. CP 42.

On January 21, 2011, Norman, acting *pro se*, filed a motion to dismiss the charges against him on the grounds of government misconduct. CP 48. In support of his motion, Norman submitted Wetle's May 9, 2005 affidavit of probable cause, the transcript of the probable cause hearing, and Lynn's search warrant applications, including Lynn's affidavits. CP 96. After a hearing without argument on February 28, 2011, the trial court found that there was no material evidence of prosecutorial misconduct and denied Norman's motion. CP 298; VRP 3. Norman timely appeals. CP 297.

V. ARGUMENT

Norman presented evidence to the trial court that the prosecuting attorney withheld information about the conduct of the investigation. The effect of the prosecutor's omissions was to bolster the credibility of the complaining witness, by failing to reveal to the court that the only percipient witness to the alleged abuse, Z.N., denied seeing or hearing any evidence of it, as well as that K.H.'s allegations about being shown a specific pornographic video were demonstrated to be false. Such

disclosures, had they been made, would have had a direct bearing on the court's determination of the complaining witness's reliability and veracity, as required under *Aguilar* and *Spinelli*. Because the State's grounds for arresting Norman were based entirely upon the alleged victim's statements, the contradiction of her story would have completely undercut the alleged probable cause for the crime. Absent probable cause, the case, of course, should not have been permitted to proceed.

Norman's motion sought relief under CrR 7.8(b)(3), which provides a procedure for seeking relief from a judgment on the grounds of fraud, misrepresentation, or misconduct of an adverse party. The grounds for relief must be shown by clear and convincing evidence. *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996).

To establish fraud, nine elements must be proven: (1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the other party; (6) the other party's ignorance of its falsity; (7) the other party's reliance on the truth of the representation; (8) the right of the other party to rely upon it; and (9) consequent damage. *Hardesty*, 129 Wn.2d at 318. To establish governmental misconduct, a defendant must prove (1) government

misconduct, and (2) prejudice affecting his right to a fair trial. *State v. Athan*, 160 Wn.2d 354, 376, 158 P.3d 27 (2007).

Norman further requested relief for a violation of his right to due process of law. Dismissal is an appropriate remedy when State misconduct shocks the conscience of the court and is so outrageous that it exceeds the bounds of fundamental fairness. *State v. Martinez*, 121 Wn. App. 21, 35, 86 P.3d 1210 (2004). Indeed, in *Martinez*, the State's withholding of exculpatory evidence to secure a conviction was held to be adequate grounds to dismiss the case. *Id.* at 36.

For the prosecuting attorney to mislead the court about the strength of its case is precisely the kind of outrageous conduct that undermines the integrity of the judicial proceedings. It is unethical for attorneys to make false statements of fact to a tribunal, or to fail to correct a false statement when the truth becomes known. RPC 3.3. The duty not to mislead the court is particularly critical in probable cause determinations, in which evidentiary standards are relaxed and a certain degree of inaccuracy is tolerated. *See, e.g., State v. Chenoweth*, 160 Wn.2d 454, 475-76, 158 P.3d 595 (2007). Permitting the State to obtain a probable cause determination by presenting only the favorable evidence and omitting the exculpatory evidence would effectively nullify the protections of the Fourth Amendment and makes a mockery of the probable cause requirement.

An arrest must be based upon probable cause, defined as “evidence which would ‘warrant a man of reasonable caution in the belief’ that a felony has been committed.” *State v. Smith*, 102 Wn.2d 449, 453, 688 P.2d 146 (1984) (quoting *Wong Sun v. United States*, 371 U.S. 471, 479, 83 S.Ct. 407, 413, 9 L.Ed.2d 441 (1963)).

Merely to detain a person on reasonable suspicion of criminal activity, let alone to arrest the person on probable cause, an uncorroborated informant’s tip is insufficient. Instead, intrusions into areas protected by the Fourth Amendment based on information obtained from the public requires that the information bear sufficient indicia of reliability. *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980). This requires some consideration of the reliability of the information as well as the circumstances from which the officer concluded that the informant was credible or the information was reliable. *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984). This two-pronged inquiry into the reliability and credibility of the informant is known as the *Aguilar-Spinelli* test based on *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *Id.* A deficiency in either prong can be overcome by facts that tend to corroborate the tip in a way that points to criminal activity. *Id.* at 438.

Critical to the *Aguilar-Spinelli* analysis in this case is the fact that the complaining witness and the source of the information used to arrest and prosecute Norman was a twelve-year-old girl, shortly after the conclusion of an acrimonious divorce between her mother and her step-father. CP 123. She had a motive to accuse her step-father of wrongdoing to strengthen her mother's position in the divorce. As a child, she did not have any history of providing information to police, and therefore no grounds upon which to establish her credibility. Some additional corroboration was required to find probable cause solely based upon her statements.

Not only did such corroboration not exist, but in fact, the evidence available to the prosecutor – but not disclosed to the court – directly impeached her credibility. No physical evidence of abuse was presented or alleged. The person in the best position to confirm the abuse, Z.N., who slept on the bunk above K.H. where the abuse allegedly occurred, denied seeing or hearing anything suspicious. The trial court was not made aware of this fact. And the alleged victim's description of the pornographic videotape she claimed Norman made her watch was demonstrably proven to be false when the police searched Norman's home and recovered the videotape. This information, as well, was not revealed to the trial court.

The purpose of the *Aguilar-Spinelli* test is that the probable cause determination must be made by a neutral magistrate, not the officer engaged in the investigation. *Jackson*, 102 Wn.2d at 436-37. To withhold from the magistrate known information that bears directly on the informant's credibility and the truthfulness of the information undermines the magistrate's critical function. In this case, had the information that the prosecuting attorney withheld been disclosed to the trial court, it is highly unlikely that the court could have concluded that the alleged abuse "probably" occurred. And it is elementary that probable cause is a prerequisite to arrest a defendant and subject him to a criminal prosecution. See RPC 3.8(a) (setting forth prosecutor's duty not to proceed with a prosecution that he knows is unsupported by probable cause).

In short, the trial court erred when it found that Norman had failed to present evidence of government misconduct. To the contrary, Norman demonstrated that the State withheld critical information from the trial court during the probable cause determination. Further, Norman made a *prima facie* showing that the misconduct had a substantial effect on his right to a fair trial by subjecting him to arrest, imprisonment, and prosecution on charges that would not have been supported by probable cause, had all of the pertinent information then known to the police been

provided to the magistrate. The government's actions in cherry-picking the evidence to present to the judge so as to minimize the problems with its case are outrageous and undermine the integrity of the proceedings used to convict Norman. Summary dismissal of his motion was improper and should be reversed.

VI. CONCLUSION

Norman presented ample evidence to the trial court to warrant the relief requested under CrR 7.8(b)(3). Consequently, it was error for the trial court to deny Norman's motion summarily and without a hearing on his request. The order denying Norman's motion should be reversed and the cause remanded for a hearing on his motion as provided by CrR 7.8(c)(3).

RESPECTFULLY SUBMITTED this 29th day of August, 2011.


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CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the Brief of Appellant upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 29th day of August, 2011 in Walla Walla, Washington.


Andrea Burkhart