

FILED

MAY 13, 2014

Court of Appeals
Division III
State of Washington

30593-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNIE LLOYD TRAUB, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF

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INDEX

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR1

B. SUPPLEMENTAL STATEMENT OF THE CASE.....2

C. SUPPLEMENTAL ARGUMENT3

 1. MATERIAL INFORMATION WAS DELIBERATELY
 OR RECKLESSLY EXCLUDED FROM DETECTIVE
 TUCKER’S AFFIDAVIT FOR A SEARCH WARRANT,
 AND ADDING THIS OMITTED INFORMATION
 VITIATES PROBABLE CAUSE TO SEARCH THE
 ENTIRE RESIDENCE3

 2. IN THE ALTERNATIVE, THERE WAS NO PROBABLE
 CAUSE FOR THE ISSUANCE OF A SEARCH
 WARRANT FOR THE ENTIRE MULTIPLE UNIT
 RESIDENCE.....5

D. CONCLUSION.....5

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. COPELAND, 130 Wn.2d 244,
922 P.2d 1304 (1996)..... 3, 4

STATE V. NETH, 165 Wn.2d 177,
196 P.3d 658 (2008)..... 4

STATE V. OLLIVIER, 178 Wn.2d 813,
312 P.3d 1 (2013)..... 3, 4

STATE V. WOLKEN, 103 Wn.2d 823,
700 P.2d 319 (1985)..... 4

SUPREME COURT CASES

FRANKS V. DELAWARE, 438 U.S. 154,
98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)..... 2, 3

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in entering the following portions of Finding of Fact 2:

[Deputy Stearley] didn't describe it as an apartment. Deputy Stearley's use of the term "apartment" is a factor to be considered but it is not a legal conclusion.

(CP 60).

2. The trial court erred in entering Conclusion of Law 2:

The Defendant has not made a substantial preliminary showing that the affidavit includes any intentional, deliberate or reckless inaccuracies or omissions.

(CP 61).

3. The trial court erred in entering Conclusion of Law 3:

The Court finds that Detective Tucker's affidavit did not include factual inaccuracies or omissions that were material or made in reckless disregard for the truth.

(CP 61).

4. The trial court erred in entering Conclusion of Law 4:

Even if the information about the reference to an apartment had been included in the search warrant affidavit, Detective Tucker rebutted any concern that it was a multi-unit dwelling with his independent research that he conducted. Any omission was not material to a determination of probable cause.

(CP 61).

5. The trial court erred in entering Conclusion of Law 5:

The fact that Johnnie Traub let the officers in the basement is consistent with someone who viewed the entire home as a single unit. The evidence indicated that Mr. Traub felt he had a right to open the door and he did. This indicates that he had a right to be in the entire home, including the upstairs and the basement.

(CP 61).

6. The trial court erred in entering Conclusion of Law 6:

Based on the information available to Detective Tucker at the time he prepared his affidavit in support of the search warrant, no Franks hearing is warranted in this case.

(CP 61).

B. SUPPLEMENTAL STATEMENT OF THE CASE

On December 3, 2013, in an unpublished opinion, this Court remanded this case to the trial court for the trial judge's determination of the matters required by *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

On remand, the trial court heard argument on the *Franks* issue, and did not take additional evidence. (Supp. RP¹ 17-42). The trial court concluded that the fact that the affiant, Detective Robert Tucker, did not reveal that the responding officer, Deputy Christopher Stearley, called the basement of the residence an

¹ References to "Supp. RP" refers to the single transcript volume containing the hearings held on remand, on March 11, 13, and 17, 2014.

apartment was an omission from the affidavit, but it was not a material omission. (CP 61; Supp. RP 40-41). The trial court concluded that a *Franks* hearing was not warranted in this case. (CP 61; Supp. RP 41). The trial court entered findings of fact and conclusions of law regarding the *Franks* challenge. (CP 60-62). Mr. Traub objected to these findings and conclusions. (Supp. RP 52-53).

C. SUPPLEMENTAL ARGUMENT

1. MATERIAL INFORMATION WAS DELIBERATELY OR RECKLESSLY EXCLUDED FROM DETECTIVE TUCKER'S AFFIDAVIT FOR A SEARCH WARRANT, AND ADDING THIS OMITTED INFORMATION VITIATES PROBABLE CAUSE TO SEARCH THE ENTIRE RESIDENCE.

An omission from a search warrant affidavit 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). “A search warrant may be invalidated . . . if there were deliberate or reckless omissions of material information from the warrant.” *State v. Ollivier*, 178 Wn.2d 813, 847, 312 P.3d 1 (2013); *see also Franks v. Delaware*, 438 U.S. 154. “If the defendant makes a substantial preliminary showing of such a[n] . . . omission, the defendant is entitled to a *Franks* evidentiary hearing.” *Id.* If the defendant establishes the allegations at the *Franks* hearing, “the omitted material must be included and the sufficiency of the affidavit then assessed as so modified.” *Id.* If the modified affidavit fails to

show probable cause, the warrant will be held void and the evidence found pursuant to the search warrant must be suppressed. *Id.*

The issuance of a warrant and the denial of a *Franks* hearing are reviewed for abuse of discretion. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (issuance of a warrant); *State v. Wolken*, 103 Wn.2d 823, 829-30, 700 P.2d 319 (1985) (denial of a *Franks* hearing). The assessment of probable cause is a legal conclusion subject to de novo review. *Neth*, 165 Wn.2d at 182.

Here, the trial court erred in concluding that Mr. Traub failed to make a preliminary showing of a deliberate or reckless omission of material information for the search warrant, and therefore, that a *Franks* hearing was not warranted. (CP 61). The trial court also erred in concluding that any omission in the search warrant was not material to a determination of probable cause. (CP 61).

Material information was deliberately or recklessly excluded from Detective Tucker's affidavit for a search warrant. *See Copeland*, 130 Wn.2d at 277; *Ollivier*, 178 Wn.2d at 847. The omitted material information was (1) that the basement of the residence was an apartment, and (2) that in the order for law enforcement to access this apartment, the basement entry door had to be opened with a screwdriver by the homeowner. (CP 23-24). Detective Tucker wrote the affidavit for the search warrant based on speaking to Deputy Stearley and reviewing his police report. (RP 21-22, 37-39, 58). Deputy Stearley's police report describes the basement of the residence as an apartment, and details how

entry could only be gained by the homeowner opening the door with a screwdriver. (CP 23-24).

Adding the material omitted information to the search warrant affidavit vitiates probable cause to search the entire residence. *See Ollivier*, 178 Wn.2d at 847. When the basement of the residence is described as an apartment, it shows that this is a multiple unit residence, and that the alleged criminal activity is limited to this basement unit. Also, the fact that the basement entry door was secure, and had to be opened by the homeowner using a screwdriver, is inconsistent with the home being a single family residence.

2. IN THE ALTERNATIVE, THERE WAS NO PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT FOR THE ENTIRE MULTIPLE UNIT RESIDENCE.

Should this Court agree with the trial court that a *Franks* hearing was not warranted, or that any omission in the search warrant was not material to a determination of probable cause, there was nevertheless no probable cause for the issuance of a search warrant for the entire residence. This argument is set forth in Mr. Traub's opening brief.

D. CONCLUSION

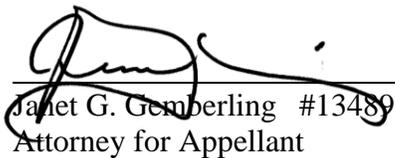
Material information was deliberately or recklessly excluded from Detective Tucker's affidavit for a search warrant. Adding this omitted

information vitiates probable cause to search the entire residence. In the alternative, as argued in Mr. Traub's opening brief, where the affidavit in support of the search warrant made no mention of the upstairs unit in a multiple unit residence, there was no probable cause for the issuance of a search warrant for the entire residence. The trial court should have suppressed the methamphetamine found in Mr. Traub's bedroom. Mr. Traub's conviction for possession of a controlled substance should be dismissed.

Dated this 13th day of May, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) No. 30593-7-III
)
 vs.) CERTIFICATE
) OF MAILING
)
 JOHNNIE LLOYD TRAUB,)
)
 Appellant.)

I certify under penalty of perjury under the laws of the State of Washington that on May 13, 2014, I served a copy of the Appellant's Supplemental Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on May 13, 2014, I mailed a copy of the Appellant's Supplemental Brief in this matter to:

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