NO. 56179-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM HOWARD WITKOWSKI,

Appellant.

BRIEF OF APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
THE HONORABLE MICHARL E. SCHWARTZ, JUDGE

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

IV. STATEMENT OF THE CASE 3

V. ARGUMENT 8

A. This Court Should Review the Trial Court's Determination of Probable Cause De Novo. 8

B. Probable Cause Did Not Support the Warrant Because the Evidence was Stale. 10

C. The Drug and Firearm Evidence Should Have Been Suppressed as Fruit of the Poisonous Tree. 20

VI. CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Andresen v. Maryland,
427 U.S. 463, 96 S.Ct. 2737,
49 L.Ed.2d 627 (1976) 2, 15, 16, 19

Segura v. United States,
468 U.S. 796, 104 S. Ct. 3380,
82 L. Ed. 2d 599 (1984) 20

Sgro v. United States,
287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138,
85 A.L.R. 108 (1932) 13

State v. Byrd,
125 Wn.2d 707, 887 P.2d 396 (1995) 21

State v. Duncan,
146 Wn.2d 166, 43 P.3d 513 (2002) 20

State v. Friedrich,
4 Wn. App. 945, 425 P.3d 518 (2018) 14

State v. Hall,
53 Wn. App. 296, 766 P.2d 512 (1989) 2, 15, 16, 19

State v. Harrington,
167 Wn.2d 656, 222 P.3d 92 (2009) 9

State v. Higby,
26 Wn. App. 457, 613 P.2d 1192 (1980) 11, 13

State v. Jackson,
150 Wn.2d 251, 76 P.3d 217 (2003)..... 9

State v. Maddox,
152 Wn.2d 499,
98 P.3d 1199 (2004) 2, 10, 11, 14, 17-19

State v. Neth,
165 Wn.2d 177, 196 P.3d 658 (2008)..... 10

State v. Perez,
92 Wn. App. 1, 963 P.2d 881 (1998)..... 11

State v. Sibert,
168 Wn.2d 306, 230 P.3d 142 (2010)..... 21

State v. Smith,
165 Wn. App. 296, 266 P.3d 250 (2011)..... 20, 21

State v. Thein,
138 Wn.2d 133, 977 P.2d 582 (1999)..... 9, 10, 14

State v. Young,
123 Wn.2d 173, 867 P.2d 593 (1994)..... 10, 13

State v. Witkowski,
17 Wn. App. 2d 1002,
2021 WL 1259730 (2021) 5, 6, 12, 21

Wong Sun v. United States,
371 U.S. 471, 83 S.Ct. 407,
9 L.Ed.2d 441 (1963)..... 20

///

Constitutions

U.S. Const. Amend. IV 9

Wash. Const. art. I, sec. 7 9

Statutes

RCW 9A.56.50..... 5

RCW 9A.56.040..... 5

I. INTRODUCTION

In October 2015, police obtained a warrant to search the property where William Witkowski resided. Police based the warrant request on information from a utility company and their own observations when police entered the curtilage of the property. When executing the search warrant, police found drugs, firearms, and evidence of drug dealing. However, on appeal, this Court found that police failed to give necessary *Ferrier* warnings. This Court remanded to excise portions of the warrant and determine if it was still supported by probable.

The trial court redacted the affidavit and found that probable cause still supported the warrant. This Court should reverse because the evidence in the affidavit was stale. The warrant affidavit stated that police were looking for evidence of utility theft, specifically a "[g]rey power meter" a "[t]emporary meter base" and a "lock ring" for a power meter. CP 116. However, three weeks before police executed the search warrant, a utility employee reported that the stolen power meter "had been

removed and was nowhere in sight." CP 118. This Court should reverse Mr. Witkowski's convictions, with the exception of count VI (defrauding a public utility in the first degree), because the evidence obtained by police was fruit of the poisonous tree.

II. ASSIGNMENTS OF ERROR

Mr. Witkowski assigns error to the following portions of the Findings and Conclusions on Admissibility of Evidence CrR 3.6 entered on September 3, 2021:

1. The trial court erred by misinterpreting *State v. Maddox*, *Andresen v. Maryland*, and *State v. Hall*. CP 114.
2. The trial court erred by concluding that a "reasonable inference" was that "the criminal activity, theft of power, in this case was ongoing." CP 114-15.
3. The trial court erred by concluding that it was "reasonable to believe that evidence of theft of power would be found on the property." CP 115.
4. The trial court erred by concluding that probable cause supported this search warrant. CP 115.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was this search warrant based on stale evidence when the contraband that police sought to find—a stolen power meter—had been "removed and was nowhere in sight" three weeks before the warrant was executed?

2. Should this Court reverse Mr. Witkowski's convictions when the search warrant was not supported by probable cause, and all evidence obtained was fruit of the poisonous tree?

IV. STATEMENT OF THE CASE

This appeal arises from the search of a property at 31717 47th Avenue East in Eatonville, Washington. CP 110. William Witkowski and Tina Berven resided at this property. CP 116. In October 2015, police began investigating Mr. Witkowski and Ms. Berven for utility theft and possession of stolen property. *Id*.

Police were alerted to the alleged utility theft by employees of Ohop Mutual Light Company. *Id*. On October 6, 2015, Ohop Mutual employee James Field went to the Eatonville

property to investigate a report of an illegal power hookup. CP 117. Mr. Field saw the original power meter on the ground, and a stolen power meter hooked up in its place. *Id*. He took pictures of his observations. *Id*. Mr. Field then left the property and returned later that same day with a crew to retrieve the stolen power meter. CP 117-18. However, the stolen meter was removed and "nowhere in sight." CP 118. The original meter was still on the ground. *Id*.

On October 26, 2015, another Ohop Mutual employee, Kenneth Klotz, contacted police. CP 116. He reported the information from Mr. Field's visit on October 6, 2015. CP 117. He also told police that the power to the property was shut off in May 2015 due to nonpayment. CP 116-17. Mr. Klotz reported that the theft of power amounted to over $8,000, which included "theft of power, original meter replacement, site visits, disconnection fees, transformer replacement, and temporary meter replacement." CP 117.

Police visited the property on October 26, 2015. CP 117. They entered the curtilage of the property and spoke with both Ms. Berven and Mr. Witkowski. CP 87-88. Police included their observations, as well as the evidence from the Ohop Mutual employees, in their application for a search warrant. CP 85-88. In the affidavit, police stated that they were searching for the stolen power meter and associated items, as "evidence of the crimes of Possession of Stolen Property RCW 9A.56.50, and Theft of Services (Theft 2nd) RCW 9A.56.040." CP 116. A judge granted the search warrant on October 27, 2015. CP 120.

Police executed the search warrant on October 29, 2015. *State v. Witkowski*, 17 Wn. App. 2d 1002, 2021 WL 1259730, *2 (2021) (unpublished).[1] They found drugs, evidence suggesting drug dealing, and evidence of additional controlled substances and firearms. *Id*. Based on this evidence, police obtained a

[1] Unpublished opinions have no precedential value and are not binding on any court. GR 14.1(a).

second search warrant. *Id*. While executing the second warrant, police found numerous firearms. *Id*.

The State charged Mr. Witkowski with multiple felonies, including possession of a controlled substance with intent to deliver, defrauding a public utility, and many counts of unlawful possession of a firearm. CP 18-28. A jury convicted him as charged, and Mr. Witkowski appealed. *Witkowski*, 2021 WL 1259730 at *3 (unpublished).

On appeal, this Court concluded that police did not provide Ms. Berven with necessary *Ferrier* warnings before entering the curtilage of the property. *Id*. at *1. This Court remanded to the trial court "to determine which portions of the search warrant should be excised, and whether sufficient probable cause exists for the search warrant following that excision." *Id*.

Pursuant to this Court's decision, the trial court held a suppression hearing on July 9, 2021. CP 110. The court excised

all portions of the warrant affidavit that resulted from the police visit to the property on October 26, 2015. CP 111, 118-19.

The trail court concluded that "[t]wo people provided the police with information used to establish probable cause for a search of the property": the Ohop Mutual employees, Kenneth Klotz and James Field. CP 111. The court found that when Mr. Field and the power crew returned to the property on October 6, 2015, "the stolen meter had been removed and was nowhere in sight." CP 113.

Mr. Witkowski argued that the information from the Ohop Mutual employees was unreliable and stale. RP at 24. The trial court rejected both of these arguments. CP 111-15. Despite the fact that the stolen power meter was removed, the court concluded that the evidence was not stale:

> It was reasonable to believe that evidence of theft of power would be found on the property. The detailed description provided by Mr. Field of the illegal power hook up shows that the person doing this had the knowledge and the ability to steal power from the power company.

CP 115. The court found that after redaction, "the remaining facts establish probable cause to search the property and outbuildings at 31717 47th Avenue E., Eatonville." *Id*. Mr. Witkowski appeals. CP 106.

V. ARGUMENT

The superior court in this case reviewed the warrant affidavit, redacted portions of it, and concluded that the remainder established probable cause. CP 110-15. This Court should review the superior court's findings and conclusions de novo. The information in the warrant affidavit was stale because Ohop Mutual employees specifically reported that the stolen power meter was no longer present. This Court should reverse Mr. Witkowski's convictions because this warrant was not supported by probable cause, and all evidence obtained pursuant to this warrant is fruit of the poisonous tree.

A. This Court Should Review the Trial Court's Determination of Probable Cause De Novo.

The Fourth Amendment to the United States Constitution provides that warrants may be issued only upon a showing of

"probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Washington Constitution also protects individuals from unlawful searches. Wash. Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); *see also State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). It is well established that article I, section 7 "grants greater protection to individual privacy rights than the Fourth Amendment." *Harrington*, 167 Wn.2d at 663 (citing U.S. Const. amend. IV).

"Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The affidavit should be evaluated in a commonsense manner. *State v. Jackson*, 150 Wn.2d 251, 265,

76 P.3d 217 (2003). An affidavit must be based on more than mere suspicion that evidence of a crime will be found on the premises searched. *Id*. Probable cause requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched. *Thein*, 138 Wn.2d at 140.

Appellate courts generally review the issuance of a search warrant for abuse of discretion and give great deference to the issuing magistrate. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004); *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). However, at a suppression hearing the trial court "acts in an appellate-like capacity; its review, like ours, is limited to the four corners of the affidavit supporting probable cause." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Thus, the trial court's assessment of probable cause at a suppression hearing is a legal conclusion reviewed de novo. *Id*.

B. Probable Cause Did Not Support the Warrant Because the Evidence was Stale.

Warrants cannot be based on stale evidence or information. An affidavit for a search warrant must establish the

probability of current criminal activity "occurring at or about the time the warrant is issued." *State v. Higby*, 26 Wn. App. 457, 460, 613 P.2d 1192 (1980). Facts which tend to show that "criminal activity occurred at some prior time" are insufficient. *Id*. The contemporaneousness of the criminal activity is assessed on a case-by-case basis, taking into consideration the nature and scope of the suspected criminal activity. *Id*. at 461.

In other words, stale information cannot establish probable cause for a warrant. The test for staleness is based on common sense. *Maddox*, 152 Wn.2d at 505. To determine if information is stale, courts examine not only the number of days between the alleged criminal activity and the issuance of the warrant, but also consider "the probability that the items sought in connection with the suspected criminal activity will be on the premises at the time of the search." *State v. Perez*, 92 Wn. App. 1, 9, 963 P.2d 881 (1998).

Here, the information from the Ohop Mutual employees was stale by the time police obtained and executed the warrant.

The information was stale for two reasons. First, it was over three weeks old, and second, the Ohop Mutual employees specifically reported that the stolen power meter was no longer at the hookup site.

Mr. Field, an employee of Ohop Mutual, visited the property on October 6, 2015. CP 117. He initially observed a stolen power meter, but when he returned to the property later that day, the stolen meter was removed and "nowhere in sight." CP 117-18.

Mr. Field's observations were stale because police did not execute the search warrant until over three weeks later, on October 29, 2015. *Witkowski*, 2021 WL 1259730 at *2 (unpublished). There was no reason to believe that the stolen power meter would still be located at the property after this period of time, particularly considering Mr. Field returned later on October 6 and the stolen meter was gone.

The superior court concluded that this evidence was not stale because "the criminal activity, theft of power, in this case

was ongoing." CP 114. Ohop Mutual reported to police that power to the property was shut off in May 2015. CP 115. Thus, it was "reasonable to believe that evidence of theft of power would be found on the property." *Id*.

The trial court erred because it not enough to assert that "criminal activity occurred at some prior time." *Higby*, 26 Wn. App. at 460 (citing *Sgro v. United States*, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138, 85 A.L.R. 108 (1932)). Instead, the "facts or circumstances must support the reasonable probability that the criminal activity was occurring at or about the time the warrant was issued." *Id*.

Staleness "involves not only duration, but the probability that the property in question would be retained." *Young*, 62 Wn. App. at 903. The "duration" of the alleged criminal conduct here—from May to October 2015—does not negate the fact that Mr. Field returned to the property on October 6 and the stolen power meter was not there.

Nor did the state establish that the stolen power meter was likely still on the property. The affidavit did not include any specific information about Ms. Berven and Mr. Witkowski, suggesting that they took the stolen power meter and stored it on the property. *See Thein*, 138 Wn.2d at 148-49 (requiring individualized evidence establishing "a factual nexus between the *evidence* sought and the *place* to be searched") (emphasis in original). For example, no one saw the stolen power meter on the property and there were no reports of Ms. Berven and Mr. Witkowski trying to offload or sell it. The affidavit also included no information about utility theft in general to suggest that a person would retain a stolen power meter on his or her property. *See, e.g.*, *State v. Friedrich*, 4 Wn. App. 945, 957-58, 425 P.3d 518 (2018) (evidence about how possessors of sexually explicit images of children generally store and retain these images helped establish that the warrant affidavit was not stale).

The trial court relied on three cases to conclude that probable cause supported this warrant: *Maddox*, 152 Wn.2d 499;

Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976); and *State v. Hall*, 53 Wn. App. 296, 766 P.2d 512 (1989). CP 114. However, these cases are either distinguishable, or actually support the conclusion that probable cause was negated.

Beginning with *Andresen* and *Hall*, these cases are factually distinguishable and not applicable here. In *Andresen*, investigators obtained a warrant to search the offices of an attorney. 427 U.S. at 465-66. They found paperwork suggesting that Andresen was involved in fraudulent real estate dealings. *Id*. at 467. Andresen argued that the warrant was based on stale information because there was "a three-month delay between the completion of the transactions on which the warrants were based, and the ensuing searches". *Id*. at 478 n9. The U.S. Supreme Court rejected this argument because "[i]t is eminently reasonable to expect that such records would be maintained in those offices for a period of time and surely as long as the three

months required for the investigation of a complex real estate scheme." *Id*.

Similarly, in *Hall*, police obtained a warrant to search a residence based on information that the defendant had a marijuana grow operation. 53 Wn. App. at 298. The witness saw the plants about two months earlier. *Id*. at 299-300. The Court held that this information was not stale because "it was reasonable to believe the established grow operation was still in existence" based on "the size of the plants remaining at the house." *Id*. at 300.

In both *Andresen* and *Hall*, there was no evidence to suggest that the incriminating items were moved, destroyed, sold, or otherwise absent from the locations being searched. This distinguishes these cases from the present case, where Mr. Field reported that the stolen power meter was no longer present on October 6. The State may speculate that the stolen meter was hidden away on the property, but as explained above, it provided no evidence to support this supposition.

Instead, this case more closely resembles the methamphetamine in *Maddox*. 152 Wn.3d 499. In that case, an informant made a controlled buy of methamphetamine from the defendant. *Id*. at 503. Police obtained a warrant to search Maddox's house for methamphetamine and paraphernalia used in the distribution of drugs. *Id*. However, police waited over a week to execute the warrant to avoid jeopardizing other investigations involving this informant. *Id*. at 503-04. In the ten days between obtaining and executing the warrant, the informant made additional buys from Maddox. *Id*. at 504. The day before police executed the warrant, Maddox told the informant that he was "out" of methamphetamine. *Id*. Police did not bring this information to a magistrate and executed the warrant regardless. *Id*. They found cash, paraphernalia, and other drugs, but no methamphetamine. *Id*.

The Washington Supreme Court upheld this warrant, but its reasons for doing so shed light on this case. *Id*. at 512-13. The Court concluded that, when the warrant was issued, there

was probable cause to believe that Maddox had methamphetamine and paraphernalia. *Id*. Maddox's later statement that he was "out" negated probable cause as to the methamphetamine, but did not affect probable cause as to paraphernalia of dealing:

> We conclude that the magistrate did not abuse his discretion in issuing the search warrant. There was probable cause to believe that Maddox had methamphetamine and paraphernalia at his house on September 18 when the warrant was issued. We further hold that probable cause as to the paraphernalia and currency authorized by the warrant was not affected by ***Maddox's statement negating probable cause as to methamphetamine***.

Id. (emphasis added). In other words, the Court specifically concluded that evidence establishing that methamphetamine was no longer present at the location to be searched negated probable cause as to the methamphetamine. *Id*.

The same principle applies here. Here, like in *Maddox*, police were looking for evidence of specific contraband. However, police received information showing that the contraband was no longer at the location to be searched. In

Maddox, the warrant was saved because there was still probable cause to search for other evidence of criminal activity. 152 Wn.2d at 512-13. However, in this case, all other evidence of alleged criminal activity was excluded from the warrant. The warrant was based on the evidence from Ohop Mutual—and that evidence established that the stolen power meter was no longer at the location. Like the methamphetamine in *Maddox*, this evidence established changed circumstances and negated probable cause as to the stolen power meter.

The trial court misinterpreted *Maddox*, *Andresen*, and *Hall*. The court erred by finding that this warrant was supported by probable cause. Instead, Mr. Field's observations negated probable cause as to the stolen power meter. The stolen power meter formed the only basis for probable cause to search this property after the warrant affidavit was redacted. This Court should reverse and hold that probable cause did not support this warrant.

C. The Drug and Firearm Evidence Should Have Been Suppressed as Fruit of the Poisonous Tree.

All evidence derived from this unlawful search must be suppressed. "The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion." *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Derivative evidence must also be excluded unless it was obtained without exploiting the original illegality or by means sufficiently distinguishable to be purged of the primary taint. *State v. Smith*, 165 Wn. App. 296, 309, 266 P.3d 250 (2011). This rule is known as the "fruit of the poisonous tree doctrine." *Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984). Where a defendant seeks suppression of derivative evidence, the State's has the burden of establishing

that the taint has been purged. *Smith*, 165 Wn. App. at 309. The State cannot meet this burden here.

Police searched the property pursuant to the first warrant and found suspected drugs and items used for dealing drugs. *Witkowski*, 2021 WL 1259730 at *2 (unpublished). Based on this evidence, police obtained a second search warrant. *Id*. During the search pursuant to the second warrant, police found numerous firearms. *Id*. Both of these searches derived from the first warrant issued in this case. All evidence obtained during these searches must be suppressed because, as explained above, the first search warrant was not supported by probable cause. *See Smith*, 165 Wn. App. at 309.

Suppression of this evidence also requires reversal of Mr. Witkowski's convictions, with the exception of count VI (defrauding a public utility in the first degree). "The State must prove every element of a crime beyond a reasonable doubt for a conviction to be upheld." *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (quoting *State v. Byrd*, 125 Wn.2d 707, 713,

887 P.2d 396 (1995)). Without the evidence obtained from the two searches, Mr. Witkowski could not be convicted beyond a reasonable doubt. This Court must reverse.

VI. CONCLUSION

For the reasons stated above, this Court should reverse the trial court and hold that the first warrant issued in this case was not supported by probable cause. This Court should remand for suppression of all evidence derived from this unlawful warrant and order reversal of all of Mr. Witkowski's convictions except for count VI (defrauding a public utility in the first degree).

Pursuant to RAP 18.17, this document is proportionately spaced using Times New Roman 14-point font and contains 3628 words, excluding the caption, tables, signature blocks, and certificate of service (word count by Microsoft Word).

RESPECTFULLY SUBMITTED on January 31, 2022.

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CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On January 31, 2022, I filed a true and correct copy of the **Brief of Appellant** via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

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SIGNED in Tacoma, WA, on January 6, 2022.

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