

FILED  
10/31/2017 4:24 PM  
Court of Appeals  
Division III  
State of Washington

NO. 34591-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

---

STATE OF WASHINGTON,

Respondent,

v.

TIPASA UULIATA,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KLIKITAT COUNTY

---

APPELLANT'S REPLY BRIEF

---

Marla L. Zink  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. ARGUMENT IN REPLY ..... 1

    1. **The evidence police seized should have been suppressed because the search warrant affidavit provided insufficient information about timing and about the confidential informant** ..... 1

        a. The affidavit presented only two controlled buys without specifying the date or dates of the buys or providing other information sufficient to establish probable cause that narcotics would be in the residence at the time of the warrant application or the search..... 1

        b. The affidavit did not describe the source of the confidential informant’s information or attest to his credibility..... 4

    2. **The warrant did not authorize the police to seize firearms and no exception to the warrant requirement applies, requiring suppression of the firearms seized**..... 8

    3. **Because there is no record of the in camera hearing on the confidential informant, the matter must be remanded for a new hearing**..... 9

    4. **The evidence is insufficient to prove the possession was committed within 1,000 feet of a school bus route, requiring dismissal of the enhancements**..... 10

    5. **As the State concedes, the Court should remand for correction of two scrivener’s errors** ..... 12

B. CONCLUSION ..... 12

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

*State v. Fisher*, 96 Wn.2d 962, 38 Wn. App. 722 (1982)..... 7

*State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012) ..... 1

**Washington Court of Appeals Decision**

*State v. Casto*, 39 Wn. App. 229, 692 P.2d 890 (1984)..... 5, 6

*State v. Hatcher*, 3 Wn. App. 441, 475 P.2d 802 (1970)..... 4

*State v. Johnson*, 94 Wn. App. 882, 974 P.2d 855 (1999)..... 4

*State v. Olson*, 32 Wn. App. 555, 649 P.2d 476 (1982) ..... 8, 9

*State v. Perez*, 92 Wn. App. 1, 963 P.2d 881 (1998)..... 3

*State v. Selander*, 65 Wn. App. 134, 827 P.2d 1090 (1992)..... 9, 10

*State v. Steenerson*, 38 Wn. App. 722, 688 P.2d 544 (1984) ..... 6, 7

*State v. Ward*, 125 Wn. App. 138, 104 P.3d 61 (2005)..... 11

**U.S. Supreme Court Decisions**

*Aguilar v. State of Texas*,  
378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964)..... 6

*Spinelli v. United States*,  
393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969)..... 6

**Other Federal Court Decisions**

*United States v. Formaro*, 152 F.3d 768 (8th 1998)..... 3

*United States v. Jeanetta*, 533 F.3d 651 (8th Cir. 2008) ..... 2

*United States v. Ortiz*, 143 F.3d 728 (2d Cir. 1998)..... 3

*United States v. Pitts*, 6 F.3d 1366 (9th Cir. 1993)..... 3

*United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978) .....4

A. ARGUMENT IN REPLY

1. **The evidence police seized should have been suppressed because the search warrant affidavit provided insufficient information about timing and about the confidential informant.**

The Court should reverse and remand with an order to suppress the evidence obtained as a result of the search of 1021 Dallesport Road because the magistrate lacked sufficient facts to independently find probable cause. The affidavit was stale. It also failed to provide sufficient indicia of the confidential informant's reliability. Either basis compels reversal and exclusion of the evidence seized.

- a. The affidavit presented only two controlled buys without specifying the date or dates of the buys or providing other information sufficient to establish probable cause that narcotics would be in the residence at the time of the warrant application or the search.

On review, this Court must look to the facts set forth in the warrant application affidavit to determine whether the evidence suspected would probably be at the premises to be searched at the time the warrant is issued. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012). The Court should reject the facts that the State relies on because they derive from trial testimony and the trial prosecutor's argument to support the issuance of the warrant. For example, by citing the prosecutor's argument during the suppression hearing in the

trial court, the State contends the second of the two controlled buys occurred on the day of the warrant application. Resp. Br. at 2-3 (citing prosecutor's argument at RP 9 as to timing of controlled buys).

However, the warrant affidavit does not specify the day on which either of the controlled buys occurred. CP 21-24. In fact, they could have occurred on the same day. *Id.*

Relying on facts outside the warrant affidavit, the State also contends "[t]his case involved an on-going criminal enterprise in drug trafficking." Resp. Br. at 6. Here, the State cites to trial testimony that was not contained in the warrant affidavit. *Compare id.* (citing trial testimony at RP 145-46) *with* CP 21-24. Moreover, unlike the cases cited by the State, the warrant affidavit (and, indeed, the testimony at trial), showed only two controlled buys where the informant obtained personal quantities of drugs and did not see evidence of large quantities or more extensive drug dealing. CP 21-22 (for example, police provided informant with \$20 recorded buy money).

This is in stark contrast to the facts of *United States v. Jeanetta*, 533 F.3d 651, 653 (8th Cir. 2008), where the confidential informant told police the suspected dealer received two to four pounds of narcotics each week and police had similar reports over the course of a

year. Likewise, the warrant application was not stale in *United States v. Formaro*, 152 F.3d 768, 769 (8th 1998) where police suspected a continuing drug operation based on 14 months of investigation that included controlled buys. Again, here, the affidavit attested to only two controlled buys over a four-day period or perhaps during the same unspecified day within that period. CP 21-24. The State's other citations suffer from similar flaws. See *United States v. Ortiz*, 143 F.3d 728, 732-33 (2d Cir. 1998) (affidavit attested to four months of narcotics trafficking); *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) (evidence in affidavit derived from courier who obtained drugs on a weekly basis and knew defendant as the supplier); *State v. Perez*, 92 Wn. App. 1, 5-6, 963 P.2d 881 (1998) (confidential informant knew defendant as a "large quantity" cocaine dealer and knew defendant had just received a large shipment of narcotics).

Here, the magistrate could only rely on law enforcement's affidavit. And that affidavit simply attested that sometime between March 20 and March 24, two quantities of drugs worth \$20 each were purchased at 1021 Dallesport Road. Drugs, particularly in small quantities, can be easily sold, used or otherwise disposed of within a very short period of time. *E.g.*, CP 22-23 (detective attests to same

based on generalized experience in affidavit); *United States v. Twigg*, 588 F.2d 373, 378 (3d Cir. 1978) (sale of an illegal drug is a fleeting and elusive crime to detect); *State v. Johnson*, 94 Wn. App. 882, 887-89, 974 P.2d 855 (1999); *State v. Hatcher*, 3 Wn. App. 441, 447, 475 P.2d 802 (1970). Therefore, the limited information in the affidavit was insufficient to establish probable cause that as of March 24 or when the warrant ultimately would be executed, evidence of simple drug dealing would be present at the residence.

b. The affidavit did not describe the source of the confidential informant's information or attest to his credibility.

The warrant affidavit was not only stale, but the detective also failed to provide to magistrate with bases for the informant's knowledge and credibility. *See* CP 21-24. These unconstitutional deficiencies separately require remand with an order to suppress the evidence seized. *See* Op. Br. at 13-17; Resp. Br. at 7-8 (State agrees with these constitutional requirements).

For example, the affidavit does not state how the informant gained the information he provided to the detective in advance of any controlled buys. *See* CP 21-24. The affidavit provides only unsupported statements that the detective knew the informant's information to be true. *Id.* Again, the magistrate did not know from

where the information was derived, what that information was, or how the detective “knew [it] to be true.” CP 21.

The authority relied on by the State does not overcome these deficiencies. The State’s reliance on *State v. Casto*, 39 Wn. App. 229, 233-34, 692 P.2d 890 (1984) supports Uiliata’s argument. In that case, this Court found the affidavit sufficient because it actually repeated the information the informant provided police: “he had been in the residence and seen growing marijuana plants, . . . he was welcome and could enter again to buy marijuana[, and after the buy] he said he had again seen plants which the occupant identified as marijuana.” Here, the affidavit simply states “I was a [sic] contacted by a concerned citizen wanting to provide me with local drug information and possible [sic] do some controlled buys. The concerned citizen provided me with information that I knew to be true and had for most of their adult life been exposed to drugs in Klickitat County and surrounding areas. There was no doubt in my mind that the concerned citizen’s knowledge and information was good.” CP 21.

Unlike in *Casto*, here the police provided the magistrate no basis to independently assess the informant’s reliability or credibility. Another case cited by the State confirms that an officer’s conclusory

statements that an informant is reliable is insufficient to satisfy the *Aguilar-Spinelli*<sup>1</sup> test. *State v. Steenerson*, 38 Wn. App. 722, 725-26, 688 P.2d 544 (1984) (affirming trial court’s suppression based on insufficient warrant application). There, this Court reasoned: “The affidavits merely state that the informant is ‘[a] reliable informant who has proven to be reliable in the past’. ‘Reliable’ as used in both instances is a mere conclusion of the affiant which could mean a number of things. There are no facts given to support this conclusion.” *Id.* Likewise, here, the police offered no facts to support its assertion that it “knew” the informant’s information “to be true” or that there was “no doubt in my mind that the . . . knowledge and information was good.” CP 21.

Moreover, in *Casto*, the Court found the controlled buy could substantiate probable cause where the confidential informant conducted a controlled buy and the informant could also attest to the presence of more drugs or where such presence can be presumed. 39 Wn. App. at 234. Those facts were not present in the affidavit presented here. *See* CP 21-24.

---

<sup>1</sup> *Aguilar v. State of Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

The State also argues that the controlled buys, executed after the police took the informant to be knowledgeable and reliable, provide sufficient support for the warrant. Resp. Br. at 9. But, as argued in the opening brief, this is a circular argument because the accuracy of the information obtained in the controlled buy depended on the veracity of the confidential informant. Op. Br. at 16-17; *accord Steenerson*, 38 Wn. App. at 726 (a controlled buy might demonstrate an informant's cooperation, but does not in itself establish his credibility as a reporter of facts). Unlike in *State v. Fisher*, 96 Wn.2d 962, 965, 38 Wn. App. 722 (1982), the controlled buys here were not information that were independently proved to be true and correct or information regarding the informant's past conduct. Rather, here, they were the foundation for the State's warrant application—not the foundation for the informant's reliability.

The Court should reverse and remand for the trial court to suppress the evidence seized as a result of the unlawfully obtained search warrant.

**2. The warrant did not authorize the police to seize firearms and no exception to the warrant requirement applies, requiring suppression of the firearms seized.**

The warrant was capable of describing with particularity an extensive list of items to be seized. CP 25-26 (listing precisely the areas to be searched and the items to be seized). Yet, the warrant omitted firearms from among the items authorized for seizure. The seized firearms should have been suppressed. *See* Op. Br. at 18-23.

In its response brief, the State relies primarily on the same flawed, conclusory premise it asserted below. The State argues the police “knew” that any weapons possessed by Uiliata were illegal. *E.g.*, Resp. Br. at 10, 12. The police did not “know” the firearms were contraband because the State has not shown law enforcement knew the details of Oregon’s prohibition on firearm possession, the duration of any such requirement, whether Uiliata remained under any prohibition that restricted his constitutional right to possess a gun, and whether his rights had been restored.

The State’s reliance on *State v. Olson*, 32 Wn. App. 555, 558-59, 649 P.2d 476 (1982) is misplaced. That decision does not discuss the seizure of firearms not described in the warrant; it simply reiterates

the plain view doctrine. 32 Wn. App. at 558-59. In fact, the only contraband at issue in *Olson* was controlled substances. *Id.* at 556.

Because the guns were not immediately recognizable as contraband, the plain view exception to the warrant requirement does not apply and the unlawfully seized firearms should have been suppressed.

**3. Because there is no record of the *in camera* hearing on the confidential informant, the matter must be remanded for a new hearing.**

The State concedes there was no record made of the trial court's *in camera* hearing to determine whether it would require disclosure of the government's confidential informant. Resp. Br. at 17; Decl. of Bell; Decl. of Hanson. However, the State fails to discuss this Court's on point decision in *State v. Selander*, 65 Wn. App. 134, 135, 827 P.2d 1090 (1992). There, as here, the trial court held an *in camera* hearing where it met with the confidential informant whose veracity the defendant had challenged. *Id.* at 136, 138. There, as here, the hearing was not recorded. *Id.* There, as here, the Court cannot determine from the trial court's written findings whether the record supported those findings. *Id.* at 140. Accordingly, the Court could not meaningfully review Mr. Selander's challenge to the confidential informant. *Id.*

Therefore the Court reversed and remanded for a new in camera hearing. *Id.*

The State does not claim that the trial court's findings are sufficient for this Court's review. It simply claims that any error is harmless. Resp. Br. at 19. This Court did not require the appellant to show prejudice in *Selander* and nor should it here. 65 Wn. App. at 139-40. Mr. Uiliata cannot challenge the basis for the trial court's decision without a record of what transpired at the in camera hearing. Further, Mr. Uiliata cannot provide all the reasons the informant's identity and testimony would have been persuasive in the trial because Mr. Uiliata has been denied access to that information.

However, Mr. Uiliata can offer a glimpse into the resulting prejudice. The State's case rested squarely on the veracity of the confidential informant. The State was able to shield his credibility by not presenting him at trial.

**4. The evidence is insufficient to prove the possession was committed within 1,000 feet of a school bus route, requiring dismissal of the enhancements.**

The school bus route enhancement to counts I and II must be stricken and the aggravators dismissed because the State failed to

present sufficient evidence to prove the elements beyond a reasonable doubt. Op. Br. at 26-32.

The State does not respond to Uiliata's argument that it failed to show any bus route stop that existed on the date of the offenses. The Court should treat the State's silence as a concession and dismiss the aggravators for insufficient evidence. *State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005).

The State also does not contest that the vehicles utilizing the stops met the statutory definition for a school bus. This issue has also been conceded. *Ward*, 125 Wn. App. at 143-44.

Finally, the State argues that although it did not prove the distance between the site of the offense and the stops, the jury could infer the distance. *See* Resp. Br. at 15-16. However, the jury had no facts from which to infer the distance from the property line to the room in which the evidence was found. The State did not present maps to scale or testimony supporting its argument that it was within 1,000 feet from the stop. The State bore the burden to prove the school bus enhancement and it failed to do so. The enhancements should be stricken and the matter remanded for resentencing.

**5. As the State concedes, the Court should remand for correction of two scrivener's errors.**

In the opening brief, Uiliata requested remand to correct two clerical errors in the judgment and sentence: it provides the wrong statutory citation for the unlawful possession of a firearm offenses and incorrectly indicates the offenses were committed while Uiliata was on community placement or community custody. CP 263-6; RP 334. The State concedes both errors. Resp. Br. at 19-20. The Court should accept the State's concession and remand with instructions to correct these clerical errors.

**B. CONCLUSION**

For the reasons set forth here and in the opening brief, the Court should reverse and remand to suppress the evidence seized as the result of a stale and insufficient warrant application. In the alternative, the Court should remand to suppress the firearms the police seized because the warrant did not authorize seizure of firearms.

If the matter is remanded for a new trial, the Court should also order a new *in camera* hearing with a record preserved for appellate review. Additionally, the two sentencing enhancements should be dismissed with prejudice for insufficient evidence.

By agreement of the State, if the sentence is affirmed, the matter should be remanded for correction of two clerical errors in the judgment and sentence.

DATED this 31st day of October, 2017.

Respectfully submitted,

s/ Marla L. Zink  
Marla L. Zink, WSBA 39042  
Washington Appellate Project  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
T: (206) 587-2711  
F: (206) 587-2710  
marla@washapp.org

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

---

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 34591-2-III
v.	)	
	)	
TIPASA UILIATA,	)	
	)	
APPELLANT.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF OCTOBER, 2017, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID WALL, DPA	( )	U.S. MAIL
[davidw@klickitatcounty.org]	( )	HAND DELIVERY
KLICKITAT COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE VIA PORTAL
205 S COLUMBUS AVE. STOP 18		
GOLDENDALE, WA 98620		

[X] TIPASA UILIATA	(X)	U.S. MAIL
392391	( )	HAND DELIVERY
COYOTE RIDGE CORRECTIONS CENTER	( )	_____
PO BOX 769		
CONNELL, WA 99326		

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF OCTOBER, 2017.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎ (206) 587-2711

# WASHINGTON APPELLATE PROJECT

October 31, 2017 - 4:24 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 34591-2  
**Appellate Court Case Title:** State of Washington v. Tipasa Lesumi Uiliata  
**Superior Court Case Number:** 16-1-00039-0

### The following documents have been uploaded:

- 345912\_Briefs\_20171031162257D3272929\_5763.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was washapp.org\_20171031\_160825.pdf*

### A copy of the uploaded files will be sent to:

- davidq@klickitatcounty.org
- davidw@klickitatcounty.org
- greg@washapp.org
- paapeals@klickitatcounty.org

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Marla Leslie Zink - Email: marla@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 701  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20171031162257D3272929**