

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

PERRY BLYE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Kevin D. Hull

APPELLANT'S OPENING BRIEF

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WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENTS OF ERROR

1. In Perry Blye's trial on a charge of possession of heroin with intent to deliver, the trial court erred in denying Mr. Blye's motions to suppress the drug and other evidence obtained pursuant to a search warrant for his home executed by the Bremerton Police Department.

2. The trial court erred in entering suppression hearing finding of fact III.

3. The trial court erred in entering suppression hearing finding of fact IV.

4. The trial court erred in entering suppression hearing finding of fact V.

5. The trial court erred in entering suppression hearing finding of fact VI.

6. The trial court erred in entering suppression hearing finding of fact VII.

7. The trial court erred in entering suppression hearing Conclusion of Law II.

8. The trial court erred in entering suppression hearing Conclusion of Law IV.

9. Defense counsel was ineffective in not asking that Mr. Blye's jury be instructed on the lesser included offense of possession.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The affidavit in support of the search warrant failed to establish any "nexus" to the residence on Old Military Road as a repository of evidence of drug dealing activity engaged in by resident Joanne McFarland, which occurred at locations geographically distant from the house.

Did the trial court err when it denied Mr. Blye's motions to suppress the heroin and other evidence obtained pursuant to the search warrant for the premises?

2. Did the trial court incorrectly apply State v. Thein, as requiring suppression for an absence of nexus between the drug activity and a residence only where the warrant affidavit for search of the home consists solely of rote generalizations that drug dealers have evidence of the crime in their homes?

3. Did the trial court apply an erroneous standard under Franks when it stated that an omission or misstatement from an affidavit must have been made for purposes of intentional concealment, in order to invalidate the warrant?

4. The State had charged Mr. Blye with possession of the heroin found at the mobile home, with intent to deliver. Joanne McFarland admitted to the Bremerton Police, and testified at trial, that she had packaged and was the dealer of heroin that officers found on a shelf in the trailer home she and Blye were sleeping at. She made clear that Mr. Blye was not involved. Defense counsel argued to the jury that Mr. Blye should not be punished for merely being a drug user, and suggested to the jury that his claimed assertion “I am a dope dealer” was completely misconstrued by the interrogating detective.

Was counsel ineffective in not asking that the jury be instructed on the lesser included offense of simple possession of drugs?

C. STATEMENT OF THE CASE.

1. Search warrant. The Bremerton Police surveilled a house that a confidential informant stated was the residence of Joanne McFarland and Perry Blye, who the police suspected of dealing heroin. CP 1-6 (information and affidavit of probable cause); CP 7-10 (amended information). Then, on February 18 and 21, 2013, the police conducted two controlled purchases of heroin from Joanne McFarland at a business parking lot and another location several miles from the home, which was on Old Military Road. A search warrant was obtained for the home. CP

355-60 (Memorandum of Law in Support of Thein Motion to Suppress); CP 361-99 (State's Response).

When police entered the home, several occupants were located including McFarland and the defendant Perry Blye. Individually packaged quantities of heroin were located, along with a scale, packaging materials, and cash on a kitchen shelf. At trial, McFarland testified that the drugs were hers, and that she had just cut them up and divided them into pre-packaged portions. At the home when the warrant was executed, Mr. Perry, seemingly attempting to take responsibility for what police had found, told Bremerton detective Aaron Elton following Miranda¹ warnings that he was a 'dope dealer', that he had purchased the heroin from a supplier, and that he was using McFarland to physically accomplish the delivery of drugs to people, because he was trying to stay off the police "radar." CP 355-60; CP 361-99.

Following delays in the proceedings occasioned in part by personal affairs issues of original defense counsel, new counsel moved to suppress the fruits of the search warrant under Thein² and Franks.³ The

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (the "nexus" requirement of probable cause for a search warrant for a home is not satisfied by mere rote assertions that people who manufacture or deliver drugs at a location or on the streets generally keep further evidence of such activity in their residence).

State responded that the search warrant affidavit (1) made out probable cause under Thein because there was an adequate “nexus” between the drug selling activities and the home that was searched, and (2) that there were no material omissions or misstatements in the warrant that affected probable cause, under Franks. The Court found there was information known to the affiant that did not make it into the search warrant affidavit, but held that those facts either strengthened probable cause, or were not material to probable cause. CP 400-02.

2. Trial. Trial was subsequently held in October, 2014, during which Joanne McFarland continued to state that the drugs found were her supplies for dealing heroin. 10/20/14RP 2; CP 33. Nevertheless, Mr. Perry was convicted as charged of possession with intent to deliver. CP 477-78. At sentencing, the trial court agreed with counsel that Mr. Perry’s offender score included prior convictions that should be scored as one offense, and sentenced Mr. Perry within the standard range. CP 607-17. He appeals. CP 618.

³ Franks v. Delaware, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (material omissions or misstatements in search warrant affidavit require suppression if reckless or intentional).

D. ARGUMENT

1. THE EVIDENCE SEIZED AT 7410 OLD MILITARY ROAD SHOULD HAVE BEEN SUPPRESSED.

a. Motions to suppress and ruling. Mr. Blye, through his original trial counsel Mr. Goss, filed numerous motions to suppress the evidence found at the Old Military Road address, by challenging the search warrant. These motions made pertinent documents, including the Bremerton police reports, a part of the trial court record of the case. CP 11, 59, 115, 162, 211, CP 799 (Declaration of Defendant's Attorney in Support of Motions, filed May 7, 2014); CP 623-798 (Exhibits and Table of Contents). Arguments were heard on whether certain Franks misstatements or omissions from the warrant affidavit required a hearing. 5/13/14RP at 73-74. Then, around the time the trial court and parties were determining the scheduling of hearings for challenges under the probable cause standard, new defense counsel Mr. Weaver assumed responsibility for Mr. Blye's case. 6/9/14RP at 2. Counsel filed a Memorandum of Law in Support of Motion to Suppress (Thein Motion) in July, 2014, and arguments on the suppression issues was taken in

August, 2014. The motion to suppress was denied following an August hearing and written findings entered October 3, 2014. CP 400-02.⁴

b. The requirement of probable cause to search a home. The warrant clauses of the Fourth Amendment to the United States Constitution and article I, section 7 of the state constitution require that a search warrant issue only based on a determination of probable cause. U.S. Const. amend. 4; Wash. Const. art. 1, § 7;⁵ State v. Fry, 168 Wn.2d 1, 5–6, 228 P.3d 1 (2010) (citing State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002)). Probable cause is established if the affidavit sets forth sufficient facts to lead a reasonable person to conclude there is a probability the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004) (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

⁴ The inadequacy of the existing warrant affidavit to support probable cause is also an issue that a criminal defendant may raise for the first time on appeal, where prejudice is manifest because his conviction is the product of the evidence obtained. See State v. Harris, 154 Wn. App. 87, 94, 224 P.3d 830 (2010) (citing State v. Littlefair, 129 Wn. App. 330, 338, 119 P.3d 359 (2005)). U.S. Const. amend. 4; Wash. Const. art. 1, § 7; RAP 2.5(a)(3); see generally State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

⁵ The United States Constitution protects the people from unreasonable searches and seizures, and provides that no warrants may issue except when they are based on a showing of probable cause, including as to the place to be searched. U.S. Const. amend. 4. Article 1, section 7 of the state constitution provides that searches conducted by law enforcement require authority of law, by virtue of its language stating “[n]o person shall be disturbed in his private affairs . . . without authority of law.” Wash. Const. art. 1, § 7.

(i). The warrant affidavit failed to establish a “nexus” to the home on Old Military Road. There is no “nexus” between the criminal activity and a home to be searched unless there is actual probable cause to believe that evidence of that activity is to be found at that location. Thein, 138 Wn.2d at 140. Probable cause requires a connection between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched. State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFave, Search and Seizure § 3.7(d), at 372 (3d ed.1996) (emphasis added)).

In the present case, there was no such nexus, and the trial court erred in concluding that the warrant affidavit supplied the required connection between McFarland’s drug sales and home that was searched. The Thein case presented the Supreme Court with the question whether, if a magistrate determines a person is probably a drug dealer, then a finding of probable cause to search that person's residence automatically follows. Thein, 138 Wn.2d at 141. In Thein, the police executed a valid search warrant on a structure used by one McKone containing a marijuana grow. Thein, 138 Wn.2d at 136. It was determined that the landlord of the structure – Steven Thein -- also supplied McKone with materials for the marijuana operation. Police discovered money orders

from McKone to Thein bearing the notation “rent,” found a box of nails addressed to Thein at his residential address, and uncovered boxes of oil filters, marked “Toyota,” corresponding to the fact that Thein owned a Toyota pickup truck. The warrant affidavit asserted that Thein was a drug manufacturer or dealer, and then generically asserted that such persons keep evidence or the substance itself at their home, and on this basis a warrant was issued. Thein, 138 Wn.2d at 150.

The Supreme Court ordered suppression, agreeing with Thein that the search warrant affidavit failed to establish the requisite nexus between the criminal activity and his home. Thein, 138 Wn.2d at 150. Characterizing the affidavit's recitation of the box of nails and the oil filters as “innocuous,” the Court ruled these items incapable of establishing a nexus and further ruled that generic stereotypes about narcotic traffickers, standing alone, were insufficient to establish the requisite nexus, no matter how consistent the stereotypes were with common sense. Thein, 138 Wn.2d at 148–49. The court held that the necessary connection between Thein's residential address and evidence of drug-related crimes was not established as a matter of law because neither the particular facts nor the stereotypes about drug dealers were enough for probable cause. Thein, 138 Wn.2d at 147.

Here, the warrant affidavit failed to establish any nexus between the observed conduct of Joanne McFarland and the home on Old Military Road beyond boilerplate and relatively innocuous facts, just like in Thein. CP 383-88. The affidavit relates that the Bremerton Police conducted two controlled purchases of heroin from Joanne McFarland, who was claimed to live at the trailer at the Old Military Road address along with Mr. Blye. However, the locations of these purchases were not at, or near, that home. The controlled purchases took place at a Goodwill store in East Bremerton. CP 384. The police, despite the fact they knew when the informant was dialing Ms. McFarland's cell phone, never observed any departure of Ms. McFarland from that home, before she later appeared at the Goodwill parking lot. CP 384. Furthermore, the police did not observe Ms. McFarland's path of travel after the purchase. Although an officer later observed her car arrive at Old Military Road and the trailer home residence, the affiant could not attest to where and what location(s) McFarland went to, or stopped at, during that time. CP 383-85.

This dearth of "nexus" facts from the first controlled purchase was repeated to a greater degree in the affidavit's description of the second controlled purchase, which was both fleeting and erroneous. The

warrant affidavit states that the second purchase was “conducted in the same manner.” CP 386. This limited description added nothing to the already inadequate probable cause showing – but moreover, it throws everything described before into further doubt. The affidavit states that the police observed Ms. McFarland’s path of travel just as in the first purchase. But no such observation of her travel, or further facts showing she was keeping drug supplies at the Old Military Road house, was ever stated.

Additionally, the boilerplate assertions in the warrant were just that. Stating that persons “distributing controlled substances maintain” evidence of the crime in their “house” or “premises” were mere generic assertions, not substantiated by any supportable factual allegations of the present case. CP 381-83 (warrant affidavit, numbered paragraphs 1 to 12). Indeed, the affidavit also asserts – highly generically – that the “suspect” likely keeps dogs or pets to ward off law enforcement personnel. CP 383. These generic claims were not enough to satisfy the protections of the Fourth Amendment and the state constitution under Thein.⁶

⁶ Additionally, but not integral to the lack of probable cause, the absence of nexus is further exacerbated by the passage of time. The Bremerton police conducted controlled purchases on February 18, and 21. CP 383-87. On February 22, the warrant affidavit was prepared, and a warrant was executed on February 25.

Probable cause exists for a search warrant when the affidavit properly sets forth actual facts and circumstances peculiar to the case that establish a reasonable inference that evidence of the crime at issue will be found at the location that police desire to search. Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Here, the search warrant failed to show an adequate connection between the drug activity and the place to be searched, resting as it did on mere innocuous facts, and generalizations that drug dealers maintain evidence of the crime at their residences. Thein makes clear that the inclusion of innocuous facts in the warrant, along with the boilerplate assertions, does not save probable cause, and the trial court abused its discretion in holding that the Thein standard meant only that a warrant may not be comprised solely of boilerplate assertions. Mr. Blye seeks suppression of the warrant's proceeds and fruits, because the warrant affidavit failed to make out probable cause. Reversal is required.

(ii). Misstatements and omissions under Franks also require suppression. The trial court also erred in its decision to deny suppression under Mr. Blye's Franks argument. The court, in oral and

CP 389. These lag times lend further credence to Mr. Blye's argument that there was no adequate demonstration of probable cause to believe evidence of this observed drug selling would be at the house. See State v. Thomas, 121 Wn.2d 504, 513, 851 P.2d 673 (1993); State v. Bohannon, 62 Wn. App. 462, 470, 814 P.2d 694 (1991).

written findings, concluded that the probable cause affidavit for the search made out the required nexus to the home on Old Military Road, including under a Franks analysis, and denied the motions to suppress. CP 400-02.

This was error. The Court agreed that there were omissions from the warrant, based on Mr. Blye's arguments regarding the materials and information known to the warrant affiant, Detective Elton. CP 400-02 (Finding II). The trial court found that the affiant knew about other facts including the failed efforts of the Bremerton police to track Ms. McFarland constantly before and after the sales, and misstated facts in the warrant regarding the observations made of the two transactions and Ms. McFarland's path of travel. CP 400-02, 8/25/14RP at 64-70.

However, the Court applied the wrong legal standard. The Court stated that the omissions from the affidavit and its resultant summariness in description failed a Franks challenge because they were not done intentionally to conceal information from or deceive the magistrate. CP 400-02 (Finding III). But factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (a) material and (b) made deliberately *or in reckless disregard* for the truth. Franks v. Delaware, 438 U.S. 154, 155–56, 98 S.Ct. 2674, 57

L.Ed.2d 667 (1978); State v. Cord, 103 Wn.2d 361, 366–67, 693 P.2d 81 (1985). If material omissions or representations occurred in the warrant affidavit, they are considered in order to determine whether, as modified, the affidavit supports the finding of probable cause. Franks, 438 U.S. at 171. If the affidavit as modified fails to support probable cause, the warrant will be held void and evidence obtained pursuant to it excluded. Franks, at 171; Cord, 103 Wn.2d at 367.

Here, the trial court concluded that the Franks standard was not met because there was no intentional misrepresentation. However, although a mere showing of negligence or inadvertence is insufficient, reckless omission of information does require the trial court to find this aspect of Franks satisfied. Franks, 438 U.S. at 171; State v. Seagull, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). Reversal is required because the inaccuracies were material to probable cause. The police reports also make clear that information was erroneously included in the affidavit stating that McFarland was observed constantly in the second transaction, similar to the first. But this was incorrect as to both. In fact, the police attempted to follow McFarland, but were unsuccessful, in one instance losing track of her three times, including near Shari's restaurant in Bremerton, and near a Fred Meyer store in unincorporated Kitsap

County. This period of time and these interruptions would have allowed McFarland to drop off drug supplies or cash at an unknown location. The court erroneously found that McFarland returned to her residence within 5 minutes after the drug sale rendezvous. CP 400-02 (Finding VI). But the Franks evidence including from Officer Plum's description, showed this period of time – where the Franks information showed that McFarland went unobserved despite great effort of the police to surveil her continuously – was certainly upwards of as much as half an hour, as attested to through the police reports – a period of time where McFarland was likely dropping off drugs at some other location. 8/25/14RP at 50-51; CP 623-798 (Exhibits and Table of Contents).

Because the information was omitted from the affidavit, or was incorrect in the affidavit, the defendant's Franks motion to suppress should have been granted.

2. COUNSEL WAS INEFFECTIVE IN NOT SEEKING A LESSER INCLUDED OFFENSE INSTRUCTION FOR SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE.

a. **Lesser included offense.** Mr. Blye's counsel was ineffective in failing to seek a jury instruction on simple possession of a controlled substance, which is a lesser included crime within possession with intent to deliver. See State v. McClam, 69 Wn. App. 885, 888, 850 P.2d 1377

(1993). A defendant is entitled to a lesser included offense instruction if (1) each element of the lesser offense is a necessary element of the offense charged, and (2) the evidence in the case supports an inference that the lesser crime was committed. State v. Speece, 115 Wn.2d 360, 798 P.2d 294 (1990). In this case, the trial evidence allowed a determination that Mr. Blye was only guilty of simple possession, because there was affirmative evidence from which the jury could conclude that he committed the lesser included crime. State v. Fowler, 114 Wn. 2d 59, 67, 785 P.2d 808 (1990). Mr. Blye would have been entitled to an instruction on possession of one had been requested.

b. Reversal for ineffective assistance. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) his lawyer's performance was so deficient that the lawyer was not functioning as "counsel" for Sixth Amendment purposes, and (2) that there is a reasonable probability that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987); U.S. Const amend. 4. The defendant must show there were no legitimate tactical reasons for counsel's conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

In the context of the Sixth Amendment, it can be ineffective assistance to fail to seek a jury instruction on a lesser included offense. See State v. Breitung, 173 Wn. 2d 393, 399-400, 267 P.3d 1012, 1015 (2011); State v. Hassan, 151 Wn. App. 209, 220, 211 P.3d 441 (2009). In this case, in closing argument, defense counsel argued that Mr. Blye was not in fact asserting that he was a drug dealer, and he did not possess the heroin with any intent to deliver. 10/23/14RP at 754-57, 771-73. Further, counsel argued that Mr. Blye's alleged statement that he was a drug dealer was plainly stated during the detective's questioning about what the police *suspected* he was. 10/23/14RP at 771-72. The jury should have been given the option to find Mr. Blye guilty solely of simple possession. Mr. Blye's judgment should be reversed.

E. CONCLUSION

This Court should reverse Mr. Blye's conviction and sentence.

Respectfully submitted this 16th day of July, 2015.

s/ OLIVER R. DAVIS
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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 46950-2-II
v.)	
)	
PERRY BLYE,)	
)	
Appellant.)	

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