

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

NO. 41129-6-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

DAVID WALDECK,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant due process when it refused to require the state to identify and produce a transactional witness for the defendant's suppression motion.

2. The trial court erred when it refused to suppress evidence the police seized pursuant to a warrant issued without probable cause to support the search.

3. The affidavit the police gave in support of the search warrant contains material misrepresentations and intentionally omits material facts that vitiate probable cause.

4. The trial court denied the defendant a fair trial when it refused to give the defendant's proposed instruction on unwitting possession of heroin.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, or United States Constitution, Fourteenth Amendment, if it refuses to require the state to identify and produce a transactional witness whose identity and presence are necessary for the defendant to effectively present a motion to suppress evidence?

2. Does a trial court err if it refuses to suppress evidence the police seized pursuant to a warrant issued without probable cause to support the search?

3. Should the trial court suppress evidence the police obtained pursuant to a warrant when the affidavit the police gave in support of the search warrant contains material misrepresentations and intentionally omits material facts that vitiate probable cause?

4. Does a trial court deny a defendant a fair trial if it refuses to give the defendant's proposed instruction on unwitting possession when that defense is both factually and legally available?

STATEMENT OF THE CASE

Factual History

On February 18, 2010, Deputy Sheriff Michael Balch was on routine patrol driving west on State Route 4 (SR4) at about milepost 41 when he saw two cars approaching him in the eastbound lane. RP 4-11.¹ According to his radar, the first vehicle was traveling at 56 mph, while the second, which was approaching the first at a high rate of speed, was quickly slowing down from 68 to 66 mph, which was over the posted speed at that point. *Id.* As the two vehicles passed, Deputy Balch slowed down, turned around, turned on his stop lights, and accelerated towards the two vehicles, intending to stop the second vehicle for speeding. *Id.* At the time, he did not claim any reason to believe that the driver and the front seat passenger in the second vehicle had been involved in any criminal activity or that they were any danger to him. *Id.*

After turning around, Deputy Balch lost sight of the two vehicles as they went over a hill. RP 4-11. However, he was able to catch up within a short period of time. *Id.* Once he got behind the second vehicle, it pulled

¹The record on appeal includes three verbatim reports of proceedings with each volume starting with a new page one. They are: (1) the suppression motion held on June 7, 2010, referred to herein at “RPS [page #],” (2) the trial held on August 16, 2010, referred to herein as “RP [page #],” and (3) the sentencing hearing held on August 23, 2007, referred to herein as “RP 8/23/07 [page #].”

over at the first safe location. *Id.* Deputy Balch then got out of his vehicle and spoke with the driver, who was the defendant David Waldeck. *Id.* At the officer's request, the defendant rolled down the window and produced his valid Washington licence, along with his insurance and proof that he had recently purchased the car. *Id.* As he did, Deputy Balch could smell the odor of cut marijuana coming from inside of the vehicle. RP 11.

At about this time, a former police officer by the name of Michael Savant stopped by in his vehicle and told Deputy Balch that he had just seen the passenger open the passenger door to the car and discard some trash. RP 47-50. Upon hearing this, Deputy Balch called Wahkiakum Deputy Sheriff Gary Howell to the scene to assist. RP 11-14. Once at the scene, Deputy Balch informed him of the odor of cut marijuana coming from the vehicle and about Mr. Savant seeing the passenger drop some trash out the passenger door of the vehicle. RP 65-71; RPS 35-36. Deputy Howell then informed Deputy Balch that he was acquainted with the defendant and knew that he had a valid Washington State Medical Marijuana card. RPS 35-36. Officer Howell then went with Mr. Savant to retrieve the discarded trash. RP 69-71.

While Deputy Howell went with Mr. Savant, Deputy Balch kept the defendant and the passenger detained at the scene, even though he had verified that the defendant had a valid license. RPS 8-10. At no point did he claim to fill out or attempt to fill out a citation to charge the defendant with

speeding. RPS 4-27. Neither did he suspect that the defendant had committed any crime such as driving while intoxicated. *Id.* After a short period of time, Deputy Howell returned with Mr. Savant, and showed Deputy Balch what looked like a “Red Bull” can and a small silver case that Mr. Savant believed that the passenger had discarded out the passenger door of the vehicle. RP 78-81. In fact, the first item was a “hide a can,” and had a screw top used to secure items inside. *Id.* Once back at the defendant’s vehicle, the two deputies opened the can and case and found what they believed to be baggies with drug residue in them and other drug paraphernalia. *Id.* After finding these items, Deputy Howell spoke with the passenger, who denied discarding any items out of the vehicle. *Id.* Deputy Howell then arrested the passenger for possession of the drugs and paraphernalia he had discarded out of the passenger door of the defendant’s vehicle. *Id.* During a search of the passenger’s person incident to arrest, Deputy Howell found a drug pipe. *Id.*

At this point, the two deputies went back to the defendant, ordered him out of the vehicle and arrested him for possession of the items the passenger had discarded out of the passenger door of the vehicle. RP 78-81. During a search of the defendant’s person incident to arrest the officers found \$1,812.00 in cash, and a syringe on the defendant’s person. *Id.* The defendant said he had won the cash at a casino the previous evening. *Id.* The

syringe had no drug residue on or in it. *Id.* Deputy Balch then had the defendant's vehicle impounded and taken to a tow yard. RP 82-91. After taking the defendant to jail, Deputy Balch prepared an affidavit requesting a warrant to search the defendant's vehicle. Exhibit 2. This affidavit stated the following in pertinent part. *Id.*

On 2/18/10 at approximately 17:20hrs, I was traveling westbound on State Route#4 (SR4) near mile post 41 when I observed 2 vehicles coming towards me on SR4. The first vehicle was traveling at 56 mph according to my speed measuring device in a posted 55 mph zone. The second vehicle, a white passenger car, caught my attention when it came quickly up to the rear of the first vehicle and had to brake in an erratic fashion to avoid the first vehicle. My speed measuring device captured the speed of the second vehicle slowing down from 68 mph to 66 mph as it went by me. As I was at the MP 41 mile marker there was room to immediately turn around to pursue the second vehicle for a speeding violation. I then turned around and caught up to the white passenger car just before mile post 42 and stopped the vehicle using my emergency lights on my patrol car. The vehicle tried to stop immediately but had no where to pull over, and it moved to the on-coming lane and pulled over on the westbound side of SR4. I got out and contacted the driver, David L. Waldeck. Waldeck showed me his Washington driver's license and proof of insurance and a signed document from DOL labeled "Affidavit in Lieu of Title."

The vehicle Waldeck was driving was displaying Washington license 144YJJ. As Waldeck opened his window to talk with me I could smell the obvious strong odor of growing and/or green Marijuana coming from the vehicle. Waldeck told me the reason he was driving this way was because the dog in the car was causing him to do that. I told him that he was speeding and that is why I pulled him over. I observed the dog in the car along with an adult male passenger. While I was doing this a local resident, and former law enforcement officer I know and used to work with, drove up to my location and told me that he had seen the people throw out something from the passenger side of this car, (meaning the car I had pulled over) just

before I pulled them over. The reason I have not included the name of the concerned citizen is because he has expressed fear of retaliation on himself or his family if his identity became known. Because I could not check out the items thrown out and stay with the car at the same time I called for assistance from Deputy Gary Howell who was also working at this time. Deputy Howell came to my location. I asked the concerned citizen if he could show Deputy Howell where he saw the items thrown out at. He said he could. I know this subject to be of good character and has no known criminal history. He took Howell to the location where items were thrown out. Deputy Howell came back and showed me the items found thrown out of the car. The items included a small silver case with scales and a disguised container which had baggies of drug residue in them. The residue field tested positive for Heroin and Methamphetamine. The amount of residue was more than is normal for a simple drug user.

Deputy Howell and I went back up to the suspect vehicle and because the items were described as being thrown out from the passenger side of the vehicle Deputy Howell asked to see identification from the passenger. The passenger handed Howell a Washington State driver's license that identified him as being Joseph I. Loudin. Howell confronted the passenger with the information we had been given and Loudin denied any knowledge of this. Howell placed Loudin under arrest and I read him his Miranda rights. He told me he understood his rights. Loudin was patted down and a drug pipe with residue was found along with other items in his pockets. I ran both subjects through the law-enforcement criminal history data base and discovered that both Waldeck and Loudin had extensive felony criminal history's including felony drug convictions for both. Deputy Howell told me that he had interacted with David Waldeck in the past and knows that he had been a Heroin user and has been at Waldeck's residence when he has overdosed on drugs.

I then assisted Deputy Howell in re-contacting David Waldeck and asked him to step out of the vehicle. Deputy Howell patted Waldeck down and handcuffed him. During the pat down Deputy Howell located what appeared to be a used syringe in his pants pocket along with over \$1,800.00 in cash. Deputy Howell advised Waldeck of his Miranda Rights at this time. He was placed in the rear of my patrol car as we called Wahkiakum Tow for an impound preparing to apply for a search warrant. The vehicle was sealed and placed in the in-

door storage. As we were preparing the vehicle for tow, Waldeck asked several times for us to “not tow the car”. He seemed to be very upset at this fact and asked Deputy Howell if there was any way to avoid the car being towed.

Exhibit 2.

In fact, when Deputy Balch stated in this affidavit that the former police officer who stopped by the scene and told him that “he had seen *the people throw* out something from the passenger side of this car, (meaning the car I had pulled over) just before I pulled them over,” he materially misrepresented what Michael Savant had told him. Exhibit 2. In fact, what Mr. Savant had stated was that he saw the passenger open the passenger door and discard items that appeared to Mr. Savant to be trash. RP 47-50. In addition, when Deputy Balch mentioned that he had smelled the odor of cut marijuana coming from inside the vehicle, he intentionally omitted the fact that Deputy Howell had told him that the defendant had a valid Washington State Medical marijuana card that made it legal for him to possess marijuana. RP 35-36.

Based upon this affidavit, Deputy Balch obtained a warrant to search the defendant’s vehicle, which he did at the tow yard. Exhibit 1. Although not finding any marijuana or items of interest in the passenger compartment of the vehicle, he did find a box, a “Red Bull” hide-a-can, and a “Coke” hide-a-can in the trunk. RP 16-36. The box contained a set of scales, a container

with two safety deposit keys, and a glass pipe. *Id.* Although the glass pipe from the box and the syringe taken from the defendants's pocket did not contain any drug residue in them, the scales taken from the box in the trunk did have heroin residue on it. RPS21; RP 97-102. The box also had items of identification belonging to the defendant. *Id.*

Procedural History

The state charged Mr. Loudin with possession of the drugs found in the items he dropped from the passenger door of the vehicle, and he pled guilty to possession of those drugs. RP 54-59. The state charged the defendant with possession of the heroin residue found on the scales in the trunk of the car. CP 5-6. The defendant then moved to suppress the evidence seized from his vehicle, arguing that Deputy Balch had illegally detained him when he called for Deputy Howell and had him go with Mr. Savant to gather evidence of an infraction not committed in an officer's presence, when he arrested him without probable cause, when he searched his vehicle pursuant to a search warrant issued on less than probable cause, and when he included material misrepresentations and omitted material evidence from the search warrant affidavit. CP 12-17.

The case later came on for a hearing on the defendant's suppression motion. RPS 2. During this motion, the state called Deputies Balch and Howell as witnesses. RPS 4-27, 28-41. However, state refused to call or

even identify Mr. Savant as a witness, and the court refused to compel the state to identify this witness, in spite of the defendant's two requests that the state do so. RPS 17-18, 33-34. During this motion, Deputy Balch testified that the citizen who stopped by during the stop told him that "items were pitched out the passenger side of the vehicle." RPS 8. Since the court refused to compel the state to identify and produce Mr. Savant, the defense was unable to call him as a witness to testify that what he actually told Deputy Balch was that he had seen the passenger open the door and discard some trash out of the vehicle. RPS 17-18, 33-34; RP 47-51.

Based on Deputy Balch and Howells' testimony, the court denied the motion to suppress, and later entered the following findings and conclusions in support of its decision.

II. Findings of Fact

2.1 While on patrol in Wahkiakum County, Washington, Detective Balch of the Wahkiakum County Sheriff's office turned on a white BMW sedan for speeding near milepost 41 on State Route 4. Detective Balch smelled marijuana coming from the motor vehicle while contacting the driver.

2.2 A citizen, Mike Savant, observed an object being thrown from the passenger side of the BMW just before the stop and notified Detective Balch of that act.

2.3 Detective Balch called Deputy Howell for backup and to assist Mr. Savant in locating the tossed object. Deputy Howell and Mr. Savant returned to the area of the toss-out and recovered a small case and a disguised container (hide-a-can) which contained plastic wrap and drug residue in it. The residue field tested positive for

heroin and methamphetamine.

2.4 Deputy Howell returned to the stop and identified Joe Loudin as the passenger since the item had come out of the passenger side. Since Mr. Loudin denied any knowledge about the tossed item, Mr. Loudin was arrested.

2.5 The driver of the BMW, Mr. Waldeck, was asked to step out and was arrested and searched. A used syringe was found in his pants pocket along with over \$1,800.00 in cash. The driver produced proof of insurance and an Affidavit in Lieu of Title.

2.6 The vehicle was impounded and a search warrant was issued to search the vehicle. A case was found in the trunk of the BMW and it contained a scale with heroin residue.

III. Conclusions of Law

3.1 The officers had probable cause to arrest Mr. Waldeck. Maryland v. Pringle, 540 U.S. 366, 124 S.Ct. 795, 157 L.Ed. 2d 769 (2003); State v. Huff, 64 Wn.App. 641, 826 P.2d 698 (1992).

3.2 The search of Mr. Waldeck's person incident to the arrest was legally authorized.

3.3 The search of the BMW's trunk pursuant to the Search Warrant after the vehicle was impounded was proper. State v. Grande, 164 Wn.2d 135, 187 P.3d 248 (1008); Arizona v. Gant, — U.S. —, 129 S.Ct. 1710, 173 l.Ed.2d 485 (2009).

CP 97-99.

Following the court's decision denying the suppression motion, the case came on for trial before a jury, with the state calling Deputies Balch and Howell, as well as the forensic scientist and Joseph Loudin, who had previously pled guilty and was then serving a prison sentence on that plea. RP 4, 46, 54, 65, 97. The deputies testified to the facts contained in the

preceding factual history. RP 4-46, 65-93. The forensic scientist testified that he had tested the residue on the scales taken from the trunk of the car and found the residue to contain heroin. RP 97-102. Mr. Loudin testified that he was the owner of the box and can he had dropped out of the open passenger door of the defendant's moving vehicle. RP 54-64. He further testified that the drugs inside the containers belonged to him, and that he had been with the defendant earlier that day at the Lucky Eagle Casino, where the defendant won the money the police found in his pocket. *Id.*

Finally, contrary to its refusal to identify Mr. Savant during the suppression motion, the state both identified Mr. Savant and called him as a witness at trial. RP 46-53. Mr. Savant testified before the jury that he had seen the defendant's vehicle drive by and had seen the passenger open the passenger door and discard what he believed to be some items of trash. *Id.* He further testified that he later went with Deputy Howell and retrieved those items. *Id.*

After the close of evidence, the defense proposed that the court instruct the jury on unwitting possession by giving WPIC 52.01 in its entirety. RP 108-116. After argument, the trial court refused, and instead gave a modified version of WPIC 52.01 which omitted the last 9 words from the first paragraph suggested from the patterned instruction. *Id.* The following shows the instruction the court gave, with the words it excised from the

defendant's proposed instruction lined out.

INSTRUCTION NO. 10

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession ~~or did not know the nature of the substance.~~

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP 48 & 84; RP 112-116.

Following instruction, the parties presented closing argument. RP 120-121; 122-139. The jury then retired for deliberation, eventually returning a verdict of guilty to possession of the heroin. CP 87. One week later, the court sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 100-110, 113.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS WHEN IT REFUSED TO REQUIRE THE STATE TO IDENTIFY AND PRODUCE A TRANSACTIONAL WITNESS FOR THE DEFENDANT'S SUPPRESSION MOTION.

Under certain circumstances, the state may have legitimate interest in protecting the identity of a confidential informant. *See i.e., State v. Moen*, 150 Wn.2d 221, 230, 76 P.3d 721 (2003). When legitimately asserted, this right to hide the identity of a confidential informant is known as the “informer’s privilege.” *Id.* Under it, the government may “withhold from disclosure the identity of persons who provide information to law enforcement concerning the commission of crimes.” *State v. Harris*, 91 Wn.2d 145, 148, 588 P.2d 720 (1978). In Washington State, this privilege is recognized under both statute and court rule. The applicable statute is RCW 5.60.060(5), and states as follows:

(5) A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.

RCW 5.60.060(5).

The applicable court rule is CrR 4.7(f)(2), which states the following about the identity of informants:

(f) Matters Not Subject to Disclosure.

(1) . . .

(2) Informants. Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

CrR 4.7(f)(2).

The key limitation for the state when attempting to rely upon this provision is that the state's desire to shield an informant's identity cannot override a defendant's constitutional right to the disclosure of that informant when the failure to disclose would "infringe upon the constitutional rights of the defendant." *State v. Petrino*, 73 Wn.App. 779, 871 P.2d 637 (1994) (confidential informant was an eyewitness to the crime as his testimony was critical to a determination of guilt or innocence; trial court properly ordered disclosure and dismissed case when prosecution refused to disclose). In addition, under the plain language of the last sentence of the court rule, the state may not use the privilege to shield the identity of an informant and then call that person as a witness "at a hearing or trial." Finally an informant's identity must also be revealed when that person is a material witness on the determination of the accused's guilt or innocence or when that person possesses information helpful to possible defenses of the defendant. *State v. Casal*, 103 Wn.2d 812, 699 P.2d 1234 (1985) (defendant's allegations cast reasonable doubt on information in search warrant affidavit).

In *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639

(1957), the United States Supreme Court called for the trial court to apply a balancing test whereby it weighs the interests of the accused in criminal discovery against the interests of the state in protecting the identity of the confidential informant. The Court specifically addressed the government's obligation to reveal the identity of an informant not called as a witness in the case. In *Roviaro*, the court held:

[N]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Roviaro v. United States, 354 U.S. at 62.

If, after considering these factors, the court determines that the disclosure of an informant's identity is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause," the court should order disclosure and dismiss if the state refuses to abide by the court's order. *Rovario v. United States*, 354 U.S. at 60-61.

For example, in *State v. Casal, supra*, the prosecutor charged the defendant with manufacturing marijuana after the police executed a warrant at the defendant's home issued in reliance upon a police affidavit which was itself based upon information provided by a "confidential informant." The defendant moved that the court require the state to identify the informant,

arguing that the police affiant had misrepresented the information the informant provided. The defendant provided his own affidavit in support of the motion in which he alleged that a person identifying himself as the informant had approached him, stated that while at a tavern he had heard a rumor that the defendant had a marijuana grow, that he had told the police about this rumor, and that at the direction of the police he had illegally entered the defendant's home to verify the presence of growing marijuana.

Following argument on the motion, the court refused to require the state to produce the name of the informant, holding that (1) the affidavit given in support of the warrant was valid on its face, and (2) a defendant who only challenges the existence of probable cause to support the issuance of a search warrant is not entitled to disclosure of the identity of a confidential informant. Following conviction, the defendant sought review, and the court of appeals affirmed, holding that since the defendant was only challenging the existence of probable cause to support the issuance of a search warrant, he was not entitled to disclosure of the confidential informant's identity. The court also held that the defendant was not even entitled to a closed hearing at which the trial court examined the informant outside the presence of the defense.

On further review, the Washington State Supreme Court reversed, holding as follows:

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A more reasonable rule requires the trial court to exercise its discretion to order an *in camera* hearing where the defendant's affidavit casts a reasonable doubt on the veracity of material representations made by the affiant. Corroboration of the defendant's story is helpful, but not necessary. This rule is in accord with the rules enunciated by other courts. *See United States v. Brian, supra*, requiring only that defendant make a "minimal showing of inconsistency" between what the affiant stated and what the defendant alleges to be true; *People v. Pointdexter*, 90 Mich.App. 599, 282 N.W.2d 411 (1979) (holding that the defendant's proof may consist of mere allegations if he raises a "legitimate question" regarding the existence of an informant or the affiant's veracity).

In the present case, petitioner's affidavit and offer of proof certainly cast a reasonable doubt upon the truthfulness of the officer-affiant's affidavit. Petitioner's affidavit and offer of proof specifically contradicted the officer's affidavit on a number of material points. Petitioner even named the alleged informant and stated specifically what the informant allegedly told him. Unquestionably, if petitioner's story is the true version, probable cause did not exist for the search warrant since the affidavit contained no other information which could provide probable cause. We note that in any case where probable cause is established independently of the affiant's challenged statements, the rule in today's case will not be applicable.

State v. Casal, 103 Wn.2d at 820-821.

Under the court rule and the decisions previously mentioned, there are three reasons in the case at bar why the trial court erred when it refused to order disclosure of the informant's identity, or at least when it failed to hold an *in camera* review of the informant's claims. The first reason is that under the plain language of the court rule, the state was not entitled to claim an informant's privilege for a person the state intended to and did call as a witness at trial. Second, in the case at bar, the trial court abused its discretion

when it failed to perform any type of balancing test at all when the defense asked the two police officers to identify the informant. Third, as the trial testimony of the informant revealed, there was a substantial difference between what he actually told the officer (that the passenger had opened the door and discarded trash) and what the officer put in the affidavit (that the informant told him that “they,” meaning the driver and the passenger, had discarded the containers with the drugs in them. Thus, while the defense did not provide an affidavit putting the officer’s statements in the affidavit in question, the trial testimony of the informant did put the officer’s statements in the affidavit in question. Consequently, this court should reverse the defendant’s conviction and remand with instructions to allow the defense to argue its suppression motion anew with the name of the informant now revealed.

II. THE TRIAL COURT ERRED WHEN IT REFUSED TO SUPPRESS EVIDENCE THE POLICE SEIZED PURSUANT TO A WARRANT ISSUED WITHOUT PROBABLE CAUSE TO SUPPORT THE SEARCH.

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, search warrants may only issue upon a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582, 585 (1999); *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). In order for the judge, rather than the requesting

officer, to make that determination, the affidavit must state the underlying facts and circumstances so that the judge can make a “detached and independent evaluation of the evidence.” *Id.* “Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” *Id.*

In 2001, Judge Morgan of Division II of the Court of Appeals emphasized that there is no probable cause to search unless the facts in the affidavit prove two nexus. *State v. Johnson*, 104 Wn. App. 489, 17 P.3d 3 (2001). First, there must be a “a nexus between criminal activity and the item to be seized.” Second, there must be “a nexus between the item to be seized and the place to be searched.” *Id.* This means that all search warrant affidavits “must contain facts from which the issuing magistrate can infer (1) that the item to be seized is probably evidence of a crime, and (2) that the item to be seized will probably be in the place to be searched when the search occurs.” *Id.*

When a search warrant is challenged, the reviewing court performs a *de novo* evaluation of the warrant and affidavit, examining them in a commonsense manner. *State v. Perez*, 92 Wn.App. 1, 963 P.2d 881 (1998). Although the reviewing court is given deference to the issuing judge, it must

find the warrant invalid if the information on which the warrant is based is not sufficient to establish probable cause. *Id.*

For example in *State v. Thein, supra*, the state charged the defendant with possession of marijuana with intent to deliver and defrauding a public utility after the police executed a search warrant at the defendant's residence and found a large quantity of marijuana. The affidavit given in support of the search warrant contained a detailed description of the prior execution of a search warrant at another address. Based upon the evidence seized during the execution of this warrant along with the interview of a number of witnesses, the police developed strong evidence that the defendant was then and had in the past been dealing large quantities of marijuana. Based upon this information and the general experience of the police that drug dealers usually keep drugs and evidence of their drug dealing at their homes, the police sought and obtained the warrant they executed at the defendant's house. During the execution of the warrant the police found growing marijuana and arrested the defendant.

Following his arrest, the defendant unsuccessfully moved to suppress the evidence seized from his house. He was later convicted and appealed, arguing that the search warrant did not establish probable cause to search his home. However, the court of appeals affirmed. From that point, the defendant sought and obtained review before the State Supreme Court. In

addressing the issues presented, the court noted a division among the three divisions of the Court of Appeals in Washington as well as a division among the many federal and other state courts which had addressed this issue. After examining a number of these cases, the Washington Supreme Court held that the mere fact that the police have probable cause to believe that the defendant is a drug dealer does not create probable cause to search the defendant's home without some evidence other than police speculation that there will be evidence of the drug dealing at that location.

In the case at bar, Deputy Balch's affidavit set out the fact that the officer smelled cut marijuana from inside the passenger compartment of the vehicle. While this statement would normally be sufficient to establish probable cause to believe that there was cut marijuana in the car, in the case at bar, it did not establish probable cause to believe that this was a crime since the deputy knew that the defendant had a Washington State Medical Authorization Card to possess and use marijuana. Indeed, under these circumstances, even the existence of probable cause to believe that there was marijuana present is questionable because the odor could have simply been coming from the person who had the medical authorization. Apparently that is precisely what happened in the case at bar because the police did not find any cut marijuana in the passenger compartment of the car.

Deputy Balch's affidavit also set out the fact that the passenger in the

defendant's vehicle had discarded what appeared to be trash out the passenger door of the vehicle, and that the containers the passenger discarded contained drug residue. However, this information did not establish probable cause to believe that illegal drugs were in the defendant's vehicle. Rather, the conclusion to be drawn from this information is that the only drugs present in the car were those drugs in the passenger's possession, and that he had abandoned those drugs by dropping the containers out of the open door to the car. In addition, the fact that the drugs were in containers indicates that the defendant was unaware that his passenger was even possessing the drugs. Thus, in the case at bar, the trial court erred when it found that the affidavit Officer Balch prepared established probable cause to believe that there was "a nexus between criminal activity and the item to be seized," or that there was "a nexus between the item to be seized and the place to be searched." Consequently, this court should reverse the defendant's conviction and remand with instructions to grant the defendant's motion to suppress.

III. THE AFFIDAVIT THE POLICE GAVE IN SUPPORT OF THE SEARCH WARRANT CONTAINS MATERIAL MISREPRESENTATIONS AND INTENTIONALLY OMITS MATERIAL FACTS THAT VITIATE PROBABLE CAUSE.

Ordinarily a judge reviewing a challenged search warrant may only consider those matters that were presented to the magistrate who issued the warrant, that is, the information contained within the "four corners" of the

search warrant affidavit. *United States v. Damitz*, 495 F.2d 50 (9th Cir.1974). However, the reviewing court must examine matters outside of the affidavit at an evidentiary hearing when the defendant makes a preliminary showing that the affiant knowingly and intentionally or with reckless disregard for the truth included false statements necessary to the finding of probable cause or if the affiant with the same mental state omitted material facts. *State v. Garrison*, 118 Wn.2d 870, 827 P.2d 1388 (1992); *Delaware v. Franks*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

Such omissions or false statements are fatal to a search warrant. As Division II of the Court of Appeals has succinctly put it: “An omission or incorrect statement made in support of a search warrant may invalidate the warrant if it was (1) material, and (2) made deliberately or with reckless disregard for the truth.” *State v. Herzog*, 73 Wn. App. 34, 54, 867 P.2d 648 (1994). The defendant, in his or her preliminary showing, must allege that the affiant acted deliberately or with reckless disregard for the truth. *Garrison*, 118 Wn.2d at 872.

Once a defendant makes the required preliminary showing, the reviewing court must then insert the omitted matters into the affidavit for the warrant or excise them from the affidavit. *Garrison*, 118 Wn.2d at 873; *State v. Jones*, 55 Wn. App. 343, 345, 777 P.2d 1053 (1989); see *State v. Stephens*, 37 Wn. App. 76, 79, 678 P.2d 832 (1984). If the affidavit, as supplemented

or redacted, is insufficient to allow a finding of probable cause, then the defendant is entitled to an evidentiary hearing on whether the material was omitted deliberately or recklessly. *Garrison*, 118 Wn.2d at 873; *see State v. Frye*, 26 Wn. App. 276, 279, 613 P.2d 152 (1980). If after such a hearing, the reviewing court determines that the material was deliberately or recklessly omitted or included and further determines that the omitted material (or falsely included material) was necessary to a probable cause finding, then the warrant is invalid and all fruits from it must be suppressed. *Herzog*, 73 Wn. App. at 54; *Jones*, 55 Wn. App. at 345; *see Stephens*, 37 Wn. App. at 79; *Garrison*, 118 Wn.2d at 872-874.

In this case, the defendant met the burden of presenting evidence that Officer Balch's affidavit contains both material misrepresentations as well as intentional material omissions. Perhaps the most glaring omission came through Deputy Howell's testimony at the suppression motion that he knew that the defendant had a valid Washington State Medical Marijuana Card, that it was legal for the defendant to possess marijuana, and that he had told Deputy Balch this fact. In spite of this information provided by Deputy Howell, Deputy Balch stated in the affidavit that "[a]s Waldeck opened his window to talk with me I could smell the obvious strong odor of growing and/or green marijuana coming from the vehicle." This, of course, would usually create probable cause to search the vehicle for marijuana. The only

exception would be for a person who had a valid Washington State Medical Marijuana Card and could legally possess marijuana. The omission of this critical piece of evidence misrepresented the facts to the issuing magistrate.

The second material error in the affidavit was proven through Mr. Savant's trial testimony. While on the stand at trial, Mr. Savant had stated that he saw the passenger open the passenger door and discard a few items that appeared to Mr. Savant to be trash. RP 47-50. What Deputy Balch stated in this affidavit was that Mr. Savant (identified only as "the former police officer") told him that "he had seen *the people* throw out something from the passenger side of this car, (meaning the car I had pulled over) just before I pulled them over." (emphasis added). This version of the facts made it sound like the defendant might well have been the person throwing the items out of vehicle, or that he was at least privy to the passenger's actions. Deputy Howell's testimony at the suppression motion, and Mr. Savant's testimony at trial met the defendant's requirement of showing that the affidavit contained a material misrepresentation sufficient and a material omission to require the court to hold a hearing on whether or not Deputy Balch acted intentionally or recklessly when he omitted material information and when it included material misrepresentations. Consequently, this court should vacate the defendant's conviction and remand for a *Franks* hearing.

In this case, the state may argue that the defendant did not formally

request a *Franks* hearing and should now be precluded from arguing that the trial court erred by not holding a *Franks* hearing. While this would normally be a valid argument, under the facts of this case, the state should be stopped from making this argument. The reason is that the state actively concealed Mr. Savant's identity during the suppression motion. Thus, at the point that the defendant would normally present an affidavit and request a *Franks* hearing, the defense in this case did not have the information necessary to request the hearing because the state had actively hidden the information necessary to request the hearing. It was not until the state finally produced Mr. Savant as a witness at trial and he took the stand that the defense first heard his version of the events in regards to Deputy Balch's misrepresentation about what Mr. Savant said. As a result, the court should vacate the defendant's conviction and remand for a *Franks* hearing.

IV. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT REFUSED TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION ON UNWITTING POSSESSION OF HEROIN.

Unwitting possession of contraband may be proven in either of two ways. First, the defense of "unwitting" possession may be supported by a showing that the defendant did not know he was in possession of the contraband. *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981); *see e.g. State v. Bailey*, 41 Wn.App. 724, 728, 706 P.2d 229 (1985) (trial court

properly instructed jury that possession [was] not unlawful if defendant did not know the drug was in his or her possession). The defendant may also show that he did not know the nature of the [contraband] he possessed. *See State v. Adame*, 56 Wn.App. 803, 806, 785 P.2d 1144 (1990) (trial court correctly instructed the jury that possession was unwitting if the person did not know that the substance was present or did not know the nature of the substance). If the defendant affirmatively establishes that “his ‘possession’ was unwitting, then he had no possession for which the law will convict.” *Cleppe*, 96 Wn.2d at 381.

In the case at bar, the testimony at trial establishes the defendant’s right to make both of these arguments. First, in support of the former argument, the defendant was able to establish through cross-examination of the state’s witnesses that the defendant had claimed that he had purchased the vehicle and taken possession of it that day, and that he had not gotten into the trunk. While it was well within the jury’s right to reject this claim, the evidence entitled the defendant to instruction on the issue. Second in support of the latter argument, the defendant was able through cross-examination of the state’s witnesses to determine that the amount of heroin on the scales was residue only, thus not necessarily identifiable as a controlled substance. Once again, the jury would certainly have been entitled to reject the claim. However, the evidence presented at trial did entitle the defendant to an

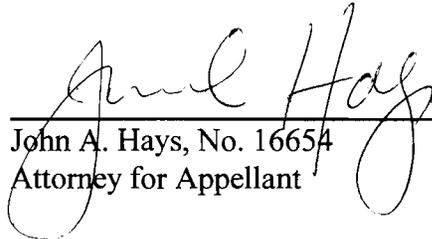
instruction to enable him to present it to the jury. Thus, by excising the words “or did not know the nature of the substance” from the end of the first paragraph in WPIC 52.01, the court denied the defendant his constitutional right to present an available defense. As a result, this court should reverse the defendant’s conviction and remand for a new trial.

CONCLUSION

The trial court denied the defendant a fair trial when it refused to require the state to identify a material witness and when it failed to give an instruction supporting an available defense. In addition, the court erred when it denied the defendant's motion to suppress. As a result, this court should reverse the defendant's convictions and remand for a new trial.

DATED this 3rd day of May, 2011.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

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 and things to be seized.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Defendant's Proposed Instruction No. 1

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

Court's Instruction No. 10

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

WPIC 52.01
Unwitting Possession

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person [did not know that the substance was in [his][her] possession] [or][did not know the nature of the substance].

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

COURT OF APPEALS
DIVISION II

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

**STATE OF WASHINGTON,
Respondent,**

NO. 41129-6-II

vs.

AFFIRMATION OF SERVICE

**DAVID L. WALDECK,
Appellant.**

STATE OF WASHINGTON)
County of Wahkiakum) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On May 2, 2011, I personally placed in the mail the following documents

- 1. BRIEF OF APPELLANT
- 2. AFFIRMATION OF SERVICE

to the following:

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Dated this 2ND day of MAY, 2011 at LONGVIEW, Washington.

Cathy Russell
CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS