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Court of Appeals
Division III
State of Washington

No. 32174-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY RIEKER,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The affidavit in support of the search warrant failed to establish probable cause because it did not provide sufficient information regarding the veracity and basis of knowledge of the informant. [1]

2. Mr. Rieker was constitutionally entitled to a *Franks* hearing because he made a preliminary showing that the material false statements and omissions in the search affidavit were made in a deliberate or reckless disregard for the truth.

3. The trial court erred in entering Finding of Fact 1 because it incorrectly asserts that the informant said Mr. Rieker is "not one to get rid of tools."

4. The trial court erred in entering Finding of Fact 4 because it concludes that the informant's convictions for crimes involving dishonesty were not material to the determination of probable cause.

5. The trial court erred in entering Finding of Fact 5 because it proclaims that no evidence was presented to show that law enforcement knew of the dispute between Mr. Rieker and the informant.

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[1] CrR 3.6 findings of fact and conclusions of law are attached as Appendix A.

6. The trial court erred in Finding of Fact 6 because it states that law enforcement's failure to confirm when another potential witness was booked into jail was merely negligent and not reckless.

7. The trial court erred in entering Finding of Fact 7, to the extent that it presumes the information omitted from the search warrant would not have significantly changed the probable cause determination because of corroboration by other sources.

8. The trial court exceeded its sentencing authority when it imposed conditions of community custody that were not statutorily authorized.

9. The trial court imposed legal financial obligations without considering Mr. Rieker's financial resources and the nature of the burden that payment of costs would impose as required by RCW 10.01.160(3).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When evaluating the existence of probable cause where information was provided by an informant, the affidavit in support of the search warrant must establish the veracity of the informant and his basis of knowledge. Did the affidavit fail to establish the informant's credibility where the suspicious circumstances signaled the informant's

motive to falsify allegations? Did the affidavit fail to establish the informant's basis of knowledge where he described property he "assumed" was stolen?

2. Where a defendant makes a substantial and preliminary showing that a false statement or omission with reckless disregard for the truth was included by the affiant in a warrant affidavit, and if the alleged false statement or omission impacts the finding of probable cause, the U.S. Constitution and the Washington Constitution require an evidentiary hearing at the defendant's request. Was Mr. Rieker constitutionally entitled to a *Franks* hearing where he demonstrated that the affidavit contained false statements concerning the information that the informant provided to law enforcement, as well as significant omissions pertaining to the informant's credibility, both of which were material to the determination of probable cause?

3. A court may only impose a sentence that is authorized by statute. The trial court lacks authority to impose community custody conditions unless authorized by the legislature. Did the court exceed its authority when it imposed alcohol related conditions where there was no evidence in the record that alcohol was related to Mr. Rieker's offenses? Did the trial court fail to make the required finding that

chemical dependency contributed to Mr. Rieker's offenses before ordering a chemical dependency evaluation as a condition of community custody?

5. A sentencing court shall not order a defendant to pay legal financial obligations unless the defendant is or will be able to pay them. In determining the amount and method of payment of legal financial obligations, the court must take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose. Does the imposition of legal financial obligations constitute a sentencing error because the trial court failed to make any inquiry into Mr. Rieker's individual financial circumstances as required?

C. STATEMENT OF THE CASE

Lance Smith, an individual with a lengthy criminal history that includes convictions for crimes involving dishonesty, contacted Detective Mitch Matheson to provide incriminating information about Jeffrey Rieker. CP 39, 61. On January 3, 2012, Detective Matheson recorded his interview of Mr. Smith. CP 33. Prior to the interview, Mr. Smith had not had contact with Mr. Rieker for over a month due to a number of disputes between them. CP 33, 39.

At the time of the interview, Mr. Smith was in possession of a tool that was stolen during a burglary at Ridgeview Plumbing on October 11, 2011. CP 32, 34. Mr. Smith described other tools in remarkable detail that were also stolen in that burglary. CP 34. Mr. Smith said that he received the tool in his possession from Mr. Rieker. *Id.* He maintained that he was able to describe these other tools because he noticed them in Mr. Rieker's shop on November 23, 2011, the last time he was there prior to their falling out with one another. CP 33.

According to Mr. Smith, Mr. Rieker did not tell him where he obtained the tools. *Id.* Mr. Smith admitted that he "never really talked to Mr. Rieker about the tools that he had." CP 61. Mr. Smith explained to Detective Matheson that he "assumed" the tools in Mr. Rieker's shop were stolen. *Id.* Mr. Smith believed that Mr. Rieker was trying to sell those tools. CP 60. Mr. Smith claimed to have discussed the tools a few days later with Tanner Schwind. CP 33. Mr. Smith said that Mr. Schwind admitted to stealing the tools and giving them to Mr. Rieker. CP 33.

Detective Matheson contacted the owner of Ridgeway Plumbing and ascertained that the tool in Mr. Smith's possession was stolen

during the October 11, 2011 burglary. CP 34. When Detective Matheson relayed Mr. Smith's descriptions of the other items, the owner said it sounded like the items may be his tools. *Id.* Detective Matheson took no other steps to corroborate Mr. Smith's allegation that this stolen property was connected to Mr. Rieker. *See* CP 32-36.

Detective Matheson applied for and was granted a search warrant.[2] CP 32-36. Mr. Rieker was subsequently charged with a number of crimes based on evidence obtained during execution of the search warrant.[3] CP 159-62. Prior to pretrial motions addressing the validity of the search warrant, Mr. Rieker's attorney listened to the recorded interview of Mr. Smith conducted by Detective Matheson. CP 60. He also interviewed Detective Matheson. CP 39.

Mr. Rieker's attorney filed two separate declarations putting forth evidence of false statements contained within the search affidavit and material omissions pertaining to Mr. Smith's credibility. CP 39-40, 60-61. The declarations established that statements in the warrant

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[2] The affidavit for the search warrant is attached as Appendix B.

[3] Mr. Rieker was ultimately convicted of possession of stolen property in the first degree, possession of a stolen motor vehicle, unlawful manufacture of marijuana, unlawful possession of a firearm in the second degree, and bail jumping. CP 175.

affidavit attributed to Mr. Smith were not contained in the recorded interview. CP 60-61. Additionally, Detective Matheson omitted from the affidavit adverse information that he knew regarding Mr. Smith's credibility, including the nature of his criminal history and his motive to falsify allegations against Mr. Rieker. CP 39, 61. The pertinent facts are addressed in more detail in the relevant argument sections below.

The trial court denied Mr. Rieker's motion to suppress, concluding that the information provided by Mr. Smith was not stale and presumably finding Mr. Smith's credibility and the basis for his knowledge sufficient to support the search warrant. CP 165-67; 1 RP 101-03.[4] The trial court also denied Mr. Rieker's request for an evidentiary hearing regarding the false statements and omissions in the search affidavit, determining that Detective Matheson's actions, or lack thereof, were at most negligent and that the omissions were not material to the determination of probable cause. CP 167-68. Mr. Rieker subsequently waived his right to a jury trial, stipulated to the

[4] The verbatim report of proceedings (RP) is in two volumes. The first volume is consecutively paginated and contains hearings that occurred on May 23, 2012, April 10, 2013, and May 8, 16, and 20, 2013. The second volume is consecutively paginated and contains hearings that occurred on September 26, 2012, June 12, 2013, December 2, 2013, and January 8 and 9, 2014. The verbatim report of proceedings is referred to by the volume and page number.

court's consideration of exhibits and police reports, and was found guilty. CP 163, 1 RP 139.

D. ARGUMENT

1. The search warrant was not supported by probable cause because the affidavit failed to establish the veracity and basis of knowledge of the informant.

The warrant clause of the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution require that a search warrant be issued upon a determination of probable cause based upon "facts and circumstances sufficient to establish a reasonable inference" that criminal activity is occurring or that contraband exists at a certain location. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980)).

Probable cause is established when an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). A search warrant probable cause decision is reviewed for abuse of discretion. *Cole,* 128 Wn.2d at 286.

When evaluating the existence of probable cause where information was provided by an informant, Washington applies the two-pronged *Aguilar-Spinelli* test. *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136 (1984) (citing *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)). The two prongs consist of the "veracity" or the credibility of the informant, and the informant's "basis of knowledge." *Id.* More specifically:

> For an informant's tip (as detailed in an affidavit) to create probable cause for a search warrant to issue: (1) the officer's affidavit must set forth some of the underlying circumstances from which the informant drew his conclusion so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information; and (2) the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.

Id. (citing *Spinelli*, 393 U.S. at 413; *Aguilar*, 378 U.S. at 114).

These prongs are independent and both must be established in the affidavit. *Jackson*, 102 Wn.2d at 437. The two prongs have an independent status and are analytically severable, thus ensuring the validity of the information. *Id.*

a. The information contained within the warrant affidavit was insufficient to establish the credibility of the informant.

The credibility of an informant cannot be presumed when there is an apparent motive to falsify. *State v. Rodriguez*, 53 Wn. App. 571, 576, 769 P.2d 309 (1989). Mr. Smith, the informant, had motive to falsify allegations against Mr. Rieker because of their past disputes. CP 33, 39.

The search affidavit must contain information that establishes the informant's veracity. *State v. Lair*, 95 Wn.2d 706, 709, 630 P.2d 427 (1981). Even if an informant states how he obtained the information that led him to conclude that contraband is present in a certain location, it is still necessary to establish the informant's credibility. *Id.* (citing *State v. Woodall*, 100 Wn.2d 74, 76-78, 666 P.2d 364 (1983); *State v. Fisher*, 96 Wn.2d 962, 965-66, 639 P.2d 743 (1982); *State v. Partin*, 88 Wn.2d 899, 903-04, 567 P.2d 1136 (1967)).

The veracity prong is satisfied in either of two ways: (1) the informant's credibility may be established, or (2) if nothing is known about the informant, the facts and circumstances surrounding the information may reasonably support an inference that the informant is telling the truth. *Id.* at 709–10.

Credibility cannot be presumed simply because the identity of the informant in included in a search affidavit. *State v. Duncan*, 81 Wn. App. 70, 78, 912 P.2d 1090 (1996). The informant's identification is merely a consideration in determining whether the informant is truly a citizen informant. *Rodriguez*, 53 Wn. App. at 576. Naming a person alone is not a sufficient ground on which to credit an informant. *Id.* (quoting 1 Wayne R. LaFave, *Search and Seizure* § 3.4, at 726–27 (2d ed.1987)). Here, the affidavit does not show any steps taken by police to ensure Mr. Smith's credibility.

The suspicious circumstances present in the warrant affidavit signaled that Mr. Smith was more than merely a civic minded citizen. The affidavit contains no explanation regarding why Mr. Smith waited more than 40 days to contact law enforcement after allegedly observing stolen property at Mr. Rieker's shop. *See* CP 32-35. The affidavit does, however, indicate that Mr. Smith and Mr. Rieker were not on good terms. CP 33. They had not interacted since November 23, 2011 when Mr. Smith ended his employment due to "a dispute relating to

unpaid wages and Rieker's current lifestyle."[5] *Id.* Credibility cannot be presumed when there is an apparent motive to falsify. *Rodriguez*, 53 Wn. App. at 575.

> [A]s a general proposition any person purporting to be a crime victim or witness may be presumed reliable, though the police must remain alert to the existence of any circumstances which would make that presumption inoperative in a particular case. Thus, courts frequently emphasize, in the course of holding that veracity was properly presumed, that the police were unaware of any "apparent motive to falsify" or that it did not appear to the police "that the accusations by the citizen were reported to the police merely to spite defendant." Other decisions stress that the police, upon learning of a possible motive to falsify, took additional steps to ensure reliability.

Id. (quoting 1 Wayne R. LaFave, *Search and Seizure* § 3.4(a), at 718–20 (2d ed. 1987)).

To establish the reliability of a citizen informant, the police must ascertain such background facts as would support a reasonable inference that he is credible and without motive to falsify. *State v. Berlin*, 46 Wn. App. 587, 591, 731 P.2d 548, 550 (1987). However,

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[5] Moreover, during his defense interview prior to pretrial motions, the affiant, Detective Matheson, explained that Mr. Smith expressed that he was not happy with Mr. Rieker. CP 39. This related to another dispute where Mr. Rieker contacted the mother of Mr. Smith's child and reported that Mr. Smith was involved in drug activity. *Id.* According to Detective Matheson, this caused Mr. Smith problems relating to visitation with his child. *Id.* However, because this information was not included in the warrant affidavit, it is discussed in the following section.

these circumstances (i.e., Mr. Smith's prior disputes with Mr. Rieker and the length of time between supposedly observing criminal activity and reporting it to law enforcement) negate any presumed reliability.

Rather, the information contained in the warrant affidavit supports the conclusion that Mr. Smith had strong motive to falsify allegations against Mr. Rieker. Detective Matheson was fully aware of their prior disputes and thus the presumption of reliability is inoperative. Law enforcement took no additional steps to confirm the reliability of the information Mr. Smith provided and neglected to inquire as to Mr. Smith's explanation for the delayed reporting. The information contained within the warrant affidavit was insufficient to establish Mr. Smith's credibility and thus failed to satisfy the veracity prong of the *Aguilar-Spinelli* test.

b. The warrant affidavit failed to sufficiently establish the basis of Mr. Smith's knowledge.

The warrant affidavit must inform the magistrate of the underlying circumstances that led the officer to conclude that the informant obtained the information in a reliable manner. *Jackson*, 102 Wn.2d at 436-37. There are a number of ways that this requirement may be satisfied. *State v. Ibarra*, 61 Wn. App. 695, 702, 812 P.2d 114 (1991).

First, the affidavit may show that the observer had the necessary skill, training, or experience to identify the contraband. *Id.* (citing *State v. Wilke*, 55 Wn. App. 470, 476, 778 P.2d 1054 (1989); *State v. Matlock*, 27 Wn. App. 152, 155-56, 616 P.2d 684 (1980)). Alternatively, the affidavit could show that the observer provided enough first hand, factual information to an individual that possesses the necessary skill, training, or experience to identify the contraband. *Id.* (citing *Berlin*, 46 Wn. App. at 592). Lastly, the affidavit may show that the observer provided enough information for the magistrate to independently determine that the informant had a basis for the allegation that a crime had been committed. *Id.* (citing *Lair*, 95 Wn.2d at 709; *State v. Riley*, 34 Wn. App. 529, 532, 663 P.2d 145 (1983)).

However, an affidavit must contain more than the informant's personal belief that what he observed was contraband. *See Ibarra*, 61 Wn. App. at 702. The warrant affidavit asserted that Mr. Smith asked Mr. Rieker about some tools located in his shop. CP 33. Mr. Rieker was "somewhat vague and did not give an answer as to where they came from." *Id.* The affidavit then reports that Mr. Smith "assumed

they were stolen."[6] *Id.* The recitation of Mr. Smith's unsupported conclusion that he assumed the observed tools were stolen is insufficient to satisfy the basis of knowledge prong.

c. Law enforcement's investigation did not corroborate Mr. Smith's tip and therefore did not remedy the affidavit's failure to satisfy the requirements of *Aguilar-Spinelli*.

If an informant's tip fails under either prong, the warrant fails unless independent police investigation corroborates the tip to such an extent that it supports the missing elements of the test. *Jackson,* 102 Wn.2d at 438. "Corroborating evidence offered to remedy a deficiency in either prong of the *Aguilar-Spinelli* test 'should point to suspicious activities or indications of criminal activity along the lines suggested by the informant.'" *State v. Murray*, 110 Wn.2d 706, 712, 757 P.2d 487 (1988) (quoting *State v. Huft*, 106 Wn.2d 206, 210, 720 P.2d 838 (1986)).

However, mere verification of innocuous details, commonly known facts, or easily predictable events should not suffice to remedy a deficiency in either the basis of knowledge or veracity prong. *Jackson*,

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[6] Mr. Smith also indicated that Mr. Rieker had unrelated stolen property in his shop on previous occasions. Prior criminal activity, however, is insufficient to establish probable cause. *See State v. Hobart*, 94 Wn.2d 437, 446, 617 P.2d 429 (1980).

102 Wn.2d at 438. Probable cause exists only if the tip, as corroborated, is as trustworthy as a tip which would pass the *Aguilar-Spinelli* test without independent corroboration. *Murray*, 110 Wn.2d at 712.

The trial court's findings of fact and conclusions of law do not specifically address the *Aguilar-Spinelli* requirements of veracity and basis of knowledge. *See* CP 165-68. In its oral ruling, the trial court stated:

> So – and there's a lot of other information, which, in some way, crosses over into the *Aguilar-Spinelli* portion of the reliability of information. But there's a lot of corroborating information for things that Mr. Smith reported.
>
> And, so, that would, then, of course, tend to also corroborate his report about the hidden – hidden space in the wall, and Mr. Rieker's tendency to hold onto tools.

1 RP 102-03. In evaluating whether probable cause supports a search warrant, the focus is on what was known at the time the warrant issued, not what was learned afterward. *Murray,* 110 Wn.2d at 709–10. There was no corroboration that Mr. Smith's statement regarding the hiding space was credible.

The only corroboration contained in the affidavit is that Mr. Smith brought a tool to his interview that law enforcement connected to

the October 11, 2011 burglary at Ridgeview Plumbing. CP 34. Mr. Smith was also able to describe tools that matched those stolen in the same burglary. CP 33-34. This information, however, only corroborates that Mr. Smith had possession of stolen property from the Ridgeview Plumbing burglary and that he could describe other property stolen during that same incident.

This information does not in any way corroborate Mr. Rieker's alleged connection to or possession of stolen property. Law enforcement's investigation does not point to the specific suspicious activities "along the lines suggested by the informant." *See Murray*, 110 Wn.2d at 712. Mr. Smith's possession of stolen property and his ability to describe other tools stolen during the burglary are insufficient to corroborate his tip that *Mr. Rieker* was in possession of these items.

On the contrary, it raises additional suspicions concerning the basis of his knowledge and his credibility. Mr. Smith claimed to have seen these items one time approximately 40 days before his interview with Detective Matheson. CP 33. However, he was able to recollect and extensively describe many of these tools:

> Smith recalled seeing two Mig welders, one was a smaller 110 volt unit while the other was a larger industrial 220 volt unit. He also observed a plasma cutter, a Hilti diamond coring concrete motor, a Wirsbo

> expander tool, a handheld Milwaukee band-saw with the words "Ridgeview Plumbing" written on the side of it, an orange colored power snake plumbing tool, a black & Decker drill, and a new in the box security monitoring system with four cameras.

Id. Rather than corroborating Mr. Smith's tip, his ability to recall in extraordinary detail the tools he "noticed" at Mr. Rieker's shop before their dispute further calls into question Mr. Smith's credibility. Moreover, none of this information corroborates his tip that these items were present at Mr. Rieker's shop. Thus, the police investigation does not remedy the warrant affidavit's failure to satisfy both prongs of the *Aguilar-Spinelli* test.

Because the affidavit presented to the magistrate was insufficient to support a finding of probable cause, the warrant was improperly issued and the evidence obtained as a result of the search should have been suppressed.

2. The affiant's material false statements and omissions were made in a deliberate or reckless disregard for the truth and thus a *Franks* hearing was required.

Where a defendant makes a substantial preliminary showing that a false statement or omission with a reckless disregard for the truth was included by the affiant in a warrant affidavit, and if the alleged false statement or omission impacts the finding of probable cause, the U.S.

Constitution and the Washington Constitution require an evidentiary hearing at the defendant's request. *See Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); U.S. Const. amend. IV; Const. art. I, § 7. "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." *Franks*, 438 U.S. at 171. There must be allegations of deliberate falsehood or reckless disregard for the truth, which are accompanied by an offer of proof. *Id.*

The defendant must make a substantial preliminary showing of (1) a material falsity or omission that would alter the probable cause determination, and (2) a deliberate or reckless disregard for the truth. *United States v. Glover*, No. 13-2475, 2014 WL 2747124, at *7 (7th Cir. June 18, 2014). This is a burden of production. *Id.* Proof by a preponderance of evidence is not required until the *Franks* hearing itself. *Id.* (citing *United States v. McMurtrey*, 704 F.3d 502, 508 (7th Cir. 2013)).

When requesting a *Franks* hearing, the defendant need not overcome the court's speculation regarding an innocent explanation for the falsity or omission. *Id.* at *8. While reasonable explanations might

exist, the defendant need not disprove them before the *Franks* hearing itself. *Id.* (citing *McMurtrey*, 704 F.3d at 509).

If the defendant makes this preliminary showing, he then must establish the allegations by a preponderance at the evidentiary hearing. *Franks*, 438 U.S. at 171. If the defendant carries his preponderance burden, the material misrepresentation will be stricken from the affidavit. *Id.* "Where ... a warrant's validity is challenged for deliberate or reckless omissions of facts that tend to mislead, the affidavit must be considered with the omitted information included." *United States v. DeLeon*, 979 F.2d 761, 764 (9th Cir. 1992) (citing *United States v. Condo*, 782 F.2d 1502, 1506 (9th Cir. 1986)).

The court then determines whether, as modified, the affidavit supports a finding of probable cause. *Franks*, 438 U.S. at 171. If the affidavit fails to support probable cause, the warrant will be held void and evidence obtained pursuant to the warrant shall be excluded. *Id.* The standard of review of a trial court's denial of a *Franks* hearing is de novo. *United States v. Reeves*, 210 F.3d 1041, 1044 (9th Cir. 2000).

a. The false statements contained in the search affidavit were material and support an inference of either a deliberate or reckless disregard for the truth.

Mr. Rieker established that the search affidavit contained false assertions regarding Mr. Smith's statements to law enforcement. Detective Matheson recorded his interview with Mr. Smith. CP 33. The affidavit in support of the search warrant asserted:

> Smith said Rieker used to brag to him about how he was amassing numerous stolen tools and having to pay almost nothing for them from local youths, he commissions to do various crimes.

Id. Prior to the request for a *Franks* hearing, Mr. Rieker's attorney, Nicholas Yedinak, listened to the recorded interview between Mr. Smith and Detective Matheson. CP 60. In support of Mr. Rieker's motion, defense counsel provided the trial court with a declaration.[7] CP 60-61. Mr. Yedinak declared:

> Nowhere in the recorded interview did it indicate that: "Rieker used to brag to him about how he was amassing numerous stolen tools and having to pay almost nothing for them from local youths he commissioned to do various crimes." To the contrary, Mr. Smith indicates in the interview that he never really talked to Rieker about the tools he had.

[7] Supplemental declaration of Nicholas Yedinak is attached as Appendix C.

CP 61. This false claim contained within the affidavit concerning Mr. Smith's statements during the interview raises the inference that Detective Matheson either deliberately or recklessly disregarded the truth.

Secondly, the warrant affidavit stated that Mr. Smith "said Rieker is not one to get ride [sic] of tools he acquires and the tools in question are almost certainly still at Rieker's shop." CP 33. Mr. Yedinak, on the other hand, declared the following after listening to the recorded interview:

> At no time during the interview did Mr. Smith say that "Rieker is not one to get rid of the tools that he acquires and the tools in question are almost certainly still at Rieker's shop." In fact, the opposite is true, wherein Mr. Smith states that he thought that Mr. Rieker was brokering or trying to sell the tools that Tanner Schwin[d] brought to him. Detective Math[e]son's statement in the affidavit to the contrary seems to be an attempt to negate the staleness of his information.

CP 60. Both of these factual misstatements support the inference that Detective Matheson acted with deliberate or reckless disregard for the truth by attributing allegations to Mr. Smith that were not contained on the recorded interview. As such, Mr. Rieker carried his burden of production, which is less than the preponderance of evidence standard necessary at the evidentiary hearing, that Detective Matheson acted in

deliberate or reckless disregard for the truth when including these misrepresentations in the search affidavit.

These erroneous assertions were material to the probable cause determination because they were relied upon by the trial court in concluding that the information contained in the affidavit was not stale. CP 165-66 (Finding of Fact 1). The trial court concluded that because Mr. Smith had been to Mr. Rieker's property on previous occasions, he had "at least some factual basis for saying that the defendant is not one to get rid of tools." *Id.* (Finding of Fact 3). Because the trial court relied on this false statement when denying the suppression motion, it was clearly material and necessary to the probable cause determination.

The facts underlying the determination of probable cause for issuance of a search warrant must be sufficient to justify the conclusion that the property to be seized probably is on the premises to be searched at the time the warrant is issued. *Partin*, 88 Wn.2d at 904. "The support for issuance of a search warrant is sufficient if, on reading the affidavits, an ordinary person would understand that a violation existed and was continuing at the time of the application." *State v. Clay*, 7 Wn. App. 631, 637, 501 P.2d 603 (1972).

Furthermore, the false statements portrayed Mr. Smith as knowledgeable and familiar with Mr. Rieker's activities, which would support the trial court's reliance on the information provided by him that constituted the sole basis for the search warrant. Rather, Mr. Smith actually told Detective Matheson that he never really talked to Mr. Rieker about the tools. CP 61. The false statements contained in the affidavit gave the impression that Mr. Smith had a basis for his knowledge regarding the tools when, in reality, he did not.

Mr. Rieker showed a material falsity that would alter the probable cause determination that was either deliberately or recklessly done in disregard for the truth. Mr. Rieker was not required to overcome any speculation regarding a reasonable explanation for the discrepancies between Mr. Smith's statements on the recorded interview and Detective Matheson's version of Mr. Smith's statements in the warrant affidavit. *See Glover*, at *8. Any explanations from the government regarding the discrepancies must wait for the *Franks* hearing where Mr. Rieker has the opportunity of full cross examination. *See id.* Since Mr. Rieker satisfied his preliminary burden, the trial court erred by denying his request for an evidentiary hearing.

b. Mr. Rieker further demonstrated that omissions from the warrant affidavit pertaining to Mr. Smith's credibility were material and in reckless disregard for the truth.

The *Franks* test for material misrepresentations also applies to allegations of material omissions. *United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980); *State v. Cord,* 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Credibility omissions themselves, regardless of the absence of more direct evidence of an officer's state of mind, may provide sufficient circumstantial evidence to support a reasonable and thus permissible inference of reckless disregard for the truth. *Glover*, at *7. "An officer's omission from the probable cause affidavit of known and substantial adverse information about the informant's credibility is sufficient to support a reasonable inference of recklessness, requiring that [the defendant's] request for a *Franks* hearing be granted." *Id.*

Recklessness may be shown by establishing that the affiant entertained serious doubts about the informant's veracity. *State v. Clark*, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001) (citing *State v. O'Connor,* 39 Wn. App. 113, 117, 692 P.2d 208 (1984)). "Serious doubts" may be inferred from either (a) an affiant's actual deliberation, or (b) the existence of obvious reasons to doubt the informant's veracity or the information provided. *Id.*

An affiant can manipulate the inferences a magistrate will draw by reporting less than the total story. *United States v. Stanert,* 762 F.2d 775, 781 (9th Cir. 1985), amended by 769 F.2d 1410 (9th Cir. 1985). To allow a magistrate to be misled in such a manner could remove all real meaning from the requirement of probable cause. *Id.* As discussed below, the following omissions were material to the determination of probable cause and, at a minimum, signify a reckless disregard for the truth.

i. Nature of informant's criminal history

The search affidavit indicated that Detective Matheson reviewed Mr. Smith's criminal history and that he was a convicted felon. CP 33. However, the affidavit failed to inform that magistrate that Mr. Smith had prior convictions for crimes involving dishonesty. *See* CP 32-35.

In *United States v. Hall*, the affiant failed to disclose the informant's prior conviction for making a false statement. 113 F.3d 157, 158 (9th Cir. 1997). The informant was the sole source of crucial information leading to the warrant. *Id.* at 157-59. The court held that probable cause was lacking because the conviction for making a false report to the police seriously undermined the informant's credibility

and there was no independent evidence to corroborate the informant's claims. *Id.* at 159-61.

Any crime involving dishonesty necessarily has an adverse effect on an informant's credibility. *Reeves*, 210 F.3d at 1045. "In the absence of countervailing evidence to bolster the informant's credibility or the reliability of the tip, an informant's criminal past involving dishonesty is fatal to the reliability of the informant's information, and his/her testimony cannot support probable cause." *Id.* (citing *United States v. Meling*, 47 F.3d 1546, 1554-55 (9th Cir. 1995)). However, the trial court wholly and erroneously discounts any material impact that Mr. Smith's convictions for crimes involving dishonesty would have on the probable cause determination. CP 166 (Finding of Fact 4).

The only information that stolen property may have been in Mr. Rieker's shop came from Mr. Smith. These circumstances are similar to those in *Hall* where the informant was the sole source of information leading to the search warrant and there was no independent evidence to corroborate his claims. As previously discussed, law enforcement's investigation only corroborated that Mr. Smith had possession of property stolen from the Ridgeway Plumbing burglary and could describe other tools stolen during that same incident.

Thus, the entire probable cause determination rested on Mr. Smith's tip. These omissions were not only material, but "fatal to the reliability of the informant's information." *See Reeves*, 210 F.3d at 1045. As a result, Mr. State's statements alone cannot support the probable cause determination.

This omission also supports an inference that Detective Matheson acted in deliberate or reckless disregard for the truth. During the recorded interview, Detective Matheson explained to Mr. Smith that he had his criminal record in front of him. CP 61. They then discussed Mr. Smith's extensive felony history for drug and theft related crimes. *Id.* The omission of this information, which was substantially adverse to Mr. Smith's credibility and known to Detective Matheson, was sufficient to support a reasonable inference of recklessness. Therefore, the trial court was constitutionally required to grant Mr. Rieker's request for a *Franks* hearing.

ii. Past disputes between Mr. Smith and Mr. Rieker

In the search affidavit, Detective Matheson mentioned that there was a dispute between Mr. Rieker and Mr. Smith over unpaid wages, but no other information regarding their relationship or past history was included. CP 33.

Detective Matheson omitted information about another dispute between Mr. Rieker and Mr. Smith that illustrated Mr. Smith's motive to falsify allegations.[8] CP 39-40. During the defense interview prior to the pretrial hearings, Detective Matheson described Mr. Smith as being unhappy with Mr. Rieker for an incident involving the mother of Mr. Smith's child. CP 39. Detective Matheson explained that Mr. Rieker had either called or texted Mr. Smith's ex-wife[9] and reported that Mr. Smith was still involved with drugs. *Id.* This caused problems for Mr. Smith's visitation with his child. *Id.*

This powerful motive to falsify allegations against Mr. Rieker was not included in the search affidavit. *See* CP 32-36. In denying Mr. Rieker's request for a *Franks* hearing, the trial court entered the following finding regarding this motive to falsify:

> With respect to the dispute between Mr. Smith and the defendant, no evidence was submitted to show that law enforcement even knew of the dispute, or that the dispute was of criminal nature, which it was not. There was no showing that the officer, by not asking additional questions of Mr. Smith to acquire that dispute information, was recklessly disregarding the truth.

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[8] Declaration of Nicholas Yedinak attached as Appendix D.

[9] It is unclear whether this individual was Mr. Smith's ex-wife or ex-girlfriend. She is referred to in this brief as his ex-wife.

CP 166 (Finding of Fact 5). This finding was directly contradicted by Detective Matheson's interview with defense counsel where he provided this information, clearly demonstrating his knowledge of this dispute. CP 39.

"A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." *Leschi Improvement Council v. Wash. State Highway Comm'n*, 84 Wn.2d 271, 283, 525 P.2d 774 (1974) (quoting *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590 (2d Cir. 1961)). Findings of fact are reviewed under a substantial evidence standard. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). "Substantial evidence" is evidence sufficient to persuade a fair minded, rational person of the finding's truth. *State v. Hill*, 123 Wn.2d 641, 644, 87 P.2d 313 (1994).

The court's finding that there was no evidence that Detective Matheson was aware of Mr. Smith's motive to falsify allegations against Mr. Rieker is not supported by substantial evidence. To the contrary, Detective Matheson was fully aware of this dispute and discussed it during his interview with defense counsel. CP 39. This motive to falsify was material to the probable cause determination,

which relied solely on Mr. Smith's tip. Detective Matheson's omission of this information, which significantly undermines Mr. Smith's credibility, supports a reasonable inference of recklessness meriting a *Franks* hearing.

iii. Mr. Smith's false statement regarding speaking with Tanner Schwind

The last time Mr. Smith visited Mr. Rieker's shop was on November 23, 2011. CP 33. Mr. Smith told Detective Matheson that a couple days later he ran into Tanner Schwind. *Id.* Mr. Smith claimed that at that time Mr. Schwind confessed to committing the burglary and giving the tools to Mr. Rieker. *Id.* Detective Matheson noted that at the time of the affidavit, Mr. Schwind was in custody in Kittitas County on a drug related charge. *Id.* Detective Matheson made no efforts to interview Mr. Schwind prior to requesting the search warrant. *See id.*

The defense provided the court with a declaration that demonstrating that Mr. Smith was lying regarding his interaction with Tanner Schwind. CP 41. This declaration indicated that Mr. Schwind had been incarcerated since October 29, 2011, making it impossible for Mr. Smith's statement about their interaction a few days after November 23, 2011 to be true. *See id.*

The trial court concluded that Detective Matheson could have been negligent in failing to confirm when Mr. Schwind was booked into jail, but that this did not amount to recklessness. CP 167 (Finding of Fact 6). "Conclusions of law are determinations made by a process of legal reasoning from the facts in evidence." *Casterline v. Roberts*, 168 Wn. App. 376, 382-83, 284 P.3d 743 (2012) (citing *State v. Niedergang*, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986)). Whether Detective Matheson's actions, or lack thereof, were reckless or negligent is a conclusion of law. A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law. *Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980).

Detective Matheson had already checked Tanner Schwind's custody status prior to requesting the search warrant. CP 33. It would have taken little effort to simply check the date that he was booked into custody. Because the information provided by Mr. Smith was the sole source of the probable cause determination, his credibility was paramount. If Detective Matheson had taken this minimal step, he would have quickly verified that the information provided by Mr. Smith regarding Tanner Schwind was false. Detective Matheson's failure to attempt to corroborate Mr. Smith's claim that he spoke with

Tanner Schwind a few days after observing the tools was a reckless disregard for the truth. This omission was also material because, again, it related directly to Mr. Smith's credibility.

The warrant affidavit's false statements and material omissions constitute a deliberate or reckless disregard for the truth. Mr. Smith's information was the sole basis for the search warrant and all information pertaining to his lack of credibility was highly material to the determination of probable cause. The trial court erred when it denied Mr. Rieker's request for an evidentiary hearing to which he was constitutionally entitled. This Court should reverse and remand for a *Franks* hearing.

3. The trial court imposed community custody conditions that were not statutorily authorized and consequently should be stricken.

A court may only impose a sentence that is authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). The trial court lacks authority to impose a community custody condition unless authorized by the legislature. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173, (2013) (citing *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008)). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Bahl*,

164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court had statutory authority to impose community custody conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

a. The conditions related to alcohol were not crime related and therefore improper.

RCW 9.94A.505(8) provides that as a part of any sentence, "the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10).

As part of the judgment and sentence, the court ordered Mr. Rieker to "submit to random urinalysis, BAC, or other tests at the direction of his/her community corrections officers and at the defendant's own expense." CP 185. The court also ordered that Mr. Rieker "shall not consume or possess alcohol and shall not frequent places whose principal source of income is the sale of alcoholic beverages, i.e.[,] taverns and cocktail lounges." CP 179, 185.

Nothing in the record suggests that alcohol contributed to Mr. Rieker's offenses. These conditions should be stricken because they are not crime related and thus the trial court exceeded its authority when imposing them.

b. The trial court neglected to make the necessary finding required by RCW 9.94A.607 and thus lacked the statutory authority to order a chemical dependency evaluation.

The sentencing court also ordered Mr. Rieker to undergo an evaluation for chemical dependency treatment as part of his community custody. CP 180. The SRA only authorizes the court to order an offender to obtain a chemical dependency evaluation and to comply with recommended treatment if it finds that the offender has a chemical dependency that contributed to his or her offense:

> Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

RCW 9.94A.607(1). "If the court fails to make the required finding, it lacks statutory authority to impose the condition." *Warnock*, 174 Wn. App. at 612.

While the sentencing court engaged Mr. Rieker in a discussion about his past drug use, the court never made a finding that chemical dependency contributed to the specific offenses for which Mr. Rieker was being sentenced. 2 RP 22-27. Moreover, the box next to the language "[t]he defendant has a chemical dependency that has contributed to the offense(s)" was not checked in the judgment and sentence. CP 176. Because the court did not make the necessary finding, the trial court exceeded its authority when imposing this condition and therefore it must be stricken.

4. The trial court's imposition of legal financial obligations without considering Mr. Rieker's ability to pay as required constitutes a sentencing error.[10]

A trial court may impose costs "authorized by law" when sentencing an offender for a felony. RCW 9.94A.760. However, the sentencing court must consider an individual's financial circumstances

[10] On February 11, 2014 the Washington Supreme Court heard oral argument in *State v. Blazina*, Supreme Court No. 89028-5, which was consolidated with *State v. Colter*, Supreme Court No. 89109-5. In its ruling, Division Two acknowledged that it had previously allowed an appellant to raise imposition of legal financial obligations for the first time on appeal. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013). However, the court held that RAP 2.5(a) did not compel it to allow the issue to be raised in every case and declined to allow Mr. Blazina to raise imposition of LFOs for the first time on appeal. *Id.* The Supreme Court granted review.

and conclude that he has the ability or likely future ability to pay before imposing legal financial obligations (LFOs). RCW 10.01.160(3).

The sentencing court adopted boilerplate findings in the judgment and sentence addressing Mr. Rieker's ability to pay:

> **Ability to Pay Legal Financial Obligations**. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:
>
> [X] The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 178. The court did not make any inquiry into Mr. Rieker's finances and thus did not make any individualized determination regarding Mr. Rieker's financial circumstances before it imposed LFOs. 2 RP 18-24. The sentencing court imposed the following LFOs: $500 victim penalty assessment, $200 court costs, $450 fee for a court appointed attorney, $500 to the drug enforcement fund of Columbia River Drug Task Force, $100 crime lab fee, and $100 DNA collection fee.[11] CP 180.

[11] Mr. Rieker does not challenge imposition of the following legal financial obligations: the $500 victim penalty assessment pursuant to RCW 7.68.035 and the $100 DNA collection fee pursuant to RCW 43.43.7541. The victim penalty assessment and DNA collection fee are statutorily mandated and courts are not required to consider defendant's past, present, or future ability to pay. *State v.*

Because consideration of a defendant's financial resources is statutorily required as a condition precedent to imposing LFOs, the trial court's imposition of LFOs was erroneous and the validity of the order may be raised for the first time on appeal.

a. A defendant may raise the issue of imposition of legal financial obligations for the first time on appeal.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. *Ford*, 137 Wn.2d at 477-78; *see also*, *Bahl*, 164 Wn.2d at 744 (holding erroneous condition of community custody could be challenged for the first time on appeal). A defendant may challenge for the first time on appeal the imposition of a criminal penalty on the ground that the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).

RCW 10.01.160(3) provides:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of

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Kustler, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013).

> the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3). The word "shall" establishes that the requirement is mandatory. *State v. Claypool*, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). Before imposing discretionary LFOs, the sentencing court has an affirmative duty to make an inquiry into the defendant's individual situation to determine his or her ability to pay. *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013). Therefore, the trial court was without authority to impose discretionary LFOs as a condition of Mr. Rieker's sentence because it did not first take into account his financial resources and the burden of payments.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the defendant's individualized financial circumstances and made an individualized determination that he or she has the ability or likely future ability to pay. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166, (1992); *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). Here, the trial court did not consider Mr. Rieker's financial resources at any point. The trial court's LFO order is not in compliance with RCW 10.01.160(3) and thus exceeds the trial court's authority.

The boilerplate finding in the judgment and sentence does not establish compliance with the requirements of RCW 10.01.160(3). CP 178. A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. *See, e.g., In re Dependency of K.N.J.*, 171 Wn.2d 568, 580-81, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave independent consideration of the necessary facts); *Hardman v. Barnhart*, 362 F.3d 676, 679 (10th Cir. 2004) (explaining boilerplate findings in the absence of a more thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility). The trial court did not individually consider or acknowledge Mr. Rieker's financial circumstances as required.

b. The challenge to the imposition of legal financial obligations is ripe for review.

This case involves a direct challenge to the legal validity of the LFO order on the ground that the trial court failed to comply with RCW 10.01.160(3). Thus it is distinguishable from the line of cases that establish that the time to challenge LFOs is after the State seeks to enforce them; these cases address challenges based on an assertion of

financial hardship or procedural due process principles that arise in the collection of LFOs.[12]

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *Bahl*, 164 Wn.2d at 751. The legal validity of a LFO order based on non-compliance with RCW 10.01.160 is primarily a legal issue. The issue of whether the trial court failed to comply with the statute will not be changed by time or future circumstances. As such, it requires no further factual development. LFOs become enforceable at the time the judgment is rendered and begin to accrue interest immediately. RCW 10.82.090. The challenged action is final because the original sentencing order imposing LFOs is final. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the

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[12] *See, e.g.*, *Lundy*, 176 Wn. App. at 109 (any challenge to the order requiring payment of legal financial obligations on hardship grounds is not ripe for review until the State attempts to collect); *State v. Ziegenfuss*, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003) (determining defendant's constitutional challenge to the LFO violation process is not ripe for review until the State attempts to enforce); *State v. Phillips*, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (defendant's constitutional objection to the LFO order based on the fact of his indigence was not ripe until the State sought to enforce the order); *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116, 837 P.2d 646 (1991) (the meaningful time to review a constitutional challenge to the LFO order on financial hardship grounds is when the State enforces the order).

order authorizing the debt in the first place does not change. Therefore, the imposition of LFOs is ripe for review.

c. Remand for resentencing is the proper remedy.

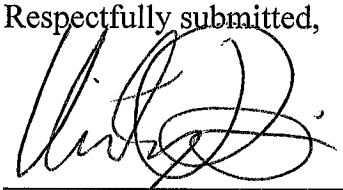
Because the imposition of LFOs without inquiring into Mr. Rieker's ability to pay constitutes a sentencing error, this Court should vacate the order imposing LFOs and remand for resentencing.

E. CONCLUSION

This Court should reverse Mr. Rieker's convictions and remand with instructions to suppress all evidence obtained pursuant to the search warrant. Alternatively, this Court should reverse and remand for a *Franks* hearing to address the material false statements and omissions in the search affidavit. In the event that the sentence remains in effect, this Court should remand for the trial court to strike the improper community custody conditions and consider Mr. Rieker's individualized financial circumstances before imposing LFOs.

DATED this 23rd day of July, 2014.

Respectfully submitted,



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APPENDIX A

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KIM MORRISON
CHELAN COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON, Plaintiff, vs. JEFFREY L. RIEKER, Defendant.	No. 12-1-00024-8 FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: CrR 3.6 HEARING

THIS MATTER, having come duly and regularly before the Court on the 20th day of May, 2013 for hearing pursuant to CrR 3.6 on Defendant's Motion to Suppress, Plaintiff State of Washington appearing by and through Gene A. Pearce, Deputy Prosecuting Attorney, Defendant appearing in person and with his attorney George P. Trejo, Jr., and the Court having heard and considered the evidence presented, and the statements and arguments of counsel, makes the following:

FINDINGS OF FACT

1. In regard to the staleness issue, tools are less transitory in nature and are not easily discarded or consumed as compared to a controlled substance. Looking at the nature of the criminal activity, and the character of the evidence to be seized in this case, tools are not typically something that disappear, are consumed, or thrown away. Further, the witness, Mr. Smith gave information to the police about being on the defendant's property on several occasions so he would have at least some

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factual basis for saying that the defendant is not one to get rid of tools. When Mr. Smith came in to speak with the police he had in his possession one of the tools that he stated was given to him by the defendant. This tool was confirmed as being one of the tools that had been reported as stolen. In addition, Mr. Smith specifically relayed information about the defendant having a hiding place between the walls where he would store stolen tools. This would factually support the inference that the defendant would still have the tools in question, rather than discard them.

2. In regard to the issue of probable cause and whether the defendant is entitled to a *Franks* hearing the court looked at the case of *State v. Evans*, 129 Wn. App 211, 188 P.3d 419 (2005), *reversed on other grounds*, 159 Wn.2d 402, 150 P.3d 105 (2007), which reiterates the *Franks* standards.

3. Before a defendant is entitled to a *Franks* hearing, the defendant must make a preliminary showing that the affiant included a false statement knowingly and intentionally, or with reckless disregard for the truth and the false statement was necessary to a finding of probable case. The same standard applies to omissions.

4. In this case it was disclosed that Mr. Smith did have a felony history. The fact that specific history wasn't cited does not show that its omission was knowing and intentional, or done with reckless disregard for the truth. In regard to the specific crimes of "Larceny" that Mr. Smith had on his record, these were two fairly old crimes, one being a misdemeanor and one a felony from out of state, occurring over ten years ago. This court does not see how it would have materially changed Judge Bridges assessment of whether there was probable cause for the issuance of the search warrant.

5. With respect to the dispute between Mr. Smith and the defendant, no evidence was submitted to show that the law enforcement officer even knew of the dispute, or that the dispute was of a criminal nature, which it was not. There was no showing that the officer, by not asking additional questions of Mr. Smith to acquire that dispute information, was recklessly disregarding the truth.

6. In regard to the issue about Mr. Schwind possibly being in jail in Kittitas County on the days that Mr. Smith claimed to have spoken with him in Chelan County about the defendant, it appears

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that the officer could have been negligent in not confirming what days Mr. Schwind was in and out of jail. However, this does not appear to be an issue of the officer acting with reckless disregard for the truth or knowingly and intentionally.

7. If we are to assume that the information about Mr. Schwind should have been part of the search warrant, then the question would be whether that additional information would have significantly changed the finding of probable cause by Judge Bridges. When looking at the totality of the specific information that was provided by Mr. Smith, which was corroborated by other reliable sources, such as producing a tool stolen from the alleged victim, this court does not believe it would have changed the determination that there was probable cause.

CONCLUSIONS OF LAW

1. In regard to the staleness issue, when this court looks at all of the information in the warrant, plus the nature of the evidence in the alleged criminal activity it was reasonable for Judge Bridges to conclude that this information was not stale, and to proceed with his analysis on whether the search warrant was justified based upon the information acquired by Mr. Smith some 43 days before the application of the search warrant. Defendant's motion to suppress based upon the staleness issue is denied.

2. In regard to the issue of probable cause and whether the defendant is entitled to a *Franks* hearing, the defendant has failed to make the requisite preliminary showing therefore his motion for a *Franks* hearing is denied. In addition, this court does not believe that the addition of Mr. Smith's specific criminal history nor the allegation of whether Mr. Schwind was in jail the day that Mr. Smith claimed to have spoken with him would have changed Judge Bridges' finding of probable cause.

3. Based upon the State's agreement to dismiss the criminal counts associated with the search of the defendant's cabin, the defendant's motion to suppress evidence found in that cabin is now moot and will not be addressed by this court.

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4. Defendant's motion to suppress is DENIED.

DATED this 9th day of January, 2014

THE HONORABLE LESLEY A. ALLAN
JUDGE OF THE SUPERIOR COURT

Presented by:

Gene A. Pearce, WSBA #32792
Deputy Prosecuting Attorney

Copy received, approved as to form:

Nicholas A. Yedinak, WSBA #20113
Attorney for Defendant

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APPENDIX B

Superior COURT FOR CHELAN COUNTY ORIGINAL

STATE OF WASHINGTON)
) ss.
COUNTY OF CHELAN)

No. 12-1-00024-8

AFFIDAVIT FOR SEARCH WARRANT

FILED
JAN 17 2012
KIM MORRISON
CHELAN COUNTY CLERK

The undersigned on oath states: That affiant believes that:

☒ Evidence of the crime of Possessing Stolen Property in the First Degree (9A.56.150) , and

☒ Contraband, the fruits of a crime, or things otherwise criminally possessed, and

☐ Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed, and

☐ A person for whose arrest there is probable cause, or who is unlawfully restrained are I located in , on , or about the following described premises, vehicle or person: Your Honor,

Your affiant Mitch Matheson has been a commissioned Law Enforcement Officer in the State of Washington since March of 1980. I was commissioned by the Deer Park Police Department on March, 1980, I am currently employed by the Chelan County Sheriff's Office. In January 2005 I was promoted to the position of detective; the title I currently hold.

I have successfully completed the Basic Law Enforcement Academy. In addition, I have received specific training in Crime Scene Investigation, Child Abuse Investigation, Harbor View Child Interview Training, Infant Death Investigation, Narcotics Investigation, Interview and Interrogation, Homicide Investigation, Blood Stain Pattern Interpretation, Computer Data Recovery and Analysis, the Sexual Exploitation of Children, numerous S.W.A.T. related trainings, including team leader and first line supervisor training, and Domestic Violence Investigation training. I have read and studied material regarding Homicide Investigation, Child Abuse Investigation, Rape Investigation, and Bloodstain Evidence Interpretation, to name a few.

I have interviewed numerous victims and suspects while investigating felonious crimes including Homicide, Attempted Homicide, Rape, Child Physical Abuse, Child Sexual Abuse, Forgery, Theft, and Assault. I have also interviewed numerous persons having knowledge of lesser crimes. I have been the affiant on several Search Warrants, as well as assisted in the serving of numerous other warrants. Many of these warrants resulted in the recovery of evidentiary items and/or the arrest of suspects listed in the warrants.

Your Affiant is a certified Washington Pease Officer in accordance with RCW 43.101.010.

THIS AFFIDAVIT IS BASED ON THE FOLLOWING SET OF CIRCUMSTANCES:

On 10/11/2011, Chelan County Sheriff's Office received a report of a burglary of a shop at 5510 Mill Road in Cashmere Washington. This shop houses two businesses, A&W Paving and Ridgeview Plumbing. Numerous tool type items were stolen from the two businesses during the burglary. Deputy Brent Patterson responded and took the initial report from the victims. (See the below list of items).

EXHIBIT
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On 01/03/2012, at 0825 hours, I conducted a recorded interview with a Lance D. Smith (10/05/1967) Mr. Smith said he used to work as a handyman/ mechanic for a subject named Jeffrey L. Rieker (12/27/1961). Smith told me he worked part time for Rieker over a period of approximately two years, ending his employment on November 23, 2011 over a dispute relating to unpaid wages and Rieker's current lifestyle. According to Smith, both he and Rieker are convicted felons and realizing Rieker was still in this lifestyle, decided to part company. Smith said he has been clean and free of drugs for over three years. I checked both subjects though WACIC and NCIC and confirmed both are convicted felons. The only activity showing for Smith since approximately 2008 was a warrant service for an unpaid fine in 2011. The fine was paid and Smith was released the same day.

According to Smith, he was originally introduced to Rieker by Smith's stepson, Kelly L. Garrett (01/08/1990). Kelly was working for Rieker at the time.

Smith told me he was aware Rieker was receiving stolen property for drugs and or money but did not want to get into trouble with Rieker so he kept quiet. Smith also talked about how Rieker sometimes hid stolen tools/items in the walls of the shop. Smith stated there is approximately an 18-inch space between the inner and outer walls and Rieker will remove screws securing the inner wall panels to access the space behind. Smith said Rieker used to brag to him about how he was amassing numerous stolen tools and having to pay almost nothing for them from local youths, he commissions to do various crimes.

Smith told me one of the subjects Rieker has used to do crimes for him is a Tanner S. Schwind (12/15/1989). Smith said Schwind was best friends with his stepson. Garrett and Schwind were close friends up until Garrett returned home. Smith said he would often talk with Schwind regarding his activities for Rieker and Schwind would brag about things he had done. Schwind bragged to Smith about how a few years ago he set a front-end loader on fire up Chumstick Canyon. Smith stated Rieker was mad at Shaun Brender so he had Schwind set the loader on fire. (I found case number 09C13925 associated with an unsolved suspicious loader fire at 11890 Spromberg Canyon. The victim was Shaun Brender).

The last day Smith was at Rieker's shop, November 23, 2011, he noticed several tools he had not seen in the shop before. Smith recalled seeing two Mig welders, one was a smaller 110 volt unit while the other was a larger industrial 220 volt unit. He also observed a plasma cutter, a Hilti diamond coring concrete motor, a Wirsbo expander tool, a handheld Milwaukee band-saw with the words "Ridgeview Plumbing" written on the side of it, an orange colored power snake plumbing tool, a black & Decker drill, and a new in the box security monitoring system with four cameras.

Smith said it had been about a month since he had been in Rieker's shop and he did not recall seeing these tools at that time. When he asked Rieker about the tools, Rieker was somewhat vague and did not give an answer as to where they come from. Smith said he just assumed they were stolen, like most of the tools in his shop. Smith said Rieker is not one to get ride of the tools he acquires and the tools in question are almost certainly still at Rieker's shop.

A few days after seeing the tools in Rieker's shop, Smith said he ran into Schwind in Leavenworth. The two began talking and the subject of the tools in Rieker's shop came up. Schwind bragged to smith about filling a "shopping list" Rieker gave to him relating to tools Rieker wanted Schwind to steal. Schwind said the tools at the shop were tools he stole from a plumbing shop in Cashmere. According to Smith, Schwind thought it was funny how he was able to fill the order at the one location. (Schwind is currently incarcerated in Kittitas County on a drug related charge. I will be attempting to interview him at a later date).

Smith also told me about an AK-47 assault rifle Rieker has hidden on the property near the shop. Smith described a section of culvert buried in the ground with the top sticking out about two feet. Smith said there is a green fiberglass lid covering the top of the culvert. Smith described the location of the culvert as being just past the junction of the two dirt roads on the way to the shop and off in the woods about fifty feet to the north west. Smith said Rieker wanted him to take the assault rife because he was a felon and was fearful law enforcement was going to catch him with the gun. Rieker felt his neighbor may have observed him with the rifle and was afraid they would call the sheriff's office. Smith said he refused to take the rifle, being a convicted felon him self. Smith said he has observed Rieker with the assault rifle in the shop on more than one occasion in the past. Rieker has not observed the rifle in the hidden location described above, and was only told of its location by Rieker in order for Smith to pick it up for him.

When smith came in for the interview, he brought an orange colored Super Vee brand snake plumbing tool. (This is a power tool used to unplug drains). This particular tool also had a white plastic sticker on it. Smith said Rieker had given this tool, along with a skill saw and power drill to him because they did not work and wanted Smith to try to fix the tools for him.

I spoke by phone with Robert McLeod, the owner of Ridgeview Plumbing. McLeod described having either "Ridgeview Plumbing" or "RVP" written on some of his tools and/or green paint on some part of the tool. McLeod also mentioned placing white plastic stickers on some of his tools as well. I shared the names of tools Smith told me he observed in Rieker's shop. McLeod said it sounded like they were definitely his tools. McLeod went on to tell me how the Wirsbo expander tool and the Hilti diamond coring tool are very high-end specific tools for plumbing and are somewhat rare and the chance for anyone, or another plumbing company having those brand tools in the Wenatchee valley is unlikely. Regarding the Super Vee power snake, McLeod said, based on the white sticker, that was his for sure.

McLeod told me he does not know Rieker, Smith, Schwind, or Garrett. McLeod did say he received a call from someone named Smith, asking if he had been the victim of a burglary, in which plumbers tools were taken. When McLeod said he had, Smith stated he knows who may have the tools now. McLeod encouraged Smith to call the Chelan County Sheriff's Office and report the information. (Chelan County case number 11C13373 was handled by Deputy Nelson and involved Smith calling into River Com reporting having information regarding a burglary and possible arson).

Rieker has a shop and small cabin in the woods off the US 97 (Blewett Pass) highway in the area of 4088 US 97 Peshastin, Washington. (I checked with Chelan County Planning and learned Rieker had not applied for any permits to build a cabin or a shop anywhere in the area of US 97; subsequently, no address exists for the shop/cabin in question). Both Sergeant Long and Corporal Reinfeld have been to Rieker's shop and cabin with-in the past year and describe its location as follows. An unmarked dirt road located on the west side of US 97, one quarter of a mile south of Camas Road. This dirt road continues across a small wooden bridge allowing access to the west side of Peshastin Creek. The road then continues south, paralleling Peshastin Creek for approximately three quarters of a mile where it dead-ends at Rieker's shop and cabin. The shop is described as approximately thirty feet wide by fifty feet long, with tan or light brown metal siding on the lower four feet of its sides, with the remaining portion of the walls made up of horizontally placed split log siding. The roof is covered with galvanized metal roofing. The small 500 square foot cabin is located approximately one hundred feet south east from the shop, nearest Peshastin Creek. Mr. Smith provided the same basic information to me when I asked him to describe how to get to Rieker's shop.

Your Honor,

I am requesting a search warrant to look for the below listed items which are listed in the original burglary report, items described as being observed by Lance Smith inside Rieker's shop, and any and all firearms located with-in said shop and above described hiding location in the woods near the shop.

Items taken from A&W Paving:

Propane Torch / value $50.00
ESAB Migmaster 275 welder / serial number SMORJ937002 / value $2000.00
Thermal Dynamics Cutmaster 62 Plasma Cutter/ serial number 05724235 / value $1600.00
Lincoln SP120T Wirefeed Welder / serial number U1940115215 / value $500.00
Dewalt pressure washer / serial number DPH3800 / value $1100.00
Snap-on super 550 battery charger / serial number 0645BO / value $500.00
Thor valve grinder / value $100.00
Dewalt Chopsaw / value $250.00
Blue air hose / value $100.00
Skilsaw worm-drive saw / value $170.00
Milwaukee framing air nailer / value $450.00
Ryobi cordless 18v impact wrench / value $110.00
Bostich palm-nailer with case / value $120.00
Dewalt ½" staple gun / value $350.00
Ryobi 18v cordless drill w/ several batteries / value $250.00
Dewalt ½" electric impact wrench w/ case / value $250.00
Porter Cable sawzall / value $170.00
Husky chainsaw / value $350.00

Items taken from Ridgeview Plumbing:

(3) Dewalt angel drill / model DW124 / value $350.00
Hatachi chopsaw / model C10FSH / value $180.00
Wirsbo expander tool/ serial number 26261555 / with black case / value $1400.00
SuperVee drain snake / model SV-C-WC / value $435.00....recovered.
Hilti breaker / model DE-805
Hilti diamond coring / model DD-160E / value $270.00
Milwaukee handheld bandsaw / model 623ON / Ridgeview Plumbing written on the side / value $270.00
Milwaukee rotohammer / model 5262-21 / value $240.00
Dynaglo space heater / 100K-150K BTU / value $250.00
Upmor stapler / serial number E6021638 / value $1530.00

Affiant

35

Agency, Title and Personnel Number

Subscribed and Sworn to before me this 5 day of January, 20 12

Place where signed: Wenatchee WA.

Judge

APPENDIX C

FILED

JUL 13 2012

Kim Morrison
Chelan County Clerk

SUPERIOR COURT OF WASHINGTON IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON, Plaintiff, vs. JEFFREY RIEKER Defendant	CASE NO.: 12-1-00024-8 SUPPLEMENTAL DECLARATION OF NICHOLAS YEDINAK IN SUPPORT OF MOTION TO SUPPERSS

I, NICHOLAS YEDINAK, am the attorney for the defendant Jeffrey Rieker. I have filed a Motion and Memorandum in support of Motion to Suppress in this case. Since the Motion and Memorandum and accompanying declaration was filed, I have had an opportunity to locate and listen to the recorded interview of the named informant, Lance Smith, occurring when he provided the information to Detective Mathison who then used the information to apply for a search warrant. The following facts and omissions were evident in the interview transcript:

1) At the time that Detective Mathison was interviewing Mr. Smith, Detective Mathison relates that he can smell the odor of Marijuana on Mr. Smith. Detective Mathison neglected to ask him when the last time he used marijuana was or whether he was high;

2) At no time during the interview did Mr. Smith say that "Rieker is not one to get rid of the tools that he acquires and the tools in question are almost certainly still at Rieker's shop." In fact, the opposite is true, wherein Mr. Smith states that he thought that Mr. Rieker was brokering or trying to sell the tools that Tanner Schwin brought to him. Detective Mathison's statement in the affidavit to the contrary seems to be an attempt to negate the staleness of his information.

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3) Mr. Smith states in the interview that he did occasional small jobs for the defendant for the past 2 years, not that he worked for him as an employee.

4) During the interview, Detective Mathison informs Mr. Smith that he has his criminal record in front of him and the two of them discuss his extensive felony history for drug and theft related crimes. This of course was not relayed to Judge Bridges.

5) Nowhere in the recorded interview did it indicate that: "Rieker used to brag to him about how he was amassing numerous stolen tools and having to pay almost nothing for them from local youths he commissioned to do various crimes." To the contrary, Mr. Smith indicates in the interview that he never really talked to Rieker about the tools that he had.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Wenatchee, Washington on this 12 day of July, 2012.

NICHOLAS YEDINAK

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APPENDIX D

SUPERIOR COURT OF WASHINGTON IN AND FOR THE COUNTY OF CHELAN

STATE OF WASHINGTON, Plaintiff, vs. JEFFREY RIEKER Defendant	CASE NO.: 12-1-00024-8 DECLARATION OF ATTORNEY NICHOLAS YEDINAK

I, NICHOLAS YEDINAK, am the attorney for the defendant Jeffrey Rieker. On April 13th, 2012, I interviewed Detective Mitch Mattheson at the Chelan County Prosecutor's office. During that interview, Det. Matthison affirmed that he was aware that informant Lance D. Smith had felony history according to the NCIC, however that was not information that could be summarily supplied to defense counsel. Subsequently, Deputy Prosecuting Attorney Roy Fore acknowledged that informant Lance D. Smith's criminal history included a couple of Larceny convictions from the State of Oklahoma, "one of which is still within the 10 year window". Mr. Fore also indicated that there may have been an older "embezzlement by a bailee" out of Oklahoma that was deferred.

These crimes of dishonesty are but a few convictions in Mr. Smith's significant criminal history collection. Attached to this declaration as Exhibit "D" is Mr. Smith's DCH as it was provided to the undersigned in discovery.

During the interview with Det Matthison, it was revealed that the informant actually contacted Detective Matthison about providing information about the defendant. Detective Matthison further described that Mr. Smith was not happy with Mr. Rieker because Mr. Rieker had either called or texted Mr. Smith's ex girlfriend/wife who lived back east and told her that Mr. Smith was involved in drugs. This apparently caused an issue with Mr. Smith's visitation with his child.

EXHIBIT
B

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Wenatchee, Washington on this 10 day of ~~April,~~ May 2012.

NICHOLAS YEDINAK

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 32174-6-III
	)	
	)	
JEFFREY RIEKER,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	DOUGLAS SHAE, DPA CHELAN COUNTY PROSECUTOR'S OFFICE PO BOX 2596 WENATCHEE, WA 98807-2596	(X) U.S. MAIL ( ) HAND DELIVERY ( ) _____
[X]	JEFFREY RIEKER 293381 AIRWAY HEIGHTS CC PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) U.S. MAIL ( ) HAND DELIVERY ( ) _____

SIGNED IN SEATTLE, WASHINGTON, THIS 23RD DAY OF JULY, 2014.

X_____

Washington Appellate Project
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