

FILED

AUG 20, 2014

Court of Appeals
Division III
State of Washington

NO. 30593-7-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHNNIE LLOYD TRAUB,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant's makes the following assignments of error in his supplemental brief;

1. Material information was deliberately or recklessly excluded from Det. Tucker's affidavit for a search warrant, and adding this omitted information vitiates probably cause to search the entire residence.
2. Alternatively, there was no probable cause for the issuance of a search warrant for the entire multiple unit residence.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no deliberate or reckless actions on the part of Det. Tucker. The trial court on remand once again properly denied the motion to suppress.
2. The court erred when it imposed this condition on Appellant based on its belief that the imposition was mandatory.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in the original briefing supplied by both parties therefore, pursuant to RAP 10.3(b), the State shall not set forth an additional facts section. The State shall refer to the record as needed. There were additional Clerk's papers and verbatim report of proceedings filed with this court after remand. The State shall designate these supplemental documents as SRP and SCP.

III. ARGUMENT.

At the remand hearing the trial court was presented with proposed findings and conclusions by both parties, the court ultimately entered its own findings and conclusions. (CP 60-62) The Appellant has challenged “portions” of a Findings of Fact set forth in the findings and conclusions entered after the remand. He has challenged some of the Conclusions of Law. Those unchallenged findings are covered by the analysis set out in State v. Handburgh, 61 Wn. App. 763, 766, 812 P.2d 131 (1991); These findings were unassailed by either party on appeal and, consequently, they are verities on appeal. Metropolitan Park Dist. v. Griffith, 106 Wn.2d 425, 433, 723 P.2d 1093 (1986).

Here once again the courts findings while complete should be reviewed while taking into consideration the trial court's oral findings to aid review. State v. Robertson, 88 Wash.App. 836, 843, 947 P.2d 765 (1997), review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998). The oral ruling in this case covers approximately five pages, and is contained in Appendix A. SRP 37-42, 48-9 State v. Atchley, 142 Wn.App. 147, 173 P.3d 323 (Wn.App. Div. 3 2007) “The trial court's findings of fact are reviewed under a clearly erroneous standard, and will be reversed only if not supported by substantial evidence. State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991). Substantial evidence exists only if there is a

sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing State v. Halstien, 122 Wn.2d 109, 129, 857 P.2d 270 (1993)). Great deference is given to the trial court's factual findings. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

Conversely, this court reviews challenges to the trial court's conclusions of law de novo.”

It is noteworthy that at the time of its initial ruling the court made statements to the effect that the decision was “razor thin” but the next time the parties were before the court the court indicted;

THE COURT: Let me -- let me split those apart because I also reflected over the weekend and I think I used the term razor thin and I think sometimes I say things that perhaps have more application to or are sympathetic to Mr. Traub's position.

I will tell you, I've reflected and -- both personally and with others, that this is not so razor thin. I'm very comfortable with the decision. That doesn't mean I'm any less sensitive to Mr. Traub and -- and his concerns. I -- I understand he may have some confusion about the circumstances that he created or assisted in creating but I -- I'm not, in any respect, uncomfortable with the decision and -- and would, I guess, withdraw that comment that I said it was razor thin. SRP 53-4

The warrant was challenged pursuant to Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). (*Franks*) This is often referred to as a “*Franks* hearing.” To attack a facially sufficient affidavit,

it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause. The same basic standard also applies when affidavits omit material facts. An affidavit will be vitiated only if the defendant can show that the police omitted facts with the intent to make, or in reckless disregard of whether the omission made, the affidavit misleading and that the affidavit, as supplemented by the omitted information, would not have been sufficient to support a finding of probable cause. United States v. Sherrell, 979 F.2d 1315, 1318 (8th Cir.1992); State v. Garrison, 118 Wn.2d 870, 872-873, 827 P.2d 1388, 1390 (1992).

For the second time in this case the same court has determined that there was no need for a *Franks* hearing to determine if there was probable cause in the search warrant. In this instance the court made very specific and findings reflected both in the extensive oral ruling and the findings and conclusions. The court stated in its oral ruling;

...I -- and Mr. Case, as the transcript reveals, was very careful and assertive about limiting the inquiry into what Officer Tucker knew at the time he made the application as opposed to what occurred after the entry and that's what we're examining now.

Number one, is it a material omission that he did not reveal that Stearley, Officer Stearley had called it an apartment; that he had checked with the GIS and could not find a -- that it was a multi-unit dwelling; that he had -- it was his -- it was a

single family residence in which two people lived. It's an omission. I can't -- I -- I'm not going to say that it's a material omission and the reason is is -- I think if I include it I still end up at the same place.

Officer Stearley referenced an apartment. Officer Tucker responds to that reference and I think even if this information is included he's effectively rebutted any concern that it wasn't an apartment and that it was, in fact, a single family residence in which multiple people lived.

I can't find that there's certainly any intentional conduct or intentionality about Officer Tucker's conduct that he was intending to mislead or to recklessly assert a truth that wasn't a fact. There is no question there was a certain limit on his information but I think what he had was sufficient to establish that it was not a material omission and in fact had it been added in it would -- and the affidavit had been reformed I've -- I would have found that it was -- based on the evidence that was presented I would have found that it was valid in any event. So I don't believe a *Franks* hearing was appropriate and the motion would be denied. SRP 39-40

The court followed up with the written findings and conclusions, specifically conclusions 2-4 which specifically address the court's belief that Appellant "has not made a substantial preliminary showing that the affidavit includes any intentional, deliberated or reckless inaccuracies or omissions. That "Detective Tucker's affidavit did not include factual inaccuracies or omissions that were material or made in reckless disregard for the truth, and that "Even if the information about the reference to an apartment had been included in the search warrant affidavit, Detective Tucker rebutted any concern it was a multi-unit dwelling with his

independent research that he conducted. Any omission was not material to the determination of probable cause.” SCP 61

There was nothing at the initial hearing before this same judge that would indicate that the officers, specifically Det. Tucker did anything that was in purposeful act which withheld information that would have been crucial to the determination of probable cause. The trial court also found that the actions of the detective such that if the information was included it would have made a difference in the scope of the search warrant that was issued.

State v. Gore, 143 Wn.2d 288, 296-7, 21 P.3d 262 (2001);

A search warrant may be issued only upon a determination of probable cause, which exists when an affidavit supporting the search warrant sets forth sufficient facts to lead a reasonable person to conclude that the defendant probably is involved in criminal activity. In re Personal Restraint of Yim, 139 Wn.2d 581, 594, 989 P.2d 512 (1999); State v. Cord, 103 Wn.2d 361, 365-66, 693 P.2d 81 (1985). If a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed.2d 667 (1978). Allegations of negligence or innocent mistake are insufficient. Franks, 438 U.S. at 171; State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992). If the defendant makes this preliminary showing, and at the hearing

establishes the allegations by a preponderance of the evidence, the material misrepresentation will be stricken from the affidavit and a determination made whether as modified the affidavit supports a finding of probable cause. Cord, 103 Wn.2d at 367. If the affidavit fails to support probable cause, the warrant will be held void and evidence obtained pursuant to it excluded. *Id.*

The *Franks* test for material misrepresentations applies to allegations of material omissions. Cord, 103 Wn.2d at 367; Garrison, 118 Wn.2d at 873. If the defendant makes the required preliminary showing of intentional material omissions or material omissions made with reckless disregard for the truth, and establishes the allegations at a hearing by a preponderance of the evidence, the omitted material is included in the affidavit to make the determination whether the affidavit supports a finding of probable cause. Garrison, 118 Wn.2d at 873. If, as modified, the affidavit does not support a probable cause finding, the search warrant is invalid.

Under *Franks*, an affiant's omission or false statement may invalidate a search warrant if the omission or false statement was material and made either intentionally or with reckless disregard for the truth. Franks, 438 U.S. at 155-56. A statement or omission is material if it is necessary for a probable cause finding. State v. Gentry, 125 Wn.2d 570, 604, 888 P.2d 1105 (1995) (citing State v. Garrison, 118 Wn.2d 870, 874, 827 P.2d 1388 (1992)). Probable cause exists if the supporting affidavit recites objective facts and circumstances which, if believed, lead a neutral and detached person to conclude that more probably than not, evidence of a crime will be found if a search takes place. In re Det. of Petersen, 145

Wn.2d 789, 797, 42 P.3d 952 (2002). A statement is reckless if the affiant "entertained serious doubts as to the truth' of facts or statements in the affidavit.' State v. O'Connor, 39 Wn. App. 113, 117, 692 P.2d 208 (1984) (quoting St. Amant v. Thompson, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)). These doubts can be shown by (1) actual deliberation by the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports. O'Connor, 39 Wn. App. at 117. But an affiant's negligent or innocent mistakes are insufficient. Garrison, 118 Wn.2d at 872.

The trial court looked at this issue very closely and even made findings that if Appellant had made his preliminary showing of a *Franks* violation that the trial court, in this instance acting as a reviewing court, in this factual setting added in the alleged false representations and include any omissions, the court stated that even with these edits, the affidavit was still sufficient to establish probable cause and that probable cause would have been for the entire residence not limited to the "apartment." On that basis the court denied the motion to suppress for a second time. See, Garrison, 118 Wn.2d at 873. (CP 60-62, SRP 37-4))

This court must give considerable deference to the trial court's findings on whether the omissions or misstatements were intentional or

made with reckless disregard for the truth. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

The second review and the actions of the trial court were discretionary in nature. The court received briefing from all parties at the initial hearing, heard argument at both occasions and the testimony from two officers and the defendant before making the decisions on both occasions. Based on that information the court made a discretionary decision with regard the suppression of the search in this case. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) “Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” (Citations omitted.)

The testimony, which the court pointed out in the first hearing, was as follows:

But there’s nothing that would alert the officers that they had a separate residence that they were looking at. And again, I think it turns on whether or not you’ve got a roommate versus a tenant

arrangement. I think it -- it was reasonable for the officers to go in. I think they would have naturally thought this was a roommate situation and that frankly Mr. Ross had the right to go up and down the stairs and use the entire facility. There's nothing that would indicate that use of the premises was restricted in any way.

This was reiterated during the remand hearing and the findings and conclusions entered afterwards.

Once again, State v. Alexander, 41 Wn. App. 152, 704 P.2d 618 (1985) cited by both parties is on point in this case. "However, in upholding such searches, courts have required that, upon discovery of the multiple occupancy, reasonable efforts be made to limit the search to the subunit most likely connected to the criminal activity identified in the warrant. See, e.g., United States v. Davis, 557 F.2d 1239, 1248 (8th Cir. 1977); People v. Lucero, 174 Colo. 278, 483 P.2d 968, 970 (1971)." Alexander at 154. See also, State v. Anderson, 84 Hawai'i 462, 935 P.2d 1007 (Hawai'i 1997) which cites Alexander.

The search warrant met the standard set forth in the cases cited at the trial court as well as here. There was probable cause to search this home. "[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

IV. CONCLUSION

The facts of this case and the law clearly supported the actions of the trial court on both occasions were the trial court reviewed this case, the trial court properly denied the motion to suppress. This court should deny this appeal. There was no basis for a Franks hearing to be conducted and there was probable cause to support the issuance of the search warrant as determined by the trial court on two occasions.

Respectfully submitted this 20th day of August 2014

s/ David B. Trefry
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APPENDIX A

THE COURT: Well, I -- I'll tell you, it's a -- it's a tough decision because, well for obvious reasons perhaps; but I guess as a basic grass roots level I -- I -- I certainly wouldn't want to be the victim of having my house searched because of a -- an error. And I -- that's not the appropriate way to analyze it necessarily is to personalize it; but I -- I've looked at this that way, in part, to make sure that I'm exploring both sides.

There is -- there are some clear ambiguities here. Obviously there's some presumption -- there's a presumption that the -- the -- the affidavit in support was valid.

The -- the issue, and I think both counsel addressed it, examines what in this case Officer Tucker should have known or did know about the living situation. As Mr. Case has pointed out the -- there is no issue with regard to the entry into the basement. The question -- but that presumes a fixed line between the upstairs and the downstairs. And the issue really is whether or not they had a right to walk through the front door as opposed to the basement.

So what did Tucker know or what should he have known? And the -- the Court of Appeals and -- and --and Mr. Case have -- have referenced the repeated references by Officer Stearley to an apartment.

In my original decision I -- I thought I addressed that clearly. I didn't -- he called it an apartment in his report. Does that make his statement a -- I guess a conclusive presumption that it is, in fact, an apartment? Or is it simply a factor that would be examined?

What I was left with was there is a house at 3291 Kays Road in Wapato. Both Mr. Traub, Johnnie Traub and Robert Ross live there. It

appears that Amber Ross had no authority to live there, so it -- but the -- she's kind the tangential character in this drama in any event.

But it's really Mr. Traub and Mr. Ross. We know they both live there. They live at the same address. We know that Stearley has des -- just called it an apartment. I -- I can't say he described it as an apartment, but he called it an apartment. Tucker -- Officer Tucker goes to the GIS website to determine - - to -- to examine that very issue. And he determines that it is a single family home.

There's nothing that, from the outside, it would give one the understanding that it is a multi-unit dwelling. And I know there was a lot of activity after the entry into the home and I -- and Mr. Case, as the transcript reveals, was very careful and assertive about limiting the inquiry into what Officer Tucker knew at the time he made the application as opposed to what occurred after the entry and that's what we're examining now.

Number one, is it a material omission that he did not reveal that Stearley, Officer Stearley had called it an apartment; that he had checked with the GIS and could not find a -- that it was a multi-unit dwelling; that he had -- it was his -- it was a single family residence in which two people lived. It's an omission. I can't -- I -- I'm not going to say that it's a material omission and the reason is is -- I think if I include it I still end up at the same place.

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I can't find that there's certainly any intentional conduct or intentionality about Officer Tucker's conduct that he was intending to

mislead or to recklessly assert a truth that wasn't a fact. There is no question there was a certain limit on his information but I think what he had was sufficient to establish that it was not a material omission and in fact had it been added in it would -- and the affidavit had been reformed I've -- I would have found that it was -- based on the evidence that was presented I would have found that it was valid in any event. So I don't believe a *Franks* hearing was appropriate and the motion would be denied.

Alright. And -- and I guess the other issue that I should address, Rick Traub is listed as the --

MR. TRAUB: [Inaudible on tape -- whispered].

MR. CASE: Okay.

THE COURT: -- Rick Traub is listed as the homeowner under the -- the GIS website but it was clear that he was not there and that it was Johnnie Traub who was the occupant or -- or the -- and asserted as the homeowner in this case. So I don't think Rick Traub changes the outcome.

I -- I think the other part that, and I didn't brief -- comment on this, was I made a -- an issue about it a little bit in the -- my original decision, was that when law enforcement sought to get into the basement area it was Johnnie Traub who let them in. And that conduct would be consistent with somebody who viewed the entire home as a single unit and that he had a right to enter that home.

And I -- and I think clearly, and I think Mr. Case has referenced that -- that -- that if he didn't have a right that it could have been a separate basis for a -- a suppression; but it was clear that he felt he certainly had a right to open that door and he did open it. So for that -- and I do believe that the focus was on -- in Officer Stearley's original contact,

the focus was not on Mr. Ross's right to live there and his status; but on Mrs. Ross and her lack of status.

SRP 37-42

THE COURT: Well, let me just -- so you -- you reflect on it over the weekend Mr. Traub. It was not an easy decision at all and you wouldn't necessarily know this but it was real clear to me how much time your lawyer spent going through this paperwork. In fact, what he submitted this morning was very extensive. And it concerns me a great deal. It --it's kind of a razor thin issue in a lot of ways. And I -- I -- I understand your feelings and I don't know that you're going to help me by what I would -- might call venting.

So give it some thought over the weekend. I --I -- I respect the fact that you're here today. I appreciate deeply what your lawyer put together, because it was very helpful. This is a tough -- it was a tough case and that's why it came back from the Court of Appeals. Anything else?

SRP 48-9

THE COURT: Well, let me just -- so you -- you reflect on it over the weekend Mr. Traub. It was not an easy decision at all and you wouldn't necessarily know this but it was real clear to me how much time your lawyer spent going through this paperwork. In fact, what he submitted this morning was very extensive. And it concerns me a great deal. It --it's kind of a razor thin issue in a lot of ways. And I -- I -- I understand your feelings and I don't know that you're going to help me by what I would -- might call venting.

So give it some thought over the weekend. I --I -- I respect the fact that you're here today. I appreciate deeply what your lawyer put together, because it was very helpful. This is a tough -- it was a tough case and that's why it came back from the Court of Appeals. Anything else?

SRP 53-4

Certificate of Service

I, David B. Trefry state that on August 20, 2014, I emailed, by agreement of the parties a copy of the Respondent's Brief, to Ms. Janet Gemberling, C/O Robert Canwell, at admin@gemberlaw.com and to Johnnie L. Traub, 3291 Kays Rd, Wapato, WA 98951.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of August, 2014 at Spokane, Washington.

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