

79712-9

NO. 57210-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT CHAMBERLIN,

Appellant.

APPELLANT'S BRIEF  
KJ

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

The Honorable Alan R. Hancock, Judge  
The Honorable Vickie I. Churchill, Judge

BRIEF OF APPELLANT

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent, containing a copy of the document to which this declaration is attached.

ISLAND COUNTY PROSECTOR  
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Eric Broman  
Name Done in Seattle, WA Date

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion that asked the judge who signed the search warrant to recuse himself from hearing the CrR 3.6 motion to decide whether the warrant was properly issued.

2. The trial court erred in denying appellant's motion to suppress evidence obtained from the execution of a search warrant.

3. The trial court erred in entering conclusions of law 1, 2, 3, 4, 5, and 6. CP 16-17. A copy of the court's CrR 3.6 Findings and Conclusions is attached as appendix A.

4. The trial court erred in failing to enter written findings of fact and conclusions of law as required under CR 6.1(d).

Issue Pertaining to Assignments of Error

1. Appellant was charged with possessing controlled substances based on evidence seized when the police executed a search warrant at appellant's residence. The judge who authorized the search warrant was also the judge who ruled on the appellant's CrR 3.6 suppression motion. Before the suppression hearing, appellant moved to have the CrR 3.6 motion heard by a different judge. Did the trial judge err in denying appellant's motion to recuse

himself from the suppression hearing where he was in a position to review his own authorization of the search warrant?

2. Under Article I, section 7 of the Washington state constitution, where a search warrant is issued based on an informant's tip, the affidavit for the search warrant must inform the magistrate of the underlying circumstances which led the officer to conclude that the informant was credible, and the basis for the informant's knowledge. Did the trial court err in upholding the search warrant where the warrant affidavit on its face failed to establish the informant's credibility under Aguilar-Spinelli?

3. The trial court failed to enter written findings of fact and conclusions of law after appellant's bench trial as required under CrR 6.1(d). Must appellant's judgment and sentence be vacated and his case remanded for entry of written findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural Facts<sup>1</sup>

On January 25, 2005, the Island County prosecutor charged appellant Scott Chamberlin with one count of possession of marijuana with intent to deliver and one count of possession of methamphetamine with intent to deliver alleged to have occurred on January 21, 2005. CP 33-34. These charges were based on evidence obtained during the execution of a search warrant on Chamberlin's residence. CP 14.

At the April 15, 2005 readiness hearing, defense counsel noted his intention to ask Judge Alan R. Hancock to recuse himself from the suppression motion because he was also the judge who had authorized the search warrant. 1RP 3-4. Even before hearing any arguments, Judge Hancock stated that he did not think he needed to recuse himself, and:

[i]f, indeed, I issued the warrant in this case, I'm sure that I did read carefully the application for the warrant, sworn testimony in support of the warrant, issued the warrant [sic].

1RP 4-5. The suppression hearing was originally scheduled

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP - 4/15/05; 2RP - 5/23/05; 3RP - 8/3/05; 4RP - 10/7/05.

for May 23, 2005, at which time the defense formally made a motion for Judge Hancock to recuse himself. 2RP 2-5. Judge Hancock continued the suppression hearing so the parties could provide additional authority related to the recusal motion. 2RP 11.

On August 3, 2005, the defense again argued for Judge Hancock to recuse himself, relying on the appearance of fairness doctrine. 3RP 16-18. Judge Hancock denied the recusal motion, stating that he did not know of a reason why he would not be fair and impartial. 3RP 19.

Judge Hancock then proceeded with the suppression hearing. 3RP 20. The defense argued that the affidavit was invalid on its face because it failed to establish the veracity of Randall Paxton, the informant. 3RP 21. Paxton had been arrested by Island County Deputy Todd on January 20, 2005 and was booked into jail on charges of attempting to elude, driving while under the influence, and reckless driving. CP 15. When he was arrested, Paxton admitted that he was under the influence of methamphetamines and marijuana. CP 15. Paxton then told Deputy Todd that he would be willing to give a taped statement that he bought the drugs from Chamberlin in exchange for possible leniency on his current charges. CP 15. During his taped statement, Paxton acknowledged that the

detective was not making any threats or promises regarding his pending charges. Supp. CP \_\_\_ (sub. no. 42, State's Brief in Opposition to Motion to Suppress).<sup>2</sup> Paxton also said that he wanted to make the statement against Chamberlin because he wanted to stop using drugs. Supp. CP \_\_\_ (sub. no. 42). Paxton told the detective that he had bought drugs from Chamberlin at Chamberlin's house earlier that day. CP 15. Paxton's criminal history consisted of seven felony convictions, including several burglary and theft charges. Supp. CP \_\_\_ (sub. no. 42); 3RP 24-25.

Judge Hancock upheld the validity of the search warrant. 3RP 40-48. He determined that veracity had been established because Paxton was a named citizen informant, made a statement against penal interest, and provided a detailed description that provided corroboration of Paxton's credibility. CP 16-17; 3RP 43-46.

The trial was held before Judge Vickie Churchill on October 7, 2005. 4RP 1-2. Chamberlin waived his right to a jury trial and proceeded with a bench trial on stipulated facts. 4RP 2-5; Supp. CP \_\_\_ (sub no. 61, Crime Lab Report and Other Evidence). The trial court found Chamberlin not guilty of possession of marijuana with

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<sup>2</sup> The search warrant affidavit was attached as an appendix to the state's suppression brief.

intent to deliver and guilty of possession of methamphetamine with intent to deliver. 4RP 9. The court sentenced Chamberlin to a mid-range sentence of 16 months. CP 8.

C. ARGUMENT

1. **THE TRIAL COURT ERRED IN DENYING THE MOTION FOR RECUSAL.**

The trial court judge, acting as a magistrate, found that a police affidavit supported a finding of probable cause to issue a search warrant. The defense later moved to suppress, arguing that the affidavit failed to support a finding of probable cause. The defense also timely moved to recuse the trial court judge from reviewing his own prior decision on this question. The trial court erred in denying the motion to recuse. If this Court agrees, it need not and should not reach the remaining questions raised in this appeal.

A person accused of a crime has the right to due process of law. Const. art. 1, § 3; U.S. Const. amends 5, 14. An unbiased judge and the appearance of fairness are hallmarks of due process. In re Murchison, 349 U.S. 133, 99 L.Ed. 942, 55 S.Ct. 623 (1955); Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct.

80, 34 L.Ed.3d 267 (1972); State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270 (1993).

The Code of Judicial Conduct states that "[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned." CJC Canon 3(D)(1). The canon lists several specific instances where a judge's duty to recuse is "clear and nondiscretionary." State v. Carlson, 66 Wn. App. 909, 918, 833 P.2d 463 (1992). Such instances include the situation where "the judge has a personal bias or prejudice concerning a party." Carlson, at 919 n.4 (citing former CJC Canon 3(C)(1)(a), recodified as CJC Canon 3(D)(1)(a)). The canon also recognizes that other situations may arise where the appearance of fairness might be compromised by a judge's participation in the decision. See e.g. Carlson, at 918-19. As the Carlson court reasoned in addressing a similar, but untimely request, "the critical concern in determining whether a proceeding satisfies the appearance of fairness doctrine is how it would appear to a reasonably prudent and disinterested person." Carlson, at 919 (emphasis added, quoting Chicago, M., St. P. & Pac. R.R. v. State Human Rights Comm'n, 87 Wn.2d 802, 810, 557 P.2d 307 (1976)); see also Sherman v. State, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995)

(stating the canon's "reasonable person" standard and remanding the case to a different judge); State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983) ("Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised"); State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972) ("The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial").

No Washington case has addressed whether a judge who authorized a search warrant can also preside over the suppression hearing without violating the appearance of impartiality. However, other jurisdictions have determined that a judge should recuse himself when asked to review a decision that the same judge made in a previous proceeding.

In Brent v. State, \_\_\_ So.2d \_\_\_, 2005 WL 2430577 (Miss. App. 2006),<sup>3</sup> the Mississippi Court of Appeals addressed this

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<sup>3</sup> At the time this brief is being filed, it is unclear whether the Brent case is permanently published. The Westlaw reference includes this disclaimer: "NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL." Counsel reviewed the Mississippi appellate court website, and it appears that further review of the decision may be pending. The Mississippi cause number is 2003-

precise issue. The magistrate who issued the warrant became the judge who later heard and denied the defense motion to suppress evidence. The Court of Appeals reversed, applying Mississippi's version of CJC 3(D)(1)(a). The court stated:

The problem created by this scenario is patently obvious. Not only might a reasonable person harbor doubts about the impartiality of the judge in this situation, we find that any reasonable person should have such doubts. The trial judge committed manifest error in failing to recuse himself, despite his subjective pronouncements that he held no bias against Brent. According to the objective "reasonable person" test established by Mississippi precedent, we must reverse this case and remand it for trial with a new judge.

Brent v. State, at ¶ 6 (court's emphasis).

Other courts addressing similar issues under objective "appearance of unfairness" standards have also held that recusal is required. In Russell v. Lane, the Seventh Circuit held that a district court judge erred in hearing a habeas petition where the judge previously sat on the state appellate panel that affirmed the petitioner's conviction. Russell v. Lane, 890 F.2d 947 (7th Cir. 1989). The court reasoned:

Judge Mills was being asked to find that he had affirmed an unconstitutional conviction, and, implicitly, that by doing so he had become complicit in sending

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Russell to prison in violation of Russell's constitutional rights.

Russell, at 948. Because the petitioner showed at least the appearance of impropriety, the district court's orders were vacated and remanded for rehearing by a different judge.

Similarly, in Rice v. McKenzie, the Fourth Circuit held that a district court judge erred in not recusing himself from consideration of a habeas petition where the judge had participated in the West Virginia Supreme Court's rejection of the same claims. The court stated the issue:

Our task, then, is to determine whether a reasonable person would have had a reasonable basis for doubting the judge's impartiality. In the process of making such a determination, we cannot be influenced by our own faith in the integrity of a particular judge. Congress was concerned with the appearance of impartiality to the general public. Neither our faith nor the imaginings of one highly suspicious of others are relevant. The inquiry begins and ends with a determination whether a reasonable person would have had a reasonable basis for doubting the judge's impartiality.

Rice, 581 F.2d 1114, 1116-17 (4<sup>th</sup> Cir. 1978) (emphasis added).

The court analogized the situation to one where a district court judge would sit on the appellate panel in the same case, a circumstance the court condemned as "unbecoming", "to say the

least." Rice, at 1117.<sup>4</sup> Noting the furor that had arisen from previously lax historic practice, the court quoted colorful remarks from an 1889 address to the American Bar Association:

Such an appeal is not from Phillip drunk to Phillip sober, but from Phillip sober to Phillip intoxicated with the vanity of a matured opinion and doubtless also a published decision.

Rice, 581 F.2d at 1117 (quoting 12 ABA Rep. 289, 307, quoted in 13 Wright, Miller and Cooper Federal Practice and Procedure 360, s 3545).<sup>5</sup>

The Third Circuit reached the same conclusion, finding error when a district court failed to recuse from a habeas proceeding after serving as the trial court judge who presided over the state

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<sup>4</sup> The Appellate Court of Illinois has noted "It is elementary that no judge may sit in review of a case decided by him [or her]." Kendler v. Rutledge, 78 Ill.App.3d 312, 396 N.E.2d 1309, 1313 (1979).

<sup>5</sup> The court was careful to note that its colorful language was not intended to chastise the district court judge, but rather to illustrate the point.

In this case, Phillip was not drunk on either occasion, but it still was an appeal from Phillip to Phillip, and a reasonable person would have a reasonable basis for questioning Phillip's impartiality on the appeal.

Rice, at 1117 (emphasis added).

court trial. Clemmons v. Wolfe, 377 F.3d 322, 325-29 (3<sup>rd</sup> Cir. 2004) (citing, *inter alia*, Russell and Rice). The court vacated the lower court's dismissal of the petition and remanded for reconsideration by a different judge. Id., at 329.<sup>6</sup>

When applied here, the principles from these cases lead to the conclusion that the trial judge erred in denying the motion to recuse. Chamberlin's motion asked the judge to invalidate a search warrant that the same judge had issued. The same question was raised – whether the affidavit supported a finding of probable cause. Judge Hancock was essentially sitting in review of his own prior decision, an "unbecoming" practice, "to say the least." Rice, 581 F.2d at 1117. Given the fact that Chamberlin was asking the court to overturn its own previous authorization of the search warrant, a "reasonably prudent and disinterested person" would question whether Judge Hancock's participation would be

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<sup>6</sup> Chamberlin's trial counsel provided a similar example, albeit one closer to home. Counsel mentioned that his wife worked for the state, arguing cases on appeal. His wife noted, gee . . . Judge Schindler recently retired from the King County Superior Court bench but moved on to the court of appeals. She doesn't hear her cases. Pure and simple.

2RP 3-4.

impartial or would appear to be impartial. Carlson, at 919; accord Rice, and Russell, *supra*.

The appearance of fairness was further undermined by Judge Hancock's statement that he felt confident he had read the warrant application carefully. 1RP 4-5. This comment indicates that Judge Hancock not only appeared to be, but actually was predisposed to uphold the search warrant that he had authorized.

As the cited case law shows, there is a reasonable basis to doubt the impartiality of any judge in this circumstance. The purpose of CJC Canon 3(D)(1) is to prevent that doubt from infecting public confidence in the judiciary. Sherman, 128 Wn.2d at 205; State v. Dugan, 96 Wn. App. 346, 354, 979 P.2d 885 (1999) (citations omitted).

In response, the state may contend that there is no proof of actual bias or actual prejudice. Judge Hancock's statement, however, suggests actual bias on the question. Even absent that statement, as the Rice, Russell, Clemons and Brent cases recognize, the absence of proof of actual bias or actual prejudice will almost universally be the case. It is the appearance of bias or prejudice that the cited cases condemn. The threshold for this inquiry "is evidence of a judge's or decisionmaker's actual or

potential bias." State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) (emphasis added). That threshold is met where a magistrate initially finds probable cause, then is later asked to review that same decision in a motion to suppress. With or without Judge Hancock's statement of confidence in the thoroughness of his own prior review of the affidavit, a reasonable person would conclude that the process did not appear fair. The suppression ruling therefore should be reversed and the case remanded for further proceedings.

Because the trial court's ruling denied Chamberlin his right to a fair suppression hearing before an impartial trial court judge, the proper course is to remand for a new suppression hearing before a different and impartial trial court judge. See State v. Levy, \_\_\_ Wn.2d \_\_\_, 132 P.3d 1076, 1083 n.3 (2006) (denial of the right to a fair trial court decision maker is never harmless) (citing Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927)). If this Court agrees, this Court need not and should not decide the merits of the remaining arguments raised in this brief.

2. THE WARRANT AFFIDAVIT WAS INADEQUATE ON ITS FACE BECAUSE IT FAILED TO ESTABLISH THE INFORMANT'S VERACITY.

The Fourth Amendment and Article I, section 7 of the Washington Constitution require a search warrant be issued upon a determination of probable cause based upon "facts and circumstances sufficient to establish a reasonable inference" that criminal activity is occurring or that contraband exists at a certain location. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); U.S. Const. amend. 4; Const. art. 1, § 7.

Because of the substantial difference in wording between the Fourth Amendment and Article I, section 7, the freedom from unreasonable searches and seizures must be interpreted more expansively under the state constitution than under the federal constitution. State v. Jackson, 102 Wn.2d 432, 439, 688 P.2d 136 (1984). Thus, in Jackson, the Washington Supreme Court rejected the United States Supreme Court's departure from the two-pronged Aguilar-Spinelli<sup>7</sup> standard for assessing the reliability of an informant's tip. Id., at 443. Pursuant to Aguilar-Spinelli, the affidavit for search warrant must inform the magistrate of the underlying

circumstances which led the officer to conclude that the informant was credible and obtained his information in a reliable way. Id., at 437. These two prongs are analytically severable and each must be met to establish the reliability of an informant. Id. The affidavit for the search warrant of Chamberlin's residence fails to establish the informant's veracity.

The veracity prong of Aguilar-Spinelli is satisfied by showing the credibility of the informant or by establishing that the facts and circumstances surrounding the furnishing of the information support an inference the informant is telling the truth. State v. McCord, 125 Wn. App. 888, 893, 106 P.3d 832 (2005). The most common way to satisfy the veracity requirement is to evaluate the informant's track record for providing accurate information in the past. State v. Woodall, 100 Wn.2d 74, 76, 666 P.2d (1983). However, when the informant does not have a track record, the court can consider other factors to determine if the veracity prong has been satisfied.

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<sup>7</sup> Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); Spinelli v. United States, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969).

a. Paxton Was Not A Citizen Informant And Therefore Was Not Presumptively Credible.

Unlike a criminal or professional informant, a named citizen informant is subject to a more relaxed credibility requirement. McCord, 125 Wn. App. at 893; State v. Northness, 20 Wn. App. 551, 557, 582 P.2d 546 (1978) (citizen informant regarded as more reliable than a criminal or professional informant). The fact that an informant is named is merely one consideration in determining whether he or she is acting as a citizen informant. State v. Duncan, 81 Wn. App. 70, 78, 912 P.2d 1090 (1996) (defendant's girlfriend who provided the tip was not a citizen informant because their domestic dispute earlier that day colored her motivations). Furthermore, information provided by a named citizen informant, standing alone, is not enough to establish reliability. McCord, 125 Wn. App. at 893.

Randall Paxton was arrested for attempting to elude, driving while under the influence, and reckless driving. CP 15. After admitting that he ingested methamphetamines and marijuana, Paxton offered to provide information of alleged drug activity in hopes of receiving leniency for his own criminal charges. Supp. CP \_\_\_ (sub. no. 42); 3RP 22. Because Paxton was motivated by self-

interest he was not a citizen informant who should be afforded a greater inference of reliability than a criminal or professional informant.

b. The Information Provided by Paxton Was Not Sufficient to Establish Veracity.

Although a statement against penal interest may add little or nothing to the informant's credibility, it is nevertheless a factor to be considered. State v. Lair, 95 Wn.2d 706, 712, 630 P.2d 427 (1981) (where the informant's admission against penal interest was corroborated by the statement of another informant with a verified track record and was made to a private individual rather than the police, the admission was one factor supporting the credibility determination); State v. Estorga, 60 Wn. App. 298, 304, 803 P.2d 813, review denied, 116 Wn.2d 1027 (1991) (information implicating both informant and defendant that was given in exchange for immunity was a relevant factor in determining credibility); State v. O'Connor, 39 Wn. App. 113, 124, 692 P.2d 208 (1984) (acknowledging that a statement against penal interest is a relevant factor, but declining to adopt a rule that such a statement by itself is sufficient to establish probable cause).

When an informant faces criminal prosecution, there is a strong motive to be truthful when the tip is given in exchange for a promise of leniency. State v. Bean, 89 Wn.2d 467, 471, 572 P.2d 1102 (1978); Estorga, 60 Wn. App. at 304-05. An informant who has been promised leniency is unlikely to risk losing that benefit by being untruthful with law enforcement. Estorga, 60 Wn. App. at 304.

Detective Beech did not promise Paxton any leniency, however, in exchange for his information against Chamberlin. Supp. CP \_\_\_. (Sub. no. 42). Therefore, Paxton did not have the strong motive to be truthful as discussed in Bean and Estorga because he was not at risk of losing any benefit. Although Paxton hoped to gain leniency, the fact that he was not promised anything makes it less likely he was being truthful than if he had an agreement for leniency.<sup>8</sup> Estorga, 60 Wn. App. at 304-05.

As it did in the trial court, the state may rely on State v. Merkt, to argue that even without a leniency agreement Paxton's statement

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<sup>8</sup> Without an actual agreement for leniency, Paxton did not face any negative repercussions if he provided false information. Paxton could easily have provided information based on rumor or speculation in the hopes that the information would turn out to be accurate. If the information he provided was not accurate Paxton would be no worse off, and if it was accurate there was still a possibility he would gain some leniency.

against penal interest was still sufficient to establish his credibility.<sup>9</sup> State v. Merkt, 124 Wn. App. 607, 102 P.2d 828 (2004). However, such reliance is misplaced. In Merkt, however, two different informants corroborated each other's statements. Id., at 611. Also, the detective knew from independent investigation that Merkt had two prior drug convictions, associated with a well-known methamphetamine cook, and lived at the address provided by the informants. Id., at 613. In contrast, Paxton was the sole informant against Chamberlin, there was no independent investigation verifying Paxton's information<sup>10</sup>, and Chamberlin had no prior criminal history. Supp. CP \_\_\_ (sub. no. 42). Furthermore, an informant's reliability is greatly diminished if he was involved in the alleged criminal activity or was otherwise motivated by self-interest. State v. Rodriguez, 53 Wn. App. 571, 576, 769 P.2d 309 (1989).

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<sup>9</sup> The state argued that whether there was a leniency agreement or not, "it apparently works both ways in favor of the state." 3RP 33. The state's position was that if a deal had been made it would be an indication of Paxton's credibility because he would have a strong incentive to be truthful, and if there was no deal that would also be an indication of credibility because he would not be motivated by self-interest. 3RP 33.

<sup>10</sup> The search warrant affidavit states that Deputy Todd heard from "independent sources" that Chamberlin was selling methamphetamine. Supp. CP \_\_\_ (sub. no. 42). However, unsubstantiated rumors from sources with unproven track records

The state may contend that the detailed nature of Paxton's information provides some indicia of credibility. However, the detailed nature of an informant's tip does not make up for a deficiency in the veracity prong of a criminal or professional informant. See Jackson, 102 Wn.2d at 440 (firsthand observation by the informant should not cure a failure to establish the informant's credibility because a liar can fabricate in as much detail as an honest person can speak the truth); McCord, 125 Wn. App. at 893 (intrinsic indicia of reliability may be found in detailed description of circumstances when the informant is an ordinary citizen rather than a criminal or professional informant).

To the extent that Paxton's identity and his statement against penal interest provided indicia of reliability, his credibility was thoroughly undermined by his seven felony convictions. Supp. CP \_\_\_ (sub. no. 42). The fact that Paxton was a criminal informant who offered information merely in the hopes of receiving leniency coupled with his criminal history leads to the conclusion that the state failed to establish Paxton's veracity and therefore there was no probable cause to support the search warrant.

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do not lend credibility to Paxton's statement.

Because the warrant was unlawfully issued, the evidence seized during its execution should be suppressed. State v. Thein, 138 Wn.2d at 151. Where that evidence formed the sole basis for Chamberlin's conviction, the judgment should be reversed and the case remanded with directions to dismiss the charge with prejudice. State v. Canady, 116 Wn.2d 853, 858, 809 P.2d 203 (1991).

3. THE COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The trial court did not enter written findings and conclusions to support the finding of guilt. This is error.

The trial court's oral opinion at the conclusion of a bench trial is no more than an oral expression of "the court's informal opinion at the time rendered." State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (citation omitted). "An oral opinion has no final or binding effect unless formally incorporated into findings, conclusions, judgment." Head, 136 Wn.2d at 622 (citations omitted). Accordingly CrR 6.1(d) requires the court to enter written findings of fact and conclusions of law at the conclusion of a bench trial. 136 Wn.2d at 621-22.

In some cases, a comprehensive oral ruling has been held to cure this error. However, this is not such a case. After reviewing

the jury trial waiver with Chamberlin, the trial court proceeded immediately to its oral ruling, stating:

All right. I have reviewed [the documents] and it does appear, based upon the information that's in those stipulated facts as well as the fact that there was a 3.5 hearing, that you would be found guilty and I do so find you guilty.

4RP 5.

Defense counsel interjected and asked to make closing arguments. 4RP 5. After hearing arguments, the court reversed its initial position, stating:

Thank you for your argument, sir. I don't find that there is proof beyond a reasonable doubt for Count I, so I would only find him guilty for the second count.

4RP 9. From this ruling, there is no mention of the ultimate facts necessary to establish the elements of possession of methamphetamine with intent to deliver.

The oral ruling therefore is not sufficiently clear to cure the failure to enter written findings. This Court should vacate the conviction. State v. Head, 136 Wn.2d at 625-26; See also State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997); State v. Smith, 68 Wn. App. 201, 210-11, 842 P.2d 494 (1992) (vacation and dismissal may be the appropriate remedy when state fails to propose findings).

In response to this brief, the state may prepare and present findings and conclusions while the appeal is pending.<sup>11</sup> Given the paucity of the trial court's oral ruling, it is questionable whether such findings can now be presented in a way that will not run afoul of the prohibition against unfairly "tailoring" findings in response to an appellate argument.<sup>12</sup>

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<sup>11</sup> In that event, the state should comply with this Court's decision in State v. Corbin, which requires the state to notify appellant's counsel when it submits its late-proposed findings. State v. Corbin, 79 Wn. App. 446, 451, 903 P.2d 999 (1995).

<sup>12</sup> The question of "tailoring" is not yet ripe. State v. Head, 136 Wn.2d at 624-25, n.3.

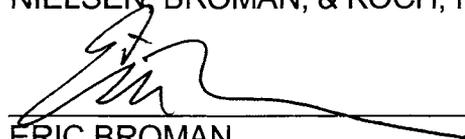
D. CONCLUSION

For the reasons stated in argument 1, this Court should reverse the trial court's suppression ruling and remand for a new suppression hearing before a different judge. For the reasons stated in argument 2, this Court should reverse the suppression ruling and remand for dismissal. For the reasons stated in argument 3, this Court should vacate the judgment and remand for findings and conclusions necessary to support the judgment of guilt.

DATED this 31<sup>st</sup> day of May, 2006.

Respectfully submitted,

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APPENDIX A

No. 57210-5-I

**FILED**

OCT 07 2005

SHARON FRANZEN  
ISLAND COUNTY CLERK

**IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

Vs.

SCOTT ALAN CHAMBERLIN,

Defendant.

NO. 05-1-00026-1

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW

THIS MATTER came before the court on August 3, 2005, on motion of the Defendant for a hearing pursuant to CrR 3.6 to suppress evidence obtained via a search warrant alleging that the affidavit or declaration in support of the warrant issued by the Court does not contain sufficient information from which the Court can determine that the informant was a credible informant or had the requisite veracity under the *Aquilar-Spinelli* test. The plaintiff appeared by and through Island County Prosecuting Attorney, Gregory M. Banks, or his deputy, and the defendant appeared in person with his attorney, James Burnell. The court having reviewed the briefs of counsel, the attached exhibits, the authorities cited therein and having heard the arguments of counsel, and deeming itself fully apprised in the premises, makes the following:

**I. FINDINGS OF FACT**

1. On January 20, 2005 Randall Paxton, was arrested by Island County Sheriff's Deputy Dan Todd. Randall Paxton provided the Island County Sheriff's Office with information upon which an affidavit for a search warrant for the house of the defendant, Scott A. Chamberlin was prepared.

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2. As indicated in the search warrant, Mr. Paxton had been arrested for DUI and Attempting to Elude a Pursuing Police Vehicle, and Reckless Driving.
  3. Mr. Paxton admitted being under the influence of methamphetamines and marijuana at the time of his arrest.
  4. Mr. Paxton also told Deputy Todd and/or Detective Beech that the defendant, Scott Chamberlin, had provided drugs to him personally and gave quite a detailed description of the circumstances under which both methamphetamine and marijuana were delivered to Mr. Paxton. These details included that he had purchased the drugs from the defendant in the defendant's home at 5305 April Drive earlier that afternoon. Mr. Paxton stated that he asked the defendant if he had any methamphetamine to sell and the defendant responded that he did. Mr. Paxton then stated that the defendant picked up a black duffel bag off of the coffee table, opened it and removed a large quantity of empty bindle bags and a large "ziplock" bag contained crystal methamphetamine. Mr. Paxton estimated that the "ziplock" bag contained three to four ounces of methamphetamine. Mr. Paxton then stated that he purchased 1.75 grams of methamphetamine which the defendant weighed on a digital scale and placed into a small plastic bindle bag. Mr. Paxton told the Sheriff's deputies that he paid \$45 for this methamphetamine and left the defendant's residence and ingested the drug by injecting himself. Mr. Paxton went on to state that later he went back to the defendant's residence and was given some marijuana. Mr. Paxton explained that the defendant got the marijuana came from the same black bag in which he had stored the methamphetamine Mr. Paxton purchased earlier that afternoon.
  5. Mr. Paxton has seven prior felony convictions.

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## II. FINDINGS OF DISPUTED FACTS

1. Mr. Paxton agreed to be a named informant and to testify against the defendant.

1 2. The statement Mr. Paxton provided included the information that he was under the  
2 influence of methamphetamine and marijuana and that information could be used  
3 against him in a trial for Driving Under the Influence. Mr. Paxton was under arrest  
4 for driving under the influence at the time he provided this information.  
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6 THEREFORE, the court enters the following:

7 **III. CONCLUSIONS OF LAW**

- 8 1. The affidavit for search warrant contained sufficient information from which the  
9 Court can determine whether or not the informant had an appropriate basis of  
10 knowledge and whether or not the informant was a credible informant or had the  
11 requisite veracity under the **Aguilar-Spinelli** test.
- 12 2. The affidavit for search warrant established that Mr. Paxton had the requisite personal  
13 knowledge necessary to support a search warrant under the **Aguilar-Spinelli** test.
- 14 3. Mr. Paxton is a named citizen informant not a paid or professional informant. As  
15 such he is presumed to be a reliable informant. *See State v. Wible*, 113 Wn. App. 18,  
16 51 P.3d 830 (2002).
- 17 4. Mr. Paxton's statements were against his penal interest. In *State v. Merkt*, 124 Wn.  
18 App. 607, 102 P.3d 828 (2004) the court states that an informant acting against his  
19 penal interest may be sufficient to establish the informant's credibility.
- 20 5. The information provided to the deputies by Mr. Paxton was very detailed  
21 information. The information provided was not mere innocuous detail but very  
22 detailed information about the nature of the buy that he had made from the defendant  
23 at the defendant's home. By providing such detailed information regarding the events  
24 or facts that form the basis of the affidavit in support of the warrant Mr. Paxton not  
25 only established his own basis of knowledge but also established in and of itself his  
26 veracity. *See State v. Wible*, 113 Wn. App. 18, 51 P.3d 830 (2002) and *State v.*  
27 *Northness*, 20 Wn. App. at 551, 582 P.2d 546 (1978). These cases state that if the  
28 underlying circumstances are sufficiently detailed to satisfy the first prong of *Aguilar-*  
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