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APR 26, 2017

Court of Appeals
Division III
State of Washington

No. 34478-9-III

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

STATE OF WASHINGTON, Respondent

v.

FELIPE HERNANDEZ-GONZALEZ, Appellant

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY
THE HONORABLE JUDGE BRIAN ALTMAN

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The Evidence Admitted At Trial Was Unlawfully Seized In Violation Of The Fourth Amendment And Washington State Constitution Article 1, § 7
- B. The Trial Court Erred When It Admitted Evidence of Prior Misconduct Under ER 404(B).
- C. Mr. Hernandez-Gonzalez Received Ineffective Assistance Of Counsel Which Prejudiced His Right To A Fair Trial.
- D. The Trial Court Erred When It Imposed A Two-Thousand Dollar Fine Under RCW 69.50.430(2).
- E. This Court Should Exercise Its Discretion In The Decision Terminating Review By Declining To Impose Appellate Costs.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Where a search warrant authorizes entry to seize items not supported by probable cause, and does not identify the crime being investigated is it a de facto general exploratory search?
- B. Where the search warrant authorizes a search and seizure of items which are inherently innocuous and unrelated to

criminal activity does it offend the probable cause nexus standard?

- C. Did the informant's lack of veracity negate probable cause for the first warrant?
- D. Was Mr. Hernandez-Gonzalez's Sixth amendment right to effective assistance of counsel violated where counsel failed to argue the first warrant was overbroad and the second warrant was invalid because the information was obtained through an illegal search?
- E. Did the trial court commit reversible error in admitting ER 404(b) evidence?
- F. Was Mr. Hernandez-Gonzalez's Sixth amendment right to effective assistance of counsel violated where counsel failed to request a limiting instruction on ER 404(b) evidence?
- G. Did the trial court err when it imposed a two thousand dollar fine under RCW 69.50.430(2)?
- H. Mr. Hernandez-Gonzales has been found indigent for this direct appeal. Under RAP 14.2 and RAP 15.2(f), should this Court exercise its discretion to deny appellate costs in its decision terminating review?

II. STATEMENT OF FACTS

During the first week of February 2016, Officer Randall of the Klickitat County Sheriff's Office recruited David Studer, an inmate of an Oregon jail, to work as a confidential informant. RP 53; Exh. 1 p.3. Studer said he could buy methamphetamine from a Hispanic male named "Felipe" who lived at the Spring Street Trailer Park in Klickitat County. Exh. 1 p.4.

On February 9, 2016, officers drove Studer to just outside of the trailer park, searched him, gave him buy money and sent him in to make a purchase. Upon return, officers searched him and found a small quantity in a baggie and a piece of white crystal substance, which had come from the alleged drug purchase, in the coin pocket of his blue jeans. RP 60. Studer contended he had not opened the baggie, protesting that it was untied when he got it. The officer told him that next time he needed to make sure that drugs did not spill into his pocket. Exh. 1 p.4-5.

The following day the officer again drove Studer to make a controlled buy. RP 62. Randall had obtained a copy of Mr. Hernandez-Gonzalez's driver's license, which had been renewed a day earlier. Exh. 1 p. 5; RP 62; 84. The license included his photo

and the same physical address. RP 62; 84-85. Studer confirmed the photo was of Mr. Hernandez-Gonzalez. RP 62.

They waited in the driveway until a younger Hispanic male drove a Subaru Legacy with an Oregon license plate into the driveway space. Mr. Hernandez-Gonzales got out of the passenger seat and both he and the younger male entered the residence. Exh. 1 p.6. Studer completed the second controlled buy. RP 64. Nine days later, February 19th, Studer participated in a third controlled buy. Exh. 1 p.7.

On March 1, 2016, for the second time, officers caught Studer stealing some of the drugs he had been sent to purchase. Exh. 1 p. 7-8; RP 55. Randall stopped using Studer as a confidential informant because he was untrustworthy. RP 55.

Fourteen days after the last controlled buy in Washington, and three days after learning of Studer's theft of the heroin, Randall prepared an affidavit for a search warrant. RP 68. The affidavit provided information about the controlled buys and lack of veracity of the confidential informant. The affidavit read:

It is now my intent to apply for a search warrant to be able to show domianship (sic) and control by Felipe E. Gonzalez Hernandez (sic) and/or Ernesto Hernandez Lopez of 580 NE Spring Street # 6.

Exh. 1 p.8.

It began:

1. The affiant believes that:

EVIDENCE OF A CRIME:

CONTRABAND, THE FRUITS OF A CRIME, OR

THINGS OTHERWISE CRIMINALLY POSSESSED:

Items or articles of personal property tending to show the identity of person(s) in ownership dominion or control of said premises and/or vehicle(s) including but not limited to keys, canceled mail envelopes, rental agreements and receipts, utility and telephone bills, telephone/address books, photographs, gas receipts, insurance papers, notices from governmental agencies, and the like. Financial records of person(s) in control of the premises including tax returns, bank accounts, loan applications, income and expense records, safe deposit keys and records, property acquisition and notes.

Computer equipment, programs, storage disks and printouts, evidencing the distribution of controlled substances, the expenditure of currency or currency equivalents.

WEAPONS OR OTHER THINGS BY MEANS OF WHICH A CRIME HAS BEEN COMMITTED OR REASONABLY APPEARS ABOUT TO BE COMMITTED:

Exh. 1 p.1-2.

The basis for probable cause to search for weapons:

Through training and experience: I also know drug dealers use various vehicles to facilitate their ongoing criminal enterprise. The reason for this is to frustrate law enforcement's ability to determine who is going where, and when. The vehicles used are both containers and movers of controlled substances and will often contain cash, records, and weapons.

Exh. 1 p.9.

The search warrant issued by Judge Hansen of the East Klickitat County District Court¹ that same day read:

Upon the sworn affidavit of F.R. Randall made before me, it appears that there is probable cause to believe that:

1. Evidence of a crime, or
2. Contraband, the fruits of the crime or things otherwise criminally possessed or
3. Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed.

are under the control of in the possession of some person(s) and are concealed in or on certain premises, vehicle(s) or person(s) within KLICKITAT COUNTY, STATE OF WASHINGTON, hereinafter described.

YOU ARE COMMANDED TO:

1. SEARCH SAID PREMISES, VEHICLE OR PERSON SPECIFICALLY DESCRIBED AS FOLLOWS:
The premises, including all rooms, storage areas, surrounding grounds, trash areas, garages and outbuildings assigned to or part of the residence and/or building located at 580 NE Spring Street # 6, White Salmon, Washington, County of Klickitat. The residence and/or building is believed to be presently occupied by Felipe E. Gonzalez-Hernandez and or Ernesto Hernandez Lopez.
2. SEIZE THE FOLLOWING PROPERTY:
Items or articles of personal property tending to show the identity of person(s) in ownership, dominion or control of said premises and/or vehicle(s) including but not limited to keys, canceled mail envelopes, rental agreements and receipts, utility and telephone bills, telephone/address books, photographs, gas

¹ The search warrant is not considered a clerk's paper and not numbered, but was made part of the record by ruling of the Commissioner of Division 3 Court of Appeals on 3/9/17. The search warrant was filed with the Court on 3/16/17.

receipts, insurance papers, notices from governmental agencies, and the like.

Financial records of person(s) in control of the premises including tax returns, bank accounts, loan applications, income and expense records, safe deposit keys and records, property acquisitions and notes.

Computer equipment, programs, storage disks and printouts, evidencing the distribution of controlled substances, the expenditure of currency or currency equivalents.

3. Safely keep the property seized.
4. Return this warrant to the undersigned judge within (03) as following execution of this warrant. The return must include an inventory of all property seized. A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from whose premises and/or vehicle property is taken. If no person is found in possession a copy and receipt shall be conspicuously posted at the place where the property is found.

On March 8th, eighteen days after the last controlled buy, officers entered Hernandez-Gonzalez's home. RP 10. Randall testified the purpose of the warrant was to "retrieve documents to show that Mr. Gonzalez-Hernandez actually resided at that residence." RP 68.

Upon entry Randall observed a set of scales on the kitchen table, plastic bags, and "a little plastic bag that had a white crystal substance in it." RP 12. Randall applied for a second search warrant because "my search warrant was for paperwork on

dominion and control, not for the controlled substances.” RP 14; 71.

The second affidavit did not include information about the confidential informant’s theft of the drugs in Oregon. Judge Baker, of the West Klickitat County District Court authorized the second warrant². That warrant contained the boilerplate language of “it appears that there is probable cause to believe that evidence of a crime, or contraband, the fruits of a crime, or things otherwise criminally possessed, or weapons or other things by means of which a crime has been committed.” Like the first warrant, this one also did not identify the crime being investigated.

Officers recovered two bags of methamphetamines, one off the kitchen table and the other from a kitchen pantry. RP 89-90. He testified the amounts, 19.1 grams and 2.3 grams, seemed “more than what a normal person would use or keep on them, if all they were was a user.” RP 92; 106-107.

Klickitat County prosecutors charged Mr. Hernandez-Gonzalez with one count of possession of a controlled substance-methamphetamine, with intent to deliver. CP 9-10.

² The second warrant is also not considered a clerk’s paper and is not numbered. It was made part of the record on ruling of the Commissioner of the Court of Appeals on 3/9/17.

In a pretrial hearing, defense counsel moved for a *Franks* hearing. Counsel asked the court to determine whether omitting information in the second affidavit regarding Studer's lack of credibility negated probable cause. RP 22. The court denied the motion, finding the second warrant was issued based on the officer's observations of items in plain view. RP 26. Despite prompting by the judge, defense counsel raised no objections to the first affidavit or search warrant. RP 23.

On the morning of trial, the state sought to admit evidence of the three controlled buys under ER 404(b). RP 32. It justified admission saying,

This is a possession with intent. I'm merely showing evidence of the defendant's intent. We're not charging him with these controlled buys. But 404(b) says other crimes, wrongs or acts, evidence of other crimes, wrongs or acts is not admissible to prove the character of a person -- in order to show action in conformity therein. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake. So, what goes to the defendant's intent more than the fact that he's been delivering drugs?
RP 35.

Defense counsel objected because Mr. Hernandez-Gonzalez was not charged with unlawful delivery of a controlled substance, it was unfairly prejudicial, and it was late notice of intent to introduce ER 404(b) evidence. RP 33.

The court allowed introduction of the evidence. RP 38. The court stated:

So the findings I need to make is first of all that the evidence of those controlled buys is relevant. They're relevant because obviously they show that there's a possibility that he formed the requisite intent to in fact deliver methamphetamine by virtue of those buys. The evidence then needs to be examined to determine whether or not, even if relevant it should be excluded because it's more prejudicial than probative. And in fact it's my view that this evidence, while prejudicial, as all good evidence for the state usually is, is not more prejudicial than it is probative. That's 403.

404(b), other crimes, wrongs or acts, it is my view that the state is not proffering the evidence of the three controlled buys to prove the character of the defendant, but rather to show some other purpose, and in this case the purpose would be intent, most likely, but also preparation, plan, knowledge. So under 404(b) the evidence of the three controlled buys is admissible.

RP 109.

The State introduced testimony and evidence through Officer Randall of the three baggies of methamphetamine from the alleged buys. RP 56-66; 87; 104-106. Defense counsel did not request a limiting instruction.

During closing argument, the State argued:

How do we know that the defendant intended – deliver. Well, one of the ways we determine – person's intent is you look at what they've done in the past. Not that they've acted in conformity with, but – shows their intent on the day that we're given.

So, -- On February 9th of this year, we know that there was a delivery of methamphetamine that came from -- defendant's (inaudible). We know that on -- the 10th, the next day, there was a delivery of methamphetamine that came from the defendant's home and the defendant was home when the delivery was made. And we know -- what was it, ten days later on the 18th, there was another delivery of methamphetamine from the defendant's home.

RP 138

The jury found Mr. Hernandez-Gonzalez guilty of the crime of intent to deliver a controlled substance. RP 156; CP 54. His offender score was zero. The court imposed a two thousand dollar fine under RCW 69.50.430. CP 57. The trial court entered an order of indigence for purposes of appeal. CP 72-85. Mr. Hernandez-Gonzalez makes this timely appeal. CP 62-71.

III. ARGUMENT

A. The Evidence Against Mr. Hernandez-Gonzalez Was Unlawfully Seized In Violation Of The Washington State Constitution Article 1, § 7 And The Fourth Amendment To The United States Constitution.

The Fourth Amendment to the United States Constitution guarantees the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the

places to be searched and the persons or things to be seized. U.S. Const. amend. IV. Washington State Constitution, Article I, §7 provides a more rigorous and broader protection of privacy rights by guaranteeing that no person shall be disturbed in his private affairs, or his home invaded, without authority of law. Const. art. I, §7; *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

To invade the protected sphere of private affairs, a neutral and detached magistrate must make a finding of probable cause to justify issuance of a search warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 449-50, 91 S.Ct. 2022, 2029-30, 29 L.Ed.2d 564 (1972). Probable cause requires, given the evidence presented, a reasonable belief that a crime has occurred or is occurring, and that the *item sought is evidence of that crime*. There must be a nexus between criminal activity and the item to be seized. *State v. Goble*, 88 Wn.App. 503, 509, 945 P.2d 263 (1997). The Constitution does not condone general, exploratory searches, as they are “unreasonable, unauthorized, and invalid.” *State v. Thein*, 138 Wn.2d 133, 149, 977 P.2d 582 (1999)(internal citation omitted). Allegations of constitutional violations are reviewed de novo. *State v. Siers*, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012). The validity

of a search warrant is an issue of law reviewed *de novo*. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

It is startlingly clear that the first search warrant authorized officers to enter Mr. Hernandez-Gonzalez's home in order to look for evidence of drug dealing in plain sight under the guise of searching for evidence of dominion and control of the premises. It is significant that the officer sent the informant to the same residence three times, had a copy of Mr. Hernandez-Gonzalez's driver's license, his phone number, and the license plate and VIN number to his truck. He already had all the information he needed to determine where Mr. Hernandez-Gonzalez resided.

Whether officers did not believe they had probable cause to search for evidence of drugs because of the unreliable informant and the staleness of the information remains unknown. But what is plain is the search warrant authorized an unconstitutional overbroad general exploratory search that was unreasonable and invalid, but was then used to support probable cause for a second warrant to search for evidence of controlled substances.

The Informant

An affidavit in support of a search warrant must establish an informant's basis of knowledge and his reliability. *State v. Wible*,

113 Wn.App. 18, 22, 51 P.3d 830 (2002). “The most common way to satisfy the veracity prong [of the *Aguilar-Spinelli* test] is to evaluate the informant’s ‘track record’. i.e. has he provided accurate information to the police a number of times in the past?” *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984).

The affidavits here state that Studer sought out officers when he was in an Oregon jail on charges of unlawful possession and shoplifting charges, offering to act as a drug informant. Officer Randall cleared a warrant Studer had in Washington on other matters, and Oregon police released Studer to begin informing. (Exh. 1 p.3). The affidavit did not provide the court with any information about a track record to establish veracity. However, on the first controlled buy conducted by Randall, Studer attempted to steal some of the drugs he had allegedly purchased. Studer was later terminated from the informant status because he was caught stealing heroin at another controlled buy. The track record he developed in conjunction with this case is splintered at best.

One way an informant’s information can salvage questionable veracity is satisfaction of the “basis of knowledge” prong: “the informant must declare that he has personally seen the facts asserted and is passing on first-hand information.” *Jackson*,

102 Wn.2d at 437. Here, the affidavit does not provide any detailed information about how the drug transaction occurred. Rather, it says that Studer contacted Mr. Hernandez-Gonzalez by telephone, went into the house and returned with drugs and no buy money. There is no description of how many people were in the home each time Studer entered, any conversations or observations that occurred in the home, or even whether Mr. Hernandez-Gonzalez personally delivered drugs. The affidavit did not establish veracity or a knowledge basis sufficient to support probable cause for a search warrant. This is especially significant, because the first warrant did not authorize officers to search for drugs.

First Affidavit and Warrant

A warrant is overbroad if it authorizes seizure of items for which there is no probable cause. *State v. Temple*, 170 Wn.App. 156, 162, 285 P.3d 149 (2012). In *Riley*, our Supreme Court held that a warrant authorizing the seizure of “fruits, instrumentalities, and/or evidence of a crime,” followed by a list of items that might fit the description was overbroad because it did not limit the seizure by stating the crime under investigation. *State v. Riley*, 121 Wn.2d 22, 26, 846 P.2d 1365 (1993).

Here, the warrant did not limit the search and seizure by stating the crime under investigation. The section entitled “That affiant believes that: EVIDENCE OF A CRIME:” was simply left blank on both the affidavit for probable cause and the warrant. (Exh. 1 p.1; Search Warrant issued by E. Klickitat District Court p.1). In *Besola*, the Court held that even a citation to the statutory definition of the crime under investigation is insufficient to meet the particularity requirement. *State v. Besola*, 184 Wn.2d 605, 614, 359 P.3d 799 (2015). Even a general description of “certain evidence of a crime, to-wit: ‘Assault 2nd DV’ RCW 9A.36.021” was rejected by the court as insufficiently particular. *State v. Higgins*, 136 Wn.App. 87, 93, 147 P.3d 649 (2006). There, the Court held a warrant to search for any such violation automatically allowed for seizure of items for which there was no probable cause. *Id.*

The warrant in this case authorized a seizure of items of dominion and control for which there was no probable cause: “keys, canceled mail envelopes, rental agreements and receipts, utility and telephone bills, telephone/address books, photographs, gas receipts, insurance papers, notices from government agencies”, and “financial records including tax returns, bank accounts, loan applications, income and expense records, safe deposit keys and

records, property acquisitions and notes.” (Search Warrant E. Klickitat District Court.).

In reality, without identification of a crime, the warrant authorized officers to conduct a “general, exploratory rummaging” through every drawer, cabinet, closet, computer file, glove compartment, key fob, photo album, bag, and envelope found on the property or in the vehicle. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). The warrant authorized seizure of items legally possessed, and nothing suggested that evidence of the unnamed crime would be found within those items. *State v. Keodara*, 191 Wn.App. 305, 317, 364 P.3d 777 (2015).

To support a search for evidence of dominion and control, there must be probable cause to search the premises *where contraband is found*. *State v. Higgs*, 177 Wn.App. 414, 311 P.3d 1266 (2013) (internal citation omitted; emphasis added). Here, not only did the affidavit not list a search for contraband, neither did the warrant. This was “nothing less than an unconstitutional ‘general warrant’”. *Perrone*, 119 Wn.2d at 545.

The warrant further authorized a search for and seizure of items that were unrelated to either dominion and control or a crime: photographs, gas receipts, income and expense records, safe

deposit keys and records, loan applications and bank accounts.

This is the very type of search probable cause seeks to prevent³.

Perrone, 119 Wn.2d 545.

The particularity requirement of the Fourth Amendment does more than limit the prevention of general searches. “A particular warrant also assures the individual whose property is searched or seized of the lawful authority of the executing officer, *his need to search*, and the limits of his power to search.” *Groh v. Ramirez*, 540 U.S. 551, 562, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).

At issue here is the officer’s need to search under the particularity requirement. The record is silent whether the affidavit was attached to the warrant. The warrant did not use “appropriate words of incorporation” directing the reader to understand the warrant meant for him to look to some other document to ascertain its scope. *Id.* at 557-58. Because neither the affidavit nor the warrant identified the crime under investigation, the need of the officer to search for “computer equipment, programs, storage disks and printouts evidencing the distribution of controlled substances,

³ The officer testified he sought and received authorization to search for and seize only items of dominion and control. RP 68.

the expenditure of currency or currency equivalents⁴” was not established. Finally, the facts of the alleged small drug buys, without more, did not support probable cause that officers would find computer printouts or spreadsheets detailing sales of drugs.

Second Affidavit and Warrant

As a result of the original unlawful search, Officer Randall prepared a second affidavit and the court issued a second search warrant. Similar to the first, neither the affidavit nor the warrant identified the crime under investigation.

Except for eliminating that the informant relationship had been terminated because Studer had been caught stealing drugs a second time, the majority of the second affidavit is identical to the first⁵. The new information in the affidavit was the following recitation:

I observed a plastic bag containing a white crystal substance lying on the kitchen table.... It appeared to me that the substance was possibly methamphetamine. There was also a set of digital scales that were visible in a drawer below the microwave.

I read Gonzalez-Hernandez (sic) his Miranda Warnings...Gonzalez-Hernandez (sic) advised that he understood and he advised that the product on the table was methamphetamine. I immediately stopped my search and

⁴ (Search Warrant E. Klickitat District Court p.3).

⁵ Search Warrant Affidavit, Search Warrant, W. Klickitat District Court p. 1-12.

applied for a second search warrant for controlled substance⁶.

The trial court held that probable cause for the second warrant was established by the officer's observation of the alleged contraband. Under this set of facts, however, the court's ruling was error.

The first warrant did not meet the particularity requirements of the Fourth Amendment, and was not supported by probable cause. It is well-settled law that information in an affidavit of probable cause for a search warrant, made in the course of an unconstitutional search, cannot be used to support probable cause for a warrant. *State v. Ross*, 141 Wn.2d 304, 311-12, 4 P3d. 130 (2000). If the officer's observation of the drugs and scales is excised from the second affidavit, the affidavit is indistinguishable from the first one. It is clear officers did not believe in the first instance there was probable cause nor did the court, as it did not authorize a search for drugs or drug dealing on the basis of that information: the informant was unreliable and the information was stale. *State v. Bittner*, 66 Wn.App. 541, 546, 832 P.2d 529 (1992);

⁶ Search Warrant Affidavit, W. Klickitat District Court. p. 9.

State v. Higby, 26 Wn.App. 457, 461, 613 P.2d 1192 (1980)(single purchase of marijuana 2 weeks prior to application for warrant).

The second warrant was issued based on an unconstitutional search. “When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). This exclusion of evidence has as “its paramount concern” the protection of an individual’s article I, §7 right of privacy. “It accomplishes this by closing the courtroom door to evidence gathered through illegal means”, “examining the legality of each link in the causal chain and not merely the last.” *State v. Eserjose*, 171 Wn.2d 907, 919, 259 P.3d 172 (2011).

There is one exception to the exclusion of evidence in this context. Under the independent source exception, an unlawful search does not invalidate a subsequent search if (1) issuance of the search warrant is based on untainted, independently obtained information, and (2) the State’s decision to seek a warrant is not motivated by the previous unlawful search and seizure. *State v. Miles*, 165 Wn.App. 296,311, 266 P.3d 250 (2011). The exception does not apply under these facts: the information obtained by

officers resulted directly from the illegal search and the State's decision to seek a warrant was motivated by the previous unlawful search.

Mr. Hernandez-Gonzalez respectfully asks this Court to reverse his conviction because the search and seizure were unlawful.

B. This Court Should Review This Issue Because It Is A Manifest Constitutional Error Under RAP 2.5(a)(3).

Under the rules of appellate procedure, where there has been no objection below, the appellate court may conduct review of the unpreserved claim for the first time on appeal if it is a manifest error affecting a constitutional right. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015); RAP 2.5(a)(3). RAP 2.5(a)(3) provides this narrow exception and requires a showing of actual prejudice, which may be demonstrated by a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). (Internal citations omitted). Mr. Hernandez-Gonzalez meets the requirements of RAP 2.5(a)(3).

First, admission of evidence obtained in violation of either the federal or state constitutions is an error of constitutional magnitude. *Keodara*, 191 Wn.App. at 317. Where there is no probable cause to search for items described in the warrant, a constitutional interest is implicated.

He has met the second part of the analysis of RAP 2.5(a)(3) because the asserted error is manifest from the record. To determine whether the error had practical and identifiable consequences, this Court places itself in the shoes of the trial court to ascertain whether, given what the trial court knew at the time, the court could have corrected the error. *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009).

Here, the trial court had a copy of the first affidavit for the warrant. (Exh.1). The court knew or should have known the affidavit was almost three weeks old by the time police conducted the search. Second, neither the affidavit nor the warrant identified the crime officers intended to investigate. Third, there was no probable cause to search for and seize documents of dominion and control. The affidavit sought and the warrant authorized a general exploratory search. Finally, observations made in the

unconstitutional search were used to support a second warrant, which is contrary to Washington law. *Ross*, 141 Wn.2d at 311-12.

The record here is sufficiently developed for this Court to determine whether a motion to suppress would have been granted or denied. *State v. Contreras*, 92 Wn.App. 307, 313-14, 966 P.2d 915 (1998). The affidavits and warrants for both searches are included in this record and the error is manifest. Mr. Hernandez-Gonzalez has not waived the error before this Court.

C. The Admitted ER 404(B) Evidence Was Unduly Prejudicial And Requires Reversal.

Standard of Review

A trial court's ruling on admission of prior bad act evidence is reviewed for a manifest abuse of discretion. *State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007). An abuse of discretion occurs when the trial court bases its decision on untenable grounds, or exercises discretion in a manner that is manifestly unreasonable. *State v. Valdobinos*, 122 Wn.2d 270, 279, 858 P.2d 199 (1993).

Analysis

The purpose of ER 404(b)⁷ is to prevent the fact-finder from convicting a defendant because he has a propensity to commit crimes, rather than considering the merits of the current case. *State v. Wade*, 98 Wn.App. 328, 335, 989 P.2d 576 (1999). It prohibits admission of evidence of other crimes, wrongs, or acts to prove the character of a person to show he acted in conformity with that character. *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). The same evidence, however, *may* be admissible for other purposes, depending on its relevance and the balance of its probative value and danger of unfair prejudice. *Gresham*, 173 Wn.2d at 420. (Emphasis added).

The analytic framework to test admissibility of prior misconduct evidence requires the trial court to: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is to be introduced, (3) determine whether the evidence is relevant to prove an element of

⁷ ER 404(b) provides: (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

the crime charged, and (4) weigh the probative value against the prejudicial effect.” *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Here, the court conducted an on the record analysis finding evidence of the controlled buys was “relevant to show that there’s a possibility that he formed the requisite intent to in fact deliver methamphetamine by virtue of those buys.” RP 109. Without any further reasoning on the record, the court made a conclusory statement that the evidence was not more prejudicial than probative. RP 109. It ruled the evidence of the three buys was “to show some other purpose, and in this case the purpose would be intent, most likely, but also preparation, plan, knowledge.” RP 109.

Prior possession of drugs to show knowledge is appropriate where the defendant claims he did not know the substance was a contraband drug, or did not know of its presence. *State v. Pogue*, 104 Wn.App. 981, 986, 17 P.3d 1272 (2001). Neither applies in this case. Further, the State sought to introduce the evidence solely to show intent. RP 35.

Where the “sole purpose of the other crimes evidence is to show some propensity to commit the crime at trial, there is no room for ad hoc balancing. The evidence is then unequivocally

inadmissible- this is the meaning of the rule against other crimes evidence.” *State v. Holmes*, 43 Wn.App. 397, 400, 717 P.2d 766 (1986).

If the State offers evidence of prior acts to prove intent, “there must be a logical theory, *other than propensity*, demonstrating how the prior acts connect to the intent required to commit the charged offense. That a prior act ‘goes to intent’ is not a ‘magic [password] whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in [its name].” *Wade*, 98 Wn.App. at 334 (internal citations omitted).

In *Holmes*, the State charged the defendant with attempted burglary. The court allowed admission of two previous juvenile theft convictions into evidence as the basis for an inference that Holmes intended to commit theft when he removed a screen from a neighbor’s window. *Holmes*, 43 Wn.App. at 398-400. On review, the Court held this was error. *Id.* at 401. The Court reasoned that the first sentence of ER 404(b) made the prior convictions legally irrelevant, because “the only reason the two convictions were admitted was to prove that since Mr. Holmes once committed thefts, he intended to do so again after entering the Thompson

home. This falls directly within the prohibition of ER 404(b)". *Id.* at 400.

Here, the prosecutor stated the purpose for admission: "So, what goes to the defendant's intent more than the fact that he's been delivering drugs?" RP 35. This falls squarely within the prohibition of ER 404(b).

The State later asked the jury to conclude that because Mr. Hernandez-Gonzalez allegedly possessed the requisite intent for delivery of drugs in the past, he must have had the same intent on the day he was arrested. In closing argument, he argued, "How do we know that the defendant intended – deliver. Well, one of the ways we determine – person's intent is you look at what they've done in the past. Not that they've acted in conformity with, but – shows their intent on the day that we're given." RP 138. This is an incorrect inference because "[I]t cannot be argued: Because A did an act last year, therefore he probably did the act X now charged." *Wade*, 98 Wn.App. at 335 (*citing to* WIGMORE ON EVIDENCE § 192, at 1857).

In an analogous case, the Court ruled prior acts of the defendant's drug sale charges were erroneously admitted under ER 404(b) to prove intent to sell the drugs in his possession. *Wade*, 98

Wn.App. at 333. The Court reasoned “use of prior acts to prove intent is generally based on propensity when the only commonality between the prior acts and the charged act is the defendant. To use prior acts for a non-propensity based theory, there must be some similarity among the facts of the acts themselves.” *Wade*, 98 Wn.App. at 335.

In *Wade*, the Court noted the facts of the previous offenses differed significantly from the facts surrounding the charged crime. *Id.* at 337. *Wade* had previously sold drugs to a police informant and had been observed trafficking in drugs on another occasion. Although the current charges occurred in the same neighborhood as the previous incidents, the most recent charges stemmed from the defendant hurrying away from a social contact with officers and dropping a baggie of cocaine on the ground. *Id.* at 332. The Court concluded that using prior bad acts to prove current criminal intent was to say that because he “had the same intent to distribute drugs previously, he must therefore possess the same intent now.” *Id.* at 336. As in *Holmes*, such an inference rests entirely on propensity to commit a certain crime and is prohibited under ER 404(b). *Id.*

Similarly here, the facts of the alleged previous deliveries differ from the facts of the current offense. First, the State

presented no witness who saw Mr. Hernandez-Gonzalez deliver drugs. The one individual who could corroborate the State's theory, Studer, did not testify because he was an untrustworthy informant. However, even if the previous acts occurred as the State theorized, when officers entered Mr. Hernandez Gonzalez's residence, he was simply standing in his kitchen. Like Wade, possession of drugs does not support an inference of intent to deliver. *Wade* 98 Wn.App. at 337.

Evidentiary errors pertaining to ER 404(b) are not of constitutional magnitude, and are considered harmless unless the outcome of the trial would have been different had it been error free. *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982). Washington Courts have concluded that an inference of intent to deliver cannot be based on bare possession of a controlled substance, absent other facts and circumstances. *State v. Hagler*, 74 Wn.App. 232, 235, 872 P.2d 85 (1994). Similarly, a police officer's expert opinion that the quantity of the drug found is beyond what is normal for personal use does not provide adequate corroborating evidence of intent to deliver. *State v. Lopez*, 79 Wn.App. 755, 768, 904 P.2d 1179 (1995).

Here, the evidence about prior alleged drug sales should not have been allowed and the error was not harmless. The admissible evidence of the defendant's guilt consisted of his proximity to the drugs, that scales were on the kitchen table, and that he said he was not a drug dealer. RP 72. The jury could have reasonably concluded that Mr. Hernandez-Gonzalez was packaging drugs with the intent to deliver them. However, it could also have reasonably concluded that Mr. Hernandez-Gonzalez lived in the home, but was not a drug dealer. Where there is a reasonable probability that erroneous admission of ER 404(b) evidence materially affected the outcome of the trial, reversal is required. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). This matter should be reversed.

D. Mr. Hernandez-Gonzalez Received Ineffective Assistance
Of Counsel Which Prejudiced His Right To A Fair Trial.

Standard of Review

The right to counsel includes the right to effective assistance of counsel. U.S. Const. Amend. VI; *Strickland v. Washington*, 466 U.S. 558, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ineffective assistance of counsel raises an issue of constitutional magnitude, which the reviewing Court can consider for the first time on appeal.

State v. Kyllo, 155 Wn.2d 856, 862, 215 P.3d 177 (2009). An ineffective assistance of counsel claim is reviewed *de novo*. *State v. Rainey*, 107 Wn.App. 129, 135, 28 P.3d 10 (2001). Reversal is required if counsel's deficient performance prejudices the defendant. *Kyllo*, 155 Wn.2d at 687.

1. Mr. Hernandez-Gonzalez's Attorney Provided Ineffective Assistance By Failing To Challenge The First Search Warrant As Overbroad And Issued Without Probable Cause.

Counsel's performance is deficient if it falls below an objection standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The defendant is prejudiced by such deficient performance if there is a reasonable probability that the error affected the outcome of the proceedings. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). Failure to move to suppress unlawfully obtained evidence constitutes ineffective assistance of counsel, if there is no tactical or strategic justification. *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004).

As discussed above in Section A, police initially entered Mr. Hernandez-Gonzalez's residence under an unconstitutionally overbroad warrant. Information gleaned from that warrant was

used to apply for a second warrant. Defense counsel challenged only the affidavit for the second warrant, but failed to challenge the initial overbroad warrant. This argument was available to counsel and failing to challenge the first search represents deficient performance and cannot be a legitimate trial tactic. Defense counsel should have known that information obtained from an illegal search cannot be the basis for a warrant. *Ross*, 141 Wn.2d at 311-12. Failure to assert the defendant's rights under the Fourth Amendment and art. 1, § 7 was deficient conduct. See *Reichenbach*, 153 Wn.2d at 131.

Here, there is also a substantial likelihood that defense counsel's deficient performance resulted in prejudice because there is a reasonable probability the deficient conduct affected the outcome. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The court here knew of the dubious veracity of the confidential informant⁸. The errors in the warrant were plain: It was clear in the request for the search that officers knew the informant was sketchy. It had been almost three weeks since the last alleged buy. The affidavit did not request and the warrant did not authorize

⁸ At one point, the court unsuccessfully encouraged defense counsel to consider challenging the first affidavit and warrant. RP 23.

seizure of drugs and no crime was identified as under investigation. The officer specifically stated he wanted authorization to search for documents of dominion and control. Exh. 1p. 8. By failing to challenge the overbroad authorization to conduct a general exploratory search in every nook and cranny of the home, vehicle, and person to find documents of dominion and control, evidence obtained through the second warrant was wrongly admitted against Mr. Hernandez-Gonzalez.

Mr. Hernandez-Gonzalez has met his burden to show that counsel's failure to move to suppress on these grounds caused prejudice.

2. Defense Counsel's Failure To Request A Limiting Instruction For ER 404(b) Evidence Was Ineffective Assistance of Counsel.

Representation is deficient if it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d 334-35. Mr. Hernandez-Gonzalez contends that his trial counsel was ineffective for failing to ask for a limiting instruction as provided for in ER 105.

ER 105 provides, "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the *court upon request, shall*

restrict the evidence to its proper scope and instruct the jury accordingly.” (Emphasis added). The rule specifically functions to prevent fact finders from relying on propensity evidence to convict a defendant. The two prongs require the party to request the instruction and mandate the court to provide it when asked.

Here, a limiting instruction would have prevented the jury from using evidence of alleged previous drug deliveries as proof that Mr. Hernandez-Gonzalez acted with the same intent on a later occasion. This was especially important because the State introduced the evidence from the uncharged drug buys, and pointedly argued that the jury could find intent in the current matter by looking at the defendant’s past uncharged conduct. The applicable legal rule was evident, counsel knew or should have known it was pertinent, and failure to request the instruction was deficient performance.

The deficient performance prejudiced Mr. Hernandez-Gonzalez, because there is a reasonable probability the intent evidence affected the outcome of the trial. The State had to prove intent as an essential element of the crime. RCW 69.50.401(a)(1)(i).

The court gave jury instruction number 9: “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” RP 130. When officers entered Mr. Hernandez-Gonzalez’s residence, he was not delivering drugs. Intent had to be inferred based on the circumstances. Counsel’s failure to request the limiting instruction allowed the jury to make an impermissible mental leap that past conduct was evidence of current conduct. Courts are instructed to give the instruction for this very reason. The jury could have easily and permissibly determined that Mr. Hernandez-Gonzalez was guilty of possession, but based on the dearth of evidence of intent to deliver, failure to request the instruction was prejudicial to Mr. Hernandez-Gonzalez. It constitutes ineffective assistance of counsel and the conviction must be reversed. *Reichenbach*, 153 Wn.2d at 137.

E. The Trial Court Erred When It Imposed A Two-Thousand Dollar Fine Under RCW 69.50.430(2).

RCW 69.50.430 provides that adult offenders convicted of a felony violation under specified drug laws must be fined in addition to any other fine or penalty imposed. RCW 69.50.430(1) requires the court to impose a fine of one thousand dollars unless the court

finds the offender to be indigent. RCW 69.50.430(2) requires a fine of two thousand dollars to be imposed for any subsequent violation of any of the specified drug statutes, with the proviso that the court should not impose the fine on an indigent offender.

Mr. Hernandez-Gonzalez was found indigent by the trial court and appointed counsel. Supp. CP 86. He was found indigent and appointed counsel on appeal. CP 72-85. The court should not have imposed the additional fine of \$2000. CP 57.

The \$2000 fine authorized under RCW 69.50.430(2) is to be imposed for offenders for whom this is a subsequent violation. The State presented no evidence of prior drug convictions and the offender score was zero. CP 55. This court should remand this matter for vacation of the fine.

F. This Court Should Exercise Its Discretion In The Decision Terminating Review By Declining To Impose Appellate Costs.

RAP 15.2(f) provides the appellate court will give a party the benefits of an order of indigency throughout review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent. Similarly, RAP 14.2 provides: When the trial court has entered an order that an offender

is indigent for purposes of appeal, that finding of indigency remains in effect, under RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

The trial court found Mr. Hernandez-Gonzalez indigent. CP 72-85. Under the Rules, this Court can presume his indigency continues throughout the appeal process. There is no evidence that his financial circumstances have significantly improved since the trial court made its determination.

Mr. Hernandez-Gonzalez respectfully asks this Court to exercise its discretion and decline to impose appellate costs if he does not substantially prevail on appeal and the state submits a cost bill. RCW 10.73.160(1).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hernandez-Gonzalez respectfully asks this Court to reverse and dismiss the conviction with prejudice.

Respectfully submitted this 26th day of April 2017.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Felipe Hernandez-Gonzalez, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid on April 26, 2017 to the following:

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