

NO. 47239-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RAMSEY R. SHABEEB,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

APPELLANT'S REPLY BRIEF

DAVID L. DONNAN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY1

 1. THE SEARCH WARRANT AFFIDAVIT WAS
 INSUFFICIENT TO ESTABLISH PROBABLE CAUSE
 LINKING MR. SHABEEB’S ALLEGED CRIMINAL
 CONDUCT TO THE SEARCHED VEHICLE.....1

 2. THE SEARCH WARRANT DID NOT PROVIDE
 AUTHORITY SEIZE AND SEARCH MR. SHABEEB’S
 BACKPACK5

 3. THE FAILURE TO PERFORM AN INQUIRY
 REGARDING MR. SHABEEB’S ABILITY TO PAY
 REQUIRES REMAND.....6

B. CONCLUSION.....8

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 6, 7

State v. Chambers, 88 Wn.App. 640, 945 P.2d 1172 (1997)..... 5

State v. Lyons, 174 Wn.2d 354, 273 P.3d 314 (2012)..... 1

State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986) 6

State v. Neth, 165 Wn.2d 177, 196 P.3d 658 (2008)..... 1

State v. Patterson, 83 Wn.2d 49, 515 P.2d 496 (1973)..... 1

State v. Rivera, 76 Wn.App. 519, 522, 888 P.2d 740 (1995) 5

State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999)..... 1, 3

State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) 6

Washington Court of Appeals

State v. Davis, 182 Wn.App. 625, 331 P.3d 115 (2014)..... 3

State v. Goble, 88 Wn.App. 503, 945 P.2d 263 (1997) 2

State v. VanNess, 186 Wn.App. 148, 344 P.3d 713 (2015) 1

United States Supreme Court

Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927) 5

Court Rules

RAP 2.5(a) 7

A. ARGUMENT IN REPLY

1. THE SEARCH WARRANT AFFIDAVIT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE LINKING MR. SHABEEB'S ALLEGED CRIMINAL CONDUCT TO THE SEARCHED VEHICLE

A search warrant may issue only if the affiant provides facts sufficient to establish probable cause to believe that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008); *State v. VanNess*, 186 Wn.App. 148, 155, 344 P.3d 713 (2015); U.S. Const. amend. IV; Const. art. I, § 7. The affidavit must provide facts beyond the personal beliefs and suspicions of the applicant. *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999); *State v. Lyons*, 174 Wn.2d 354, 364, 273 P.3d 314 (2012).

As the outset, the prosecutor argues that this Court is limited in its review of the search warrant to the theories argued below. See e.g. ARB 9-10. In a challenge to the sufficiency of a search warrant, however, the Court of Appeals “reviews de novo a trial court’s assessment of a magistrate’s probable cause determination when issuing a search warrant.” *VanNess*, 186 Wn.App. at 154. It is for this Court then to make its own determination regarding the sufficiency of the affidavit to establish probable cause, notwithstanding the theories offered by the parties below.

Because Mr. Shabeeb's conduct on the date of his arrest was innocuous and did not establish a foundation of probable cause that drugs would be found within the vehicle, the affiant did not establish a nexus between the items to be seized and the place to be searched. *State v. Goble*, 88 Wn.App. 503, 511, 945 P.2d 263 (1997).

First, Mr. Shabeeb's contact with the unidentified individual in the Ford Focus was consistent with legal activity. Innocuous conduct that is equally consistent with lawful and unlawful activity does not create probable cause to search. *Neth*, 165 Wn.2d at 185. Therefore these facts failed to raise any suspicion that Mr. Shabeeb's vehicle contained narcotics. The exchange between these individuals was equally consistent with lawful conduct, such as returning a backpack to a friend who left their backpack at your home. Similarly, entering and exiting an auto shop and working on one's car engine is certainly consistent with legal activity.

Second, the K-9 alert does not further the search for probable cause the vehicle contained illicit narcotics where the dog was trained to alert to legal substance like marijuana. Probable cause requires a reasonable person, given the evidence presented, to believe that the item sought was contraband. *Goble*, 88 Wn.App. at 509 (emphasis added). Absent a reliable basis then from which to conclude evidence of illegal narcotics

would be found in the place searched, a reasonable nexus was not established. *Thein*, 138 Wn.2d at 147.

Third, the detective's "experience and training" cannot fill this gap because:

[a] conclusory assertion in an affidavit that drug traffickers commonly store a portion of their drug inventory and paraphernalia in their residences [is] insufficient to establish a nexus between evidence of illegal drug activity and the place to be searched, absent any statements actually tying the defendant's home to suspected criminal activity.

State v. Davis, 182 Wn.App. 625, 633, 331 P.3d 115 (2014). Similarly, a conclusory assertions that drug dealers commonly store narcotics in items likely to be found in a vehicle is not enough to establish a nexus between evidence of illegal activity and the vehicle.

Finally, the criminal informant's reliability was never adequately established. The reliability of the information provided by a criminal informant must be established by a showing that his or her assertions are based on direct personal observations. "In every case, the informant's information must go beyond a mere unsupported conclusion...that illegal activities are occurring or will occur." *State v. White*, 10 Wn.App. 273, 277, 518 P.2d 245 (1973). In this case, there was independent no showing that the informant based his or her assertions on direct personal observations. The affidavit simply indicates that the detective met with the informant, drove him or her to a home in Battle Ground to purchase

heroin, and believed the informant's claim that he or she purchased the heroin from Mr. Shabeeb. CP 14. However, the affidavit does not indicate that Mr. Shabeeb was seen during this drug buy. CP 13-15. Therefore, the informant's information amounts to an unsupported conclusion of criminal activity attributed to Mr. Shabeeb. Furthermore, the informant's reliability cannot be inferred from the production of a small amount of heroin absent any indication that the informant's past information has led to any arrests or convictions. CP 9-17. Thus, the affidavit's statement detailing how a past "reliability buy" of heroin "resulted in the informant becoming reliable" is conclusory and inadequate. CP 14.

This Court should, therefore, reverse the order denying suppression and the judgment and sentence which were the fruits thereof.

2. THE SEARCH WARRANT DID NOT PROVIDE AUTHORITY SEIZE AND SEARCH MR. SHABEEB'S BACKPACK

The Fourth Amendment requires that warrants describe with particularity the things to be seized. *State v. Rivera*, 76 Wn.App. 519, 522, 888 P.2d 740 (1995); *State v. Chambers*, 88 Wn.App. 640, 643, 945 P.2d 1172 (1997). "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Rivera*, 76 Wn.App. at 522 (quoting *Marron v. United States*, 275 U.S. 192, 195, 48 S.Ct. 74, 72 L.Ed. 231 (1927)).

In this case, the search warrant does not mention the backpack. The affidavit for the search warrants did not mention the backpack either where Detective Latter was specific about the items he wished to seize: 1) heroin; 2) records relating to the ordering and possession of heroin; 3) photographs, films; 4) telephone records/Mr. Shabeeb's phone; 5) records showing the identity of co-conspirators; 6) drug paraphernalia; and 7) photographs of the crime scene. CP 9-10. The decision not to mention the backpack should be presumed to have been intentional in light of the otherwise extraordinarily specific request. CP 50.

Because of the heightened expectation of privacy one holds in a backpack, particularly a locked versus unlocked pack, a warrant specifically authorizing the intrusion was necessary. *See e.g. State v.*

Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986), overruled on other grounds by *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009).

Since Mr. Shabeeb's backpack was unlawfully searched, this Court should reverse the judgment of the lower court.

3. THE FAILURE TO PERFORM AN INQUIRY REGARDING MR. SHABEEB'S ABILITY TO PAY REQUIRES REMAND

RCW 10.01.160(3) mandates that a trial court not order a defendant to pay costs unless the defendant is or will be able to pay them. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). In determining the amount and method of payment of costs, therefore, the sentencing court must specifically take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose. *Blazina*, 182 Wn.2d at 838-39.

The sentencing court here failed to make any individualized inquiry. *Blazina* requires that prior to imposing discretionary LFOs, the sentencing court must make an individualized inquiry into the defendant's financial circumstances and his current and future ability to pay. 182 Wn.2d at 839. The record must reflect this individualized inquiry:

Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay.

Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Id.

Here, the sentencing court simply checked a boilerplate finding in the Judgment and Sentence without making the individualized inquiry required under RCW 10.01.160. CP 78.

While the prosecutor argues this challenge is waived, Mr. Shabeeb contends this Court should reach the issues herein for the first time on appeal since neither of the appellants in *Blazina* objected at the time of sentencing. Nevertheless, the Supreme Court concluded that “[n]ational and local cries for reform of the LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” Blazina, at 835. The demands are equally compelling in Mr. Shabeeb's case.

Where the sentencing court fails to make an individualized inquiry into the defendant's ability to pay, on the record, the remedy is to remand to the trial court for “new sentence[ing] hearings.” *Blazina*, 182 Wn.2d at 839. The sentencing court failed to comply with the statutory requirement of RCW 10.01.160(3) when imposing legal financial obligations (LFOs),

thus warranting remand Mr. Shabeeb's matter for a new sentencing hearing.

B. CONCLUSION

For the reasons stated herein, Mr. Shabeeb asks this court to reverse his conviction and sentence and remand for further proceedings.

Respectfully submitted this 19th day of February 2016.

s/ David Donnan

David L. Donnan (WSBA 19271)
Washington Appellate Project
Attorneys for Appellant
1511 Third Avenue, Suite 701
Seattle, WA 98101

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 47239-2-II
v.)	
)	
RAMSEY SHABEEB,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] AARON BARTLETT, DPA	()	U.S. MAIL
[prosecutor@clark.wa.gov]	()	HAND DELIVERY
CLARK COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE VIA COA
PO BOX 5000		PORTAL
VANCOUVER, WA 98666-5000		
[X] RAMSEY SHABEEB	(X)	U.S. MAIL
19901 NE DOLE VALLEY RD	()	HAND DELIVERY
YACOLT, WA 98675	()	_____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF JANUARY, 2016.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

January 19, 2016 - 4:19 PM

Transmittal Letter

Document Uploaded: 5-472392-Reply Brief.pdf

Case Name: STATE V. RAMSEY SHABEEB

Court of Appeals Case Number: 47239-2

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:

Answer/Reply to Motion:

Brief: Reply

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: Maria A Riley - Email: maria@washapp.org

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

prosecutor@clark.wa.gov