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STATE OF WASHINGTON
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NO. 42242-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

DONALD R. CARNER, JR.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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P.M. 3-30-2012

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STATEMENT OF THE FACTS

The State generally agrees with appellant's Statement of Facts and Prior Proceedings only to add that the trial court found that Carner's NCIC Interstate Identification Index indicating that he had a prior felony drug conviction which was relied upon by Sergeant Mitchell when he drafted the search warrant. (Finding of Fact No. 2; CP 10).

ARGUMENT

1. The search warrant established probable cause.

Probable cause is established in an affidavit supporting a search warrant by setting forth facts sufficient for a reasonable person to conclude the defendant is probably involved in criminal activity. State v. Perrone, 119 Wn.2d 538, 551, 834 P.2d 611 (1992); State v. Maxwell, 114 Wn.2d 761, 791 P.2d 223 (1990). "An affidavit need not establish proof of criminal activity, but merely probable cause to believe it may have occurred." State v. Gunwall, 106 Wn.2d 54 73, 729 P.2d 808 (1986) (emphasis added).

The question of whether or not probable cause exists for the issuance of the search warrant should not be analyzed in a "hypertechnical" manner. State v. Matlock, 27 Wn.App. 152, 616 P.2d 684 (1980). Nor must the issuing magistrate be convinced beyond a reasonable doubt that there is probable cause; there must only be a prima facie showing of probable cause. State v. Osborne, 18 Wn.App. 318, 569 P.2d 1176 (1977); State v. Lehman, 8 Wn.App. 408, 506 P.2d 1316 (1973).

The affidavit is evaluated in a common sense manner with doubts resolved in favor of validity, and with a considerable deference being accorded to the issuing judge's determination. State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977); State v. Freeman, 47 Wn.App. 870, 737 P.2d 704 (1987). Affidavits of probable cause are tested by much less regular standards than those governing the admissibility of evidence at trial and the issuing magistrates are not to be confined by restrictions on the use of good common sense. State v. Harrison, 5 Wn.App. 454, 488 P.2d 532 (1967). Doubts as to the sufficiency of information to support probable cause must be resolved in favor of validity of the warrant. State v. Walcott, 72 Wn.2d 959, 435 P.2d 994 (1967).

The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all circumstances set forth in the affidavit before him, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of a reviewing court is to pay great deference to the magistrate's determination of probable cause, and simply to insure that the magistrate had a substantial basis for his or her decision.

State v. Steenerson, 38 Wn.App. 722 725, 688 P.2d 544 (1984).

2. Bitar's reliability was established.

With regard to informant reliability, under the two-part Aguilar-Spinelli test an affidavit must contain information sufficient to establish the informant's trustworthiness based upon the underlying circumstances and basis of his or her knowledge and must contain

information that establishes the informant's veracity. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. U.S., 393 U.S. 410 (1969). The affidavit is insufficient and it fails to meet either prong unless other police investigation corroborates the informant's tip. State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994).

(a) Basis of knowledge.

In State v. Duncan, 81 Wn.App. 70, 912 P.2d 1090 (1996), it was held that "[i]nformation showing the informant personally have seen the facts asserted and is passing on first hand information satisfies the basis of knowledge prong." Duncan, at 76. In State v. Murray, 110 Wn.2d 706, 757 P.2d 487 (1988), an anonymous "tipster" stated that he had seen marijuana growing inside a Montesano residence. He passed this information on to an informant who told the police what the tipster had said. The Supreme Court held that "[h]ere, the basis of knowledge prong is readily satisfied by the tipster's claim that he personally observed marijuana growing in the basement of the Montesano house. Murray, at 711.

Clearly the basis of knowledge prong of Aguilar-Spinelli is satisfied as Bitar had personal knowledge of the events described in the affidavit. (CP 35, 49).

(b) Veracity

"The veracity prong is satisfied by showing the credibility of the informant, or by establishing the facts and circumstances surrounding the furnishing of the information that support an inference the informant is

telling the truth.” State v. McCord, 125 Wn.App. 888, 893, 106 P.3d 832 (2005); State v. Lair, 95 Wn.2d 706, 710, 630 P.2d 427 (1981). “When the informant is an ordinary citizen rather than a criminal or professional informant and his identity is revealed to the issuing magistrate, intrinsic indicia of his liability may be found in his detailed description of the underlying circumstances of what he observed.” McCord, at 893; State v. Northness, 20 Wn.App. 551, 557, 582 P.2d 546 (1978). That an informant is named in the affidavit is one factor to be considered in determining veracity. McCord, at 893; State v. Duncan, 81 Wn.App. 70, 78, 912 P.2d 1090 (1996). Nor does it really matter that the informant is a “criminal,” rather than “ordinary citizen,” informant. “[T]he fact that an identified eye witness informant may also be under suspicion . . . has been held not to vitiate the inference of reliability raised by the detailed nature of the information in the disclosure of the informant’s identity” State v. Chenoweth, 127 Wn.App. 444, 454, 111 P.3d 1217 (2005) quoting Northness at 558 (citing United States v. Banks, 539 F.2d 14, 17 (9th Cir. 1976) (fact that named, untested, nonprofessional informer was under investigation based on suspicion of being involved in drug traffic was immaterial to question a reliability of informant where he voluntarily provided detailed eye witness report of defendant’s drug dealing).

The court in Lair noted that the veracity prong of the Aguilar-Spinelli test may be satisfied “if the magistrate is provided sufficient facts to determine that the informant’s information on the specific occasion is

reliable.” Lair at 710. The court framed the inquiry, “was the information furnished under circumstances giving reasonable assurances of trustworthiness? If so, the information is reliable, notwithstanding the ignorance as to its source’s credibility.” Lair at 710 quoting Thompson v. State, 16 Md.App. 560, 566, 298 A.2d 458 (1973).

One factor to consider is whether the statement was made against the informant’s penal interest. “Since one who admits criminal activity to a police officer faces possible prosecution, it is generally held to be a reasonable inference that a statement raising such a possibility is a credible one.” Lair at 711. Bitar admitted to making arrangements to go to Connor’s house to purchase heroin and admitted to texting other individuals about his plans to purchase heroin. Furthermore, Bitar gave a detailed description of his meeting with Mr. Carner. (CP 49).

Another factor to be considered in establishing veracity is whether or not the information provided by the informant is corroborated by other evidence or statements. Lair at 711-712. Here, the police had the text messages that Bitar sent announcing his plans to go to Carner’s house to purchase heroin. (CP 34, 48, 73-85). Bitar was seen leaving Carner’s residence as anticipated. (CP 35, 48). Furthermore, Mitchell was aware that the Grays Harbor County Drug Task Force had investigated Carner in the past for illegal narcotics sales. (CP 34-35, 48).

Also, the fact that Bitar is named in the affidavit is another factor that can be considered in determining the veracity of the informant:

When, however, there is an underlying factual basis for the statements, or other indications of reliability, the additional fact that an informant is named is at least more helpful than no name at all and may be one circumstance contributing to a conclusion that the information in the affidavit was reliable.

Lair at 712-713; State v. Sieler, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980).

Given the foregoing, the veracity prong of Aguilar-Spinelli has been satisfied in this case.

3. Bitar's criminal history was immaterial to the issue of probable cause, that Carner had a prior felony conviction was not known to be false at the time it was included in the affidavit and a Franks hearing was not required.

A police informant's criminal record or criminal status is not material to finding probable cause to issue a search warrant based upon information provided by the informant. State v. Taylor, 74 Wn.App. 111, 872 P.2d 53 (1994). A defendant seeking the disclosure of an informant's identity needs to offer more than merely speculative evidence that the informant has evidence which bears upon the defendant's guilt or innocence. State v. Burleson, 8 Wn.App. 233, 566 P.2d 1277 (1977); State v. Frederick, 45 Wn.App. 916 719 P.2d 56 (1986).

In State v. Taylor, *supra*, the defense argued that the fact of the confidential informant criminal history, the fact that he was a drug addict and the fact that he had pending criminal charges should have been disclosed to the issuing magistrate. He argued that this constituted both a material misrepresentation and an omission of relevant facts necessary to

make a determination of probable cause. He further argued that the trial court should have suppressed the evidence or that he was entitled to a hearing under Franks v. Delaware, 430 U.S. 154, 155, 156, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978) (as is argued here). The Court of Appeals in Taylor held that these issues were not relevant to the determination of probable cause for issuance of the warrant:

Even if the defense had argued pretrial that Taylor's motive was a material omission, we would reject that argument on appeal. In United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989), the defendant argued, inter alia, that the police should have informed the magistrate that the informants, who were husband and wife, were motivated by their desire to obtain immunity from prosecution, that the wife was paid for her information and that the husband was a convicted felon, drug user, and was under investigation for purchasing methamphetamine manufacturing equipment. The Circuit Court held that the omission of these circumstances was immaterial to the informant's credibility:

It would have to be a very naive magistrate who would suppose that a confidential informant would drop in off the street with such detailed evidence and not have an ulterior motive. The magistrate would naturally have assumed that the informant was not a disinterested citizen. While the magistrate was not informed of the informant's probity, the magistrate was given reason to think the informant knew a good deal about what was going on at 22700 West Deal Road.

Strifler, 851 F.2d at 1201. See also United States v. Flagg, 919 F.2d 499, 500-01 (8th Cir. 1990) (the omission of facts about the informant's criminal record and possible motive would not generally mislead magistrates since informants often have criminal records and supply information to the government pursuant to plea agreements); State v.

Garberding, 245 Mont. 356, 362, 801 P.2d 583, 586 (1990) (that the primary informant was a convicted felon and received payment for his tip did not cast doubt on his reliability; therefore, the omission of these circumstances did not warrant a Franks hearing, because "[a] . person of known criminal activity. . . is not likely to place himself in such a dubious position unless he is telling the truth").

The reasoning applied by the courts in Strifler, Flagg and Garberding is persuasive. Here, as in those cases, omission of the informant's criminal record and ulterior motive for supplying information was not material because informants frequently have criminal records as well as ulterior or self-serving motives for divulging the information.

Taylor, at 120-121.

The implication seems to be that by not including Bitar's criminal history in the affidavit, Mitchell was somehow trying to pass Mr. Bitar off as someone he is not. However, the only conclusion that one can come to from reading the affidavit is that Mr. Bitar is a heroin addict. In the affidavit, Mr. Bitar admits to Mitchell that he is a heroin addict. Mitchell discloses in the affidavit that Officer Dayton is familiar with Bitar and can recognize him from numerous police related contacts. Dayton is also aware that Bitar is known to him to be involved in the illegal drug culture. (CP 48-49). Bitar is in no way portrayed in the affidavit as an upstanding citizen.

In response to similar arguments the court in Chenoweth held as follows:

Because Detective King provided Parker's name to the commissioner, because Parker made statements against his penal interest, and because the amount and kind of detail provided support an inference of reliability, the

commissioner did not abuse her discretion in finding that probable cause supported the search warrant.

Chenoweth at 455.

In limited circumstances, the information contained in (or omitted from), a search warrant can be challenged. Franks, supra at 155-156. When false information is deliberately or recklessly included (or omitted) in an affidavit, a court is to excise or include the information and see if probable cause still exists. Franks at 171-172. If there is still probable cause, the motion for a hearing will be denied. If probable cause no longer exists, then the challenger is entitled to a hearing to attempt to establish the contention that the information was false and known to be so at the time it was included in the affidavit. Franks at 172.

A reckless disregard for the truth is shown where the affiant entertains serious doubts as to the truth of facts or statements in the affidavit and “serious doubts” can be shown by actual deliberation on the part of the affiant or the existence of obvious reasons to doubt the veracity of the informant or the accuracy of the reports. Chenoweth at 456. Here, no showing has been made that the omission of the defendant’s criminal history was either material or made intentionally or with reckless disregard for the truth.

Similarly, the statement that Carner had a prior felony drug conviction, although false, was not known to be so at the time it was included in the affidavit. Carner’s criminal history relied upon by Mitchell in drafting the search warrant showed that Carner had a prior felony drug

conviction. (Finding of Fact 2; CP 10). Mitchell did not include that information in the affidavit knowing it to be false or with a reckless disregard for the truth.

If the statement that Carner had a prior felony drug conviction is excised from the affidavit, and Bitar's criminal history included, there is still probable cause for the issuance of the search warrant, and thus a Franks hearing was not required.

4. The search warrant was not overbroad.

The fact that the search warrant may have authorized the seizure of items for which probable cause did not exist, does not invalidate the entire search warrant. A search warrant is severable when it clearly describes other items for which probable cause exists. State v. Cockrell, 102 Wn.2d 561, 570, 689 P.2d 32 (1984); Aday v. Superior Court, 55 Cal.2d 789, 362 P.2d 47 13 Cal.Rptr. 415 (1961).

The admittedly invalid portion of the search warrant can be severed from the balance of the search warrant. Under the severability doctrine "infirmity of part of a warrant requires suppression of evidence seized pursuant to that part of the warrant but does not require suppression of items seized pursuant to valid parts of the warrant." State v. Perrone, 119 Wn.2d 538, 556, 834 P.2d 611 (1992). When a search warrant describes both items that are supported by probable cause, and items that are not supported by probable cause, the doctrine of severability applies so long as

a “meaningful separation” can be made on some “logical and reasonable basis.” Perrone 119 Wn.2d at page 560.

The case at hand is nearly identical to the warrant reviewed in State v. Maddox, 116 Wn.App. 796, 806, 67 P.3d 1135 (2003). Maddox presented a situation in which some items listed were supported by probable cause and others were not. The warrant in the case at hand meets the requirement for severability as set forth in Maddox 116 Wn.App. at page 807-809.

First of all, the warrant validly authorized entry onto the premises. Secondly, the warrant clearly described at least five items for which probable cause existed: drugs, the drug paraphernalia, the firearms, cash, and indicia (Bitar told law enforcement he had paid Carner \$30.00 for the heroin, CP 49, and indicia was certainly relevant to establish Carner’s control of the premises). Thirdly, those items described for which there is probable cause are significant when compared to the warrant as a whole. The search warrant affidavit addresses itself to the presence of firearms, drugs, and drug paraphernalia seen in the residence by Bitar. Indeed, of the 29 items seized during the execution of the search warrant, only 8 were arguably not supported by probable cause (Item 6, a cell phone; Item 9, an Apple iBook; Item 17, surveillance equipment; Item 18, a laptop; Item 22, surveillance equipment; Item 23, Anarchist Cookbook; Item 25, a Duwalt drill; and Item 28, cell phones). (CP 40-42). No information was derived from any of those items to support the conviction of the appellant.

This is not a general exploratory search warrant. The items seized were found while executing the valid portion of the search warrant. There is no evidence that the officers conducted a general search and there is no allegation that the officers “flagrantly disregarded” the scope of the warrant.

5. The defendant received effective assistance of counsel.

The standard for determining effective assistance of counsel is well established. First of all, the defendant must show that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness. If this can be shown, then the defendant must show prejudice. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

As regards the claim that the search warrant declaration was overbroad, the defendant cannot show the defense counsel’s conduct was deficient. No one can dispute that the search warrant affidavit stated probable cause to seize drugs, drug paraphernalia and firearms. The fact that other items may have been named in the search warrant for which there was no probable cause, does not prevent severance of those portions of the search warrant which are not supported by probable cause. Counsel for the defendant undoubtedly was aware of the case law to that effect. State v. Cockrell, *supra*, 102 Wn.2d at page 570.

CONCLUSION

For the reasons set forth, the defendant's conviction must be affirmed.

DATED this 30 day of March, 2012.

Respectfully Submitted,

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