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Washington State
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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. PERRY BLYE, Appellant.	No. 46950-2-II UNPUBLISHED OPINION

BJORGEN, C.J. — Perry Blye appeals his conviction for possession of a controlled substance, heroin, with intent to manufacture or deliver and a sentencing enhancement for committing the crime within 1,000 feet of a school bus route stop. He argues that the trial court erred in ruling that the warrant affidavit was sufficient to establish probable cause to search a residence that provided the primary evidence for his conviction. We agree. Accordingly, we reverse his conviction and sentencing enhancement and remand for further proceedings.

FACTS

On February 18 and 21, 2013, police used a confidential informant (CI) to conduct two controlled buys. On both occasions, Joanne McFarland was observed selling heroin to the CI. Subsequently, Aaron Elton, a detective in Bremerton Police Department's special operations group, submitted an affidavit of probable cause to obtain a search warrant for a residence located at space 48 in a mobile home park on Old Military Road.

As to the first controlled buy on February 18, Elton's affidavit for probable cause provided in relevant part:

> On 2/18/13, . . . [t]he operative [CI] contacted Joanne [McFarland] via cell phone prior to the deal. . . . The operative arranged to purchase a ounce of heroin from her. She asked the operative to meet her at the parking [lot] of Goodwill on the east side of Bremerton. . . . The operative was shown an aerial photo of a map containing the Countryside Mobile Home Park. The operative pointed to space 48 and advised that Joanne lives there with Perry Blye.
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> Det. Whatley and I followed the operative to the parking lot where Joanne was supposed to meet him/her. I parked near the operative with an unobstructed view. . . . Det. Whatley then moved from the buy location to the address where the operative said Joanne lives. This is a trailer located at space 48 in the Countryside Mobile Home Park off of Military. An orange Ford Mustang is parked in the driveway belonging to space 48 bearing WA plate #079XVJ.
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> The operative said the suspect car would likely be a green Jeep SUV of some type. At about 1457 I observed a female in a green Jeep Cherokee pulling into the parking lot. . . . The operative got into the car with the suspect. . . . The operative got out of the car shortly after this, and the suspect left the lot. I maintained surveillance of the operative as we drove to the post-buy secure location.
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> . . . .
>
> . . . . Sgt. Plumb saw the female suspect leave . . . and he lost sight of her. . . . Det. Whatley called me about 10 minutes later to tell me that the suspect female arrived back at space 48 in the green Jeep Cherokee bearing WA# AJG2732. This Jeep is registered to Joanne McFarland at 2817 Hefner Ave. The Mustang was registered to Perry Blye at 2817 Hefner Ave as well. Perry Blye is a known heroin, and meth dealer in this area. Det. Whatley advised that the suspect got out of the Jeep at this location and she went into the trailer (space 48).
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> The operative immediately handed me a bag containing a substance that resembled black tar heroin. I noted a pungent smell similar to vinegar that accompanies heroin. I recognized the substance to be heroin based on its appearance and smell, and this is based on my training and experience as a police officer since 1997. I searched the operative and their car at the post-buy location. I located nothing of concern to the investigation at this meeting.
>
> . . . . The operative said Joanne showed up in the Jeep, and parked near him/her. The operative said Joanne had the heroin pre-weighed and packaged. The operative reported handing Joanne the [special operations group] funds and receiving the bag of heroin in return. The operative said they exited the vehicle as soon as the deal was done.

> I later weighed the heroin by removing it from its packaging, and placing it on a digital scale. The weight was 4.2 grams. I tested a sample of the heroin in a narcotics identification kit, which revealed a positive result for the presence of heroin.

Clerk's Papers (CP) at 391-92.

Elton's affidavit for probable cause also provided a description of the second controlled buy occurring on February 21:

> I supervised a second controlled purchase of heroin from McFarland on 2/21/13. This operation was conducted in the same manner as buy #1. The operative who assisted us in Buy #1 was also involved in buy #2. The second purchase of heroin from McFarland occurred within the City limits of Bremerton as well. [Special operations group] detectives assisting with the purchase on 2/21/13 were able to follow McFarland back to the mobile home (#48) after Buy #2, as was done after Buy #1. Due to this fact, and the probability that there will be evidence of drug delivery and or possession located inside of the dwelling at 7410 Old Military Rd, Space #48, in Bremerton, WA, I would like to search this location.
>
> The purchased heroin from Buy #2 weighed 3.9g and tested positive with a narcotics identification kit, used in the manner I was trained. The result of the test was a positive indication for the presence of heroin.

CP at 386. Elton also alleged that based on his personal training and experience, people who possess or distribute controlled substances will hide the drugs and proceeds of sales in their homes. Finally, Elton's affidavit laid out McFarland's and Blye's criminal histories, each containing drug offenses. Based on the entire probable cause affidavit, the court issued a warrant on February 22 to search the Old Military Road residence.

Upon entering that residence, officers found four people, including McFarland and Blye. In the kitchen, a gum container was found with nine individually packed bags of heroin, which weighed about two ounces in total. In a bedroom where Blye had been sleeping, approximately 19 grams of heroin were found in a shoe.

In an interview with Elton, Blye stated that he would pick up two to three ounces of heroin each day from individuals located in Everett. He said he would then give McFarland the heroin to sell so that he could stay off the police's radar. He also declared that he was a "f***ing dope dealer." Report of Proceedings (RP) at 332.

The State charged Blye with possession of a controlled substance with intent to deliver[1] occurring on February 25, 2013 and a special allegation that he committed the crime within 1,000 feet of a school bus route stop.[2] Before trial, Blye moved the trial court to suppress evidence acquired from the search of the Old Military Road residence. His principal argument for suppression was that Elton's affidavit failed to establish a nexus between McFarland's drug activity on February 18 and 21 and the residence. The trial court denied his motion, entering findings of fact and conclusions of law that the judge issuing the warrant did not abuse its discretion in finding probable cause to search the Old Military Road residence.

Blye was convicted of possession of a controlled substance with intent to deliver occurring on February 25, 2013, with a sentencing enhancement for committing the crime within 1,000 feet of a school bus route stop. He appeals.

[1] RCW 69.50.401(1). This statute was subject to amendments in 2013 and 2015, but they do not affect the outcome in this matter.

[2] RCW 69.50.435(1)(c). This statute was subject to an amendment in 2015, but it does not affect the outcome in this matter.

ANALYSIS

I. SEARCH WARRANT

Blye argues that the trial court erred in ruling that the warrant affidavit was sufficient to establish probable cause. We agree with Blye.

1. Standard of Review

We review a trial court's ruling on a motion to suppress evidence to determine whether substantial evidence supports the court's findings and whether its findings support its conclusions. *State v. Cherry*, 191 Wn. App. 456, 464, 362 P.3d 313 (2015), *review denied*, 185 Wn.2d 1031 (2016). Substantial evidence exists only if the evidence in the record would persuade a fair-minded, rational person of the truth of the finding. *State v. Atchley*, 142 Wn. App. 147, 154, 173 P.3d 323 (2007). Unchallenged findings of fact are verities on appeal. *Cherry*, 191 Wn. App. at 464.

We review a trial court's legal conclusions de novo, including whether its findings of fact support its conclusions of law. *State v. Neeley*, 113 Wn. App. 100, 106, 52 P.3d 539 (2002). Although we defer to an issuing judge's determination of probable cause, a trial court's later assessment of probable cause is a legal conclusion subject to de novo review. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

2. Probable Cause

Blye assigns error to findings of fact six and seven[3] and conclusion of law four, where the trial court determined that the warrant affidavit was sufficient to establish probable cause:

[Finding of Fact Six]

> That *State v. Thein*, 138 Wn.2d 133 (1999), is distinguishable, as this case relies not on an officer's opinion, but on evidence linking criminal activity to the residence, including subject McFarland's return to her residence within approximately five minutes of the two separate drug transactions.

[Finding of Fact Seven]

> That the Court is aware of no requirement that the reviewing magistrate adopt all potential alternative theories or innocent explanations, or that law enforcement maintain constant visual contact for a probable cause finding to stand.

[Conclusion of Law Four]

> That [the issuing judge] did not abuse his discretion in finding probable cause and authorizing the search warrant at issue.

CP at 401-02

"In reviewing a probable cause determination in support of a warrant, the information we may consider is the information that was available to the issuing magistrate." *State v. Olson*, 73 Wn. App. 348, 354, 869 P.2d 110 (1994). That information, including the warrant affidavit and any attachments, must set out objective facts and circumstances that "would lead a neutral and

[3] Finding six appears to be a mixed finding of fact and conclusion of law, and finding seven appears to be a conclusion of law. The factual element of finding six is examined under the substantial evidence rule, and the legal elements of findings six and seven are reviewed under the de novo standard. *See Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013), *review denied by, First-Citizens Bank & Tr. Co. v. Gibbs & Olson, Inc.*, 179 Wn.2d 1011 (2014).

detached person to conclude that more probably than not, evidence of a crime will be found" in the place to be searched. *See In re Det. of Petersen*, 145 Wn.2d 789, 797, 42 P.3d 952 (2002).

Probable cause for a search also requires "a nexus between criminal activity and the item to be seized and between that item and the place to be searched." *Neth*, 165 Wn.2d at 183. We evaluate the affidavit in a commonsense manner, rather than hyper-technically. *Id.* at 182. However, an affidavit must be based on more than mere suspicion or personal belief that evidence of a crime will be found in the place to be searched. *Id.* at 182-83. Finally, "'[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.'" *State v. Allen*, 138 Wn. App. 463, 469, 157 P.3d 893 (2007) (quoting *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)).

In challenging findings six and seven and conclusion four, Blye argues that the warrant affidavit failed to establish a nexus between the drug sales on February 18 and 21 involving McFarland and the Old Military Road residence. We begin the analysis of nexus with a brief view of our prior cases examining when a warrant affidavit sufficiently establishes a connection between a defendant's drug activities and his or her home to provide probable cause to search the home.

In *State v. Dalton*, 73 Wn. App. 132, 133-35, 139, 868 P.2d 873 (1994), the affidavit established that Dalton was engaged in drug dealing and that he attempted have marijuana delivered to a post office box in Alaska. Based on this affidavit, the court issued a warrant to search for drugs at his home in Lewis County. *Id.* at 135. On appeal, the court held that the affidavit was insufficient to search his home, reasoning that "[w]hile he may have been about to possess drugs in Alaska, '[p]robable cause to believe a man has committed a crime on the street

does not necessarily give rise to probable cause to search his home.'" *Id.* at 140 (footnote omitted) (quoting *Commonwealth v. Kline*, 234 Pa. Super. 12, 335 A.2d 361, 364 (1975))

Similarly, in *State v. Goble*, 88 Wn. App. 503, 504-05, 945 P.2d 263 (1997), the affidavit established that Goble was involved in drug distribution and was about to receive a package of controlled substances addressed to his mailbox located at the post office. A court issued a warrant to search his residence, contingent on officers observing him take the package from his post office mailbox back to his home. *Id.* at 506. The *Goble* court held that the affidavit was insufficient to search his home because there was "no information from which to infer, at the time [the magistrate] issued the warrant, that Goble would take the package from the post office to his house, or that the package would probably be found in the house when the warrant was executed." *Id.* at 512 (emphasis omitted).

Following *Dalton* and *Goble*, our Supreme Court in *State v. Thein*, 138 Wn.2d 133, 136, 142-44, 977 P.2d 582 (1999), found probable cause insufficient to sustain a warrant to search the defendant's home. The warrant was based on an affidavit establishing that Thein was the landlord of a different residence in which the tenant was distributing drugs and that Thein was the supplier of those drugs. *Id.* at 136-38. In addition, the affidavit averred that officers located in the tenant's residence a box of nails addressed to Thein's residence as well as oil filters that fit in a vehicle Thein owned. *Id.* at 137-38. Finally, the affidavit contained generalized statements of belief regarding the common habits of drug dealers. *Id.* at 138-39.

In approving the reasoning of *Dalton* and *Goble*, the *Thein* court held that the affidavit failed to establish a nexus between the drugs found at the tenant's residence and Thein's personal residence. *Id.* at 142-47, 151. It recognized that a person's involvement in drug dealing

elsewhere does not sufficiently connect that activity to a person's residence, even in conjunction with an officer's generalized statements about the behavior of drug dealers. *Id.* at 146-48. Further, the box of nails and oil filters, the only evidence linked to Thein's residence, were "innocuous." *Id.* at 137-38, 150.

These cases lead to the conclusion that a person's return to his or her home after engaging in illegal activity does not, by itself, establish probable cause that illegal activity will be found in the person's home. *Cf. State v. G.M.V.*, 135 Wn. App. 366, 372, 144 P.3d 358 (2006) (warrant affidavit established sufficient probable cause to search home when officers observed suspect leave from and return to residence after he sold drugs). The evidence that McFarland went home after selling the drugs, by itself, shows only that she did not have the drugs when she returned to the residence. Police never observed McFarland leave the Old Military Road residence and drive to either of the controlled buys. Without more, the evidence set out in the affidavit failed to establish a sufficient link between the distribution of drugs and the residence. Further, the police's inability to keep McFarland in sight when following her to the residence further attenuates any connection the controlled buys may have had with the residence.

Additionally, Blye's presence at the Old Military Road residence and his and McFarland's prior drug offenses do not sufficiently link the two controlled buys with the residence. *See Neth*, 165 Wn.2d at 185-86. Elton's generalized statements about drug dealers also fail to establish probable cause to believe that drugs were stored at the residence. *See Thein*, 138 Wn.2d at 151. Criminal histories and generalized habits of drug dealers can certainly support a probable cause determination, but they cannot supply the principal evidence needed to

connect one's drug activities to his or her home. Without such foundational evidence, the affidavit failed to reach the threshold to establish probable cause of drug activity in the home.

CONCLUSION

We hold that the trial court erred in ruling that the warrant affidavit was sufficient to establish probable cause and in failing to suppress the evidence derived from the search of the residence. Accordingly, we reverse Blye's conviction and sentencing enhancement and remand for further proceedings.[4] In light of this decision, we need not examine his other claimed errors.

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.

BJORGEN, C.J.

We concur:

WORSWICK, J.

LEE, J.

[4] In his statement of additional grounds, Blye argues only that the State presented insufficient evidence in order to convict him on a theory of constructive possession. Along with constructive possession, the State presented at trial a theory that he was the accomplice to McFarland. Because Blye does not raise a sufficiency challenge to both theories, we decline to reach the issue whether our reversal should be with prejudice. Accordingly, we reverse and remand to the trial court.