

FILED
April 21, 2015
Court of Appeals
Division I
State of Washington

NO. 72863-6-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Appellant,

v.

Shawn Green,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT	1
II. ASSIGNMENTS OF ERROR	2
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
IV. STATEMENT OF THE CASE.....	4
V. ARGUMENT.....	7
1. THE VALIDITY OF A SEARCH WARRANT IS REVIEWED ON AN ABUSE OF DISCRETION STANDARD.....	7
2. THE BURDEN OF PROOF IS ON THE DEFENDANT MOVING FOR SUPPRESSION OF A SEARCH WARRANT TO ESTABLISH THE LACK OF PROBABLE CAUSE.....	7
3. GREAT DEFERENCE IS GIVEN TO THE MAGISTRATE’S DETERMINATION OF PROBABLE CAUSE.....	8
4. A SEARCH WARRANT IS SUPPORTED BY PROBABLE CAUSE BASED UPON AN AFFIDAVIT SETTING FORTH FACTS AND CIRCUMSTANCES SUFFICIENT TO ESTABLISH A REASONABLE INFERENCE THAT CRIMINAL ACTIVITY IS OCCURRING OR EVIDENCE OF CRIMINAL ACTIVITY EXISTS AT A CERTAIN LOCATION.....	9
VI. CONCLUSION	12

TABLE OF AUTHORITIES

Page

WASHINGTON SUPREME COURT CASES

State v. Jackson, 102 Wn.2d 432, 442, 688 p.2d 136 (1984) 7

State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003) 9

State v. Smith, 93 Wn.2d 329, 352, 610 P2d. 869, *cert denied*, 449 U.S.
873 (1980)..... 6

State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)..... 7, 9

WASHINGTON APPELLATE COURT CASES

State v. Anderson, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001)..... 7

State v. Kennedy, 72 Wn.App. 244, 248, 864 P2d. 410 (1993) 9

State v. Trasvina, 16 Wn.App. 519, 523, 557 P2d. 368 (1976)..... 7

State v. Garcia, 63 Wn. App. 868, 871, 824 P2d. 1220 (1992).....6

I. SUMMARY OF ARGUMENT

On August 1, 2014 Skagit County District Court issued a search warrant for investigation of Violations of the Uniform Controlled Substances Act for an address at 219 Laurel Drive, Sedro Woolley.

During the course of the search warrant, Shawn Green was arrested and subsequently charged with Possession with Intent to Manufacture or Deliver a Controlled Substance – Methamphetamine relating to evidence located at the address. The defendant filed a motion to suppress the search warrant issued by the magistrate. The motion was heard and the trial court found the magistrate did not have probable cause to issue the warrant and suppressed the search warrant and dismissed the charges against the defendant.

The State believes the trial court erred finding there was not probable cause to issue the search warrant. The trial court did not place the burden of proof on the defendant moving for suppression. The trial court did not give deference to the magistrate's determination of probable cause. The trial court stated its determination was a 50/50 proposition, but then found that since the burden of proof is probable cause there was not probable cause to issue the warrant. Thus, the trial court erred in ruling the magistrate did not have probable cause to issue the warrant and in suppressing the search warrant.

Therefore, this Court must reverse the decision of the trial court, find the magistrate had probable cause to issue the search warrant and reinstate the dismissed charges.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in not placing the burden of proof on the defendant moving for suppression.
2. The trial court erred in not giving deference to the magistrate's determination of probable cause.
3. The trial court erred in reasoning that its determination was a 50/50 proposition but that the magistrate's finding of probable cause to support the warrant should be overturned.
4. The trial court erred in holding that magistrate did not have probable cause to issue the search warrant.
5. The trial court erred in suppressing the search warrant issued by the magistrate.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court erred in not placing the burden of proof on the defendant moving for suppression of the search warrant. (Assignment of Error Number One.)

2. The trial court erred in not giving deference to the magistrate's determination of probable cause. (Assignment of Error Number Two.)

3. The trial court erred in reasoning that, "In fact, it's a 50/50 proposition to me". (Assignment of Error Number Three.)

4. The trial court erred in its reasoning that, "So it's a 50/50 proposition when the burden of proof is probable cause falls ever so slightly short because it has to be more probable cause than not equally probable." (Assignment of Error Number Three.)

5. Where the trial court held the magistrate did not have probable cause to issue the search warrant. (Assignment of Error Number Four.)

6. The trial court erred in suppressing the search warrant issued by the magistrate. (Assignment of Error Number Five.)

IV. STATEMENT OF THE CASE

On August 1, 2014 Skagit County District Court issued a search warrant for 219 Laurel Drive in Sedro Woolley for investigation of Violations of the Uniform Controlled Substances Act. CP 37-38. The warrant was based upon the affidavit setting forth the drug trafficking and drug house investigation by the Sedro-Woolley Police Department. CP 33-36. The affidavit states that neighbors, other criminal informants, information from law enforcement and information from the confidential informant in the case all indicated that 219 Laurel was an ongoing drug house. CP 34. The affidavit states a confidential informant advised law enforcement they had purchased Methamphetamine from several different people at 219 Laurel Drive for the past two years. CP 34. The confidential informant made multiple purchases of methamphetamine from the residence in late July 2014. CP 34-35. The dealers during those controlled buys weighed drugs on a scale and packaged the drugs for sale to the informant at the residence. CP 34-35. The affidavit states that on three occasions the week of July 28th, 2014 the confidential informant was advised the occupants of the residence were temporarily out of stock but would be re-upping. CP 35. The affidavit states that “[E]veryone at the house was sold out and were waiting to re-up.” CP 35. The affidavit states that re-up is a term used by dealers to indicate that they are out of

drugs but plan to re-stock. CP 35. The confidential informant was told by one individual present at the residence that he would be re-upping that night. CP 35.

On August 8, 2014 the defendant was charged by information with Possession with Intent to Manufacture or Deliver a Controlled Substance, Methamphetamine with a School Zone Enhancement, RCW 69.50.401 and RCW 69.50.435. CP ____, Supplemental CP, Sub 1. These charges arose from the defendant's arrest at the residence and from evidence discovered at the residence pursuant to the search warrant. CP ____, Supplemental CP, Sub 2.

On September 26, 2014 the defendant filed a motion to suppress the search warrant issued in the case. CP 1-43.

On November 12, 2014 the state filed a response (incorrectly referred to as a State's Reply). CP 46-58.

On November 19, 2014, the trial court heard the arguments of counsel and ruled orally on the motion to suppress. (11/19/2014) RP 1-56.

The trial court granted the motion to suppress finding a lack of probable cause in the warrant. (11/19/2014) RP 52.

The court orally reasoned, "... I'm not really convinced either way. In fact, it is a 50/50 proposition to me. I understand Ms. Johnson's argument. And it certainly wouldn't surprise me that any day of the week

all year long you could walk into that house and find drugs.” (11/19/2014) RP 51. “So it’s a 50/50 proposition when the burden of proof is probable cause falls ever so slightly short because it has to be more probable cause than not equally probable.” (11/19/2014) RP 52. “So, as I indicate, I don’t think there could be a closer possible call, at least in my mind, but under these circumstances the Court will grant the motion to suppress finding a lack of probable cause in the warrant.” (11/19/2014) RP 52.

On November 21, 2014, the court entered written findings of fact and conclusions of law. CP 44-45.

The trial court entered conclusions of law which read:

1. Now, Therefore, the Court finds that based upon the four corners of the of the search warrant the magistrate did not have probable cause on August 1, 2014 to believe there would be drugs in the residence and therefore did not have probable cause to issue the search warrant.

CP 44. The trial court suppressed any evidence located in the residence and found that based upon the suppression there was insufficient evidence for the state to proceed and ordered the case be dismissed. CP 45.

On December 19, 2014, the State timely filed a notice of appeal. CP ____, Supplemental CP, Sub 39.

V. ARGUMENT

1. The validity of a search warrant is reviewed on an abuse of discretion standard.

A judge's finding of probable cause to issue a search warrant is reviewed for abuse of discretion. *State v. Garcia*, 63 Wn. App. 868, 871, 824 P2d. 1220 (1992) (citing *State v. Smith*, 93 Wn.2d 329, 352, 610 P2d. 869, *cert denied*, 449 U.S. 873 (1980)).

2. The burden of proof is on the defendant moving for suppression of a search warrant to establish the lack of probable cause.

The defendant moving for suppression of a search warrant bears the burden of proof to establish the lack of probable cause. *State v. Anderson*, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001), *State v. Trasvina*, 16 Wn.App. 519, 523, 557 P2d. 368 (1976).

The trial court shifted this burden to the state as demonstrated by its reasoning. In stating that "it is a 50/50 proposition", the trial court is reasoning that the burden is in fact upon the state to show probable cause to support the issuance of the search warrant by the magistrate. RP 51. This is in error. If the court is evenly divided, defendant has not met his burden and the issuance of the warrant by the magistrate should be affirmed.

3. Great deference is given to the magistrate's determination of probable cause.

Great deference should be given to the magistrate's determination of probable cause. *State v. Jackson*, 102 Wn.2d 432, 442, 688 p.2d 136 (1984), *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Doubts concerning the existence of probable cause are generally resolved in favor of issuing the search warrant. *Id.*

The trial court did not give deference to the magistrate's determination of probable cause. The court stated:

So it's a 50/50 proposition when the burden of proof is probable cause falls ever so slightly short because it has to be more probable cause than not equally probable.

(11/19/2014) RP 52.

So, as I indicate, I don't think there could be a closer possible call, at least in my mind, but under these circumstances the Court will grant the motion to suppress finding a lack of probable cause in the warrant.

(11/19/2014) RP 52. The trial court's reasoning is error. If the trial court is evenly divided, probable cause does not fall short – instead deference is given to the determination of the magistrate and doubts are resolved in favor of the warrant.

4. A search warrant is supported by probable cause based upon an affidavit setting forth facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or evidence of criminal activity exists at a certain location.

“Probable cause exists where the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.” *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003), citing *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). “The affidavit is evaluated in a common sense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant.” *Id.* The magistrate is entitled to make commonsense inferences from the facts in the warrant affidavit. *State v. Kennedy*, 72 Wn.App. 244, 248, 864 P.2d. 410 (1993), *Garcia*, supra, at 873.

The affidavit in support of the search warrant sets forth probable cause that evidence of criminal activity relating to Violations of the Uniform Controlled Substances Act would be located at 219 Laurel. The affidavit states that neighbors, other criminal informants, information from law enforcement and information from the confidential informant in the case all indicated that 219 Laurel was an ongoing drug house. CP 34. The affidavit states the confidential informant advised law enforcement they

had purchased Methamphetamine from several different people at 219 Laurel Drive for the past two years. CP 34. The confidential informant made multiple purchases of methamphetamine from the residence in late July 2014. CP 34-35. The dealers during those controlled buys weighed drugs on a scale and packaged the drugs for sale to the informant at the residence. CP 34-35. In addition, the affidavit states that on three occasions the week of July 28th, 2014 the confidential informant was advised the occupants were temporarily out of stock and would be re-upping. CP 35. The affidavit states that “[E]veryone at the house was sold out and were waiting to re-up.” CP 35. The affidavit states that re-up is a term used by dealers to indicate that they are out of drugs but plan to restock. The confidential informant was told by one individual present at the residence that he would be re-upping that night. CP 35.

The magistrate determined that there was probable cause for the authorized warrant based upon the affidavit. The affidavit indicated the informant had purchased methamphetamine from individuals at the location for two years. The informant made two controlled buys from the location with law enforcement. Drugs were weighed on a scale and packaged for sale to the informant at the residence. Prior to the warrant being issued, the informant was told by the occupants of the address that they were “sold out” and they were going to “re-up”. One occupant

advised the informant he would be re-upping that night. The magistrate was entitled to make reasonable inferences from the facts and circumstances set forth in the affidavit. The magistrate could infer that the address was an active drug house and that the location was being used to coordinate, package and sell drugs. The magistrate could infer that the occupants had been involved in ongoing drug activity and that the drug trafficking and drug use would continue. The magistrate determined that there was probable cause to believe that evidence of the crime of Violations of the Uniform Controlled Substances Act existed at 219 Laurel Drive. CP 37-38.

The reasoning applied by the trial court in finding the affidavit does not provide probable cause to issue the warrant demonstrates that the trial court is not resolving inferences in favor of the warrant. The trial court found that the warrant was not supported by probable cause despite stating, “[I]t certainly wouldn’t surprise me that any day of the week all year long you could walk into that house and find drugs.” RP 51. The trial court erred in finding that magistrate did not have probable cause to issue the search warrant.

VI. CONCLUSION

For the foregoing reasons, this court must hold that the trial court erred in ruling that the magistrate did not have probable cause to issue the search warrant, reverse the decision of the trial court to suppress the warrant and reinstate the charges of Possession with Intent to Manufacture or Deliver a Controlled Substance - Methamphetamine.

DATED this 20 day of April, 2015.

SKAGIT COUNTY PROSECUTING ATTORNEY

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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, Washington, 98101.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 21st day of April, 2015.



KAREN R. WALLACE, DECLARANT