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Court of Appeals
Division I
State of Washington
NO. 72863-6-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Appellant,

v.

Shawn Green,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

APPELLANT’S REPLY BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: Trisha Johnson, WSBA#24437
Senior Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460

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I. SUMMARY OF REPLY

As a result of a drug house investigation by the Sedro Woolley Police Department, on August 1, 2014, Skagit County District Court issued a search warrant for investigation of Violations of the Uniform Controlled Substances Act for an address at 219 Laurel Drive, Sedro Woolley. By issuing the warrant, the magistrate found that the criminal informant completed controlled buys from the address, made statements against penal interest, the confidential informant was reliable and that probable cause existed to find evidence of Violations of the Uniform Controlled Substances Act would be located.

The defendant filed a motion to suppress the search warrant issued by the magistrate. The motion was heard and the trial court found the magistrate did not have probable cause to issue the warrant and suppressed the search warrant and dismissed the charges against the defendant.

The State believes the trial court erred finding there was not probable cause to issue the search warrant. The trial court did not place the burden of proof on the defendant moving for suppression. The trial court did not give deference to the magistrate's determination of probable cause. The trial court stated its determination was a 50/50 proposition, but then found that since the burden of proof is probable cause there was not probable cause to issue the warrant. Thus, the trial court erred in ruling

the magistrate did not have probable cause to issue the warrant and in suppressing the search warrant.

Therefore, the Appellant requests the Court reverse the decision of the trial court, find the magistrate had probable cause to issue the search warrant and re-instate the dismissed charges.

II. STATEMENT OF PERTINENT FACTS

The pertinent facts are set forth in the Appellant's Opening Brief, page four.

III. ARGUMENT

- 1. The trial court is to review the validity of a search warrant issued by the magistrate on an abuse of discretion standard and the appellate court reviews de novo the legal conclusion of law.**

In *State v. Vickers*, 148 Wn.2d 91, 108-109, 59 P.3d 58 (Dec. 2002), the court reviewed search warrants relating to homicide convictions and held that:

A magistrate exercises judicial discretion in determining whether to issue a warrant. That decision is reviewed for abuse of discretion. This court generally accords great deference to the magistrate and views the supporting affidavit for a search warrant in the light of common sense. Doubts concerning the existence of probable cause are generally resolved in favor of issuing the search warrant.

Eight months earlier, the court decided *In re Det. of Petersen*, 145 Wn.2d 789, 42 P.3d 952 (March 2002). *Petersen* was a review of a probable cause determination in a Sexual Violent Predator proceeding. At that time, the court held “A trial court's legal conclusion of whether evidence meets the probable cause standard is reviewed de novo.” *Id* at 799. When the court stated the abuse of discretion standard on review in *Vickers*, it did not refer to the court’s earlier decision in *Petersen*.

The court in *Petersen* did discuss probable cause in the context of search warrants, even though a search warrant issue was not before the court:

However in an *Aguilar-Spinelli*¹ probable cause context the trial court or magistrate necessarily first must find whether the information from these tips is sufficiently competent to qualify as historical fact. See *State v. Jackson*, 102 Wn.2d 432, 436-43, 688 P.2d 136 (1984). Fact-finding on reliability and credibility is required. *Id*. On such matters it makes sense for a magistrate or trial judge to be afforded appropriate discretion on review. *Id*. However, as described later in *Ornelas*², once the court makes this factual determination, it then must decide the legal issue whether the qualifying information as a whole amounts to probable cause. As to this legal conclusion, *de novo* appellate review is necessary.

¹ *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).

² *Ornelas v. United States*, 517 U.S. 690, 695, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

Petersen at 800.

In *Ornelas*, the U.S. Supreme Court reviewed a trial court's denial of the defendant's motion to suppress a warrantless search. The defendant's challenged law enforcement's reasonable suspicion to stop, and probable cause to engage in a warrantless search. The court stated, "We hold that the ultimate questions of reasonable suspicion and probable cause to make a warrantless search should be reviewed *de novo*." *Id.* at 691. The court reasoned:

The Court of Appeals, in adopting its deferential standard of review here, reasoned that *de novo* review for warrantless searches would be inconsistent with the "great deference" paid when reviewing a decision to issue a warrant, see *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983) ... We cannot agree. The Fourth Amendment demonstrates a "strong preference for searches conducted pursuant to a warrant," *Gates*, *supra*, at 236, and the police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less than that for warrantless searches. Were we to eliminate this distinction, we would eliminate the incentive.

Ornelas, at 698-699.

The respondent cited *State v. Chamberlin*, 161 Wn.2d 30, 162 P.3d 389 (2007), for the proposition the trial court is to review a search warrant *de novo*. In a case of alleged judicial bias, the court in *Chamberlin* decided that the same magistrate that issued a search warrant could hear a

motion to suppress the warrant and upheld the warrant. The extent of the court's discussion of the standard of review was:

Even where actual bias is not apparent, a party is not without protection against prejudice or error. Independent appellate review reduces the risk of error. Appellate courts review de novo the legal conclusion of law whether probable cause is established. *In re Det. of Peterson*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002). In determining whether probable cause is established, the appellate courts review the same evidence presented below. What this means is where the probable cause finding was error, appellate review cures the error.

Chamberlin, at 41. The *Chamberlin* court did not reference *State v. Vickers*, supra, or the line of cases and analysis that preceded it.

In *State v. Dunn*, 186 Wn.App 889, 348 P.3d 791 (Div. III, 2015)

the Court of Appeals addresses the issue of review.

Generally, we review the validity of a search warrant for an abuse of discretion, giving great deference to the issuing judge. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, when a trial court assesses a search warrant affidavit for probable cause at a suppression hearing, we review the trial court's conclusion on suppression de novo. *Id.*

Dunn at 896.

2. On a challenge to a search warrant issued by the magistrate, the burden of proof is on the defendant moving for suppression of a search warrant to establish the lack of probable cause.

The defendant moving for suppression of a search warrant bears

the burden of proof to establish the lack of probable cause. *State v. Anderson*, 105 Wn.App. 223, 229, 19 P.3d 1094 (2001), *State v. Trasvina*, 16 Wn.App. 519, 523, 557 P2d. 368 (1976). The Respondent's brief indicates this is in error, but only points out the initial burden of the state to set forth facts and circumstances to obtain a search warrant. Once the magistrate has found probable cause and issued the warrant, the defendant moving for suppression of the warrant bears the burden of proof. See *Anderson*, *Trasvina*, *supra*.

The trial court shifted this burden to the state as demonstrated by its reasoning. In stating that "it is a 50/50 proposition", the trial court is reasoning that the burden is in fact upon the state to show probable cause to support the issuance of the search warrant by the magistrate. RP 51. This is in error. If the court is evenly divided, defendant has not met his burden and the issuance of the warrant by the magistrate should be affirmed.

3. The magistrate's determination of probable cause is given great deference and doubts concerning probable cause are resolved in favor of the warrant.

Great deference should be given to the magistrate's determination of probable cause. *State v. Jackson*, 102 Wn.2d 432, 442, 688 p.2d 136 (1984), *State v. Vickers*, *supra*, 108. Doubts concerning the existence of

probable cause are generally resolved in favor of issuing the search warrant. *Id.*

The application for a search warrant must be judged in the light of common sense, resolving all doubts in favor of the warrant.

Dunn at 896, citing *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977).

In the case cited by the Respondent, *In Re Petersen*, *supra* at 800, the court addressed the magistrate's analysis under *Aguilar-Spinelli*.

[T]he trial court or magistrate necessarily first must find whether the information from these tips is sufficiently competent to qualify as historical fact.³ Fact-finding on reliability and credibility is required. *Id.* On such matters it makes sense for a magistrate or trial judge to be afforded appropriate discretion on review.

The trial court did not give deference to the magistrate's determination of probable cause. The court stated:

So it's a 50/50 proposition when the burden of proof is probable cause falls ever so slightly short because it has to be more probable cause than not equally probable.

(11/19/2014) RP 52.

So, as I indicate, I don't think there could be a closer possible call, at least in my mind, but under these circumstances the Court will grant the motion to suppress finding a lack of probable cause in the warrant.

³ See *State v. Jackson*, 102 Wn.2d 432, 436-43, 688 P.2d 136 (1984).

(11/19/2014) RP 52. The trial court's reasoning is error. If the trial court is evenly divided, probable cause does not fall short – instead deference is given to the determination of the magistrate and doubts are resolved in favor of the warrant.

4. Controlled buys, statements against penal interest and corroboration by law enforcement support the reliability of the confidential informant and probable cause to support the magistrate's issuance of the search warrant.

Police frequently use informants to make purchases of controlled substances. A properly conducted controlled buy makes an informant a credible source of information. *State v. Casto*, 39 Wn. App. 229, 233-235, 692 P.2d 890 (1984). The court explained:

In a "controlled buy," an informant claiming to know that drugs are for sale at a particular place is given marked money, searched for drugs, and observed while sent into the specified location. If the informant "goes in empty and comes out full," his assertion that drugs were available is proven, and his reliability confirmed. Properly executed, a controlled buy can thus provide the facts and circumstances necessary to satisfy both prongs of the test for probable cause.

Id. at 233. The search warrant in the present case sets forth multiple controlled buys of methamphetamine the confidential informant made from 219 Laurel Drive in late July of 2014. CP 34-35.

The search warrant affidavit also indicated the informant in the present case was a criminal informant. As a criminal informant, courts

have determined that such informants have a strong incentive to provide accurate information, since a benefit in their criminal charges would not be likely for false information. See e.g. *State v. Bean*, 89 Wn.2d 467, 469-471, 572 P.2d 1102 (1978).

In additional indication of reliability, the criminal confidential informant here made statements against penal interest to law enforcement.

Statements against penal interest are intrinsically reliable because a person is unlikely to make a self-incriminating admission unless it is true.

State v. Chenowith, 160 Wn.2d 454, 483, 158 P.3d 595 (2007). The informant advised law enforcement that they had purchased methamphetamine from several individuals at 219 Laurel Drive for the past two years. CP 34. The search warrant affidavit indicates that neighbors and other informants also provided information that 219 Laurel was an ongoing drug house for years. CP 34.

The affidavit states that on three occasions the week of July 28th, 2014 the confidential informant was advised the occupants were temporarily out of stock and would be re-upping. CP 35. The confidential informant was told by one individual present at the residence that he would be re-upping that night. CP 35. The Respondent argues this lack of a “sale” removes probable cause to support the issuance of the warrant.

It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit.

State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). In *Maddox*, the informant was advised the defendant was temporarily out of methamphetamine to sell prior to the service of the search warrant.

[I]n this case, a reasonable person could infer from the facts and circumstances set forth in the affidavit that evidence of methamphetamine dealing remained at Maddox's home even if he was temporarily out of the drug itself. The warrant authorized a search for evidence of methamphetamine dealing as well as methamphetamine itself.

Id. at 510. The warrant in *Maddox* did not mention the informant observed scales or packaging when at the residence, or evidence of drug use and paraphernalia as existed in the present case.

The magistrate determined that there was probable cause for the authorized warrant based upon the affidavit. The magistrate was entitled to make reasonable inferences from the facts and circumstances set forth in the affidavit. The magistrate could infer that the address was an active drug house and that the location was being used to coordinate, package and sell drugs. The magistrate could infer that the occupants had been involved in ongoing drug activity and that the drug trafficking and drug use would continue. The magistrate determined that there was probable

cause to believe that evidence of the crime of Violations of the Uniform Controlled Substances Act existed at 219 Laurel Drive. CP 37-38.

IV. CONCLUSION

For the foregoing reasons, this court should hold that the trial court erred in ruling that the magistrate did not have probable cause to issue the search warrant, reverse the decision of the trial court to suppress the warrant and reinstate the charges of Possession with Intent to Manufacture or Deliver a Controlled Substance - Methamphetamine.

DATED this 22nd day of October, 2015.

SKAGIT COUNTY PROSECUTING ATTORNEY



By: _____
Trisha Johnson, WSBA#24437
Senior Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, Washington, 98101.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 22nd day of October, 2015.



KAREN R. WALLACE, DECLARANT