FILED
January 13, 2012
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 29754-3-III

STATE OF WASHINGTON, Respondent,

v.

JEFFREY SCOTT NORMAN, Appellant.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

The State argues erroneously that Norman only requested relief in the trial court under CrR 8.3(b), not CrR 7.8(b)(3). *Brief of Respondent* at 3. But Norman expressly relied upon CrR 7.8(b)(3) to request that the judgment be vacated and the cause dismissed *as an alternative* to his argument for dismissal due to government misconduct under CrR 8.3(b). CP 49. The State thus neglects to respond to Norman's argument that the fraud perpetrated on the court by the trial prosecutor, John G. Wetle, establishes grounds for relief from the judgment under CrR 7.8(b)(3) and *State v. Hardesty*, 129 Wn.2d 303, 318, 915 P.2d 1080 (1996). The State does not contradict the facts that occurred, nor does the State argue that Mr. Wetle's conduct in concealing pertinent facts from the trial court in determining probable cause was not so outrageous as to shock the conscience and exceed the bounds of fundamental fairness, warranting relief from the judgment. *State v. Martinez*, 121 Wn. App. 21, 35, 86 P.3d 1210 (2004).

The State further fails to acknowledge that the issues raised in Norman's 7.8(b)(3) motion, which are the subject of this appeal, were not addressed in any prior appeal. *Brief of Respondent* at 3.

The State further contends that summary dismissal without a hearing was not an abuse of discretion even though Norman presented a *prima facie* case that the trial prosecutor deliberately misled the judge, concealed evidence, and thereby violated his right to due process of law. *Brief of Respondent* at 3-4. Suggesting that there was *no* evidence of misconduct when the record plainly shows that the prosecuting attorney concealed critical evidence from the court that had a direct bearing on the veracity and reliability of the 12-year-old informant, is disingenuous.

Finally, the State claims there is no showing of prejudice as a result of the prosecutor's misconduct. First, it is elementary that a warrantless arrest as well as the issuance of a search warrant must be founded on probable cause. *See generally* U.S. Const., Amend. 4; Wash. Const. Art. I, Sec. 7; *State v. Parks*, 136 Wn. App. 232, 148 P.3d 1098 (2006) (holding issuance of bench warrant invalid due to lack of probable cause finding); *State v. Fisher*, 145 Wn.2d 209, 35 P.3d 366 (2001) (discussing probable cause requirement applicable to the issuance of warrants). Second, for probable cause to be based on hearsay statements of informants, the information must be reasonably reliable and the informant must be reasonably reliable. *State v. Vanzant*, 14 Wn. App. 679, 681, 544 P.2d 786 (1975) (*citing Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964)). And third, evidence obtained in

exploitation of an illegal seizure is fruit of the poisonous tree that cannot be admitted into court. *State v. Eserjose*, 171 Wn.2d 907, 920, 259 P.3d172 (2011). As a matter of protecting his right to due process, Norman should be entitled to a hearing on his CrR 7.8(b)(3) motion to determine whether any of the evidence used against him at trial was "fruit of the poisonous tree" or was sufficiently attenuated to be admissible.

Additionally, the trial prosecutor's withholding of exculpatory evidence at the probable cause hearing arguably violates due process under the disclosure rule established in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady*, the U.S. Supreme Court stated:

> The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals.

373 U.S. at 87. Here, at the very inception of a case, the disclosure of exculpatory evidence is critical in avoiding unfair imprisonment and trial of innocents. It would defeat the entire purpose of the probable cause determination if the State is *only* required to describe the facts that suggest guilt while ignoring the facts that point to innocence. The irony of the State's position is that had all of the facts been presented to the trial court *when they were known*, it is highly likely Norman's trial would never have occurred in light of their tendency to discount the reliability of the 12-year-old informant.

In light of the abundant evidence of misconduct here, a hearing under CrR 7.8(b)(3) is necessary to examine the fairness of the proceedings and to determine the appropriate remedy.

VI. CONCLUSION

The State does not seriously challenge the issues raised either in the Brief of Appellant or in Norman's Statement of Additional Grounds. The State does not – indeed, cannot – defend the actions of the trial prosecutor in suppressing exculpatory evidence critical to the probable cause determination. These facts warrant the hearing Norman requested. The order denying Norman's motion should be reversed and the cause remanded for a hearing on his motion as provided by CrR 7.8(c)(3).

RESPECTFULLY SUBMITTED this 13th day of January, 2012.

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CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the Reply Brief of Appellant upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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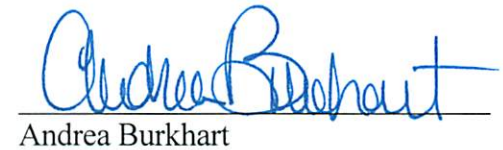
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 13th day of January, 2012 in Walla Walla, Washington.



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