

NO. 34478-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

FELIPE HERNANDEZ-GONZALEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00025-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the evidence in this case properly seized pursuant to valid warrants?
2. Did the court properly admit ER 404(b) evidence during the trial?
3. Was appellant's trial counsel ineffective?
4. Should the court have imposed the VUCSA fine?
5. Should this court impose appellate costs?

B. STATEMENT OF THE CASE

In 2016 Frank Randall was the narcotics detective for Klickitat County Sheriff's Office. RP 48. In early February, 2016 Randall approached David Struder, an inmate in-custody at Norcor in The Dalles, Oregon, regarding the possibility of working as a confidential informant. RP 53. Struder agreed and began communicating with Randall, revealing a name of a possible dealer, a person by the name of "Felipe" (herein Appellant). Exh.1 p.4, RP 54. On February 9, 2016 Struder was released from Norcor and went with Randall to purchase narcotics from the Appellant. RP 56. Struder purchased what was later confirmed to be methamphetamine from the Appellant at what was believed to be Appellant's home. RP 56-61. On February 10, 2016 Struder completed another undercover purchase of methamphetamine from the Appellant at the same location. RP 62. During this purchase the Appellant was a passenger in a vehicle that came to the home prior to the drug buy. Exh. 1

p. 6. By this time Randall had done some research on “Felipe” and after obtaining DOL photographs of the Appellant, was able to confirm with Struder that a Felipe Gonzalez Hernandez was selling him the drugs. Exh. p. 5, RP 62-63. Randall also confirmed the identity of the Appellant that same day when he saw the Appellant outside of his home. RP 64.

On February 18, 2016 another purchase was arranged and Struder successfully purchased more methamphetamine. RP 66-67. Shortly thereafter Struder was terminated from his position as a confidential informant after he was found to have been stealing some of the drugs he was obtaining in another undercover operation. RP 67. While Randall was not aware that Struder was stealing drugs initially, during the February 9, 2017 buy the methamphetamine bag was open in Struder’s pocket and some methamphetamine had fallen out. RP 60-61, 67, 93-94.

Upon, further investigation, Randall learned that Felipe Gonzales Hernandez was also known as Ernesto Hernandez Lopez and had been convicted of drug charges in Hood River, Oregon in the 1990’s and been deported. Exh. 1 p. 8. Upon obtaining a photograph of Hernandez Lopez from US Immigration and Customs Enforcement, Randall was able to determine that Gonzalez Hernandez and Hernandez Lopez were one and the same person. Exh. 1 p. 8.

On March 8, 2016 Randall executed a search warrant for the home Struder had purchased the drugs from the Appellant on all three occasions.

RP 68. Randall was specifically looking for evidence supporting dominion and control. RP 70. When Randall executed the search warrant he found the Appellant in the home. RP 70. Drug paraphernalia, including a scale, small bags, and a bag that contained white crystal substance in it were visible on a kitchen table. RP 70. Suspecting the substance was methamphetamine, Randall left the home to apply for another search warrant. RP 71. Prior to the search warrant, the Appellant was Mirandized and taken to jail. RP 72.

A second warrant for controlled substances was issued roughly an hour later and Randall returned to the home to inspect the drugs further. RP 73. With the assistance of other officers, Randall took photographs and inspected the premises. RP 74. Because the Appellant had been taken to jail, a copy of the search warrant was left at the home. RP 76. In the home the officers found methamphetamine, bags, scales, cell phones, a large amount of cash, and firearms. RP 75-80. The officers also found the Appellant's birth certificate, several rental receipts, a paystub, and money transfer receipts evidencing dominion and control. RP 82-85. The drugs thought to be methamphetamine were confirmed to be methamphetamine by the crime lab prior to trial. RP 100-07. A total of 19.1 grams was retrieved on the day of the warrant, with smaller amounts being purchased during the controlled buys. RP 100-07.

A pretrial CrR 3.5 and Frank's Hearing were held on May 16, 2016. RP 9. After questioning Randall, attorney for Appellant, Christopher Lanz,

argued that the statements made prior to the Appellant being Mirandized should be suppressed. RP 19. The Honorable Brian Altman, presiding, denied the motion on the basis that when Randall executed the initial warrant, the questioning of Appellant of whether there were firearms in the home, contemporaneously with the observation by Randall of suspected methamphetamines in plain view, was for officer safety and was sufficient to support that the Mirandizing was properly done. RP 20. Trial counsel then argued the second affidavit supporting the second warrant was insufficient because it lacked information concerning Struder stealing drugs. RP 21. Based on the absence of this disclosure, counsel argued that there was no credibility with Struder and therefore there should not have been probable cause found. RP 23-24. When Judge Altman inquired into whether the same argument should be applied to the first warrant, counsel recognized that the language concerning Struder taking drugs was included in the initial affidavit, and that the Judge in question had the opportunity to weigh the factors when determining whether to issue the warrant. RP 23.

Trial was held on May 16, 2016. At trial defense counsel objected to evidence of Struder's controlled buys pursuant to 404(b). RP 109. Judge Altman ruled that the controlled buys were relevant, and that the probative value outweighed the potential prejudice. RP 109. The jury reached a verdict of guilty of the crime of Possession with the Intent to Manufacture or Deliver a Controlled Substance, Methamphetamine, on May 19, 2016.

RP 156.

The sentencing hearing was held on June 6, 2016. RP 157. The prosecutor requested 20 months, with a VUCSA fine of \$2,000 due to the fact that it was Appellant's third VUCSA offense. RP 157. Trial counsel objected to the recommendation and advocated for twelve months plus a day, and that the court only impose the legal financial obligations the Appellant would have the means to pay. RP 157-58. Judge Altman imposed 20 months. RP 159. He then inquired about the Appellant's finances upon his release, asking the Appellant his ability to work going forward, to which the Appellant stated he would have a job waiting. RP 159. Judge Altman then ordered \$500 in victim's compensation, \$100 in DNA fees, \$2,000 fine for a subsequent VUCSA, and attorney's fees in the amount of \$1000. RP 159. The payments were set at \$50 per month beginning June 6, 2018 – 24 months from the date of sentencing. RP 159.

C. ARGUMENT

1. The evidence in this case was properly seized pursuant to valid warrants.

The Fourth Amendment to the United States Constitution provides that “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV. This amendment was designed to prohibit “general searches” and to prevent “general,

exploratory rummaging in a person's belongings." *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (internal quotation marks omitted) (quoting *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)). Similarly, Article I, Section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." W.A. CONST. art I, § 7.

These constitutional provisions impose two requirements for search warrants that are "closely intertwined." *Perrone*, 119 Wn.2d at 545. First, a warrant can be issued only if supported by probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause requires a nexus both between criminal activity and the item to be seized and between the item to be seized and the place to be searched. *Id.* at 140.

Second, "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, 692, 940 P.2d 1239 (1997). The required degree of specificity "varies according to the

circumstances and the type of items involved.” *Id.* at 692. The particularity requirement serves the dual functions of “limit[ing] the executing officer’s discretion” and “inform[ing] the person subject to the search what items the officer may seize.” *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993).

An Appellate Court reviews the trial court’s probable cause and particularity determinations de novo, giving deference to the magistrate’s determination, and evaluates a search warrant in a commonsense, practical manner and not in a hyper technical sense. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008); *Perrone*, 119 Wn.2d at 549.

In this case, it is clear that law enforcement was investigating numerous drug transactions from the same house by a person whose identity was in question. Law enforcement sought the first warrant to “show dominion and control by Felipe. E. Gonzales Hernandez and/or Ernesto Hernandez Lopez of 580 N.E. Spring Street #6.” Exh. 1, p. 8. The affidavit for the search warrant clearly informed the issuing magistrate that a drug investigation was ongoing, that a number of controlled buys had occurred at the residence in question, that there were some potential issues bearing on the informant’s credibility, and that the true identity of the person suspected of the three deliveries was in question as to whether his name was Felipe Gonzales Hernandez or Ernesto Hernandez Lopez. The affidavit established that there were facts and circumstances to establish a reasonable inference that someone was delivering drugs from the residence and the

identity of that someone could be located within the house to be searched.

Exh. 1.

The identity of the person committing any crime is a necessary fact which has to be determined before charges can be brought. Determining dominion and control of the house where the drug deals in this case took place would assist in determining the suspect's identity. Such a search would also assist in identifying who and how many people lived at the house and who may be associated with the house but not live there – all questions which need answers before a charge can be brought.

Appellant is incorrect in his claim that “photographs, gas receipts, income and expense records, safe deposit keys and records, loan applications and bank accounts” are unrelated to dominion and control. AOB 17-18. In fact, these are the very items used to determine by the totality of the circumstances and their cumulative effect that dominion and control has been established. *See State v. George*, 146 Wn.App. 906, 193 P.3d 693 (2008); *State v. Shumaker*, 142 Wn.App. 330, 174 P.3d 1214 (2007); *State v. G.M.V.*, 135 Wn.App. 366, 144 P.3d 358 (2006).

In this case, only after lawfully executing the first warrant, observing in open view suspected methamphetamine, and hearing Appellant's post Miranda statement that the substances observed was, in fact, methamphetamine, did law enforcement stop the first search and apply for a second warrant. While it is unfortunate that the second affidavit did

not include the evidence which bore on the informant's truthfulness, as the trial court found during the request for a "Frank's Hearing," the affidavit more than established probable cause based upon the officer's training and experience, his observation of what he perceived to be controlled substances in plain view, and the Appellant's statements. RP 26.

Put simply, the Appellant's arguments fail because the warrants were properly issued and executed. The information concerning the informant was irrelevant at the point the second warrant was requested because there was sufficient evidence, as recognized by both the judge at the time the second warrant was issued and by the trial judge at the time of the "Frank's Hearing," to justify the issuance of a warrant.

2. The court properly admitted evidence of prior deliveries pursuant to ER 404(b).

Absent an abuse of discretion, appellate courts will not disturb on appeal a trial court's evidentiary ruling. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). 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). "Evidentiary errors under ER 404 are not of constitutional magnitude" and are harmless unless the outcome of the trial would have differed had the error not occurred. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

The purpose of the Rules of Evidence is to secure fairness and to ensure that truth is justly determined. To that end, ER 404(b) forbids evidence of prior acts that tend to prove a defendant's propensity to commit a crime, but allows its admission for other limited purposes. In this case that the defendant possessed a controlled substance with the intent to deliver it. ER 404(b) provides that:

[e]vidence 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.

As *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982), explains:

[e]vidence of prior crimes, wrongs, or acts must be closely scrutinized and admitted only if it meets two distinct criteria. First, the evidence must be shown to be logically relevant to a material issue before the jury. We have expressed the test as "whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged." Second, if the evidence is relevant, its probative value must be shown to outweigh its potential for prejudice.

Logical relevance is demonstrated if the identified fact for which the evidence is to be admitted is "of consequence to the outcome of the action" and tends to make the existence of the identified fact more or less probable. *Id.* at 362-63. Evidence is legally relevant if its probative value outweighs its prejudicial effect under ER 403. *Id.* at 363. Regardless of logical and legal relevance, however, evidence may not be admitted simply to prove the character of the accused in order to show that he or she acted in conformity

with it. *Id.* at 362.

The defendant was charged and convicted of a violation of RCW 69.50.401(2)(b); Possession with Intent to Deliver a Controlled Substance. To that end the State was required to prove to a jury beyond a reasonable doubt that on a specific date, the defendant possessed a controlled substance, that the defendant's intent was to deliver the controlled substance he possessed, and that the acts occurred in Klickitat County, Washington.

One of many facts admitted to show the Appellant intended to deliver the controlled substances in his possession was evidence, offered pursuant to ER 404(b), that a confidential informant had made three controlled buys of a controlled substance from the Appellant's house during the course of law enforcement's investigation between February 6, 2016 and March 8, 2016. This evidence was only admitted after the State sought, and the court conducted, an on the record analysis of the evidence under ER 404(b). RP 109. As part of the court's analysis admitting the evidence the court found that the admission of the evidence while prejudicial, "as all good evidence for the State usually is," the prejudice did not outweigh the probative value of its admission. RP 109.

Appellant's claim that the admitted evidence is propensity evidence is not well taken. Rather than admitting prior acts of misconduct unrelated to the crime charged as the cases cited by the Appellant prohibit, this case involves "bad acts" admitted under ER 404(b) which were part and parcel

of the ongoing law enforcement investigation.

The cases of *State v. Holmes*, 43 Wn.App. 397, 717 P.2d 766 (1986) and *State v. Wade* 98 Wn.App 328, 989 P.2d 576 (1999), both involved evidence of prior convictions to support the defendants committed unrelated crimes. This is unlike *State v. Thomas*, 63 Wn.App. 268, 843 P.2d 540 (1992), where similar evidence was found to be properly admitted under ER 404(b).

In *Thomas*, the officers' testimony indicated that the defendant appeared to be selling drugs in three separate incidents outside the restaurant before he was arrested. That evidence logically related directly to the material issue of what the defendant intended to do with the cocaine he possessed when he was arrested. *See State v. Hubbard*, 7 Wn.App. 61, 64, 615 P.2d 1325 (1980) (evidence of defendant's prior drug sales was relevant to rebut his denial of an intent to sell a controlled substance). In addition, the officers' testimony supported a finding that it was more probable that the defendant intended to deliver the cocaine he possessed. It also provided the jury with a complete picture of what occurred that evening. *See State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981) (the "unbroken sequence of incidents" leading up to the alleged commission of a crime "were necessary to be placed before the jury in order that it have the entire story of what transpired on that particular evening"). Although the officers' testimony was prejudicial to the defendant in *Thomas*, it was not unduly or

unfairly prejudicial. ER 403. It was also highly probative of what the defendant intended to do with the cocaine, and its probative value greatly outweighed the prejudicial effect. Thus, the trial court properly admitted the officers' testimony under ER 404(b). *Thomas*, 63 Wn.App. at 274.

Similar to the facts and circumstances in *Thomas*, evidence of the prior controlled buys from the Appellant's house was logically related to the material issue of what the Appellant intended to do with the controlled substances found in his house, made it more probable than not that the Appellant intended to deliver the controlled substances he possessed, showed the sequence of events which led up to the commission of the crime for which the Appellant was convicted, and provided the jury with the entire story of what transpired during the investigation which led to the crime charged. Additionally, the evidence of the controlled buys was just one piece of the evidence that was indicative of the Appellant intent and was part and parcel of the other non-404(b) evidence regarding the type and amount of drugs discovered, the packaging of the drugs, the presence of scales to weigh the drugs, and the large amount of cash taken. All of this evidence taken together provided a logical basis for the jury to determine that the Appellant possessed the controlled substances in question with the intent to deliver.

3. Appellant's attorney was not ineffective.

Appellant argues that Appellant's trial attorney was ineffective

because he failed to object to what he now claims is an overbroad warrant. For the reasons already stated, the first warrant was not overbroad. Evidence of a suspect's identity and whether the suspect has dominion and control over a house where drugs are being sold are legitimate questions to be answered by law enforcement's investigation.

To demonstrate ineffective assistance of counsel, a defendant must show that defense counsel's representation was deficient and the deficient performance prejudiced the defendant. *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008) (acknowledging that this state has adopted the standards from *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *Hicks*, 163 Wn.2d at 486; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Brousseau*, 172 Wn.2d 331, 352, 259 P.3d 209 (2011). If a party fails to satisfy either prong of the test for ineffective assistance of counsel, we need not consider both prongs. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726 (2007). Counsel's reasonable tactical decisions cannot be the basis of an ineffective assistance of counsel claim. *See State v. Grier*, 171 Wn.2d 17, 44, 246 P.3d 1260 (2011), cert. denied, ___ U.S. ___, 135 S.Ct. 153 (2014).

The appellant's complaint with trial counsel's performance apparently stems from his unsupported claim that "[i]t is startling 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." BOA at P. 13. However, regardless of what one claims may or may not be startlingly clear, it is undisputed that law enforcement had a legitimate obligation to determine the identity of the person who had dominion and control of the house in question and had established probable cause for the issuance of the warrant seeking that information.

Where there was no basis to challenge the original warrant at the trial court level it cannot later be said that counsel's failure to do so was ineffective.

4. The VUCSA fine was supported by the evidence.

Washington law provides for additional fines for certain felony convictions. Specifically, RCW 69.50.430(2) provides for a \$2,000.00 fine for any subsequent convictions of certain drug offenses. A conviction for Possession of a Controlled Substance with Intent to Deliver, for which the Appellant was convicted, is subject to the fines set out by RCW 69.50.430(2). The Court imposed this fine because this was the Appellant's third VUCSA conviction. RP 157. While the two prior convictions had "washed out," nothing in RCW 69.50.430 limits the imposition of the fine

to only those convictions which count in the offender score. Moreover, the Appellant himself indicated at sentencing that he would be able to pay any assessed legal financial obligations because upon his release he would have a job waiting for him and would be working. RP159.

5. Appellate costs should not be addressed here.

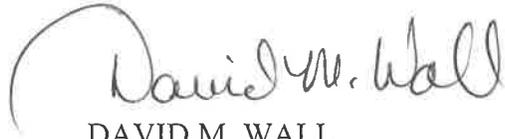
The Appellant asks this Court to refrain from awarding appellate costs if the State seeks them. The Court should decline to consider this issue. The proper procedure would be for a Commissioner of this Court to consider whether to award appellate costs under RAP 14.2 if the State decides to file a cost bill and if the Appellant objects to that cost bill.

D. CONCLUSION

The two warrants issued in this case were valid and based upon probable cause. Evidence of the three controlled buys which occurred during the course of law enforcement's investigation were admissible under E.R. 404(b). Appellant's trial counsel was not ineffective. The VUCSA fine was appropriately ordered. Finally, the issue of appellate costs are currently moot because the State has not filed a cost bill.

The defendant's conviction should be affirmed and his appeal denied.

Respectfully submitted this 24th day of August, 2017.

A handwritten signature in cursive script that reads "David M. Wall". The signature is written in black ink and features a large, sweeping initial "D" that loops around the first few letters of the name.

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August 24, 2017 - 2:57 PM

Transmittal Information

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