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No. 36373-9-II

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

STATE OF WASHINGTON,
Respondent,
v.
MICHAEL MANNING,
Appellant.

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

The Honorable James B. Sawyer II

APPELLANT'S OPENING BRIEF

ELAINE L. WINTERS
Attorney for Appellant

MINDY M. ATER
APR 9 Intern

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

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A. ASSIGNMENT OF ERROR

In the defendant's trial for methamphetamine possession with intent to distribute, the trial court erred by denying the defense motion to suppress evidence resulting from the informant-based search warrant, despite an intentional or reckless material omission by the warrant affiant related to the informant's credibility.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the trial court was clearly erroneous in its ruling that Birkenfeld's omission in the oral search warrant affidavit was not made in reckless or intentional disregard of the truth, where Birkenfeld omitted material information about the informant's status in custody under electronic home monitoring.

2. Whether the trial court erred in upholding the search warrant where the warrant affidavit, but for the material omission, failed to establish the informant's reliability under Aguilar-Spinelli.¹

C. STATEMENT OF THE CASE

1. Charge and convictions. Michael Manning was arrested during the execution of an informant-based search warrant at his

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

home in Belfair, Washington. RP 87, 194.² During the search, the police found one 2.2 gram and eleven 1.7 gram bags of methamphetamine, and drug-related paraphernalia. RP 97-99, 159, 171, 219-224. Mr. Manning was charged with possession with intent to distribute methamphetamine, under RCW 69.50.401(1). CP 63 (second amended information).

Following presentation of evidence at trial, the jury found Mr. Manning guilty as charged. CP 21. He was sentenced to imprisonment for sixteen months. CP 10.

The defendant appeals. CP 3-4.

2. Procedural history surrounding the search warrant.

(a) Oral affidavit in support of the search warrant.

The affidavit asserting probable cause for issuance of the search warrant was presented by oral statements made by Detective Birkenfeld in a telephone conversation with Judge Hartman, on October 4, 2006. CP 77-81.³

In the warrant affidavit, Birkenfeld did not use the informant Neil Devitt's name, but instead referred to him as a "police

² The verbatim report of trial proceedings consists of four volumes of consecutively paginated transcripts, referred to herein as RP.

³ A transcript of the telephonic search warrant affidavit is attached as Appendix A, with original page numbers 2 through 6, and will hereinafter be referred to as WT.

operative," or "PO." WT 3. The information Birkenfeld gave to establish Devitt's reliability is as follows,

The PO initiated contact with me during the most recent burglary investigation and provided possible suspect locations for those crimes. The PO has always called me on time, will contact me if he is unable to meet with me. And based off the information the PO provided, arrests were made and stolen property was located.

WT 3. Birkenfeld revealed that Devitt used to be involved with the narcotics trade, and had convictions for malicious mischief, firearm offenses, VUCSA, and DWLS. WT 3.

Birkenfeld stated the informant was out of custody and had no charges pending. WT 3. Birkenfeld testified at trial that he was involved in Devitt's arrest in 2005—fourteen months before Devitt served as an informant on this case—but did not mention this in the warrant affidavit. RP 228, 241.

In support of the search warrant, Birkenfeld stated the informant had known Mr. Manning for twenty years, and had received or purchased methamphetamine from Mr. Manning over the past ten years on a monthly basis. WT 3-4. According to Birkenfeld, the informant visited Mr. Manning's residence on September 15 and 20, 2006, and October 4, 2006. WT 4-5.

Birkenfeld stated that during each of these visits, the informant observed scales, a bong, and baggies. WT 4-5. Birkenfeld explained that the informant was familiar with methamphetamine residue, and recognized that the bong and baggies contained such residue. WT 4.

Birkenfeld stated the informant observed several guests at Mr. Manning's residence, a camera system monitoring the driveway, and a police scanner. WT 4-5. Birkenfeld concluded by stating that Mr. Manning had been arrested in 2004 for possession with intent to deliver methamphetamine. WT 5.

Based on these statements, Judge Hartman approved a search warrant for methamphetamine, drug paraphernalia, weapons and ammunition, and any documents of dominion and control of the residence at 741 Blacksmith Lake Drive in Belfair, Washington. WT 2, 5-6. The judge's finding of probable cause did not specify whether Neil Devitt was considered a citizen or other type of informant, and did not specifically address the issue of his credibility. WT 6.

(b) Pretrial motion to suppress. The defense moved pretrial to suppress evidence resulting from the search, challenging

probable cause for the search warrant. RP 48-51. The defense argued the information in Detective Birkenfeld's search warrant affidavit was insufficient to establish the informant's credibility. RP 55-56.

The Court noted that the warrant affidavit did not provide any specifics about the time and place of the "most recent burglary investigation," and that ideally, credibility of an informant is established where the informant has yielded reliable information on multiple specific occasions. RP 56. However, the court denied the motion to suppress, reasoning,

But at some point in time, you have to make a decision, well, yep, by golly the guy or the gal—whoever it is—came out with reliable information and shows that there is the ability to rely thereon.

RP 56.

(c) Renewed motion to suppress. During trial, the defense renewed the motion to suppress after testimony by Birkenfeld and Devitt revealed an inconsistency as to whether Birkenfeld's statement in the affidavit, that the informant was not in custody, was true. RP 230, 262, 265-68.

Birkenfeld testified at trial, and in his warrant affidavit, that Devitt was not in custody. RP 230, WT 3. However, Devitt testified

at trial that, before he acted as an informant, he told Birkenfeld that he was under electronic home monitoring. RP 262. Devitt testified that Birkenfeld knew he was on home monitoring and told him he would not get in any trouble for serving as an informant while on home monitoring. RP 262.

The defense argued that Birkenfeld's statement constituted a material omission. RP 266. The court noted that if Birkenfeld did know Devitt was in custody when he served as an informant, there could have been a material omission. RP 275. However, the court denied the motion to suppress, reasoning that Devitt had a reason to lie and Birkenfeld was more credible. RP 273-275.

D. ARGUMENT

THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS EVIDENCE RESULTING FROM THE SEARCH WARRANT BECAUSE DETECTIVE BIRKENFELD'S MATERIAL OMISSION IN THE WARRANT AFFIDAVIT NEGATES THE BASIS FOR THE INFORMANT'S CREDIBILITY UNDER AGUILAR-SPINELLI AND THEREBY EVISCERATES PROBABLE CAUSE

A warrant to search a person or his home must be based upon probable cause. When the warrant request is based upon information from an informant, the affidavit must demonstrate the informant's veracity and basis of knowledge. A warrant affiant invalidates probable cause if he or she includes false statements or

omits material information in the warrant affidavit, intentionally or with reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct 2674, 57 L.Ed.2d 667 (1978). The search warrant in this case is invalid because the warrant affiant intentionally, or with reckless disregard for the truth, made a material omission regarding the informant's credibility, which eviscerates probable cause. Therefore the trial court erred by denying the motion to suppress the methamphetamine and other items seized from Mr. Manning's home as a result of the search warrant.

1. The federal and state constitutions require that search warrants be based upon probable cause

The Fourth and Fourteenth Amendments of the United States Constitution and Article 1, §§ 3 and 7 of the Washington Constitution protect citizens from unreasonable searches and seizures and provide that a search warrant may only be issued upon a showing of probable cause. Kyllo v. United States, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable 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 or things to be seized.

U.S. Const amend. 4. Article 1, § 7 of the Washington Constitution states, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Both the Fourteenth Amendment and Article 1, § 3 guarantee due process of law.

A warrant affiant’s use of intentional or reckless perjury to secure a search warrant is a constitutional violation “because the oath requirement implicitly guarantees that probable cause rests on an affiant’s good faith.” State v. Chenoweth, 160 Wn.2d 454, 473, 158 P.3d 595 (2007), citing Franks, 438 U.S. at 155-56. .

The affidavit or other evidence submitted in an application for a search warrant must set forth the facts and circumstances the police assert create probable cause, so the issuing judge or magistrate may make a detached and independent evaluation of whether probable cause exists. Thein, 138 Wn.2d at 140.

Probable cause is established if a reasonable, prudent person would understand from the facts contained in the affidavit that the defendant is probably involved in criminal activity and that evidence

of the crime can be found in the place to be searched, at the time the search occurs. Id. The affidavit must contain more than mere conclusions; otherwise the magistrate becomes no more than a rubber stamp for the police. United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 12 L. Ed. 2d 684 (1965); State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 114 (1984).

Because probable cause to issue a search warrant involves an issue of law, the appellate court reviews the probable cause determination de novo. Detention of Peterson, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002), citing Ornelas v. United States, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 1657 (1996). Appellate courts review findings of fact for clear error. Ornelas, 517 U.S. at 699.

2. Detective Birkenfeld's false statement in the warrant affidavit that the informant was out of custody, was made intentionally or with reckless disregard for the truth, and was material to probable cause.

In order to challenge the validity of a warrant based on a misrepresentation of fact in the supporting affidavit, Franks requires a defendant to show by preponderance of the evidence that the warrant affiant made intentional falsehoods or omitted material facts with reckless disregard for the truth. Franks, 438 U.S. at 155-

56. Misstatements or omissions as a result of simple negligence or innocent mistake are insufficient. Id. at 171; Chenoweth, 160 Wn.2d at 486. The defendant's showing must be based on specific facts and offers of proof rather than on conclusory assertions. State v. Garrison, 118 Wn.2d 870, 827 P.2d 1388 (1992).

If the defendant establishes the affiant's intent or reckless disregard for the truth by preponderance of the evidence, the court must add the material omissions; and if the modified affidavit then fails to establish probable cause, the warrant is void. Franks, 438 U.S. at 155-56. The court must then suppress evidence obtained as a result of the warrant. Id.

(a) Birkenfeld's omission was intentional or reckless, not negligent.

Detective Birkenfeld's statement in the warrant affidavit, that the informant was out of custody, was intentionally false or was made with reckless disregard for the truth. Neil Devitt, the informant, testified that before he served as an informant in Mr. Manning's case, he told Birkenfeld that he was under electronic home monitoring (EHM). RP 262. Further, Devitt testified that Birkenfeld knew he was under EHM and said that Devitt's work as an informant would not violate the EHM conditions. RP 262.

Devitt had several good reasons to disclose his status in EHM to Birkenfeld. Devitt testified that he told Birkenfeld this information in order to ensure that he would not get in trouble with EHM for violating the conditions of his custody. RP 262. He testified that he had three months of EHM remaining, and would return to jail if these violated conditions, which specified the hours he was required to be either at home or work. RP 258-59. Devitt testified that if he did not “clear” his informant activities, they would most likely be considered a violation of EHM. RP 262.

Further, Devitt had ample opportunity to disclose this information to Birkenfeld. According to the warrant affidavit, Devitt worked as an informant for Birkenfeld on “the most recent burglary investigation.” WT 3. Birkenfeld was also involved in Devitt’s arrest fourteen months prior to Devitt’s work on Mr. Manning’s case, so Birkenfeld knew first hand there was a possibility that Devitt would be on EHM. RP 228, 241

The trial court erred by finding that Devitt’s testimony was not credible. The trial court reasoned that the disparity in Birkenfeld’s and Devitt’s testimony likely resulted from the fact that defendants under EHM do not consider themselves “in custody,” so are unlikely to respond affirmatively to a question of whether they

are in custody. RP 273. The court therefore found that Devitt did not tell Birkenfeld that he was under EHM, but was merely “filling in the blanks” of his memory. RP 274.

In making this ruling, the trial court deliberately ignored Devitt’s testimony. Devitt did not testify that his discussion with Birkenfeld addressed whether or not he was “in custody;” rather, he testified that he specifically told Birkenfeld that he was under EHM, and asked whether he would get in trouble with EHM for his work as an informant. RP 262. The disparity was therefore not a result of a simple misunderstanding. Nor was it a case of a witness “filling in the blanks” of his memory. Devitt faced serious consequences if he violated EHM, so he needed to “clear” it with Birkenfeld before he did anything that might be considered a violation.

Furthermore, the trial court’s ruling contradicted its earlier finding of Devitt’s credibility—when the informant’s credibility was essential to the validity of the warrant. RP 56. The court denied the defense’s pretrial motion to suppress the search warrant because it found the informant credible as a result of his prior work on one case, which occurred at an unspecified time and place. RP 56. The court acknowledged that this was less than ideal, but that it did establish Devitt’s credibility. RP 56. It would seem that the trial

court's standard for establishing informant credibility is extremely low when credibility is essential for a warrant, but extremely high when credibility threatens the validity of the warrant.

When a court requires more proof than the State's own witness's testimony that he disclosed the omitted information directly to the warrant affiant and that the affiant responded to this information, it renders the Franks standard impossible to meet. No defendant would be able to prove the affiant's intentional or reckless disregard for the truth, short of through an admission by the warrant affiant. Such a standard would render the affiant's oath meaningless, would allow police excessive power to search, and would eviscerate the standard established in Franks, which was established to protect citizens' Fourth Amendment right to be free of searches not based on actual probable cause.

The preponderance of the evidence shows that Birkenfeld omitted information about Devitt's status in custody knowingly, intentionally, or with reckless disregard for the truth. Therefore, it was clearly erroneous for the trial court to find otherwise.

Thus, the trial court's error deprived Mr. Manning of his right to a Franks hearing in order to determine whether the omission destroys probable cause for the search warrant.

(b) The omission was material because, but for the omission, the informant did not meet the high standard of reliability required to establish probable cause for a warrant based on a criminal informant.

An omission from a warrant is “material” if it would affect the finding of probable cause. State v. Copeland, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996); State v. Gentry, 125 Wn.2d 570, 604, 888 P.2d 1105 (1995). Article 1 section 7 of the Washington Constitution “requires that, in evaluating the existence of probable cause in relation to informants’ tips, the affidavit in support of the warrant must establish the basis of information and credibility of the informant.” State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 114 (1984).⁴

In Jackson, the Washington Supreme Court rejected the “totality of the circumstances” approach under Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), and affirmed the two-pronged Aguilar-Spinelli approach. Id. at 443. In rejecting the Gates approach, the Court reasoned,

To perform the constitutionally prescribed function, rather than being a rubber stamp, a magistrate requires an affidavit which informs him of the underlying circumstances which led the officer to conclude that the informant was credible and obtained the information in a reliable way. Only in this way (as

⁴ Citing Spinelli, 393 U.S. 410; Aguilar v. Texas, 378 U.S. 108.

the Court emphasized in Aguilar and Spinelli) can the magistrate make the proper independent judgment about the persuasiveness of the facts relied upon by the officer to show probable cause.

Jackson, 102 Wn.2d at 436-37. The two prongs of the Aguilar-Spinelli test have an independent status, and both are required to establish probable cause. Id. at 437.

Under the second, “credibility,” prong an affiant for a search warrant based on an informant’s claim of criminal activity inside a home must present the issuing magistrate with sufficient facts to determine the informant’s credibility and reliability. State v. Huff, 33 Wn. App. 304, 307-08, 654 P.2d 1211 (1982). The search warrant affidavit must, within its four corners, establish the credibility of the informant. Jackson, 102 Wn.2d at 433.

Different rules exist for establishing the credibility of an informant, depending on whether the informant is a professional informant or a private citizen. State v. Ibarra, 61 Wn. App. 695, 699, 812 P.2d 114 (1991), citing State v. Franklin, 49 Wn. App. 106, 108, 741 P.2d 83, review denied, 109 Wn.2d 1018 (1987). When the informant is a “citizen informant,” a presumption of reliability reduces the State’s burden of demonstrating the

informant's reliability. State v. Northness, 20 Wn. App. 551, 556-57, 582 P.2d 546 (1978).

In contrast, courts require a heightened showing of credibility where the informant is a criminal informant. State v. Rodriguez, 53 Wn. App. 571, 574-76, 769 P.2d 309 (1989). Courts presume criminal, or "professional", informants to be unreliable because professional informants have ulterior motives for making an accusation. Northness, 20 Wn. App. at 557. The primary method to establish a criminal informant's credibility is to require the affidavit to include facts showing the informant's "track record"—a record that he or she provided accurate information to the police a number of times in the past. Jackson, 102 Wn.2d at 437.

The State can also establish an informant's reliability by looking at whether the informant makes statements against his penal interests. See State v. Lair, 95 Wn.2d 706, 630 P.2d 427 (1981); United States v. Harris, 403 U.S. 573, 581, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971). Washington courts grant substantial weight to informants who police designate by name in their search warrant applications. State v. O'Connor, 39 Wn. App. 113, 121, 692 P.2d 208 (1984).

The omitted information regarding Devitt's in custody status is material because it is central to the question of Devitt's credibility as an informant under Aguilar-Spinelli. The trial court conceded the potential materiality of this information,

Although it is material—and I agree with you counsel, that if [Birkenfeld] knew that this was the case, that it should have been disclosed to the reviewing magistrate.

RP 274. Devitt's in custody status is material because it suggests many ulterior motives for making a false accusation. Devitt's credibility could have been affected by deals with the police to gain a reduced sentence, or EHM instead of jail time. These deals might have been contingent on Devitt supplying a certain amount of information, thereby creating an incentive to make false accusations in order to maintain the deals and gain favor with the police. The magistrate who granted the search warrant was unable to consider these potential ulterior motives in his evaluation of probable cause because he did not know that the informant was in custody.⁵ As Justice Sanders reasoned in his dissent in Chenoweth,

⁵ Not only did Birkenfeld state that the informant was out of custody, he also omitted Devitt's name from the affidavit. The warrant judge, Judge Hartman, was the same judge who sentenced Devitt for

[T]he magistrate cannot determine if there is probable cause when the affidavit misinforms him of the underlying circumstances; the magistrate cannot judge whether the informant was credible or obtained the information in a reliable way. Only by ensuring the magistrate is presented with truthful and complete information can he make a proper and independent judgment and act with authority of law.

State v. Chenoweth, 160 Wn.2d at 486 (Sanders, J., dissent).

Judge Hartman's determination of probable cause was meaningless because it was not based on truthful and complete information.

Furthermore, without the material omission added back into the warrant affidavit, the facts in the warrant affidavit were barely sufficient to establish Devitt's credibility under Aguilar-Spinelli. When the trial court denied the defense pretrial motion to suppress the search warrant, the court recognized that the basis for the informant's credibility was less than ideal. RP 56. The trial court noted that it would be preferable that the informant had been working with the police for several months, had provided information on multiple occasions that was "reliable, relied upon, and fruitful." RP 56. However, the court ruled that the information in

possession of methamphetamine and possession of a firearm. (266) So, Judge Hartman may have had his own impression of Devitt's credibility, and at least would have known that he was in custody.

the warrant contained sufficient facts supporting informant credibility, reasoning,

But at some point in time, you have to make a decision, well, yep, by golly the guy or the gal— whoever it is—came out with reliable information and shows that there is the ability to rely thereon.

RP 56.

The only fact within the warrant affidavit to establish the informant's credibility was that the informant had provided reliable information about suspect locations, during a burglary investigation that occurred at some unnamed time and place. WT 3. Birkenfeld did not disclose the informant's identity to Judge Hartman. WT 3. Birkenfeld did not provide any information that Devitt made any statements against his own penal interest. Further, Birkenfeld did not provide any information provided through independent police investigation that verified any of Devitt's information.

Because Devitt's credibility as an informant under Aguilar-Spinelli was so tenuous to begin with, the warrant affidavit complete with the addition of Birkenfeld's omission does not meet the high standard of credibility required for criminal informants. Therefore, Birkenfeld's omission was material to probable cause, and Franks requires suppression of evidence resulting from the search warrant.

E. CONCLUSION

Based on the foregoing, Mr. Manning respectfully asks this Court to reverse the order denying the defense motion to suppress the evidence seized as a result of the search warrant.

Respectfully submitted this 3rd day of December, 2007.



Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorney for Appellant



Mindy M. Ater – WSBA # 9099745
Washington Appellate Project
APR 9 Intern

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

STATE OF WASHINGTON,)	
)	
Respondent,)	COA NO. 36373-9-II
)	
v.)	
)	
MICHAEL MANNING,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 3RD DAY OF DECEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] MONTY DALE COBB, DPA MASON COUNTY PROSECUTOR'S OFFICE PO BOX 639 SHELTON, WA 98584-0639</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] MICHAEL MANNING 803395 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF DECEMBER, 2007.

X _____ *gril*

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