

FILED

MAY 26 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY .....

No. 332179

COURT OF APPEALS DIVISION III  
OF THE STATE OF WASHINGTON

---

**State of Washington,**  
*Respondent*

v.

**William J. Wright,**  
*Appellant*

---

Appeal from the Superior Court of Pend Oreille County

---

*BRIEF OF APPELLANT*

---

Attorney for Appellant William J. Wright:  
Douglas D. Phelps, WSBA #22620  
Katharine Allison, WSBA #41648  
Phelps & Associates  
N. 2903 Stout Rd.  
Spokane, WA 99206  
(509) 892-0467

## TABLE OF CONTENTS

	Page No.
Table of Authorities	ii-iv
I. Introduction	1
II. Assignments of Error	1, 2
III. Statement of the Case	2
IV. Argument	9
V. Conclusion	30

## TABLE OF AUTHORITIES

STATE CASES	Pages
<i>City of Auburn v. Hedlund</i> , 165 Wn.2d 645 (2009)	27
<i>Commonwealth v. Kline</i> , 335 A.2d 361 (1975)	22
<i>State v. Bauer</i> , 98 Wn.App. 870 (2000)	15, 16, 17, 18
<i>State v. Boehning</i> , 127 Wn.App. 571 (2005)	29
<i>State v. Boyer</i> , 124 Wn.App. 593 (2004)	16
<i>State v. Brett</i> , 126 Wn.2d 136 (1995)	29
<i>State v. Burden</i> , 104 Wn.App. 507 (2001)	25, 26
<i>State v. Case</i> , 49 Wn.2d 66 (1956)	30
<i>State v. Chatmon</i> , 9 Wn.App. 797 (1973)	17
<i>State v. Chenoweth</i> , 160 Wn.2d 454 (2007)	10, 16
<i>State v. Chrisman</i> , 100 Wn.2d 814 (1984)	9
<i>State v. Cord</i> , 103 Wn.2d 361 (1985)	11
<i>State v. Cote</i> , 128 Wn.2d 262 (1995)	17, 20
<i>State v. Dalton</i> , 73 Wn.App. 132 (1994)	22
<i>State v. Davenport</i> , 100 Wn.2d 757 (1984)	29
<i>State v. Duncan</i> , 81 Wn.App. 70 (1996)	19
<i>State v. Emery</i> , 174 Wn.2d 741 (2012)	29
<i>State v. Ferrier</i> , 136 Wn.2d 173 (1994)	9
<i>State v. Franklin</i> , 49 Wn.App. 106 (1987)	17, 19
<i>State v. Garrison</i> , 118 Wn.2d 870 (1992)	11
<i>State v. Goble</i> , 88 Wn.App. 503 (1997)	20, 21
<i>State v. Groth</i> , 103 Wn.App. 548 (2011)	25, 26
<i>State v. Haapala</i> , 139 Wn.App. 424 (2007)	21
<i>State v. Henderson</i> , 100 Wn.App. 794 (2000)	30
<i>State v. Hendrickson</i> , 129 Wn.2d 61 (1996)	9
<i>State v. Huft</i> , 106 Wn.2d 206 (1986)	19
<i>State v. Ibarra</i> , 61 Wn.App. 695 (1991)	17
<i>State v. Jackson</i> , 102 Wn.2d 432 (1984)	15, 16, 19, 20
<i>State v. Jones</i> , 85 Wn.App. 797 (1997)	17

<i>State v. Klinger</i> , 96 Wn.App. 619 (1999)	14, 23
<i>State v. Ladson</i> , 138 Wn.2d 343 (1999)	9
<i>State v. Lair</i> , 95 Wn.2d 706 (1981)	16
<i>State v. Maddox</i> , 152 Wn.2d 499 (2004)	21
<i>State v. Maxwell</i> , 114 Wn.2d 761 (1990)	19
<i>State v. McCord</i> , 125 Wn.App. 888 (2005)	17
<i>State v. Mickle</i> , 53 Wn.App. 39 (1988)	15
<i>State v. Murray</i> , 8 Wn.App. 944 (1973)	15
<i>State v. Myrick</i> , 102 Wn.2d 506 (1984)	10
<i>State v. Northness</i> , 20 Wn.App. 551 (1978)	15, 18
<i>State v. Olson</i> , 73 Wn.App. 348 (1994)	22
<i>State v. Parker</i> , 139 Wn.2d 486 (1999)	9, 10
<i>State v. Perez</i> , 92 Wn.App. 1 (1998)	21
<i>State v. Perrone</i> , 119 Wn.2d 538 (1992)	13, 14
<i>State v. Powell</i> , 126 Wn.2d 244 (1995)	27
<i>State v. Reep</i> , 161 Wn.2d 808 (2007)	14
<i>State v. Riley</i> , 34 Wn.App. 529 (1983)	17
<i>State v. Riley</i> , 121 Wn.2d 22 (1993)	14
<i>State v. Rupe</i> , 101 Wn.2d 664 (1984)	28, 29
<i>State v. Sanchez</i> , 74 Wn.App. 763 (1994)	23
<i>State v. Smith</i> , 93 Wn.2d 329 (1980)	20
<i>State v. Smith</i> , 124 Wn.App. 417 (2004)	29
<i>State v. Stenson</i> , 132 Wn.2d 668 (1997)	14
<i>State v. Thein</i> , 138 Wn.2d 133 (1999)	13, 21, 23
<i>State v. Wilke</i> , 55 Wn.App. 470 (1989)	17
<i>State v. Williams</i> , 102 Wn.2d 733 (1984)	9
<i>State v. Wittenbarger</i> , 124 Wn.2d 467 (1994)	24, 25
<i>State v. Young</i> , 123 Wn.2d 173 (1994)	9, 19

<b>FEDERAL CASES</b>	<b>Pages</b>
<i>Aguilar v. Texas</i> , 378 U.S. 108 (1964)	16
<i>Arizona v. Youngblood</i> , 488 U.S. 51 (1988)	25
<i>California v. Trombetta</i> , 467 U.S. 479 (1984)	24
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978)	10, 11
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1960)	9
<i>Spinelli v. United States</i> , 393 U.S. 410 (1969)	16
<i>United States v. Elliot</i> , 322 F.3d 710 (2003)	18
<i>United States v. Meling</i> , 47 F.3d 1546 (1995)	18
<i>United States v. Reeves</i> , 210 F.3d 1041 (2000)	18

## I. INTRODUCTION

The State of Washington charged William J. Wright on October 21, 2013 by information with one count of Possession with Intent to Manufacture or Deliver a Controlled Substance – Methamphetamine, one count of Possession with Intent to Manufacture or Deliver a Controlled Substance – Hydrocodone, and four counts of Possession of a Stolen Vehicle. CP 1-7. The matter proceeded to trial on January 20, 2015 in Pend Oreille County Superior Court in front of The Honorable Allen Nielson. CP 409-429, RP 111-822.

Ultimately, the jury returned a verdict of guilty on Counts I, III, IV, V, and VI. CP 404-408, RP 814-815. Count II was dismissed pursuant to defense motion at the close of the State's case. RP 698-699, 712. Mr. Wright was sentenced on February 19, 2015 to 120 months of incarceration on all counts, to be served concurrently along with legal financial obligations totaling \$2,950.00, and twelve months of community custody. CP 498-507, RP 831-847. A timely notice of appeal was filed in Pend Oreille County Superior Court.

## II. ASSIGNMENTS OF ERROR and ISSUE STATEMENTS

- 1. Did the Court err when it denied the Defense suppression motion and denied the request for a *Franks* hearing on that motion?**
- 2. Did the Court err when it denied the Defense motion to dismiss for destruction of evidence?**
- 3. Did the Court err when it allowed irrelevant evidence to be introduced at trial which was taken from another residence during the search of the property?**

**4. Did the Court err when it denied Defense motion for mistrial based on improper prosecutorial statements during closing?**

**III. STATEMENT OF THE CASE**

On October 17, 2013, Pend Oreille County Sheriff's Office deputies arrested Charles A. Castro (DOB 06/02/81). CP 75, 98. Mr. Castro advised that he had information about methamphetamine sources in Pend Oreille County. CP 74-84. He advised that he wished to speak to law enforcement even in the absence of any promises of plea deals on the charges he was facing. CP 74-84. He told law enforcement that he and another man, Dale Tucker, met at the home of William Wright two days prior in order to purchase methamphetamine and they put their money together in order to buy a half ounce to split. CP 74-84. He stated that the half ounce was taken from a "grapefruit sized" rock of methamphetamine. CP 74-84. Castro also made statements that there would be firearms in Mr. Wright's home as well as a Dodge pickup that he believed to be stolen based on a conversation he overheard where removal of an ignition from a Dodge pickup was discussed. CP 74-84. This interview with law enforcement was held at the Pend Oreille County Sheriff's Department and was recorded. CP 74-84. However, the recording was not saved and was destroyed well in advance of trial on this case, never having been provided to defense counsel. CP 96, RP 78.

A search warrant was requested and granted on October 19, 2013 based entirely on Mr. Castro's statements to officers, then used in the officer's affidavit for search warrant. CP 74-84, 85-90. The warrant granted authorization to search, among other things, four parcel numbers belonging to Mr. Wright, one of which had his shop and residence on it, one of which had a trailer on it in which two other individuals resided, and two of which contained no buildings. CP 85-90. The parcels total 44.84 acres altogether. The warrant authorized officers to search for, among other things, a white mid-'90s Dodge Ram pickup, all firearms including but not limited to a revolver, a 7mm rifle, and a .30-06 rifle, and "all other things by means of which the crime(s) of manufacturing, delivering, or possessing a controlled substance[s] (sic) has/have or reasonable appears to be committed." CP 85-90. The search warrant was executed on October 20, 2013 and Mr. Wright was arrested at that time. CP 91-93.

While Mr. Wright's criminal case was pending, his counsel made numerous requests and attempts to acquire the recording of Mr. Castro's recorded interview with law enforcement. CP 96, RP 78. It was never provided to defense counsel. CP 96, RP 78.

Defense counsel interviewed Mr. Castro and recorded the interview on March 17, 2014. CP 98-118. During that interview, Mr. Castro made it clear that he had exceptional ill will toward Mr. Wright and was "out for vigilante justice." CP 102. He stated that he wanted to set Mr. Wright up and "do some heinous

stuff to him.” CP 100. He also informed police that his desire was to shoot Mr. Wright. CP 103. When asked if his reason for giving information to the police was to get even with Mr. Wright, Mr. Castro stated that it was, and that he had told the police that. CP 104. When he was asked about the drugs that were in his possession when he was arrested on October 17, 2013, he stated that he did not know where they came from but that they did not come from Mr. Wright. CP 113. This conflicts with the search warrant affidavit, in which Deputy Bowman states that when asked where he bought methamphetamine, Mr. Castro said it was from Mr. Wright. CP 74-84.

On June 6, 2014 defense counsel filed a motion to suppress the evidence obtained in the search and requested a *Franks* hearing. CP 50-120. The motion for the *Franks* hearing was heard on July 24, 2014 before the Honorable Patrick Monasmith. RP 37. Defense counsel argued that the omission of Mr. Castro’s vitriol toward Mr. Wright from the affidavit for search warrant was sufficient to meet the *Franks* threshold, and that the statements elicited in the interview with defense counsel were contrary to many of those alleged in the search warrant affidavit. RP 41-46. The Court disagreed and denied Defense motion, setting the 3.6 suppression motion to be heard absent a *Franks* hearing on August 14, 2014. RP 55-57, 59-60.

On August 14, 2014 oral argument was held on the suppression motion before the Honorable Patrick Monasmith. RP 65. Defense counsel argued that

the search warrant lacked particularity, was overly broad, and there was insufficient probable cause in general and also specifically to search any parcel other than that which contained Mr. Wright's residence. RP 66-70, 76-81. It was noted in argument, as in the briefing, that the recording of Mr. Castro's initial interview with law enforcement was destroyed and not available to defense counsel. RP 78.

The court ruled that while there were inconsistencies and concerns about the reliability and credibility of the information provided by Mr. Castro, as well as a lack of additional investigation by law enforcement to corroborate the information provided, the search warrant was valid and the suppression motion was denied. RP 81-87.

A motion to dismiss based on the destruction of the recording of Mr. Castro's interview was filed by defense counsel and heard on January 8, 2015 before the Honorable Allen Nielsen. CP 210-254, RP 102, 107, 120-121. The motion was denied. RP 120-121.

Deputy McKay testified at trial that he and Deputy Bowman had contact with Mr. Castro and subsequently interviewed him. RP 159, 161. He testified that there were no controlled buys in this case and that the search warrant affidavit was based entirely on the information provided by Mr. Castro. RP 168, 256. He testified that the interview room at the Sheriff's Office is video and audio recorded and that he can get copies of the recordings. RP 229. He testified that

he did not get a copy of the recording of the interview with Mr. Castro and that he should have requested one. RP 230, 232.

Deputy Dice testified at trial that he participated in executing the search warrant at Mr. Wright's property. RP 304. He was primarily responsible for the search of the other trailer on the property, which was the residence for two other individuals, Monte Radan and Ellen Daily. RP 308, 311, 322. Deputy Dice testified that Radan and Daily owned the trailer and that because it was theirs, he got written consent from them to search the trailer. RP 322-323. Firearms, methamphetamine, and paraphernalia were located in that trailer. RP 309-311, 324. The materials found in the trailer belonged to Mr. Radan and Ms. Daily. RP 324-325. Deputy Dice testified that there was no evidence that Mr. Wright resided in that trailer. RP 311. Defense counsel objected to admitting the evidence, including drugs and firearms, that were located in the Radan trailer based on lack of relevance. RP 312. None of the baggies or other materials in the trailer were connected to Mr. Wright himself. RP 312. The court ruled that there was some limited relevance in the evidence, that the lack of ties to Mr. Wright would go to the weight of the evidence rather than its admissibility, and admitted the evidence. RP 312-313.

Mr. Castro testified at trial that at the time of his arrest, he talked to law enforcement about Mr. Wright. RP 349, 351. He stated that the officers had told him they would put in a word for him with the prosecutor in exchange for his

information. RP 351. He testified that he told law enforcement about his dislike for Mr. Wright. RP 353. He testified on cross examination that he knew he was in a significant amount of trouble and that he was possibly facing a return to prison on a DOSA violation as well as new charges and even potential federal charges. RP 365-366, 397. He testified that he knew that people who give information often receive deals in exchange for doing so. RP 366-367. He testified that he knew the initial interview with law enforcement was recorded. RP 372, 398.

Deputy Bowman testified regarding his contact with Mr. Castro. RP 545, 547. He testified that they asked Mr. Castro about where he got his methamphetamine and that Mr. Castro then said he would be willing to talk with them about it. RP 547. He had told Mr. Castro that he would put in a good word with the prosecutor in exchange for speaking with them. RP 547. He testified that the interview room at the Sheriff's Office is video and audio recorded. RP 547-548, 639. He testified that it records continuously. RP 548. He testified that he did not get a copy of the recording of Mr. Castro's interview, that he knew how to do so, and that he should have requested a copy. RP 548-549. He testified that Mr. Castro told him he did not like Mr. Wright and that he did not include that within his report or his affidavit for search warrant. RP 550, 553.

Defense counsel re-raised the government's failure to preserve the video and noted that he cannot at trial fully inquire into that failure, or into the original

interview with Mr. Castro because it could bring in the reasons for Mr. Castro's hatred of Mr. Wright. RP 618-621.

Deputy Bowman testified that there was no controlled buy in this case although the possibility of conducting one was discussed with Mr. Castro. RP 667-668. Further testimony of Deputy Bowman revealed that he was aware that Mr. Castro would be facing significant time on the new charges. RP 675.

During closing arguments, the prosecutor made some statements vouching for the case, particularly during rebuttal. RP 766, 768, 801-802. He stated, "I looked at Mr. Castro's criminal history. I looked at what he was involved with, I looked at the situation that --", "I looked at all that and we took that in consideration, as the evidence showed --", and "I made a deal with Mr. Castro. And the deal was worth it." RP 801-802. The court asked that the jury disregard the last comment but otherwise overruled defense counsel's objections. RP 766, 768, 801-802. After the jury was sent to deliberate, defense counsel made a motion for mistrial based on the vouching comments made by counsel for the State. RP 805-806. He argued that the cumulative effect of the various comments, combined with the final comment that the court ordered the jury to disregard, was improper and that the bell could not be un-rung. RP 805-806, 810. Counsel for the State argued that it was not vouching and was in response to defense counsel's closing argument. RP 807. The court ruled that there was no

vouching and the one comment that was close he had ordered the jury to disregard and denied the motion. RP 811-812.

#### IV. ARGUMENT

**1. The trial court erred when it denied the Defense suppression motion and denied the request for a *Franks* hearing on that motion.**

The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, homes, papers, and effects against unreasonable searches and seizures. The due process clause of the Fourteenth Amendment extends this right to protect against intrusions by state governments. *Mapp v. Ohio*, 367 U.S. 643 (1960). The federal constitution, however, only establishes the minimum level of protection for individual rights. *State v. Chrisman*, 100 Wn.2d 814, 817 (1984).

"It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 W.2d 486, 493 (1999). The Washington Constitution has consistently provided greater protection of individual rights than its federal counterpart. *See State v. Ladson*, 138 Wn.2d 343 (1999); *State v. Ferrier*, 136 Wn.2d 103, 111 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 69 n.1 (1996); *State v. Young*, 123 Wn.2d 173, 180 (1994); *State v. Williams*, 102 Wn.2d 733 (1984). Indeed, the scope of the protections offered by article I, section 7 is "not limited to subjective expectations of privacy but, more broadly, protects 'those privacy interests

which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Parker*, 139 Wn.2d at 494 (quoting *State v. Myrick*, 102 Wn.2d 506, 511 (1984)).

Here, Defense filed a motion to challenge the search warrant in this case. CP 50-120. The search warrant was based solely on statements made by a recently arrested informant, Mr. Castro. CP 74-84, RP 168, 256, 667-668. The Defense motion argued that Mr. Castro's tip did not satisfy the *Aguilar-Spinelli* test, that even if it did satisfy the test, there was still a lack of probable cause to issue the warrant, that the warrant did not have sufficient particularity, that the defects in the warrant were not severable, and that these defects required suppression of all evidence obtained in the search. CP 51-72. The motion further requested a *Franks* hearing in order to determine if the law enforcement officers investigating the case misrepresented material facts in procuring the warrant. CP 70-71.

**a. Denial of a *Franks* hearing was in error.**

A trial court's denial of a *Franks* hearing is reviewed for clear error. *See, e.g., State v. Chenoweth*, 160 Wn.2d 454, 481, 158 P.3d 595 (2007). In order to hold a *Franks* hearing to challenge the validity of a search warrant for omission of pertinent facts in procuring a search warrant, a defendant must have a more than conclusory attack that is supported by more than a mere desire to cross-examine. *Franks v. Delaware*, 438 U.S. 154, 171, 98 S.Ct. 2674 (1978). The allegation

must point out specifically with supporting reasons the portion of the warrant affidavit that is claimed to be false and must be accompanied by an offer of proof. *Id.* Where these requirements are met, if there remains after removal of the false material sufficient information to support a finding of probable cause, no hearing is required. *Id.* at 171-172. In Washington, the *Franks* test includes material omissions of fact. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). For an omission to rise to the level of a misrepresentation, the challenged information must be necessary to the finding of probable cause. *State v. Garrison*, 118 Wn.2d 870, 874, 827 P.2d 1388 (1992).

It was testified to repeatedly that Mr. Castro was up front with law enforcement as regards his hatred of Mr. Wright. CP 98-118, RP 353, 550, 553. It was also testified to repeatedly, and the documentation bears out, that no officer included that information in the affidavit for search warrant. CP 74-84, RP 168, 256, 550, 553, 667-668. That information is directly related to Mr. Castro's motives for talking to law enforcement, as well as any possible sentence he could receive. Failing to include the most pertinent information as regards Mr. Castro's veracity casts doubt on the entirety of the affidavit for search warrant. Mr. Castro's veracity is, furthermore, crucial to a finding of probable cause because his information was the sole basis for the search warrant.

Mr. Castro's veracity is exceedingly doubtful. In the search warrant affidavit, it is alleged he said that he had been out to buy from Mr. Wright a mere

two to three days before his arrest but then in his interview with defense counsel, stated with great assurance it had been at least two weeks and he had told officers that. CP 74-84, CP 98-118. Then in trial testimony, he stated once again that it was a couple of days. RP 359. This indicates that the information in the search warrant affidavit was stale. In the search warrant affidavit, it is claimed that he said he and another person put together \$300 each to buy a half ounce from Mr. Wright. CP 74-84. Then in the defense interview he stated that it was a quarter ounce he purchased, and he maintained both then and at trial that that was what he had told law enforcement. CP 98-118, RP 367. In the search warrant affidavit, it is claimed that Mr. Castro said he had been purchasing from Mr. Wright for several years and that he had bought from him six or seven times in the previous thirty days. CP 74-84. However, at trial he then stated that he only went to the property five or six times total, then he stated that he had bought from Mr. Wright eight times. RP 355, 359. In the interview with defense counsel, he stated that the drugs he had at the time of his arrest in Pend Oreille county were not from Mr. Wright but the ones on him at the time of his arrest in Spokane county were. CP 98-118. Then at trial, he stated that not even that methamphetamine was from Mr. Wright. RP 374. Again, this would indicate the staleness of the information provided by Mr. Castro. Most importantly, the only information listed in the search warrant affidavit regarding Mr. Castro's hatred of Mr. Wright was that he "does not usually like to buy" from him. CP 74-84. However, the defense

counsel interview revealed a deep seated hatred of Mr. Wright. Mr. Castro stated he wanted to “do heinous stuff” to him, that he was “trying to set Bill up,” he was “out for vigilante justice,” that he was “going to shoot him,” and he stated repeatedly that he had told officers all of that. CP 98-118.

Perhaps most importantly, a *Franks* hearing is the only appropriate venue to address these issues. As noted at trial, any attempt to dig into Mr. Castro’s motives would be excessively likely to cause the incidental introduction of very prejudicial, ordinarily inadmissible character testimony against Mr. Wright. RP 618-620. Addressing the issue at a *Franks* hearing would have allowed for the issue to be fully addressed without that risk.

**b. Denial of suppression motion was in error because the warrant fails the particularity requirement and the *Aguilar-Spinelli* test.**

Beyond the *Franks* issue, the defense challenged the search warrant on grounds that it lacked particularity, did not satisfy the *Aguilar-Spinelli* test, and that if it did, it still did not provide probable cause.

Whether a search warrant is sufficiently particularized is reviewed de novo. *See, e.g., State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992). The Constitution does not condone general exploratory searches. *State v. Thein*, 138 Wn.2d 133, 149 (1999). Accordingly, a valid search warrant must comply with the particularity clause of the Fourth Amendment by specifically identifying both

the location to be searched and the items to be seized. The words of the Fourth Amendment itself require that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

"To comply with the mandate of the Fourth Amendment particularity clause, a search warrant must be sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty." *State v. Stenson*, 132 Wn.2d 668, 691-92 (1997). The description of the items sought in the search must be as specific as circumstances permit. *Stenson*, 132 Wn.2d at 692. A general description will suffice only if a more specific description is not possible. *Stenson*, 132 Wn.2d at 692; *State v. Perrone*, 119 Wn.2d 538, 547 (1992) ("the use of a generic term or general description is constitutionally acceptable only when a more particular description of the items to be seized is not available at the time the warrant issues"); *State v. Klinger*, 96 Wn. App. 619, 627 n.3 (1999) (generic boilerplate-type affidavits are frowned upon); *State v. Reep*, 161 Wn.2d 808, 815 (2007) (warrant for evidence of fictitious crime of "child sex" too "broad[] and . . .ambiguous" because it allowed officer unbridled discretion in determining what to seize). Search warrants for documents should receive heightened scrutiny due to the increased potential for intrusion into personal privacy. *Stenson*, 132 Wn.2d at 692. With respect to the items to be seized, the particularity requirement serves the dual purpose of limiting police

discretion and informing the subject of the search as to what may be legally taken. *State v. Riley*, 121 Wn.2d 22, 29 (1993).

The search warrant itself and the affidavit for search warrant use general terms for all items the law enforcement officers wished to seize, allowing officers to seize nearly anything they wished if it could conceivably be at all related to manufacturing, delivering, or possessing a controlled substance or to possession of a stolen vehicle. CP 74-84, 85-90. The search warrant authorized search of four parcels of land, when all the information available, even if taken as true, limited the possible criminal activity to one parcel – that on which Mr. Wright resided. CP 85-90. There was no nexus between the other parcels and the alleged criminal activity. A general search wherein officers may seize basically anything is not permitted and the trial court was in error when it found that the warrant here had sufficient particularity. *See State v. Murray*, 8 Wn.App. 944, 509 P.2d 1003 (1973).

A finding of probable cause may be predicated on information provided by an informant. *State v. Northness*, 20 Wn. App. 551, 554 (1978). Information provided by an informant must be carefully scrutinized, however. *State v. Mickle*, 53 Wn. App. 39, 41 (1988). In determining whether an informant's tip is sufficient to establish probable cause, Washington applies the two-pronged *Aguilar-Spinelli* test. *State v. Bauer*, 98 Wn. App. 870, 875 (2000). Our state

constitution mandates continued use of this test despite changes in federal case law. *State v. Jackson*, 102 Wn.2d 432 (1984). “[A]rticle I, section 7 demand[s] adherence to the *Aguilar/Spinelli* test.” *State v. Chenoweth*, 160 Wn.2d 454, 466 (2007). To satisfy the *Aguilar-Spinelli* test, police must establish (1) that the informant has a factual basis for his or her allegations, and (2) that the information is reliable and credible. *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969); *State v. Jackson*, 102 Wn.2d 432 (1984).

Officers here failed to establish Mr. Castro’s basis for knowledge. That may be accomplished if the alleged facts are derived from the informant’s direct personal observations. *Bauer*, 98 Wn.App. at 875. However, it is not established if the affiant does not indicate why, for example, the informant could specifically identify the drug in question or why there is a belief that items being searched for are stolen. *State v. Boyer*, 124 Wn.App. 593, 606 (2004). The affidavit here does not include any basis for Mr. Castro’s belief that the Dodge pickup was stolen. Rather, the affiant makes a conclusory statement that the vehicle was stolen. Even if inferences may be made that there is a stolen vehicle, unless the information adding up to those inferences is fully spelled out in the affidavit for search warrant, the affidavit will have failed to establish the informant’s basis for knowledge. For these reasons, the trial court’s ruling was in error.

The State also failed to establish Mr. Castro's veracity. The veracity prong seeks to "evaluate the truthfulness of the informant." *State v. Lair*, 95 Wn.2d 706, 709, 630 P.2d 427 (1981). The level of proof required to establish an informant's veracity depends in part on whether the informant is a professional or citizen informant. *Bauer*, 98 Wn. App. at 876. The standard for demonstrating reliability is somewhat relaxed for an identified citizen informant; for example, no proof of past performance is required. *Bauer*, 98 Wn. App. at 876; see also *State v. Riley*, 34 Wn. App. 529, 533 (1983) (ordinary citizen has no opportunity to establish track record of reliability); *State v. Chatmon*, 9 Wn. App. 741, 746 (1973) (no requirement that police show previous reliability of citizen informer).

Nonetheless, some showing of reliability is required. *State v. Jones*, 85 Wn. App. 797, 800, review denied, 133 Wn.2d 1012 (1997). Indeed, even with the relaxed standard, "it is axiomatic under the *Aguilar-Spinelli* rule that the police must ascertain some information which would reasonably support an inference that the informant is telling the truth." *State v. Chatmon*, 9 Wn. App. 741, 746 (1973); *Bauer*, 98 Wn. App. at 876; *State v. Wilke*, 55 Wn. App. 470, 477, review denied, 113 Wn.2d 1032 (1989); *State v. Franklin*, 49 Wn. App. 106, 109 (1987); *State v. McCord*, 125 Wn. App. 888, 893 (Wash. Ct. App. 2005). To make such a showing, police must obtain background facts to support a reasonable inference that the informant is credible and without motive to falsify. *Bauer*, 98 Wn. App. at 876; *State v. Cole*, 128 Wn.2d 262, 287-88 (1995); *State v.*

*Ibarra*, 61 Wn. App. 695, 700 (1991); *Wilke*, 55 Wn. App. at 477; *Chatmon*, 9 Wn. App. at 748. A citizen informant's tip may be self-authenticating if the information provided is so detailed as to demonstrate intrinsic indicia of reliability. *Northness*, 20 Wn. App. at 557.

This prong demonstrates why a *Franks* hearing was so necessary – the veracity prong requires authentication of the information or some reason to believe the informant’s veracity. As noted *supra*, there were significant inconsistencies and outright falsities between the search warrant affidavit and what Mr. Castro told defense counsel and later, the jury. As the *Bauer* decision makes clear, there must be reason provided to indicate that the informant is credible and without motive to falsify. Here, Mr. Castro’s hatred for Mr. Wright provided significant motive to falsify his tip. He also had several crimes of dishonesty in his past. CP 51-120. “Any crime involving dishonesty necessarily has an adverse effect on an informant’s credibility.” *United States v. Elliot*, 322 F.3d 710, 716 (9<sup>th</sup> Cir. 2003) (citing *United States v. Reeves*, 210 F.3d 1041, 1045 (9<sup>th</sup> Cir. 2000)). Due to his crimes of dishonesty, Mr. Castro effectively begins at a reduced level of credibility. “Therefore, when an informant’s criminal history includes crimes of dishonesty, additional evidence must be included in the affidavit ‘to bolster the informant’s credibility or the reliability of the tip.’ *Id.* Otherwise, ‘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)). No such additional evidence was included here. The entirety of the search warrant affidavit was based on information provided by Mr. Castro. Even the relaxed standard for a named informant for the veracity prong was not met here.

If an informant’s tip fails under either prong, as the tip failed under both prongs here, the trial court must determine if law enforcement conducted independent investigation in order to corroborate the information so as to supply the missing element or elements. *State v. Young*, 123 Wn.2d 173, 195 (1994); *State v. Jackson*, 102 Wn.2d at 438; *Duncan*, 81 Wn. App. at 76. The police must corroborate more than just public or innocuous facts, however. *Young*, 123 Wn.2d at 195; *State v. Duncan*, 81 Wn. App. 70, 77, review denied, 130 Wn.2d 1001 (1996) ; see also *State v. Maxwell*, 114 Wn.2d 761, 769 (1990)(“investigation must point to suspicious activities or indications of criminal activity along the lines suggested by the informant”); *State v. Franklin*, 49 Wn. App. 106, 108 (“Innocuous details do not suffice to remedy a deficiency under either the basis of knowledge or the veracity prong.”), review denied, 109 Wn.2d 1018 (1987); *State v. Huft*, 106 Wn.2d 206, 210 (1986)(“investigation is insufficient if it only corroborates innocuous facts”). “Merely ‘verifying innocuous details,’ commonly known facts or easily predictable events should not suffice to remedy a deficiency in either the basis of knowledge or veracity prongs.

Corroboration of public or innocuous facts only shows that the informer has some familiarity with the suspect's affairs. Such corroboration only justifies an inference that the informer has some knowledge of the suspect and his activities, not that criminal activity is occurring. Corroboration of the informer's report is significant only to the extent that it tends to give substance and verity to the report that the suspect is engaged in criminal activity.” *Jackson*, 102 Wn.2d at 438 [citations omitted].

There was no investigation of any kind by the officers and therefore no corroboration. This was testified to repeatedly, as discussed above. The trial court erred in ruling the search warrant valid.

**c. Denial of suppression motion was in error because even if the above issues did not apply, the warrant affidavit did not establish probable cause to issue a warrant.**

Lastly, even if the Aguilar-Spinelli test did not apply, there was neither probable cause to search for most items listed in the search warrant nor probable cause to believe that any evidence at all would be found in Mr. Wright's home or on his property. A search warrant may issue only upon a showing of probable cause to believe that contraband or other evidence of a crime will be found at a particular location. *State v. Goble*, 88 Wn. App. 503, 508-09 (1997); *State v. Cole*, 128 Wn.2d 262, 286 (1995). Prior to issuance, a neutral detached magistrate must evaluate the search warrant application to determine whether the underlying facts

and circumstances are sufficient to establish probable cause to search. *State v. Smith*, 93 Wn.2d 329, 352 (1980). An affidavit is sufficient if it contains information from which an ordinarily prudent person would conclude that evidence of a crime can be found at the place to be searched. *State v. Goble*, 88 Wn. App. at 509. Review of a magistrate's probable cause determination is normally limited to the facts on the face of the warrant affidavit. *State v. Perez*, 92 Wn. App. 1, 4 (1998), review denied, 137 Wn.2d 1035 (1999).

In order to justify issuance of a search warrant, the affidavit must establish "a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *State v. Goble*, 88 Wn. App. 503, 509 (1997) (citing Wayne R. LaFare, *Search and Seizure* § 3.7(d), at 372 (3d ed. 1996)). Accordingly, the warrant application must identify specific facts and circumstances from which the reviewing magistrate can draw the required inference that evidence of a crime will be found in the premises to be searched. *State v. Thein*, 138 Wn.2d 133, 147 (1999). "Probable cause exists where an affiant sets forth sufficient facts from which a reasonable person could find a probability that the defendant is involved in criminal activity and that the evidence of criminal activity can be found at the place to be searched." *State v. Haapala*, 139 Wn. App. 424, 432 (2007) (citing *Maddox*, 152 Wn.2d 499, 509 (2004)). Here, the information provided in the affidavit for search warrant states that Mr. Castro overheard a conversation about switching out an ignition on a

Dodge pickup and that he believed that pickup to be stolen, but does not provide any reason for such belief. CP 74-84. No other vehicles were mentioned in the affidavit at all. CP 74-84. There was no reason to think that, given the information provided, there would be any evidence of stolen vehicles on the property. No facts were provided to establish a nexus between criminal activity and the items to be seized pursuant to the warrant, nor to establish a nexus between the items to be seized and the property to be searched. Thus there was no probable cause to search for any vehicles or vehicle parts, nor any justification to include them on the search warrant.

Under Washington law, the police cannot search a suspect's home just because the suspect is allegedly engaged in criminal activity. There has to be reason to believe that the evidence to that criminal activity will be found at his home, and that reason cannot be based on the generalized habits of similar criminals. "Probable cause to believe that a man has committed a crime on the street does not necessarily give rise to probable cause to search his home." *State v. Dalton*, 73 Wn.App. at 140 (quoting *Commonwealth v. Kline*, 234 Pa.Super. 12, 335 A.2d 361 (1975)). "An officer's belief that persons who cultivate marijuana often keep records and materials in safe houses is not, in our judgment, a sufficient basis for the issuance of a warrant to search a residence of a person connected to the grow operation." *State v. Olson*, 73 Wn. App. 348, 357 (1994). A generalized belief as to what a drug dealer keeps in his house does not create

probable cause that evidence that drug dealing will be found in the house, no matter how qualified the officer might be to offer that opinion.

While the affidavit for search warrant does include statements from Castro that he had recently purchased and smoked meth in Wright's home even a recent drug sale from a house may not give rise to probable cause that drugs will be found in the house. CP 74-84. See *State v. Sanchez*, 74 Wn.App. 763 (1994). In *State v. Sanchez*, the police had evidence that: 1) a person had very recently purchased cocaine from "Joe" at a particular house; 2) the house had been raided the previous March and drugs were found; 3) during the prior search, police observed the house was marred by shotgun blasts; and 4) unidentified citizens had lodged unspecified complaints about suspected drug activity at the residence. *Id.* at 713. The court of appeals in *Sanchez* properly concluded that because there was just one recent sale at the house, there was no probable cause that evidence of criminal activity would be found within the house. *Id.* at 715.

However, conclusory predictions that evidence will likely be found in a residence do not establish probable cause, and mere suspicion and personal belief do not establish probable cause. See *Thein*, 138 Wn.2d 133, 147; *State v. Klinger*, 96 Wn. App. 619, 624 (1999). Castro's uncorroborated statements, absent actual facts indicating that methamphetamine would likely be found on the Wright property, were not sufficient to establish probable cause to search the property,

especially the buildings/homes thereon, for methamphetamine. The court was in error in denying the motion to suppress.

**2. The Court erred when it denied the Defense motion to dismiss for destruction of evidence.**

Because of the inconsistencies between what Mr. Castro was alleged to have said in his initial interview with law enforcement and what he said in his interview with defense counsel, defense counsel filed a motion to dismiss due to the failure of the State to preserve the video recording of Mr. Castro's interview. CP 210-254. This recording would have been significant in any renewal of the suppression motion and separately warranted dismissal of the case, as it is evidence that was not only not turned over to defense counsel but was destroyed due to failure of the State to timely request a copy.

Under both the state and federal constitutions, due process in a criminal prosecution requires fundamental fairness and meaningful opportunity to present a complete defense. *State v. Wittenbarger*, 124 Wn. 2d 467, 474-5, 880 P.2d 517 (1994) (citing *California v. Trombetta*, 467 U.S. 479 (1984)). The state's failure to preserve evidence that is material and exculpatory violates a defendant's right to due process. *Wittenbarger* at 475.

Material and exculpatory evidence must "possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant

would be unable to obtain comparable evidence by other reasonable available means.” *Id* at 475 (citing *California v. Trombetta*, 467 U.S. 479, 489 (1984)). However, if the evidence does not meet this two part test and is only potentially useful to the defense, failure to preserve the evidence does not constitute a denial of due process unless the criminal defendant can show bad faith on the part of the state. *Wittenbarger* at 477 (citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)). If the evidence meets the standard as materially exculpatory or the State acted in bad faith then the criminal charges against the defendant must be dismissed if the State fails to preserve it. *Wittenbarger* at 475.

The courts found that a jacket, unable to be produced at trial, containing drugs and worn by the defendant asserting an unwitting possession claim was materially exculpatory. *See State v. Burden*, 104 Wn. App. 507, 17 P.3d 1211, (Wash. App. Div. 2 2001). The court found that the coat’s exculpatory value was apparent before it disappeared because the fit and appearance of the jacket where the illegal substances were found were important factors in determining its ownership. *Id.* at 513-4. Moreover, the court found that a different but comparable coat was not sufficient because the jury could not determine whether the thickness and fit of a substitute coat were the same as the original. *Id* at 514. Thus, the court found there was no comparable evidence left for the defendant to properly prepare for his case and upheld the dismissal. *Id* at 514.

On the other hand, the courts in *Groth* found that destruction of several pieces of evidence in an old unsolved murder case were only “potentially material” because the evidence had no exculpatory value without testing or analysis and it is unclear that that was done before the evidence was destroyed. *See State v. Groth*, 103 Wn. App. 548, 261 P.3d 183, (Wash. App. Div. 1 2011). Moreover, the court found that the evidence was destroyed 15+ years after the crime was committed and the case was unsolved and closed as part of a space making effort. *Id.* Since the evidence was only “potentially material” the court found that the defendant did not show bad faith by the State in destroying the evidence and upheld his conviction.

Here, the exculpatory value of the recording was significant as without that recording, there is no verification for any of the statements Mr. Castro allegedly made that are the entire basis for the search warrant and subsequent search. It is analogous to *Burden* because of the numerous inconsistencies between the alleged statements made in that interview and the statements actually made in the interview with defense counsel and subsequently on the stand. Absent the tape, proper preparation of a defense was all but impossible. This case is unlike *Groth* because the tape was misplaced while the case was in active litigation, not 15 years after the crime was committed in an effort to make room in a warehouse.

Secondly, the videotaped interview/interrogation of the “informant” was impossible to obtain by any other available means. In fact, in defense counsel’s interview with Mr. Castro he denied several accusations made by the State. CP 98-

118. An interview is a unique event that cannot be recreated after that fact. As such, the videotape in this case met the two part test to show materially exculpatory evidence, the State failed to preserve the tape, and thus the denial of this motion must be reversed.

Even if the interview were only potentially material, the court was in error in denying the motion because the testimony of Deputy McKay and Deputy Bowman at trial was clear that they should have preserved the interview. RP 230, 232, 548-549. Their failure to do so was in bad faith, meeting the standard for destruction of potentially material evidence.

**3. The Court erred when it allowed irrelevant evidence to be introduced at trial which was taken from another residence during the search of the property.**

Over objection, the trial court allowed in evidence, specifically drugs and firearms, that were seized from the trailer belonging to Mr. Radan and Ms. Daily. RP 312-313. Defense counsel had argued that this evidence was irrelevant, as there was no evidence that Mr. Wright had any dominion and control over the contents of that trailer, to the point that law enforcement requested written consent from the owners and residents of the trailer in order to search it. 308-313, 323-325.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d

315 (2009). That discretion is abused where the exercise of discretion is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Irrelevant evidence is not admissible. ER 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

The State argued that the items found in the trailer are relevant because the baggies had similar designs on them as ones located in Mr. Wright’s residence. RP 312. The trial court even acknowledged that the relevance was tenuous. RP 313. Defense counsel maintains that rather than tenuous, the relevance was quite simply not there. The baggies found are mass produced with those designs, and Mr. Wright had no ownership or residence in the trailer.

Furthermore, the evidence seized from the Radan and Daily residence included firearms. RP 309-311, 324. Deputy Dice was allowed to testify as to the firearms found in that trailer. The Washington Supreme Court has opined that “many individuals view guns with great abhorrence and fear. Still others may consider certain weapons as acceptable but others as ‘dangerous.’ A third type may react solely to the fact that someone who has committed a crime has such weapons. Any or all of these individuals might believe that defendant was a dangerous individual...” *State v. Rupe*, 101 Wn.2d 664, 708, 683 P.2d 571 (1984). Here, not only was such highly prejudicial testimony allowed to be

presented to the jury, it was not even relevant. The firearms belonged to Mr. Radan and Ms. Daily, not to Mr. Wright. RP 324-325. However, the jury could infer from the court's admission of that evidence that Mr. Wright had some ties to the firearms, despite the fact that that is patently false. Once there is firearm evidence admitted, a jury may very well decide that although the crimes alleged are wholly unrelated to firearms, Mr. Wright was a "dangerous individual" as meant by *Rupe* and therefore deserving of punishment. The trial court's ruling was an abuse of discretion because it was manifestly unreasonable.

**4. The Court err when it denied Defense motion for mistrial based on improper prosecutorial statements during closing.**

Prosecuting attorneys are quasi-judicial officers charged with the duty of ensuring that a defendant receives a fair trial. *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct violates that duty and can constitute reversible error. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A prosecutor commits misconduct by personally vouching for a witness's credibility. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). We will reverse a conviction when the defendant has met his burden of establishing (1) the State acted improperly and (2) the State's improper act prejudiced the defendant. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Denial of a motion for a mistrial is reviewed for abuse of discretion, giving great deference to the trial court because it is in the best position to discern prejudice. *State v. Smith*,

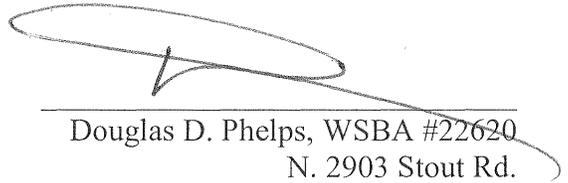
124 Wn.App. 417, 428, 102 P.3d 158 (2004). Abuse of discretion occurs where the trial court exercises it on untenable grounds or reasons. *Id.*

Here, counsel for the State made repeated comments about his own view of the case. RP 766, 768, 801-802. Defense counsel's objections were overruled every time until the final comment, wherein counsel stated that he "made a deal with Mr. Castro. And the deal was worth it." RP 766, 768, 801-802. At that point, the court did instruct the jury to disregard that statement. RP 802. However, the jury cannot un-hear the counsel for the State inserting himself and his interest into the case and had heard every comment up to that point. The cumulative effect of these comments cannot help but be prejudicial to Mr. Wright. Multiple incidents of a prosecutor's improper conduct that, when combined, materially affect the verdict violate a defendant's right to a fair trial and require a new trial. *See State v. Case*, 49 Wn.2d 66, 73-74, 298 P.2d 500 (1956); *State v. Henderson*, 100 Wash.App. 794, 805, 998 P.2d 907 (2000). Here, the trial court itself agreed that at least the final comment was improper conduct. It was preceded by enough similar if milder comments to rise to reversible error.

## V. CONCLUSION

The case should properly be reversed for the above reasons and remanded to the trial court for a new trial with evidence properly excluded.

Respectfully submitted this 26<sup>th</sup> day of May, 2016



---

Douglas D. Phelps, WSBA #22620  
N. 2903 Stout Rd.  
Spokane, WA 99206  
(509) 892-0467