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JAN 20 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 322157

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT GENE WATTS, Appellant.

REPLY TO MOTION ON MERITS

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I. ASSIGNMENTS OF ERROR

- A. **Mr. Watts has the authority to contest sufficiency of a probable cause statement filed after a warrantless arrest; such authority is supported by case law and the traditional standard of appellate review is *de novo*.**

- B. **A claim of error may be raised for the first time on appeal if there was a manifest error affecting a constitutional right. Mr. Watts was denied his constitutional due process right to a fair trial when the court allowed the jury to hear testimony of the transaction on December 7, 2012; this testimony tainted the jury because this transaction in no way implicated Mr. Watts in wrongdoing either directly or indirectly.**

- C. **Cumulative error violated Mr. Watts's constitutional due process right to a fair trial.**

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. **Whether Mr. Watts has the authority to contest the sufficiency of a probable cause statement filed after a warrantless arrest; and whether such authority is supported by case law and whether the traditional standard of appellate review is *de novo*.**

- B. **Whether a claim of error may be raised for the first time on appeal if there was a manifest error affecting a constitutional right; when Mr. Watts was denied his constitutional due process right to a fair trial when the court allowed the jury to hear testimony of the transaction on December 7, 2012.**

- C. **Whether cumulative error violated Mr. Watts's constitutional due process right to fair trial.**

III. STATEMENT OF THE CASE

Petitioner incorporates by reference the facts of the case as outlined in the initial brief of the appellant. See initial brief of appellant.

VI. ARGUMENTS

A. Mr. Watts has the authority to contest sufficiency of a probable cause statement filed after a warrantless arrest; such authority is supported by case law and the traditional standard of appellate review is *de novo*.

A trial court's legal conclusion of whether evidence meets the probable cause standard is reviewed *de novo*. *Detention of Petersen v. State*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002). *Compare, e.g., State v. Perrone*, 119 Wn.2d 538, 551, 834 P.2d 611 (1992) (applying a *de novo* standard as determination involves “point of law”); *State v. Estorga*, 60 Wn. App. 298, 304 n. 3, 803 P.2d 813 (1991) (“We review *de novo* ... whether probable cause is established.”); *State v. White*, 44 Wn. App. 215, 218-19, 720 P.2d 873 (1986) (seemingly applying *de novo* standard) with *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995) (applying an abuse of discretion standard); *State v. Wilson*, 97 Wn. App. 578, 584, 988 P.2d 463 (1999) (same); *State v. Rakosky*, 79 Wn. App. 229, 240, 901 P.2d 364 (1995) (same). A defendant may challenge, on appeal, the sufficiency of a probable cause statement based on the information from a confidential informant, in that it does not satisfy the *Aguilar-Spinelli* test. *State v. Thompson*, 13 Wn. App. 526, 536 P.2d 683 (1975). The test is equally applicable to determinations of probable cause to make an arrest without a warrant. *State*

v. Helfrich, 33 Wn. App. 338, 341, 656 P.2d 506 (1982) (citing *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); *State v. Luellen*, 17 Wn. App. 91, 93, 562 P.2d 253 (1977)).

Mr. Watts respectfully disagrees with the State's misunderstanding of the standard of review when challenging the sufficiency of the probable cause statement after a warrantless arrest for the first time on appellate review. As explicitly stated in *Detention of Petersen v. State*, and the stream of cases cited above, the legal conclusion of a trial court as to whether evidence meets the probable cause standard is properly reviewed de novo. Although the State is correct that *State v. Thompson* is distinguishable because it pertains to challenging affidavits for the issuance of a search warrant, *State v. Helfrich* plainly states that the *Aguilar-Spinelli* test is equally applicable to determinations of probable cause to make an arrest without a warrant. 33 Wn. App. 338 at 341.

In the present case, the State fails to address the issue pertaining to the sufficiency of evidence to pass the requisite *Aguilar-Spinelli* test. No affidavit in support of a search warrant, nor affidavit of an arrest warrant in question is necessary in determining whether the information provided by the informant passes the requisite *Aguilar-Spinelli* test. Moreover, the State confounds the issue before the court by claiming the court will consider probable cause for the purpose of setting bail or other conditions of release, and not for the purpose of deciding issues of admissibility or suppression of

evidence. Although this is not the point that Mr. Watts is trying to argue, the State nonetheless makes these assertions unsubstantiated by case law.

- B. A claim of error may be raised for the first time on appeal if there was a manifest error affecting a constitutional right. Mr. Watts was denied his constitutional due process right to a fair trial when the court allowed the jury to hear testimony of the transaction on December 7, 2012; this testimony tainted the jury because this transaction in no way implicated Mr. Watts in wrongdoing either directly or indirectly.**

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) *manifest error affecting a constitutional right*. RAP 2.5(a).

(Emphasis added). A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." *Powell*, 126 Wn.2d at 258. "Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

The State claims that due to a lack of objection to the admission of evidence of the alleged prior drug transaction on December 7, 2012, that it is not subject to review. However, the State fails to mention that if the

defendant can identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error “manifest”, allowing appellate review. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). In *State v. McFarland*, the court held that it is not enough to allege prejudice, rather it must appear on the record; and because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. 127 Wn.2d at 334. The present case is properly distinguishable from *McFarland* because we are not dealing with a motion to suppress. Rather, Mr. Watts seeks a review of the discretion of the trial court to allow information that did not have any tendency to make the existence of any fact more or less probable, thus, an affirmative showing of actual prejudice can be gleaned from the four corners of the trial testimony.

As mentioned in the appellate brief, the evidence offered by the State implicating Mr. Long and Ms. Mumm in a drug transaction at Mr. Watts’s house on December 7, 2012, was manifest error effecting a constitutional right to a fair trial, was manifestly unreasonable, therefore, was an abuse of the trial court’s discretion which in turn was actually prejudicial to Mr. Watts so as to make appellate review proper. Nowhere in the record does any witness or evidence directly or indirectly implicate Mr. Watts in any wrongdoing on December 7, 2012. The introduction of this testimony was manifestly unreasonable and materially misled the jury due to the State’s attempt to paint the picture that because the transaction took place in or

around Mr. Watts's home, he must have been involved in the delivery of methamphetamine. Had the state not presented hours of testimony pertaining to the December 7 transaction, the jury would have not been tainted

The State seeks to couch the admission of the drug transaction of December 7 under ER 401. Considering that no evidence was provided to prove Mr. Watt's knowledge, involvement, or presences at the transaction, said transaction is irrelevant to show knowledge. Assuming arguendo that that drug transaction was relevant, even though no evidence was provided to prove Mr. Watts's involvement, to allow the narrative would be highly prejudicial under ER 403. In the context of trial, the jury heard hours upon hours of narrative concerning this first transaction, which had no legal connection to Mr. Watts. First the probative value is substantially outweighed by the danger of unfair prejudice because the transaction implicates Ms. Mumm and has nothing to do with Mr. Watts. Second, needless presentation of evidence that did not tend to implicate Mr. Watts but did tend to associate him with such activities in an incriminating and prejudicial manner. Again, although no objection was made, it was an abuse of the trial court's discretion to allow such narrative into the trial which effected Mr. Watts's constitutional right to a fair trial.

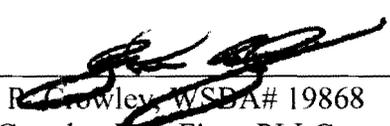
C. Cumulative error violated Mr. Watts's constitutional due process right to a fair trial.

Based on the aforementioned material errors in both the appellate brief and this reply, Mr. Watts maintains his claim of cumulative error which on the aggregate denied him his constitutional right to a fair trial.

VII. CONCLUSION

For the reasons stated above, Robert Watts respectfully requests that the court reverse the trial court's decision.

DATED this 15th day of January, 2015.



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