

FILED

DEC 14 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____



No. 337782

STATE OF WASHINGTON,

Respondent,

v.

KEVIN RAY EDGAR,

Appellant

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	3
	Assignments of Error	
	No. 1.....	3
	Issues Pertaining to Assignments of Error	
	No. 1.....	3
II.	STATEMENT OF FACTS.....	3
III.	LAW.....	5
IV.	ARGUMENT.....	7
V.	CONCLUSION.....	8

TABLE OF AUTHORITIES

Table of Cases

State v. Berlin, 46 Wn.App. 587, 731 P.2d 548 (1987).....6

State v. Chatmon, 9 Wn.App. 741, 515 P.2d 530 (1973).....5

State v. Franklin, 49 Wn.App. 106, 741 P.2d 83 (1987).....5

State v. Hauser, 19 Wn.App.506, 511, n. 1, 576 P.2d 420 (1978),
review denied, 90 Wash.2d 1022 (1978); cert. denied, 440
U.S. 960, 99 S.Ct. 1503, 59 L.Ed.2d 773 (1979).....7

State v. Huff, 106 Wash.2d 206, 211, 720 P.2d 838 (1986).....5, 7

State v. Jackson, 102 Wn.2d 432 (1984).....3

State v. Kennedy, 107 Wash.2d 1, 8, 726 P.2d 445 (1986).....5

State v. Northness, 20 Wn.App.551, 557, 582 P.2d 546 (1978).....6

State v. Riley, 34 Wn.App.529, 533, 663 P.2d 145 (1983).....5

State v. Sheldon, 38 Wn.App.195, 196, 684 P.2d 1350 (1984).....6

State vs. Stock, 44 Wn.App.at 470-71, 722 P.2d 1330 (1986).....6

State v. Wakeley, 29 Wn.App.238, 628 P.2d 835 (1981).....5

I. ASSIGNMENTS OF ERROR

Assignment of Error #1:

It was error for the Superior Court to hold that a determination of the affiant officer that the undisclosed informant was reliable was sufficient to satisfy the reliability prong of *Aguilar-Spinelli* as required by *State v. Jackson*, 102 Wn.2d 432 (1984).

Issue Presented:

Whether the reliability of an informant whose identity is not disclosed to the magistrate, is nevertheless sufficient if determined by the affiant police officer.

II. STATEMENT OF FACTS

On the night of January 10, 2015, the appellant was driving his vehicle, a silver Ford Windstar van, westbound, on SR10 near milepost 101. A witness reported that the vehicle speed was between 80 and 90 M.P.H. in a posted 55 zone. CP 29.

A Washington State trooper was on-scene, and conducted an investigation and determined that the appellant's vehicle left the roadway, went airborne over an embankment, rolled, and came to a rest on it's passenger side, on the shoulder. CP 29.

The trooper spoke with a witness who had stopped at the scene and who had pulled both parties from the vehicle and then waited for aid and law enforcement to arrive. The witness advised that the female passenger was yelling at the male for driving too fast, being drunk and high, and almost killing her. The witness provided a statement to law enforcement at the scene. CP 29.

The trooper had contact with both the appellant and the person identified by the witness as the passenger. The trooper noted that the appellant was belligerent and had a strong odor of alcohol coming from his person, and that his speech was slurred. CP 29.

A trooper with drug recognition expert qualifications made contact with appellant at the hospital. The appellant did not cooperate in the taking of a blood sample. A warrant for a blood sample was then obtained. CP 29.

Neither the identity of the witness who identified the appellant as driver and the female as passenger, nor the witness who allegedly heard screaming at the appellant at the scene was disclosed to the issuing magistrate. Declaration in Support of Search Warrant.

III. LAW

In *State v. Franklin*, 49 Wn.App. 106, 741 P.2d 83 (1987), the officer vouched for the reliability of the informant in the affidavit for a search warrant. Reversing, the appellate court held at p. 109:

“Although the necessary showing of reliability may be relaxed when a citizen informant furnishes information, that information must still support an inference that he or she is telling the truth and establish a basis of knowledge.” *State v. Kennedy*, 107 Wash.2d 1, 8, 726 P.2d 445 (1986); *State v. Huft*, 106 Wash.2d 206, 211, 720 P.2d 838 (1986); *State v. Riley*, 34 Wn.App.529, 533, 663 P.2d 145 (1983). Citations are those of the *Franklin* court.

Continuing, the court explains its reasoning.

“In attempting to establish veracity or credibility, the police officer gave his personal opinion that the informant was an upstanding citizen since the informant had no criminal record, was motivated by a desire to thwart crime, and requested anonymity because of fear of retribution. To establish credibility here, one must rely solely on the officer's conclusions. Other than the officer's statement the informant did not have a criminal record, no facts were given that an impartial magistrate could weigh to determine if the informant was credible. This generic recitation is not sufficient to raise the requisite inference the informant was telling the truth. See *State v. Wakeley*, 29 Wn.App.238, 628 P.2d 835 (1981); *State v. Chatmon*, 9 Wn.App. 741, 515 P.2d 530 (1973) (reliability of unidentified citizen informant required corroboration by a description of him, his purpose for being at the locus of the crime, and the reason for desiring anonymity). Although the ultimate search and arrest resulted in confirmation

of the details provided in the affidavit, no showing was made at the time the warrant issued that independent police investigation had resulted in corroboration of the informant's veracity. The only corroboration consisted of confirmation the defendant was going to visit her husband at the prison on the noted date. These details were innocuous and were of no benefit in establishing credibility.”

The issue was also addressed in *State v. Berlin*, 46 Wn.App. 587, 731 P.2d 548 (1987). The court in *Berlin* found that the reliability prong was satisfied. However, in *Berlin*, the issuing magistrate was provided the identity of the informants as well as phone numbers, and addresses. In addition, the affidavit stated that the informants were found by the affiant officer to have had no criminal background, to have come forward voluntarily, had given the officer the appearance of being honest citizens.

The *Berlin* court, p. 590, held:

“When a citizen informant's identity is revealed to the issuing magistrate, the indicia of reliability requirement is satisfied if the informant provides a detailed description of the underlying circumstances of the crime observed or about which the informant has knowledge.” *State vs. Stock*, 44 Wn.App.at 470-71, 722 P.2d 1330; *State v. Northness*, 20 Wn.App.551, 557, 582 P.2d 546 (1978). Citations are those of the court.

In every Washington appellate case concerning citizen informants where the court held the reliability prong was satisfied, the citizen's identity was revealed to the magistrate. E.g.; *State v. Stock*, supra; *State v. Sheldon*, 38 Wn.App.195, 196, 684

P.2d 1350 (1984); *State v. Hauser*, 19 Wn.App.506, 511, n. 1, 576 P.2d 420 (1978), review denied, 90 Wash.2d 1022 (1978); cert. denied, 440 U.S. 960, 99 S.Ct. 1503, 59 L.Ed.2d 773 (1979); *State v. Braun*, 11 Wn.App.882, 886, 526 P.2d 1230 (1974). In *State v. Huft*, supra, 106 Wash.2d at 211, 720 P.2d 838, the Supreme Court cited the anonymity of the citizen informant as one factor for finding no showing of reliability.

IV. ARGUMENT

The purpose of a magistrate independently making a probable cause and reliability finding under *Aguilar-Spinelli* is fundamentally part and parcel of the checks and balances system. Although the courts have carved-out limited situations where specific facts in an affidavit for a warrant can serve to aid the reliability requirement, those cases involve the identity of the informant being disclosed to the informant. There is no judicial checks and balances function being performed by the issuing magistrate if the officer is allowed to simply state his own belief in the reliability of the informant.

V. CONCLUSION

The order denying suppression should be reversed and the matter dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chelsea C. Korte". The signature is written in a cursive, flowing style with some loops and flourishes.

Chelsea C. Korte
Attorney for Appellant