1998

Utah v. Michael Todd Mcarthur : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
MICHAEL TODD MCARTHUR,	:	Case No. 981421-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Burglary, a second degree felony in violation of Utah Code Ann. § 76-6-202 (1995), and Theft, a second degree felony in violation of Utah Code Ann. § 76-6-404 (1995), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal from judgment of conviction for Burglary of a Dwelling, a second degree felony, and Theft, a second degree felony, pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996). A copy of the judgment is in Addendum A.

TEXT OF CONSTITUTIONAL PROVISION

The text of the Fourth Amendment to the United States Constitution is in Addendum B.

ISSUES, STANDARDS OF REVIEW, PRESERVATION

Issue: Whether the search of Appellant's home violated the Fourth Amendment, requiring that items seized pursuant to the search warrant and statements made by Appellant be suppressed.

A. Whether Aimee acted as an agent for Deputy Delahunty when she entered McArthur's home and seized evidence.

B. Whether items seized by police officers when acting pursuant to a search warrant must be suppressed since the search warrant was the fruit of Aimee's prior illegal search.

C. Whether Deputy Delahunty recklessly or

intentionally included false statements and omitted material information from the affidavit, requiring suppression of items seized pursuant to the search warrant.

D. Whether McArthur's statements upon arrest should be suppressed as the fruit of the Fourth Amendment violation.

Standard of Review: This Court "review[s] the factual findings underlying the trial court's decision to grant or deny a motion to suppress using a clearly erroneous standard. [It] review[s] the trial court's conclusions of law based on these facts under a correctness standard." State v. Brown, 853 P.2d 851, 854 (Utah 1992) (citing State v. Ramirez, 817 P.2d 774, 781-82 (Utah 1991)).

Preservation: The issues raised in this appeal were preserved by Appellant's motion to suppress (R. 24-26), the hearing on the motion to suppress (R. 114), and the trial judge's ruling (R. 92). See Addenda C and D.

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

On July 9, 1997, the State filed an Information charging Defendant/Appellant Michael Todd McArthur ("Appellant" or "McArthur") with one count of Burglary, a second degree felony in violation of Utah Code Ann. § 76-6-202 (1995), and one count of theft, a second degree felony in violation of Utah Code Ann. § 76-6-404 (1995).

Prior to trial, Appellant filed a motion to suppress the evidence seized from his home. R. 24-26. A copy of the motion is in Addendum C. After the state filed its responsive

memorandum (R. 28-37), the trial judge held an evidentiary hearing on the suppression motion. R. 38. Thereafter, the trial judge denied Appellant's motion to suppress and requested that the state prepare the order. R. 38.

The state prepared proposed findings of fact and conclusions of law which did not accurately reflect the trial court's rulings and which contained findings which were not made by the trial judge. R. 75-76, 92. Appellant objected to the findings and conclusions prepared by the state, and submitted proposed findings and conclusions which were patterned after the trial judge's actual ruling. R. 89-90.[1] Thereafter, the trial judge issued a minute entry adopting the findings and conclusions prepared by Appellant. R. 92. A copy of the findings and conclusions is in Addendum D. The transcript of the trial judge's oral findings is also in Addendum D. R. 114:105-06.

On January 16, 1998, Appellant entered a conditional plea of guilty to Theft, a second degree felony, and Burglary, a second degree felony. That plea was made pursuant to Ut.R.Crim.P. 11 and State v. Sery, 758 P.2d 935, 937-38 (Utah App. 1988), and preserved for appeal the denial of Appellant's motion to suppress. R. 51-58. On June 22, 1998, the trial judge entered judgment, sentencing Appellant to two concurrent terms of one to fifteen years at the Utah State Prison, and staying execution of

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[1] Appellant continued to maintain his Fourth Amendment claim. Appellant's submission of findings and conclusions which reflected the judge's actual ruling did not waive that claim; instead, it simply provided the judge with a written statement of his previous ruling.

the prison sentence and placing Appellant on probation on the condition he serve 12 months in jail and various other terms. R. 99.

STATEMENT OF FACTS

On July 1, 1997, Deputy Vaun Delahunty[2] obtained a search warrant to search the McArthur residence located at 2802 East 3900 South in Salt Lake County. State's Exhibit ("Exh.") 1; see Addendum E. The affidavit in support of the search warrant indicated that certain property consisting of a Waterford Crystal ashtray, various Lladro porcelain statues and a gold Dunhill cigarette lighter, which the officer believed to be evidence of crimes of burglary, theft and theft by receiving would be found at the McArthur residence. See Addendum E.

In support of the search warrant, the affidavit alleged that the Salt Lake City residence of a Mr. Clark was burglarized in early March, 1997, and items of personal property, "including numerous guns, computers, electronics, art objects, clothing, tools, alcohol, crystal, figurines, silverware, a Ford Bronco automobile and other items" were taken. Exh. 1 at 2. Additionally, the affidavit stated:

> Ms. Aimee Rolfe told your affiant that during the first part of March 1997, she was with Michael Todd McArthur and Dominic Newman when they said they were "going to work." The next morning when Aimee went back to Mr. Newman's residence, she observed the two men

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[2] The transcript indicates that the deputy's name was John Dellapiana. This appears to be incorrect. The Information, Search Warrant, Motion to Suppress filed by Appellant, and Memorandum filed by the state all refer to the officer as Deputy Vaun Delahunty. See R. 3-4, 24-6, 28-37; State's Exh. 1.

> unloading numerous items of personal property from Dominic's vehicle into his residence. The next day Dominic Newman took Aimee to the house where they had obtained the property, which is Mr. Clark's residence. On 30 June 1997, Aimee went to Mr. McArthur's residence located at 2802 East 3900 South, Salt Lake City, Utah. There she obtained a Kbar Marine Fighting Knife in a distinctive leather sheath from Michael Todd McArthur's bedroom and a Waterford Crystal cigarette lighter from an entertainment center shelf in the front room of the residence and gave them to your affiant. Mr. Clark has identified these items as being among those stolen in the above-described burglary. Aimee has seen a matching crystal ashtray on the above-mentioned entertainment shelf and two Lladro figurines in the home on 30 June 1997. Aimee observed the defendant in possession of a solid gold Dunhill brand cigarette lighter. On 30 June 1997, she used it to light up a cigarette. Mr. Clark has reported missing from his Home Lladro figurines, a Waterford crystal ashtray and a Dunhill solid gold cigarette lighter.

Exh. 1 at 2.

The affidavit did not mention that on June 30, 1997, Deputy Delahunty picked Aimee up in West Jordan so that Aimee could go to the McArthur house in the Holladay area and take some items out of the home. R. 114:18, 28. Aimee had told the deputy she could get evidence including a knife and crystal object from McArthur's home. R. 114:19, 24-5. Delahunty agreed to Aimee taking the property and told her, "that will be great." R. 114:65. The officer picked Aimee up and transported her to the house so that she could take the evidence out of the house and give it to him. R. 114:46. He knew that the house was the McArthur residence and suspected that it was the home of Appellant's mother. R. 114:45.

The affidavit also did not mention that the deputy waited in the car in the driveway while Aimee took the items out of the

house. R. 114:46. Delahunty admitted that he "was kind of nervous about the situation." R. 114:20. Aimee went to the front door, which was locked, then walked to the east side of the house, and the officer lost sight of her. R. 114:20. Aimee returned to the officer's car five to ten minutes later with a Tupperware bin containing personal property, a crystal ashtray and a Marine Corps fighting knife. R. 114:21. She immediately turned the ashtray and knife over to Delahunty, who kept the items and initiated a search warrant. R. 114:23. Aimee told Delahunty that she used a cigarette lighter, which she claimed McArthur kept on his person, while she was inside the McArthur residence. R. 114:66.

Aimee reported to the deputy that she had entered the residence through the east door, but did not tell him whether the door was open or how she had gained access. R. 114:22. She said that McArthur and his niece were at home. R. 114:22.

The affidavit also did not mention that the deputy did not obtain consent to search the McArthur residence on June 30, 1997. All of the June 30, 1997 information in the affidavit was obtained when Aimee entered the residence while Deputy Delahunty sat in his car in the driveway.

Additionally, the affidavit did not mention that Aimee had been picked up after trying to pass checks which were stolen in the burglary. R. 114:4-5. Aimee had the stolen checks in her possession and therefore was in possession of stolen property. R.114:35. She had been cashing the stolen checks and admitted

committing forgeries with those stolen checks. R. 114:35-6. Because she possessed property stolen in the burglary, Aimee was also a possible suspect in the burglary. R. 114:37. Aimee's work with Delahunty came about because she had been picked up on the forgeries. R. 114:40.

The burglary in this case occurred on March 3 or 4, 1997. Deputy Delahunty, a burglary detective who had been with the Salt Lake County Sheriff's office for eighteen years, was one of the officers investigating the burglary. R. 114:3. He became aware of Aimee when Sgt. Wardell told him in late May or early June to contact Deputy Flores, who was investigating Aimee's forgeries. R. 114:4-5. Deputy Flores gave Delahunty the address of an apartment on Redwood Road where he could reach Aimee. R.114:5.

Deputy Delahunty went to the apartment on Redwood Road and was told that Aimee had moved. R. 114:5. The occupants of the apartment gave Delahunty a phone number and told him that Aimee was living at that location with her boyfriend's mother. R. 114:5.[3]

Delahunty located the address associated with the phone number he had been given. R. 114:6. That address was 2802 East 3900 South. R. 114:6. Delahunty ascertained that the house was the McArthur home and believed that the house was probably owned

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[3] Appellant objected to this testimony as hearsay and lacking in reliability in violation of due process. R. 114:6. The trial judge admitted it "to show why he did what he did," but indicated that the testimony did not "go[] to the truth of the matter asserted." R. 114:6. Since the testimony was not admitted to prove that Aimee lived in the McArthur house, it does not provide support for such a finding.

by McArthur's mother. R. 114:45, 48.[4]

Deputy Delahunty went to the McArthur address on June 16, 1997, and knocked on the door. R. 114:7. A child answered. R. 114:7. When the officer asked if Aimee was there, the child responded, "yes," then got Aimee. R. 114:7.[5]

The deputy identified himself to Aimee and asked whether she knew anything about the burglary. R. 114:7. Aimee appeared nervous and asked to talk later. R. 114:7.

The next day, June 17, 1997, Aimee went to the police substation where she was interviewed by Delahunty. R. 114:8, 14. She told Delahunty that she was at Dominic Newman's house late at night on May 3, 1997.[6] According to Aimee, McArthur was also there, and he and Newman told everyone that they were "going to work." R. 114:11. Aimee said that everyone laughed because "going to work" meant committing a burglary. R. 114:11.

Aimee said that the next day, she returned to Newman's house and saw Newman and Appellant unloading items from Appellant's car

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[4] During his testimony, Delahunty suggested that Aimee worked with him because "she wanted to come clean and get her life in order" and "got religion." R. 114:39. She did not approach Delahunty, however, and agreed to work with him only after she had been picked up on the forgeries and knew "she was in a possible bad position." R. 114:4-5, 39.

[5] At the preliminary hearing, Delahunty did not testify that he had seen Aimee at the residence on June 16, 1997. Instead, he testified that the only information he had indicating that Aimee might have lived at the McArthur residence at some time was hearsay. R. 114:50.

[6] The officer testified that this incident occurred on May 3, 1997 rather than on March 3, 1997, when the burglary occurred. R. 114:11.

and taking them into Newman's house. R. 114:11. The items, which included, among other things, guns, Chinese vases and crystal, were put in a closet or displayed in Newman's house. R. 114:11-12. According to Delahunty, these items were similar to what was taken in the burglary. R. 114:12. Aimee also told Delahunty that Newman had described to her how he and McArthur had disassembled the gate in order to gain entry, and had taken Aimee to the burglarized property. R. 114:12.

At some point in mid-June, 1997, Aimee also told Deputy Delahunty that Appellant had some of the stolen property at his house, which was located at 2802 East 3900 South. R. 114:15. Aimee said that McArthur wore some of the stolen property and kept some in his bedroom. R. 114:16. According to Delahunty, taking the property from McArthur's home was Aimee's idea, but the deputy agreed to it and told Aimee it would be great if she got the property from McArthur's home. R. 114:19.

On June 19, 1997, Delahunty picked up Aimee in West Jordan. R. 114:17. At that time, she was staying in West Jordan with a friend. R.114:17. The purpose of the June 19 excursion was to have Aimee direct Delahunty to the burglarized house, which she did. R. 114:14, 17.

Between June 17 and 30, 1997, although Delahunty drove by or was near the McArthur house everyday, he did not see Aimee at the McArthur residence. R. 114:44.[7] Delahunty testified that as of

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[7] According to Delahunty, Aimee had told him that she was out of state for a period of time in June 1997 attending to details after her grandfather passed away in South Dakota. R. 114:68-9.

June 19, Aimee was staying with a friend in West Jordan and he picked her up in West Jordan on two occasions; he also testified that when he took Aimee to the McArthur residence to take items, Aimee indicated she had access to the house because she was living there. R. 114:19. Delahunty knew that as of June 19, Aimee had begun staying with friends. R. 114:64. He testified that he did not know where she was living on June 19, and that she may not have been living at the McArthur house. R. 114:64. He also testified that he thought she was living there "on and off" but did not ask her for consent to search because he "didn't feel good about" it since her name was not McArthur, and because he did not think "she had the legal right to grant a search." R. 114:54.

Deputy Lone testified that the McArthur house was not Aimee's permanent residence, and that she had stayed there as a guest rather than living there on an ongoing basis. R. 114:74.

Tracy McArthur, Appellant's mother, testified Aimee had stayed in the house for a little while, but had moved out long before the search warrant was executed. R. 114:79. Aimee visited occasionally, as she had for about ten years. R. 114:82.

After Delahunty took Aimee to the McArthur house to get items inside, he drove Aimee to a friend's house, then initiated a search warrant. R. 114:23. Delahunty obtained the search warrant on July 1, 1997, the day after he took Aimee to the McArthur house. See Addendum E.

Delahunty and other officers served the warrant on July 3,

1997. R. 114:30. When they served the warrant, they entered the house through an unlocked sliding glass door on the east side of the house. R. 114:30. They found McArthur and another young man in a bedroom-type area in the basement. R. 114:30-1.

As part of the search, officers recovered a number of items which Delahunty indicated fit the descriptions of items taken in the burglary. R. 114:32. Delahunty interrogated McArthur when he served the search warrant. R. 114:32. McArthur waived his Miranda rights and made incriminating statements regarding the burglary. R. 114:32-3.

Delahunty did not know whether any charges were filed against Aimee. R. 114:25, 65. He knew that Deputy Flores was investigating the forgeries, but did not ask whether Aimee was charged. R. 114:26. He did discuss with Aimee "that there may be jurisdictions or other deputies or officers that would be looking at her for activity that she's engaged in [but that he] didn't know of any." R. 114:26. He also told her that "there could be some heat rolling [her] way, in connection with [the] forgeries." R. 114:38.

SUMMARY OF ARGUMENT

Aimee acted as an agent for Deputy Delahunty when she searched Appellant's home and seized items. Delahunty was aware of Aimee's search, encouraged her to conduct the search and participated in the search by picking Aimee up in West Jordan, driving her to the McArthur home in Holladay, and waiting in the driveway while she went inside and seized the items. Aimee could

not have consented to the search of McArthur's home and Deputy Delahunty could not otherwise have conducted the search himself. The Fourth Amendment was therefore violated by Aimee's search of the residence.

The search pursuant to the warrant was the fruit of Aimee's illegal search. The affidavit relied solely on items seized and observed by Aimee during the illegal search to establish probable cause to believe that items taken from the burglary would be found in McArthur's home. Evidence seized during the search by officers should therefore be suppressed.

The search pursuant to the search warrant also violated the Fourth Amendment since Deputy Delahunty intentionally or recklessly omitted material information and conveyed a false impression about Aimee's role. When the affidavit is assessed in light of the omissions and misrepresentations, it fails to establish probable cause. Evidence seized pursuant to the warrant should be suppressed.

McArthur's statements when he was arrested shortly after the search warrant was executed should also be suppressed. The circumstances indicate that the statements were not sufficiently attenuated from the police misconduct in using Aimee to conduct a search and obtaining a search warrant without accurately detailing information so as to allow their admission.

ARGUMENT

POINT. THE FOURTH AMENDMENT REQUIRES THAT ALL OF THE EVIDENCE SEIZED FROM APPELLANT'S HOME ALONG WITH APPELLANT'S STATEMENTS FOLLOWING ARREST BE SUPPRESSED.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. Amend. IV, U.S. Const. When a search is conducted pursuant to a search warrant, the evidence must be suppressed where the search warrant fails to establish probable cause, is the fruit of prior illegal activity, or when material misrepresentations or omissions impacted on the existence of probable cause. In this case, the affidavit in support of the search warrant was based primarily on evidence which was illegally seized by Aimee, who was acting as a government agent. Therefore, the search warrant was the fruit of the prior illegality. Additionally, the officer intentionally or recklessly misrepresented material facts and omitted material information; when the affidavit is considered in light of the misrepresentations and omissions, it fails to establish probable cause. Further, Appellant's arrest was the fruit of the illegal search; his statements to officers following arrest must likewise be suppressed.

A. AIMEE ILLEGALLY SEIZED EVIDENCE FROM APPELLANT'S HOME, IN VIOLATION OF THE FOURTH AMENDMENT.

When Aimee entered Appellant's home on June 30, 1997, she was acting as a government agent and her warrantless search violated the Fourth Amendment. Moreover, she could not consent to a search of the McArthur home, and Delahunty could not have otherwise conducted a search.

1. Aimee Acted as an Agent for Deputy Delahunty When She Searched Appellant's Home.

While the Fourth Amendment protection does not apply to

searches conducted by private individuals acting on their own, it does apply where the totality of circumstances indicate that the individual was acting as an agent or instrument of the police. See State v. Watts, 750 P.2d 1219, 1221 (Utah 1988); State v. Koury, 824 P.2d 474, 477 (Utah App. 1991); State v. Knudsen, 500 N.W.2d 84, 85 (Iowa App. 1993).

> In the "gray area" between the extremes of overt governmental participation in a search and the complete absence thereof, the search must be judged according to the nature of the governmental participation in the search process and in light of all of the facts and circumstances of the case.

Watts, 750 P.2d at 1221 (footnotes omitted). The burden of establishing governmental involvement is on the defendant. Id.; Koury, 824 P.2d at 477.

"[O]vert governmental participation in a search" or an express request by officers that the private individual conduct the search is not required in order to demonstrate sufficient governmental involvement to implicate the Fourth Amendment. Instead, passive acquiescence by officers in the individual's actions also implicates the Fourth Amendment protection. See State v. Anonymous, 379 A.2d 946, 947 (Conn. 1977) (citing inter alia, Moody v. United States, 163 A.2d 337 (D.C. Ct. App. 1960)); People v. Tarantino, 290 P.2d 505 (Cal. 1955); see also Koury, 824 P.2d at 477 (first factor to be considered is "whether government knew of or acquiesced to the search); Watts, 750 P.2d at 1222 (same).

The Supreme Court articulated "[t]wo critical areas of inquiry ... which bear upon the determination of whether a

private person or body has conducted a search as a governmental agent." Watts, 750 P.2d at 1222. Those two critical areas are: "(1) the government's knowledge of and acquiescence in the intrusive conduct, and (2) the intent and purpose of the person(s) or body(ies) conducting the search." Id. at 1222. "As part of the inquiry in Watts, the Supreme Court considered factors such as whether there was an ongoing relationship between the informant and the police, whether the informant was rewarded for his efforts, and whether the police gave the informant any direction or guidance." Koury, 824 P.2d at 477 (citing Watts, 750 P.2d at 1222-23). Moreover, in assessing these areas of inquiry, two basic principles must be kept in mind: (1) "law enforcement agencies out of necessity rely heavily on informants," and (2) the Fourth Amendment "preclude[s] law enforcement officers or agencies from having informants do for them what they cannot legally do themselves." Watts, 750 P.2d at 1221.

In Watts, the Supreme Court held that an agency relationship did not exist where officers did nothing more than tell an informant that a case against him would be dismissed if he provided officers with information which led to a criminal charge. Id. at 1220. The Court reasoned that any subsequent search made by the informant was a private search. Although there was some governmental involvement, the "'offer' given to the informant was 'far too vague and general to constitute governmental knowledge of the search.'" Id. at 1223. Moreover,

the defendant in Watts was motivated by his personal desire to not be prosecuted for a crime. Given these factors and the lack of ongoing relationship between officers and the informant, the Court concluded that the informant's "specific actions were for the most part his own and were not substantially motivated by the prompting and encouragement of the [officers]." Id.

In Koury, this Court did not reach the issue of whether the private citizen, Joseph Horvath, acted as an agent for officers when he observed cocaine residue in the defendant's house. Instead, this Court concluded that Horvath, who had a key and periodically entered the house to feed the defendant's pets, had permission to be in the house and that "it was proper for him to report [to officers] what he observed in defendant's house." Koury, 824 P.2d at 478. This Court concluded:

> We find no error in the court's conclusion that Horvath's entry into defendant's house was not intrusive and therefore, lawful. Accordingly, it was proper for him to report what he observed in defendant's house.

Koury, 824 P.2d at 478.

In Koury, the officers did not direct Horvath in anyway, and conducted their own investigation after Horvath relayed his observations. This Court focused on Horvath's observations while inside the house, concluding that since Horvath had permission to be inside, he could properly report what he saw inside. By contrast, Aimee removed items, without permission to do so, from McArthur's house.

Other courts have formulated tests similar to that in Watts

for determining whether a citizen acted as an agent of the state. For instance, in State v. Coy, 397 N.W.2d 730, 731 (Iowa 1986), *rev'd on other grounds*, Coy v. Iowa, 487 U.S. 1012 (1988), the Iowa Supreme Court articulated the following test:

> Whether a private citizen has become an agent or instrument of the state depends on the total circumstances surrounding the challenged conduct. Factors variously considered and weighed by courts include: (1) whether the state directly or indirectly encouraged or participated in the challenged conduct; (2) whether the state, although knowing the challenged conduct was occurring or likely to occur, did nothing to prevent it; (3) whether the challenged conduct was intended to assist law enforcement officials or to further some other end; and (4) whether law enforcement officials themselves could have undertaken the conduct without violating the defendant's fourth amendment rights.

Knudsen, 500 N.W.2d at 86 (quoting Coy, 397 N.W.2d at 731 (citations omitted)).[8]

Various courts have held that under the totality of the circumstances, a private citizen was acting as an agent or instrument of the government. See, e.g., State v. Becich, 509 P.2d 1232 (Or. 1973) (Fourth Amendment violated where officer asked private individual to obtain items, drove by while

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[8] This test is essentially the same as the test articulated in Watts. The first two factors in the Coy test address the first Watts factor--"the government's knowledge of and acquiescence in the intrusive conduct." See Watts, 750 P.2d at 1221. The third factor in the Coy test is similar to the second Watts factor--"the intent and purpose of the person(s) or body(ies) conducting the search." Id. The final Coy factor is one of the basic principles articulated in Watts, 750 P.2d at 1221; if the government could have conducted the search without violating the Fourth Amendment, inquiry into whether the informant was an agent or instrument of the government is unnecessary. Appellant's argument that the officer could not have conducted the search since Aimee could not consent to a search of Appellant's home addresses this fourth Coy factor. See discussion infra at 22-32.

individual was removing items from defendant's house, and met individual nearby to obtain items); Moody v. United States, 163 A.2d at 339-41 (Fourth Amendment violated where officer stood in hallway while complaining witness entered through open door of defendant's apartment and obtained complaining witness's possessions which were in plain view inside apartment); Commonwealth v. Borecky, 419 A.2d 753, 755 (Pa. Super. 1980) (Fourth Amendment violated where officer knew of search beforehand and acquiesced in search); State v. Boynton, 574 P.2d 1330 (Haw. 1978) (Fourth Amendment violated by search by informant who was actively recruited by officers and paid a minimal amount for information over a year-long period even though officers did not direct informant to conduct search).

In Anonymous, 379 A.2d at 947, the officers had several contacts with an informer who was "encouraged to continue his surveillance of the defendants and to furnish such information as he might acquire." Anonymous, 379 A.2d at 947. After the informer stole cocaine from the defendants, the officers used the cocaine as the basis for obtaining a search warrant. Although the officers did not suggest that the informer take anything from defendants' home, the court recognized that "they must have realized that the substance handed to them by the informer had been stolen from the defendants." Id. at 947.

The circumstances in Becich also required suppression. An officer who was investigating a burglary questioned Boley, a suspect in that burglary. Boley told the officer that the

defendant committed the crime and that the stolen items were at the defendant's house and Boley could get them back. The officer told Boley that he would drive by and observe Boley taking the items from defendant's house, then meet Boley in a nearby school parking lot. After seeing Boley at the defendant's house loading boxes into his car, the officer met Boley at the school and received the evidence. He thereafter obtained a search warrant and found marijuana in the defendant's house while executing the warrant. Becich, 509 P.2d at 1234.

The court held that the officer's involvement, including his request for return of the stolen items, his surveillance as Boley took the items, and his knowledge that he would need a search warrant, were sufficient to taint the seizure. In reaching that decision, the court recognized that the purpose for the exclusionary rule would be served by suppressing the evidence in that case.

> The purpose of the exclusionary rule in this type of case is to discourage officials from participating or engaging indirectly in searches which would be illegal if conducted by the official. It seems clear that exclusion of the evidence in this case would be in consonance with the purpose of the exclusionary rule if the extent of participation of the officer in the unlawful search was sufficient to make the police a party to the illegal search. The extent of official involvement in the total enterprise is the crucial element.

Becich, 509 P.2d at 1234 (citation omitted); see also Boynton, 574 P.2d at 1336 (recognizing that exclusionary rule served by suppressing evidence and that admitting evidence "would tempt the police to use persons unaffected by the fourth amendment

restriction to obtain evidence which they cannot directly obtain").

In the present case, pursuant to the factors articulated in Watts, 750 P.2d at 1222, Aimee acted as an agent for Deputy Delahunty when she searched Appellant's home.[9] The first factor in Watts weighs in favor of finding an agency relationship since Deputy Delahunty knew of, acquiesced in, and even encouraged the intrusive conduct. Although Delahunty claimed that Aimee came up with the idea of searching McArthur's home and seizing items, the deputy acknowledged that he actively agreed to it and told Aimee that it would be great if she took some of the property from McArthur's home. R. 114:19. This conduct alone was sufficient to establish "the government's knowledge and acquiescence in the intrusive conduct." See Watts, 750 P.2d at 1222.

Additional evidence existed, however, which established that the government knew of and acquiesced in the conduct, and otherwise created an agency relationship with Aimee. Delahunty directly encouraged Aimee and participated in Aimee's activities.[10] In addition to telling Aimee it would be great if she took some things, Delahunty enabled her to do so by picking her up in West Jordan and transporting her to the house.

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[9] The trial judge did not make a determination as to whether Aimee was acting as an agent for the deputy when she searched the McArthur home. Instead, he concluded that the affidavit was supported by probable cause. R. 91.

[10] The first Coy factor--"whether the state directly or indirectly encouraged or participated in the challenged conduct..." (Coy, 397 N.W.2d at 731)--weighs in favor of an agency relationship.

Additionally, he sat in the car in the driveway and immediately took the items from Aimee when she returned to the car. Further, Deputy Delahunty knew of Aimee's planned conduct and did nothing to prevent it[11]; indeed, he actively encouraged it. Hence, under the first Watts factor, an agency relationship existed in this case.

The second Watts factor also weighs in favor of an agency relationship. The challenged conduct--Aimee's search of the house--was intended to assist law enforcement officials. See Watts, 750 P.2d at 1221. Indeed, Deputy Delahunty immediately took the seized property from Aimee and obtained a search warrant the next day. Moreover, Delahunty emphasized that he had nothing to do with any potential charges against Aimee, and indicated that Aimee was not motivated by any potential benefit to herself. Instead, she entered the McArthur house and provided seized items to officers to aid them in their investigation of Appellant.

Unlike the situation in Watts, 750 P.2d at 1220, Aimee was not given a specific offer that charges against her would be dismissed if she obtained evidence against McArthur. Although Aimee faced potential charges, Delahunty was not responsible for those charges, and told her "that there may be jurisdictions or other deputies or officers that would be looking at her for activity that's she's engaged in, [but that he] didn't know of

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[11] The second Coy factor also weighs in favor of an agency relationship since Delahunty knew "the challenged conduct was occurring or likely to occur, [and] did nothing to prevent it." Coy, 397 N.W.2d at 731.

any." R. 114:26. Any possible benefit to Aimee in taking the evidence was so amorphous and general that it fails to defeat this factor.

Finally, Delahunty could not have conducted the search himself. This fourth factor articulated in Coy, 397 N.W.2d at 731, is one of the principles embraced in Watts, 750 P.2d at 1221. Aimee could not have consented to a search as set forth more fully in subpart 2(a). Additionally, there were not exigent circumstances which would have justified a search. Finally, absent Aimee's search and seizure of items, the officers did not have probable cause to believe items taken in the burglary would be found in the McArthur home.

Under the totality of circumstances, Aimee was an agent of Deputy Delahunty when she searched McArthur's home and seized items therein. Appellant's Fourth Amendment rights were violated by her conduct.

2. Deputy Delahunty Could Not Have Conducted the Search.

(a) Aimee Could Not Consent to a Search of Appellant's Home.

"Voluntary consent to search is one of the well established exceptions to the warrant requirement of the Fourth Amendment." State v. Elder, 815 P.2d 1341, 1343 (Utah App. 1991). Consent to search can be given by the defendant or by "'a third party who possesse[s] common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" State v. Davis, 965 P.2d 525, 532 (Utah App. 1998) (quoting

United States v. Matlock, 415 U.S. 164, 171 n. 7, 94 S.Ct. 988, 993 n. 7, 39 L.Ed.2d 242 (1974)).

In Matlock, the United States Supreme Court held that a third party other than the defendant could consent to a search where the third party had common authority over the area searched. The Court indicated that

> [c]ommon authority to consent to search rests ... on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id.

A warrantless entry made pursuant to third party consent does not violate the Fourth Amendment where the officers reasonably believed at the time of the search that the third party had common authority and the ability to consent even if it is later learned that no such common authority existed. See Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).

The burden is on the state to prove by a preponderance of the evidence common authority to consent or a reasonable belief by officers that the third party had common authority to consent. Brown, 853 P.2d at 855. On appeal, this court reviews the trial judge's underlying factual findings under a clearly erroneous standard; it reviews the trial court's ultimate legal conclusion for correctness, according the trial judge "a measure of discretion." Davis, 965 P.2d at 532 (citing Elder, 815 P.2d at

1343).

In Davis, this Court held that the state had failed to establish its burden of proving that the officers reasonably believed that the defendant had common authority over a vehicle parked on the premises. Instead, the officers merely assumed that common authority existed without ascertaining whether the vehicle belonged to someone else or whether the defendant had joint access or control.[12] Davis demonstrates that where the officer fails to establish common authority to consent, he does not have a reasonable belief that the search is proper.

In Elder, this Court held that a homeowner's daughter who had been given keys to the house in order to pick up personal items for her hospitalized mother did not have common authority to consent to a search of the home's crawlspace. Elder, 815 P.2d at 1343-5. This Court reasoned that the evidence did not support an inference that the daughter had the authority to care for her mother's home. Id. at 1343. Although the evidence established that the mother gave the daughter keys to "'the living areas of her home' to pick up some personal items," the daughter's testimony as to her authority was "at odds" with an inference that she had authority to care for the home, and "it does not

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[12] Davis involved the search of a parolee's house and surrounding property. Davis, 965 P.2d at 527-28. The "common authority" test of Matlock applies to parole searches in determining what areas can properly be searched pursuant to the lesser reasonable cause standard for parole searches; areas where the parolee has "common authority" as outlined in Matlock are subject to parole search. Hence, the common authority analysis in Davis is applicable to third party consent searches. See Davis, 965 P.2d at 531-35.

follow from the delivery of keys, with the request that specific items be fetched, that one has necessarily been asked to care for a home, much less that one has become entitled to invite others into the home to search." Id. This Court concluded that the delivery of the keys to fetch items did not give the daughter authority to consent to a search of the crawlspace, an area which was not entered with the use of the keys.

Moreover, this Court concluded in Elder that it was not reasonable for the officers to believe that the daughter had the authority to consent to a search of the crawlspace because

> The officers who conducted the search knew these facts at the outset: (1) [the daughter] did not live at the house, (2) both occupants of the house were absent, (3) [the daughter] did not have a key to the crawlspace, and (4) [the daughter's] husband had to kick the crawlspace door open to gain access to the crawlspace.
>
> Confronted with these facts, it is not possible for the officers to have reasonably believed that [the daughter] had authority to consent to the search.

Id. at 1344.

By comparison, in Brown, 853 P.2d at 855, the Utah Supreme Court held that the owner of a trailer at a brine shrimp camp had common authority to consent to a search of the common areas of a trailer. The evidence showed that ground radios and the camp refrigerator, which was used to store food for all people in the camp, were in the trailer. The employees and owner could enter the trailer at any time to obtain food or the radios. Based on this, the Court held that the owner "had an unrestricted right of access to at least the common area" of the trailer and therefore "had the right to grant the officers authority to enter that

area." Brown, 853 P.2d at 856.

The Seventh Circuit Court of Appeals held in United States v. Harris, 534 F.2d 95, 97 (7th Cir. 1976), that officers had not obtained proper third party consent to search since the individual who consented did not have common authority over the property. Edwardsen, the third party, had known the defendant for three weeks and had been at the defendant's apartment a dozen times. During Edwardsen's last visit, the defendant had left and told Edwardsen to lock the door on his way out. Edwardsen, after being arrested, told officers that there was evidence of a robbery in the apartment. Edwardsen also told officers "that he had permission to use the apartment, but did not have a key." Id. at 96. In addition, Edwardsen told officers they could gain access through a sliding glass door, which they did. In concluding that Edwardsen did not have common authority over the apartment, the court reasoned that "since [defendant] did not give Edwardsen a key, it can hardly be surmised that he expected Edwardsen to enter and leave the locked apartment at will." Id. Since the lack of key was also known to the officers, the search violated the Fourth Amendment.

In the present case, the trial judge found that (1) Aimee had permission to enter the McArthur residence on June 30, 1997; (2) she had habitually come and gone from the residence; (3) she lived at the McArthur residence; (4) McArthur "expected and was aware that Aimee had a right to enter the house on June 30, 1997"; and (6) Aimee was a citizen informant. R. 90, 114:105.

The finding that Aimee lived in the house on June 30, 1997 is clearly erroneous.[13] The marshaled evidence supporting the finding that Aimee lived in the house on June 30 is as follows:

1. Deputy Delahunty testified that when he went to the McArthur home on June 16, 1997, Aimee was there, and that she lived at the house in mid-June, 1997. R. 114:7, 16.

2. Aimee told Delahunty she had access to the house. R. 114:17. She told him she had access to the house because she was living there. R. 114:19. She entered the house and returned with items from the house. R. 114:22-3.

3. When Delahunty drove to the house on June 30, 1997, Aimee told him to park in the driveway while she went inside. R. 114:20.

Delahunty's testimony as to whether Aimee lived at the McArthur house on June 30, 1997 was conflicting, however, and, as

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[13] The determination that Aimee was a citizen informant is a legal conclusion rather than a factual finding, and is incorrect. See generally Koury, 824 P.2d at 477 (determination as to whether individual was a police agent is a question of law). A citizen informant is someone who is the victim or witness of a crime, and who "'volunteer[s] information out of concern for the community and not for personal benefit.'" Kaysville City v. Mulcahy, 943 P.2d 231, 235 (Utah App. 1997) (quoting State v. Brown, 798 P.2d 284, 286 (Utah App. 1990)). By contrast, "[a] police informant is one who gains information through involvement in criminal activity or who is "'motivated ... by pecuniary gain.'"" Mulcahy, 943 P.2d at 238 n. 2 (quoting State v. Evans, 692 So.2d 216, 219 (Fla. Dist. Ct. App. 1997) (further citation omitted). Aimee was not a concerned citizen who voluntarily got involved out of the goodness of her heart. Instead, she gained information through her involvement with the criminal activity, became involved only when the deputy sought her out, and had concerns about possible criminal charges against herself when supplying information. Her information did not have the heightened reliability accorded citizen informants; instead, it was tainted by her involvement and self-interest. See discussion infra at 40-41.

a whole, establishes that Aimee was not living in the McArthur house at that time. Delahunty testified that as of June 19, Aimee was staying with a friend in West Jordan. R. 114:18, 19, 64. Additionally, he testified that as of June 19, he did not know where Aimee was living, and that she may not have been living at the McArthur house. R. 114:64. When asked whether he believed Aimee when she said she was living at the house on June 30, Delahunty testified that he believed she had access to the house, "that she lived there, that she was staying there, living there off and on." R. 114:52.

Additionally, on June 19, 1997, Delahunty picked Aimee up at a house in West Jordan where he thought she was staying with a friend. R. 114:18. Delahunty again picked Aimee up in West Jordan on June 30. R. 114:18. Aimee told Delahunty that "she had some of her personal property that she needed to pick up pending her move to her mother's home." R. 114:19.

Given the contradictions in Delahunty's testimony and his testimony as a whole, the trial judge's finding that Aimee lived in the McArthur home on June 30 was unreasonable and clearly erroneous. In addition, Deputy Lone testified that although Aimee occasionally stayed as a guest at the McArthur home, the home was not her permanent residence. R. 114:74. Moreover, McArthur's mother testified that Aimee did not live in the home. R. 114:79. The clear weight of the evidence establishes that Aimee was not living in the McArthur home on June 30.

Regardless of whether the finding that Aimee lived in the

McArthur home on June 30 is clearly erroneous, the facts demonstrate that Aimee did not have sufficient relationship with the property to consent to a search. Assuming that the finding that Aimee lived there was clearly erroneous, the remaining evidence of her relationship with the McArthur property established that she occasionally came and went as a guest and that she knew how to enter through an open sliding glass door. Guests do not have the authority to consent to a search. See generally Elder, 815 P.2d at 1343-5 (daughter who had keys to house could not consent to search of crawl space).

Even if Aimee were "living" at the McArthur house, she did not have the authority to consent to a search of the house as a whole or McArthur's bedroom. First, the state presented no evidence that Aimee had common authority over McArthur's bedroom at the time of her search. The evidence showed only that at some point prior to June 30, Aimee, Appellant and Appellant's mother lived in the upstairs front portion of the McArthur house. R. 114:78. Aimee took the knife from Appellant's bedroom. State's Exh. 1 at 2. The state failed to sustain its burden of establishing that Aimee had common authority over the bedroom. See Davis, 965 P.2d at 534 (officers failed to establish that parolee had common authority over vehicle).

Second, even if Aimee were "living" at the McArthur home, the state failed to establish that she had a sufficient relationship with the property to establish common authority to consent. The evidence unequivocally established that even if

Aimee were "living" at the McArthur residence on June 30, such residence was only temporary and sporadic. At the end of May, she was "living" in an apartment on Redwood Road. By June 19, she was staying with a friend in West Jordan. Sometime during June, she was in South Dakota. At the end of June, she was planning to move back in with her mother in Heber City and removing the last of her personal items from the home.

At best, Aimee was a transient guest who was staying at the McArthur residence on June 30. As a transient guest, she did not have sufficient relationship with the property to consent to a search.[14]

Under these circumstances where Aimee did not have the authority to consent to a search, Delahunty could not have conducted the warrantless search.

(b) Delahunty Did Not Otherwise Have Authority to Search Appellant's Home When Aimee Conducted the Search on June 30.

On June 30, 1997, Delahunty could not have conducted the search himself. He did not have a warrant, and none of the exceptions to the warrant requirement were met. Brown, 853 P.2d at 854. Those exceptions include: (a) consent searches, (b) searches involving probable cause and exigent circumstances, (c) seizures of evidence in plain view following a lawful intrusion or in a public place, and (d) searches incident to arrest.

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[14] Nor would it have been reasonable for Delahunty to believe Aimee had the authority to consent under these circumstances. See Illinois v. Rodriquez, 497 U.S. 177; Davis, 965 P.2d at 534. Indeed, Delahunty acknowledged that he did not believe that Aimee could consent to a search. R. 114:54.

See id.

As set forth previously, Aimee did not have the authority to consent. Additionally, McArthur, who did not even know a search was occurring, did not consent. Nor do the facts support a plain view analysis or search incident to arrest since McArthur was arrested days later, and the officer did not have a lawful right to be in the house.

Moreover, probable cause and exigent circumstances justifying a warrantless search did not exist. The state bears an especially heavy burden in establishing probable cause and exigent circumstances when a warrantless search of a house is involved. State v. Yoder, 935 P.2d 534, 540 (Utah App. 1997).

Exigent circumstances include circumstances where the delay in obtaining a search warrant "would risk 'physical harm to the officers or other persons, the destruction of relevant evidence, [or] the escape of the suspect.'" State v. Beavers, 859 P.2d 9, 17 (Utah App. 1993) (citation omitted). McArthur was unaware of the police interest in him and therefore none of these concerns were heightened. In addition, there is no evidence in this case that any of these exigent circumstances existed.

Nor did probable cause to search the McArthur home exist when Aimee conducted her search. Probable cause is based on the totality of circumstances; ""[p]robable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a [person] of reasonable

caution in the belief that' an offense has been or is being committed."" Yoder, 935 P.2d at 540 (quoting State v. Dorsey, 731 P.2d 1085, 1088 (Utah 1986) (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1949))).

Although Aimee told Delahunty that items from the burglary were in the McArthur home, Aimee's reliability was suspect due to her possession of items stolen in the burglary and her involvement in other crimes, including forgery, which is a classic crime of dishonesty. See State v. Wight, 765 P.2d 12, 18 (Utah App. 1988) (recognizing that crimes of dishonesty which impeach credibility under Utah R. Evid. 609(a)(2) are crimes involving fraud or deceit). Aimee's word was not "reasonably trustworthy" given her status as a police informant and her background to establish probable cause. See Kaysville City v. Mulcahy, 943 P.2d 231, 238 (Utah App. 1997) (police informant has less reliability than citizen informant); State v. Potter, 860 P.2d 952 (Utah App. 1993) (reliability of police informant's information not established). In the absence of corroboration of her statements that items taken in the burglary were in the McArthur house, Delahunty lacked probable cause to search the house.

Since an exception to the warrant requirement did not exist when Aimee searched McArthur's home, Delahunty could not have conducted the search. Aimee's search of McArthur's home violated the Fourth Amendment.

B. INFORMATION IN THE AFFIDAVIT WAS FRUIT OF THE ILLEGAL SEARCH; ALL ITEMS SEIZED PURSUANT TO THE SEARCH WARRANT MUST BE SUPPRESSED.

The exclusionary rule requires that evidence obtained from the search of McArthur's home pursuant to a search warrant be suppressed. See Wong Sun v. United States, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963); Borecky, 419 A.2d at 757. Because the evidence seized by Aimee during the illegal search contributed significantly to the affidavit in support of the search warrant, the evidence seized pursuant to the search warrant was the fruit of the poisonous tree. See Wong Sun, 371 U.S. at 487, 83 S.Ct. at 417. Indeed, the connection between Aimee's unlawful search and the obtaining of the search warrant is not "so attenuated as to dissipate the taint" of the unlawful activity. Wong Sun, 371 U.S. at 487, 83 S.Ct. at 417.

In Becich, 509 P.2d at 1234, the court held that evidence seized pursuant to a search warrant must be suppressed since the warrant was based on a prior illegality. "[A]n intervening act is required to purge the taint of the initial illegality." Id. (footnote omitted). Because the illegal seizure by the police agent in Becich "prompted the securing of the search warrant ... [and] [t]he progression was straight, from the initial seizure to the search warrant" and seizure of contraband, the court held that the contraband must be suppressed. Id.

The court in Anonymous also suppressed evidence seized pursuant to a search warrant because the evidence seized pursuant to the warrant was tainted by the original illegal seizure by a

police agent. See Anonymous, 379 A.2d at 947 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 64 L.Ed. 319, 40 S.Ct. 182 (1920) (suppressing evidence seized pursuant to warrant because evidence seized pursuant to original illegality "was a highly significant part of the affidavit," and warrant was therefore "tainted with the original illegality as the 'fruit of the poisonous tree'")); see also Borecky, 419 A.2d at 757 (suppressing evidence seized pursuant to warrant as "fruit of the poisonous tree" where "the sample contraband seized by the informant obviously supplied the foundation upon which the subsequent search warrant was obtained ... "); Boynton, 574 P.2d at 1336 (suppressing evidence seized pursuant to search warrant where "search warrant was based upon the information gleaned from the informant's search").

In this case, the warrant was the direct fruit of the Fourth Amendment violation. Delahunty took the items from Aimee when she left the house. He immediately set about obtaining a warrant, as evidenced by the fact that he obtained it the next day. The affidavit relies solely on the items Aimee seized and/or observed on June 30, 1997 as the basis for establishing that items from the burglary were in the McArthur house. Given these circumstances, the affidavit and warrant are the fruit of the poisonous tree; items seized during Aimee's search as well as items seized pursuant to the search warrant should be suppressed.

C. WHEN THE AFFIDAVIT IS CONSIDERED ABSENT THE ILLEGALLY SEIZED EVIDENCE AND INCLUDING THE OMITTED INFORMATION, PROBABLE CAUSE TO SEARCH APPELLANT'S HOME DID NOT EXIST.

Appellant's motion to suppress should be reversed since the affidavit, when considered in light of the omissions and misrepresentations, fails to establish probable cause. A search warrant must be invalidated where the officer intentionally or recklessly misrepresents information and/or omits material information, and such misrepresentations or omissions materially affect the determination of probable cause. See, e.g., Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); State v. Nielsen, 727 P.2d 188 (Utah 1986), cert. denied, 107 S.Ct. 1565 (1987); State v. Lee, 863 P.2d 49, 54-56 (Utah App. 1993).

In Franks v. Delaware, 438 U.S. at 155-56, the United States Supreme Court held that the Fourth Amendment is violated where an officer intentionally or recklessly misrepresents information, and "the affidavit's remaining content is insufficient to establish probable cause . . . ." The burden is on the defendant to establish by a preponderance of the evidence that a false statement was recklessly or intentionally included, and that such false statement was necessary to the determination of probable cause. Id. at 156.

If the defendant establishes that false information was intentionally or recklessly included in the affidavit, the false material must be excised from the affidavit, and the remaining information contained in the affidavit must be reviewed for a

determination as to whether it supports a finding of probable cause. If probable cause does not exist without the excised material, the search warrant must be voided and the items seized under the warrant excluded "to the same extent as if probable cause was lacking on the face of the affidavit." Id.

A similar approach is required where an officer intentionally or recklessly omits material information from a search warrant affidavit. See Nielsen, 727 P.2d at 190. The material which was intentionally or recklessly omitted must be added to the affidavit and assessed with the remaining information to determine whether probable cause would have existed if the magistrate had been made aware of the omitted information. Id.

In Nielsen, the Court held that the defendant established that the officer had intentionally or recklessly included false statements and omitted material information from the affidavit. Id. at 191. The officer in Nielsen swore in the affidavit that a confidential informant ("C.I.") had given him certain information, and attested to the informant's reliability based on prior transactions with the C.I. At the preliminary hearing, the officer essentially reiterated this information. Id. at 190. Sometime after the preliminary hearing, the state revealed that the affiant did not know or have contact with the C.I. and had received the information from another officer who had worked with the C.I. Id.

The Supreme Court found the state's argument that the

misstatements in the affidavit were not intentionally or recklessly made "entirely unpersuasive." Id. at 191. It stated,

> "[a] law enforcement officer must be aware not only of the need for accuracy in the information provided to a magistrate in support of an application for a search warrant, but also of the importance of absolute truthfulness in any statements made under oath."

Id.

Although the officer intentionally or recklessly included false statements in the affidavit and omitted material information therefrom, the Supreme Court upheld the search in Nielsen since even if the missing information had been revealed, the affidavit would have established probable cause. The falsehood in Nielsen involved the failure to tell the magistrate that an officer other than the affiant knew and had worked with the C.I. in the past. The Court reasoned that since there is a "presumption that police officers will be truthful in their communications with each other" and hearsay can be used to establish probable cause, the double hearsay supported the warrant. Hence, although the affiant intentionally or recklessly misrepresented the information by failing to indicate that an officer other than himself had prior dealings with the C.I., the search warrant was not invalidated.

1. Delahunty Intentionally or Recklessly Omitted Material Information From the Affidavit.

Delahunty omitted the following material information from the affidavit:

1. Aimee had been picked up for passing checks stolen in the burglary. She was a possible suspect in the burglary and

also faced potential charges of forgery and receiving stolen property. R. 114:4-5, 35-6, 37.

2. Aimee's work for Deputy Delahunty came about because she had been picked up passing stolen checks. R. 114:40.

3. On June 30, 1997, Deputy Delahunty picked Aimee up in West Jordan and drove her to the McArthur home so that she could go inside and take items. R. 114:18, 19, 24-5, 28, 46, 65. He also picked her up in West Jordan on June 19. R. 114:17.

4. Deputy Delahunty waited in the driveway while Aimee went inside and took items, and immediately took the seized items from Aimee when she returned to the car. R. 114:23, 46.

5. Delahunty did not believe Aimee could consent to a search. Aimee was, at best, temporarily living in the McArthur home. R. 19, 64.

The omission of this information was intentional or reckless. Delahunty was well aware that Aimee was implicated in the forgeries, receipt of stolen property and burglary. R. 114:25, 26. As an experienced police officer, he certainly knew that this information impacted on Aimee's credibility and would be important to the magistrate in assessing whether probable cause existed. As was the case in Nielsen, any claim that the omission was not intentional or reckless is "entirely unpersuasive." Nielsen, 727 P.2d at 190. Deputy Delahunty was aware "of the need for accuracy ... [and] the importance of absolute truthfulness in any statements made under oath." See Nielsen, 727 P.2d at 191. He therefore was aware of the need for

completeness in the information provided the magistrate, and the importance of establishing the veracity and reliability of an informant. Pursuant to Nielsen, Deputy Delahunty acted recklessly or intentionally in failing to inform the magistrate that Aimee had been picked up for passing checks stolen in the burglary and was implicated in those forgeries as well as other crimes related to the burglary.

The omission of information regarding Delahunty's role in Aimee's search and seizure of the McArthur home was likewise intentional or reckless. Delahunty recognized that he was uncomfortable with having Aimee enter the house to seize items. R. 114:20. He also did not believe that Aimee could consent to a search. R. 114:54. Additionally, as an experienced police officer, he knew that he could not enter and search the residence. This uncomfortableness and knowledge, coupled with the deputy's awareness of the need for accuracy and complete truthfulness, makes any claim that the omission was not intentional or reckless "entirely unpersuasive." See Nielsen, 727 P.2d at 190.

2. When the Affidavit is Considered in Light of the Omitted and Misleading Information, It Fails to Establish Probable Cause.

When the omitted information is added to the affidavit, the affidavit fails to establish probable cause. All of the information demonstrating that evidence from the burglary would be found in the McArthur home was provided by Aimee and was gained during her June 30, 1997 illegal search of the premises.

First, the reliability of any statements made by Aimee were severely undercut by her involvement in the various crimes and her role as a police informant. As set forth supra at 27, fn. 13, the trial judge's determination that Aimee was a citizen informant was incorrect.[15] A citizen informant "volunteer[s] information out of concern for the community and not for personal benefit." Mulcahy, 943 P.2d at 235 (citation omitted). The marshaled evidence in support of the court's determination is comprised only of Deputy Delahunty's testimony that Aimee was helping him out of the goodness of her heart and because she found religion. R. 114:39.[16]

By contrast, the evidence unequivocally shows that (1) Aimee was not a volunteer; she worked with Delahunty only after he sought out; (2) she did not provide information out of concern for the community; instead, she volunteered information only after being picked up for passing checks stolen in the burglary; (3) she gained her information through criminal involvement; and (4) she had committed crimes of dishonesty which impacted on her credibility. R. 114:4-5, 26, 39. Hence, Aimee was a police informant. See Mulcahy, 943 P.2d at 235.

Absent the omitted information, the affidavit implies that

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[15] As set forth supra at 27, the determination as to whether an individual is a police or citizen informant is a conclusion of law. While underlying factual findings are subject to a clearly erroneous standard of review, the conclusion as to the type of informant is reviewed for correctness.

[16] To the extent this Court considers the determination that Aimee was a citizen informant, such finding was clearly erroneous.

Aimee was a citizen informant. Since citizen informants are "high on the reliability scale" and ordinarily "need[] no 'independent proof of reliability or veracity'" (Mulcahy, 943 P.2d at 235), a magistrate reviewing this affidavit would simply assume the veracity of the information supplied by Aimee.

When the information of Aimee's criminal involvement, commission of crimes of dishonesty, and police informant status is added to the affidavit, the veracity and reliability of Aimee's statement that she saw other items taken in the burglary in McArthur's house are not established. See Potter, 860 P.2d at 957.

Aimee's situation is distinguishable from that of the confidential information (C.I.) in State v. Purser, 828 P.2d 515 (Utah App. 1992). This Court considered the C.I. in Purser reliable since he volunteered the information, did not benefit, and provided extensive detail. By contrast, Aimee did not volunteer, provided only minimal detail, was involved in crimes which implicated her veracity, and faced the possibility of "some heat rolling her way."

Additionally, since Aimee had already removed two items tied to the robbery, the observation of additional objects tied to the burglary which were remaining in the house was important to a determination of probable cause to search for such items. Aimee's statements regarding the existence of other items were therefore important to a determination of probable cause.

In addition to significantly undercutting the reliability of

Aimee's statements, the omitted information precludes the consideration of the items seized by Aimee. Had the magistrate been told that Deputy Delahunty encouraged, participated in, and, at the very least, acquiesced in Aimee's search of the McArthur home, the magistrate would have been required to disregard those items and the information that Aimee seized them from the house, as the fruit of the poisonous tree. See supra at 12-35.

Aimee's statements as to what she observed inside the house are also the fruit of Aimee's illegal search. She entered the McArthur house under false pretenses as a police agent. Although McArthur allowed her inside as a guest, he did not knowingly and voluntarily consent for her to enter and search. Since Aimee was a police agent when she entered, the requirements for a knowing and voluntary consent to police officers to search applies with full force to Aimee. In addition, Delahunty did not search Aimee before she entered the house. Although he claimed she was not wearing enough clothing to hide the items before entering, the items were small and she managed to remove them without being seen by McArthur.

Without Aimee's statements as to what she observed and the information as to what she seized, there is no information demonstrating that items taken in the burglary could be found at McArthur's house.[17] Even if Aimee's statements as to what she saw inside the house were included, the affidavit would not

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[17] While Aimee had previously told Delahunty of McArthur's involvement, she also told him that the stolen items had been taken to Newman's house, not McArthur's.

establish probable cause since her reliability and veracity were not established.

Since the affidavit would not have established probable cause if the omitted information had been included, McArthur's Fourth Amendment rights were violated when the officers searched the house pursuant to the warrant. Accordingly, the trial judge's order denying McArthur's motion to suppress should be reversed.[18]

D. STATEMENTS MADE BY APPELLANT WHEN HE WAS ARRESTED MUST ALSO BE SUPPRESSED AS THE FRUIT OF THE POISONOUS TREE.

The incriminating statements made by McArthur "were constitutionally tainted by police misconduct." See State v. Allen, 839 P.2d 291, 300 (Utah 1992). In order to be admissible, McArthur's statements must be attenuated from the police misconduct in using Aimee as an agent to conduct a search and/or of intentionally or recklessly misrepresenting and omitting material information from the affidavit. See id.

Courts consider four factors in determining whether a "confession is 'tainted' by prior police misconduct: whether

---

[18] The good faith exception set forth in United States v. Leon, 468 U.S. 897 (1984), does not apply in this case. For the exception to apply, "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable." Id. at 922. Reliance on the warrant was not objectively reasonable since Delahunty recklessly or intentionally omitted material information. See Potter, 860 P.2d at 958 (good faith exception does not apply, and suppression is appropriate where magistrate intentionally or recklessly misled by information in affidavit). Additionally, the good faith exception does not apply because the warrant was obtained as the fruit of an illegal search.

Miranda warnings were given, the temporal proximity of the illegality and the confession, the absence or presence of intervening circumstances, and the purpose and flagrancy of the official misconduct." Allen, 839 P.2d at 300-01 (citing State v. Arroyo, 796 P.2d 684, 690-91 n. 4 (Utah 1990) (further citation omitted)).

In Allen, the Court held that the defendant's confessions were sufficiently attenuated from any misconduct by Montana police, including arresting the defendant in Idaho, because (1) the defendant was informed of his Miranda rights and knowingly and voluntarily waived them; (2) the defendant made his incriminating statements more than a day after his arrest, which was "a sufficient period of time for the tension that arose during the arrest to subside considerable, if not completely"; (3) "[n]othing in the record indicate[d] that the alleged misconduct was an aid in the investigation"; (4) the record did not "indicate[] that the behavior of the officers in arresting the defendant was flagrant, in light of his belligerence and uncooperative attitude"; and (5) the illegal arrest occurred because the officers were in hot pursuit of the defendant. Allen, 839 P.2d at 301.

In contrast, in the present case, (1) McArthur's incriminating statements were made immediately after arrest; the arrest itself was based on items seized in the illegal search, (2) the misconduct in using Aimee as a police agent to conduct a search as well as the misconduct in constructing the affidavit

were directed solely at aiding the investigation, (3) Delahunty's actions in using Aimee as an agent to conduct a search that he could not conduct himself was flagrant in light of basic Fourth Amendment principles and case law as well as the officer's acknowledged uncomfortableness with the search, and (4) there were no exigent circumstances justifying the illegal conduct. Although McArthur did speak to officers after being informed of his Miranda rights, such circumstance occurs in almost every case where a defendant claims that police misconduct was not attenuated from the defendant's statements; standing alone, the fact that a defendant makes incriminating statements after being Mirandized is not sufficient to attenuate the taint. See Arroyo, 796 P.2d at 689 (emphasizing that voluntariness of confession alone does not control admissibility since such a rule "fails to give proper weight to Fourth Amendment values"; analysis of exploitation of primary illegality is critical to protecting Fourth Amendment values).

Applying the Allen/Arroyo factors to this case establishes that the police misconduct in using Aimee as an agent to conduct the search, then using the illegally obtained items to obtain a search warrant and/or recklessly or intentionally omitting information and including misleading information in the affidavit was not sufficiently attenuated from McArthur's statements to allow admission of those statements. While the officer gave McArthur the Miranda warnings, all other factors weigh against attenuation. The temporal proximity of the statements was

immediate, there were no intervening circumstances, and the police misconduct in using Aimee to search McArthur's house, then using the fruits of that search to obtain a search warrant, and the misconduct in intentionally or recklessly failing to fully and accurately construct the affidavit were flagrant in light of clear mandates in case law.

Because McArthur's statements were not sufficiently attenuated from the police misconduct, they must be suppressed.

CONCLUSION

Appellant/Defendant Michael McArthur respectfully requests that this Court reverse the trial court order denying his motion to suppress. Since Appellant's conviction was based on a conditional plea, Appellant further requests that his convictions be reversed and the case remanded for a new trial.

SUBMITTED this 1st day of February, 1999.

JOAN C. WATT
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 S. State, 5th Floor, P. O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 E. 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 1st day of February, 1999.

Joan C. Watt
JOAN C. WATT

DELIVERED copies to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____ day of February, 1999.

ADDENDA

ADDENDUM A

THIRD DISTRICT COURT - SLC COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 971901299 FS
MICHAEL TODD MCARTHUR, Defendant.	:	Judge: HOMER WILKINSON Date: June 12, 1998

2223818
6-23-98

PRESENT
Clerk: jaredl
Prosecutor: JIM COPE
Defendant
Defendant's Attorney(s): REBECCA C HYDE

DEFENDANT INFORMATION
Date of birth: November 29, 1965
Video
Tape Count: 9.41

CHARGES

1. BURGLARY OF A DWELLING - 2nd Degree Felony
   Plea: Guilty - Disposition: 01/16/1998 Guilty Plea
2. THEFT - 2nd Degree Felony
   Plea: Guilty - Disposition: 01/16/1998 Guilty Plea

SENTENCE PRISON

Based on the defendant's conviction of BURGLARY OF A DWELLING a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

Based on the defendant's conviction of THEFT a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

Case No: 971901299
Date: Jun 12, 1998

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Counts are to run concurrent.

SENTENCE JAIL SERVICE NOTE

There is to be no credit for time served.

SENTENCE FINE

Charge # 1 Fine: $10000.00
Suspended: $10000.00
Due: $0.00

Charge # 2 Fine: $10000.00
Suspended: $10000.00
Due: $0.00

Total Suspended: $20000.00
Total Surcharge: $0
Total Amount Due: $0

SENTENCE TRUST

The defendant is to pay the following:
Attorney Fees: Amount: $100.00
Pay to:
LEGAL DEFENDERS ASSOCIATION
LEGAL DEFENDERS ASSOCIATION

Case No: 971901299
Date: Jun 12, 1998

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 12 month(s) jail.
Defendant is to report to the Salt Lake County Jail.
a.m.
Defendant is to pay a fine of $370.00 where the surcharge has been added to the fine.
Commitment is to begin immediately.

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult Probation & Parole.
Submit to searches of person and property upon the request of any Law Enforcement Officer.
Do not use, consume or possess alcohol or illegal drugs, nor associate with any people using, possessing or consuming alcohol or illegal drugs.
Submit to tests of breath and urine upon the request of any Law Enforcement Officer.
Violate no laws.
Pay restitution as determined by Probation Officer.
Submit to drug testing.
Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
Refrain from the use of alcoholic beverages.
Defendant is to enter and complete the Odyssey House Inpatient program.
Defendant is to pay full restitution. Said restitution is to be imposed jointly and severally with the others involved in this matter.
Defendant is to cooperate with the authorities in apprehending the others involved in this incident.
Defendant is to have no victim contact.

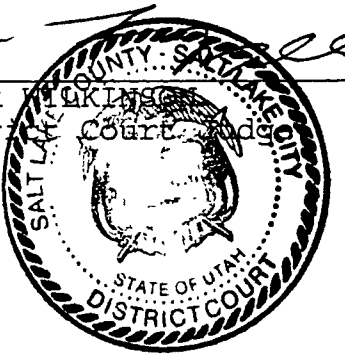
Case No: 971901299
Date: Jun 12, 1998

SENTENCE PROBATION SERVICE NOTE

There is to be no credit for time served. After 10 months the defendant may be released directly to AP&P for transport to Odyssey House, if bed space becomes available.

Dated this 12 day of June, 1998.

HOMER WILKINSON
District Court Judge



ADDENDUM B

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ADDENDUM C

REBECCA C. HYDE, #6409
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH,

SALT LAKE DEPARTMENT, DIVISION I

STATE OF UTAH,	:	**MOTION TO SUPPRESS**
Plaintiff,	:	
v.	:	
MICHAEL TODD MCARTHUR,	:	Case No. 971901299FS JUDGE HOMER F. WILKINSON
Defendant.	:	

COMES NOW Defendant, MICHAEL TODD MCARTHUR, by and through counsel of record, REBECCA C. HYDE, and hereby moves this Court to suppress all the evidence obtained as a result a search warrant issued on July 1, 1997 and executed on the premises of 2802 East 3900 South on July 3, 1997. (See Attachment A). Defendant bases this motion on the grounds that the affidavit is not supported by probable cause as required by the Fourth Amendment to the United States Constitution and Article I, section 14 of the Utah Constitution.

The affidavit is not supported by probable cause because portions of the information sworn to by the affiant, Officer Vaun Delahunty, ("Delahunty") Salt Lake County Sheriff's Office, were obtained as a result of illegal police conduct and should therefore be stricken. Specifically, all information obtained as a result of Aimee Rolfe's

("Rolfe") visit to the defendant's residence at 2802 East 3900 South on June 30, 1997 should be stricken because Rolfe was acting as an agent of the Salt Lake County Sheriff's Office when she unlawfully entered Defendant's home. State v. Kahoonei, 925 P.2d 294 (Hawaii 1996); State v. Becich, 500 P.2d 1232 (Ore. Ct. App. 1973): United States v. Reed, 15 F.3d 928 (9th Cir. 1994).

2) Delahunty's failure to include in the affidavit material information as to the State's involvement in Rolfe's unlawful entry into Defendant's home on June 30, 1997 was reckless if not intentional, and thus invalidates the warrant because inclusion of this critical omitted fact would have prevented a finding of probable cause. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667; Madiwale v. Savaiko, 117 F.3d 1321 (11th Cir. 1997); United States v. Martin, 615 F.2d 318 (5th Cir. 1980).

3) Delahunty also intentionally or recklessly omitted information material to the determination of probable cause by failing to include information that Rolfe was a suspect in a related forgery case, was a potential suspect in the burglary itself, and therefore was not merely a "citizen informant" but was a suspect and potential codefendant. Rolfe's statements thus lack the reliability presumed to exist with a citizen informant because of a criminal suspect's incentive to curry favor with the police and gain immunity for herself. Martin, 615 F.2d at 325-26.

4) Lastly, Delahunty failed to inform the magistrate that Rolfe was not searched prior to entering Defendant's home unlawfully or upon leaving the home and was not within his sight for significant periods of time.

The remaining portions of the affidavit do not establish probable cause. The illegally obtained information gained as a result of Rolfe's unauthorized entry into Defendant's home cannot be used to corroborate the remaining portions of the affidavit.
No independent corroboration was provided to the issuing magistrate and no statements were made verifying the reliability of the informant, Rolfe.

Because the search warrant was not supported by probable cause all evidence obtained as result of the search should be suppressed including Defendant's confession to the police. Wong Sun v. United States, 83 S.Ct. 407, 371 U.S. 471 (1963).

DATED this 12 day of December, 1997.

REBECCA C. HYDE
Attorney for Defendant

MAILED/DELIVERED a copy of the foregoing to the office of the District Attorney, 231 East 400 South, Salt Lake City, Utah 84111 this 12 day of December, 1997.

ADDENDUM D

REBECCA C. HYDE, #6409
Attorney for Defendant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 532-5444

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH,

SALT LAKE DEPARTMENT, DIVISION I

STATE OF UTAH, Plaintiff, v. MICHAEL TODD MCARTHUR, Defendant.	: : : : :	**DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** Case No. 971901299FS JUDGE HOMER F. WILKINSON

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Honorable F. Wilkinson on December 22, 1997 on Defendant's Motion to Suppress the Evidence. The plaintiff, the State of Utah was represented by Richard G. Hamp, and the defendant, Michael Todd McArthur was represented by Rebecca C. Hyde. Testimony was received by this Court and arguments presented by counsel. Based upon the foregoing, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Aimee Rolfe had permission to be in the Mcarthur residence on June 30, 1997.

2. Aimee Rolfe had habitually come and gone from the McArthur residence.

3. Aimee Rolfe was living at the McArthur residence on June 30, 1997.

4. The Defendant, Michael McArthur expected and was aware that Ms. Rolfe freely came and went to and from the residence.

5. Aimee Rolfe had a right to enter and leave the McArthur house on June 30, 1997.

6. Aimee Rolfe was a citizen informant.

CONCLUSIONS OF LAW

1. Though additional information could have been included, the search warrant was supported by probable cause.

2. There were no material omissions made which would render the search warrant invalid.

3. Aimee Rolfe was a citizen informant who had a right to enter the McArthur home.

DATED this 27 day of ~~February~~ March, 1998.

BY THE COURT:

JUDGE HOMER F. WILKINSON
Third District Court, Division I

MAILED/DELIVERED a copy of the foregoing to the office of the District Attorney, 231 East 400 South, Salt Lake City, Utah 84111 this _____ day of February, 1998.

If she had free rein at the house, she could get that property. That's not a search.

And quite frankly, even if she didn't have free rein, if she represented to the police officers she had free rein, that's not a search.

THE COURT: Well, I think there's a big distinction between the cases which the defendant's cited and the facts in this case as far as the informant is concerned.

I think in this case, that the Rolfe girl had permission to be in that house, that she had been coming and going; she was living there; that the defendant expected her to be going in and out of the house, and that was a right which she had.

I think that the search warrant which was obtained was a valid search warrant. I think more could have been put in it as far as the material, but I don't think the omissions that were left out of it make it invalid in any way.

I think that she was a citizen that gave him that information. I don't know

that there's anything else you need to put in as far as findings of fact are concerned.

But the warrant that was obtained was a valid warrant. The informant was a citizen informant, who had the right to go in the house, who gave the information to the police.

The court would deny the motion to suppress. The State will prepare the order?

MR. HAMP: We will, your Honor. Thank you.

THE COURT: We're going to be in recess. Have you got that other case resolved?

MS. HYDE: If I can have five minutes, I might be able to save us some time in the long run, Judge.

(Whereupon, the instant proceedings came to a close.)

RETURN TO SEARCH WARRANT

NO. _____

The personal property listed below or set out on the inventory attached hereto was taken from the person of Michael Todd McArthur and/or the premises known as 2802 East 3900 South by virtue of a search warrant dated the _____ day of July, 1997, and issued by Magistrate Michael L. Hutchings of the above-entitled court.

I, Vaun Delahunty, by whom this warrant was executed, do swear that the above listed or below attached inventory contains a true and detailed account of all the property taken by me under the warrant, on the _____ day of _____, 1997.

All of the property taken by virtue of said warrant will be retained in my custody subject to the order of this court or of any other court in which the offense in respect to which the property, or things taken, is triable.

_____
Vaun Delahunty

Subscribed and sworn to before me this _____ day of _____, 1997.

_____
MICHAEL L. HUTCHINGS
MAGISTRATE

WHEREFORE, your affiant prays that a Search Warrant be issued for the seizure of said items:

in the daytime.

Vaun Delahunty
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME this 1 day of July, 1997.

~~MICHAEL L. HUTCHINGS~~
MAGISTRATE
Dennis Fuchs

and that said property or evidence:

was unlawfully acquired or is unlawfully possessed, or

consists of an item of, or constitutes evidence of, illegal conduct, possessed by a party to the illegal conduct, or

consists of an item of, or constitutes evidence of, illegal conduct, possessed by a person or entity not a party to the illegal conduct.

Affiant believes the property and evidence described above is evidence of the crime or crimes of Burglary, Theft and Theft by Receiving Stolen Property.

The facts to establish the grounds for issuance of a Search Warrant are:

Your affiant is a Detective with the Salt Lake County Sheriff's Office currently assigned to the Burglary Investigations Unit. Your affiant has been a Deputy Sheriff for 18 years and has spent the last two years working specifically with burglary and theft investigations.

Ms. Dorothy Gant, the housekeeper for Mr. Michael Clark, who resides at 2550 East Brentwood Drive, Salt Lake City, Utah, has told your affiant that on 3 March 1997 she checked on Mr. Clark's residence while he was out of town and found everything to be in order. On 4 March 1997, she returned and found the house to be ransacked and numerous items of Mr. Clark's personal property, including numerous guns, computers, electronics, art objects, clothing, tools, alcohol, crystal, figurines, silverware, a Ford Bronco automobile and other items missing.

Ms. Aimee Rolfe told your affiant that during the first part of March 1997, she was with Michael Todd McArthur and Dominic Newman when they said that they were "going to work." The next morning when Aimee went back to Mr. Newman's residence, she observed the two men unloading numerous items of personal property from Dominic's vehicle into his residence. The next day Dominic Newman took Aimee to the house where they had obtained the property, which is Mr. Clark's residence. On 30 June 1997, Aimee went to Mr. McArthur's residence located at 2802 East 3900 South, Salt Lake City, Utah. There she obtained a Kbar Marine Fighting Knife in a distinctive leather sheath from Michael Todd McArthur's bedroom and a Waterford Crystal cigarette lighter from the an entertainment center shelf in the front room of the residence and gave them to your affiant. Mr. Clark has identified these items as being among those stolen in the above-described burglary. Aimee has seen a matching crystal ashtray on the above-mentioned entertainment shelf and two Lladro figurines in the home on 30 June 1997. Aimee observed the defendant in possession of a solid gold Dunhill brand cigarette lighter. On 30 June 1997, she used it to light up a cigarette. Mr. Clark has reported missing from his home Lladro figurines, a Waterford crystal ashtray and a Dunhill solid gold cigarette lighter.

E. NEAL GUNNARSON
DISTRICT ATTORNEY
RODWICKE YBARRA, Bar No. 4184
DEPUTY DISTRICT ATTORNEY
231 E. 400 SOUTH
Salt Lake City, Utah 84111
Telephone: 3637900

IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

AFFIDAVIT FOR SEARCH WARRANT

BEFORE: Michael L. Hutchings — 450 South 200 East

MAGISTRATE — ADDRESS

STATE OF UTAH)
: ss
County of Salt Lake)

The undersigned affiant, Vaun Delahunty, being first duly sworn, deposes and says:

That your affiant has reason to believe

That on the person of Michael Todd McArthur
and/or
on the premises known as 2802 East 3900 South

In the City of Salt Lake City, County of Salt Lake, State of Utah, there is now certain property or evidence described as:

1. Waterford Crystal Ashtray
2. Various Lladro porcelain statues
3. Gold Dunhill cigarette lighter

RETURN TO SEARCH WARRANT

NO. _____

The personal property listed below or set out on the inventory attached hereto was taken from
the person of Michael Todd McArthur and/or the premises known as 2802 East 3900 South by virtue of a search warrant dated the _____ day of July, 1997, and issued by Magistrate Michael L. Hutchings of the above-entitled court.

I, Vaun Delahunty, by whom this warrant was executed, do swear that the above listed or below attached inventory contains a true and detailed account of all the property taken by me under the warrant, on the _____ day of _____, 1997.

All of the property taken by virtue of said warrant will be retained in my custody subject to the order of this court or of any other court in which the offense in respect to which the property, or things taken, is triable.

_____
Vaun Delahunty

Subscribed and sworn to before me this _____ day of _____, 1997.

_____
MICHAEL L. HUTCHINGS
MAGISTRATE

to make a search of the above-named or described person of Michael Todd McArthur and/or premises known as 2802 East 3900 South for the herein-above described property or evidence and if you find the same or any part thereof, to bring it forthwith before me at the Third Circuit Court, Salt Lake Department, County of Salt Lake, State of Utah, or retain such property in your custody, subject to the order of this court.

GIVEN UNDER MY HAND and dated this ____ day of July, 1997.

_____

Michael L. Hutchings
MAGISTRATE

IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SEARCH WARRANT

No. _____

COUNTY OF SALT LAKE, STATE OF UTAH

To any peace officer in the State of Utah:

Proof by Affidavit under oath having been made this day before me by Vaun Delahunty, I am satisfied that there is probable cause to believe

That on the person of Michael Todd McArthur
and/or
on the premises known as 2802 East 3900 South

In the City of Salt Lake City, County of Salt Lake, State of Utah, there is now certain property or evidence described as:

1. Waterford Crystal Ashtray
2. Various Lladro porcelain statues
3. Gold Dunhill cigarette lighter

and that said property or evidence:

was unlawfully acquired or is unlawfully possessed, or

consists of an item of, or constitutes evidence of, illegal conduct, possessed by a party to the illegal conduct, or

consists of an item of, or constitutes evidence of, illegal conduct, possessed by a person or entity not a party to the illegal conduct.

You are therefore commanded

in the daytime

WHEREFORE, your affiant prays that a Search Warrant be issued for the seizure of said items:

in the daytime.

_____
Vaun Delahunty
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME this _____ day of July, 1997.

_____
MICHAEL L. HUTCHINGS
MAGISTRATE

and that said property or evidence:

was unlawfully acquired or is unlawfully possessed, or

consists of an item of, or constitutes evidence of, illegal conduct, possessed by a party to the illegal conduct, or

consists of an item of, or constitutes evidence of, illegal conduct, possessed by a person or entity not a party to the illegal conduct.

Affiant believes the property and evidence described above is evidence of the crime or crimes of Burglary, Theft and Theft by Receiving Stolen Property.

The facts to establish the grounds for issuance of a Search Warrant are:

Your affiant is a Detective with the Salt Lake County Sheriff's Office currently assigned to the Burglary Investigations Unit. Your affiant has been a Deputy Sheriff for 18 years and has spent the last two years working specifically with burglary and theft investigations.

Ms. Dorothy Gant, the housekeeper for Mr. Michael Clark, who resides at 2550 East Brentwood Drive, Salt Lake City, Utah, has told your affiant that on 3 March 1997 she checked on Mr. Clark's residence while he was out of town and found everything to be in order. On 4 March 1997, she returned and found the house to be ransacked and numerous items of Mr. Clark's personal property, including numerous guns, computers, electronics, art objects, clothing, tools, alcohol, crystal, figurines, silverware, a Ford Bronco automobile and other items missing.

Ms. Aimee Rolfe told your affiant that during the first part of March 1997, she was with Michael Todd McArthur and Dominic Newman when they said that they were "going to work." The next morning when Aimee went back to Mr. Newman's residence, she observed the two men unloading numerous items of personal property from Dominic's vehicle into his residence. The next day Dominic Newman took Aimee to the house where they had obtained the property, which is Mr. Clark's residence. On 30 June 1997, Aimee went to Mr. McArthur's residence located at 2802 East 3900 South, Salt Lake City, Utah. There she obtained a Kbar Marine Fighting Knife in a distinctive leather sheath from Michael Todd McArthur's bedroom and a Waterford Crystal cigarette lighter from the an entertainment center shelf in the front room of the residence and gave them to your affiant. Mr. Clark has identified these items as being among those stolen in the above-described burglary. Aimee has seen a matching crystal ashtray on the above-mentioned entertainment shelf and two Lladro figurines in the home on 30 June 1997. Aimee observed the defendant in possession of a solid gold Dunhill brand cigarette lighter. On 30 June 1997, she used it to light up a cigarette. Mr. Clark has reported missing from his home Lladro figurines, a Waterford crystal ashtray and a Dunhill solid gold cigarette lighter.

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IN THE THIRD CIRCUIT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

AFFIDAVIT FOR SEARCH WARRANT

BEFORE: Michael L. Hutchings — 450 South 200 East

MAGISTRATE — ADDRESS

STATE OF UTAH)
: ss
County of Salt Lake)

The undersigned affiant, Vaun Delahunty, being first duly sworn, deposes and says:

That your affiant has reason to believe

That on the person of Michael Todd McArthur
and/or
on the premises known as 2802 East 3900 South

In the City of Salt Lake City, County of Salt Lake, State of Utah, there is now certain property or evidence described as:

1. Waterford Crystal Ashtray
2. Various Lladro porcelain statues
3. Gold Dunhill cigarette lighter

ADDENDUM E