

SUPREME COURT NO. 77615-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDALL CHENOWETH AND BARBARA WOOD,

Petitioners.

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

The Honorable Steven Mura, Judge

SUPPLEMENTAL BRIEF OF PETITIONER WOOD

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A. SUPPLEMENTAL ISSUE STATEMENT

Under the Fourth Amendment, a material omission or false statement in an affidavit may invalidate a warrant if it was made *intentionally* or *with reckless disregard* for the truth. Should this Court hold that search warrants are invalid under article 1, § 7 of Washington's Constitution where material facts are *negligently* omitted from affidavits filed in support of a warrant?

B. SUPPLEMENTAL STATEMENT OF THE CASE

1. Trial Proceedings

The facts leading to the charges in this case are discussed in the Court of Appeals published opinion. In summary, in February 2003, Nick Parker contacted Lynden police and told them that Randy Chenoweth and Barbara Wood were involved in the manufacture of methamphetamine at a Lynden residence. State v. Chenoweth, 127 Wn. App. 444, 447, 111 P.3d 1217 (2005).

Detective Ryan King and Deputy Prosecutor Rosemary Kaholokula sought a search warrant. They informed the court that Parker had a conviction for possession and delivery of cocaine and Kaholokula indicated that she had personally prosecuted him on the charges. Id. at 449. After the warrant had been executed, Kaholokula and Lynden Police Detective Lee Beld sought a second warrant for a motorhome. Kaholokula

indicated to the court that she had “confirmed Nicholas Parker’s criminal history from what I recalled yesterday.” Id.

Based on evidence found in the searches, both Chenoweth and Wood were charged with one count each of possession of precursor materials with intent to manufacture methamphetamine, manufacturing methamphetamine, and possession of methamphetamine. Chenoweth was also charged with an additional count of possessing methamphetamine based on evidence found during his arrest. Id.

Chenoweth and Wood moved to suppress all seized evidence and requested a hearing under Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Both defendants contended that:

Kaholokula omitted material facts including (1) that Parker had once been a paid informant for the Bellingham Police Department and had been terminated from that role based on concerns about his reliability; (2) that Parker had a much more extensive criminal history than that revealed to the Commissioner; (3) that during her previous prosecution of Parker, Kaholokula had known about Parker’s relationship with the police and had questioned his truthfulness to the extent of threatening to bring charges of suborning perjury against him; (4) that Parker requested payment from the police after the warrant was obtained and the WIN department paid Parker after the search warrants were executed; (5) that Parker sought and received police assistance in retrieving his car [which Chenoweth had in his possession] after the warrant was obtained but before it was executed; and (6) that Wood was a plaintiff in a civil suit

against the Whatcom County Sheriff in his former capacity as Blaine Chief of Police.

Id. at 449-450.

The trial court concluded that the missing information was material and would have prevented a finding of probable cause had it been intentionally or recklessly omitted. But because the information was only negligently omitted, and the court refused to apply a negligence standard, the warrants were upheld. The court indicated, however, that should an appellate court determine that negligence is the proper standard, the omissions would undermine the magistrate's finding of probable cause.

Id. at 450; VRP of 6/5/03 at 21-56.

Chenoweth and Woods were convicted. CP 225-26.

2. Argument on Appeal

On appeal, Chenoweth and Woods argued that article 1, § 7 of the Washington Constitution compelled use of a negligence standard for material omissions in search warrant affidavits. See Brief of Appellant Wood, at 5-22. The Court of Appeals acknowledged that other states had adopted a negligence standard. Chenoweth, 127 Wn. App. at 458. But ultimately the Court found that "Wood fails to demonstrate that Article 1, Section 7 requires a different standard for challenging warrants from that of the Fourth Amendment." Chenoweth, 127 Wn. App. at 461.

C. ARGUMENT

ARTICLE 1, § 7 OF THE WASHINGTON CONSTITUTION
COMPELS A NEGLIGENCE STANDARD FOR MATERIAL
OMISSIONS.

Prior to the published opinion in Wood's case, both this Court and the Court of Appeals left open the possibility that negligent omissions or misstatements could provide the basis for a successful warrant challenge under the Washington Constitution. See State v. Cord, 103 Wn.2d 361, 367-69, 693 P.2d 81 (1985)(declining to decide the issue because appellant offered no direct argument on issue); State v. Clark, 68 Wn. App. 592, 601-02, 844 P.2d 1029 (1993)(same), aff'd, 124 Wn.2d 90, 875 P.2d 613 (1994).

Historically, Washington courts have applied the federal standard when evaluating warrant affidavits in the context of Fourth Amendment challenges. Because no party has properly raised the state constitutional issue, Washington courts have yet to give shape to an independent jurisprudence in this area. Division One's conclusion that Washington's Constitution does not compel a different standard is not supported by the relevant criteria.

In State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), this Court set out six nonexclusive neutral criteria to be examined when determining the contours of a state constitutional right: (1) the textual

language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. Applying these factors, it is apparent that Wash. Const. art. 1, § 7 provides greater protections than does the Fourth Amendment against unreasonable searches -- protections that allow warrant challenges based on negligence.

Factors One, Two, and Three: The text and the history of Const. art. 1, § 7 show an intention to provide greater protection of individual rights under the state Constitution. State v. Young, 123 Wn.2d 173, 179-80, 867 P.2d 593 (1994); State v. Gunwall, 106 Wn.2d at 65.

At the time the Washington State Constitutional Convention (Convention) adopted Wash. Const. art. 1, § 7, the federal Constitution had already been construed to provide expansive protection of privacy interests. Young, 123 Wn.2d at 180 (citing Boyd v. United States, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746 (1886)). Nevertheless, the Convention decided to provide even more rigorous protection of privacy rights. In so doing, the Convention rejected the language of the federal Constitution's Fourth Amendment,¹ adopting the following language instead: "No person

¹ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. 1, § 7.

The language in Const. art. 1, § 7 was designed to provide Washington citizens greater protection than the minimum standards of the Fourth Amendment. Young, 123 Wn.2d at 180. It stands to reason that Const. art. 1, § 7 also affords greater protections than does the Fourth Amendment against unreasonable erroneous probable cause findings whether predicated upon intentional government misconduct, recklessness, or negligence.

Factor Four: Washington has a distinct history of providing enhanced constitutional protections from unreasonable government intrusions. See, e.g., State v. Ferrier, 136 Wn.2d 103, 112, 960 P.2d 927 (1998) (citing examples). Although the Washington courts have not yet decided whether negligent omissions can serve as the basis for challenging a supporting affidavit, settled case law does impose a higher state standard when considering challenges to warrant affidavits that include informant information. State v. Jackson, 102 Wn.2d 432, 439-440, 688 P.2d 136 (1984).

seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Traditionally, under the federal Constitution, information from an informant could establish probable cause only when the facts and circumstances available to the police establish the informant's basis of knowledge and credibility. Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964). In 1983, the United States Supreme Court abandoned this test, instead applying the less rigorous "totality of the circumstances" test. Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The Washington Supreme Court rejected this lesser standard, holding that the greater privacy protections embodied in Const. art. 1, § 7 would be jeopardized if it were applied. Jackson, 102 Wn.2d at 439-440. This Court concluded that the state constitution requires a stronger showing of credibility on behalf of the affiant and his sources than the "totality of circumstances" test provides. Id.

Washington courts have also rejected the lower federal standard in the context of unwarranted government intrusions and the exclusionary rule. The Washington Supreme Court adopted the exclusionary rule in 1922. From 1922-1961, Washington courts developed and applied an independent state exclusionary rule. In 1961, the United States Supreme Court began requiring state courts to apply the federal exclusionary rule, but when the United States Supreme Court subsequently narrowed the scope and

enforcement of this rule through the good-faith exception,² the Washington Supreme Court rejected the federal approach and again asserted an independent state jurisprudence that required greater protections against unwarranted police activity. See Sanford E. Pitler, The Origin And Development Of Washington's Independent Exclusionary Rule: Constitutional Right And Constitutionally Compelled Remedy, Wash. L. Rev. 459, 465 (1986) (citations omitted).

Specifically, in State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982), the Washington Supreme Court found the federal good-faith exception to the exclusionary rule unworkable under Const. art. 1, § 7. The Court emphasized that an individual's right to privacy, with no express limitations, was the cornerstone of that provision. The Court reaffirmed its commitment to the "immediate application of the exclusionary rule whenever an individual's right to privacy is unreasonably invaded," stating that it provided stability to individual rights by making law enforcement more honest and predictable. White, 97 Wn.2d at 110-12.

These same concerns -- stability of individual rights and predictable law enforcement -- are at the heart of the issue presented here. See State v.

² Under the good-faith doctrine, even if a warrant is later found to be defective, evidence seized in reasonable, good faith reliance on the search warrant is admissible in federal prosecutions. See generally, United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984).

Kurland, 28 Cal.3d 376, 388, 168 Cal.Rpt. 667, 618 P.2d 213 (1980) (judicial review of negligent omissions for warrant affidavits discourages carelessness by law enforcement officers and protects against mistaken probable cause findings), cert. denied, 451 U.S. 987 (1981).

Given Washington's previous rulings jealously guarding privacy rights against unreasonable police conduct, requiring officers to account not only for intentional misstatements or omissions but also for negligent actions is entirely consistent with this pre-existing case law. See White, 97 Wn.2d at 110-12; Jackson, 102 Wn.2d at 439.

Division One noted that Washington has a history of following the federal standard for warrant affidavits. See Chenoweth, 127 Wn. App. at 460 (citing State v. Goodlow, 11 Wn. App. 533, 523 P.2d 1204 (1974); State v. Hink, 6 Wn. App. 374, 492 P.2d 1053 (1972); State v. Sewell, 11 Wn. App. 546, 524 P.2d 455 (1974); State v. Seagull, 95 Wn.2d 898, 632 P.2d 44 (1981)). But in none of these cases did the defendant argue for a stricter standard under the Washington Constitution. These cases were decided under the Fourth Amendment and, thus, they add little to the debate.

Far more enlightening are prior decisions comparing article 1, § 7 to its federal counterpart in scope and purpose. This Court has recognized that within our state constitution, and in contrast to the Fourth Amendment, “the emphasis is on protecting personal rights rather than on curbing

governmental actions.” White, 97 Wn.2d at 110; see also State v. Crawley, 61 Wn. App. 29, 34, 808 P.2d 773 (“Under the Washington Constitution, the exclusionary rule serves not merely as a remedial measure for unconstitutional government actions, but rather to assure judicial integrity and preserve the individual's right to privacy.”), review denied, 117 Wn.2d 1009 (1991). This distinction compels a negligence standard for warrant affidavits under the Washington Constitution.

In Franks v. Delaware, the Supreme Court sought to fashion a rule that would curb governmental misconduct (the Fourth Amendment’s goal). Indeed, several of the factors cited by the Court in support of the federal standard focus on what is necessary to achieve this goal. Franks, 438 U.S. at 156, 166-67 (considerations one, two, and five). It is not surprising that the Court limited the federal rule to knowing and intentional or reckless acts since these are the most egregious and least reasonable.

In other words, the Fourth Amendment targets only intentional or reckless acts because they are most worthy of sanction where deterrence is the primary goal. See Franks, 438 U.S. at 167 (stating that in light of the government’s concerns -- including inordinate focus on the deterrence of official misconduct -- “the rule announced today has a limited scope, both as to when the exclusion of the seized evidence is mandated, and when a

hearing on allegations of misstatements must be accorded.”); see also United States v. Leon, 468 U.S. 897, 906-07, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (federal exclusionary rule does not apply where cost of suppressing evidence outweighs deterrent benefit).

In contrast -- as discussed above -- article 1, § 7 is not focused exclusively on deterring misconduct. The competing interests are simply not the same. Whether a material omission is knowing and intentional, reckless, or negligent, that omission leads to the issuance of a search warrant without probable cause. Without probable cause, there is no valid warrant. And without a valid warrant, there is no “authority of law” to invade an individual’s private affairs or his home. City of Seattle v. McCready, 123 Wn.2d 260, 271-72, 868 P.2d 134 (1994). Yet the government was permitted to do just that in Wood’s case.

Preexisting state law -- which shuns the Fourth Amendment’s focus on deterrence in favor of recognized privacy expectations -- supports a negligence standard for material omissions under the Washington Constitution.

Factor Five: “The fifth Gunwall factor, structural differences between the state and federal constitutions, will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution

represents a limitation of the State's power." Young, 123 Wn.2d at 180 (citing State v. Smith, 117 Wn.2d 263, 286, 814 P.2d 652 (1991) (Utter, J., concurring)).

Factor Six: State law enforcement measures are a matter of state interest and local concern. Young, 123 Wn.2d at 180; Gunwall, 106 Wn.2d at 67. The State's very strong interest in protecting an individual's right to privacy is not outweighed by any need for national uniformity when reviewing warrant affidavits. Id. Washington has already diverged from the federal standard when reviewing affidavits containing informant information. See Jackson, 102 Wn.2d at 439. Additionally, several other states have already diverted from the federal standard and held that negligent material omissions can be fatal to warrants. See State v. Worrall, 293 Mont. 439, 446-47, 976 P.2d 968 (1999); People v. Dailey, 639 P.2d 1068, 1075 (Colo. 1982); Kurland, 28 Cal.3d at 388; State v. Byrd, 568 So.2d 554, 559 (La. 1990).

In sum, an analysis of the Gunwall factors demonstrates that an accused is afforded heightened privacy protections under Const. art. 1, § 7. These heightened protections are seriously undermined when the State is allowed to secure a search warrant based on an erroneous finding of probable cause -- regardless of whether the error was intentional or simply the result of negligence. As the Montana Supreme Court explained:

If inaccurate or misleading information is included in [a warrant] application, it must be excised from the application regardless of whether that information was included mistakenly, negligently or intentionally. A search based upon a warrant application which contains material misstatements and inaccurate information may skew the magistrate's determination of probable cause. Importantly, such a search is no more reasonable nor less an invasion of privacy merely because the misstatements and inaccuracies were made mistakenly, unintentionally or negligently. Divining the intent of the search warrant applicant is irrelevant; misstatements and inaccuracies, whether intentional or unintentional, may produce the same constitutionally impermissible result -- a search based upon something other than probable cause.

Worrall, 293 Mont. at 447; see also Kurland, 28 Cal.3d at 388 (applying similar reasoning in the context of negligent omissions). This Court should hold that under Const. art. 1 § 7, negligent omissions or misstatements can invalidate a search warrant.

The trial court was reluctant to apply a negligence standard because it had difficulty precisely delineating the scope of an affiant's duty under such a standard. 6/5/03 at 21. The prosecutor warned that imposing a bright-line rule that an affiant has a duty to investigate the criminal background of an informant before obtaining a warrant would be unworkable given the realities of police investigations. 6/5/03 at 37-38. In response, the defense argued the court need not establish a bright-line rule; instead, it could consider the facts of each case to determine whether the affiants' actions fell below a reasonable standard of care. 6/5/03 at 46. The

trial court decided that because there was no case law defining the affiant's duty and because a bright-line rule requiring affiants to run criminal checks would hamper law enforcement's ability to obtain warrants quickly, it would not apply the negligence standard. 6/5/03 at 49-52.

Although Washington courts have not yet had the opportunity to flesh out this issue and address the trial court's concerns, the California Supreme Court has created a workable negligence standard that avoids bright-line rules and accounts for law enforcement realities. An affiant's duty requires taking reasonable steps to furnish the magistrate with information, both favorable and adverse, sufficient to permit the magistrate to make an informed probable cause determination. Kurland, 28 Cal.3d at 384 (citations omitted); see also People v. Lopez, 173 Cal.App.3d 125, 133-134, 218 Cal.Rptr. 799 (1985). In other words, negligent omissions occur when the affiant is unreasonably ignorant of material facts, unreasonably forgets to include them, or makes a good faith but unreasonable decision that they need not or should not be included in an affidavit. Kurland, 28 Cal.3d at 388 (emphasis added).

Not only did the Kurland court define the duty owed by the affiant, it provided a framework for trial courts to follow when deciding whether that duty was breached. Under this framework, the trial court must first determine whether the omission is material. When a negligent omission is

alleged, the defense has the burden of showing materiality. Id. at 390. If all omissions are immaterial, then the affiant had no duty to supply them to the magistrate and the warrant is upheld. Id. at 387.

If the omissions are material, however, the burden shifts to the State to show that material omissions were proper or reasonable. Id. at 390. Material omissions, reasonably made, will not provide a basis for quashing a warrant. Id., at 388. If material omissions were the result of unreasonable negligence, however, the omitted facts are then added to the affidavit and it is retested to determine if probable cause would have been found. Id., at p. 388.

By distinguishing between reasonable and unreasonable omissions, the California Supreme Court has devised a workable test that allows trial courts to consider the particular circumstances in each case and decide whether the affiant's conduct or decisions were reasonable under those circumstances. For example, if an officer is facing emergency conditions and needs to obtain a warrant quickly and he is unable to access a database to verify an informant's criminal history because the computer system is down, the State is free to argue that it was unreasonable to expect that officer to access the informant's criminal history even if that criminal history was material. If the court agrees, the warrant will stand. This framework affords the flexibility for trial courts to consider the urgencies and realities of law

enforcement while at the same time protecting citizens from unreasonable mistakes that result in erroneous probable cause findings.

The Kurland standard is workable and places the appropriate emphasis on a citizen's constitutional privacy rights while accounting for the realities of law enforcement. As such, it should be adopted in Washington. This Court should adopt the standard and find, consistent with the trial court's findings, that the affiants' negligent omissions led to an erroneous finding of probable cause in Wood's case.

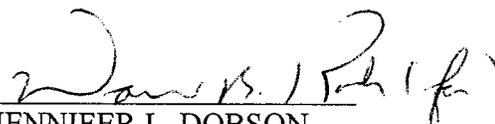
D. CONCLUSION

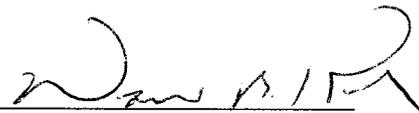
For the reasons stated above, Wood respectfully requests that this Court reverse the Court of Appeals.

DATED this 30th day of June, 2006.

Respectfully submitted,

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