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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

Chelan County Superior Court
Cause No. 12-1-00024-8

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

JEFFREY L. RIEKER,
Defendant/Appellant.

RESPONDENT'S MOTION ON THE MERITS

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1. Identity of Moving Party

State of Washington, by Gene A. Pearce, Deputy Prosecuting Attorney for the County of Chelan.

2. Statement of Relief Sought

State of Washington, by counsel, makes this motion on the merits to affirm the action taken by the Superior Court for Chelan County as indicated herein.

3. Facts Relevant to Motion

On May 16, 2013, a suppression hearing was commenced in this cause before the Honorable Lesley A. Allan, Judge of the Superior Court of Chelan County, Washington. 1 RP 22-59. Because of scheduling conflicts the hearing was adjourned and rescheduled for May 20, 2013. 1 RP 36-37, 59.

On May 20, 2013, the suppression hearing was resumed. 1 RP 60. During the course of the suppression hearing the State and appellant reached an agreement whereby the appellant would

agree to a stipulated facts trial and would reserve the right to appeal the suppression issues in exchange for the State removing the firearms enhancements from the charges and agree to a sentence of 55 months. 1 RP 92-93. The parties concluded arguing the suppression issues. 1 RP 93-113. After hearing arguments the court made its ruling and denied appellant's motion to suppress. 1 RP 113-117. The parties proceeded with the stipulated facts trial with the State submitting stipulated exhibits. 1 RP 127-135. The court made its ruling and found the appellant guilty of: Count 1, Possessing Stolen Property in the First Degree; Count 2, Possession of a Stolen Vehicle; Count 3, Unlawful Manufacture of a Controlled Substance-Marijuana; Count 4, Unlawful Possession of a Firearm in the Second Degree; and Count 5, Bail Jumping. 1 RP 139. The appellant was permitted to remain out of custody and a sentencing hearing was scheduled for June 5, 2013. 1 RP 141-142.

The appellant failed to appear for sentencing so the court issued a warrant for his arrest. 2 RP 10-12. On January 8, 2014, the appellant was brought before the Honorable Lesley L. Allan for sentencing. 2 RP 14. The parties informed the court that a global resolution was reached that encompassed the present case and a

new count of bail jumping that was filed by the State after the appellant failed to appear for sentencing. 2 RP 14-16. Sentencing on both cases was continued until January 9, 2014.

On January 9, 2014, prior to sentencing, Findings of Fact and Conclusions of Law were entered for both the prior suppression hearing and stipulated bench trial. 2 RP 17-18. At sentencing the court was informed by both parties once again that a global resolution had been reached and the terms were recited to the court which, in the present case, included time of confinement, community custody, community custody conditions, and legal financial obligations. 2 RP 18-22. The court followed the parties agreed sentencing recommendations. 2 RP 24.

4. Grounds for Relief and Argument

a. The search warrant was supported by probable cause and a named informant, who provided detailed information about stolen property actually viewed in the place to be searched, satisfies the *Aguilar-Spinelli* test.

i. Appellant's Assignment of Error #1 is clearly without merit.

Probable Cause

Probable cause exists if the State sets forth facts and circumstances which, if believed, lead a neutral and detached person to conclude that more probably than not, evidence of a crime will be found at the place to be searched. *In re Det. of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002). The affidavit must be tested in a commonsense fashion rather than hypertechnically. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). An affidavit need not establish proof of criminal activity, but merely probable cause to believe it has occurred. *State v. Mejia*, 111 Wn.2d 892, 901, 766 P.2d 454 (1989), citing, *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). The decision to issue a search warrant is highly discretionary. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). Accordingly, the courts will generally resolve doubts concerning the existence of probable cause in favor of the validity of the search warrant. *Id.* (citing *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002)). Even if the propriety of issuing the warrant were debatable, the deference due the magistrate's decision would tip the balance in favor of upholding the warrant. *State v. Jackson*, 102 Wn.2d 432, 446, 688 P.2d 136 (1984).

A search warrant must be based on a finding of probable cause that the facts and circumstances presented to the magistrate are sufficient to support a reasonable inference that the defendant is involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Warrants must be based on specific facts, but a magistrate reviewing a warrant application is entitled to rely on his or her own common sense and experience to determine what inferences may be reasonably drawn from the facts for purposes of making probable cause determinations. *Id.* at 148-49. (Emphasis added.) “Judges looking for probable cause in an affidavit may draw reasonable inferences about where evidence is likely to be kept” *State v. Gebaroff*, 87 Wn. App. 11, 16, 939 P.2d 706 (1997).

Courts have found probable cause to search on less evidence than was presented to the issuing judge herein. See, e.g., *State v. Clark*, 143 Wn.2d 731, 749-50, 24 P.3d 1006 (2001). (Combination of prior criminal history and inadmissible polygraph evidence sufficient for probable cause to search vehicle.) See also, *State v. Condon*, 72 Wn. App 638, 644, 865 P.2d 521 (1993). (When the object of a search is a weapon used to commit a crime,

it is reasonable to infer that the weapon is located at the perpetrator's residence.)

Aguilar-Spinelli Test

Washington applies the two-part *Aguilar-Spinelli* test to determine whether an informant's statements support the issuance of a warrant. *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984). The *Aguilar-Spinelli* test requires that an affidavit in support of a search warrant establish the informant's basis of knowledge and the informant's reliability. *Id.* at 433; see also *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964), and *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969). The appellant contends that the affidavit herein failed to establish either prong of the *Aguilar-Spinelli* test.

Reliability may be established from the circumstances under which the information was furnished. *State v. Lair*, 95 Wn.2d 706, 710, 630 P.2d 427 (1981). Herein, a named informant provided detailed information about stolen property he alleged to have personally observed in the place to be searched. The informant, moreover, had in his possession a tool that was stolen in the same burglary as the property he asserted was seen in the defendant's shop and admitted receiving and possessing the tool, which he

believed to be stolen property. Moreover, the informant told about a conversation he overheard wherein a front-end loader had been set afire. Detective Matheson's investigation confirmed the fact of the burglary, details of the stolen tools, and a suspicious loader fire.

A factor supporting the determination of probable cause herein is that Smith was named in the affidavit. See, *State v. Chamberlin*, 161 Wn.2d 30, 42, 162 P.3d 389 (2007); *Chenoweth*, 160 Wn.2d at 483; *State v. O'Connor*, 39 Wn. App. 113, 692 P.2d 208 (1984). Further, Smith was not a professional or paid informant and, therefore, may be considered a named citizen informant. See, *Chamberlin*, at 42; *Chenoweth*, at 454; *O'Connor*, supra; and *State v. Northness*, 20 Wn. App. 551, 558, 582 P.2d 546 (1978). Such an informant may be presumed to be reliable. *Chamberlin*, supra.

The level of detail further supports a determination of reliability. See, *Chenoweth*, 160 Wn. App. at 454; and *O'Connor*, 39 Wn. App. at 122-23. In *O'Connor* the informant named a specific person, identified a specific place, and recounted certain events and items to be found. *Id.* Smith, similarly, named the defendant, specified the defendant's residence and shop,

recounted certain events, and particularly described items likely to be found.

Moreover, Smith made statements against his penal interest. When Smith met with Detective Matheson, he had in his possession a tool that was stolen. Smith admitted receiving and possessing the tool although he believed it was stolen. Admissions against penal interest are relevant to probable cause determinations under the *Aguilar-Spinelli* test. *O'Connor*, 39 Wn. App. at 199; see also, *Chamberlin*, 161 Wn.2d at 42; *Chenoweth*, 160 Wn.2d at 483; *Lair*, 95 Wn.2d at 711; and *State v. Bean*, 89 Wn.2d 467, 572 P.2d 1102 (1978). Admissions against penal interest support a reasonable inference that the statement is reliable. *Lair*, supra. Indeed, statements against penal interest require no corroboration. *O'Connor*, at 119-20. "When a named informant has made admissions against penal interest 'there is much more reason to conclude that the veracity prong is satisfied. . . . Such persons do not have reason to believe that their admissions of criminal conduct will be ignored by the police.'" *Id.* at 121, quoting, 1 W.LaFave, *Search and Seizure*, Sec. 3.3 at 526-27 (1978).

State v. Chenoweth, 160 Wn.2d 454, 483, 158 P.3d 595 (2007), is illustrative. In *Chenoweth* an informant contacted a police officer to complain that the defendant had his car. 160 Wn.2d at 459. The informant claimed that the defendant was manufacturing methamphetamine. *Id.* The informant told a detective that he had been to the residence and seen equipment consistent with the manufacture of methamphetamine. *Id.* The informant also admitted that in the past he had assisted the defendant in manufacturing methamphetamine and ingested methamphetamine with him. *Id.* Noting that the informant was named in the affidavit, that he made statements against penal interest, and the detail of the information he provided, courts agreed that the informant's veracity had been established. *Id.* at 483.

The *O'Connor* case, *supra*, involved circumstances materially similar to those at issue herein. In *O'Connor* a confidential informant made a controlled buy of suspected stolen property from a suspect. 39 Wn. App. at 115. The suspect was later contacted by the detective and asked how he had obtained the item. *Id.* The suspect said he had stolen it from a car. *Id.* The detective said he did not believe the explanation. *Id.* The suspect

then stated that he had been receiving stolen property at the defendant's residence, that he had been selling stolen property for the defendant for over a year, and that the defendant always had stolen property at his residence. *Id.* On appeal the court found that the veracity of the suspect (informant) had been shown, explaining that he was named in the affidavit, that he made statements against penal interest and, that he gave detailed information describing the criminal activity and items to be found. *Id.* at 120-23.

In light of the above cases and Detective Matheson's corroboration of certain factual allegations, Judge Bridges clearly acted within his discretion in finding probable cause herein. The affidavit named the informant, it set forth, in significant detail, the nature of the suspected criminal conduct observed by Smith and contraband likely to be found in the defendant's shop, and it contained statements against Smith's penal interest. The affidavit in this case, therefore, amply set forth facts from which a judge could reasonably find that the veracity prong of the *Aguilar-Spinelli* test to have been satisfied.

The appellant's challenge relating to the basis of knowledge prong is clearly without merit. The basis of knowledge test can be

satisfied by showing that the informant personally observed the facts asserted and is conveying personal knowledge. *Vickers*, 148 Wn.2d at 113. Clearly, Smith had first-hand knowledge of the asserted facts.

b. Detective Matheson did not deliberately or recklessly make material false statements and/or omissions that would have required a *Franks* hearing.

i. Appellant's Assignments of Error #2, #3, #4, #5, #6, and #7 are clearly without merit.

Prerequisites of a *Franks* Hearing

In *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978), the court held that material misrepresentations in an affidavit may invalidate a search warrant. Upon a preliminary showing that an affiant made a false statement necessary to probable cause, a defendant is entitled to a hearing. *Vickers*, 148 Wn.2d at 114. Such hearings are referred to as *Franks* hearings. The test and procedure adopted by the United States Supreme Court is applicable in Washington with respect to both material falsehoods and material omissions of fact. See, e.g., *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Const. art. I, § 7

does not require suppression upon proof of a negligent omission or error. *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007).

State v. Garrison, 118 Wn.2d 870, 874, 827 P.2d 1388 (1992), spelled out the procedures and requirements requisite to a *Franks* hearing. First, the challenged information must be necessary to a finding of probable cause. Omitted information, for example, that is potentially relevant to finding probable cause but not dispositive is not enough to warrant a *Franks* hearing. *Id.* Whether omitted information “tends to negate probable cause” is not the proper inquiry. *Id.*

Any fair doubt as to whether allegations of the affidavit on which a search warrant issued were perjurious is to be resolved in favor of the warrant. *People v. Alfinito*, 16 N.Y.2d 181, 211 N.E.2d 644 (1965). This heavy burden is imposed upon the defendant because the allegations of the affidavit have already been subjected to examination by a judicial officer in issuing the warrant. *Id.*

An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation, and the mere fact that an affiant did not include every conceivable conclusion in the warrant does not taint the validity of the affidavit.

United States v. Colkley, 899 F.2d 297, 300-01 (4th Cir. 1990), quoting *United States v. Burnes*, 816 F.2d 1354, 1358 (9th Cir. 1987); *State v. Bockman*, 37 Wn. App. 474, 486, 682 P.2d 925 (1984), *review denied*, 102 Wn.2d 1002 (1985). *Franks* only protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead, the magistrate. *Colkley*, 899 F.2d at 301.

To secure a *Franks* hearing a defendant must allege deliberate falsehood or omission, or a reckless disregard of the truth. *Garrison*, 118 Wn.2d at 872. The allegations must be accompanied by an offer of proof. *Id.* Allegations of negligence or innocent mistake are insufficient. *Id.* Further, the allegations may not rest solely on an inference drawn from the omission of facts, even if those facts are critical to probable cause. *Id.* at 873 (stating that evidence of an omission only serves to prove the content of the omission; proving nothing about intent or reckless disregard for the truth.) See, *Id.* If the foregoing requirements are not met, the inquiry ends. *Id.* at 873.

If the requirements are met, and the false representation or omitted material is relevant to establishment of probable cause, the affidavit for search warrant must be examined. *Id.* at 873. If it is a

matter of false representation, the false representations are set aside. *Id.* If it is a matter of reckless omission, the omitted matters are considered as part of the affidavit. *Id.* If the resulting affidavit is sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. *Id.* A *Franks* hearing is only appropriate when the altered content of the affidavit is insufficient to establish probable cause. *Id.*

The alleged false assertions are not sufficient offers of proof to support a *Franks* hearing.

In an attempt to show a deliberate or reckless disregard for the truth on part of Detective Matheson, the appellant compares the search warrant affidavit with a declaration from Mr. Rieker's attorney, Nick Yedinak, who reviewed a recorded interview between Detective Matheson and Mr. Smith. In his declaration Mr. Yedinak declares, "Nowhere in the recorded interview did it indicate . . ." and "At no time during the interview did Mr. Smith say" CP 60-61. Appellant assumes that this one, isolated, recorded interview would have been the only time Detective Matheson would have spoken with Mr. Smith about the facts of the case. In fact, an examination of the search warrant affidavit as a whole clearly shows that Detective Matheson was relying upon facts that he had

gleaned so far in his total investigation up to the point of preparing the affidavit. CP 32-35. These allegations by the appellant are not sufficient offers of proof to make a substantial preliminary showing of deliberate falsehood or a reckless disregard for the truth.

In addition, appellant asserts that alleged false statements by Detective Matheson portrayed Mr. Smith as having a basis for his knowledge regarding the tools when, according to the declaration of attorney Yedinak, Smith told Matheson that he never really talked to the appellant about the tools. CP 60-61. The question is what tools was Mr. Smith allegedly referring to: the tools in the shop before the Ridgeview Plumbing tools arrived, the tools that belonged to Ridgeview Plumbing, or the tools that the appellant gave Mr. Smith? This one alleged statement by Mr. Smith is not a sufficient offer of proof to make a substantial preliminary showing of deliberate falsehood or a reckless disregard for the truth.

The alleged omissions are insufficient offers of proof to support a *Franks* hearing.

Reckless disregard will not be established solely from the omission of a material fact. *State v. Garrison*, 118 Wn.2d at 873; *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990).

Evidence of omission of an informant's criminal history, even involving crimes of dishonesty, does not demonstrate intentional conduct or reckless disregard. See, *State v. Evans*, 129 Wn. App. 211, 220-21, 118 P.3d 419 (2005), *reversed on other grounds*, 159 Wn.2d 402, 150 P.3d 105 (2007). In *Evans* the affiant's (officer) failure to mention the informant's six convictions for forgery and two convictions for second degree theft were insufficient to make the requisite preliminary showing. *Id.* Further, as the trial court ruled, the information was unnecessary to probable cause. *Id.*

First, as in *Evans*, at the most the defendant's offer of proof in this case suggests negligence. Further, Detective Matheson stated that Smith had prior felonies. CP 33. Thus, the judge in this case was at least as well-informed as the judge in *Evans*. Finally, the information does not eliminate probable cause. Perhaps it tends to negate probable cause, but, as noted, a tendency to negate probable cause is not enough to justify a *Franks* hearing. *Garrison*, 118 Wn.2d at 872.

The appellant's additional claims of omission similarly fail to justify a *Franks* hearing. Assuming that Schwind was in custody elsewhere in November 2011, all that can be said is that Detective Matheson may have had the means to discover that fact. There is

no showing that Detective Matheson knew anything regarding the specific status of Schwind in November 2011. Further, even if Smith could not have spoken with Schwind on the date proposed, or even if Smith was mistaken about when he spoke with Schwind, it would only tend to negate probable cause. The same is true regarding any disputes between Smith and the appellant. In fact, the judge was aware that there was a dispute between Smith and the appellant over unpaid wages and lifestyle. CP 33. Reading all of these facts into the affidavit, probable cause still exists. The alleged omissions are insufficient offers of proof to support a *Franks* hearing.

c. Legal financial obligations and community custody conditions were agreed to by both parties pursuant to a global plea agreement. (This addresses Appellant's arguments #3 and #4).

i. Appellant's Assignment of Errors #8 and #9 are clearly without merit.

Prior to sentencing in this case the State and appellant reached a global agreement whereby the appellant would agree to a 60-month sentence in the present cause along with community custody, conditions on community custody, and legal financial

obligations in exchange for the State recommending a prison-based DOSA sentence, along with community custody conditions and fees in his subsequent plea of guilty to the crime of bail jumping in Chelan County Cause No. 13-1-00314-8. 2 RP 15-38. At appellant's sentencing before the trial court on January 9, 2014, the State recommended, pursuant to the global plea agreement between the State and appellant, that the appellant be sentenced to 60 months in prison with community custody, community custody conditions, and legal financial obligations of \$500 victim assessment, \$200 court costs, \$450 court-appointed attorney fees, \$500 drug enforcement fund to the Columbia River Drug Task Force, \$100 crime lab fee and \$100 DNA collections fee, for a total of \$1,850, with \$25 monthly payment amounts. 2 RP 18-21. Pursuant to the global agreement the appellant's attorney properly asked the court to follow the State's recommendation. 2 RP 21-22. The court followed the agreed sentencing recommendations. 2 RP 24.

The appellant's claimed errors are clearly without merit under the invited error doctrine. *In re Personal Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). "The invited error doctrine prohibits a party from setting up an error in the trial

court then complaining of it on appeal.” *Id.* The appellant received the benefit of his agreement with the State; he should not now be heard to claim error for that which he agreed to.

5. Conclusion

Based upon the foregoing, the appellant’s conviction and sentence should be affirmed.

DATED this 18th day of November, 2014.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



By: Gene A. Pearce WSBA #32792
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JEFFREY L. RIEKER,

Defendant/Appellant.

)
) No. 32174-6-III
) Superior Court No. 12-1-00024-8
)
) DECLARATION OF SERVICE
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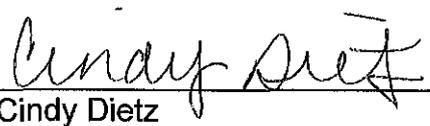
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Signed at Wenatchee, Washington, this 18th day of November, 2014.



Cindy Dietz
Legal Administrative Supervisor
Chelan County Prosecuting Attorney's Office

CHELAN COUNTY PROSECUTOR

November 18, 2014 - 3:15 PM

Transmittal Letter

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Case Name: Jeffrey L. Rieker

Court of Appeals Case Number: 32174-6

Party Represented: Respondent

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Trial Court County: Chelan - Superior Court # 12-1-00024-8

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