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No. 37160-3-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Christopher Morrell,**

Appellant.

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Spokane County Superior Court Cause No. 17-1-03903-0

The Honorable Judge Raymond F. Clary

**Appellant's Opening Brief**

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. The trial court erred by denying Mr. Morrell's suppression motion.
2. The trial court erred by admitting into evidence items obtained in violation of Mr. Morrell's rights under the Fourth Amendment and Wash. Const. art. I, §7.
3. The officers unlawfully seized Mr. Morrell in the absence of a reasonable suspicion.
4. The trial court erred by finding that the informant provided a basis to detain Mr. Morrell.
5. The trial judge erred by finding that "there are no contested facts."
6. The trial judge erred by finding that "[t]he Court incorporates all reports and the Search warrants submitted by the parties as additional facts in this case as if fully set forth herein."
7. The trial judge erred by finding that "[t]hese facts form the substance of pending Superior Court case SC 17-1-01403-7."
8. The trial judge erred by finding that "Judge Cooney heard and denied a suppression motion in that case."
9. The trial judge erred by finding that Officer Lesser observed in plain sight "multiple cell phones."
10. The trial judge erred by concluding that "there was [sic] sufficient indicia of reliability of the tip that Mr. Morrell was engaged in narcotics trafficking to support a [sic] investigatory detention on August 10, 2017."
11. The trial judge erred by concluding that "the information supplied by the tip about the defendant was corroborated by the individual knowing the defendant and his nickname, knowing his location, knowing his vehicle, the notable similarity between the narcotics baggie she possessed and the baggies observed in the defendant's vehicle."
12. The trial judge erred by concluding that "[b]ased on the totality of the information known to Officer Lesser there was sufficient reliable information to support a Terry investigative detention."
13. The trial judge erred by concluding that "[t]here were sufficient facts presented in the search warrant application to support the issuance of a lawful search warrant."

**ISSUE 1:** An investigatory stop is unlawful unless supported by specific, articulable facts giving rise to a reasonable belief that the person seized is engaged in criminal activity. Did police improperly seize Mr. Morrell in violation of his rights under the Fourth Amendment and Wash. Const. art. I, §7?

**ISSUE 2:** An informant's tip cannot provide reasonable suspicion unless it bears indicia of reliability. Should the court have suppressed the evidence here because (a) the State did not produce any evidence regarding the informant's reliability, and (b) the officers corroborated only innocuous facts unrelated to criminal activity?

14. The search warrant affidavit did not provide probable cause to search the two cell phones seized from the Monte Carlo.
15. The search warrant affidavit did not supply probable cause to search the cell phones for "[a]ll data that can be downloaded."
16. The cell phone warrant was based on conclusory predictions, blanket inferences, and generalities about the habits of drug dealers.

**ISSUE 3:** A search warrant must be supported by probable cause. Was the cell phone warrant in this case unsupported by probable cause because the informant did not suggest that Mr. Morrell used a cell phone to arrange drug transactions?

17. The search warrant failed to particularly describe the two cell phones it authorized police to search for data.

**ISSUE 4:** A search warrant must particularly describe the place to be searched and the things to be seized. Was the cell phone warrant insufficiently particular because it described the two phones so generically that it could apply to a vast number of phones?

18. All three search warrants were unconstitutionally overbroad.
19. The warrants improperly authorized police to search for and seize items for which they lacked probable cause, including books, computers, data, and other items protected by the First Amendment.

**ISSUE 5:** A search warrant is unconstitutionally overbroad if it includes authorization for police to search for and seize items for which there is no probable cause. Were the warrants here unconstitutionally overbroad?

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Based on an informant's tip, police stopped Christopher Morrell's car and detained him. Nothing suggested that the informant was reliable, and police did not corroborate any of her allegations beyond innocuous facts available to the public. The unsubstantiated tip did not provide a reasonable suspicion justifying the stop.

The informant did not claim that she'd communicated with Mr. Morrell via text, social media, or phone. Despite this, police seized two cell phones from Mr. Morrell's car and sought a warrant for "[a]ll data that can be downloaded." Although police had both phones when they applied for the warrant, they provided only generic descriptions of each phone. They also provided only generalizations in support of their request to search for and seize all data from the two phones. No specific facts provided any justification for seizing data from either phone. The cell phone warrant was overbroad, unsupported by probable cause, and insufficiently particular to satisfy constitutional requirements.

Police also obtained warrants to search two vehicles for books, papers, and other materials protected by the First Amendment. Neither the informant nor any police investigation provided probable cause to search for such materials.

Mr. Morrell's convictions must be reversed, and the evidence suppressed. The case must be remanded for a new trial or dismissal.

### **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

In August of 2018, police arrested Ashley Ansbaugh on a warrant and found drugs on her. RP (6/13/19) 6. She offered, without being asked, to tell law enforcement where she'd obtained the drugs. RP (6/13/19) 7; CP 28. She said it was Christopher Morrell, who she said was also called Duffles, and that he drove a maroon Monte Carlo. RP (6/13/19) 8. She did not mention using a phone to make her deal or claim that Mr. Morrell used phones in his alleged work. CP 27-30.

Ansbaugh had never worked with police before, and she was unknown to the officers she spoke with. CP 27-29; RP ((6/13/19) 25. Based on Ansgaugh's claim that she'd just purchased from Morrell and her further claim that he would have additional drugs with him, police searched for Morrell. Police saw Morrell at a gas station outside of a maroon Monte Carlo, followed him once he got in, and made a traffic stop. RP (6/13/19) 12.

Police got Mr. Morrell out, and frisked him. They did not find any weapons, but the officer felt what he concluded was a roll of cash in Mr. Morrell's pocket. RP (6/13/19) 15.

At this point, looking inside the car, the officer saw crystal powder, large air fresheners, and baggies. RP (6/13/19) 15-18. Police sought warrants for the Monte Carlo and for two cell phones, which were granted. RP (6/13/19) 18-20. The phones were described as “[s]ilver iPhone with black Otter case” and “[w]hite Verizon htc phone with CE2200 marked on the back of the phone.” CP 55.

Methamphetamine and heroin were found in the searches, as well as cash and scales. RP (6/13/19) 19-20.

But police released Mr. Morrell that night and didn’t charge him for over a month. Then, having obtained an arrest warrant based on the August search, police arrested Mr. Morrell in late September. RP (6/13/19) 21. He was driving a GMC Yukon. Again, police saw crystals inside the vehicle, and obtained a warrant for the Yukon. RP (6/13/19) 22-25. Methamphetamine and heroin were found, along with cash, scales and baggies. RP (6/13/19) 23-24. A phone was found as well, but there was no warrant to search its data. RP (6/13/19) 22.

The state charged Mr. Morrell with two counts of possession of heroin with intent to deliver, and two counts of possession of

methamphetamine with intent to deliver, covering both searches.<sup>1</sup> CP 1, 269.

Mr. Morrell moved to suppress all the evidence, arguing that the initial seizure of Mr. Morrell was not lawful. CP 28-172. The state presented only the testimony of one officer, Scott Lesser. RP (6/13/19) 4-28. No exhibits were admitted. RP (6/13/19) 5-28.

The defense, in addition to arguing that the searches lacked probable cause, also argued that the warrants were overbroad. RP (6/13/19) 31. The warrants authorized “all data” to be taken from the two phones, and permitted police to seize (from the vehicles) “books, records, receipts, notes, computer disks/records, ledgers, and other papers” relating to drug distribution, “papers, tickets, notes, schedules, receipts and other items relating to the [sic] domestic travel including but not limited to travel to, from and between Washington, Idaho, Oregon, and California,” “address and/or telephone books and papers reflecting names, addresses, and/or telephone numbers of suspected co-conspirators...”, “books, records, receipts, bank statements and records, money drafts,” and “photographs and/or videotapes,” “[b]usiness records, cash registers, bank

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<sup>1</sup> The charges were originally filed under two cause numbers, but the court joined them for trial and the matters are consolidated into a single appeal.

accounts for buy money, and all records pertaining to business that may be indicative of money laundering.” CP 59-64, 66-67, 157-162, 164-165.

After a hearing, the trial court denied the motion. RP (6/13/19) 4-41; CP 174-178. The order entered by the trial court “incorporated all reports and the search warrants submitted by the parties as additional facts in this case as if fully set forth within.” CP 175. Those reports were filed by the defense, as what they expected the State to present at hearing. CP 23.

The cases went to trial, and the jury convicted Mr. Morrell as charged. CP 252, 283. Once he was sentenced, Mr. Morrell timely appealed. CP 267, 298.

## **ARGUMENT**

### **I. THE POLICE DID NOT HAVE A REASONABLE SUSPICION JUSTIFYING DETENTION OF MR. MORRELL.**

Police stopped Mr. Morrell’s car based on Ansbaugh’s accusation. Nothing suggested that Ansbaugh was a reliable informant, and police were unable to corroborate anything more than one innocuous fact—that Mr. Morrell was driving a maroon Monte Carlo. Ansbaugh’s claims were insufficient to justify the stop. Mr. Morrell’s conviction must be reversed, the evidence suppressed, and the charges dismissed with prejudice.

Under the Fourth Amendment and Wash. Const. art. I §7, warrantless seizures are *per se* unreasonable.<sup>2</sup> *State v. Doughty*, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010). Because art. I, §7 “provides for broader privacy protections than the Fourth Amendment, our state constitution generally requires a stronger showing by the State” when it seeks to introduce evidence seized without a warrant.<sup>3</sup> *State v. Z.U.E.*, 183 Wn.2d 610, 618, 352 P.3d 796 (2015).

The State bears the burden of proving that a warrantless seizure falls into one of the “jealously and carefully drawn” exceptions to the warrant requirement. *Doughty*, 170 Wn.2d at 61-62. The State failed to meet its burden in this case, because it did not show that Ansbaugh provided officers a valid basis to detain Mr. Morrell.

An investigatory stop must be based on “reasonable suspicion.” *Id.* Police must have a suspicion of criminal activity that is well-founded, reasonable, and based on specific and articulable facts. *Id.*

Where suspicion is based on an informant’s tip, “the State must show that the tip bears some ‘indicia of reliability’ under the totality of the

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<sup>2</sup> Appellate courts review *de novo* the constitutionality of a warrantless seizure. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

<sup>3</sup> Unlike the Fourth Amendment, the analysis under art. I, §7 **Error! Bookmark not defined.** “focuses on the rights of the individual rather than on the reasonableness of the government action.” *State v. Eisfeldt*, 163 Wn.2d 628, 639, 185 P.3d 580 (2008).

circumstances.” *Z.U.E.*, 183 Wn.2d at 618. In this case, Ansbaugh’s statements did not satisfy this constitutional requirement.

At a suppression hearing, the prosecution can show indicia of reliability in one of two ways. *Id.* The State must either show “(1) circumstances establishing the informant's reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion.” *Id.*

Here, the State could not demonstrate the informant’s reliability. Officer Lesser testified that he’d never worked with Ansbaugh as an informant and didn’t know if she’d ever provided police reliable information. RP (6/13/19) 25. The court had no evidence of “circumstances establishing the informant's reliability.” *Id.*

Nor did the State produce evidence corroborating Ansbaugh’s information. An officer’s corroborative observations “need [not] be of particularly blatant criminal activity, but they must corroborate more than just innocuous facts, such as an individual's appearance or clothing.” *Id.* at 618-619.

Here, the officers were able to “corroborate” only a single innocuous detail before detaining Mr. Morrell. Ansbaugh told police that Mr. Morrell was driving a maroon Monte Carlo. RP (6/13/19) 8. This

innocuous fact was akin to a description of Mr. Morrell's "appearance or clothing." *Id.* It did not provide any indication of the tip's reliability. *Id.*

As in *Z.U.E.*, "the State can point to no observations supporting a reasonable suspicion of criminal activity." *Id.* The officers did not have a well-founded and reasonable suspicion that Mr. Morrell was engaged in criminal activity. *Doughty*, 170 Wn.2d at 62. The seizure was unlawful and tainted all that followed. *Z.U.E.*, 183 Wn.2d at 624-625.

Accordingly, Mr. Morrell's conviction must be reversed. *Id.* The evidence must be suppressed, and the charges dismissed with prejudice. *Id.*

## **II. POLICE UNLAWFULLY SEARCHED TWO CELL PHONES SEIZED FROM THE MONTE CARLO.**

Ansbaugh made no mention of a cell phone when she accused Mr. Morrell of dealing drugs. She did not claim that she had called or texted with him. Despite this, police searched two cell phones they'd seized from the Monte Carlo. The warrant authorizing police to search the cell phones was not supported by probable cause.

In addition, the warrant failed to particularly describe each phone. Although police had both phones in their possession when the warrant issued, they did no more than provide a generic description of each phone.

The warrant's description of the phones would apply to many of the billions of cell phones in circulation.

Mr. Morrell's convictions must be reversed. Evidence seized from the phones must be suppressed, and the case remanded for a new trial or dismissal.

A. Police did not have probable cause to search the cell phones.

Under both the state and federal constitutions, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). To establish probable cause, the warrant application "must set forth sufficient facts to convince a reasonable person of the probability... that evidence of criminal activity can be found at the place to be searched." *Id.*

An affidavit in support of a search warrant "must state the underlying facts and circumstances." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). By itself, an inference drawn from the facts "does not provide a substantial basis for determining probable cause." *Lyons*, 174 Wn.2d at 363-64.

Similarly, generalizations about the habits of drug dealers or other criminals cannot provide the individualized suspicion required to justify the issuance of a search warrant. *Thein*, 138 Wn.2d at 147-148. The constitution requires more. *Id.*; see also *State v. Keodara*, 191 Wn. App.

305, 315-316, 364 P.3d 777 (2015), *review denied*, 185 Wn.2d 1028, 377 P.3d 718 (2016).

In this case, the warrant affidavit did not establish probable cause to search the two cell phones seized from the Monte Carlo. The justification for stopping Mr. Morrell came from Ansbaugh, who claimed she'd purchased drugs from him. CP 50.

Ansbaugh did not make any reference to a cell phone. CP 50. She did not state that she'd communicated with him via cell phone to arrange a drug transaction. CP 50. Nor did she say that she'd seen him in possession of a cell phone. CP 50. Her accusation against him did not provide a basis to seize or search either phone. CP 50.

The only information in the affidavit suggesting that the phones might contain evidence came in the form of generalizations of the type prohibited under *Thein*. The affidavit recites that the officer knew, through training and experience, that drug dealers “often use multiple phones to avoid detection and that phones are the main method used to distribute or purchase illegal drugs.” CP 53; *see also* CP 52.

Such generalizations cannot provide a basis to rummage through cell phone data. *Thein*, 138 Wn.2d at 147-148. In *Thein*, the warrant affidavits relied heavily on the officers’ “statements of belief regarding the

common habits of drug dealers.” *Id.*, at 138. For example, one affidavit recited:

[I]t is generally a common practice for drug traffickers to store at least a portion of their drug inventory and drug related paraphernalia in their common residences. It is generally a common practice for drug traffickers to maintain in their residences records relating to drug trafficking activities... Moreover, it is generally a common practice for traffickers to conceal at their residences large sums of money... [I]t is common practice for drug traffickers to maintain firearms, other weapons and ammunition in their residences for the purpose of protecting their drug inventory and drug proceeds.

*Id.*, at 138-139.

The Supreme Court made clear that “probable cause [must] be based on more than conclusory predictions.” *Id.*, at 147. It criticized “[b]lanket inferences” of the kind contained in the affidavits before it. *Id.* Such inferences “substitute generalities for the required showing of reasonably specific ‘underlying circumstances’ that establish evidence of illegal activity will likely be found in the place to be searched in any particular case.” *Id.*, at 147-148.

As in *Thein*, the authorization to search the two cell phones in this case rests on “nothing more than generalizations regarding the common habits of drug dealers.” *Id.*, at 148. The affidavit recites that drug dealers “often” use cell phones to transact business. CP 52, 53.

Such “broad generalizations”<sup>4</sup> do not establish probable cause to search a cell phone in a particular case. Instead, there must be at least some specific evidence linking the phone to criminal activity. *Id.*

This is particularly true where police seek authorization to search a cell phone. *See State v. Fairley*, --- Wn.App.2d ---, \_\_\_, 457 P.3d 1150 (2020). Cell phone searches “implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.” *Riley v. California*, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (*Riley I*).

Cell phones “contain information touching on ‘nearly every aspect’ of a person’s life ‘from the mundane to the intimate.’” *Fairley*, --- Wn.App.2d at \_\_\_ (quoting *Riley I*, 573 U.S. at 393). Accordingly, “[a] cell phone search will ‘typically expose to the government far *more* than the most exhaustive search of a house.’” *Id.* (quoting *Riley I*, 573 U.S. at 396) (emphasis in original).

As these authorities show, the intrusion here was even greater than the residential search in *Thein*. It was based on nothing more than broad generalizations and blanket inferences of the type prohibited under *Thein*. *Thein*, 138 Wn.2d 140-149.

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<sup>4</sup> *Id.*, at 148-149.

The cell phone search violated the Fourth Amendment and Wash. Const. art. I, §7. *Id.* Mr. Morrell’s convictions must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Lyons*, 174 Wn.2d at 361.

B. The cell phone warrant did not particularly describe the two phones to be searched.

A search warrant must particularly describe the place to be searched and the things to be seized. U.S. Const. Amend. IV; Wash. Const. art. I, §7; *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992). In general, “a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permits.” *Id.*, at 547. Thus “a generic or general description may be sufficient, if probable cause is shown and a more specific description is *impossible.*” *Id.* (emphasis added).

Here, the warrant authorizing police to search the two cell phones was insufficiently particular in its description of each phone. Given that the officers had the two phones in their possession, “a more specific description” was possible. *Id.* Instead, one phone was described only as “[s]ilver iPhone with black Otter case.” CP 55. The second was described as “[w]hite Verizon htc phone with CE2200 marked on the back of the phone.” CP 55.

At a minimum, the warrant could have specified the model number of each phone (i.e. iPhone 8). In addition, the warrant could have clarified which phones were subject to search by referencing the time and place the phones were seized. Furthermore, police could have described any scratches or other unique features, such as the image displayed on each phone's lock screen.

Because each description was generic, the warrant, as written, authorized police to search a large number of the more than 2 billion iPhones that have been sold worldwide. It would also apply to many of the millions of HTC phones in circulation.

For example, if officers had found an iPhone or HTC phone when they stopped the Yukon, they may have believed the initial warrant granted authority to search that phone without seeking another warrant. Similarly, the warrant appears to grant authority to search similar phones already in the police evidence locker. Likewise, police could search phones seized incident to the arrest of other suspects, or phones found during execution of other search warrants.

The search warrant allowed police to search an iPhone (in a black Otter case) and an HTC phone. It did not describe the phones with particularity. The State cannot show that "a more specific description was

impossible,” because police had possession of the phones when the warrant issued. *Id.*

Mr. Morrell’s convictions must be reversed. The evidence seized from the two phones must be suppressed and the case remanded for a new trial or dismissal. *Id.*

### **III. THE SEARCH WARRANTS WERE UNCONSTITUTIONALLY OVERBROAD.**

The three search warrants issued in this case allowed police to seize numerous items for which they lacked probable cause, including a vast trove of material protected by the First Amendment. The warrants were unconstitutionally overbroad. Mr. Morrell’s convictions must be reversed, and evidence seized pursuant to the three warrants suppressed.

A search warrant is overbroad if it allows police to search for and seize items for which there is no probable cause. *Perrone*, 119 Wn.2d at 551-552; *see also Keodara*, 191 Wn. App. at 316-317. Furthermore, a warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Perrone*, 119 Wn.2d at 545.

- A. The cell phone warrant was overbroad because it authorized a search for materials protected by the First Amendment in the absence of probable cause.

As noted above, the affidavit seeking permission to search the cell phones outlined only “conclusory predictions” and “[b]lanket inferences.” *Thein*, 138 Wn.2d at 147. By resting on assertions that drug dealers “often” use cell phones,<sup>5</sup> the affiant “substitute[d] generalities for the required showing of reasonably specific ‘underlying circumstances’ that establish evidence of illegal activity.” *Id.*, at 147-148.

In addition, nothing in the search warrant affidavit provided a basis to search for or seize “[a]ll data that can be downloaded from this phone.” CP 56. At best, even if the impermissible generalizations could constitutionally justify a search, the affidavit would support only a search for evidence of communications between dealers and buyers. But the warrant placed no limits on the directive to search for and seize “[a]ll data.” CP 56.

The depth and breadth of the authorization to search for and seize “[a]ll data” on each phone is illustrated by the comprehensive list of examples provided. In its description of items that might be found, the warrant granted permission to search not only for evidence of communication, but also for photos, any deleted data, “[a]ny app

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<sup>5</sup> CP 52, 53.

information and password information,” and “[s]ubscriber information.”  
CP 56.

As the U.S. Supreme Court has observed, the vast quantity of data contained on a cell phone can expose all aspects of a person’s private life to government scrutiny. *Riley I*, 573 U.S. at 393-398. First Amendment concerns demand a close examination of the cell phone warrant to ensure compliance with the probable cause and particularity requirements. *Zurcher*, 436 U.S. at 564; *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 545. The search warrant in this case does not survive such an examination. *Perrone*, 119 Wn.2d at 545, 551-552. It permitted the officers to rummage through and seize all the data contained on each phone despite the absence of probable cause.<sup>6</sup>

The warrant authorizing search of the two cell phones was unconstitutionally overbroad. *Perrone*, 119 Wn.2d at 551-552. Mr. Morrell’s convictions must be reversed, and the case remanded for dismissal or a new trial. *Id.*

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<sup>6</sup> Furthermore, the warrant listed the crime under investigation as simple possession. CP 55. It is difficult to imagine how the items sought could possibly relate to the crime of simple possession. This provides another basis to invalidate the warrant—the “crime under investigation” does not circumscribe the scope of the search. *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993) (*Riley II*).

- B. The vehicle warrants were overbroad because they authorized police to search for materials protected by the First Amendment in the absence of probable cause.

Without justification, police obtained permission to search for numerous items protected by the First Amendment within the Monte Carlo and the Yukon. CP 66-67, 164-165. Police did not even bother to outline blanket inferences or conclusory predictions about the habits of drug dealers when seeking authorization to seize these materials.

For example, the warrant application did not include any facts<sup>7</sup> suggesting that either car would contain “books, records, receipts, notes, computer disks/records, ledgers, and other papers” relating to drug distribution. CP 59-64, 66, 157-162, 164. The police did not have any basis to claim that such records actually existed or that Mr. Morrell kept them in his car. CP 59-64, 157-162. Indeed, the officers did not even assert that drug dealers typically have such records with them when driving around. CP 59-64, 157-162.

The same is true regarding the authorization to search for “papers, tickets, notes, schedules, receipts and other items relating to the [sic] domestic travel including but not limited to travel to, from and between Washington, Idaho, Oregon, and California.” CP 59-64, 66, 157-162, 164. Nothing in either search warrant application suggests that Mr. Morrell had

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<sup>7</sup> Or broad generalizations.

any documentation relating to travel either within Washington or between the named states. CP 59-64, 157-162. Nor did police assert that drug traffickers typically keep such records, either in their cars or elsewhere. CP 59-64, 157-162.

The warrant application also lacked probable cause to search for “address and/or telephone books and papers reflecting names, addresses, and/or telephone numbers of suspected co-conspirators...” CP 59-64, 66, 157-162, 164. Police did not outline any facts suggesting that Mr. Morrell had such materials in his car. CP 59-64, 157-162. Nor did they claim that drug dealers generally have records of this sort. CP 59-64, 157-162.

The affidavit did not supply probable cause to search either car for “books, records, receipts, bank statements and records, money drafts,” or the numerous other types of financial information listed.<sup>8</sup> CP 59-64, 66, 157-162, 164. Police did not claim to have any facts suggesting that Mr. Morrell had any financial records of any sort. CP 59-64, 157-162. Nor did they claim that drug offenders generally keep such records, or that the documents would likely be found in a suspect’s car. CP 59-64, 157-162.

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<sup>8</sup> Arguably, there was a basis to search for “United States Currency.” CP 66, 164. However, nothing suggested that police would find “precious metals, and financial instruments, including, but not limited to, stocks and bonds...” CP 66, 164.

Police did not provide justification to search for “photographs and/or videotapes,”<sup>9</sup> “[b]usiness records, cash registers, bank accounts for buy money, and all records pertaining to business that may be indicative of money laundering.” CP 59-64, 66-67, 157-162, 164-165. The affiant did not provide facts suggesting that Mr. Morrell had any relevant photographs or videotapes. CP 59-64, 157-162. Nor were there facts suggesting he had any business records or similar materials. Indeed, as with the other listed items, police did not even seek to rely on the kind of generalizations disapproved of by the Supreme Court in *Thein*.

The materials outlined in these provisions of the search warrants are protected by the First Amendment. Accordingly, each warrant is subject to close scrutiny to ensure compliance with the probable cause and particularity requirements. *Zurcher*, 436 U.S. at 564; *Stanford*, 379 U.S. at 485; *Perrone*, 119 Wn.2d at 545.

Neither warrant survives close examination. *Perrone*, 119 Wn.2d at 545, 551-552. The warrants allowed police to search for items for which they lacked probable cause, including items protected by the First Amendment. The search violated the Fourth Amendment and Wash. Const. art. I, §7. Mr. Morrell’s convictions must be reversed, the evidence

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<sup>9</sup> The authorization to search for “cell phones or similar digital devices” is addressed elsewhere in this brief. CP 66, 165.

suppressed, and the case dismissed with prejudice. *Perrone*, 119 Wn.2d 538, 551-552.

**IV. THE TRIAL COURT’S FINDINGS IMPROPERLY “INCORPORATE[D]... ADDITIONAL FACTS” THAT WERE NOT INTRODUCED AS EVIDENCE AT THE SUPPRESSION HEARING.**

The evidence introduced at the suppression hearing consisted of the testimony of Scott Lesser. CP 174; RP (6/13/19) 5-28. No exhibits were introduced during the hearing. RP (6/13/19) 5-28.

Despite this, the court incorporated into her findings “all reports and the Search warrants submitted by the parties as additional facts as if fully set forth herein.” CP 175. These reports consisted of 148 pages of documents submitted by Mr. Morrell’s attorney, who “believe[d] the contents of those reports would form the testimony at a hearing on this matter.” CP 23.

Absent stipulation or a ruling admitting the documents into evidence, the court had no basis to consider these documents at the contested suppression hearing.<sup>10</sup> Nor did the court have any justification for incorporating the materials “as additional facts as if fully set forth herein.” CP 175.

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<sup>10</sup> Mr. Morrell does not contest the court’s consideration of the search warrant affidavits and the warrants themselves, even though they were not introduced into evidence at the hearing.

The court's finding incorporating the police reports "as additional facts" must be stricken.<sup>11</sup> CP 175.

### **CONCLUSION**

Police had no reason to think their informant was reliable when they stopped Mr. Morrell and detained him based on the informant's tip. Prior to the stop, the officers were unable to corroborate anything beyond innocuous facts. Their initial seizure of Mr. Morrell was unsupported by reasonable suspicion. All information derived from that initial stop must be suppressed.

In addition, the informant provided no information suggesting that Mr. Morrell had a cell phone he used to arrange drug transactions. Despite this, police obtained a warrant to search for and seize "[a]ll data that can be downloaded" from two phones found in the car he was driving. The cell phone warrant was overbroad and wholly unsupported by probable cause. All information seized from the cell phones must be suppressed.

Although police had both phones in their possession, the warrant application and the warrant itself provided only a generic description of each phone. Because of this, the cell phone warrant was insufficiently

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<sup>11</sup> The court made a number of additional findings that are not supported by substantial evidence. Appellant assigns error to these findings either because no supporting evidence was introduced or for the reasons set forth in the arguments in this brief.

particular to meet constitutional standards. Data seized from the cell phones must be suppressed.

Neither the informant nor police investigation suggested that the vehicles driven by Mr. Morrell would contain books, papers, computers, or other materials protected by the First Amendment. The authorization to search each car for such materials was unconstitutionally overbroad, failing both the probable cause and particularity requirements.

Mr. Morrell's convictions must be reversed, and the evidence suppressed. The case must be remanded for a new trial or for dismissal.

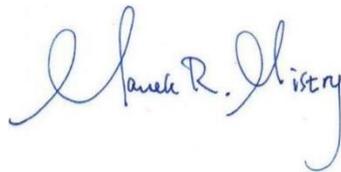
Respectfully submitted on May 7, 2020,

**BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Christopher Morrell, DOC #888194  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

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

Spokane County Prosecuting Attorney  
SCPAAppeals@spokanecounty.org

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 Olympia, Washington on May 7, 2020.



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Jodi R. Backlund, WSBA No. 22917  
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# BACKLUND & MISTRY

May 07, 2020 - 9:40 AM

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