

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 28895-1-III
	)	consolidated with
Respondent,	)	No. 28896-0-III
	)	
v.	)	Division Three
	)	
MICHAEL SMITH,	)	
	)	UNPUBLISHED OPINION
Appellant.	)	
	)	

Brown, J. • Michael Smith appeals his convictions for possessing heroin with intent to deliver, possessing stolen property, and unlawfully possessing a firearm. He contends the trial court erred in denying his *Franks*<sup>1</sup> motion because the search warrant affidavit did not include complete informant criminal histories. Although we are unaware of any requirement to put an informant's criminal history in a search warrant affidavit, even if there were such a requirement we find no error here. We affirm.

FACTS

On February 6, 2009, Benton County Sheriff's Deputy Scott Runge responded to a burglary reported by Valerie Seabury. Ms. Seabury and Randall Spanjer reported their shop had been broken into and several items were missing, including a Harley

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<sup>1</sup> *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Davidson motorcycle, large tool rollaway boxes, hand tools and power tools. Over the next two days, Deputy Runge investigated the burglary. Ms. Seabury implicated Mica Jones as a suspect and suggested asking him about someone named Ken. Mr. Jones denied involvement in the burglary but identified Ken as Kenneth Moore.

Mr. Spanjer's son revealed Ms. Seabury had a heroin habit, and the burglary was likely related to her friends. Interviewed again, Ms. Seabury admitted she had used heroin in the previous month with both Mr. Jones and Mr. Moore. Eventually, Ms. Seabury mentioned a drug dealer by the name of Mike.

Officers learned Mr. Moore had pawned items similar to those described as stolen. Mr. Moore eventually admitted he had the motorcycle and he knew the location of some of the stolen items. Mr. Moore implicated a heroin dealer by the name of Long Hair Mike. He said Mike would accept stolen items in exchange for heroin, and he had traded some of Mr. Spanjer's tools to Mike. Mr. Moore directed police to the residence of Long Hair Mike. Detective Cantu discovered that Mike was Michael S. Smith and he investigated Mr. Smith's previous criminal record, which included a drug possession with intent to deliver conviction.

On February 10, 2009, Detective Lee Cantu successfully applied for a search warrant for Mr. Smith's home. The affidavit for the search warrant does not contain any specific information regarding past criminal convictions of any of the people interviewed by the police. However, the affidavit did explain that Mr. Moore confessed to receiving stolen property from Ms. Seabury and Mr. Jones. Additionally, the affidavit states that

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Ms. Seabury admitted to participating in thefts to trade for heroin.

As a result of the discoveries during the search, Mr. Smith was charged with possession of heroin with the intent to deliver, possession of stolen property, and unlawful possession of a firearm. Before trial, Mr. Smith moved for a *Franks* hearing alleging Detective Cantu's application for the search warrant failed to include the criminal histories of the informants. Mr. Smith provided the court with histories of all the people named in the affidavit.

The trial court denied the motion for the *Franks* hearing, reasoning Mr. Moore's pending charges did not have to be specifically provided to the magistrate because the supporting facts for the theft charges in the current case were provided. Further, the court noted Ms. Seabury's previous convictions were not disclosed. And, Ms. Seabury did not provide relevant information regarding Mr. Smith.

After Mr. Smith was found guilty in a stipulated facts trial, he appealed.

#### ANALYSIS

The issue is whether the trial court erred in denying a *Franks* hearing. Mr. Smith contends the omission of the informants' criminal histories from the search warrant affidavit was material because they include crimes of dishonesty. Accordingly, he argues the information gained from the informants could not support probable cause because crimes of dishonesty are fatal to the reliability of their information.

The denial of a *Franks* hearing is reviewed for abuse of discretion. *State v. Wolken*, 103 Wn.2d 823, 829-30, 700 P.2d 319 (1985).

Normally, once issued, a search warrant is entitled to a presumption of validity, and courts will give “great deference to the magistrate’s determination of probable cause” and resolve any doubts in favor of the warrant. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). However, a warrant may be invalidated, and the fruits of a search may be suppressed, if the applying officer intentionally or recklessly omitted material information from the warrant affidavit. *Id.* 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 the omissions and their materiality. *Franks*, 438 U.S. at 155-56. An omission is material if it was necessary to the finding of probable cause. *State v. Copeland*, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996).

“Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” *State v. Atchley*, 142 Wn. App. 147, 161, 173 P.3d 323 (2007). Accordingly, the test for probable cause when information is omitted from a search warrant affidavit is whether the affidavit remains sufficient to support a finding of probable cause with the omission inserted. *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992). Thus, if the affidavit supports probable cause even when the omitted information is considered, “the suppression motion fails and no hearing is required.” *Id.*

Initially, the State argues Detective Cantu’s omission of the criminal histories was neither intentional nor reckless. Relying on *State v. Evans*, 129 Wn. App. 211,

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220, 118 P.3d 419 (2005), the State contends “it is not *per se* reckless not to run a witness’s criminal history and to fail to present it to the magistrate.” Br. of Resp’t at 6. In support, the State points this court’s attention to the fact Mr. Smith has never claimed Detective Cantu knew Ms. Seabury or Mr. Moore had any criminal history, and nothing in the record indicates they had a criminal record.

However, the thrust of Mr. Smith’s argument is Detective Cantu’s alleged recklessness in not discovering the informant’s criminal histories and he should have done so to establish reliability. When the existence of probable cause depends on information supplied by an informant, the two-prong *Aguilar-Spinell*<sup>2</sup> test must be satisfied. *State v. Cole*, 128 Wn.2d 262, 287, 906 P.2d 925 (1995). The credibility prong requires that the reliability of the informant be established. *Id.*

As Mr. Smith argues, “[a]ny crime involving dishonesty necessarily has an adverse effect on an informant’s credibility.” *United States v. Reeves*, 210 F.3d 1041, 1045 (9th Cir. 2000). Theft, taking a motor vehicle and forgery are crimes of dishonesty. See *State v. Schroeder*, 67 Wn. App. 110, 115-16, 834 P.2d 105 (1992); *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991); *State v. Teal*, 117 Wn. App. 831, 843, 73 P.3d 402 (2003). On the other hand, “[a]n informant’s willingness to come forward and identify himself is a strong indicator of reliability.” *Chenoweth*, 160 Wn.2d at 483. Likewise, “[s]tatements against penal interest are intrinsically reliable because a person is unlikely to make a self-incriminating admission unless it is true.” *Id.* (citing

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<sup>2</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).

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*State v. Lair*, 95 Wn.2d 706, 711, 630 P.2d 427 (1981). Accordingly, an informant's criminal history is not dispositive of the reliability of their information.

Here, Mr. Moore's criminal history at the time Detective Cantu presented his affidavit included no crimes of dishonesty; he had convictions for fourth degree assault and driving while suspended. The affidavit, therefore, would still support probable cause even if that omitted information were considered. And, the affidavit provides Mr. Moore admitted possessing stolen property and trading it for heroin. The affidavit revealed the State would be charging Mr. Moore for those crimes.

Regarding Ms. Seabury, her criminal history includes convictions for third degree theft and possession of a controlled substance by fraud or forgery. However, she did not provide the police information regarding Mr. Smith. Therefore, the omission of her criminal history does not affect the sufficiency of probable cause. Even so, the affidavit revealed Ms. Seabury admitted to participating in thefts to trade for heroin and she was known to steal property from her boyfriend to trade for property.

Given all, the omissions were not material. We conclude the trial court did not err in denying Mr. Smith's *Franks* motion.

Affirmed.

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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WE CONCUR:

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Kulik, C.J.

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Korsmo, J.