

FILED

JAN 27 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 302245-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

SARA C. KORTAN,

Appellant.

BRIEF OF APPELLANT

JAMES E. EGAN
Attorneys for Appellant

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Kennewick, WA 99336
(509) 586-3091

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ASSIGNMENT OF ERROR NO. 1

The Court erred in failing to suppress the evidence found at defendant's home.

ISSUE NO. 1

The affidavit in support of the warrant was insufficient to establish the veracity of the informant under Aguilar/Spinelli.

ISSUE NO. 2

The defendant made no statement against her penal interest.

STATEMENT OF FACTS

On June 3, 2010, defendant, Sara Kortan was charged by the Douglas County Prosecutor, Steven Clem with possession of methamphetamine with intent to manufacture a controlled substance or intent to deliver a controlled substance. (CP 001). The information also alleged a school zone violation. (CP 002). After losing a 3.6 suppression hearing (CP 83:3), the defendant stipulated to facts sufficient for a guilty finding. (CP 055-056). She was sentenced to 36 months. (CP 76:10). The sentence was stayed pending this appeal upon defendant's payment of an appeal bond. (RP 8/15/10; 105:1). The defendant filed a timely notice of appeal on August 22, 2010. (CP 77).

There was no evidence to support the allegations contained in the information except for evidence that the State obtained by seeking and serving a search warrant on April 30, 2010 at the defendant's home in Wenatchee, Washington. (CP 006). Without the evidence obtained by serving the search warrant at the

defendant's home, there would be no basis whatsoever for charging the defendant with a crime.

The search warrant was based totally upon a search warrant affidavit (CP 022-23 and 025) that said that evidence and contraband (methamphetamine) were located in defendant's residence in Wenatchee. (CP 022). The following facts were listed in the affidavit to support this allegation. (CP 022-23 and 025).

1. That the affiant is an experienced officer who has previously investigated methamphetamine.
2. That the affiant served a search warrant at Lanny Griffith's home on April 22, 2010.
3. That the affiant found marijuana and methamphetamine in a bedroom that was shared by Lanny and his wife Tracy Donovan.
4. Ms. Donovan was asked if the police would "find any illegal drugs in this bedroom." She replied, "a pot pipe, a meth pipe, and some weed." (She did not say that these were hers or that she possessed or used them).
5. Ms. Donovan was asked about what would be found in "a safe in the bedroom. She replied, "there shouldn't be anything in there any more, we've been trying to get away from that lifestyle."

6. Ms. Donovan admitted that Lanny was selling methamphetamine.
7. Ms. Donovan was reluctant to admit that she had knowledge of Lanny's involvement.
8. Ms. Donovan said that Lanny obtained a half ounce of methamphetamine every day or every other day. (She did not say that she obtained meth).
9. Ms. Donovan said Lanny (not herself and not they) divided the meth into smaller quantities for sale.
10. Ms. Griffith said that Lanny (not herself and not they) sold meth to about five different people.
11. Ms. Griffith was asked where Lanny (not herself and not they) bought the meth and Ms. Griffith told the police Sara, referring to the defendant.
12. The affiant then changed the affidavit questions to ask where they (Lanny and Tracy) had been buying, not where Lanny had been buying. The officer stated that Tracy said:
 - a. They had obtained a half ounce on April 21st;
 - b. Lanny (not they) had paid \$1,100 or \$400 to Sara;
 - c. They got poor quality meth on the 21st;

- d. They returned the poor quality of meth for a refund;
- e. Tracy saw defendant with a sandwich bag 1/4 full of meth on April 21st;
- f. Tracy said she did not always go with Lanny, but knew he always went to Sara's house;
- g. Tracy had accompanied Lanny to Sara's house on numerous occasions for the purpose of buying meth. (CP 022-023 and 025).

This change from Lanny's actions and what he did to their actions and what they did is explained to the Court by the police officer, affiant Jeff Dilks, in testimony at the CrR 3.6 hearing on May 9, 2011. On direct examination by the State, Officer Dilks is asked, "did you discuss with her (Tracy) her involvement in narcotics sales?" The officer stated that he told her that he believed either she or Mr. Griffith, or both were involved in selling meth and Ms. Griffith said, "we've been trying to get away from that lifestyle." (RP 5/9/11; 68:18).

When asked if the officer further discussed that issue (her involvement in drug sales), the officer testified that she said that Lanny (not her and not they) sold meth to about five different people (RP 5/9/11; 68:24); that Ms. Donovan did not tell the police who the five people were (RP 5/9/11; 69: 1); and that he (Lanny) bought a half ounce everyday or every other day (RP 5/9/11; 69:2).

The officer then, as he had done in his affidavit, changed the pronoun “he” or “Lanny” to “they.”

- a. I asked her who her supplier was (RP 5/9/11; 69:11);
- b. They had been buying meth (RP 5/9/11; 69:22);
- c. They bought a half ounce the previous day (RP 5/9/11; 69:25);
- d. They took it back (RP 5/9/11; 70:1);
- e. Sara was their only supplier (RP 5/9/11; 70:2); and
- f. How much they paid for meth (RP 5/9/11; 70:3).

The defendant believes that the most significant part of the affiant's CrR 3.6 testimony occurred when Officer Dilks was asked, "did she (Tracy) indicate whether or not she participated in the purchase of meth from Sara?" He responded, "she really didn't say that she was the primary person that had purchased it, but she had been there during the purchases and was aware of what was going on (RP 5/9/11; 70:20).

Police officers, based upon this affidavit, obtained a search warrant, served it upon defendant's home, and found drugs in her home.

In findings and conclusions prepared by the prosecution and approved by the court (CP 078-083), the court found as true facts the following disputed facts:

Detective Dilks testified that during his conversation with Terry Donovan on April 22, 2010 inside her house she told him:

1. He would find a pot pipe, a methamphetamine pipe and some "weed" in her bedroom.

This finding is disputed because in fact the affidavit said in a bedroom she shared with Lanny, not in her bedroom. There is no indication in the affidavit that Ms. Donovan claimed ownership or use of these items.

2. Her husband, Lanny Griffith, was selling methamphetamine, and described that he typically obtained a half ounce every other day which he would divide into smaller quantities for sale to about 5 different people;
3. She wrote on a piece of paper that "Sara, Handy Hands Massage" was Lanny Griffith's methamphetamine supplier. Detective Dilks did not retain or save this alleged piece of paper. Ms. Donovan discussed that they had been buying from Sara for several months with the last occurrence on April 21, 2010.

Of significance is the testimony of Detective Dilks who stated Tracy really didn't say she participated in the purchase of methamphetamine (RP 5/9/11; 70:20). Finding number 3 is disputed in so far as it states or implies that Tracy did participate in the purchases.

4. She stated that they obtained a half ounce of methamphetamine on April 21st. She claimed to have

short term memory loss and could not remember how much Lanny paid Sara for the one half ounce. "It was either \$1,100 or \$400."

The use of the pronoun "they" should be considered in light of Detective Dilks statement that Tracy never said she participated. Finding number 4 is disputed as it implies Tracy did participate in the purchases.

5. That the methamphetamine that Sara gave them on April 21 was such poor quality that the returned it to Sara and asked for a refund, and that Sara had a sandwich bag that was about 1/4 full of methamphetamine.

The use of the pronoun "they" is explained at RP 5/9/11; 70:20). Finding number 5 implies that Tracy was involved in the purchases and it is therefore disputed.

6. That she didn't always accompany Lanny Griffith when he purchased methamphetamine from Sara, but she knew that he always went to Sara's house to make the purchases.
7. That she had accompanied Lanny Griffith on numerous occasions to Sara's house for the purpose of purchasing methamphetamine, and that they would always go inside the house to complete the transaction,

and that she was certain that Sara stores the drugs in the house.

8. That she didn't know the address of Sara's house, but gave Detective Dilks directions to the house, phone number and business name "Handy Hands Massage." She stated that the business number was in the phone book.

ARGUMENT

ASSIGNMENT OF ERROR NO. 1

The Court erred in failing to suppress the evidence found at defendant's home.

ISSUE NO. 1

The affidavit in support of the warrant was insufficient to establish the veracity of the informant under Aguilar/Spinelli.

ISSUE NO. 2

The defendant made no statement against her penal interest.

ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR NO. 1

Article 1, section 7 of the Washington State Constitution has been interpreted to require a 2 prong test to establish probable cause in relation to allegations made by an informant. The 2 prongs,

requiring a showing of the veracity of the informant and a basis for knowledge of the information, are outlined in two federal cases, *Spinelli v. U.S.*, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed.2d 637 (1969) and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964). 15 years after this test was established, the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983) discarded this 2 prong test in favor of a “totality of the circumstances” test.

In *State v. Jackson*, 102 Wn.2d 432 (1984), the State of Washington maintained the 2 prong *Aguilar/Spinelli* test because this state wanted greater protections against the invasion of citizen’s homes. This state still requires both a showing of informant veracity and a basis of knowledge as essentials to establish probable cause to search.

In the instant case, defendant does not dispute the basis of knowledge prong. The informant told police that she was in the defendant’s home the day before the warrant was issued and saw the defendant with 1/4 of a sandwich bag of methamphetamine. If this

statement is true, it certainly provides the magistrate with enough facts as to how this informant would know that meth was probably in the place to be searched.

However, this detailed statement of where drugs were seen provides no information as to the veracity of the informant. This story could be a complete lie to conceal the identity of the informant's true supplier. Under the veracity requirement of *Aguilar/Spinelli*, a magistrate must have information in the affidavit that would allow him to conclude that the person claiming to have seen drugs in someone's home the day before is a truthful person who is now telling the truth.

As the *Jackson* case states,

Even if the informant states how he obtained the information which led him to conclude that contraband is located in a certain building, it is still necessary to establish the informant's credibility. See *Woodall*, 100 Wash.2d at 76-78, 666 P.2d 364; *Fisher*, 96 Wash.2d at 965-66, 639 P.2d 743; *Partin*, 88 Wash.2d at 903-04, 567 P.2d 1136.

The most common way to satisfy the “veracity” prong is to evaluate the informant’s “track record”, i.e., has he provided accurate information to the police a number of times in the past? *Woodall*, 100 Wash.2d at 76, 666 P.2d 364; *Fisher*, 96 Wash.2d at 965, 639 P.2d 743; see also 1 W. LaFave, Search & Seizure § 3.3(b) (1978). If the informant’s track record is inadequate, it may be possible to satisfy the veracity prong by showing that the accusation was a declaration against the informant’s penal interest. *State v. Bean*, 89 Wash.2d 467, 572 P.2d 1102 (1978); 1 W. LaFave, § 3.3©.

In the *Bean* case, the Supreme Court approved the veracity prong of an informant’s statement on the basis of a statement against penal interest. In the *Bean* case, a gentleman by the name of Hawn was arrested by police officers. Hawn, with his attorney, a police officer, and a prosecutor present, entered into an agreement where, in return for a favorable recommendation to the court at the time of his sentencing, Hawn would furnish good information to the police concerning a more important drug dealer. Hawn, under this agreement, which was conditioned upon truthfulness, then told

police where and how he purchased drugs, used drugs, and sold drugs. The Supreme Court found that because of a strong motive to tell the truth (favorable sentencing treatment), that Hawn had to be accurate in his information to police. The *Bean* Court found that the magistrate was justified in finding Hawn reliable.

In the instant case, Tracy Donovan had no motive to be accurate. She was never promised anything for her statements. She never implicated herself in a crime, but only spoke of her husbands criminal acts. She confessed only to presence and knowledge that criminal acts were occurring. This is insufficient to be an accomplice. WPIC 10.51, RCW 9A.08.020. Rather than having a motive to tell the truth, Tracy's motive would be to try to hide her husbands source of supply or to hide any participation she might have in the purchase of meth.

In *State v. Rodriguez*, 53 Wn. App. 571 (1989), the Court cited *Aguilar/Spinelli* and *Jackson* and reaffirmed that the two prongs of the test are independent and both must exist to establish probable cause. *Id.* at 574. *Rodriguez* cites *State v. Northness*, 20

Wn. App. 551 (1978) to establish that if the informant is an uninvolved witness or victim of a crime, then the necessity of credibility is relaxed. *Id.* at 574. The same is true if the informant is named. However, merely supplying the name does not turn an arrested drug dealer into a citizen informer who provides information to police to fulfill his duty as a citizen. *Rodriguez* said:

[W]hen an average citizen tenders information to the police, the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case. . . .

. . . The . . . modern view . . . is that as a general proposition any person purporting to be a crime victim or witness may be presumed reliable, though the police must remain alert to the existence of any circumstances which would make that presumption inoperative in a particular case. Thus, courts frequently emphasize, in the course of holding that veracity was properly presumed, that the police were unaware of any “apparent motive to falsify” or that it did not appear to the police “that the accusations by the citizen were reported to the police merely to spite defendant.” Other decisions stress that the police, upon learning of a possible motive to falsify, took additional steps to ensure reliability.

(Footnotes omitted.) 1 W. LaFave, Search and Seizure § 3.4(a), at 718-20 (2d ed. 1987). *Id.* at 575.

Naming an informant is only one factor to consider in coming to a veracity determination. *Rodriguez* said:

Identification of the informant thus may be viewed as merely a factor to be considered in determining whether the informant is truly a citizen informant, i.e., an innocent victim or uninvolved witness to criminal activity. In the Washington cases cited above, the circumstances promoted suspicions that the informants were more than merely civic-minded citizens. In *Chatmon* and *Singleton*, the informants' complete anonymity raised the possibility they were "anonymous troublemaker[s]". *State v. Northness*, supra 20 Wash.App. At 557, 582 P.2d 546 (quoting *United States v. Darenbourg*, 520 F.2d 985, 988 (5th Cir. 1975)). And in *Mickle, Franklin* and *Berlin*, the affidavits did not explain why the informants were present at the sites of marijuana grow operations. The circumstances of the informants' tips raise suspicions they were involved criminally themselves or were otherwise motivated by self-interest. See *State v. Northness*, supra 20 Wash.App. At 557, 582 P.2d 546. In all of these cases, suspicious circumstances

greatly diminished the presumption of reliability of the informants.
Id. at 577.

Defendant argues that the affidavit makes clear that Tracy is not just a civic-minded citizen, not an innocent victim, or uninvolved witness. The affidavit in this case shouts out with suspicious circumstances that should greatly diminish any presumption of Tracy's reliability.

In *State v. Ibarra*, 61 Wn. App. 695 (1991), the Court stated that the need to show veracity was increased when there was cause to worry that an informant might be an anonymous troublemaker, someone acting on self interest or someone just passing a casual rumor. The *Ibarra* Court stated that an informant who, "is somehow involved in the criminal activity or is motivated by self interest is not a true citizen informant and any presumption of reliability must be diminished." *Id.* at 700.

In the instant case, Officer Dilks voided suspicions that Ms. Tracy Donovan was somehow involved, and her husband was unquestionably involved in the criminal activity. Tracy was

motivated by self interest to keep herself out of trouble and to get her husband out of trouble and this self interest could very well cause her to name a supplier other than her husband's true supplier.

It would have been just as easy for Tracy Donovan to know the address or general location of John Hotchkiss' or Eric Biggar's home and to write either name on a piece of paper and say that one or the other was her husband's supplier. She could have said that she got a half an ounce at either home the day before and watched her husband pay the judge or the prosecutor \$1,100 or \$400. She could have said she was certain that the dope was stored in the Hotchkiss/Biggar home. Ms. Donovan might not have had the Hotchkiss/Biggar phone number stored in her phone, but the police certainly could have found the Hotchkiss/Biggar address and phone number in the telephone directory or city directory just as they found this information for Ms. Kortan. If the police had driven by either home, they likely would have found a vehicle in the driveway registered to Hotchkiss or Biggar. If the police checked their criminal records, it is probable that, just like Sara Kortan the instant

defendant, neither would have had felony or misdemeanor convictions.

Would a magistrate presented with the name of Hotchkiss or Biggar rather than Sara Kortan been required to find probable cause to search the prosecutor's or judge's home? Based upon the affidavit's analysis of Tracy's credibility, would the magistrate command the police to search the Hotchkiss/Biggar home and seize meth?

The State may argue that Ms. Donovan's motivation and self interest was to tell the truth to keep from immediately being taken to jail or to get some consideration for herself or her husband for crimes that might be charged. The affidavit does not tell the magistrate that this was why the police thought she was reliable. There is no mention of this in the affidavit that she was promised anything for truthful statements. In *Bean*, the magistrate was told that Hawn was promised something for truthfulness. If motivation to avoid was present, Ms. Donovan still could have avoided jail by saying any name - - perhaps not Hotchkiss or Biggar - - but the name

of any acquaintance or enemy whose telephone number was in her cell phone. If Ms. Donovan did have a motivation to tell the truth to the officer, the motivation sure went away when she got to court and said the officer had made up the whole story.

Judge Hotchkiss got it right when he said that, “I think every judge in the state probably recognizes that information that you receive from drug users is not necessarily always as reliable as you would like. . . .” (RP 5/9/11; 86:5). Judge Hotchkiss erred however when he said “. . . but that is kind of the way the chain goes on the particular matter.” A drug dealer snitching off an alleged supplier may be the way the chain goes, but this alone is not sufficient for an independent magistrate to order police to break into, enter, and search a citizen’s home. Before the use of this extraordinary power of the state can be ordered, there must be a showing that the accusing informant is reliable—something in the affidavit that would convince a judge of this state that this informant is reliable.

On some occasions, Courts find that a statement against penal interest is a sufficient substitute for an informant’s past track record

of proving information that is shown by actual experience to be true, reliable information. Both parties to this litigation agree that Ms. Donovan had no qualifying past track record and that no such facts were included in the affidavit for the search warrant. Appellant also argues that no statement against Ms. Donovan's penal interest was included in the affidavit. She is not reported as stating that any of the drugs or paraphernalia in the house belong to her, were used by her, were purchased by her, or intended for sale by her. She told police that they would find, "a pot pipe, a meth pipe, and some weed" in a bedroom that she shared with her husband. The affidavit does not say she admitted that these items belong to her or were used by her. She said, "that there should not be anything in the safe as we've been trying to get away from that lifestyle". She did not admit that she ever owned, possessed, used, purchased, or sold anything that was now in, or in the past, had been in the safe. She never said that she personally ever opened or used that safe. She said that her husband Lanny was selling meth and buying meth every other day or

more often. She said that Lanny was dividing the meth for sale and Lanny was selling to about 5 different people.

Starting at the fourth paragraph on the second page of the affidavit the affiant starts using the pronoun "they" in reference to illegal activities. This ambiguity as to who was performing illegal acts, Lanny or they, is cleared up by Detective Dilks in his testimony at the 3.6 hearing when the following exchange occurred:

- Q. Did she indicate whether or not -
uh - she participated in the
purchase of methamphetamine
from Sara?
- A. She didn't really say that she was
the primary person that had
purchased it -
- Q. Okay.
- A. - - but she had been there during
the purchases and was aware of
what was going on. (RP 5/9/11;
69:14-20).

In the Court's finding and conclusions, the Court stated:

At the time she provided the
information detailed in Detective Dilk's
affidavit for probable cause she

implicated herself in the purchase of controlled substances, acknowledged that her residence was used as a place for the sale of controlled substances, and acknowledged that controlled substances and paraphernalia were located inside the house, and she cooperated openly with law enforcement during the investigation. Under these circumstances, and the fact that she was a named citizen informant, the Court concludes that the affidavit for probable cause established the reliability prong of Aguilar-Spinelli. (CP 082: 7-10).

Defendant argues that Tracy did not implicate herself in the purchase of controlled substances. Officer Dilk's testified that she did not. (RP 5/9/11; 70:16). Neither Ms. Donovan nor anyone else, including the police, said that this residence was used as a place for the sale of controlled substances. Ms. Donovan said that Lanny sold to 5 people, but Ms. Donovan did not say she knew them or that they had been to her home or that sales took place in the home. She did say that she knew drugs and paraphernalia were present in the bedroom she shared with her husband, but presence at the scene of a crime and knowledge of it is not a crime. Ms. Donovan said she and

her husband were, “trying to get away from that lifestyle.”

Defendant argues that while Ms. Donovan was named in the affidavit, she was not a citizen informant voluntarily providing information to police for civic reasons.

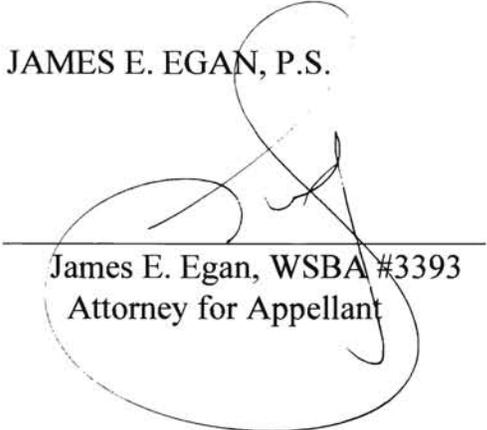
Defendant also argues that spouses of people involved in drug dealing who are also suspected of being involved themselves (RP 5/9/11; 68:15); who are caught in close proximity to drugs, are not looked upon as reliable sources of information about these drugs. Citizens, drug dealers, and every judge in this state do not believe such informers are reliable or truthful. Police officers would laugh at anyone who purported to rely upon the words of spouses caught in these circumstances. Defining and categorizing these informers with legal nuances in an effort to coat them with a mask of reliability disserves logic, the law, and a citizens right not to have his private affairs disturbed, nor to have his home invaded.

CONCLUSION

Defendant urges the Court to reverse the trial Court and dismiss the charges in the information.

Respectfully Submitted this 25th day of January, 2012.

JAMES E. EGAN, P.S.



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