

FILED  
COURT OF APPEALS  
DIVISION II

2015 AUG 14 PM 1:24

STATE OF WASHINGTON

BY

DEPUTY

47502-2-II  
NO. 475202-2-II

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

STATE OF WASHINGTON  
Respondent

v.

MARBELLA HERNANDEZ-LORENZO  
Appellant

THE HONORABLE JUDGE ROBERT LEWIS  
JUDGE OF THE SUPERIOR COURT  
OF CLARK COUNTY, STATE OF WASHINGTON

APPELLANT'S BRIEF

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### **A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Appellant's motion for new trial or in the alternative arrest of judgment (CP 102).
2. The trial court erred in denying Appellant's motion to suppress (RP Vol. 1, RP 11-14).
3. The trial court erred in denying Appellant's objection to Exhibit 58, a notebook, as "consistent with drug notes" (Vol. 2, RP 201.6).
4. The trial court erred in denying Appellant's objection to admission of Exhibit 40 and 41, documents showing repair work on Appellant's vehicle that Jamie Cardenas-Paniagua, co-defendant, was driving (RP 209-210).
5. The trial court erred in denying Appellant's motion to dismiss Count 3- Maintaining a Dwelling or Place for Controlled Substance (RP 220).
6. The trial court erred in providing instruction #11 concerning accomplice liability; by including the paragraph "the defendant did not have to be present" (RP 263, RP 266, RP 268).
7. The trial court erred in providing instruction #14 rather than Appellant's proposed instruction (RP 264.7, RP 269 (read into the record)).

8. The trial court erred in providing instruction #11 by adding the accomplice liability paragraph that did not require the Appellant to be present (RP 268, the objection read into the record at RP 270).
9. The trial court erred in not disclosing the informant.

**Issues Related To Assignments Of Error**

1. When facts or circumstances stated in an affidavit for a search warrant show the controlled buy in Appellant's residence by alleged confidential informant was with an unknown person, not naming Appellant or Appellant's co-defendant, there is insufficient proof of probable cause to believe a controlled substance is present when the search warrant is to be executed?
2. Is it sufficient probable cause to search a residence with multiple occupants and multiple guests to show in the affidavit for the search warrant that a controlled buy occurred with someone at the residence when the informant states Appellant's co-defendant, Jaime Cardenas-Paniagua was a known methamphetamine trafficker, but the informant never said he/she purchased from him in the past or during the controlled buy?
3. Was there sufficient evidence to convict Appellant of maintaining a dwelling for a controlled substance when it is contested that a month prior to the

execution of the search warrant she was in California for several months in school working on a nursing certificate and had rented out rooms in her residence to assist in living expenses?

4. Was there an abuse of discretion in not disclosing the informant's identity so Appellant could subpoena him/her to prove she was not present in the house when her roommate sold controlled substances?
5. Did the trial court abuse discretion in not granting Appellant's motion for new trial or in the alternative arrest of judgment to correct error made in trial?
6. Was the provision in jury instruction #11, over objection, "Appellant did not have to be present to be an accomplice" a comment on the evidence not allowed by Washington Constitution Article 4, § 16.

## **B. STATEMENT OF THE CASE**

### **Summary**

Appellant resided in a mobile home in Clark County, Washington. She worked as a manager/waitress at a restaurant. Appellant rented rooms in her mobile home to help pay the rent and other costs associated with mobile home. Appellant rented a room to Jaime Cardenas-Paniagua. Approximately four months prior to the execution of the search warrant Appellant returned to California, where she lived before moving to Washington, to enter a nurse training program. Appellant stayed

with her parents while she was in California and they watched after her infant child. Appellant was in the nurse training program approximately four months, she received her certificates, and returned to her mobile home in Vancouver, Washington. Appellant returned home approximately one month before the execution of the search warrant.

Jaime Cardenas-Paniagua kept his belongings in the room he rented from Appellant. Jaime Cardenas-Paniagua would occasionally spend the night in the room he rented. Appellant rented two bedrooms in her mobile home to share expenses and had three roommates.

A search warrant was executed at Appellant's residence and no controlled substances, drug notes, paraphernalia or anything indicating drug use or selling of drugs was discovered in her room.

Approximately three pounds of heroin was discovered in a box of laundry detergent in a common area of the laundry room.

Appellant was charged with possession of a controlled substance with intent to deliver and maintaining a dwelling for controlled substances. A jury found Appellant not guilty of possession of a controlled substance with intent to deliver. Appellant was found guilty of maintaining a dwelling for controlled substances.

Jaime Cardenas-Paniagua testified on her behalf. He testified Appellant had no knowledge of his drug dealing activities at the house. The search warrant affidavit and search warrant did not mention Appellant.

Defendant moved for an in-camera interview of the informant. The motion was granted but the court refused to disclose the informant's identity.

### **Facts**

A suppression hearing was held on November 4, 2014 (Vol. 1 RP 1). Appellant's motion to suppress argued the alleged controlled buy of the confidential reliable informant (CRI) in Appellant's house. The house did not have a nexus to Appellant or co-defendant, Jaime Cardenas-Paniagua's, possession of controlled substance in the house because the vendor of the controlled substance was not described or identified. The CRI identified Jamie Cardenas-Paniagua as the person selling drugs from the house in the past but not in the present controlled buy that becomes the substance of the search warrant affidavit. The CRI conducted a controlled buy inside the house but does not say who sold the drugs. The CRI makes no reference to Appellant (Vol. 1, RP 2-8). The court found there was sufficient evidence for the magistrate to find that controlled substance would be at that residence (RP 11.17). There were alternative explanations but the court is not required to discredit them (RP 13.1).

Jury trial began on February 4, 2015 (RP 21). The parties stipulated Appellant rented and resided in the mobile home where the search warrant was executed (RP 38.12). It was agreed Appellant could argue and present evidence that she was in California for a significant length of time prior to the execution of the search warrant to obtain certificates for her nursing career.

Detective Brian Kessel, of the Clark County Sheriff's Office, testified as to evidence gathered during the execution of the search warrant (RP 47.16). A large amount of controlled substance was found in a laundry detergent box in the laundry room (RP 65). Detective Kessel testified he drew the floor plan of the residence that became exhibit #69 describing each room in the residence and who occupied the rooms (RP 83, exhibit #69). Detective Kessel testified he did not find any controlled substances in rooms 3, 4, and 5 (RP 81-82). Appellant's room was room #3.

Detective Jeffrey Brokus, of the Clark County Sheriff's Office, testified on behalf of the state (RP 89.25). He identified evidence he seized during the execution of the search warrant. Detective Brokus testified no controlled substances were seized from rooms 3, 4, and 5 by him (RP 105). There was approximately \$17,225 in cash discovered in room 6 and \$24,250 in room 7 (RP 109).

WSP Crime Lab Forensic Scientist John Dunn testified the substances tested were controlled substances (RP 131).

On February 3, 2015 a CrR 3.5 hearing was held (Vol. 1, RP 147). The court ruled Defendant's statements were admissible.

Deputy Robert Latter, of the Clark County Sheriff's Office, testified as to Statements Appellant made during the execution of the search warrant (Vol. 1, RP 150, February 5, 2015). Deputy Latter testified he asked Appellant if she knew Jamie Cardenas-Paniagua was dealing drugs from her residence and she said Jaime Cardenas-Paniagua rented a room at her residence.

Appellant identified exhibits #15, #48, and #49 as Appellant's nursing certificates from California.

Detective Shane Hall testified on behalf of the state (RP 96). Detective Hall was allowed to testify that exhibit #58 (suspect drug notes in notebook) was consistent with "drug notes." He testified the notebook was not in the safe but everything else he seized was in the safe (RP 206.17). In Appellant's room (room #3) he recovered exhibits #48, #49, and #50 (RP 207). He also identified exhibits #40 and #41 as being recovered from room #3. Appellant objected to the admission of exhibit #40 and #41; a receipt recovered from room #3 from John's Foreign Car Service for car service on a Nissan Extera that was registered to Appellant and driven by co-defendant, Jaime Cardenas-Paniagua. Appellant's room was #3 on the map (RP 207.10).

Appellant filed a motion to dismiss the allegation she maintained a dwelling for controlled substances (RP 220). Appellant cited State v. Ceglowski, 103 Wn. App. 346 (2000). Appellant argued case law requires proof that it was not a single isolated incident, that there be continued drug related activity and the substantial purpose for the house was to maintain the house for drug activity. The court denied the motion.

Jamie Cardenas-Paniagua testified on behalf of Appellant (RP 230). He testified he did not rent the room at Appellant's residence, his nephew rented it and he used it. He testified he did not stay in the room very often he just used it to store his things and drugs. He testified Appellant had a separate room and she was not there very often because she was at work. Mr. Cardenas-Paniagua testified he never conducted drug deals in front of Appellant (RP 232.24). He testified there were only one or two drug deals at Appellant's house. During the time period of the drug transactions Appellant was in California for several months completing her nursing license (RP 233). Appellant had returned to Washington about one month prior to the execution of the search warrant. Mr. Cardenas-Paniagua testified Appellant was not involved in his drug dealing activity. He occasionally had social activities with Appellant (RP 235).

Appellant testified (RP 238.25) she rented out rooms in her mobile home

(space #415) to help with the rent and other expenses. She identified Jaime Cardenas-Paniagua's room on the floor plan as room #7. She also rented a room to Enrique and Jessica. Appellant was not aware of Jaime Cardenas-Paniagua's drug dealings (RP 243). She testified she worked 11 hour shifts as a Manager/Waitress at a restaurant in Portland, Oregon and she worked approximately 6 days a week. Appellant's child, a toddler, stayed with her mother-on-law while she was working. Appellant testified she went to California to complete her nursing certificates (RP 243.7). She returned to Washington about one month prior to the execution of the search warrant. She identified exhibit #48, 49, and 50 as nursing certificates and she was in California when they were granted on June 11, 2014, May 30, 2014, and November 9, 2012 (RP 243.17-245). Appellant identified exhibit #75 as her California License (CNA) and she was present when it was granted on June 13, 2014 (RP 245). Appellant denied making the statements Detective Latter testified to. She did not tell him she observed drug activity by Jaime Cardenas-Paniagua and she was not aware he was selling drugs (RP 249).

Appellant objected to jury instructions (RP 263). In reference to the court's Instruction #11, Appellant objected to giving the last paragraph in the instruction that she did not have to be present to be an accomplice.

The court allowed evidence Appellant was involved prior to July 31, 2014 as charged and allowed evidence that any activity Jaime Cardenas-Paniagua (RP 265) was involved in could be linked to Appellant. Appellant objected arguing the charged document is limited to July 31, 2014 as a starting point and anything before is not relevant or pertinent and involves evidence Appellant is not charged with (RP 264-266). The argument was if there was no evidence she was involved then the paragraph in the accomplice instruction that she didn't have to be present was unnecessary and irrelevant. The court found there was sufficient evidence to give the accomplice instruction with the last paragraph because of the amount of drugs involved, the scales, and Appellant's statements to the police, if believed by the jury that she saw controlled substance dealings, by Jaime Cardenas-Paniagua. The court initially said the accomplice instruction should only apply to Count 1 but then reversed the ruling and said it applied to Count 3-maintaining a dwelling or house for controlled substance (RP 267.13). Appellant took exception to the court's instruction #14 and requested her proposed instruction be given (RP 264.7). Appellant read her proposed instruction into the record, and it was filed with the court, for the court's instruction #14 (RP 269). Appellant read into the record his objection to instruction #11 and the paragraph he wanted deleted (RP 270).

The jury came back with a verdict on February 6, 2015 and found Appellant not guilty of possession of a controlled substance with intent to deliver and guilty of maintaining a dwelling or house for controlled substances (RP 281).

### C. ARGUMENT

#### **Issues Related To Assignments Of Error No. 1 and 2**

Appellant's right to be free of unlawful search and seizures as protected by Article I, § 7 of the Constitution of the State of Washington and the Fourth Amendment of the United States Constitution was violated by the execution of the search warrant at her residence, the search of her room, and the common areas. The premise for analysis of search and seizure issues is Article 1 § 1 of the Constitution of the State of Washington. It provides the purpose of the government is to protect individual rights.

Appellant maintains she has standing to argue the admission of evidence seized from her roommates because she is being implicated in a manufacturing operation and maintaining a dwelling for controlled substances. This gives her automatic standing under State v. Simpson, 95 Wn.2d 170 (1980) and State v. Kypreos, 110 Wn. App. 612 (2002).

Kypreos held automatic standing applies if (1) possession is an element; (2)

defendant was in possession of contraband; (3) contraband bears a direct relationship to the search sought to be contested; and (4) defendant reasonably believed he or she was legitimately on the premises searched. The state's theory is Appellant was in possession of a drug house and constructive possession of all drugs within it.

The affidavit for search warrant shows a CRI conducted a buy at the house where the search warrant was executed. It does not state who sold the drugs to the CRI or who was present at the time of the buy. The affiant reported the informant identified Jaime Cardenas-Paniagua but does not state the informant purchased drugs from Jaime Cardenas-Paniagua or any information he resided at the residence searched or any nexus whatsoever to the residence. There must be a nexus between the criminal activity and the place to be searched, State v. Thein, 138 Wn.2d 133 (1999).

At page 4, line 16 there is a reference the affiant and DOC Officer Jennifer Thomas met the CRI to conduct a controlled purchase of methamphetamine from a known trafficker that the CRI knew as Jaime Cardenas-Paniagua. It does not give any basis as to why this is to be believed. There is no statement of facts as to the CRI's past dealings with Jaime Cardenas-Paniagua that would lead the affiant or the magistrate issuing the search warrant to believe there is a factual basis for the conclusion that Jaime Cardenas-Paniagua is trafficking in methamphetamine. It's

worth mentioning again, there is no reference to who sold the drugs to the CRI or if Jaime Cardenas-Paniagua was even at the residence at the time of the buy or any nexus to the residence.

The only thing the issuing magistrate knows from the affidavit is that a controlled buy was conducted with someone at the residence. The magistrate does not know if the person who sold the drugs actually lives at the residence or a guest. There may be nothing more than a transitory connection with the residence. For instance, if a CRI enters a residence having a party and buys drugs from a partygoer it does not lead to an inference there are continued drugs at that residence unless there is proof the partygoer who sold the drugs actually resides there.

Thein also noted an officer's general conclusions and conclusionary predictions and inferences do not establish the necessary specific underlying circumstances that establish evidence of illegal activity to authorize and search a home. It also noted probable cause to believe a person has committed a crime does not necessarily give rise to probable cause to search his home. State law holds a sale from someone who has only a transitory connection to the residence is not a basis for the issuance of a search warrant for that residence because there is no nexus to that residence. There is no reason to believe drugs would be present at the time the search warrant is executed.

In State v. Sanchez, 74 Wn. App. 763 (1994) the affidavit named the informant who said he obtained drugs from Joe at a certain house at some undisclosed time. The house had been raided 7 months earlier where drugs were found and the house had been marred by shotgun blasts. An unidentified citizen complained about drug activity at the house. The court held while probable cause to believe an informant purchased drugs from the house existed there is not enough to believe under these facts that "some means more" while "some may mean more" in some circumstances here there is only a showing of a single delivery made by a largely unidentified individual at an unknown time who may or may not have resided at the house.

Washington follows the two-prong Aguilar-Spinelli test to determine if information from an informant is reliable. To satisfy the Aguilar-Spinelli test the police must establish (1) that the informant has a factual basis for his or her allegations, and (2) the information is reliable and credible. This is sometimes referred to as basis of knowledge and veracity; State v. Jackson, 102 Wn.2d 432 (1984).

In this case, there is insufficient basis to credit the informant as being reliable and credible. For instance, when the "controlled buy" referred to in the affidavit occurred the affiant only makes conclusionary statements the CRI has given

information in the past that has been corroborated through other unknown sources. The only basis the issuing magistrate had was the conclusionary statements and an alleged controlled buy made at an unknown time. Finally, as an independent basis for suppression Appellant would note the requirement for a search warrant return for a drug case is to be returned within three (3) days of execution; RCW 69.50.504; State v. Thomas, 121 Wn.2d 509 (1993) and CrR 2.3. The search warrant return in this case was filed five (5) days after the search warrant was executed. All evidence should be suppressed and Appellant's case dismissed due to insufficient evidence.

#### **Issues Related To Assignments Of Error No. 3 and 6**

In State v. Brush, \_\_\_ Wn. 2d \_\_\_ (No. 90479, July 2, 2015) the court addressed the issue of a WPIC jury instruction as a comment on the evidence. WPIC 300.17 defined a prolonged period of time to mean more than a few weeks when defining a domestic violence aggravating factor. The majority concluded this was a comment on the evidence not allowed by Article 4, § 16 of the Constitution of the State of Washington. Four Justices concurred with the majority on the basis the instruction incorrectly stated the law but was not a comment on the evidence because it could not be interpreted as a personal comment by the judge on a particular item of evidence or testimony.

In the context of this case, the instruction is a comment on the evidence. Appellant submitted testimonial and documentary evidence (exhibits #48, #49, #50, and #75) that she was in California for several months completing training as a nurse and only at the residence about a 1 month prior to the execution of the search warrant. This was her defense to both charges. Appellant's evidence was she was out of the state of Washington, had no knowledge of illegal drug activity at her residence by her renter and therefore did not intend to keep or maintain a dwelling for controlled substances. There is no evidence Appellant received any money from her co-defendant other than rent. The courts instruction that she did not have to be present to be an accomplice is a comment on the evidence negating her defense. There was insufficient evidence Appellant maintained a dwelling for controlled substances within the meaning of RCW 69.50.402(1)(f) as charged.

The test for sufficiency of evidence is the following: Was sufficient evidence viewed in a light most favorable to the state sufficient for a rational trier of fact to find guilt; State v. Ceglowski, 103 Wn. App. 346 (2000) at page 349.

State v. Ceglowski, 103 Wn. App. 346 (2000) requires the State to prove there is more than a single isolated incident or instance of illegal drug activity to Appellant maintaining a dwelling for keeping or selling controlled substances. There must be proof of a course of continuing drug related activity and that a substantial

purpose of maintaining the house is for drug activity (State v. Ceglowski at page 352-353). Mr. Ceglowski had a bait and tackle shop business. A search warrant was executed at his business and .9 grams of methamphetamine was found and in his safe with 10 pages of drug transaction notes.

In Appellant's house much more controlled substances were found but in the common laundry room not in Appellant's room. The so called drug notes were admitted over objection. None were found in Appellant's room. Her mere presence is insufficient for accomplice liability. It is undisputed she was in California working on nursing certificates until about one month prior to the execution of the search warrant. There is no proof she conducted any transactions. One of her roommates admitted to selling drugs several times but specifically denied her involvement. The maintaining a dwelling for controlled substances does not create strict liability among roommates. Such a ruling would have a disproportionate impact on the poor, as too many laws do, by imputing liability for the actions of roommates. Justice Madsen noted in her concurrence in State v. E.J.J., \_\_\_ Wn. 2d. \_\_\_ (No. 88694-6, Filed June 25, 2015) our system of justice cannot condone disparate treatment of people. She wrote in reference to race and the obstructions statue. But the same principal of disparate treatment of people based on wealth applies to the State and the Courts

instructions to the jury on accomplice liability and maintaining a dwelling for controlled substances (No. 11 and 14).

Appellant's proposed instructions would have informed the jury an isolated transaction is insufficient and did not have the direct comment that Appellant did not have to be present to be an accomplice. This comment by the court negated her defense that she was in school in California and thus had no knowledge of her roommate's activities nor was she involved in a continuing pattern of criminal behavior in relation to the alleged sale of drugs at her house. The comment also negated her defense she did not maintain this dwelling for a substantial purpose of selling drugs. There is insufficient evidence she maintained the dwelling for a controlled substance. She did not maintain it for that purpose or even for a substantial purpose of drug use. Her roommate did the drug dealing while she was undisputedly gone.

#### **Issues Related To Assignments Of Error No. 4**

Appellant requested disclosure of the informant. An in-camera hearing of the informant was held and the motion denied. Appellant requested to supplement the record with the in-camera review. The judge ordered the record of the interview sealed and sent to the Court of Appeals.

Appellant does not know what was said at the hearing. She asks this Court to review the trial court's decision not to disclose on an abuse of discretion standard. Appellant is seeking evidence she was not at the residence when any selling of drugs took place, the informant has no knowledge of her involvement in drug sells, and any selling of drugs was an isolated event.

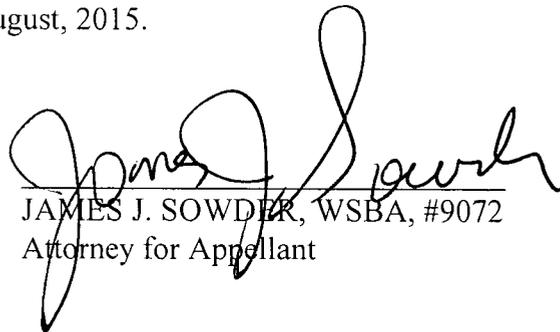
#### **Issues Related To Assignments Of Error No. 5**

Appellant made a good faith effort to appraise the trial court of errors in Appellant's motion for new trial. The errors noted are individually and cumulatively sufficient for new trial or arrest of judgment. The motion corrects any inadequacy of trial objections. The cumulative error doctrine allows reversal when an individual error is insufficient. The courts comments on the evidence in the accomplice instruction when combined with failure to give Appellant's jury instruction on what is required for maintaining a drug house had the cumulative effect of the court telling the jury she did not have to have knowledge of drug sells and even an isolated sell was sufficient.

#### **D. CONCLUSION**

Dismiss Appellant's conviction for maintaining a dwelling for controlled substance due to insufficient evidence, remand for a new trial.

DATED this 10 day of August, 2015.



JAMES J. SOWDER, WSBA, #9072  
Attorney for Appellant

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STATE OF WASHINGTON

BY  \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON,	)	
	)	NO. 475202-2-II
Respondent,	)	
	)	DECLARATION OF MAILING
v.	)	
	)	
MARBELLA HERNANDEZ-LORENZO,	)	
	)	
<u>Appellant.</u>	)	

I, REBA D. GRAHAM, certify and declare under penalty of perjury under the laws of the State of Washington, that on the 10<sup>th</sup> day of August, 2015, I personally mailed the original and a copy of the Appellant's Brief to David Ponzoha, Clerk, Court of Appeals, as well as a copy of this declaration of service; I hand delivered a copy of same to the Clark County Prosecuting Attorney's Office; and mailed a copy to Appellant at the below listed address.

Marbella Hernandez-Lorenzo  
710 NE 106<sup>th</sup> Ave.  
Vancouver, WA 98664.

DATED this 10<sup>th</sup> day of August, 2015.

  
REBA D. GRAHAM, Legal Assistant  
JAMES J. SOWDER WSBA #9072

DECLARATION OF SERVICE