No. 31448-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

RICHARD EDWARD FENTON,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Bruce A. Spanner, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

A. ASSIGNMENTS OF ERROR

A. Mr. Fenton's state and federal constitutional rights to privacy were violated when the police searched his home pursuant to a warrant that was not based upon probable cause.

B. The trial court erred by admitting items seized from Mr. Fenton's home pursuant to a search warrant that was not based upon probable cause.

C. The trial court erred by admitting items seized from Mr. Fenton's home pursuant to a search warrant that did not establish the basis of knowledge or reliability of the confidential police informant.

D. The trial court erred in denying the motion to suppress evidence and dismiss count III.

E. The trial court erred in entering the following findings of fact regarding its denial of the suppression motion (at CP 130):

> 1. The affidavit in support of the warrant reflects that the confidential informant has given information in the past which has been corroborated which have led to several arrests and seizures of narcotics.
>
> 2. The informant is an individual known to the police and as such has provided credible information.
>
> 3. The informant was involved in a controlled buy from the defendant in the recent past.

> 4. The fact of the controlled buy verifies the information which the informant gave to the police and lends to her credibility.
>
> 5. The informant was a "professional informant."

F. To the extent they are findings of fact, the court erred in entering the following conclusions of law regarding its denial of the suppression motion (at CP 131):

> …
>
> 2. The informant has both shown to be reliable as to past performance and,
>
> 3. Shown the ability to see and observe criminal activity.
>
> 4. The recent controlled buy of narcotics from the residence of the defendant supplements the contribution of the informant by independent police investigation.

G. The trial court erred by imposing a variable term of community custody as part of the sentence.

H. The Judgment and Sentence contains a scrivener's error that should be corrected.

Issues Pertaining to Assignments of Error

1. Were Mr. Fenton's constitutional rights violated when his home was searched and items seized based upon a search warrant affidavit that

did not establish the credibility of the unnamed informant or the basis of the informant's knowledge?[1]

2 Does a sentencing court lack statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody?[2]

3. The Judgment and Sentence states the date of the offense in Count II, delivery of a controlled substance—methamphetamine, was November 1, 2010. The evidence establishes that the date of the offense was November 5, 2010. Should this scrivener's error be corrected?[3]

B. STATEMENT OF THE CASE

Search warrant and supporting affidavit. Kennewick Police Department Detective Juan Dorame enlisted an informant to purchase suspected methamphetamine from the defendant, Richard Edward Fenton, under police supervision on one occasion in November 2010. CP 22.[4] The detective observed the informant make a call to the phone number 509-783-2583.

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[1] Assignments of Error A, B, C, D, E and F.
[2] Assignment of Error G.
[3] Assignment of Error H.
[4] The Affidavit for Search Warrant is found at CP 22–23. The Search Warrant is found at CP 20.

The confidential informant took prerecorded buy money to Mr. Fenton's apartment and returned with suspected methamphetamine. Id. The informant was searched by the police before and after the purchase, and officers observed him or her enter and leave the apartment. Id. According to Detective Dorame, several months earlier the informant provided information that Mr. Fenton "is and has been" selling methamphetamine from the residence, and provided information at some time in the unspecified past that had led to several arrests and seizures of narcotics. Id. The detective did not reveal the name of the informant, or whether he or she was being paid or had any criminal history, or any details about the actual purchase, or any follow-up investigation by police such as to whom the phone number belonged to or any results of possible surveillance of the apartment based upon the informant's claim of drugs being sold.

A search warrant for "Richard Edward Fenton (Thurman[5])", his apparent residence in Kennewick, and a cell phone with the phone number 509-783-2583 was issued by the Honorable Judge Tanner, Benton County District Court, on November 7, 2010. CP 20. The warrant permitted police to search the residence and person of Mr. Fenton. Id. Among other

[5] The reference "Thurman" is found in the search warrant and supporting affidavit, but does not seem to appear anywhere else in the record below.

things the warrant authorized police to seize illegal controlled substances; "implements, furniture and fixtures" used in their manufacture, sale or possession; documents showing dominion or control over the premises, and the cell phone. Id.

Charges. The warrant was executed on November 12, 2010. CP 3. Based upon items seized and evidence obtained in two controlled buys, the Benton County Prosecutor charged Mr. Fenton with two counts of delivery of a controlled substance–methamphetamine and one count of possession with intent to manufacture/deliver a controlled substance. CP 1–2. After Mr. Fenton indicated his intent to go to trial, the information was amended to add the allegations that the crimes alleged in the two delivery counts occurred within 1000 feet of a school bus stop. CP 10–12; 2/16/11 RP 4; 8/29/12 RP 17; 2/15/13 RP 359–61.

Denial of Mr. Fenton's motion to suppress evidence obtained pursuant to the search warrant. Prior to trial, Mr. Fenton moved to suppress the items seized pursuant to the search warrant and on this basis, to dismiss Count III. CP 16–28; 11/14/12 RP 17–27. The Honorable Robert G. Swisher denied Mr. Fenton's motion. 11/14/12 RP 25–27. Written "Findings, Conclusions, [sic] Denying Motion to Suppress" were entered. CP 130–31.

Jury trial, verdict and sentence. A mistrial was declared as to the first trial by the Honorable Bruce Spanner. CP 29–30.

At the second trial, the State presented evidence of two controlled buys of methamphetamine from Mr. Fenton that were made using Jolene Nichols as the confidential informant; evidence there were at least two school bus stops within 1,000 feet of Mr. Fenton's residence; and evidence obtained during execution of the search warrant at Mr. Fenton's apartment including methamphetamine, digital scales , "ledger" type notebooks and dominion paperwork. 12/5/12 RP 61–143, 152–261; 12/6/12 RP 272–98. Ms. Nichols testified at trial. 12/5/12 RP 161–79. Mr. Fenton did not testify.

The jury found Mr. Fenton guilty as charged of two counts of delivery of controlled substance–methamphetamine within 1,000 feet of a school bus stop and one count of possession with intent to deliver a controlled substance. CP 108–11, 113. The court imposed concurrent sentences, for a total term of confinement of 64 months. CP 123. The court also imposed the following term of community custody:

> (A) The defendant shall be on community custody for the longer of:
> (1) the period of early release. RCW 9.94A.728(1), (2); or
> (2) the period imposed by the court, as follows:
>
> Counts one, two and three for 12 months;

CP 123 at ¶ 4.5. This appeal followed. CP 129.

C. ARGUMENT

1. Mr. Fenton's constitutional rights were violated when his home was searched and items seized based upon a search warrant affidavit that did not establish the credibility of the unnamed informant or the basis of the informant's knowledge.

Affidavits in support of search warrants are to be read as a whole, in a common sense, nontechnical manner, with doubts resolved in favor of the warrant. United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); State v. Partin, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977). A magistrate may issue a search warrant based on information received from an informant if the application establishes probable cause to believe that the items sought will be found in the place to be searched. "The support for issuance of a search warrant is sufficient if, on reading the affidavits, an ordinary person would understand that a violation existed and was continuing at the time of the application." State v. Clay, 7 Wn.App. 631, 637, 501 P.2d 603 (1972), *rev. denied*, 82 Wn.2d 1001 (1973). Washington courts apply the two-pronged *Aguilar-Spinelli* test. State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984); 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).

The test requires that facts and circumstances be shown from which the magistrate can, independently of the officer seeking the warrant, evaluate the reliability of the manner in which the informant acquired the information (basis of knowledge) *and* the affidavit sets forth the underlying circumstances from which the officer concluded the informant was credible or the information reliable (personal credibility or veracity). Jackson, 102 Wn.2d at 435. Both the reliability of the manner by which the information was acquired and the reliability of the informant must be shown in an effort to determine *present* reliability. *See e.g.*, State v. Woodall, 100 Wn.2d 74, 666 P.2d 364 (1983) (affidavit insufficient to establish veracity); State v. Fisher, 96 Wn.2d 962, 639 P.2d 743, *cert. denied*, 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.2d 1355 (1982); State v. Partin, *supra.* Conclusory assertions of reliability will not suffice. State v. Castro, 39 Wn.App. 229, 233, 692 P.2d 890, 892 (1984), *rev. denied*, 13 Wn.2d 1029 (1985). The credibility and the basis of knowledge prongs of the test are separate and both must be established in the search warrant affidavit; a strong showing on one prong may not overcome a deficiency in the other. Jackson, 102 Wn.2d at 437, 441.

The affidavit in this case did not establish the informant's credibility. A search warrant affidavit must, within its four corners, establish the informant's credibility – why there are reasons to believe she is telling the truth. Jackson, 102 Wn.2d at 433. The veracity prong of the *Aguilar-Spinelli* test is met when the police present the magistrate with sufficient facts to determine the informant's credibility or reliability. Id. at 437. A heightened showing of credibility is required where the information comes from a paid or criminal informant; such informants may have an ulterior motive for making an accusation. State v. Ibarra, 61 Wn.App. 695, 699–700, 812 P.2d 114 (1991).

Here, the affidavit supporting the search warrant request provides only scant information about the informant. The detective summarily claims information the informant has provided in the past has led to several arrests and seizures of narcotics. CP 22. No details are given such as her criminal history or prior status and historical use as a paid (mercenary) informant, or the recency of and in what manner the information provided in the past contributed to the "several arrests". The detective's conclusory statement hardly conveys a "track record" of supplying reliable specific information that may support a search warrant. Jackson, 102 Wn.2d at 437, 443–44 (informant provided highly reliable

information about drug import operation); State v. Munoz-Garcia, 140 Wn.App. 609, 620, 166 P.3d 848 (2007) (officer had known informant for eight years, informant had no criminal history, informant signed written statement).

Problems in establishing an informer's credibility may be cured by independent police investigation that corroborates the suspect's involvement in criminal activity along the lines suggested by the informant. Jackson, 102 Wn.2d at 438. The informant's participation in a closely controlled "buy" under the supervision of law enforcement officers may provide that type of corroboration. Castro, 39 Wn.App. at 234–35. If, however, the controlled buy is initiated by law enforcement officers, and not the informant, it only shows that the informant follows direction. Id. at 234; State v. Steenerson, 38 Wn.App. 722, 726, 688 P.2d 544 (1984).

Here, the affidavit does not state the informant had any kind of prior relationship with Mr. Fenton or his house. Nor does it establish that the informant initiated the controlled buy at Mr. Fenton's house. Thus, as in Steenerson, the informant's purchase of suspected methamphetamine suggested only her cooperation and indicates very little about the

informant's credibility and ability to accurately report facts while not under supervision. Steenerson, 38 Wn.App. at 726.

The detective apparently saw the informant dial a particular phone number (which the affidavit does not establish as belonging to Mr. Fenton) and listened as the informant spoke to an unnamed person. The detectives did not observe what happened between the time the informant entered and left the apartment. Further, the affidavit contains no statement by the informant that she purchased the methamphetamine from Mr. Fenton. It contains only the detective's assertion that "I conducted a controlled buy of methamphetamine from Richard Fenton." CP 22. In short, the single controlled buy referenced in the affidavit does not establish that the methamphetamine was purchased from Mr. Fenton.

Thus, the fact of the controlled buy alone fails to corroborate the suspect's involvement in criminal activity along the lines suggested by the informant. Jackson, 102 Wn.2d at 438. As discussed *infra*, the affidavit fails to establish the informant's credibility or her reliability.

The affidavit in this case did not establish the basis of the informant's knowledge. The remaining issue under *Aguilar-Spinelli* is whether the affidavit established the confidential informer's basis of knowledge. Jackson, 102 Wn.2d at 437. Generally, the informant "must

declare that he personally has seen the facts asserted and is passing on first-hand information. Id. In State v. Maddox, 152 Wn.2d 499, 511, 98 P.3d 1199 (2004), for example, the affidavit showed the informant had known the suspect for five years and had purchased methamphetamine from him at least 35 times in the past four years.

Here, there is no assertion that the confidential informant had any first-hand dealings with Mr. Fenton. CP 22. The affidavit does not demonstrate the informer had ever been inside Mr. Fenton's apartment. Although the informant identified a picture as that of Mr. Fenton and said he was the person who "is selling" drugs at the apartment, the affidavit contains no facts to explain how and when the confidential informant knew Mr. Fenton or how she happened to "know" this information. Id.

In Jackson, the informant named two people as drug distributors and gave the address for one without showing the underlying basis for the statement. Jackson, 102 Wn.2d at 444. "This type of bare allegation is insufficient to meet the basis of knowledge prong." Id. Here, there was not even a bare allegation made in the affidavit by the confidential informant that she had ever purchased a controlled substance from Mr. Fenton or knew someone who did. The affidavit simply contains no

information to establish the informant's basis of knowledge and thus her reliability.

The police did extremely little to follow up with the informer's information. They did confirm the address was connected with Mr. Fenton through a database (CP 22), but did not verify that he was presently living at the apartment. Nor did they establish that the phone number dialed by the informant was associated with Mr. Fenton. *See* State v. Atchley, 142 Wn.App. 147, 152–53, 173 P.3d 323 (2007) (police followed up on information from anonymous citizen informant, by, for example, confirming defendant owned and resided at address provided and owned similar vehicle). The police did not notice unusual levels of traffic at the property or observe Mr. Fenton purchase drug trafficking supplies. *See* Id. (police went to residence and observed evidence of possible marijuana grow; confirmed suspect's vehicle had been seen at garden supply store where police had obtained information leading to arrests of others for marijuana manufacturing).

As above, the controlled buy referenced in the affidavit does not overcome the deficiencies in showing the informant's basis of knowledge because the buy was at the direction of the police and because the

supervising officers could not confirm the informant actually interacted with Mr. Fenton at the apartment.

Mr. Fenton's conviction for possession with intent to deliver a controlled substance—methamphetamine must be reversed and dismissed. The search warrant in this case was based upon information from a police informant but did not contain information to demonstrate the informant was credible and there was a basis for her knowledge. The controlled buy failed to establish the credibility or knowledge prongs of the *Aguilar-Spinelli* test because the controlled buy was orchestrated by the police not the informant, and thus shows only that the informant was able to follow the officers' directions. Moreover, the police observing the controlled buy could not confirm that the informant interacted with Mr. Fenton.

Because the affidavit did not demonstrate the informer's reliability on the basis of her credibility and/or knowledge, the search warrant was issued without probable cause in violation of Mr. Fenton's constitutional right to privacy. The trial court erred by denying Mr. Fenton's motion to suppress all of the evidence seized pursuant to the search warrant. This court must reverse Mr. Fenton's conviction for possession of a controlled substance with intent to deliver. Steenerson, 38 Wn.App. at 723.

2. The sentencing court did not have statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody.

Sentencing is a legislative power, not a judicial power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. State v. Mulcare, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Statutory construction is a question of law and reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980).

RCW 9.94A.701(3) provides that:

> A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for: …
>
> > (c) A felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000; …

RCW 9.94A.701(3)(c). The three convictions here are for felony class B drug offenses under RCW 69.50.401(2)(b). Thus, the court could impose a 12-month term of community custody.

However, "[u]nder [RCW 9.94A.701], a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing." State v. Franklin, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).

Here, the trial court imposed the following term of community custody:

> (A) The defendant shall be on community custody for the longer of:
> (1) the period of early release. RCW 9.94A.728(1), (2); or
> (2) the period imposed by the court, as follows:
>
> Counts one, two and three for 12 months;

CP 123 at ¶ 4.5. The language "for the longer of" clearly establishes a contingency.

The trial court did not have the statutory authority to sentence Mr. Fenton to a variable term of community custody contingent on the amount of earned release. Under RCW 9.94A.701 it could only sentence him to a finite term of 12 months. Franklin, *supra.* Therefore, the variable term of community custody imposed by the trial court was improper, and the matter should be remanded for resentencing to a finite term.

3. The Judgment and Sentence contains a scrivener's error that should be corrected.

The Judgment and Sentence states that the date of the offense in Count II, delivery of a controlled substance—methamphetamine, was November 1, 2010. CP 118. The First Amended Information charged, and the jury was instructed, that the offense took place between November 1, 2010, and November 8, 2010. CP 11, 89. However, the evidence established that the date of the offense was November 5, 2010. RP 71–78, 95–99, 120–21, 129 156, 168–69, 186. Therefore, this court should remand the case for correction of the Judgment and Sentence to accurately reflect the date of the offense. *See, e.g.,* State v. Nallieux, 158 Wn. App. 630, 647, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); State v. Healy, 157 Wn. App. 502,

516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

D. CONCLUSION

For the reasons stated, the matter should be remanded to dismiss the conviction for possession with intent to deliver (count III), and with instructions to impose a finite term of 12 months community custody and to correct the scrivener's error

Respectfully submitted on August 29, 2013.

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