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Division III
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NO. 36705-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN EPPS, JR.,
Appellant.

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

Stevens County Cause No. 17-1-00181-8

The Honorable Jessica T. Reeves, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Epps's Fourth and Fourteenth Amendment rights by denying his motion to suppress.
2. The trial court violated Mr. Epps's Wash. Const art. I, § 7 rights by denying his motion to suppress.
3. The warrant to search Mr. Epps's home was not supported by probable cause.

ISSUE 1: Probable cause does not exist unless specific and articulable facts indicate that the item to be seized is likely to be found in the place to be searched. Did the affidavit in support of the warrant to search Mr. Epps's home fail to establish probable cause when it demonstrated only that a gun he had possessed when he was still legally able to do so was not found at a single pawn shop after a court had prohibited him from possessing weapons?

4. Defense counsel violated Mr. Epps's Sixth Amendment right to counsel by violating her duty of loyalty.
5. Defense counsel violated Mr. Epps's Sixth Amendment right to counsel by creating an actual conflict of interest.
6. Defense counsel's actual conflict of interest adversely affected her performance on Mr. Epps's behalf.
7. The violations of Mr. Epps's right to counsel require reversal of his conviction.

ISSUE 2: An accused person is deprived of his/her right to counsel when his/her defense attorney has an actual conflict of interest that adversely affects his/her representation. Did Mr. Epps's attorney violate her duty of loyalty and create an actual conflict of interest by providing evidence to the prosecution that exposed her client to potential additional criminal charges?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

When Mr. Epps was ordered not to possess any guns because a no-contact order had been entered against him, he voluntarily surrendered his Concealed Pistol License to the police. RP 63, 188-91. He removed all of the guns from his rural property and either entrusted them with friends or pawned them. RP 164, 190-91.

Even so, the police believed that he still had guns on his property and sought a warrant to search. CP 23-28.

The warrant affidavit stated that Mr. Epps lived in a rural property in Stevens County and that he had a silver and black rifle in his possession when the police served him with a temporary no-contact order on 06/10/17. CP 25, 27.

The affiant searched the Spokane County pawn database and determined that Mr. Epps had pawned thirteen different guns at multiple, different pawn shops in the previous three years. CP 26. Mr. Epps retrieved three of those guns from the pawn shops in 2014 and another one in October 2016. CP 26. The affiant did not know whether those guns were still in Mr. Epps's possession as of the time of the warrant application. CP 26. The affiant did nothing to investigate pawn shops in Stevens County, where Mr. Epps lives. *See* CP 23-28.

On 06/23/17, Mr. Epps told a Sheriff's Deputy that all of his guns were either in pawn shops or in a "safe place." CP 26. The deputy took the "safe place" comment to mean that there were still guns on Mr. Epps's property. CP 28.

The affiant contacted one pawn shop in Spokane County and learned that the silver and black rifle that Mr. Epps had possessed on 06/10/17 was not there. CP 28. The affiant believed that this demonstrated probable cause to believe that the silver and black rifle was still in Mr. Epps's possession because it had not been located at the pawn shop. CP 28.

A magistrate granted the application for a warrant to search Mr. Epps's property. CP 29.

The day that the police executed the search warrant, one of Mr. Epps's friends was at his property, attempting return two guns to his girlfriend, at her request. RP 163-65, 181-83. Mr. Epps's girlfriend intended to surrender the guns to the police. RP 181.

The police found those guns -- a .22 rifle and a shotgun -- and charged Mr. Epps with two counts of unlawful possession of a firearm. CP 69-70.

Mr. Epps moved to suppress those guns, arguing that the warrant had not been supported by probable cause. CP 17-40. The court denied his

motion and the guns, ammunition, and fingerprint and functionality testing results of the guns were admitted against him at trial. RP 14, 75-91, 123-24, 140-61.

The jury acquitted Mr. Epps of possessing the rifle but convicted him of possessing the shotgun. RP 239-40.

Immediately after the verdict was read, the prosecutor asked for Mr. Epps to be remanded into custody. RP 246-47. The prosecutor's request was based primarily on evidence incriminating Mr. Epps of additional crimes, which had been provided to him by defense counsel before the trial began:

PROSECUTOR: Even more concerning, Judge, is on Friday I received an email from [defense counsel] with a screenshot of four different text messages that Mr. Epps sent to somebody by the name of Nathan which is referencing the trial that we're supposed to start tomorrow and in these text messages he's actively soliciting Nathan to go lobby the victim in that case to not cooperate and not testify. So, he's indicated that he's not gonna (sic) follow court orders where he's prohibited from having contact with a victim in a case that's set for trial and he's actively trying to sabotage the case.
RP 246-47.

Mr. Epps timely appealed. CP 114.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. EPPS'S RIGHTS UNDER THE FOURTH AMENDMENT AND ART. I, § 7 BY DENYING HIS MOTION TO SUPPRESS EVIDENCE SEIZED FROM HIS HOME PURSUANT TO AN UNCONSTITUTIONAL SEARCH WARRANT, UNSUPPORTED BY PROBABLE CAUSE.

The July 2017 affidavit in support of the warrant to search Mr.

Epps's home alleged facts that can be summarized as follows:

- Mr. Epps lives in Stevens County. CP 25.
- Mr. Epps lawfully possessed a silver and black rifle when the no-contact order¹ was served on 06/10/17. CP 25, 27.²
- Mr. Epps had pawned thirteen different guns at *multiple, different* pawn shops in the previous three years, according to the Spokane County pawn database. CP 26.
- Mr. Epps redeemed three of those guns from the pawn shops in 2014 and another one in October 2016. CP 26. The affiant did not know whether those guns were still in Mr. Epps's possession as of July 2017. CP 26. The affiant did nothing to investigate pawn shops in Stevens County, where Mr. Epps lives. *See* CP 23-28.
- On 06/23/17, Mr. Epps told a Sheriff's Deputy that all of his guns were either in pawn shops or in another "safe place." CP 26.
- The affiant contacted *one* pawn shop and learned that the silver and black rifle was not there. CP 28.

¹ This initial, temporary, order did not prohibit Mr. Epps from possessing guns. The order prohibiting Mr. Epps from possessing weapons was not entered until 06/19/17. *See* CP 26.

² Mr. Epps also told the officers on 06/10/17 that he had purchased another gun the previous day. CP 25. But the affiant determined that Mr. Epps had pawned that recently purchased gun on 06/24/17 and that it was still in the pawn shop at the time of the affidavit. CP 26, 28.

The affiant believed that these facts demonstrated probable cause to believe that the silver and black rifle was still in Mr. Epps's possession because it had not been located at a single pawn shop and because the Deputy who spoke to Mr. Epps on 06/23/17 took the "safe place" comment to mean that there were still guns on Mr. Epps's property. CP 28.

But neither of those conclusions are supported by the facts in the warrant affidavit. Indeed, the silver and black rifle could have been pawned at any of the other pawn shops that Mr. Epps had patronized in Spokane County, none of which the affiant checked. Mr. Epps could also have been a customer at pawn shops in Stevens County, where he lived. The fact that Mr. Epps possessed the rifle when he was legally permitted to do so, combined with the fact that he had not pawned it at a single shop in Spokane County is insufficient to establish probable cause that the rifle was still in his possession after he was no longer legally permitted to have it.

Likewise, the deputy's belief that Mr. Epps's "safe place" comment indicated that guns were still on his property is improperly conclusory and has no basis of knowledge. The deputy's interpretation of Mr. Epps's statement is also inadequate to establish probable cause.

In order to justify issuance of a search warrant, a warrant affidavit must demonstrate probable cause to believe that evidence of a crime will be found on the premises at the time of the search. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012); *State v. Goble*, 88 Wn. App. 503, 508–09, 945 P.2d 263 (1997); U.S. Const. Amend. IV; art. I, § 7. A trial court’s conclusion that probable cause has been established is reviewed *de novo*. *State v. Shupe*, 172 Wn. App. 341, 349, 289 P.3d 741 (2012).

A. The fact that the silver and black rifle had not been located at a single pawn shop in Spokane County was not sufficient to establish probable cause that it would be found at Mr. Epps’s home.

The affiant’s primary claim in support of the warrant to search Mr. Epps’s home is that, because he had not located the silver and black rifle (which Mr. Epps lawfully possessed on 06/10/17) at the Double Eagle Pawn Shop in Spokane County, then the rifle must have been located on Mr. Epps’s property.

First, the fact that Mr. Epps lawfully possessed a gun before he was prohibited from doing so does not necessarily lead to the conclusion that he also unlawfully possessed the gun after a court ordered him not to. The affiant’s conversations with the pawn shop owner sheds no light on whether Mr. Epps had gotten rid of the gun through some other means, such as by selling it or entrusting it to a friend or family member.

Additionally, the affiant's conclusion fails to account for the fact that Mr. Epps had also previously pawned guns at other pawn shops. *See* CP 26. There is nothing in the affidavit permitting the conclusion that Mr. Epps had not pawned the gun somewhere else. *See* CP 23-28.

Finally, Mr. Epps lived in Stevens County, not Spokane County. CP 25. The affiant did not take any steps to investigate pawn shops in Stevens County at all. *See* CP 23-28.

The Supreme Court has explicitly held that police failure to locate contraband in the first place they look does not necessarily establish probable cause to believe that the contraband must be located at a suspect's home. *See State v. Thein*, 138 Wn.2d 133, 150, 977 P.2d 582 (1999) ("Nor do we find it reasonable to infer evidence is likely to be found in a certain location simply because police do not know where else to look for it").

"By this rationale," the Supreme Court noted:

...lack of investigation and fewer details might result in a warrant, whereas thorough investigation revealing more about the suspect - and, therefore, potentially more places to look - would not.

Id.

In Mr. Epps's case, the police knew that he had a history of pawning guns at *multiple* pawn shops. CP 26. But they took no steps to determine whether the rifle was in one of those locations before

concluding that it must have been located at his home. *See* CP 23-28. As in *Thein*, the finding of probable cause in Mr. Epps's case rewards a lack of reasonable investigation on the part of the police. *Id.*

A similar circumstance was true in *Thein*: the police knew that the suspect in that case owned at least one other house, which had not been ruled out as the location of the contraband. *Id.* at 151. Because it was just as likely that the drugs in that case would have been found at that other house (or were in the possession of other accomplices), the police had failed to establish probable cause to search Mr. Thein's home. *Id.*

In Mr. Epps's case, the police failure to investigate whether the rifle was at any other pawn shop, alone, is enough to undermine the reasonable belief that it would be found at his home. *Id.* The affidavit's claim that the silver and black rifle had not been located at a single pawn shop in Spokane County was insufficient to establish probable cause that it would be found at Mr. Epps's home. *Id.*

B. Mr. Epps's statement that his guns were in a "safe place" does not establish probable cause to believe that they would be found on his property.

Mr. Epps allegedly told a deputy that all of his guns were either pawned or "in a safe place because he lived in the woods." CP 26. The affidavit does not contain any clarification regarding what Mr. Epps meant by a "safe place." CP 23-28. The affidavit does, however, state that Mr.

Epps's statement was "interpreted [by the deputy] as him possessing firearms on the property." CP 28. But the deputy's belief is inadequate to establish probable cause because it is improperly conclusory and is not grounded in fact.

The allegations in a warrant affidavit must not be merely conclusory. *State v. Youngs*, 199 Wn. App. 472, 476, 400 P.3d 1265 (2017). Likewise, "mere speculation will not do." *State v. Anderson*, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001). To demonstrate probable cause, a warrant affidavit must "establish circumstances that extend beyond mere speculation or personal belief." *Id.*

A finding of probable cause must be "grounded in fact." *Thein*, 138 Wn.2d at 146-47 (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980); *State v. Helmka*, 86 Wn.2d 91, 92-93, 542 P.2d 115 (1975)). Information that is not grounded in fact is inherently unreliable and "frustrates the detached and independent evaluative function of the magistrate." *Id.*; *See also Youngs*, 199 Wn. App. at 476.

Accordingly, probable cause cannot be established through conclusory statements, providing an officer's belief without any facts and circumstances underlying that belief. *Youngs*, 199 Wn. App. at 476; *Helmka*, 86 Wn.2d at 92.

Additionally, even facts that “seem odd and perhaps suspicious” are not enough to establish probable cause if they are consistent with legal activity. *State v. Neth*, 165 Wn.2d 177, 184, 196 P.3d 658 (2008). This is because such equivocal allegations do not constitute specific and articulable facts that a crime has been committed. *State v. Doughty*, 170 Wn.2d 57, 62-63, 239 P.3d 573 (2010); *See also State v. Weyand*, 188 Wn.2d 804, 815, 399 P.3d 530 (2017); *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986).

The objective factual allegations in the affidavit in Mr. Epps’s case provide only that he told a deputy that his guns were either pawned or in a “safe place because he lived in the woods.” CP 26. That statement is equivocal at best as to whether the guns were still on Mr. Epps’s property. Accordingly, it is insufficient to establish probable cause. *Neth*, 165 Wn.2d at 184; *Doughty*, 170 Wn.2d at 62-63.

The deputy’s personal belief that Mr. Epps’s “safe place” comment indicated that the guns were still on his property is inapposite because it is improperly conclusory and not “grounded in fact.” *Youngs*, 199 Wn. App. at 476; *Thein*, 138 Wn.2d at 146–47. The deputy’s belief and speculation is far from sufficient to establish probable cause that Mr. Epps possessed guns on his property after he was legally barred from doing so. *Anderson*, 105 Wn. App. at 229.

- C. Mr. Epps's pawn history does not establish probable cause to believe that guns would be found on his property at the time of the warrant search.

Finally, the warrant affidavit in Mr. Epps's case delineates that the Spokane County pawn database showed that Mr. Epps had pawned thirteen different guns in the previous three years, four of which were later recovered from the pawn shops. CP 26. The affiant did not take any steps to investigate pawn shops in Stevens County, where Mr. Epps lives. *See* CP 23-28.

In fact, the affiant admitted that he did not know whether any of those four guns were still in Mr. Epps's possession. CP 26. By the affiant's own admission, Mr. Epps's pawn history does not provide specific and articulable facts to believe that he had weapons on his property at the time of the warrant search. *Thein*, 138 Wn.2d at 146-47; *Doughty*, 170 Wn.2d at 62-63.

Additionally, "stale" information is insufficient to justify issuance of a search warrant because it does not demonstrate that evidence of a crime will be found at the time of the search. *Lyons*, 174 Wn.2d at 360-61 (*citing Andresen v. Maryland*, 427 U.S. 463, 478 n. 9, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976)).

The allegations in the warrant affidavit establishing that Mr. Epps lawfully possessed and pawned guns in previous years did not establish

probable cause to believe that any guns would be found on his property at the time of the warrant search. *Id.*

D. The trial court erred by denying Mr. Epps's motion to suppress.

As outlined above, the allegations in the warrant affidavit were insufficient to establish probable cause to believe that any weapons would be found on Mr. Epps's property at the time of the warrant search.

Accordingly, the trial court violated Mr. Epps's rights under the Fourth Amendment and art. I, § 7 by denying his motion to suppress. *Lyons*, 174 Wn.2d at 360.

A trial court's failure to suppress evidence seized pursuant to an improper warrant is presumed to be prejudicial. *Shupe*, 172 Wn. App. at 351-52. Reversal is required unless the state can prove beyond a reasonable doubt that the improperly admitted evidence did not contribute to the verdict. *Id.*

The state cannot show harmlessness in this case. One of the guns seized pursuant to the warrant formed the basis for Mr. Epps's conviction. RP 123-24. The state also relied on the gun to introduce critical fingerprint and ballistics test evidence, without which conviction would likely have been impossible. RP 140-61.

The improper denial of Mr. Epps's motion to suppress requires reversal of his conviction. *Lyons*, 174 Wn.2d at 360.

II. MR. EPPS WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL BECAUSE HIS DEFENSE ATTORNEY WAS ACTIVELY WORKING AGAINST HIS LEGAL INTEREST AT THE TIME OF HIS TRIAL AND SENTENCING.

Immediately after the verdict at Mr. Epps's trial, the prosecutor revealed that defense counsel had sent him some evidence before trial that likely exposed Mr. Epps to prosecution on additional charges of witness tampering and violating a no-contact order. RP 246-47.

When discussing whether Mr. Epps should be taken into custody, the prosecutor stated that:

Even more concerning, Judge, is on Friday³ I received an email from [defense counsel] with a screenshot of four different text messages that Mr. Epps sent to somebody by the name of Nathan which is referencing the trial that we're supposed to start tomorrow and in these text messages he's actively soliciting Nathan to go lobby the victim in that case to not cooperate and not testify. So, he's indicated that he's not gonna (sic) follow court orders where he's prohibited from having contact with a victim in a case that's set for trial and he's actively trying to sabotage the case.
RP 246-47.

Mr. Epps's defense attorney violated her duty of loyalty to her client and created an actual conflict of interest by actively working against her client's legal interest through sharing information with the state that exposed him to additional criminal prosecution. Mr. Epps was denied his Sixth Amendment right to counsel and his conviction must be reversed.

³ Mr. Epps's trial happened on a Monday and a Tuesday, so defense counsel sent the messages to the prosecutor a few days before the trial began.

Constitutionally adequate defense counsel adheres to a duty of loyalty to his/her clients and to a duty to avoid conflicts of interest. *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); U.S. Const. Amend. VI, XIV.⁴

Unlike a typical ineffective assistance claim, an allegation that defense counsel was ineffective because of conflicting interests does not follow the normal *Strickland* analysis. See *State v. McDonald*, 143 Wn.2d 506, 513, 22 P.3d 791 (2001).

Rather, an accused person has been denied his/her right to counsel and reversal is required if counsel has an actual conflict of interest, which adversely affects his/her performance. *Id.*

No separate showing of prejudice is required. *State v. Regan*, 143 Wn. App. 419, 425–26, 177 P.3d 783 (2008). This is because the “actual conflict” inquiry is not “something separate and apart” from the “adverse effect” inquiry. *Id.* at 427-28 (citing *State v. Dhaliwal*, 150 Wn.2d 559, 79 P.3d 432 (2003); *Mickens v. Taylor*, 535 U.S. 162, 172 n. 5, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)). Rather, an actual conflict always affects

⁴ Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Whether a conflict of interest exists is a question of law, reviewed *de novo*. *Regan*, 143 Wn. App. at 428.

counsel's performance, as compared to "a mere theoretical division of loyalties." *Id.* (quoting *Mickens*, 535 U.S. at 171).

An actual conflict exists whenever "during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *Id.* (quoting *United States v. Baker*, 256 F.3d 855, 860 (9th Cir.2001)). Accordingly, an attorney has an actual conflict when s/he "actively represents conflicting interests." *United States v. Tatum*, 943 F.2d 370, 375–76 (4th Cir. 1991) (citing *Cuylar v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)). An attorney also has an actual conflict when s/he "owes duties to a party whose interests are adverse to those of the defendant." *State v. MacDonald*, 122 Wn. App. 804, 813, 95 P.3d 1248 (2004).

Mr. Epps's defense attorney created an actual conflict of interest because she "actively represent[ed] conflicting interests" when she provided the prosecution with evidence that exposed her client to potential additional prosecution. *Tatum*, 943 F.2d at 375–76. Defense counsel and Mr. Epps's "interests diverged" when counsel pursued a course of action that was directly averse to her client's interests. *Regan*, 143 Wn. App. at 427-28.

Far from representing a “a mere theoretical division of loyalties,” defense counsel actively worked in favor of the party – the prosecution – which stood directly adverse to Mr. Epps. *MacDonald*, 122 Wn. App. at 813.

There is no published Washington caselaw addressing a situation like this one, in which a defense attorney actively provides the state with incriminating evidence against his/her client. But analogy can be drawn to a circumstance in which defense counsel represents two criminal defendants, one of whom has provided the state with incriminating information against the other.

In that context, reversal is required whenever “incriminating information voluntarily supplied by one client is used to provide evidence of another client's criminal activities, expose another client to potential criminal prosecution, or provide justification for a sentencing recommendation or a sentence.” *State v. Dadas*, 190 Wis.2d 339, 346–47, 526 N.W.2d 818 (Wis. Ct. App. 1994).

In Mr. Epps’s case, defense counsel’s actions provided evidence of her own client’s alleged criminal activities and exposed him to potential additional prosecution. *Id.* Accordingly, the actual conflict of interest adversely affected her performance on Mr. Epps’s behalf. *Id.*; *McDonald*, 143 Wn.2d at 513.

The actions of Mr. Epps's defense attorney directly undermine the very nature of our adversarial justice system. Defense counsel violated her duty of loyalty to Mr. Epps and created an actual conflict of interest, which adversely affected her actions in the case. *McDonald*, 143 Wn.2d at 513. Mr. Epps's conviction must be reversed. *Id.*

CONCLUSION

The trial court erred by denying Mr. Epps's motion to suppress and violated his constitutional rights by admitting evidence that had been seized pursuant to an unconstitutional warrant. Mr. Epps was also denied his right to counsel when his attorney created an actual conflict of interest by actively working against her own client's interest. Mr. Epps's conviction must be reversed.

Respectfully submitted on September 17, 2019,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

John Epps, Jr.
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Stevens County Prosecuting Attorney
trasmussen@stevenscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on September 17, 2019.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT

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