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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RAMSEY RAY SHABEEB, Appellant.	No. 47239-2-II UNPUBLISHED OPINION

MAXA, J. – Ramsey Shabeeb appeals his conviction of unlawful possession of a controlled substance with intent to deliver and the trial court's imposition of discretionary legal financial obligations (LFOs). The conviction arose from a search of Shabeeb's car pursuant to a search warrant, during which officers discovered controlled substances in a locked backpack in the car's trunk.

We hold that (1) probable cause supported issuance of the search warrant for Shabeeb's car and (2) the locked backpack in the car's trunk was within the scope of that warrant. We also decline to consider, under the specific facts of this case, whether the trial court erred in failing to assess Shabeeb's future ability to pay his LFOs because he did not object below. Accordingly, we affirm Shabeeb's conviction and sentence.

FACTS

Stipulated Facts

At trial, Shabeeb agreed to a trial based on stipulated facts. He stipulated that on April 16, 2014, Detective Robert Latter of the Clark-Vancouver Regional Drug Task Force (the Task Force) stopped Shabeeb's vehicle and arrested him for selling heroin to a confidential informant (CI) working for the Task Force. The Task Force officers saw Shabeeb place a backpack into the trunk of his car and obtained and executed a search warrant for the vehicle. The officers seized the backpack from the trunk, cut off the padlock securing it, and discovered controlled substances in it. The officers also seized a digital scale and a spiral notebook containing notations about collection of money.

Facts from Search Warrant Application

In his affidavit for a search warrant, Latter detailed his 10 years of experience working with narcotics investigations and arrests. He stated that he could identify marijuana, methamphetamine, heroin, and cocaine by sight and smell. And he stated that he confirmed these identifications in the past through field testing and state laboratory tests.

Latter described the events leading to Shabeeb's arrest. Latter employed a CI to purchase heroin in a controlled buy. He described the CI as reliable because of a prior heroin purchase the CI had made while working for the Task Force and as knowledgeable because of his previous involvement in the drug subculture. Latter explained that the CI was working for the Task Force because of a pending felony charge and that the CI had no prior felonies and three prior gross misdemeanors.

Latter then described further surveillance of Shabeeb. CP 12. Officers observed as Shabeeb parked at an auto parts store and then another car parked next to Shabeeb. Shabeeb talked with the driver of the other car for a time and then retrieved a backpack from the trunk of that car. Officers arrested Shabeeb after he drove away from the store based on probable cause to arrest developed at an earlier date. During a search incident to arrest, officers discovered a black substance wrapped in tin foil that later field tested positive for heroin.

Latter stated that after the police impounded Shabeeb's car, an officer used a K-9 dog to search the outside of the car. The K-9 was trained to identify cocaine, crack, marijuana, methamphetamine and heroin. The K-9 alerted to the presence of drugs at the rear bumper seam on the driver's side of Shabeeb's car.

Latter requested a warrant because he believed that searching Shabeeb's vehicle could uncover drug packaging materials, identification, controlled substances, and cell phones. A magistrate granted Latter's request and issued a search warrant. As noted above, the police seized controlled substances, a digital scale, and a transaction record from the backpack found in Shabeeb's trunk.

Motion to Suppress Evidence

Before his stipulated facts trial, Shabeeb filed a motion to suppress all evidence seized based on the search warrant. He challenged the magistrate's decision to issue a search warrant because the K-9 was trained to alert on five substances, one of which was marijuana. Shabeeb argued that because possession of small amounts of marijuana is lawful, the K-9's alert could not be used to establish probable cause. The trial court denied the motion to suppress, finding that the K-9's alert, along with other factors, could establish probable cause.

Trial and Sentence

Based on the stipulated facts, the trial court found Shabeeb guilty of unlawful possession of a controlled substance with intent to deliver. The trial court authorized a residential drug treatment program and referred Shabeeb to drug court. The drug court imposed three to six months of residential chemical dependency treatment, two years of community custody, and legal financial obligations of $4,125.[1] The drug court checked a box stating that "the defendant is presently indigent but is anticipated to be able to pay financial obligations in the future. RCW 9. 94A.753." Clerk's Papers (CP) at 78. But the drug court did not specifically assess Shabeeb's ability to pay.

Shabeeb appeals his conviction and the imposition of LFOs.

ANALYSIS

A. VALIDITY OF SEARCH WARRANT

Shabeeb argues that the district court erred in issuing a search warrant because (1) Shabeeb's behavior at the auto parts store did not create a reasonable suspicion of criminal activity; (2) the K-9 was trained to alert on marijuana, which eliminated the alert as a basis for probable cause; (3) there was no nexus between Shabeeb's car and the CI's earlier purchase of heroin from Shabeeb; and (4) the warrant failed to establish the CI's reliability. We hold that the magistrate did not abuse his discretion in finding probable cause and issuing the search warrant.

[1] At least $900 is mandatory (victim assessment, criminal filing fee, crime lab fee, and DNA (deoxyribonucleic acid) collection fee) and Shabeeb agreed to pay $600 for drug court, leaving a discretionary total of $2,625.

1. Legal Principles

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, issuance of a search warrant must be based on probable cause. The affidavit supporting the search warrant application must "set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched." *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). There must be a "nexus between criminal activity and the item to be seized and between that item and the place to be searched." *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). "Probable cause requires more than suspicion or conjecture, but it does not require certainty." *State v. Chenoweth*, 160 Wn.2d 454, 476, 158 P.3d 595 (2007).

We review the validity of a search warrant for an abuse of discretion, giving great deference to the issuing magistrate. *Neth*, 165 Wn.2d at 182. We consider only the information within the four corners of the supporting affidavit. *Id.* Although we give deference to the magistrate, we review the trial court's probable cause determination de novo. *Id.* We resolve all doubts in favor of the warrant's validity. *Chenoweth*, 160 Wn.2d at 477.

2. Reasonable Suspicion

Shabeeb argues that police observations of him and the other vehicle at the auto parts store did not provide a reasonable suspicion of criminal activity. He claims that the behavior the police observed was consistent with legal activity and therefore there was an insufficient nexus between criminal activity and his car. We disagree.

Shabeeb relies on *Neth*. In that case, a trooper stopped Neth for speeding. Following a series of events, the trooper impounded the vehicle and obtained a search warrant to look for narcotics. *Neth*, 165 Wn.2d at 179. The search warrant application affidavit listed Neth's nervous and unusual behavior, his possession of plastic baggies and large amounts of cash, and his criminal history as support for the warrant. *Id.* at 183-84. The Supreme Court reversed, noting that possession of plastic baggies, nervousness, lack of identification, and criminal history are not enough to support a finding of probable cause. *Id.* at 185. It explained that "[s]ome factual similarity between the past crime and the currently charged offense must be shown before the criminal history can significantly contribute to probable cause." *Id.* at 186.

Shabeeb argues that his activities similarly were consistent with lawful behavior. He claims that the facts show that he was working on his car when a friend stopped by to help or check on him and return his backpack. Shabeeb notes that officers did not see plastic baggies or an exchange between Shabeeb and the driver. And Shabeeb did not have a criminal history that included drug offenses.

However, the warrant application showed more than these potentially innocuous facts. In addition to Latter's observations about the surveillance, he also explained in the application affidavit that a CI had purchased heroin from Shabeeb, that he had probable cause to arrest Shabeeb, that he arrested Shabeeb and discovered heroin in a search incident to arrest, and that a K-9 alerted on Shabeeb's vehicle. In light of these facts, Shabeeb's behavior at the auto parts store was suspicious enough to establish a nexus between criminal activity and Shabeeb's car.

3. K-9 Alert

Shabeeb argues that because the K-9 may have alerted on marijuana rather than the other five drugs it was trained to detect and because marijuana is legal to possess in certain quantities, there is little or no probative value that can be drawn from the alert on his car. He claims that without the alert, there was not a sufficient nexus between the place to be searched and illegal activity. We disagree.

The State concedes and we agree that since the decriminalization of marijuana, a K-9 alert *standing alone* no longer establishes probable cause when the K-9 was trained to alert on multiple narcotics, one of which is marijuana. However, a magistrate may consider a K-9 alert as one factor in determining if probable cause exists. This is particularly true where, as here, there was no evidence that any marijuana was present and there was evidence that other drugs for which the K-9 was trained were present.

Here, the K-9 alert was only one of many factors establishing probable cause. Therefore, the district court's consideration of the alert does not affect the validity of the probable cause determination.

4. Nexus Between Prior Purchase and Car

Shabeeb argues that Latter's affidavit failed to establish a nexus between Shabeeb's earlier sale to the CI and Shabeeb's car. He argues that this lack of correlation between the two eroded any potential probable cause and left the magistrate to rely on only Latter's experience rather than on facts demonstrating probable cause. We disagree.

Latter stopped Shabeeb's car and arrested him for the earlier sale to the CI. He searched Shabeeb incident to arrest and discovered heroin in his pocket. He also observed the interaction

and backpack exchange at the auto parts store. Combined with the K-9 alert and Latter's experience in narcotics investigations, this was sufficient to establish probable cause.

Shabeeb relies on *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999). In that case, the police obtained a search warrant for Thein's residence even though Thein's prior drug transactions had occurred at a different location. *Id.* at 136-40. The Supreme Court reversed the conviction, holding that probable cause could not be established based on stereotypes about drug dealers without some showing of a nexus between Thein's criminal activity and his residence. *Id.* at 147.

As with the K-9 alert, the fact that Shabeeb had engaged in a drug transaction elsewhere may not be sufficient – standing alone – to support probable cause to search his car. But the prior drug transaction was only one of many factors establishing probable cause. Latter's affidavit showed a direct connection between Shabeeb's car and criminal activity. Therefore, the district court's consideration of the prior drug transaction does not affect the validity of the probable cause determination.

5. CI's Reliability

Shabeeb argues that the search warrant affidavit fails to establish the CI's reliability. He argues that the affidavit does not indicate that the CI's prior purchase was from Shabeeb and therefore cannot be attributed to him.[2] He also argues that the affidavit fails to show that the

[2] The State argues that we should not consider Shabeeb's argument on the CI's reliability because he did not make that argument in the trial court. We exercise our discretion under RAP 2.5(a) to address this argument.

information from the CI in other cases led to an arrest and conviction and therefore is insufficient to establish his reliability. We disagree.

When a search warrant application is based on information provided by a confidential informant, under the *Aguilar-Spinelli*[3] test, the supporting affidavit must contain information from which the court can determine (1) the reliability of the informant's information, i.e., the basis of the informant's knowledge, and (2) the credibility or veracity of the informant. *See State v. Ollivier*, 178 Wn.2d 813, 849-50, 312 P.3d 1 (2013). An informant's track record may establish the informant's reliability for purposes of a probable cause determination. *State v. Marcum*, 149 Wn. App. 894, 906, 205 P.3d 969 (2009); *see also State v. Woodall*, 100 Wn.2d 74, 76-78, 666 P.2d 364 (1983) (reliability is sufficiently shown if the informant has given information in the past that has led to a conviction); *State v. Fisher*, 96 Wn.2d 962, 965-66, 639 P.2d 743 (1982) (reliability sufficiently shown where information from informant about drug trafficking in past proved true and informant made two controlled buys).

Here, Latter's affidavit explained that he had used the CI for two drug purchases, one of which resulted in Shabeeb's arrest for delivery of heroin. Further, the affidavit stated that the CI gave the Task Force information in the past that the Task Force corroborated with other sources. It also explained that the CI was working with the Task Force for possible favorable treatment on a drug charge he was facing. Finally, the affidavit set out the CI's criminal record, which contained no crimes of dishonesty.

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

This information provided the magistrate with sufficient information to conclude that the CI was a reliable informant with a basis of knowledge in the narcotics trade. Accordingly, we hold that the probable cause determination is not invalid on this basis.

6. Conclusion

As noted above, we give deference to the magistrate issuing the warrant and resolve all doubts in favor of validity. *Chenoweth*, 160 Wn.2d at 477. Considering all the surrounding facts and Latter's extensive experience in narcotics investigations, we hold that the trial court did not err in affirming the validity of the magistrate's probable cause determination.

B. SCOPE OF SEARCH WARRANT

Shabeeb argues that the officers acted improperly in searching the padlocked backpack found in the trunk of his car because the warrant did not expressly reference the backpack. He claims that locking a backpack is an indication that the owner has a heightened expectation of privacy and therefore the magistrate either had to directly authorize the search of the backpack or require a separate warrant. We disagree.

The Fourth Amendment requires search warrants to "particularly describe" both the place to be searched and the items to be seized. The purpose of the particularity requirement is to prevent the State from engaging in exploratory rummaging in a person's belongings. *State v. Higgs*, 177 Wn. App 414, 425, 311 P.3d 1266 (2013). The description of the items sought in the search must be as specific as the circumstances and nature of activity under investigation permit. *State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1977).

Under a search warrant for a premises, personal effects of the owner may be searched if they are plausible repositories for the items named in the warrant. *State v. Hill*, 123 Wn.2d 641,

643, 870 P.2d 313 (1994). "A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search . . . [and] applies equally to all containers." *U.S. v. Ross*, 456 U.S. 798, 821-22, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).

Here, the search warrant and accompanying affidavit described with particularity the location to be searched and items to be seized. Both the affidavit and the search warrant identified Shabeeb's car as the location to be searched. And both identified the items to be seized as controlled substances including any evidence of distribution of those controlled substances, and any evidence of exercise of domain and control of the vehicle. The search of the locked backpack was within the particular scope of the search warrant because it was inside the car and possibly could contain evidence of controlled substances.

Shabeeb relies on *State v. VanNess*, 186 Wn. App. 148, 344 P.3d 713 (2015). In that case, the court invalidated a search of a locked box found in the defendant's backpack. *Id.* at 151. However, the court addressed whether the locked box was subject to a *warrantless* search incident to the defendant's arrest under either the officer safety exception to the warrant requirement or the inventory search exception. *Id.* at 155. *VanNess* did not address whether an officer can search a locked backpack pursuant to a lawful search warrant allowing a search for items that could be contained in a backpack.

We hold that the officers did not exceed the scope of the warrant when they searched the locked backpack pursuant to a lawful search warrant.

C. LEGAL FINANCIAL OBLIGATIONS

Shabeeb argues that the drug court erred by failing to conduct an individualized assessment of his present financial ability to pay before imposing discretionary LFOs as required

under RCW 10.01.160(3). But he did not object to the drug court's imposition of discretionary LFOs. We have discretion under RAP 2.5 to decline to consider issues not raised in the trial court. *See State v. Blazina*, 182 Wn.2d 827, 832, 834-35, 344 P.3d 680 (2015). Under the specific facts of this case, we decline to consider Shabeeb's LFO argument for the first time on appeal.

Here, the record indicates that Shabeeb was a 25-year-old man who was given no jail time, ordered into three to six months of drug treatment, and placed in community custody for two years. Shabeeb also signed a drug court contract agreeing to maintain full time employment. At the DOSA hearing, the trial court explained to Shabeeb that if he were to refer him to drug court he would have to get full time work. Shabeeb responded that he had just obtained his driver's license and was able to look for a job. The trial court also discussed the importance of Shabeeb learning work skills and holding a job in order to be successful. At the sentencing hearing in drug court, Shabeeb indicated that he had purchased a car and was working.

Based on this record, the drug court had a basis for its conclusion that Shabeeb had an ability to pay LFOs even if it did not conduct an individualized assessment. Further, Shabeeb had a strategic reason not to argue in the drug court that he did not have a future ability to pay LFOs – he wanted to convince the drug court that he would be able to maintain a full time job.

Under the specific circumstances of this case, we exercise our discretion under RAP 2.5 to decline to consider Shabeeb's LFO argument.

CONCLUSION

We affirm Shabeeb's conviction and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

WORSWICK, J.

BJORGEN, C.J.