

NO. 310701-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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Mar 21, 2013
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,
Respondent,

v.

THOMAS R. JONES
Petitioner

APPEAL FROM THE SUPERIOR COURT OF
PEND OREILLE, STATE OF WASHINGTON
HONORABLE REBECCA BAKER

BRIEF OF RESPONDENT

THOMAS A. METZGER
Prosecuting Attorney
Pend Oreille, Washington

By: JEREMY T. SCHMIDT,
WSBA No. 40863
DEPUTY PROSECUTOR

Pend Oreille County Prosecuting Attorney's Office
PO Box 5070
Newport, WA 99156
(509)447-4414

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I. ISSUES PRESENTED

- A. **Whether there was probable cause for the issuance of a warrant to search the defendant's residence.**
- B. **Whether the trial court abused its discretion when it did not order the additional discovery of reports relating to uncharged controls buys and additional information about the confidential informant.**
- C. **Whether the trial court abused its discretion in determining that a misdating on the search warrant by the authorizing magistrate did not invalidate the warrant.**

II. STATEMENT OF THE CASE

Utilizing a confidential informant, Pend Oreille County Sheriff's officers conducted a series of controlled buys at the Appellant's residence on November 9, 2010, December 2, 2010, December 16, 2010, and December 21, 2010. *Clerk's Papers(CP)* at 21. Prior to each controlled buy, law enforcement searched the and determined that the informant was not carrying a controlled substance on the informant's person. *CP* at 23. Law enforcement surveilled the entry to the defendant's property while the informant was there. *CP* 22. The defendant's residence is the only one located on the driveway. *CP* 22. When the informant emerged from the defendant's property, the informant had methamphetamine in their

possession, but did not have the buy money which detectives had furnished. *CP 22*.

On December 22, 2010, District Court Judge Philip J. Van De Veer acting in his capacity as Superior Court Commissioner reviewed an affidavit for search warrant and proposed search warrant provided by Detective Jon Carman. *CP 32*. The Search Warrant indicates that the date it was signed was 10 December 2010. *CP 32*. The affidavit in support of the search warrant was dated 22 December 2010, the caption on both the warrant and the affidavit for warrant were noted as "SW12-22-2010" which corresponds with the date the affidavit was signed. *CP 23*. The affidavit for the warrant indicates control buy dates of December 16, 2010 and December 21, 2010. *CP 21*. The date that the search warrant and search warrant affidavit were signed and issued was on December 22, 2010. *CP 23 and CP 32*. The warrant authorized the search of Tom Jones' residence 481 Hope Road, Newport, WA. 99156. *CP 29*.

On December 23rd, 2010, , the Pend Oreille County Sherriff's Office executed the search warrant at 481 Hope Rd, Newport the residence of Thomas R. Jones. During the search, officers located a large amount of methamphetamine, materials for the packaging of methamphetamine, scales for the weight and distribution of methamphetamine, and cash. Some of the cash was the controlled buy money that had been used by the

confidential informant to purchase methamphetamine at the property prior to execution of the search warrant. *CP 240*. Thomas R. Jones was the sole occupant in the residence. *CP 241*. The suspected methamphetamine was tested and was confirmed to be methamphetamine, a controlled substance. *CP 256*.

During the execution of the search warrant, a Beretta semi-automatic pistol with a loaded magazine and a Winchester lever-action rifle were found. *CP 246*.

Thomas R. Jones is a convicted felon, having previously been convicted of possession of a controlled substance methamphetamine on July 19, 2007. *CP 262*.

During the execution of the search warrant, a pink round tablet was discovered in a yellow cigar box in the residence, it was identified by its color, shape, and markings as Oxycodone 20 mg, a controlled substance. The Oxycodone pill was not in a prescription container, and no prescription authorizing Mr. Jones to possess Oxycodone was discovered or presented to law enforcement. *CP 242; see also CP 275*. Mr. Jones did not possess a prescription for Oxycodone 20 mg at that time. *CP 234*.

The Appellant was charged with possession of a controlled substance with intent to deliver and unlawful possession of a firearm.

The appellant, through counsel, filed a CrR 3.6 motion to suppress evidence seized pursuant to a warrant. *Report of Proceedings* at 15; *see also CP 11*. The Court heard argument of counsel and reviewed the affidavit for search warrant for facial validity. *RP 15 and CP 11*. The issue involved whether there was probable cause for the issuance of a warrant to search the Appellant's residence. *Id.* The trial court entered the following:

I. Finding of Facts

1. On December 22, 2010 District Court Judge Philip J. Van De Veer acting in his capacity as Superior Court Commissioner reviewed an affidavit for search warrant and proposed search warrant provided by Detective Jon Carman which had been reviewed by Deputy Prosecuting Attorney Jeremy Schmidt.
2. The warrant authorized the search of residence of Tom Jones 481 Hope Road, Newport, Wa. 99156
3. A confidential informant alerted the detectives that drugs were present in Mr. Jones's residence before the controlled buys were made. *Affidavit for Search Warrant* at 3.
4. Utilizing the confidential informant, a series of controlled buys were performed on Mr. Jones's residence on November 9, 2010, December 2, 2010, December 16, 2010, and December 21, 2010. *Affidavit for Search Warrant* at 4.
5. Before each controlled buy law enforcement searched the informant before the informant went onto the defendant's property and determined that the informant was not carrying a controlled substance on the informant's person. *Id.* at 5.
6. Law enforcement surveilled the entry to the defendant's property while the informant was there. *Id.*
7. The defendant's residence is the only one located on the driveway. *Id.* at 7.
8. When the informant emerged from the defendant's property, the informant had methamphetamine in their possession, but did not have the buy money which detectives had furnished. *Id.* at 5.
9. This series of events occurred on four different occasions. *Id.*

10. The detectives did not note in the affidavit for search warrant whether the informant had any criminal history.
11. The detectives did not note in the affidavit for search warrant if the informant had any pending charges or if the defendant would receive any "credit" for working with detectives.
12. The detectives did not note in the affidavit for search warrant that the driveway to the defendant's property was heavily wooded.

BASED UPON the foregoing Findings of Fact, the court now enters the following:

II. Conclusions of Law

1. The controlled buys were sufficient to establish the confidential informant's reliability and satisfy both prongs of *Aguilar-Spinelli*.
2. The facts in *State v. Lane*, 56 Wn. App. 286, 293 (1989) are analogous to this case, the distinction being that the *Lane* case occurred in an urban setting while the present case occurred in a rural setting.
3. The detectives should have provided information in the affidavit for search warrant about the nature of the woods along the driveway to Mr. Jones's property and should have provided information as to the confidential informant's criminal history, if any, and pending cases, if any, and whether the confidential informant was receiving any benefit for working with law enforcement. This would allow the magistrate reviewing the affidavit to make a full and informed decision.
4. However, even if they affidavit had noted the defendant had an extensive criminal history, or was attempting to "work off" pending charges, or that the defendant's driveway was a heavily wooded area, the number of controlled buys would have been sufficient to establish the confidential informant's reliability and credibility and overcome any such negative information that could have been contained in the affidavit for search warrant.
5. Therefore, having taken that issue fully into account, an additional *Franks* hearing is not necessary.
6. In this case the informant "went in empty and came out full" under controlled circumstances, and thus, just as in *State v. Lane*, the controlled buys are sufficient to establish the informant's reliability and satisfy both prongs of *Aguilar-Spinelli*. *State v. Lane*, 56 Wn. App. 286, 293 (1989)(quoting *State v. Casto*, 39 Wn. App. 229, 234)(1984). The controlled buys undertaken by

the informant are sufficient to establish probable cause, the veracity prong is met, the warrant is proper, and all the evidence seized is admissible at trial.

7. Because there was probable cause to believe that evidence of the crimes of possession and possession with intent to deliver controlled substance was located in the defendant's residence, the warrant was valid. All evidence seized from the residence is admissible at trial and the defendant's motion is denied. *CP 81-84.*

The Appellant then retained, new counsel and through counsel filed a motion to reconsider as well as a request for additional discovery, and a new motion to suppress. *CP 86 and CP 88.*

The matter came on hearing under CrR 3.6 on Appellant's motion to reconsider the court's ruling against the suppression of evidence seized pursuant to a warrant. *Report of Proceedings at 70; see also CP 88.* The Appellant further moved to be provided with additional discovery of reports relating to uncharged controls buys, and additional information about the confidential informant. *RP 70 and CP 88.* The Appellant further added a new motion to suppress evidence based on a misdating on the search warrant by the authorizing magistrate. *Id.*

The Court heard argument of counsel and reviewed the affidavit for search warrant, the search warrant, the briefing of counsel, and examined video and photographic offers of proof provided by the defense. *RP 70 and CP 88.* The trial court order addressed whether there was probable

cause for the issuance of a warrant to search the appellant's residence, whether the appellant was entitled to further discovery of uncharged events and information about the confidential informant, and whether the search warrant was rendered invalid based on an incorrect date. *Id.* The trial court entered the following:

III. Order Denying motion to Reconsider

The court declines to reconsider the previous ruling on this case. The defense has made no offer of proof to support the fact that other individuals were living on the defendant's property, and has provided no offers of proof that would challenge the veracity of the informant's information. It is clear in the affidavit that all of the information about the property came from the confidential informant and that there were no material omission made by the officers. It is also clear for the affidavit that the officers observed the confidential informant enter the defendant's property and did not misrepresent what they observed to the magistrate.

Under case law and the Fourth Amendment, factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (a) material and (b) made in 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). There are no material factual inaccuracies or omissions here, nor were there and factual inaccuracies or omissions that were made in a reckless disregard for the truth.

The court would further rule, that based on review of the video and photographs provided by the defense, that the information in the affidavit was accurate and there are no additional residences on the defendant's property.

This factual situation is analogous to the facts in the Division III Court of Appeals case *State v. Lane*, 56 Wn.app. 286 (1989). In *Lane*, Detectives of the Pasco Police Department signed an affidavit in support of a warrant request to search two apartments at 405 and 407 W. Bonneville, Pasco. He stated that within the last 24 hours, a confidential informant had made a controlled buy of one-eighth ounce of cocaine at 407 W. Bonneville. Prior to the buy, the informant was strip searched and

given \$120. Detectives observed the informant enter the main entrance at 407 W. Bonneville. When the informant came out of 407 W. Bonneville, he no longer had the \$ 120 buy money and gave detectives one-eighth ounce of white powder. Detectives field tested the powder and determined it to be cocaine. *State v. Lane*, supra, 286 at 289.

The Division III Court of Appeals held that the controlled buy undertaken by the informant was sufficient to establish probable cause, that the veracity prong was met, the warrant was proper, and all the evidence seized was admissible at trial. *Id.*

The facts in this case and *Lane* are analogous, and as the court has previously noted, this case is the rural equivalent of the urban situation in *Lane*. Thus under *Lane*, the controlled buys undertaken by the informant are sufficient to establish probable cause, the veracity prong is met, the warrant is proper, and all the evidence seized is admissible at trial.

IV. Order Denying Request for Further Discovery

The defense contends that the magistrate was not informed of the confidential informant's criminal history or of the contract the confidential informant was working under with law enforcement. This does not invalidate the search warrant. Say for example that the confidential informant was working off a charge. The Washington Supreme Court has ruled that individuals who are providing information to the police in order to avoid criminal punishment for his/her own crimes are reliable. Courts have determined that since a reduction of charges is not likely for false information, that such informants have a strong incentive to provide accurate information. *See, e.g., State v. Bean*, 89 Wn.2d 467, 469-71, 572 P.2d 1102 (1978) (an informant who trades information for a favorable sentencing recommendation has a strong motive to be accurate).

Therefore, if the confidential informant had been working off charges, disclosure of that information to the magistrate would only heighten the confidential informant's reliability. The fact that it was not disclosed (if the confidential informant were actually working off charges) does not diminish the search warrant or invalidate it because the defense cannot show by a preponderance of the evidence that this omission (if it were true) was a material fact which affected the finding of probable cause.

The Division III Court of Appeals has held, and the Supreme Court of Washington has affirmed, that omission of informant's criminal history, current drug use, and pending charges was not material or misleading because magistrate could reasonably infer those facts from informant's participation in controlled drug buy. *State v. Lane*, supra (cited by *State v. Chenoweth*, 160 Wn.2d 454 (2007)).

Therefore, any information about the confidential informant's criminal history, whether they were under contract with law enforcement, or working off charges that were not disclosed to the magistrate would not have been material or misleading, would not have affected the determination of probable cause, and would not invalidate the warrant.

A confidential informant's identity and information about that informant is privileged and not subject to disclosure. *State v. Casal*, 103 Wn.2d 812, 815, 699 P.2d 1234 (1985). It is well established that the State has a legitimate interest in protecting the identity of confidential informants. *State v. Moen*, 150 Wn.2d 221, 230, 76 P.3d 721 (2003). 323 (2007). Washington courts have held that, where the informant provided information relating only to probable cause rather than to the defendant's guilt or innocence, disclosure of the identity of an informant is not required. *State v. Casal*, 103 Wn.2d at 816 (citing *State v. Larson*, 26 Wn. App. 564, 567-68, 613 P.2d 542 (1980); *State v. Sewell*, 11 Wn. App. 546, 548, 524 P.2d (1974)).

The defense has made no offer of proof to support the fact that other individuals were living on the defendant's property, and have provided no offers of proof that would challenge the veracity of the informant's information. It is clear that there was probable cause to believe that there was evidence of criminal activity occurring on the defendant's property based on the multiple purchases of methamphetamine; as such, case law makes it clear that a *Franks* hearing is not necessary and the disclosure of information about the confidential informant or additional information about the controlled buys is not required.

V. Findings of Fact

13. On December 22, 2010, District Court Judge Philip J. Van De Veer acting in his capacity as Superior Court Commissioner reviewed an affidavit for search warrant and proposed search warrant provided by Detective Jon Carman which had been reviewed by Deputy Prosecuting Attorney Jeremy Schmidt.
14. The warrant authorized the search of residence of Tom Jones at 481 Hope Road, Newport, WA. 99156.
15. The Search Warrant indicates that the date it was signed was 10 December 2010.
16. The affidavit is dated 22 December 2010, the caption on both the warrant and the affidavit for warrant are noted as "SW12-22-2010" which corresponds with the date the affidavit was signed.
17. The affidavit for the warrant indicates control buy dates of December 16, 2010 and December 21, 2010.

18. It is clear the Judge Van De Veer made a scrivener's error when noting the warrant's date as the 10th rather than the 22nd day of December 2010.
19. The record is clear and no live testimony is required as to this issue.
20. The date that the search warrant and search warrant affidavit were signed and issued was on December 22, 2010.

BASED UPON the foregoing Findings of Fact, the court now enters the following:

VI. Conclusions of Law

1. The rules of the execution and return of a valid search warrant are ministerial in nature. *State v. Smith*, 15 Wn. App. 716, 552 P.2d 1059(1976).
2. Case law makes it clear that a mere scrivener's error does not invalidate a search warrant.
3. The court in *State v. Wible*, 113 Wn. App. 18, 25-26 (2002), found that a ministerial mistake is grounds for invalidation of a search warrant only if prejudice is shown. *See also State v. Vickers*, 148 Wn.2d 91, 121, 59 P.3d 58 (2002); *State v. Dodson*, 110 Wn. App. 112, 121, 39 P.3d 324 (2002) ("That the original warrant form mistakenly indicated the search was for marijuana rather than methamphetamine does not implicate a lack of probable cause, but a clerical error. Whether that error was harmful depends on its effect."); *State v. Parker*, 28 Wn. App. 425, 427, 626 P.2d 508 (1981) ("Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits."); *see also Commonwealth v. Pellegrini*, 405 Mass. 86, 539 N.E.2d 514, 515 ("Ministerial errors do not nullify search warrants."), *cert. denied*, 493 U.S. 975, 107 L. Ed. 2d 501, 110 S. Ct. 497 (1989). Allegations of a negligent or innocent mistake are not sufficient to void a warrant. *See also, State v. Gore*, 143 Wn.2d at 296 (2001); *In re. Yim*, 139 Wn.2d at 597 (1999).
4. The *Wible* court also found that the same holds true for clerical errors. *State v. Wible*, 113 Wn. App. 18,25-26, 51 P.3d 830 (2002) (citing *State v. Huguenin*, 662 A.2d 708, 710 (R.I. 1995) (where judge "had intended to sign the warrant" but did not, such "mere clerical error will not void an otherwise valid warrant"); *Power v. State*, 605 So. 2d 856, 863 (Fla. 1992) ("scrivener's error" in search warrant that identified Donald

- rather than Donna, as owner of house to be searched, did not invalidate warrant because place to be searched was sufficiently identified on face of warrant), *cert. denied*, 507 U.S. 1037, 123 L. Ed. 2d 483, 113 S. Ct. 1863 (1993); *cf. State v. Bohan*, 72 Wn. App. 335, 338, 864 P.2d 26 (1993)).
5. Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits. *State v. Parker*, 28 Wn. App. 425, 426-427, 626 P.2d 508 (1981); *State v. Wraspir*, 20 Wn. App. 626, 581 P.2d 182 (1978); *State v. Smith, supra*; *State v. Bowman*, 8 Wn. App. 148, 504 P.2d 1148 (1972).
 6. Here, there was a minor scrivener's error that in no way prejudices the defendant or invalidates the warrant. The warrant was valid. All evidence seized from the residence is admissible at trial and the defendant's motion is denied. *CP 215-222*.

Mr. Jones was found guilty at a stipulated facts trial of Possession with Intent to Manufacture or Deliver a Controlled Substance – Methamphetamine, two counts of Unlawful Possession of a firearm in the Second Degree, and Possession of a Controlled Substance – Oxycodone. *CP 237*.

III. STANDARD OF REVIEW

The Court of Appeals reviews a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S.

249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). When the defendant does not challenge any of the trial court's findings of fact, the Court considers them verities on appeal. *State v. Hill*, 123 Wn.2d 641 at 644 (1994). The Court of Appeals reviews the trial court's legal conclusions resulting from a suppression hearing de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

A trial court's findings of fact will not be disturbed on appeal if supported by substantial evidence. *World Wide Video, Inc. v. Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1991), *cert. denied*, U.S. , 118 L. Ed. 2d 391, 112 S. Ct. 1672 (1992) (citing *Bering v. Share*, 106 Wash. 2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987)).

Substantial evidence exists where the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation. *World Wide Video*, 117 Wash. 2d at 387. *State v. Halstien*, 122 Wn.2d 109 at 281, 857 P.2d 270 (1993).

The Washington State Supreme Court has held that in reviewing findings of fact entered following a motion to suppress, the appeals court will review only those facts to which error has been assigned. Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal. *State v. Hill*, 123 Wn.2d 641 at 647 (1994).

While a trial court's erroneous determination of facts unsupported by substantial evidence will not be binding on appeal, mere conflicting testimony or evidence presented at the 3.6 hearing does not make a court's findings of fact erroneous or unsubstantiated. *See State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). In that case, despite conflicting testimony at the hearing, the trial court set out an undisputed fact and that finding was relied upon by the Washington State Supreme Court despite being contested by defense. *See eg State v. Hill*, 123 Wn.2d 641 at 647 (1994).

Here, the Appellant asks the Court to go beyond the Court's obligation of reviewing if the trial courts findings of fact are supported by substantial evidence. The Appellant asks the Court to set aside the trial court findings and make an independent evaluation and review of the evidence.

In asking that the Appeals Court make an independent evaluation and review of the evidence, the Appellant ignores the ruling in *State v. Hill*, which unequivocally rejects the use of an independent evaluation of the evidence and states the following:

“The history behind the rule requiring an independent evaluation of the evidence reveals that it is an anomaly in Washington law **and should be discarded**. Originally a standard for federal review of state court decisions under the federal constitution, this rule was misappropriated into our body of state law. *See State v. Rutherford*, 63 Wn.2d 949, 955, 389 P.2d 895 (1964) (first Washington case

referring to the duty to conduct an independent evaluation of the record where constitutional rights involved)(emphasis added).... The reason given for this is the "trial judge and jury are closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony." *Haynes*, at 516....Review by a state appellate court of a trial court decision does not implicate the same concern of undue influence by state courts over matters of federal constitutional law. Within our appellate court system there is no reason to make a distinction between constitutional claims, such as those involved in a suppression hearing, and other claims of right. The trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying. See *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 405, 858 P.2d 494 (1993); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990). This remains true regardless of the nature of the rights involved....There is adequate opportunity for review of trial court findings within the ordinary bounds of review. A trial court's **erroneous determination of facts**, unsupported by substantial evidence, will not be binding on appeal. *Nord v. Eastside Ass'n Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4, review denied, 100 Wn.2d 1014 (1983); cf. *Halstien*(emphasis added). This strikes the proper balance between protecting the rights of the defendant, constitutional or otherwise, and according deference to the factual determinations of the actual trier of fact. We hold that in reviewing findings of fact entered following a motion to suppress, we will review only those facts to which error has been assigned. Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal." *State v. Hill*, 123 Wn.2d 641 at 647 (1994)(emphasis added).

Therefore, the Court cannot set aside the findings of the trial court, and the court cannot undertake an independent evaluation of the evidence as the Appellant requests.

The Findings of Fact and Conclusions of Law dated April 21, 2011 were based on a facial challenging of the search warrant, the trial court relied on the “four-corners” of the search warrant itself and the affidavit for search warrant, as well as the briefing of the parties to makes its determination. *Report of Proceedings* at 15; *see also CP* 11.

The Findings of Fact and Conclusions of Law dated October 12, 2011 were based on a facial challenging of the search warrant, the trial court relied on the “four-corners” of the search warrant itself and the affidavit for search warrant, as well as the briefing of the parties, including some photographic evidence provided by the Appellant, to makes its determination. *Report of Proceedings* at 70; *see also CP* 88.

A. There is substantial evidence in the record supporting the challenged facts in the Findings of Fact and Conclusions of Law dated April 21, 2011

a. Claims that the findings are incomplete or misleading

Appellant continually claims that the findings are incomplete or misleading. Nowhere in case law does it indicate that a trial courts finding are to be reviewed for being incomplete or misleading. As stated above, the issue is whether substantial evidence supports the challenged findings of fact. The findings of fact are the trial court’s own rational to support its

ruling. The trial court's findings cannot be misleading or incomplete as logically there is no one to mislead as it is the court's own reasoning. They can, however, be unsupported by the evidence. In this case, each finding made by the court was supported by the evidence as will be discussed below.

b. Challenge to Findings of Fact No. 1

The Appellant first assigns error to Finding of Fact no. 1, alleging that there is no evidence present in the record that Superior Court Commissioner Van De Veer reviewed and signed the warrant on December 22, 2010. There is substantial evidence in the record supporting this finding. The record relied upon by the court in making its determination demonstrates that the affidavit in support of the search warrant is dated 22 December 2010, the caption on both the warrant and the affidavit for warrant are noted as "SW12-22-2010" which correspond with the date the warrant was signed, and the affidavit on the warrant indicates control buy dates of December 16, 2010 and December 21, 2010. *CP 18-26*. It is clear the Judge Van De Veer made a scrivener's error when authorizing the warrant.

The record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation. The date that the

search warrant and search warrant affidavit were signed and issued was on December 22, 2010.

c. Challenge to Finding of Fact No. 3

The Appellant next claims to assign error to Finding of Fact no. 3, yet fails to allege an actual error. Rather, Appellant claims that the findings should include more detailed information. There is substantial evidence in the record supporting the finding that a confidential informant alerted the detectives that drugs were present in Mr. Jones's residence before the controlled buys were made. The affidavit for search warrant contains information sworn to by Detective Carman that the CI alerted officer to the presence of drugs at Thomas Jones's residence. *CP 19*.

The record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation. Further, the Appellant cannot ascribe any specific error to this finding and it should be considered verities.

d. Challenge to Findings of Facts No. 4, 5, 6, 8, 9.

The Appellant next claims to assign error to Finding of Fact no. 4, 5, 6, 8, and 9, yet fails to allege an actual error. Rather, Appellant claims that the findings should include more detailed information as well as a

legal “definition” of a controlled buy. There is substantial evidence in the record supporting the findings in no 4, 5, 6, 8, and 9. The affidavit for search warrant contains information sworn to by Detective Carman that utilizing the confidential informant, a series of controlled buys were performed on Mr. Jones’s residence on November 9, 2010, December 2, 2010, December 16, 2010, and December 21, 2010. *CP 21-23*. Detective Carman further swore that before each controlled buy, law enforcement searched the informant before the informant went onto the defendant’s property and determined that the informant was not carrying a controlled substance on the informant’s person. *CP 21-23*. Detective Carman further swore that law enforcement surveilled the entry to the defendant’s property while the informant was there. *CP 21-23*. Detective Carman further swore that when the informant emerged from the defendant’s property, the informant had methamphetamine in their possession, but did not have the buy money which detectives had furnished. *CP 21-23*. Detective Carman further swore this series of events occurred on four different occasions. *CP 21-23*.

The record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation. Further, the Appellant cannot ascribe any specific error to this finding and it should be considered verities.

e. Challenge to Findings of Fact No. 7

The Appellant next claims to assign error to Finding of Fact no. 7, yet fails to allege an actual error. Rather, Appellant claims that the officer should have verified that the Hope Road residence was the only residence located down the .5 mile road way. The affidavit for search warrant contains information sworn to by Detective Carman that their information shows that the Appellant's residence was the sole residence down the .5 mile roadway, and this was further corroborated in the Appellant's motion to reconsider when the Appellant provided photo documentation that the Appellant's residence was the sole residence down that roadway. *CP 20 and CP 217.*

The record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation. Further, the Appellant cannot ascribe any specific error to this finding as it should be considered verities.

B. There is substantial evidence in the record supporting the challenged facts in the Findings of Fact and Conclusions of Law dated October 12, 2011.

a. Claims that the findings are incomplete or misleading.

Appellant continually claims that the findings are incomplete or misleading. Nowhere in case law does it indicate that a trial courts finding are to be reviewed for being incomplete or misleading. As stated above, the issue is whether substantial evidence supports the challenged findings of fact. The findings of fact are the trial court's own rational to support its ruling. The trial court's findings cannot be misleading or incomplete as logically there is no one to mislead as it is the court's own reasoning. They can, however, be unsupported by the evidence. In this case, each finding made by the court was supported by the evidence as will be discussed below.

b. Challenge to Findings of Fact No. 1, 4, 5, 6, 7,8.

The Appellant assigns error to Finding of Fact No. 1, 4, 5, 6, 7, and 8 alleging that there is no evidence present in the record that Superior Court Commissioner Van De Veer reviewed and signed the warrant on December 22, 2010. There is substantial evidence in the record supporting this finding. The record relied upon by the trial court in making its determination demonstrates that the affidavit in support of the search warrant is dated 22 December 2010, the caption on both the warrant and the affidavit for warrant are noted as "SW12-22-2010" which correspond with the date the warrant was signed, and the affidavit on the warrant

indicates control buy dates of December 16, 2010 and December 21, 2010. CP 21-23. It is clear the Judge Van De Veer made a scrivener's error when authorizing the warrant.

The record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation. The date that the search warrant and search warrant affidavit were signed and issued was on December 22, 2010.

c. The Findings of Fact in This Case are Binding on Appeal.

The Washington State Supreme Court has held that where there is substantial evidence in the record supporting challenged facts, those facts will be binding on appeal. *State v. Hill*, 123 Wn.2d 641 at 647 (1994). Here, as noted above, there is substantial evidence in the record supporting the trial court's findings facts, and those facts are binding on appeal.

IV. ARGUMENT

A. There was probable cause for the issuance of a warrant to search the defendant's residence.

The Court of Appeals reviews a trial court's denial of a motion to suppress by considering whether substantial evidence supports the challenged findings and whether those findings support the trial court's

conclusions of law. *State v. Ross*, 106 Wn.App. 876, 880, 26 P.3d 298 (2001). The Court of Appeals reviews a magistrate's issuance of a search warrant for abuse of discretion. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). A magistrate may not issue a search warrant absent probable cause. *Cole*, 128 Wn.2d at 286. The reviewing court will accord the issuing magistrate great deference in its determination of probable cause and resolve any doubts as to the existence of probable cause in favor of the warrant. *Cole*, 128 Wn.2d at 286.

Probable cause exists when an affidavit supporting the search warrant sets forth facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity. *Cole*, 128 Wn.2d at 286. Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *Cole*, 128 Wn.2d at 286. A magistrate may “draw reasonable inferences from the facts and circumstances set forth in the supporting affidavit.” *State v. Maffeo*, 31 Wn.App. 198, 200, 642 P.2d 404 (1982).

This factual situation is analogous to the facts in the Division III Court of Appeals case *State v. Lane*, 56 Wn.App. 286 (1989).

In *Lane*, this Court held that the controlled buy undertaken by the informant was sufficient to establish probable cause, that the veracity

prong was met, the warrant was proper, and all the evidence seized was admissible at trial. *Id.*

The facts in this case and *Lane* are analogous, and as the trial court had previously noted, this case is the rural equivalent of the urban situation in *Lane*. CP 83 and CP 217.

In *Lane*, the confidential informant entered the main entrance of an apartment complex¹; in our case the confidential informant entered a .5 mile driveway. Neither the CI in *Lane* or in the case at hand could be viewed actually entering the residence that was to be searched, but this Court in *Lane* was satisfied that the controlled buys established probable cause for the issuance of a search warrant. Thus, under *Lane*, the controlled buys undertaken by the informant were sufficient to establish probable cause, the veracity prong was met, the warrant was proper, and all the evidence seized was admissible at trial. CP 83 and CP 217.

The issuing judge properly drew reasonable inferences from the facts and circumstances set forth in the supporting affidavit. In this case the informant “went in empty and came out full” under controlled circumstances, and thus, just as in *State v. Lane*, the controlled buys are

¹ In *Lane*, the detective stated “that within the last 24 hours, a confidential informant had made a controlled buy of one-eighth ounce of cocaine at 407 W. Bonneville. Prior to the buy, the informant was strip searched and given \$ 120. Detective Randy Barnes observed the informant enter **the main entrance** at 407 W. Bonneville”. *State v. Lane*, 56 Wn. App. 286, 293 at 289 (1989)(emphasis added).

sufficient to establish the informant's reliability and satisfy both prongs of *Aguilar-Spinelli*. *State v. Lane*, 56 Wn. App. 286, 293 (1989)(quoting *State v. Casto*, 39 Wn. App. 229, 234)(1984). See *Spinelli v. United States*, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964).

Because there was probable cause to believe that evidence of the crimes of possession and possession with intent to deliver controlled substance was located in the defendant's residence, the warrant was valid. All evidence seized from the residence was admissible at trial; and the issuing magistrate did not abuse its discretion because the facts and circumstances, when viewed together, provided probable cause to issue the warrant. Accordingly, the trial court did not err in denying Appellant's CrR 3.6 motion to suppress.

B. The trial court did not abuse its discretion when it did not order the additional discovery of reports relating to uncharged control buys, and additional information about the confidential informant.

The scope of discovery is within the sound discretion of the trial court and its decisions will not be disturbed absent manifest abuse of that discretion. *State v. Gregory*, 158 Wn.2d 759, 822, 147 P.3d 1201 (2006) (citing *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988); *State v.*

Boehme, 71 Wn.2d 621, 633, 430 P.2d 527 (1967), *cert. denied*, 390 U.S. 1013 (1968)).

Affording discretion to a trial court allows the trial court to operate within a “range of acceptable choices.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

Under an abuse of discretion standard, the reviewing court will find error only when the trial court's decision (1) adopts a view that no reasonable person would take and is thus “manifestly unreasonable,” (2) rests on facts unsupported in the record and is thus based on “untenable grounds,” or (3) was reached by applying the wrong legal standard and is thus made “for untenable reasons.” *State v. Sisouvanh*, 175 Wn.2d 607 (2012)(quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

A confidential informant's identity and information about that informant is privileged and not subject to disclosure. *State v. Casal*, 103 Wn.2d 812, 815, 699 P.2d 1234 (1985). It is well established that the State has a legitimate interest in protecting the identity of confidential informants. *State v. Moen*, 150 Wn.2d 221, 230, 76 P.3d 721 (2003). Washington courts have held that, where the informant provided information relating only to probable cause rather than to the defendant's

guilt or innocence, disclosure of the identity of an informant is not required. *State v. Casal*, 103 Wn.2d at 816 (citing *State v. Larson*, 26 Wn. App. 564, 567-68, 613 P.2d 542 (1980); *State v. Sewell*, 11 Wn. App. 546, 548, 524 P.2d (1974)).

The defense made no offer of proof to support the fact that other individuals were living on the defendant's property, and have provided no offers of proof that would challenge the veracity of the informant's information. *CP 216*.

It is clear that there was probable cause to believe that there was evidence of criminal activity occurring on the defendant's property based on the multiple purchases of methamphetamine; as such, case law makes it clear that a *Franks* hearing was not necessary and the disclosure of information about the confidential informant or additional information about the controlled buys was not required. *CP 83 and CP 219*.

Under case law and the Fourth Amendment, factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (a) material and (b) made in 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). There are no material factual inaccuracies or

omissions here, nor were there any factual inaccuracies or omissions that were made in a reckless disregard for the truth.

The trial court further ruled that, based on review of the video and photographs provided by the defense, the information in the affidavit was accurate and there were no additional residences on the defendant's property. *CP 217*.

Therefore, if the confidential informant had been working off charges, disclosure of that information to the magistrate would only heighten the confidential informant's reliability. The fact that it was not disclosed (if the confidential informant were actually working off charges) did not diminish the search warrant or invalidate it because the defense cannot show by a preponderance of the evidence that this omission (if it were true) was a material fact which affected the finding of probable cause.

This Court has held, and the Supreme Court of Washington has affirmed, that omission of informant's criminal history, current drug use, and pending charges was not material or misleading because the magistrate could reasonably infer those facts from informant's participation in a controlled drug buy. *State v. Lane*, supra (cited by *State v. Chenoweth*, 160 Wn.2d 454 (2007)).

Therefore, any information about the confidential informant's criminal history, whether they were under contract with law enforcement, or

working off charges that were not disclosed to the magistrate would not have been material or misleading, would not have affected the determination of probable cause, and would not invalidate the warrant. In fact, additional information would have only enhanced the veracity of the informant and the validity of the warrant. Thus, the court was reasonable in determining that a *Frank's* hearing was not necessary.

Here, the state was not required to disclose any additional information about the controlled buys or the informant. If a defendant requests the disclosure of information beyond that which the prosecutor is specifically obligated to disclose under the discovery rules, the defendant's request must meet the requirements of CrR 4.7(e)(1). *State v. Blackwell*, 120 Wn.2d 822 at 828 (1993). This rule provides:

Upon a showing of *materiality* to the preparation of the defense, and if the request is *reasonable*, the court in its discretion may require disclosure to the defendant of the relevant material and information not [otherwise specified in the rule]. *CrR 4.7(e)(1)*.

Thus, a defendant's discovery request must meet two threshold requirements before the court may exercise its discretion in granting the request: (1) the information sought must be material, and (2) the discovery

request must be reasonable. *State v. Blackwell*, 120 Wn.2d 822 at 828 (1993).

If these two requirements are met, the trial court has the discretion to condition or deny the disclosure request if it finds the disclosure's usefulness is outweighed by a substantial risk of harm or unnecessary annoyance to any person. CrR 4.7(e)(2). *Blackwell* at 828.

In this case, the defense provided no evidence that the information sought was material, and in fact the record shows that the information requested was immaterial to the case as a whole and to the facial challenge to the search warrant specifically. *CP 218*. Secondly, the defense made no showing that their request was reasonable. *CP 216*.

Finally, the defense did not show that the disclosures' usefulness would outweigh the risk of harm, in this case the harm of revealing a confidential informant's identity. *CP 219*.

The trial court's decision adopted a view that a reasonable person would take and is thus not "manifestly unreasonable". The trial court's decision rested on facts supported in the record, as indicted above, and is thus not based on "untenable grounds". The trial court's decision was reached by applying the correct legal standard, in noting the *Casal* line of cases and comports with CrR 4.7, and was thus not made "for untenable reasons". *State v. Sisouvanh*, 175 Wn.2d 607 (2012)(quoting *State v.*

Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). The trial court did not abuse its discretion when it denied the request for further discovery.

C. A mere scrivener's error on the search warrant by the authorizing magistrate did not invalidate the warrant.

The reviewing court reviews the validity of a search warrant for abuse of discretion, giving great deference to the issuing magistrate's determination of probable cause; generally, the warrant is valid if a reasonable, prudent person would understand from the facts contained in the officer's affidavit that a crime has been committed and that evidence of the crime is located at the place to be searched; as long as the basic requirements are met, affidavits should be viewed in a commonsense, not hypertechnical manner; doubts should be resolved in favor of the warrant. *Garcia*, 63 Wn. App. at 871; *see also State v. Patterson*, 83 Wn.2d 49, 55-56, 515 P.2d 496 (1973); *State v. Matlock*, 27 Wn. App. 152, 155, 616 P.2d 684 (1980).

The rules of the execution and return of a valid search warrant are ministerial in nature. *State v. Smith*, 15 Wn. App. 716, 552 P.2d 1059(1976). Case law makes it clear that a mere scrivener's error does not invalidate a search warrant.

The court in *State v. Wible*, 113 Wn. App. 18, 25-26 (2002), found that a ministerial mistake is grounds for invalidation of a search warrant only if prejudice is shown. *See also State v. Vickers*, 148 Wn.2d 91, 121, 59 P.3d 58 (2002); *State v. Dodson*, 110 Wn. App. 112, 121, 39 P.3d 324 (2002) ("That the original warrant form mistakenly indicated the search was for marijuana rather than methamphetamine does not implicate a lack of probable cause, but a clerical error. Whether that error was harmful depends on its effect."); *State v. Parker*, 28 Wn. App. 425, 427, 626 P.2d 508 (1981) ("Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits."); *see also Commonwealth v. Pellegrini*, 405 Mass. 86, 539 N.E.2d 514, 515 ("Ministerial errors do not nullify search warrants."), *cert. denied*, 493 U.S. 975, 107 L. Ed. 2d 501, 110 S. Ct. 497 (1989). Allegations of a negligent or innocent mistake are not sufficient to void a warrant. *See also, State v. Gore*, 143 Wn.2d at 296 (2001); *In re. Yim*, 139 Wn.2d at 597 (1999).

The *Wible* court also found that the same holds true for clerical errors. *State v. Wible*, 113 Wn. App. 18,25-26, 51 P.3d 830 (2002) (citing *State v. Huguenin*, 662 A.2d 708, 710 (R.I. 1995) (where judge "had intended to sign the warrant" but did not, such "mere clerical error will not void an otherwise valid warrant"); *Power v. State*, 605 So. 2d 856, 863 (Fla. 1992)

(“scrivener's error” in search warrant that identified Donald rather than Donna, as owner of house to be searched, did not invalidate warrant because place to be searched was sufficiently identified on face of warrant), *cert. denied*, 507 U.S. 1037, 123 L. Ed. 2d 483, 113 S. Ct. 1863 (1993); *cf. State v. Bohan*, 72 Wn. App. 335, 338, 864 P.2d 26 (1993).

Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits. *State v. Parker*, 28 Wn. App. 425, 426-427, 626 P.2d 508 (1981); *State v. Wraspir*, 20 Wn. App. 626, 581 P.2d 182 (1978); *State v. Smith, supra*; *State v. Bowman*, 8 Wn. App. 148, 504 P.2d 1148 (1972).

In this case, the Search Warrant indicates that the date it was signed was December 10, 2010. However, the affidavit in support of the search warrant is dated December 22, 2010, the caption on both the warrant and the affidavit for warrant are noted as “SW12-22-2010” which corresponds with the date the affidavit was signed. *CP 220*. The affidavit for the warrant indicates control buy dates of December 16, 2010 and December 21, 2010. *CP 220*. It is clear the Judge Van De Veer made a scrivener’s error when noting the warrant’s date as the 10th rather than the 22nd day of December 2010. *CP 220*. The Appellant provided no evidence that would indicate how he was prejudiced by this scrivener’s error. *CP 222*.

Here, there was a minor scrivener's error that in no way prejudices the Appellant or invalidates the warrant. The trial court's decision adopted a view that a reasonable person would take and is thus not "manifestly unreasonable". Furthermore, the trial court's decision rested on facts supported in the record, as indicted above, and is thus not based on "untenable grounds". Additionally, the trial court's decision was reached by applying the correct legal standard, in noting the *Wible* line of cases and that the misdating was a mere scrivener's error, and was thus not made "for untenable reasons". *State v. Sisouvanh*, 175 Wn.2d 607 (2012)(quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). The trial court did not abuse its discretion when it denied the Appellant's motion to invalidate the warrant and suppress evidence.

V. CONCLUSION

For the foregoing reasons, there was probable cause for the issuance of a warrant to search the defendant's residence. The trial court did not abuse its discretion when it did not order the additional discovery of reports relating to uncharged controls buys, and additional information about the confidential informant. The trial court did not abuse its discretion in determining that a misdating on the search warrant by the authorizing magistrate did not invalidate the warrant.

Dated this 21 day of March, 2013.



JEREMY T. SCHMIDT, WSBA #40863
Deputy Prosecuting Attorney
P. O. Box 5070
Newport, WA 99156
(509) 447-4414

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)
)
) Plaintiff,) No. 310701-III
 vs.) CERTIFICATION
) OF SERVICE
 THOMAS R. JONES,)
)
)
)
) Defendant.)

I, Jeremy T. Schmidt, Deputy Prosecuting Attorney for Pend Oreille County, certify under penalty of perjury of the laws of the State of Washington, that I served the defense counsel on the 21st day of March, 2013, with a copy of Brief of Respondent, by depositing a true and correct copies of the same in the U.S. Mails, postage prepaid addressed to:

David R. Hearrean
Attorney at Law
901 N. Monroe, Suite 356
Spokane, WA 99201

Thomas R. Jones
481 Hope Road
Newport, WA 99156

by: (E-File) Renee S. Townsley, Clerk
Court of Appeals Division III
500 North Cedar Street
Spokane, Washington 99201

SIGNED at Newport, WA this 21st day of March, 2013.


Jeremy T. Schmidt, WSBA # 40863
Deputy Prosecuting Attorney
PO Box 5070
Newport, WA 99156-5070
(509) 447-4414