

NO. 46950-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

PERRY K. BLYE,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 13-1-00474-5

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Brief OF RESPONDENT

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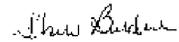
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the search warrant issued on February 22, 2012, and served on February 25, 2012, was based upon sufficient, true material facts to establish probable cause?

2. Whether the complaint for search warrant contained facts establishing a nexus between the crime being investigated and the residence to be searched.

3. Whether defense counsel's performance was not deficient for not requesting a lesser included offense instruction for case-theory and tactical reasons.

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Perry K. Blye was charged by a first amended information filed in Kitsap County Superior Court with possession of controlled substance with intent to manufacture or deliver with a school zone special allegation. CP 7-10.

Blye moved to suppress, alleging that the February 22, 2014, search warrant complaint failed to establish an appropriate nexus between alleged drug sales and the premises to be searched and further asserted that it contained omissions and misstatements requiring an evidentiary hearing under *Franks v. Delaware*. CP 355. The trial court orally denied the

motion, RP 8/25/14 at 64, and subsequently entered written findings of fact and conclusions of law. CP 400.

In a subsequent trial Blye was found guilty as charged. CP 477-78; 5RP 809.

## **B. FACTS**

On February 25, 2012, police served a search warrant at 7410 Old Military Road, Space 48 in Bremerton, Washington. 2RP 316. The warrant resulted from two controlled purchases of heroin on February 18, 2012, and February 21, 2012, from Joanne McFarland. 2RP 373-74, 378-381 (Detective Elton describes controlled buys). Investigation revealed that McFarland lived at space 48. 2RP 319.

When the warrant was served, police found the defendant, Perry Blye, in the house along with McFarland, his father Daryl Blye and Theresa Simon. 2RP 320. It appeared as though defendant Blye had been awoken by the police. 2RP 321. The lead detective, Elton, immediately recognized Blye from previous contacts. *Id.* Blye was arrested upon the police finding the heroin in the residence. 2RP 325.

In the home, police found two piles of heroin. 2RP 353-54. One was found in the kitchen broken down into saleable quantities. 2RP 354, 358-59. Another pile was found in a shoe on the bedroom floor. 2RP 354. These two piles of heroin were the drugs underlying the charge herein and

were admitted at trial as Exhibits 1 and 2.

Blye was interviewed by Elton after his arrest. 2RP 325-26. Blye advised Elton that he is a dope dealer and wondered if he was staying off the police radar. *Id.* Blye discussed the supplier of the heroin with Elton. 2RP 327-28. Blye indicated that McFarland was selling the drugs he purchased. 2RP 328

### III. ARGUMENT

**A. THE TRIAL COURT CORRECTLY RULED THAT PROBABLE CAUSE FOR THE WARRANT ISSUED ON FEBRUARY 22, 2014 WAS BASED ON SUFFICIENT MATERIAL FACTS AND THAT THERE WAS A SUFFICIENT NEXUS BETWEEN THE CRIMES BEING INVESTIGATED AND THE RESIDENCE TO BE SEARCHED.**

***1. The warrant complaint contains sufficient material facts to support probable cause despite possible omissions or misrepresentations.***

Blye argues that misstatements and omissions in the warrant complaint invalidate the February 22, 2014 warrant. He claims that police failed to aver that they continuously followed McFarland from the two drug buys to the Military Road address. Specifically, he complains that such continuous surveillance did not happen following the first buy and thus the summary statement regarding the second buy (that surveillance had occurred as in the first buy) is misleading. Appellant's Brief at 14-15. Blye asserts that detective Plum's attached police report supports this

claim. *Id.* at 15.

Probable cause for issuance of a search warrant obtains if a reasonable person understands from the facts averred that a crime has been or is being committed and that evidence of the crime can be found at the place to be searched. *State v. Graham*, 78 Wn. App. 44, 50-51, 896 P.2d 704 (1995). There must be sufficient facts for a reasonable person to conclude that the defendant is probably involved in criminal activity. *In re Yim*, 139 Wn.2d 581, 594, 989 P.2d 512 (1999). The search warrant affidavit is reviewed in a commonsense and realistic fashion and commonsense inferences may be drawn from the facts alleged. *See State v. Cherry*, 61 Wn. App. 301, 304, 810 P.2d 940, *rev. denied*, 117 Wn.2d 1018 (1991). A probable cause finding does not require a prima facie finding of criminal conduct; the probability of such activity suffices. *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). Further, a magistrate's findings are accorded great deference and doubts are resolved in favor of the warrant's validity. *See State v. Kennedy*, 72 Wn. App. 244, 248, 864 P.2d 410 (1993).

These general principles apply to all warrant challenges. A particular challenge alleging misstatements or omissions follows the test announced in *Franks v. Delaware*, 438 U.S. 154, 98S. Ct. 2674, 57 L. Ed. 2d 667 (1978). In *State v. Copeland*, 130 Wn.2d 244, 277, 922 P.2d 1304

(1996), our Supreme Court articulated the *Franks* test:

[A defendant] must show that any omissions (1) were knowing and intentional, or reckless with regard to the truth, and (2) were material, that is, they were necessary to the finding of probable cause. As to the first requirement, allegations of negligence or innocent mistake are insufficient. As to the second, it is not enough that [the defendant] prove an intentional or reckless omission, he must show that probable cause to issue the warrant would not have been found if the omitted material had been included.

(internal citation and quotation omitted)

A trial court's findings on the issue of omission or misrepresentation will be upheld unless clearly erroneous. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). If a defendant can jump the initial hurdles of showing intentional or reckless omission and materiality, he is entitled to an evidentiary hearing wherein he must establish his allegations by a preponderance. *See State v. Gore*, 143 Wn.2d 288, 296-97, 21 P.3d 262 (2001). Upon that showing, the court will strike material misrepresentations or include material omissions and determine whether the affidavit so modified still supports probable cause. *Id.*

In the present case, the trial court reviewed the complaint for search warrant. CP 400 (Complaint at CP 379) and police reports related to the two controlled buys in the case. CP 391, report of Detective Elton relating to first buy; CP 393, report of detective Plumb relating to first buy; CP395, supplemental report of Detective Elton relating to second

buy; CP 397, supplemental report of Detective Plumb relating to second buy; CP 399, report of Detective Heffernan relating to second buy).

The complaint consists of 11 pages. CP 379-392. It recites the crime being investigated and that evidence thereof would be found in a Jeep Cherokee and a residence at 7410 Old Military Road, Space 48. It recites the training and experience of the affiant, Detective Elton, and outlines his understanding of the behavior of drug defendants. At page 5 (CP383), under the heading “Probable cause for this search warrant is as follows,” Detective Elton outlines the specific facts of this case that support probable cause.

Detective Elton avers that he supervised a controlled purchase of drugs from Joanne McFarland using a confidential informant (CI) on February 18, 2013. The CI’s criminal history, reason for performing the task, and success in other operations was recounted to the magistrate. Elton describes the preparations for the operation, including searching the CI and observing the CI phone McFarland to arrange the transaction. Elton and other detectives watched from a distance as McFarland arrived and completed the transaction.

McFarland was surveilled by Detective Plumb as she left. She met with an unidentified female in a nearby parking lot. As she left this meeting, “[Sgt. Plumb] lost sight of her shortly after this.” Another

detective, Whatley, advised that McFarland had arrived back at space 48 ten minutes later driving the same Jeep.

It had been established that McFarland lived at space 48 with defendant Blye. The Jeep she was driving was registered to her at a different address, 2817 Hefner Avenue. It was established that a Mustang seen contemporaneously at space 48 was registered to Blye at the same Hefner address. Elton alleged that Blye is a “known heroin, and meth dealer in this area.” Elton listed the criminal history of both McFarland and Blye.

The affidavit continues outlining “a second controlled purchase of heroin from McFarland on 2/21/13.” The same CI is used and Elton asserts that this buy too happened within the City of Bremerton. This second buy is summarized in the complaint: “SOG detectives assisting with the purchase on 2/21/13 were able to follow McFarland back to the mobile home (#48) after Buy #2, as was done after Buy #1.”

Based on these assertions, a warrant issued for space 48 and the Jeep. Blye argues that the paucity of specific information regarding buy #2 implicates *Franks*. Blye claims that “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.” Appellant’s Brief at 15. Asserting that this is a flaw in probable

cause, Blye speculates extensively as to what McFarland may have done during brief periods that she was not being directly watched. *Id.*

This claim fails. First, this argument is itself factually inaccurate. Detective Elton never said that there had been continuous surveillance on the first buy. Elton clearly states that observation of McFarland from the first buy to space 48 was not constant because Detective Plumb lost sight of her. CP 402. It is thus manifest that Elton was making no assertion that there was continuous surveillance after either buy. In fact, the assertion that McFarland was followed “as was done in buy #1” necessarily includes the fact from buy #1 that she was not continuously followed. Thus any evidence that Blye can mine from the reports showing that surveillance was not continuous in buy #2 serves but to support the truth of Elton’s summary of #2, regardless of whether Elton’s summary of #2 was inartful enough to be considered negligent.

Second, these true, but perhaps inartful, assertions may be indicted as negligent but fall far short of intentional omission or reckless disregard for the truth. The trial court so found:

That the information in the Complaint related to the second controlled purchase was scant and lacking in detail. That the affidavit suggests Detective Elton was rushed or sloppy in drafting the Complaint, but does not suggest that his summariness was done intentionally to conceal information from or deceive the magistrate.

Finding of Fact III, CP 401. No case is cited equating “rushed or sloppy”

with intentional deceit or reckless disregard. Moreover, the trial court further found:

It is clearly understandable that the same general process, including the defective attempt to follow subject McFarland, described in detail for the first controlled purchase was also employed during the second controlled purchase.

Finding of Fact IV; CP 401. Similarly, no argument is advanced explaining why this finding is not supported by the evidence. And, as indicated above, this finding constitutes a reasonable reading of the complaint. The reasonableness of this reading is clear and thus passes the clearly erroneous standard. Blye asserts no other evidence establishing intentional falsity or reckless disregard for the truth.

Similarly, Blye fails to establish the materiality of the omission. Even though Blye failed on the initial showing of intentional or reckless omission or inclusion, the trial court proceeded to consider materiality.

The trial court found none:

That none of the omitted or incorrect information if inserted into the Complaint would detract from a finding of probable cause. To the contrary, if the information regarding McFarland's counter-surveillance techniques had been included, it likely would have strengthened probable cause.

Finding of Fact V; CP 401. On this point the trial court concluded:

That neither the information that McFarland stopped twice driving home and that visual surveillance was broken during the second controlled purchase, nor the precise location of the purchase outside city limits, is material

information.

Conclusion of Law II; CP 401-02. The trial court clearly finds that the purported omission was not material; more detail would have served to further support probable cause, not undermine it. And, again, Blye asserts no argument establishing that the finding is not supported by the evidence and is therefore clearly erroneous nor that the conclusion does not in reason flow correctly from the finding.

In *State v. Chenoweth*, 160 Wn2d 454, 475, 158 P.3d 595 (2007) our Supreme Court considered an argument that mere negligence in a warrant complaint should suffice to invalidate the warrant. The Court observed that “tolerance for factual inaccuracy is inherent to the concept of probable cause,” and rejected that argument. Here, Blye seeks to elevate possible negligence into invalidation. His argument fails to do so.

**2. *There was a nexus between the crime under investigation and the residence searched.***

Blye also claims that the warrant complaint failed to establish a nexus between the crime being investigated and the search of space 48. Citing *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999), Blye argues that there was no such nexus. Appellant’s Brief at 8. This argument fails because such a nexus was in fact established.

A review of the facts established by the complaint reveals the inapplicability of *Thein* and its progeny. The complaint can reasonably be

read to include the following facts: that there was probable cause to arrest the target of the investigation, Joanne McFarland, for two heroin deliveries; that McFarland lived at space 48; that McFarland returned to space 48 shortly after each delivery and went inside the trailer; that the vehicle used in the deliveries was registered to McFarland and was to be found at space 48; that McFarland's criminal history included drug-related convictions; that Perry Blye was staying at space 48; that a Mustang registered to Blye had been observed at space 48 during the same time period as the deliveries; that Blye is a known drug dealer; that Blye's criminal history included drug-related convictions.

As the trial court found, CP 401, these facts distinguish this case from *Thein*. Blye ignores these facts. Rather, Blye asks the court to focus on innocuous details in the complaint. Whether termed "boilerplate" or "generic claims," Appellant's Brief at 11, Detective Elton did in fact recount his training and experience; he advised the magistrate that that training and experience results in his knowledge of the behaviors of drug dealers. *Thein* makes it clear that such "generalized statements" are "insufficient to establish probable cause" standing alone. 138 Wn.2d at 148. But the training and experience facts are not a part of Elton's presentation of "probable cause for this search warrant," which includes the above averments of particular facts regarding McFarland and her

residence.

In *Thein*, the Supreme Court did not change the principle that reasonable inferences may be drawn from the facts alleged: “common sense and experience inform the inferences reasonably to be drawn from the facts.” 138 Wn.2d at 148. The Court reviewed *State v. Graham*, 130 Wn.2d 711, 927 P.2d 227 (1996), and noted that officers may make reasonable inferences from their experience and that actually seeing the defendant with drugs established probable cause. It remains the law, after *Thein*, that an officer’s training and experience matter in the probable cause calculus.

Similarly, the *Thein* Court did not disapprove of an affiant’s personal, specific knowledge about a suspect being part of a probable cause finding. Here, police knew that McFarland had twice delivered heroin. Here, police knew that Blye and McFarland were drug dealers with multiple convictions each for drug-related crimes. Prior convictions are a factor to be considered in determining probable cause. *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001).

Moreover, Blye’s attempt to reduce the complaint here to a mere statement of innocuous facts fails.

A single fact in an affidavit, when viewed in isolation, may not constitute probable cause but, when read together with other facts stated in the document, the affidavit satisfies the

requirement for evidence necessary to establish probable cause.

*State v. Vickers*, 148 Wn.2d 91, 111, 59 P.3d 58 (2002). On the facts of the present case, a reviewing court could simply ignore Detective Elton's recitation of the things he knows from training and experience. The actual factual averments would still allow for reasonable inferences amounting to probable cause. That these factual statements come from an experienced officer who knows his business serves only to enhance the finding.

We see then that an experienced officer stated facts establishing a connection between McFarland's actual drug possession and sale and her residence. Moreover, Blye cites no authority indicating that a magistrate may reject the warrant application based upon her (or Appellant's) surmise that there are other innocent explanations for the stated facts. Again it must be remembered that probable cause is an elastic, case-by-case determination. The trial court knew this:

That the court is aware of no requirement that the reviewing magistrate adopt all potential alternative theories or innocent explanations, or that law enforcement maintain constant visual contact for a probable cause finding to stand.

Finding of Fact VII; CP 402.

Blye's arguments seek a higher standard of proof for search warrant affidavits than is required by the cases. Reasonable inferences from the facts stated in the present case supply the necessary nexus. The

trial court should be affirmed.

**B. DEFENSE COUNSEL’S FAILURE TO SEEK A LESSER INCLUDED OFFENSE INSTRUCTION CONSTITUTED REASONABLE TRIAL STRATEGY AND DOES NOT PROVE DEFICIENT PERFORMANCE IN REPRESENTING BLYE.**

Blye also claims that his trial attorney was ineffective for failing to submit a lesser included offense instruction of simple possession. This claim fails because the record establishes that defense counsel made a considered tactical decision to seek acquittal based on his argument that Blye did not in fact possess the heroin that was the basis of the charge.

In 2011, the Washington Supreme Court considered a split amongst the divisions of the Court of Appeals in analysis of just this sort of claim. *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011). That case and *State v. Breitung*, 173 Wn. 2d 393, 267 P.2d 1012 (2011), establish that the “all-or-nothing” approach of counsel in the present case does not constitute deficient performance under the test for ineffective assistance of counsel. *But see Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015) (critical of the *Grier* court’s analysis of the prejudice prong).

The *Grier* court first reaffirmed its adherence to the *Strickland v. Washington* test for ineffective assistance claims. *Grier*, 171 Wn.2d at 32. Thus, Blye has the burden of establishing both prongs of the

*Strickland* test:

First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Grier* at 32-33 (quoting *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland*, 466 U.S. at 687)). Herein, there is no showing of any such serious error by defense counsel.

Deficient performance can be found if counsel's performance falls "below an objective standard of reasonableness." A defendant must overcome "a strong presumption that counsel's performance was reasonable." *Grier*, 171 Wn.2d at 33. Further, "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Grier*, 171 Wn.2d at 33 (quoting *State v. Kylo*, 199 Wn.2d 856, 863, 215 P.3d 177 (2009)). Thus a defendant must show that "there is no conceivable legitimate tactic explaining counsel's performance." *Id.*

These rules were applied to the failure to request the lesser included instruction in *Grier*. After a review of counsel's arguments in the case, the Court found that "Grier and her defense counsel reasonably

could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal.” *Grier*, 171 Wn.2d at 43. Moreover, the lack of success of this approach is immaterial to the analysis because “hindsight has no place in ineffective assistance analysis.” *Id.*

In the present case, counsel also reasonably asserted an all or nothing defense. The defense called Joanne McFarland. 4RP 659. McFarland attempted to take responsibility for all the drugs in her house. She described the heroin packaged for sale found in her kitchen and stated that she had done the packaging. 4RP 668. She testified that she was “taking responsibility for the investigation that occurred on February 18th, February 21st, and February 25, 2013.” 4RP 672-73. She claimed that she had placed the bag of heroin found in a shoe. 4RP 675. She directly denied that Blye assisted her with regard to either pile of heroin discovered in her house. 4RP at 676.

Under cross examination, McFarland indicated that she had told detectives that

Any heroin that was in my house, I purchased. I am the one that processed it. I’m the one that used it, and I am the one that either sold it or gave it to my friends, yes. I never would have somebody else go get drugs for me. That’s my responsibility.

4RP 691. This testimony allowed the defense to develop a case theory that Blye never in fact possessed the drugs.

This theory is seen in remarks defense counsel made during discussion of jury instructions. In objecting to an accomplice instruction, counsel said

I guess I'm having a hard time wrapping my head around the idea how a person can be an accomplice to possession with intent to deliver without first having constructive possession of the drugs. And the jury is going to have to decide if he has constructive possession. If he has constructive possession, then they're probably going to convict. If he doesn't have constructive possession, then they're probably going to acquit.

4RP 725-26. In closing, defense counsel argued McFarland's admissions at length noting that "she purchased it altogether [referring to Exhibits 1 and 2 which are the two piles of drugs seized]. She knew the quantities. She possessed it." 4RP 762. Then, "Mr. Blye never possessed it. Mr. Blye had not been there when it was purchased. He was not part of the cutting of it. He had been outside, working on cars. This was exclusively her heroin." *Id.* This and the rest of closing were calculated to convince the jury that Blye never possessed the heroin.

On this record, then, it is clear that defense counsel had a reasonable case theory that targeted McFarland's claim of exclusive possession and thereby raised doubt as to Blye's possession. An instruction allowing the jury to find simple possession would have been contrary to this theory. If the jury did find Blye in possession, the with intent element would likely closely follow since some of the drugs he has

now been found to possess were packaged for sale and McFarland had in fact been selling it.

The theory is reasonable and no more is required from effective counsel. Moreover, the Supreme Court held that the decision whether or not to offer a lesser included instruction lies with counsel upon consultation with the defendant. *Grier*, 171 Wn.2d at 28. Counsel made a reasonable all-or-nothing decision on this record. There was no deficient performance and Blye's claim fails.

#### IV. CONCLUSION

For the foregoing reasons, Blye's conviction and sentence should be affirmed.

DATED October 14, 2015.

Respectfully submitted,  
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A handwritten signature in black ink, appearing to read "John L. Cross", written over the typed name of the Deputy Prosecuting Attorney.

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**October 14, 2015 - 8:17 AM**

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