100128-2

No. 36412-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MODESTO BRAVO GONZALEZ, JR.,

Petitioner.

PETITION FOR REVIEW

Modesto B. Gonzalez,Jr.
Pro-se Appellant

#777618
L-B-23
P.O. Box 2049
AIRWAY HEIGHTS CORRECTION CENTER
Airway Heights, WA 99001

A. IDENTITY OF PETITIONER

Modesto Bravo Gonzalez Jr, prays this court to accept review of the decision designated in part B of this motion.

B. DECISION

Petitioner seeks review of each and every part of the Court of Appeals decision to affirm the trial court's denial of Mr. Gonzalez's motion to suppress the fruits of the intercept orders; finding the state provided sufficient evidence for school bus stop enhancement; finding that defense counsels deficient performance did not prejudice the outcome of trial, thus denial of ineffective assistance of counsel claim. A copy of the Court of Appeals decision is attached as EXHIBIT A. A copy of the same courts denial of Mr. Gonzalez's Motion for Reconsideration is attached as EXHIBIT B.

C. ARGUMENTS WHY REVIEW SHOULD BE GRANTED

The case at bar presents this court with seperate and distinct basis for review pursuant to RAP 13.4 (b)(1-4). Under (b)(1): the decision of the Court of Appeals conflicts with decisions of the Supreme Court; Under (b)(2): the decision of the Court of Appeals conflicts with its own Division and other Divisions decisions; Under (b)(3): there are significant questions of law under the Constitution of the State of Washington and the United States involved: Lastly, under (b)(4): this case presents questions of a substantial public interest regarding privacy rights issues that must be determined by this court. The following sets out the arguments in support of these claims.

D. ASSIGNMENTS OF ERROR

1. The Appellate Court erred in affirming the trial courts denial of the motion to suppress the fruits of the intercept orders, as the issuing judge and trial judge abused their discretion in granting the intercept orders.

A. The Appellate Court erred in supplementing evidence not in the record to base a decision there is a "showing/argument" in the intercept application of "safety concern" for the confidential informant.

2. The Appellate court erred in affirming the issuing judge and trial courts intercept orders in violation of Article 1, § 7; and The Aguilar-Spinelli two prong test when probable cause is based on an unknown and unamed informants tip.

3. The Appellate Court erred in affirming the States approximate and guessed at measurments to suffice as proof beyond a reasonable doubt to give a school bus stop enhancement.

4. The Appellate Court erred in denying ineffective assistance of counsel claim, when defense counsel failed to properly interview the State's chief witness in advance to trial, and prejudicing the outcome of trial because of deficient performance.

E. STATEMENT OF THE CASE
STATEMENT OF FACTS

Sometime around February 19-20, 2017, a Detective with the Columbia River Drug Task Force (CRDTF) meets and interviews for the first time an individual who has been arrested with an Ounce of Methamphetamine, and charged with Unlawful Possession of a Controlled Substance with Intent to Deliver: This Unkown individual now seeks to become an informant for leniency.

February 21, 2017 Based on this unkown criminal informant (CI) motives and his allegations against Modesto B. Gonzalez Jr (Mr. Gonzalez), the detective sends in the CI in his first control buy, under CRDTF surveillance, into Mr. Gonzalez's residence with control buy money- the CI returns with 23.5 grams of Methanphetamine alleging in a recorded statement he had purchased the drugs from Mr. Gonzalez, in Mr. Gonzalez's room.

February 2[illegible], 2017 The State and Detective enter with the CI into a contract for nine(9) control buys total, against three(3) different drug dealers. This contract mandates multiple conditions the CI must comply with, inter alia, CI shall not use controlled substances, and shall obey all criminal laws, etc,...In exchange the CI is promised, if CI complies with all the conditions of the contract, only one year and one-day in prison for his pending charges.

February 24, 2017 Based upon the CI's tips, and allegations of the first control buy in Mr. Gonzalez's room, the Detective submitts and affidavit for application to intercept and record authorization to the local magistrate: affidavit details (1) Detectives belief for probable cause Mr. Gonzalez committed and is going to commit Conspiracy and Delivery of an Unlawful Controlled Substance Methamphetamine;(2) Detective is using an un-named CI;(3) CI's pending charges and Criminal History Check of 7 felony's and 6 Misdemeaners;(4) Mr. Gonzalez's last arrest for a traffic violation in December 2016;(5) Mr. Gonzalez has a girlfriend-that he calls from jail after the traffic violation-listening to the telmate call they are in a dating relationship-a Sargeant Foreman knows her very well because of an investigation on her husband- this Sargeant had called her to release her husband's property to her;(6) The CI told the Detective he saw the same week two firearms in "Chavella's" downstairs room- that Mr. Gonzalez has access to this space and has been seen downstairs;(7) Lastly, the Detective particularizes his case-specific "need" for the intercept I. Due to the location being subject to change and therefore not able to place officers close enough to overhear, and II. It is anticipated the the CI's credibility would be a primary issue in subsequent proceedings.

On this same date, February 24, 2017 The court, having given full consideration to the matter, in its discretion Orders the Authorization to Intercept, finding: (a) There is probable cause for belief...pertaining to purchasing and/or delivery ...at a location as of yet undecided but to be limited to Chelan/Douglas County area. A more particular place cannot be determined at this time as Mr. Gonzalez can dictate where the delivery of Methanphetamine will occur.; and (d) Normal investigative techniques reasonably appear to be unlikely to obtain convincing, accurate evidence of the crime(s) because of attacks that can be made on the CI credibility and relaiability and because Mr. Gonzalez can control who will attend any meetings with the CI which could result in Mr. Gonzalez producing witnesses to substantiate their views of the conversations with the CI. See EXHIBIT C-ORDER(s) AUTHORIZING INTERCEPT.

March 17, 2017 The Search Warrant is executed at Mr. Gonzalez's residence. Heroin is found in a Mens coat pocket in the living area: A scale with Heroine residue is located in Mr. Gonzalez's dresser drawer: Two firearms are found hidden underneath the stairwell to the downstairs room.

July 11, 2018 A CrR 3.5/3.6 Suppression hearing is held in regards to the intercept order(s): Defense counsel raises, twice, there has never been a "Safety Concern" involved in this case; that the Detective created his own "need" for the intercept because his CI is not credible. The State does not object or give rebuttal to the argument there is no safety concerns inherent in this case; argues the need for the intercept is to make sure the CI is not leaving the drugs at the residence, while not under surviellance, and unbeknownst to defendant retrieves them as a control buy; and because the CI is using drugs, that also goes to the particularized need for the intercept.

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

F. SUMMARY OF ARGUMENT

Mr. Gonzalez's privacy rights were infringed when a detective in his haste, to ferret out crimes of controlled substances, took the word of an individual at face value, and without investigating properly the defendant acquired an intercept authorization, but in his haste he did disigenously copy a particular statement of facts of a similar authorization order found in caselaw.

RCW 9.73.130(3)(f) is strict in its mandates to protect privacy of every individual, these mandates were circumvented to attain the ends desired.

Art. 1 § 7 of the Washington Constitution provides greater protection than the Fourth Amendment, therefore Washington citizens have an expectation that police officers will not progressively intrude into their personal affairs on the motives of individuals seeking leniency for thier crimes, and step outside the law delineated by the statutes as occured here.

G. ARGUMENTS

I. THE STATE FAILED TO MAKE A PARTICULARIZED SHOWING OF NEED FOR ISSUANCE OF THE INTERCEPT ORDER

On appeal, the State argued that "the trial Court considered the facts involved and the applicable law in making its decision denying [Mr. Gonzalez's] motion to suppress", Supplemental Brief of Respondent(Respondents Supp. Brief), at 4. However, the State failes to identify specific facts establishing a need for the intercept order. As such, the State failed to meet the requirements set out in RCW 9.73.130(3)(f).

Under Washington's Privacy Act, RCW 9.73, a very narrow exception exists that permits police investigating a felony to obtain authorization to intercept private conversations from a magistrate. RCW 9.73.090(2). The present offenses under investigation, Conspiracy and Delivery of a Controlled Substance in violation of RCW 69.50.401.

"In balancing the legitimate needs of Law enforcement to obtain information in criminal investigations against the privacy interest of individuals, the

Washington statute, unlike similar statutes in 38 other States, tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant".

State v. Christenson, 153 Wash.2d 186,199, 102 P.3d 789 (2004)

RCW 9.73.130(3)(f) provides,

> Each application for an authorization to record communications or conversations pursuant to RCW 9.73.090 as now or hereafter amended shall be made in writing upon oath or affirmation and shall state:
> (3) A particular statement of facts relied upon by the applicant to justify his or her belief that an authorization should be issued, including:
> (f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ...

"These statutory safeguards protect against unfettered discretion in the hands of the recording party in the absence of proper circumstances". State v. D.J.W., 76 Wn.App. 135,145,882 P.2d 1199(1994). Thus, to obtain advanced court approval, the officer's application for an intercept order must satisfy several statutory requirements. Subsection (f) is interpreted that:

> "Before resorting to an application under RCW 9.73.130, the police must either try, or give serious consideration to, other methods and explain to the issuing judge why these other methods are inadequate in the particular case, This is the critical inquiry to which the issuing judge and the trial judge must give their attention when reviewing an application. To approve an application that contains nothing more than general boilerplate declarations of the type set forth [below] would undermine the restrictive intent of the statute".
> See
> State v. Manning, 81 Wn. App. 714,720-21, 915 P.2d 1162 (1996)

In the case at bar, to begin with, the affaint copies verbatim the boilerplate particular statement of facts found in State v. Lopez, 70 Wash. App. 259, at 266, 856 P.2d 390 (1993), review denied, 123 Wash.2d 1002, 868 P.2d 871 (1994), in an attempt to fulfill the subsection (f) provision, rather than write his own case-specific facts as the statute mandates [Each application for an authorization...shall be made in writing upon oath..].

This is done unbeknownst to both the issuing and trial judge, and perhaps even the State too. Comparing the "Application of Grant L. Giacomazzi", pages 4-5, section 4(CP at 145-46), to what Lopez, supra, states in section (f)

at 266, it is identical. Petitioner will provide what Lopez states below, and the changes this affaint made in his application in brackets:

> (f) Successful prosecution of this type of case requires proof of knowledge contained in a verbal exchange. Other normal investigative methods to obtain evidence of the conversations, such as stationing an officer close enough to overhear the conversation appears unlikely to succeed due to the location being of necessity to be agreed to by the drug [dealer] buyer and subject to change[s]. It is anticipated that Gregorio Cantu's [the CI] credibility would be a primary issue in subsequent proceedings. Possession of this verbal exchange (Between Gregorio Cantu [the CI] and Domincio [sic] Lopez [Modesto B. Gonzalez, Jr.]), in the form of a recording can resolve any issue as to exactly what was said, by whom, and in what context things were said. Thus, a "swearing contest" between Gregorio Cantu [the CI] and Domincio [sic] Lopez [Modesto B. Gonzalez, Jr.] could be avoided in subsequent court proceeding and Gregorio Cantu [the CI] will have his [/her] credibility enhanced [verafied by the recording of the conversation].
> (This last paragraph is not included in this case, but is relavent to consider in regards to the "safety concern" now alleged by the appellate court in its decision, which will be argued below)
> Possession of the record of an actual conversation may also negate any defense of entrapment. Finally the intercept will help protect the safety of the participants.

Aside from misleading the courts with this faulty application, by not writing a case-specific account, within these boilerplate justifications there is no stated reasons provided to the issuing judge if any other methods are considered or tried and have failed. "They do not inform the issuing judge of reasons why, in this particular case, other procedure's will not successfully resolve the investigation". Manning, supra, at 720. See, e.g., State v. Irwin, 43 Wash.App. 553,557, 718 P.2d 826 (1986) (defendant refused to deal with new parties; police unable to gain access to neighboring property), review denied, 106 Wash.2d 1009 (1987); State v. Cisneros, 63 Wash.App. at 726-27, 729, 821 P.2d 1262(1992) (attempts made to introduce undercover officers but defendant refused to talk to unkown persons); State v. Constance, 154 Wn.App. 861 (2010) (where police show that "normal investigative techniques" were inadequate because they have previously questioned the defendant about the incident unsuccessfully). In an equal manner the State also fails to set forth reasons for the probable inadequacy of other investigative methods in its Respondants Supp. Brief. Relying instead on the reasoning that "the

issuing judge has considerable discretion to determine whether the statutory safeguards of RCW 9.73.130(3)(f) have been satisfied". Respondents Supp. Brief, at 1. However, judicial discretion is still governed and guided by the rules and principles of the law or in this case the statute. Regardless of how considerable the exercise of discretion is allowed, otherwise the court in its decisions of procedural points or equitable determinations, particularly in discretionary decisions involving the application of the law to facts set forth, can as it did here, abuse its discretion:

> "Discretion is abused when it is exercised on untenable grounds or for untenable reasons".
>
> State ex rel. Carroll v. Junker, 79 Wn.2d 12, 492 P.2d 775(1971).

The State also relies heavily on its reasoning and emphesizes that "proof of knowledge, and the need for an exact recording of what was said was obvious". Respondents Supp. Breif, at 3. As a recording would help enhance the credibility of the CI, and thus avoid a "one-on-one swearing contest" supra, at 4.

The decision by the Court of Appeals to affirm the trial court's denial of the suppression of the fruits of the intercept orders conflicts with its own Divisions ruling in State v. Porter, 98 Wash.App. 631, 990 P.2d 460(1999).

Although the crime under investigation in Porter, was Possession of a Controlled Substance, an intercept order was authorized, and Division III Court found "The intercept affidavit does not allege that these, methods, or, for that matter, any other methods, were tried or were unlikely to succeed. In fact, there is no indication that the Yakima police tried, or even considered, other investigative techniques". Porter, supra, at 636.

Petitioner posits the decision to copy the Lopez particular statement of facts is a clear indication nothing else was ever seriously considered by the affaint before resorting to the intercept.

"Failure to comply with the statutory safeguards requires exclusion of evidence illegally obtained. RCW 9.73.050; State v. Irwin,[supra]; State v. Kichinko, 26 Wash.App. 304,310-11, 613 P.2d 792 (1980)", and "The legislature added the procedural requirements of RCW 9.73.130 and amended RCW 9.73.090 after the privacy act's original passage. By doing so, it intended that failure to comply with the procedures would render an order based upon a faulty application unlawful. Kichinko, 26 Wash.App. at 310-11, 613 P.2d 792. Absent minimal compliance, the legislative purpose in inter posing procedural safeguards between the police and the public prevails". Porter, supra, at 638.

In conclusion of this issue, petitioner posits that givien the fact the affaint intentionally, and in reckless disregard for the truth copied and did not "write" a case-specific account to fulfill the requirements delineated by statute, thus misleading the courts: Under Franks v. Delaware, 438 U.S. 154, 57 L.Ed.2d 667, 98 S. Ct. 2674 "would cause a voiding of the warrant and the suppression of evidence", State v. Garrison, 118 Wn.2d 870, 827 P.2d 1388 (1992); State v. Seagull, 95 Wn.2d 898, 632 P.2d 44(1981). And also the affaints and States failure to specify to the courts if any other methods were tried and failed, or reasons any other investigative methods were inadequate: Then the issuing judge abused its discretion in authorizing the intercept orders; The reviewing courts equally based their findings on "untenable grounds for untenable reasons" in affirming the denial of the suppression of fruits from unlawful intercept orders. These decisions conflict with Supreme Court rulings; The Appellate Court conflicts with its own Division in State v. Porter, supra, and with other Divisions decisions State v. Manning, supra. For the reasons set forth this Court should accept review of this case and reverse the decisions of the Court of Appeals; or at a minimum, mandate a Franks evidentiary hearing.

> One of the age-old maxims of organic law is that "[W]hat is not judicially presented cannot be judicially considered, decided, or adjudged".
> William T. Hughes, THE LAW RESTATED: The ROOTS OF LAW 21 (1915).

I.A. THE STATE FAILED TO ESTABLISH A SAFETY CONCERN; THE APPELLATE COURT ERRED IN INCLUDING A SAFETY CONCERN TO AFFIRM THE DENIAL OF INTERCEPT ORDER.

On appeal the State cites to State v. Knight, 143,151, 772 P.2d 1042 (1989), a case where the "court held that the necessity prong was satisfied because it would be apperent that an undercover officer's safety would require that others be able to listen in in order to respond of necessary". Responants Supp. Brief. at 3. However, the State fails to establish specific facts this "safety concern" was inherent in the case at bar. Instead the State emphasizes what Knight also held "the need [was] for an exact recording of what was said was obvious". See, Respondants Supp. Brief. at 3.

Moreover, memorialized at the Suppression Hearing, the trial court considered these facts involved, after defense attorney raised these same issues, twice, and argued the distinction in the instant case to the Knight case cited above:

> Mr.Tibbits: And, then, the other case that Mr. Hershey cites [Knight], where they talked about knowledge, they also talked about officer safety. And I would argue to the Court, that's never been mentioned in this case, here. That doesn't appear to be present in this case here.
>
> (See RP, at 14,July 11, 2018 3.5/3.6 Hearing).

And again defense attorney raises the argument that:

> Mr.Tibbits: We aren't talking about a case where somebody is in physical danger, so they need to rush in, based upon what's heard on a recording. But we're talking about buying, I mean, very typical.
>
> (See RP, at 17, supra.)

The State fails to object or give rebuttal to these arguments. "The prosecutor is entitled to make a fair response to the arguments of defense counsel". State v. Brown, 132 Wn.2d 529,566,940 P.2d 546 (1997). Instead, the State argues the quiet part out-loud to justify the particularized "needs" for the intercept orders: (First "need")

> Mr.Hershey: In addition, in that regard, as--as it also points out in particular, the officers didn't know, for sure, where the buy was going to go down.
>
> (Second "need")
>
> Mr.Hershey: So, by having the recording...for instance, if the--if the CI had been in the house, previously, when he wasn't under surveillance by the police, and had left drugs in the house, and then they take him over there, for this operations, and he goes in and obtains drugs that he knows are inside, unrelated to the defendant, that, again--they would be able to--or, more likely, to be able to tell, if that was happening, based on having a wire order.
>
> (See RP, at 22, supra.).

It is then, the trial court enters its findings of facts and conclusions of law, affirming the intercept orders on the two "needs" proffered by the State. "Generally, findings are viewed as verities, provided there is substantial evidence to support the findings". State v. Halstien, 122 Wn.2d 109,

128,857 P.2d 270 (1993) "Substantial evidence exists where there is a sufficient quantity of evidence in the record to pursuade a fair-minded, rational person, of the truth of the findings". Halstien, supra, at 129.

The appellate court thus erred in ruling that:

> The intercept applications did not simply contain standard, boilerplate information. Law enforcement did not merely recite the truism that testimony from a CI would be enhanced by corroboration. Instead, the application made clear safety was also a significant concern...Officers needed an intercept order to "listen and be prepared to move in if necessary". State v. Knight, [supra]. The issuing judge therefore had a tenable factual basis to issue the intercept orders.
>
> (See, EXHIBIT A, Slip Opinion, at 7).

The reviewing court's role is not to review the application's sufficiecy de novo, but "to decide of the facts set forth in the application were minimally adequate to support the determination that was made". United States v. Scibelli, 549 F.2d 222, 226 (1st Cir.), cert. denied, 431 U.S. 960, 53 L.Ed.2d 278, 97 S.Ct. 2687 (1977). The determination that was made by the issuing judge was on the two same premises recited throughout:

> WHEREAS, upon sworn application, having been made before me by Detective Grant L. Giacomazzi,...and full consideration having been given to the matter set forth therein, the court hereby finds:
> (a) There is probable cause for belief that conversations between Modesto B. Gonzalez, Jr. and the CI pertaining to purchasing and/or delivery of a controlled substance (methamphetamine) will occur...at a location as of yet undecided but to be limited to the Chelan/Douglas County area. A more particular place cannot be determined at this time as Modesto B. Gonzalez, Jr. can dictate where and when the delivery of methamphetamine will occur.
> (d) Normal investigative techniques reasonably appear to be unlikely to obtain convincing, accurate evidence of the crime(s) because of attacks that can be made on the CI credibility and reliability, and because Modesto B. Gonzalez, Jr. can control who will attend any meetings with the CI which could result in Modesto B. Gonzalez, Jr. producing witnesses to substantiate their view of the conversation(s) with the CI.
>
> (See EXHIBIT C, ORDER(S) AUTHORIZING INTERCEPT)
> Submitted pursuant to RAP 9.1(a)(2)(c).

In other words, there must be affirmative evidence in the record to support a finding. The corollary is that courts cannot assume or speculate upon the existance of facts that do not appear in the record. State v. Blight,

89 Wn.2d 38, 46, 589 P.2d 1129 (1977); State v. Werneth, 147 Wn.App. 549, 555, 197 P.3d 1195(2008).

Moreover, under Rules of Appellate Procedure (RAP) 12.1(a)(b)- Generally... the appellate court will decide a case only on the basis of issues set forth by the parties in their breifs. The appellate court violated this rule by sua sponte re-weighing the issue of safety-concern, as the State failed to particularize the "need" in the intercept application, and failed to object or rebutt the argument when raised by defense counsel. In reviewing a trial court's decision, the appellate court is to confine itself "to the issues the parties have raised and which the trial court considered". Babcock v. State, 116 Wn.2d 596, 606 (1991); See also Tacoma Grocery Co. v. Barlow, 12 Wash.21 22(1895)("The general rule of appellate courts is that they will review only questions which the trial court passed on"); Reviewing courts do not reweigh the evidence. State v. Ramos, 187 Wn.2d 420,453, 387 P.3d 650 (2017). The appellate court also violated RAP 12.1 (b) As Mr. Gonzalez has a right to be notified and given an opportunity to present written argument on the issue raised by the court. The reviewing court still determines whether the trial courts findings are supported by substantial evidence and will find an abuse of discretion when they are unsuported. State v. Delbosque, 195 Wn.2d 106, 116, 456 P.3d 806(2020).

In conclusion of this issue, for the reasons set out above, this court should accept review of the case, reverse the decision of the Court of Appeals and suppress the fruits of the unlawful intercept orders.

II. UNDER ARTICLE 1, SECTION 7, WHEN PROBABLE CAUSE IS BASED ON AN UNNAMED INFORMANT: THE PROPER TEST IS SET OUT IN THE AGUILAR-SPINELLI TWO-PRONG TEST

"We hold that Const. Article 1, § 7, requires that, in evaluating the existence of probable cause in relation to informant's tips, the affidavit in support of the warrant must establish the basis of information and credibility of the informant. See Spinelli v United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)". State v. Jackson, 102 Wash.2d 432, 433, 688 P.2d 136 (1984).

The undisputed fact in the instant case, is that the CI was never deemed to be credible by any parties involed or the lower court judges. As stated

the State clearified to the trial court the particularized "need" for the intercept order, "if the CI had been in the house, previously, when he wasn't under surveillance by the police, and had left drugs in the house...then they [police] take him over there...and [CI] goes in and obtains drugs that he knows are inside, unrelated to the defendant,that, again...they [police] would be able to...or more likely,...tell, if that was happening, based on having a wire order" (RP,at 22,July 11, 2018, 3.5/3.6 Hearing). Because defense counsel argued the search warrant should have included that the CI was "using", the State doubles-down and argues "So the fact that the allegation is made actually supports and, again, goes with the particular need stated by the officer". (RP, at 23, supra).

> "Recklessness may be shown by establishing that the affaint actually entertained serious doubts about informant's veracity". State v. Clark, 143 Wash.2d 731, 751, 24 P.3d 1006(2001)(citing State v. O'conner, 39 Wash.App. 113, 117, 692 P.2d 208(1984)). "Serious doubts" may be inferred from either (a) an affaint's actual deliberation or (b) the existance of obvious reasons to doubt the informant's veracity or the information provided. Clark, 143 Wash.2d at 751, 24 P.3d 1006(quoting O'conner, 39 Wash.App. at 117, 692 P.2d 208)."
>
> State v. Chenowth, 160 Wash.2d 454, 479, 158 P.3d 595 (2007)

Defendant objected through counsel and reason, the introduction of evidence obtained as a result of the intercept order, and search warrant, as they were unlawful:

> Mr. Tibbits: So my only other comment is, for the State to say that their confidential informant is, has credibility problems, and uses drugs, and so forth, therefore, we need a wiretap, they're creating their own situation to justify a wiretap...I am, just arguing, logically, if we have a bad confidential informant, we need to support him with a wiretap, they're creating their own necessity.
>
> RP, at 25, Supra.

The Court of Appeals decision that "The totality of the facts alleged here were sufficient to meet the privacy act's particularity requirement". Slip Opinion at 7. Thus, affirming the denial of the suppression of the fruits of the intercept orders, conflicts with this Courts decisions. "However, as noted above, we have specifically rejected the 'totality of the circumstances' approach as inconsistent with Washington Constitution article I, section 7, State v. Jackson, 102 Wash.2d at 443, 688 P.2d 136 (1984)". State v. Lyons, 174 Wash.2d 354,368, 275 P.3d 314 (2012); "[T]he 'totality of the circumstances' analysis downgrades the veracity and basis of knowledge elements and makes them only 'relevant considerations'. [Illinois v.] Gates, [462 U.S. 213, 230,] 103 S.Ct. 2317, at 2329,[76 L.Ed.2d 527 (1983)]". Jackson, Supra, at 436.; "The Fourth Amendment command's that a warrant issue not only on probable cause supported by oath or affirmation, but also particularly describing the place to be searched, and the persons or things to be seized. The need for the particularity in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope". Berger v. State of N.Y., 388 U.S. 41, 55, 87 S.Ct. 1873, L.Ed.2d 1040 (1967).

Washington is one of many states that rely on their own constitutions to protect civil liberties. Since the recent retrenchment of the United States Supreme Court in this area, the appellate courts of a majority of the states have interpreted their state constitutions to provide greater protection for individual rights than does the United States Constitution. State v. Gunwall, 106 Wash.2d 54,61 (1986). In conclusion of this issue, petitioner posits, at every procedural point thus far, defendants right to question the inconstant manner of facts and law are over looked or changed to fit, the circumstances. Article 1, section 7, affords greater privacy rights than the ones given in the instant case. Under Aguilar-Spinelli two prong test, the violations of defendants rights would have stopped at the suppression hearing, instead theeburden is shifted onto the defendant to prove if the CI was not credible. The decision of Appellate court conflicts with the approach to our State Constitution in Art.1, section 7. For the reasons set forth this Court should grant review and reverse the Appellate courts decision.

III. THE APPELLATE COURT ERRED IN FINDING APPROXIMATE MEASUREMTS SUFFICIENT TO AFFIRM SCHOOL BUS STOP ENHANCEMENT

"Division three of our court held that the terminal point for the school zone enhancement must be the actual site where the offense was commited. State v. Clayton, 84 Wash.App. 318, 322, 927 P.2d 258(1996)".

State v. Jones, 140 Wash.App. 431, 436, 166 P.3d 782 (2007).

Despite this holding in its own division, the Appellate Court held that, "Nothing in RCW 69.50.435 specifies the manner in which the State must prove its case. Here, the State used a witness with experieance in estimating distances through his work as a law enforcement sniper. The witness estimated the distance at 300 feet. Thas was well below the outer limit required by the statute. Given the defeential standard of proof applicable to our review, the State's evidence was sufficient". Slip Opinion at 10. The "witness" referred to, is of course the same affaint who copies requirements from case law, under oath, but the conflict is not who or what is used, it must be the terminal point, the actual site where the offense was committed.

"In Clayton, the court found that there was insufficient evidence to uphold the enhancement where the officer measured the distance from the school playground to the defendant's property fence and determined it to be 926 feet 10 inches. Clayton, 84 Wash.App. at 322, 927 P.2d 258. The record was "devoid of any evidence of the measurement to the exact site where the crimes occured". Id. Jones,supra, at 437.

Given these facts, this decision conflicts with the applicable law, and for these reasons petitioner posits this court should grant review of this issue and reverse.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL OCCURRED WHEN DEFENSE COUNSEL FAILED TO PROPERLY INTERVIEW THE STATE'S CHIEF WITNESS

A criminal defendant's Sixth Amendment right to counsel attaches at a "critical stage" of the proceeding which takes place after the formal initiation of criminal proceedings, See Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972): "It is then that the defendant finds himself

faced with the prosecutorial forces of organized society, and immersed in the intracacies of substantive and procedural law". Since the right of the accused in a criminal prosecution to assistance of counsel under the Sixth Amendment to the United States Constitution is a fundamental right, it is therefore made obligatory on the States by the Fourteenth Amendment. Pointer v. Texas 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Defense counsel knew by the time of the July 11, 2018 3.5/3.6 Suppression Hearing he had made himself a witness, by not properly interviewing the State's chief witness (RP, at 34, supra); The State also stipulated to what the Ci had stated to defense counsel at the interview (RP,at 34-35, supra). Thus defense counsel knew, or should have known he would not be able to properly cross-examine the CI at trial: He should have remedied his error, by sending his investigater to re-interview the CI before the trial. The appellate court contends that "Regardless of whether defense counsel performed deficiently in conducting an interview without a defense witness to supply potential impeachment testimony, Mr. Gonzalez cannot show prejudice. The jury acquitted Mr. Gonzalez of the charge stemming from the day on which there was a dispute as to the CI's testimony". Slip Opinion at 12.

The conflict was not just about the CI's testimony on one day, it was what he had disclosed at the interview, and the State along with the detective, having been present, knew the truth of the matter; only they were aloud to conveniently "not remember" when asked at cross-examination.

> "[Factual stipulations are] binding and conclusive ...and the facts stated are not subject to subsequent variation. So, the parties will not be permitted to deny the truth of the facts stated,... or to maintain a contention contrary to the agreed statement..."
>
> Christian Legal Society v. Martinez,561 U.S. 661, 130 S.Ct. 2971, at 2983, 177 L.Ed.2d 838 (2010).

This is not an issue of a perfect trial, but of a fair trial. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. State v. Lopez, 190 Wn.2d 104, 410 P.3d 1117 (2018).

The Appellate courts decision therefore conflicts with fundamental principles of trial rights, and effective assistance of counsel rights. For the reasons set forth, this Court should grant review and reverse the appellate courts decision.

H. CONCLUSION

For the reasons set out in this motion, this court should accept review of this case, reverse the decision of the Court of Appeals and correct the errers inherent herein.

Dated this 21st day of October,2021.

Respectfully submitted,

Modesto Bravo Gonzalez, Jr.

EXHIBIT A. SLIP OPINION

FILED
APRIL 6, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. MODESTO BRAVO GONZALEZ, JR., Appellant.	)	No. 36412-7-III OPINION PUBLISHED IN PART

PENNELL, C.J. — Washington's privacy act restricts the authority of undercover law enforcement agents to intercept or record private conversations through devices such as body wires. Under the privacy act, the use of surreptitious recording devices must be supported by a court order and based on a case-specific showing of particular need. The required showing of need is not onerous, but it must be something more than generalized truisms.

In Modesto Bravo Gonzalez's case, law enforcement obtained intercept orders authorizing placement of a body wire on a confidential informant (CI) who was engaged in several undercover drug buys. The applications for the orders stated not only the truism that law enforcement wanted to corroborate the CI's testimony, but also that the specific facts of the case showed potential risks to the CI's safety that could be mitigated by the

use of a body wire. Under these circumstances, the intercept orders were warranted. We therefore affirm the trial court's denial of Mr. Gonzalez's motion to suppress the fruits of the orders.

FACTS

This case revolves around four controlled drug buys that took place inside Modesto Bravo Gonzalez's home. A CI facilitated the buys. After the first controlled buy, law enforcement obtained two intercept orders, allowing them to place a wire on the CI and record the CI's interactions with Mr. Gonzalez.

The two applications for intercept orders were authored by a detective working with the CI. Both applications explained Mr. Gonzalez had a practice of selling drugs from inside his home and access to at least two firearms within the home, including a sawed-off shotgun. The second application disclosed the CI had a pending drug case as well as several prior convictions. According to the applications, the plan was for the CI to make additional controlled buys from Mr. Gonzalez inside of Mr. Gonzalez's home.

After the CI participated in three additional controlled buys while using a body wire, officers obtained a search warrant for Mr. Gonzalez's home.

In executing the warrant, officers found heroin along with paraphernalia related to drug use and drug trafficking. In the home's basement, officers found three firearms.

Two shotguns, one of which had a sawed-off barrel, were located in a boarded-up area under the stairwell. A pistol was found, among some clutter, near a bed. Officers were able to recover fingerprints from at least one of the firearms. The prints did not correspond to Mr. Gonzalez.

The State charged Mr. Gonzalez with several felony offenses, including four counts of unlawful delivery of a controlled substance (one for each undercover sale), two counts of first degree unlawful possession of a firearm, one count of possession of an unlawful firearm (the sawed-off shotgun), one count of unlawful possession of heroin with intent to deliver, and one count of maintaining a drug property.

After unsuccessfully moving to suppress the fruits of the intercept orders and search warrant, Mr. Gonzalez exercised his right to a jury trial. The jury acquitted him of the charges related to the first two drug sales and convicted him of the remaining counts.

Mr. Gonzalez timely appeals.

ANALYSIS

In the published portion of this opinion we address Mr. Gonzalez's claim, made in a statement of additional grounds for review, that the intercept order was invalid because it was not based on a particularized showing of need. The remaining contentions are addressed in the unpublished portion of the decision.

Intercept orders

Washington's privacy act, chapter 9.73 RCW, generally prohibits law enforcement from intercepting or recording private conversations without full consent of all parties or one-party consent and a court order. *See* RCW 9.73.090(2); *State v. Roden*, 179 Wn.2d 893, 898-99, 321 P.3d 1183 (2014). Evidence obtained in violation of the act is subject to suppression and inadmissible at trial. RCW 9.73.050.

When the issue on appeal is the legitimacy of a privacy act order, our focus is somewhat unique. We do not defer to the trial judge who ruled on a motion to suppress the fruits of the order; the propriety of a suppression order is reviewed de novo. Instead, we focus on the decision of the judicial officer who initially authorized the intercept order. We accord "considerable discretion" to the initial intercept decision. *State v. Clark*, 129 Wn.2d 211, 237, 916 P.2d 384 (1996) (Alexander, J., concurring in part and dissenting in part). So long as the authorizing judge used the correct legal standard, we will uphold an intercept order based on minimally sufficient facts. *See State v. J.K.T.*, 11 Wn. App. 2d 544, 555, 455 P.3d 173 (2019) (quoting *State v. Manning*, 81 Wn. App. 714, 718, 915 P.2d 1162 (1996)).

Applications for intercept orders are governed by RCW 9.73.130. The statute identifies several factual prerequisites. Relevant here, an intercept application must

include "[a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ." RCW 9.73.130(3)(f).[1] This subsection is known as the particularity requirement.

The privacy act's particularity requirement is distinct from the particularity requirement imposed by the Fourth Amendment to the United States Constitution. The Fourth Amendment's particularity requirement mandates that a warrant specifically describe all items to be seized. *State v. Fairley*, 12 Wn. App. 2d 315, 319-20, 457 P.3d 1150 (2020). To be constitutionally sufficient, a warrant must narrowly describe the targets of a search so law enforcement does not improperly intrude into private areas for which they lack probable cause. *See State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (quoting *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)).

The privacy act's particularity requirement is less exacting. The statute provides safeguards against governmental intrusions even when constitutional rights are not

[1] Some of the factual prerequisites set forth in RCW 9.73.130 are not necessary in drug cases. RCW 9.73.090(5) ("true name of the nonconsenting party, or particular time and place for the interception" not necessarily required if unknown at the time of application). However, the particularity requirement of RCW 9.73.130(3)(f) remains applicable.

implicated due to one-party consent. *See United States v. White*, 401 U.S. 745, 751, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971) (Fourth Amendment does not prohibit intercepting conversations when one party consents.); *State v. Salinas*, 119 Wn.2d 192, 197, 829 P.2d 1068 (1992) (WASH. CONST. art. 1, § 7 does not prohibit intercepting conversations when one party consents). As a matter of constitutional law, law enforcement officers enjoy broad discretion to decide whether to record undercover conversations through devices such as body wires. Washington's privacy act is designed to limit this discretion. *State v. D.J.W.*, 76 Wn. App. 135, 145, 882 P.2d 1199 (1994), *aff'd*, *State v. Clark*, 129 Wn.2d 211, 237, 916 P.2d 384 (1996). The privacy act does not require a showing of absolute necessity to obtain an intercept order. *See State v. Cisneros*, 63 Wn. App. 724, 729, 821 P.2d 1262 (1992). What is contemplated is a flexible, practical assessment of whether law enforcement has shown an intercept warrant is justified in a particular case. *State v. Platz*, 33 Wn. App. 345, 349-50, 655 P.2d 710 (1982).

While the privacy act's particularity requirement is not onerous, it still must consist of something more than a "boilerplate" showing of need. *Manning*, 81 Wn. App. at 720. Evidence obtained through an intercept order will invariably be helpful to the State in securing a conviction. *Id.* But mere helpfulness is insufficient. To meet the terms of the

privacy act, an intercept application must make a case-specific showing of need, so as to guard against orders being made available in all cases as a matter of course.

The totality of the facts alleged here were sufficient to meet the privacy act's particularity requirement. The intercept applications did not simply contain standard, boilerplate information. Law enforcement did not merely recite the truism that testimony from a CI would be enhanced by corroboration. Instead, the applications made clear safety was also a significant concern. The facts set forth in the intercept applications reveal the CI reported seeing firearms in Mr. Gonzalez's home, including a sawed-off shotgun. Given the undercover purchases were to take place inside of the home, standard law enforcement surveillance methods were insufficient to address the CI's safety. Officers needed an intercept order to "listen and be prepared to move in if necessary." *State v. Knight*, 54 Wn. App. 143, 151, 772 P.2d 1042 (1989). The issuing judge therefore had a tenable factual basis to issue the intercept orders.

We affirm the trial court's denial of Mr. Gonzalez's motion to suppress the fruits of the intercept orders.

The panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no

precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Sufficiency of the evidence—unlawful firearm possession

Mr. Gonzalez contends the State failed to submit sufficient evidence to convict him of unlawful possession of firearms because the evidence at trial showed nothing more than mere proximity to the three guns seized by law enforcement. We disagree.

A sufficiency challenge such as Mr. Gonzalez's is governed by an extremely deferential standard of review. *See In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). The test is "'whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Id.* (quoting *State v. Walton*, 64 Wn. App. 410, 415, 824 P.2d 533 (1992)).

The totality of the trial evidence provided a substantial basis for showing Mr. Gonzalez was in constructive possession of the firearms. At the time of the search, only Mr. Gonzalez, his mother, and his 11-year-old daughter lived at the residence. Mr. Gonzalez exercised control over the entirety of the premises, setting rules about who

could come and go from the home in order to protect his young daughter. Testimony from the CI indicated Mr. Gonzalez was aware the firearms were in the home, as they were visible during some of the CI's undercover activities. This combination of circumstances permitted an inference of constructive possession. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

Mr. Gonzalez points out someone else's fingerprints were found on at least one firearm and a third party used to live in the basement where the firearms were found. These facts do not undermine the jury's verdict. The fingerprints show only that the firearms may have been possessed by more than one person. "Constructive possession need not be exclusive." *State v. Mobley*, 129 Wn. App. 378, 384, 118 P.3d 413 (2005). In addition, the former tenant no longer lived at the residence at the time of the search. Nor was the tenant present at the time the CI reported seeing the firearms. Firearms are valuable items. A sawed-off shotgun is generally illegal to possess. The jury was entitled to infer that the tenant would not have left an illegal firearm out in plain view while not at the residence or that they would have mistakenly abandoned the firearms when they moved out. There was sufficient evidence to establish constructive possession.

Sufficiency of the evidence—school bus stop enhancement

The jury found Mr. Gonzalez's drug offenses occurred within 1,000 feet of a protected zone (a school bus route stop), as contemplated by RCW 69.50.435(1)(c). The State's evidence on this point consisted largely of testimony from a law enforcement sniper. Relying on his familiarity with estimating distances, the sniper testified the distance between the school bus stop and Mr. Gonzalez's address was "around 300 feet." 2 Report of Proceedings (Sept. 12, 2018) at 241.

Mr. Gonzalez claims the sniper's testimony was not good enough. According to Mr. Gonzalez, the State needed to provide a precise measurement of the distance between his offense and the school bus stop. We disagree.

Nothing in RCW 69.50.435 specifies the manner in which the State must prove its case. Here, the State used a witness with experience in estimating distances through his work as a law enforcement sniper. The witness estimated the distance at 300 feet. This was well below the outer limit required by the statute. Given the deferential standard of proof applicable to our review, the State's evidence was sufficient.

Because the sniper's testimony placed Mr. Gonzalez's home in close proximity to the school bus stop, the sufficiency of the State's case did not turn on a precise measurement of the distance from the school bus stop to the location of the undercover

sales inside Mr. Gonzalez's home. *Cf. State v. Jones*, 140 Wn. App. 431, 437-38, 166 P.3d 782 (2007) (reversing when no direct measurements between school bus stop and site of offense and distance estimated as 750 feet); *State v. Clayton*, 84 Wn. App. 318, 322-23, 927 P.2d 258 (1996) (reversing when no direct measurement between school and site of offense and distance estimated as about 927 feet). The sniper's testimony here left a 700-foot buffer between the site of Mr. Gonzalez's home and the outer edge of the school bus stop zone. This distance exceeds the length of two football fields. According to the trial testimony, Mr. Gonzalez lived in a residential area in a three-bedroom home. Given this evidence, it was reasonable for the jury to infer Mr. Gonzalez's offense conduct occurred well within the outer bounds of the 1,000-foot school bus stop zone. The evidence was sufficient.

Ineffective assistance of counsel

To show ineffective assistance of counsel, the defendant must demonstrate: (1) counsel's performance was deficient; and (2) counsel's errors were serious enough to prejudice the defendant. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Failure to meet either criterion precludes relief. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012).

Mr. Gonzalez asserts defense counsel was ineffective in interviewing the CI without a defense witness present to supply possible impeachment testimony. This claim fails as Mr. Gonzalez cannot show prejudice.

The only possible impeachment testimony at issue in Mr. Gonzalez's case went to the CI's claim that they could not remember whether they used drugs the day of the first undercover drug buy. The CI admitted to using drugs approximately every other day during the time period. This use violated the confidential informant contract. Nevertheless, the CI believed they did not use drugs on any of the days of the undercover work, as that would have been detected by law enforcement. Defense counsel proffered the CI had admitted during a pretrial interview to the use of drugs on the day of the second undercover drug buy.

Regardless of whether defense counsel performed deficiently in conducting an interview without a defense witness to supply potential impeachment testimony,[2] Mr. Gonzalez cannot show prejudice. The jury acquitted Mr. Gonzalez of the drug charge stemming from the day on which there was a dispute as to the CI's testimony. The CI also

[2] Contrary to Mr. Gonzalez's claim, a law enforcement officer was present during the interview and could have been a witness to any inconsistent statements. The problem for Mr. Gonzalez was the officer did not recall the CI making the statement proffered by defense counsel. A defense witness would not necessarily have had a different memory. Thus, it is not at all clear counsel's conduct was deficient.

admitted to a violation of the confidential informant agreement by using drugs during the general time period of the undercover work. Given these circumstances, we do not perceive any possibility that impeachment testimony by a defense witness would have had an appreciable impact on Mr. Gonzalez's case.

Juror unanimity—multiple acts

Mr. Gonzalez contends the trial court violated his right to a unanimous jury verdict because the State submitted evidence of multiple acts of possession of heroin with the intent to deliver without electing which act it relied on to convict him. This claim fails. Possession with intent to distribute is an offense involving a continuing course of conduct. *State v. Love*, 80 Wn. App. 357, 362, 908 P.2d 395 (1996). Thus the jury need not be unanimous as to what evidence it relied on in rendering a guilty verdict. *Cf. State v. King*, 75 Wn. App. 899, 903, 878 P.2d 466 (1994) (unanimity required in context of simple possession).

Juror unanimity—alternative means

Mr. Gonzalez argues the offenses of unlawful possession of a firearm and maintaining a drug dwelling are both alternative means crimes, requiring either juror unanimity or sufficient evidence as to each of the alternative means.

Mr. Gonzalez's unanimity claim with respect to the crime of unlawful possession of a firearm fails based on *State v. Barboza-Cortes*, 194 Wn.2d 639, 646, 451 P.3d 707 (2019) (holding that statute prohibiting a person from owning, possessing, or having control over a firearm is not an alternative means crime).

In contrast, the State correctly concedes Mr. Gonzalez's challenge with respect to his drug dwelling conviction. The drug dwelling statute proscribes two alternative means of criminal conduct: (1) maintaining a place that others resort to for drug use or (2) using a property for drug storage and sales. RCW 69.50.402(1)(f). Because the trial court did not issue a unanimity instruction as to these two alternative means and because the evidence was insufficient to show drug use by others (as opposed to drug sales or storage) took place at Mr. Gonzalez's home, the conviction for maintaining a drug dwelling must be reversed. *State v. Fernandez*, 89 Wn. App. 292, 300, 948 P.2d 872 (1997).

Legal Financial Obligations (LFOs)

Mr. Bravo Gonzalez claims his judgment contains two LFO errors: imposition of interest in violation of RCW 10.82.090(1) and a criminal filing fee. The State correctly concedes both errors. Nonrestitution interest is no longer applicable, RCW 10.82.090(1), and the reference to the $200 criminal filing fee appears to be a scrivener's error. We remand with instructions to strike the interest provision and the criminal filing fee.

Search warrant

In his statement of additional grounds of review, Mr. Gonzalez argues the trial court should have suppressed the warrant to search his home because the warrant application contained material misstatements or omissions.[3] *See Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). We are unpersuaded.

At trial, Mr. Gonzalez's sole argument under *Franks* was that the application failed to disclose the CI was using drugs at the time of the undercover drug buys. Evidence of the CI's drug use would have undermined their credibility; however, there was no evidence indicating the search warrant affiant knew the CI was using drugs or the affiant recklessly ignored evidence of drug use. Given this circumstance, Mr. Gonzalez failed to proffer a sufficient challenge to the warrant under *Franks*. *See State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992) (*Franks* allegations must rise to a deliberate falsehood or reckless disregard of the truth; mere negligence or innocent mistakes are not sufficient.).

[3] Mr. Gonzalez also disputes whether probable cause supported the interception of his conversations, whether that probable cause was sufficiently "timely," and whether his relationship with an associate was relevant to the intercept applications. We decline to review these unpreserved challenges. *See* RAP 2.5(a).

CONCLUSION

Mr. Gonzalez's conviction for maintaining a drug dwelling is reversed. This matter is remanded with instructions to strike interest from nonrestitution LFOs and the criminal filing fee from the judgment. The matter is otherwise affirmed.

Pennell, C.J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, J.

EXHIBIT B. ORDER DENYING MOTION FOR RECONSIDERATION

FILED
AUGUST 5, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. MODESTO BRAVO GONZALEZ, JR., Appellant.	)	No. 36412-7-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant Modesto Bravo Gonzalez, Jr.'s pro se motion for reconsideration of our April 6, 2021, opinion; and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Pennell, Siddoway, and Lawrence-Berrey

FOR THE COURT:

REBECCA L. PENNELL
Chief Judge

EXHIBIT C. ORDER(S) AUTHORIZING INTERCEPT

ORIGINAL

FILED

MAR 3 1 2017

Kim Morrison
Chelan County Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CHELAN

17-1-00001 0

IN THE MATTER OF AUTHORIZATION TO INTERCEPT AND RECORD COMMUNICATIONS OR CONVERSATIONS)	CASE # 17C01803 ORDER AUTHORIZING INTERCEPT AND RECORDING PURSUANT TO RCW 9.73.090

STATE OF WASHINGTON)
) vs. Modesto B. Gonzalez, Jr.
County of Chelan)

TO: Detective Grant L. Giacomazzi, and all members of the Columbia River Drug Task Force:

WHEREAS, upon sworn application, having been made before me by Detective Grant L. Giacomazzi, a commissioned law enforcement officer of the Washington State Patrol assigned to the Columbia River Drug Task Force, currently assigned to narcotics investigations, and full consideration having been given to the matter set forth therein, the court hereby finds:

(a) There is probable cause for belief that conversations between Modesto B. Gonzalez, Jr. and the CI pertaining to purchasing and/or delivery of a controlled substance (methamphetamine) will occur on or about February 29, 2017 at a location as of yet undecided but to be limited to the Chelan/Douglas County area. A more particular place cannot be determined at this time as Modesto B. Gonzalez, Jr. can dictate where and when the delivery of methamphetamine will occur.

(b) There is probable cause for belief that communications or conversations relating to said offense(s) will take place and will be obtained as evidence through interception and recording as hereafter set forth; and that multiple interceptions and recordings may be required to learn of Modesto B. Gonzalez, Jr. full involvement in the delivery of methamphetamine.

(c) The CI, one party to the expected communication or conversation, has given consent to intercept and recording of same.

(d) Normal investigative techniques reasonably appear to be unlikely to obtain convincing, accurate evidence of the crime(s) because of attacks that can be made on the CI credibility and reliability, and because Modesto B. Gonzalez, Jr. can control who will

attend any meetings with the CI which could result in Modesto B. Gonzalez, Jr. producing witnesses to substantiate their view of the conversation(s) with the CI.

Now, therefore it is hereby **ORDERED** that Detective Grant Giacomazzi and members of the Columbia River Drug Task Force, together with all necessary technical assistance, are authorized to intercept and record by body microphone or telephone microphone or by any other device or instrument, all the communications or conversations between Modesto B. Gonzalez, Jr. and the CI and others present within Douglas/Chelan County as arranged by Modesto B. Gonzalez, Jr. and/or the CI, as well as other persons who may be inadvertently present. In the event Modesto B. Gonzalez, Jr. surreptitiously sends a proxy to meet with the CI concerning the narcotics transaction, then this order shall extend to all conversations between the CI and that proxy regarding narcotics transactions.

IT IS FURTHER ORDERED that this authorization is effective at 1400 hours on February 27, 2017 and shall terminate upon intercept and recording of all communications and conversations described above or on the passage of fourteen (14) days from the effective date.

[
XX] (Check if applicable) The Judge/Magistrate's signature, below, was placed by the judge/magistrate's by

[ ] telephone (preserve a recording of the authorization),
[XX] email (preserve and file the email), or by
[ ] _____ (other reliable method).

Signed this 24th day of February, 2017, at Wenatchee, WA

Signature: *Alicia H. Nakata*

SUPERIOR COURT JUDGE

Printed Judge Name: Alicia H. Nakata

ORIGINAL

FILED
MAR 3 1 2017
Kim Morrison
Chelan County Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF CHELAN 17-1-00001-0

IN THE MATTER OF AUTHORIZATION)	CASE # 17C01803
TO INTERCEPT AND RECORD)	ORDER AUTHORIZING
COMMUNICATIONS OR CONVERSATIONS)	INTERCEPT AND RECORDING PURSUANT TO RCW 9.73.090

STATE OF WASHINGTON)
) vs. Modesto B. Gonzalez, Jr.
County of Chelan)

TO: Detective Grant L. Giacomazzi, and all members of the Columbia River Drug Task Force:

WHEREAS, upon sworn application, having been made before me by Detective Grant L. Giacomazzi, a commissioned law enforcement officer of the Washington State Patrol assigned to the Columbia River Drug Task Force, currently assigned to narcotics investigations, and full consideration having been given to the matter set forth therein, the court hereby finds:

(a) There is probable cause for belief that conversations between Modesto B. Gonzalez, Jr. and the CI pertaining to purchasing and/or delivery of a controlled substance (methamphetamine) will occur on or about March 15, 2017 at a location as of yet undecided but to be limited to the Chelan/Douglas County area. A more particular place cannot be determined at this time as Modesto B. Gonzalez, Jr. can dictate where and when the delivery of methamphetamine will occur.

(b) There is probable cause for belief that communications or conversations relating to said offense(s) will take place and will be obtained as evidence through interception and recording as hereafter set forth; and that multiple interceptions and recordings may be required to learn of Modesto B. Gonzalez, Jr. full involvement in the delivery of methamphetamine.

(c) The CI, one party to the expected communication or conversation, has given consent to intercept and recording of same.

(d) Normal investigative techniques reasonably appear to be unlikely to obtain convincing, accurate evidence of the crime(s) because of attacks that can be made on the CI credibility and reliability, and because Modesto B. Gonzalez, Jr. can control who will

attend any meetings with the CI which could result in Modesto B. Gonzalez, Jr. producing witnesses to substantiate their view of the conversation(s) with the CI.

Now, therefore it is hereby **ORDERED** that Detective Grant Giacomazzi and members of the Columbia River Drug Task Force, together with all necessary technical assistance, are authorized to intercept and record by body microphone or telephone microphone or by any other device or instrument, all the communications or conversations between Modesto B. Gonzalez, Jr. and the CI and others present within Douglas/Chelan County as arranged by Modesto B. Gonzalez, Jr. and/or the CI, as well as other persons who may be inadvertently present. In the event Modesto B. Gonzalez, Jr. surreptitiously sends a proxy to meet with the CI concerning the narcotics transaction, then this order shall extend to all conversations between the CI and that proxy regarding narcotics transactions.

IT IS FURTHER ORDERED that this authorization is effective at 1400 hours on March 10, 2017 and shall terminate upon intercept and recording of all communications and conversations described above or on the passage of fourteen (14) days from the effective date.

[X] (Check if applicable) The Judge's signature, below, was placed by the judge by

[ ] telephone (preserve a recording of the authorization),
[X] email (preserve and file the email), or by
[ ] _____ (other reliable method).

Signed this 10th___ day of __March_____, 20_17_, at Wenatchee, WA

Signature: *Alicia H. Nakata*

SUPERIOR COURT JUDGE

Printed Judge Name: Alicia H. Nakata

STATE OF WASHINGTON vs. MODESTO B. GONZALEZ JR

CERTIFICATE OF FILING AND SERVICE

I, Modesto Bravo Gonzalez, Jr., hereby certify that on the date below I caused to be electronically filed the PETITION FOR REVIEW and CERTIFICATE OF FILING AND SERVICE with the Clerk of the Court using the CM/ECF System wich will send notification to the following CM/ECF participant:

James Hershey Prosecuting Attorney
401 Washington Street Floor 5
P.O. Box 2596
Wenatchee, WA 98807-2596

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge and belief.

EXECUTED this 21 day of October, 2021, at Airway Heights Washington.

/s/ Modesto Gonzalez

Modesto Bravo Gonzalez, Jr.

INMATE

October 21, 2021 - 3:15 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,128-2
Appellate Court Case Title:	State of Washington v. Modesto Bravo Gonzalez Jr.
Superior Court Case Number:	17-1-00140-7

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