

ORIGINAL

NO. 35397-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM OLIN,

Appellant.

M

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-01853-4

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Clayton Longacre
Ste. F, 569 Division St.
Port Orchard, WA 98366

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED November 13, 2007, Port Orchard, WA *R. Burdick*
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the application for search warrant established probable cause on its face where the application contained sufficient factual basis to justify issuance of the warrant, the information that there were stolen property and drugs a Olin's house did not become stale in the space of four days, the warrant incorporated the application by reference, and the information given by identified informant Derek Smith satisfied the dictates of the *Aguilar-Spinelli* test?

2. Whether the trial court properly determined that the police did not intentionally or recklessly omit any material information from the application, and properly rejected Olin's untimely attempt to revisit the issue?

3. Whether Olin fails to show that counsel was ineffective for not calling Smith to testify at the *Franks* hearing, where at the time of the hearing he was in custody facing federal charges related to the statement that formed the basis for the warrant, and where, in any event, the trial court found Smith's subsequent story not credible?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On December 3, 2004, William Olin was charged by information filed in Kitsap County Superior Court with one count of manufacturing

methamphetamine. CP 1.

On December 22, 2004, attorney Jonathan Morrison appeared on Olin's behalf. CP 9.

On June 1, 2005, Olin filed a motion to suppress alleging that material facts were omitted from the application for search warrant, that Derek Smith, the individual who provided the information upon which the application was based, lacked sufficient credibility, and that the application was facially insufficient to support a finding of probable cause to search. CP 10.

On August 3, 2005, the parties argued whether Olin had set forth sufficient allegations to warrant an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), as to whether the police had intentionally or recklessly omitted material facts from the warrant application. RP (8/3) 2-5. The trial court set the matter over for decision. RP (8/3) 28.

On August 5, 2005, the court ruled that Olin had met his burden and set the matter over for an evidentiary hearing on the *Franks* issue. RP (8/5) 3-4. Defense counsel Morrison then informed the court that he had hearsay statements that Derek Smith had repudiated his statements to the police. RP (8/5) 5. The court found that this latter submission was not sufficient to warrant a *Franks* hearing. RP (8/5) 7.

On October 3, 2005, the *Franks* hearing was held. Olin called Kitsap County Sheriff's Detective Jon VanGesen, who had interviewed Smith and relayed, and Detective Chad Birkenfeld, who had applied for the warrant, based on VanGesen's report of the interview. RP (10/3) 3, 31.

After hearing the evidence, the trial court summarized Olin's position. RP (10/3) 75. Olin was arguing that Birkenfeld failed to apprise the issuing magistrate of Smith's complete criminal history, that Smith initially gave a false name when he was arrested, that Smith denied knowledge that the truck and its contents were stolen, that Smith denied possession of the methamphetamine lab and the methamphetamine in the truck, and that the price paid for the methamphetamine at the Olin house and the methamphetamine-for-truck trade were not believable. RP (10/3) 75-76.

The court concluded, in light of the statement in the application that Smith was a convicted felon, and in light of the charges Smith was facing at the time of the interview, that the failure to give Smith's full criminal history was not relevant to the magistrate's evaluation. RP (10/3) 76. Likewise, the giving of a false name was also not relevant where Smith almost immediately admitted to his true name. RP (10/3) 77.

The court also found that Smith did not actually deny that he knew the truck stolen considering that stated that he had done similar trades for stolen

property in the past. RP (10/3) 77. Finally, the detectives' testimony refuted the claim that price Smith paid for the meth and the terms of the trade of the stolen truck for drugs were incredible. RP (10/3) 76-78.

The court then held that even if it accepted as material Smith's denial of possession of the methamphetamine and lab, or the unusualness of truck trade, it would not be persuaded that the detectives did or should have entertained serious doubts about Smith's information that there would be methamphetamine or stolen property at Olin's house. RP (10/3) 78. The court set forth the relevant facts:

[Smith] was driving a truck which had recently been stolen in a burglary, that the truck at the time that it was stolen included a canopy that was not with the truck when Mr. Smith was apprehended, that Mr. Smith knew about the canopy, and Mr. Smith placed the canopy in Mr. Olin's garage. This on its face, his story about that part of his possession of the truck, is corroborated by the investigation of the burglary.

With respect to finding methamphetamine at Mr. Olin's house: The information that tends to corroborate that is Mr. Smith's admission; one, that he was a meth user; two, that he used meth just a couple of hours before he was apprehended; and three, that there was meth in the truck when he was apprehended.

RP (10/3) 79. Court could not say that based on the other information the detectives received that they should have concluded that Smith was likely to be lying about these facts. RP (10/3) 79. Smith had just been apprehended on a fairly serious felony elude. RP (10/3) 79. He admitted quite a number of facts about that incident. RP (10/3) 80. The court therefore ruled that Olin

failed to establish that the warrant application should be supplemented with additional facts under *Franks*. RP (10/3) 80.

The court then heard argument on the facial sufficiency of the warrant. RP (10/3) 80-100. The matter was set over for a ruling. RP (10/3) 101.

On October 14, 2005, the court issued its ruling. The court observed that Smith's statement was the only thing connecting Olin's home to methamphetamine or the Craig and Benton burglaries. RP (10/14) 2. It found that two issues were thus presented:

(1) Whether there were sufficient indicia of reliability to have allowed the magistrate to rely on Smith under the *Aguilar-Spinelli*¹ test?

(2) Whether the information provided was sufficient support the full scope of the warrant? RP (10/14) 2.

With regard to the first issue, the court found that it had to answer two questions. The first was whether Smith's observations were trustworthy based on the circumstances and his source of knowledge. In concluding that they were, the court noted that Smith accurately described the exterior of the house, with which VanGesen was familiar, that Smith knew about the missing canopy, that Smith said he had done methamphetamine with Olin and the other individuals at the house two hours before he was arrested while still

¹ *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

high and in possession of methamphetamine. RP (10/14) 3-4.

The second question under *Aguilar-Spinelli* was whether Smith was personally reliable. The court found that he was. Although Smith had not previously worked as a police informant, he was named, he had just been arrested for serious crimes and made several statements against penal interest after being *Mirandized*, and again, he volunteered information about the missing canopy. RP (10/14) 4.

Turning to the scope of the warrant, the trial court again rejected Olin's contentions. The court first noted that Smith stated that he had recently used drugs in the Olin residence, which if accepted as reliable, which the court did, justified searching the house and outbuildings for drugs and paraphernalia. RP (10/14) 5. The court further observed that some, but not all, of the property from the burglaries was found in the truck. Although the canopy was identified as being in the garage, it was reasonable to believe that other proceeds of the burglaries would have been in the house. RP (10/14) 5.

In light of these rulings, Olin's motion to suppress was denied. RP (10/14) 6. Although the parties had been acting under the assumption that Olin would go to trial on stipulated facts if his suppression motion were denied, Olin changed his mind after additional, unrelated, charges were filed. RP (10/14) 6-7. The matter was therefore set over for a trial on December 12,

2005. RP (10/14) 9. Trial was apparently not held on that date.

On November 4, 2005, the trial court entered written findings of fact and conclusions of law on the suppression issues. CP 70.

On February 6, 2006, current counsel, Clayton Longacre, substituted for Morrison on Olin's behalf. CP 73.

On February 15, 2006, Olin filed two declarations, one from Marybrigit Scott and one from Derek Smith, in which it was alleged that Smith did not make the statements attributed to him by VanGesen, and that they were untrue. CP 74, 76.

On March 17, 2006, Olin obtained an order authorizing transcription of the suppression hearing at public expense. CP 81.

On May 5, 2006, the State filed a memorandum regarding Olin's purported desire to rehear the suppression motion. Supp. CP. It noted that Olin originally requested a suppression hearing in March 2005. Olin requested a number of continuances, hearings were eventually held in August and October 2005. After the suppression motion, there were several defense continuances of the trial, the most recent having been granted in March 2006. Olin made an oral motion to reconsider the suppression order on February 13, 2006, based on the declarations of Smith and Scott that were filed at that time. The State pointed out that since that time, although present defense

counsel had represented Olin since at least February 6, 2006, no formal written motion for reconsideration had been filed some three months later. Supp. CP.

The State also argued that under Local Rule 59, any motion for reconsideration would be grossly untimely, and that Olin failed under CrR 7.8 to state a basis for relief. Supp. CP.

On June 7, 2006, Olin finally filed his motion for reconsideration of the court's November 4, 2005 order denying his motion to suppress. CP 82. The trial court rejected Olin's motion for reconsideration. CP 124. Although it found that the motion had not been filed in a timely manner, it nevertheless addressed the merits under CrR 7.8. CP 124.

On the merits, the court found that the Smith declaration did not afford a basis for relief under CrR 7.8(b)(2) (newly discovered evidence) both because the evidence could have been discovered before the suppression hearing with the exercise of due diligence, and because it would not have changed the outcome because the trial court did not find Smith credible because to accept his claim, the court would have to believe that VanGesen fabricated virtually his entire report. CP 125.

On August 28, 2006, Olin went to trial on stipulated facts and was convicted of manufacturing methamphetamine. CP 127-30. The trial court

imposed a standard-range sentence. CP 177-78.

B. FACTS

On December 1, 2004, Kitsap County Sheriff's Detective Chad Birkenfeld applied for a search warrant. The application recited that burglaries of the Craig and Benton homes took place within one and a half blocks of each other and within a 24-hour period, on November 25 and 26, 2004. 3.6 Exh. 1, Complaint for Search Warrant ("Application") at 2. The Craig home was entered through the garage and the burglar took, *inter alia*, ID's, checks, credit cards and a truck. *Id.* The burglar also entered the Benton home through the garage and again stole ID, checks, credit cards and a truck. *Id.* The close proximity in time and place, and the similarity of mode of entry and items taken led the police to believe the same suspects were involved. *Id.*

On November 27, 2004, Derek Smith was arrested after a lengthy chase in which he was driving the stolen Benton truck. Application at 2-6. The green canopy that was on the truck when it was stolen was missing, however. Application at 2-3. Some of the property taken in the Benton burglary was found in the truck. Application at 6. Also found in the truck was methamphetamine and items suspected to be for the manufacture of meth. *Id.*

Detective VanGesen interviewed Smith after his arrest. *Id.* Smith

stated that he had injected methamphetamine with three others – Olin, Adam Graden and Matthew Snyder – at Olin’s house two hours before his arrest. Application at 6-7. Smith paid Snyder \$100 for the methamphetamine, which Snyder manufactured himself. Application at 7.

Smith stated that the Benton truck was at Olin’s house when he got there. *Id.* The canopy had been removed and was Olin’s garage. *Id.* Graden gave Smith the truck in exchange for some methamphetamine. *Id.*

The police had prior experience with numerous burglaries involving Graden, and knew the suspects involved traded stolen property for narcotics. *Id.* They also knew that not all the property from the Benton and Craig burglaries had been recovered. *Id.*

After considering the application, the magistrate issued a search warrant for the Olin residence. 3.6 Exhibit 1 (Search Warrant) at 1-2. The warrant, which incorporated the application by reference, permitted the police to search for the fruits of the burglaries and for evidence of possession of methamphetamine. *Id.*

The following evidence was adduced at the *Franks* hearing held on October 3, 2005.

Detective Chad Birkenfeld testified that before requesting the warrant in this case, he read Deputy Andrews’s initial report and Detective

VanGesen's interview of Smith. RP (10/3) 4. He had not interviewed Smith himself and was not present at VanGesen's interview. RP (10/3) 4. He was not aware that Smith had given a false name; it was not in the report. RP (10/3) 5. He had not reviewed Smith's criminal history outside what appeared in the report. RP (10/3) 6. He never stated in the affidavit that he thought Smith was credible. RP (10/3) 9. He would not normally make such an assertion with a named informant. RP (10/3) 9.

Birkenfeld testified that an eight-ball of methamphetamine was worth \$185 to \$250 on the street. RP (10/3) 10. The price could vary beyond that depending on the parties' relationship. RP (10/3) 11. An eight-ball was 3.5 grams. RP (10/3) 11. Smith's statement that he gave Snyder an eight-ball for \$100 did not seem out of line to Birkenfeld. RP (10/3) 11. Birkenfeld did not include any facts about what the interior of the garage looked like, because there were not any statements about that in VanGesen's interview of Smith. RP (10/3) 11.

If Smith had been a confidential or "true" informant Birkenfeld would have listed any crimes of dishonesty in the affidavit. RP (10/3) 11. He did not consider Smith an informant, but a suspect who had been arrested with evidence of a certain crime and who was pointing to further evidence of the same crime. RP (10/3) 11. The deputies had not made any promises to Smith. RP (10/3) 15. They did not pay him. RP (10/3) 15.

Birkenfeld was not concerned about Smith's veracity. RP (10/3) 16. Nothing Smith told VanGesen struck Birkenfeld as odd or fictitious. RP (10/3) 16.

According to the statement Smith acquired the bags containing the methamphetamine seized by the police after trading the last of his methamphetamine for the truck. RP (10/3) 19. Birkenfeld included the fact that Smith said he got the stolen truck from Graden at Olin's house in the affidavit. RP (10/3) 21. Birkenfeld did not include Smith's statement that he had traded the remainder of his methamphetamine to Graden for the truck, because he did not recall Smith stating how much meth he traded for the truck RP (10/3) 21. Birkenfeld was aware of, but did not include Smith's denial that the meth lab in the truck was his. RP (10/3) 22.

Birkenfeld had three binders of reports resulting from his follow-up investigation of the burglaries. RP (10/3) 22. He did not have the binders before presenting the affidavit. RP (10/3) 23. He did follow-up for several weeks after the warrant was issued. RP (10/3) 23.

The defense alleged that Smith had falsely claimed that that canopy was at Olin's when in fact it was at Dammick's. RP (10/3) 27. Birkenfeld responded that Olin's then live-in girlfriend Ronda Levin had corroborated Smith's version. RP (10/3) 27. Other witnesses stated that the canopy had

originally been at the Olin house and then moved to Dammick's. RP (10/3) 28.

The police ultimately concluded that the burglaries had been committed by Smith and Graden. RP (10/3) 28. Olin was not implicated as being a burglar himself. RP (10/3) 28. The further investigation all came after the warrant was applied for, however. The only documents Birkenfeld had at the time he executed the affidavit were Andrews's incident report and VanGesen's report of his interview of Smith. RP (10/3) 28.

Birkenfeld did not perform any further investigation himself before the warrant, although he did have, at that time, case files open on burglaries that Graden and Smith had performed together. RP (10/3) 29. So there was corroboration through another investigation. RP (10/3) 29. Birkenfeld did not put this information in the affidavit. RP (10/3) 29.

On questioning by the trial court, Birkenfeld clarified that he briefly spoke with Andrews and VanGesen before he submitted the affidavit. RP (10/3) 30. Andrews let Birkenfeld know a few days after the incident which personal property of the victims they had recovered. RP (10/3) 30. The items not recovered were listed as the items sought in the search warrant. RP (10/3) 30. Birkenfeld also learned around that time that VanGesen was planning to interview Smith. RP (10/3) 30. VanGesen orally told Birkenfeld

what he learned in the interview, and shortly thereafter Birkenfeld got his written report. RP (10/3) 30.

Detective Jon VanGesen testified that he was called to the scene after the truck had been immobilized. RP (10/3) 32. He was called in because the deputies had located items suspected to involved in the manufacture of methamphetamine. RP (10/3) 32.

He interviewed Smith the day after the incident. RP (10/3) 33. The focus of the interview was the eluding incident and his activities that day. RP (10/3) 33.

They clarified the location and the layout of the house early on in the conversation, so VanGesen could be sure they were talking about the house that VanGesen was familiar with. RP (10/3) 56. The garage was located under the house. RP (10/3) 57. VanGesen had been there before. RP (10/3) 57. Smith never described entering the house or where they were sitting. RP (10/3) 57.

At first, Smith was not sure whether his day began at his mother's house or Dammick's. RP (10/3) 34. After discussing the events of the day, Smith became more certain he started at Dammick's. RP (10/3) 34. He took a cab from Dammick's house to Olin's. RP (10/3) 34. VanGesen did not confirm that with the cab company. RP (10/3) 34.

VanGesen generally found Smith to be credible. RP (10/3) 34. When VanGesen asked him about the firearm, Smith indicated that he did not want to talk about that without speaking to an attorney. RP (10/3) 34. So VanGesen told him they would not discuss that. RP (10/3) 35. Smith nevertheless told him that he was more than willing to talk about anything else. RP (10/3) 35.

VanGesen was not concerned that Smith was unsure where his day began. RP (10/3) 35. Smith stated that he had not slept the night before and the days were blending together, which was not uncommon for a meth user. RP (10/3) 35. That was why Smith went back with him and pinned down the order of events. RP (10/3) 35. Smith wanted to only talk about what happened at Olin's house, but VanGesen had to focus him on the entire sequence of events for the day. RP (10/3) 35. It became clear, after some pinpointing, however, what the sequence of events was. RP (10/3) 36.

The only thing that Smith denied was knowing what was in the two backpacks. RP (10/3) 42. He admitted to using, to delivery in exchange for the truck, to driving the stolen truck, to eluding. RP (10/3) 42. He admitted to accepting a stolen truck for drugs on a previous occasion. RP (10/3) 43.

VanGesen had not run a recent criminal history check on Smith. RP (10/3) 43. VanGesen had eleven years experience as successful narcotics

officer focusing on meth, and was well respected. RP (10/3) 44. He would not consider Smith an informant because he was an arrested suspect providing information about his own criminal activity. RP (10/3) 45.

VanGesen did not offer Smith any deals; he actually referred the case for federal prosecution. RP (10/3) 48.

The trade of the truck for the methamphetamine did not seem odd to VanGesen. RP (10/3) 50. Nothing about what Smith told VanGesen about the events at Olin's house struck VanGesen as lacking in credibility. RP (10/3) 51. Based on what he said VanGesen believed that there could be evidence of related to the burglaries in the Olin house. RP (10/3) 51. It was the sort of information he would typically rely upon when seeking a warrant. RP (10/3) 51. It was not unusual in his experience for people involved in methamphetamine use to also be associated with stolen property and burglaries. RP (10/3) 52.

The trial court also questioned VanGesen and elicited that VanGesen's only concern for Smith's credibility was that he would try to "wiggle his way out of responsibility," but his statements only strengthened the charges against him. RP (10/3) 58. His statements also showed his involvement in other crimes that had not been mentioned before the interview. RP (10/3) 59. VanGesen had no information that would have

caused him concern if he had been the one applying for the warrant. RP (10/3) 59.

III. ARGUMENT

A. THE APPLICATION FOR SEARCH WARRANT ESTABLISHED PROBABLE CAUSE ON ITS FACE.

Olin argues that the warrant for the search of his home was facially invalid for a number of reasons. This claim is without merit because the application for the warrant set forth sufficient facts establish probable cause to search the home for drugs and stolen property, because the warrant permitted the police to search the likely locations for such contraband, and because the person who supplied the police with the information was sufficiently credible.

1. *The application contained sufficient factual basis to justify issuance of the warrant.*

Olin first argues that the application did not contain sufficient factual allegations to establish probable cause that there would be evidence of the burglaries or drug use at his house. This claim is belied by the application.

The warrant clause of the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution require that a search warrant be issued upon a determination of probable cause based upon “facts and circumstances sufficient to establish a reasonable inference”

that criminal activity is occurring or that contraband exists at a certain location.” *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Probable cause is established when an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity. *Vickers*, 148 Wn.2d at 108.

A magistrate exercises judicial discretion in determining whether to issue a warrant. That decision is reviewed for abuse of discretion, and a reviewing court generally accords great deference to the magistrate and views the supporting affidavit for a search warrant in the light of common sense. *Vickers*, 148 Wn.2d at 108. Doubts concerning the existence of probable cause are generally resolved in favor of issuing the search warrant. *Vickers*, 148 Wn.2d at 109.

Here, the application recited that burglaries of the Craig and Benton homes took place within one and a half blocks of each other and within a 24-hour period. 3.6 Exh. 1, Complaint for Search Warrant (“Application”) at 2. The Craig home was entered through the garage and the burglar took, *inter alia*, ID’s, checks, credit cards and a truck. *Id.* The burglar also entered the Benton home through the garage and again stole ID, checks, credit cards and a truck. *Id.* The close proximity in time and place, and the similarity of mode of entry and items taken led the police to believe the same suspects were involved. *Id.*

The next day, Derek Smith was arrested after a lengthy chase in which he was driving the stolen Benton truck. Application at 2-6. The green canopy that was on the truck when it was stolen was missing, however. Application at 2-3. Some of the property taken in the Benton burglary was found in the truck. Application at 6. Also found in the truck was methamphetamine and items suspected to be for the manufacture of meth. *Id.*

Detective VanGesen interviewed Smith after his arrest. *Id.* Smith stated that he had injected methamphetamine with three others – Olin, Adam Graden and Matthew Snyder – at Olin’s house two hours before his arrest. Application at 6-7. Smith paid Snyder \$100 for the methamphetamine, which Snyder manufactured himself. Application at 7.

Smith stated that the Benton truck was at Olin’s house when he got there. *Id.* The canopy had been removed and was Olin’s garage. *Id.* Graden gave Smith the truck in exchange for some methamphetamine. *Id.*

The police had prior experience with numerous burglaries involving Graden, and knew the suspects involved traded stolen property for narcotics. *Id.* They also knew that not all the property from the Benton and Craig burglaries had been recovered. *Id.*

The application showed that two deliveries as well as the possession and use of methamphetamine by Olin himself had recently occurred at the

Olin home. Clearly this evidence was sufficient to establish probable cause to believe there would be evidence of possession of methamphetamine at the house.

Likewise, the evidence was clearly sufficient to establish probable cause that the fruits of the burglaries was at the home. The burglaries were close in time and place and both involved entry through a garage and the taking of ID, checks, credit cards and vehicles. It was reasonable to conclude that they were committed by the same burglar. Moreover, the truck was exchanged for drugs at the Olin house, and the canopy from it was left there when Smith took the truck. Since the canopy was in Olin's garage, it was entirely reasonable to suppose that other items taken in the same and the related burglary would be there as well. It cannot be said the magistrate abused her discretion in issuing the warrant on the grounds that the probable cause was insufficient.

2. *Information that there were stolen property and drugs a Olin's house did not become stale in the space of four days.*

Olin next claims that the information, which was obtained from Smith on Saturday, November 27, 2004, was stale by the following Wednesday, December 1. As he notes, common sense governs this issue. He fails, however, to apply that precept.

In evaluating whether the facts underlying a search warrant are stale, a

reviewing court looks at the totality of the circumstances. *State v. Maddox*, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004). “The length of time between issuance and execution of the warrant is only one factor to consider along with other relevant circumstances, including the nature and scope of the suspected criminal activity.” *Maddox*, 152 Wn.2d at 506. Whether information is timely and whether evidence is likely to remain at the place sought to be searched depends on the nature of the evidence sought. *State v. Dobyms*, 55 Wn. App. 609, 620, 779 P.2d 746, *review denied*, 113 Wn.2d 1029 (1989).

One of the items sought, the canopy was a large and unwieldy object. It certainly was reasonable to presume that it would still be there after four days. Further, as discussed above, it was also reasonable to suppose that the other fruits of the burglaries were at the house as well. Since based on the officer’s experience, Graden regularly traded drugs for stolen property, it would thus also be reasonable to believe that the use and possession of methamphetamine was also ongoing in that location. A common sense evaluation does not lead to the conclusion that Smith’s information would have been stale after only a few days.

3. *The warrant incorporated the application by reference.*

Olin contends that the warrant was overbroad because it did not incorporate the application by reference and the application was not attached

to the warrant. This contention is contrary to the record.

The warrant specifically recites that it was issued “upon the sworn complaint heretofore made and filed ... and *incorporated herein by reference.*” 3.6 Exh 1 (Search Warrant) at 1. There is no record evidence whatsoever that the application was not attached to the warrant. To the contrary, given that the two documents were filed as a single exhibit at the CrR 3.6 hearing, the record suggests that the application *was* attached to the warrant.

Moreover, this contention is red herring, because the warrant, even divorced from the application, specified the crimes under investigation, the items sought, and the place to be searched:

[F]ruits, instrumentalities and/or evidence of the crime(s) of
**RCW 9A.56.150 POSSESSION OF STOLEN PROPERTY FIRST
DEGREE, RCW 69.50 VUCSA TO WIT – POSSESSION OF
METHAMPHETAMINE**

**to wit – GREEN FIBERGLASS TRUCK CANOPY, NAIL GUNS,
HITACHI AIR COMPRESSOR, SIGNED FOOTBALL WITH STEVE
LARGENT NAME ON IT, CHECKS WITH CRAIG NAME, ID WITH
CRAIG NAME, CREDIT CARDS WITH CRAIG NAME, HP LAP
TOP, .22 CALIBER HANDGUN, GERBER KNIVES, ID WITH
BENTON NAME, CREDIT CARDS WITH BENTON NAME, CHECKS
WITH BENTON NAME, PAPERWORK SHOWING DOMINION AND
CONTROL FOR RESIDENCE, PROCESSED METHAMPHETAMINE,
BAGGIES, SCALES, PIPES, STRAWS AND OTHER
PARAPHERNALIA, US CURRENCY, LEDGER BOOKS, PHONE
BOOKS ANY OTHER ITEMS WITH THE VICTIM NAMES OF
BENTON OR CRAIG ON THEM.**

* * *

The said person/place/vehicle(s) above referenced to, located in the County of Kitsap, State of Washington, is designated and described as follows –

2553 FIRCREST DRIVE, PORT ORCHARD WASHINGTON, KITSAP COUNTY, A TAN AND GREEN TWO STORY RESIDENCE WITH ATTACHED GARAGE, CURRENTLY OCCUPIED BY WILLIAM OLIN.

Exh. 1 (Warrant), at 2. This claim should be rejected.

4. *The information given by Smith satisfied the dictates of the Aguilar-Spinelli test.*

Olin also asserts that Smith was not credible enough to use his information to establish probable cause to search. The trial court correctly rejected this contention.

Probable cause for a search warrant may be based on information from an informant. *See State v. Cole*, 128 Wn.2d 262, 287, 906 P.2d 925 (1995). Under what is typically referred to as the *Aguilar-Spinelli* test, an affidavit using an informant's tips to establish probable cause must establish both the basis of the information and the credibility or reliability of the informant. *State v. Gaddy*, 152 Wn.2d 64, 71, 93 P.3d 872 (2004). Although the United States Supreme Court has rejected the *Aguilar-Spinelli* test for the 'totality-of-the-circumstances' test outlined in *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), Washington courts adhere to *Aguilar-Spinelli*. *State v. Gaddy*, 152 Wn.2d 64, 71 n. 2, 93 P.3d 872 (2004).

The *Aguilar-Spinelli* strictures, however, are “aimed primarily at unnamed police informers.” *State v. O’Connor*, 39 Wn. App. 113, 120, 692 P.2d 208 (1984) (emphasis in original). For this reason, named citizen informants are generally presumed to be reliable. *State v Wible*, 113 Wn. App. 18, 24, 51 P.3d 830 (2002); *Gaddy*, 152 Wn.2d at 72-73; *State v. Franklin*, 49 Wn. App. 106, 109, 741 P.2d 83, 85 (1987).

Similarly, if the identity of an informant is known (as opposed to being anonymous or a professional informant), the necessary showing of reliability is relaxed because there is less risk of the information being a rumor or irresponsible conjecture which may accompany anonymous informants. *Gaddy*, 152 Wn.2d at 72-73; *State v. Northness*, 20 Wn. App. 551, 557, 582 P.2d 546 (1978).

Other Washington courts, however, have formulated a different analysis, and have indicated that the presumption of reliability does not apply to “criminal or professional informants,” and at least one Washington court has stated that if the named informant “was a participant in the crime under investigation or has been implicated in another crime and is acting in the hope of gaining leniency,” then the presumption of reliability does not apply. *State v. Rodriguez*, 53 Wn. App. 571, 576, 769 P.2d 309 (1989). This language from the *Rodriguez* decision, however, is dicta, as the informant in that case was not named, and the court ultimately held that the credibility

prong of the *Aguilar-Spinelli* test was satisfied, in part, because the description of the informant in the affidavit made the informant readily identifiable and the circumstances did not diminish the presumption of reliability. *Rodriguez*, 53 Wn. App. at 577. This dicta in *Rodriguez* has not been universally accepted, however. Other Washington cases have instead concluded that the fact that an informant may also be under suspicion does not “vitiate the inference of reliability.” *State v. Chenoweth*, 127 Wn. App. 444, 454, 111 P.3d 1217 (2005); *State v. Northness*, 20 Wn. App. 551, 558, 582 P.2d 546 (1978).

In *Northness*, for instance, a search warrant was granted based on information provided by a named informant who stated that her roommates had a large quantity of marijuana. *Northness*, 20 Wn. App. at 552-53. In discussing the issue of the informant’s credibility under the *Aguilar-Spinelli* test, this Court stated that such inquiries usually fall into one of four categories:

Category 1: The informant remains wholly anonymous, even to the police.

Category 2: The informant’s identity is known to the police, but not revealed to the magistrate. Different rules for establishing credibility must be applied, depending upon whether the informant is (1) a “criminal” or professional informant, or (2) a private citizen.

Category 3: The informant’s identity (name and address) is disclosed to the magistrate.

Category 4: The situation described in *State v. Chatmon*, 9

Wn. App. 741, at page 748, n. 4 (1973) as follows: “Where eyewitnesses to crime summon the police, and the exigencies are such (as in the case of violent crime and the imminent possibility of escape) that ascertainment of the identity and background of the informants would be unreasonable, the ‘reliability’ requirement might be further relaxed. *Cf. State v. Morsette*, 7 Wn. App. 783, 502 P.2d 1234 (1972).”

Northness, 20 Wn. App. at 555.

This Court then held that the informant in *Northness* was a “category 3 informant” as she had been named in the affidavit, and stated that, at that time, there appeared to be no Washington cases dealing with the credibility of a named informant; thus making *Northness* a case of first impression. *Northness*, 20 Wn. App. at 555. The Court then noted that, as it was impossible in such a case to show a “track record,” evidence of past reliability was not required. *Northness*, 20 Wn. App. at 556. Rather, the Court adopted the rule enunciated by the Supreme Court of Colorado:

We believe, and hold, that the constitutional safeguards (federal and state) are met when the affidavit supporting an arrest warrant or search warrant contains the name and address of the citizen-informant who was a witness to criminal activity and includes a statement of the underlying circumstances.

Northness, 20 Wn. App. at 558 (quoting *People v. Glaubman*, 175 Colo. 41, 485 P.2d 711, 717 (1971)).

The Court then held that because the information provided by the informant was based on her personal observations, the first prong of the

Aguilar-Spinelli test was met, and that those same details should have been found sufficient “to support the reasonable inference that [the informant], as an identified citizen informant, was reliable, thus satisfying the second prong of *Aguilar-Spinelli*.” *Northness*, 20 Wn. App. at 558. Furthermore, the court also stated that this inference was valid even though the witness was arguably self-interested and was potentially under suspicion as she was a co-possessor of the premises:

Finally, with respect to defendant Fias we are not unmindful of the possibility that [the informant] may have been motivated by self interest, i.e., a desire to exculpate herself from criminal liability as co-possessor of the premises wherein the marijuana was kept. However, the fact that an identified eyewitness informant may also be under suspicion in this case because of her initial contact has been held not to vitiate the inference of reliability raised by the detailed nature of the information and the disclosure of the informant’s identity.

Northness, 20 Wn. App. at 558.

Subsequent Washington cases have followed *Northness*, and have recognized that an informant’s status as a suspect does not “vitate the inference of reliability raised by the detailed nature of the information and the disclosure of the informant’s identity.” *E.g., State v. Riley*, 34 Wn. App. 529, 533, 663 P.2d 145 (1983)(“The fact that an identified eyewitness informant may also be under suspicion does not vitiate the inference of reliability raised by the detailed nature of the information and the disclosure of the informant’s

identity.”); *State v. Chenoweth*, 127 Wn. App. 444, 454, 111 P.3d 1217 (2005) (citing *Northness*, 20 Wn. App. at 588) (fact that named, untested, non-professional informer was under investigation based on suspicion of being involved in drug traffic was immaterial to question of reliability of informant where he voluntarily provided detailed eyewitness report of defendant’s drug dealing).

Even assuming, however, that the fact that an informant is named does not create a presumption of reliability if the informant is a criminal suspect, the naming of the informant must still be considered as a factor in determining reliability even if it does not, on its own, create a presumption of reliability. For instance, even in *Rodriguez* the Court observed the fact that an informant is named “is one factor which may be weighed in determining the sufficiency of an affidavit.” *Rodriguez*, 53 Wn.App at 576.

In the present case, therefore, the fact that Smith was named either creates a presumption of reliability, or, at the least, is a factor that is to be weighed in determining his reliability. Furthermore, even putting aside the inference of reliability that occurs when the informant’s identity is provided, there are a number of factors present in the case at bar that Washington courts have previously recognized as factors that can demonstrate an informant’s reliability.

For instance, “[i]t is well settled in Washington that admissions

against penal interest are a relevant factor in probable cause determinations under the *Aguillar/Spinelli* test” and are relevant indicia of an informant’s veracity. *O’Connor*, 39 Wn. App. at 119 (citing *State v. Lair*, 95 Wn.2d 706, 711, 630 P.2d 427 (1981)); *State v. Patterson*, 37 Wn. App. 275, 679 P.2d 416 (1984); *State v. Hett*, 31 Wn. App. 849, 852, 644 P.2d 1187, review denied, 97 Wn.2d 1027 (1982); see also *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971); and *State v. Estorga*, 60 Wn. App. 298, 304, 803 P.2d 813 (1991). This is because statements against penal interest are not often made lightly and, therefore, support an inference of reliability. See *Lair*, 95 Wn.2d at 710-11 (because informant who admits criminal activity to police officer faces possible prosecution, statements raising such a possibility may support an inference of reliability as such statements are “not often made lightly”).

In addition, Washington courts have held that the fact that an informant was under arrest at the time he made his statements is also relevant to veracity, since lying to the police would bring their disfavor. *O’Connor*, 39 Wn. App. at 121 (citing *State v. Bean*, 89 Wn.2d 467, 471, 572 P.2d 1102 (1978)); also *State v. Lopez*, 70 Wn. App. 259, 265, 856 P.2d 390 (1993), review denied, 123 Wn.2d 1002 (1994) (“The fact that an informant provides information following arrest has been recognized as an indicia of his credibility”).

The Court in *O'Connor* explained that the potential for criminal charges enhances an informant's motivation to be truthful with the police because:

One who knows the police are already in a position to charge him with a serious crime will not lightly undertake to divert the police down blind alleys. Thus, where the circumstances fairly suggest that the informant "well knew that any discrepancies in his story might go hard with him," that is a reason for finding the information reliable. In such a situation, it is the "clearly apprehended threat of dire police retaliation should he not produce accurately" more so than the admission of criminal conduct which produces the requisite indicia of reliability.

O'Connor, 39 Wn. App. at 121; also *Lopez*, 70 Wn. App. at 265 ("motivation to be truthful with the police is enhanced by the existence of a pending charge").

In the present case, Smith spoke with Detective VanGesen after his arrest and admitted to crimes which he was not charged. The fact, therefore, that Smith provided the information following his arrest is another, recognized, indicia of his credibility.

In addition, the amount and kind of detailed information given by an informant may also enhance his reliability. *O'Connor*, 39 Wn. App. at 122; *State v. Jessup*, 31 Wn. App. 304, 318, 641 P.2d 1185 (1982); *Hett*, 31 Wn. App. at 852.

In *O'Connor*, the court noted that the informant had given a fairly detailed statement to the police, named a specific person at a specific

residence, gave the date, and described by brand name certain items located at the residence. *O'Connor*, 39 Wn. App. at 122-23. The court noted that other Washington cases that had been concerned with the veracity of an informant had listed the detailed nature of the informant's information as an indicia of reliability. *O'Connor*, 39 Wn. App. at 122, citing *State v. Patterson*, 37 Wn. App. 275, 278, 679 P.2d 416 (1984); *State v. Hett*, 31 Wn. App. 849, 852, 644 P.2d 1187 (1982).

In the present case, Smith identified the canopy that had been on the truck, and identified the house, with which the detective was familiar.

While it is true that the existence of a proven "track record" of reliability reasonably supports an inference that the informant is presently telling the truth, a "track record" is not a necessary condition for a finding of reliability. *Lair*, 95 Wn.2d at 710-11:

In the event an informant cannot demonstrate a record of truthfulness, the second prong of the *Aguilar-Spinelli* test may be satisfied if the magistrate is provided sufficient facts to determine that the informant's information on the specific occasion is reliable.

Lair, 95 Wn.2d at 710. Furthermore,

Even knowing nothing about the inherent credibility of a source of information, we may still ask, "Was the information furnished under circumstances giving reasonable assurances of trustworthiness?" If so, the information is "reliable," notwithstanding the ignorance as to its source's credibility.

Lair, 95 Wn.2d at 710, citing *Thompson v. State*, 16 Md.App. 560, 566, 298

A.2d 458 (1973). Corroboration, therefore, is not a prerequisite to a finding of reliability, but when corroboration of significant facts does occur, as it did in the present case, this is an additional factor that supports a finding of reliability. Here, as noted, Smith's statement was corroborated by the fact that the police knew, from the victim's report, that there was a canopy to the truck. As to the methamphetamine, his statements were corroborated by the fact that he had methamphetamine in his possession on arrest. The trial court properly concluded that both Smith and his information were sufficiently reliable.

To the extent that Olin challenges the reliability of the informant based on extra-application information, the trial court properly determined that there was no basis for looking beyond the face of the application for search warrant, as will be discussed presently.

B. THE TRIAL COURT PROPERLY DETERMINED THAT THE POLICE DID NOT INTENTIONALLY OR RECKLESSLY OMIT ANY MATERIAL INFORMATION FROM THE APPLICATION, AND PROPERLY REJECTED OLIN'S UNTIMELY ATTEMPT TO REVISIT THE ISSUE.

Olin next claims that the trial court erred in denying his original June 2005 motion, pursuant to *Franks v. Delaware*, 438 U.S. 1354, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), to look beyond the face of the warrant application,

as well as his June 2006 motion to revisit that issue. The trial court properly determined that the police did not intentionally or recklessly omit any material information from the application, and properly rejected his untimely attempt to revisit the issue.

1. June 2005 motion

The *Franks* test for material misrepresentations applies to allegations of material omissions. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985); *State v. Garrison*, 118 Wn.2d 870, 872-73, 827 P.2d 1388 (1992), *Franks*, 438 U.S. at 155-56. In determining materiality, the challenged information must be *necessary* to the finding of probable cause. *State v. Taylor*, 74 Wn. App. 111, 117, 872 P.2d 53, *review denied*, 124 Wn.2d 1029 (1994). It is not enough to say that the information tends to negate probable cause. *Taylor*, 74 Wn. App. at 117. If the facts were relevant, the court must delete the false or misleading information or insert the omitted information. *State v. Taylor*, 74 Wn. App. at 117. If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails. *Garrison*, 118 Wn.2d at 873; *Taylor*, 74 Wn. App. at 117.

In *State v. Lane*, 56 Wn. App. 286, 294-95, 786 P.2d 277 (1989), the defendant challenged a search warrant, claiming the State failed to mention the confidential informant's criminal history. The court, however, upheld the

search warrant, holding that,

Here, the affidavit supports a finding of probable cause even if the omitted information is added. Given our common experience that a person who is in a position to set up a controlled buy often has had prior contact with the criminal justice system, we hold the magistrate was not misled. Thus, we need not decide whether the informant's criminal record was deliberately or recklessly omitted.

State v. Lane, 56 Wn. App at 295; *See, also, State v. Taylor*, 74 Wn. App. 111, 118, 872 P.2d 53 (1994) (where although the defense asserted a material omission due to the failure to include the informant's criminal history, the court concluded the even if the detective had deliberately or recklessly omitted the informant's history, "his criminal status was not material to a finding of probable cause").

Here, Olin argues that Birkenfeld should have informed the magistrate that Smith gave false information about his name, that Smith denied committing a number of crimes, that Smith still had methamphetamine in his possession, that Smith had other convictions for crimes of dishonesty and that Smith was "part of a vehicle theft ring."

The trial court concluded, in light of the statement in the application that Smith was a convicted felon, and in light of the charges Smith was facing at the time of the interview, that the failure to give Smith's full criminal history was not relevant to the magistrate's evaluation. RP (10/3) 76. Likewise, the giving of a false name was also not relevant where Smith

almost immediately admitted to his true name. RP (10/3) 77.

The court also found that Smith did not actually deny that he knew the truck stolen considering that stated that he had done similar trades for stolen property in the past. RP (10/3) 77.

The court further concluded that even if it accepted as material Smith's denial of possession of the methamphetamine, it would not be persuaded that the detectives did or should have entertained serious doubts about Smith's information that there would be methamphetamine or stolen property at Olin's house. RP (10/3) 78. The court set forth the relevant facts: [Smith] was driving a truck which had recently been stolen in a burglary, that the truck at the time that it was stolen included a canopy that was not with the truck when Mr. Smith was apprehended, that Mr. Smith knew about the canopy, and Mr. Smith placed the canopy in Mr. Olin's garage. This on its face, his story about that part of his possession of the truck, is corroborated by the investigation of the burglary.

With respect to finding methamphetamine at Mr. Olin's house: The information that tends to corroborate that is Mr. Smith's admission; one, that he was a meth user; two, that he used meth just a couple of hours before he was apprehended; and three, that there was meth in the truck when he was apprehended.

RP (10/3) 79. Court could not say that based on the other information the detectives received that they should have concluded that Smith was likely to be lying about these facts. RP (10/3) 79. Smith had just been apprehended on a fairly serious felony elude. RP (10/3) 79. He admitted quite a number of facts about that incident. RP (10/3) 80. The court therefore ruled that Olin failed to establish that the warrant application should be supplemented with

additional facts under *Franks*. RP (10/3) 80. Olin fails to explain why this ruling is incorrect. His claim should be rejected.

2. June 2006 rehearing motion

Olin also asserts that the trial court erred in denying his motion to reconsider its original ruling on the *Franks* issue. The motion, which was grossly untimely, was properly denied.

The trial court determined that there was no provision for a “motion for reconsideration” under the criminal rules. In this the court was incorrect. However, an appellate court may affirm a trial court’s decision on any theory supported by the record and the law. *State v. Gutierrez*, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). The appellate court may therefore affirm on other grounds even after rejecting a trial court’s reasoning. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993).

Here the local rules of the Kitsap County superior court specifically provide for reconsideration:

KCLCrR 1.1 SCOPE

The local civil rules shall apply in all criminal proceedings when not inconsistent with these rules, the Superior Court Criminal Rules or applicable statutes. Local civil rules particularly applicable to criminal cases include but are not limited to the following rules:

* * *

Rule 59 Motions for Reconsideration

The trial court's result, however, was correct under the local rule. KCLCR 59(b) provides:

(b) Motion for Reconsideration; Time for Motion; Contents of Motion. *A motion for reconsideration shall be filed, noted, and served on all parties and the trial judge not later than ten (10) days after entry of the judgment, decree, or order.* The motion shall be noted on the trial judge's departmental motion docket to be heard not sooner than thirty (30) but not later than forty (40) days after entry of the judgment, decree, or order, unless the court directs otherwise. The bench copy shall be delivered to the trial judge's law clerk at the Superior Court office and shall contain the date the judgment, decree, or order was entered, and the names and addresses of opposing counsel.

(Italics supplied). Olin's motion, filed some *seven months* after the trial court's written findings on the *Franks* hearing were entered was clearly outside the 10-day limit and untimely. The trial court properly denied the motion. Although Olin contends the trial court improperly applied CrR 7.8 to his motion for rehearing he fails to acknowledge the local rule or cite to any other authority requiring the trial court revisit his suppression motion in a case that had already been pending for a year and a half. This claim should be rejected.

C. OLIN FAILS TO SHOW THAT COUNSEL WAS INEFFECTIVE FOR NOT CALLING SMITH TO TESTIFY AT THE *FRANKS* HEARING, WHERE AT THE TIME OF THE HEARING HE WAS IN CUSTODY FACING FEDERAL CHARGES RELATED TO THE STATEMENT THAT FORMED THE BASIS FOR THE WARRANT, AND WHERE, IN ANY EVENT, THE TRIAL COURT FOUND SMITH'S SUBSEQUENT STORY NOT CREDIBLE.

Olin finally claims that defense counsel Morrison was ineffective in his prosecution of the *Franks* hearing because he allegedly did not interview Smith. This claim is without merit because Olin establishes neither deficient performance nor prejudice.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort

to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Olin fails to establish that Morrison's performance was deficient. The clear implication of Morrison's statement to the court on August 5, 2005, was that Smith, who was in federal custody, facing prosecution, and represented by counsel, was not going to speak to anyone about his criminal activities, *see* RP (8/5) 5, which would necessarily include the events surrounding his statements to VanGesen. *See* RP (10/3) 48 (as a result of the interview, VanGesen referred Smith's case for federal prosecution). The record fails to show otherwise. Indeed, according to Smith's own declaration, his case was

not resolved until four months after the *Franks* hearing was held. CP 81. As such, it cannot be shown that Morrison acted unprofessionally in not interviewing² Smith.

Further, Olin fails to establish prejudice. The trial court's analysis of Smith's recantation in its order denying rehearing shows that even had Morrison been able to call Smith and had Smith testify in accordance with his declaration, it would not have affected the outcome of the proceeding:

To accept Mr. Smith's position, the court would need to find that Detective VanGesen fabricated substantial parts of his personal report, and complaint for the search warrant. This is simply not creditable.

CP 125. It must be recalled in this regard that VanGesen testified live before the trial court, which found him credible. This claims should be rejected.

² The record does not actually establish that Morrison did not attempt to or interview Smith.

IV. CONCLUSION

For the foregoing reasons, Olin's conviction and sentence should be affirmed.

DATED November 13, 2007.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'R D Hauge', with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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