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STATE OF WASHINGTON

Supreme Court no. _____
COA No. 53027-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDALL CHENOWETH,

Petitioner.

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

The Honorable Steven J. Mura

PETITION FOR REVIEW

OLIVER R. DAVIS
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A. IDENTITY OF PETITIONER

Mr. Randy Chenoweth was the defendant in Whatcom County Cause No. 03-1-00211-1, and the appellant in Court of Appeals No. 53027-5-I.

B. COURT OF APPEALS DECISION

Mr. Chenoweth seeks review of the Court of Appeals decision in No. 53027-5-I, decided May 16, 2005. The decision is attached as Appendix A. The denial of the motion for reconsideration is attached as Appendix B.

C. ISSUES PRESENTED ON REVIEW

Mr. Chenoweth raises the following issues: (1) Whether the issues raised warrant review by this Court pursuant to RAP 13.4(b); and (2) Whether the trial court erred in upholding the search warrant following a Franks hearing, under the reasoning that certain facts, which the court found material to probable cause, were not made “recklessly.”

D. STATEMENT OF THE CASE

Randy Chenoweth and a co-defendant, Barbara Wood, were arrested during the execution of an informant-based search warrant at a house in Lynden, Washington, in which police found an apparent methamphetamine drug laboratory. CP 89-91. Mr. Chenoweth was charged with possession and manufacture offenses. CP 89-91 (Third amended information). He was found guilty following a jury trial. CP 43-44.

The defendant appealed, CP 27, arguing inter alia that the trial court

had erred in failing to suppress the drug evidence where one of the warrant affiants, prosecutor Kaholokula, acted in reckless disregard of the truth when she stated to the magistrate that the informant, Nicholas Parker's, background consisted of one prior drug conviction, omitting material information about Parker's full criminal history and also his failed professional informant background. The trial court ruled that the omissions about Parker's history would have defeated the warrant, but held that the affiant's failure to include this information was not intentional or reckless. See Appellant's Opening Brief, at pp. 1-2, 44-63; Appellant's Reply Brief, at pp. 4-12.

The Court of Appeals ruled that prosecutor Kaholokula had not acted in intentional or reckless disregard of the truth under Franks. Appendix A, at p. 11. Mr. Chenoweth sought reconsideration of the Court's opinion by motion pursuant to RAP 12.4, which motion was denied. Appendix B.

E. ARGUMENT

1. SUPREME COURT REVIEW IS WARRANTED UNDER RAP 13.4(b)(3).

Supreme Court review of the present case is warranted because the issues raised regarding the sufficiency of the warrant affidavit under Franks v. Delaware, based on the requirements of the Fourth Amendment, present issues of significant constitutional concern. RAP 13.5(b)(3).

2. AFFIANT KAHOLOKULA RECKLESSLY OMITTED INFORMATION FROM THE AFFIDAVITS THAT SHOWED PARKER HAD PAST CRIMES OF DISHONESTY AND A PROFESSIONAL INFORMANT RELATIONSHIP WITH THE POLICE.

(a). Issuance of warrant and summary of *Franks* hearings. The affidavits asserting probable cause for issuance of the search warrant were presented by oral statements made in two telephone conversations with the issuing Commissioner. Supp. CP ____, Sub # 44 (5/9/03) (attached as attachment A), and Exhibits A and C thereto (copies attached). In the first telephone application, upon elicitation by prosecutor Kaholokula, Officer Ryan King stated as follows: He was called by the Lynden Police Department and put in touch with one Nick Parker, who wanted “to meet with me to provide information about a methamphetamine lab that was actually in progress at the 1200 Aaron Drive address.” Officer King stated that Parker told him his criminal history consisted of a “one year and a day” sentence for delivery and possession of cocaine, which the officer did not verify through a criminal records check. Supp. CP ____, Sub # 44 (5/9/03, Exhibit A, pp. 4-10.). Parker stated that around 4 a.m. that morning he went to 1200 Aaron Drive, and in the course of his visit to the residence, owned by Chenoweth, Parker stated he observed flasks, filters, chemicals and other substances, which the officer stated to the Commissioner were indicative of “meth manufacture.” Supp. CP ____, Sub # 44 (5/9/03, Exhibit A, pp. 4-10.).

At this point in the first telephonic warrant application, prosecutor Kaholokula addressed the Commissioner directly, and offered an additional matter, stating that, "as far as Mr. Parker's criminal history," she, Kaholokula, was the prosecutor in the prior "year and a day" criminal case referred to by Officer King. Kaholokula stated that Parker had been convicted of drug delivery in this case. CP ____, Sub # 44 (5/9/03, Exhibit A, p. 10.). The Commissioner asked Kaholokula to swear this statement was true "to the best of your knowledge," which Kaholokula did. Supp. CP ____, Sub # 44 (5/9/03, Exhibit A, p. 10.). Based on these statements by King and Kaholokula, Commissioner Mary Gross approved a search warrant for methamphetamine, manufacture equipment, and documents of dominion and control at the residence. Supp. CP ____, Sub # 44 (5/9/03, Exhibit A, p. 10.).

After commencement of the execution of the search warrant the following day, affiant Kaholokula and new affiant Detective Lee Beld sought and received an addendum to the warrant covering the motorhome outside the residence at 1200 Aaron Drive. Supp. CP ____, Sub # 44 (5/9/03, Exhibit C).

In this second telephonic application, affiant Kaholokula first told the issuing commissioner that she wanted to put on the record that after the previous day's application she had "confirmed Nicholas Parker's criminal history from what I recalled yesterday." (Emphasis added.) Supp. CP ____, Sub # 44 (5/9/03, Exhibit C, at p. 1.).

Prior to trial, the co-defendant Ms. Wood, joined by the defendant Mr. Chenoweth, 5/12/03 at 146; CP 83-85, sought dismissal of the charges based on insufficiency of the affidavits to support probable cause, or alternatively for a Franks hearing to prove that material omissions or representations were made in the warrant affidavits that eviscerated probable cause.

The full picture of the informant's credibility, his informant class, and of the nature and remarkable amount of information omitted from the warrant affidavits, including not just his prior history but his informant background, and his requests for money for his information, was revealed in stages during multiple pre-trial Franks hearings. This information is detailed thoroughly in Appellant's Opening Brief to the Court of Appeals. Important aspects thereof are summarized here as briefly as possible.

Kaholokula admitted that her prior prosecution file of Parker contained the information that Parker had been a paid police criminal informant and had been terminated from that relationship. Supp. CP ____, Sub # 44 in Wood file, 5/9/03, pp. 1-2.

Kaholokula admitted that when Sergeant King told her an informant had offered him a tip about a methamphetamine laboratory and told her that the informant was "Nick Parker," she recognized Parker's name as a person she had prosecuted for a VUCSA matter several years previously [in 1999/2000]. Supp. CP ____, Sub # 44 in Wood file, p. 1. However, she stated

she had forgotten that there was information in her file on Parker showing that he had prior charges and convictions for offenses of dishonesty, and a prior professional paid informant relationship with the Blaine police. Supp. CP ____, Sub # 44 in Wood file, p. 3, para. 12, and attachment D. She stated that after one of the recent Franks hearings, she again examined the files in her office regarding her prior prosecution of Parker, and noted it revealed he had prior juvenile adjudications for theft in the first degree, theft in the second degree, and burglary in the second degree. Supp. CP ____, Sub # 44 in Wood file, 5/9/03, p. 3, paras. 14-15, and attachments F, G and H.

Following argument at multiple hearings, the trial court ruled as follows: "In Franks this court needs to find that there was an intentional withholding of information or reckless disregard in order to trigger this Franks hearing. Franks specifically does hold, and I agree with the State, that mere negligence in and of itself is not sufficient." 6/5/03 at 50-52. The court ruled that Kaholokula was only negligent, but also ruled that the omitted information about Parker's prior crimes of dishonesty, prior solicitation of perjury, and prior informant work, would have been fatal to his credibility and thus fatal to probable cause for the search warrant if the information had been intentionally or recklessly omitted under Franks. 6/5/03 at 53-56.

(b). Kaholokula intentionally or recklessly misrepresented the informant's credibility. Under the requirements of Aguilar-Spinelli, which

apply to informant search warrant cases, the omission of the informant's history of crimes of dishonesty and prior informant work, was fatal to the credibility showing required for probable cause to issue a search warrant. An omission or false statement made in an affidavit in support of a search warrant will invalidate the warrant if, inter alia, it was material to the question of probable cause. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); State v. Cord, 103 Wn.2d 361, 366-67, 693 P.2d 81 (1985); see 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). If the defendant then also establishes intentional or reckless omission of this information from the warrant affidavits, the warrant is void and the evidence obtained thereunder must be excluded (as discussed infra). Franks, 438 U.S. at 155-56; Cord, 103 Wn.2d at 366-67.

Prosecutor Kaholokula acted not merely negligently, but in reckless or intentional disregard of the truth, when she affirmatively represented to the issuing Commissioner during the warrant application process that she had looked into her information about Nick Parker's background, and swore that the only information bearing on his history was that he had a previous conviction for a drug crime. For the affiant to make this representation to the Commissioner, when in fact she had not looked into her own prosecution file of Parker, which would have revealed his prior informant work and his

extensive criminal history, all of which she was intimately aware of in the past, was at least reckless under Franks.

Franks requires that a defendant show the affiant made intentional falsehoods or omitted material facts with reckless disregard for their untruth. The Franks movant will not prevail if the misstatements or omissions were the result of simple “negligence or innocent mistake.” Franks, 438 U.S. at 171; United States v. Davis, 714 F.2d 896, 899 n. 5 (9th Cir.1983).

When providing her own affiant statements to the Commissioner in her first warrant affidavit, prosecutor Kaholokula stated to the Commissioner that, “as far as Mr. Parker’s criminal history,” she, Kaholokula, was the prosecutor in his single prior conviction, which had been referred to by affiant King, and in that case Parker was convicted of delivery. (Emphasis added.) CP ___, Sub # 44 (5/9/03, Exhibit A, p. 10.). The Commissioner asked Kaholokula to swear this was true “to the best of your knowledge,” which she did. Supp. CP ___, Sub # 44 (5/9/03, Exhibit A, p. 10.).

Then, during her second affidavit in support of the warrant, prosecutor Kaholokula told Commissioner Mary Gross that she wanted to put on the record that after the previous day’s affidavit she had “confirmed Nicholas Parker’s criminal history from what I recalled yesterday.” (Emphasis added.) Supp. CP ___, Sub # 44 (5/9/03, Exhibit C, at p. 1.).

Commissioner Mary Gross issued the search warrant in reliance on

Kaholokula's statements about Parker's background. But Kaholokula's implicit representation to the Commissioner that she had reviewed her available information about Parker's history, with good faith and with at least some effort to be complete, was reckless because she knew she had not done so, as shown by the extensive information about Parker she later revealed was right there in her own files on Parker. Later, after months of effort by the defense to try and elicit the truth about Parker throughout the Franks hearings, Kaholokula stated that she had recently again reviewed the file of her own prior prosecution of Parker, and she had realized that her Parker file "has a copy of a confidential informant agreement between Nicholas Parker and the Bellingham Police Department. It was signed in February, 1999." Supp. CP ____, Sub # 44 in Wood file, 5/9/03, pp. 4-5. Kaholokula admitted she "knew when [she] was prosecuting Parker in 2000 that he was an informant." Supp. CP ____, Sub # 44 in Wood file., p. 5

Critically here, Kaholokula in total was admitting that she had failed to do a complete review of her file on Parker, yet she subsequently represented to Commissioner Mary Gross that she could vouch for Parker's relevant history as being one drug conviction.

Kaholokula's statements as warrant affiant were made in reckless disregard of the truth, requiring the affidavits be read to include these true facts. State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992). The

prosecutor's actions in this case cannot reasonably be described as "negligence or innocent mistake." Garrison, 118 Wn.2d at 872 (citing Franks, 438 U.S. at 171).

For the same reasons, Kaholokula's affirmative representations to the Commissioner also were reckless because Kaholokula failed to have actually reviewed her own files showing Parker's extensive criminal history, which included not just additional drug offenses but also multiple crimes of general dishonesty such as theft, and an investigation or charging of the crime of suborning false testimony in court. Again, the truth of Parker's background mounted steadily as it was elicited in the course of the Franks hearings, in which Kaholokula repeatedly had to admit, on multiple occasions, that Parker had a far more extensive pertinent history than Kaholokula had previously claimed to the Commissioner, and then to the trial court.

The Washington Supreme Court noted in State v. O'Connor, 39 Wn. App. 113, 117-18, 692 P.2d 208 (1984), that Franks and the relevant Washington decisions do not precisely illuminate what constitutes "reckless" disregard for the truth. However, O'Connor applied the test of United States v. Davis, 617 F.2d 677, 694 (D.C.Cir.1979), where the court deemed recklessness was shown where the affiant in fact entertained serious doubts as to the truth of facts or statements in the affidavit. O'Connor, 39 Wn. App. at 117 (citing United States v. Davis, 617 F.2d at 694. Such "serious doubts"

are shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports. O'Connor, at 117 (citing Davis, 617 F.2d at 694).

Here, there were glaring reasons right in front of Kaholokula to raise doubts about the veracity of the informant. The prosecutor represented to the issuing Commissioner that she had looked into Nick Parker's background, but the truth was that she had not done what she implicitly stated she had, which was review Parker's past as recorded in her own files. She admitted to having only done a full review of the very file months into the Franks hearings, and when this task, previously implied as done but never completed, was finally performed, it of course showed Parker was a prior failed police informant, and he had an extensive history of criminal offenses of general and specific dishonesty that made him wholly not credible. Kaholokula offered her affidavit statements for the search warrant while blithely ignoring her own record on Parker which she implied to the Commissioner, in her oral affidavit, that she had reviewed. A warrant affiant "may not intentionally or recklessly prepare the search warrant affidavit to create a materially false impression of enhanced reliability" United States v. Taft, 769 F. Supp. 1295 (D.Vt. 1999). Kaholokula prepared her warrant affidavits in reckless disregard of the truth about the informant that was present in her own office file.

The difference between negligence on the one hand, and the recklessness that occurred in this case, is illustrated by United States v. Miller, 753 F.2d 1475 (9th Cir.1985), a case in which it was held that a failure to learn that the criminal background of an informant included a past conviction for perjury, did not constitute reckless disregard for the truth, although it was negligent. The Ninth Circuit reasoned in Miller as follows.

The federal agents knew of the charges for which Becker was being held, and they knew of his Oregon narcotics and firearms convictions. They observed Becker's demeanor and behavior during the interview and testified that he appeared rational and coherent. The linchpin of Miller's challenge is Becker's [omitted] perjury conviction. But none of the officers, county or federal, was aware of the perjury conviction until the day the Franks hearing was held. It was not mentioned in the California rap sheet nor in the teletype from Oregon. The officers made diligent efforts to find out about Becker's background. Their failure to uncover the perjury conviction can be considered no more than negligence, if that.

(Emphasis added.) Miller, 753 F.2d at 1478. The warrant affiants were at most negligent in Miller: they employed a standard of care, making a good faith effort to discover information about the informant's background in preparing their warrant affidavits, but missed one prior matter.

Here, the trial court erroneously found that Kaholokula's omissions were merely negligent. There is supporting evidence for the finding Kaholokula did not have present conscious awareness of her knowledge of Parker's past when she gave her affidavit statements. But this prosecutor in

fact had a long and convoluted history with the informant Parker, charging and convicting him with drug crimes in the past, and knowing in the past that he had been convicted of multiple drug crimes and also crimes of general dishonesty. Unlike the investigators in Miller, who failed to uncover one prior matter about that informant of which they had never had any knowledge in the first place, Kaholokula in this case had intimate prior involvement with Parker's multiple past crimes of dishonesty, having once discussed the bringing of charges against him herself, for actual subornation of perjury. And of course, her own file showed Parker to be a prior terminated professional informant. All of these things placed Nick Parker in an informant class diametrically opposite to that of "citizen" informant. To offer Parker up to the Commissioner as a "concerned citizen" coming forward, while ignoring all her known records that she had on Parker and not reviewing them in even a remotely complete manner, despite representing to the Commissioner that she had done her 'leg work' on Parker and could vouch for his credibility, is the personification of bad faith. These multiple material omissions about Parker's informant and criminal background were a result of Kaholokula's reckless preparation of her warrant affidavit statements to the Commissioner.

Importantly, even absent Kaholokula's misleading representations to the Commissioner that she had looked into Parker's past, the state and federal

caselaw on Franks shows that the extraordinarily material nature of the multiple omissions in the affidavits about Parker in and of itself points strongly toward a conclusion that omitting that information was “reckless.”

As noted in United States v. Martin, 615 F.2d 318, 329 (5th Cir.1980):

It is possible that when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself.

United States v. Martin, 615 F.2d at 329; see also United States v. Reivich, 793 F.2d 957, 961 (8th Cir.1986).

All of this information was plainly central to the question of an informant’s credibility. It is a basic tenet of probable cause that the intensity with which a court scrutinizes an informant's veracity depends upon the informant's status. State v. Conner, 58 Wn. App. 90, 98-99, 791 P.2d 261 (1990); State v. Northness, 20 Wn. App. 551, 556-57, 582 P.2d 546 (1978). Named citizen informants are presumed reliable, State v. Rodriguez, 53 Wn. App. 571, 574- 75, 769 P.2d 309 (1989), while professional informants are presumed to be unreliable, given that a professional informant may have ulterior motives for making an accusation. State v. Northness, 20 Wn. App. at 557.

The trial court in this case, despite its reluctance to find recklessness, correctly and unambiguously concluded that the information omitted from the warrant affidavits was fatal to probable cause. Mr. Chenoweth submits that

the outcome-determinative materiality of those omissions suffices in and of itself to establish Kaholokula recklessly portrayed Parker as a citizen informant with only one conviction, for a drug offense.

Furthermore, the prosecutor's statements to magistrate were also intentionally false. The Court of Appeals mistakenly characterized the appellant's argument as being that prosecutor Kaholokula falsely stated to the magistrate that she had specifically reviewed her office's file on the informant, but appellant's argument was broader, though of similar import: Kaholokula's Franks recklessness, or even intentional falsity, in applying for the search warrant was her act of telling the magistrate she had "confirmed" the informant's criminal history as being only one prior drug offense, when she had Parker's history only one of possibly numerous means that she might have, but did not employ, to actually re-acquaint herself with her prior knowledge of Parker's far more extensive relevant history. But she had not re-acquainted herself with Parker's background, despite stating she had.

Thus the Court of Appeals held:

But Chenoweth fails to identify any evidence in the record to show that Kaholokula told the Commissioner that she had actually reviewed her file on Parker before swearing to her recollection of the fact of the conviction and fails to provide any support for an argument that she had an affirmative duty to review the file.

Court of Appeals decision, Appendix A, at p. 11. In fact, appellant's actual

contention was that Kaholokula's recklessness in applying for the search warrant was her act of telling the magistrate she had confirmed the informant's criminal history as being one prior drug offense, when she had not done so. Appellant's opening brief, at pp. 6-9, 53-55.

Kaholokula's failure to review her own file on the informant was one of many things she could and should have done (but did not do) to check Parker's history; however, it was her overall misrepresentation to the Commissioner about having confirmed Parker's criminal history -- which she had in fact failed to check, and which would have revealed numerous offenses of dishonesty including ones prosecuted by her office, not to mention his prior career as a failed professional criminal informant -- that renders the warrant invalid under Franks. Appellant's arguments place great emphasis on the fact that Kaholokula had voluminous prior knowledge about Parker and kept a file on him, but his case does not in any way turn on whether he can show that Kaholokula specifically told the magistrate she had reviewed that file or that she had a duty to do so. The gravity of the case is that Kaholokula uttered an intentional falsehood -- or at a minimum, was "reckless" -- when she stated she had confirmed Parker's history as being one drug conviction. She had not confirmed Parker's history, yet she stated to a judge responsible for issuing search warrants of Washington citizen's homes that she had done so. A review of the transcripts of the telephonic search

warrant applications clearly shows that Kaholokula told the Commissioner in the first application that Mr. Parker had one prior conviction for a drug offense, and then told the Commissioner in the second application that she had "confirmed Nicholas Parker's criminal history from what I recalled yesterday." Supp. CP ____, Sub # 44 (5/9/03, Exhibit A, at p. 10) (Exhibit C, at p. 1). The transcripts of both applications are attached as Appendix A.

The question is, did deputy prosecutor and warrant affiant Kaholokula tell the truth, when she stated to Commissioner Mary Gross that she had "confirmed Nicholas Parker's criminal history from what I recalled yesterday." Supp. CP ____, Sub # 44 (5/9/03, Exhibit C, at p. 1). The answer is no. Deputy prosecutor Kaholokula did not tell the truth to the Commissioner when she represented that she had confirmed Mr. Parker's criminal history. The prosecutor's actions in this case cannot reasonably be described as mere "negligence or innocent mistake," and in conjunction with the trial court's materiality finding, render the informant-based warrant unsupported by probable cause. State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992) (citing Franks, 438 U.S. at 171).

Ultimately, because of the prosecutor's misrepresentations to the Commissioner intimating she had reviewed Parker's background in preparation for giving the warrant affidavits, no reasonable court could conclude that the defense did not establish reckless disregard by prosecutor

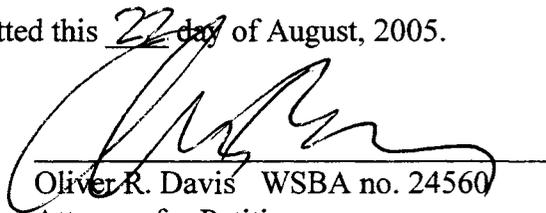
Kaholokula by a preponderance of the evidence. With the omitted information considered as having been in the affidavit, the affidavit is insufficient to establish probable cause, as the trial court here ruled.

Because of Kaholokula's recklessness, the Commissioner's review of the warrant affidavits in this case was rendered meaningless. Commissioner Mary Gross was not provided with a fair opportunity to review the question of the informant's true credibility in making the probable cause determination, and ended up performing her critical role at the caprice of the affiants involved in the case. United States v. Dorfman, 542 F.Supp. 345, 367 (N.D.Ill. 1982). The search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the original affidavit. Franks, 438 U.S. at 155-56.

F. CONCLUSION

Based on the foregoing, and on appellant's briefing below, petitioner Chenoweth asks this Court to accept review and to reverse the trial court's order denying the defense motion to suppress the evidence.

Respectfully submitted this 22 day of August, 2005.


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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)		
)	NO. 53027-5-I	
Respondent,)	NO. 53076-3-I (Consolidated)	RECEIVED
)		MAY 16 2005
v.)	DIVISION ONE	Washington Appellate Court
)		
RANDAL LEE CHENOWETH,)		
BARBARA JOYCE WOOD,)	PUBLISHED OPINION	
)		
Appellants.)	FILED: <u>May 16, 2005</u>	

KENNEDY, J. — Defendants charged with manufacturing methamphetamine challenged the validity of a search warrant, contending that State agents omitted material facts from warrant affidavits in violation of the Fourth Amendment, but the trial court determined that any omissions or inaccuracies were innocent or negligent rather than intentional or reckless. On appeal, defendants attack the warrant on its face, argue that the Washington State Constitution should allow challenges to search warrants based on negligent omissions, challenge a jury instruction, and allege that a second count of possession of methamphetamine violates double jeopardy. Because the defendants fail to demonstrate error regarding consideration of the warrant, and fail to establish that the Washington State Constitution requires a different result, the trial court's ruling on probable cause is affirmed. Because the second possession charge against Defendant Chenoweth violates double jeopardy, however, one of his convictions of possession is reversed, and the case against him is remanded for resentencing.

FACTS

In February 2003, Nick Parker told Lynden Police Officer Michelle Boyd that Randy Chenoweth was operating a methamphetamine laboratory at 1200 Aaron Drive in Lynden, where Chenoweth had Parker's car. Boyd passed the information to Whatcom Interagency Narcotic (WIN) Detective Ryan King of the Blaine Police Department. Parker then told King that he had been to the residence, described equipment consistent with the manufacture of methamphetamine, and stated that both Chenoweth and Barbara Wood participated in the manufacture of methamphetamine. Parker also told King that he wanted his car back.

Detective King and Deputy Prosecutor Rosemary Kaholokula then sought and obtained a search warrant for the residence. By means of questions posed by the deputy prosecutor and answered by the detective under oath, they informed the Court Commissioner that Parker had a prior conviction for possession and delivery of cocaine. During the presentation, Kaholokula stated to the Commissioner that she had prosecuted Parker for the cocaine charges. The Commissioner asked the deputy prosecutor to swear to that, and she did so.

Following execution of the search warrant, Prosecutor Kaholokula and Lynden Police Detective Lee Beld sought and obtained a second warrant for a motor home outside the residence. During that transaction, the deputy prosecutor remarked that she had "confirmed Nicholas Parker's criminal history from what I recalled yesterday." And she asked the Commissioner whether the first warrant would have issued if she had not verified what she recalled about Parker's criminal history the previous day. The Commissioner responded that the warrant would have issued without the prosecutor's statement because Parker had already told Detective King about his criminal conviction

and since there was no reason for him to have said that unless it were true, the statement was somewhat self-authenticating.

Based on the evidence found in the searches, the State charged Chenoweth and Wood each with one count of possession of precursor materials with intent to manufacture methamphetamine, one count of manufacturing methamphetamine, and one count of possession of methamphetamine. The State also charged Chenoweth with an additional count of possession of methamphetamine based on a white powder that he dropped during his arrest.

Chenoweth and Wood moved to suppress all evidence seized from the property, alleging that Kaholokula willfully and recklessly omitted material facts regarding Parker's history from discussions with the Commissioner when seeking the search warrants and requested a hearing pursuant to Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). In particular, Chenoweth and Wood 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 from Chenoweth 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.

After several hearings to consider the Franks issues, the trial court stated that the information regarding Parker's extensive criminal history, the Bellingham Police Department's decision not to use Parker based on concerns about his reliability, and Kaholokula's suspicion that Parker had suborned perjury, would have prevented a finding of probable cause to issue the warrant if it had been intentionally or recklessly, rather than negligently, omitted. Thus, the omissions were material. But because the trial court found that King and Beld did not know about, and Kaholokula did not remember Parker's history or relationship with the Bellingham Police Department, none of the omissions was intentional or reckless. The evidence found in the execution of the warrant was ruled admissible under Franks, and the case proceeded to trial.

A jury found Chenoweth and Wood guilty as charged. On appeal, Chenoweth attacks the warrant, challenging the trial court's findings (1) that Parker's previous informant relationship with police was terminated "for an unknown reason;" (2) that Detective King and Prosecutor Kaholokula were not dishonest and did not affirmatively hide information from the commissioner; (3) that Detective King and Prosecutor Kaholokula did not exercise bad faith in failing to gather relevant information for the Commissioner. Chenoweth also challenges the trial court's conclusions that Parker was acting as a citizen informant and that Parker's criminal history was not omitted with reckless disregard for the truth. Wood joins his arguments, and she also contends that under the Washington Constitution, *negligent* omissions of material facts can provide a sufficient basis upon which to challenge warrant affidavits. Finally, Chenoweth

contends that the trial court erroneously instructed the jury, and that his second possession conviction subjected him to double jeopardy.

ANALYSIS

Informant Reliability

Probable cause for a search warrant may be based on information provided by an informant if the supporting affidavit contains sufficient underlying facts from which a neutral and detached magistrate could conclude that both the information and the informant are reliable. State v. Northness, 20 Wn. App. 551, 554, 582 P.2d 546 (1978), citing Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). A magistrate's determination of probable cause will not be reversed absent an abuse of discretion. State v. Clark, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001). When a "criminal" or professional informant provides the information supporting the warrant, evidence of his trustworthiness must be included in the warrant to establish his reliability, but "[w]hen the informant is an ordinary citizen, as opposed to the criminal or professional informant, and his identity is revealed to the issuing magistrate, intrinsic indicia of the informant's reliability may be found in his detailed description of the underlying circumstances of the crime observed or about which he had knowledge." Northness, 20 Wn. App. at 557.

Chenoweth first contends that the warrant affidavit was inadequate on its face because it did not contain sufficient facts to indicate Parker's reliability. In particular, Chenoweth argues that although Parker's identity was revealed to the Commissioner, when it was also revealed that he had been convicted of a drug crime, the Commissioner erred by considering Parker to be a citizen informant such that intrinsic

indicia of his reliability could be found in "his detailed description of the underlying circumstances of the crime observed or about which he had knowledge." Northness, 20 Wn. App. at 557. Chenoweth contends that State v. Bittner, 66 Wn. App. 541, 832 P.2d 529 (1992) "stands for the proposition that the critical distinction of being a 'concerned citizen informant,' and the concomitant cloaking of the informant in the presumption of reliability, is not warranted where the true facts reveal even mere suspected, unconvicted criminal conduct." Brief of Appellant Chenoweth at 43.

In Bittner, an officer's affidavit stated that a "concerned citizen" who was "NOT a regular police informant, or a paid police informant, and ha[d] not previously contacted this office, or any other police entity" reported a drug transaction and wished to remain anonymous for fear of "swift and sure retribution;" that the officer had "conducted a thorough criminal records check on the concerned citizen with negative results;" and that the informant was a long-standing member of the community employed by a major corporation. 66 Wn. App. at 542. According to the affidavit, the informant testified that his friend purchased drugs at a particular residence within the past week and that he accompanied the officer to the suspect's residence and identified the residence and the suspect's car. Id. Following the execution of the warrant, the informant testified that he cooperated only because the officer threatened him with prosecution for intimidating a federal witness and impersonating a police officer; that the officer was aware that he was unemployed; that he had a prior criminal record of reckless driving and driving while intoxicated; that he had previously contacted the police to discuss his impersonation of a police officer; that the drug deal took place 3 or 4 weeks prior to the affidavit and that he participated in the drug use and paid for the drugs; and that he did not know the defendant, had no reason to fear him, and had never accompanied the

officer to the defendant's residence. Id. at 543. Following a Franks hearing, the trial court found that the informant was not a credible witness and that the officer was unaware that some of the statements in the affidavit were false, and held that the affidavit established probable cause and the defendants failed to prove by a preponderance of the evidence that any reckless or intentional misstatements or omissions of material fact affected the finding of probable cause. Id. at 544.

On appeal, this court reversed the defendants' judgments and sentences because the facts in the affidavit were insufficient to support a finding of probable cause where the informant merely testified to a single unobserved transaction by an unidentified friend, and no corroborating evidence was provided regarding whether the defendant was a known drug dealer or whether the friend was reliable. Id. at 547. The court then stated:

In light of our decision, it is not necessary to reach the issue of whether the affidavit in support of the search warrant contained reckless or intentional misstatements or omissions of material fact which violate the principles of Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Nonetheless, we note with disapproval the type of affidavit produced here. The picture of the informant created by the affidavit for a search warrant was not in accord with the true facts. Although we accept the trial court's credibility determinations which resolved most of the Franks issues, it was error not to have included in the affidavit that the "concerned citizen" had previously contacted the sheriff's office because he had been investigated for a crime. This type of information could influence a magistrate's decision in assessing the reliability of an informant's tip.

Id. at 548.

Contrary to Chenoweth's claim, Bittner does not establish a rule that an informant with a criminal conviction or suspected of criminal activity cannot be considered a citizen informant, rather than a criminal or professional informant, for the purposes of evaluating reliability. In fact, as stated in Northness, "the fact that an identified eyewitness informant may also be under suspicion in this case because of her initial

contact has been held not to vitiate the inference of reliability raised by the detailed nature of the information and the disclosure of the informant's identity." 20 Wn. App. at 558 (citing United States v. Banks, 539 F.2d 14, 17 (9th Cir. 1976) (fact that named, untested, non-professional informer was under investigation based on suspicion of being involved in drug traffic was immaterial to question of reliability of informant where he voluntarily provided detailed eyewitness report of defendant's drug dealing); United States v. Darenbourg, 520 F.2d 985, 988 (5th Cir. 1975) (affidavit providing name and address of 15 year-old informant and detailed information about robbery evidence sufficient to demonstrate reliability); United States v. Rueda, 549 F.2d 865, 869 (2d Cir. 1977) (no need to show past reliability where informant is in fact a participant in the very crime at issue)).

Moreover, Chenoweth fails to demonstrate that other indicia of reliability here could not support a finding of probable cause. It is undisputed that Detective King informed the Commissioner that the informant's name was Nicholas Parker; that Parker had a prior conviction for delivery and possession of cocaine; that Parker went to the Chenoweth residence to get his car and was told to leave; that Parker had observed flasks, filters, chemicals and equipment consistent with methamphetamine manufacture and that Chenoweth told Parker that he was manufacturing methamphetamine; that Parker admitted to assisting Chenoweth and Wood with methamphetamine manufacture in the past; that Parker admitted to ingesting methamphetamine with Chenoweth and Wood at the residence in the past; and that Detective King verified that Wood's address was listed as that provided by Parker.

Because Detective King provided Parker's name to the Commissioner, because Parker made statements against his penal interest, and because the amount and kind of

detail provided support an inference of reliability, the Commissioner did not abuse her discretion in finding that probable cause supported the search warrant. See Northness, 20 Wn. App at 556-57 (where informant is named to magistrate, rule requiring independent evidence of credibility may be relaxed); State v. Lair, 95 Wn.2d 706, 711, 630 P.2d 427 (1981) (because informant who admits criminal activity to police officer faces possible prosecution, statements raising such a possibility may support an inference of reliability as such statements are "not often made lightly"); State v. O'Connor, 39 Wn. App. 113, 122-23, 692 P.2d 208 (1984) (amount and detail of information provided enhanced credibility of named informant who was under arrest at the time of the statement and made statements against penal interest.) We reject Chenoweth's assertion that Parker's tip must be subjected to the heightened scrutiny generally reserved for criminal unnamed informants, as well as his intimation that all other inferences are inapplicable. Reviewing courts are required to give great weight to a magistrate's determination related to probable cause and all doubts are to be resolved in favor of the warrant. O'Connor, 39 Wn. App. at 123.

Material Omissions

Under the Fourth Amendment, an omission or false statement made in an affidavit in support of a search warrant may invalidate the warrant if it was (1) material, and (2) made intentionally or with reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154, 155-56; 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); State v. Cord, 103 Wn.2d 361, 366-67, 693 P.2d 81 (1985). Where a defendant makes a substantial preliminary showing of such an omission or false statement, the trial court must hold a hearing. Franks at 155-56; Cord at 366-67. If the defendant then establishes his allegations by a preponderance of the evidence at that hearing, the material

misrepresentations will be stricken from the affidavit and the material omissions will be added. If the modified affidavit then fails to support a finding of probable cause, the warrant is void and the evidence obtained will be excluded. Franks at 155-56; Cord at 366-67.

Here, the parties do not dispute the trial court's finding that information not provided to the Commissioner but later revealed at various Franks hearings was material. In particular, the police and deputy prosecutor did not tell the Commissioner about Parker's past work as a paid informant to the Bellingham Police Department, about Parker's full criminal history, about compensation paid to Parker by WIN, and about the prosecutor's prior dealings with Parker, including her suspicion that he had suborned perjury. The question is whether the trial court erred in concluding that these omissions were not intentional or reckless. Chenoweth contends that Deputy Prosecutor Kaholokula and Detective King omitted material information with reckless disregard for the truth. By implication at least, he argues that on these facts, the omissions were reckless as a matter of law regardless of the court's findings regarding the veracity of the deputy prosecutor and detective.

A reckless disregard for the truth may be shown where the affiant "'in fact entertained serious doubts as to the truth' of facts or statements in the affidavit." State v. Clark, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001) (quoting O'Connor, 39 Wn. App. at 117. "Serious doubts" can be "shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'" Id. (quoting O'Connor.)

Chenoweth contends that Kaholokula acted with reckless disregard for the truth by swearing to the best of her knowledge to the Commissioner that Parker's criminal

history included the drug charge she prosecuted and then, when asking for the second search warrant, telling the Commissioner that she had confirmed her previous recollection, despite the fact that she did not actually fully review her file regarding her 2000 prosecution of Parker. If she had thoroughly reviewed her file, she would have found a copy of Parker's confidential informant agreement with the Bellingham Police Department dating from 1999 and continuing until after the Franks hearing process had begun. But Chenoweth fails to identify any evidence in the record to show that Kaholokula told the Commissioner that she had actually reviewed her file on Parker before swearing to her recollection of the fact of the conviction and fails to provide any support for an argument that she had an affirmative duty to review the file. Although a thorough review of the file would have undoubtedly reminded Kaholokula of her earlier suspicions regarding Parker's reliability, Chenoweth fails to identify any deliberation on Kaholokula's part, or any obvious reasons from the circumstances of Parker's tip to Detective King to cause her to doubt Parker's veracity. Given the trial court's unchallenged finding that Kaholokula, who prosecutes over 200 cases per year, had no recollection of Parker's relationship with the Bellingham police, and Chenoweth's failure to demonstrate that Kaholokula had serious doubts as to the truth of her statements regarding the fact of Parker's conviction in the case she prosecuted against him, the trial court did not err in concluding that Chenoweth's challenge to the warrant failed.

Chenoweth also contends that because the totality of the omissions—including Kaholokula's prior knowledge of Parker and King's knowledge that Parker had asked for money—was material and would be fatal to probable cause if intentionally or recklessly omitted, the trial court may infer recklessness. Relying on United States v. Martin, 615 F.2d 318, 329 (5th Cir. 1980) Chenoweth asserts that the "outcome-determinative

materiality of those omissions suffices in and of itself to establish Kaholokula and King recklessly portrayed Parker as a citizen informant." Brief of Appellant Chenoweth at 61.

But as the court recognized in State v. Garrison, inferring recklessness from the omission of facts "clearly critical to the finding of probable cause," United States v. Martin, 615 F.2d at 329, is not proper because that "inference collapses into a single inquiry the two elements, 'intentionality' and 'materiality'—which Franks states are independently necessary." State v. Garrison, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992).

The trial court's credibility determinations that underlie its findings regarding the honesty of the deputy prosecutor and the detective in this case are binding on this appellate court.

Challenge to Warrant Affidavit under Washington State Constitution

Wood contends that Wash. Const. art. 1, § 7 provides greater protection than the Fourth Amendment, such that defendants should be allowed to challenge warrants based on negligent inclusion of false information or negligent omissions of material facts. Wood cites cases from California, Montana, Colorado, and Louisiana adopting this rule or some variation of this rule. See People v. Kurland, 28 Cal. 3d 376, 618 P.2d 213 (1980); State v. Worrall, 293 Mont. 439, 446-47, 976 P.2d 968 (1999); People v. Dailey, 639 P.2d 1068, 1075 (Colo. 1982); State v. Byrd, 568 So.2d 554, 559 (La. 1990). Wood presents an analysis of the six factors identified in State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), for claims under the state constitution: (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.

The central question of the Gunwall analysis is whether a particular result is actually compelled by the unique characteristics of the state constitutional provision and its prior interpretations. City of Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994). The Fourth Amendment provides,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. The Washington State Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. Art. 1, § 7. While it is true that the term "private affairs" has been interpreted to provide protection that is broader in scope than the language of the Fourth Amendment, see, e.g., State v. Young, 123 Wn.2d 173, 179-80, 867 P.2d 593 (1994) the focus here is on what constitutes "authority of law." Because a valid search warrant constitutes "authority of law," McCready, 123 Wn.2d at 271-72, the question we must decide is whether a warrant supported by an affidavit omitting material facts due to negligence rather than intention or recklessness necessarily fails to constitute "authority of law." Wood fails to argue or demonstrate that the textual differences between "authority of law" and the Fourth Amendment's "Warrants" issued "on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized," or that any constitutional history compels a different treatment of the negligent omission of material facts under the Washington Constitution.

Wood next argues that under the fourth factor, preexisting state law, State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984) supports her contention that Article I, Section 7 demands a higher standard than the Fourth Amendment when considering

challenges to warrant affidavits including informant information. In Jackson, our Supreme Court declined to follow the United State Supreme Court decision in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) replacing the Aguilar-Spinelli test with a "totality of the circumstances" approach. But Washington courts had required indicia of reliability to support informant tips even prior to Aguilar-Spinelli. Jackson, 102 Wn.2d at 439-40. Similarly, Washington courts allowed challenges to search warrants based on intentional or reckless omissions, but not negligent omissions, even before Franks was decided. State v. Goodlow, 11 Wn. App. 533, 535, 523 P.2d 1204 (1974) (adopting rule of United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973) suppressing evidence only if government agent was either recklessly or intentionally untruthful); State v. Hink, 6 Wn. App. 374, 377, 492 P.2d 1053 (1972) (detective's honest misunderstanding of informant's information did not justify striking down warrant); State v. Sewell, 11 Wn. App. 546, 547-48, 524 P.2d 455 (1974) (detective's good faith claim that he conducted the controlled buy was a negligent misstatement that did not justify striking down warrant); see also State v. Seagull, 95 Wn.2d 898, 908, 632 P.2d 44 (1981) (adopting Franks as "wholly logical" because Fourth Amendment proscribes "unreasonable" but not "inaccurate" searches). Thus, this factor does not compel a different rule for negligent omissions of material information under Article I, Section 7.

The sixth factor considers matters of particular state or local concern. The question is whether potential policy considerations outweigh any need for national uniformity. Although four other states have departed from the Franks rule, Wood offers no particular state or local concern weighing in favor of a new rule beyond the State's general interest in protecting an individual's right to privacy.

In sum, we conclude that Wood fails to demonstrate that Article I, Section 7 requires a different standard for challenging warrants from that of the Fourth Amendment.

Jury Instructions

Chenoweth also contends the trial court erred by giving Instruction 23 providing:

In conclusion, let me remind you that each of you has taken a solemn oath that you will well and truly try the case and a true verdict render upon the evidence given you in the trial and upon the law as now given you by the Court. You must not allow yourselves in the least to be moved by sympathy or influenced by prejudice. The question of guilt or lack of guilt is a question of fact, not a question of sympathy or prejudice or what the punishment will be. If, as a matter of fact, from the evidence, the defendant is guilty, no amount of sympathy will make the defendant innocent. If the defendant is innocent, no amount of prejudice will make him guilty; for, regardless of any feelings of sympathy or prejudice, the defendant is, upon the evidence and evidence alone, either guilty or not guilty. What is the true verdict, as shown by the evidence, is the one question before you.

Clerk's Papers at 82.

In particular, Chenoweth contends that the instruction suggests that the defendant can only be acquitted if he is innocent. Chenoweth cites Gomilla v. United States, 146 F.2d 372 (5th Cir. 1944) to support his argument that Instruction 26 constituted reversible error. In Gomilla, the trial court instructed the jury as follows:

The rule of the presumption of innocence imposes upon the government the burden of establishing the guilt of each defendant, as stated, beyond a reasonable doubt, but, Gentlemen, as forceful as that rule is in protecting one charged with crime, it must never be forgotten that it was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment. The rule is but a humane provision of the law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but absolutely nothing more.

146 F.2d at 373. Because the instruction was not a correct statement of the law, and because it and other errors could have led the jury to believe that the judge was of the

opinion that the defendants were guilty and should be convicted, the Gomilla court reversed the conviction. Id. at 376.

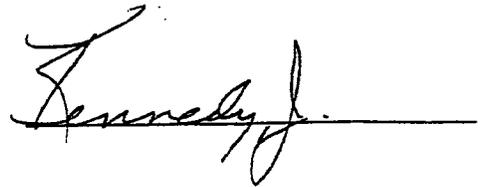
But here, several instructions, including Instruction 26, told the jury that it was to decide whether the defendants were guilty or not guilty. Standing alone, the wording of Instruction 26 probably could be improved, but read as a whole, the instructions would not lead the jury to believe that acquittal required a finding of actual innocence.

Double Jeopardy

Finally, Chenoweth contends that his two convictions for possession of methamphetamine subjected him to double jeopardy, relying on State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). When, as here, a defendant is charged with more than one crime under the same statutory provision, the proper inquiry is what unit of prosecution was intended by the Legislature within the particular criminal statute. Adel, 136 Wn.2d at 634. If the Legislature fails to designate the unit of prosecution within the criminal statute, any resulting ambiguity must be construed in favor of lenity. Id. at 635 (citing Bell v. United States, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955) (doubt is resolved against turning a single transaction into multiple offenses)). Former RCW 69.50.401(d), as the section at issue in Adel, former RCW 69.50.401(e), did not indicate whether the Legislature intended to punish a person multiple times for having amounts of the drug in more than one place within the person's actual or constructive possession. The State argues that the vial of methamphetamine found near Chenoweth's person at the time of his arrest supports a separate charge because there was no evidence that the methamphetamine found in the house was from the same batch or source. But the unit of prosecution test and the rule of lenity require a different result. Because the statute prohibits possession, regardless of intent or

source, and nothing in the record suggests a separate unit of prosecution, double jeopardy concerns require dismissal of one count of possession. Adel, 136 Wn.2d at 637.

The trial court's ruling denying suppression of evidence obtained as a result of the warrant is affirmed. All convictions are affirmed except Count IV against Chenoweth, which is reversed. The case against Chenoweth is remanded for resentencing on his remaining convictions.

A handwritten signature in cursive script, appearing to read "Kennedy J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Schweitzer, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Aziz, J.", written over a horizontal line.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RECEIVED

STATE OF WASHINGTON,)
)
Respondent,)
)
v.)
)
RANDAL LEE CHENOWETH,)
BARBARA JOYCE WOOD,)
)
Appellants.)

AUG - 4 2005
NO. 53027-5-1
NO. 53076-3-1 (Consolidated) Washington Appellate Project

ORDER DENYING APPELLANTS'
MOTIONS FOR RECONSIDERATION

The court having received and considered Appellant Randall Chenoweth's Motion for Reconsideration which was filed on June 3, 2005, and appellant Barbara Wood's Motion for Reconsideration which was filed on June 6, 2005, and the panel having determined that said motions should be denied, Now Therefore, It Is Hereby

ORDERED that said Motions for Reconsideration are denied.

Dated this 4th day of August, 2005.

FOR THE COURT:



Presiding Judge

ATTACHMENT A (Supp. CP __, Sub # 44)

This was the extent of my personal recollection as to Parker's criminal history.

3. I did not independently run a criminal history on Parker prior to calling Commissioner Gross to seek a search warrant.
4. I do not recall if I asked Sergeant King about Parker's history prior to the request to the commissioner for a search warrant. I probably did not but only first proposed the question in the midst of the search warrant request.
5. When Sergeant King said that Parker had told him that he had served approximately a year and a day in the state penitentiary for delivery of a controlled substance and possession of cocaine, this comported with my personal recollection of that case. The year and a day seemed a little short considering the standard range for a delivery charge, but I did not know how much good time or work release he would have received.
6. Yesterday I examined the files in my office with respect to Parker's charges that were prosecuted in 1999/ 2000. I found that Parker, in fact, was convicted of one delivery of cocaine charge and one possession charge. I also learned that Parker, in fact, spent slightly over a year in prison (10/3/2000 to 10/23/2001). See Exhibit B.
7. On February 6, 2003, Detective Lee Beld called me requesting an addendum to the original search warrant to search a motor home on the property. Beld told me that the search warrant granted the previous day was in the process of being executed. He wanted to search the mobile home based on additional information received from Parker. The addendum was granted. The application for the addendum is attached hereto as Exhibit C.
8. At the State's request, on either the 6th or 7th of February, the court sealed the applications for the above search warrant and addendum. The sealing was for purposes of protecting the informant's identification. After the execution of the search warrants, I was informed by law enforcement that they wanted to explore the possibility of using Parker as an informant for future cases. I was told he was not then an informant. I have since learned that law enforcement is not interested in using Parker as an informant.
9. On February 7, 2003, I filed charges on Randal Chenoweth and Barbara Wood for a variety of offenses related to the manufacture of methamphetamine.
10. On March 13, 2003, I filed the State's first Witness List. Parker is listed as "confidential informant" therein. I was unsure whether I would actually use him as a witness in the case yet.

11. An amended witness list was filed on March 31, 2003. At this point, the case had been largely transferred to a different prosecutor and we decided that we would probably call Parker as a witness. Therefore, we listed his name on this witness list.
12. On April 2, 2003, a hearing was held on defendant's first Franks motion. At that hearing, I had in my possession a print-out of Nicholas Parker's criminal history. It is a state-wide print-out that I can access in my office and rely on in determining criminal history. A copy of it is attached hereto as Exhibit D. It indicates only the two felony drug convictions from 2000. It does not indicate any other felony criminal history (which term I use to mean "convictions"). It only indicates a pri [REDACTED] and a couple of driving charges.
13. At some point I accessed another criminal history system (nation wide system) known as "NCIC." This system reflects only three felony convictions: Theft in the First Degree, Delivery of a Controlled Substance, and Possession of a Controlled Substance. I don't remember if I had this print-out at the time of the April 2 hearing. If I did, I would have told the court about this criminal history. See Exhibit E.
14. Defense counsel alleges that because I prosecuted Parker in 1999/2000, I knew his arrest and conviction history. I prosecute more than 200 cause numbers a year. I did not have an independent recollection of Parker's history. I have since reviewed Parker's Judgment and Sentence filed in Cause # 00-1-00069-6 and see that the criminal history reflected therein was for three juvenile adjudications: [REDACTED] Second Degree, [REDACTED] First Degree, and Burglary in the Second Degree. See Exhibit F.
15. After the April 2, 2003, hearing in which defense counsel kept insisting that Parker had many other felony criminal convictions, I checked our computer in my office that logs all cases received and prosecuted [REDACTED]. According to our computer, Parker was adjudicated as a juvenile of Burglary II and Theft II under Cause # 92-8-00782-5. See Exhibit G. These adjudications do not appear on the history that I relied on in the April 2 hearing. This system also shows a juvenile adjudication for Theft in the First Degree under Cause #95-8-00634-3. See Exhibit H. This adjudication does not appear as a conviction on the history that I relied on in the April 2 hearing. Our system also reflects the drug convictions that I prosecuted in 1999/2000. Our computer reflects the Incest charge that defense counsel has asserted to be a conviction, however, our computer shows that that charge was dismissed. See Exhibit I. I have not checked the court files with respect to any of these charges.
16. Defense counsel alleges that because I prosecuted Parker in 1999/2000, I had personal knowledge that Parker had been described as a person who fabricates

things. As previously indicated, the extent of my recollection with respect to this issue, at the time I sought a search warrant, was that I had information that Parker had alleged that he had provided drugs to his defense attorney. I knew the allegation was disputed. I have since reviewed my files and it appears that the reason that I brought this issue to the court's attention was because of a concern that, with his client supposedly making these allegations, the defense attorney may have a conflict of interest. In reviewing my file it appears that the veracity of Parker was not relevant to this issue – the issue was whether the attorney would have a conflict when his client was saying these things.

17. On April 2, 2003, I provided defense counsel with criminal conviction history and any plea bargains with witnesses. See Exhibit J.
18. On April 7, 2003, I provided further information to defense counsel about Parker. See Exhibit K.
19. I was unaware of any civil suit with the Blaine Police Department at the time of the application for the search warrant.
20. Defense counsel alleges, "Rosemary Kaholokula at first denied the facts, and after being confronted with the issue of the vehicle as a motive to lie, still claimed that the vehicle being returned was not discussed until after the revelation of the incriminating information against the Defendants by the informant. That was a lie. Officer Boyd of Lynden, clearly stated that Parker's first calls were solely about his desire to get his vehicle and his insistence that the police help him do so." See p. 20. I don't know what defense counsel is talking about here. There was an evidentiary hearing on April 2, 2003, where Officer King testified about when the meth lab information was revealed as compared to when the retrieval of Parker's vehicle was discussed. I do not believe that I testified to anything. Furthermore, I have never spoken with Officer Boyd. After the April 2, 2003, the case was essentially taken over by another prosecutor. I have no personal knowledge as to what Officer Boyd has said with respect to this issue.
21. Yesterday, I reviewed Parker's criminal files in our office from the 1999/2000 drug charges. I learned the following:
 - a. There were three cause numbers. The first cause number, 99-1-00349-0, alleged two deliveries of cocaine. The Information was filed on April 1, 1999. I was not the prosecution who charged this case. According to our computer system and file, I took over the prosecution of the case sometime in July of 1999. [REDACTED] informant agreement between Nicholas Parker and the Bellingham Police Department. It was signed in February, 1999.

- b. The second cause number, also from 1999, was charged by me on October 13, 1999, based on an event occurring in July of 1998. It charged one count of delivery.
- c. The third cause number was charged by me on January 20, 2000, for events occurring on December 4, 1999, and December 15, 1999. The charges were two deliveries. I filed an amended information on February 10, 2000, alleging another delivery occurring on 11/17/99. On February 11, 2000, I filed another information incorporating the two deliveries from the first 1999 cause number, and adding a tampering with a witness charge.
- d. In June of 2000, I became concerned about possible issues arising on appeal with respect to a potential/actual conflict of interest with Parker's attorney. This was in light of information provided to me by several people including Parker's attorney, and in light of the line of questioning that Parker's attorney was pursuing in witness interviews. Some of those same people indicated that they thought Parker was untruthful. Parker himself later denied having made any of those allegations about his attorney. A hearing was held, Parker waived any conflict, and the case proceeded.
- e. These pending matters were finally resolved on September 27, 2000, when the second 99 cause number was dismissed and Parker pled to one count of delivery and one count of possession in the 2000 cause number. (The first 99 cause number was dismissed in February, 2000, when those charges were incorporated into the 2000 cause number.
- f. At the time of the application for the search warrant, and up until I reviewed the defendant's pending motion, I had no independent recollection that Parker had [REDACTED]. After reviewing the [REDACTED] it seems clear now that he did, but I believe that that was finished by the time I took over the prosecution of his cases. It is clear from the files that I took over the Parker matters in July, 1999. I do not believe he was working as an informant at that time. I'm sure I knew when I was prosecuting Parker in 2000 that he was an informant previous to the prosecution, but it was not a factor pertinent to my prosecution which probably explains why I have no independent recollection of it. I do not know why Parker's informant relationship as an informant with the Bellingham Police Department ended badly. I may have known in 1999 or 2000, but I have no recollection at this point as to having information explaining why the relationship ended.

22. On May 8, 2003, at 12:15 p.m., I was informed by Deputy Prosecuting Attorney James Hulbert, who has been handling this case since April 2, 2003, that according to Detective Lee Beld, Nicholas Parker was paid several hundred dollars some time after providing the information that led to the search warrant and after the execution of the search warrant. I was informed that after the search warrant was obtained, but before its execution, Parker had asked if he could get some money out of this. I was informed that Parker was

informed that if the search warrant “panned out”, then he might get some money. I was informed that the issue of money did not arise until after the information that led to the first search warrant was given. This was the first I had heard of this. I was not informed by Detective Beld or anybody else that Parker was subsequently paid for the information.

23. On May 9, 2003, in the morning, I listened to a voice mail left by Detective Beld for Jim Hulbert. It related to payment to Nicholas Parker and Parker’s willingness and motivation to testify at the trial. The first part of the voice mail I relate verbatim as follows:

Yeah, Lee Beld. I just talked to Nick Parker and he was going to give you a call but he says, I will give you 100% truthful testimony, I saw lots of shit in that house, I saw lots of people doing lots of things, I didn’t discuss it with him any further than that. I did ask him a little bit about this when did the whole money thing come up and he says well I told you right . . . I told somebody right from the beginning that I wanted uh I’d like some money out of this I definitely wanted my car back and and uh he says I’m not sure that somebody actually promised me the money just said that you know we’ll see how it all turns out and make sure everything is where I said it was going to be and he says I don’t know if that was you or Ryan or whoever he says it might even have been later but at some point in time the money came up and he thought it was pretty early on.

The remainder of the voice mail is summarized as follows:

Parker affirmed that he would testify. Beld told him to testify truthfully. Beld talked about whether Parker would present as a good witness. Parker told Beld he was hoping for consideration on the case he’s currently got pending.

24. This morning I called Sergeant Ryan King. He told me that no conversation about money occurred in his presence prior to the issuance of the search warrant. He said that the sequence of events was as follows: King responded to meet with Parker. King knew nothing about any desire for money on the part of Parker. King met with Parker. Parker didn’t say anything about wanting any money. They talked for about 10 – 15 minutes prior to Detective Beld’s arrival. About half the information was out before Beld arrived. After Beld’s arrival there was no discussion about any payment to Parker or about Parker’s desire for money. The search warrant was applied for and issued. Some time after the issuance of the search warrant but before it’s execution, Parker approached Beld and asked for some money to repair his car. Beld approached King and asked if money could be provided to Parker. Sergeant King also said that his knowledge of Parker before this day was limited to having heard Parker’s name several years ago in context of his (King’s) job.


Rosemary H. Kaholokula, #25026
Deputy Prosecuting Attorney

SUBSCRIBED AND SWORN to before me this 9 day of May, 2003.


NOTARY PUBLIC in and for the
State of Washington. My
commission expires:
July 15, 2005

SEARCH WARRANT
2003M00333
State v. Randal Chenoweth 03-1-00211-1
State v. Barbara Wood 03-1-00212-0

Rosemary Kaholokula: RHK
Commissioner Martha Gross: CMG:
Officer Ryan King: ORK

RHK: This is a telephonic application for a search warrant. Rosemary Kaholokula is representing the State, Commissioner Gross is the magistrate and Officer Ryan King of the Blaine Police Department is the affiant and if you would please raise your right hand, Officer King, the Commissioner can swear you in.

ORK: My right hand is raised.

CMG: Okay, do you swear to tell the truth, the whole truth and nothing but the truth in all matters before the Court?

ORK: I do, your Honor.

CMG: Okay. Go ahead.

RHK: Why don't you first go ahead the state your occupation and where you work.

ORK: I am currently a police officer with the City of Blaine Police Department.

RHK: And how long have you been with the Blaine Police Department?

ORK: Approximately 12 years.

RHK: And, during that tenure there, did you spend some time as the drug detective over there?

ORK: Yes, I did, I spent approximately 4 ½ years as a drug investigator assigned to DEA and U.S. Customs Service in Blaine, Washington.

RHK: And, as an officer and also with the WIN team or as the drug investigator, did you receive specific training in how meth labs are operated and how methamphetamine is manufactured?

ORK: Yes, I have.

RHK: What is that training that you received?

Exhibit A

ORK: Uh, approximately 3 years as a Certified Crime Lab Enforcement Officer, certified by the Drug Enforcement Administration in Quantico, Virginia. Also, approximately 120 hours in Site Safety School certified by DEA in Quantico and the Clandestine Laboratory Technical Entry Officer also certified by DEA in Quantico, Virginia.

RHK: And, so what sort of things are you trained in when you receive these certifications?

ORK: I am trained in the recognition of (unintelligible) chemicals, the manufacturing process of illicit drugs.

RHK: Including methamphetamine?

ORK: Methamphetamine? Um, also instructed on how to dismantle such laboratories and investigation of further suspects on that concerning the methamphetamine manufacturing.

RHK: How long ago did you have this training?

ORK: Training occurred approximately 3 years ago.

RHK: And when did you stop being the drug investigator?

ORK: Could have been January 1st of 2003.

RHK: Have you, um, actually investigated and seen methamphetamine labs as an officer and as the drug investigator?

ORK: Yes, I have. I have actually assisted in the clean up and removal of at least four methamphetamine labs within Whatcom County, Washington.

RHK: And, was that within the last 3-6 years?

ORK: Yeah, that was within the last 3 years.

RHK: Okay. Why don't you go ahead and state, well, why don't you first state what it is you want to search and what you want to search for.

ORK: Okay. The place, your Honor, the place that I would like to search is a white single story wood framed single family dwelling with composite roof located at 1200 Aaron Drive, Lynden, Washington.

CMG: Can you repeat that again?

ORK: The....

CMG: Just the address.

ORK: 1200 Aaron Drive.

CMG: How do you spell Aaron?

ORK: A-A-R-O-N

CMG: Okay, and that was in which community? Blaine?

ORK: In Lynden, Washington.

CMG: Thank you.

ORK: You're welcome. The residence is further located on the southwest corner of Aaron Drive and Binup Road. Binup is B-I-N-U-P in Lynden, Washington.

CMG: Okay.

ORK: (unintelligible) has the numbers 1200 attached to the front, as well as blue lettering painted on the street curb with the numbers 1200. Also included in that scripture is a C attached to the garage.

RHK: How is it attached?

ORK: I'm sorry?

RHK: How is it attached?

ORK: It is attached by a, uh, kind of walkway directly off of the laundry room area or utility room as soon as you exit out to that floor, you walk up to the garage door.

CMG: So it's a detached garage, but it's associated with the house?

ORK: Correct.

CMG: Okay.

RHK: Why don't you go ahead and write that on the search warrant that it would be a detached garage associated with the house by a walkway that leads to it from the house?

ORK: Okay.

RHK: And while you've got that, go ahead and tell us what you want to search for.

ORK: Okay. It's been noted on the warrant. The other search for, your Honor, would be flasks, ephedrine, red phosphorous, tincture of iodine, acetone, kerosene, draino, red devil lye, scales, chemical bi-products, hoses, occufilters with bi-product, hydrogen gas generators, jars, beakers or chemicals used in methamphetamine manufacturing, methamphetamine, packaging materials, crib notes, records showing dominion of occupancy, currency associated with the sale of controlled substances.

RHK: And these items that you mention specifically, the chemicals and the flasks, are those all items associated with the manufacturer of methamphetamine?

ORK: Yes they are.

RHK: And the chemicals, would they all be used actually in the to make the methamphetamine in the manufacturing process?

ORK: Yes they are.

RHK: And the flasks and scales, they would be used also to, um, um, I guess mix up those chemicals?

ORK: That's correct.

RHK: Then to weigh the finished product?

ORK: Correct.

RHK: And the ephedrine, is that the common precursor drug used to manufacture methamphetamine?

ORK: Yes it is.

RHK: Okay, why don't you go ahead and state the probable cause if you have it?

ORK: Okay, your Honor, on today the February 5th 2003 at approximately 7:00 a.m., I received a telephone call from Lynden Police Department, who put me in contact with a Ferndale resident by cellular telephone. I contacted that person and he was identified as John Nicholas Parker of Robin Drive in Ferndale, Washington. Mr. Parker agreed to meet with me to provide information about a methamphetamine lab that was actually in progress at the 1200 Aaron Drive address.

RHK: Let's talk about, um, Nicholas Parker for just a minute. Are you aware of his criminal history?

ORK: Yes I am.

RHK: And, what is his criminal history as far as you know?

ORK: He's indicated that he served approximately a year and a day in the state penitentiary for delivery of a controlled substance and possession of cocaine.

RHK: And this is what he told you?

ORK: That's correct.

RHK: Could he have verified through a record's check?

ORK: I have not.

RHK: Okay. Um, okay go ahead.

ORK: I met with Mr. Parker at the police department and he indicated to me that at around 3:30 to 3:45 this morning, um, on the 5th of February, he had a conversation with an acquaintance of his by the name of Kelby Hines H-I-N-E-S, I believe. Um, that discussion was regarding a vehicle in which Mr. Parker had taken to one of the suspects of this residence, a Randy Chenoweth. Um, apparently Mr. Parker had been trying to get his vehicle back and during this conversation, a three-way call had been placed to Randy Chenoweth at his residence by Kelby Hines. It was Kelby Hines and Randy Chenoweth that had the conversation about the release of Mr. Parker's vehicle over Mr. Chenoweth was unaware that Mr. Parker was on that three-way call. The conversation....

CMG: Mr. Parker, Mr. Chenoweth was unaware that Mr. Parker was on the call?

ORK: Correct.

CMG: Okay.

ORK: The conversation over the vehicle took place over a period of just a few minutes. The telephone call ended.

RHK: And this was about 3:30 or 3:45 this morning?

ORK: Correct.

RHK: Okay.

ORK: Um, Mr. Parker then went to the Chenoweth residence at 1200 Aaron Drive and his girlfriend is Barbara Wood.

RHK: Randy's girlfriend?

ORK: Right.

RHK: Okay.

CMG: Okay, back up again, I missed, how could a phone call (unintelligible) I missed a little piece before they talked to the girlfriend, what did you say before that?

ORK: Mr. Parker had gone to the 1200 Aaron Drive address.

CMG: Okay.

ORK: To meet with Randy Chenoweth regarding the retrieval of his vehicle.

CMG: Okay.

ORK: This occurred about well, 4:10 this morning after the phone call.

RHK: Okay, and then they got there and then Parker got to Randy's residence. What happened then?

ORK: Um, Mr. Parker indicated he was in the garage and observed flasks believed to be glass filled with liquid and other products. It appeared to him that it was in a separation process and that it appeared that illegal drugs were being manufactured there. He had also seen several chemicals, those chemicals, bear with me a moment, I'll get my list. Uh, he had seen ephedrine, uh, canning jars, red phosphorous, tincture of iodine, acetone coffee filters, red devil lye, draino, what he described as a gas generator, (unintelligible) a bottle with a hose coming onto the top of it they use in part of the process of manufacturing methamphetamine. Um, he also had seen coffee filters and kerosene inside of the garage.

RHK: This is all at 4:00 this morning?

ORK: Yes.

RHK: Okay.

ORK: Um, he had inquired about, Mr. Parker inquired about the danger of bringing the vehicle back to Mr. Chenoweth and apparently Mr. Chenoweth basically told him to leave, that he wasn't getting his vehicle back and a short time later, Mr. Parker did leave the residence.

RHK: Okay, will you back up a little bit, was, um, you had mentioned Randy's girlfriend, Barbara Wood, previously, was she in the area as well?

ORK: She was not immediately in the garage at the time of this contact at 4:00 this morning.

RHK: Okay, is she associated with the house somehow?

ORK: Yes she is. She also lives at 1200 Aaron Drive.

RHK: How do you know?

ORK: Um, Ms. Wood was a previous employee with the City of Blaine and I am personally familiar as that being her address as it was indicated in police records here.

RHK: And did Mr. Parker also say that he knew that Barbara lived there?

ORK: Yes he did.

RHK: Okay, now you indicated that Mr. Parker, in the garage, saw, um, flasks with liquid and other products that appeared to be in a separation process and that illegal drugs appeared to be manufactured at that location on, did he say illegal drugs or did he specify methamphetamine?

ORK: He specified methamphetamine.

RHK: And, do you know the basis of his knowledge as to why he thinks it was methamphetamine being manufactured?

ORK: He told me that he had been told directly by Randy Chenoweth that he makes methamphetamine at that location and residence. Um, he has also had Mr. Parker during visits by Parker to the residence obtain flasks and other precursor chemicals directly from Ms. Wood and hand them to Mr. Chenoweth during the manufacturing process.

RHK: So basically, he indicated to you that he had been there when they were manufacturing meth before and they had admitted to him that they were in fact manufacturing methamphetamine at the time?

ORK: Correct.

RHK: And on those occasions, did the set up when they said they were manufacturing methamphetamine, was the set up the same as what he saw this morning at about 4:00?

ORK: Yes.

RHK: And what he described to you about, um, the flasks with products in a separation phase, what does that indicate to you in your knowledge of manufacturing methamphetamine?

ORK: To me, the separation phase could either be at the beginning or toward the end of the manufacturing process. Normally, ephedrine and other chemicals such as kerosene, uh, alcohol or water are combined in a flask or large container and allowed to sit for some time where the ephedrine is actually extracted from the binder and the binder basically

floats to the top, the ephedrine is, or, excuse me, the ephedrine remains at the bottom, that liquid containing the ephedrine is then strained off into, uh, another container to continue with the manufacturing process.

RHK: And what Parker describes to you about these liquids, does that comport with your understanding about the separation phase and the extracting the ephedrine?

ORK: Yes it does.

RHK: And he specifically told you that he saw ephedrine, how does he know that it was ephedrine?

ORK: He was told directly by, um, Mr. Chenoweth that it was ephedrine and he has also obtained ephedrine, uh, in what appears to be bulk (unintelligible) from Barb, excuse me, from the garage area.

CMG: Who obtained it before from Barb?

ORK: Uh....

CMG: You said he obtained it before from Barb....

ORK: I misspoke, your Honor.

CMG: Oh, okay.

ORK: He, Mr. Parker had obtained ephedrine from within the garage to Mr. Chenoweth.

RHK: So Mr. Parker in the past has gotten ephedrine from the garage from Randy, is that what you are saying?

ORK: He's actually handed him, the ephedrine, in the garage.

RHK: Parker handed Randy the ephedrine?

ORK: Could you hold for just a moment? (unintelligible) (silence). According to Mr. Parker, the ephedrine apparently had already been cooked down according to Mr. Chenoweth.

RHK: Is this, are we talking about this morning, or are we talking about some other occasion?

ORK: These were other occasions.

RHK: Okay, so the ephedrine that Mr. Parker saw this morning, he recognized it as ephedrine, why?

ORK: The ephedrine he saw this morning. Mr. Parker is indicating that he was told to leave the garage and suspected because based on consistently with what he saw previously, of the ephedrine being cooked down, um, from prior manufacturing of methamphetamine in the garage suspected that the item he saw today and the flask was the item.

RHK: Okay, based on his prior visit there where they said they were making methamphetamine and this is ephedrine.

ORK: Correct.

RHK: Okay, and on the (unintelligible) that Mr. Parker is with you right now?

ORK: Yes he is.

RHK: And you are obtaining information with him as well as speaking with us?

ORK: Correct.

RHK: Okay. And the bottle that you describe with the hose coming out of it, what would that be used for?

ORK: That's commonly used as to what we refer to as a hydrogen gas generator. It occurs in the bubbling stage or the finishing product (unintelligible) other chemicals and salt is added that produces hydrogen gas. The gas is then stuck into the wet product and the hydrogen gas actually assists in the drying out and the finishing product of methamphetamine.

RHK: Okay, now all of this stuff is in the garage, right?

ORK: Correct.

RHK: Has, did Mr. Parker indicate to you whether or not he has received methamphetamine within the residence in the past?

ORK: Yes he has.

RHK: And what did he say with respect to that?

ORK: He told me that approximately 3-4 days ago, he was at the Aaron Drive address and both Barb Wood and Randy Chenoweth were present, um, Randy Chenoweth had gone to bedroom and retrieved a vial containing methamphetamine to the living room area, handed it to Barbara Wood and Mr. Wood placed some of the methamphetamine on the table and cut it into lines for ingestion.

RHK: Okay. And, so, from this, would it be safe to say that at least in that particular instance, the methamphetamine that they manufactured in the garage appears to be stored within the residence?

ORK: Yes.

RHK: Um.....

ORK: Mr. Parker has also indicated that Mr. Chenoweth manufactures methamphetamine primarily for personal use and occasionally gives it away to, not only Mr. Parker on occasion, but to other people as well.

RHK: Okay. Your Honor, the only thing I would add is that as far as Mr. Parker's criminal history, although Officer King hasn't verified what he said, I can tell the court that I was the prosecutor on that prior criminal case and so I know that to be accurate that he was convicted of a delivery of a drug.

CMG: Okay, and do you swear that that is true and to the best of your knowledge?

RHK: I do, I don't remember the time he served, although I do remember that he went to prison for it.

CMG: Okay, but do you swear that that is true?

RHK: Yes.

CMG: Thank you. Okay, um, the court does find probable cause to issue the warrant to search, um, the 1200 Aaron Drive residence, which is the single story white residence with a composition roof in the southwest corner of Binup and Aaron Drive to search therein for, um, all of the items which you listed for the court in your, uh, testimony which included flasks and filters and other manufacturing equipment, and, as well as the chemicals for the manufacture and the bi-products of the manufacture and the, um, ephedrine and drugs, um, packaging materials, crib notes, documents, dominion control and currency associated with it and the other items which I have not, was not able to take notes fast enough to get them down, but you may search for all those items in that location and you may, in the garage, and in the house, um, for the any drugs of manufacturing or precursor products. Okay?

ORK: And, your Honor (unintelligible)

CMG: Yes, you may.

ORK: Okay.

RHK: Alright, thank you.

ORK: Thank you very much.

CMG: Bye bye.

ORK: Goodbye.

ADDENDUM TO SEARCH WARRANT

2003M00333

State v. Randal Chenoweth 03-1-00211-1

State v. Barbara Wood 03-1-00212-0

Rosemary Kaholokula: RHK
Commissioner Martha Gross: CMG:
Detective Lee Beld: DLB

RHK: The tape is on. This is a telephonic application for an addendum to a search warrant that was obtained yesterday. Today is February 6, 2003 and it is 1:48 p.m. This is Rosemary Kaholokula representing the State. The magistrate will be Commissioner Gross as she was yesterday and the affiant today will be Detective Lee Beld of the Lynden Police Department and before we actually get started, since this is an addendum to yesterday's search warrant, um, I would just like to put on the record that I had confirmed Nicholas Parker's criminal history from what I recalled yesterday and further thought I would like to ask if the Commissioner would have found probable cause in the absence of that statement so that I don't need to be a witness in my own search warrant that might arrive later.

CMG: So, are you referring to would I have granted the, is your question would I have granted the search warrant yesterday based on just the officer's testimony without the confirmation that you added in that you had, you were aware of his criminal record?

RHK: Correct.

CMG: Uh, yes I would have and I think that because the only issue that you added was that you had independent knowledge of the fact that the informant, Mr. Parker, had, um, a criminal record and I think his statements to the officer are somewhat self-authenticated and there is no reason to say that you have a criminal record unless you do, because it's against your own interest, so I think that's self-authenticated and I would have granted the search warrant without the prosecutor's confirmation of that record.

RHK: Alright, thank you. As far as today, um, Detective Beld if you would raise your right hand, the Commissioner can swear you in.

CMG: Do you swear to tell the truth, the whole truth and nothing but the truth in all matters before the Court?

DLB: I do.

RHK: Will you please go ahead and state what it is that you want to search for at this point and what you want to search for?

Exhibit C

DLB: We want to search a crème colored 1978 motorhome in front of 1200 Aaron Drive. Further described as a Cruiser brand motorhome with license no. 676 KYR.

RHK: Okay, and what do you want to search for?

DLB: We are looking for flasks, ephedrine, red phosphorous, tincture of iodine, acetone, kerosene, Draino, red devil lye, scales, chemical bi-products, hoses, coffee filters with bi-products, hydrogen gas generators, jars, vapors or chemicals used in methamphetamine manufacturing, methamphetamine packaging materials, crib notes, records showing dominion and control referring to the association of the sale of controlled substances.

RHK: Now you have spoken with, uh, Ryan King?

DLB: That is correct.

RHK: And this tape should reflect that at yesterday's search warrant, we set forth Ryan King's qualifications in terms of meth labs and manufacturing of methamphetamine. When you spoke with Officer King, did he confirm that those items that you are searching for are items used in the manufacture of methamphetamine?

DLB: That is correct.

RHK: Now the search warrant that was issued yesterday, um, well, let me back up even before that, were you present when Officer King was talking with Nicholas Parker in terms of gathering information for yesterday's search warrant?

DLB: I was.

RHK: And you heard what Nicholas Parker had to say about what was in the garage and in the house?

DLB: That is correct.

RHK: And are you familiar with whether or not the garage and the house are currently being searched pursuant to yesterday's search warrant?

DLB: They are right now.

RHK: Whose doing the search?

DLB: Uh, I was part of the original take down in front of the residence and the Washington State Patrol is currently doing a search along with Ryan.

RHK: Now are they specially trained individuals in terms of methamphetamine labs?

DLB: They are.

RHK: And it's generally, what is their training? In other words, what are they trained to do and recognize?

DLB: Uh, they are trained in, uh, SWAT procedures and also in the acts of takedowns and dismantling of a methamphetamine lab.

RHK: And they have received specific training in terms of how to dismantle a lab?

DLB: That is correct.

RHK: And are they familiar then with what a meth lab looks like and how methamphetamine is manufactured?

DLB: I'm sorry, repeat that.

RHK: And are they then familiar with how methamphetamine is manufactured?

DLB: They are.

RHK: Okay. Have they given you some indication of what they have found so far in the garage?

DLB: They have.

RHK: And what have they told you?

DLB: They found red phosphorous reduction, acetone, iodine, sodium hydroxide, baggy with, um, a white powdery substance tested positive for meth and pipes with residues that also test positive for methamphetamine.

RHK: Now the red phosphorous and the acetone and, um, perhaps the iodine methamphetamine, are those items consistent with what Nicholas Parker had said would in fact be found in the garage?

DLB: That is correct.

RHK: Did Nicholas Parker provide information to you regarding the motorhome that you seek to search?

DLB: He did.

RHK: What information did he provide?

DLB: He said that a couple of days ago, while they were in the process of the cooking portion of the meth that is referred to as the cooking portion while the chemical processes

are going to make methamphetamine, he stated that Randy and Barb, the two subjects that were, uh, inside the residence and have dominion and control over the residence, uh, kept going in and out of the motorhome and he believed that Barb had made some mention to do with odor and that they were doing something in the motorhome he wasn't sure what it was, but it had to do with the process of methamphetamine cooking and had something to do with the fact that the odor was strong and they didn't want it in the house.

RHK: Was this cooking going on in the garage or in the house?

DLB: They, correct, it was taking place in the house.

RHK: Okay, so while Barb and Randy are cooking the meth in the garage a few days ago, they keep wandering in and out of this motorhome and Barb says something about to prevent the odor, or the odor was too strong, to do it in the garage?

DLB: That is what he believed. Something along those lines.

RHK: Okay, um, I think that's it, your Honor.

CMG: Okay, and, um, court does have, um, find that there is probable cause to search the crème colored motorhome in front of 1200 Aaron Drive, more particularly described as having a license plate no. of 676 KYR and to search therein for the chemicals, equipment and other items that the officer listed in his testimony, um, including precursor chemicals, crib notes, documents of dominion and control, currency and equipment, all of those items that were listed.

RHK: And this will be based on yesterday's probable cause, as well as.....

CMG: Well, the information today, yes.

RHK: Alright, thank you, may we sign your name to the warrant?

CMG: Yes you may.

RHK: Thank you.

CMG: Bye bye.

RHK: Bye.