

COA No. 29047-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOSHUA DAVID RAY, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The court erred by denying the defense motion to suppress evidence.

B. Without this drug evidence, the State's case is essentially terminated and the conviction must be reversed.

Issues Pertaining to Assignments of Error

1. Did the court err by denying the defense motion to suppress drug evidence when there was an insufficient nexus between the place to be searched and the evidence of illegal activity, so that the search warrant affidavit did not establish probable cause to issue the warrant? (Assignment of Error A).

2. Without this drug evidence, is the State's case essentially terminated? (Assignment of Error B).

II. STATEMENT OF THE CASE

Joshua David Ray was charged by information with one count of possession of a controlled substance – temazepam and one count of possession of a controlled substance – marijuana (40 grams or less). (CP 12). After a CrR 3.6 hearing on January 14, 2010, the court denied the defense motion to suppress evidence and entered the following findings of fact:

1. On April 6, 2009, the Honorable Lesley A. Allan,

Chelan County Superior Court Judge, reviewed an affidavit for a search warrant (attached as Exhibit A) presented by Detective Kirk Drolet of the Wenatchee Police Department.

2. The affidavit for search warrant sought to obtain evidence of the crimes of murder in the second degree, unlawful possession of controlled substances, and possession of drug paraphernalia.

3. The evidence to be sought included drugs, paraphernalia used to ingest controlled substances, the proceeds of drug sales, ledgers, and weapons, including certain pistols and rifles.

4. The area to be search[ed] was a residence at 616 Fourth Street in Wenatchee, Washington, together with two vehicles parked at that location.

5. In Detective Drolet's affidavit on page 4 . . . , Detective Drolet included the statement, "Ray has been arrested and charged at least 3 times with unlawful possession of controlled substances."

6. The defendant submits and the State concurs in the allegation that this statement was incorrect and does not reflect the defendant Ray's true criminal history.

7. The affidavit contained other information indicating that a call had been received on April 6, 2009, that there had been a shooting at 616 Fourth Street, that when officers arrived the defendant Joshua Ray was sitting on the steps of the house and that the front door had been forced open and a person believed to be an individual named Scott Bates was dead in the doorway.

8. The affidavit further indicates that Bates appeared to have been shot multiple times in the chest and that there were at least two handguns on the floor in the house which were visible from the doorway of the room.

9. The affidavit also indicated that a glass smoking pipe used to smoke marijuana was on the floor in front of the couch near the door of the residence and that an AK-47 style rifle was on top of the stereo cabinet in the house. A safe was observed in another room when the officers performed a security sweep to check for other persons in the residence.

10. Judge Allan issued a search warrant (attached hereto as Exhibit B) at 5:04 a.m. on April 6, 2009, after review of the affidavit from Detective Drolet.

11. After a search of the premises pursuant to the warrant, officers of the Wenatchee Police Department located glass smoking pipes, miscellaneous pills, and green vegetable matter. The pills were ultimately determined by the Washington State Patrol Crime Laboratory to contain temazepam, a controlled substance, and marijuana. (CP 69-70).

From those findings, the court entered conclusions of law:

1. The court finds that the statement of Detective Drolet on page 4 of the affidavit incorrectly states the criminal history of the defendant Ray. The court pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), disregards that statement in its consideration of the sufficiency of the affidavit.

2. The court concludes that the affidavit does establish and support probable cause of the issuance of the search warrant in this case without consideration of the offending language.

3. The court concludes that there is a sufficient nexus between the place to be searched and the evidence of illegal activity in this case.

4. The court concludes that since the questioned affidavit does establish probable cause, the affidavit properly supports the issuance of the search warrant by Judge Allan on April 6, 2009.

5. The defendant's motion to suppress evidence gathered in response to the search under that warrant is denied. (CP 70-71).

Thereafter, the State and Mr. Ray agreed to a stipulated facts trial on a third amended information charging him with one count of unlawful possession of a controlled substance – temazepam. (CP 80, 82-86). For the facts, the court reviewed the affidavit of probable cause dated April 16, 2009, and the lab report of June 5, 2009. (CP 82). The stipulated facts were reflected in Detective Justin Kissel's affidavit of probable cause:

On 4/06/09, at approximately 0128 hrs., officers responded to 616 4th Street for a shooting. Officers arrived and located Joshua D. Ray (the renter at 616 4th Street) on the front porch of the residence with a gun shot wound to the leg. Officers also located an adult male (later identified as Scott D. Bates, DOB 08/17/65) lying on the living room floor of the residence, just inside the front door. Scott was pronounced dead at the scene by medical personnel. Joshua told officers that Scott had rammed his front door in with a sledge hammer, entered his residence wearing a ski mask, stated he was "the cops", and pointed a hand gun at him. Joshua said that as he got up off the couch to get his SKS rifle, Scott fired his hand gun and shot Joshua in the right leg. Joshua then maintained that he fired his rifle at Scott in self-defense. Officers conducted a security sweep of Joshua's residence and observed several firearms along with some drug paraphernalia in plain view.

Detectives were called out to the scene to take over the investigation. I observed Scott's body lying on top of a sledge hammer, a ski mask next to his head, and a black

semi-automatic pistol lying on the floor just a few feet from Scott's right hand. I looked around the living room and saw an SKS rifle on a table, a hand gun on the coffee table, and another hand gun on the living room floor. I also noticed a marijuana smoking bong on the living room floor next to the couch.

After Joshua was treated at CWH for his gun shot wound, he was interviewed at the police station where he provided a recorded statement. After Miranda, Joshua stated that he was sitting on his couch smoking marijuana. Joshua also admitted that he had marijuana and drug paraphernalia for marijuana and Oxycontin inside his residence. Joshua admitted to having an Oxycontin habit, but said he didn't have any other drugs or pills in his residence. Joshua also told us he had removed the ski mask off of Scott's face after he shot him. Joshua said he didn't know who Scott was or why he was at his house. We told Joshua that Scott has a violent history of doing drug rip-offs and told him that would be the only reason Scott would break into his house like that. Joshua said he didn't have enough drugs in his house for someone to rip off.

A search warrant was granted for the residence, to include evidence for a homicide investigation and evidence for drugs and drug paraphernalia. Detectives initially conducted a limited service of the search warrant, being careful not to disturb the integrity of the homicide scene (WSP Crime Lab had been contacted and was going to process the scene later that morning). Several glass smoking pipes with burnt residue inside (used for smoking marijuana and other controlled substances), some green leafy substance (which field tested positive for marijuana) and some miscellaneous loose pills (identified as legend drugs: Ambien, Tramadol, and Cyclobenzaprine) were all found in Joshua's bedroom. That evidence was collected and the search was stopped until the crime lab arrived and a more thorough search could be completed.

Joshua was then booked into jail for possession of drug paraphernalia, possession of marijuana (less than 40

grams), and possession of legend drugs. He later made bail on these charges.

I later contacted the Wenatchee City Attorney and requested that these charges be dismissed due to the forthcoming request for felony level drug charges as a result of the search warrant on Joshua's residence.

During the more thorough search of the residence with the WSP crime lab, detectives located and collected additional loose pills and a small glass vial with a sticky substance (which later field tested positive for heroin) in a safe located in Joshua's bedroom. Joshua's ID was also located in the safe. The pills were later identified as Temazepam (10 pills) – a Schedule IV controlled substance, Seroquel (9 pills) – a Legend drug, Cyclobenzaprine (1 pill) – a Legend drug, and Buprenorphine/Naloxone (11 pills) – a Legend drug. There were also large amounts of suspected marijuana found; green leafy substance (inside a wooden box) and green stems, seeds, and leafy substance (found inside four plastic tubs and a glass jar). These were all later field tested positive for marijuana and the combined weight for all of the suspected marijuana was 113.3 grams. (CP 2-3).

The crime lab report identified one of the tested substances as temazepam. (CP 85).

Mr. Ray reserved the right to appeal the issue concerning the validity of the search warrant. (CP 98; 5/6/10 RP 2-16). The court found him guilty as charged. (*Id.*). The felony judgment and sentence was entered on May 6, 2010. (CP 87). This appeal follows.

III. ARGUMENT

A. The court erred by denying the defense motion to suppress when there was an insufficient nexus between the place to be searched and the evidence of illegal activity.

On the motion to suppress, Mr. Ray's counsel did not ask the court to find there was no probable cause to search. (1/14/10 RP 17). Rather, he asked the court to rule that there was no probable cause for the scope of the warrant. (*Id.* at 18). The defense conceded probable cause existed to search for and seize firearms and to seize the suspected marijuana pipe. (*Id.* at 20, 22). The State argued Detective Drolet was initially at the home to investigate a murder, possession of controlled substances, and possession of drug paraphernalia. (*Id.* at 26). It contended the warrant was valid on its face. (*Id.* at 29). The court denied the motion to suppress. (CP 70-71; RP 31-32). Findings and conclusions as required by CrR 3.6 were entered. (CP 68-71).

Mr. Ray does not challenge the findings of fact as substantial evidence supports them. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). But the conclusions do not flow from these findings as the facts fail to establish a sufficient nexus between the place to be searched and the evidence of illegal activity.

Conclusions of law are reviewed de novo. *State v. Sanchez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Detective Drolet's search warrant affidavit stated in relevant part:

That affiant states:

(X) Evidence of a crime (describe):

- Murder 2
- Unlawful possession of controlled substances
- Possession of drug paraphernalia

(X) Contraband, the fruits of a crime, or things otherwise criminally possessed, consisting of:

- Drugs . . .
- Paraphernalia . . .

(X) Weapons or other things by means of which a crime has been committed . . .

is concealed in Chelan County, Washington, in, on, or about:

(X) Certain Premises (describe):

616 – 4th Street, Wenatchee, WA 98801. A single story house . . .

The affiant's belief is based upon the following facts and circumstances:

a. Training and Experience:

. . .

Probable Cause Narrative:

On 6 April 2009 at about 0129 hours, I was leaving the Wenatchee Police Department. Officer Evitt passed by

and said that I had better wait as there was a shots fired call coming in.

At about 0131 hours, I heard Officer Shaw on the radio, advising that there were two victims down at the scene and requesting detectives respond. A third person fled the scene to the north. Multiple officers responded.

At about 0135 hours, I arrived on scene. I ran to the front (south) side of the house which faces 4th Street. Officer Shaw was with a male, Joshua Ray, who was sitting on the steps. He was bleeding from a visible gun shot wound to the right upper thigh. Ray was complaining that he was in pain and no one was doing anything about it. He was complaining about the weather, that it was cold and he wanted to warm up. Ray was ignoring questions posed to him by loudly complaining. He did not answer when asked if he knew the person in the house. I moved past Ray as the ambulance arrived and looked into the house.

The front door had been forced open. Something heavy hit the door and blew the strike plate out of the door jamb. Whatever hit the door also took about 4 inches of door frame around the barrel and strike plate and turned it to splinters. The sledge hammer we thought was used was under the male figure just inside the door. This appeared to be Scott Bates. From the lack of color in the face and no reaction to lights being shone on his face, I could tell that he was dead. I saw at least five gun shots in the chest area. The shots were in a horizontal line. Blood was draining out Bates' mouth. In plain view across his chest was a bandolier of shotgun shells. On the floor just to the north of Bates were two fired shotgun shells. Near his right hand was a Government model (1911) .45 ACP clone pistol. I did not see a shotgun in plain view.

I scanned the room. To the left of the front door was a couch. At the far end of the couch, I saw a Government model (1911) .45 ACP clone pistol on the floor, partially

covered by some clothing that was black. I saw a black wallet near the gun on the floor. On the coffee table in front of the couch was a pocket pistol, unknown caliber, made of blued steel or similar dark metal, on the edge away from the door. I saw a glass smoking pipe, used to smoke marijuana on the floor in front of the couch near the door. On top of the stereo cabinet was a rifle. I immediately recognized it as an AK. Near the butt of the AK was a Dell tower computer. It was wired to use the TV as a monitor.

Sgt. Kruse looked in another room and said that he saw a safe. Other officers conducted a safety sweep.

Ray was transported to the hospital. Bates was pronounced dead at the scene. I was later told that on the pair of pants that Ray wore when he was shot, there was a holster for a pistol.

I checked the alley to the east of the house and found a vehicle parked at the north east corner of the house running with no one inside. I was able to determine that it was Scott Bates' truck.

Ray has been arrested and charged at least 3 times with unlawful possession of controlled substances.

Bates has been convicted at least three times for unlawful possession of controlled substances. He also has multiple charges of unlawful possession of firearms violations.

...

Records and ledgers can be stored electronically. They need not be stored on the computer hard drive as there are online options to store data. . . . The Dell computer provides Ray the ability to go online, as does the game system on the shelf under the AK style rifle. The data may be stored online or in an external device. I saw a cell phone on the coffee table and a USB external

storage device next to the computer.

. . .

d. Conclusions (short summary of what is expected to be found based upon above probable cause).

I expect to find controlled substances, firearms, records, and ledgers in one or all of the following places – the house, the computer, the vehicles, electronic storage media and the safe.

This may identify the third person that fled the scene.

This may assist in identifying why Bates was at Ray's house. (CP 45-49; 62-66).

Finding probable cause to believe there was evidence of a crime or contraband at the home, Judge Allan issued the warrant based on Detective Drolet's affidavit. (CP 60-61).

At the suppression hearing, the court did find that the detective's statement regarding Mr. Ray's criminal history was incorrect and, pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed.2d 667 (1978), disregarded that statement in considering the sufficiency of the affidavit. (CP 70). It nevertheless concluded the affidavit established and supported probable cause for issuance of the search warrant even without the offending language. (*Id.*). The court erred.

If a search warrant affidavit contains factual inaccuracies or omissions that are material and are made either intentionally or in

reckless disregard of the truth, the search warrant is invalid and all evidence obtained as a result must be suppressed. *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007). Mr. Ray's incorrect criminal history as to drug possession was material because it was used to show and establish to the magistrate that there was a drug tie with Mr. Bates and thus a reason to allow the search for drugs and guns. Without that link, any search would have been limited to guns and marijuana paraphernalia. In the circumstances of the "shots fired" call, the search for drugs in the home was based on a mere hunch in light of Mr. Bates' prior drug involvement. The incorrect statement on Mr. Ray's criminal history was indeed material, rendering the search warrant invalid. 160 Wn.2d at 479.

A search warrant may be issued only upon a showing of probable cause. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An affidavit for a search warrant must state the underlying facts and circumstances on which it is based so that a detached and independent evaluation of the evidence can be made by the issuing magistrate. *State v. Helmka*, 86 Wn.2d 91, 92, 542 P.2d 115 (1975).

Probable cause exists if the affidavit sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). Most pertinent here, “probable cause requires a nexus 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. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The magistrate’s determination a warrant should issue is an exercise of judicial discretion that is reviewed for abuse of discretion. *State v. Remboldt*, 64 Wn. App. 505, 509, 827 P.2d 282, *rev. denied*, 119 Wn.2d 1005 (1992).

Even without the offending statement on Mr. Ray’s criminal history, the search warrant affidavit still contained nothing more than a declaration of suspicion and belief that drugs would be found. Contrary to the State’s argument, it was invalid on its face. *Chenoweth*, 160 Wn.2d at 481-82. The purpose of the police involvement was to investigate a shooting. Aside from the bong, none of the circumstances hinted there was a nexus between that criminal activity, the drugs to be seized, and the place to be

searched. *Thein*, 138 Wn.2d at 140. Accordingly, there was no basis in fact from which the magistrate could conclude evidence of illegal drugs would likely be found at the place to be searched. A reasonable nexus was not established as a matter of law. See *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980).

Because its decision was based on untenable grounds and reasons, the court abused its discretion and erred by denying Mr. Ray's motion to suppress. *Remboldt*, 64 Wn. App. at 509.

B. Without evidence of temazepam, the State's case is essentially terminated.

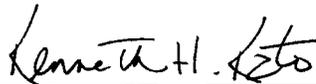
When a search is unconstitutional, as here, the evidence discovered in that search becomes fruit of the poisonous tree and must be suppressed. *State v. Ladson*, 138 Wn. 2d 343, 359, 979 P.2d 833 (1999); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963). The temazepam was found in the safe as a result of the unlawful search. (1/14/10 RP 26, 28). The evidence must be suppressed. *Id.* Without that evidence, the State has no case. See *State v. Wraspir*, 25 Wn. App. 457, 607 P.2d 335 (1980). The conviction should be reversed and the charge dismissed.

V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Ray respectfully urges this Court to reverse the denial of his motion to suppress evidence, reverse his conviction, and dismiss the charge.

DATED this 13th day of December, 2010.

Respectfully submitted,

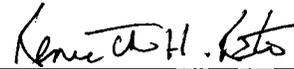


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CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on December 13, 2010, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on Gary A. Riesen, Chelan County Prosecutor, PO Box 2596, Wenatchee, WA 98807-2596; and Joshua David Ray, 616 Fourth Street, Wenatchee, WA 98801.

DATED this 13th day of December, 2010, at Spokane, WA.



Kenneth H. Kato