

NO. 29821-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID WHISLER,

Appellant.

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**FILED**  
Oct 05, 2011  
Court of Appeals  
Division III  
State of Washington

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

The Honorable John D. Knodell, Judge  
The Honorable John M. Antosz, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The affidavit for search warrant failed to establish probable cause.

2. The trial court abused its discretion by refusing to consider a mitigating factor raised by the defense because it was not one expressly listed in RCW 9.94A.535(1).

3. The trial court erred when it entered conclusions of law 3.3<sup>1</sup> and 3.4. CP 45-48, attached as an appendix.

Issues Pertaining to Assignments of Error

1. Did the warrant affidavit fail to establish probable cause where the informants were unknown to the magistrate, the informants did not provide contact information, the affiant failed to establish whether the informants were compensated, the affiant failed to assert he conducted a criminal background check on the informants, the informants provided no explanation why they wanted to remain anonymous, and the police failed to corroborate the informants' allegations with facts that were not generally open to the public or indicative of reliability?

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<sup>1</sup> As explained below this "conclusion of law" also contains within it several findings of fact. Appellant assigns error to those findings as well.

2. Did the trial court abuse its discretion where the defense raised a mitigating issue at sentencing but the trial court did not consider it as such because it was under the mistaken belief that it could only consider those illustrative factors expressly set forth in the statute RCW 9.94A.535(1)?

B. STATEMENT OF THE CASE

Appellant David Whisler has emphysema, chronic obstructive pulmonary disease, and hepatitis C. RP (3-3-11) 120. Marijuana helps raise platelets in his liver. Id. Consequently, he was issued a medical marijuana permit. RP (3-3-11) 87, 111. Pursuant to this permit, Whisler grew his own marijuana and weighed and packaged his doses in his home. RP (3-3-11) 111.

In May 2010, Detective Alan Barrowman was contacted by a citizen informant (CI-1) who had observed high amounts of cars coming and going from what was later determined to be Whisler's residence. CP 33. CI-1 explained the vehicles are there for only a short time and that this occurs consistently for a couple of days each month and then stops. CP 33. CI-1 also reported Whisler's house had a sign posted that read "Legalize don't Penalize" and the windows were mostly covered. CP 34.

CI-1 explained that another citizen informant (CI-2) had seen several marijuana plants being removed from the residence. CP 33. Barrowman contacted CI-2 and confirmed this. CP 34. CI-2 described the plants, explaining that he was familiar with what marijuana plants look like. CP 34.

Barrowman went to the residence and observed the covered windows and sign. CP 34. He observed several cars in the driveway. CP 34. He determined one belonged to Whisler's roommate. RP 34. He also checked electricity records, noting Whisler's residence had unusually high consumption levels. CP 34. Barrowman also checked Whisler's criminal record, finding Whisler had previously been convicted of manufacturing and possessing marijuana.<sup>2</sup> CP 35.

On May 19, 2010, Barrowman sought a search warrant. In addition to relating the above-stated facts, he included the following statement pertaining to the informants' credibility:

[CI-1 and CI-2] are familiar with the look of marijuana and are familiar with the look of the plants. [CI-1 and CI-2] are members of the community and neither have any known criminal history. [CI-1 and CI-2] are concerned citizens and appear to have nothing to gain, other than they are concerned for the

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<sup>2</sup> Barrowman's affidavit did not state the date of these convictions. CP 35.

community and felt the need to report alleged narcotics activity. [CI-1 and CI-2] have lived in the Grant Count community in excess of 5 years. [CI-1 and CI-2] reported these observations under circumstances involving no criminal activity on their part.

CP 35.

Barrowman obtained a warrant and executed it on May 19, 2010. CP 31, 37. Upon searching the house, officer's found marijuana plants in Whisler's bedroom, scales, baggies of marijuana, and a firearm in Whisler's closet. CP 37-42. Whisler was arrested and later charged with possession of marijuana with intent to deliver and second degree unlawful possession of a firearm due to his prior felony conviction. CP 1-3.

On September 14, 2010, Whisler moved to suppress, arguing the information in the affidavit was insufficient to establish probable cause. CP 11-42. The judge hearing the motion had issued the warrant himself. RP (9-22-10) 33. After arguments, the trial court concluded that it would show deference to itself and uphold its decision to grant the warrant. RP (9-22-10) 33. The trial court entered written findings and conclusions on October 15, 2010. CP 45-48.

In March 2011, Whisler went to trial and was convicted. CP 75-76. At sentencing, the defense presented an argument for a downward departure from the standard range. RP (4-28-11) 51. Defense counsel raised what appeared to be an equal protection challenge which did not fit into any of the mitigating factors expressly set forth in RCW 9.94A.535(1). RP (4-28-11) 53-55, 57-58. The trial court stated that it was bound by the enumerated factors found in the statute and denied the defense's request. RP (4-28-11) 56, 63. It sentenced Whisler within the standard range. CP 93-107. He appeals. CP 92

C. ARGUMENT

I. THE INFORMATION PROVIDED IN THE AFFIDAVIT WAS NOT SUFFICIENT TO ESTABLISH PROBABLE CAUSE.

The validity of a search warrant rests on the existence of probable cause. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). When the existence of probable cause depends on an informant's tip, the affidavit in support of the warrant must establish the basis of the informant's information as well as the veracity of the informant. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984); 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). To satisfy both parts of the Aguilar-Spinelli test, the State must prove the underlying circumstances which the trier of fact “may draw upon to conclude the informant was credible and obtained the information in a reliable manner.” State v. Vickers, 148 Wn.2d 91, 112, 59 P.3d 58 (2002).

Heightened scrutiny applies when an informant’s identity is known to the police, but is not revealed to the magistrate. State v. Atchley, 142 Wn. App. 147, 162, 173 P.3d 323 (2007). This is because courts must be able to conclude the information is not coming from an “anonymous trouble maker” and this is more difficult where the informant remains unidentified. State v. Northness, 20 Wn. App. 551, 558, 582 P.2d 546 (1978). “In fact, anonymity of a citizen informant may be one factor for finding no showing of reliability.” State v. Ibarra, 61 Wn. App. 695, 700, 812 P.2d 114 (1991).

Suspicious circumstances can greatly diminish an informant’s reliability. To overcome such circumstances, the search warrant affidavit must demonstrate the informant is truly a citizen informant and not a troublemaker or motivated by self-interest. Id. An anonymous or confidential informant’s reliability can be corroborated by a description of the informant, and an

explanation of his or her purpose for being at the scene of the crime and the desire for remaining anonymous. Id. This kind of information substantially decreases the possibility that the informant is an anonymous troublemaker, is somehow involved in the criminal activity, or is motivated by self interest. Id. This is not the case here, however.

Based on this record, the officer's affidavit does not satisfy the credibility prong of the Aguilar–Spinelli test because it lacks sufficient specificity to establish the informant's veracity. Because the informant remained unidentified to the magistrate, the specter of the anonymous troublemaker was still present and heightened scrutiny applied. In applying this standard, the trial court reached beyond the affidavit and improperly relied on facts that were not included within the search warrant affidavit. See, State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (explaining the trial court's review is limited to the four corners of the affidavit supporting probable cause). As shown below, the record does not support a finding of reliability when only those facts set forth in the affidavit are considered.

The trial court considered three facts that were outside the four-corners of the affidavit.<sup>3</sup> CP 47. First, it found the informants provided contact information to police. CP 47. Yet, the affidavit never establishes that officers were provided contact information. Compare, CP 33-35 with, State v. Berlin, 46 Wn. App. 587, 591, 731 P.2d 548 (1987) (affiant attested to fact the informant provided address and phone number).

Second, the trial court found the informants received no compensation. CP 47. This fact also is not found within the four corners of the affidavit. Compare, CP 33-35, with, Atchley, 142 Wn. App. at 152 (affiant attested to fact that no compensation was requested).

Third, the trial court found the informants stated they came forward because they were concerned members of the community and felt it was their duty to report drug crimes. CP 47. Again, this fact is not found in the affidavit. CP 33-35. Although the warrant includes Barrowman's belief the informants were concerned

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<sup>3</sup> These three findings are found in paragraph 3.3. Although this paragraph is labeled "Conclusion of Law" it also contains the three factual findings at issue here. A finding of fact that is mislabeled as a conclusion of law is reviewed as a finding of fact. State v. Ross, 141 Wn.2d 304, 309, 4 P.3d 130 (2000).

citizens that felt the need to report alleged narcotics activity (CP 35), there is nothing in the affidavit establishing Barrowman's belief was predicated upon any statement made by the informants. Thus, Barrowman's statement amounts to nothing more than a generalized recitation that the informants were acting out of a sense of civic duty, which is not sufficient to establish reliability. See, Ibarra, 61 Wn. App. at 701. (affiant's "sparse recitation that [the informant] is acting out of sense of civic duty" is not indicative of reliability).

The unsupported findings noted above were central to the trial court's determination that the veracity prong had been met. The trial court explained its veracity determination was based on the reasoning in Atchley. CP 47. In Atchley, the informant's credibility was established through the following facts: (1) the informant provided name and contact information to police; (2) the informant received no compensation or reward; (3) the officer conducted a criminal background check<sup>4</sup> on the informant which revealed no reason to suspect falsehood; and (4) the informant said his reason for coming forward was to assist law enforcement in

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<sup>4</sup> The affiant here never attested to conducting a background check on the informants. CP 35.

ridding the community of suspected drug dealers. Atchley 142 Wn. App. at 162-63.

Although the trial court's findings closely track those in Atchley, there is one big difference. The facts in Atchley were found within the four corners of the affidavit. That is not so here.

Looking only at the assertions found in the affidavit, the affidavit contains only a vague assertion that the informants are concerned citizens who felt the need to report drug offenses and were not involved in criminal activity. There is no assertion that the informants provided contact information. The affidavit contains no explanation of either informant's reason for wishing to remain anonymous. Finally, although Barrowman states the informants have no criminal history, there is no evidence he ran a criminal background check to confirm this. Consequently, the informants could have been his only source of that information. This is simply not enough to establish credibility under the veracity prong.

Moreover, the police investigation did not sufficiently corroborate the informant's allegations to make up for the failure to meet the veracity prong. To corroborate, officers must verify more than innocuous details, commonly known or public facts, or predictable events. Atchley, 142 Wn. App. at 163. Barrowman

verified that Whisler and his roommate lived in the home and were seen by the informants. He verified that the house had many windows covered and a sign that stated "Legalize not Penalize" posted. CP 34. He observed several parked vehicles in the driveway. CP 34. However, these are all public facts and therefore do not sufficiently demonstrate reliability.

The only two other potentially corroborating facts established in the affidavit -- Whisler's criminal history and power consumption -- do not sufficiently establish reliability. While Whisler's criminal history theoretically could have been a corroborating factor, State v. Clark, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001), the affidavit did not include the dates of conviction. CP 35. Thus, the magistrate did not have enough information to determine whether the criminal history was so stale as to no longer be a good indicator of Whisler's current conduct. As such, it held little corroborating value.

Likewise, the power consumption records held little corroborating value. Excessive or increased electrical consumption by itself does not constitute probable cause to issue a search warrant. See, Cole, 128 Wn.2d at 291. This is because there are many reasons for excessive energy consumption that do not constitute illegal activity. Id. This is particularly so given the fact

that one may legally grow in their home if they have a medical marijuana permit, as was the case here.

In sum, the affidavit fails to establish the informants' credibility and the police investigation did not provide sufficient corroboration to satisfy the veracity prong of the Aguilar-Spinelli test. Thus, the trial court erred in finding there was probable cause and denying appellant's motion to suppress and dismiss.

II. THE TRIAL COURT FAILED TO RECOGNIZE AND EXERCISE ITS DISCRETION UNDER RCW 9.94A.535(1).

Failure to exercise discretion is an abuse of discretion. Brunson v. Pierce County, 149 Wn. App. 855, 861, 205 P.3d 963 (2009). Trial courts are provided the discretion to consider and mitigate sentences when there are "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. To this end, RCW 9.94A.535(1) provides in relevant part:

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences. ...

Emphasis added. The illustrative examples cited in the statute do not include a mitigating factor the covers the argument raised by the defense. Id.

In considering whether mitigation was appropriate, the trial court was under the mistaken impression that it could not consider mitigating factors that were not expressly listed under RCW 9.94A.535. Consequently, it did not consider the merits of appellant's argument because it did not fit in one of the statutory examples. RP (4-28-11) 56, 63. The trial court's failure to exercise its discretion under RCW 9.94A.535 was an abuse of discretion. Brunson, 149 Wn. App. at 861. As such, this Court should remand for a sentencing hearing so the trial court may give appellant's mitigation argument full consideration.

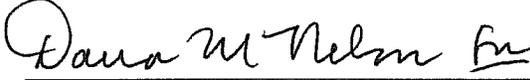
D. CONCLUSION

Appellant respectfully asks this Court to reverse the order denying suppression and dismiss. Alternatively, this Court should remand for a new sentencing hearing.

Dated this 5<sup>th</sup> day of October, 2011.

Respectfully submitted

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FILED

OCT 05 2010

KIMBERLY A. ALLEN  
Grant County Clerk



07-275917

SUPERIOR COURT OF WASHINGTON  
FOR GRANT COUNTY

STATE OF WASHINGTON,	)	
	)	NO. 10-1-00255-6
Plaintiff,	)	
	)	FINDINGS OF FACT AND
v.	)	CONCLUSIONS OF LAW
	)	ON CrR 3.5/3.6 HEARING
DAVID WHISLER,	)	
	)	
Defendant.	)	
	)	

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I. HEARING

- 1.1 Date: September 22, 2010.
- 1.2 Purpose: CrR 3.6 Hearing, before the Honorable Judge John Knodell. Present at the hearing was the Defendant, David Whisler, and the attorneys of record, Ere Puccio for Plaintiff and Dean Terrillion for the Defendant.
- 1.3 Evidence: The Court reviewed the briefs submitted by the State and the Defense as well as the Search Warrant and the Search Warrant Affidavit.

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## II. FINDINGS OF FACT

### THE COURT FINDS AS FOLLOWS:

- 2.1 INET detective Barrowman and Wentworth (detectives) received information from two informants (CS 1 and CS 2) about a suspected marijuana operation in Soap Lake, Washington. After conducting independent investigation, the detectives sought and obtained a search warrant for 1479 Rd. 19 NE, Soap Lake, WA, 98851. The remaining findings of fact were obtained solely through the Search Warrant and the Affidavit supporting the Search Warrant:
- 2.2 CS 1 informed detectives that he/she had personally observed high amounts of short stay vehicular traffic coming and going from 1479 Rd. 19 NE, Soap Lake, WA, a couple times per month.
- 2.3 CS 1 personally observed that it was common to have approximately 10 vehicles a day arrive at the residence, stay for just a few minutes and depart. CS 1 reported that he/she had seen this happen on a number of occasions. CS 1 informed police that the two males at the residence were known as "Monte" and "Wiz". CS 1 described the individuals.
- 2.4 Detectives independently confirmed the true names of the individuals living at the residence were Monte Haughey and David Whisler. Detectives showed pictures of the individuals to CS 1 who positively identified them.
- 2.5 CS 1 described the residence, including a sign in one of the windows stating "legalize don't penalize."
- 2.6 CS 2 informed detectives that he/she had personally seen several marijuana plants being removed from the residence. CS 2 went into detail about the size of the plants, the containers they ~~wee~~ <sup>were</sup> in, and the appearance of the leaves.
- 2.7 In addition to determining the residence in question was occupied by the two individuals identified by CS 1, detectives also made additional observations. Detectives observed the house was consistent with the description they received from the informants, including the marijuana sign in the window.
- 2.8 Detectives also acquired electricity consumption records from the Grant County PUD. The information indicated that the consumption rate of energy was in some cases 5 times higher than that drawn from a comparable residence (which was approximately 300 square feet larger).

- 2.9 Detectives also obtained the criminal history of both Haughey and Whisler. Whisler had 6 felony convictions including a prior conviction for manufacturing marijuana and misdemeanor drug convictions (including marijuana possession).
- 2.10 The Affidavit states that both CS 1 and CS 2 are familiar with the look of marijuana and marijuana plants. Both informants are members of the community and have no known criminal history. Detectives reported that the informants appear to have nothing to gain other than their concern for the community and the need to report narcotics activity. They also made their observations under circumstances involving no criminal activity on their part.
- 2.11 The informants were known to detectives and were willing to disclose their identities to the magistrate.
- 2.12 The Search Warrant was limited to items relating to the manufacturing and/or sale of controlled substances.

### III. CONCLUSIONS OF LAW

- 3.1 The information contained in the Affidavit satisfies the "basis of knowledge" prong of the *Aguilar-Spinelli* test. *See State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984). The informants are members of the community who saw and reported from first hand knowledge. Additionally, detectives were able to confirm the majority of what the informants provided.
- 3.2 The informants should be considered private citizens, who's identity was known to police but not to the magistrate.
- 3.3 In conformity with the reasoning of *State v. Atchley*, 142 Wn. App. 147, 173 P.3d 323 (2007) the "veracity" prong of the *Aguilar-Spinelli* test was also met. The informants provided their names and contact information to detectives. They received no compensation. They have no known criminal history. They also stated their reasons for coming forward was because they were concerned members of the community and felt it was their duty to report drug crimes. Finally, detectives were able to confirm much of what the informants reported.
- 3.4 The issuing magistrate did not abuse his discretion in issuing the Search Warrant. The Search Warrant is supported by probable cause.
- 3.5 The Search Warrant was not overly broad and appropriately limited itself to items associated with the suspected crime of the manufacturing and/or sale of controlled substances.

IV. ORDER

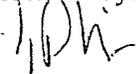
On the basis of the foregoing findings and conclusions, IT IS HEREBY ORDERED that:

- 4.1 The evidence seized pursuant to the Search Warrant shall not be suppressed and shall be admissible at trial.

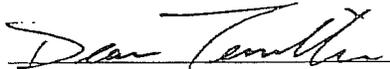
DATED: <sup>OCA</sup> September 5, 2010.

  
Superior Court Judge

Presented by:

  
\_\_\_\_\_  
TYSON R. HILL, WSBA# 40685  
Deputy Prosecuting Attorney

Approved as to form:

  
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State v. David Whisler

No. 29821-3-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 5<sup>th</sup> day of October, 2011, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

D Angus Lee  
Grant County Prosecuting Attorney  
[dlee@co.grant.wa.us](mailto:dlee@co.grant.wa.us)  
[kburns@co.grant.wa.us](mailto:kburns@co.grant.wa.us)

**Signed** in Seattle, Washington this 5<sup>th</sup> day of October 2011

X Patrick Mayovsky