

**FILED**

AUG 31 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

Case No. 349292-III

Adams County Superior Court No. 16-1-00048-7

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STATE OF WASHINGTON,

Respondent,

vs.

JESUS MARTINEZ,

Appellant.

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BRIEF FOR APPELLANT

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## **A. ASSIGNMENTS OF ERROR**

1. The trial court erred in failing to suppress the evidence found at the search of 659 S. Kaylee Road, Othello, WA. on April 28, 2016, as the Affidavit for Search Warrant relied on information provided by a criminal informant, which was insufficient to pass the requisite *Aguilar-Spinelli* test.

## **B. STATEMENT OF FACTS**

On April 26, 2016 at approximately 2336 hours, Officer Maulen saw what he believed to be a hand to hand drug transaction at Pik-A-Pop, in the City of Othello, County of Adams. When questioned by law enforcement, Russell Richardson told Officer Maulen that he had just purchased crystal methamphetamine from the driver in the silver pickup. Richardson reached into his right front pant pocket and removed a small plastic baggie and handed it to Officer Maulen. (CP 2).

Officer Mendoza followed the silver truck, stopped the pickup, and contacted the driver, Raul O. Gonzalez. There were two other occupants in the truck who were identified as Erasmo Gutierrez and Eyvette Cano. The passengers were detained on the side of the roadway, and Raul O. Gonzalez was placed into restraints and told to sit on the side of the roadway. Raul O. Gonzalez was observed by Sgt. Silva moving the

gravel and dirt around behind his back with his hands while he was sitting on the roadway. Officers checked the area, and located a small plastic baggie containing a crystal substance, which field tested positive for methamphetamine. (CP 2-3).

Raul O. Gonzalez was interviewed by officers and admitted to selling methamphetamine to Russell in the parking lot, for \$7. Raul Gonzalez told officers there were two additional baggies of methamphetamine hidden in the gear shift box of the vehicle, and two glass pipes in the bed of the pickup, which he told his passenger to hide when he realized he was being stopped by police. (CP 3).

Raul O. Gonzalez stated that before he went to Pik-A-Pop, he was visiting his friend Jesse (Jesus) Martinez, who he also knows as "Panther", and that Panther gave him \$40 worth of methamphetamine. Raul said he has known Panther for a long time and met him for the first time when he was a customer and was purchasing methamphetamine. Raul said he got the \$40 worth of methamphetamine from Panther on 4/26/26 around 2200 hours, and that he was with Erasmo and Eyvette playing pool when he got the methamphetamine. (CP 3). On April 27, 2016, Officer Maulen interviewed Erasmo and Eyette seperately. Erasmo said he was in the vehicle when Raul sold Russell the methamphetamine, but he did not

know where Raul got the methamphetamine from. Eyvette said she was also in the vehicle when Raul sold Russell the methamphetamine, and that she had been with Raul most of the day on 4/26/16, until she and Erasmo were left at "Burros" house while they were playing pool. She said Raul left and later returned, and she believed he visited his friend Panther alone, while she and Erasmo were at Burro's house. (CP 56).

Raul described Panther's house as white in color with several solar powered garden lamps and an older red car parked on the driveway, and that Panther lives there with his wife and one of his teenage boys, and that Panther drove a white Impala. (CP 3).

On April 27, 2016, an Affidavit for Search Warrant was prepared by Officer Maulen, and approved by Othello District Court Judge Gary Brucher to search 659 S. Kaylee Road. (CP 54-56).

On April 29, 2016, Defendant, Jesus Martinez, was charged by the Adams County Prosecutor's Office with Possession with Intent to Deliver a Controlled Substance-Cocaine, Possession with Intent to Deliver a Controlled Substance- Methamphetamine, and Unlawful Possession of a Firearm in the Second Degree. (CP 7-10). The Court denied Defendant Martinez' Motion to Suppress (CP 26-29, RP 23-24), and the Defendant proceeded with a Stipulated Facts Trial, wherein he was found guilty of

Possession of Methamphetamine with Intent to Deliver, Not Guilty of Possession of Cocaine with Intent to Deliver, and Guilty of Unlawful Possession of a Firearm. (RP 26-31). Defendant Martinez was sentenced to 15 months (CP 30-41, 44-45). The Defendant filed a timely Notice of Appeal on December 12, 2016. (CP 67).

### **C. ARGUMENT**

1. The trial court erred in failing to suppress the evidence found at the search of 659 S. Kaylee Road, Othello, WA. on April 28, 2016, as the Affidavit for Search Warrant relied on information provided by a criminal informant, which was insufficient to pass the requisite *Aguilar-Spinelli* test.

A defendant may challenge on appeal, the sufficiency of a probable cause statement based on the information from a confidential informant, in that it does not satisfy the *Aguilar-Spinelli* test. *State v. Thompson*, 13 Wn.App. 526, 536 P.2d 683 (1975).

The Fourth Amendment to the U.S. Constitution, as well as Article 1, § 7 of the Washington State Constitution, protects citizens from unreasonable searches and seizures. *State v. Knox*, 86 Wn.App 831 (1997). Probable cause is an objective standard used to measure the

reasonableness of an arrest. *State v. Graham*, 130 Wash.2d 711, 724, 927 P.2d 227 (1996).

Probable cause has been defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. *State v. Scott*, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). The standard for probable cause is limited to what the officer knew at the time of the arrest. *State v. Maesse*, 29 Wn.App 642, 629 P.2d 1349 (1981). Our State Supreme Court recently ruled that probable cause must be “grounded in fact.” *State v. Thein*, 138 Wn.2d 133, 197 P.2d 582 (1999). A basis for probable cause that is based solely on suspicion and belief is legally insufficient. *Id.*, quoting *State v. Helmka*, 86 Wn.2d 91, 92 542 P.2d 115 (1975).

When the existence of probable cause depends on information supplied by an informant, the two-prong *Aguilar-Spinelli* test must be satisfied. *State v. Cole*, 128 Wash.2d 262 (1995). The *Aguilar-Spinelli* test must be satisfied when an informant supplies the facts to support probable cause. *State v. Jackson*, 102 Wash.2d 432, 433, 688 P.2d 136 (1984); see *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d. 723 (1964). This is true whether the issue is probable cause for an arrest or search without a warrant,

or a magistrate's determination for issuing a warrant. *State v. Salinas*, 119 Wash.2d 192, 200, 829 P.2d 1068 (1992). The two prongs of the *Aguilar-Spinelli* test have independent status and both must be shown in order to establish probable cause. *Jackson*, 102 Wash.2d at 437, 688 P.2d 136; *State v. Maxwell*, 55 Wash.App. 466, 451, 788 P.2d 51 (1989).

The *Aguilar-Spinelli* test requires (1) that the informant had a sufficient basis of knowledge, and, (2) showing the informant's veracity. *State v. Duncan*, 81 Wash.App. 70, 76, 912 P.2d 1090 (1996). The State must satisfy both prongs 'unless the police can overcome the deficiencies through other police investigation corroborating the informant's tip.' *Id.* See also, *Jackson*, 102 Wash.2d at 438, 688 P.2d 136 (1984). However, probable cause to believe that a person has committed a crime does not necessarily give rise to probable cause to search his home, and generalized statements about the habits of drug dealers alone are insufficient to establish probable cause to search the dealer's home. *Thein*, at 147-148.

The first prong is the knowledge prong, which requires that the basis of the informant's information be established. The knowledge prong of the *Aguilar-Spinelli* test is satisfied if the informant provides firsthand facts regarding his skill, training, or experience that link his observations to criminal activity. *Smith*, 110 Wn.2d at 663 (citing *Jackson*, 102 Wn.2d at

437-38); *State v. Ibarra*, 61 Wn.App. 695, 702, 812 P.2d 114 (1991). The informant must declare that he has personally witnessed the facts asserted and is passing on first-hand information. *State v. Partin*, 88 Wash.2d 899, 903-04, 567 P.2d 1136 (1977). If the informant's information is hearsay, the basis of knowledge prong can be satisfied if there is sufficient information so that the hearsay establishes a basis of knowledge. See *United States v. Carmichael*, 489 F.2d 983 (7<sup>th</sup> Cir.1973).

In this case, the affidavit does not provide any background as to the criminal informant's reputation and history of providing accurate information to law enforcement, making the State unable to meet the requirements of the reliability prong. The affidavit in this case does not indicate the informant's skill, training, or experience, and does not mention that the informant has a lengthy criminal history, including 17 convictions. (RP 3-10). The informant simply states to law enforcement, after he is arrested for his own delivery of methamphetamine, that on 4/26/16 around 2200 hours, he had been given \$40 worth of methamphetamine from Jesse (Jesus) Martinez who he knew as "Panther", and that "Panther" had allegedly pulled out the drugs from his pant pocket to give to him in exchange for prior services on his vehicle. (CP 55). The affidavit does not mention that law enforcement provided the informant a photograph of

"Panther" and confirmed that the person he allegedly received the drugs from was Jesus Martinez. The informant did not indicate if he had even been inside of the residence located at 659 S. Kaylee Road, and did not indicate at all that illegal activity was occurring inside of the residence. The affidavit does not indicate the informant personally viewed any items inside of the residence associated with the possession of controlled substance. (RP 12-13). Furthermore, the informant's ability to recognize methamphetamine was not included in the affidavit. With the possibility of delivery charges being filed against him, the informant in this case undoubtedly had a strong motive to lie. (RP 11).

The second prong of the *Aguilar-Spinelli* test is the reliability prong, requiring that the reliability of the informant be established. When the informant is an "ordinary citizen" rather than a "criminal or professional informant" and his identity is revealed to the issuing court, intrinsic indicia of the informant's reliability may be found in his detailed description of the underlying circumstances of what he observed. *State v Northness*, 20 Wn.App. 551 (1978). However, merely naming a person is an insufficient basis to establish reliability. *State v McCord*, 125 Wn.App. 88 (2005).

In the present case, Raul O. Gonzalez was not a named "citizen informant", but instead a "criminal informant" seeking favorable consideration

from law enforcement. (RP 11-12). When a criminal or professional informant provides the information supporting a warrant, evidence of the informant's trustworthiness must be included in the warrant to establish his reliability. *Northness, supra*. The reliability prong of the *Aguilar-Spinelli* test is most commonly satisfied by establishing the informant's "track record" of having previously provided accurate, helpful information to the police. *Jackson*, 102 Wn.2d at 437.

In the present case, there is absolutely no evidence of Raul O. Gonzalez' trustworthiness or "track record" of providing verified reliable information in the past. The affidavit is devoid of any prior information given by the informant, which proved to be true, or resulted in any convictions. In fact, the affidavit shows the informant to be a methamphetamine dealer (witnessed by police officers), who, when confronted by law enforcement, attempted to hide the methamphetamine he possessed by burying it under gravel. This shows the informant in this case is most likely a drug addict, who is not credible, and has clearly has motive to falsify. (CP 54-57, RP 11-12).

If the informant lacks this veracity, statements against his penal interests and strong motive to be truthful can satisfy the veracity prong of the *Aguilar-Spinelli* inquiry. Additionally, the amount and kind of detailed information given may enhance the informant's credibility. *State v.*

*O'Connor*, 39 Wn.App. 113, 122, 692 P.2d 208 (1984), *review denied*, 103 Wn.2d 1022 (1985). It is necessary for the police to interview the informant and ascertain such background facts as would support a reasonable inference that he is "prudent" or credible, and without motive to falsify. *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 72 (1971).

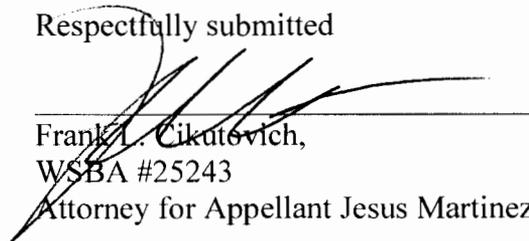
Furthermore, the information provided by the criminal informant in this case was not corroborated by law enforcement. Law enforcement did not provide a photograph to the informant to confirm who "Panther" was, and did not even confirm that Jesus Martinez "Panther" lived at 659 S. Kaylee Rd. Police officers could have attempted controlled buys from "Panther" in order to corroborate the informant's information, or at the very least, pulled DOL records and property records to confirm that the address listed was even his residence. The information provided by the criminal informant in this case suggested that on April 26, 2016 around 2200 hours, "Panther" may have possessed a controlled substance. There is no information whatsoever to suggest that on April 28, 2016, 2 days later, that he still possessed the alleged controlled substance, and there was no information at any time that any ongoing illegal activity was occurring inside of the residence.(RP 12-17).

**D. CONCLUSION**

Based upon the foregoing points and authorities, Appellant, Jesus Martinez, respectfully requests that his conviction, judgment and sentence in this matter be reversed, and the subject charges be dismissed with prejudice.

DATED this 31<sup>st</sup> day of August, 2017.

Respectfully submitted



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Frank L. Cikutovich,  
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Attorney for Appellant Jesus Martinez

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**FILED**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	COA No. 349292
	)	Adams Cty. Sup. Ct. No. 16-1-00048-7
Plaintiff/Respondent,	)	
	)	
vs.	)	
	)	Certificate of Service
JESUS MARTINEZ,	)	
	)	
Defendant/Appellant.	)	
_____	)	

STATE OF WASHINGTON )  
 ) ss:  
 County of Spokane )

Sara Hayden, being first duly sworn, upon oath, deposes and states:

That she is now and at all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, Washington, over the age of eighteen years; that on the 31<sup>st</sup> day of August, 2017, she caused service of the Brief of Appellant, relevant to the above-entitled matter, to the following parties:

/ / / / / / / / / / / /

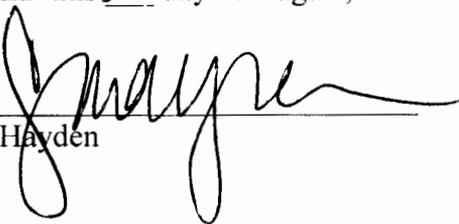
CERTIFICATE OF SERVICE I

CIKUTOVICH LAW, PLLC  
1408 W. BROADWAY AVE.  
SPOKANE, WA 99201  
PHONE (509) 323-9000  
FAX (509) 324-9029

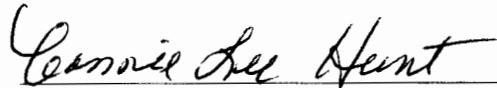
1 Adams County Prosecutor's Office  
2 210 W. Broadway, Ste. 100  
3 Ritzville, WA 99169  
(Copy via regular mail)

4 Jesus Martinez  
5 659 Kaylee Rd.  
6 Othello, WA 99344  
(Copy via regular mail)

7 DATED this 31<sup>st</sup> day of August, 2017.

8  
9   
10 Sara Hayden

11  
12 SUBSCRIBED AND SWORN TO before me this 31<sup>st</sup> day of August, 2017.

13  
14 

15 NOTARY PUBLIC in and for the State  
16 of Washington, residing at Spokane.

17 My Commission Expires: 4/19/2021



CERTIFICATE OF SERVICE 2

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