

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

**No. 28268-6-III**

**Respondent,**

**Division Three**

**v.**

**NIKKI SUE SHERMAN,**

**UNPUBLISHED OPINION**

**Appellant.**

Brown, J. — Nikki Sue Sherman appeals her convictions for attempted possession of a controlled substance and possession of a controlled substance with intent to deliver, contending the trial court erred in denying her suppression motion for evidence gathered from her impounded car. She mainly argues the search warrant affidavit failed to show a sufficient nexus to establish probable cause for the search. We agree, and reverse Ms. Sherman’s conviction for possession of a controlled substance with intent to deliver. Because her conviction for attempted possession of a controlled substance was unrelated to the unsuppressed evidence, it is affirmed.

**FACTS**

Donald Alexander owned property located at 123 East Eighth Avenue in Kennewick. On the morning of September 1, 2008, Kennewick Police Officer Christopher Slocombe was following a small blue car he found suspicious when the car suddenly stopped in front of Mr. Alexander's property. Two men, later identified as Ryan Emerson and James Morris, got out of the car and walked away. Officer Slocombe contacted and arrested both men on outstanding warrants. He recovered about \$3,400 in cash from Mr. Emerson, and between \$300 and \$600 in cash from Mr. Morris. Officer Slocombe did not see Mr. Emerson or Mr. Morris throw anything as they walked away and a police search revealed nothing.

Later that day, Mr. Alexander found a red silk pouch on his property in bushes near an irrigation canal. His wife called the police. Kennewick Police Officer Kenny Melone arrived and took possession of the pouch. It contained methamphetamine. Another police search of the area revealed nothing else of interest.

Still later that day, Mr. Alexander's neighbor, Bobbie Cheung, saw a man and a woman park in Mr. Alexander's driveway and get out of a white car. Ms. Cheung saw the man and woman looking around the bushes and the canal. Aware of the earlier police visits to Mr. Alexander's property, Ms. Cheung called the police.

Kennewick Police Officer Ryan Kelly responded to Ms. Cheung's call. He saw a man and a woman, later identified as Jay Miller and Ms. Sherman, appearing to look for something on the ground around the canal and the bushes. Officer Kelly approached

and spoke with Mr. Miller and Ms. Sherman. Officer Slocombe arrived at the scene and spoke with Ms. Sherman. After Ms. Sherman gave a suspicious story connecting her to Mr. Emerson, Officer Slocombe arrested her for trespassing.

The white car was registered to Ms. Sherman. According to Kennewick Police Detective John Davis, the white car was taken from the driveway of 123 East Eighth Avenue and impounded “on an evidence hold pending a search warrant.” Report of Proceedings (RP) (June 30, 2009) at 299. Four days later, on September 5, 2008, Detective Davis applied for a search warrant to search Ms. Sherman’s vehicle and to seize all controlled substances found therein and all evidence violating the Uniform Controlled Substances Act. The affidavit in support of the search warrant partly related:

On 09/01/2008 . . . I was informed that Ryan Emerson and James Morris were in a small car in east Kennewick when Officer Slocomb[e] saw them in a small blue car. Officer Slocomb[e] turned and made contact with the two mentioned males . . . . Both males had exited the car and two other people in the car got in the front seat and left. The driver then was a female and the front seat passenger was now a different male. Emerson was arrested . . . [and] Morris was arrested.

. . . .  
On 09/01/2008 Kennewick Officers arrested Brian Buell . . . . I was called to talk with him because he possibly had information related to the Emerson and Morris arrest. . . . Buell said Emerson and Morris were at his house . . . earlier on this date. He said Morris was driving the car they came in which was a teal/blue older smaller car. Emerson, another male named Jay and a female possibly named Caroline were in the car with Morris. Buell said he purchased meth from Morris . . . . Buell also said J-Bird bought meth from Emerson . . . . Buell said Morris has his own stash of meth and kept it in a black packaging of some sort. He described Emerson’s stash of meth in a red/orange bag with a knot on the top.

. . . .

Later in the day of 09/01/2008 Kennewick Police Officers arrested Nikki Sherman and Jay Miller in the exact area where Emerson and Morris were arrested after they got out of the blue car. . . . Nikki Sherman is an alleged methamphetamine user who purchases her drugs from Ryan Emerson. This tip came from Brian Buell reported to Corporal Joe Jackson a few weeks prior. Buell had given Corporal Jackson some information that led to the arrest of two felons. Corporal Jackson told me Buell . . . ha[s] given good information in the past and the information about Sherman using illegal narcotics should be considered good information. When officers contacted Sherman and Miller, Sherman's car was parked in a private residence driveway nearby. . . . Sherman advised officers that Emerson called her from the jail and said he dropped Sherman's house key when he was arrested. Sherman's car was towed as evidence pending a search warrant for stolen property and or controlled substances. . . . Sherman's car is a white Acura Legend.

. . . .  
Sherman insisted she never left the sidewalk when looking for the house key. . . . She told me that Emerson called her from the jail and told her he dropped the key when he was arrested. I told Sherman the phone call was probably recorded so I could verify what was said. Sherman then said Emerson did not actually ask her to look for the key. She said she must have heard it from someone else. Sherman said she was looking there because it seemed like a good place to look for the key and most likely the place Emerson lost it. . . . I asked Sherman who owned the drugs on the seat of her car, even though there were no drugs on her car seat. . . . Sherman did not deny having any drugs; rather she said she does not know anything about drugs in her car. I repeated the question stating she did not answer, rather evaded it. Sherman again said she knew nothing of any drugs.

. . . .  
Prior to Sherman's arrest but after Emerson's arrest Kennewick Police Officers located around 44 grams of suspected meth near 123 E. 8th Avenue. It appeared to be in a location and position with someone throwing it from the street. Based on its location and the description of the drugs being sold to Buell by Emerson, it appears Emerson threw the drugs when he jumped out of the small car when Officer Slocomb[e] arrested Emerson. . . . James Morris' pouch of drugs were never found. I feel it is possible there could be controlled substances in Sherman's car. It is possible she or Miller located Morris' drugs on the ground and place [sic] them into the car. It is also possible Sherman has narcotics in her car based on other statements from reliable sources.

.....  
On 09/03/2008 . . . I went to the area of 123 8th Avenue where Nikki Sherman and Jay Miller were arrested for trespassing. I wanted to search the surrounding areas for the . . . drugs that James Morris allegedly had in his possession. . . . I did not locate drugs or a gun in this area.

.....  
On 09/04/2008 I received information from FBI agent Jessie Huckemeyer that Nikki Sherman was identified by a confidential informant as being a drug transporter for the Gypsy Joker motorcycle gang. Specific instances were mentioned as to her driving to Portland, OR to get methamphetamine to transport back to Kennewick. Sherman was reported as driving a smaller car and placing the drugs in the trunk.

Clerk's Papers (CP) at 125-30.

The affidavit contained generalized information based upon Detective Davis' "training, experience and participation in these and other financial/drug trafficking investigations, and based upon my conversations with other experienced law enforcement agents with whom I work." CP at 130. This information partly included:

Individuals who cultivate and distribute illegal controlled substances commonly secrete [sic] contraband, including drugs, the proceeds of drug sales and records of drug transactions . . . in their vehicle(s), . . . not only for ready access but also to conceal them from law enforcement.

CP at 130. A judge granted the search warrant as requested.

Kennewick Police Detective Rick Runge executed the search warrant on the day it was issued. Under the driver's seat, Detective Runge found a black bag "marked with the initials NS." RP (June 30, 2009) at 172. Inside the bag, Detective Runge found, among other items, packaging material, a digital scale, a measuring spoon, drug ledgers, and 106 grams of methamphetamine.

The State charged Ms. Sherman with possession of a controlled substance with intent to deliver, based upon the methamphetamine found in her vehicle, and attempted possession of a controlled substance, based upon the methamphetamine found in the red silk pouch. No trespass charges were brought. Ms. Sherman moved to suppress all evidence resulting from her arrest, the seizure of her vehicle, and the execution of the search warrant. In writing, Ms. Sherman argued (1) the police did not have the authority to arrest her for trespassing, (2) the affidavit submitted in support of the search warrant was insufficient to support a finding of probable cause, (3) her vehicle was unlawfully impounded and held for an unreasonable amount of time, and (4) the search warrant was not issued by a neutral and detached magistrate. At the suppression hearing, Ms. Sherman explained the search was not one incident to arrest and thus her focus was on the vehicle seizure, delay in securing the search warrant, search warrant validity, and the neutrality of the magistrate issuing the warrant.

In a written ruling, the trial court denied Ms. Sherman's motion to suppress:

The Court finds that probable cause existed herein to search Ms. Sherman's car, as the information, facts, and circumstances provided to [the issuing magistrate] were sufficient to establish a reasonable inference that Ms. Sherman was probably involved in criminal activity and that evidence of the crime would likely be found in Ms. Sherman's car. The fact that Ms. Sherman and Mr. Miller took Ms. Sherman's vehicle to the area of the "drug drop" to search for something in that same area within hours of the arrests of Mr. Emerson and Mr. Morris, and of the homeowner's discovery of the drugs, certainly provides sufficient nexus between the criminal activity, the items to be seized, and the place to be searched.

CP at 170. The trial court did not enter written findings of fact and conclusions of law. Ms. Sherman unsuccessfully moved to reconsider.

At trial, Ms. Sherman renewed her suppression motion, particularly requesting the trial court rule on the legality of her arrest for trespassing. The trial court denied the motion, finding probable cause based on Ms. Cheung's testimony.

The jury found Ms. Sherman guilty as charged. She appealed.

#### ANALYSIS

The issue is whether the trial court erred in finding probable cause to issue the search warrant and denying Ms. Sherman's motion to suppress.

In a suppression review, we generally review factual findings for substantial evidence and conclusions of law de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). While the court did not enter formal findings of fact or conclusions of law, when the court's oral findings are sufficient for review, the omission is harmless. *State v. Smith*, 145 Wn. App. 268, 274, 187 P.3d 768 (2008). The suppression court gave a detailed written ruling regarding the search warrant, and it gave an oral ruling regarding Ms. Sherman's arrest. The error is thus, harmless.

We review a magistrate's decision to issue a warrant for an abuse of discretion.

*State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). In general, this decision should be given great deference. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). However, a trial court's legal conclusion as to whether an affidavit establishes probable cause is reviewed de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Our review is limited to the four corners of the affidavit. *Id.* "[T]he 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).

Probable cause is required to issue a search warrant. *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). "Probable cause exists where 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 may be found at a certain location." *Id.* Thus, "'probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.'" *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). Courts evaluate the existence of probable cause on a case-by-case basis. *Id.* at 149. "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." *Id.* at 147. "Probable cause requires a probability of criminal activity, not a prima facie showing of criminal activity." *Maddox*,



152 Wn.2d at 510. “[A]n affidavit in support of a search warrant must be based on more than mere suspicion or personal belief that evidence of a crime will be found on the premises searched.” *Neth*, 165 Wn.2d at 183 (citing *Jackson*, 150 Wn.2d at 265).

Ms. Sherman argues the search warrant affidavit does not establish probable cause that evidence of criminal activity would be found in her car, a required nexus. She argues the affidavit relies on conjecture. We agree.

The affidavit shows Mr. Emerson and Mr. Morris were arrested on the morning of September 1, 2008. It relates Mr. Buell said both Mr. Emerson and Mr. Morris sold methamphetamine on that date and each man had his own stash. Mr. Emerson had a “stash of meth in a red/orange bag with a knot on the top.” CP at 126. Later that date, Ms. Sherman was arrested at the exact location where Mr. Emerson and Mr. Morris were arrested. Mr. Emerson’s stash of methamphetamine was found, but Mr. Morris’ stash was not. The affiant, Detective Davis, theorized, “I feel it is possible there could be controlled substances in Sherman’s car. It is possible she or Miller located Morris’ drugs on the ground and place [sic] them into the car.” CP at 128.

The related information does not support the conclusion that evidence of controlled substances would likely be found in Ms. Sherman’s vehicle. See *Thein*, 138 Wn.2d at 147. No evidence showed Mr. Morris threw anything down before his arrest. The suspicion that Ms. Sherman or Mr. Miller possibly located Mr. Morris’ stash of methamphetamine and placed it in Ms. Sherman’s vehicle does not establish probable

cause. See *Neth*, 165 Wn.2d at 182-83 (citing *Jackson*, 150 Wn.2d at 265). No facts in the affidavit show Mr. Morris threw his methamphetamine stash before he was arrested or that Ms. Sherman or Mr. Miller found anything or were seen accessing Ms. Sherman's car after looking around in the area of Mr. Morris' arrest.

Further, no other facts in the affidavit establish a sufficient basis in fact to conclude evidence of controlled substances would likely be found in Ms. Sherman's vehicle. See *Thein*, 138 Wn.2d at 147. In the affidavit, Detective Davis partly related he had received information from an FBI agent given by a confidential informant identifying Ms. Sherman as a drug transporter, but no information was given of any recent transport. Where informant tips form the basis of probable cause, an affidavit must set forth facts satisfying the *Aguilar-Spinelli*<sup>1</sup> test: that an informant truthfully relates facts about which he or she has personal knowledge. *State v. Mejia*, 111 Wn.2d 892, 896-97, 766 P.2d 454 (1989). "Only after the magistrate is satisfied as to both the truthfulness of the informant and that the informant knows what he is talking about can the magistrate determine whether the facts support the conclusion that there is probable cause to believe that criminal conduct may have occurred." *Id.* at 897 (citing *State v. Gunwall*, 106 Wn.2d 54, 73, 720 P.2d 808 (1986)). The State properly acknowledges the affidavit does not satisfy the *Aguilar-Spinelli* test for this informant tip.

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<sup>1</sup> *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), *abrogated by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), *adhered to by State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984).

And, Detective Davis' generalized conclusions about individuals who cultivate and distribute illegal controlled substances are not sufficient bases for a search warrant. See, e.g., *State v. Olson*, 73 Wn. App. 348, 351-52, 357, 869 P.2d 110 (1994) (a warrant to search the defendant's residence for a marijuana grow operation, based upon "[a]n officer's belief that persons who cultivate marijuana often keep records and materials in safe houses" was not supported by probable cause).

In sum, the search warrant affidavit does not establish probable cause because it lacks a nexus that evidence of criminal activity would be found in Ms. Sherman's car. Ms. Sherman's conviction for possession of a controlled substance with intent to deliver is reversed. Ms. Sherman's conviction for attempted possession of a controlled substance is unrelated to the evidence discovered in her car, and is affirmed. Based upon our holding, we do not reach Ms. Sherman's other contentions related to whether the police lacked the authority to arrest her for criminal trespass and whether the police lacked the authority to impound her car. Similarly, we do not reach Ms. Sherman's statement of additional grounds for review.

Reversed in part. Affirmed in part.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

No. 28268-6-III  
*State v. Sherman*

WE CONCUR:

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Korsmo, A.C.J.

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Siddoway, J.