NO. 103461-0

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-Petitioner,

v.

LAVELLE KENNETH JOHNSON,

Petitioner.

STATE'S ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF ANSWERING PARTY

The State of Washington is the Respondent and Cross-Petitioner in this matter.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Johnson, No. 83412-6-I, 2024 WL 3758103 (unpublished, August 12, 2024).

C. ISSUES PRESENTED FOR REVIEW

1. Petitioner Johnson seeks review of the Court of Appeals' holding that he failed to preserve his "fruit of the poisonous tree" claim by failing to raise it in the trial court, and that he failed to explain how this constitutes a manifest error affecting a constitutional right under RAP 2.5. This Court should deny review of this issue because it does not meet the criteria for review.

2. Johnson seeks review of the Court of Appeals' holding that the trial court properly exercised its discretion in granting his motion to proceed pro se based on his unequivocal

requests to waive his right to counsel. This Court should deny review of this issue because it does not meet the criteria for review.

3. Johnson seeks review of the Court of Appeals' holding that amendments to the Sentencing Reform Act (SRA) that omit some juvenile convictions from an offender score, which became effective on July 23, 2023, do not apply here because the plain language of the statute does not evince legislative intent to apply the amendments retroactively. This Court should deny review of this issue because it does not meet the criteria for review.[1]

4. The State asks this Court to grant review of the issues raised in the State's cross-appeal, which the Court of Appeals failed to reach. The State requests reversal of the trial court's erroneous rulings as contained in the trial court's order

[1] Johnson's petition does not list this claim in the issues presented for review (*see* Petition at 1-2), but he seems to suggest that this claim should be reviewed in the argument section of his petition (*see* Petition at 16-20).

on the CrR 3.6/Franks[2] motion. Because the trial court's rulings conflict with decisions both of this Court and the Court of Appeals, and because this matter involves an issue of substantial public interest that should be determined by this Court, review is warranted solely on the issues raised in the State's cross-appeal. *See* RAP 13.4(b)(1), (2), (4).

D. STANDARD FOR ACCEPTANCE OF REVIEW

"A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

[2] Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

E. STATEMENT OF THE CASE

The facts relevant to the issues on which Johnson seeks review are set forth more fully in the Brief of Respondent/Cross-Appellant below. A brief recitation is included here.

Johnson was convicted of first-degree unlawful possession of a firearm following a jury trial. Prior to trial, Johnson moved in limine to suppress all evidence found in his car under CrR 3.6. Johnson asserted two bases for the motion: (1) that police officers had never seen suspected drugs in plain view in the driver's door pocket, but instead they obtained that information by illegally opening the car door; and (2) that information obtained from Johnson's girlfriend, Amber Bryant, admitting there was a gun in the car did not satisfy the requirements for reliability of a citizen informant under Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 414, 89 S.

Ct. 584, 588, 21 L. Ed. 2d 637 (1969).[3] CP 10-52. Johnson also requested a Franks hearing, alleging that, because in-car video showed the officers opening the car door and looking at the door pocket post-arrest and that information was not included in the application for the search warrant, its omission tended to suggest the detectives were lying about what had originally been observed. CP 53-101.

The trial court held a joint CrR 3.6/Franks hearing and, following testimony from Seattle Police Detectives Terry Bailey and Benjamin Hughey and the admission of several exhibits, the trial court granted Johnson's motion in part and denied it in part. CP 124-35.

The court found, contrary to the defense argument, that Bailey testified credibly that he had seen a balled-up plastic baggie in the door pocket while the car door was open

[3] Both of these cases were abrogated by the United States Supreme Court 18 years before the trial in this matter. *See* Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

immediately following Johnson's arrest. CP 127 (Finding of Fact 21). The court further found that in-car video corroborated rather than undercut this testimony, because Bailey appeared to point out the door pocket to Hughey on the video, which he would not have known to do absent the earlier observation. Id.

However, the trial court erroneously found that Hughey, the affiant in the warrant application, had recklessly omitted material information by not naming Bailey as the source of the information regarding the baggie, by not stating that there was a white latex glove in the door pocket adjacent to or under the baggie, and by not including that Bailey made a second observation by opening the car door and pointing out what he had seen. CP 126-35. The court ruled that there was no probable cause to search for drugs based on erroneous findings of fact and conclusions of law. Id. Still, the trial court upheld the warrant because it found that Bryant's statements satisfied the Aguilar/Spinelli test, and, even after excising all information about the suspected drugs, probable cause existed

based solely on Bryant's statements to Hughey about the gun in the car.

Johnson timely appealed and the State timely cross-appealed. CP 840, 844. After the State filed its cross-appeal, Johnson moved to strike the cross-appeal; that motion was referred to the panel by the commissioner. Ultimately, the Court of Appeals did not strike the cross-appeal, but declined to reach the issues raised by the State and affirmed Johnson's conviction on other grounds.

F. THIS COURT SHOULD DENY JOHNSON'S PETITION FOR REVIEW

Johnson fails to establish that any of the criteria for review in RAP 13.4(b) are satisfied by the issues he raises in his petition. As the State's briefing below and the Court of Appeals' opinion amply demonstrate, the Court of Appeals properly rejected Johnson's challenges to (1) the warrant, where he failed to raise a "fruit of the poisonous tree" claim in the trial court and failed to demonstrate a manifest constitutional error on appeal, (2) the trial court's grant of his request to proceed

pro se, where Johnson's unwavering and repeated requests to proceed pro se were unequivocal, and (3) inclusion of juvenile convictions in his offender score, where this Court's precedent has repeatedly held that sentences are meted out in accordance with the law in effect at the time of the offense. Because the Court of Appeals' determinations on each of these issues do not conflict with this Court's precedent and do not present significant questions of law under either the Washington State or United States constitutions, review is not warranted under RAP 13.4(b)(1) or (3) as Johnson claims.

G. THIS COURT SHOULD ACCEPT REVIEW OF THE ISSUES RAISED IN THE STATE'S CROSS-APPEAL BECAUSE THEY ARE OF PUBLIC IMPORTANCE AND BECAUSE THE TRIAL COURT'S RULINGS CONFLICT WITH PRECEDENT

The trial court erroneously determined that two Seattle Police detectives acted recklessly when one of them allegedly omitted "material" information from a warrant application. This erroneous ruling rests on suppositions and mischaracterizations of the evidence, the erroneous application of hindsight and

information not known to the detectives at the time, and a misunderstanding of the law. The State challenged these rulings in a cross-appeal, but the Court of Appeals, in a footnote, declined to address them.

The State agrees that the Court of Appeals was not absolutely required to address the cross-appeal unless it had ruled in Johnson's favor, in which case the cross-appeal would have provided an alternative basis to affirm Johnson's conviction. However, the Court of Appeals should have reviewed these issues whether or not it was absolutely necessary to do so, because the trial court's rulings result in an unwarranted burden on the State to disclose and litigate the relevance of these erroneous findings in other criminal matters, along with potential adverse impacts to both detectives. These errors present an issue of substantial public interest under RAP 13.4(b)(4) that should be determined by this Court, as both the State and the detectives are negatively affected by the trial court's findings with no other recourse or opportunity for

review. These rulings should also be reviewed under the policy evident in RAP 13.4(b)(1) and (2) because the trial court's rulings conflict with opinions from both this Court and the Court of Appeals.

Where the government is unsure whether certain evidence should be disclosed pursuant to Brady[4] obligations, it should err in favor of disclosure. Kyles v. Whitley, 514 U.S. 419, 439-40, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *see also* United States v. Agurs, 427 U.S. 97, 108, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) ("the prudent prosecutor will resolve doubtful questions in favor of disclosure"). Here, although the trial court's determination that two detectives recklessly omitted material information from a warrant affidavit is plainly wrong (along with the findings that underpin this determination), the State is now disclosing the trial court's Franks order to criminal defendants in every other case

[4] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

involving these detectives. Following the trial court's erroneous rulings and the Court of Appeals' failure to review them, the State continues to have the unwarranted obligation of disclosure and the additional burden of litigating admissibility and relevance in other cases without the ability to challenge the order's underlying merit. The State is aggrieved pursuant to RAP 13.1 because the trial court's decision imposes a "burden or obligation" on the State. Randy Reynolds & Assocs. v. Harmon, 193 Wn.2d 143, 150, 437 P.3d 677 (2019); *see also* State v. Bergstrom, 199 Wn.2d 23, 34, 502 P.3d 837 (2022) (finding the State to be an aggrieved party where the Court of Appeals erroneously held that the State had to prove an element that did not exist in the 2001 bail jumping statute, but upholding the conviction on harmless error grounds).

Additionally, as addressed more fully in the brief of amicus curiae below, absent review by this Court, the individual detectives face potential professional consequences from these findings without any review of their accuracy.

Outside of this appeal, the officers have no process to challenge these findings. According to amicus curiae, these public employees could face discipline, including decertification, or be denied new employment. While they might be entitled to a hearing if the State considered decertifying them, a hearing officer would have no basis upon which to disturb the trial court's findings. For these reasons, this Court should accept review of the issues raised in the State's cross-appeal because they present issues of public importance.

In addition, the failure to address the State's cross-appeal allows the trial court's errors to stand when those errors contravene prior opinions of this Court and those of the Court of Appeals. For brevity, and within the limitations of an Answer and Cross-Petition, the State discusses the trial court's errors in four general categories rather than individually, as many of the trial court's erroneous rulings are repetitive or are based on the same faulty premise or misapplication of the law.

For more detailed briefing, *see* Brief of Respondent/Cross-Appellant below.

1. ALLEGED FAILURE TO ATTRIBUTE OBSERVATIONS.

In several of its erroneous findings and conclusions, the trial court found that Hughey withheld material information as to the source of the observations regarding the baggie of suspected drugs in the car door. CP 127 (Findings of Fact 19-20). These findings are wholly contradicted by the plain language of the warrant affidavit.

"Scrutinizing a warrant affidavit for evidence of negligent omissions or misstatements is also inconsistent with our State's established jurisprudence governing search warrant challenges." State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). In this context, affidavits are reviewed "in a commonsensical manner rather than hypertechnically." Id. The relevant portion of the warrant affidavit written by Detective Hughey states as follows:

> After JOHNSON's arrest, Detective Terry Bailey walked up to the open driver's door and was able to look clearly into the driver's door pocket where he had observed JOHNSON making motion to earlier. Detective Bailey observed a clear plastic baggy [sic] in the door pocket.

CP 44. Unquestionably, Hughey directly attributes the observations to Bailey rather than himself and suggests that he was not present by not referring to himself. Thus, Hughey in no way misled the reviewing magistrate as to the source of this information.

But even assuming the affidavit lacked specificity as to who was present when the baggie was spotted, it is customary and permissible for officers to rely on the observations of other officers in a warrant affidavit. State v. Chasengnou, 43 Wn. App. 379, 384, 717 P.2d 288 (1986) (a reviewing magistrate may rely upon a police officer's affidavit that relays hearsay information from other officers). In fact, "[p]robable cause may be based on hearsay, a confidential informant's tip, and other unscrutinized evidence that would be inadmissible at trial." Chenoweth, 160 Wn.2d at 475.

Moreover, "[i]n examining whether an omission rises to the level of a misrepresentation, the proper inquiry is…whether the challenged information was *necessary* to the finding of probable cause." State v. Atchley, 142 Wn. App. 147, 158, 173 P.3d 323 (2007). Therefore, if the affidavit with the additional information inserted remains sufficient to support a finding of probable cause, the Franks motion must fail. State v. Garrison, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992). And, where hearsay is permissible, it stands to reason that explicit attribution of observations to individual officers is immaterial because it is unnecessary to the determination of probable cause.

According to the trial court, the affidavit should have read something like this:

> After JOHNSON's arrest, Detective Terry Bailey walked up to the open driver's door and was able to look clearly into the driver's door pocket where he had observed JOHNSON making motion to earlier. Detective Bailey observed a clear plastic baggy in the door pocket. [Detective Hughey was not present at the time and was verbally informed of these details by Detective Bailey

upon Hughey's arrival shortly after the arrest and observation].

CP 44 (modified by adding bracketed language). As is readily apparent, the added information is wholly unnecessary for the reviewing magistrate to determine that probable cause existed to search the car for drugs. Whether or not Hughey was present when Bailey saw a baggie would make no difference to the reviewing magistrate or to the validity of the warrant. The trial court's determination that such information was material is erroneous as a matter of law and warrants review because it conflicts with the Court of Appeals' opinions in Chasengnou and Atchley and this Court's opinions in Chenoweth and Garrison.

2. FAILURE TO MENTION THE GLOVE.

Interspersed throughout the trial court's ruling below is the flawed conclusion that the warrant application contains a material omission because it did not mention a white latex glove tucked partially underneath the suspected drug baggie.

According to the trial court, the exculpatory value of the glove was "obvious," failing to notice it was inconceivable, and failing to mention it in the warrant affidavit was intentionally or recklessly misleading. *See, e.g.*, CP 129 (Finding of Fact 28). Thus, according to the trial court, if the magistrate had been told about the glove "he reasonably would not have approved the search warrant." CP 131 (Finding of Fact 41).

But the trial court's rulings are at odds with Washington State appellate opinions regarding Franks. While the trial court was seemingly concerned that the detectives inadequately explored an alternative explanation for the whitish color within the baggie, this is not the proper analysis for whether an omission is material or reckless or rises to the level of a misrepresentation.

As noted above, the proper analysis for whether an omission is material is whether its insertion would result in a lack of probable cause. Garrison, 118 Wn.2d at 873. Thus, the relevant question was not whether the officers allegedly failed

to investigate the glove, but whether mentioning the glove's presence would have led to a different finding by the reviewing magistrate. With the glove included in the warrant affidavit as the trial court believed was required, the relevant paragraph of the affidavit might have read as follows:

> After JOHNSON'S arrest, Detective Terry Bailey walked up to the open driver's door and was able to look clearly into the driver's door pocket where he had observed JOHNSON making motion to earlier. Detective Bailey observed a clear plastic baggy in the door pocket. The baggy was in the shape of a ball and contained a whitish substance inside. [It further appeared to Detective Bailey that there was a white latex glove stuffed next to and partially underneath the baggy in the door pocket.] Based on his 19 plus years of law enforcement experience, Detective Bailey recognized this style of packaging to be consistent with narcotics packaging and believed the substance to possibly be crack cocaine.

CP 44 (modified by addition of bracketed language).

The additional information about the glove has no effect on probable cause absent hindsight knowledge that the baggie was empty–something unknown to the detectives at the time. As the trial court did not find that Bailey lied about seeing something white in the bag, and instead credited Bailey's

account of seeing something white with the logical explanation that the glove was the likely reason, it cannot be said on this record that the glove's presence should have convinced Bailey that no drugs were actually present. *See* CP 130 (Finding of Fact 36).

The trial court erroneously faulted Hughey for relying on the observations of his fellow detective and failing to scrutinize those observations based on photographs that did not exist at the time the affidavit was written because they were taken when the warrant was served. CP 128, 130 (Findings of Fact 24, 36). All the detectives could have done to investigate further and determine whether the glove was causing the baggie to appear to have something white inside would have been to remove the baggie from the door–which would have been illegal without the warrant that had not yet been obtained.

"[I]nsistence on the accuracy of an affidavit poses a catch-22 situation for police: requiring police to thoroughly investigate the accuracy of an affidavit, a feat impossible to do

without a warrant." Chenoweth, 160 Wn.2d at 476. Information that "later turns out to be inaccurate or even false is of no consequence if the affiant had reason to believe it was true." Id. Contrary to the trial court's hindsight view of the evidence, the fact that no drugs were in the baggie does not make the glove material where mentioning the glove would not have negated the magistrate's determination of probable cause.

3. FAILURE TO MENTION THE "SECOND LOOK."

The third category of errors made by the trial court relates to the affiant's failure to explain that the detectives took a "second look" into the car to observe the baggie. As noted above, Bailey had first observed the plastic baggie he suspected to contain drugs in plain view in the open driver's side door of the car at the time of Johnson's arrest. Bailey admitted in pretrial testimony that, because he had already shut the car door, he re-opened the car door following Hughey's arrival to show Hughey what he had seen. As the detective testified and

the trial court found, Hughey's affidavit did not rely on his own observations of the baggie and solely relied on Bailey's initial view because the "second look" was an impermissible intrusion.

As explained above, whether information is material to a warrant turns on whether its insertion alters probable cause. Garrison, *supra*. Here, because the "second look" was an impermissible search, any information about it could not have been considered by the reviewing magistrate; therefore, it was immaterial as a matter of law. Had such information been included in the warrant affidavit, the reviewing magistrate would have needed to disregard it to determine whether probable cause existed independently of the unlawful entry. *See* State v. Ross, 141 Wn.2d 304, 311-12, 4 P.3d 130 (2000) (explaining that if information contained in warrant affidavit was obtained by an illegal search, the reviewing court must determine if probable cause existed based only on information obtained independent of the illegality). Further, it is the better

practice to exclude such information from the warrant affidavit so that the magistrate does not have to engage in the mental gymnastics of ignoring facts that it may not consider. State v. Miles, 159 Wn. App. 282, 295-96, 244 P.3d 1030 (2011) (where information gathered from an illegal search is excluded from the affidavit there can be no dispute as to whether the ill-gotten evidence influenced the reviewing magistrate's decision to issue the warrant).

The trial court's ruling that the exclusion of the "second look" was a material omission is clearly contrary to binding authority from this Court and from the Court of Appeals. Multiple opinions explain that information gleaned from an illegal search could not be considered by a reviewing magistrate; accordingly, it could not have been material to the magistrate's determination of probable cause.

4. RECKLESSNESS.

As a general matter, the trial court's recklessness findings also controvert applicable law. To prove a reckless disregard for the truth, the evidence must demonstrate that the affiant had "serious doubts" as to the truth of statements in the affidavit. State v. Clark, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001). "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." Id.

The trial court did not discuss these standards at all. Other than the content of the alleged omissions, none of the court's findings describe Hughey as entertaining "serious doubts" about the contents of the baggie or "actually deliberating" about the significance of the glove. All of the court's recklessness findings hinge on its mistaken legal conclusions that the omitted information was material and that Hughey should have not relied on information provided by

another officer without taking action to independently investigate it. As officers are prohibited from engaging in illegal investigations in order to firm up a warrant affidavit, and they are permitted to rely on hearsay information from other officers without separately scrutinizing it, the trial court's claim that the detectives' failure to do so was reckless cannot stand. And, as the information actually or allegedly omitted was immaterial to the magistrate's determination of probable cause, Hughey's failure to include such information cannot be characterized as "reckless" because there was no reason to include it in the first place. The trial court's analysis is clearly erroneous in light of contrary authority.

The Court of Appeals' failure to review these trial court rulings overlooks the fact that they contradict numerous appellate court opinions and impose obligations on the State to disclose and litigate these rulings in other matters. It also detrimentally impacts the careers of two public employees without due process on appeal. This presents an issue of

substantial public interest that should be determined by this Court.

H. CONCLUSION

For the foregoing reasons, Johnson's petition for review should be denied, and the State's cross-petition for review should be granted.

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DATED this 9th day of October, 2024.

Respectfully submitted,

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