No. 44166-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

WARREN L. LEMMON, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay

No. 11-1-00287-0

BRIEF OF RESPONDENT (AMENDED)

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

TABLE OF CONTENTS

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Page

Table of Cases

State Cases

Federal Cases

Rules

A. STATE'S COUNTER-STATEMENT OF ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

Lemmon asserts that the trial court erred in denying his trial court motion to suppress evidence obtained from execution of the search warrant. Lemmon asserts that the judge who issued the search warrant had insufficient probable cause to issue the warrant because the affidavit in support of the warrant failed to establish the credibility of a confidential informant. In response, the State avers that the confidential informant's credibility was sufficiently established.

B. FACTS AND STATEMENT OF THE CASE

On August 10, 2011, Detective Valley of the Mason County Sheriff's Office, Special Operations Group (SOG), made application to the Mason County District Court for a warrant to search property located in Mason County. CP 56-60.[1] In this appeal, Lemmon's only challenge is that "[t]he trial court erred in denying [his] motion to suppress evidence obtained pursuant to [the] search warrant...," because the search warrant affidavit failed "... to establish the reliability of a confidential informant." Brief of Appellant at 5.

[1] The trial court in its findings of fact and conclusions of law issued at the conclusion of Lemmon's CrR 3.6 motion referred to "the affidavit for search warrant which was attached to defendant's memorandum to suppress evidence." CP 23. The defendant's

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

On review of the validity of a lower court's issuance of a search warrant, the facts are limited to the information that was brought to the issuing judge's attention when the warrant was issued. *State v. Murray*, 110 Wn.2d 706, 709-10, 757 P.2d 487, 488-89 (1988). In the instant case, the facts known to the judge who issued the warrant are those facts that are contained in Detective Valley's affidavit in support of the search warrant application. CP 57-60.

In addition to preliminary information, such as Detective Valley's training and experience and the location of the premises where the warrant is to be executed, etc., the affidavit also states that SOG had conducted a controlled buy on August 8, 2011. CP 56-57. The affidavit then provides the following facts relevant to Lemmon's issue on appeal:

> SOG Detectives met with a Police Operative (PO) at a predetermined location. The PO stated that Lemmon sells Methamphetamine and Heroin and keeps it in his motorhome. The PO stated that he/she could buy both controlled substances from him. The aforementioned information has been corroborated by multiple reliable sources over the past year.
>
> The PO was searched for any contraband and/or money; none was located. The PO was issued inventoried monies from the MCSO SOG narcotics investigation fund. After the PO was issued the inventoried money, a SOG Detective drove the P/O to the

---

memorandum is found at CP 45-60. An additional copy of the search warrant affidavit is attached to the Brief of Appellant.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

intersection of Centerline and Rivendell. SOG Detectives couldn't keep a constant visual on the PO all the way down to Lemmon's residence, due to the rural setting and location of his residence. The PO walked to Lemmon's residence, at the end of Centerline and purchased a predetermined amount of methamphetamine from Warren Lemmon.

Once the PO purchased the methamphetamine from Lemmon, he/she walked back out to the area SOG Detectives, dropped him/her off. The PO called me and informed me that he/she was walking back to the pickup point. A SOG Detective picked up the P/O and took him/her back to the predetermined location. The PO did not have contact with anyone unrelated to the investigation. The methamphetamine was recovered by SOG and the PO was searched for any contraband and/or monies, nothing was found.

While interviewing the PO after the buy, he/she stated that there were two females inside the motor home smoking Heroin while he/she was inside buying methamphetamine. The PO described Lemmon's residence as having a wooden fence and metal gate at the front of the property. The property had Lemmon's motorhome, a travel trailer, and several cars and a little shed on the property. The PO stated that there was a dog house next to the motorhome with a very mean pit bull dog on the property.

On 8-8-11 a SOG Detective and the MCSO animal control officer drove to Lemmon's property and verified the PO's information.

The PO has been convicted of three felonies, theft 2, in 2009, possession of stolen property 1, in 2005 and VUSCA Possession of marijuana more than 40 grams in 2004, Two gross misdemeanors, and four misdemeanors The PO has provided SOG with information about narcotic activity, illegal firearms and felony warrants in the past that have led to several arrests and felony charges in Mason County Superior Court. The PO's ongoing cooperation is motivated by receiving a favorable recommendation from SOG, on pending charges in Mason County, in exchange for reliable information that leads to the seizure of controlled

substances, related evidence and successful prosecution of the same.

This PO has made numerous statements against his/her penal interest, admitting to having been involved in the possession, possession with intent to deliver and delivery of methamphetamine. This PO has extensive knowledge and experience concerning the appearance of methamphetamine and other controlled substances and the terminology related to possession, manufacture and delivery of controlled substances, having been around and involved in the these operations for over 11 years.

CP 57-59.[2]

C. ARGUMENT

Lemmon asserts that the trial court erred in denying his trial court motion to suppress evidence obtained from execution of the search warrant. Lemmon asserts that the judge who issued the search warrant had insufficient probable cause to issue the warrant because the affidavit in support of the warrant failed to establish the credibility of a confidential informant. In response, the State avers that the confidential informant's credibility was sufficiently established.

i) State's response to Lemmon's arguments at paragraphs 1, 2, and 3 of the Brief of Appellant.

The State sees no basis to dispute Lemmon's legal assertions contained in the first two numbered sections of his brief at pages 5-8. At

the numbered section "3" of his argument, however, Lemmon misconstrues the legal test applied by the trial court. Brief of Appellant at 8-9.

Washington follows the *Aguilar-Spinelli*[3] test to establish probable cause for the issuance of a search warrant. *State v. Vickers*, 148 Wn.2d 91, 111-12, 59 P.3d 58 (2002). The *Aguilar-Spinelli* test requires that where a search warrant is based upon an informant's tip, the affidavit in support of the warrant must establish the informant's: (1) basis of knowledge; and (2) veracity. *Vickers* at 112.

Lemmon focuses upon the trial court's finding of fact no. 3, where the trial court stated that "[i]n determining the reliability of the confidential informant, the Court looks at the totality of the information set forth in the affidavit." Brief of Appellant at 8; CP 24 (Conclusion of Law No. 3). Lemmon argues that the trial court erred because Washington has "specifically rejected the federal 'totality of the circumstances' test" that is applicable to search warrants. Brief of Appellant at 9. The State

---

[2] Effort was made to follow the punctuation and spelling of the original document.
[3] *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).

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

agrees that the correct test under Washington law is the *Aguilar-Spinelli* test.

But the trial court in this case did not use the totality of the circumstances test to determine probable cause in this case. The trial court correctly applied the *Aguilar-Spinelli* test to determine probable cause for issuance of the warrant. CP 23-24 (Conclusions of Law 1, 7); RP 15-21.[4] Thus, the trial court did not erroneously apply the federal totality of the circumstances test in the instant case to determine probable cause for the search warrant; instead, the trial court considered the totality of the circumstances, or in other words looked to "the information contained in the 'four corners' of the search warrant affidavit," when assessing the confidential informant's veracity. CP 23 (Conclusion of Law No. 1).

ii) State's response to Lemmon's arguments at paragraph 4 of the Brief of Appellant.

Lemmon asserts that "[t]he affidavit did not assert sufficient facts to allow an independent assessment of the informant's reliability. To

[4] Reviewing court may look to oral ruling to explain or give context to written rulings. *See, e.g., State v. Carlson,* 143 Wn. App. 507, 178 P.3d 371 (2008); *Tyler v. Grange Ins. Ass'n,* 3 Wn. App. 167, 473 P.2d 193 (1970)

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

advance this point, Lemmon individually disputes the weight to be given to each of the facts that the district court judge considered when issuing the search warrant. Brief of Appellant at 10-15. But the correct method for viewing the facts is in totality, because "[a] single fact in an affidavit, when viewed in isolation, may not constitute probable cause." *State v. Vickers*, 148 Wn.2d 91, 110, 59 P.3d 58 (2002). However, "when read together with other facts stated in the document, the affidavit... [may satisfy] the requirement for evidence necessary to establish probable cause." *Id.* The reviewing court grants great deference to the discretion of the court that issued the warrant, and doubts about whether there was sufficient probable cause are generally resolved by validating the search warrant. *Id.* at 108-09.

On appeal, the sole inquiry of the reviewing court is whether the trial court's findings are supported by substantial evidence in the record. *Id.* at 116. The party who challenges a finding of fact bears the burden of proving that the finding is not supported by substantial evidence in the record. *Id.*

In the instant case, the confidential informant (CI) conducted a controlled buy from Lemmon at the direction of detectives. CP 57-58.

Lemmon takes issue with the controlled buy because it was an imperfect controlled buy. Brief of Appellant at 12-15. The controlled buy was imperfect because detectives "couldn't keep a constant visual on the PO all the way down to Lemmon's residence, due to the rural setting and location of his residence." CP 58.

Where police are able to keep a CI under constant surveillance during a controlled buy and are able to witness the sale of drugs, the controlled buy is regarded as a "properly executed" controlled buy, which may be self-corroborating of even an untrustworthy informant's veracity, at least as far as that particular information is concerned. *See, e.g., State v. Casto*, 39 Wn. App. 229, 234, 692 P.2d 890 (1984), *review denied,* 103 Wn.2d 1020 (1985). Under such circumstances, the single fact of a controlled buy may satisfy both prongs of the *Aguilar-Spinelli* test. *Casto* at 234. But, while not self-corroborating, Lemmon has provided no authority to support an assertion that an imperfect controlled buy is not otherwise useful when combined with other facts to support a finding of probable cause.

In the instant case, the CI was searched before and after the controlled buy; he/she left with inventoried money, and he/she returned

with illegal drugs. CP 57-58. The buy occurred in a rural neighborhood. *Id.* Arguably, because the transaction was not witnessed by detectives, it was theoretically possible that, with enough planning and good fortune, the CI could have obtained the drugs from somewhere other than Lemmon's house. CP 57-58. But the CI had admitted to drug dealing, and he/she was working as a CI because he/she was hoping to receive favorable treatment in regard to charges he/she was facing. CP 58-59. Search warrant applications are to be viewed and judged in the light of common sense. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). The State contends that it would make little sense to suppose that the CI in the instant would have any imaginable motivation to risk a fake buy from an innocent person, where the risk would be substantial that a subsequent, fruitless search warrant would expose the sham. "That an informant may be trying to win favorable treatment in his own case will usually strengthen the motivation to tell the truth, because the informant knows his own fate will be affected by the ability of law enforcement officials to rely on his information." *State v. Casto*, 39 Wn. App. 229, 235 n.2, 692 P.2d 890 (1984).

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Still more, the CI gave corroborating information that indicated that he/she had, in fact, been to the Lemmon residence. CP 58. The CI described the people who were then currently inside the residence and also described the property. CP 58. The property description was verified by a subsequent investigation by law enforcement. CP 58.

The CI had a criminal history, which included crimes of dishonesty. CP 58. A CI's credibility can be substantially increased if the person is not involved in criminal activity. *State v. Ibarra*, 61 Wn. App. 695, 700, 812 P.2d 114 (1991). But the mere fact that the CI has been convicted of crimes in the past does not "vitiate the warrant." *State v. Taylor*, 74 Wn. App. 111, 118-19, 872 P.2d 53 (1994), citing *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992).

The CI in the instant case had provided information to detectives in the past, and this past information had led to "several arrests and felony charges." CP 58. Lemmon argues that this fact is not corroborative of the CI's reliability or veracity because there was no mention of how far in the past these things occurred, the number of arrests of or charges, or whether any of these resulted in convictions. Brief of Appellant at 11.

The State avers that the fact that the CI has proved reliable and truthful in the past is important evidence of his current reliability, but that the age of any past demonstration of reliability is not determinative of whether the CI is currently reliable. Regardless, the fact that the CI has been credible in the past is currently useful information.

Additionally, the fact that the CI has only provided information on "several" occasions may not generate the weight of confidence that would be generated by 2 $^1/_2$ years of corroboration, as in *State v. Taylor*, 74 Wn. App. 111, 118-19, 872 P.2d 53 (1994), but the fact that the CI has proved reliable on several occasions is still entitled to some weight. *Id.*; *Casto,* 39 Wn. App. at 233.

Lemmon argues that providing information that merely results in arrests and charges but not necessarily convictions does not establish a track record of reliability. Brief of Appellant at 11-12. The State contends that while a resulting conviction may bolster the weight to be given to an assessment of reliability based on past experiences with the CI, it is also true that not all cases result in arrests, charges or convictions. Police may choose to continue an investigation rather than expose an investigation by making an immediate arrest, or the target of the

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

investigation may choose to become a CI rather than face a conviction, or any number of contingencies may occur. The important thing is whether the CI's past information has proved reliable. The fact that the information led to arrests and subsequent charges shows the tip to be corroborated.

Finally, Lemmon challenges the detective's use of the term "rural" in the affidavit for a search warrant. Brief of Appellant at 12. Lemmon contends that use of the term "rural" was misleading, because -- he contends -- there were other houses in the area where the controlled buy occurred, and -- at least theoretically -- the CI could have obtained the illegal drugs from somewhere other than Lemmon's house. But Lemmon's challenge relies on evidence that is found outside the four corners of the warrant affidavit, and this challenge does not satisfy the requirements as established by *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). *See, State v. Casto*, 39 Wn. App. at 234-35. To prevail on this theory, Lemmon must show that the detective's affidavit recklessly or intentionally misrepresented a material fact. *Id.* Here, the dispute about whether the area was rural is a dispute derived

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

from individual perspective, and because the detective disclosed that he did not witness the CI at Lemmon's house, the term is not material.

Lemmon provides a quote, as follows, which he seemingly attributes to Conclusion of Law 6:

> "The use of the word 'rural' by Det. Valley in describing the area and location of the Defendant's residence... indicates a complete lack of other buildings or residences in the area...."

Brief of Appellant at 12. But this quoted language does not correspond to the trial court's findings of fact and conclusions of law. CP 23-24. Instead, this quoted language is from a document that appears in the "Clerk's Papers Index" as "Statement by Quillian on Findings" at CP 25.[5] The document is captioned: "Add to paragraph 6:". CP 25. There is no further explanation about what document this document refers to. *Id.*

Paragraph 6 of the trial court's conclusions of law states: "The controlled buy, as set forth in the affidavit, provides sufficient basis for reliability of the informant." CP 24. Paragraph 9 of the conclusions states: "The court interpreted word 'rural' in the affidavit to mean that the setting is amidst some trees and not amidst other residences." CP 24; RP 18 (lines 7 and 8). This, of course, is the view of the reviewing court (i.e.,

[5] Mr. Quillian was Lemmon's trial attorney. RP 1-128.

the superior court hearing the CrR 3.6 motion), rather than the view of the district court judge who issued the warrant. The affidavit says simply that because of "the rural setting and location of [Lemmon's] residence[,]" the detective was unable to "keep a constant visual... all the way down to Lemmon's residence...." CP 58. Whatever facts might be imagined from use of the word "rural" are what is in dispute.

Thus, considering the totality of the facts known from the affidavit, the credibility prong of the *Aguilar-Spinelli* test is well established on the facts of this case. The individual facts might or might not amount to probable cause, but the facts taken as a whole do.

Affidavits are to be read as a whole, in a common sense, nontechnical manner, with doubts resolved in favor of the warrant. *Casto,* 39 Wn. App. at 232. Generally, great deference is given to the issuing magistrate's probable cause determination. *State v. Young,* 123 Wn.2d 173, 195, 867 P.2d 593 (1994). When viewed in this light, the totality of the facts found in the four corners of the search warrant affidavit support a finding of probable cause based upon the complete satisfaction of both prongs of the *Aguilar-Spinelli* test.

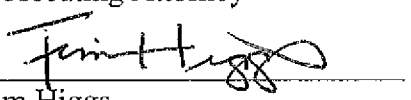
Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

D. CONCLUSION

For the reasons stated above, the State asks the court to sustain the trial court's findings validating the search warrant in this case and to sustain the jury's verdict in this case.

DATED: September 4, 2013.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

MASON COUNTY PROSECUTOR

September 04, 2013 - 4:29 PM

Transmittal Letter

Document Uploaded: 441667-Other.pdf

Case Name: State v. Warren Lemmon

Court of Appeals Case Number: 44166-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

■ Motion: __Other__

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Tim J Higgs - Email: **timh@co.mason.wa.us**

A copy of this document has been emailed to the following addresses:

maria@washapp.org
sally@washapp.org