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Court of Appeals
Division III
State of Washington

No. 30089-7-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

NIBARDO ANDRADE MENDOZA,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Ruth E. Reukauf, Suppression Hearing
Honorable F. James Gavin, Trial

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

Appellant’s Issue 1. Both parts of the Strickland¹ test for ineffective assistance of counsel are met by defense counsel’s failure to challenge lack of probable cause to issue the search warrant for Andrade’s home and business addresses because the supporting affidavit contained no facts to indicate that criminal activity was connected with these addresses.

The State answers:

Mr. Andrade has not met his burden of showing that his counsel was ineffective. Counsel challenged the search of the Carvo Road address, as well as the affidavit for the search warrant to search his home and business addresses.

Brief of Respondent (“BOR”) 1–2. The State’s response disregards the issue on appeal – defense counsel failed to challenge lack of probable cause to issue the second warrant for search of Mr. Andrade’s home and business addresses.

A fair reading of the record reveals that defense counsel moved only to suppress evidence obtained from the first search of the Carvo Road greenhouse and surrounding structures. The State counters that defense

¹ Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

counsel “aggressively challenged the search at [Carvo Road], as well as the affidavit for the search warrant for the home and business addresses.” BOR 4–5. While counsel did reference the search warrant for the home and business addresses, he did so only on the basis that there were alleged material misrepresentations therein which did not support probable cause to search the Carvo Road property.

The record supports the conclusion that counsel was focused on suppressing all evidence originating from the Carvo Road search. Defense counsel’s supplemental motion and memorandum in support of motion to suppress listed the following alleged “material omission[s] and misrepresentation[s]”:

- Detective Tucker’s [affiant] statements regarding Fire Fighter Stilley:
 - Fire Fighter Stilley stated that they went to 231 Carvo Road in an attempt to locate a water source to resupply their apparatus
 - On entering the gravel driveway at 231 Carvo Road, Fire Fighter Stilley stated that he observed marijuana plants inside a greenhouse.
 - The visible windows to the structure ha[ve] black plastic concealing the contents.
- [Affiant’s] statements regarding neighbor John Ferry:
 - John Ferry saw ANDRADE approximately one week ago from the current date of July 18, 2010 at the 231 Carvo Road [address] tending a waterline at the property.
- [Affiant’s] misleading statements regarding necessity to enter property without a warrant
- [Affiant] makes misleading or untruthful statements regarding the strong odor of marijuana

CP 35–43. The court concluded the search warrant for the home and business addresses was valid because misstatements by Detective Tucker “concerning statements by a neighbor that the defendant was seen by him on the property and that firefighters entered the property looking for water were not material misrepresentation[s] impacting the validity of the warrant.” CP 254. The court denied the motion to suppress concluding there was probable cause for a Judge to issue the telephonic search warrant for the Carvo Road property. CP 254.

The issue on appeal is instead whether defense counsel should have pursued a suppression motion asserting lack of probable cause to issue the second search warrant for Mr. Andrade’s home and business addresses. Counsel failed to challenge the lack of probable cause to issue the subsequent search warrant for Mr. Andrade’s home and business addresses resulting in evidence which—had it been suppressed—would leave insufficient evidence of accomplice liability. *See* Brief of Appellant 15–23.

The State responds that failure to pursue suppression of evidence obtained from execution of the second warrant—search of the home and business addresses—was a strategic move, stating that if defense counsel had been successful in his motion to suppress evidence from the execution

of the first warrant, then “all of the warrants would necessarily have been invalid. Failing that, counsel pursued a strategy of challenging both warrants, making a detailed, point-by-point argument that several statements contained in the written affidavit were no[t] supported by the facts.” BOR 5–6.

First, undersigned counsel sees no competent strategy or logic in attacking a first search (Carvo Road premises) based on information contained in a subsequent affidavit used to secure a warrant which authorizes a second and third search (home and business addresses). Moreover, defense counsel’s “detailed, point-by point-argument” regarding material misrepresentations was aimed only at attacking the first search.

More importantly and as conceded by the State, its case against Mr. Andrade was overwhelmingly based on circumstantial evidence. 3 RP 283. There was no evidence of principal liability. The only issue was whether Mr. Andrade was liable as an accomplice to the grow operation at Carvo Road. Absent the evidence gathered under the challenged search warrants for the home and business addresses, the State had little basis to support its theory of accomplice liability. Instead, the fruits of the illegal

search provided evidence essential—albeit circumstantial—to support Andrade’s convictions. This included numerous yearly leases, rent payments in cash, no financial records, a nephew’s statement suggesting Andrade may have known of the grow operation for a few years, some sort of reference to future renters’ payment of a bonus based on production located in a scribbled draft of a lease agreement, etc. There was no conceivable advantage strategically in not moving to suppress all evidence recovered in these searches for which there was no probable cause. The presumption of effectiveness fail if there is no legitimate tactical explanation for counsel’s actions. State v. Aho, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999). Therefore, counsel’s failure to move to suppress on this basis meets the first prong of the *Strickland* test as being clearly deficient.

The second *Strickland* prong is also met. Without the information obtained in the illegal search, the remaining evidence was insufficient to support conviction of Andrade as a principal or an accomplice to manufacture and possession of marijuana. There was no direct evidence that Andrade participated in the grow operation or aided someone else in growing marijuana. After excision of the fruits of the illegal search, the only remaining circumstantial evidence consisted of Andrade’s name as

property owner and blue compost-like barrels found at the three locations. There is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Counsel was deficient in not pursuing a suppression motion based on lack of probable cause to support issuance of the second search warrant and Mr. Andrade was prejudiced by the deficient performance thereby denying him a fair trial.

State v. Thein, 128 Wn.2d 133, 977 P.2d 582 (1999) is instructive. Police had probable cause to believe that the target, Thein, was involved in illegal activity because informants told police that he was a drug dealer. In Thein, the court considered whether evidence obtained in the search of a South Brandon household belonging to a third party amounted to probable cause to search Thein's Austin Street residence. The court determined the only evidence linked to the Austin Street residence was innocuous: a box of nails addressed to Thein and registration in Thein's name of a black car similar to a car seen at the South Brandon address. "[E]ven assuming Thein was [the South Brandon resident's] 'supplier,' none of the evidence found at South Brandon, nor any of the information supplied by the informants, linked this activity to the Austin Street residence." Thein, 128 Wn.2d at 150. There was "no independent evidence linking Thein's

supposed drug dealing to his Austin Street residence (e.g., no observations of him leaving Austin Street with packages, no sealed windows, no power records, no other suspicious activity at Austin Street).” Id. Finally, the court found it unreasonable “to infer evidence is likely to be found in a certain location simply because police do not know where else to look for it”, observing that the search warrant affidavit contained evidence that Thein owned at least one more house and Thein's relative "Dave" was also believed to have supplied drugs to the South Brandon resident making it just as probable that "Dave" would be making the next delivery as it was that Thein would be. Thein, 128 Wn.2d at 150–51.

At issue in Thein was whether officers' general statements in a search warrant regarding the common habits of drug dealers are *alone* sufficient to establish probable cause in view of the above-described innocuous evidence and unreasonable inferences. The court said no. Thein, 128 Wn.2d at 151.

The facts of this case are indistinguishable from those in Thein, and do not support probable cause to support the issuance of search warrants for Mr. Andrade’s residence and business addresses. *See* Brief of Appellant 21–23.

The State asserts the following facts do support probable cause:

- (1) a tax information document addressed to Mr. Andrade at 231 Carvo Road and a nursery catalogue addressed to “Nibardo Andrade or Current Occupant, FloraCare, 231 Carvo Road”, both found at the Carver Road location;
- (2) neighbors said Mr. Andrade had operated a landscaping business at 231 Carvo Road and had been seen there;
- (3) Mr. Andrade had a city-issued license for a business called “FloraCare Nursery” showing the business address;
- (4) Mr. Andrade resides at his residence; and
- (5) Based upon his training and experience Detective Tucker knew that drug traffickers maintain records related to the distribution of controlled substances and that they “are maintained where the drug traffickers have ready access to them”.

BOR 6–7. These facts, according to the State, “provided a sufficient nexus between the location [of the] grow operation and the other two properties, as there was specific information indicating that the business was run by Andrade from elsewhere, including, based on the detective’s training and experience, Andrade’s residence.” BOR 7.

A finding of probable cause must be grounded in fact. Thein, 128 Wn.2d at 151 at 147. “Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. See, e.g., ... State v. Patterson, 83 Wn.2d 49, 52, 61, 515 P.2d 496 (1973)

(record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant).” Thein, 128 Wn.2d at 147 (some citations omitted).

The State’s “facts” are innocuous and the inferences it urges from those facts are unreasonable. A tax document and a catalogue imprinted with “Nibardo Andrade or Current Occupant, Flora Care”, sent to an address where neighbors saw Mr. Andrade operate a plant nursery in the past, does not establish current criminal activity at the Carvo Road property, much less at either Mr. Andrade’s home or current business addresses. Holding a business license in the name FloraCare and using his current business address likewise fails to establish any drug activity at Mr. Andrade’s home or the business address. The Thein Court rejected the notion that belief that a suspect is *probably* involved in drug dealing is sufficient to establish a nexus between the items to be seized (drug-related items) and the place to be searched (Mr. Andrade’s house and his business addresses). Thein, 128 Wn.2d at 141, 147. As in Thein, there were no observations of Mr. Andrade leaving his home or business addresses with packages or drug manufacturing items, no sealed windows, no power records and no other suspicious activity at these places. Thein, 128 Wn.2d at 150. In view of the above-described innocuous evidence and

unreasonable inferences, Detective Tucker's general statements in the search warrant affidavit regarding the common habits of drug dealers are insufficient to establish probable cause. Thein, 128 Wn.2d at 151.

Based on the facts and all reasonable inferences made thereon, the magistrate abused his discretion in finding probable cause to issue a search warrant for 2603 West King Court (home) and 908 North 9th Avenue (business). Had a motion been brought challenging probable cause, the search warrant would have been found to be deficient and all evidence flowing from its execution would have been suppressed. Without this evidence the State would not have a case, and the conviction should be reversed.

2. Appellant accepts the State's concession of error as to the remaining issues.

a. Exceptional sentence. The State concedes error as to the aggravated sentence imposed on Count 1. The State agrees that the exceptional sentence should be reversed and Mr. Andrade Mendoza be resentenced within the standard range on Count 1. BOR 8–9; *see* Brief of Appellant at Assignments of Error 3 and 4 (p. 1) and Issue 2 (pp. 26–33). Appellant accepts the concession.

b. Legal financial obligations. The State concedes that the court's finding that Mr. Andrade Mendoza had the current or future ability to pay legal financial obligations is not supported in the record and is therefore clearly erroneous. BOR 9–10; *see* Brief of Appellant at Assignment of Error 6 (p. 1) and Issue 4 (pp. 42–43). Appellant accepts the concession.

The remedy is remand to strike the unsupported finding. State v. Bertrand, 165 Wn. App. 393, 405, 267 P.3d 511, 517 (2011). This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); State v. Schelin, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). Counsel is aware of no authority holding that it is appropriate to send a finding without support in the record back to a trial court for purposes of “fixing” it with the taking of new evidence. *Compare* State v. Souza (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn.

App. 534, 541, 805 P.2d 237, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991) *with Lohr* (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

B. CONCLUSION

For the reasons stated here and in the initial brief of appellant, this Court should remand the matter for reversal and dismissal of the conviction or alternatively, for resentencing to a standard range sentence and to strike the finding as to ability and means to pay legal financial obligations.

Respectfully submitted on November 30, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 30, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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