

FILED
November 27, 2013
Court of Appeals
Division III
State of Washington

NO. 314481-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

RICHARD EDWARD FENTON, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 10-1-01176-9

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

CHRISTOPHER M. HOXIE
BAR NO. 46293
Office id 91004

BRENDAN M. SIEFKEN, Deputy
Prosecuting Attorney
BAR NO. 41219
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT OF FACTS.....1

II. ARGUMENT.....3

1. THE AFFIDAVIT PROVIDED PROBABLE CAUSE FOR THE SEARCH WARRANT......3

A. BASIS OF KNOWLEDGE.4

B. VERACITY5

2. CONCESSIONS.....9

III. CONCLUSION10

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>State v. Bauer</i> , 98 Wn. App. 870, 991 P.2d 668 (2000)	4
<i>State v. Castro</i> , 39 Wn. App. 229, 692 P.2d 890 (1984)	8, 9
<i>State v. Chenoweth</i> , 160 Wn.2d 454, 158 P.3d 595 (2007)	3
<i>State v. Fisher</i> , 96 Wn.2d 962, 639 P.2d 743 (1982).....	6, 7
<i>State v. Hopkins</i> , 113 Wn. App. 954, 55 P.3d 691 (2002).....	3
<i>State v. Jackson</i> , 102 Wn.2d 432, 688 P.2d 136 (1984).....	3, 4
<i>State v. Lair</i> , 95 Wn.2d 706, 630 P.2d 427 (1981)	5
<i>State v. Merkt</i> , 124 Wn. App. 607, 102 P.3d 828 (2004).....	4
<i>State v. Remboldt</i> , 64 Wn. App. 505, 827 P.2d 282 (1992).....	3
<i>State v. Smith</i> , 110 Wn.2d 658, 756 P.2d 722 (1988).....	5
<i>State v. Steenerson</i> , 38 Wn. App. 722, 688 P.2d 544 (1984).....	7, 8
<i>State v. Thompson</i> , 13 Wn. App. 526, 536 P.2d 683 (1975)	6, 7
<i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	7

SUPREME COURT CASES

<i>Aguilar v. Texas</i> , 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723 (1964).....	7, 9
<i>Spinelli v. U.S.</i> , 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed.2d 637 (1969).....	7, 9

I. STATEMENT OF FACTS

In September, 2010, an individual who was working with the Kennewick Police Department as a Confidential Informant (CI), provided Detective Juan Dorame with information that Richard Fenton was engaged in the sale of narcotics, specifically methamphetamine. (CP 22). The CI indicated Mr. Fenton operated out of a residence at 108 N. Conway Street, Apartment B, in Kennewick, Washington. (CP 22). The CI identified Richard Fenton from a photograph. (CP 22). Detective Dorame checked the local database, I/LEADS¹, which confirmed Richard Fenton as living at the address provided by the CI. (CP 22).

Based upon this representation by the CI, Detective Dorame planned and executed a controlled buy. (CP 22). The CI was searched before and after the controlled buy. (CP 22). The search prior to the controlled buy turned up no methamphetamines. (CP 22). Detective Dorame provided the CI with the pre-recorded buy funds, and observed the CI entering the residence. (CP 22). The residence was under surveillance for the entire time the CI was there. (CP 22). When the CI exited the residence, the CI handed over a clear zip lock type baggie containing purported methamphetamine that was purchased from Richard

¹I/Leads refers to “Intergraph’s law enforcement records management system.”

Fenton. (CP 22). The purported methamphetamine was field tested, and tested positive for methamphetamine. (CP 22).

Based upon the information provided by the CI, and the results of the controlled buy, Detective Dorame sought, and was granted a search warrant. (CP 20-24). A search of 108 N. Conway Street was performed and methamphetamine and other narcotics were located on the premises, as well as multiple objects related to the manufacture, use, and sale of methamphetamine. (RP 12/05/12, 196-221). Items found during the search included a glass pipe intended for the consumption of methamphetamine, a large stack of U.S. currency, marijuana, methamphetamine, a digital scale, a ledger containing names and monetary amounts related to the sale of narcotics, coffee filters, and ten pills of hydrocodone. (RP 12/05/12, 210-216).

Based upon the controlled buy outlined above, a second controlled buy, and the search of Mr. Fenton's home, Mr. Fenton was tried and convicted of two counts of a Delivery of a Controlled Substance - Methamphetamine, and one count of Possession With Intent to Manufacture/Deliver a Controlled Substance - Methamphetamine. (CP 118-127). As part of his sentence, the defendant was given a community custody term of the longer of 12 months, or the period of earned release time, whichever is longer. (CP 123).

II. ARGUMENT

1. THE AFFIDAVIT PROVIDED PROBABLE CAUSE FOR THE SEARCH WARRANT.

The defendant bears a heavy burden in attempting to invalidate a search warrant. “A search warrant is entitled to a presumption of validity.” *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). “If the officers acted without a valid warrant, the State bears the burden of establishing a search was reasonable. If the officers had a warrant authorizing the search, the defendant bears the burden of establishing the search was unreasonable.” *State v. Hopkins*, 113 Wn. App. 954, 958, 55 P.3d 691 (2002). Mr. Fenton bears the entire burden here. “The question of probable cause should not be viewed in a hypertechnical manner.” *State v. Remboldt*, 64 Wn. App. 505, 510, 827 P.2d 282 (1992).

When a search warrant is based upon information provided by an informant, as opposed to the officer’s own observations, the court has directed that a two-pronged test must be satisfied before the search warrant will be upheld: (1) The informant must demonstrate an adequate factual basis for his allegations, and (2) the veracity of the informant must be shown. *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984).

A. BASIS OF KNOWLEDGE

As the defendant admits, an informant whose information is based upon personal observations has satisfied the basis of knowledge prong. *State v. Bauer*, 98 Wn. App. 870, 875, 991 P.2d 668 (2000); *State v. Merkt*, 124 Wn. App. 607, 613, 102 P.3d 828 (2004). “To satisfy the ‘basis of knowledge’ prong, the informant must declare that he personally has seen the facts asserted and is passing on first-hand information.” *State v. Jackson*, 102 Wn.2d at 437.

Here, the informant was very clearly providing first-hand information. The informant had entered Mr. Fenton’s home, and purchased the methamphetamine directly from him. (CP 22). The controlled buy provided a factual basis for the warrant, as the defendant physically was handed a baggie of methamphetamine by the defendant.

The defendant claims that the controlled buy cannot “overcome the deficiencies” because the buy was at the direction of the police, and because the supervising detectives did not observe the CI in Mr. Fenton’s home. (App. Brief, 13-14). Regarding the first claim, the State has no idea how that is relevant to the question of how the informant came to know what he/she purports to know. The defendant had physically handed the CI a baggie of methamphetamine. Whether the CI entered the residence at will, or at police instruction, has no bearing as to how the

defendant came about this information. As to the observation remark, police observation is only relevant when the truthfulness or ‘veracity’ of the informant is at question. The defendant, in essence, says the police had no way to know if the story of events presented by the defendant was what actually occurred. If the basis of knowledge test requires the informant’s alleged basis be corroborated, the entire prong of the test is meaningless. The question before the court is simply if the CI’s provided information is sufficient to show the court how the informant came by the knowledge he or she claims to possess. Blending a veracity requirement mistakes the import of that prong of the test.

The affidavit presented a clear basis of knowledge, and as such satisfied one prong of the test.

B. VERACITY

Veracity can be established in a number of ways, depending on the factual circumstances. One of the primary ways veracity is established in cases where the informant is a criminal, is through a track record of reliability. *State v. Lair*, 95 Wn.2d 706, 710, 630 P.2d 427 (1981). Prior tips regarding criminal activity which have led to actual arrests, or have been confirmed by police, lead to the satisfaction of the veracity requirement. *State v. Smith*, 110 Wn.2d 658, 664, 756 P.2d 722 (1988).

In examining when an informant's background is sufficient to be determined reliable, the inquiry is heavily fact specific. In *State v. Thompson*, 13 Wn. App. 526, 528, 536 P.2d 683 (1975), the following was stated to be enough to provide adequate background for a determination of veracity, "My informant's reliability is based on information given to me in the past which lead to two arrests. In addition my informant has given me information about drug users and pushers which I have substantiated from other sources." Likely the outermost bound of the veracity requirement is found in *State v. Fisher*. 96 Wn.2d 962, 639 P.2d 743 (1982). In *Fisher*, the following was found sufficient to satisfy the veracity prong, "The informant is reliable in that he/she has given information regarding drug trafficking (sic.) and use in the past which has proven to be true and correct." *Id.* at 964. The information provided in *Fisher* was found to be sufficient. *Id.*

Here, Police provided the following information:

The CI has provided information in the past that I have corroborated, based on my investigations, and I, as well as other officers in the area have deemed the CI's information credible. The information the CI has provided in the past has lead to several arrests and seizures of narcotics. This leads me to believe that the CI's information is credible and reliable. The CI has been in constant contact with me over the last several months.

(CP 22).

Here, the State would argue that the information provided by the State far exceeds what was given in either *Thompson* or *Fisher*. Information provided by the CI involved more than one drug bust and arrest. Additional information provided had been corroborated by Detective Dorame. The CI's relationship with Detective Dorame spanned several months. The State believes these facts alone justified considering the CI as truthful, and satisfy the veracity prong of the test.

Furthermore, the police corroborated the informant's information. Police corroboration can cure a deficiency in either, or both of the prongs of the *Aguilar-Spinelli*² test. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). However, this corroboration must be of more than just public or innocuous facts. *Id.* Here, the police arranged for a controlled buy, testing the informant's information. (CP 22). The informant knocked, and was allowed entrance to Mr. Fenton's home. When the CI went in, the CI did not have methamphetamine. (CP 22). When the CI came out, the CI had methamphetamine. (CP 22). This is clear corroboration.

The defendant uses *State v. Steenerson*, 38 Wn. App. 722, 688 P.2d 544 (1984) to argue that the controlled buy cannot provide corroboration. (App. Brief, 14). The defendant however misunderstands

² *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. U.S.*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

the holding of *Steenerson*. In *Steenerson*, the only information about the controlled buy was that the CI performed them. *Id.* at 723. There was no indication given that the defendant provided the information that lead to the targeting of the individuals involved in the controlled buys. As such, all the judge had before him was that the CI followed police directions. As such, the affidavit in *Steenerson* did not provide the judge with any indication that these controlled buys said anything about the defendant's truthfulness.

The Court expressed the meaning of *Steenerson* in *State v. Castro*, 39 Wn. App. 229, 234-35, 692 P.2d 890 (1984), which the defendant also cites. "We distinguished the situation where the informant had initiated the buy, as by making the assertion that drugs, the items to be seized, were present in the specified residence, the place to be searched." The defendant claims that the affidavit does not show that the CI had any prior relationship with Mr. Fenton, or that that the informant initiated the controlled buy. (App. Brief, 10). The State is unsure how the defendant reads the affidavit that way. The Affidavit states, "During the month of September (2010), CI #10-027 provided information that Richard "Rick" Fenton (Thurman), is and has been selling narcotics in the City of Kennewick. . . . The CI stated that Richard Fenton has been selling Methamphetamine from a residence located at 108 N. Conway Street, Apt.

B.” (CP 22). All of this occurred before the controlled buy. The informant provided the information that lead to the targeting of Mr. Fenton. The CI ‘made the assertion that drugs, the items to be seized, were present in the specified residence, the place to be searched.’ This case is a mirror of *Castro* in that respect. “The informant's veracity is sufficiently established by the ‘controlled buy’ based on the informant's own assertions and contacts. The showing of probable cause was sufficient under the Aguilar-Spinelli test.” *State v. Castro*, 39 Wn. App. at 235.

As the State showed both the informants basis of knowledge (the fact that Mr. Fenton had given the CI the drugs) and the CI’s veracity (from the combination of the testimony demonstrating the informants relationship with officers, and the corroboration of the buy), the *Spinelli-Aguilar* test has been satisfied, and the warrant was based on probable cause. As a result, defendant’s Assignments of Error A through F are all in error

2. CONCESSIONS

The State agrees that it appears the date of offense was incorrectly stated as November 1, 2010, instead of November 5, 2010, and that a variable term of community custody was assigned in error. The proper

remedy for these errors is for the defendant to be resentenced, at which time he may be given a community custody term fixed by the trial court.

III. CONCLUSION

The State requests the Court to remand this matter, so the term of community custody may be adjusted, and the date of offense corrected. In all other matters, we ask this Court to affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 27th day of November 2013.



CHRISTOPHER M. HOXIE
Bar No. 46293
OFC ID NO. 91004

ANDY MILLER
Prosecutor



BRENDAN M. SIEFKEN, Deputy
Prosecuting Attorney
Bar No. 41219
OFC ID NO. 91004