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KITITAS SUP. CT. # 15-1-00002-0

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON
CASE # 345785**

STATE OF WASHINGTON,
Respondent,

v.

SHAWN PARKER,
Appellant.

REPLY BRIEF OF APPELLANT.

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I. SUMMARY

In this appeal, the primary issues relate to the testimony at trial of the primary law enforcement investigator, Detective Horn. It is clear from the record that the Detective testified falsely, and it is clear that the false testimony concerned the lynchpin of the State's investigation and case. The testimony in question related the circumstances that led to the discovery of a backpack that had allegedly been stolen during the burglary at I 90 motorsports in the possession of and for sale at Mr. Parker's store in Ronald WA. This "discovery" was self-evidently crucial to the investigation. It was at trial, the only concrete piece of evidence that was cited as the basis of the issuance of a search warrant that led to the discovery of virtually all of the other evidence that was offered at trial. Without the warrant there would be no evidence that Mr. Parker was ever in possession of anything that had been stolen from I 90 Motorsports.

Further, the discovery of the backpack was explicitly used by the State in closing argument as a lynchpin of their case. The State argued in closing that:

“there's no question that that backpack brought by those individuals was bought at Mr. Parker's place of business.” RP at 501.

“Now, the backpack brought into court purchased by two individuals from Mr. Parker is direct evidence.” RP at 507.

In response to defense counsel's argument that the list of missing items might simply have been sold before the burglary, RP at 518:

“let's think about the concept, the possibility that this backpack walked out the door and they didn't know about it. It still without a doubt was in Mr. Parker's store.” RP at 543.

This particular piece of evidence in a trial otherwise filled with circumstantial evidence was “direct evidence,” and “there's no question” that “without a doubt was in Mr. Parker's store.”

Aside from this backpack serving as the basis for the search warrant, it was used by the prosecution as unambiguous, irrefutable proof that Mr. Parker had property taken from the burglary in his store.

Regarding this testimony and the search warrant, counsel for the State points out that the warrant affidavit is not part of the record. State's Response at 25-26. While this is true this does not in this case deprive this court of the ability to determine if there was a violation of the fourth amendment or an analysis of whether the warrant was supported by probable cause. As stated in our opening brief, the warrant affidavit either contained information that stated or implied that Detective Horn had actually confirmed the results of the unauthorized sting operation, or it contained what the state appears to adopt as its position, that Detective Horn simply took the word of civilians playing detective regarding the results of their investigation. In

that case, no judge would have properly found the affidavit supported a finding of probable cause.

II. Mr. Parker should be able to challenge the search warrant for the first time on appeal because there is adequate information in the record for this court to determine that a manifest error of a fourth amendment and Article 1 Section 7 violation occurred and that the trial court, had a motion to suppress been brought, would have granted the motion.

The State argues that because the warrant affidavit is not part of the record on appeal, that the record is insufficient to support a finding that a manifest error occurred, and that a requisite showing of prejudice could be made.

In this case however we have the testimony of Detective Horn, who in both of the conflicting versions of how he came across the information that the backpack was a match, stated that it was in fact the crucial piece of the puzzle. Opening Brief at 29-30. Horn's testimony regarding this can be found at RP 77, and RP 443. In the average case there is not going to be part of

the record that demonstrates what the basis for the warrant was, that is not the case here. It is not speculation to conclude that Mr. Parker has met his burden to identify “a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review.” *State v. McFarland*, 127 Wn.2d 322,333 (1995).

It is also important to note that because we are asking for review of a search warrant, that *McFarland* makes it clear that in order to show prejudice we must only “show the trial court likely would have granted the motion if made.” *State v. McFarland*, 127 Wn.2d at 333, 334.

We have Detective Horn’s conflicting statements. We have the testimony of the other witnesses that were involved in the “sting” and the underlying facts about how Detective Horn supposedly came to know that a “match” had been found in Mr. Parker’s store. If this same testimony had been elicited at a

suppression hearing, a motion to suppress would have been granted. Regardless of what the affidavit actually says, this testimony would have, at the very least, likely resulted in the court suppressing the evidence.

III. Due process requires that the State not use false testimony to secure a conviction. In this trial, it is indisputable that false testimony was given. There is significant evidence that the State's knew or should have known it was false. Even if they did not know, the principles of the Due Process cases impute responsibility and knowledge of the lead investigator to the State.

In this case, we have false testimony. There is no possibility that Detective Horn's first round of testimony and his testimony when he was later called by the defense can both be true. They are mutually exclusive. This isn't a case where the tangential details are being picked apart by defense counsel. The detective testified first that he had personally been presented with the pack and that he had personally matched the number. He identified a photo of

what was not the backpack in question as a photo of the pack in question. Then when he took the stand later in the trial he testified to the contrary. His testimony did not acknowledge that he was mistaken. It is more in the nature of a denial that he had said the things he had previously said at all. When he was directly asked by defense counsel if he had previously testified that he had identified the orange backpack as the backpack purchased by the men who went to Mr. Parker's business he avoided the question by directly contradicting his earlier testimony.

Q. Okay. Wasn't your testimony the other day that you received a photograph of the backpack?

A. The photograph I received that I was referring to was the photograph of the description of where the sealed tags are in orange picture, picture of the orange backpack.

Q. Okay. So you never actually got the photographs that Mr. Hassard or Mr. -- or the other gentleman sent over; is that correct?

A. Correct, sir.

RP 443-444

The point here is that even when Horn was given a chance to explain the inconsistencies in his testimony he obfuscated, pretending as if he had said nothing of the sort. As pointed out previously in briefing, the prosecution had succinctly summarized this now disavowed testimony. RP at 75, Opening Brief at 13.

At a minimum, this demonstrates that Detective Horn testified falsely, and that the prosecution knew or should have known that this was the case. If not before he was recalled, then certainly when he so obviously contradicted his previous testimony. Testimony that the prosecutor understood well enough to succinctly summarize. As stated in our opening brief, the prosecution has a duty to correct false testimony. *State v. Cohen*, 19 Wn.App. 600 at 610, Opening Brief at 34.

The State asserts that actual knowledge by the prosecutor that the testimony is false is required. State's response at 21. This clearly is not the case in *Giglio v. United States*, 405 U.S. 150

(1972), where it was acknowledged that the trial prosecutor was not aware of the false testimony by a cooperating witness regarding a promise of leniency in exchange for his testimony that had been made by another prosecutor in the same office.

The State cites three cases for this proposition. *United States v. Michael*, 17 F.3d 1383, 1385 (11th Cir.1994). *Shore v. Warden, Stateville Prison*, 942 F.2d 1117, 1122 (7th Cir.1991), and *United States v. Vega*, 813 F.3d 386.

Michael involved a mistake on the part of one law enforcement witness that was immediately corrected, and two instances where an agent's testimony conflicted in some details with other witnesses, one law enforcement and one co-defendant. *Michael* at 1385. In *Shore*, the 7th Circuit found that the District Court had erred in granting a Habeas petition by applying caselaw from another circuit. *Shore* at 1122. That case involved recantation of witnesses after trial and is not relevant to the issues in this case. In *Vega*, the familiar issue of cooperating witnesses

and the benefits they received was at issue. The court ultimately found insufficient evidence of falsity. *Vega* at 392.

There are some federal circuits that do support the reading that the State urges. The Supreme Court cases do not resolve the disagreements between circuits and the Ninth Circuit does not agree as stated in our opening brief at 37 citing *United States v. Zuno-Arce*, 339 F.3d 886 (9th Cir. 2003), where a knew or should have known standard is applied. Further, the Ninth Circuit has found that a prosecutor who had participated in an earlier trial with the same witness knew that that witness had lied when he testified contrary to his previous testimony. *United States v. LaPage*, 231 F.3d 488, 491 (9th Cir. 2000) citing *Napue v. Illinois*, 360 U.S. 264 (1959) at FN 7.

Clearly the prosecution in this case knew or should have known that Horn had some point testified falsely. He was there, He summarized from his own mouth, testimony that Horn later disavowed.

Finally, we reiterate that the *Giglio and Napue* line of cases is part and parcel of the *Brady v. Maryland*, 373 U.S. 83 (1963) line of cases that require disclosure of favorable evidence. That body of law imputes the prosecution with the knowledge of law enforcement so that prosecutors can't say I didn't know that, the officer did. Knowledge of police officers or investigators will be imputed to the prosecution. See *Kyles v. Whitley*, 514 U.S. 419, 421, 437 (1995). [A]n agency will be considered part of the prosecution, and its knowledge of Brady material will be imputed to the prosecution. See also *United States v. Wood*, 57 F.3d 733, 737 (9th Cir.1995). "The government cannot with its right hand say it has nothing while its left hand holds what is of value." *Wood*, 57 F.3d at 737.

There is no reason that this principle should not apply here, and there are myriad reasons that it should. Primarily to protect the integrity of the justice system. Finally, counsel would acknowledge that Professor Poulin's article, *Convictions Based on*

Lies: Defining Due Process Protection By Anne Bowen Poulin. 116 Penn St. L. Rev. 331, sets forth the development of the false testimony cases and the disclosure cases and makes the argument that I make here which is that the prosecution needs to be imputed with the knowledge of law enforcement to maintain integrity.

The State seems to argue that Detective Horn was “confused” to some extent by counsel. This is not believable. If Horn had simply been mistaken in one of his iterations of what happened he should have explained that. Because he did not it is impossible to know if he had been misled, but had failed to exercise diligence in confirming information that others had given him, or if he had simply decided that it was expedient at that time to testify untruthfully. In either case the result of this trial should be reversed.

IV. Although the court may have discretion of the amount of restitution, it should be grounded in fact. The record shows that there was no offset

**for the value of the recovered material in the
restitution order.**

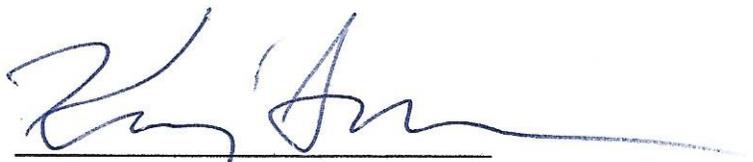
I want to be very brief on this issue. It may be that the trial court has discretion to serve the restorative and punitive aspects of restitution. However, the court should demonstrate that it has taken clearly relevant information into account. The fact that there is no offset for the recovered property shows that this did not occur.

The state can not argue that the material that they removed from Mr. Parker's shop and gave to I 90 did not have value. It clearly had market value, as it was being offered for sale. This and the other previously identified problems with the restitution proceedings require that this issue be remanded for a new restitution hearing.

V. CONCLUSION

For the reasons stated above Mr. Parker requests that the court grant the relief requested.

RESPECTFULLY SUBMITTED this 9th day of September
2019.

A handwritten signature in blue ink, appearing to read 'Kraig Gardner', written over a horizontal line.

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