

No. 36373-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer II
Cause No. 06-1-00410-8

BRIEF OF RESPONDENT

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A. ASSIGNMENT OF ERROR

1. 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. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in denying Manning's motion to suppress evidence that resulted from the informant-based search warrant when: (a) Detective Birkenfeld did not make a material omission that was either reckless or with an intentional disregard of the truth, and (b) the informant's information satisfied both prongs of Aguilar-Spinelli?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP." The search warrant attached to Manning's brief shall be referred to "WT."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Manning's recitation of the procedural history and facts and adds the following:

During his voir dire of Detective Birkenfeld, Mr. Mahoney, counsel for Manning, engaged in the following colloquy:

Mr. Mahoney: Detective, you were aware at the time you used this man [Devitt, the informant] that he had been sentenced a few months before in June of '06, weren't you?

Det. Birkenfeld: My knowledge of Mr. Devitt was his case was on August 5th and everything had been adjudicated and he had no criminal cases pending. RP 245: 20-25.

Later in his voir dire of Detective Birkenfeld, Mr. Mahoney inquired:

Mr. Mahoney: Sir, showing you what has been marked Exhibit 43, which appears to have been marked with a file stamp by the Kitsap County Superior Court, or the clerk. Are you indicating that you were not aware that during the time that you used [Devitt] in this case that he was on home detention?

Det. Birkenfeld: Correct.

Mr. Mahoney: You did not observe on his person the anklet which typically is put on people who are on home detention?

Det. Birkenfeld: No, sir.

Mr. Mahoney: Have you ever seen such an anklet before?

Det. Birkenfeld: I believe one time on a person wearing shorts. RP 246: 19-25; 247: 1-4.

During the final portion of this questioning, the following exchange occurred:

Mr. Mahoney: Okay. So you're saying that to your knowledge that Mr. Devitt was not promised anything at the time by the Kitsap County Sheriff's Office of being

helped to receive more lenient treatment on the charged where he was arrested?

Det. Birkenfeld: Correct. And at one point I even asked Mr. Devitt from previous help on cases if he wanted any monetary compensation, as sometimes informants or police operatives get, and he even denied that. RP 247: 23-25; 248: 1-5.

3. Summary of Argument

The trial court did not err by denying Manning's motion to suppress evidence that resulted from the informant-based search warrant because: (a) Detective Birkenfeld did not make a material omission that was either reckless or with an intentional disregard of the truth; and (b) informant Devitt's information satisfied both prongs of Aguilar-Spinelli. Manning's argument that the evidence obtained from the search warrant should be suppressed because he was on EHM status is not only purely academic but also, to use the terminology from Chenoweth, hypertechnical.

Additionally, the record clearly shows the trial court engaged in a thoughtful, well-reasoned decision in response to Manning's motions to suppress evidence. No error occurred. The State respectfully requests that the Court affirm the judgement and sentence in Manning's case.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY DENYING MANNING'S MOTION TO SUPPRESS EVIDENCE THAT RESULTED FROM THE INFORMANT-BASED SEARCH WARRANT BECAUSE:

(a) DETECTIVE BIRKENFELD DID NOT MAKE A MATERIAL OMISSION THAT WAS EITHER RECKLESS OR WITH AN INTENTIONAL DISREGARD OF THE TRUTH

The trial court did not err by denying Manning's motion to suppress evidence that resulted from the informant-based search warrant because Detective Birkenfeld did not make a material omission that was either reckless or with an intentional disregard of the truth.

A search warrant is entitled to a presumption of validity. State v. Chenoweth, 160 Wash.2d 454, 477, 158 P.3d 595 (2007); see State v. Wolken, 103 Wash.2d 823, 827-828, 700 P.2d 319 (1985); State v. Atchley, 173 P.3d 323, 329 (Div. 3, December 18, 2007). Scrutinizing a warrant affidavit for evidence of negligent omissions or misstatements is also inconsistent with our State's established jurisprudence governing search warrant challenges. Chenoweth, 160 Wash.2d at 477.

The decision to issue a warrant is highly discretionary. Chenoweth, 160 Wash.2d at 477; see State v. Cole, 128 Wash.2d 262,

286, 906 P.2d 925 (1995). Great deference is generally given to the magistrate's determination of probable cause and view the supporting affidavit for a search warrant in a commonsensical manner rather than hypertechnically. Chenoweth, 160 Wash.2d at 477, see State v. Young, 123 Wash.2d 173, 195, 867 P.2d 593 (1994). A magistrate's determination that a warrant should issue is an exercise of judicial discretion that is reviewed for abuse of discretion. Cole, 128 Wash.2d at 287.

Doubts concerning the existence of probable cause are generally resolved in favor of the validity of the search warrant. Chenoweth, 160 Wash.2d at 477; see State v. Vickers, 148 Wash.2d 91, 109, 59 P.3d 58 (2002). Shifting focus from the reasonableness of the magistrate's probable cause determination to the reasonableness of the affiant's investigation would permit an end run around the deliberately deferential standard of review that a reviewing court applies to search warrants. Chenoweth, 160 Wash.2d at 477.

The construction of the Washington State constitution is a question of law that is reviewed de novo. Chenoweth, 160 Wash.2d at 462; see State v. Norman, 145 Wash.2d 578, 589, 40 P.3d 1161 (2002). Under the Fourth Amendment, factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they

are: (a) material and (b) made in reckless disregard from the truth.

Chenoweth, 160 Wash.2d at 462; see Franks v. Delaware, 438 U.S. 154, 155-156, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978). A showing of mere negligence or inadvertence is insufficient. Chenoweth, 160 Wash.2d at 462; see Franks, 438 U.S. at 171; State v. Seagull, 95 Wash.2d 898, 908, 632 P.2d 44 (1981).

Washington courts have consistently applied the Franks standard, requiring a showing of reckless or intentional misstatement or omissions of material facts. Chenoweth, 160 Wash.2d at 470; see State v. Olson, 74 Wash.App. 126, 131-132, 872 P.2d 64 (1994). Under Franks, ‘Allegations of negligence or innocent mistake are insufficient.’ Vickers, 148 Wash.2d at 114; see Franks, 438 U.S. at 156-157. There must be allegations of deliberate falsehood or of a reckless disregard of the truth, accompanied by an offer of proof. Vickers, 148 Wash.2d at 114; see Franks, 438 U.S. at 171; State v. Garrison, 118 Wash.2d 870, 872, 827 P.2d 1388 (1992).

Recklessness may be shown by establishing that the affiant actually entertained serious doubts about the informant’s veracity. Chenoweth, 160 Wash.2d at 479; see State v. Clark, 143 Wash.2d 731, 751, 25 P.3d 1006 (2001). “Serious doubts” may be inferred from either: (a) an affiant’s actual deliberation or (b) the existence of obvious reasons

to doubt the informant's veracity or the information provided.

Chenoweth, 160 Wash.2d at 479.

The procedure and facts of Chenoweth are directly applicable to Manning's case because they squarely address the issue of telephonic search warrants and the State's alleged omission of material facts to the magistrate.

In Chenoweth, Nicolas Parker called the Lynden Police Department and reported that defendant Chenoweth was operating a methamphetamine lab at a specific address in Lynden. Chenoweth, 160 Wash.2d at 458-459. The tip was relayed to Whatcom Inter-agency Narcotic Detective Ryan King of the Blaine Police Department, who then contacted Parker. Chenoweth, 160 Wash.2d at 459. Parker gave Detective King his full name and address, and agreed to come to the police department for an interview. Based on the information Parker gave during the interview, Detective King sought and obtained a telephonic search warrant with the assistance of Whatcom County prosecutor Rosemary Kaholokula.

After the magistrate placed Detective King under oath, the prosecutor elicited information from him through a series of questions. The prosecutor asked Detective King to relate what he knew of Parker's criminal history. Detective King said that Parker told him that he had

spent a year and a day in prison for unlawful possession of cocaine and delivery of a controlled substance. The prosecutor then asked Detective King whether he had verified the information through a criminal records check. Detective King replied that he had not.

Detective King also told the magistrate that Parker said he went to defendant Chenoweth's property earlier that day to try and get his car back. Defendant Chenoweth refused to return the car and ordered Parker off the premises. During the visit, Parker went inside the garage and saw various chemicals and equipment that he recognized as components of a methamphetamine lab, including glass flasks containing liquids, ephedrine, canning jars, red phosphorous, tincture of iodine, acetone, coffee filters, Red Devil lye, Drano, a gas generator, a bottle with a hose, and kerosene.

Parker said that during earlier visits to the property Chenoweth admitted to making methamphetamine in the garage, that he had watched Chenoweth make methamphetamine and had actually assisted him by handing him chemicals and equipment. In addition, Parker said that Chenoweth had given him another person, Wood, methamphetamine while he (Parker) was at the house three or four days earlier.

In concluding, prosecutor Kaholokula said, 'Your Honor, the only thing that I would add is that as far as Mr. Parker's criminal history,

although Officer King hasn't verified what he said, I can tell the court that I was the prosecutor on the prior criminal case and so I know that to be accurate that he was convicted of a delivery of a drug." Chenoweth, 160 Wash.2d at 459-460. The magistrate asked her to swear to the accuracy of that information and she replied, "I do, I don't remember the time he served, although I do remember that he went to prison for it." Chenoweth, 160 Wash.2d at 460. The commissioner issued the search warrant.

The next day, the prosecutor sought and obtained an addendum to the search warrant. She stated, "I would just like to put on the record that I had confirmed Nicholas Parker's criminal history from what I recalled yesterday and further thought I would like to ask if the Commissioner would have found probable cause in the absence of that statement." The prosecutor explained that she wanted to avoid being a witness in a proceeding to challenge the warrant. The commissioner replied that Parker's admission of a criminal conviction was somewhat "self-authenticated" because "there is no reason to say that you have a criminal record unless you do," making the prosecutor's confirmation of that record superfluous.

Based on evidence obtained during the searches, the State charged Chenoweth and Wood with possession of precursor materials with intent to manufacture methamphetamine and unlawful manufacture of

methamphetamine. The State also charged Chenoweth with two counts of possession of a controlled substance.

Chenoweth and Wood moved to suppress the evidence, arguing that Detective King and Prosecutor Kaholokula recklessly and/or intentionally omitted facts about informant Parker's background that would have precluded the magistrate's determination of probable cause, including: (1) Parker's criminal history included several crimes of dishonesty; (2) Parker had been a paid informant for the Bellingham police department, but his contract was terminated because of concerns about his reliability; (3) four years previously, Kaholokula charged Parker with intimidating a witness; (4) two years previously, Kaholokula was aware that Parker made unsubstantiated allegations that his attorney accepted cocaine as payment for his defense; (5) Parker was motivated by revenge in that he was angry with Chenoweth for failing to return his car; (6) Parker was motivated by self-interest in that he expected the police to help him retrieve his car; and (7) Parker provided the information in the expectation that the police would pay him. Chenoweth, 160 Wash.2d at 460-461. In the alternative, Wood argued that the search warrant was invalid under the Washington State constitution even if the omissions resulted from negligent rather than reckless or intentional conduct.

Chenoweth, 160 Wash.2d at 461.

The trial court held several hearings to explore these allegations, and concluded that the omitted facts would have negated probable cause. However, the trial court concluded that the defendants failed to carry their burden of proving that Detective King or prosecutor Kaholokula recklessly failed to disclose the full extent of Parker's criminal history or his unsuccessful career as a paid informant to the issuing magistrate. The trial court also concluded that Parker was acting as a citizen informant when he informed the police about the methamphetamine lab. Accordingly, the trial court denied the motion to suppress, and the Court of Appeals affirmed.

The Washington State Supreme Court reasoned that the factual findings made in this case support the trial court's conclusion that prosecutor Kaholokula did not act in reckless disregard for the truth by failing to disclose material facts to the commissioner. Chenoweth, 160 Wash.2d at 481. Per the Supreme Court, the trial court found that Kaholokula was not aware of Parker's history as a failed police informant when she applied for the search warrants. Further, the trial court found that Kaholokula, who prosecutes over 200 cases per year, did not intentionally hide any information from the magistrate and did not act in bad faith in failing to gather relevant information. The State Supreme Court then held that the trial court's conclusion that the prosecutor did not

recklessly omit material facts in obtaining a search warrant was not clearly erroneous.

The facts of Manning's case, by contrast, are far less dramatic than those in Chenoweth, as Detective Birkenfeld simply did not disclose to Judge Hartman in Kitsap County that Manning was on EHM at the time he telephonically applied for the search warrant. Ruling on Manning's motion to suppress, the trial court judge in Mason County took considerable time and effort to make a complete record and wisely reasoned:

I'll make as good of record for both sides as I can with respect to my ruling in this, because I think it's important. Obviously, it's important...[B]asically what you have is...disparate testimony of two individuals regarding the knowledge of Detective Birkenfeld at the time that he made this request for a search warrant through the judge...Detective Birkenfeld says I didn't know. I didn't see the anklet on him. I asked him if he was-if he had any pending cases, he said no pending cases. I represented that to the judge, which is consistent with the record that has been transcribed...RP 272: 5-23.

Was he [Devitt] in custody? Yes, he was in custody. I mean, the case law clearly says that EHM is custody. Is that the type of thing that the average defendant considers to be custody? I don't think so. When you get a person before the Court and they find out that they're going to get EHM, they walk out of the door with a big smile on their face because they're not going to jail, which is custody in their view. And of course for those of us who work in the profession, we understand that EHM is custody. RP 273: 8-16.

Does that explain a disparity in the testimony before the Court? I think it does, to a great extent. Whether Mr. Devitt thought that 90 days was a big deal or not-and I don't find that particularly surprising either, because people that have had a fair amount of exposure to the system, I think probably the easiest thing that they do is time, oftentimes....But, what I am indicating is that I am accepting and I believe the testimony of Detective Birkenfeld that at the time that he made this representation to the judge, he did not know that Devitt was on EHM. And basically, what I'm doing is I'm calling a credibility call here between the two. RP 273: 17-25; 274: 1-3.

I think that Devitt is trying to be honest with us in his testimony. I think that he, typical of a lot of witnesses, is filling in the blanks. I think that Detective Birkenfeld has been quite forthright in his testimony with respect to what it is he knew or didn't know. And I'm not so naïve to believe that there aren't times that I don't get a straight story from all of the official witnesses that come before me, but I think that I watched and listened to Detective Birkenfeld very closely in his presentation and I believe that he is being forthright with the Court. RP 274: 4-13.

And as such, I don't believe that there was a material omission because of course, although it is material-and I agree with you, counsel, that if he knew that this was the case, that it should have been disclosed to the reviewing magistrate-I don't know what it would have done, whether it would have changed the outcome...RP 274: 14-19.

As such, the facts, as submitted to the judge, were sufficient to support the issuance-they still are sufficient to support the issuance-and I do not find that there was a material omission, in that I'm not finding that the individual who contacted the judge knew this fact, which, if it were known, could be considered to be material. Therefore, I will not grant the motion to suppress and we will proceed with our trial...RP 275: 18-24.

Given the Supreme Court's holding in Chenoweth, where the defense argued that at least seven defects marred probable cause for the warrant, Manning's argument here is without merit. The record shows that the trial court judge in Manning's case took testimony and made a careful, well-reasoned decision. At most, Detective Birkenfeld made an omission, but applying the reasoning and holding of Chenoweth, it was in no way intentional, reckless and/or material. Any doubt surrounding the search warrant in Manning's case should be resolved in favor of its validity under Chenoweth as well as Vickers. The trial court did not err and its decision should be affirmed.

1. THE TRIAL COURT DID NOT ERR BY DENYING MANNING'S MOTION TO SUPPRESS EVIDENCE THAT RESULTED FROM THE INFORMANT-BASED SEARCH WARRANT BECAUSE:

(b) INFORMANT DEVITT'S INFORMATION SATISFIED BOTH PRONGS OF AGUILAR-SPINELLI.

The trial court did not err by denying Manning's motion to suppress evidence that resulted from the informant-based search warrant because informant Devitt's information satisfied both prongs of Aguilar-Spinelli.

An informant's tip supporting a search warrant is analyzed under the two-part Aguilar-Spinelli test. Vickers, 148 Wash.2d at 112; see 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). Under that test, to establish probable cause for the issuance of a search warrant based upon an informant's tip detailed in an affidavit, the affidavit must demonstrate the informant's (1) basis of knowledge and (2) veracity. Vickers, 148 Wash. 2d at 112; see State v. Jackson, 102 Wash.2d 432, 440, 688 P.2d 136 (1984).

To satisfy both parts of Aguilar-Spinelli, a magistrate must require an affidavit to state the underlying circumstances which the magistrate may draw upon to conclude the informant was credible and obtained the information in a reliable manner. Vickers, 148 Wash.2d at 112. If either or both parts of the Aguilar-Spinelli test are deficient, probable cause may yet be satisfied by independent police investigation corroborating the informant's tip to the extent that it cures the deficiency. The knowledge part is satisfied by showing that the information provided by the informant was based upon personal knowledge.

The credibility of a confidential informant depends on whether the informant is a private citizen or a professional informant, and, if a citizen informant, whether his or her identity is known to the police. Atchley, 173

P.3d at 331; see State v. Ibarra, 61 Wash.App. 695, 699, 812 P.2d 114 (1991). When the identity of an informant is known, the necessary showing of reliability is relaxed, as the information is less likely to be given in self-interest. Atchley, 173 P.3d at 331; see State v. Gaddy, 152 Wash.2d 64, 72-73, 93 P.3d 872 (2004). However, Washington requires a heightened showing of credibility for citizen informants whose identity is known to police but not disclosed to the magistrate. Atchley, 173 P.3d at 331; see Ibarra, 61 Wash.App. at 700. To address concerns that the confidential citizen informant is not an “anonymous troublemaker,” the affidavit must contain “background facts to support a reasonable inference that the information is credible and without motive to falsify.” Atchley, 173 P.3d at 331-332; see Cole, 128 Wash.2d at 287-288.

The facts of Atchley are comparable to defendant Manning’s case because they involve an informant who provided his name and other contact information to the police and who received no compensation or other reward in return for the tip.

In Atchley, Deputy Jack Rosenthal presented an affidavit for search warrant for a suspected indoor marijuana grow at defendant Atchley’s residence. Atchley, 173 P.3d at 326. Deputy Rosenthal had been contacted by a concerned citizen informant, who provided the location of the residence and defendant Atchley’s name. The informant

told the deputy that marijuana was being grown in defendant Atchley's basement and that defendant Atchley sold marijuana from this residence and at the Big Foot Tavern. In addition, the informant indicated that defendant Atchley worked at a local home and garden store. The informant alleged that defendant Atchley had devised an elaborate ventilation system and may have been diverting power from his residence to avoid detection of the marijuana grow operation by law enforcement.

Deputy Rosenthal obtained the informant's name, date of birth, address, place of employment, and phone number. Atchley, 173 P.3d at 327. Deputy Rosenthal completed a criminal background check of the informant, and found "no reason to believe that the [informant] would provide false information to law enforcement." The affidavit stated that the informant requested no compensation and that the information was not provided in connection with any past, present or pending criminal charges.

Deputy Rosenthal followed-up on the information provided by the informant and confirmed that defendant Atchley owned and resided at the address provided. Deputy Rosenthal performed a Department of Licensing search and verified that defendant Atchley was the owner of a 1988 GMC pickup. The deputy discovered that the vehicle was observed in 2002 at a local garden supply store where one year earlier law enforcement had conducted a surveillance operation, resulting in several

arrests for marijuana cultivation and manufacturing. Deputy Rosenthal conducted a financial background check of defendant Atchley, and verified that he worked at Home Depot. Deputy Rosenthal stated in the affidavit that he believed that defendant Atchley was living beyond his reported means.

The deputy independently conducted a ruse, whereby he visited the outside of Atchley's residence undercover. The deputy stated that he did not detect the odor of marijuana. While outside the residence, however, Deputy Rosenthal did notice large quantities of potting soil dispersed around Atchley's home containing what "appeared to be" the root balls of marijuana plants. Deputy Rosenthal also stated that he was able to see, through a partially open gate, that the backyard was covered in potting soil. Based on the deputy's training and experience, these observations were indicative of an indoor marijuana cultivation operation.

Based on the information contained in the affidavit, a search warrant was issued for the person, residence and vehicle of defendant Atchley. Upon execution of that warrant, items were found in defendant Atchley's residence, including marijuana plants, lights and other grow equipment, scales, packaging materials and calendars. Defendant Atchley was charged with one count of manufacturing a controlled substance and one count of possession of a controlled substance with intent to deliver.

Defendant Atchley brought, among three motions, one to suppress the evidence derived from the search of his home. He based his motion to suppress on his claims that the warrant was issued without sufficient probable cause and was based on false information. The trial court held a hearing on the validity of the search warrant and: (1) found that probable cause existed; (2) declined a Franks hearing; and (3) denied the motion to suppress. The trial court denied reconsideration, and found him guilty at a stipulated facts trial on both counts.

At the Court of Appeals, Division 3 affirmed Atchley's convictions, reasoning that under the first prong of Aguilar-Spinelli, there was sufficient evidence that the credibility of the informant was established. The informant provided his or her name and other contact information to the police. Atchley, 173 P.3d at 332. The informant received no compensation or other reward in return for the tip, and a background check revealed nothing to give Deputy Rosenthal reason to suspect the information provided was false. The informant said that his or her reason for coming forward was to assist law enforcement in ridding the community of suspected narcotic manufacturers and traffickers.

The Court did note, however, that the State's case under the second prong of Aguilar-Spinelli was weak, in that Deputy Rosenthal did not provide any information in the affidavit establishing that the informant's

tip was based on firsthand knowledge or indicating that the informant had been inside defendant Atchley's residence. Per the Court, whether the information provided by the informant, standing alone, provided probable cause sufficient to support the issuance of a search warrant need not be addressed because the informant's statements were not the sole basis for supporting the affidavit.

Applying the rationale of Atchley to the facts of Manning's case, both prongs of Aguilar-Spinelli were satisfied because: (1) Devitt had talked with Detective Birkenfeld before, had no reason to lie and did not request any reimbursement for his tip (veracity); and (2) provided specific, credible and firsthand information regarding Manning's involvement with methamphetamine (basis of knowledge). Unlike the informant in Atchley who may or may not have actually gone inside that defendant's residence, informant Devitt in Manning's case had firsthand knowledge that Manning had methamphetamine and drug paraphernalia in his house. As Detective Birkenfeld related to the magistrate during his telephonic application for a search warrant:

On September 15, 2006, the PO [Police Operative, Devitt] called back and spoke with me. The PO advised they were at a person's house that they had known for twenty years. The PO identified this person as Michael Manning, M-A-N-N-I-N-G, who resides at the above-listed address, 741 Blacksmith Lake Drive, Belfair. The PO in the past has received or purchased methamphetamine from

Manning over the past ten years on a monthly basis. WT 3: 21-25.

On September 15, 2006, when the PO was at the Manning residence, they observed two scales inside the Manning home. One scale was digital, the other was a triple-beam styled scale. The PO also observed a bong about two feet in size as what they described as methamphetamine residue inside of it. The PO is familiar, from their past history, with what methamphetamine looks like, how it is stored, used, weighed and packaged. The PO also observed several baggies laying around in the living room area of the home. Based off their observations, the baggies were described as one by one inch in size and used to store methamphetamine. WT: 4: 1-13.

In Manning's case, Devitt provided far stronger information to Detective Birkenfeld than the informant in Atchley did. Devitt did not simply observe suspicious activity, but had actually purchased methamphetamine from Manning on a monthly basis for ten years, and had known him for twenty. WT 3: 21-25; 4: 1-2.

While the informant in Atchley told law enforcement that defendant Atchley was growing and selling marijuana, Devitt had more substantial information. Atchley, 173 P.3d at 326. Devitt personally saw, inside Manning's residence: "two scales"; "a two-foot bong" with what appeared to be "methamphetamine residue inside of it"; and several "one by one inch baggies" that Devitt knew were typically "used to store methamphetamine. WT 4: 3-13. During the search of Manning's residence, law enforcement found: "a triple-beam scale"; an "RCBS

powder scale”; “two glass smoking devices” that “contain[ed] residue”; “[o]ne cigarette box that contained eleven plastic bags, all of which contained white crystalline powder...[and] another cigarette box that contained a plastic Ziploc bag with white crystalline powder...” RP 171: 4-5; 172: 12-13; 175: 9-10; 96: 10-16; 356: 7-25; 357: 1-2, 12-16.

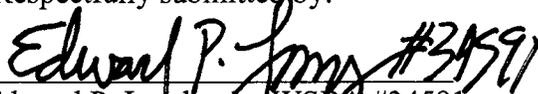
The white powder from one of the eleven Ziploc bags, “weighed 1.7 grams net and was found to contain methamphetamine.” RP 103: 23-24. “The second substance” that was tested was “the second plastic Ziploc bag in the second cigarette box. The net weight was 2.2 grams, [and] found to contain methamphetamine.” RP 104: 1-3. Informant Devitt’s information thoroughly satisfied both prongs of Aguilar-Spinelli because law enforcement specifically found the items that Devitt said they would in Manning’s residence. No error occurred.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 14TH day of March, 2008

Respectfully submitted by:



Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 MICHAEL MANNING,)
)
 Appellant,)
 _____)

No. 36373-9-II

DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
08 MAR 17 AM 11:57
STATE OF WASHINGTON
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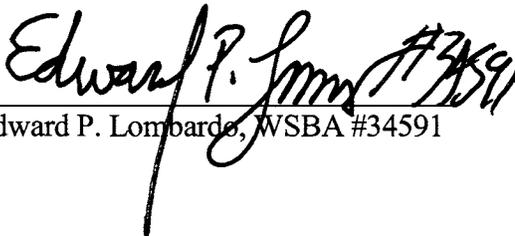
I, EDWARD P. LOMBARDO, declare and state as follows:

On FRIDAY, MARCH 14, 2008, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Elaine L. Winters, Attorney at Law
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 14TH day of MARCH, 2008, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591

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