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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

NO. 46304-1

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

STATE OF WASHINGTON, APPELLANT/CROSS-RESPONDENT

v.

ALFRED G, BURTON, RESPONDENT/ CROSS-APPELLANT

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Appeal from the Superior Court Of Pierce County  
The Honorable Staley Rumbaugh

No. 12-1-02167-0

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**REPLY BRIEF OF CROSS-APPELLANT**

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By: Jay Berneburg  
Attorney for Respondent/Cross Appellant  
WSB # 27165

ORIGINAL

**TABLE OF CONTENTS**

**A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ...1**

1. Whether the trial court erred when it denied Mr. Burton’s motion to redact material false statements from the declaration of probable cause.....1

2. Whether the trial court erred when it found “there were no deliberate omissions or a reckless disregard for the truth” in the Declaration of Probable Cause.....1

**B. STATEMENT OF THE CASE.....1**

**C. ARGUMENT.....1**

1. The court erred when it failed to redact Deputy Jarvis’ offensive statements which he made intentionally, deliberately, and with a reckless disregard for the truth.....1

2. In the declaration of probable cause, Deputy Jarvis made false statements intentionally, deliberately, and with a reckless disregard for the truth. ....3

**D. CONCLUSION .....4**

**TABLE OF AUTHORITIES**

Cross-Appellant relies entirely on the record.

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it denied Mr. Burton's motion to redact material false statements from the declaration of probable cause.
2. Whether the trial court erred when it found "there were no deliberate omissions or a reckless disregard for the truth" in the Declaration of Probable Cause.

B. STATEMENT OF THE CASE

The statement of the case is detailed in Cross-Appellant's opening/ response brief.

C. ARGUMENT

1. IN THE DECLARATION OF PROBABLE CAUSE, DEPUTY JARVIS MADE FALSE STATEMENTS INTENTIONALLY, DELIBERATELY, AND WITH A RECKLESS DISREGARD FOR THE TRUTH.

April 27, 2012, Pierce County Sheriff's Deputies Johnson,

Nordstrom and Jarvis contacted Mr. Burton and Mr. Bivens at the office of Green Path of Washington. CP 48.

In the Declaration of Probable Cause, Deputy Jarvis wrote: "Burton said that he was not a medicinal marijuana patient, therefore had no legal reason to be in possession of marijuana."

Based upon testimony taken at the Franks hearing, we know that Mr. Burton did not make that statement. Mr. Burton was a qualifying patient with valid documentation at the time of contact with law enforcement. CP 35. Mr. Bivens was also a qualifying patient with valid documentation at the time of

contact with law enforcement. *See* CP 35. Mr. Burton's and Mr. Bivens' valid documentation was posted on the wall of the Green Path office. Ex. 3.

At the Franks hearing, Deputy Nordstrom testified that the statement attributed to Mr. Burton may not be accurate. Deputy Nordstrom said that what may have actually been said was "I don't even use the medicine." Even more significant is when Nordstrom also stated that it may not have been Mr. Burton who made the statement that "it may have been Bivens who actually made the statement."

Like Deputy Nordstrom, Deputy Jarvis testified that "what was most likely said was 'I don't even use the medicine,' and that it may have actually been Mr. Bivens who said it."

In the Declaration of Probable Cause, Deputy Jarvis intentionally, deliberately, and with a reckless disregard for the truth wrote: "Burton said that he was not a medicinal marijuana patient, therefore had no legal reason to be in possession of marijuana."

By the Deputies' own admission under oath, we know that what was most likely said was "I don't even use the medicine" and that the person who said may have been the guy sitting next to Mr. Burton who Deputy Jarvis intentionally, deliberately, and with a reckless disregard for the truth completely erased from existence.

Had Deputy Jarvis told the truth in the Declaration for Probable Cause, he would have written: "one of the two men seated behind the counter stated something to the effect of "I don't even use the medicine."

Had Deputy Jarvis been truthful in the Declaration for Probable Cause he could not have inserted the legal conclusion: “and therefore had no legal reason to be in possession of marijuana.”

Deputy Jarvis intentionally, deliberately, and with a reckless disregard for the truth, reinvented reality for the sole purpose of persuading the Judge to issue a search warrant.

2. THE COURT ERRED WHEN IT FAILED TO REDACT DEPUTY JARVIS’ OFFENSIVE STATEMENTS WHICH HE MADE INTENTIONALLY, DELIBERATELY, AND WITH A RECKLESS DISREGARD FOR THE TRUTH.

The Court erred when, at the conclusion of the *Franks* hearing, the Court stated that “there were no deliberate omissions or a reckless disregard for the truth” and denied Mr. Burton’s motion to exclude the offensive statement.

The Court, perhaps unwittingly, admitted the error when ruling at the conclusion of the CrR 3.6 hearing the Court stated:

The next paragraph talks about Mr. Burton saying that he was not a medical marijuana patient and had no legal reason to be in possession of marijuana. The facts deduced at the hearing are otherwise and there has been confusion by both Officer Nordstrom and Officer Jarvis as to whether the statement really came from Mr. Burton or whether it came from another person that he didn't use medical marijuana. At any rate, I don't find this particular statement to have factual support and, therefore, would not supply grounds for probable cause. I think that based on the dispute and the fact that both of the officers have testified that they couldn't say unequivocally that Mr. Burton told them he was not a medical marijuana patient, this particular statement would fail.

For some unknown reason, the Court made this ruling at the conclusion of the CrR 3.6 hearing instead of at the conclusion of the *Franks* hearing. Had the Court made this ruling at the proper time, at the

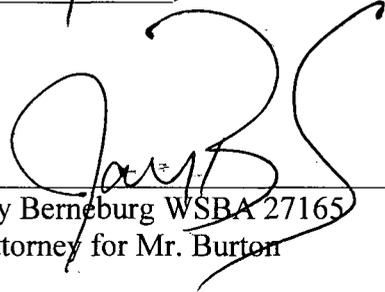
conclusion of the Franks hearing, it would have redacted the offensive statement. With the offensive statement removed, it is even more likely that the Court would have granted Mr. Burton's motion to quash the search warrant and suppress evidence.

D. CONCLUSION

The Court erred when it failed to redact offensive statements in the declaration of probable cause. The Court erred because Deputy Jarvis made the offensive statements intentionally, deliberately, and with a reckless disregard of the truth. Accordingly, this Court should reverse the Trial Court's ruling and grant Mr. Burton's motion to redact the offensive statements.

With the offensive statements removed, this Court must then reexamine the Trial Court's ruling in Mr. Burton's CrR 3.6 motion and affirm the Trial Court's ruling.

DATED this 1 day of May, 2015.

  
Jay Berneburg WSBA 27165  
Attorney for Mr. Burton

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COURT OF APPEALS – DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 ) NO. 46304-1-II  
 Appellant, )  
 ) DECLARATION OF SERVICE  
 vs. )  
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 ALFRED G. BURTON, )  
 )  
 Respondent. )  
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DECLARATION

I declare under penalty of perjury of the laws of the State of Washington that the following is true and correct.

On this date I personally EMAIL served via JBLcopier@gmail.com a Respondent’s reply brief to trobert@co.pierce.wa.us in the above encaptioned case. On this day, Mr. Berneburg also hand delivered the original and a copy to the Court of Appeals Division II.

DATED this 1<sup>st</sup> day of May, 2015.

/s/ Kym Schodron  
Kym Schodron Manager  
Jay Berneburg WSBA 27165  
Attorney for Respondent

DECLARATION OF SERVICE

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