

No. 32406-1-III

IN THE COURT OF APPEALS  
OF THE  
STATE OF WASHINGTON  
  
DIVISION THREE

FILED  
July 8, 2014  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

JOSE MARTINEZ,  
Appellant.

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

The Honorable Judge M. Scott Wolfram

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APPELLANT'S OPENING BRIEF

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JILL S. REUTER, Of Counsel  
KRISTINA M. NICHOLS  
Nichols Law Firm, PLLC  
Attorneys for Appellant  
P.O. Box 19203  
Spokane, WA 99219  
(509) 731-3279  
Wa.Appeals@gmail.com

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**A. SUMMARY OF ARGUMENT**

The trial court should have suppressed the evidence seized from Mr. Martinez's property pursuant to a search warrant. The search warrant was issued based upon an informant(s)' tip, set forth in an affidavit alleging three controlled buys of cocaine, at or near Mr. Martinez's house. The affidavit for the search warrant did not describe how the controlled buys were conducted. At the suppression hearing, the issuing judge and the affiant testified regarding their understanding of the term controlled buy. The trial court erred in considering this additional evidence. Should this Court disagree, even with this additional evidence, the veracity of the informant(s) was not established. The affidavit does not state whether the same informant was involved in all three controlled buys or why the informant was present. There is no information in the affidavit regarding the informant(s), other than their mere participation in the three controlled buys. The affidavit does not state whether the information on which the controlled buys were arranged came from the informant(s), or whether the informant(s) were given the information by the police. There was not sufficient independent police investigation to cure the lack of evidence of veracity of the

informant(s). Therefore, there was no probable cause for the issuance of a search warrant for Mr. Martinez's property.

**B. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering the following portions of "Undisputed Facts" 2:

Although Sgt. Bolster did not describe the specifics of each "controlled buy" in his affidavit, he did describe the location where each occurred, and the identity of the participants in those buys and their respective travels. In particular Sgt. Bolster described that during each "controlled buy" that the subject who delivered the drugs to the informant first went to [Mr. Martinez's house] before effecting the delivery to the informant.

(CP 161-162).

2. The trial court erred in entering "Undisputed Facts" 3:

Sgt. Bolster testified that in using the term "controlled buy" in his affidavit he understood and meant "controlled buy" to mean and incorporate the following, based on his training and experience: the informant would first contact the drug dealer to determine the time and place of delivery, which information the informant would give to the police; the informant would then meet with the police and be searched for drugs and money before being given buy money for the drugs; the police would conduct continuous surveillance of the informant from the time he/she left the police to meet with the drug dealer and then return to the police; and the police would then search the informant for any drugs or money upon the informant's return to the police.

(CP 162).

3. The trial court erred in entering “Undisputed Facts” 4:

District Court Judge Knowlton, who reviewed the search warrant affidavit prepared by Sgt. Bolster in this case, testified that he understood the term “controlled buy” to mean and incorporate the following, based on his background, experience, and knowledge: that the informant would know the general area of where the controlled buy would take place and inform the police of such; the informant would meet with the police and be searched for drugs and money; the police would then give the informant “buy” money for the drugs; the police would then conduct continuous surveillance on the informant on his way to and from the meeting with the suspect; and that upon the informant’s return to the police the informant would be searched again for drugs and money with the drugs from the transaction being turned over to the police.

(CP 162-163).

4. The trial court erred in entering “Court’s Findings as to the Facts” 1:

The Court finds that Sgt. Bolster’s and Judge Knowlton’s testimony were credible regarding their understanding of the term “controlled buy” and that the term did mean what they testified to.

(CP 163).

5. The trial court erred in entering “Court’s Findings as to the Facts” 2:

The Court finds that based on Sgt. Bolster’s and Judge Knowlton’s testimony, that the “controlled buys” described in the search warrant affidavit meant what they testified it meant.

(CP 163).

6. The trial court erred in entering “Court’s Reason for Admissibility of Physical Evidence” 1:

The term “controlled buy” as stated in the search warrant affidavit by Sgt. Bolster is a term of art that is understood to include the necessary actions by and between the police and their informant when conducting a drug transaction between the informant and a drug dealer.

(CP 163).

7. The trial court erred in entering “Court’s Reason for Admissibility of Physical Evidence” 2:

The drugs found on the premises of Mr. Martinez’s property is admissible for the reason that probable cause existed for the search warrant affidavit based on the described “controlled buys” and observations by officers of contact by the alleged drug dealer at [Mr. Martinez’s house], before the culmination of the drug deal with the informant.

(CP 163).

8. The trial court should have suppressed the evidence seized from Mr. Martinez’s property pursuant to the search warrant.

#### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: The trial court should have suppressed the evidence seized from Mr. Martinez’s property pursuant to the search warrant.

#### **D. STATEMENT OF THE CASE**

In April 2008, Walla Walla County Sheriff’s Office Detective Sergeant Gary Bolster submitted an affidavit for a search warrant for Jose Martinez’s property, including his house and all buildings on the property. (CP 149-156, 161). The affidavit alleges three controlled buys of cocaine,

conducted by an unnamed informant, took place at or near Mr. Martinez's house. (CP 151-152, 161).

The affidavit states in the first controlled buy, the suspect, an individual named Luciano Castorena, "went down the alley behind his house to get the cocaine." (CP 151). The affidavit did not specifically identify this house as Mr. Martinez's house, stating "[a]lthough we could not determine the house for sure, we believed it was [Mr. Martinez's house]." (CP 151). The affidavit states in the second controlled buy, Mr. Castorena went into Mr. Martinez's house, and later Mr. Castorena gives cocaine to an informant. (CP 151-152, 161-162).

The third and final controlled buy is from another suspect, not Mr. Castorena. (CP 152). The affidavit alleges a police officer saw this suspect in the backyard of Mr. Martinez's house. (CP 152, 161-162). The affidavit continues:

[The suspect] is conversing with a slightly older person in the back yard. They then move to the back porch and continue talking. The older gentleman then goes into his residence and [the suspect] waits on the back porch. A few minutes later the same male appears and makes a hand to hand exchange with [the suspect]. [The suspect] then walks down the alley to where the [informant] is waiting and gets into the [informant's] vehicle. [The suspect] then gives the [informant] a small baggie of cocaine but has additional cocaine with him.

(CP 152, 162).

The affidavit does not describe how each controlled buy was conducted, who initiated the contacts, or why the informant was present. (CP 149-156). The affidavit indicates the second and third controlled buys were conducted by the same informant, but it does not indicate this was the same informant used in the first controlled buy. (CP 151-152).

Walla Walla County District Court Judge John Knowlton granted the search warrant. (CP 157-160; RP 8-10, 12, 17). The search warrant was executed the next day. (CP 28). The police found cocaine in Mr. Martinez's house and in a garage located on the property. (CP 64). The police also found over \$4,000 in cash, some of which was used by officers during the controlled buys. (CP 64).

The State charged Mr. Martinez with count I, possession with intent to deliver cocaine, based upon the evidence seized during the execution of the search warrant, and counts II and III, complicity to deliver cocaine, based on two controlled buys. (CP 11-16).

Mr. Martinez moved to suppress the evidence seized during the execution of the search warrant, arguing the affidavit lacked probable cause for the issuance of the warrant, and requesting count I be dismissed. (CP 17-46). Shortly after filing this motion, Mr. Martinez pleaded guilty to one count of delivery of cocaine. (CP 47-61). The trial court did not rule on the motion to suppress.

Subsequently, Mr. Martinez moved to withdraw his guilty plea, arguing his trial counsel failed to properly advise him of the potential immigration consequences of his plea. (CP 65). The trial court denied this motion, and Mr. Martinez appealed. (CP 65). In a published decision, this Court reversed and remanded the case to the trial court to allow Mr. Martinez to withdraw his guilty plea. (CP 63-69); *see also State v. Martinez*, 161 Wn. App. 436, 253 P.3d 445 (2011).

Mr. Martinez then proceeded to a jury trial. (CP 70-84). His motion to suppress was not renewed and was never heard. (CP 88). The jury found Mr. Martinez guilty of counts I and III. (CP 70-84). He appealed from the jury's verdict, arguing, in relevant part, that his trial counsel was ineffective for failing to renew his motion to suppress. (CP 88-91). In an unpublished opinion, this Court did not decide this issue, but instead remanded the case to the trial court for a suppression hearing. (CP 88-91, 97). This Court found there was an unresolved factual question regarding the use of the words "controlled buy" in the search warrant affidavit, without the affidavit defining "controlled buy." (CP 91).

At the hearing held on Mr. Martinez's motion to suppress, the State called Judge Knowlton and Sergeant Bolster to testify regarding their understanding of the term "controlled buy." (RP 4-27). Judge Knowlton testified his understanding of a controlled buy is as follows:

[A]n informant agrees with the police to buy drugs and the police search the informant, give the informant money, know generally where the deal is going to take place and sent the informant out and surveil the informant all the time to the maximum extent possible. And then when the informant returns from the - - from the incident directly, continues the surveillance and brings in the informant and have - - have the informant present them the drugs and they search the informant to confirm that those are the drugs that he received and that he doesn't have the money anymore and that ends that part of the purchase.

(RP 6).

He testified he had this same understanding of the term in 2008. (RP 6, 8, 18). Judge Knowlton stated he had no independent recollection of reading the search warrant affidavit and issuing the search warrant herein. (RP 8-10, 12, 17). He testified there were no recordings made of his issuance of the search warrant. (RP 10, 12).

Sergeant Bolster testified his understanding of a controlled buy is as follows:

[A]n informant is met, the informant is searched to make sure they don't have any drugs or money on their person. They are given buy money in order to purchase the narcotics. We do surveillance of the informant to and from the location where the informant is going to purchase the narcotics. Often times that informant may wear some kind of audio recording device so that it would be recorded audio. That doesn't always happen but occasionally we do that. Once the controlled - - or the informant makes the narcotics purchase, they are surveilled coming from that location back to a predetermined area where we meet, the drugs are obtained from the informant and then another search is done to make sure that there's no drugs or money

on the informant and then that would conclude the controlled buy.

(RP 22).

He testified the term “controlled buy” had this same meaning in his search warrant affidavit. (RP 22-23).

The trial court denied Mr. Martinez’s motion to suppress. (CP 161-164; RP 39). Mr. Martinez timely appealed. (CP 165-170).

### **E. ARGUMENT**

**Issue 1: The trial court should have suppressed the evidence seized from Mr. Martínez’s property pursuant to the search warrant.**

A motion to suppress is reviewed “to determine whether substantial evidence supports the trial court’s challenged findings of fact and, if so, whether the findings support the trial court’s conclusions of law.” *State v. Cole*, 122 Wn. App. 319, 322–23, 93 P.3d 209 (2004) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

Unchallenged findings of fact are verities on appeal. *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Conclusions of law are reviewed *de novo*. *Cole*, 122 Wn. App. at 323.

The Fourth Amendment of the United States Constitution and Article I, § 7 of the Washington Constitution protect citizens from unreasonable searches and seizures, and provide that a search warrant may only be issued upon a showing of probable cause. *State v. Lyons*,

174 Wn.2d 354, 359, 275 P.3d 314 (2012). In order for an affidavit to establish probable cause, it “must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched.” *Id.* (citing *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)).

While the courts must evaluate an affidavit in a commonsense, rather than a hypertechnical, manner, “the [reviewing] court must still insist that the magistrate perform his ‘neutral and detached’ function and not serve merely as a rubber stamp for the police.” *Id.* at 360 (citations omitted) (internal quotation marks omitted) (alteration in original). The existence of probable cause is a legal question which the reviewing court considers *de novo*. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).

When evaluating the issuance of a search warrant based upon an informant’s tip, Washington follows the *Aguilar-Spinelli* test. *State v. Jackson*, 102 Wn.2d 432, 435-443, 688 P.3d 136 (1984). “Under that test, to establish probable cause for issuance of a search warrant based upon an informant's tip detailed in an affidavit, the affidavit must demonstrate the informant's (1) basis of knowledge and (2) veracity.” *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002) (citing *Jackson*, 102 Wn.2d at 435). If

either or both prongs of the *Aguilar-Spinelli* test are not met, “probable cause may yet be satisfied by independent police investigation corroborating the informant's tip to the extent it cures the deficiency.” *Id.* (citing *Jackson*, 102 Wn.2d at 438).

To establish the veracity prong of the *Aguilar-Spinelli* test, “the affidavit must set forth some of the underlying circumstances from which the officer concluded that the informant was credible or his information reliable.” *Jackson*, 102 Wn.2d at 435 (citing *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964)). “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?” *Id.* at 437. “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.” *Id.*

Under proper circumstances, a properly conducted controlled buy can establish an informant’s veracity. *State v. Lane*, 56 Wn. App. 286, 293, 786 P.2d 277 (1989); *see also State v. Casto*, 39 Wn. App. 229, 234-35, 692 P.2d 890 (1984). A controlled buy alone does not establish veracity where the informant was directed by the police to go to a given location and buy drugs from a specific person. *State v. Steenerson*, 38

Wn. App. 722, 726, 688 P.2d 544 (1984); *cf. Casto*, 39 Wn. App. at 234-35 (holding a successful controlled buy demonstrated reliability under circumstances where the informant initiated the buy and selected the seller). And, “[a]dditional circumstances surrounding the buy may be needed to prove the informant reliable, especially when the buy is not associated with the defendant.” *Casto*, 39 Wn. App. at 234.

Review of the issuing judge’s decision to issue a search warrant is limited to the four corners of the affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, Division One of the Court of Appeals held “[a]n inquiry beyond the affidavit or affidavits permits making use of matters within the field of judicial notice and includes a consideration of the experience and special knowledge of the magistrate and of the police officers who applied for the search warrant.” *State v. Jansen*, 15 Wn. App. 348, 351, 549 P.2d 32 (1976). In *Jansen*, the trial court denied the State’s request to call the magistrate who issued the search warrant and the officer who submitted the affidavit in support of the search warrant to prove the term “controlled buy” had a commonly understood meaning. *Id.* at 350. The court reversed, holding “the trial judge should have permitted the State to make its offer of proof that ‘controlled buy’ is a term of art understood by both the magistrate and the

officer and that, in the context of the affidavit, convincingly demonstrated the reliability of the informant.” *Id.* at 351.

Here, at the suppression hearing, the trial court allowed the State to offer the type of evidence permitted in *Jansen*. *See id.* at 350-51; (RP 4-27). Mr. Martinez requests this Court decline to follow Division One’s opinion in *Jansen*. *See id.* at 350-51. Review of the search warrant should be limited to the four corners of the affidavit. *See Neth*, 165 Wn.2d at 182.

The affidavit here does not establish probable cause for the issuance of a search warrant, because the veracity prong of the *Aguilar-Spinelli* test is not established. *See Jackson*, 102 Wn.2d at 435 (citing *Aguilar*, 378 U.S. at 114) (setting forth the requirements for establishing the veracity prong). The affidavit for the search warrant does not describe how the controlled buys were conducted. (CP 149-156). The veracity prong of the *Aguilar-Spinelli* test cannot be established without this information. There is no indication that the informant(s) were searched prior to the controlled buys to determine they did not have controlled substances on their persons. *See Casto*, 39 Wn. App. at 234 (stating “[i]f the informant “goes in empty and comes out full,” his assertion that drugs were available is proven, and his reliability confirmed.”). Furthermore,

there is no information in the affidavit regarding the informant(s), other than their mere participation in three controlled buys. (CP 149-156).

Should this Court disagree and follow *Jansen*, then even with the additional evidence presented at the suppression hearing defining the term “controlled buy,” the veracity prong of the *Aguilar-Spinelli* test is not established. *See Jackson*, 102 Wn.2d at 435 (citing *Aguilar*, 378 U.S. at 114); *see also Jansen*, 15 Wn. App. at 350-51. The affidavit and this additional evidence does not demonstrate the reliability of the informant(s).

The affidavit establishes an informant participated in three controlled buys. (CP 151-152). However, the affidavit does not state whether the same informant was involved in all three controlled buys or why the informant was present. (CP 149-156). The affidavit does not include information regarding the informant(s)’ track record, or show the accusations were against the informant(s)’ penal interest. *Jackson*, 102 Wn.2d at 437. As recognized above, there is no information in the affidavit regarding the informant(s), other than their mere participation in three controlled buys. (CP 149-156).

The affidavit also does not state whether the information on which the controlled buys were arranged came from the informant(s), or whether the informant was given the information by the police. (CP 149-156);

*compare Steenerson*, 38 Wn. App. at 726 (a controlled buy alone does not establish veracity where the informant was directed by the police to go to a given location and buy drugs from a specific person), *with Casto*, 39 Wn. App. at 234-35 (holding a successful controlled buy demonstrated reliability under circumstances where the informant initiated the buy and selected the seller). Likewise, Sergeant Bolster and Judge Knowlton did not testify regarding whether the informant(s) or the police initiated the controlled buys. (RP 6, 22).<sup>1</sup>

Furthermore, for the second and third controlled buys, the affidavit names two suspects, Mr. Castorena and another individual, as the persons selling cocaine to the informant without any information relating them in any way to Mr. Martinez's property, other than their mere presence. *See Casto*, 39 Wn. App. at 234 (stating "[a]dditional circumstances surrounding the buy may be needed to prove the informant reliable, especially when the buy is not associated with the defendant.>").

In addition, there was not sufficient independent police investigation to cure the lack of evidence of veracity of the informant(s).

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<sup>1</sup> Substantial evidence does not support the trial court's "Undisputed Facts" 3 and 4. (CP 162-163). "Undisputed Fact" 3 states "the informant would first contact the drug dealer to determine the time and place of the delivery, which information the informant would be give to the police[.]" (CP 162). However, Sgt. Bolster did not testified to these facts. (RP 22). "Undisputed Fact" 4 states "the informant would know the general area of where the controlled buy would take place and inform the police of such[.]" (CP 162). However, Judge Knowlton did not testify to these facts, but rather, testified "the police . . . know generally where the deal is going to take place and send the informant out . . . ." (RP 6).

*See Vickers*, 148 Wn.2d at 112 (citing *Jackson*, 102 Wn.2d at 438); *see also Lane*, 56 Wn. App. at 293-94). In *Lane*, the court found the *Aguilar-Spinelli* test was satisfied where the police conducted independent investigation by surveilling the location “for some time” and seeing known drug users come and go. *Lane*, 56 Wn. App. at 294. The court concluded this investigation “corroborate[d] the informant’s story and support[ed] his veracity.” *Id.* Here, there was no mention of independent police investigation of this type of Mr. Martinez’s property. (CP 149-156). The only mention of police observations in the affidavit is that during the third controlled buy, the affidavit alleges a police officer saw the suspect in the backyard of Mr. Martinez’s house. (CP 152, 161-162). It is unclear whether the other observations set forth of this controlled buy, or of the other two controlled buys, were observed by the police or by the informant(s). (CP 151-152).

Additionally, in describing the first controlled buy, the affidavit states the suspect went down the alley behind his house to get cocaine. (CP 151). However, the affidavit does not allege he went behind Mr. Martinez’s house. (CP 151). Instead, the affidavit acknowledges “we could not determine the house for sure . . . .” (CP 151).<sup>2</sup> Therefore, the

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<sup>2</sup> Substantial evidence does not support the trial court’s “Undisputed Facts” 2. (CP 161-162). For the first controlled buy, the affidavit does not describe the location of the controlled buy, or “that the subject who delivered the drugs to the informant first went to [Mr. Martinez’s house] before effecting the delivery to the informant.” (CP 161-162).

first controlled buy does not further a belief that contraband would be discovered on Mr. Martinez's property.

The second prong of the *Aguilar-Spinelli* test, requiring informant veracity, is not established here. *See Jackson*, 102 Wn.2d at 435 (citing *Aguilar*, 378 U.S. at 114) (setting forth the requirements for establishing the veracity prong). Therefore, there was no probable cause for issuance of a search warrant for Mr. Martinez's property. *See Vickers*, 148 Wn.2d at 112 (citing *Jackson*, 102 Wn.2d at 435) (setting forth the requirements for establishing probable cause for issuance of a search warrant based upon an informant's tip). The search warrant was invalid and the trial court erred in denying Mr. Martinez's motion to suppress.

#### **F. CONCLUSION**

The trial court should have suppressed the evidence seized from Mr. Martinez's property pursuant to the search warrant. Mr. Martinez's conviction (for Count I) should be reversed and the charge dismissed with prejudice.

Respectfully submitted this 8th day of July, 2014.

  
Jill S. Reuter, WSBA #38374

/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918

Attorney for Appellant