

No. 35604-0-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY [Signature]
[Date]

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

RAYMOND TIMOTHY HANKINS,
Appellant.

REPLY BRIEF OF APPELLANT HANKINS

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ORIGINAL

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I. ISSUES ON APPEAL

Appellant Hankins has set forth six specific issues on appeal, which also designate the assignments of error, in relation to each individual issue.

The State has generally reiterated five of the six issues raised by Hankins (see "Statement of the Issues," page 1, Respondent's Brief).

The State has not responded to the issue designated Issue No. 3 in Hankins' brief. That issue, as stated in Hankins' brief, is: "Did the trial court err when it ruled that evidence of methamphetamine labs is long-lived? (AOE 2, 6)."

This omission by the State is extremely significant, because Judge Wickham's ruling in the Criminal Rule 3.6 hearing below was premised on the Court-initiated Finding of Fact 2.3, which reads as follows:

"Evidence of methamphetamine labs is long-lived. A lapse of a month or two between when the confidential informant went to the property and when the warrant was sought did not render the information stale, given the nature of the evidence in this case." CP 97.

The State, obviously, omits addressing this significant issue, because there is nothing in the record, by way of evidence, to support such a finding at the trial court level.

II. STATEMENT OF THE CASE
(HANKINS' REPLY TO RESPONDENT)

The search warrant that was sought and issued by the District Court Judge, was premised on information from CI Kim Gautreaux. The State does not dispute this fact. The State concedes that there was no informant reliability after 1999. (Respondent's Brief at page 2.)

The State concedes that the CI was at Hankins' residence in Yelm, Washington, in November of 2004. The State agrees that the informant claimed she observed methamphetamine being manufactured, and that she participated in cleaning up the "meth lab." (Respondent's Brief, at page 2-3.)

Both parties agree that a small, blue pickup registered to Hankins had been driven to the property of Dwayne Cullens.

(See Appellant's Brief at page 8, and Respondent's Brief at page 3.)

At the time of the suppression hearing before Judge Wickham, it was unknown who took the garbage to Cullens' property, and when the garbage was taken to Cullens' property. (Appellant's Brief at page 7-8.) Cullens told police that the truck had been left on his property, removed from his property, and returned to his property about a week prior to the execution of the search warrant on January 25, 2005, but was unable to provide any information about any garbage in the truck.

The State represents that the CI told Detective Duprey that there was meth lab sludge left over and put into Hankins' garage for storage. (Respondent's Brief, at page 5.) (In fact, at the time of the execution of the search warrant, no evidence of methamphetamine manufacturing or sludge was retrieved from Hankins' garage or his residence.) The State represents that the CI stated that she observed a red phosphorous meth lab in Hankins' master bath and bedroom, with iodine stains all over

the walls as a result of the manufacturing activity. The State represents that Detective Duprey told the judge that the kind of stains described by the CI would be produced by red phosphorous methamphetamine manufacturing.

All that the information described in the previous paragraph proves, is that Kim Gautreaux purportedly knew how to manufacture methamphetamine by the red phosphorous method. Kim Gautreaux was known to the police as a methamphetamine user. CP at 28, 53.

The State spends a good deal of time talking about evidence of methamphetamine found in Hankins' residence. (Respondent's Brief at page 8.) The Court should not be distracted by this evidence. The citations for the State regarding evidence of the existence of methamphetamine are at RP 58, 62 and 109. (Respondent's Brief, page 8.) Hankins was never charged with possession of methamphetamine, and at trial, did not dispute evidence of possession of methamphetamine.

Evidence of possession of methamphetamine, in this case, cannot be bootstrapped to constitute manufacturing of methamphetamine.

The State asserts that methamphetamine “dissolved” in acetone was found in a glass container in the freezer, and in a glass container in the pantry. The State further represents that methamphetamine crystals “grow” when this mixture is placed in a freezer. (Respondent’s Brief at 8-9.)

When acetone and previously manufactured methamphetamine are placed in a freezer, the form changes, but there are no molecular substantive changes in the methamphetamine. RP 117, lines 16-20; RP 122. There is no evidence that methamphetamine crystals “grow,” or have molecular change, when mixed in acetone and placed in a freezer.

The State claims there were items found at Hankins’ residence consistent with the manufacture of methamphetamine. (Respondent’s Brief at page 10.) The State lists the following

items as evidence of manufacture of metamphetamine: hot plate burners, glass jars, tubing, coffee filters, hydrogen peroxide, muriatic acid, and red flares containing red phosphorous. RP at 56, 65 through 71, and 110 through 113.

The items of evidence listed in the preceding paragraph are not evidence of manufacturing methamphetamine in November of 2004, or January 25, 2005, or any time in between. Any of these items can be purchased at a store like Target or Fred Meyer. These items were recovered from the living room, various places within the garage, the kitchen, and the bathroom hallway. RP 65-67. Hankins' garage was full of paint supplies. RP at 67. The hydrogen peroxide was with a toothbrush and cold pills in the bathroom. RP at 72.

Items that were found throughout the household, designated in the previous paragraphs, were not tested for evidence of meth production, and there is no evidence in the record by which it can be determined that any of these items were used for actual manufacturing of methamphetamine.

Several of the items were dusted for latent prints, but no latent prints were discovered that were of any forensic value. RP at 79.

Rubber gloves, probably used in the manufacture of methamphetamine, were found during the initial search on Dwayne Cullens' property. RP at 83. No such rubber gloves were discovered at Hankins' residence. RP at 82-83.

III. ARGUMENT

3.1 The totality of the circumstances clearly demonstrates the “staleness” of the confidential informant’s information.

The State concedes that evidence of produced methamphetamine at Hankins' house would be “stale, with the 2-month plus time frame between November 2004, and January 19, 2005.” (Respondent’s Brief, page 15). The State claims that evidence of “waste” from the manufacturing process is the core subject matter by which to determine the “staleness” issue. (Respondent’s Brief at 15). Hankins agrees with this argument.

The State further premises its position on the trial court's Finding of Fact 2.3, which states that evidence of methamphetamine production is long-lived. (Respondent's Brief at 17). CP at 96. Unfortunately for the State, as well as for the trial court, there is no evidentiary basis to support this argument. The State argues that evidence of a past production would be found at Hankins' residence. (Emphasis added). (Respondent's Brief at 17).

The State cites State v. Maddox, 152 Wn. 2d 499, 98 P. 3d 1199 (2004) in support of its argument. Maddox does not support the State's position. In Maddox, the CI did a controlled buy three days before the execution of the warrant. State v. Maddox, supra, at 511. The informant had purchased methamphetamine from Maddox at least 35 times over the prior four years. State v. Maddox, supra, at 503. Maddox also had a record for possession and delivery of a controlled substance, which was made known to the magistrate. State v. Maddox, supra, at 512.

In Hankins' case, the following set of facts takes the instant case out of the purview of Maddox. (1) On January 19, 2005, the CI gave evidence of an alleged meth lab from sometime in November of 2004, while Hankins was vacationing in Mexico. CP at 69, 75. (2) The CI said meth lab garbage would be found on the property of Dwayne Cullens, and in Hankins' garage. CP at 68-9, 75. (3) There is no possibility that the CI had been to Hankins' residence after December 15, 2004. RP 130-131. (4) There was no proof in the hearing below as to when, and who took the meth garbage to Cullens' residence.

If the CI, or someone on her behalf, took meth garbage to Cullens' property, why would she leave additional evidence in the garage? This question should have been raised with the magistrate, especially since the CI had not been to Hankins' residence since at least December 15, 2004. In fact, there was no methamphetamine production evidence in paint cans in Hankins' garage, when the warrant was executed.

Judge Wickham found as fact, that evidence of methamphetamine production is long lived, and two months was not an unreasonable lapse of time. FOF 2.3. It is unknown where Judge Wickham got this information. There is no evidence in the record to support this Finding of Fact. In fact, a toxicity team from Thurston County took samples from the location of the purported laboratory, the day after execution of the warrant. CP 143-146. No evidence of methamphetamine production was discovered. CP 143-146. There must be substantial evidence to support any Finding of Fact made by the trial court. State v. Hill, 123 Wn. 2d 641, 644, 870 P. 2d 313 (1994).

The CI told police that evidence from the meth lab would be found in Hankins' garage. She made no mention of methamphetamine being on the premises, nor the two glass vials from the kitchen area, which contained previously manufactured methamphetamine mixed with acetone. These omissions make

it extremely clear that the CI had not been in the residence for weeks.

“Suspicion, belief and guess alone are not enough” to establish probable cause. State v. Harris, 12 Wn. App. 481, at 484, 530 P.2d 646 (1975). “Reasonableness” seems to be the test, for determining the validity of search warrants. State v. Maddox, supra., at 509; State v. Thein, 138 Wn. 2d 133, 140, 977 P.2d 582 (1999).

It is unreasonable to assume that methamphetamine production evidence is long-lived. It is unreasonable to assume that methamphetamine production evidence was taken off the premises to discard, and some was purposely left in the garage in paint cans, on the same premises. It is unreasonable to assume the accuracy of a CI’s information who had been in jail for approximately 6 weeks, before talking to the police about who or what was in someone else’s house.

The only conclusion that the appellate court should come to, is that the CI information regarding Hankins' residence was stale and unreliable.

3.2 The CI information in this case does not meet the Aguilar-Spinelli test.

Hankins will not repeat what has been set out in Appellant's Brief on this issue. (See Appellant's Brief at 15-18.) There was no contemporaneous work by the CI and police, by which veracity could be determined. It should be presumed that one who is in jail for criminal activity, and who has not provided reliable information to the police for 5-6 years, may not be credible. This is exacerbated by the fact that the CI's criminal record was not made known to the issuing magistrate. MRP 19.

If either prong of the Aguilar-Spinelli test is not satisfied, the affidavit is deficient. State v. Duncan, 81 Wn. App. 70, 76, 912 P.2d 1090 (1966). It is unreasonable to assume that the knowledge prong could be met in the instant case. The CI had

no access to Hankins' residence since, at best, December 15, 2004. The CI would have no way of verifying methamphetamine lab evidence in paint cans in the garage, even if that was accurate back in November of 2004. There was no such evidence in Hankins' garage.

3.3 Mixing manufactured methamphetamine in acetone should not be construed to be "manufacturing."

There was no evidence at Hankins' residence on January 25, 2005, that Hankins was engaged in manufacturing methamphetamine on that day, nor was there evidence of manufacturing methamphetamine from November of 2004.

Frank Boshears from the Washington State Crime Laboratory was called as a witness by the State. Boshears provided the scientific testimony regarding methamphetamine and other chemicals. Frank Boshears could not testify as to when the manufactured methamphetamine was put into acetone. RP at 116, lines 13-16. Mr. Boshears could not date when any

of the other evidence collected at Cullens' residence was created. RP at 116, lines 4-10.

Mr. Boshears was very clear as to what the methamphetamine in acetone meant, from a chemical analysis. Boshears testified: "It was finished methamphetamine dissolved in acetone." RP at 116, line 23. The methamphetamine was placed into acetone to "change the form" for use. RP at 117. There was no substantive molecular change to the methamphetamine by mixing it with acetone. RP at 117-118.

The jury in this case really convicted Hankins for possession of methamphetamine, even though no possession charge was ever filed. Hankins does not quarrel with the "sufficiency" cases cited by the state. See State v. Joy, 121 Wn. 2d 333, 851 P.2d 654 (1993). State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

There is apparently no case law precisely on the issue of whether changing the "form" of an already manufactured drug,

constitutes “manufacturing” the drug. Given the wide disparity of the consequences of being convicted of possession, as contrasted with “manufacturing”, the Court should construe the definition of “manufacturing” to mean something other than changing the “form” of previously manufactured methamphetamine.

3.4 The State’s argument regarding accomplice liability begs the question, and should be rejected.

The State argues that the defendant claims it was error for the Court to give the accomplice instruction in this case. (Respondent’s Brief, p. 35). This argument is incorrect.

As was pointed out in Hankins’ initial brief, the instructions given by the Court become the law of the case. State v. Ortega, 134 Wn. App. 617 622, ____ P.3d ____ (2006). No objection was made to the accomplice instruction by Hankins. No error has been assigned to the giving of the instruction by Hankins. (See Assignments of Error, Appellant’s Brief, page 2-3).

The State charged Hankins in the alternative, as principal or accomplice. CP at 3. For reasons unknown, the State submitted its theory of the case solely on accomplice liability. (See Appellant’s Brief at p. 40.) An element of the crime, as submitted to the jury, required proof beyond a reasonable doubt that Hankins acted as an accomplice “with another person.” CP at 163. There is no evidence in the record that Hankins’ acted in any capacity with another person to manufacture methamphetamine. To convict Hankins, the evidence must be sufficient, viewed most favorably for the State, on all essential elements of the crime. State v. Joy, supra.; State v. Green, supra.

There is no evidence, other than pure speculation, that Hankins acted with another person to manufacture methamphetamine. The State relies upon State v. McDonald, 138 Wn. 2d 680, 981 P. 2d 443 (1999) to assert that Hankins can be convicted as a principal in this case. (Respondent’s Brief at 35.) This case is easily distinguishable.

In McDonald, the jury was instructed that it could convict McDonald as either a principal or as an accomplice. State v. McDonald, supra., at 690. The court went on to discuss how liability could have been found on either theory. The jury was not given this alternative option at Hankins' trial. They were instructed that Hankins must be found guilty as an accomplice only. CP at 163. If the State had given the jury alternative theories, Hankins' argument regarding accomplice liability only, would have been forfeited. The State made the election. Hankins did not object, or take exception to this instruction for obvious reasons. The fact that Hankins was convicted anyway, is beside the point. Hankins protected this issue for appeal by his Motion to Arrest Judgment.

IV. CONCLUSION

Hankins' conviction should be reversed, and the manufacturing charge should be dismissed with prejudice. All of the bases for reversal require dismissal, not retrial. The Motion to Suppress should have been granted. The conviction

is reversible for the additional reasons asserted by Hankins. The appeal issues have all been properly preserved for appellate review.

Respectfully submitted this 9th day of July, 2007.



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STATE OF WASHINGTON

Re: State v. Raymond T. Hankins
Court of Appeals No. 35604-0-II
Thurston County Cause no. 05-1-00183-0

Dear Mr. Ponzoha:

Enclosed for filing in this matter please find the original and one copy of the Reply Brief of Appellant, Raymond Timothy Hankins. The Affidavit of Service on all parties will follow under separate cover.

Thank you.

Very truly yours,



G. Saxon Rodgers

GSR/ch
Enclosures
cc: w/enc:

Jim Powers, Deputy Prosecuting Attorney
Tim Hankins

