

COA NO. 45001-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JONES,

Appellant.

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

The Honorable Michael J. Sullivan, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE SEARCH WARRANT WAS UNSUPPORTED BY PROBABLE CAUSE, REQUIRING SUPPRESSION OF EVIDENCE RECOVERED FROM THE RESIDENCE	1
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Atchley</u> , 142 Wn. App. 147, 173 P.3d 323 (2007).....	2
<u>State v. Franklin</u> , 49 Wn. App. 106, 741 P.2d 83 (1987).....	2
<u>State v. Ibarra</u> , 61 Wn. App. 695, 812 P.2d 114 (1991).....	2, 3
<u>State v. Jackson</u> , 102 Wn.2d 432, 688 P.2d 136 (1984).....	3
<u>State v. Lund</u> , 70 Wn. App. 437, 853 P.2d 1379 (1993), <u>review denied</u> , 123 Wn.2d 1023, 875 P.2d 635 (1994).....	4
<u>State v. Lyons</u> , 174 Wn.2d 354, 275 P.3d 314 (2012).....	5
<u>State v. Maxwell</u> , 114 Wn. 2d 761, 791 P.2d 223, 227 (1990).....	5
<u>State v. Woodall</u> , 100 Wn.2d 74, 666 P.2d 364 (1983).....	1, 2
 <u>FEDERAL CASES</u>	
<u>United States v. Carmichael</u> , 489 F.2d 983 (7th Cir. 1973)	4, 5
 <u>OTHER STATE CASES</u>	
<u>State v. Yaw</u> , 58 Haw. 485, 572 P.2d 856 (Haw. 1977)	4, 5

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

1 W. LaFave, Search & Seizure § 3.3(c) (1978).....	4
2 W. LaFave, Search & Seizure (5th ed. 2012)	4, 5

A. ARGUMENT IN REPLY

THE SEARCH WARRANT WAS UNSUPPORTED BY PROBABLE CAUSE, REQUIRING SUPPRESSION OF EVIDENCE RECOVERED FROM THE RESIDENCE.

The State insists that the search warrant affidavit establishes the reliability of the confidential informants because they were "citizen" informants. Brief of Respondent (BOR) at 4-7. The State acknowledges the Supreme Court's decision in State v. Woodall, 100 Wn.2d 74, 75, 666 P.2d 364 (1983) but does not engage it, instead falling back on the notion that Jones has mischaracterized the status of the informants. BOR at 5-6.

The problem for the State is that the informant in Woodall is described in the same cursory manner as the informants in Jones's case. In both cases, the informant is identified as someone who provided reliable information in the past. Compare CP 20 (the confidential informant "provided reliable information on another case") and CP 21 (the other informant "has previously provided info. to PCSO that has proved to be reliable.") with Woodall, 100 Wn.2d at 75 ("A reliable informant who has proven to be reliable in the past has given information to Duane Golphenee that he/she has been in the house within the last twelve hours and has personally observed marijuana being used in the house. The informant is familiar with the appearance of marijuana."). The affidavit in Woodall failed to establish the reliability of the informant because it stated

a conclusion about reliability rather than a fact supporting reliability. Woodall, 100 Wn.2d at 77. The outcome in Jones's case must be the same. There is no way to meaningfully distinguish between the two cases.

Contrary to the State's argument, describing the informants as "citizen" informants does not change anything here because the informants were not identified to the issuing magistrate. "When the identity of an informant is known, the necessary showing of reliability is relaxed, as the information is less likely to be given in self-interest." State v. Atchley, 142 Wn. App. 147, 162, 173 P.3d 323 (2007). "However, Washington requires a heightened showing of credibility for citizen informants whose identity is known to police but not disclosed to the magistrate." Atchley, 142 Wn. App. at 162. The heightened standard is used because "the specter of the anonymous troublemaker is still present," which "raises grave concerns of the informant's reliability." State v. Ibarra, 61 Wn. App. 695, 700, 812 P.2d 114 (1991).

In Jones's case, the identity of the informants was not disclosed to the magistrate. The heightened showing of reliability is therefore required but cannot be met here. The State contends the officer's barebones recitation that each informant desired to remain anonymous because of fear of retaliation suffices to establish reliability. BOR at 6. Similar generic recitations have been condemned in the past as insufficient to

establish reliability. See State v. Franklin, 49 Wn. App. 106, 109, 741 P.2d 83 (1987) (officer's "generic recitation" that "the informant was an upstanding citizen since the informant had no criminal record, was motivated by a desire to thwart crime, and requested anonymity because of fear of retribution" insufficient to establish reliability of informant); Ibarra, 61 Wn. App. at 701 (officer's generic conclusion that "persons who cooperate with the police would be harmed or otherwise injured if their identity were known" insufficient to raise the requisite inference that the informant had a valid reason for wishing to remain anonymous).

The State also takes issue with Jones's argument that the affidavit does not establish the basis of knowledge for the second informant's statement that "they heard from at least two people that Mike was going around town bragging about the burglary. Mike was telling people that he knew about the guns and other items because his family is close to Brian's. The citizen also informed me that Mike tried to sell an item to them that is similar to one stolen from the Settlemyre residence." CP 21. The State argues other information in the affidavit establishes the basis of this informant's knowledge. BOR at 8. The State is mistaken.

"If the informant's information is hearsay, the basis of knowledge prong can be satisfied if there is sufficient information so that the hearsay establishes a basis of knowledge." State v. Jackson, 102 Wn.2d 432, 437-

38, 688 P.2d 136 (1984) (citing United States v. Carmichael, 489 F.2d 983, 986 (7th Cir. 1973) (hearsay based on hearsay is acceptable as long as the affiant has sufficient information so that both levels of hearsay meet the two-pronged test); State v. Yaw, 58 Haw. 485, 488, 572 P.2d 856 (Haw. 1977) (where hearsay upon hearsay is at issue, the affidavits must establish that the reliability and basis of knowledge has been met as to both the first and the second informants); 1 W. LaFave, Search & Seizure § 3.3(c) (1978)).

In double hearsay situations, the requisite inquiry is whether there is "sufficient information so that both levels of hearsay . . . may be properly relied upon." 2 W. LaFave, Search & Seizure § 3.3(d) 199-200 (5th ed. 2012) (quoting Carmichael, 489 F.2d at 986). The basis of knowledge must be shown for the source of the hearsay. Id. But here, there is no information in the affidavit that establishes how or in what manner the sources of the hearsay obtained any of their information. The first level of hearsay from unknown sources that was relayed to the second informant contains no description of their source of knowledge. The basis of knowledge for the second informant that relied on that information therefore remains unsatisfied.

Further, there is no statement against penal interest here. See State v. Lund, 70 Wn. App. 437, 451 n.9, 853 P.2d 1379 (1993) ("Under

appropriate circumstances, an adequate basis of knowledge can be established not only by personal knowledge, but also by an admission against penal interest.") (citing Carmichael, 489 F.2d at 986; Yaw, 58 Haw. 485), review denied, 123 Wn.2d 1023, 875 P.2d 635 (1994). "In the hearsay-upon-hearsay situation, as where an informant of established reliability tells police what someone else has told him, there is a need to establish veracity with respect to each person in the hearsay chain. This can be done by showing that these other links made admissions against their penal interest." 2 W. LaFave, 3.3(c) 174 (internal citation omitted)). The State makes no argument that the second informant's statement or the statements relayed by the hearsay sources is against penal interest, nor could it because there are no facts by which to make the inference.

Jones otherwise stands by the arguments made in the opening brief. "Although a magistrate reviewing an affidavit for a search warrant is accorded deference, that deference is not boundless." State v. Maxwell, 114 Wn. 2d 761, 770, 791 P.2d 223, 227 (1990) (informant's observation of frequent visitors, tin foil on window, and suspicious conversation not sufficient evidence of illegal marijuana activity). No deference is given "where the affidavit does not provide a substantial basis for determining probable cause." State v. Lyons, 174 Wn.2d 354, 363, 275 P.3d 314 (2012). Such is the case here.

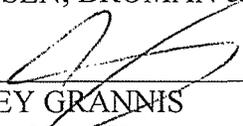
B. CONCLUSION

For the reasons set forth above and in the opening brief, Jones requests that this Court reverse the convictions and dismiss counts I and II.

DATED this 7th day of July 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 45001-1-II
)	
MICHAEL JONES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE REPLY BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL JONES
1110 LARCH STREET
RAYMOND, WA 98577

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JULY 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

July 07, 2014 - 3:23 PM

Transmittal Letter

Document Uploaded: 450011-Reply Brief~2.pdf

Case Name: Michael Jones

Court of Appeals Case Number: 45001-1

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: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

dburke@co.pacific.wa.us