NO. 43297-8-II

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

STATE OF WASHINGTON,
Respondent,

v.

JOHN R. GARDNER, JR.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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COUNTER STATEMENT OF THE CASE

The State generally agrees with the Statement of Facts as contained in appellant's brief with the following exceptions.

First of all, there was ample evidence in the record below that appellant was residing in Room Number 9 at the Snore & Whisker Motel in Hoquiam. Frank Wirshup told Sergeant Mitchell that he had sold a stolen Dremel tool to the appellant on August 24, 2011. 1/25 RP 3-4. On August 19, 2011, Sergeant Mitchell had contacted the appellant at Room Number 9 of the Snore & Whisker Motel:

> On August 19, Gardner had a vehicle blocking the alley by his room. I contacted him in the room, at which point he told me he was living there . . .

1/31 RP 48. When the search warrant was executed on August 26, 2011, Gardner was found exiting the bedroom where the methamphetamine was found. 1/31 RP 49, 71, 76. Appellant was dressed only in pants and no shirt. 1/31 RP 60. As far as the officers could tell, there was no evidence of anyone else living there. 1/31 RP 61-62.

Secondly, appellant misstates the record below by stating that Wirshup's statement to Sergeant Mitchell was never produced at the Franks hearing (Franks v. Delaware, 430 U.S. 154, 155, 156, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978)):

> It is puzzling under the circumstances that Officer Mitchell would not have included the written statement by Wirshup with the affidavit and that the State elected not to preserve such a statement in the record.

Appellant's brief at 29.

> This shifted the burden to the State to produce some sort of substantial evidence that Wirshup said what Mitchell said he did, such as by putting the alleged writing into evidence. The State produced nothing but Mitchell's bald assertions.

Appellant's brief at 8.

Actually, the statement was marked as an exhibit and admitted at the Franks hearing. 1/25 RP 5-6; CP 91. Mr. Wirshup was cross-examined regarding this statement. Although he testified that he didn't recall the written statement he did admit that his initials and signature were on the Advice of Rights form and the statement. 1/25 RP 25-26. Finally, it was not established that Frank Wirshup "could not read." The testimony was that he could not read "very well." 1/25 RP 26. With regard to Mr. Wirshup's ability to read Sergeant Mitchell testified as follows:

> I do recall him saying that he didn't read very well. After I typed the statement I had him read it, and I asked if he read it thoroughly, and if he agreed to the contents, and he said yes.
>
> **********
>
> I said, see if you can read through it. He said he read through it. And I said you understand everything, and he said yes, and I asked him to sign that - or initial that I had typed it for him and sign at the bottom. He expressed no confusion of what was in the statement.

1/25 RP 28, 29

With regard to Mr. Wirshup's criminal history, Sergeant Mitchell did not testify that he knew Wirshup had several convictions for crimes of dishonesty. Mitchell testified that he knew he had been arrested for shoplifting in the past, but did not know if he had been convicted. 1/25 RP.9.

ARGUMENT

1. The findings complained of by the appellant are either irrelevant or are supported by the record.

Appellant claims that the one disputed fact contained in the Findings of Fact and Conclusions of Law with regard to the suppression hearing "grossly oversimplifies the disputed facts" and that "Gardner filed a broad challenge to the warrant for lack of probable cause." Appellant's brief at 6. Actually, the challenge to the search warrant was quite specific: The challenge was that the affidavit lacked probable cause and that the affiant, Sergeant Mitchell, intentionally or recklessly omitted pertinent information from the search warrant application and intentionally or recklessly included false information in the search warrant application. CP 5. While a number of arguments were made in support of these contentions, those were not disputed facts. The issue was whether or not Wirshup gave a statement to Mitchell that he had sold a stolen tool to appellant at his motel room a couple of days prior and whether, on that occasion he had seen methamphetamine. As has already been demonstrated in the Counter Statement of the Case, Wirshup's written statement that he gave to Sergeant Mitchell was admitted during the

Franks - CrR 3.6 hearing as well as was his later recantation. 1/25 RP 5-6; 24. Wirshup was cross examined about the statement and admitted that his signature was on the statement and his initials were on the statement and on the Advice of Rights form. 1/25 RP 25-26. The court entered conclusions of law as to whether or not Mitchell recklessly or intentionally omitted Gardner's criminal history, finding that he did not. CP 65-66.

Appellant claims that "Gardner further claimed that Mitchell ran a background check on Wirshup then recklessly or deliberately omitted criminal history that affirmatively demonstrated Wirshup's inherent lack of credibility." Appellant's brief at 6. Once again, this is a misstatement of the record below. What the Motion to Suppress actually claims is that "nor did he [Mitchell] indicate that he ran a criminal background check on Mr. Wirshup to determine if he had a criminal record." CP 7. And on page 9 of the Motion to Suppress, CP 13, all that is stated is that "Officer Mitchell asserted that he was familiar with Frank Wirshup from previous contacts . . ." No where did Gardner claim that Mitchell ran a background check on Wirshup and deliberately omitted it from the affidavit. It is undisputed that this was not done.

With regard to the bench trial findings the Court can review the transcript of the sentencing hearing, 3/5 RP 2 et seq. as to why the court made the interlineations in Finding 1 and Finding 3 and draw its own conclusions. In any event, those findings are irrelevant and not supported by the evidence. That the parties stipulated to the admissibility of the

evidence, Finding 3, CP 75 (Appellant's brief 9) is also irrelevant in that the methamphetamine was admitted without objection. 1/31 RP 77-78. Finally, it cannot reasonably be argued that the officers did not find drug paraphernalia and packaging material while executing the search warrant. 1/31 RP 52-55.

This issue is without merit.

2. The evidence was sufficient to support the appellant's conviction.

Appellant has challenged the sufficiency of the evidence. The test for determining the sufficiency of the evidence is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). The challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, affd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

An appellate court need not be convinced of the defendant's guilt beyond a reasonable doubt; it must only determine whether substantial evidence supports the State's case. State v. Potts, 93 Wn.App. 82, 969 P.2d 494 (1998). "Substantial evidence" is evidence sufficient to persuade

a fairminded person of the truth of the matter. State v. Thetford, 109 Wn.2d 392, 396, 745 P.2d 496 (1987). The test for "substantial evidence" is modest. State v. Henjum, 136 Wn.App. 807, 810, 150 P.3d 1170 (2007). "The only question is whether the State has made out a prima facie case. Henjum at 810.

In considering the sufficiency of the evidence, circumstantial evidence is no less reliable than direct evidence, State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980), and in reviewing such evidence, the appellate court does not weigh the evidence, but merely examines whether or not the State has produced substantial evidence from which the jury could infer guilt. State v. Palmer, 1 Wn.App. 152, 459 P.2d 812 (1969).

The trier of fact is "free to believe the testimony presented by one side and disbelieve that presented by the other." State v. Gilmore, 42 Wn.2d 624, 627, 257, P.2d 215 (1953).

To determine whether or not there is sufficient evidence to support a charge of constructive possession courts "will look at the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the drugs and thus was in constructive possession of them." State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). One way to prove constructive possession is to prove that an individual has dominion and control over the premises where the controlled substances are found. State v. Weiss, 73 Wn.2d 372, 438 P.2d

610 (1968). Once again, a week prior to the execution of the search warrant on August 19, 2011, Sergeant Mitchell contacted the appellant in Room 9 of the Snore & Whisker Motel and appellant told Sergeant Mitchell that he was living there. 1/31 RP 48. When the search warrant was executed on August 26, 2011, appellant was found coming out of the bedroom where the methamphetamine was later found. 1/31 RP 49; 71; 76. When arrested appellant was wearing only pants and no shirt. 1/31 RP 60. This is indicative of one who is a resident and not a casual visitor. Officers found no evidence of anyone else living there. 1/31 RP 61-62.

State v. Callaghan, 77 Wn.2d 27, 459 P.2d 400 (1969) is an "mere proximity" case and is inapplicable here.

There was substantial evidence from which the trier of fact could infer that Gardner was in constructive possession of the drugs.

3. The warrant established probable cause.

Probable cause is established in an affidavit supporting a search warrant by setting forth facts sufficient for a reasonable person to conclude the defendant is probably involved in criminal activity. State v. Perone, 119 Wn.2d 538, 551, 834 P.2d 611 (1992); State v.Maxwell, 114 Wn.2d 761, 791 P.2d 223 (1990). "An affidavit need not establish proof of criminal activity, but merely probable cause to believe it may have occurred." State v. Gunwall, 106 Wn.2d 54 73, 729 P.2d 808 (1986) (emphasis added).

The question of whether or not probable cause exists for the issuance of the search warrant should not be analyzed in a "hypertechnical" manner. State v. Matlock, 27 Wn.App. 152, 616 P.2d 684 (1980). Nor must the issuing magistrate be convinced beyond a reasonable doubt that there is probable cause; there must only be a prima facia showing of probable cause. State v. Osborne, 18 Wn.App. 318, 569 P.2d 1176 (1977); State v. Lehman, 8 Wn.App. 408, 506 P.2d 1316 (1973).

The affidavit is evaluated in a common sense manner with doubts resolved in favor of validity, and with a considerable deference being accorded to the issuing judge's determination. State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977); State v. Freeman, 47 Wn.App. 870, 737 P.2d 704 (1987). Affidavits of probable cause are tested by much less regular standards than those governing the admissibility of evidence at trial and the issuing magistrates are not to be confined by restrictions on the use of good common sense. State v. Harrison, 5 Wn.App. 454, 488 P.2d 532 (1967). Doubts as to the sufficiency of information to support probable cause must be resolved in favor of validity of the warrant. State v. Walcott, 72 Wn.2d 959, 435 P.2d 994 (1967).

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of a reviewing court is to pay great deference to the magistrate's determination of probable cause, and simply to insure that

> the magistrate had a substantial basis for his or her decision.

State v. Steenerson, 38 Wn.App. 722 725, 688 P.2d 544 (1984).

(a) Wirshup's reliability was established.

With regard to informant reliability, under the two-part Aguilar-Spinelli test an affidavit must contain information sufficient to establish the informant's trustworthiness based upon the underlying circumstances and basis of his or her knowledge and must contain information that establishes the informant's veracity. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. U.S., 393 U.S. 410 (1969). The affidavit is insufficient and it fails to meet either prong unless other police investigation corroborates the informant's tip. State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994).

(i) Basis of knowledge.

In State v. Duncan, 81 Wn.App. 70, 912 P.2d 1090 (1996), it was held that "[i]nformation showing the informant personally have seen the facts asserted and is passing on first hand information satisfies the basis of knowledge prong." Duncan, at 76. In State v. Murray, 110 Wn.2d 706, 757 P.2d 487 (1988), an anonymous "tipster" stated that he had seen marijuana growing inside a Montesano residence. He passed this information on to an informant who told the police what the tipster had said. The Supreme Court held that "[h]ere, the basis of knowledge prong is readily satisfied by

the tipster's claim that he personally observed marijuana growing in the basement of the Montesano house. Murray, at 711.

Clearly the basis of knowledge prong of Aguilar-Spinelli is satisfied as Wirshup had personal knowledge of the events described in the affidavit.

(ii) Veracity

"The veracity prong is satisfied by showing the credibility of the informant, or by establishing the facts and circumstances surrounding the furnishing of the information that support an inference the informant is telling the truth." State v. McCord, 125 Wn.App. 888, 893, 106 P.3d 832 (2005); State v. Lair, 95 Wn.2d 706, 710, 630 P.2d 427 (1981). "When the informant is an ordinary citizen rather than a criminal or professional informant and his identity is revealed to the issuing magistrate, intrinsic indicia of his liability may be found in his detailed description of the underlying circumstances of what he observed." McCord, at 893; State v. Northness, 20 Wn.App. 551, 557, 582 P.2d 546 (1978). That an informant is named in the affidavit is one factor to be considered in determining veracity. McCord, at 893; State v. Duncan, 81 Wn.App. 70, 78, 912 P.2d 1090 (1996). Nor does it really matter that the informant is a "criminal," rather than "ordinary citizen," informant. "[T]he fact that an identified eye witness informant may also be under suspicion . . . has been held not to vitiate the inference of reliability raised by the detailed nature of the information in the disclosure of the informant's identify" State v.

Chenoweth, 127 Wn.App. 444, 454, 111 P.3d 1217 (2005) quoting Northness at 558 (citing United States v. Banks, 539 F.2d 14, 17 (9th Cir. 1976) (fact that named, untested, nonprofessional informer was under investigation based on suspicion of being involved in drug traffic was immaterial to question a reliability of informant where he voluntarily provided detailed eye witness report of defendant's drug dealing).

The court in Lair noted that the veracity prong of the Aguilar-Spinelli test may be satisfied "if the magistrate is provided sufficient facts to determine that the informant's information on the specific occasion is reliable." Lair at 710. The court framed the inquiry, "was the information furnished under circumstances giving reasonable assurances of trustworthiness? If so, the information is reliable, not withstanding the ignorance as to its source's credibility." Lair at 710 quoting Thompson v. State, 16 Md.App. 560, 566, 298 A.2d 458 (1973).

One factor to consider is whether the statement was made against the informant's penal interest. "Since one who admits criminal activity to a police officer faces possible prosecution, it is generally held to be a reasonable inference that a statement raising such a possibility is a credible one." Lair at 711. Wirshup admitted to stealing the Dremel tool and then selling it to Gardner. He also admitted, according to the affidavit, to having seen methamphetamine and drug paraphernalia in the motel room. He also told Mitchell that he had purchased methamphetamine from "Johnny Five" in the past. CP 20-21.

Another factor to be considered in establishing veracity is whether or not the information provided by the informant is corroborated by other evidence or statements. Lair at 711-712. Here, Mitchell knew that "Johnny Five" was the nickname for John Gardner. Mitchell was also aware that he was staying in room #9 at the Snore & Whisker as he had contacted him in that room a week prior to talking to Wirshup. Mitchell was advised by Officer Dayton of the Hoquiam Police Department that there was "numerous short stay foot and vehicle traffic at Gardner's room." Dayton was familiar with Gardner from his time in the Drug Task Force and that the Drug Task Force had done numerous cases on Gardner throughout the years. In addition, Detective Bradbury of the Drug Task Force advised that the Drug Task Force had made numerous controlled buys of methamphetamine from Gardner between October of 2010 and April of 2011. CP 21.

Also, the fact that Wirshup is named in the affidavit is another factor that can be considered in determining the veracity of the informant:

> When, however, there is an underlying factual basis for the statements, or other indications of reliability, the additional fact that an informant is named is at least more helpful than no name at all and may be one circumstance contributing to a conclusion that the information in the affidavit was reliable.

Lair at 712-713; State v. Sieler, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980).

Given the foregoing, the veracity prong of Aguilar-Spinelli has been satisfied in this case, and the affidavit established probable cause.

4. Wirshup's criminal history was immaterial to the determination of probable cause.

A police informant's criminal record or criminal status is not material to finding probable cause to issue a search warrant based upon information provided by the informant. State v. Taylor, 74 Wn.App. 111, 872 P.2d 53 (1994).

In State v. Taylor, supra, the defense argued that the fact of the confidential informant criminal history, the fact that he was a drug addict and the fact that he had pending criminal charges should have been disclosed to the issuing magistrate. He argued that this constituted both a material misrepresentation and an omission of relevant facts necessary to make a determination of probable cause. He further argued that the trial court should have suppressed the evidence or that he was entitled to a hearing under Franks v. Delaware, 430 U.S. 154, 155, 156, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978). The Court of Appeals in Taylor held that these issues were not relevant to the determination of probable cause for issuance of the warrant:

> Even if the defense had argued pretrial that Taylor's motive was a material omission, we would reject that argument on appeal. In United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989), the defendant argued, inter alia, that the police should have informed the magistrate that the informants, who were husband and wife, were motivated by their desire to obtain immunity from prosecution, that the wife was paid for her information and that the husband was a convicted felon, drug user, and was under investigation for purchasing methamphetamine manufacturing equipment. The Circuit Court held that the omission of these circumstances was immaterial to the informant's credibility:

> It would have to be a very naive magistrate who would suppose that a confidential informant would drop in off the street with such detailed evidence and not have an ulterior motive. The magistrate would naturally have assumed that the informant was not a disinterested citizen. While the magistrate was not informed of the informant's probity, the magistrate was given reason to think the informant knew a good deal about what was going on at 22700 West Deal Road.
>
> Strifler, 851 F.2d at 1201. See also United States v. Flagg, 919 F.2d 499, 500-01 (8th Cir. 1990) (the omission of facts about the informant's criminal record and possible motive would not generally mislead magistrates since informants often have criminal records and supply information to the government pursuant to plea agreements); State v. Garberding, 245 Mont. 356, 362, 801 P.2d 583, 586 (1990) (that the primary informant was a convicted felon and received payment for his tip did not cast doubt on his reliability; therefore, the omission of these circumstances did not warrant a Franks hearing, because "[a] . person of known criminal activity. . . is not likely to place himself in such a dubious position unless he is telling the truth").
>
> The reasoning applied by the courts in Strifler, Flagg and Garberding is persuasive. Here, as in those cases, omission of the informant's criminal record and ulterior motive for supplying information was not material because informants frequently have criminal records as well as ulterior or self-serving motives for divulging the information.

Taylor, at 120-121.

The argument seems to be that by not including Wirshup's criminal history in the affidavit, Mitchell was somehow trying to pass Mr. Wirshup off as someone he is not. The only conclusion that one can come to from reading the affidavit is that Mr. Wirshup is a thief. Wirshup is in no way portrayed in the affidavit as an upstanding citizen.

In response to similar arguments the court in Chenoweth held as follows:

> Because Detective King provided Parker's name to the commissioner, because Parker made statements against his penal interest, and because the amount and kind of detail provided support an inference of reliability, the commissioner did not abuse her discretion in finding that probable cause supported the search warrant.

Chenoweth at 455.

5. The court conducted an adequate Franks hearing.

A reckless disregard for the truth is shown where the affiant entertains serious doubts as to the truth of facts or statements in the affidavit and "serious doubts" can be shown by actual deliberation on the part of the affiant or the existence of obvious reasons to doubt the veracity of the informant or the accuracy of the reports. Chenoweth at 456.

As has previously been demonstrated an informant's criminal history is immaterial to a finding of probable cause in a search warrant. Furthermore, the court heard from both Sergeant Mitchell and Frank Wirshup and considered the circumstances of both Mr. Wirshup's original statement to Sergeant Mitchell and his later alleged recantation. The court concluded that Sergeant Mitchell, in preparing the search warrant affidavit, had not made any intentional or material misrepresentations and did not demonstrate a reckless disregard for the truth. 1/25 RP 39. Once again, the trier of fact is "free to believe the testimony presented by one side and disbelieve that presented by the other." Gilmore, supra, at 627.

6. The information was not stale.

In State v. Perez, 92 Wn.App. 1, 863 P.2d 881 (1998), a search warrant was executed upon a safe house believed to be used by a drug dealer named "Felix." There was a three-day period between the last observation described in the affidavit (delivery) and the issuance of the warrant. The search warrant was then executed at the address four days after it was issued. (A total of seven days). In rejecting the argument that the information was too stale, the Court held as follows:

> A tabulation of the intervening number of days is not the final determinate of probable cause; rather, it is just one factor which is considered along with all the other circumstances including the nature and scope of the suspected criminal activity.
>
> * * * *
>
> Here, the facts recited in the affidavit supported an inference that criminal activity was occurring at 3021 southwest Thistle at the time the warrant was issued. . . . [H]ere both the information provided by the information and police observations suggested that "Felix" was a drug dealer and that his drug dealing activities were ongoing.

In the case at hand, the theft of the Dremel tool occurred on August 24, 2011. Wirshup was located and interviewed on August 26, 2011. The search warrant was obtained and executed that same day. Furthermore, on the morning of August 26, 2011, Officer Dayton told Sergeant Mitchell that during the night and early morning hours of August 25 - 26 there was numerous short stay foot and vehicle traffic at Gardner's room. CP 21.

Furthermore, CrR 2.3(c) permits a search warrant to be executed up to ten days after it is issued. This search warrant was executed the same day it was issued, the same day the information contained in it was obtained and only two days after the events complained of. Appellant has cited to no authority that in such circumstances the information was stale.

7. The reliability of Dayton and Bradbury was established in the affidavit.

"The level of evidence necessary to establish the reliability prong of Aguilar-Spinelli depends on whether the informant is a professional or citizen informant." State v. Bauer, 98 Wn.App. 870, 876, 991 P.2d 668 (2000). Evidence of past reliability ("track record") is not strictly required where the informant is a citizen. State v. Northness, 20 Wn.App. 551, 556, 582 P.2d 546 (1978).

> To establish the reliability of a citizen informant, and thus to fulfill the pong of the Aguilar test, it is only necessary for the police to interview the informant and ascertain such background facts as would support a reasonable inference that he is "prudent" or credible, and without motive to falsify. In making this determination, the police may justifiably assume that the ordinary citizen who has seldom or never reported a crime to the police may, in fact, be more reliable than one who supplies information on a regular basis.
>
> In making this evaluation, an ascertainment of the citizen's identity will almost invariably be necessary. However, should the citizen wish to remain anonymous, as here, his reliability could certainly be corroborated by description of him, his

> purpose for being at the locus of the crime, and the reason for his desire to remain anonymous.

State v. Dobyns, 55 Wn.App. 609, 618, 779 P.2d 746 (1989), citing State v. Berlin, 46 Wn.App. 587, 591, 731 P.2d 548 (1987) and State v. Chatmon, 9 Wn.App. 741, 748, 515 P.2d 530 (1973).

Police officers are much more like citizen informants than professional informants. Police officers are presumed to be reliable. State v. Matlock, 27 Wn.App. 152, 155, 616 P.2d 684 (1980). "Generally, affidavits based upon observations of law officers are considered a reliable basis for the issuance of warrants." Matlock at 155, citing U.S. v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L.Ed. 684 (1965). "The information presented in Officer Davidson's affidavit should be accorded a reasonable degree of reliability because an affiant, seeking a search warrant, can base his information on information in turn supplied him by fellow officers." State v. Laursen, 14 Wn.App. 692, 695, 544 P.2d 127 (1975). Both of them were named in the affidavit. Their reason for being at the locus of the crime was apparent from the affidavit and both had personal knowledge of the facts they related to Sergeant Mitchell.

8. Issue 10 of appellant's brief should be disregarded as the argument in support thereof is not credible and contains no citation to authority.

Appellant frames issue number ten as "suspected possession of stolen property worth $34.00 is not sufficient to establish probable cause

for a warrant to invade a dwelling." Appellant's brief at 35. Appellant cites to no authority nor makes any credible argument that the value of property has any bearing on whether or not probable cause exists to issue a search warrant. "Without argument or authority to support it, an assignment of error is waived." State v. Sublett, 156 Wn.App. 160, 186, 231 P.3d 231 (2010) citing State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Once again, just because appellant claims the information is stale, without more, does not make it so.

Appellant goes on to claim that since possession of stolen property worth less than $750.00 is a gross misdemeanor, and since police may not prosecute a gross misdemeanor unless it was committed in the presence of the officer, that this was insufficient to support a warrant to invade a home. Appellant cites to RCW 10.31.100. Appellant's brief at 36.

RCW 10.31.100(1) provides that "[a]ny police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving . . . the unlawful taking of property. . . shall have authority to arrest that person." Furthermore, trafficking in stolen property, which includes receiving stolen property, is a felony. RCW 9A.82.050(2); RCW 9A.82.055(2); RCW 9A.82.010(19).

This issue should not be considered by the court.

9. Judge Godfrey was not prejudiced against the appellant.

The point of Judge Godfrey's remarks at the conclusion of the Franks - CrR 3.6 hearing held on January 25, 2012, (1/25 RP 33-39) was not that police officers and the well to do tell the truth and that poor and homeless people lie; it was that in reading affidavits in support of search warrants judges' use their common sense and life experience:

> It would have to be a very naive magistrate who would suppose that a confidential informant would drop in off the street with such detailed evidence and not have an ulterior motive. The magistrate would naturally have assumed that the informant was not a disinterested citizen. While the magistrate was not informed of the informant's probity, the magistrate was given reason to think the informant knew a good deal about what was going on at 22700 West Deal Road.

Strifler, 851 F.2d at 1201. See also United States v. Flagg, 919 F.2d 499, 500-01 (8th Cir. 1990) (the omission of facts about the informant's criminal record and possible motive would not generally mislead magistrates since informants often have criminal records and supply information to the government pursuant to plea agreements); State v. Garberding, 245 Mont. 356, 362, 801 P.2d 583, 586 (1990) (that the primary informant was a convicted felon and received payment for his tip did not cast doubt on his reliability; therefore, the omission of these circumstances did not warrant a Franks hearing, because "[a] . person of known criminal activity. . . is not likely to place himself in such a dubious position unless he is telling the truth").

The reasoning applied by the courts in Strifler, Flagg and Garberding is persuasive. Here, as in those cases, omission of the informant's criminal record and ulterior motive for supplying information was not material because informants frequently have criminal records as well as ulterior or self-serving motives for divulging the information.

Taylor, at 120-121. Judge Godfrey simply found that Sergeant Mitchell did not make any intentional nor reckless statements or omissions in the affidavit in support of the search warrant. 1/25 CP 38-39.

10. The drug paraphernalia was admissible under the res gestae rule and ER 404(b).

The "res gestae" or "same transaction rule allows evidence of other bad acts to be admitted "[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place." State v. Tharp, 27 Wn.App. 198, 204, 616 P.2d 693 (1980).

> The defendant cannot insulate himself by committing a string of connected offense and then argue that the evidence of the other uncharted crimes is in admissible because it shows the defendant's bad character, thus forcing the State to present fragmented version of events.

State v. Lillard, 122 Wn.App. 422, 431, 93 P.3d 969 (2004).

In State v. Jordan, 79 Wn.2d 480, 487 P.2d 617 (1971), the defendant was arrested for unlawful possession of a narcotic was found with needle marks on his arms and drug paraphernalia nearby. The court rejected his argument that such testimony and exhibits placed him on trial for crimes not charged and held that evidence of criminal acts which are inseparable parts of the whole deed is admissible.

Furthermore, the State would argue that the evidence went to prove knowledge under ER 404(b). The State did not know whether or not the appellant would testify and whether or not he would assert the defense of

unwitting possession. While such a defense may be successful against a baggie of methamphetamine stuffed in a laundry basket, it would be much more difficult to be successful with that defense with evidence of drug paraphernalia being found throughout the motel room.

Appellant was charged by Amended Information with Possession of Methamphetamine. CP 51. All of the drug paraphernalia admitted into evidence (metal and glass smoking pipes, spoons, tubes, and scales) as well as the testimony about the syringes, are all associated with the use, not sale, of controlled substances. The only questionable evidence might be the packaging materials (small Ziploc baggies). However, in the case of bench trials judges are presumed to ignore inadmissible evidence:

> In such evidences a liberal practice in the admission of evidence is followed in this state, supported, as it is, with a presumption on appeal that the trial judge, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making his findings. And, in non jury proceedings a new trial ordinarily will not be granted for error in the admission of evidence, if there remains substantial admissible evidence to otherwise support the trial court's findings.

State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970) (citations omitted).

> In the trial of a non-jury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a non-jury case because of the admission of incompetent evidence, unless all of the competent evidence is sufficient to support the judgment or unless it affirmatively

> appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made.

State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002) citing Builders Steel Company v. Commissioner of Internal Revenue, 179 F.2d 377, 379, (8th Circuit 1950).

This presumption is rebuttable. The burden is on the defendant to show the verdict is not supported by sufficient admissible evidence or that the trial court relied on the inadmissible evidence to make essential findings. Read at 245-46. This appellant has not done.

Appellant was living in room 9 of the Snore & Whisker Motel and had dominion and control over the premises. Methamphetamine was found in his room along with drug paraphernalia associated with the use of controlled substances. There is sufficient evidence to support the verdict.

CONCLUSION

This is a rather straight forward case. Frank Wirshup stole a Dremel tool on August 24, 2011, and sold it to the appellant who was living in Unit 9 of the Snore & Whisker Motel in Hoquiam. He relayed this information to Sergeant Mitchell of the Hoquiam Police Department along with the fact that he had seen methamphetamine while at the motel room. The night before the search warrant was executed other officers had seen a lot of short stay foot traffic going to and from Mr. Gardner's room. Mr. Gardner was the subject of other drug investigations. A search

warrant was obtained and executed on August 26, 2012, and methamphetamine was found.

Both common sense and the law dictate that Mr. Gardner's conviction be affirmed.

DATED this 30 day of November, 2012.

Respectfully Submitted,

By: William A. Leraas
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Deputy Prosecuting Attorney
WSBA #15489

WAL/lh

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

STATE OF WASHINGTON, Respondent, v. JOHN R. GARDNER, JR., Appellant.	No.: 43297-8-II **DECLARATION OF MAILING**

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 30th day of November, 2012, I mailed a copy of the Brief of Respondent to Jordan Broome McCabe, McCabe Law Office, PO Box 7424, Bellevue, WA 98008-1424, by depositing the same in the United States Mail, postage prepaid.

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.

DATED this 30th day of November, 2012, at Montesano, Washington.

Barbara Chapman

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