

NO. 40983-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JACK BOOKER,

Appellant.

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

The Honorable Barbara Johnson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in concluding that the circumstances described in the search warrant affidavit corroborated the informant's reliability.

2. The court erred in denying appellant's motion to suppress evidence seized pursuant to an unlawful warrant.

Issue pertaining to assignments of error

Appellant was charged with possession of methamphetamine based on evidence seized in his home pursuant to a search warrant. Where the warrant affidavit relied on an un-named informant's tip to establish probable cause, but the affidavit did not demonstrate the informant's credibility and did not describe any independent police investigation to corroborate the informant's allegations, was the warrant unlawfully issued? Must evidence seized pursuant to the warrant be suppressed?

B. STATEMENT OF THE CASE

1. Procedural History

The Clark County Prosecuting Attorney charged appellant Jack Booker with possession of methamphetamine, unlawful possession of a firearm, possession of stolen property, and bail jumping. CP 1-2. Prior to trial, the Honorable Barbara Johnson denied Booker's motion to dismiss

evidence seized pursuant to an unlawful search warrant. CP 16-18. The firearm and stolen property charges were dismissed with prejudice, and the case proceeded to jury trial. 7RP¹ 55. The jury entered guilty verdicts, and the court imposed a standard range sentence. CP 42-43, 46. Booker filed this timely appeal. CP 55.

2. Substantive Facts

On June 18, 2009, Clark County Sheriff's Detective Peter Muller applied for a warrant to search the residence of Jack Booker located at 5810 94th Avenue in Vancouver, Washington, for evidence relating to methamphetamine possession and distribution. CP 11-12. In the search warrant affidavit, Muller stated that an un-named informant reported he/she had been in Booker's residence within the past 72 hours and observed Booker with a quantity of methamphetamine in his possession concealed on his body in a plastic baggy. The informant said he/she had observed numerous glass methamphetamine pipes throughout the house and outbuildings on the property and had observed Booker concealing methamphetamine and methamphetamine pipes throughout the residence and outbuildings to prevent discovery by law enforcement. CP 14. The informant claimed he/she had been an invited guest in Booker's home

¹ The Verbatim Report of Proceedings is contained in nine volumes, designated as follows: 1RP—11/2/09; 2RP—11/9/09; 3RP—12/3/09; 4RP—1/8/10; 5RP—2/2/10; 6RP—2/26/10; 7RP—6/28/10; 8RP—6/29/10; 9RP—7/1/10.

more than 30 times and had seen methamphetamine and drug paraphernalia every time. CP 14.

Muller stated that the informant was cooperating with law enforcement in exchange for a positive recommendation on a pending criminal charge. CP 14. He/she also had a criminal history “which includes felony assault, forgery, and possession of a controlled substance. He/she also has convictions for misdemeanor assault, criminal impersonation, and misdemeanor driving offenses.” CP 14.

The search warrant affidavit indicated that the informant had knowledge of methamphetamine and correctly identified a photograph of Booker. CP 14. Muller stated that the informant “has conducted eight controlled buys of methamphetamine and provided information which led to the execution of four search warrants and the arrests of seven persons.” CP 14.

Muller confirmed that Booker lived at the address provided by the informant. CP 15. Muller further determined that Booker had no outstanding warrants, although he had previously been convicted of possession of a controlled substance, two gross misdemeanors, and two misdemeanor traffic offenses. CP 15.

A district court judge issued the warrant, and a search was conducted on June 24, 2009. 7RP 110. A pill bottle with

methamphetamine crystals was found on a shelf in the master bedroom and glass pipes with methamphetamine residue were found in a shed on the property. 7RP 128, 135, 137, 165, 167.

Booker moved to suppress the evidence, arguing the search warrant affidavit failed to establish the credibility of the un-named informant. CP 3-9; 6RP 41-47. The court denied the motion, and the case proceeded to trial. CP 51. Booker testified that the methamphetamine was not his and he did not know it was on the premises. 8RP 184.

C. ARGUMENT

THE WARRANT AFFIDAVIT FAILED TO DEMONSTRATE THE INFORMANT'S VERACITY AND THUS DID NOT ESTABLISH PROBABLE CAUSE. ALL EVIDENCE SEIZED PURSUANT TO THE UNLAWFULLY ISSUED WARRANT SHOULD HAVE BEEN SUPPRESSED.

The state and federal constitutions protect individuals against unreasonable searches and seizures, and warrantless searches are generally condemned as unreasonable. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996); U.S. Const. amend. 4; Const. art. 1, § 7. In light of these constitutional protections, a search warrant may issue only on a showing of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). A search warrant application must specify the underlying facts so the magistrate can make a detached and independent assessment of the evidence to determine if probable cause exists. Id.

An affidavit supporting a search warrant shows probable cause to search only if it sets forth facts sufficient for a reasonable person to conclude that the defendant is probably involved in criminal activity. State v. Maxwell, 114 Wn.2d 761, 769, 791 P.2d 222 (1990). The affidavit must adequately show circumstances that extend beyond suspicion and personal belief that evidence of a crime will be found on the premises to be searched. State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). Probable cause must be based on facts and not mere conclusions. Thein, 138 Wn.2d at 140.

While deference is given to the magistrate's ruling and doubts are resolved in favor of the warrant's validity², the deference accorded the magistrate is not boundless. Maxwell, 114 Wn.2d at 770. Reasonableness is the key in determining whether a search warrant should issue. State v. Gunwall, 106 Wn.2d 54, 73, 720 P.2d 808 (1986). The appellate court reviews *de novo* the information presented to the magistrate to determine whether there was probable cause. In re Detention of Petersen, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002). Review of the search warrant's validity is limited to the information before the magistrate when the warrant was issued. State v. Anderson, 105 Wn. App. 223, 229, 19 P.3d

² Seagull, 95 Wn.2d at 907.

1094 (2001). If the warrant application does not establish probable cause, evidence seized pursuant to the unlawful warrant must be suppressed. Id.

When, as in this case, the search warrant application is based on an informant's hearsay, Washington courts evaluate the warrant application using the two-pronged Aguilar-Spinelli³ test. State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984). Under that test, probable cause exists only if the informant's (1) basis of knowledge and (2) veracity have been demonstrated. Both prongs must be satisfied to support probable cause unless the substance of the tip is verified by independent police investigation. Jackson, 102 Wn.2d at 436-38.

Booker has never disputed that the warrant affidavit established the informant's basis of knowledge. See CP 5. The affidavit failed to establish the informant's veracity, however.

Several circumstances present in this case require a heightened showing of credibility in order to satisfy the veracity prong. First, the informant's name was not revealed to the issuing judge. When the informant is unidentified, there is a concern that the information is coming from an "anonymous troublemaker." Thus, Washington requires a heightened showing of credibility for a citizen informant whose identity is

³ Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

known to police but not revealed to the issuing judge. State v. Ibarra, 61 Wn. App. 695, 700, 812 P.2d 114 (1991).

Second, the informant here was not merely a citizen informant, acting out of a sense of civic duty. Rather, he was implicated in a crime and was acting in the hopes of gaining favorable treatment from law enforcement. CP 14. Heightened scrutiny must be used in evaluating the credibility of an informant from the criminal milieu. State v. Rodriguez, 53 Wn. App. 571, 576, 769 P.2d 309 (1989), (citing 1 Wayne R. LaFave, Search and Seizure §3.4(a), at 726-27 (2d ed. 1987)).

Furthermore, the informant had a significant criminal history, including forgery and criminal impersonation, both crimes of dishonesty. CP 14. Where, as here, the court is being asked to issue a warrant based solely on the uncorroborated claims of the informant that the defendant is engaged in criminal activity, a history of crimes of dishonesty is material to the informant's veracity. See State v. Chenoweth, 127 Wn. App. 444, 111 P.3d 1217 (2005) (undisputed that informant's full criminal history, prior work as paid informant, compensation for information provided, and prior dealings with prosecutor were material to warrant determination), affirmed, 160 Wn.2d 454, 158 P.3d 595 (2007). When an informant's criminal history includes crimes of dishonesty, additional evidence must be included in the affidavit to bolster the informant's credibility or the

reliability of the tip. U.S. v. Elliot, 322 F.3d 710, 716 (9th Cir. 2003), cert. denied, 540 U.S. 862 (2003).

Because these suspicious circumstances greatly diminish the presumption of reliability of the informant, there must be enough additional information in the affidavit to support an inference that the informant is telling the truth. See Ibarra, 61 Wn. App. at 700. Typically, an informant's credibility is bolstered by information about his or her track record of providing accurate information to the police a number of times in the past. State v. Woodall, 100 Wn.2d 74, 76, 666 P.2d 364 (1983); see also 1 W. LaFave, Search & Seizure § 3.3(b) (1978). In this case, Muller attempted to bolster the informant's credibility with his/her track record, stating that the informant "has conducted eight controlled buys of methamphetamine and provided information which led to the execution of four search warrants and the arrests of seven persons." CP 14.

A controlled buy, if properly executed, can establish an informant's reliability:

In a "controlled buy," an informant claiming to know that drugs are for sale at a particular place is given marked money, searched for drugs, and observed while sent into the specified location. If the informant "goes in empty and comes out full," his assertion that drugs were available is proven, and his reliability confirmed. Properly executed, a controlled buy can thus provide the facts and

circumstances necessary to satisfy both prongs of the test for probable cause.

State v. Casto, 39 Wn. App. 229, 234-35, 692 P.2d 890 (1984), review denied, 103 Wn.2d 1020 (1985).

In Casto, this Court explained that when an informant comes to the police asserting that drugs can be purchased at a specified location, a controlled buy can confirm the reliability of that assertion and thus the credibility of the informant. By asserting that drugs can be found, the informant puts his credibility on the line. By “coming out full” in a controlled buy, the informant proves the truth of his earlier assertion and establishes his credibility. An informant’s veracity is sufficiently established when the controlled buy is based on the informant’s own assertions and contacts. Casto, 39 Wn. App. at 234-35.

Here, there is no indication that the controlled buys the informant participated in were arranged on the basis of the informant’s assertions and contacts. The search warrant application does not state that the informant came to the police claiming to know information which led to the controlled buys, just that he/she participated in them. Without any assertions that the informant provided accurate information, the controlled buys prove only that the informant was cooperative, not credible. See

Casto, 39 Wn. App. at 234; State v. Steenerson, 38 Wn. App. 722, 726, 688 P.2d 544 (1984).

The informant's track record of providing information leading to search warrants and arrests also fails to establish the informant's reliability. While Muller states that the informant provided the information, he does not state that the information proved accurate once the search warrants were executed. Again, the affidavit fails to bolter this questionable informant's credibility.

If the informant lacks an adequate track record, it may be possible to satisfy the veracity prong by showing that the accusation against the defendant was a declaration against the informant's penal interests. Jackson, 102 Wn.2d at 437. That is not the case here. As noted above, the informant's accusations did not put the informant in jeopardy; rather, the informant made the accusations in hopes of receiving favorable treatment from law enforcement. CP 14.

If the informant's tip fails to satisfy either or both prongs of the Aguilar-Spinelli test, probable cause may still be established by independent police investigation which corroborates the substance of the informant's tip. Jackson, 102 Wn.2d at 438; State v. Cole, 128 Wn.2d 262, 287, 906 P.2d 925 (1995). But the police must corroborate more than innocuous details, commonly known facts, or easily predictable events.

Id. The corroborating evidence must point to criminal activity along the lines suggested by the informant. Jackson, 102 Wn.2d at 438 (quoting United States v. Canieso, 470 F.2d 1224, 1231 (2nd Cir. 1972)).

Here, the police corroborated no information pointing to suspicious or criminal activity on Booker's part. Muller determined that the informant recognized a photograph of Jack Booker, and he verified the address provided by the informant. CP 14-15. These facts showed only that the informant had some familiarity with Booker, however; they did not corroborate the accusation of criminal activity. See Jackson, 102 Wn.2d at 438. Muller also accessed Booker's criminal history and determined that he had no outstanding warrants. CP 15. But no facts were described in the warrant affidavit which tended to corroborate the informant's claim that Booker was currently in possession of methamphetamine in his home. The informant's accusation was not sufficiently corroborated to compensate for the failure to establish his/her veracity.

The affidavit in this case does not provide enough details about the informant or any independent police investigation to establish the informant's reliability. As our Supreme Court has recognized,

Const. art. 1, § 7 confers upon the citizenry of this state a right to be free from unreasonable governmental intrusions. This constitutional right can be protected only if the affidavit informs

the magistrate 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 can the magistrate make the properly independent judgment about the persuasiveness of the facts relied upon by the officer to show probable cause.

Jackson, 102 Wn.2d at 443. The issuing judge in this case did not have enough information to determine that the informant Muller relied upon was credible. The warrant affidavit thus fails to establish probable cause to believe drugs would be found in Booker's house. All evidence seized pursuant to the unlawfully issued warrant should have been suppressed. Since there was no other evidence supporting Booker's conviction, the conviction must be reversed and the charge dismissed.

D. CONCLUSION

The warrant affidavit failed to demonstrate the informant's reliability and thus was insufficient to establish probable cause. All evidence seized as a result of the unlawful warrant should have been suppressed. Booker's conviction, based solely on the improperly admitted evidence, must be reversed and the charge dismissed.

DATED this 27th day of January, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski", written in a cursive style.

CATHERINE E. GLINSKI

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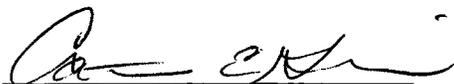
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid,
properly stamped and addressed envelopes containing copies of the Brief of Appellant in
State v. Jack Booker, Cause No. 40983-6-II directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the
foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
January 27, 2011

11 JAN 29 PM 10:27
STATE OF WASHINGTON
BY em
DEPUTY