IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONALD R. CARNER, JR., Appellant.	No. 42242-5-II UNPUBLISHED OPINION

Johanson, A.C.J. — Donald R. Carner, Jr. appeals his bench trial conviction for unlawful possession of a controlled substance (heroin). He challenges the trial court's denial of his (1) CrR 3.6 suppression motion, arguing that the search warrant affidavit was overbroad and lacked particularity; and (2) his request for a *Franks*[1] hearing.[2] Because any potential error in the search warrant can be cured by severing those portions of the search warrant and Carner failed to make a substantial preliminary showing that the officer applying for the search warrant intentionally or recklessly omitted material information from the warrant affidavit, we affirm.

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[1] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

[2] Carner also argues that, if his CrR 3.6 argument was not preserved for review, he received ineffective assistance of counsel. Because we address the CrR 3.6 argument below, we do not reach Carner's ineffective assistance of counsel claim.

FACTS

I. Background

A. Investigation

In December 2010, Hoquiam Police Officer Brian Dayton contacted Detective Jeremy Mitchell, a narcotics investigator on the Grays Harbor Drug Task Force (GHDTF), to discuss "suspicious text messages" a person had received on her cellular telephone. Clerk's Papers (CP) at 17. The text messages appeared to be related to a potential drug purchase. One text message stated: "'I'm at donny carners [sic] on my way back now. I'm getting a T[3] and ten dollars.'" CP at 17.

The officers determined that the text messages were from Bryce Bitar's cellular telephone. Officer Dayton knew Bitar was involved "in the illegal drug culture" and had "numerous police related contacts" with Bitar. CP at 17. Officer Dayton was also familiar with Carner; knew where Carner lived; and had received "numerous complaints of short stay traffic at all hours of the day" at Carner's residence, which was "consistent with an individual or house being associated with street level narcotic dealings." CP at 17.

After reviewing the text messages, Officer Dayton watched Carner's residence and observed Bitar leaving the residence and driving away. Officer Dayton stopped Bitar, and Bitar admitted that he had just "come from Donald Carner's house where he had bought heroin." CP at 17-18. With Bitar's permission, Officer Dayton searched Bitar's car and found some heroin in the car's center console.

[3] A "T" is the abbreviation for a "'teener' or 1/16th of an ounce of an illegal narcotic." CP at 17.

Officer Dayton and Detective Mitchell then interviewed Bitar at the police station; Bitar admitted to having purchased heroin from Carner and to having sent the text message the officers had seen. CP at 18. Bitar also stated that while he was in Carner's home, Carner had shown him two guns, he (Bitar) observed that there was "a bunch of stolen property at the residence," and Carner sold him some prepackaged heroin from a bag containing "a large amount of suspected heroin." CP at 18.

B. Search Warrant and Search

Based on this information, Detective Mitchell applied for a search warrant for Carner's residence. In his affidavit's narrative, Detective Mitchell set out the background facts as described above. In addition, he asserted that, based on his training and experience, he was aware that individuals involved in selling narcotics often (1) kept large amounts of cash; (2) had photographs or videos of themselves or their customers using controlled substances; (3) kept "[c]rib [s]heets" or "records and/or ledgers of their transactions and the names of their customers," CP at 15; (4) maintained bank accounts and safety deposit boxes that related to or contained materials related to the drug sales; (5) kept and used firearms; (6) used and carried narcotics and drug paraphernalia; (7) concealed drugs and related items outside their homes in outbuildings or other facilities; and (8) used electronic devices, such as pagers and mobile telephones, for the purpose of selling drugs. Detective Mitchell also stated that he knew Carner and was aware the GHDTF had previously investigated Carner and that he had received several tips from informants and others indicating that Carner was selling narcotics from the subject residence.[4] The detective also stated that he had checked Carner's criminal history and had

discovered that Carner had a 2001 felony conviction for methamphetamine possession and an arrest for possession of marijuana; the felony conviction "would prohibit Carner from possessing firearms or ammunition." CP at 19.

Based on this information, a judge issued a search warrant for Carner's residence. The search warrant authorized officers to:

> 1. Search such premises, vehicles, or persons as described above and seize controlled substances as found therein, together with the vessels in which they are contained,
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> 2. Seize any and all implements or articles used of [sic] kept for the illegal possession, administering, sale, delivery, distribution, or otherwise disposing of such controlled substances.
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> 3. Search such premises and containers therein for personal computers together with peripheral devices attached thereto and records contained therein in any manner such as removable digital storage media (thumb drive/flash drive); compact disks, and the like, and seize the following, to include but not limited to: Indicia of domain or control over the defendant premises, records of income; e.g., banking records and statements describing loans and payments thereof, deposits, and withdrawals; emails; Internet browsing records. Computers found to contain said records may be examined and seized if, upon examination, probable cause exists that they have been used during commission of VUCSA or other illegal activity.
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> 4. Search said premises and containers therein for video tapes, and still photographs; cell phones and cell phone records; letters and crib sheets; and weapons. And seize such items.
>
> 5. Search such premises and seize evidence of unexplained wealth, to include but not limited to monies, personal property, stocks, bonds, saving certificates, and then [sic] like.

CP at 43-44.

[4] Apart from Bitar, Detective Mitchell did not identify any of these individuals.

When the officers searched Carner's residence, they found Carner leaving the upstairs bathroom; inside the bathroom they found plastic baggies containing heroin floating in the toilet.[5] The officers seized the heroin, additional baggies containing pills, various drug packaging materials, cash, several cellular telephones, drug paraphernalia, various computer equipment, scales, a prescription bottle containing marijuana, Psilocybin mushrooms, surveillance equipment, the "Anarchist Cook Book," a drill, a saw, and prescription medication in bottles. CP at 41. The State ultimately charged Carner with a single charge of unlawful possession of a controlled substance, heroin.[6]

II. Procedure

A. Motion for *Franks* Hearing and Suppression Motion

Carner moved for a *Franks* hearing and to suppress the evidence seized from his residence, arguing that the search warrant affidavit failed to establish probable cause because the search warrant affidavit did not include "evidence of [Bitar's] trustworthiness" in order to establish his "reliability" under the *Aguilar-Spinelli*[7] test. CP at 25. Carner asserted that Detective Mitchell had "withheld information of Mr. Bitar's untrustworthiness from the Affidavit for Search Warrant so that it could not be considered by the issuing magistrate."[8] CP at 25.

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[5] The officers also found and detained several other people who were in the house.

[6] RCW 69.50.4013(1). This statute was amended by initiative in 2012; the amendment did not change subsection (1); accordingly, we cite to the current version of the statute. *See* Laws of 2013, ch. 3 § 20.

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

[8] Carner also raised other issues that are not relevant to this appeal.

Carner also asserted that the search warrant affidavit "suggest[ed]" that "Detective Mitchell and Officer Dayton should have been aware that Bryce Bitar had a lengthy criminal record for crimes of dishonesty,[9] but neither of them disclosed this record of untrustworthiness to the magistrate considering whether to sign the search warrant." CP at 26. The motion did not discuss any over breadth or first amendment particularity issues.

The trial court denied the motion to suppress, concluding that the search warrant affidavit established probable cause to believe that Carner was involved in criminal activity. The trial court also denied Carner's motion for a *Franks* hearing, concluding that, although the search warrant affidavit did not contain information about Bitar's criminal history, (1) Bitar's criminal history was not material, and (2) Carner had not shown that this omission was intentional or made with a reckless disregard of the truth.[10]

Following this ruling, Carner agreed to a bench trial based on the record. Based on the facts described above, the trial court found Carner guilty of unlawful possession of heroin. Carner appeals his conviction.

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[9] Carner asserted that Bitar had two felony and three gross misdemeanor convictions for crimes of dishonesty.

[10] Specifically, the trial court concluded:

> A *Franks* hearing in this case is not required because the omission of the informant's criminal history was not material, and that omission . . . was not made intentionally or with reckless disregard to the truth. A reckless disregard to the truth is shown where the affiant entertains serious doubts as to the truth of facts or statements in the affidavit and serious doubts can be shown by actual deliberation on the part of the affiant, or the existence of obvious reasons to doubt the veracity of the informant or the accuracy of the reports.

CP at 13 (Conclusion of Law 9).

ANALYSIS

I. Overbroad Search Warrant and Severance

Carner first argues that the search warrant was unconstitutionally overbroad and lacked sufficient particularity because the search warrant affidavit did not establish probable cause for the seizure of certain items, including some materials protected by the First Amendment.[11] Carner admits, however, that there was probable cause supporting the seizure of the heroin. The State concedes that the search warrant was overbroad, but it argues that we can sever the valid portions of the search warrant. Assuming, but not deciding that this issue was preserved for review,[12] we

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[11] Specifically, Carner is challenging the portions of the search warrant that allowed for the search and seizure of the following:

> 3. Search such premises and containers therein for personal computers together with peripheral devices attached thereto and record contained therein in any manner such as removable digital storage media (thumb drive/flash drive); compact disks, and the like, and seize the following, to include but not limited to : Indicia of domain or control over the defendant premises, records of income; e.g., banking records and statements describing loans and payments thereof, deposits, and withdrawals; emails; Internet browsing records. Computers found to contain said records may be examined and seized if, upon examination, probable cause exists that they have been used during commission of VUCSA or other illegal activity.
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> 4. Search said premises and containers therein for video tapes, and still photographs; cell phones and cell phone records; letters and crib sheets; and weapons. And seize such items.
>
> 5. Search such premises and seize evidence of unexplained wealth, to include but not limited to monies, personal property, stocks, bonds, savings certificates, and then [sic] like.

CP at 43-44.

[12] *See* RAP 2.5(a).

agree with the State's severance argument.

A warrant is overbroad when it describes many items but fails to link some of them to the offense. *State v. Griffith*, 129 Wn. App. 482, 489, 120 P.3d 610 (2005) (citing *State v. Perrone*, 119 Wn.2d 538, 555-56, 834 P.2d 611 (1992)), *review denied*, 156 Wn.2d 1037 (2006). And courts require a heightened degree of particularity when a search warrant includes items protected by the First Amendment, such as books and films. *State v. Chambers*, 88 Wn. App. 640, 644, 945 P.2d 1172 (1997) (citing *Perrone*, 119 Wn.2d at 547; *Gonzales v. State*, 577 S.W.2d 226, 228, *cert. denied*, 444 U.S. 853 (1979)). But even assuming that the search warrant here is overbroad or insufficiently particular, under the severability doctrine only the invalid portions of the warrant must be suppressed unless the valid portions of the warrant cannot be meaningfully severed from the warrant as a whole. *Perrone*, 119 Wn.2d at 556-57.

Here, the valid portion of the search warrant can be meaningfully severed. The only seized item required to support Carner's unlawful possession of heroin charge was the packaged heroin that the officers found in the toilet located in the bathroom that Carner was exiting at the time of the search. The search warrant identified controlled substances in a separately enumerated paragraph distinct from the portions of the search warrant that Carner now challenges. Additionally, based on the record before us, the drugs were the only evidence seized that the trial court considered in convicting Carner. Thus, even if the trial court should have suppressed the remainder of the warrant, the evidence that supports his conviction was validly seized.[13] *See*

[13] Citing *Perrone*, Carner argues that the severability doctrine cannot apply because this was "an illegal general warrant." Reply Br. of Appellant at 3. We disagree. In *Perrone*, the search warrant authorized the seizure of several items within one paragraph and failed to provide sufficient guidance as to how the searching officers would identify the materials to be seized—in

Griffith, 129 Wn. App. at 489.

II. Denial of Motion for *Franks* Hearing

Carner next argues that the trial court erred by denying his motion for a *Franks* hearing because Detective Mitchell omitted Bitar's prior crimes of dishonesty from the search warrant affidavit. Again, we disagree**.**

We review a trial court's denial of a *Franks* hearing for abuse of discretion. *State v. Wolken*, 103 Wn.2d 823, 829, 700 P.2d 319 (1985). The trial court may invalidate a search warrant and suppress the fruits of a search if it finds that the applying officer intentionally or recklessly omitted material information from the warrant affidavit. *State v. Chenoweth*, 160 Wn.2d 454, 478-77, 158 P.3d 595 (2007). A defendant challenging a warrant on this basis is entitled to an evidentiary hearing, known as a *Franks* hearing, if he makes a substantial preliminary showing of both (1) the omissions and their materiality; and (2) the affiant's omissions having been made knowingly and intentionally, or with a reckless disregard to the truth. *Franks*, 438 U.S. at 155-56; *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992) (quoting

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that case, "'child pornography.'" 119 Wn.2d at 550. Here, in contrast, the search warrant set out the section allowing for the seizure of "controlled substances" in an individually numbered subsection that did not include any other materials, and Carner does not assert that the phrase "controlled substances" failed to offer sufficient guidance. *See* CP at 43.

Carner also argues that the search warrant was a general warrant because the clause, "Indicia of domain [sic] or control over the defendant [sic] premises," was imbedded in a paragraph containing other items that were not supported by probable cause. Reply Br. of Appellant at 4. The search warrant did authorize seizure of other items that might establish "[i]ndicia of domain or control over the defendant's premises," in the same paragraph it authorized the seizure of items that were arguably not supported by probable cause. But, such indicia of domain and control were unnecessary to support the conviction here because the officers discovered Carner immediately after he attempted to destroy the heroin.

Franks, 438 U.S. at 155-56)). "'[A]llegations of negligence or innocent mistake are insufficient'" to justify a hearing. *Garrison*, 118 Wn.2d at 872 (quoting *Franks*, 438 U.S. at 171; *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981)).

Carner argues that Detective Mitchell acted with reckless disregard for the truth because he failed to mention Bitar's criminal history when "it would have been a simple matter to review [Bitar's] record (as they did with Mr. Carner before applying for the warrant)." Br. of Appellant at 21. But Carner points to no authority requiring an affiant to run record checks before applying for a search warrant. In fact, there is case law to the contrary holding that although such oversight may be negligent, it does not rise to the level of intentional or reckless disregard. *See Chenoweth*, 160 Wn.2d at 480 (rejecting a similar argument and noting that the defendant provided "no authority that police must routinely check an informant's criminal history before applying for a search warrant, let alone that a prosecutor must perform an exhaustive review of court files relating to an informant's past criminal conviction."); *State v. Evans*, 129 Wn. App. 211, 221, 118 P.3d 419 (2005), *rev'd on other grounds*, 159 Wn.2d 402, 150 P.3d 105 (2007).

Furthermore, there is nothing in the record suggesting that Detective Mitchell knew of and intentionally disregarded the fact Bitar had been convicted of any crimes of dishonesty. At most, Carner alleged that officers knew Bitar from previous contacts and knew Bitar was involved "'in the illegal drug culture.'" CP at 25 (quoting CP at 17). Based on this, Carner asserts that the search warrant affidavit "suggests that both Detective Mitchell and Officer Dayton should have been aware that Bryce Bitar had a lengthy criminal record for crimes of dishonesty." CP at 26. But awareness that Bitar was involved in the "drug culture" does not necessarily imply that Bitar

also had a criminal record that included crimes of dishonesty. CP at 17, 25. Because Carner failed to make a substantial preliminary showing that Detective Mitchell knew of and intentionally or recklessly disregarded Bitar's prior convictions for crimes of dishonesty, the trial court did not err in refusing Carner's motion for a *Franks* hearing.[14]

We affirm.

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.

Johanson, A.C.J.

We concur:

Hunt, J

Bjorgen, J.

[14] To the extent Carner is also arguing that we should infer that Detective Mitchell acted recklessly based on the fact that the detective would have discovered that Bitar's criminal history included crimes of dishonesty had he checked Bitar's record, our Supreme Court has repeatedly expressed disapproval in this approach. *Chenoweth*, 160 Wn.2d at 480-81 (noting that the court had previously held in *Garrison*, 118 Wn.2d at 872, that, "'[s]uch an inference collapses into a single inquiry the two elements—"intentionally" and "materiality"—which Franks states are independently necessary.'").