

COA No. 38375-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BRAD ALLAN SHIRLEY,

Appellant.

CO. JUDGE  
STATE OF WASH.  
BY \_\_\_\_\_  
10/10/11 10:00 AM  
COURT REPORTERS

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ON APPEAL FROM THE CLALLAM COUNTY SUPERIOR COURT  
IN THE STATE OF WASHINGTON

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The Honorable S. Brooke Taylor  
The Honorable Ken Williams

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REPLY BRIEF

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OLIVER R. DAVIS  
WSBA No. 24560  
Attorney for Appellant

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

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## A. REPLY ARGUMENT

**1. In this double hearsay informant case, the trial court failed to apply the *Aguilar-Spinelli*<sup>1</sup> test to both informants as required under *Laursen*.<sup>2</sup>**

The Respondent fails in its attempt to refute the fact that this is manifestly a "double hearsay" informant-based search warrant case. The trial court plainly erred when it applied the Aguilar-Spinelli analysis solely to one informant, Smith, and plainly erred in finding that the information provided by Smith, alleging drug activity by appellant Shirley, was based on his personal knowledge and own observations.

The State tries to convince this Court that this is not a double hearsay case because informant Smith had first hand knowledge of the basis of his accusation since he himself actually saw his passenger Granson leave Smith's car and return from Shirley's house with drugs. BOR at 11. The State misapprehends the

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<sup>1</sup>See State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984) (citing Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), and Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)).

<sup>2</sup>State v. Laursen, 14 Wn. App. 692, 695, 544 P.2d 127 (1976) (citing United States v. Wilson, 479 F.2d 936 (7th Cir. 1973)).

meaning of hearsay within the context of informant cases. Smith never personally observed any sale or delivery, and never even made any observations of Granson remotely akin to a police “controlled buy” conducted by Granson (i.e., where officers check him for drugs before he leaves the vehicle, as they would have done in a controlled purchase).

Instead, Shirley's later arrest was based on Smith telling police what Granson told him he claimed occurred in the house while Smith waited outside. This is hearsay, times two. There were two informants, with all the credibility and basis of knowledge problems that criminal informants carry, yet the trial court applied the informant's tip analysis for probable cause only to one of the informants, Granson. No amount of linguistic machination by the Respondent can wish-away this error of legal analysis by the trial court. There was no probable cause.

Next, in a classic deployment of the "straw man" fallacy, the Respondent claims that Mr. Shirley is arguing that an informant can only provide probable cause for a drug dealing arrest if he personally observes a drug exchange. BOR at 13. This is the straw man - Mr. Shirley is not contending that this is the rule. Rather, his true assertion, unanimously supported by the caselaw

cited in the Opening Brief and by all other state and federal cases, is that there is no proper establishment of probable cause by a court analyzing these facts if the court inexcusably fails to apply the required Aguilar-Spinelli analysis to both informants through which the accusation of drug dealing is communicated to police.

Of course there may well be circumstances in which one reliable, well-informed criminal informant could pass along a credible accusation to another reliable, well-informed informant, who then in turn passes along that accusation to police, and where both informants satisfy the required Aguilar-Spinelli analysis of their trustworthiness and reliability. But the trial court must perform the analysis in every case where an arrest is predicated on probable cause claimed to be provided by two informants proffering double hearsay. Such was not done here, and that error demands reversal -- not even the Respondent has the temerity that would be necessary in this case to offer up the two preposterously unreliable informants in this case as examples of the trustworthiness needed to establish probable cause. There was no proper finding of probable cause, and the error is manifestly not harmless.

**2. The satisfaction of the informant credibility prong by means of showing 'statements against penal interest' requires facts in support of that circumstance – an accuser's mere utterance of other matters that tend to be self-inculpatory does not establish informant credibility and there is no Washington case that issues such a broad, general claim.**

Next, the Respondent asserts that informant credibility in this case under Aguilar-Spinelli was established by virtue of statements made 'against penal interest.' BOR at 15-17. Each of the Respondent's specific contentions in this regard was anticipated and refuted in the Appellant's Opening Brief. AOB at Parts D.1.d (iii) and (v). In essence, the Respondent asks this Court to simply assume that informants who accuse others of crime do so honestly because they are seeking leniency, and that the giving of information by informants is automatically done with truth-promoting awareness that its falsity will produce repercussions. This assumption is not warranted under Washington case law.

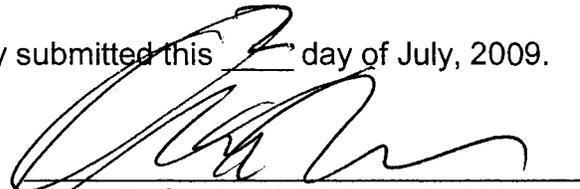
As noted by one commentator, Washington law provides that it is only the "clearly apprehended threat of dire police retaliation should he not produce accurately [that] produces the requisite indicia of reliability." (Emphasis added.) Wayne R. LaFave, Search

and Seizure § 3.3, at 528-29 (3d ed. 1996). The present case, involving random accusatory statements made by two drug-addled methamphetamine dealers, who were already under arrest and made no statements against further penal interest, and who were offered no leniency, results in no showing of affirmative credibility whatsoever, where the informants were neither citizen informants entitled to a presumption of credibility, and yet as criminal informants had no track record of reliable tips.

#### **B. CONCLUSION**

Based on the foregoing and on his Appellant's Opening Brief, Mr. Shirley respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 2 day of July, 2009.



Oliver R. Davis WSBA no. 24560  
Attorney for Appellant  
Washington Appellate Project – 91052

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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v.	)	NO. 38375-6-II
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BRAD ALLAN SHIRLEY,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, SIMON ADRIANE ELLIS, STATE THAT ON THE 2<sup>ND</sup> DAY OF JULY, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> BRIAN PATRICK WENDT ATTORNEY AT LAW CLALLAM COUNTY PROSECUTOR'S OFFICE 223 E 4 <sup>TH</sup> ST., STE 11 PORT ANGELES, WA 98362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 2<sup>ND</sup> DAY OF JULY, 2009.

x 

CLALLAM COUNTY PROSECUTOR'S OFFICE  
09 JUL 09 AM 9:55  
STATE OF WASHINGTON  
BY \_\_\_\_\_

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711