

No. 42242-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Donald Carner, Jr.,

Appellant.

Grays Harbor County Superior Court Cause No. 10-1-00506-7

The Honorable Judge Gordon Godfrey

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 4

ARGUMENT..... 7

I. The search of Mr. Carner’s residence violated the First, Fourth, and Fourteenth Amendments and Article I, Section 7, because the search was conducted pursuant to an overbroad search warrant. 7

A. Standard of Review 7

B. A search warrant must be based on probable cause and must describe with particularity the things to be seized. 8

C. The search warrant in this case was unconstitutionally overbroad: it authorized seizure of items for which probable cause did not exist (including items protected by the First Amendment), and failed to describe the things to be seized with sufficient particularity. 10

II. The trial judge should have held a *Franks* hearing to explore omissions in the warrant affidavit. 18

A. Standard of Review 18

B.	Mr. Carner made a substantial showing that the affiant recklessly omitted material information from the warrant application.....	18
III.	If Mr. Carner’s argument that the warrant was overbroad is not preserved for review, he was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.....	21
A.	Standard of Review.....	21
B.	An accused person is constitutionally entitled to the effective assistance of counsel.	22
C.	Defense counsel was ineffective for failing to object to inadmissible and prejudicial evidence.	23
	CONCLUSION	25

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Aguilar v. Texas</i> , 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) ..	18
<i>Alford v. United States</i> , 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931)	20
<i>Franks v. Delaware</i> , 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)	2, 3, 18, 20, 21
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	22
<i>Mapp v. Ohio</i> , 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).....	8
<i>Spinelli v. United States</i> , 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).....	18
<i>Stanford v. Texas</i> , 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)..	10, 11, 12, 14
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	23
<i>United States v. Han</i> , 74 F.3d 537 (4th Cir.1996)	19
<i>United States v. Martin</i> , 618 F.3d 705 (7 th Cir. 2010)	20
<i>United States v. Salemo</i> , 61 F.3d 214 (3 rd Cir., 1995)	22
<i>United States v. Vigeant</i> , 176 F.3d 565 (1 st Cir. 1999)	19
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....	17, 19
<i>Zurcher v. Stanford Daily</i> , 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).....	10

WASHINGTON STATE CASES

Bellevue School Dist. v. E.S., 171 Wash.2d 695, 702, 257 P.3d 570 (2011) 7

In re Fleming, 142 Wash.2d 853, 16 P.3d 610 (2001)..... 21

State v. Chenoweth, 160 Wash.2d 454, 158 P.3d 595 (2007)..... 18, 21

State v. Eisfeldt, 163 Wash.2d 628, 185 P.3d 580 (2008) 17

State v. Garcia-Salgado, 170 Wash.2d 176, 240 P.3d 153 (2010)..... 7, 18

State v. Hendrickson, 129 Wash.2d 61, 917 P.2d 563 (1996) 23

State v. Higgins, 136 Wash.App. 87, 147 P.3d 649 (2006) 17

State v. Horton, 136 Wash. App. 29, 146 P.3d 1227 (2006) 21

State v. Kirwin, 165 Wash.2d 818, 203 P.3d 1044 (2009)..... 8

State v. Lohr, ___ Wash.App. ___, ___ P.3d ___ (2011)..... 18

State v. Maddox, 116 Wash.App. 796, 67 P.3d 1135 (2003)..... 10

State v. McCord, 125 Wash.App. 888, 106 P.3d 832 (2005)..... 18, 21

State v. Nguyen, 165 Wash.2d 428, 197 P.3d 673 (2008) 8

State v. Nordlund, 113 Wash.App. 171, 53 P.3d 520 (2002)..... 9

State v. Perrone, 119 Wash.2d 538, 834 P.2d 611 (1992) 10, 14, 15, 16, 17

State v. Reep, 161 Wash.2d 808, 167 P.3d 1156 (2007)..... 7

State v. Reichenbach, 153 Wash.2d 126, 101 P.3d 80 (2004) 22, 23

State v. Riley, 121 Wash.2d 22, 846 P.2d 1365 (1993)..... 10, 17

State v. Russell, 171 Wash.2d 118, 249 P.3d 604 (2011) 8

State v. Saunders, 91 Wash.App. 575, 958 P.2d 364 (1998)..... 23, 24

State v. Thein, 138 Wash.2d 133, 977 P.2d 582 (1999)..... 9, 13, 14, 17

<i>State v. Walsh</i> , 143 Wash.2d 1, 17 P.3d 591 (2001).....	8
<i>State v. Young</i> , 123 Wash.2d 173, 195, 867 P.2d 593 (1994)	9

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I.....	1, 7, 10, 11, 12, 14
U.S. Const. Amend. IV	1, 2, 3, 7, 8, 9, 16, 19, 21
U.S. Const. Amend. VI.....	2, 3, 21, 22
U.S. Const. Amend. XIV	2, 3, 7, 8, 21, 22
Wash. Const. Article I, Section 22.....	22
Wash. Const. Article I, Section 7.....	1, 2, 7, 9, 16, 21

OTHER AUTHORITIES

RAP 2.5.....	8
--------------	---

ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Carner's motion to suppress.
2. The trial court violated Mr. Carner's right to privacy under Wash. Const. Article I, Section 7 by admitting evidence seized under authority of an overbroad warrant.
3. The police violated Mr. Carner's right to privacy under Wash. Const. Article I, Section 7 by seizing evidence under authority of an overbroad warrant.
4. The police violated Mr. Carner's Fourth Amendment right to be free from unreasonable searches and seizures by seizing evidence discovered pursuant to an overbroad warrant.
5. The search warrant was overbroad because it authorized police to search for and seize items for which the affidavit did not establish probable cause.
6. The search warrant was overbroad because it failed to describe the things to be seized with sufficient particularity.
7. The search warrant unlawfully authorized police to search for and seize items protected by the First Amendment.
8. The search warrant affidavit did not establish probable cause to search for or seize "personal computers together with peripheral devices attached thereto and records contained therein... such as removable digital storage media (thumb drive/flash drive); compact disks, and the like..."
9. The search warrant affidavit did not establish probable cause to search for or seize "[i]ndicia of domain [sic] or control over the defendant [sic] premises..."
10. The search warrant affidavit did not establish probable cause to search for or seize "records of income, e.g., banking records and statements describing loans and payments thereof, deposits, and withdrawals..."
11. The search warrant affidavit did not establish probable cause to search for or seize "emails; [i]nternet browsing records..."

12. The search warrant affidavit did not establish probable cause to search for, seize, or examine “Computers found to contain” indicia of occupancy, banking and loan records, emails, and internet browsing records.
13. The search warrant affidavit did not establish probable cause to search for or seize “video tapes, and still photographs; cell phones and cell phone records; letters and crib sheets; and weapons.”
14. The search warrant affidavit did not establish probable cause to search for or seize “evidence of unexplained wealth, to include but not limited to monies, personal property, stocks, bonds, savings certificates, and then [sic] like.”
15. The trial court erred by denying Mr. Carner’s request for a *Franks* hearing.
16. The search warrant affidavit was characterized by material omissions which were either deliberate or reckless.
17. The trial court erred by refusing to hold a hearing to explore the affiant’s omission of the informant’s lengthy criminal history in the warrant application.
18. The search violated Mr. Carner’s Fourth Amendment rights because the search warrant was based on an affidavit characterized by deliberate or reckless omissions.
19. The search violated Mr. Carner’s Article I, Section 7 rights because the search warrant was based on an affidavit characterized by deliberate or reckless omissions.
20. The trial court erred by adopting Conclusion of Law No. 6.
21. The trial court erred by adopting Conclusion of Law No. 7.
22. The trial court erred by adopting Conclusion of Law No. 8.
23. The trial court erred by adopting Conclusion of Law No. 9.
24. If Mr. Carner’s argument that the warrant was overbroad is not preserved for review, then he was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

25. Defense counsel unreasonably failed to argue that the search warrant was overbroad.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A search warrant is overbroad if it authorizes seizure of items for which probable cause does not exist, or if it fails to describe the things to be seized with sufficient particularity. In this case, the search warrant was overbroad for both reasons. Must the evidence derived from execution of the overbroad search warrant be suppressed?

2. The Fourth Amendment requires a trial judge to hold a hearing whenever an accused person makes a substantial preliminary showing that material information was omitted from a search warrant affidavit, and that the omission was made with reckless disregard for the truth. In this case, officers seeking a search warrant failed to tell the issuing magistrate that the informant (whose statement provided the basis for a probable cause determination) had five prior convictions for crimes of dishonesty. Did the trial judge err by refusing to hold a *Franks* hearing?

3. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, Mr. Carner's defense attorney failed to argue that the search warrant was overbroad. If Mr. Carner's argument that the warrant was overbroad is not preserved for review, was he denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Hoquiam police officers were shown a text message, originating from the cell phone of Bryce Bitar. The message read

I'm at donny carners [sic] on my way back now. I'm getting a T and ten dollars.
CP 17.

Bitar was known to the police: one of the officers could “recognize him on sight from numerous police related contacts,” and knew him to be “in the illegal drug culture.” CP 17.

Believing that the text message related to a drug purchase, the officers went to the house where Donald Carner lived.¹ When they saw Bitar emerge, they pulled him over, explained why they had stopped him, and obtained an admission that he had just come from Mr. Carner’s house where he had purchased heroin. Officers discovered heroin in Bitar’s car. CP 17-18.

Bitar told police that he had used heroin for two months, and had purchased from Mr. Carner. He acknowledged sending texts earlier in the

¹ According to the officers, the police department had received “numerous complaints of short stay traffic at all hours of the day” at the house; however, the officers did not name anyone who had complained, or provide further information about the complaints. The officers indicated that Carner had previously been investigated by the drug task force (apparently without being charged), and claimed that “numerous” people had accused Carner of selling heroin from his residence. The officers did not name any of these accusers. CP 17.

day, but could not remember to whom he had sent them. He claimed he had spoken with Mr. Carner and gone to the house, where he had called again from outside. After being admitted, he claimed to have purchased heroin from Mr. Carner. He also claimed that he had seen “a brown rifle and a black pistol,” which Mr. Carner kept in his upstairs bedroom.² CP 18.

Based on this information, the police applied for a search warrant. The search warrant affidavit also contained numerous generalizations about the habits and practices of drug dealers. It did not mention Bitar’s five prior convictions for crimes of dishonesty.³ CP 14-20; Defendant’s Case History (Bitar) (Attachment to Statement of Defendant on Submission of Case, Supp. CP.)

A search warrant was issued, authorizing the police to search for and seize (among other things):

personal computers together with peripheral devices attached thereto and records contained therein... such as removable digital storage media (thumb drive/flash drive); compact disks, and the like...”[i]ndicia of domain [sic] or control over the defendant [sic] premises...records of income, e.g., banking records and statements

² Bitar also claimed to have seen stolen property throughout the house, but did not provide details or explain how he knew it was stolen. CP 17-18.

³ The affiant also erroneously asserted that Mr. Carner had been convicted of possession of methamphetamine. CP 19. The trial court found that Mr. Carner’s conviction was actually for attempted possession of a controlled substance. CP 10.

describing loans and payments thereof, deposits, and withdrawals... emails; [i]nternet browsing records...video tapes, and still photographs; cell phones and cell phone records; letters and crib sheets; and weapons...evidence of unexplained wealth, to include but not limited to monies, personal property, stocks, bonds, savings certificates, and then [sic] like.
Search Warrant (Attachment to Statement of Defendant on Submission of Case, Supp. CP.)

Other than his claim that he had spoken to Mr. Carner by telephone and that he had seen “a brown rifle and a black pistol,” Bitar’s statement to the police did not mention or imply the existence of any of these materials, or suggest that such materials might relate to Mr. Carner’s alleged criminal activity. CP 14-20. Nor did the police provide other specific information suggesting that such materials might be linked to criminal activity and found at Mr. Carner’s residence. Instead, the only grounds to believe these materials might exist were the officer’s generalizations about the habits of drug dealers. CP 14-16.

Police searched Mr. Carner’s residence pursuant to the warrant, and found heroin. Grays Harbor Drug Task Force Report, p. 4 (Attachment to Statement of Defendant on Submission of Case, Supp. CP.) Mr. Carner was charged with possession of heroin, and he moved for an evidentiary hearing, alleging that the omission of Bitar’s criminal

history was both material and reckless.⁴ Defendant's 3.6 Hearing Brief, Supp. CP.

The trial court denied the request for a hearing and refused to suppress the evidence. CP 10. Mr. Carner waived his right to a jury and stipulated to the police reports. Statement of Defendant on Submission of Case, Supp. CP. He was convicted and sentenced as a first time offender, and he timely appealed. CP 3, 23.

ARGUMENT

I. THE SEARCH OF MR. CARNER'S RESIDENCE VIOLATED THE FIRST, FOURTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 7, BECAUSE THE SEARCH WAS CONDUCTED PURSUANT TO AN OVERBROAD SEARCH WARRANT.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Whether a search warrant meets the probable cause and particularity requirements is an issue of law reviewed *de novo*. *State v. Garcia-Salgado*, 170 Wash.2d 176, 183, 240 P.3d 153 (2010); *State v. Reep*, 161 Wash.2d 808, 813, 167 P.3d 1156 (2007).

⁴ He also alleged that the misstatement regarding his own criminal history was material and reckless.

A manifest error affecting a constitutional right may be raised for the first time on review.⁵ RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

- B. A search warrant must be based on probable cause and must describe with particularity the things to be seized.

The Fourth Amendment provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the... things to be seized.” U.S. Const. Amend. IV. The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961). Washington’s constitution provides that “No

⁵ In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.

Under both provisions, search warrants must be based on probable cause. *State v. Young*, 123 Wash.2d 173, 195, 867 P.2d 593 (1994). An affidavit in support of a search warrant “must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate.” *State v. Thein*, 138 Wash.2d 133, 140, 977 P.2d 582 (1999). The facts outlined in the affidavit must establish a reasonable inference that evidence of a crime will be found at the place to be searched; that is, there must be a nexus between the item to be seized and the place to be searched. *Young*, at 195; *Thein*, at 140. Generalizations cannot provide the individualized suspicion required under the Fourth Amendment and Article I, Section 7 of the Washington Constitution.⁶ *Thein*, at 147-148.

⁶ See also *State v. Nordlund*, 113 Wash.App. 171, 182-184, 53 P.3d 520 (2002) (“Nor is the [warrant] salvageable by the affidavit’s generalized statements about the habits of sex offenders... These general statements, alone, are insufficient to establish probable cause.”)

- C. The search warrant in this case was unconstitutionally overbroad: it authorized seizure of items for which probable cause did not exist (including items protected by the First Amendment), and failed to describe the things to be seized with sufficient particularity.

The particularity and probable cause requirements are inextricably interwoven. *State v. Perrone*, 119 Wash.2d 538, 545, 834 P.2d 611 (1992). A warrant may be overbroad either because it authorizes seizure of items for which probable cause does not exist, or because it fails to describe the things to be seized with sufficient particularity.⁷ *State v. Maddox*, 116 Wash.App. 796, 805, 67 P.3d 1135 (2003) (citing, *inter alia*, *Perrone, supra*, and *State v. Riley*, 121 Wash.2d 22, 846 P.2d 1365 (1993)).

A warrant authorizing seizure of materials protected by the First Amendment requires close scrutiny to ensure compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)); *Perrone at 547*. In keeping with this principle, the particularity requirement “is to

⁷ One aim of the particularity requirement is to prevent the issuance of warrants based on loose, vague or doubtful bases of fact. *Perrone, at 545*. The requirement also prevents law enforcement officials from engaging in a ““general, exploratory rummaging in a person’s belongings...”” *Perrone, at 545* (citations omitted). Conformance with the rule “eliminates the danger of unlimited discretion in the executing officer’s determination of what to seize.” *Perrone, at 546*.

be accorded the most scrupulous exactitude” when the materials to be seized are protected by the First Amendment. *Stanford, at 485.*

In this case, the affidavit lacks probable cause for the majority of items listed in the warrant, including items protected by the First Amendment. Indeed, the only information provided by the informant was his claim that Mr. Carner had a quantity of heroin (already packaged) and two firearms in his house, and that Mr. Carner communicated by telephone.^{8,9} CP 17-18. At best, this information provided probable cause to search for and seize heroin, packaging material, firearms, and possibly the telephone used to communicate with the informant. It certainly did not establish probable cause for the vast trove of items and information listed in the warrant.

Furthermore, the warrant itself is completely lacking in particularity. The broad categories used to describe the items to be seized transform the warrant into an illegal general warrant, authorizing police to rummage through Mr. Carner’s physical belongings as well as information

⁸ The informant did not specify whether Mr. Carner used a cell phone or a land line, and did not provide the number he used to contact Mr. Carner. CP 17-18.

⁹ The informant also claimed Mr. Carner possessed stolen property, but did not provide specifics and did not explain his basis of knowledge. CP 17-18.

protected by the First Amendment. *See, e.g., Stanford, supra* (discussing the evils of general warrants).

1. The affidavit did not establish probable cause to search for or seize any items or information protected by the First Amendment, and the warrant failed to describe such items with sufficient particularity.

Aside from boilerplate generalizations, nothing in the affidavit suggests that Carner possessed any written materials, electronic media, or other information that related to criminal activity. CP 14-20. Despite this, the warrant provides almost unlimited authority to examine and seize written materials and other items and information protected by the First Amendment, including:

personal computers together with peripheral devices attached thereto and records contained therein... such as removable digital storage media (thumb drive/flash drive); compact disks, and the like... Indicia of domain [sic] or control over the defendant [sic] premises, records of income, e.g., banking records and statements describing loans and payments thereof, deposits, and withdrawals; emails; [i]nternet browsing records... video tapes, and still photographs... cell phones and cell phone records; letters and crib sheets...

Search Warrant (Attachment to Statement of Defendant on Submission of Case, Supp. CP.)¹⁰

¹⁰ The warrant specifically authorizes officers to examine computers, and to seize them if “probable cause exists that they have been used during commission of VUCSA or other illegal activity.” Search Warrant (Attachment to Statement of Defendant on Submission of Case, Supp. CP.)

Washington residents should be secure in the knowledge that law enforcement cannot review their private information—whether stored on computers, cell phones, other electronic equipment, or in paper form—in the absence of a warrant based on probable cause. *Thein*, at 148-149. The warrant affidavit in this case was wholly lacking in specifics linking the type of records sought with the criminal activity alleged (or any other criminal activity).

The informant in this case did not observe *any* computers, electronic equipment, videos, pictures, or other written materials, much less criminal activity involving such items. CP 17-18. Nor did the informant correspond with Mr. Carner via email or by letter. Nothing in the affidavit establishes that Mr. Carner kept a “crib sheet” or log of drug transactions. CP 14-20.

Furthermore, the affiant provided no information suggesting that Mr. Carner’s internet browsing history related to criminal activity of any sort. Nor did the affiant explain why “[i]ndicia of domain [sic] or control over the defendant [sic] premises” would be helpful to the investigation. CP 14-20. The same is true regarding Mr. Carner’s financial records: nothing in the affidavit established that any financial records (including loan documents) related to criminal activity. CP 14-20.

Although there was evidence that Mr. Carner communicated by telephone, the warrant's authorization to seize "cell phones and cell phone records" was overly broad. Search Warrant (Attachment to Statement of Defendant on Submission of Case, Supp. CP.) The informant called Mr. Carner on at least two occasions; despite this, the officers did not obtain the specific telephone number Mr. Carner used. Nor did they attempt to determine whether the calls were to a cell phone or a landline. CP 14-20. Having failed to take these basic steps, the officers' request to search for and seize all cell phones and cell phone records marks a particularly egregious failure to comply with the particularity requirement. *Perrone, at 545*. This is especially true because modern cell phones are used for much more than telephonic communication: a cell phone can store text, images, emails, bookmarks, internet browsing history, and passwords for everything ranging from bank accounts to pornography sites.

The warrant affidavit contains little more than generalizations, of the type prohibited by the Supreme Court in *Thein*. Both the affidavit and the search warrant itself fail to describe the materials sought with the "scrupulous exactitude" required by the First Amendment. *Stanford, at 485*. Accordingly, the warrant is overbroad. *Perrone, at 545*.

2. The affidavit did not establish probable cause to seize "weapons," and the warrant did not describe with sufficient

particularity the “brown rifle and black pistol” mentioned in the affidavit.

According to the affidavit, the informant claimed that Carner “showed him a brown rifle and black pistol” during a conversation in the upstairs bedroom of the house. CP 18. The affidavit makes no mention of any other weapons. CP 14-20. By contrast, the search warrant authorizes seizure of “weapons,” but does not specifically describe the brown rifle and black pistol, and fails to mention that they were seen in the upstairs bedroom. Search Warrant (Attachment to Statement of Defendant on Submission of Case, Supp. CP).

Under these circumstances, the authorization to seize “weapons” is overbroad: it is not supported by probable cause (except with respect to the two firearms), and it fails the particularity requirement (because it does not describe the two firearms). *Perrone*, at 545.

3. The warrant affidavit does not establish that Mr. Carner had unexplained wealth, and the warrant did not describe with sufficient particularity the personal property and financial instruments to be seized.

The affidavit contains no information about Mr. Carner’s employment or his standard of living. CP 14-20. Absent such information, there is no basis to conclude that Mr. Carner had unexplained wealth. Furthermore, the affidavit does not describe with any degree of particularity the kinds of items that would be considered indicative of

unexplained wealth, authorizing seizure of “monies, personal property, stocks, bonds, savings certificates, and [the] like.” Search Warrant (Attachment to Statement of Defendant on Submission of Case, Supp. CP.)

The lack of probable cause and the particularity violation allows officers unlimited discretion to seize anything they choose. For example, the warrant authorizes seizure of “personal property” indicative of unexplained wealth. Based on this phrase, an officer could justify seizure of jewelry, automobiles, electronics equipment, antiques or anything else found in a home, regardless of its source or its value, and without knowing anything about Mr. Carner’s income from employment or other legitimate sources.

Under these circumstances, the authorization to seize “personal property” invited the police to engage in a “general, exploratory rummaging in a person’s belongings...” *Perrone*, at 545 (citations omitted). The warrant created a “danger of unlimited discretion in the executing officer’s determination of what to seize.” *Perrone*, at 546. Accordingly, it was overbroad and violated the Fourth Amendment and Article I, Section 7. *Id.*

4. The evidence seized from Mr. Carner’s residence and any evidence tainted by the overbroad warrant must be suppressed.

Evidence seized pursuant to an overbroad search warrant must be suppressed.¹¹ *State v. Higgins*, 136 Wash.App. 87, 94, 147 P.3d 649 (2006). Furthermore, evidence tainted by the initial unlawfulness must also be suppressed as “fruit of the poisonous tree.” *State v. Eisfeldt*, 163 Wash.2d 628, 640-641, 185 P.3d 580 (2008) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). An overbroad warrant is invalid regardless of whether the executing officers conducted an overbroad search. *Riley*, at 29.

Here, the evidence seized pursuant to the warrant (and any fruits tainted by the unlawful search) must be suppressed. *Thein*, *supra*. Mr. Carner’s conviction must be reversed, and the case remanded to the trial court for dismissal. *Id.*

¹¹ An exception applies when the warrant is severable; however, the severability doctrine does not apply when a search warrant is an unconstitutional general warrant. Instead, “there must be some logical and reasonable basis for the division of the warrant into parts which may be examined for severability.” *Perrone*, at 556-560. The severability doctrine cannot apply here, because the warrant is a general warrant. Furthermore, as in *Perrone*, there is no logical basis for dividing the warrant into separate parts. *Id.*

II. THE TRIAL JUDGE SHOULD HAVE HELD A *FRANKS* HEARING TO EXPLORE OMISSIONS IN THE WARRANT AFFIDAVIT.

A. Standard of Review

Probable cause determinations are reviewed *de novo*. *Garcia-Salgado*, at 183. A trial court's conclusions of law are reviewed *de novo*. *State v. Lohr*, ___ Wash.App. ___, ___, ___ P.3d ___ (2011).

B. Mr. Carner made a substantial showing that the affiant recklessly omitted material information from the warrant application.

Information provided by an informant cannot supply probable cause for issuance of a warrant unless the informant's basis of knowledge and credibility are established. *State v. McCord*, 125 Wash.App. 888, 893, 106 P.3d 832 (2005) (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)). Independent police investigation may cure a deficiency in either prong if it corroborates more than public or innocuous facts. *McCord*, at 893.

Under both the state and federal constitutions, a material omission in a warrant affidavit may invalidate a search warrant. *Franks v. Delaware*, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *State v. Chenoweth*, 160 Wash.2d 454, 462, 158 P.3d 595 (2007). Where an accused person “makes a substantial preliminary showing” that a

material omission was made “knowingly and intentionally, or with reckless disregard for the truth...the Fourth Amendment requires that a hearing be held at the defendant’s request.” *Franks*, at 155-156; *see also Chenoweth*, at 462, 478-479.

In this case, Mr. Carner made a substantial preliminary showing that the affiant omitted material information from the search warrant affidavit. Specifically, the finding of probable cause rested almost entirely on Bitar’s credibility: Bitar sent a text message implying he planned to buy drugs at Carner’s residence (although he apparently did not say that he would purchase them from Carner himself),¹² and he told police that he had bought heroin from Carner inside the residence. CP 17-18. The only “corroboration” of his accusation was his own possession of heroin.¹³ CP 18. However, this factor actually weighs against Bitar’s credibility, because it gave him incentive to “curry favorable treatment” with the

¹² When Carner’s house was later searched, there were at least three other people there. Two were arrested for drug possession; the third was arrested on a warrant. Grays Harbor Drug Task Force Report, pp. 4-5 (Attachment to Statement of Defendant on Submission of Case, Supp. CP.)

¹³ The affidavit also contained rumors that Carner was dealing drugs from his house, and that the house saw “short stay traffic at all hours of the day.” CP 17. Nothing in the affidavit established the basis of knowledge or credibility of these unnamed informants; accordingly the rumors do not contribute to a finding of probable cause. *See, e.g., United States v. Vigeant*, 176 F.3d 565, 569 (1st Cir. 1999) (“[M]ere suspicion, rumor, or strong reason to suspect [wrongdoing] are not sufficient”) (citation omitted) (quoting *United States v. Han*, 74 F.3d 537, 541 (4th Cir.1996)); *see also Wong Sun*, at 479.

police and to shift blame elsewhere.¹⁴ *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010).

Despite the importance of Bitar's credibility, the affiant failed to mention that Bitar had previously been convicted of five crimes of dishonesty, including two felonies and three gross misdemeanors.¹⁵ CP 14-20; Defendant's Case History (Bitar) (Attachment to Statement of Defendant on Submission of Case, Supp. CP). When considered along with his incentive to make accusations to shift attention from his own crime, these crimes of dishonesty reduce his credibility to zero and eliminate probable cause.¹⁶ Accordingly, the affiant's omissions were material, and Mr. Carner made a sufficient showing to require a hearing under *Franks*.

There is also evidence that the omissions were reckless. The affiant indicated that Officer Dayton was familiar with Bitar, could "recognize him on sight from numerous police related contacts," and knew

¹⁴ This is so even in the absence of any promise of immunity. *See Alford v. United States*, 282 U.S. 687, 693, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

¹⁵ These included one count of first-degree trafficking in stolen property, one count of second-degree trafficking in stolen property, and three counts of third-degree theft. Defendant's Case History (Bitar) (Attachment to Statement of Defendant on Submission of Case, Supp. CP.)

¹⁶ Although it is true that Bitar made statements against his penal interest, he did so only after he had been confronted with information already in possession of the police. CP 17-18. Because of this, his admissions do not support his veracity.

him to be “in the illegal drug culture.” CP 17. Even if the officers did not know Bitar’s specific crimes of conviction, it would have been a simple matter to review his record (as they did with Mr. Carner before applying for the warrant). CP 19. These facts suggest that the affiant acted with a reckless disregard for the truth when he failed to mention Bitar’s criminal history to the issuing magistrate.

The trial court’s failure to hold a *Franks* hearing violated Mr. Carner’s rights under the Fourth Amendment and Article I, Section 7. *Franks*, at 155-156; *Chenoweth*, at 478-479. Accordingly, the conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *McCord*, *supra*.

III. IF MR. CARNER’S ARGUMENT THAT THE WARRANT WAS OVERBROAD IS NOT PRESERVED FOR REVIEW, HE WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash. App. 29, 146 P.3d 1227 (2006).

- B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.")

- C. Defense counsel was ineffective for failing to object to inadmissible and prejudicial evidence.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel's erroneously failed to argue that the search warrant was overbroad, and this failure prejudiced Mr. Carner. First, there was no strategic purpose for a failure to argue that the warrant was overbroad. Indeed, counsel argued for suppression on alternate

grounds; it would have been a simple matter to add an argument on the grounds that the warrant was overbroad.

Second, the argument was likely to succeed. As outlined above, the search warrant was incredibly overbroad: it authorized a search for and seizure of numerous items for which there was no probable cause, including writings, images, and other information protected by the first amendment. It also gave the executing officers unlimited discretion to seize “personal property” if they believed it to be evidence of “unexplained wealth.” Search Warrant (Attachment to Statement of Defendant on Submission of Case, Supp. CP.) Under these circumstances, argument on the grounds that the warrant was overbroad was likely to succeed.

Third, a successful motion would have resulted in suppression of the evidence and dismissal of the prosecution. Accordingly, the failure to seek suppression under the theory that the warrant was overbroad prejudiced Mr. Carner.

Accordingly, defense counsel’s failure to seek suppression deprived Mr. Carner of the effective assistance of counsel. *Saunders, at* 578. The conviction must be reversed and the case remanded. *Id.*

CONCLUSION

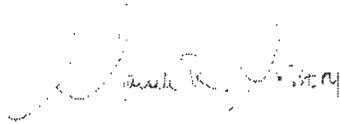
For the foregoing reasons, Mr. Carner's conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on November 7, 2011.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Donald Carner, Jr.
520 W Huntley
Aberdeen, WA 98520

And to:

Grays Harbor Co Prosecutor
102 W Broadway Ave Rm 102
Montesano WA 98563-3621

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 7, 2011.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

November 07, 2011 - 8:56 AM

Transmittal Letter

Document Uploaded: 422425-Appellant's Brief.pdf

Case Name: State v. Donald Carner JR.

Court of Appeals Case Number: 42242-5

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Manek R Mistry - Email: **backlundmistry@gmail.com**