

NO. 33724-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DOUGLAS RAY CLINE,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's failure to suppress evidence seized during the execution of a search warrant issued in reliance upon an affidavit that does not establish probable cause violated the defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment.

2. The trial court's failure to order a Franks hearing after the defense met its burden of proving material falsehoods and omissions in the search warrant affidavit violated the defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment.

3. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it denied the defendant's motion for a mistrial after the jury repeatedly saw the defendant under the control of the jail staff.

4. The trial court exceeded the statutory maximum for count I when it imposed community custody without limiting the total sentence to the statutory maximum of ten years.

Issues Pertaining to Assignment of Error

1. Does a trial court's failure to suppress evidence seized during the execution of a search warrant issued in reliance upon an affidavit that does not establish probable cause violate a defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment?

2. Does a trial court's failure to order a Franks hearing after a defendant meets its burden of proving material falsehoods and omissions in the search warrant affidavit violate that defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment?

3. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it denies the defendant's motion for a mistrial after the jury repeatedly sees the defendant under the control of the jail staff?

4. Does a trial court err if it imposes a combined term of imprisonment and community custody that exceeds the statutory maximum for the offense without noting in the judgement and sentence that the combined term of imprisonment and community custody may not exceed the statutory maximum?

STATEMENT OF THE CASE

Factual History

Daryl Lund, a logger who lives in Kelso, owns a motor home in which he once lived when working out of town. RP 254-256.¹ In September of 2001, he told the defendant Douglas Cline and his wife that they could live in his motor home, if they could find a spot to park it. RP 254. Before moving, the defendant and his wife put a number of their possessions in the motor home. RP 277. On September 21, 2001, the defendant and his wife loaded more of their belongings into their cars, and drove to Mr. Lund's house. RP 281-282. Mr. Lund then drove his motor home to the filling station to get gas, and then to a campground to get propane with the Defendant and his wife following in their vehicle. RP 358. After getting the propane, Mr. Lund drove the motor home onto property owned by a person named Chad Gaynor, with the defendant Douglas Cline and his wife leading the way. RP 358. The defendant had met Mr. Gaynor through a mutual friend who worked on the defendant's car. RP 269. The location where Mr. Lund parked his motor home was rural, with Mr. Gaynor's old inoperable truck. RP 359.

¹"RP" refers to the three volume, continuously numbered verbatim reports of three pretrial hearings and the trial. "RPSM" refers to the two volume continuously numbers verbatim reports of the two day suppression motion in this case.

After Mr. Lund parked the motor home then he, the defendant and his wife left in the defendant's car and returned to Mr. Lund's home for dinner. RP 365. They left the windows to the motor home open and the doors unlocked. *Id.* Well after dark the defendant and his wife returned to the motor home. RP 282-286. According to the defendant a few minutes after they entered the residence a number of police officers drove up the driveway and approached the motor home. *Id.* In response, he walked out of the motor home. *Id.*

According to Cowlitz County Deputy Pat Schallert, at about 5:00 p.m. on that same day Chad Gaynor came to the Sheriff's Office with a claim that the defendant and his wife were cooking methamphetamine in a motor home on his property at 294 Sauer Road in Kalama. RP 79-83. He did say that he had told them they could park the motor home at that location but now he wanted them removed. RPSM 9. He gave the Sheriff's office written permission to enter onto his property. RP 83; Exhibit 1. After taking this report, Officer Schallert passed this information to Sergeants Brad Thurman, Sergeant Denny Parkhill, and Officer John Johnston of the Cowlitz-Wahkiakum County Drug Task Force. RP 81.

After receiving the information concerning the alleged methamphetamine lab, a number of officers went out to the location. RP 98-101. Once at 294 Sauer Road, the officers approached the motor home.

RP124-126. As they walked up, the defendant exited the motor home and asked what they were doing. RP 135-140. He also told them that this was private property and they did not have permission to be on it. RP 207-208. The officers then told the defendant that they suspected that he was running a methamphetamine lab. RP 124-127. The defendant denied this claim, but stated that Chad Gaynor did manufacture methamphetamine. *Id.*

At this point, the officers asked for consent to search the motor home. RP 127. The defendant refused. *Id.* During this time, the officers noticed that the motor home was parked near Chad Gaynor's inoperable truck. RP 158. Inside the bed of the truck the officers saw a sack with empty cans of chemicals in it, a sack with dirty dishes in it, used coffee filters, a bottle of heat, some acetone cans and plastic bottles. *Id.* A strong chemical odor was coming from one of the sacks. RP 125-126. In addition, the officer looked thru the windows of the motor home and saw a bottle of Red Devil Lye on the kitchen counter, a white pyrex dish, another bottle Red Devil Lye partially hidden underneath some clothing, and an ice chest. RP 126-127. None of the officers ever claimed that they smelled any chemical odor coming from the defendant, his wife, or from inside the motor home. RP 98-226.

Based on their observations, the officers decided to apply for a search warrant. RP 208. During this process the officers continued to detain the defendant and his wife. RPSM 20. After a few hours the officers secured a

search warrant and entered the motor home, which was cluttered with a number of items. RP 129-154. Inside, the officers found and seized a number of items, including the following: (1) a gallon milk jug and a 64 ounce plastic juice jug, both containing a bi-layer liquids (found inside a blue cooler), (2) a duffle bag on the couch in the living room containing bottles of iodine, along with bottles of heat, muriatic acid, red devil lye, ph test strips, plastic spoons, syringes, and a pyrex dish, and (3) a suitcase containing filters, a pyrex dish, a funnel, pocket scales, PH test strips, plastic bowls, and red stained filters. RP 121-154. Later tests confirmed that the bi-layer liquid in one of the jugs contained methamphetamine base. RP 237-243. After finding these items, along with the bags in the truck, the officers arrested the defendant and his wife. RPSM 54-57.

Procedural History

On September 26, 2001 the Cowlitz County Prosecutor charged the defendant and his wife with one count of manufacture of methamphetamine. CP 1-2. This case later came on for trial with the defendant acting as his own attorney. CP 3-21. Both the defendant and his wife were convicted and appealed. *Id.* Although the court of appeals court affirmed the conviction for the defendant's wife, it reversed the defendant's conviction based upon the trial court's failure to perform an adequate colloquy before allowing the defendant to proceed as his own attorney. *Id.* Thus, the defendant's case was

remanded for a new trial. *Id.*

Prior to the second trial the defendant, now with counsel, filed a motion to suppress evidence and a motion for a *Franks* hearing, arguing that (1) the affidavit given in support of the search warrant did not establish probable cause to search, and (2) the officer giving the affidavit recklessly omitted the fact that the pickup truck with the chemicals in it belonged to Chad Gaynor, was inoperable, and had obviously been sitting on the property for a long period of time, and that the affiant had misrepresented the extent and character of Mr. Gaynor's prior criminal history. CP 39-79, 81-105.

The key portions of the search warrant affidavit stated the following:

At approximately 2045 hrs., I responded to 294 Sauer Rd. in Kalama with three Cowlitz County Deputies. When we arrived at the location, Deputy Bauman advised that he could hear three to four doors and cupboards slamming closed and that he observed a male coming from the area of the bathroom and cupboards. When we came to a stop, the male came out of the motor home and identified himself as Douglas Cline. I could see that there was a female laying on the couch in the motor home. The female came out and identified herself as Suzanne Lee Lindquist DOB: 12/21/56. The female did not have any identification with her. This female was later identified with a booking photo as Virginia Ann Starry DOB: 02/07/55, and it was found that STARRY had felony warrants out of her arrest. Both CLINE and STARRY refused to give consent to search the motor home and denied that there was a methamphetamine lab inside the motor home.

While there at GAYNOR's property, I walked around the motor home. Through unobstructed windows, I observed, inside the motor home, a bottle of Red Devil Lye on the kitchen counter and another bottle of Red Devil Lye concealed under clothing on the couch. Next to the bottle of Red Devil Lye, I observed a white Pyrex dish. I could

not see if there was anything in the dish. I also observed a cooler in the middle of the floor along with a fan and light. Directly outside the door of the motor home, I observed a brown paper bag in the bed of an old Ford Pickup. Inside the bag, I observed some coffee filters, 1 bottle of Heat, 2 cans of starting fluid, and 2 cans of what appeared to be acetone. There were also two plastic bottles inside this bag that had a large amount of condensation inside. Due to the toxic nature of methamphetamine labs, I did not remove the bottles from the bag to see what kind of liquid was inside. Deputy Sgt. Brad Thurman also located two propane bottles across the road approximately 40 feet from the motor home.

Based upon my training and experience, the items observed in the motor home and the bed of the Ford Pick up are indicative of manufacturing methamphetamine. I have personally observed all of these items in methamphetamine labs during past investigations. All of these items are consistent with either the red phosphorous, as well as, anhydrous ammonia/alkaline metal processes of methamphetamine manufacture.

CP 73-74.

At a later hearing on these motions the state called four witnesses, including Officer John Johnston who had signed the affidavit given in support of the request for the search warrant. RPSM 55-56. In his testimony Officer Johnston admitted that in his opinion his observations of items in the trailer did not raise to the level of probable cause although he believed that these observations in conjunction with the items he saw in the pickup did amount to probable cause. RPSM 19-20. Following this testimony and extensive argument, the trial court denied both motions. RP 136-148.

The case later came on for trial with the state called seven witnesses, who testified to the facts contained in the preceding *Factual History*. RP 78-

263. During trial the defendant, who was in custody, complained that a number of jurors has seen the jail guards transporting him from the holding cells to the court room. RP 195. In fact, the bailiff confirmed this fact and later gave the following written statement confirming this fact.

I was walking jurors #4 and #13 (the alternate) who were the last two jurors to return from lunch to Jury Room #2. I looked straight ahead and saw an officer and the defendant, Mr. Cline, in the holding tank area. I continued to escort the two jurors into the jury room, closed the door, and walked down the hall to where Judge Stonier was standing and related the incident to him.

CP 195.

Following the presentation of the state's evidence the defendant took the stand as the first witness for the defense. RP 268-269. When he did, a jail guard followed him up to the witness stand and stood behind him in the corner of the courtroom until the end of his testimony, at which time the guard accompanied the defendant back to his seat. RP 319. During the next break the defense again objected based upon the jail guard's actions and the impression it gave to the jury, along with the previous view two jurors had of the defendant in the holding cells with a jail guard. RP 319-32.

In his testimony, the defendant stated that the cooler and bag containing the drug items had not been in the motor home when it was first parked and that he first saw them when he and his wife returned to the motor home just a few minutes before the police arrived. RP 295. Following the

defendant's testimony the defense called four other witnesses including Mr. Lund, the owner of the motor home, and Mr. Grimsbo, a forensic scientist. RP 352-379. Mr. Grimsbo testified that he had performed tests on the inside of the trailer and that had anyone manufactured methamphetamine inside the trailer he would have found residue of that process. RP 386-397. He found no such residue. *Id.*

During the presentation of the defendant's case the defense renewed its motion for mistrial informing the court that jurors had again seen the jail guard taking the defendant to the holding cells. RP 322-323 The court again denied the motion. RP 323. Following the close of testimony the court instructed the jury, with the defense objecting to the court's use of an accomplice instruction. RP 428. The parties then presented the oral arguments without objection and the jury retired for deliberation. RP 429-463. The jury later returned a verdict of guilty. CP 212. The day following the trial the court sentenced the defendant to the statutory maximum of 120 months in prison with 9 to 12 months community custody. CP 214-223. The defendant thereafter filed timely notice of appeal. CP 225.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO SUPPRESS EVIDENCE SEIZED DURING THE EXECUTION OF A SEARCH WARRANT ISSUED IN RELIANCE UPON AN AFFIDAVIT THAT DOES NOT ESTABLISH PROBABLE CAUSE VIOLATED THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment search warrants may only be issued upon a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582, 585 (1999); *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). In order for the judge, rather than the requesting officer, to make that determination, the affidavit must state the underlying facts and circumstances so that the judge can make a “detached and independent evaluation of the evidence.” *Id.* “Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” *Id.*

In 2001, Judge Morgan of Division II of the Court of Appeals emphasized that there is no probable cause to search unless the facts in the affidavit prove *two* nexus. *State v. Johnson*, 104 Wn. App. 489, 17 P.3d 3 (2001). There must be both “a nexus between criminal activity and the item

to be seized” and “a nexus between the item to be seized and the place to be searched.” *Id.* (quoting a different case). This means that any search warrant affidavit “must contain facts from which to infer (1) that the item to be seized is probably evidence of a crime, and (2) that the item to be seized will probably be in the place to be searched when the search occurs.” *Id.*

When a search warrant is challenged, the reviewing court performs a de novo evaluation of the warrant and affidavit, examining them in a commonsense manner. *State v. Perez*, 92 Wn.App. 1, 963 P.2d 881 (1998). Although the reviewing court is to give deference to the issuing judge, it must find the warrant invalid if the information on which the warrant is based is not sufficient to establish probable cause. *Id.*

Under Washington Constitution, Article 1, § 7, the information provided in support of an application for a search warrant still must satisfy the two-pronged *Aguilar-Spinelli* test. *State v. Jackson*, 102 Wn.2d 432, 436-38, 443, 688 P.2d 136 (1984); *State v. Bauer*, 98 Wn.App. 870, 991 P.2d 668, 671 (2000); *State v. Ibarra*, 61 Wn.App. 695, 698, 812 P.2d 114 (1991). There is no probable cause to issue the warrant unless the affidavit establishes both that the informant is credible and believable *and* that the informant had a reliable basis for the information provided. *E.g., Bauer*, 991 P.2d at 671; *Ibarra*, 61 Wn. App. at 698. In order to allow the judge, not the police, to decide if there is probable cause to issue the warrant, the affidavit must state

the facts that led the officer to conclude that the informant was credible and believable and that the informant had obtained the information in a reliable way. *Jackson*, 102 Wn.2d at 436-37. Each prong of the test has an independent status; both must be satisfactorily established as a deficiency in one cannot be made up by a surplus in the other. *Jackson*, 102 Wn.2d at 437; *Bauer*, 991 P.2d at 671. Without both, there is no probable cause to issue the warrant. *Bauer*, 991 P.2d at 671; *Ibarra*, 61 Wn. App. at 698.

If the information in the affidavit fails to satisfy “either prong, the warrant fails unless independent police investigation corroborates the tip to such an extent that it supports the missing elements of the test.” *Bauer*, 991 P.2d at 671. Any such police investigation will not establish probable cause to search unless it uncovers “suspicious activities or indications of criminal activity along the lines suggested by the informant”; corroboration of innocuous or non-criminal information is insufficient. *State v. Huft*, 106 Wn.2d 206, 210, 720 P.2d 838 (1986); see *State v. Duncan*, 81 Wn.App. 70, 76-78, 912 P.2d 1090 (1996).

In the case at bar, the affidavit does *not* establish the credibility of Mr. Gaynor, nor does it establish that he has a sufficient basis of knowledge to recognize the “smell” of a methamphetamine lab. In fact, the trial court agreed on the credibility issue. However, even including Mr. Gaynor’s observation, the affidavit does not establish probable cause to search the

motor home for a methamphetamine lab. The following sets out these arguments.

According to the affidavit, Mr. Gaynor smelled a “strong ether smell.” The affidavit does not state anywhere that such a smell is actually associated with active methamphetamine labs, and undersigned counsel does not know that it actually is. Without a presentation, based on facts, to the magistrate that such a smell is produced by methamphetamine labs, Mr. Gaynor’s observation provides absolutely no probable cause to search. If methamphetamine labs do produce such a smell, Det. Johnston could have indicated that he knows that they do, based on either experience at actual methamphetamine labs or based on training. Det. Johnston made no such claim in the affidavit.

According to the affidavit, the only items that Det. Johnston actually saw in the motor home were two bottles of lye, a pyrex dish, a cooler, a fan, and a light. There is no claim in the affidavit that these items were set up in some particular way or fashion that is typical of a methamphetamine lab or even that these items were near to each other. These items, either alone or together do not furnish probable cause to believe any crime is occurring anywhere, and certainly do not provide probable cause to believe a crime is happening in the motor home. None of the items are contraband, and all would be commonly found in a residence or in a motor home. Lye is the only

item mentioned that has a particular use in one method of manufacturing methamphetamine, to neutralize the acidic solution produced by the combination of red phosphorous and iodine with pseudoephedrine. However, lye, as a strong caustic, has many other uses, such as cleaning drains and making soap and is commonly sold to the public.

If Det. Johnston had also observed phosphorous in the motor home or other items associated with that particular method of manufacturing, the presence of the lye might have contributed to probable cause to search the motor home for a lab. However, by itself, it is not enough to create such probable cause. The fact that there was a pyrex dish present is hardly indicative of a lab, as the motor home contained a kitchen. Further, a cooler is exactly what one would expect to find in every motor home being used by vacationing or camping citizens. The fan and the light are similarly innocuous.²

Even more problematic is that the warrant never explains *why* Det. Johnston reaches the conclusion that these items somehow contribute to probable cause to believe a methamphetamine lab is present in the motor

²It is worth noting that a warrant that describes (even with precise particularity) items that are neither evidence of a crime nor contraband is illegal as overbroad. *State v. Maddox*, 116 Wn. App. 796, 805, n.21, 67 P.3d 1135 (Div.2, 2003). Thus, if the affidavit does not provide probable cause to believe that these items were evidence or contraband, then the warrant fails both for a lack of probable cause and for overbreadth.

home. Lye is listed in one of the boilerplate paragraphs earlier in the warrant, but without any explanation of how or why it is used in the manufacture of methamphetamine or how Det. Johnston learned that it is, in fact, so used (if he did learn this). The other items are not listed as being typically or even sometimes present in anyone's training or experience.

The items found in the bed of the pickup truck do not and cannot create probable cause to search the motor home for a methamphetamine lab. The affidavit does not connect the truck to the motor home or to Mr. Cline in any way. The magistrate therefore had no basis to believe that the items in the truck were linked to the motor home. It would be more reasonable and logical to believe that these items were connected to the rest of the property at that address and to the owner of that property, as the motor home had only arrived there a few hours before.

Further, the items themselves, though more closely related to methamphetamine manufacturing than the innocuous items seen in the motor home, are not clearly and necessarily evidence of a lab. The Heet and starting fluid are sometimes used during one part of the manufacturing process. However, that is clearly not their only use, and unless they are found in combination with other items that together can be used *only* for manufacturing methamphetamine, their presence does not create probable cause to believe a lab is present anywhere. The additional presence of

acetone would *begin* to lead to that conclusion, but Det. Johnston was not even sure that he saw acetone. The coffee filters, *if they were stained certain colors or contained certain chemicals*, would also tend to lead to that conclusion, but Det. Johnston did not observe any such stains or chemicals.

Again, the affidavit fails to explain why or how these items would be used to make methamphetamine. Acetone, Heet, and starting fluid are not even on the list of ingredients mentioned in the earlier (very general) boilerplate paragraph discussing methamphetamine labs. Within that paragraph there is no explanation of how the items mentioned are used to make methamphetamine or why such items would be found at methamphetamine labs, nor is there any explanation as to how Det. Johnston supposedly gained this information.

The simple observation of these items in a paper sack does not create probable cause to believe there is a methamphetamine lab present. Even if it did, it certainly does not create probable cause to believe that a lab was present *in the motor home*. Instead, if there was probable cause at all, it would be to believe that a lab was present in the truck or elsewhere on the property, *not* in the motor home which had just arrived there.

The affidavit claimed probable cause to search the motor home based on Mr. Gaynor's "sniff," the items seen inside the motor home, and the items found in the pickup truck. Those observations do not create probable cause

to search the motor home, either individually or together. Indeed, the use of Mr. Gaynor's claimed "sniff" of ether in the affidavit is also difficult to justify as the officer himself was present in the same place and did not claim to have smelled any chemicals. However, the information Mr. Gaynor provided also should not be considered because the affidavit fails to establish either his veracity or his basis of knowledge. The following presents this argument.

When determining whether an affidavit satisfies the veracity or reliability prong, Washington courts distinguish between different types of informants, requiring differing types and quantities of reliability evidence for each type. Beginning in *State v. Northness*, 20 Wn. App. 551, 582 P.2d 546 (1978), Washington courts began referring to four broad categories of informants. Those categories of informants were: (1) completely anonymous, (2) identity known to police but not revealed to the magistrate, (3) identity (which means name *and address*) disclosed to the magistrate, and (4) eyewitness providing information in exigent circumstances. *Id.* "Category 2" has the following two subcategories to which different reliability requirements apply: (I) criminal/professional informants, and (ii) private citizen informants. *Id.*

Some cases have held that when the search warrant application relies upon a truly non-involved, fully identified, citizen informant who is

providing information only to serve the public good, then the requirement of a “track record” of providing truthful information is relaxed, as it would be neither available or as necessary. *Ibarra*, 61 Wn. App. at 699; *Bauer*, 991 P.2d at 671. The standard is relaxed on the theory that a true non-involved fully identified citizen informant is less likely to be passing on rumors or conjectures, is less likely to be an anonymous troublemaker, and is less likely to provide information “colored with self-interest” in an effort to help himself or herself. *State v. Rodriguez*, 53 Wn. App. 571, 574-75, 769 P.2d 309 (1989). However, when the informant does not fit into the fully identified citizen category or when circumstances suggest the informant is involved in the crime or does have a motive to provide false information or might be making claims to “spite” the defendant, then the informant should instead be subjected to more rigorous credibility evaluation. *See Rodriguez*, 53 Wn. App. at 575-76.

In this case, it is clear, even from the minimal information provided in the affidavit, that Mr. Gaynor is an informant from the criminal milieu, either involved in the crime himself or with some other motive to spite the defendant. The affidavit attempts to make Mr. Gaynor out to be a solid concerned citizen. However, Mr. Gaynor claims to have let two people whom he only met that day park a motor home on his property and live in it. Mr. Gaynor did not even know the last names of these people. What Mr.

Gaynor did know is that there were active warrants for one of the people and that she was actively trying to avoid the police.

These circumstances, including being involved in harboring a fugitive, did not apparently bother Mr. Gaynor. These claims either reveal Mr. Gaynor to be involved in criminal activity or reveal him to be lying about how much he knows about the people in the motor home. If true, these facts reveal to the magistrate that Mr. Gaynor is involved in criminal activity with the people in the motor home. It leads inevitably to the question of what Mr. Gaynor was receiving to allow an unknown fugitive to stay on his property, and whether some dispute over compensation led to his accusations against the motor home's occupants. Assuming (as seems reasonable) that Mr. Gaynor's claims reveal involvement in some common criminal enterprise, his sudden accusation to the police raises a serious question of whether he had some other dispute or falling out with the motor home occupants, leading to his effort to get them arrested.

The further claims of Mr. Gaynor to be intimately familiar with methamphetamine manufacturing (and to have been to prison for methamphetamine related crimes) also reveal Mr. Gaynor to be from the criminal milieu with an even bigger motive to blame someone else for the lab materials on his property. If Mr. Gaynor had been involved in manufacturing methamphetamine himself, he would have a very strong motive to blame

another if someone discovered his illegal actions. The claims in the affidavit strongly suggest such a motive.

Mr. Gaynor's obvious connection with past and current criminal activity and his possible motives to provide false information mean that he must be treated as a criminal informant, not as an identified citizen informant. This means that the affidavit in this case needed to provide independent and objective evidence that Mr. Gaynor had an established track record for truth telling and reliability. Without such a track record, Mr. Gaynor's information fails the reliability prong and cannot be considered as part of the probable cause for the warrant.

A conclusory statement that the informant is reliable and has proven reliable in the past is insufficient to establish the required veracity or credibility prong. *State v. Woodall*, 100 Wn.2d 74, 666 P.2d 364 (1983). The affidavit must recite actual facts that allow the issuing judge to determine for himself or herself that the informant is actually credible or believable. *Woodall*, 100 Wn.2d at 77-78. It is not enough for the officer to assert that the informant has provided reliable information in the past without providing more factual detail to allow the judge to draw that conclusion or the opposite one. *See Woodall*, 100 Wn.2d at 77-78 (quoting LaFave).

The affidavit contains absolutely no such "track record," not even the traditional conclusory claim that the informant has proven reliable in the past.

Det. Johnston does not make any claims about whether Mr. Gaynor has told the truth in the past, to the police or to anybody else. Nor does the affidavit recite any claims made by Mr. Gaynor that the police were then able to confirm. This is often done in drug search warrants: the informant will claim that a particular person sells drugs, and the police confirm this claim based on prior knowledge or based on a controlled buy using the informant. Nothing even approaching that is done in the warrant in this case.

In fact, the only half-hearted attempt at establishing such reliability suggests that Mr. Gaynor was *not* being truthful. Mr. Gaynor claimed to have been around methamphetamine labs and to have been sent to prison for such involvement. The affidavit recites that the police checked Mr. Gaynor's criminal history and found that "he has been to prison in Washington for Violations of the Uniform Controlled Substances Act." This laborious wording shows that the police were not actually able to confirm Mr. Gaynor's claim. There are hundreds of possible violations of the Uniform Controlled Substances Act involving hundreds of drugs. The affidavit therefore does not confirm that Mr. Gaynor was telling the truth, as it does not say that he went to prison for manufacturing methamphetamine or even for any meth-related crime. Instead, he went to prison for some unspecified drug crime, which could involve literally hundreds of other drugs. This strongly suggests that Mr. Gaynor's true criminal record did *not* actually support his claims, but that

the police were trying to make it appear that it did, by describing it in very vague terms.

Even when an informant is named in the search warrant affidavit, the police must demonstrate the veracity or reliability of the informant. *Bauer*, 991 P.2d at 671-72; *State v. Duncan, supra*; *State v. Franklin*, 49 Wn. App. 106, 109, 741 P.2d 83 (1987). As *Bauer* held, the police must interview the informant, *and* the police must also discover and recite background facts proving credibility and the lack of a motive to falsify. 991 P.2d at 671. “The affiant must supply enough additional information to support an inference that the informant is telling the truth.” *Bauer*, 991 P.2d at 671; *see State v. Huft, supra*. The required background investigation should inquire into the informant’s criminal history, the length of the informant’s citizenship in the state and community, voter registration status, *and the informant’s reason for being present at the crime scene*. *Bauer*, 991 P.2d at 672.

Quite obviously, the affidavit in this case does not provide such a background investigation into Mr. Gaynor. The affidavit does not even establish Mr. Gaynor’s address. Mr. Gaynor claimed to be the property owner, but the police did not confirm this claim, nor did they determine whether Mr. Gaynor lived there or elsewhere. In fact, the affidavit does not provide any investigation at all; the police appear to have been completely uninterested in whether Mr. Gaynor was actually reliable and telling the truth.

Even more obviously, the affidavit completely avoids any discussion of why Mr. Gaynor was present at the crime scene or why he was allowing fugitives to stay on his property. By avoiding these issues, the affidavit completely fails to eliminate the strong possibility that Mr. Gaynor had a motive to provide false information, either to minimize his own culpability or to settle some score.

The affidavit raises more questions about Mr. Gaynor's credibility than it answers. The affidavit completely fails to satisfy the required credibility prong, and the evidence gathered while serving the warrant must be suppressed. Similarly, the affidavit fails to establish a basis of knowledge for Mr. Gaynor. Rather, the affidavit in this case relies on Mr. Gaynor's conclusory claim that he smelled an methamphetamine lab in the motor home. However, the affidavit is fatally deficient in that it does not present sufficient facts to allow a magistrate to determine that Mr. Gaynor had a reliable basis of knowledge for the conclusion that a methamphetamine lab was present in the motor home. This is because the affidavit sets forth completely insufficient facts regarding whether Mr. Gaynor had the requisite skill, training, or experience to identify a methamphetamine lab by smell.

It is certainly possible that Det. Johnston does have sufficient expertise and ability to identify a methamphetamine lab by some distinctive odor (although the affidavit does not even provide sufficient specific

information regarding Det. Johnston's basis of knowledge). Even if the affidavit did establish Det. Johnston's expertise to identify a meth lab by smell or otherwise, the detective did not smell the odor described by Mr. Gaynor, at the time Mr. Gaynor smelled it or later. More importantly, Det. Johnston did not, in the affidavit, conclude or opine that the smell described by Mr. Gaynor was, in fact, a conclusive or even possible indicator of the presence of a methamphetamine lab. The affidavit thus relies on Mr. Gaynor's conclusion that a lab is present in the motor home itself; Det. Johnston's experience is completely irrelevant.

As noted above, an affidavit for a search warrant must set forth "the underlying circumstances from which the informant drew his conclusions so that a magistrate can independently evaluate" the informant's basis of knowledge, not simply rely on the informant's conclusions. *State v. Wilke*, 55 Wn.App. 470, 778 P.2d 1054 (1989); *see Ibarra*, 61 Wn. App. at 701-02. An informant's conclusion that he or she observed illegal drugs in a particular location must be supported by a particularized showing that the informant has the ability to identify such drugs, including a detailed recitation of how that ability was acquired. *Ibarra*, 61 Wn. App. at 702; *Wilke*, 55 Wn. App. at 476.

There are no facts set forth in the affidavit which would allow the magistrate to *independently determine* that Mr. Gaynor can identify

methamphetamine labs by smell. Neither are there facts set forth to allow the magistrate to independently determine that the cursory description of the odor provided by Mr. Gaynor truly matches a description of what a methamphetamine lab smells like. This is because the affidavit (strangely, given the facts alleged) completely fails to set forth a description of typical or possible methamphetamine lab odors. Det. Johnston claims to have been to methamphetamine labs, but offers absolutely no specific description of manufacturing methods, ingredients, equipment, or odors. Finally, Detective Johnston does not even state in the affidavit that the description of the odor described by Mr. Gaynor is consistent with or the same as the odor of an actual methamphetamine lab.

Det. Johnston himself makes a conclusory claim that the items he observed are “indicative of manufacturing methamphetamine.” Again, such a conclusory claim cannot form the basis of probable cause to search unless the affidavit sets forth facts from which the reviewing magistrate can independently determine whether the affiant has the requisite basis of knowledge to reach such a conclusion.

Det. Johnston’s affidavit completely fails to set forth specific facts about how many methamphetamine labs he has investigated, what specific items he has found at those labs, how those items are actually used to manufacture methamphetamine, why (or if) certain innocuous items found in

particular combinations are conclusive or probable indicators of a methamphetamine lab. The only “detailed” recitation regarding his methamphetamine lab expertise is part of the boilerplate paragraphs. Those two paragraphs are not specific to Det. Johnston and actually contain inaccuracies. Those paragraphs do refer to methamphetamine as a “narcotic” and fail to differentiate between two quite different manufacturing methods.

Most importantly, neither do the paragraphs provide any specific training or experience regarding the particular items observed by Det. Johnston. No part of the affidavit provides a factual basis of knowledge to support the conclusion that those particular items are methamphetamine lab components. The paragraph in which Det. Johnston sets forth his conclusory assertion also reads as “boilerplate,” as it does not detail the specific items and how they might be used to make methamphetamine. Instead, it merely asserts that “these items” are consistent with or indicative of methamphetamine manufacturing, with no explanation or proof.

The conclusory claims of Mr. Gaynor and Det. Johnston cannot be independently evaluated. The affidavit fails to provide the necessary information to determine whether either man had a sufficient basis of knowledge to support their claims. Therefore, the basis of knowledge prong is not met in this affidavit, and this court must therefore suppress the evidence.

The information provided by and about the informant in the affidavit is clearly inadequate to meet either prong of the *Aguilar-Spinelli* test. Further, the affidavit also does not provide a sufficient basis of knowledge for even Det. Johnston's conclusions. As noted above, if an "independent police investigation corroborates the tip to such an extent that it supports the missing elements of the test," then the affidavit may still support issuance of a warrant. *Bauer*, 991 P.2d at 671. However, the investigation *must corroborate the specific criminal behavior* alleged by the informant; corroboration of some of the innocuous facts reported by the informant are not enough to save a deficient affidavit. Examples of cases in which fairly extensive corroboration was nevertheless found insufficient include the following: *Duncan*, 81 Wn. App. at 72-73, 77-78; *Huft*, 106 Wn.2d 210-11; *State v. Young*, 123 Wn.2d 173, 196, 867 P.2d 593 (1994); *Franklin*, 49 Wn. App. at 107-09.

Here, the only attempt at police corroboration of Mr. Gaynor's reliability and basis of knowledge was a check of his criminal history, which failed to confirm his claim to have been sent to prison for methamphetamine manufacturing or even some other methamphetamine related crime. Corroboration that a motor home was parked at the location described and occupied by people with the same first names does not corroborate the alleged criminal behavior and does not rehabilitate the flawed affidavit. The

fact that Mr. Gaynor knew the first names of the people in the motor home and knew where it was parked does not confirm that he knew it contained a meth lab. Instead, these are the sorts of innocuous or public facts held again and again to be insufficient corroboration.

The police efforts to confirm the methamphetamine lab *in the motor home* (this was Mr. Gaynor's particular claim and the target of the warrant) also failed. Det. Johnston's affidavit does not claim that the police smelled the same odor as Mr. Gaynor or any chemical odor at all. This is startling, especially since the affidavit recites that Mr. Cline opened the door upon police arrival and came outside and that Ms. Starry came out later. There were thus two opportunities for the presumably well-trained noses of the police to detect the distinctive odor described by Mr. Gaynor, but no odor was detected at all. Far from corroborating Mr. Gaynor's claims, this fact tends to further diminish the probative value of his assertions.

Det. Johnston's observations inside the motor home were of completely innocuous objects: a cooler, a fan, a light, a pyrex dish with no observed contents, and two bottles of lye. He did not observe any bottle of ether. Mr. Gaynor's claim was that the methamphetamine lab was active, that cooking was currently going on, and that smells were being produced. Det. Johnston did not observe the equipment or other items connected to each other or being used to *do* anything. Neither did he see any active processing,

any ongoing operations, or any activity that would produce the smells described. The equipment observed was not set up in any particular way. These observations certainly neither corroborate Mr. Gaynor's claims nor independently establish probable cause to search the motor home. By themselves, these items are not a sufficient basis to obtain a search warrant for a methamphetamine lab, and neither do they confirm Mr. Gaynor's claim. The attempted corroboration is thus completely insufficient as it merely confirms innocuous or public facts. None of the attempted corroboration confirmed the criminal conduct alleged by Mr. Gaynor.

II. THE TRIAL COURT'S FAILURE TO ORDER A FRANKS HEARING AFTER THE DEFENSE MET ITS BURDEN OF PROVING MATERIAL FALSEHOODS AND OMISSIONS IN THE SEARCH WARRANT AFFIDAVIT VIOLATED THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7 AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT.

Ordinarily a judge reviewing a challenged search warrant may only consider those matters that were presented to the magistrate who issued the warrant, that is, the information contained within the "four corners" of the search warrant affidavit. *United States v. Damitz*, 495 F.2d 50 (9th Cir.1974). However, the reviewing court must examine matters outside of the affidavit at an evidentiary hearing when the defendant makes a preliminary showing that the affiant knowingly and intentionally or with reckless disregard for the truth included false statements necessary to the finding of probable cause or

if the affiant with the same mental state omitted material facts. *State v. Garrison*, 118 Wn.2d 870, 827 P.2d 1388 (1992); *Delaware v. Franks*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

Such omissions or false statements are fatal to a search warrant. As Division II of the Court of Appeals has succinctly put it: "An omission or incorrect statement made in support of a search warrant may invalidate the warrant if it was (1) material, and (2) made deliberately or with reckless disregard for the truth." *State v. Herzog*, 73 Wn. App. 34, 54, 867 P.2d 648 (1994). The defendant, in his or her preliminary showing, must allege that the affiant acted deliberately or with reckless disregard for the truth. *Garrison*, 118 Wn.2d at 872.

Once a defendant makes the required preliminary showing, the reviewing court must then insert the omitted matters into the affidavit for the warrant or excise from the affidavit the false statements. *Garrison*, 118 Wn.2d at 873; *State v. Jones*, 55 Wn. App. 343, 345, 777 P.2d 1053 (1989); see *State v. Stephens*, 37 Wn. App. 76, 79, 678 P.2d 832 (1984). If the affidavit, as supplemented or redacted, is insufficient to allow a finding of probable cause, then the defendant is entitled to an evidentiary hearing on whether the material was omitted deliberately or recklessly. *Garrison*, 118 Wn.2d at 873; see *State v. Frye*, 26 Wn. App. 276, 279, 613 P.2d 152 (1980). If after such a hearing, the reviewing court determines that the material was

deliberately or recklessly omitted or included and further determines that the omitted material (or falsely included material) was necessary to a probable cause finding, then the warrant is invalid and all fruits from it must be suppressed. *Herzog*, 73 Wn. App. at 54; *Jones*, 55 Wn. App. at 345; *see Stephens*, 37 Wn. App. at 79; *Garrison*, 118 Wn.2d at 872-874.

In this case, the affirmation of counsel given in support of the motion for the Franks hearing and the testimony given at the suppression motion clearly make the required preliminary showing that truthful material facts were omitted from the affidavit and that false material facts were inserted into the affidavit. Further, this evidence also demonstrates that these omissions and inclusions were made deliberately or with reckless disregard for the truth. It is clear that the omissions and false information regarding Mr. Gaynor's criminal history and the ownership of the truck in which lab items were found had to have been deliberate, as the correct information was known or easily obtainable at the time Det. Johnston wrote the affidavit. Given Washington's standards for evaluation of an informant's information, the missing and false information about Mr. Gaynor's criminal history would have required the issuing magistrate to find that the credibility prong and the basis of knowledge prong were *not* satisfied. The missing and false information about the ownership of the truck would have resulted in a conclusion that the truck was not associated with the motor home, again meaning that the items found

in the truck could not constitute probable cause to search the motor home. Finally, the removal of all of Mr. Gaynor's claims would clearly cripple the entire affidavit.

In 1989, Division II of the Washington State Court of Appeals decided a very similar case in *State v. Jones, supra*. In that case as in this one the information in the affidavit supporting probable cause came from an informant. This informant had previously provided information to the police in another case. However, before the police in *Jones* filed their affidavit containing the informant's statements, the informant recanted the information provided in the prior case. The police, although aware of the recantation, did not inform the magistrate of the informant's recantation. Because of this, the Superior Court found the warrant to be defective and the state appealed. However, the court of appeals affirmed when it found the omitted information clearly vital and necessary to the determination of probable cause because without the information, the magistrate could not render a neutral and detached judgment regarding the informant's credibility. *Id.* The State Supreme Court later criticized *Jones* in the *Garrison* decision, but only regarding the *Jones* court holding that one could infer the required recklessness from the materiality of the omission. 118 Wn.2d at 873. The *Garrison* court did not criticize the *Jones* holding that such an omission is so material as to make the supplemented affidavit insufficient to establish

probable cause.

In this case, as in *Jones*, much of the omitted information goes directly to the credibility of the main source of incriminating information, Chad Gaynor. The omitted information shows Gaynor to be dishonest and disputes his claims regarding methamphetamine expertise. Just as in *Jones*, “the omitted information was vital and necessary for the magistrate to render a neutral, detached judgment in determining [the informant’s] credibility and reliability.” 55 Wn. App. at 347.

As noted in the preceding argument, the probable cause for the warrant was already weak or non-existent. When the affidavit is modified by adding the omitted material and excising the false material, it is clearly insufficient to support issuance of a warrant, except perhaps, a warrant to search Mr. Gaynor’s truck.

Two other *Franks* cases lend support to this conclusion. Persuasive dicta in *State v. Bittner*, 66 Wn. App. 541, 548, 832 P.2d 529 (1992) held as follows: “[I]t was error not to have included in the affidavit that the ‘concerned citizen’ had previously contacted the sheriff’s office because he had been investigated for a crime. This type of information could influence a magistrate’s decision in assessing the reliability of an informant’s tip.” *State v. Stephens* is also helpful. This case is clearly distinguishable from *Frye*, in which some minor “puffing” about the informants was held to be

simply “gilding the lily.” 26 Wn. App. at 280. Here, the omissions and false inclusions were flagrant, extensive, and vital to a fair determination of probable cause. Thus, in the case at bar the trial court erred when it failed to hold an evidentiary hearing to determine whether the officer giving the affidavit had acted intentionally or recklessly.

III. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT DENIED THE DEFENDANT’S MOTION FOR A MISTRIAL AFTER THE JURY REPEATEDLY SAW THE DEFENDANT UNDER THE CONTROL OF THE JAIL STAFF.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment guarantee all defendants a fair trial in front of an impartial jury. *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968); *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). 22. This right to a fair trial includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Crediford*, 130 Wn.2d 747, 927 P.2d 1129 (1996). Indeed, the constitutionally guaranteed presumption of innocence is the “bedrock foundation in every criminal trial.” *Morissette v. United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 96 L.Ed. 288 (1952). It is the duty of the court to give effect to the presumption by being alert to any factor that could

“undermine the fairness of the fact-finding process.” *Williams*, 425 U.S. at 503, 96 S.Ct. 1691.

For example, in *State v. Gonzalez*, 129 Wn.App. 895, 120 P.3d 645 (2005), a defendant convicted by jury of eluding, driving while intoxicated, driving while revoked and hit and run appealed his convictions arguing that the trial court had violated his due process rights to a fair trial and the presumption of innocence when it gave the following preliminary instruction to which the defense objected:

The next thing I want to do, ladies and gentlemen, is read some instructions to you. The first deals with the defendant himself. In criminal cases, it is common practice for the court to set bail for a person charged with a crime or crimes. A person who posts bail is released. A defendant who cannot afford to post bail remains in custody until the case is concluded. All persons held in custody are transported to and from court proceedings by an employee of the Department of Corrections. And that’s the gentleman in the back of the courtroom.

Standard operating procedure of the department requires that a person held in custody must be handcuffed during transport to all proceedings that are conducted outside the Department of Corrections building, which is across the street. In this case, Mr. Gonzalez has been unable to post bail and is being held in custody. Thus, pursuant to the policy I have explained, he will be handcuffed during transport to the courtroom but is not handcuffed at this point, obviously.

The fact that the defendant is in custody has no bearing whatsoever on any determination a jury may reach regarding his innocence or guilt. You cannot, I emphasize, cannot draw any conclusions or in any way be affected by or concerned with the fact that he is transported to court in handcuffs. The manner in which he is escorted to court has nothing to do with him personally but is a policy for which there is no exception.

State v. Gonzalez, 129 Wn.App. at 898.

Specifically the defendant argued the court's announcement (1) that he was in jail because he could not post bail, (2) that he was being transported in restraints, and (3) that he was under guard in the courtroom all impinged upon both his right to an impartial jury and his right to the presumption of innocence. The state responded that (1) there was no error because no juror had seen the defendant in any restraints or being transported to and from the courtroom, and (2) any error was harmless beyond a reasonable doubt. In addressing these arguments the court first noted the following concerning a defendant's right to the "physical indicia" of innocence during trial.

The presumption of innocence guarantees every criminal defendant all "the physical indicia of innocence," including that of being "brought before the court with the appearance, dignity, and self-respect of a free and innocent man." We have previously held that the appearance of shackles or other restraints "may reverse the presumption of innocence by causing jury prejudice," "and thus denying due process.

For these reasons the courts must be alert to any factor that may "undermine the fairness of the fact-finding process." Due process requires the trial judge to be "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."

The court's duty to shield the jury from routine security measures is a constitutional mandate. It follows that only if an inadvertent or unavoidable breach brings the jailed defendant's condition to the attention of the jury may the court give a curative instruction. A preemptive instruction merely creates the problem it purports to solve.

State v. Gonzalez, 129 Wn.App. at 901 (citations omitted).

The court then went on to hold that the trial court had erred when it gave the general instruction.

Instead of preventing Mr. Gonzalez's jury from learning that he was indigent, incarcerated, had been transported in restraints, and was being tried under guard, the judge made a special announcement drawing the attention of the jurors to these points. This was manifest constitutional error. As in *Williams*, the jury's awareness not only of transportation protocols, but also of the presence of uniformed guards throughout the trial, was a continuing reminder that the State perceived Mr. Gonzalez as meriting the trappings--if not the presumption--of guilt.

State v. Gonzalez, 129 Wn.App. at 901-902.

Having found error the court then went on to address the issue of prejudice. The court held as follows on this issue:

In the usual case, a remedial instruction is required to cure an inadvertent juror sighting of a defendant in restraints. We have held that such instructions may be sufficient to cure any prejudice. But this is not the usual case. And there is no principled, analytical way to evaluate the effect of this needless instruction on the entire jury panel at the beginning of this trial. This was a structural error of the sort that defies analysis by harmless error standards.

However strong the government's case, the fundamental right to a fair trial demands minimum standards of due process. When a trial right as fundamental as the presumption of innocence is abridged, however, reversal is required.

State v. Gonzalez, 129 Wn.App. at 904.

In the case at bar the court did not give an instruction such as was given in *Gonzalez*. However, in the case at bar jurors apparently twice saw

the jail personnel transporting the defendant out of the elevator that leads from jail to the court holding cells, and then down a back hallway to the courtroom. This is not surprising as the jurors must use the same back hallway to get to each of the three jury rooms behind the three courtrooms used by the Superior Court in Cowlitz County. In fact, the jail guards must transport in custody defendant directly by each jury room.³ Were this case simply about two inadvertent views of the defendant being transported to and from the jail then, as in *Gonzalez*, the error may have been “sufficient to cure any prejudice.”⁴

Unfortunately this case is not just about two inadvertent views of the defendant being transported to and from the jail via the back hall. Rather these two errors that might have been cured by a timely instruction were exacerbated into an error that could not be cured by an instruction. This occurred when the jail guard who had brought the defendant to the courtroom and who was sitting in the courtroom during the trial got up and escorted the

³Appellant’s description of the holding cells, back hall, and jury rooms in the Cowlitz County Courtroom is not contained in the record in this case except as described in the written statement of the bailiff. *See* CP 195. However, counsel expects that the state will stipulate to the accuracy of the description contained herein. The configuration of this courthouse and the jury rooms has been a chronic problem for many years.

⁴The record does not reflect that the defendant was transport in shackles counsel’s own experience in other cases is that the Cowlitz County Jail does not shackle defendant’s brought to the courtroom for trial.

defendant to the witness stand for his testimony, stood in the corner behind the witness box in the front of the courtroom, and then escorted the defendant back to counsel table after the end of his testimony. This action is more prejudicial than the instruction from *Gonzalez*, which at least stated that the guard's actions were taken pursuant to general jail policy and did not reflect specifically upon the defendant. Here the jury was left to view a defendant who was apparently so dangerous and guilty that he could not be trusted to walk twenty feet to the witness stand and comport himself like a decent human being for the time it took him to testify. More than any general instruction, this action forcefully communicated the state and the court's belief that the defendant was guilty. It seriously impinged upon the presumption of innocence.

In this case, this error is far from harmless beyond a reasonable doubt. The defendant's claim that he had nothing to do with the items found in the travel trailer and that he had just returned to it was supported by a number of facts. First, Mr. Lund corroborated the defendant's time line and the fact that the motor home had just been moved to the site. Second, Mr. Grimsbo's testimony strongly supported an argument that there had been no chemical used in the motor home, thereby supporting an argument that someone had just put them into the vehicle. Third, the officer's themselves did not note any chemical odor coming from either the motor home or the person of the

defendant and his wife. Thus, in the case at bar the state did not present overwhelming evidence of guilt. In light of this balance the state cannot sustain an argument that so serious an error was harmless beyond a reasonable doubt. As a result the defendant is entitled to a new trial.

IV. THE TRIAL COURT EXCEEDED THE STATUTORY MAXIMUM FOR COUNT I WHEN IT IMPOSED COMMUNITY CUSTODY WITHOUT LIMITING THE TOTAL SENTENCE TO THE STATUTORY MAXIMUM OF TEN YEARS.

In the case at bar the defendant was convicted of manufacture of methamphetamine under former RCW 69.50.401(a)(1)(ii). This statute provides:

(a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(1) Any person who violates this subsection with respect to:

. . . .

(ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

RCW 69.50.401(a)(1)(ii).

This statute follows the general patter from RCW 9A.20.021 in which the legislature has set statutory maximums for felonies in Washington State.

This statute provides:

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

RCW 9A.20.021.

Under certain circumstances listed in RCW 69.50.408 the statutory maximum are doubled. This statute states:

(1) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(2) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state

relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(3) This section does not apply to offenses under RCW 69.50.4013.

RCW 69.50.408.

Under subsection (3) the legislature exempts “offenses under RCW 69.50.4013” from the doubling provision of this statute. This provisions states:

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

RCW 69.50.4013.

In the case at bar the defendant has two prior drug convictions: (1) a 1993 Multnomah County, Oregon conviction for “VUCSA -POSS”, and (2) a Clark County, Washington conviction for “VUCSA - POSS AMPH (22MO P). CP 222. Since both of these prior convictions are for possession of a controlled substance, the exception found in RCW 69.50.4013 applies to prevent the RCW 69.50. 408 doubling provision from going into effect. As a result the statutory maximum for the defendant’s offense is ten years.

In this case, the court sentenced the defendant to 120 months in prison

plus 9 to 12 months community custody. Thus, absent good time credits, the combined sentence of imprisonment and community custody may exceed the statutory maximum for the crime. In spite of this, the court did not state in the judgment and sentence that the actual time in custody plus the community custody may not exceed 120 months. As a careful review of the decision in *State v. Sloan*, 121 Wn.App. 220, 87 P.3d 1214 (2004), explains this was error.

In *State v. Sloan, supra*, the defendant pled guilty to three counts of third degree rape and one count of third degree child molestation. All of the offenses are Class C felonies with a statutory maximum of five years in prison each. The trial court imposed sentences of 60 months in prison plus 36 to 48 months community custody on each count concurrent. The defendant then appealed arguing that the terms of community custody exceeded the statutory maximum on each count. However, citing to its decision in *State v. Vanoli*, 86 Wn.App. 643, 937 P.2d 1166 (1997) the court rejected this argument. In *Vanoli* the court addressed the same argument and noted that given the realities of good time and early release a person sentenced to the statutory maximum confinement would probably be released prior to serving the statutory maximum. Thus, time would still be available within the statutory maximum for serving community custody.

While the court in *Sloan* rejected the defendant's argument that the

trial court had exceeded the statutory maximum at sentencing it did not deny the defendant any relief at all. Rather the court recognized that the statutory maximum would be exceeded if a defendant did serve the entire sentence in custody or if the amount of earned early release was less than the term of community custody. Given this possibility the court remanded the case for the trial court to include specific instructions in the judgment and sentence that the combined term of imprisonment and community custody could not exceed the statutory maximum. The court held:

Sloan argues Vanoli was wrongly decided. She contends an individual who has served the statutory maximum may be nevertheless forced to comply with conditions of community custody, and may be jailed for non-compliance if her community corrections officer fails to appreciate the situation. While we are inclined to give CCOs more credit than this, we recognize that sentences like Vanoli's and Sloan's may generate uncertainty in some circumstances. To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum.

"Where a sentence is insufficiently specific about the period of community placement required by law, remand for amendment of the judgment and sentence to expressly provide for the correct period of community placement is the proper course." *State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997). Accordingly, we remand for clarification of Sloan's judgment and sentence.

State v. Sloan, 121 Wn.App. at 223-224.

In the case at bar, just as in *Sloan* the trial court imposed an incarceration term at the statutory maximum for the offense. The court also

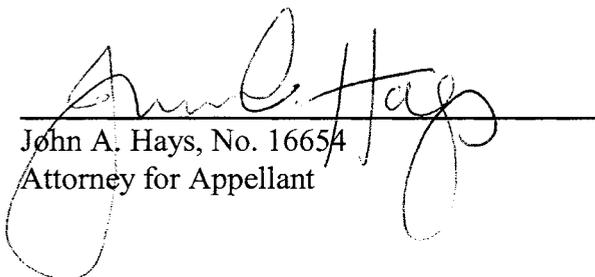
imposed a term of community custody that will exceed the statutory maximum when combined with the actual term of incarceration the defendant serves unless his good time exceeds his community custody. Finally, as in *Sloan*, the court in this case failed to include any language in the judgment and sentence that limited the combined actual term of confinement and community custody to the statutory maximum for each offense. As a result, this court should remand this case with instructions that the trial court modify the judgment and sentence to include that language mandated by *Sloan*.

CONCLUSION

The trial court erred when it denied the defendant's motion to suppress evidence. As a result this court should vacate the defendant's conviction and remand with instructions to grant the motion. In the alternative this court should vacate the conviction and remand for a trial in which the jury is not exposed to the facts surrounding the defendant incarceration and for a *Franks* hearing. Finally, the case should be remanded with instructions to clarify the judgment and sentence to assure that the sentence imposed does not exceed 10 years.

DATED this 17th day of July, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 69.50.401(a)(1)

(a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(1) Any person who violates this subsection with respect to:

(i) a controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

(ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(iv) a substance classified in Schedule IV, except flunitrazepam, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;

(v) a substance classified in Schedule V, is guilty of a crime and

upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

RCW 69.50.408

(1) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(2) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(3) This section does not apply to offenses under RCW 69.50.4013.

RCW 69.50.4013

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

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

STATE OF WASHINGTON,)
 Respondent,)
 vs.)
 DOUGLAS RAY CLINE,)
 Appellant.)

NO. 01-1-00972-6
 COURT OF APPEALS NO: 33724-0-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
 COUNTY OF COWLITZ) ss.

CATHY RUSSELL, being duly sworn on oath, states that on the 17TH day of JULY, 2006, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR
 COWLITZ COUNTY PROSECUTING ATTORNEY
 312 S.W. 1ST STREET
 KELSO, WA 98626

DOUGLAS R. CLINE #294427
 OLYMPIC CORRECTION CTR
 11235 HOH MAINLINE
 FORKS, WA 98331

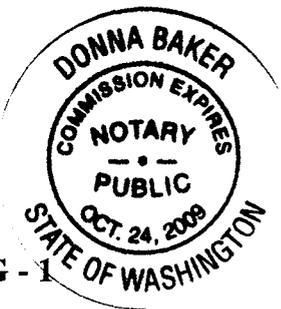
and that said envelope contained the following:

1. BRIEF OF APPELLANT
2. SECOND SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
3. AFFIDAVIT OF MAILING

DATED this 17TH day of JULY, 2006.

Cathy Russell
 CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 17th day of JULY 2006.



D. Baker
 NOTARY PUBLIC in and for the
 State of Washington,
 Residing at: LONGVIEW/KELSO
 Commission expires: 10-24-09