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**Nov 22, 2011**  
Court of Appeals  
Division III  
State of Washington

29821-3-III  
COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DAVID WHISLER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR GRANT COUNTY

The Honorable John D. Knodell  
The Honorable John Antosz

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RESPONDENT'S BRIEF

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**I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

**II. RELIEF REQUESTED**

The State asserts no error occurred in the issuing of a search warrant for the Appellant's residence and the Appellant was appropriately sentenced after being convicted at trial.

**III. ISSUES**

- A. Whether the issuing magistrate abused his discretion in issuing a search warrant for Mr. Whisler's residence.
  
- B. Whether the court abused its discretion by declining to consider certain "mitigating factors" raised by the defense at sentencing.

**IV. STATEMENT OF THE CASE**

On May 19, 2010, members of the Interagency Narcotics Enforcement Team (INET) obtained a search warrant (Warrant) for the residence of Monte Haughey and David Whisler. Clerk's Papers (CP) at 31-36. The Warrant was based on information provided by two citizen informants as well as independent verification by INET. *Id.* When INET

executed the Warrant and searched the residence they located a marijuana grow in Mr. Whisler's bedroom (and a firearm in Mr. Whisler's closet), as well as a substantial amount of individually packaged marijuana throughout the front room of the residence along with evidence indicative of marijuana sales. Verbatim Report of Proceedings 1 (RP) at 58-63<sup>1</sup>. Mr. Whisler confessed to INET that he was both selling marijuana and giving it to some people for free. *Id.* Mr. Whisler was convicted at trial of Possession of Marijuana with Intent to Deliver and Unlawful Possession of a Firearm in the 2<sup>nd</sup> Degree. CP at 75-76. Judge John Antosz, who presided over Mr. Whisler's trial, sentenced Mr. Whisler to 48 months (on the firearm charge) after considering that Mr. Whisler had previous convictions for Possession of Marijuana with Intent to Deliver and Unlawful Possession of a Firearm among his 7 prior felonies. 3 RP at 61-65; CP at 95.

Mr. Whisler cites two causes of error. First, he argues the information INET provided in the affidavit supporting the Warrant (Affidavit) was not sufficient to establish probable cause. Second, he asserts the trial court failed to recognize and exercise its discretion to

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<sup>1</sup> For ease of reference, the Verbatim Report of Proceedings will be cited as follows:  
1 RP = RP (March 2, 2010)  
2 RP = RP (March 3, 2011)  
3 RP = RP (June 3, 2010 / August 25, 2010 / September 15 & 22, 2010 / February 2 & 23, 2010 / March 28, 2011)

consider “mitigating factors” under RCW 9.94A.535(1). Mr. Whisler’s claims are meritless and this court should uphold Mr. Whisler’s convictions and sentence.

## V. ARGUMENT

### A. THE AFFIDAVIT CONTAINED MORE THAN ENOUGH INFORMATION TO SATISFY *AGUILAR-SPINELLI*.

The warrant clause of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution impose a requirement that “a search warrant be issued upon a determination of probable cause based upon ‘facts and circumstances sufficient to establish a reasonable inference’ that criminal activity is occurring or that contraband exists at a certain location. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002) (quoting *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)). Probable cause is established if an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in criminal activity. *Id.* (citing *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)).

Review is limited to the four corners of the affidavit supporting probable cause. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). A magistrate's decision to issue a search warrant is reviewed for abuse of discretion. *Id.* Appellate courts generally give great deference to the magistrate. *Id.* Even in cases where the propriety of issuing the search warrant is debatable, the deference due to the magistrate's decision tips the balance in favor of upholding the warrant. *State v. Jackson*, 102 Wn.2d 432, 446, 688 P.2d 136 (1984).

### *Aguilar-Spinelli*

When information establishing probable cause justifying a search warrant is dependant upon information supplied by an informant, the requirements of the *Aguilar-Spinelli* test must be met.<sup>2</sup> The *Aguilar-Spinelli* test has two prongs: (1) "basis of knowledge" and (2) "veracity." *Jackson*, 102 Wn.2d at 437.

### "Basis of Knowledge" Prong of *Aguilar-Spinelli*

Under the "basis of knowledge" prong of the *Aguilar-Spinelli* test, facts must be revealed which permit the judicial officer to determine

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<sup>2</sup> See *State v. Jackson*, 102 Wn.2d 432, 435-36, 688 P.2d 136 (1984); The *Aguilar-Spinelli* test is aquired its names from the United States Supreme Court decisions of *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). This test was abrogated for purposes of the Fourth Amendment by *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Washington courts, however, continue to apply the *Aguilar-Spinelli* test under article I, section 7. See *State v. Jackson*, 102 Wn.2d 432.

whether the informant had a basis for his allegation that a certain person had committed a crime. *Jackson*, 102 Wn.2d at 437. The “basis of knowledge” prong is satisfied if the informant has personally seen the facts asserted or passed on first-hand information. *Id.*

“Veracity” Prong of Aguilar-Spinelli

Under the “veracity” prong of the *Aguilar-Spinelli* test, facts must be presented to determine either the inherent credibility of the informant or the reliability of his information on that particular occasion. *Jackson*, 102 Wn.2d at 437. This prong may be satisfied in either of two ways: “(1) the credibility of the informant may be established; or (2) even if nothing is known about the informant, the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth.” *State v. Lair*, 95 Wn.2d 706, 709-10, 630 P.2d 427 (1981).

The credibility of a confidential informant rests on whether the informant is a private citizen or a professional informant. *State v. Atchley*, 142 Wn. App. 147, 162, 173 P.3d 323 (Div. III, 2007) (citing *State v. Ibarra*, 61 Wn. App. 695, 699, 812 P.2d 114 (1991)). If the informant is a citizen, the analysis changes depending on whether his or her identity is known to the police. *Id.* When the identity of the informant is known, the necessary showing of reliability is relaxed. *Id.* (citing *State v. Gaddy*, 152

Wn.2d 64, 72-73, 93 P.3d 872 (2004)). Where the identity of the informant is known to the police but not disclosed to the magistrate, the affidavit must contain “background facts to support a reasonable inference that the information is credible and without motive to falsify.” *Id.* (citing *State v. Cole*, 128 Wn.2d 262, 287-88, 906 P.2d 926 (1995) (quoting *Ibarra*, 61 Wn. App. At 699-700)); See also, *State v. Rodriguez*, 53 Wn. App. 571, 576, 769 P.2d 309 (1989).

#### *Independent Police Corroboration*

Even if either or both prongs of the *Aguilar-Spinelli* test are not met, probable cause may be established by independent police work that corroborates the informant’s tip to such an extent that it supports the missing elements. *State v. Atchley*, 142 Wn. App. at 163 (citing *Jackson*, 102 Wn.2d at 437).

#### *The Search Warrant & Affidavit*

The Affidavit shows that 2 different citizen informants provided information to the police (CS 1 and CS 2). Both informants provided first-hand knowledge, which was supported by the observations of the other.

CS 1 informed INET that he/she had personally observed high amounts of short stay vehicular traffic coming and going from the residence in question a couple times per month. CP at 33-35. CS 1 personally observed that it was common to have approximately 10

vehicles a day arrive at the residence, stay for just a few minutes and depart. *Id.* CS 1 reported that he/she had seen this happen on a number of occasions. *Id.* CS 1 described the residence where this activity was taking place and described what the two individuals looked like that lived there. *Id.* CS 1 informed INET that the two males at the residence were known as “Monte” and “Wiz”. *Id.* INET showed pictures of the individuals to CS 1 who positively identified them. *Id.*

CS 2 informed INET that he/she had personally seen several marijuana plants being removed from the residence. CP at 33-35. CS 2 went into detail about the size of the plants, the containers they were in, and the appearance of the leaves. *Id.* CS 2 also described the residence, including noting that there was a sign in one of the windows stating “legalize don’t penalize” with a depiction of a marijuana leaf. *Id.*

INET confirmed that the residence in question was occupied by the two individuals identified by CS 1. CP at 33-35. INET confirmed that the occupants of the residence, reported as “Monte” and “Wiz” by CS 1, were actually Monte Houghey and David Whisler. *Id.* INET observed the residence was consistent with the description they received from the informants, including the marijuana sign in the window. *Id.*

Additionally, INET obtained electricity consumption records from the Grant County PUD. *Id.* The information indicated that the

consumption rate of energy was in some cases 5 times higher than that drawn from a comparable residence (which was actually 300 square feet larger). *Id.* Finally, INET obtained the criminal history of both Haughey and Whisler. *Id.* Mr. Whisler had multiple prior felony convictions including a prior conviction for manufacturing marijuana and misdemeanor drug convictions (including marijuana possession).

INET knew who both CS 1 and CS 2 were and contacted them personally (which would suggest INET had the contact information for both CS 1 and CS 2). *Id.* The affidavit states that both CS 1 and CS 2 were familiar with the look of marijuana and marijuana plants. *Id.* Both informants were members of the community and had no known criminal history. *Id.* INET reported that the informants appeared to have nothing to gain other than their concern for the community and the need to report narcotics activity. *Id.* CS 1 and CS 2 made their observations under circumstances involving no criminal activity on their part.

*The information in the Affidavit satisfied the "basis of knowledge" prong of Aguilar-Spinelli*

The information contained in the Affidavit more than satisfies the "basis of knowledge" prong of *Aguilar-Spinelli*. Again, under *Jackson*, the "basis of knowledge" prong is satisfied if the informant has personally seen the facts asserted or passed on first-hand information. *Jackson*, 102

Wn.2d at 437. As was indicated in the affidavit, the two informants are members of the community who saw and reported these things from first hand knowledge. CS 1 told INET that CS 2 also had seen some of the criminal activity and INET confirmed the truth of that statement when they contacted CS 2. Additionally, officers were able to confirm the majority of what both informants provided. Therefore, this prong of the *Aguilar-Spinelli* test is met.

*The information in the Affidavit satisfied the "veracity" prong of Aguilar-Spinelli*

As to the "veracity" prong, this court, in *State v. Atchley*, found this prong was satisfied with even less information than was available in the present case. *Atchley*, 142 Wn. App. at 162-63. In *Atchley*, the court found the credibility prong was satisfied based only on the following:

Here, there was sufficient evidence that the credibility of the informant was established. The informant provided his or her name and other contact information to police. The informant received no compensation or other reward in return for the tip. A background check revealed nothing to give Deputy Rosenthal reason to suspect the information provided was false. The informant said his or her reason for coming forward was to assist law enforcement in ridding the community of suspected narcotic manufacturers and traffickers.

*Atchley* 142 Wn. App. at 162-63. Like *Atchley*, the informants provided their name and presumably contact information (as they were willing to make themselves known to the magistrate). They received no compensation. They had no known criminal history. They also stated they came forward because they were concerned members of the community and felt it was their duty to report drug crimes. Additionally, unlike *Atchley*, the officers and magistrate were able to rely on information provided by two separate informants.

Finally, the officers were able to confirm through independent investigation many of the things the informants told them. Therefore, the second prong of the *Aguilar-Spinelli* test is met. Considering the great deference to be given to the issuing magistrate, the warrant should be upheld.

B. THE SENTENCING JUDGE PROPERLY DECLINED TO CONSIDER MR. WHISLER'S "MITIGATION" ARGUMENTS FOR A DOWNWARD DEPARTURE.

Mr. Whisler next argues that he should be resentenced because Judge Antosz did not consider unlisted "mitigating factors" at sentencing. Mr. Whisler asked the judge to grant a downward departure from the standard sentencing range because some of his convictions would have

“washed” if the current crime would have been committed a short time later. 3 RP at 55-58. This court should reject Mr. Whisler’s argument.

Whether and when a conviction will be subject to “washing out” is governed under RCW 9.94A.525. The “wash out” rules are incorporated into the general guidelines determining a standard range sentence. Mr. Whisler cites to no case law suggesting a sentencing judge’s decision to not consider this type of “mitigating factor” is cause for re-sentencing. On the contrary, case law suggests that criminal history considerations are already a part of the standard range and should not be considered. See generally, *State v. Khanteechit*, 101 Wn. App. 137, 5 P.3d 727 (2000) (defendant’s lack of criminal history was not a mitigating factor because it was already factored into the offender score); *State v. Ha’Mim*, 132 Wn.2d 834, 940 P.2d 633 (1997) (lack of misdemeanor or juvenile offenses did not constitute a proper reason to justify the imposition of an exceptional sentence below the standard range).

Just as with a lack of prior criminal history, the ages of prior convictions are already accounted into the standard range under the “wash out” rules. Mr. Whisler’s previous convictions did not wash out and arguing that they would have if more time had passed should not be considered a valid reason for mitigation. Therefore, the sentencing judge

did not abuse his discretion for not considering this “mitigating factor” and Mr. Whisler’s sentence should stand.

**VI. CONCLUSION**

The Affidavit in support of the Warrant easily meets the standards of *Aguilar-Spinelli* and the Warrant should be upheld. Additionally, the sentencing judge properly declined to consider “almost washed out” arguments made by Mr. Whisler to justify a downward departure from a standard range sentence. Mr. Whisler’s convictions and sentence should stand.

Dated this 17<sup>th</sup> day of November 2011.

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Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 29821-3-III
	)	
vs.	)	
	)	
DAVID WHISLER,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
_____		

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Respondent's Brief in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Dana M. Nelson  
Nielsen, Broman & Koch, PLLC  
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That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Jennifer L. Dobson, Attorney at Law, and to Appellant containing a copy of the Respondent's Brief in the above-entitled matter.

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Dated: November 22, 2011.

  
\_\_\_\_\_  
Kaye Burns