

No. 46579-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JUSTIN WARREN HAUGEN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court incorrectly rule that Haugen had not met his burden to show there was a material omission in the search warrant affidavit?
- B. Can Haugen raise, for the first time on appeal, suppression issues based upon the alleged illegal entry into the Scammon Creek residence?

II. STATEMENT OF THE CASE

On December 12, 2013, Officer Mike Smerer and Officer Adam Haggerty with the Centralia Police Department, along with Detective Robin Holt with the Chehalis Police Department, received information that Mark Fiman was at 1013 Scammon Creek Road, Apt. J-6, in Centralia, Washington. CP 46, 50, 71-72. Mr. Fiman was at the residence with Justin Haugen and Brian Haugen¹. CP 46, 71. A records check of Mr. Fiman revealed a felony warrant out of Thurston County, a second felony warrant out of DOC, and a third misdemeanor warrant from Centralia Municipal Court. CP 46, 50, 71. Mr. Fiman was being supervised by Community Corrections Officer Mike Boone. CP 46, 50, 71. Officer Haggerty contacted CCO Boone about Mr. Fiman's location, and asked for assistance. CP 46, 50, 71.

¹ The State will refer to Justin Haugen as Haugen and Brian Haugen as Brian to avoid confusion, there is no disrespect intended.

Prior to arriving at the Scammon Creek Road address, all law enforcement officers involved observed a recent booking photo of Mr. Fiman. CP 46, 51, 71. As officers arrived at the Scammon Creek Road address, Officer Haggerty observed Brian in the upstairs apartment window. CP 46, 50, 56, 71. The window was opened, and Officer Haggerty asked Brian to join him at the front door. CP 46, 50-51, 56, 71. When officers arrived at the front door, Brian Haugen opened the door. CP 46, 51, 56, 71. Officer Haggerty saw Mr. Fiman walking down the hallway towards law enforcement. CP 46-47, 51, 56, 71. Officer Haggerty told Mr. Fiman he was under arrest, and entered the apartment. CP 47, 51, 56, 71. Mr. Fiman quickly entered into the first bedroom on the right as officers entered the apartment. CP 47, 51, 71.

While officers remained in the living room of the apartment, they ordered Mr. Fiman out of the bedroom. CP 47, 51, 56, 71. Mr. Fiman eventually left the bedroom and walked towards the living room. CP 47, 51, 56, 71. Once in the living room, Mr. Fiman was placed in custody by CCO Boone. CP 47, 51, 56, 71. While CCO Boone searched Mr. Fiman incident to his arrest two other people came out from the back of the apartment. CP 47, 51, 56, 72. A security sweep of the apartment was done to ensure there were no

more threats. CP 47, 51, 56, 72. During this search, Officer Haggerty remained with Mr. Fiman in the living room. CP 47, 56, 72.

During his security sweep of the apartment, CCO Boone entered the bedroom Mr. Fiman had run into. 47, 51, 56, 72. Seeing no threats in this room, CCO Boone searched other bedrooms in the back of the apartment. CP 56, 72. On his way back to the living room, CCO Boone re-entered the bedroom Mr. Fiman had ran into and observed a silver digital scale with white residue sitting on the desk. CP 56, 72. There was also a locked safe next to the desk. CP 56, 72. A homemade water bong-type smoking device, commonly used for smoking Methamphetamine, was also found in the closet of the bedroom. CP 56, 72. From where Officer Haggerty was standing, he could not and would not have been able to see CCO Boone's multiple entries into this bedroom. CP 47, 56, 72.

Once CCO Boone returned to the living room, Mr. Fiman was being read his Miranda warnings. CP 47, 56, 72. CCO Boone then confronted Mr. Fiman with what he had found in the bedroom. CP 56, 72. CCO Boone did not inform anyone that he had made multiple entries into the bedroom Mr. Fiman stated the scale was his, and also the contents of the safe. CP 47, 51, 56, 72. When

asked what was in the safe, Mr. Fiman eventually stated “dope stuff.” CP 47, 51, 56, 72. When asked what the white stuff on the scale was, he stated it was methamphetamine. CP 47, 51, 72.

Based on Mr. Fiman’s statements, a search warrant for the bedroom was obtained. CP 47, 50-53, 72. After the search warrant was obtained, Officer Haggerty went back into the apartment and showed it to the Haugen brothers. CP 47, 72. Justin Haugen asked if he could get his cell phone from his bedroom so that he could call his sister. CP 47, 72-73. Officer Haggerty walked with Justin back to his bedroom. CP 47, 73. Justin obtained his cell phone, and walked back to the living room with Officer Haggerty. CP 47, 73.

While walking back to the living room, Officer Haggerty asked Justin if he had any drugs in his room. CP 47, 73. Justin stated that he did, and that they were in the camouflage case on his night stand. Justin was advised of his Miranda warnings, and waived his rights. CP 47, 73. Justin again told Officer Haggerty that he had Methamphetamine in his bedroom. CP 47, 73.

Based on these statements, Officer Haggerty obtained an addendum to the original search warrant to also allow a search of Justin’s bedroom. CP 47, 73. During the search of Justin’s bedroom, officers found: one baggie containing a white crystalline

substance that field-tested positive as Methamphetamine; 10 small blue pills identified by the Poison Control Center as Alprazolam; seven Clonazepam pills of various doses; numerous pipes consistent with methamphetamine use and indicia linking Justin Haugen to the bedroom. CP 48, 73. The items discovered in Justin's bedroom were sent to the Washington State Patrol Crime Lab and tested respectively as Methamphetamine, Alprazolam, and Clonazepam. CP 73.

The State charged Haugen with three counts of possession of a controlled substance, Count I: Methamphetamine, Count II: Alprazolam, Count III: Clonazepam. Haugen's trial counsel filed a motion to suppress the evidence recovered from the execution of the search warrant pursuant to *Franks v. Delaware*. CP 41-57. The trial court heard and denied the motion. RP 1-19; CP 68-69. Haugen was found guilty as charged after a stipulated facts bench trial. CP 70-74. Haugen was sentenced 30 days in jail. CP 78. Haugen timely appeals his conviction. CP 40.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY DENIED HAUGEN'S CHALLENGE OF THE SEARCH WARRANT.

Haugen argues that the trial court incorrectly denied his motion challenging the search warrant due to alleged reckless omissions of a material fact.² The trial court appropriately ruled that Haugen had not met his burden to show Officer Haggerty made statements with reckless disregard, made deliberate misrepresentations or material omissions when he applied for the search warrant. This court should find that the motion challenging the search warrant was correctly denied.

1. Standard Of Review.

When an appellant challenges a trial court's denial of a motion to suppress, the reviewing court determines whether there is substantial evidence to support the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859 (2011). Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant

² Haugen makes a number of evidentiary challenges, many of which the State does not believe were properly preserved below. The State is restructuring the argument in its response. The restructuring should in no way be taken as a concession to any argument put forward by Haugen. The State does not concede any of the raised errors.

has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Haugen does not assign error to any of the finding of facts from the suppression motion.

A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

2. The Fourth Amendment And Article One, Section Seven, Protect Citizens From Warrantless Searches And Seizures By Police.

Citizens have the right to not be disturbed in their private affairs except under authority of the law. U.S. Const. amend IV; Const. art. I, § 7. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). Generally, a search is not reasonable unless it is based on a warrant issued upon probable cause. *Skinner v. Ry Labor Executives' Ass'n*, 489

U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989).

The Fourth Amendment requires that “no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularity describing the place to be searched, and the persons or things to be seized.” The warrant requirement places a layer of protection for a citizen against unlawful searches and seizures by government officials. *Steagald v. United States*, 451 U.S. 204, 212, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981). “The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search.” *Steagald*, 451 U.S. at 212.

The United States Supreme Court in *Steagald* noted the distinction between a search warrant and an arrest warrant. An arrest warrant serves to protect a person from unreasonable seizure and is issued upon probable cause that the person has committed a crime. *Id.* at 213. While a search warrant serves to protect invasion into the privacy of one’s personal belongings or home and “is issued upon a showing of probable cause to believe that a legitimate object of a search is located in a particular place.” *Id.* The Supreme Court held that the Fourth Amendment requires a search warrant to go into a home and arrest a non-resident who

was the subject of an arrest warrant. *Id.* at 222.

3. The Trial Court Correctly Ruled After The *Franks* Hearing That There Were No Material Omissions, Statements Made With Reckless Disregard, Or Deliberate Misrepresentations Made By Officer Haggerty.

When challenging a search warrant pursuant to *Franks v. Delaware*, the defendant must make a preliminary showing that a false statement was knowingly and intentionally, or with reckless disregard for the truth, was included in the search warrant affidavit, and the statement must be relevant and material to the issue of probable cause. *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 57 L. Ed. 2d 667 (1978). Allegations of negligence or innocent mistake on the part of the officer are an insufficient basis. *Franks*, 438 U.S. at 171.

In order for a search warrant to issue, a detached and neutral magistrate or judge must make a determination of probable cause to support issuance of a search warrant. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). “Probable cause to issue a search warrant exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.”

Maddox, 152 Wn.2d at 505. In determining the existence of probable cause to issue a search warrant, the magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. *Id.* “It is only the probability of criminal activity, not a prima facie showing of it that governs probable cause to issue a search warrant.” *Id.*

Search warrants are to be tested in a commonsense and realistic fashion as technical requirements of elaborate specificity have no proper place in this arena. *State v. Patterson*, 83 Wn.2d 49, 56, 515 P.2d 496 (1974), *citing U.S. v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965) (internal quotations omitted). On appellate review, all doubts are resolved in favor of a search warrant’s validity. *State v. Kalakosky*, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993). A magistrate’s determination that probable cause exists to issue a search warrant is entitled to considerable deference by appellate courts. *State v. Jackson*, 102 Wn.2d 432, 436, 688 P.2d 136 (1984).

Haugen argues that the trial court incorrectly ruled on his *Franks* motion because the police knew Mr. Fiman did not live at the Scammon Creek residence and it was a material omission for Officer Haggerty to fail to include that information in the search

warrant. Brief of Appellant 34-37.³ Haugen also states that the State conceded Mr. Fiman was not a resident and cited to the State's briefing. Brief of Appellant 34, *citing* CP 58-65. The trial court correctly found, on the record provided, which was the police reports and the search warrant affidavits that there was not a material omission on the part of Officer Haggerty and therefore the search warrant would stand and the evidence would not be suppressed. See CP 69.

a. There was no material omission regarding Mr. Fiman's residence because there was no evidence that Mr. Fiman resided somewhere different than the Scammon Creek residence.

There was no evidence presented that Mr. Fiman did not live at the Haugen brothers' residence. RP 14-15; CP 16-65. The only evidence presented in regards to a different address was an old Olympia address Mr. Fiman had provided to DOC, which he was on warrant status for absconding from four months prior to his arrest. RP 14; CP 46, 50, 56-67. There was another address on McElfresh Road that showed up on the police report but there is no reference

³ As stated above the State is answering this argument because it was the only one preserved below, and the State does not believe the larger argument made by Haugen on appeal is a manifest constitutional error. The State also notes that in this argument Haugen only argues material omission and does not argue, as trial counsel did that there was a reckless disregard or misrepresentation for including the information from CCO Boone that was done during the security sweep. Therefore, the State will not address it in its response as this argument was apparently abandoned on appeal.

to where the address came from, if it was one provided by Mr. Fiman or if it was an old address in the police's electronic Spillman database system. CP 46-49. Further, Mr. Fiman's personal effects were found in the bedroom that is listed in the police report as "Mark Fiman/Brian Haugen's Room" CP 47-48. Mr. Fiman's identification was located inside an empty speaker box in the bedroom. CP 56. There was a safe that Mr. Fiman stated was not his but all of the contents belonged to him. CP 56. There was also other property, such as a scale with white residue, located in the bedroom that Mr. Fiman also stated belonged to him. CP 56.

The State's briefing is not a declaration, it is the State's review of the facts and anticipated facts. The State also incorrectly stated only the Haugen brothers resided at the apartment, which was clearly not the case because one of the bedrooms belonged to Melissa Henderson, their sister. CP 47. The trial court reviewed the police report and the search warrant affidavits to determine the facts and also noted that there was no declaration from anyone that Mr. Fiman did not reside at the Scammon Creek residence. RP 14-15; CP 68-69. There was no material omission by Officer Haggerty because the evidence does not support that Mr. Fiman did not live at the address.

b. There was no material omission regarding Mr. Fiman's residence, the officer's entry into the residence was lawful even if Mr. Fiman was a third party non-resident.

The State maintains that the evidence does not sufficiently show that Mr. Fiman resided at a residence other than the Scammon Creek apartment. Arguendo, because Mr. Fiman was absconding from community custody, had an active warrant issued four months prior and attempted to evade officers after being told he was under arrest, the entry into the apartment was lawful and all observations were made from a lawful vantage point. These observations were used to obtain the search warrant and there were no statements made with reckless disregard and therefore, no material omission.

There are recognized exceptions, exigent circumstances, to the search warrant requirement to go into a home of a non-resident to execute an arrest warrant such as hot pursuit. *Steagald*, 451 U.S. at 218; *State v. McKinney*, 49 Wn. App. 850, 857-58, 746 P.2d 835 (1987). In *McKinney* detectives were attempting to question a man regarding stolen property. *McKinney*, 49 Wn. App. at 852. Detectives were informed the man may be in an upstairs apartment. *Id.* The detectives knocked on the apartment door and a man, later identified as Terry McGraw, opened the door and told

the detectives the man they were looking for was not in the apartment. *Id.* One of the detectives asked Mr. McGraw his name and he said “Rod McGraw.” *Id.* The other detective recognized the man as Terry McGraw, whom he had stopped for driving with a suspended license in July 1985 (it was now March 1986), had fled the scene and currently had a warrant for his arrest. *Id.* The detective informed Mr. McGraw that he knew Mr. McGraw was Terry McGraw and he was under arrest for the warrant on the traffic offense. *Id.* Mr. McGraw started to close the door and the detectives pushed the door open and took Mr. McGraw into custody. *Id.* When the detectives placed Mr. McGraw under arrest they could see into the kitchen and living room, where they could see a rolled up baggie and water pipe commonly used for smoking marijuana. *Id.*

After receiving his *Miranda*⁴ warnings Mr. McGraw stated some of the marijuana was his but the apartment belonged to his friend. *Id.* at 852-53. Mr. McGraw also told detectives there was another person in the apartment who was confined to a wheelchair. *Id.* at 853. One of the detectives stepped into the apartment and did a sweep for other people and to secure the premises. *Id.* The

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694

detective saw additional marijuana in plain view. *Id.* Scott McKinney showed up at the apartment, was given his *Miranda* rights and consented to a search of the apartment. *Id.* Mr. McGraw and Mr. McKinney were arrested and charged with possession of a controlled substance with the intent to deliver. *Id.*

Mr. McKinney brought a motion to suppress, which was granted by the trial court. *Id.* The trial court held that there was not a demonstrated threat of the destruction of evidence, safety or a strong likelihood of escape and therefore a search warrant was required prior to entering Mr. McKinney's residence to arrest Mr. McGraw. *Id.* The Court of Appeals reversed. The Court held there was no Fourth Amendment violation because the police were not searching for Mr. McGraw, as he was seen in the house and the detectives entered to retrieve Mr. McGraw. *Id.* at 855. The Court also found that Mr. McGraw had been under arrest upon contact, which gave justification for entering the home and the items were seen in plain view. *Id.* The Court further stated that because Mr. McGraw had already demonstrated his propensity to escape prior to attempting to close the door on the officers, as he had a warrant for his arrest after fleeing from officers previously, officers had reasonable concern for the integrity of the arrest or for safety. *Id.* at

857. The Court stated, “Mr. McGraw, while in the officer’s presence was told he was under arrest. By closing the door, he was obviously attempting to prevent being taken into custody. We hold it was reasonable for the officers to take the action they did.” *Id.*

The trial court correctly relied on *McKinney* when finding that law enforcement made a lawful entry into the apartment to take Mr. Fiman into custody. RP 15; CP 69. Mr. Fiman had been absconding from supervision for the last four months. RP 15; CP 46, 50. Mr. Fiman was told he was under arrest when the officers were at the door and they could see him in the hallway. CP 46-47, 50-51. Mr. Fiman jumped into the bedroom in an attempt to evade the officers. CP 47, 51. Therefore, the officers were, under *McKinney*, allowed to enter into the residence based upon Mr. Fiman’s arrest and the exigent circumstances of hot pursuit and Mr. Fiman’s absconding and attempting to evade the police.

The trial court’s finding that there were no material omissions or reckless disregard on the officer’s part when providing the information for the search warrant affidavit is supported by the evidence presented to the trial court. The trial court made the correct determination when it applied the standards as set forth in *Franks* to determine that suppression of the warrant was not

appropriate. This Court should affirm Haugen's convictions.

B. HAUGEN'S REMAINING SUPPRESSIONS ISSUES ARE NOT PROPERLY BEFORE THIS COURT AS HE ABANDONED AND WAIVED HIS PREVIOUSLY FILED MOTION AND THE REMAINING ISSUES ARE NOT MANIFEST CONSTITUTIONAL ERRORS.

The other suppressions issues in regards to entry into a residence to arrest a non-resident third party were not properly preserved below. The State acknowledges that a suppression motion was filed by trial counsel but the State maintains the motion was abandoned and the matter waived as trial counsel decided to continue with the *Franks* challenge to the search warrant and no suppression hearing was done in regards to the issues raised in the original motion to suppress. Without a hearing there was no testimony taken and therefore there is not a sufficient record to determine the merits of any of the claims. Haugen cannot litigate these issues for the first time on appeal.

1. Standard Of Review

A claim of a manifest constitutional error is reviewed de novo. *State v. Blancaflor*, 183 Wn. App. 215, 222, 334 P.3d 46 (2014). Challenged jury instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793, 802 (2012).

2. Haugen's Trial Counsel Abandoned The Suppression Motion He Filed Based Upon The Alleged Illegal Initial Entry Into Haugen's Residence To Arrest A Non-Resident Third Party On An Arrest Warrant.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127

Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

Haugen's trial counsel filed a motion to suppress on March 27, 2014. CP 15-24. The issue presented in the motion was, "Were the officers legally entitled to enter a third party residence to serve a Department of Corrections arrest warrant and Thurston County Superior Court bench warrant for a probation violation on a probationer who was not residing at the residence?" CP 18. At the April 23, 2014 suppression hearing that was set to hear the motion filed on March 27, 2014, trial counsel explained what he was actually doing was challenging the search warrant pursuant to *Franks*, not a full evidentiary hearing regarding the initial entry. RP (4/23/14) 2-3. The trial court was clearly confused as to what was occurring, as was the State who had produced witnesses for the

suppression hearing that had been requested by Haugen's trial counsel. RP (4/23/14) 2-7.

The actual motion hearing that occurred in Haugen's matter took place on June 18, 2014 after Haugen's trial counsel submitted a different motion to suppress based upon *Franks* and the State filed its response. RP 1-19; CP 41-65. There was no testimony taken at this hearing and the matter regarding the entry into the residence was not litigated beyond the lawfulness of the observations made by law enforcement which was included as part of the search warrant affidavit. *Id.* Therefore, there was not a full record made regarding all of the factual issues raised in Haugen's motion filed in March. Those issues were abandoned for the motion filed later in time. RP 1-19. Haugen's trial counsel could have demanded a full evidentiary hearing on that matter and a *Franks* hearing. The two motions are not mutually exclusive, bringing one motion does not preclude Haugen from arguing the other motion. Without having testimony taken the record is not sufficiently developed to fully review the issues on appeal and therefore the issue cannot be manifest. Further, it would set a terrible precedent to require the State to attempt to fully litigate an issue on appeal, that while a motion was filed, was apparently abandoned and

therefore the record is lacking. Haugen should not receive a windfall for filing but not fully litigating his motion to suppress.

V. CONCLUSION

The trial court properly ruled there were no material omissions on the part of the officer and the search warrant should not be suppressed. The other arguments raised by Haugen were abandoned and therefore, waived, by his trial counsel. The errors are not manifest because the record is incomplete and it is not possible to reach the merits of the issues raised. This Court should affirm the convictions and sentence.

RESPECTFULLY submitted this 1st day of April, 2015.

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April 01, 2015 - 9:37 AM

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