

**NO. 288951-III**

Consolidated with

**NO. 288960-III**

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**

**FEB 10 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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THE STATE OF WASHINGTON, Respondent

v.

MICHAEL SCOTT SMITH, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 09-1-00132-8

Consolidated with

NO. 09-1-00930-2

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BRIEF OF RESPONDENT

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## ISSUES

DID THE TRIAL COURT PROPERLY DENY THE MOTION FOR A *FRANKS* HEARING?

- A. Were there any intentional or reckless omissions in the search warrant affidavit?
1. At the time the search warrant affidavit was filed, what was the criminal history of Valerie Seabury and Kenneth Moore?
  2. Is a failure to obtain a "DCH<sup>1</sup>" reckless or negligent?
  3. Did Detective Cantu's affidavit inform the magistrate of:
    - a. Moore's pending charges and past assault?
    - b. Seabury's drug abuse?
  4. In any event, is there any evidence that Detective Cantu "recklessly" omitted the criminal history of Mr. Moore or Ms. Seabury?
- B. Were the omissions concerning criminal history material:
1. In general?

---

<sup>1</sup> Defendant's Criminal History

2. **Specifically as to:**

a. **Ms. Seabury?**

b. **Mr. Moore?**

**COUNTER STATEMENT OF FACTS**

On February 10, 2009, Detective Lee Cantu of the Benton County Sheriff's Office applied in writing<sup>2</sup> for a search warrant. (CP 9-16). Detective Cantu's search warrant affidavit stated that a Kenneth Moore had confessed to receiving stolen property from Valerie Seabury, Mica Jones, and a third person only known as "James." (CP 13.) Moore admitted that he fenced the stolen items to "Long Hair Mike" in exchange for drugs. (CP 13). Specifically, Mr. Moore stated that he traded a power band saw that he received from Seabury, Jones, and James to "Long Hair Mike" for \$40.00 in heroin. (CP 14). Mr. Moore also said that he received two rollaway toolboxes full of

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<sup>2</sup>The defendant's claim that "Detective Cantu applied for a telephonic search warrant" is incorrect. (App. Brief, 3).

tools from Ms. Seabury that he traded to "Long Hair Mike" for \$160.00 in drugs. (CP 14.).

Mr. Moore pointed out 1319 W. Bruneau Avenue in Kennewick, Washington as "Long Hair Mike's" residence. (CP 15). Based on this information, the search warrant application was granted by the Honorable Robert G. Swisher. (CP 16).

The defendant moved for a *Franks* hearing concerning Detective Cantu's failure to list the criminal history of various individuals listed in the search warrant affidavit. (CP 3-4). That motion was denied, and after a stipulated facts trial, this appeal follows. (CP 44-46, 49-52, 63).

#### **ARGUMENT**

A *Franks* hearing is only required if, first, there are deliberate or reckless misrepresentations or omissions in the search warrant affidavit, and, if so, they were material to the magistrate's determination of probable

cause. *State v. Taylor*, 74 Wn. App. 111, 872 P.2d 53 (1994). Here, any omission was not intentional or reckless. Further,

**A. There were no intentional or reckless omissions in the search warrant affidavit.**

**1. When the search warrant affidavit was presented, Mr. Moore had no crimes of dishonesty.**

Please note that the defendant at trial and on appeal is relying on a printout of "Defendant Case History" regarding Mr. Moore. The printout was done on January 12, 2010, almost one year after the search warrant was presented. (CP 26). When the search warrant affidavit was prepared on February 10, 2009, Mr. Moore had not been convicted of the crimes of Taking a Motor Vehicle without Permission and Trafficking in Stolen Property. He plead guilty to those offenses on March 26, 2009. (CP 37).

On February 10, 2009, Mr. Moore had the following convictions:

<b>DATE</b>	<b>SHORT TITLE</b>
11-16-08	Assault, Fourth Degree (CP 26).
10-03-08	Driving While Suspended (CP 26).

Ms. Seabury had the following convictions as of February 10, 2009:

04-29-08	Negligent Driving (CP 19).
11-30-06	Theft, Third Degree (CP 19).
04-17-88	Driving Under the Influence (CP 19).
11-20-06	Controlled Substance Violation-False Information (CP 20).

As with Mr. Moore, the defendant utilized a "DCH" regarding Ms. Seabury that included crimes committed after the search warrant affidavit was executed:

08-02-09	Controlled Substance-Possess without a prescription (CP 19).
08-02-09	Introduce Contraband, Third Degree (CP 20).
02-12-09	Controlled Substance-Possess without a prescription (CP 20).

**2. Detective Cantu's failure to obtain criminal histories for Mr. Moore and Ms. Seabury were at most negligent, not reckless.**

At most, the defendant argues that Detective Cantu should have, or could have, obtained a criminal history of Mr. Moore. However, "should have" and "could have" do not constitute an intentional or reckless omission. As stated in *State v. Evans*, 129 Wn. App. 211, 220, 118 P.3d 419 (2005), it is not *per se* reckless not to run a witness's criminal history and to fail to present it to the magistrate.

The defendant, neither at trial nor on appeal, has shown that Detective Cantu knew that Ms. Seabury or Mr. Moore had any criminal history and that he intentionally or recklessly omitted it.

**3. Nevertheless, Detective Cantu properly advised the magistrate of Mr. Moore's and Ms. Seabury's pending and prior history.**

a. **Mr. Moore:**

As stated, Mr. Moore had convictions only for Assault in the Fourth Degree and Driving While Suspended. (CP 26). The search warrant affidavit states Mr. Moore had a domestic violence assault. (CP 11). As far as current offenses, the affidavit states he was using heroin, that he was pawning stolen property, and that he had a stolen motorcycle. (CP 11, 13). Further, the affidavit states that Mr. Moore would be charged with Possession of Stolen Property and Trafficking in Stolen Property. (CP 11).

The only crime that was not covered was the Driving While Suspended.

b. **Ms. Seabury:**

Ms. Seabury had nothing to do with obtaining the search warrant at the defendant's residence. Ms. Seabury gave the police information about Kenneth Moore. It was Mr. Moore who said that "Long Hair Mike" was supplying him with heroin in

exchange for drugs. Mr. Moore pointed out "Long Hair Mike's" residence to the police. Ms. Seabury did not provide any information about the defendant.

Nevertheless, the affidavit states that Ms. Seabury admitted she was a heroin user, that she gave the stolen band saw to Moore in exchange for drugs, that she participated in thefts to trade for heroin, and that she was stealing property from her boyfriend to trade for heroin. (CP 10-13).

The only crimes of dishonesty on Ms. Seabury's DCH were for Theft, Third Degree from 2006, and arguably, Possession of a Controlled Substance by Fraud or Forgery, also from 2006. The recitation of her drug use and thefts were more than sufficient to advise the magistrate that her name was Valerie Seabury, not Lilly White.

- 4. In any case, there is no evidence that Detective Cantu was reckless in omitting the criminal history.**

Recklessness may be shown by establishing that the affiant actually entertained serious doubts about the informant's veracity. "Serious doubts" may be inferred from either (a) an affiant's actual deliberation or (b) the existence of obvious reasons to doubt the informant's veracity or the information provided. *State v. Chenoweth*, 160 Wn.2d 454, 479, 158 P.3d 595 (2007).

Two factors point to the truthfulness and reliability of Mr. Moore's statements. First, an informant's willingness to come forward and identify himself is a strong indicator of reliability. Second, statements against penal interest are intrinsically reliable because a person is unlikely to make a self-incriminating admission unless it is true. *State v. Chenoweth*, 160 Wn.2d at 483. Mr. Moore's willingness to come clean, admit his drug use, point out his drug dealer, and confess to his thefts and trafficking should establish his reliability.

There is no reason to believe that Detective Cantu doubted him, much less had "serious doubts."

**B. The omissions were not material.**

- 1. The criminal history is generally not relevant enough to warrant a *Franks* hearing.**

The Court in *State v. Taylor*, 74 Wn. App. 111, held that it is common for a person who is in the position of arranging a controlled buy to have had prior contact with the criminal justice system. In accord is *State v. Chenoweth*, 160 Wn.2d 454, and *State v. Lane*, 56 Wn. App. 286, 295, 786 P.2d 277 (1989).

- 2. Specifically, the criminal history as to Mr. Moore and Ms. Seabury were not material.**

**a. Ms. Seabury:**

Ms. Seabury provided no information about the defendant, other than knowing that Mr. Moore's heroin supplier was named Mike. She did not know where "Mike" lived, she did not have first-hand knowledge that "Mike" supplied Mr.

Moore with heroin, , or how Mr. Moore paid "Mike." All of that information came from Mr. Moore.

**b. Mr. Moore:**

The only crime not divulged to the magistrate was Mr. Moore's Driving While Suspended conviction.

**CONCLUSION**

Challenges to the sufficiency of a warrant affidavit are generally confined to an examination of the information before the magistrate. An exception exists when there is a challenge to the factual accuracy of the warrant affidavit based on reckless or intentional falsehoods. However, that is not to shift the focus from whether the magistrate could find probable cause to whether the police conducted a thorough investigation. That shift would permit an end run around the deferential standard of

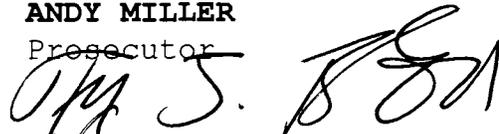
review applicable to search warrants. *State v. Chenoweth*, 160 Wn.2d at 476-477.

Here, the police investigation was exemplary. Any defendant can say, as this defendant is, that a Driving While Suspended conviction should have been revealed to the magistrate. The trial court properly kept the focus on whether there was a reckless falsehood which would have changed the result. There was not.

The denial of the motion for the *Franks* hearing, and the resultant conviction should be affirmed.

**RESPECTFULLY SUBMITTED** this 9th day of  
February 2011.

**ANDY MILLER**  
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