

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

FILED
Mar 30, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,)	NO. 302245-III
Plaintiff/Respondent,)	
)	
vs.)	
)	
SARA C. KORTAN,)	
Defendant/Appellant.)	

RESPONDENT'S BRIEF

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INTRODUCTION

Respondent, State of Washington, asks this court to uphold defendant Sara Kortan's bench trial conviction for possession of a controlled substance, methamphetamine, with intent to deliver.

QUESTION PRESENTED

Whether information provided by a named informant supported probable cause for the issuance of the search warrant?

SUMMARY

The central issue in this appeal is whether information in the affidavit in support of a search warrant concerning the informant satisfied the Aguilar/Spinelli two-pronged test. Defendant concedes the basis of knowledge prong, but asserts the veracity prong was not satisfied because the informant, an admitted drug user, did not make a statement against her penal interest. The state contends the informant did indeed implicate her penal interest, and, in addition, her veracity was further bolstered through independent investigation by law enforcement.

STATEMENT OF THE CASE

The task force executed a search warrant at the residence of Tracy Donovan. CP 22. Based on information provided from Ms. Donovan the task force applied for and received a search warrant for

defendant's residence at a separate location. The task force then searched defendant's residence and located methamphetamine and other indicia of intent to manufacture or deliver. CP 55, 56.

An Information was filed in Douglas County Superior Court charging defendant with possession of methamphetamine with intent to manufacture or deliver, along with a school bus stop enhancement. CP 1. Defendant's CrR 3.6 motion to suppress was denied after a hearing. CP 83. Defendant proceeded to a stipulated facts bench trial whereupon she was convicted and sentenced to 36 months. CCP 55-56, and CP 76. Defendant filed a timely notice of appeal. CP 77.

STATEMENT OF THE FACTS

The following information pertinent to informant's veracity was provided in the affidavit in support of the search warrant. See CP 22-23, 25. On April 22, 2010, the task force executed a search warrant at the home of Lanny Griffith and Tracy Donovan, husband and wife. Ms. Donovan and another person were present during execution of the warrant. Dilks presented Donovan with the search warrant and advised her of her Miranda warnings.

Prior to questioning Donovan, Dilks searched the upstairs bedroom shared by Donovan and her husband. The informant for the search warrant for Ms. Donovan's residence indicated that Mr. Griffith

was selling methamphetamine from his home and that he kept methamphetamine in his upstairs bedroom. Dilks found a safe which contained a plastic bag and a measuring scoop with residue which field tested positive for methamphetamine. A scoop and digital scale with methamphetamine residue was located next to the safe. A box of unused plastic bags was located inside the safe.

Upon questioning Donovan admitted the officers would find a pot pipe, a meth pipe, and "some weed" in her bedroom. Donovan eventually admitted her husband was still selling meth, that he would obtain a ½ ounce every day or every other day, and that he would measure, subdivide and repackage the meth for reselling.

Donovan stated her husband purchased meth from "Sara, Handy Hands Massage" in East Wenatchee on several different occasions, the last purchase occurring just the day before. Donovan would accompany her husband to Sara's house and was present when he purchased meth. Donovan did not know Sara's address but she provided directions to Sara's house. Donovan had Sara's phone number in her cell phone which she displayed to Dilks.

Dilks then took steps to independently corroborate certain information provided by Donovan. The phone number on Donovan's cell phone was the same number listed for Handy Hands Massage in the

phone book. Dilks drove to the address listed in the phone book and found that it matched the directions given by Donovan. Dilks ran the registration of a vehicle parked at the residence and it came back registered to Sara Kortan, the defendant. Dilks verified through law enforcement computer records that defendant was listed as a resident of this particular location. Dilks independently confirmed that defendant was associated with other known meth and drug users.

Using information gleaned from Ms. Donovan and from the search of her home, Dilks obtained a search warrant for the defendant's residence which was searched on April 30, 2010. The results of the search and the sufficiency of the evidence supporting the charge and the enhancement are not challenged.

A hearing was held on defendant's challenge to the search warrant. CP 78 – 83. The essence of the motion was that Dilks provided false statements in the affidavit (CP 81, ll. 11-12.), and that Ms. Donovan did not in any way implicate defendant in selling methamphetamine, and she did not provide the detective with defendant's phone number, business name or directions to defendant's house. CP 80, ll. 27-29. After hearing the witnesses, the court concluded, in part at CP 82:

Veracity. The Court finds that the testimony of Tracy Donovan given at the suppression hearing not credible. This testimony, however, occurred nearly one year after the search of her residence and under circumstances in which she lacked any motive to be truthful or cooperative with law enforcement or the State. 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 informant, the Court concludes that the affidavit for probable cause established the reliability prong of Aguilar-Spinelli.

...
Independent Investigation. Any deficiency in either prong was cured by Detective Dilks' independent investigation when he determined that: 1) that the defendant indeed resided at 247 Fourth Street SE, East Wenatchee, Washington; 2) that Tracy Donovan was able to give him directions to Ms. Kortan's residence; 3) that a vehicle registered to Sara Kortan was located in the address provided by Tracy Donovan; 4) that when he looked up the address and phone number for Handy Hands Massage, that information matched the phone number and business name given to him by Tracy Donovan.

ARGUMENT

I. The informant's veracity was established where she was named, gave a statement against her penal interest, demonstrated detailed information about the drug trade and the defendant's drug activities, and information connecting defendant to known drug users was independently corroborated by law enforcement.

A. Applicable legal principles.

The court's decision to issue a search warrant is reviewed for abuse of discretion and is entitled to great deference. See State v.

Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003); State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). But, “[a] trial court’s legal conclusion of whether evidence meets the probable cause standard is reviewed de novo.” In re Det. of Petersen, 145 Wn.2d 789, 799, 42 P.3d 952 (2002); see also State v. Nusbaum, 126 Wn.App. 160, 166-167, 107 P.3d 768 (2005). Appellate courts review an affidavit supporting a search warrant “in the light of common sense” and with doubts resolved in favor of the warrant. See Vickers, 148 Wn.2d at 108-109.

Under the federal and Washington state constitutions, law enforcement officials may not engage in unreasonable searches. U.S. Const. amend. IV; Wash. Const. art. I, § 7. A search warrant must be supported by probable cause. Vickers, 148 Wn.2d at 108; CrR 2.3(c). “Probable cause exists if the affidavit in support of the warrant 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. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The defendant bears the burden of establishing the search was unreasonable. State v. Hopkins, 113 Wn.App. 954, 958, 55 P.3d 691 (2002).

B. Aguilar-Spinelli two-pronged test.

Washington courts follow the two-prong *Aguilar-Spinelli* test to evaluate whether an informant's information provides probable cause to support the issuance of a search warrant. State v. Jackson, 102 Wn.2d 432, 434, 688 P.2d 136 (1984); Spinelli v. United States, 393 U.S. 410, 415, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed. 723 (1964). The magistrate must determine that (1) the informant had a “basis of knowledge” “for the information provided, and that (2) the underlying circumstances establish the informant is credible or the information reliable (“ ‘veracity’ ” prong). Jackson, 102 Wn.2d at 435. Both prongs must be met, but if one prong is not met, police may corroborate the information provided by the informant through independent investigation. *Id.* at 438.

Defendant does not challenge the “basis of knowledge” prong. Br. of Appellant, 10. Defendant focuses on the “veracity” prong and contends Donovan’s information is not reliable for two reasons: (1) Donovan does not make a statement against her penal interest; and (2) Donovan is a drug addict.

Washington courts have identified various factors that establish informant reliability: a) whether the informant is named in the affidavit, b) whether the informant made statements against penal interest, c)

whether the information was provided post-arrest, d) whether the informant has a track record of providing reliable information to police, e) how detailed and what kind of information the informant provided, and f) whether the information was corroborated. See State v. O'Connor, 39 Wn.App. 113, 119-121, 692 P.2d 208 (1984); see also State v. Lair, 95 Wn.2d 706, 711-712, 630 P.2d 427 (1981). No one factor is dispositive, and corroboration is not required. See O'Connor, 39 Wn.App. at 120.

The veracity prong may be satisfied in one of two ways: the informant's credibility may be established, or if nothing is known about the informant, the facts and circumstances surrounding the information may reasonably support an inference that the informant is truthful. See State v. Duncan, 81 Wn.App. 70, 76-77, 912 P.2d 1090, review denied, 130 Wn.2d 1001 (1996).

The informant in this matter made a statement against her penal interest where she admitted to Dilks that he would find drug pipes and drugs in her bedroom. An admission against penal interest is "one factor," "[p]articularly where [it] is not the only indication of reliability." State v. Chamberlin, 161 Wash.2d 30, 42 (2007)(citing State v. Lair, 95 Wash.2d at 711). Although an informant's statements against penal interest to the police "may add little or nothing to the informant's

credibility,” it is a factor considered in assessing veracity. State v. Estorga, 60 Wn.App. 298, 304, 803 P.2d 813 (1991). The circumstances under which the statement was made should be considered in determining whether or to what extent the informant’s statement supports an inference of veracity. See, e.g., State v. Lair, 95 Wash.2d at 710-11.

Here Donovan made her statement to a police officer who was serving a search warrant after she had been *Mirandized*, thus establishing her awareness that her statements could be used against her in a criminal prosecution. Further, Donovan’s statements were against her penal interest where she admitted drug pipes and drugs were in the bedroom she shared with her husband. Donovan at the very least implicated herself to be in constructive possession of drugs and drug paraphernalia. Constructive possession of drugs found on premises “is established when the person charged with possession has dominion and control over either the drug or the premises.” State v. Amezola, 49 Wn.App. 78, 86, 741 P.2d 1024 (1987) (citation omitted). There must be evidence demonstrating “that the defendant resides at the premises and is not merely visiting.” Amezola, 49 Wn.App. at 87. Whether a defendant had dominion and control over premises is determined by considering the

totality of the circumstances. State v. Alvarez, 105 Wn.App. 215, 221, 19 P.3d 485 (2001).

While Donovan may have tried to pin all of the drugs, drug paraphernalia, and the implements of the drug trade onto her husband, as the occupant of the premises, especially the bedroom, she has dominion and control over the premises and is just as culpable for those illegal items as is her husband. As such, the statements she gave were indeed against her penal interest.

Defendant also contends Donovan's veracity is diminished because she "is not just a civic-minded citizen, not an innocent victim, or uninvolved witnesses," and that "spouses of people involved in drug dealing who are also suspected of being involved themselves; who are caught in close proximity to drugs, are not reliable sources about these drugs." Br. of Appellant, 16, 23.

To the contrary, Washington courts have concluded informants in possession of drugs at the time of arrest or with a history of drug purchases meet the veracity prong where the informant made statements against penal interest and was identified in the affidavit. See State v. Estorga, 60 Wn.App. at 304-305 (finding veracity met where informant made post-arrest statements against penal interest after found in possession of amphetamine and marijuana obtained that day from the

place in question); State v. Hett, 31 Wn.App. 849, 850-852, 644 P.2d 1187 (1982) (finding veracity prong met where juvenile informant arrested for attempting to break into defendant's home admitted to having purchased marijuana from defendant in the past and was named in the affidavit); State v. Chenoweth, 127 Wn.App. 444, 455, 111 P.3d 1217 (2005), rev. granted, 156 Wn.2d 1031 (2006)(veracity prong met where the criminal informant was named, made statements against penal interest, and provided the amount and kind of detail sufficient to support an inference of reliability).

In addition to possessing all of the negative qualities assigned by defendant, Ms. Donovan provided information showing she was familiar with the drug trade, for instance that she knew the price of a ½ ounce of methamphetamine, and that her husband would buy and subdivide meth as evidenced by the measuring scoop, funnel, packaging material and digital scale in her bedroom. Ms. Donovan also provided detailed information about defendant's drug dealing from her residence.

Finally, the affidavit shows law enforcement took independent steps to ensure that Ms. Donovan was providing reliable information about the defendant. Dilks confirmed the phone number on Donovan's phone number belonged to defendant, that defendant's address belonged to Handy Hands Massage, that Donovan's directions to defendant's

residence were accurate. Separate to information provided by Donovan, Dilks confirmed through law enforcement records that defendant was associated with known methamphetamine dealers and drug users.

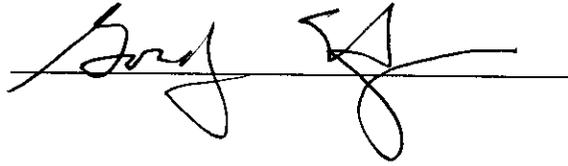
CONCLUSION

The information in the affidavit for the search warrant supported a reasonable inference the informant was being truthful where the informant was named, she provided a statement against her penal interest after being *Mirandized*, she provided detailed information about the drug trade and culture, she provided specific details about defendant's drug dealing, she knew the location of defendant's residence, she possessed defendant's telephone number, and where law enforcement independently corroborated information provided by the informant.

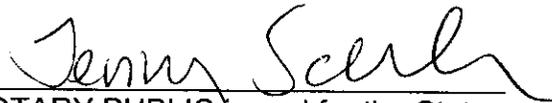
Respectfully submitted this 30th day of March, 2012.



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A handwritten signature in black ink, appearing to be "Amy J.", written over a horizontal line.

SUBSCRIBED AND SWORN to before me this 30th day of March,
2012.

A handwritten signature in black ink, appearing to be "Jenny Secker", written over a horizontal line.

NOTARY PUBLIC in and for the State
of Washington, residing at East
Wenatchee; my commission expires
02/26/2015.