

43297-8-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

JOHN R. GARDNER, JR.
Appellant

43297-8-II

On Appeal from Grays Harbor County Superior Court
Cause number 11-1-00343-7

The Honorable Gordon Godfrey

REPLY BRIEF

Jordan B. McCabe, WSBA No. 27211
Attorney for Appellant, John R. Gardner, Jr.

MCCABE LAW OFFICE
PO Box 7424, Bellevue, WA 98008
425-747-0452 ▪ jordan.mccabe@yahoo.com

CONTENTS

I.	Authorities Cited	ii
II.	Summary of the Case	1
III.	Arguments In Reply	2
	1. Wirshup’s statement was not grounds for a search warrant	2
	2. More than one fact was disputed	6
	3. The warrant affidavit did not establish probable cause	8
	4. The informant’s criminal history was material and omitted with reckless disregard for the truth	10
	5. The evidence is insufficient to prove constructive possession	16
	6. Evidence of intent to deliver was inadmissible	17
	7. Reliance on uncharged crime evidence is reversible error	18
	8. Presumptions of credibility based on status denied Gardner a fair trial	20
	9. The drug evidence was essential to the sufficiency of the warrant affidavit	21
IV.	Conclusion	22

I. AUTHORITIES CITED

Washington Cases

State v. Afana, 169 Wn.2d 169
233 P.3d 879 (2010) 12, 15

State v. Amurri, 51 Wn. App. 262
753 P.2d 540 (1988) 14

State v. Brown, 147 Wn.2d 330
58 P.3d 889 (2002) 2

State v. Callahan, 77 Wn.2d 27
459 P.2d 400 (1969) 16

State v. Chenoweth, 127 Wn. App. 444
111 P.3d 1217 (2005) 11, 12, 13, 14

State v. Clark, 143 Wn.2d 731
24 P.3d 1006 (2001) 4, 7, 13

State v. Cord, 103 Wn.2d 361
693 P.2d 81 (1985) 12, 14

State v. Davis, 16 Wn. App. 657
558 P.2d 263 (1977) 16

State v. Garrison, 118 Wn.2d 870
827 P.2d 1388 (1992) 6

State v. Goebel, 36 Wn.2d 367
218 P.2d 300 (1950) 18

State v. Jordan, 79 Wn.2d 480
487 P.2d 969 (2004) 17

State v. Lair, 95 Wn.2d 706 630 P.2d 427 (1981)	9
State v. Lane, 56 Wn. App. 286 786 P.2d 277 (1989)	11
State v. Le, 103 Wn. App. 354 12 P.3d 653 (2000)	2
State v. Lyons, 174 Wn.2d 354 275 P.3d 314 (2012)	8, 13
State v. Maddox, 152 Wn.2d 499 98 P.3d 1199 (2004)	8
State v. Mathews, 4 Wn. App. 653 484 P.2d 942 (1971)	16
State v. Myers, 117 Wn.2d 332 815 P.2d 761 (1991)	2, 3, 21
State v. Neth, 165 Wn.2d 177 196 P.3d 658 (2008)	4
State v. O'Connor, 39 Wn. App. 113 692 P.2d 208 (1984)	2
State v. Potter, 156 Wn.2d 835 132 P.3d 1089 (2006)	12
State v. Randhawa, 133 Wn.2d 67 941 P.2d 661 (1997)	14
State v. Seagull, 95 Wn.2d 898 632 P.2d 34 (1981)	13
State v. Stanton, 68 Wn. App. 855 845 P.2d 1365 (1993)	17
State v. Taylor, 74 Wn. App. 111 872 P.2d 53 (1994)	10, 11

State v. Vickers, 148 Wn.2d 91 59 P.3d 58 (2002)	21
State v. Winterstein, 167 Wn.2d 620 220 P.3d 1226 (2009)	14

Washington Statutes & Court Rules

CrR 2.3(c)	3
ER 404(b)	17
RCW 46.61.465	14

Federal Cases

Aguilar v. State of Tex., 378 U.S. 108 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964)	1, 21
Dorman v. U.S., 140 U.S. App. D.C. 313 435 F.2d 385 (1970).....	4
Franks v. Delaware, 438 U.S. 154 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)	3, 7, 12
Illinois v. Gates, 462 U.S. 213 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)	21
Martin v. U.S., 183 F.2d 436, 440 (4th Cir., 1950)	22
Payton v. New York, 445 U.S. 573 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)	22
Spinelli v. U.S., 393 U.S. 410, 89 S. Ct. 584 21 L. Ed. 2d 637 (1969)	1

Constitutional Provisions

Fourth Amendment	2, 4, 21, 22
------------------------	--------------

II. SUMMARY OF THE CASE.¹ Based on information from three informants, police obtained a warrant to search Room 9 of the Snore and Whisker motel in Hoquiam, Washington. They found a quantity of methamphetamine and associated paraphernalia. Appellant, John R. Gardner, Jr., was charged with possession with intent to deliver. The intent charge was dropped, and Gardner was tried on a single count of simple possession and was convicted following a bench trial.

On appeal, Mr. Gardner challenges the sufficiency of the search warrant affidavit on multiple grounds. First, Gardner claims the evidence was insufficient to establish that he exercised dominion and control over Room 9 at the Snore and Whisker because the State presented no evidence that he was renting the room, rather than merely visiting. In response, the State cites to evidence that the officer seeking the warrant had reason to believe Gardner could be found in Room 9. Brief of Respondent (BR) 1. But mere presence does not establish dominion and control.

Gardner also asserted an *Aguilar-Spinelli* challenge to the basis of knowledge and the credibility of the informants.²

Finally, Gardner claims the erroneous admission of unreliable and prejudicial prior acts evidence under ER 404(b) requires reversal.

¹ Please consult the Appellant's Opening Brief for cites to the record.

² *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. U.S.*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

III. ARGUMENTS IN REPLY

Failure to suppress evidence obtained in violation of the Fourth Amendment is constitutional error and is presumed to be prejudicial. *State v. Tan Le*, 103 Wn. App. 354, 367, 12 P.3d 653 (2000). The State bears the burden of demonstrating the error is harmless. *Id.* Constitutional error is harmless only if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

1. THE WRITTEN STATEMENT ATTRIBUTED TO INFORMANT WIRSHUP WAS NOT GROUNDS FOR A SEARCH WARRANT.

The State places great reliance on the existence of statement typed by Officer Mitchell and attributed to Frank Wirshup. BR 1-2, 3-4. This misses the point.

First, Gardner does not dispute that this document exists. 1/25 RP 25-26. The point is that it was not presented to the magistrate in support of the search warrant.

A superior court judge reviewing a warrant affidavit sits in an appellate capacity. *State v. O'Connor*, 39 Wn. App. 113, 123, 692 P.2d 208 (1984). It is the magistrate's probable cause determination that is dispositive, not the superior court's. *State v. Myers*, 117 Wn.2d 332, 343,

815 P.2d 761 (1991). Accordingly, probable cause must rest solely on the evidence considered by the magistrate. *Myers*, 117 Wn.2d. at 344. That is, a Franks hearing evaluates the sufficiency of the affidavit at the time the warrant was sought. It is not an opportunity to cure material omissions in the affidavit. If there is insufficient evidence to support the basis of the magistrate's probable cause determination, "the proper remedy is suppression of all of the evidence seized pursuant to the search." *Id.*

The warrant at issue here indicates that the magistrate relied solely on Mitchell's affidavit, since the warrant includes no record of any evidence in addition to the affidavit, as required by CrR 2.3(c). CP 24-25.

Further, Wirshup refuted the content of the statement. CP 16. He testified that Mitchell wrote it and did not read it back to him, even after being told that Wirshup "could not read and write." Wirshup thought Mitchell had merely documented his confession to stealing the tool and selling it for food money.³ 1/25 RP 26.

Moreover, Mitchell testified at the Franks⁴ hearing that Wirshup had been truthful in the past, but he conceded that he did not vouch for

³ Wirshup took the tool to Mr. Gardner because Gardner's reputation for kindness led him to believe Gardner would help him out with money for food. 1/25 RP 28.

⁴ *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Wirshup's credibility in the affidavit considered by the magistrate. 1/25 RP 9.

Mitchell also claimed that Officers Dayton and Bradbury had corroborated Wirshup's claim that methamphetamine was in plain view in Room 9 on August 24, 2011. 1/25 RP 7, 9-10. This is impossible on its face. Neither Dayton nor Bradbury accompanied Wirshup when he visited the Snore and Whisker, and thus could not corroborate his alleged observations. Mitchell conceded that the officers could corroborate merely that Mr. Gardner was suspected of methamphetamine offenses in the past. Without other evidence, however, a history of similar crimes is not grounds for a warrant to invade and search a dwelling. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008), citing *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001). "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." *Dorman v. United States*, 140 U.S. App. D.C. 313, 317, 435 F.2d 385 (1970).

Mitchell conceded that he knew Wirshup was functionally illiterate and that Wirshup reminded him of this when he was instructed to read the statement and sign that it was correct. Instead of reading the statement, however, Mitchell simply instructed Wirshup to do his best. 1/25 RP 26, 28-29. Later, Wirshup provided a sworn statement to the defense

investigator in which he flatly denied having told Mitchell he saw any drugs. CP 7, para. 11; CP 16. When Mitchell asked him for information about drugs, he responded, “Are you crazy?” 1/25 RP 20, 23-24. When Mitchell persisted, Wirshup said the inquiry could get him killed. 1/25 RP 22. Moreover, Wirshup denied any interest in methamphetamine because he was a heroin addict. Wirshup’s denial is corroborated by the fact that he did not receive leniency on the shoplifting charge. He served his full sentence. 1/25 RP 24.

Mitchell conceded that he did not inform the magistrate that Wirshup had not spontaneously volunteered information about drugs but merely responded to Mitchell’s prompting during the interrogation. 1/25 RP 11-12. Mitchell claimed that Wirshup was interested in trading information for leniency in several pending matters. 1/25 RP 14. At the close of the interrogation, Mitchell understood that Wirshup was hoping for leniency and told him how to set up arrangements for providing additional information in exchange for clearing up outstanding warrants. Yet the affidavit did not inform the magistrate of any of this. 1/25 RP 15.

The evidence presented to the magistrate was insufficient to support issuance of a warrant to search a dwelling. The remedy is to exclude the resulting evidence, reverse the conviction, and dismiss the prosecution with prejudice.

2. EVERY FACT RELIED ON BY THE
MAGISTRATE IN FINDING PROBABLE
CAUSE FOR THE SEARCH WARRANT
WAS DISPUTED.

The trial court entered a single, solitary “Finding as to Disputed Facts,” namely that “Frank Wirshup told law enforcement he had seen methamphetamine in Gardner’s motel room and had purchased methamphetamine from Gardner in the past and that he signed a written statement to that effect. CP 64. In the opening brief, Gardner disputed that this is the only material disputed fact. The State responds with a hypertechnical, semantic argument that dispositive facts were stipulated or otherwise not disputed, implying that these facts were established in the State’s favor. BR 3-4. This is wrong.

Gardner sought to suppress the physical evidence seized pursuant to the search warrant on the grounds that the warrant affidavit did not cite facts sufficient to establish probable cause, and that the police omitted material facts from the affidavit. A *Franks* challenge to the completeness of an affidavit supporting a search warrant requires a substantial preliminary showing that a material fact was omitted from the warrant affidavit, knowingly and intentionally, or with reckless disregard for the truth. *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992);

Franks, 438 U.S. at 171–72. Accordingly, all the facts offered in support of the warrant were disputed.

The State erroneously contends that the trial court’s determination that an omission is material or deliberate is a conclusion of law. BR 4. It is not. These are questions of fact. *Clark*, 143 Wn.2d at 752. Therefore, to facilitate review, the essential findings include (a) whether the State established every fact necessary to support a warrant; (b) whether the evidence established facts that were omitted from the affidavit; and (c) whether the omissions were material. The trial court is not relieved of its obligation enter a finding on a dispositive material fact merely because unrefuted evidence establishing that fact was introduced by the defense.

Here, the solitary entry under the heading “finding as to disputed facts” is misleading.

As a corollary matter, the State claims the defense did not object to admitting the methamphetamine at the bench trial. BR 4-5. This simply ignores the entire suppression and *Franks* proceedings wherein the defendant argued vociferously to suppress every scrap of physical evidence that was obtained pursuant to a search warrant issued without probable cause. This included the drug evidence.

Gardner has placed the issues squarely before this Court with appropriate citation to the record and trusts that the Court will review his arguments accordingly.

3. THE WARRANT AFFIDAVIT DID NOT ESTABLISH PROBABLE CAUSE.

A warrant affidavit must set forth sufficient facts to convince a reasonable person that evidence of criminal activity could be found at the place to be searched. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Gardner challenges the sufficiency of the affidavit in this case. The State implies that Gardner seeks to evaluate the warrant affidavit in a hypertechnical manner rather than in the light of common sense. BR 8. This is false.

The State first claims that Wirshup's information rested on a sound basis of knowledge. BR 9. This is wrong. Even if Wirshup saw what he said he saw, the dispositive consideration when the warrant was issued three days later was staleness. The State's reliance on a marijuana grow case on the staleness issue is misplaced. BR 9-10. Unlike a few loose crystals, a grow operation takes time to dismantle and remove. *State v. Lyons*, 174 Wn.2d 354, 361, 275 P.3d 314 (2012) (discussed at AB 20). The State does not address *Lyons*.

The State next claims that Wirshup is entitled to the credibility afforded an ordinary citizen, not a criminal. BR 10. This ignores the fact that Wirshup was under arrest when he informed, and that he was known to the police as an addict and a habitual small-time crook. The State also implies that Wirshup's having given his name somehow assures his veracity. But, again, Wirshup was in custody. Mitchell knew his identity even before he picked him up at his encampment in the woods.

The State concedes that the crucial factor is whether the magistrate received all the relevant information about the informant. BR 11, citing *State v. Lair*, 95 Wn.2d 706, 710, 630 P.2d 427 (1981). Here, it is undisputed that Sergeant Mitchell did not tell the magistrate all he needed to know in order to evaluate Wirshup's credibility.

The State continues to assert that Wirshup acted against his penal interest, as claimed by Mitchell in the affidavit (CP 21). BR 11. This is false. Wirshup could not have denied the theft he was charged with because he was videotaped in the act. Thus, he did not expose himself to prosecution by owning up because he was already under arrest and in police custody. Rather, his penal interest was enhanced by currying favor by saying what Mitchell wanted to hear. Neither did claiming he had bought meth from Gardner in the past expose Wirshup to prosecution, unless he currently had drugs in his possession. Mitchell could not

prosecute Wirshup for a controlled substance violation based on a hypothetical delivery in the past. See AB 23-24. The State does not address this weakness in its case. BR 11.

Moreover, contrary to the Sergeant Mitchell's erroneous testimony and the State's argument on appeal, Wirshup's information was entirely uncorroborated. BR 12. Informants (including those in a corroborating capacity) must have personal knowledge of the facts they assert. *State v. Taylor*, 74 Wn. App. 111, 116, 872 P.2d 53 (1994). Here, neither Officer Dayton nor Detective Bradbury claimed personal knowledge of what occurred in Room 9 of the Snore and Whisker on August 24th.

Thus the evidence was obtained pursuant to a warrant issued without probable cause and must be suppressed.

4. WIRSHUP'S CRIMINAL HISTORY
WAS MATERIAL AND OMITTED FROM
THE AFFIDAVIT WITH RECKLESS
DISREGARD FOR THE TRUTH.

The State claims that omitting an informant's criminal history or motive from a search warrant affidavit is immaterial. BR 13, 15, citing *Taylor*. This is wrong.

First, *Taylor* is distinguishable on its facts. The warrant in that case did not depend on an informant's tip. Rather, the informant undertook two controlled buys under police surveillance. Probable cause

was not diminished merely because the buy was done by an addict with a criminal record, because this is frequently the case. *Taylor*, 74 Wn. App. at 115.

The State next cites *State v. Chenoweth*, 127 Wn. App. 444, 111 P.3d 1217 (2005), in support of its claim that an informant's criminal history need not be disclosed. BR 15. In *Chenoweth*, however, the commissioner who issued a warrant to search for a meth lab was informed that the informant had a prior conviction for possession and delivery of cocaine. *Chenoweth*, 127 Wn. App. at 449. Other information bearing on credibility was not disclosed. At a Franks hearing, the court found that the omitted facts were material and would have defeated the warrant application if disclosed. The court sustained the warrant because the omissions were neither deliberate nor reckless. *Chenoweth*, 127 Wn. App. at 450.

Likewise, *State v. Lane*, 56 Wn. App. 286, 786 P.2d 277 (1989), upon which *Taylor* relies, holds that an informant who is selected by the police and participates in a controlled buy under police supervision is presumptively reliable. *Lane*, 56 Wn. App. at 294, cited in *Chenoweth*, 127 Wn. App. at 470.

Mr. Wirshup's situation was entirely different. He did not do a controlled buy, and the police had no independent knowledge of the

information he provided. Accordingly, any circumstance shedding light on Wirshup's credibility and incentive to fabricate was highly relevant. It is simply ingenuous to claim that Sergeant Mitchell did not realize that his decision to omit the relevant facts denied the magistrate the benefit of information essential to determine Wirshup's credibility.

In affirming *Chenoweth*, the Supreme Court provides an invaluable historical review of probable cause for search warrants. *Chenoweth*, 160 Wn.2d at 468-69. The Court cites the well-settled principle that material inaccuracies in a probable cause affidavit "cannot be sanctioned or condoned." *Chenoweth*, 160 Wn.2d at 469. The affidavit will survive scrutiny only if (a) it is otherwise "facially valid" and (b) any factual inaccuracy was offered in good faith and is of only "peripheral relevancy." *Id.*; *State v. Cord*, 103 Wn.2d 361, 362, 693 P.2d 81 (1985).

The current test is whether a material omission was made *either* "with deliberate falsehood *or* as a result of reckless disregard for the truth." *Chenoweth*, at 469, quoting *Franks*, 438 U.S. at 455-56. The test for the officer's state of mind is an objective one. *State v. Afana*, 169 Wn.2d 169, 182, 233 P.3d 879 (2010), citing *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006) (the facts must cause a reasonable officer to believe that probable cause exists.)

This warrant was facially invalid on the basis of the knowledge prong. A magistrate issuing a search warrant must be able to infer from the facts in the affidavit that an offense is presently being committed at the time the warrant is issued. *Lyons*, 174 Wn.2d at 364-65. That is, the magistrate must be satisfied, based on the circumstances of the particular case, that the information in the affidavit is not too stale to support a warrant. *Lyons*, 174 Wn.2d at 361; AB 21. Regardless of Wirshup's credibility, his information was three days old, too stale to support a warrant to invade a dwelling to search for crystals on a counter top.

Mitchell's omission likewise cannot be characterized as inadvertent. An omission resulting from lack of knowledge may be inadvertent, as in *Chenoweth*. A conscious decision to leave out credibility evidence, however, cannot be characterized as other than reckless disregard for the truth. In stark contrast to Officer Mitchell, the officers preparing the *Chenoweth* affidavit either did not know or did not remember the informant's credibility problems. *Id.* Actual deliberation, indicates the existence of serious doubt. *Chenoweth* at 456; *Clark*, 143 Wn.2d at 751 (cited at BR 15).

Examples of inadvertence include confusing a tomato plant with marijuana. *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 34 (1981). In *Cord*, an officer corroborated a tip about a marijuana grow by aerial surveillance,

but inadvertently omitted from the affidavit the altitude from which he made his observations. *Cord*, 103 Wn.2d at 362.

What remains is recklessness. Accepting for the sake of argument that the affidavit did not include deliberate falsehood, Mitchell's omissions demonstrate a reckless disregard for the truth.

Recklessness can be established by prima facie evidence. For example, speeding is prima facie evidence of reckless driving. RCW 46.61.465; *State v. Amurri*, 51 Wn. App. 262, 266, 753 P.2d 540 (1988). The question is whether the conduct exhibits indifference to the consequences. *State v. Randhawa*, 133 Wn.2d 67, 77, 941 P.2d 661 (1997).

Moreover, since *Chenoweth*, our Supreme Court has unequivocally rejected good faith as an excuse for a search and seizure violation, holding that a 'good faith' exception is "incompatible with the nearly categorical exclusionary rule under article I, section 7." *Afana*, 169 Wn.2d at 181, citing *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009):

When evidence is obtained in violation of the defendant's constitutional immunity from unreasonable searches and seizures, there is no need to balance the particular circumstances and interests involved. Evidence obtained as a result of an unreasonable search or seizure must be suppressed."

Winterstein, 167 Wn.2d at 633.) Because a claim of good faith does not exclude illegally obtained evidence, it is incompatible with the highly protective nature of Washington's search and seizure law. *Afana*, at 181. *Afana* rejects admitting unlawfully obtained evidence on a ground, including good faith, that is "necessarily speculative. *Id.*

Here, Mitchell conceded that he was fully aware of Wirshup's criminal history and the circumstances under which he made his statement. He nevertheless made a conscious decision to omit this information. The court was asked to speculate that Sergeant Mitchell, a highly trained officer with 11 years experience,⁵ suffered a momentary brain cramp that caused him to lose sight of the relevance of facts touching on his informant's credibility.

With or without Wirshup's information, the affidavit is insufficient and the warrant should never have been issued. The remedy is to suppress the tainted evidence, reverse the conviction and dismiss the prosecution for insufficient evidence.

⁵ 1/25 RP 2.

5. THE TRIAL EVIDENCE IS INSUFFICIENT
TO PROVE CONSTRUCTIVE POSSESSION.

The State claims it proved that Gardner had dominion and control of Room 9 at the Snore and Whisker on the date the police executed the search warrant. BR 6. This is wrong.

Constructive possession cannot be predicated upon the accused's mere presence on the premises where drugs are found. *State v. Davis*, 16 Wn. App. 657, 659, 558 P.2d 263 (1977). There must be a showing of dominion and control of the premises themselves. *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971).

Dominion and control of rental premises is established by evidence that the accused either paid rent or possessed keys. *Davis*, 16 Wn. App. at 659. But mere proof of temporary residence or knowledge of the presence of controlled substances are not sufficient. *Davis*, 16 Wn. App. at 659, citing *State v. Callahan*, 77 Wn.2d 27, 29-31, 459 P.2d 400 (1969).

The State misrepresents the record by claiming that Sergeant Mitchell testified that he had contacted Mr. Gardner in Room 9 the previous week. BR 7. This is not what Mitchell said. He said that he disturbed the occupants of the Snore and Whisker to investigate a report of an illegally parked vehicle in the vicinity, at which time Gardner told him he was staying in Room 9. 1/26 RP 4.

Moreover, even if Gardner had been observed in the room, the prior contact suffers from the same evidentiary infirmity as his presence in the room on August 26th. Gardner's presence in a motel room does not prove dominion and control absent evidence that he paid rent or had a key. Had Gardner been paying rent, the police could have obtained that information from the motel office but did not bother; and a key surely would have been in the room somewhere. Yet the State concedes it found no evidence whatsoever of dominion and control by any person. BR 7. The fact that Gardner was shirtless at the time of the raid also is immaterial. BR 7. The State offers no authority for the naïve assumption that casual visitors to motel rooms always keep their clothes on.

Without evidence of constructive possession of the premises, the possession conviction cannot stand. Insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). The Court should reverse Gardner's conviction for possession of methamphetamine and dismiss the prosecution.

6. EVIDENCE OF INTENT TO DELIVER
WAS NOT ADMISSIBLE UNDER THE
RES GESTAE EXCEPTION TO ER 404(b).

The only authority the State could offer below in support of introducing evidence of uncharged conduct under ER404(b) was *State v.*

Jordan, 79 Wn.2d 480, 487 P.2d 969 (2004). 1/31 RP 41. In the opening brief, Gardner distinguishes this case on its essential facts. AB 39.

Nevertheless, *Jordan* remains the sole authority the State can find for its *res gestae* argument. BR 21.

Gardner rests upon the argument in his brief. Moreover, even supposing possession were not a completed crime, easily provable without reference to related uncharged conduct, Gardner's presence in the room in proximity to packaging materials can no more establish dominion and control than can his presence in proximity to the substance itself.

This was a "hail-Mary" argument from the outset, which this Court should ignore.

7. THE TRIAL COURT COMMITTED
REVERSIBLE ERROR BY CONSIDERING
THE INADMISSIBLE EVIDENCE.

A defendant must be tried for the offense charged in the information, and to introduce evidence of unrelated crimes is "grossly and erroneously prejudicial." *State v. Goebel*, 36 Wn.2d 367, 368-369, 218 P.2d 300 (1950) (voluminous citing references omitted.)

Gardner challenged Finding 1, CP 74, that he was originally charged with intent to deliver, and Finding 3, CP 75, that "the officers found heroin and oxycodone that the defendant has not been charged

with.” AB 8, 10. Gardner contends these facts are not material to any issue that was before the court. The State concedes that these findings are “irrelevant and not supported by the evidence.” BR 4. But the State fails to grasp that basing a conviction on impermissible inferences from uncharged conduct is strictly prohibited and grossly prejudicial.

The court’s failure to grasp this distinction is prejudicial on its face, because the court stated unequivocally that it based the guilty verdict on the extraneous facts.

[B]ased on the fact that the Court generously allowed the downward amendment to possession and the defendant was not charged with possession of heroin and oxycodone, the State proved beyond a reasonable doubt possession of methamphetamine.

3/5 RP 4.⁶ The court appears to have perceived some sort of quid pro quo whereby Mr. Gardner was obliged to accept conviction for possession in return for the State’s dropping the intent to deliver charge. The record contains no such agreement, which, if it existed, would have resulted in a guilty plea, not a trial.

The State argues that judges are presumed to ignore inadmissible evidence. BR 22. Here, however, it is clear from the record that the disputed evidence was the basis for the conviction.

⁶ The judge thoughtfully recited this on the record in case the Court of Appeals had trouble reading his handwriting on the bench Findings and Conclusions. 3/5 RP 4.

The remedy is to reverse the conviction.

8. GARDNER WAS DENIED A FAIR TRIAL
BY PRESUMPTIONS OF CREDIBILITY
BASED ON STATUS.

Appellant's opening brief sets forth remarks by the trial judge that Gardner contends can only be viewed as demonstrating personal bias. AB 33-34. The State defends these remarks, claiming the judge was not, contrary to his plain language, suggesting that police officers are entitled to a presumption of credibility. BR 19-21. Gardner stands by his brief and invites the Court to form its own impression.

The State then makes precisely the same argument on behalf of the purported corroboration witnesses, Dayton and Bradbury, claiming that the credibility of these witnesses is presumed. BR 17-18.

The State fails to distinguish between truthfulness and credibility, honesty and reliability, in this context. Assuming for the sake of argument that these officers sincerely believed in the truth of their statements to Mitchell, the fact remains that neither can be deemed a neutral, disinterested witness comparable to a private citizen, as claimed by the State. BR 18. In criminal prosecutions, court personnel such as magistrates and court clerks are deemed disinterested; police officers, by

contrast, are not. *See, e.g., State v. Myers*, 117 Wn.2d 332, 343, 815 P.2d 761 (1991).

Moreover, by Mitchell’s own testimony, both these officers had been trying to incriminate Gardner for over a year, with nothing to show for their efforts but frustration. Each had a personal interest in the success of Mitchell’s warrant application. In short, they were biased.

In certain authoritarian regimes, the beliefs expressed by the judge and prosecutor in this case constitute the unwritten law of the land. But the United States is founded upon a healthy mistrust of government authorities — especially the police. This is precisely why we have a Bill of Rights (specifically, here, the Fourth Amendment) to protect citizens from misguided and overzealous efforts by the police, however sincere, to maintain order. *Aguilar v. Texas*, 378 U.S. at 111.⁷ The people have rejected presumptions in favor of the state in favor of affording a presumption of innocence to the accused.

9. THE DRUG EVIDENCE WAS ESSENTIAL TO THE SUFFICIENCY OF THE WARRANT AFFIDAVIT.

The State asks the Court not to consider Gardner’s “loose-ends” argument that, without evidence from which a reasonable magistrate could

⁷ *Aguilar v. Texas* was abrogated by *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) but it is still the law in Washington. *State v. Vickers*, 148 Wn.2d 91, 111-12, 59 P.3d 58 (2002).

find that controlled substance offenses were occurring in Room 9, the warrant application could not possibly have succeeded. This argument was offered to forestall a claim of harmless error.

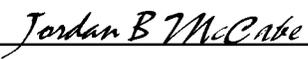
“Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment.” *Payton v. New York*, 445 U.S. 573, 587, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). The test is whether the invasion of the home is reasonable. *Martin v. U.S.*, 183 F.2d 436, 440 (4th Cir., 1950).

Contrary to the State’s claims, BR 19, the prosecution did not allege and could not have proved that Wirshup’s information could support a charge of knowing or reckless trafficking as defined in chapter 9A.82 RCW.

IV. CONCLUSION

The Court should reverse Mr. Gardner’s conviction and dismiss the prosecution with prejudice.

Respectfully submitted this December 17, 2012.



Jordan B. McCabe, WSBA No. 27211
Counsel for John R. Gardner, Jr.

CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served with this Reply Brief electronically via the Division II portal: wleraas@co.grays-harbor.wa.us.

A hard copy was also mailed, U.S. first class postage prepaid, to:

John R. Gardner, Jr., # 939710
DOC Work Release
1800 11th Ave SW
Olympia WA 98504

Jordan B McCabe Date: December 17, 2012

Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington

MCCABE LAW OFFICE

December 17, 2012 - 7:08 AM

Transmittal Letter

Document Uploaded: 432978-Reply Brief.pdf

Case Name: State v. Gardner

Court of Appeals Case Number: 43297-8

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Reply
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Jordan B McCabe - Email: jordan.mccabe@yahoo.com

A copy of this document has been emailed to the following addresses:
wleraas@co.grays-harbor.wa.us