

No. 36373-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MANNING,

Appellant.

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer II

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DIVISION II  
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REPLY BRIEF OF APPELLANT

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## A. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MANNING'S MOTION TO SUPPRESS EVIDENCE RESULTING FROM THE SEARCH WARRANT BECAUSE ADDITION OF THE INFORMATION BIRKENFELD RECKLESSLY OR INTENTIONALLY OMITTED FROM THE WARRANT AFFIDAVIT ELIMINATES THE WARRANT'S ALREADY TENUOUS BASIS OF INFORMANT RELIABILITY, THEREBY DESTROYING PROBABLE CAUSE

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 v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 667 (1978).

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 knowingly 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 must make allegations of deliberate falsehood or of a reckless disregard for the

truth, accompanied by an offer of proof. State v. Vickers, 148 Wn.2d 91, 114, 59 P.3d 58 (2002).

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 determination of whether a warrant should issue is reviewed for abuse of discretion. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

1. Birkenfeld's omission of information regarding the informant's in-custody status was reckless, knowing and intentional

Detective Birkenfeld knowingly and intentionally falsely reported that informant Neil Devitt was not in custody, and omitted the fact that Devitt was under electronic home monitoring (EHM) at the time he served as an informant in Birkenfeld's investigation of Mr. Manning. WT 3.<sup>1</sup> Devitt testified that before he served as an informant in Mr. Manning's case, he told Birkenfeld he was under

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<sup>1</sup> 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.

EHM. RP 262.<sup>2</sup> Further, Devitt testified that Birkenfeld knew he was under EHM and explicitly assured Devitt that his informant activities would not violate the EHM conditions. RP 262. It was important for Devitt to tell Birkenfeld he was under EHM because (1) Devitt wanted to ensure he would not get in trouble with EHM for violating the conditions of his custody, (2) he would have to return to jail if he violated his EHM conditions, and (3) if he did not “clear” his informant activities, they would most likely be considered a violation of EHM. RP 258-259, 262.

Devitt’s testimony shows Birkenfeld knew about Devitt’s in-custody status at the time he applied for a warrant to search Mr. Manning’s home. Despite this knowledge, Birkenfeld omitted this fact in the warrant affidavit. Birkenfeld instead stated the unnamed informant “is out of custody and has no charges pending.” WT 3. This Court may infer intent from these facts.

Birkenfeld also omitted the fact of Devitt’s in-custody status with reckless disregard for the truth. A defendant can prove recklessness where the affiant entertained “serious doubts” as to the truth of facts or statements in the affidavit. State v. Clark, 143 Wn.2d 731, 750, 24 P.3d 1006 (2001). “‘Serious doubts’ are shown

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

by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.” Id. Devitt’s in-custody status presents an obvious reason to doubt his veracity because it suggests ulterior motives for making a false accusation. Devitt’s veracity 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. Birkenfeld’s omission shows reckless disregard for the truth because it prevented the magistrate from considering these potential ulterior motives in his evaluation of probable cause.<sup>3</sup>

The trial court erroneously disregarded Devitt’s testimony that he told Birkenfeld he was under EHM. Instead, the court concocted an imaginary scenario where the only discussion between Birkenfeld and Devitt on this topic of custody consisted of Birkenfeld asking Devitt whether he was “in custody,” and Devitt

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<sup>3</sup> 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 possession of methamphetamine and possession of a firearm. RP 266. Judge Hartman likely had his own impression of Devitt’s credibility, and at least would have known that he was in custody.

replying ignorantly that he was not. RP 272-274. The trial court explained that Devitt likely just did not understand that EHM meant he was “in custody” because,

When you get a person before the Court and they find out that they’re going to get EHM, they walk out the door with a big smile on their face because they’re not going to jail, which is custody in their view.

RP 273. The trial court flippantly dismissed Devitt’s testimony regarding the several motivations he had for telling Birkenfeld he was on EHM as “filling in the blanks.” RP 274. The court acknowledged that official witnesses do not always tell the truth, but “made a credibility call here between the two,” in favor of Birkenfeld because “I think I’ve watched and listened to Detective Birkenfeld very closely in his presentation, and I believe that he is being forthright with the Court.” RP 273-274.

This is not “wise reasoning,” as the prosecution argues it is, Resp. Br. at 12, because it unfairly disregards testimony from the State’s own witness in favor of an arbitrary credibility call based on the court’s perception of Birkenfeld’s demeanor during his testimony.

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 unnamed criminal informant reliable under Aguilar-Spinelli<sup>4</sup> as a result of his prior work on one case, which occurred at an unspecified time and place. RP 56. The court reasoned,

[A]t 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 thing consistent about these rulings is the court's arbitrary disregard for facts that lead to the conclusion that incriminating evidence is inadmissible.

Birkenfeld intentionally and knowingly reported to the magistrate that his unnamed criminal informant was not in custody, and omitted, with reckless disregard for the truth, that the informant was under EHM. The State's reliance on Chenoweth is misplaced because Birkenfeld's omission was not merely negligent. In Chenoweth, the Supreme Court found that the prosecutor and warrant affiant was not aware of the omitted information, and therefore could not have intentionally or recklessly omitted it. 160

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<sup>4</sup> Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 723, 84 S. Ct. 1509 (1964); Spinelli v. United States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969).

Wn.2d at 481. Here, in contrast, there is ample evidence that Birkenfeld was aware of the omitted information.

2. When the affidavit includes Birkenfeld's omission, the affidavit fails to establish probable cause because it no longer satisfies the credibility prong of *Aguilar-Spinelli*

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).<sup>5</sup>

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, reasoning,

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

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<sup>5</sup> Citing *Spinelli*, 393 U.S. 410; *Aguilar v. Texas*, 378 U.S. 108.

the information in a reliable way. Only in this way (as 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 443, 436-37. Both the “knowledge” and “credibility” prongs of the Aguilar-Spinelli test are required to establish probable cause. Id. at 437.

The State’s burden to prove informant credibility increases where informants are unnamed in the warrant affidavit, State v. O’Connor, 39 Wn. App. 113, 121, 692 P.2d 208 (1984), or are criminal, or “professional,” informants as opposed to citizen informants. State v. Rodriguez, 53 Wn. App. 571, 574-76, 769 P.2d 309 (1989). Courts presume “professional” informants to be unreliable because they have ulterior motives for making an accusation. State v. Northness, 20 Wn. App. 551, 557, 582 P.2d 546 (1978). 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 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. As discussed previously, the omission of Devitt's in-custody status in the warrant affidavit prevented the magistrate from evaluating possible ulterior motives Devitt might have had to fabricate information, such as receiving EHM as opposed to jail time. The magistrate could not properly evaluate the informant's credibility without this information.

[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).

The omission destroys probable cause because it is questionable whether the warrant affidavit satisfied the credibility prong of Aguilar-Spinelli to begin with, as Devitt was an unnamed, criminal informant with a vague and limited "track record" of providing reliable information. WT 3. When the trial court denied

the defense pretrial motion to suppress the search warrant, the court recognized 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.

Therefore, with the omitted information added to the warrant affidavit, the affidavit does not meet the high burden for the credibility prong under Aguilar-Spinelli for unnamed, criminal informants. The State's reliance on State v. Atchley, 142 Wn. App. 147, 173 P.3d 323 (2007), is misplaced because the warrant in Atchley was not based solely on information provided by an informant – as the warrant in this case is – because the deputy in Atchley took several steps to verify the information provided by the informant. Further, Atchley's allegations of misrepresentations were related to information provided directly by police investigation, and were not related to the informant's credibility. Id. at 159-60 (defendant argued deputy falsely asserted he observed marijuana "root balls" during investigation of his yard). Atchley did not challenge the warrant on the basis that it did not satisfy the credibility prong of Aguilar-Spinelli, so this case is not on point. Id.

B. CONCLUSION

The trial court abused its discretion because it arbitrarily disregarded evidence that the warrant affiant intentionally, knowingly, and with reckless disregard for the truth, omitted information material to probable cause. Mr. Manning, therefore, 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 16th day of April 2007.



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APPENDIX A

## 1 TELEPHONIC SEARCH WARRANT

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3  
4 THE COURT: It is Wednesday, October 4, and it is 7:23  
5 p.m. My name is Russ Hartman. I am a judge on the Kitsap  
6 County Superior Court. With me on the telephone is Detective  
7 Keith Birkenfeld [sic] of the Kitsap County Sheriff's office.

8 DETECTIVE BIRKENFELD: And, Your Honor, just to make a  
9 correction, Chad Birkenfeld.

10 THE COURT: Chad, I'm sorry. Chad, do I have your  
11 permission to record this call?

12 DETECTIVE BIRKENFELD: Yes, you do, sir.

13 THE COURT: Do you solemnly swear or affirm that the  
14 testimony you are about to give will be the truth, the whole  
15 truth, and nothing but the truth?

16 DETECTIVE BIRKENFELD: Yes, I do.

17 THE COURT: And it's my understanding that you wish to  
18 apply for a search warrant; is that correct?

19 DETECTIVE BIRKENFELD: That is correct.

20 THE COURT: Go ahead.

21 DETECTIVE BIRKENFELD: The address to who -- that we  
22 are applying for, Your Honor, is 741 Blacksmith Lake Drive,  
23 Belfair, Washington, Mason County. It's a mobile home with  
24 flames on it. It's going to be for the crime of a violation of  
25 the Uniform Controlled Substance Act, VUCSA, RCW 69.50.401,

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1 possession of a controlled substance; to wit, methamphetamine.

2 The probable cause for the warrant is as follows:

3 On September 7, 2006 I was contacted by a person who  
4 used to be involved in the narcotics trade. This police  
5 operative -- later referred to as a PO -- is out of custody and  
6 has no charges pending. I have spoken with this PO in the past  
7 regarding criminal investigations and most recently during a  
8 burglary investigation.

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

15 The PO does not want to be named as a PO because they  
16 are fearful that they may be retaliated against. The PO wishes  
17 to provide information on narcotics to remove sellers from  
18 their community and family members. The PO does have a  
19 criminal history that includes convictions for malicious  
20 mischief, firearm offenses, VUCSA, and DWLS.

21 On September 15, 2006 the PO called back and spoke with  
22 me. The PO advised they were at a person's house that they had  
23 known for twenty years. The PO identified this person as  
24 Michael Manning, M-A-N-N-I-N-G, who resides at the above-listed  
25 address, 741 Blacksmith Lake Drive, Belfair. The PO in the

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1 past has received or purchased methamphetamine from Manning  
2 over the past ten years on a monthly basis.

3 On September 15, 2006, when the PO was at the Manning  
4 residence, they observed two scales inside the Manning home.  
5 One scale was digital, the other was a triple-beam styled  
6 scale. The PO also observed a bong about two feet in size as  
7 what they described as methamphetamine residue inside of it.  
8 The PO is familiar, from their past history, with what  
9 methamphetamine looks like, how it is stored, used, weighed and  
10 packaged. The PO also observed several baggies laying around  
11 in the living room area of the home. Based off their  
12 observations, the baggies were described as one by one inch in  
13 size and used to store methamphetamine.

14 The PO told me that Manning had several subjects at his  
15 residence, and he was quote, busy, unquote. The PO also  
16 advised that Manning had a camera system monitoring his  
17 driveway and kept a scanner going.

18 On September 20, 2006 the PO had a phone conversation  
19 with me again. The PO advised me that he had been back out to  
20 the 741 Blacksmith Lake Drive address. The PO advised me that  
21 the CC TV camera was functioning and viewing the driveway to  
22 and from the residence. The PO confirmed that they again saw a  
23 smoking bong and scales inside the home. The PO advised me  
24 that there were baggies lying around as well with what he knows  
25 to be methamphetamine residue inside of them.

1           Most recently, on October 4, 2006, today, the PO called  
2 me again and advised me that they had just been back to the  
3 suspect residence at the above-described location. The PO  
4 informed me that there were many subjects coming and going from  
5 the home. The PO further confirmed the monitoring cameras are  
6 still on and looking down the driveway. The PO observed more  
7 baggies with residue inside them and described it as  
8 methamphetamine residue. The PO also observed the same scales  
9 and smoking devices inside the home as well.

10           Based off the information the PO has provided, I  
11 checked the criminal contacts and history for Manning. Manning  
12 has had a VUCSA arrest with our office in 2004 for the crime of  
13 possession with intent to deliver methamphetamine.

14           Based off those facts listed in the affidavit, I would  
15 request permission to search for the following items:

16           One, any and all methamphetamine.

17           Two, drug paraphernalia, to include all equipment,  
18 products and materials of any kind which are used, intended for  
19 use or designed for use in compounding, converting, producing,  
20 processing, containing, concealing, inhaling, ingesting, or  
21 otherwise ingesting into a human body methamphetamine,  
22 included, but not limited to, bags, materials for packaging,  
23 cutting or weighing the methamphetamine, all United States  
24 currency, any weapons and ammunition, including, but not  
25 limited to, handguns, pistols, revolvers, rifles, shotguns.

*Search Warrant; MICHAEL MANNING*

1 automatic weapons, and any records or receipts pertaining to  
2 the firearms or ammunition, evidence of occupancy, residency,  
3 dominion or control, rental and/or ownership of the premises,  
4 owner vehicles described herein, including, but not limited to,  
5 utility and telephone bills, canceled envelopes, rental,  
6 purchase or lease agreements or keys, and any items used for  
7 surveillance or to protect the premises from law enforcement  
8 officers.

9 THE COURT: All right.

10 DETECTIVE BIRKENFELD: That will be all of the items  
11 that we are looking for, Your Honor.

12 THE COURT: All right. Thank you. I find that there  
13 is probable cause to find the property described, which would  
14 be the fruits and instrumentalities of the crimes associated  
15 with the use and distribution of methamphetamine at the  
16 residence described, and you may affix my name to a warrant  
17 search for those items at the place that you indicated.

18 DETECTIVE BIRKENFELD: Okay.

19 THE COURT: Is there anything else?

20 DETECTIVE BIRKENFELD: That is it, Your Honor.

21 THE COURT: All right. Just a second. I would like  
22 you to stay on the phone here while I rewind and I make sure  
23 I've got you.

24 DETECTIVE BIRKENFELD: Certainly.

25 (End of telephonic search warrant request.)

*Search Warrant; MICHAEL MANNING*

