NO. 48315-7-II

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

STATE OF WASHINGTON,

Appellant,

v.

KEVIN COX,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00209-0

REPLY

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
III. ARGUMENT	1
A. THE STATE DID NOT VIOLATE MR. COX'S RIGHT TO A SPEEDY TRAIL BY APPEALING THE SUPPRESSION ORDER WITHOUT DISMISSING THE CASE BECAUSE THE TIME FOR TRIAL IS TOLLED WHEN APPEAL AS A MATTER OF RIGHT IS ACCEPTED FOR REVIEW	1
B. MR. COX'S ARGUMENT REGARDING FINDING OF FACT NO. 7 IGNORES THAT IT IS THE CONCLUSION FROM THIS FINDING TO WHICH THE STATE ASSIGNS ERROR	2
C. THE OMISSION POINTED OUT BY MR. COX WAS NOT MATERIAL AND IS NOT AT ISSUE BECAUSE THE COURT DID NOT FIND THAT THE OMISSION WAS MADE WITH RECKLESS DISREGARD FOR THE TRUTH AND THE OMISSION WAS NOT THE BASIS FOR THE SUPPRESSION ORDER AND DOES NOT SUPPORT FINDING OF FACT NO. 9	4
D. THE SECOND MODIFICATION IN OFFICER PONTON'S STATEMENT TO JUDGE WOOD POINTED OUT BY MR. COX IS NOT AT ISSUE AND DOES NOT SUPPORT FINDIGN OF FACT NO. 9	6
E. THE RECORD DOES NOT SUPPORT A CONCLUSION THAT OFFICER PONTON'S STATEMENT IN THE AFFIDAVIT FOR THE WARRANT WAS A FALSEHOOD MADE WITH RECKLESS DISREGARD FOR THE TRUTH	8
IV. CONCLUSION	10

CERTIFICATE OF DELIVERY.. 11

TABLE OF AUTHORITIES

Washington Cases

State v. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007) 9

State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007)..... 4

State v. Cord, 103 Wn.2d 361, 366–67, 693 P.2d 81 (1985) *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).................... 5

State v. Lawley, 32 Wn. App. 337, 340, 647 P.2d 530 (1982)........ 2

Washington Court Rules

CrR 3.3 (c)(2)(iv) 1

RAP 2.2 (b)(2) 1

RAP 5.2 (a).. 1

RAP 6.1.. 1

I. ARGUMENT

A. THE STATE DID NOT VIOLATE MR. COX'S RIGHT TO A SPEEDY TRAIL BY APPEALING THE SUPPRESSION ORDER WITHOUT DISMISSING THE CASE BECAUSE THE TIME FOR TRIAL IS TOLLED WHEN APPEAL AS A MATTER OF RIGHT IS ACCEPTED FOR REVIEW.

Mr. Cox in his response brief argues that the State violated Mr. Cox's right to a speedy trial under the Sixth Amendment and CrR 3.3 by filing an appeal and not asking for a stay or dismissal because the filing of a notice of appeal under RAP 2.2 (b)(2) does not automatically stay the trial date. Mr. Cox argues that CrR 3.3 (c)(2)(iv) excludes from the time for trial the period when a case is on appeal but only after the "acceptance for review or grant of a stay by the appellate court." *See* Respondent's Br. at 3–4.[1]

Mr. Cox's argument lacks merit because "[t]he appellate court 'accepts review' of a trial court decision upon the timely filing in the trial court of a notice of appeal from a decision which is reviewable as a matter of right." RAP 6.1.

In this case the State filed the appeal of the suppression order as a matter of right because the order suppressing evidence had the practical effect of terminating the case. *See* RAP 2.2 (b)(2). The State filed a timely notice

[1] Mr. Cox also asserts that his trial date of Nov. 18, 2015 came and went without fanfare but fails to mention that on Oct. 28, 2015, after the *Franks* hearing, Mr. Cox agreed to strike the trial date and it was stricken. CP 58.

of appeal in the trial court on Nov. 30, 2015, which was within 30 days of the trial court's Nov. 2, 2015 suppression ruling. CP 15, 45; *see* RAP 5.2 (a). Mr. Cox does not dispute the right of the State to file a notice of appeal under RAP 2.2 (b)(2). Thus, the appeal was accepted for review and the time for trial is tolled while the matter is on appeal under CrR 3.3 (c)(2)(iv).

The timely filing of notice of appeal as a matter of right in this case shifted jurisdiction to the Court of Appeals and automatically stayed the trial proceedings. *See State v. Lawley*, 32 Wash. App. 337, 340, 647 P.2d 530, 532 (1982) (citing *State v. Campbell*, 85 Wn.2d 199, 532 P.2d 618 (1975); *State v. LeRoy*, 84 Wn.2d 48, 523 P.2d 1185 (1974) (recognizing that "a demand for revision [in juvenile proceedings] automatically stays further proceedings in the same manner an appeal acts as a stay in adult criminal proceedings.").

Therefore, the State did not violate Mr. Cox's right to a speedy trial by filing an appeal of the suppression order.

B. MR. COX'S ARGUMENT REGARDING FINDING OF FACT NO. 7 IGNORES THAT IT IS THE CONCLUSION FROM THIS FINDING TO WHICH THE STATE ASSIGNS ERROR.

Next, Mr. Cox argues that the Court must conclude that Mr. Cox never said he had a gun in his vehicle because the State did not assign error to finding of fact no. 7. In finding of fact no. 7 the trial court states "Officer

Ponton acknowledged that Mr. Cox never said 'that he has a gun in his car'". CP 11. This is technically correct because Officer Ponton did make it clear that Mr. Cox never said he had a gun in his car when he repeatedly clarified in the affidavit that Mr. Cox said that he *might* have a gun in his car. RP 26, 35–36.

It is the conclusion that the State objects to. *See* Br. of Appellant at 1–2 (assignment of error 1). The conclusion that Officer Ponton's statement that "Mr. Cox said he had a gun in the car" is false and made with reckless disregard for the truth completely ignores that Officer Ponton made it clear that Mr. Cox did not say he had a gun in the car, because he said he *possibly* has a gun in the car. In fact, when questioned on the stand, "Did you ever clarify to Judge Wood that Mr. Cox did not actually say he had a gun in his car, he said he might have guns in his car?", Officer Ponton responded, "I think that's what – wasn't that just what that said? I thought that that's what that said, is that he said there were possible guns under the seat." RP 26. "I thought I was clear about that." RP 26.

Therefore, the conclusion from this finding inaccurately represents the entire context of the statement at issue and then asserts that the statement was made with reckless disregard for the truth.

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C. THE OMISSION POINTED OUT BY MR. COX WAS NOT MATERIAL AND IS NOT AT ISSUE BECAUSE THE COURT DID NOT FIND THAT THE OMISSION WAS MADE WITH RECKLESS DISREGARD FOR THE TRUTH AND THE OMISSION WAS NOT THE BASIS FOR THE SUPPRESSION ORDER AND DOES NOT SUPPORT FINDING OF FACT NO. 9.

Mr. Cox argues that the State points out that Officer Ponton made it clear Mr. Cox stated that he might have a gun in the vehicle but that the State ignored that Officer Ponton failed to inform Judge Wood that Mr. Cox initially said he sold all the guns. First, the trial court did not find that this omission by Officer Ponton was made with reckless disregard for the truth. This statement is not at issue.

"Scrutinizing a warrant affidavit for evidence of negligent omissions or misstatements is . . . inconsistent with our State's established jurisprudence governing search warrant challenges. A search warrant is entitled to a presumption of validity." *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007) (citing *State v. Wolken*, 103 Wn.2d 823, 827–28, 700 P.2d 319 (1985)).

"Under the Fourth Amendment, factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (a) material and (b) made in reckless disregard for the truth." *Chenoweth*, 160 Wn.2d at 462 (citing *Franks v. Delaware*, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *State v. Cord*, 103 Wn.2d

361, 366–67, 693 P.2d 81 (1985)).

"A showing of mere negligence or inadvertence is insufficient. *Id.* (citing *Franks*, 438 U.S. at 171, 98 S.Ct. 2674; *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981)).

A warrant may be upheld despite a relevant omission in the affidavit if the omission was not intentional or made with reckless disregard for the truth. *See State v. Cord*, 103 Wn.2d 361, 366–67, 693 P.2d 81 (1985) *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

Here, according to Officer Ponton's report and testimony at the *Franks* hearing, when Officer Ponton asked Mr. Cox at the hospital whether he had any firearms, Mr. Cox did tell him, "No, I sold them all." CP 25, RP 21. Then after Officer Ponton talked with Mr. Cox further and mentioned that he would be getting a warrant, Mr. Cox said there might be two 9 mm magazines in the car and he wasn't sure if he still had the guns for them, but that they might be under the front seat. CP 25, RP 22–23. Then, Mr. Cox asked if he was going to be in trouble for possessing the guns, a fact which Officer Ponton failed to mention in his affidavit. CP 25, RP 23.

This interaction, which was not disputed, shows that Officer Ponton was not reckless in omitting the first statement that Mr. Cox said he sold the guns because it appears clear that Mr. Cox changed his mind and remembered

differently that there might in fact be guns in his vehicle. Further, Mr. Cox expressed that he was concerned about being in trouble for having a firearm.

Moreover, Officer Ponton, put the "omission" in his report for all to see and then testified consistent with his report. This shows he did not intentionally mislead the court by omitting this information in the affidavit. The evidence shows that Officer Ponton did not attach any relevance to the initial statement after Mr. Cox remembered different and showed concerns consistent with guilt.

The omission is not material in this case, it was not made in reckless disregard, and it was not a basis for overturning the warrant. In fact, the trial court did not even make such a conclusion. The omission is not at issue, is irrelevant, and does not support finding of fact no. 9 which misstated Judge Wood's question and Officer Ponton's answer.[2]

D. THE SECOND MODIFICATION IN OFFICER PONTON'S STATEMENT TO JUDGE WOOD POINTED OUT BY MR. COX IS NOT AT ISSUE AND DOES NOT SUPPORT FINDING OF FACT NO. 9.

Judge Wood asked Officer Ponton "Okay and he's admitted he's got a *possible* firearm in his vehicle then, huh?" Officer Ponton responded as follows:

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[2] Finding of Fact no. 9: "When the magistrate (Judge Wood) questioned the Officer during the telephonic affidavit whether Cox admitted he had a firearm in his vehicle, Officer Ponton said yes." CP 11.

> Yeah, he said it would be under the front seat, the front driver's seat, if he did have it. He said there are magazines in the trunk and then in the trunk there would be a gun.

CP 23, RP 36.

Mr. Cox argues that the second modification in Officer Ponton's statement was inaccurate because there was no testimony that Mr. Cox stated the 9 mm magazines would be in the trunk. *See* Br. of Respondent at 8. This statement was not examined during testimony and the trial court never found this statement to be made in reckless disregard for the truth. Mr. Cox did not testify at all and did not testify about this statement.

The testimony was that Mr. Cox stated there might be two 9 millimeter magazines in the car. CP 25, RP 22. Mr. Cox stated further that if he had the guns for the magazines, they might be under the front seat. CP 25, RP 23. The fact of where in the car the magazines would be found is not material to probable cause as they would still be in the vehicle whether under the seat or in the trunk.

Moreover, the court did not find that this statement was made in reckless disregard for the truth and did not rely upon the statement to find that probable cause was lacking. Therefore, the statement is not at issue and is irrelevant. Further, the statement does not support finding of fact no. 9 which misstated and mischaracterized both Judge Wood's question and Officer Ponton's answer.

E. THE RECORD DOES NOT SUPPORT A CONCLUSION THAT OFFICER PONTON'S STATEMENT IN THE AFFIDAVIT FOR THE WARRANT WAS A FALSEHOOD MADE WITH RECKLESS DISREGARD FOR THE TRUTH.

During argument at the *Frank's* hearing, Mr. Cox's own attorney admitted "Again, I'm not saying the officer intentionally did this dishonestly." RP 41. "I have no reason to doubt what he said today. . . ." RP 41. Nevertheless, we have a conclusion that Officer Ponton told a falsehood with reckless disregard for the truth. CP 14.

Officer Ponton's affidavit may not have been airtight, and some of his statements may have been in-artful such that they could be twisted in different directions. Nevertheless, Officer Ponton's affidavit appears to be very consistent with the information he had available to him (CP 35–36, RP 9–23). This shows that his statements in the affidavit were not falsehoods made with reckless disregard for the truth.

Officer Ponton probably should have mentioned in the affidavit that the information he had regarding the possible presence of a gun in the vehicle came from Kep Kepler, the manager of the home for veterans, where Mr. Cox resided. CP 35, RP 11–12, 18, 28–29. Officer Ponton should also have mentioned in the affidavit that Mr. Cox inquired about whether he would be in trouble for possessing the firearm just after stating it would be under the seat if he had it. CP 35, 36. Although this information does not serve to

establish probable cause because it was left out of the affidavit, it does show that Officer Ponton was not stating the information with reckless regard for the truth.

Moreover, Mr. Cox's argument that finding of fact no. 7 tells all is incorrect as it omits a critical fact: Officer Ponton made it clear that Mr. Cox said there was *possibly* a firearm under the seat in his car. Therefore, this finding does not support the conclusion that Officer Ponton misled the court by stating with reckless disregard for the truth that Mr. Cox plainly admitted there was a gun in his vehicle.

A reasonable inference could be made that there was a probability that the gun would be under the seat where the defendant seemed to remember it being and said it might still be. Furthermore, it was demonstrated in the affidavit that the defendant had a prior felony conviction and was therefore prohibited from possessing a firearm.

Although the affidavit did not demonstrate in the clearest terms and beyond a reasonable doubt that there would be a firearm in the vehicle under the seat, there was enough information available such that any doubt should be resolved in favor of the finding of probable cause. "Doubts are to be resolved in favor of the warrant's validity." *State v. Atchley*, 142 Wn. App. 147, 161, 173 P.3d 323 (2007) (citing *State v. Kalakosky*, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993)).

Therefore, the affidavit supported a finding of probable cause and the trial court's ruling suppressing the evidence should be reversed.

II. CONCLUSION

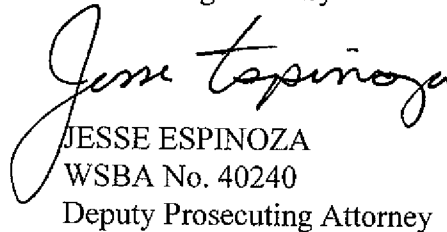
The trial court's conclusion that Officer Ponton told the magistrate, with reckless disregard for the truth, that Mr. Cox stated in definitive terms that there was a gun in his vehicle was not supported by the record. Therefore, the trial court abused its discretion in suppressing the evidence.

For the foregoing reasons, the trial court's conclusion that Officer Ponton made a false statement in the affidavit with reckless disregard for the truth and the order suppressing the evidence should be reversed.

Respectfully submitted this 5th day of May, 2016.

Respectfully submitted,

MARK B. NICHOLS
Prosecuting Attorney



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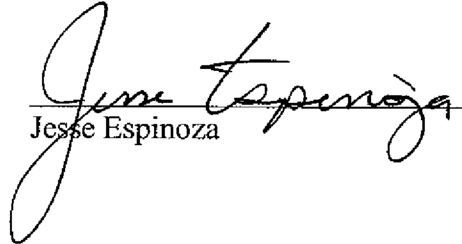

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