

NO. 47485-9-II

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

STATE OF WASHINGTON,  
Respondent,

v.

John R. Gardner,  
Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY:  DEPUTY

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

THE HONORABLE MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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## **RESPONDENT'S COUNTER STATEMENT OF THE CASE**

The State essentially agrees with the statement of facts and prior proceedings as set forth in Appellant's Brief. Pages 2-3.

The State would add that Deputy Sheriff Kevin Schrader researched appellant's criminal history and found that "Gardner's most recent felony conviction was for VUCSA [Violation of the Uniform Controlled Substances Act]." CP 16.

## **ARGUMENT**

**The search warrant was based on probable cause because the informant in this case was a citizen informant and not a professional informant.**

### **1. 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. Perone, 199 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 “hyper technical” 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 its validity, and with great deference being accorded to the issuing judge’s determination. State v. Cord, 103 Wn.2d 361, 366, 693 P.2d 81 (1985); 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 magistrate is 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).

**(a) Reliability of Informant.**

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 if 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).

**(i) Basis of knowledge.**

In State v. Duncan, 82 Wn.App. 70 912 P.2d 1090 (1996), it was held that "[i]nformation showing the informant personally has seen the facts asserted and is passing on firsthand information satisfies the knowledge prong." Duncan at 76. "Some underlying factual justification for the informant's conclusion must be revealed..." State v. Cieler, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980).

Clearly, the basis of knowledge prong of Aguillar-Spinelli is satisfied as the CC (concerned citizen) had personal knowledge of the events described in the affidavit and had been at the residence within five

days prior to the issuance of the warrant. The CC was able to describe the inside of the residence. The CC detailed his/her familiarity with methamphetamine. The CC described short stay traffic which is consistent with drug sales. CP 16.

**(ii) Informant Veracity.**

“The level of evidence necessary to establish the reliability prong of Aguilar-Spinelli depends on whether the informant is a professional or citizen informant. State v. Bauer, 98 Wn.App. 870, 876, 991 P.2d 668 (2000). Evidence of past reliability (“track record”) is not strictly required where the informant is a citizen. State v. Northness, 20 Wn.App. 551, 556, 582 P.2d 546 (1978):

The reliability requirement of Aguilar-Spinelli, retained in State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984), is generally relaxed when the informant is an ordinary citizen. State v. Stock, 44 Wn.App. 467, 711 P.2d 1330 (1986). Although our courts have relaxed the necessary showing of reliability for citizen informant, the informant must still supply information to support an inference that the informant is telling the truth. State v. Huft, 106 Wn.2d 206, 211, 720 P.2d 838 (1986).

Evidence of past reliability is not required from a citizen informant, because a citizen who is an eyewitness or a victim lacks the opportunity to establish a record of previous reliability. State v. Riley, 34 Wn.App. 529, 533, 663 P.2d 145 (1983).

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It is only necessary for the police to interview the informant and ascertain such background facts that would support a reasonable inference that he is “prudent” or credible, and without motive to falsify. United States v. Harris, 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971).

State v. Berlin, 46 Wn.App. 587, 590, 591, 731 P.2d 548 (1987).

Here, there certainly is sufficient information that the CC was credible. The CC contacted law enforcement on his or her own. His or her identity was known to law enforcement. The CC did not demand nor was the CC provided or promised any compensation in exchange for the information. The CC had no criminal history. The CC was not “working off” charges. Once again, the CC detailed his/her familiarity with methamphetamine. CP 16.

There was sufficient information in the affidavit for the issuing magistrate to determine that the CC was reliable or credible.

**(b) Steven Galbraith.**

It is irrelevant that the defendant’s CCO, Steven Galbraith, was unaware of his whereabouts and thought he had moved out of 1400 West First Street. The CC had been there five days prior to

the issuance of the warrant and told law enforcement that the defendant was living there. CP 16.

**(c) Prior Conviction.**

“Prior convictions of a suspect may be used in determining probable cause, particularly when a prior conviction is for a crime of the same general nature.” State v. Maddox, 152 Wn.2d 499, 512, 96 P.3d 1199 (2004). As detailed in the affidavit, the defendant was DOC active and his most recent felony conviction was for Violation of the Uniform Controlled Substances Act. CP 16.

**CONCLUSION**

For all the foregoing reasons, appellant’s conviction should be affirmed and this appeal should be dismissed.

DATED this 18 day of December, 2015.

Respectfully Submitted,

By:   
WILLIAM A. LERAAS  
Deputy Prosecuting Attorney  
WSBA #15489

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STATE OF WASHINGTON,

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**DECLARATION OF MAILING**

JOHN R. GARDNER,

Appellant.

**DECLARATION**

I, Sarah L. Wisdom, hereby declare as follows:

On the 18<sup>th</sup> day of December, 2015, I mailed a copy of the Brief of Respondent to Backlund & Mistry, P.O. Box 6490, Olympia, WA 98507 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 18<sup>th</sup> day of December, 2015, in Montesano, Washington.

Sarah L. Wisdom