2007

The State of Utah v. Daniel Lee Keener : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee	:	
v.	:	
DANIEL LEE KEENER	:	Case No. 20070485-CA
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for one count of Unlawful Possession of a Controlled Substance with Intent to Distribute, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (2002); and one count of Endangerment of a Child or Elder Adult, a third degree felony, in violation of Utah Code Ann. § 76-5-112.5 (2003), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Judith S. Atherton, presiding.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Constitutional Provisions

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THE STATE OF UTAH,	:	
Plaintiff/Appellee	:	
v.	:	
DANIEL LEE KEENER	:	Case No. 20070485-CA
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JURISDICTIONAL STATEMENT

This appeal is from a judgment of conviction for one count of Unlawful Possession of a Controlled Substance with Intent to Distribute, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (2002); and one count of Endangerment of a Child or Elder Adult, a third degree felony, in violation of Utah Code Ann. § 76-5-112.5 (2003), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Judith S. Atherton, presiding. Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002). See Addendum A (Judgment and Conviction).

ISSUE AND STANDARD OF REVIEW

Issue: Did the trial court err in denying Mr. Keener's motion to suppress the search warrant where the search warrant contained intentional or reckless misstatements and uncorroborated hearsay statements and failed to establish probable cause requiring the warrant to be suppressed under both the federal and state constitutions.

Standard of Review: When reviewing whether the search warrant supported by affidavit has been issued with an adequate showing of probable cause, this Court "review[s] the district court's assessment of the magistrate's probable cause determination for correctness and ask[s] whether the district court erred in concluding that the magistrate had a substantial basis for [his] probable cause determination." State v. Norris, 2001 UT 104, ¶14, n.2, 48 P.3d 872; see State v. Babbel, 770 P.2d 987, 991 (Utah 1989). This Court "should consider [the] search warrant affidavit 'in its entirety and in a common-sense fashion.'" Babbell, 770 P.2d at 991 (citations omitted). The magistrate's decision should be given "'great deference.'" Id. (citations omitted).

PRESERVATION OF ARGUMENT

Appellant, Daniel Lee Keener, preserved his argument that the search warrant supported by affidavit containing omissions and misstatements lacked an adequate showing of probable cause at R. 60-88; 108-09; 121-66; 167-171; 221; 222.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The text of the following constitutional provisions are determinative of the issue on appeal: U.S. Const. amend. IV; Utah Const. art. I, §14. The text of these provisions is located in Addendum B.

STATEMENT OF THE CASE

On December 20, 2005, Keener was charged by Information with one count of unlawful possession of a controlled substance, a third degree felony, and unlawful possession of drug paraphernalia, a class B misdemeanor. R. 1-3. On July 13, 2006, a preliminary hearing was held where Keener was bound over. R. 39-40. The trial court

granted the state's motion to amend the Information. R. 39-40. The state amended the Information, charging Keener with unlawful possession of a controlled substance with intent to distribute, a third degree felony, two counts of endangerment of a child or elder adult, both third degree felonies, and unlawful possession of drug paraphernalia, a class B misdemeanor. R. 41-43. On July 14, 2006, the state filed a second amended Information, charging an additional count of endangerment of a child or elder adult. R. 44-46.

On August 23, 2006, Keener filed a motion to suppress evidence from the search of his residence on the basis that the search warrant was invalid because the affidavit used in support of the warrant contained intentional or reckless misstatements and lacked probable cause for the search. R. 60-88. A copy of the affidavit is attached as Addendum C. The state filed a memorandum in opposition to Keener's motion to suppress. R. 89-102. On October 11, 2006, a suppression hearing was held in the matter. R. 108-09; 221. The court invited the state to submit a supplemental memorandum addressing Keener's argument made under Utah's Constitution. R. 110-120; 221:48-49. The court allowed Keener the opportunity to respond to the state's supplemental memorandum. R. 121-166; 221:49. On November 8, 2006, the trial court issued its decision denying Keener's motion to suppress. R. 167-71. A copy of the trial court's memorandum is attached as Addendum D.

On March 12, 2007, Keener entered into a conditional plea for unlawful possession of a controlled substance with intent to distribute, and endangerment of a child or elder adult, both third degree felonies. R. 204; 222. Keener reserved the right to

appeal the trial court's denial of his motion to suppress. R. 222:2. On May 4, 2007, the trial court sentenced Keener to two indeterminate terms not to exceed five years on both counts, consecutive. R. 210-12. The prison terms were suspended and Keener was placed on probation for 36 months. R. 210-12. This appeal followed.

STATEMENT OF FACTS

On December 20, 2005, the stated charged Keener by Information with unlawful possession of a controlled substance and unlawful possession of drug paraphernalia. R. 1-3. After the preliminary hearing, the Information was amended, charging Keener with unlawful possession of a controlled substance with intent to distribute, a third degree felony; three counts of endangerment of a child or elder adult, third degree felonies; and unlawful possession of drug paraphernalia, a class B misdemeanor. R. 44-46. The amended charges were based on a probable cause statement set forth in the Information:

> The written report of Salt Lake [C]ity Police Officer D. Teerlink that on December 9, 2005, he assisted in the service of a Search Warrant [at] that home [of] defendant Daniel Lee Keener, located at 849 North Sir Phillip Drive, Salt Lake County, Utah.
>
> A search of the defendant's bedroom revealed scales, and large quantities of marijuana.
>
> The defendant's two minor children, A.R.K. (DOB 1/23/95) and E.M.K. (DOB 1/26/96) live at the residence with the defendant. J.B., (DOB 2/12/03) was also present in the home. Marijuana was located in the defendant's bedroom next to his child's crib.
>
> The statements of the defendant that he gives marijuana to relatives.

R. 46.

Keener filed a motion to suppress challenging the affidavit in support of the search warrant. R. 60-88. Keener argued that the affidavit lacked sufficient probable cause to allow the issuance of a search warrant in violation of the federal and Utah constitutions.

R. 60-88. Specifically, Keener argued that the affidavit was based on misinformation as it referred to the informant as a "concerned citizen" rather than an individual apprehended while trying to pawn a stolen ring, failed to disclose the informant's criminal history, and failed to corroborate the informant's allegations. R. 60-88.

The affidavit prepared by Detective Doug Teerlink stated in relevant part the following:

> Your affiant is a Salt Lake City Police Officer and has been a police officer for over 5 years. Your affiant is currently assigned to the Salt Lake City Police Department's Narcotic Unit and investigates narcotic related offenses. Your affiant has had training in narcotics identification and in the investigation of narcotic related offenses through the Utah Police Academy and the California Narcotics Association. Your affiant's specialized training includes the DEA Clandestine Laboratory Course. Your affiant has worked street level drug interdiction as an arresting officer and as an undercover police officer. Your affiant has seen several different types of narcotics during these operations. Your affiant has been involved with over 400 drug related cases, many of which were felonies.
>
> Within the last 6 hours your affiant has received information from a concerned citizen named Gary Lambson. Mr. Lambson stated that there is stolen jewelry at the address of 849 North Sir Phillip Drive. He also stated that the individuals who reside or otherwise occupy 849 North Sir Phillip Drive are engaging in an ongoing narcotics distribution operation.
>
> On 12/6/05 Mr. Lambson met with Daniel V. Keener for the purpose of buying jewelry. Daniel V. Keener traveled with Mr. Lambson to 849 North Sir Phillip Drive. Mr. Lambson was told that this was Daniel V. Keener's son's residence. The son is named Daniel Lee Keener. Inside the residence Daniel V. Keener retrieved a bag of jewelry. Mr. Lambson said the bag contained rings, necklaces, watches and bracelets. Mr. Lambson purchased a ring for $50 from Daniel V. Keener. Mr. Lambson said Daniel V. Keener put some of the jewelry in his pocket and left most of the jewelry in the bag at the listed residence.
>
> While in the residence of 849 North Sir Phillip Drive, Mr. Lambson observed the following items on a table in the back room; two large bags of marijuana and a triple beam scale. He said one of the bags contains chronic

marijuana. Chronic is high quality marijuana. The other bag contains lower grade marijuana. Mr. Lambson said that Daniel Lee Keener is selling the marijuana out of the listed residence.

On 12/8/05 Mr. Lambson took the ring he purchased to Mike's Custom Jewelry and Repair at 254 East 6400 South for the purpose of selling it. The clerk at Mike's Jewelry recognized the ring as the one that belongs to another employee of Mike's Jewelry named Julie Baker. Mrs. Baker identified the ring to be a custom made ring that was stolen out of her vehicle along with other jewelry on 11/5/05 at 145 West Pierpont Avenue (Salt Lake City case number 05-193011). The police responded to Mike's Jewelry and questioned Mr. Lambson.

Your affiant showed Mr. Lambson the list of Jewelry stolen during the previously mentioned vehicle burglary. Mr. Lambson identified a yellow and white gold diamond ring and a Blue turquoise stretch bracelet as items he saw in Daniel V Keener bag of jewelry at the listed residence.

Your affiant considers the information received from the concerned citizen to be accurate and reliable because:

The concerned citizen, Gary Lambson, has provided your affiant with his name, date of birth and criminal history. Your affiant informed Mr. Lambson that if he gave your affiant any false information he would be charged with interfering with an investigation.

Your affiant has checked police and state records and found that Daniel V. Keener has been arrested numerous times for Possession of a Controlled Substance, the most recent arrest was on 5/5/2002. He was also arrested for Carrying a Loaded Fire Arm in a Vehicle on 6/30/89. Your affiant has also found that Daniel Lee Keener's drivers license shows the address of 849 North Sir Phillip Drive. Daniel Lee Keener has been arrested for numerous thefts including an Aggravated Burglary on 02/26/2000, numerous drug charges (the most recent on 05/12/05) and Strong Arm Robbery.

Your affiant desires to enter 849 North Sir Phillip Drive and search for stolen jewelry, marijuana, marijuana paraphernalia and other items related to the distribution of marijuana. The paraphernalia includes such items as pipes, bongs or tubes used to inhale or smoke marijuana. Other related items include packaging material used to package marijuana and scales used to weigh quantities. Your affiant knows from training and experience that these items are almost always found on the premises where search warrants for controlled substances have been executed.

> Your affiant desires to search for records of stolen jewelry and marijuana sales, both written and electronic, residency papers and U.S. currency. Your affiant knows from past experiences with narcotic investigations that persons sometimes record their sales to show dates, amounts purchased and drug indebtedness. Your affiant knows from training and experience that stolen jewelry and marijuana is sold for U.S. currency. The concerned citizen purchased the stolen ring with U.S. currency.
>
> This application for search warrant has been reviewed and approved for presentation to the court by Deputy District Attorney Blake Hills.

R. 79-81; see Addendum C. Another affidavit in support of a search warrant for the residence of Daniel V. Keener, Appellant's father who occupied a different residence than Appellant, was prepared by another detective, Michael Hardin, on the same day as the affidavit at issue in this case.[1] R. 82-88; see Addendum E. In the affidavit prepared by Detective Hardin, the detective described the informant, Gary Lambson, as an individual "who was detained by Murray Police, concerning a stolen ring." R. 83. During the motion to suppress hearing, the judge asked Detective Teerlink if these two "affidavits [were] submitted to Judge Atherton simultaneously?" R. 221:26. The detective answered, "Yes, they were." R. 221:26.

Keener argued that the court could not look beyond the four corners of the affidavit applicable to this case in determining whether probable cause existed in support of the search warrant issued for Appellant's residence. R. 221:14-15. In denying

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[1] During the motion to suppress hearing, the state objected to references made to the affidavit prepared by Detective Hardin stating, "I'm going to object to anything regarding a different search warrant for a different case in a different instance referred by a different detective. It had no bearing in relation to this case that we're here on today." R. 221:6.

Keener's motion to suppress, the trial court found "no misstatement" in the affidavit stating the following:

> Had Detective Teerlink's affidavit stood alone, his characterization of Lambson as a "concerned citizen" would be troubling to the court. But it did not stand alone; rather, it was submitted alongside Detective Hardin's affidavit, which pointed out that Lambson had been "detained by Murray Police" regarding "a stolen ring." Hardin Affidavit, p. 2. That reference in Detective Hardin's affidavit, combined with Detective Teerlink's knowledge that Judge Atherton would be reviewing both his and Detective Hardin's affidavit together, dispelled any potential false impression. It is as if the detectives defined "concern citizen" to mean Gary Lambson, a person of interest detained by authorities.

R. 169. The trial court then concluded "that Judge Atherton 'had a substantial basis for determining that probable cause existed and that evidence of illegal conduct would be found at the' Sir Phillip Drive location." R. 169.

SUMMARY OF THE ARGUMENT

The trial court's denial of Mr. Keener's motion to suppress was erroneous where an examination of the four corners of the detective's affidavit upon which the search warrant was issued demonstrates that it was insufficient to support a finding of probable cause to search Mr. Keener's residence. The evidence in this case shows that the detective intentionally or reckless misinformed the magistrate regarding the status of the informant, characterizing him as a "concerned citizen" rather than a criminal informant thereby materially misrepresenting his reliability.

The informant was being held in police custody for his suspected role in the theft of a ring that was stolen from a vehicle when he gave information to the detective concerning alleged criminal activity at Mr. Keener's residence. Although the detective

was aware of the circumstances under which the informant gave this information and its impact in lessening the reliability of that information, the detective failed to accurately inform the court in his affidavit of these circumstances. Even if it were possible for the court to look beyond the four corners of the affidavit to establish probable cause, the evidence does not support the judge's finding that the affidavit in this case presented by Detective Teerlink was read simultaneously by the magistrate with the affidavit presented by a different detective concerning a different defendant, different residence and different case when making her finding of probable cause or that the magistrate made any connection between the two affidavits. Therefore, the trial court's finding was clearly erroneous. Additionally, the evidence also demonstrates that the detective omitted material information regarding the informant's criminal history and failed to corroborate the details of the informant's allegations of criminal activity.

Because the detective's material misstatements and omissions were intentionally or recklessly false and the affidavit otherwise fails to establish probable cause the fourth amendment was violated and the evidence should have been suppressed. However, even if probable cause did exist, article I, section 14 of Utah's Constitution requires the evidence be suppressed where misstatements and omissions have been intentionally or recklessly made to the court in order to secure a search warrant.

ARGUMENT

POINT I. THE TRIAL COURT ERRED IN DENYING MR. KEENER'S MOTION TO SUPPRESS THE SEARCH WARRANT WHERE THE WARRANT WAS NOT SUPPORTED BY PROBABLE CAUSE BUT BASED ON AN AFFIDAVIT CONTAINING INTENTIONAL OR RECKLESS MISINFORMATION AND UNCORROBORATED HEARSAY STATEMENTS.

The Fourth Amendment to the United States Constitution provides, "[t]he 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." U.S. Const. amend IV. The text of article I, section 14 of the Utah Constitution contains identical language. Utah Const. art. I, § 14.

In considering whether an affidavit supporting a search warrant gave the magistrate a substantial basis for a finding of probable cause, Utah courts "'examine the search warrant affidavit "in its entirety and in a common-sense fashion," deferring to the magistrate's decision on whether the search warrant is supported by probable cause.'" State v. Dable, 2003 UT App 389, ¶ 4, 81 P.3d 783 (quoting State v. Purser, 828 P.2d 515, 517 (Utah Ct. App. 1992) (citation omitted)). However, this Court has also stated that it is "bound by the contents of the affidavit, [and] need not defer to the trial court's finding." Id.(quotation and citation omitted); see also State v. Deluna, 2001 UT App 401, ¶ 9, 40 P.3d 1136 (noting that a Utah appellate court, "like the reviewing court below, is bound by the contents of the affidavit . . . [and] make[s] an independent review of the

trial court's determination of the sufficiency of the written evidence"). In other words, although this Court may defer to the magistrate's determination of probable cause, the analysis on appeal is limited to the four corners of the affidavit in question, and this Court owes no deference to the trial court's denial of the motion to suppress. Id.; Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 565 n.8 (1971).

A search warrant based on an affidavit in support thereof "must articulate particularized facts and circumstances leading to a conclusion that probable cause exists. Mere conclusory statements will not suffice." State v. Babbell, 770 P.2d at 990. The standard requires sufficient evidence to support "'a fair probability that contraband or evidence of a crime will be found in a particular place.'" State v. Droneburg, 781 P.2d 1303, 1304 (Utah Ct. App. 1989) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)). A review of the magistrate's probable cause determination will "assess whether the magistrate had a "'substantial basis' for determining that probable cause existed." State v. Norris, 2001 UT 104, ¶14, 48 P.3d 872 (quoting State v. Thurman, 846 P.2d 1256, 1259-60 (Utah 1993) (further quotations omitted)). "[T]he magistrate can only fulfill his constitutional function if the information given to him is true." State v. Nielsen, 727 P.2d 188, 190 (Utah 1986) ("[T]he obvious assumption behind the warrant requirement is that the factual showing to support a finding of probable cause will be truthful.").

In challenges to the sufficiency of an affidavit based on an informant tip, the Utah Supreme Court has adopted the same standard that is applied under federal law; namely, the "flexible totality-of-the-circumstances standard" articulated in Illinois v. Gates, 462 U.S. 213 (1983). State v. Saddler, 2004 UT 105, ¶11, 104 P.3d 1265 (citations omitted).

Under that analysis, Utah courts consider whether an affidavit contains detailed relevant facts concerning the informant and the alleged criminal conduct. See Gates, 462 U.S. at 239; Babbell, 770 P.2d at 990-91; Droneburg, 781 P.2d at 1304-05.

> Factors to consider in determining whether probable cause exists include an informant's veracity, reliability and basis of knowledge. Gates, 462 U.S. at 233, 103 S.Ct. at 2329; State v. Hansen, 732 P.2d 127, 130 (Utah 1987); State v. Brown, 798 P.2d 284, 286 (Utah Ct. App. 1990). In some cases, the circumstances may require the supporting affidavit to set forth in detail the basis of knowledge, veracity and reliability of a person supplying information in order to establish probable cause. State v. Bailey, 675 P.2d 1203, 1205 (Utah 1984). In other cases, if the circumstances as a whole demonstrate the truthfulness of the informant's report, a less strong showing is required. Id. at 1205-06. For example, reliability and veracity are generally assumed when the informant is a citizen who receives nothing from the police in exchange for the information. See Bailey, 675 P.2d at 1206; Brown, 798 P.2d 286; State v. Stromberg, 783 P.2d 54, 57-58 (Utah App. 1989), cert. denied, 795 P.2d 1138 (Utah 1990). Courts have also consistently approved the issuance of search warrants where the informant's knowledge is based on personal observation. See Hansen, 732 P.2d at 130; Brown, 798 P.2d at 287; Stromberg, 783 P.2d at 57. Further buttressing reliability is the detail with which an informant describes the facts set forth in the affidavit and independent corroboration of the significant facts by police. See [State v.] Anderson, 701 P.2d [1099,] at 1102 [(Utah 1985)]; Bailey, 675 P.2d at 1206; Brown, 798 P.2d at 287.

Purser, 828 P.2d at 517; see also, Saddler, 2004 UT 105, ¶11 ("The indicia of veracity, reliability, and basis of knowledge are nonexclusive elements to be evaluated" in totality of the circumstances analysis (abrogating the Kaysville City v. Mulcahy, 943 P.2d 231 (Utah Ct. App. 1997) three factor analysis in determining reliability and sufficiency of an informant).

In the present case, the trial court concluded that "[h]aving reviewed Teerlink's Affidavit in its entirety, . . . Judge Atherton 'had a substantial basis for determining that probable cause existed and that evidence of illegal conduct would be found at the' Sir

Phillip Drive location." R. 169. In concluding that probable cause existed, the trial court determined that the question of whether an "'an intentional misstatement in an affidavit supporting a warrant,'" material or otherwise "'requires suppression of the evidence' under Article I, Section 14 of the Utah constitution" was left open because it found that "no misstatement" was made by the detective.[2] R. 169. In finding that no misstatement had been made by the detective, the trial court looked beyond the four corners of the Teerlink affidavit and noted that "[h]ad Detective Teerlink's affidavit stood alone, his characterization of Lambson as a 'concerned citizen' would be troubling to the court. But it did not stand alone; rather it was submitted alongside Detective Hardin's affidavit [submitted to secure a search warrant of a different residence of a different individual], which pointed out that Lambson had been 'detained by Murray Police' regarding 'a stolen ring.' Hardin Affidavit, p.2." R. 169. The trial court determined that the reference to Lambson in Detective Hardin's affidavit "combined with Detective Teerlink's knowledge that Judge Atherton would be reviewing both his and Detective Hardin's affidavits together, dispelled any potential false impression. It is as if the detectives defined 'concerned citizen' to mean Gary Lambson, a person of interest detained by the authorities." R. 169.

An examination of the four corners of the affidavit in question reveals that it was insufficient to support a finding of probable cause to search Mr. Keener's residence because Detective Teerlink intentionally or recklessly (A) misinformed the magistrate

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[2] The trial court stated in a footnote that "a finding that the Sir Phillip Drive warrant was constitutionally permissible under a state constitutional analysis necessarily means that it was permissible under a federal constitutional analysis too." R. 169 n.3.

regarding the status of the informant relied upon and failed to adequately corroborate the informant's allegations of criminal activity; (B) omitted material information regarding the informant's criminal history and (C) such intentional or reckless misstatements and omissions require suppression of the evidence where they are material and the affidavit otherwise failed to establish probable cause. The trial court's finding relying on information outside the four corners of the affidavit was erroneous. Even if it were permissible for the trial court to look beyond the four corners of the affidavit when evaluating whether the magistrate had a substantial basis for a finding of probable cause, the information relied upon by the trial court in making its finding is not supported by the evidence. Because the detective's material misstatements and omissions were intentionally or recklessly false and the affidavit otherwise fails to establish probable cause, the evidence must be suppressed.

A. The Affidavit Failed to Support a Finding of Probable Cause Because it Contained an Intentional or Reckless Material Misstatement Characterizing Lambson as a "Concerned Citizen," Thereby Misrepresenting the Reliability of the Informant, and Failed to Corroborate the Details of the Alleged Criminal Activity.

The supreme court explained in State v. Nielsen, that "[t]he responsibility for issuing warrants and for meeting the pertinent constitutional requirements that underlie their issuance rests with the magistrate, . . . [but] the magistrate can only fulfill his constitutional function if the information given to him is true." 727 P.2d 188, 190 (Utah 1986). For this reason, "[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. at 191. Additionally, "courts must be particularly vigilant in assessing a claim that a police officer has *misrepresented* information in an affidavit supporting the issuance of a search warrant." Id. at 190-91 (emphasis added).

In this case, the trial court erred when it concluded that Detective Teerlink's affidavit provided a substantial basis for a finding of probable cause because it wrongly characterized Mr. Lambson as a "concerned citizen," omitted material information regarding the informant's criminal history, and failed to corroborate the details of the informant's allegations of criminal activity. The trial court's factual finding that "no misstatement" existed as Teerlink's affidavit "did not stand alone" but "was submitted alongside Detective Hardin's affidavit" is erroneous because it is not supported by the evidence and looks beyond the four corners of the Teerlink affidavit to support probable cause.[3] R. 169.

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[3] "'[F]actual findings underlying the trial court's decision to grant or deny a motion to suppress evidence' are reviewed under the clearly erroneous standard." State v. Krukowski, 2004 UT 94, ¶11, 100 P.3d 1222 (further quotation and citations omitted). However, in Deluna, this Court stated that it is bound on review "by the contents of the affidavit," and it will not defer to the trial court's findings in support of its denial to suppress. 2001 UT App 401, ¶9, 40 P.3d 1136. Under the four corners rule limiting review to the contents of the affidavit alone, the affidavit fails to establish probable cause. Similarly, under the clearly erroneous standard, the evidence fails to support the trial court's finding that the magistrate reviewed the affidavits together to "dispel[]" the false information conveyed establishing probable cause. R. 169. Appellant argues that under the circumstances of this case, involving a judge made finding, the marshaling rule should not be implicated. Rather, the standard employed is whether the finding is against the clear weight of the evidence. Weighing evidence to determine whether the evidence is against the clear weight of evidence involves a different review standard than marshaling the evidence and considering it in the light most favorable to the finding. In other words, considering whether a finding is against the clear weight of the evidence requires reviewing all of the evidence, without weighing it in favor of the finding, and the finding can be against the clear weight of evidence, even if the marshaled evidence would

On December 9, 2005, Detective Teerlink submitted an affidavit to Judge Atherton stating in part that he had "received information from a concerned citizen named Gary Lambson. Mr. Lambson stated that there is stolen jewelry at the address of 849 North Sir Phillip Drive. He also stated that the individuals who reside or otherwise occupy 849 North Sir Phillip Drive are engaging in an ongoing narcotics distribution operation." R. 79. Detective Teerlink stated in the affidavit that he "consider[ed] the information received from the concerned citizen to be accurate and reliable because:

> The concerned citizen, Gary Lambson, has provided your affiant with his name, date of birth and criminal history. Your affiant informed Mr. Lambson that if he gave your affiant any false information he would be charged with interfering with an investigation.

R. 80.

At the motion to suppress hearing, Detective Teerlink testified that he prepared the search warrant for Mr. Keener's residence, 849 North Sir Phillip Drive. R. 221:22. The detective testified that he became involved in this investigation after

> Detective Hardin[ ] contacted me and explained that he had a – that there was a gentleman that he had in custody at the time, Mr. Lambson; and he said that he had a residence that had some—told me that there were some drugs there, some stolen jewelry, and asked me for my assistance.

R. 221:22. The detective believed he was contacted for his help because he "had experience in writing search warrants and experience in narcotics." R. 221:23. Detective Teerlink testified that he interviewed Mr. Lambson at the Salt Lake City Police Department. R. 221:23. The detective stated that the only thing he "promised [Mr.

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support the finding. See State v. Walker, 743 P.2d 191, 193 (Utah 1987). Although marshaling the evidence seems contrary to a weight of evidence review, with an abundance of caution, Appellant nevertheless marshals the evidence for this Court.

Lambson was] that if he lied to me in any way about the investigation, . . . I would charge him for false information and interfering in an investigation." R. 221:23. The detective testified that no other promises were made to Mr. Lambson but stated

> Mr. Lambson was detained that evening while the search warrant – until after the search warrant was served. I contacted Detective Hardin[ ] and suggested that since I had put his name – Mr. Lambson's name in the search warrant, that it would not be a good idea to book him into jail with the same people that he was – that he'd given us information on. Then I suggested that we – I suggested later to him that we not file charges.

R. 221:24.

The detective testified that he used Mr. Lambson's name in the affidavit because "without his name in the search warrant, it – I didn't feel like we had enough probable cause, and that we needed his name to make him – you know, if we just said an anonymous informant, then it would not be – we didn't have enough probable cause. R. 221:25. The detective testified that he used the term "concerned citizen" rather than "confidential informant" "because he was not signed up as a confidential informant. [He'd] never done any buys with him. [He] hadn't made any promises to him." R. 221:25. The detective testified that he used the term concerned citizen because he did not feel Mr. Lambson fit the guidelines normally used for confidential informants. R. 221:26. On cross-examination, the detective admitted that he knew that informants termed as "concerned citizens" were accorded more reliability than those termed criminal informants. R. 221:26. The detective stated his intent was to put Mr. Lambson in a "box that seemed to fit him in my mind." R. 221:30.

The trial judge then asked the detective whether "the affidavits [were] submitted to Judge Atherton simultaneously?" R. 221:26. The detective said "Yes, they were." R. 221:26. This single question by the judge was the only evidence presented in support of the trial court's finding that Detective Teerlink's affidavit did not stand alone. R. 169. This affirmation of the judge's question does not support the trial court's finding that Detective Teerlink had "knowledge that Judge Atherton would be reviewing both his and Detective Hardin's affidavits together, dispel[ing] any potential false impression." R. 169. Detective Teerlink did not testify that he knew that the affidavits were in fact read simultaneously or that the affidavits cross referenced each other to establish probable cause, only that he presented his affidavit at the same time Detective Hardin presented his affidavit regarding another defendant in another case. There is no evidence that these affidavits were given alone by each detective or with multiple other affidavits as is the common practice when seeking search warrants. Presumably when different officers present different affidavits dealing with different defendants and cases, a busy magistrate is not necessarily going to connect the two affidavits together. In fact, the magistrate could have been presented with a number of other affidavits at the same time and there is no evidence that the magistrate did in fact make any connection between the two affidavits in question here. The state did not present any further evidence regarding the affidavit submitted by Detective Hardin dealing with facts from a different case. Notably, both the state and defense counsel argued during the suppression hearing that references to the affidavit prepared by Detective Hardin "regarding a different search warrant for a

different case in a different instance referred by a different detective" had no bearing on this case. R. 221:6.

The marshaled evidence, therefore, does not support the judge's finding that the affidavit in this case, presented by Detective Teerlink, was read simultaneously by the magistrate with the affidavit presented by Detective Hardin concerning a different defendant, different residence and different case when making a finding of probable cause. And, the judge's finding that the affidavit was not misleading because Detective Hardin's affidavit was presented at the same time is against the weight of the evidence that shows that the officer intentionally or reckless used a more reliable informant label so as to pass the probable cause test. Furthermore, reliance on information outside the four corners of the affidavit is improper. Case law firmly establishes that probable cause must be established based on the contents of the affidavit itself. Saddler, 2004 UT 105 at ¶17; Deluna, 2001 UT App 401 at ¶9.

In this case, the affidavit prepared by Detective Teerlink used to secure the search warrant of Appellant's residence, intentionally or recklessly misinformed the magistrate about the informant's status, which bore on his reliability and omitted material information regarding the informant's criminal history, thus failing to support a finding of probable cause. The detective's testimony regarding his knowledge that by terming Mr. Lambson a "concerned citizen" the court would consider the information more reliable together with his admission that he did not believe that probable cause could be established by omitting Mr. Lambson's name from the affidavit, thus not even meeting the reliability of a confidential informant, demonstrates the detective's intentional or

reckless intent to mislead the court. However, even if this Court determines that the detective's misstatements were unintentionally or not recklessly made, the affidavit still fails to establish probable cause because the information obtained came from a criminal informant rather than a "concerned citizen," thus lowering the reliability of the hearsay statements, and the detective failed to independently corroborate the informant's allegations of criminal activity. Therefore, the evidence should be suppressed.

1. *The detective's intentional or reckless misstatements bore on the informant's reliability materially affecting the affidavit.*

When probable cause to search is predicated upon facts supplied by an informant, part of the totality of the circumstances analysis includes determining the type of tip or informant involved. State v. Dable, 2003 UT App 389, ¶6, 81 P.3d 783. There are two primary types of informant: the citizen-informant and the police informant (sometimes called a criminal or confidential informant). Generally, "an ordinary citizen-informant needs no independent proof of reliability or veracity." Deluna, 2001 UT App 401 at ¶14 (citations and quotations omitted). A citizen-informant is "an average citizen who is in a position to supply information by virtue of having been a crime victim or witness" and relates the information to the police as a matter of civic duty. State v. White, 851 P.2d 1195, 1199 (Utah Ct. App. 1993) (quotations and citations omitted); see also State v. Ortiz, 600 N.W.2d 805, 822 (Neb. 1999) ("citizen informant ... is a special status which must be affirmatively alleged"); United States v. Mahler, 442 F.2d 1172, 1175 (9th Cir. 1971) (stating that when the informant is the victim of the crime, no other facts are necessary to show that informant is reliable).

Alternatively, a police informant is one "who gains information through involvement in criminal activity or who is motivated by pecuniary gain [and thus] is lower on the reliability scale." State v. McArthur, 2000 UT App 23, ¶ 31, 996 P.2d 555 (internal quotations and citation omitted); see also State v. Harris, 589 N.W.2d 782, 789 (Minn. 1999) (noting that "statements from citizen witnesses, as opposed to criminal informants, may be presumed to be credible"); State v. Williams, 193 S.W.3d 502, 507 (Tenn. 2006) (noting the difference in reliability "between information provided by 'citizen' or 'bystander' informants and information provided by 'criminal informants' or an informant from a 'criminal milieu'" (citation omitted)). "Thus, experienced stool pigeons or persons criminally involved or disposed are not regarded as 'citizen-informants' because they are generally motivated by something other than good citizenship." See People v. Smith, 553 P.2d 557, 560 (Cal. 1976) (citation omitted). "The designation 'citizen-informant' is just as conclusionary as the designation 'reliable-informant.' In either case the conclusion must be supported by facts stated in the affidavit." Id. (citations omitted). Similarly, an anonymous tip is "toward the low-end of the reliability scale" because the tipster's "basis of knowledge and veracity are typically unknown." Kaysville City v. Mulcahy, 943 P.2d 231, 235 (Utah Ct. App. 1997) (citation omitted) (abrogated on other grounds in Saddler, 2004 UT 105). On the other hand, informants, who "give their full names, thus subjecting themselves to a penalty for providing false information," are more reliable than those who remain anonymous. Deluna, 2001 UT App 401 at ¶15.

In determining whether an informant is a citizen-informant or police informant, it is important to consider whether the informant was part of the criminal environment, which would lower his reliability. See State v. Goldberg, 872 A.2d 378, 383 (Vt. 2005) ("Our cases attaching a presumption of reliability to named citizen informants expressly distinguish between citizens who simply come forward in the interest of law enforcement, and informants who have a preexisting relationship with the police."). Another consideration in determining the informant reliability is whether the informant provided information against his penal interest. United States v. Harris, 403 U.S. 573, 583 (1971) (holding statements "against the informant's penal interest" "carry their own indicia of credibility")).

When an affidavit is based primarily on information obtained from an informant, the supreme court has recognized that

> [A]n informant's "reliability" and "basis of knowledge" are but two relevant considerations, among others, in determining the existence of probable cause under "a totality-of-the-circumstances." They are not strict, independent requirements to be "rigidly exacted" in every case. A weakness in on or the other is not fatal to the warrant so long as in the totality there is a substantial basis to find probable cause.

Saddler, 2004 UT 105, ¶11, 104 P.3d 1265. Factors looked at when evaluating the sufficiency of an affidavit based on information given by an informant are any corroborating details, statements against penal interest, participation in criminal activity, and personal observations made by the informant. Id. at ¶5.

In Saddler, the supreme court held under the totality of the circumstances present the "affidavit set[] forth sufficient underlying circumstances to support the reliability and

credibility of the confidential informant and [the detective's] corroborative efforts." 2004 UT 105 at ¶¶16, 27. Even though this affidavit set forth sufficient details to bolster the confidential informant's reliability, including the informant's statements against his penal interest and personal observation, the court noted that "even if the confidential informant's reliability were in question, this would not necessarily be fatal to the warrant under the totality-of-the-circumstances standard." Id. at ¶¶18, 21, 26. An affidavit based on an anonymous informant can support a finding of probable cause where the police are "able to corroborate" "the detailed information" given. Id. In Saddler, the detective detailed his "significant" corroborative efforts in the affidavit in addition to "verify[ing] other, more innocent details provided by the confidential informant" such as the vehicles present at the home, the vehicles registered owners, and Saddler's place of employment. Id. at ¶¶ 18-19, 22, 24.

An examination of these factors outlined above demonstrates that the affidavit in this case was insufficient to support a finding of probable cause because Mr. Lambson was not an inherently reliable informant. For example, Mr. Lambson was not a "concerned citizen" who came to the police with information about criminal activity "as a matter of civic duty," (State v. White, 851 P.2d 1195, 1199 (Utah Ct. App. 1993)) or otherwise, thus, giving his statements an indicia of reliability requiring "no independent proof of [their] reliability or veracity." Deluna, 2001 UT App 401 at ¶14. Instead, Mr. Lambson was detained for possession of a ring that was stolen from a vehicle. R. 168. Mr. Lambson had taken the ring purchased for $50 from Daniel V. Keener, Appellant's father, to a jewelry store and had attempted to sell it. R. 79, 168. And Mr. Lambson was

in police custody for his suspected role in the theft of the ring at the same time Detective Teerlink was seeking a search warrant based on information from Mr. Lambson, but depicting Mr. Lambson as a concerned citizen.

Detective Teerlink asserted that Gary Lambson was an accurate and reliable source because he provided "his name, date of birth, and criminal history." R. 80. While such information may bolster the reliability of an informant under some circumstances, here Mr. Lambson provided his information and information regarding the stolen jewelry and drugs at a time when he was under investigation for criminal conduct relating to the incident and when in police custody. Accordingly, he is not entitled to the presumption of reliability normally afforded to citizen informants with no connection to the police. See State v. McArthur, 2000 UT App 23, ¶ 31, 996 P.2d 555 (noting that an "informant who gains information through criminal activity . . . is lower on the reliability scale than a citizen informant"); see also United States v. Button, 653 F.2d 319, 326 (8th Cir. 1981) (noting that "courts should be cautious in accepting the assertion that one who apparently was present when narcotics were used or displayed is a presumptively reliable citizen-informer. . . . because as a general proposition it is an informant from the criminal milieu rather than a law-abiding citizen who is most likely to be present under such circumstances").

Furthermore, given the circumstances under which Mr. Lambson's provided his statements, they cannot be considered statements against his penal interest, thus increasing his reliability, because they did not subject him to any additional criminal liability greater than what he was facing. Saddler, 2004 UT 105 at ¶20. In fact, his

statements were aimed at lessening his criminal culpability and the sanctions he faced. For example, in State v. Spillers, 847 N.E.2d 949 (Ind. 2006), the Supreme Court of Indiana held that an informant's statements that his cocaine supplier was Spillers and he had recently purchased cocaine from him were not statements against his penal interests and did not bolster the informant's reliability. Id. at 954-57. The criminal informant in Spillers had been arrested for dealing or possession of cocaine as a result of a search warrant being executed on his home. Id. at 951-52. After his arrest, the informant told detectives that Spillers was his drug source and had recently obtained cocaine from him earlier that same day. Id. at 952. The informant also gave information regarding Spillers' girlfriend's address where he was staying and the make and model of his car. Id. Spillers moved to suppress the evidence arguing that the affidavit was insufficient to establish probable cause for a search warrant because the informant's credibility had not been established nor had the statements been corroborated. Id. at 953. The state argued that the informant's statements were not only corroborated but were made against his penal interests. Id.

The court determined that unlike those cases where "an informant, after arrest or confrontation by police, admitted committing criminal offenses under circumstances in which the crimes otherwise would likely have gone undetected" the informant here "was caught "'red-handed'" with drugs in his possession before naming his purported supplier." Id. at 956. "Although [the informant] admitted committing additional crimes of possession of cocaine, his tip was less a statement against his penal interest than an obvious attempt to curry favor with police." Id. (citing Williamson v. United States, 512

U.S. 594, 607-08 (1994) ("A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation.")). Therefore, the informant's statement was not a declaration against his penal interest demonstrating his credibility because he had already been arrested for possession and "his decision to reveal his source to police did not subject him to any additional criminal liability." Id. at 957.

Similarly, in this case Mr. Lambson was not inherently reliable because he was detained for trying to sell a stolen ring and subject to possible third degree felony charges.[4] The information he gave the detectives about Mr. Keener did not subject him to additional criminal liability. Nor did the threat of being charged for giving false information, a class B misdemeanor, increase his reliability. See Utah Code Ann. § 76-8-506 (2003); Spillers, 847 N.E.2d at 957 n.8. (dismissing the state's argument that if the informant had been found to have given false information he could have been prosecuted, concluding that because the informant had been "arrested for either a Class A or a Class C felony, his potential criminal liability for an additional misdemeanor offense was de minimus"). Furthermore, the detective was acutely aware of the circumstances under which Mr. Lambson was giving information about the stolen jewelry and drugs and its impact in lessening the reliability of that information, yet he failed to accurately inform

[4] Utah Code Ann. § 76-6-408 (2003), Theft by Receiving Stolen Property, states in part "A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen. . . ." Theft is a third degree felony if the value of the property or services is or exceeds $1,000 but is less than $5,000. Utah Code Ann. § 76-6-412.

the court. The detective was also aware that categorizing Mr. Lambson as a "concerned citizen" rather than a criminal informant would make him appear more reliable. The detective's intentional or reckless misstatements regarding Mr. Lambson's informant status bore on the reliability of the hearsay statements, materially affecting the affidavit.

However, even if this Court determines that these statements were not made intentionally or recklessly, Mr. Lambson's statements were unreliable and could not support a finding of probable cause. Although Mr. Lambson's unreliable statements could not have stood alone, it may have been possible for his allegations to support a finding of probable cause, if they had been adequately corroborated by independent police investigation prior to the issuance of the search warrant. See Saddler, 2004 UT 105 at ¶ 21. However, in this case the affidavit still lacked probable cause because, as set forth below, Detective Teerlink failed to properly corroborate Mr. Lambson's allegations.

2. *The affidavit fails to support a finding of probable cause where the detective failed to independently corroborate the unreliable hearsay statements.*

Because Detective Teerlink did not independently confirm any illegal activity, the informant's tip in this case was not properly corroborated and therefore the affidavit was insufficient to justify a search of Mr. Keener's residence. When an affidavit is based primarily on a tip from an informant, Utah courts "expect police officers to make significant independent corroborative efforts to confirm the information." State v. Valenzuela, 2001 UT App 332, ¶15, 37 P.3d 260. Moreover, the United States Supreme Court has explained that the police must corroborate the allegations of criminal activity, not merely an informant's description of a suspect's appearance or residence:

> An accurate description of a subject's readily observable location and appearance is of course reliable in [a] limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.

Florida v. J.L., 529 U.S. 266, 272 (2000); see also United States v. Clark, 31 F.3d 831, 834 (9th Cir. 1994) (noting that the "[m]ere confirmation of innocent static details in an anonymous tip does not constitute corroboration").

For example, in United States v. Frazier, 423 F.3d 526 (6th Cir. 2005), six affidavits were submitted seeking six search warrants of the defendant's different residence where defendant was suspected of dealing drugs from. Id. at 530. The sixth affidavit (the Frazier affidavit), seeking to search defendant's Jeffries Street residence, described the defendant's criminal enterprise and gave the report of an anonymous witness "CW-1" who had personally witnessed defendant selling drugs out of the housing project. Id. The Frazier affidavit did not include information regarding the activities caught on tape with a different confidential informant (CI-178) that the other five affidavits had included. Id. No substantial corroboration of the anonymous witness CW-1 statements were made by the agent. Id. The defendant moved to suppress the Frazier affidavit based on lack of probable cause, which was granted. Id.

The court reiterated established case law that when reviewing the "sufficiency of the evidence supporting probable cause [it] is limited to the information presented in the four-corners of the affidavit" and therefore "may not consider in this analysis [the agent's] testimony that CI-178 recorded the [drug] transactions" because the Frazier

affidavit did not include the information. Id. at 531. The court noted that as part of its totality of the circumstances analysis it must consider the confidential informants veracity, reliability and basis of knowledge.

> While independent corroboration of a confidential informant's story is not a *sine qua non* to a finding of probable cause, in the absence of any indicia of the informants' reliability, courts insist that the affidavit contain substantial independent police corroboration.

Id. at 532 (citations omitted). The court noted that the agent failed to include any evidence of corroboration of the informant information or evidence of the confidential informant's reliability. Id. Because none of the informants' statements were corroborated other than observations that Frazier was "coming and going from his residence on Jeffries Street" "and a search of his telephone records reveal[ing] that he was in constant contact with known drug dealers," the court concluded that the district court correctly suppressed the Frazier affidavit. Id. at 532-33.

State v. Detroy, 72 P.3d 485, 488 (Haw. 2003), also shows that when an informant's statements are low on the reliability scale, substantial independent corroboration must be done by the officers in order to establish probable cause. In Detroy, a detective received an anonymous tip that described the location of the defendant's residence and alleged that he "may [have been] growing marijuana there." Id. The informant claimed that he had smelled "the odor of marijuana plants" and had "observed through [d]efendant's open windows, in the room that contained an air conditioner, a very bright white light. . . . [and] the tops of marijuana plants." Id. The informant also provided a physical description of the suspect. Id. Upon independent

investigation, however, the detective only "ascertained that (1) [i]nformant's description of the apartment and windows was accurate, (2) [i]nformant's description of [d]efendant substantially matched the computer information he accessed, and (3) lights could be observed throughout the apartment except for the room with the air conditioner." Id. at 492. The Hawai'i Supreme Court noted that the detective "was unable to verify the incriminating aspects of the tip. [The detective] failed to (1) detect the odor of marijuana plants, (2) observe bright lights in [d]efendant's back room, [or] (3) see the tops of marijuana plants in [d]efendant's apartment." Id. Therefore, the court concluded that "to the extent corroborated, the tip did not provide probable cause." Id.

Additionally, in State v. Goldberg, 872 A.2d 378, 380 (Vt. 2005), further demonstrates that uncorroborated information from a unreliable criminal informant does not establish probable cause. In Goldberg, the police received a tip from an informant "about a marijuana growing operation." Id. at 380. The informant told the detective "that he had seen roughly forty marijuana plants at a house occupied by [the defendants] . . . [and he] described some details about the growing operation, including its location in a basement crawl space, and the lighting and drying mechanisms employed." Id. The detective "prepared an affidavit recounting [the informant's] information and the result of the DMV check [on the names provided by the informant], which he then submitted as part of his application for a warrant authorizing the search of defendants' home." Id. The defendants later filed motions to suppress the evidence obtained during the search, alleging in part "that the warrant should not have issued without some independent corroboration of the information [the informant] provided." Id. The Vermont Supreme

Court agreed, noting that the detective's "only attempts at corroboration were a drive-by of the residence, and a DMV check of the names that [the informant] gave him." Id. at 383. The court explained that "[w]hile the DMV report did corroborate some of the peripheral details of [the informant's] story, it did nothing to confirm the allegations of criminal conduct. Overall, the affidavit provided little evidence that [the detective] had corroborated [the informant's] information about the marijuana growing operation." Id.

Similarly, in this case, Detective Teerlink failed to corroborate the informant's allegations of criminal conduct or any incriminating aspects of the tip. In fact, Detective Teerlink only confirmed that the address listed on Mr. Keener's driver's license matched the address provided by the informant. This information did not demonstrate that Mr. Lambson had "knowledge of concealed criminal activity;" rather, it only helped Detective Teerlink "correctly identify the person whom [Mr. Lambson] mean[t] to accuse." See Florida v. J.L., 529 U.S. 266, 272 (2000); see also People v. Scoma, 455 P.2d 419, 424 (Cal. 1969) ("Of no greater assistance is the fact that [the defendant's] past and present addresses were those provided by the informant; again, no inference of criminal activity on [the defendant's] part may be drawn.").

Moreover, Detective Teerlink stated in the affidavit that he believed Mr. Lambson's information "to be accurate and reliable because . . . Daniel Lee Keener has been arrested for numerous thefts[,] . . . [and] numerous drug charges." See R. 79-81. However, Mr. Keener's "criminal record also [did] nothing to establish that he is currently dealing in controlled substances" or otherwise engaged in criminal activity. See State v. Brooks, 849 P.2d 640, 644 (Utah Ct. App. 1993). Accordingly, Detective

Teerlink's assertion that he believed the informant's tip to be accurate and reliable based on Mr. Keener's record of past arrests does not bolster his affidavit in support of probable cause. Therefore, because Detective Teerlink did not make a significant independent corroborative effort and did not confirm any of the informant's allegations of criminal activity, the trial court erred in finding the affidavit was sufficient to support a finding of probable cause to search Mr. Keener's residence

B. The Detective's Intentional or Reckless Omission of the Informant's Criminal History in the Affidavit Materially Affected the Finding of Probable Cause.

"Just as police officers may not include materially false statements in a warrant affidavit, they similarly cannot omit information that 'materially affects the finding of probable cause.'" State v. Krukowski, 2004 UT 94, ¶ 15, 100 P.3d 1222 (quoting Nielsen, 727 P.2d at 191). An omission is considered material "[i]f an affidavit fails to support a finding of probable cause after . . . the omitted information is added." Nielsen, 727 P.2d at 191. If this is the case, "any evidence obtained under the improperly issued warrant must be suppressed." Id. Because the informant in this case had a criminal history and was under investigation for attempting to pawn a stolen ring at the time he provided the tip to Detective Teerlink, he was not an inherently reliable informant.

The failure to disclose an informant's criminal history in an affidavit for a search warrant has been disapproved of by several state courts. For example, in State v. Bittner, 832 P.2d 529 (Wash. Ct. App. 1992), the defendants appealed their convictions for drug possession, "contending that the trial court erred in admitting evidence obtained during the execution of a search warrant." Id. at 530. The affidavit for the warrant at issue

stated that a "concerned citizen" had observed a drug transaction in the defendants' residence and had later accompanied the detective to this residence, where he "confirmed that the vehicle [in the driveway] belonged to [one of the defendants]." Id. Although the detective who prepared the affidavit was aware of the informant's identity, the affidavit specifically requested "that the identity of the concerned citizen be known only to your affiant . . . because the concerned citizen fears swift and sure retribution from the suspect parties." Id. However, the affidavit failed to reveal that the informant "had a prior criminal record of reckless driving and driving while intoxicated, and that he had previously contacted the police to discuss his impersonation of a police officer." Id. Although the court found that the affidavit on its face lacked sufficient evidence to support a finding of probable cause, the court also "note[d] with disapproval the type of affidavit produced here. The picture of the informant created by the affidavit for a search warrant was not in accord with the true facts . . . [and] it was error not to have included in the affidavit that the 'concerned citizen' had previously contacted the sheriff's office because he had been investigated for a crime. This type of information could influence a magistrate's decision in assessing the reliability of an informant's tip." Id. at 533. See also State v. Chenoweth, 158 P.3d 595, 610 (Wash. 2007) (distinguishing Bittner because "there [was] no showing that the police affiant knew more about [the informant's] criminal involvement than was disclosed during the warrant application. . . . [and] the police affiant did not gloss over the informant's identity by characterizing him as a 'concerned citizen' but disclosed his name and known criminal history"); State v. Goldberg, 872 A.2d 378, 382 (Vt. 2005) (holding that the affidavit failed to demonstrate

the credibility of the informant and thus did not establish probable cause for a search warrant, in part because it "failed to describe [the informant's] criminal history."); Davis v. State, 637 S.E.2d 431, 437 (Ga. Ct. App. 2006) (noting that "although it is not clear whether the omission was intentional, [the detective] was aware of [the informant's] criminal history and such information should have been provided to the magistrate"); Brown v. State, 535 S.E.2d 785, 787 (Ga. Ct. App. 2000) ("In order to fully apprise the magistrate, an officer seeking a warrant should provide the magistrate with any information relevant to the informant's reliability, including information about his criminal history or any pending criminal charges.").

In this case, as in Bittner, "the picture of the informant created by the affidavit for a search warrant was not in accord with the true facts." See Bittner, 832 P.2d at 530. The affidavit failed to disclose both Mr. Lambson's criminal history and the fact that he was under investigation at the time he provided the information to Detective Teerlink. Mr. Lambson's criminal history, which a search of court records in Utah appears to include a conviction for possessing/consuming/purchasing alcohol by a minor, class B misdemeanor, on December 3, 2001; an arrest for aggravated assault on November 11, 2001, which was dismissed due to the witness not being present; convictions for improper usage of lanes, a class C misdemeanor and operating a vehicle without insurance, a class B misdemeanor, on January 11, 2005; an arrest for acquiring a controlled substance by prescription alteration on May 18, 2005, dismissed without prejudice; and, currently pending charges, unrelated to this case, of 5 second degree felony Theft charges, 1 third degree felony Theft charge and 3 class A misdemeanor Criminal Mischief charges

allegedly occurring on November 6, 2004. R. 63-64. Mr. Lambson's criminal history, along with the fact that he was a suspect in the theft of jewelry, showed he was an unreliable informant. This constitutes a material omission because these facts, had they been included in the affidavit, may have significantly influenced the magistrate's assessment of the reliability of Mr. Lambson's allegations and the ultimate finding of probable cause. Additionally, the omission of Mr. Lambson's criminal history further illustrates the intentional or reckless intent of the detective in trying to mislead the court in establishing probable cause because he was aware that a criminal history might have some affect on probable cause, as he included Mr. Keener's criminal history in the affidavit.

Therefore, although the affidavit reveals Mr. Lambson's name, it was error to misrepresent his identity by characterizing him as a "concerned citizen" and failing to reveal his criminal history. See People v. Smith, 553 P.2d 557, 560 (Cal. 1976) (noting that "persons criminally involved or disposed are not regarded as 'citizen-informants' because they are generally motivated by something other than good citizenship") (internal quotations and citations omitted).

Notably, some state courts have held that the omission of an informant's criminal history in an affidavit for a search warrant does not necessarily negate a finding of probable cause, provided that the informant's statements are independently corroborated by police. See, e.g., Brown v. State, 535 S.E.2d 785, 787 (Ga. Ct. App. 2000) ("If any omissions on the part of the officer are offset by independent corroboration of criminal activity, then the magistrate may still have sufficient information to find that probable

cause exists."); Davis v. State, 637 S.E.2d 431, 437 (Ga. Ct. App. 2006) (noting that because the omission of [the informant's] criminal record was offset by independent corroboration of criminal activity, reversal [was]]not required."); cf. State v. Goldberg, 872 A.2d 378, 379 (Vt. 2005) (holding that "the warrant should not have issued based solely on an *uncorroborated* tip from an informant with a significant criminal record" (emphasis added)). However, not only did the affidavit in this case omit the informant's criminal history, the affidavit also lacked probable cause because the informant was not inherently reliable and Detective Teerlink failed to independently corroborate the allegations of criminal activity.

C. Where The Detective's Misstatements And Omissions Were Intentionally Or Recklessly False And Material And The Affidavit Otherwise Fails To Establish Probable Cause, The Evidence Should Be Suppressed.

In Franks v. Delaware, 438 U.S. 154 (1978), the United States Supreme Court held that a search pursuant to a warrant secured by false statements can violate the Fourth Amendment. Id. at 155-56. In Franks, the Court

> recognized that the Fourth Amendment's probable cause requirement rests on the premise "that there will be a truthful showing" of probable cause. If the trial court finds that a false statement in a warrant affidavit was made deliberately or with reckless disregard for the truth and that the false statement materially affected the magistrate's determination of probable cause, "the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

State v. Krukowski, 2004 UT 94, ¶14, 100 P.3d 1222 (citations omitted) (emphasis in original). Our supreme court extended this reasoning to situations where "a misstatement occurs because information is omitted." Nielsen, 727 P.2d at 191; Krukowski, 2004 UT

94 at ¶15. When information has been omitted, "the affidavit must be evaluated to determine if it will support a finding of probable cause when the omitted information is inserted." Nielsen, 727 P.2d at 191. "If an affidavit fails to support a finding of probable cause after . . . the omitted information is added," then the information that has been omitted will be considered to "materially affect[] the finding of probable cause, [and] any evidence obtained under the improperly issued warrant must be suppressed." Id.

As argued above, the affidavit submitted by Detective Teerlink in this case failed to support a finding of probable cause. See supra Points A & B. Detective Teerlink's intentional or reckless reference to Mr. Lambson as a "concerned citizen" rather than a criminal informant, along with the omitted information regarding Mr. Lambson's criminal history and failure to corroborate the details of the allegations of criminal activity, materially affected the finding of probable cause. Once the omitted information regarding Mr. Lambson's status is corrected to reflect that he offered information about Mr. Keener only after he was picked up and held for questioning by police officers for trying to pawn a stolen ring, along with his criminal history, then his hearsay statements used in the affidavit become inherently less reliable. See McArthur, 2000 UT App 23 at ¶31 (noting that an "informant who gains information through criminal activity . . .is lower on the reliability scale than a citizen informant"(quotations and citation omitted)); Spillers, 847 N.E.2d at 956 (noting that unlike those cases where "an informant, after arrest or confrontation by police, admit[s to] committing criminal offense under circumstances in which the crimes otherwise would likely have gone undetected" the

informant in Spillers did not make statements against his penal interest where he "was caught 'red-handed' with drugs in his possession before naming his purported supplier").

Because Mr. Lambson's hearsay statements alone were unreliable to support a finding of probable cause, it was necessary for the statements to be independently corroborated. Valenzuela, 2001 UT App 332 at ¶15; Frazier, 423 F.3d at 532 ("[I]n the absence of any indicia of the informants' reliability, courts insist that the affidavit contain substantial independent police corroboration."). However, the detectives failed to corroborate the allegations of criminal conduct or any incriminating aspects of the tip. The affidavit states that the detective "consider[ed] the information received from the concerned citizen to be accurate and reliable because" Mr. Lambson provided his name, date of birth and criminal history and was informed that he would be charged with interfering in an investigation. R. 80. Instead of relating any independent corroboration of the hearsay statements, the affidavit states that Mr. Lambson was shown the list of stolen jewelry taken during the vehicle burglary and he "identified a yellow and white gold diamond ring and a Blue turquoise stretch bracelet as items he saw in Daniel V. Keener [Appellant's father] bag of jewelry at the listed residence." R. 80. After listing the criminal history of Mr. Keener's father, the affidavit simply states that the detective has confirmed that the address listed on Mr. Keener's drivers license matches the address provided by Mr. Lambson and states that Mr. Keener "has been arrested for numerous" charges. R. 80.

The detective's intentional or reckless omission of Mr. Lambson's correct status as a criminal informant materially affected the finding of probable cause by making the

hearsay statement appear independently reliable without the need for any corroboration. Once the misstatement is corrected to reflect that Mr. Lambson's informant status is unreliable, necessitating significant independent corroboration which the detectives failed to do, then the Fourth Amendment requires that the evidence be suppressed.

POINT II. EVEN IF PROBABLE CAUSE DID EXIST, UTAH'S CONSTITUTION REQUIRES THE EVIDENCE BE SUPPRESSED WHERE MISSTATEMENTS AND OMISSIONS HAVE BEEN INTENTIONALLY OR RECKLESSLY MADE TO THE COURT TO SECURE A SEARCH WARRANT.

When interpreting the Utah Constitution, this Court has "cited with favor the traditional methods of constitutional analysis." State v. Tiedemann, 2007 UT 49, ¶ 37, 162 P.3d 1106. These traditional methods "'look primarily to the language of the constitution itself but may also look to 'historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to assist us in arriving at a proper interpretation of the provision in question.'" State v. Gardner, 947 P.2d 630, 633 (Utah 1997) (quoting Soc'y of Separationists v. Whitehead, 870 P.2d 916, 921 n.6 (Utah 1993)); Tiedemann, 2007 UT 49 at ¶37 (citation omitted). This traditional state constitutional analysis demonstrates that article 1, section 14 of the Utah Constitution provides Utah citizens with a greater expectation of privacy than the Fourth Amendment.

First, although article 1, section 14 contains the identical language of the Fourth Amendment, the Utah Supreme Court has "held on more than one occasion that article 1, section 14 provides a greater expectation of privacy than the Fourth Amendment as interpreted by the United States Supreme Court." State v. DeBooy, 2000 UT 32, ¶ 12,

996 P.2d 546; see also Brigham City v. Stuart, 126 S.Ct. 1943, 1950 (2006) (Stevens, J., concurring) (recognizing that "the Utah Constitution provides greater protection to the privacy of the home than does the Fourth Amendment"). In fact, the court specifically noted in State v. Watts that giving "the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts." 750 P.2d 1219, 1221 n.8 (Utah 1988); see also DeBooy, 2000 UT 32 at ¶ 12 (noting that the Utah Supreme Court "will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens."); State v. Thompson, 810 P.2d 415, 417-18, 420 (Utah 1991) (suppressing evidence under article I, section 14 of Utah Constitution due to greater privacy expectation in bank in tax records than under Fourth Amendment); State v. Larocco, 794 P.2d 460, 469-71 (Utah 1990) (construing article I, section 14 of the Utah Constitution to afford greater privacy interests than the Fourth Amendment).

Additionally, the unique history of the early settlers of Utah explains the greater protection afforded Utah citizens by article 1, section 14 because the drafters of the Utah Constitution were "acutely concerned with providing protection and remedies against unlawful searches and seizures." Kenneth R. Wallentine, Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article 1, Section 14, 17 J. Contemp. L. 267, 279 (1991). The Mormon pioneers in Utah suffered severe persecution due to their religious beliefs and their practice of polygamy in particular, which the federal government made several attempts to eradicate. See Edwin Brown Firmage & Richard

Collin Mangrum, Zion in the Courts 161 (1988). As a result, in an effort "to enforce the anti-polygamy acts of Congress, the Fourth Amendment rights of Mormon pioneers against unreasonable searches and seizures were continuously violated." Id. at 226-27. Specifically, United States Marshals searching for violators of the anti-polygamy laws "saw little need" to comply with search warrant requirements and began employing spies, spotters, and informants in an effort to discover polygamists. Kenneth R. Wallentine, Heeding the Call: Search and Sezure Jurisprudence Under the Utah Constituion, Article I, Section 14, 17 J. Contemp. L. 267, 278 (1991) . Consequently, as the Utah Supreme Court noted in DeBooy, 2000 UT 32 at ¶ 26, Utah's "early settlers were themselves no strangers to the abuses of [the warrant requirement]. Underlying the abuse of the [] warrant was the perversion of the prosecutorial function from investigating known crimes to investigating individuals for the purpose of finding criminal behavior." Id. at ¶26. Therefore, the historical circumstances surrounding the creation of the Utah Constitution indicate that the reason for the drafters' decision to include article 1, section 14 was to provide Utahns with additional protection, ensuring that the Fourth Amendment search and seizure abuses of the past never repeated themselves.

Finally, Utah is not alone in assuring its citizens a greater expectation of privacy. Many other state courts have interpreted the search and seizure provisions of their own constitutions to provide greater protection than the Fourth Amendment. See, e.g., State v. Neal, 164 P.3d 57, 62 (N.M. 2007) (noting that the search and seizure provision of the New Mexico constitution "has been construed to provide broader protections than the Fourth Amendment"); State v. Mariano, 160 P.3d 1258, 1268 (Haw.Ct. App. 2007)

(recognizing that Hawai'i courts are "free to give broader privacy protection than that given by the federal constitution[,] and 'have often extended the protections of the Hawai'i Constitution beyond those of the United States Constitution[,] particularly in the search-and-seizure context.") (internal citations omitted); Brumfield v. State, 155 P.3d 826, 833 (Okla. Ct. App. 2007) (stating that Oklahoma courts are "free to interpret [the] state constitution, with its own protection against 'unreasonable searches or seizures,' more broadly than the United States Supreme Court interprets the federal constitution."); State v. Malkuch, 154 P.3d 558, 560 (Mont. 2007) (noting that "[t]he Montana Constitution provides a greater right of privacy than the United States Constitution, and therefore 'provides broader protection than the Fourth Amendment in cases involving searches of private property.'") (internal citation omitted); State v. Gregory, 147 P.3d 1201, 1237 (Wash. 2006) (noting that the inquiry as to whether a search has occurred "is broader under the state constitution than under the Fourth Amendment"); People v. Rossman, 140 P.3d 172, 176 (Colo. Ct. App. 2006) (internal citations omitted) ("Although the Colorado and United States Constitutions are generally co-extensive insofar as they address warrantless searches and seizures, . . . [the search and seizure provision] of the Colorado Constitution affords broader protections than the Fourth Amendment.").

In sum, Utah case law, historical circumstances, and the number of other state courts that interpret their own constitutions more broadly than the Fourth Amendment all demonstrate that the Utah Constitution provides Utah citizens with greater protection against unreasonable searches and seizures. Therefore, this Court should evaluate the

sufficiency of the affidavit under the Utah Constitution so that it can "fulfill its 'responsibility as guardians of the individual liberty of [Utah] citizens.'" Brigham City, 126 S.Ct. at 1950 (Stevens, J., concurring) (quoting the Utah Supreme Court's opinion in Brigham City v. Stuart, 2005 UT 13, ¶ 14, 122 P.3d 506). To this end, under Utah's Constitution, a search warrant that has been secured by a law enforcement officer making intentionally or reckless misstatements or omissions in their sworn affidavit must be invalidated regardless of the presence of probable cause.

In Nielsen, the defendant argued that the search warrant used to search his residence was invalid under the fourth amendment because the officer made intentional misstatements in the affidavit. 727 P.2d at 189. In his affidavit, the detective stated that he had been told by a confidential informant "that an individual living at Nielsen's address and driving a car with a personalized license plate reading 'Skydive' possessed one-half pound of cocaine valued at approximately $16,000." Id. at 190. In addition, the detective stated that he had corroborated the informant's statements and considered them reliable "because the informant's previous tips had led to the arrests of three individuals on drug-related charges. Id. Based on the detective's affidavit, a search warrant for narcotics was issued for Nielsen's residence. Id. At Nielsen's preliminary hearing, the detective reiterated the statements made in his affidavit concerning the circumstances establishing probable cause. Id.

The prosecution later revealed that the detective had made false statements in his affidavit. Id. Specifically, the detective "did not know the informant, had never had any personal contact with him, and had no personal knowledge of any facts relevant to the

informant's credibility." Id. On appeal, Nielsen argued that the evidence should be suppressed because the affidavit containing false statements rendered the search warrant invalid. Id. The state argued that the detective's "false statements were not made intentionally, knowingly, or with reckless disregard for the truth, but were merely inadvertent technical errors . . . ." Id. at 191. In rejecting the state's argument and concluding that the detective's statements were made "knowingly false" the court 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 statement made under oath.

Id. (emphasis added).

In upholding a search warrant under the fourth amendment, the court noted that "[d]eterrence of police misconduct is not to be a factor in the decision to suppress [under the Fourth Amendment] unless the misconduct materially affects the finding of probable cause." Neilsen, 727 P.2d at 191. However, the court warned "that the federal law as it has developed since Franks v. Delaware is not entirely adequate." Id. at 192. The issue of whether "an immaterial, intentional misstatement in an affidavit supporting a warrant requires suppression of the evidence as a matter of Utah law" has not been decided. Id. at 193. Although the court upheld the warrant under federal law, it cautioned that "[u]pholding of the warrant under federal law should not be read as an endorsement of [the detective's] conduct or as a determination of how the issue might be resolved under the Utah Constitution." Id. at 192-93. The court left open the question of "what the

appropriate remedy might be if Nielsen had argued that the officer's action violated his rights under article I, section 14 of the Utah Constitution." Id.

Recently, the supreme court has reiterated "that Utah's search and seizure provisions (which are identical to those in the federal constitution) provide 'a greater expectation of privacy than the fourth amendment as interpreted by the United States Supreme Court.'" Tiedemann, 2007 UT 49 at ¶34 (citation omitted). The court has held that "the exclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14" of the Utah Constitution. State v. Larocco, 794 P.2d 460, 472 (Utah 1990) (plurality opinion). The court has determined that Utah's exclusionary rule should be extended in circumstances where "exclusion is necessary to deter future unconstitutional searches." Sims v. Collection Division of the Utah State Tax Commission, 841 P.2d 6, 13 (Utah 1992) (extending Utah's exclusionary rule to proceedings under the Illegal Drug Stamp Tax Act); see also 19 A.L.R. 5th 470 (listing states that have recognized the existence of an exclusionary rule derived from their state constitution search and seizure provision). The purpose of Utah's exclusionary rule is not merely designed to deter police misconduct but exists to vindicate personal privacy rights and exclude evidence unlawfully obtained. Larocco, 794 P.2d at 472.

Given the historical circumstances surrounding the inclusion of article I, section 14 to provide Utahns with additional protection, and ensuring that the fourth amendment search and seizure abuses of the past never repeated themselves, it follows that intentional or reckless misstatements or omissions made by a detective misleading a court about the reliability of the information contained in affidavit in order to secure a search

warrant is the type of police misconduct and violation of personal privacy rights that was meant to fall within the protecting perimeters of the this clause. Otherwise, these constitutional safeguards would quickly lose their prophylactic value. As the supreme court has recognized,

> There is no stronger argument for developing adequate remedies for violations of the state and federal constitutional prohibitions on unreasonable searches and seizures than the example of a police officer deliberately lying under oath in order to obtain a search warrant. To allow a police officer to obtain a warrant utilizing false information tends to undermine respect for the legal system and to make the public cynical about the honesty and professionalism of those entrusted with law enforcement."

Neilsen, 727 P.2d at 192-93.

In this case, Detective Teerlink acknowledged that he was aware that courts accord informants classified as "concerned citizens" more reliability than they do those classified as criminal informants. R. 221:26-27. In fact, he testified that he felt it necessary to used Mr. Lambson's name in the affidavit because "without his name in the search warrant, . . . I didn't feel like we had enough probable cause." R. 221:25. Although Detective Teerlink claimed he did not represent Mr. Lambson as a "concerned citizen" or omit his criminal history in an effort to "bolster" his credibility, his testimony acknowledges that he knew that incorrectly labeling Mr. Lambson as a "concerned citizen" would have that effect. Additionally, Detective Teerlink knew that Mr. Lambson had been detained after being caught trying to pawn a stolen ring and was facing possible felony charges in connection with that offense when he gave the information, and also, that Mr. Lambson had a criminal history. This testimony and the substance of the affidavit therefore demonstrate that Detective Teerlink acted at least recklessly in

labeling Mr. Lambson as a "concerned citizen" rather than including accurate and correct information about Mr. Lambson's status.

The "[in]adequate protect[ion]" of the federal law for Utah's citizens from this type of police misconduct and violation of their personal privacy rights necessitates the broader protections from Utah's search and seizure clause.

The historical circumstances surrounding the creation of Utah's constitution demonstrates that it is these very sorts of violations that the state's exclusionary rule was meant to protect against. Therefore, where a detective intentionally or recklessly provides misinformation or omits information to secure a search warrant, whether material or immaterial to showing probable cause, that evidence must be suppressed.

CONCLUSION

The Appellant, Mr. Keener, respectfully requests this Court to reverse the trial court's denial of his motion to suppress, and reverse his conviction.

SUBMITTED this 21st day of November, 2007.

DEBRA M. NELSON
ANDREA J. GARLAND
Attorneys for Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 21st day of November, 2007.

DEBRA M. NELSON

DELIVERED this _____ day of November, 2007.

Tab A

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 051909085 FS
DANIEL LEE KEENER, Defendant.	:	Judge: JUDITH S ATHERTON Date: May 4, 2007

PRESENT
Clerk: sunshinb
Prosecutor: STOTT, ROBERT L
Defendant
Defendant's Attorney(s): GARLAND, ANDREA J

DEFENDANT INFORMATION
Date of birth: July 3, 1973
Video
Tape Count: 10:39:54

CHARGES

1. POSS W/ INTENT TO DIST C/SUBSTANCE - 3rd Degree Felony
   Plea: Not Guilty - Disposition: 03/12/2007 Guilty
2. ENDANGERMENT OF CHILD OR ELDER ADULT - 3rd Degree Felony
   Plea: Not Guilty - Disposition: 03/12/2007 Guilty

SENTENCE PRISON

Based on the defendant's conviction of POSS W/ INTENT TO DIST C/SUBSTANCE a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Based on the defendant's conviction of ENDANGERMENT OF CHILD OR ELDER ADULT a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.
The prison term is suspended.

Case No: 051909085
Date: May 04, 2007

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

to run consecutive

Credit is granted for time served.
Credit is granted for 2 day(s) previously served.
Attorney Fees Amount: $250.00 Plus Interest
Pay in behalf of: LEGAL DEFENDERS

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.

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.
Participate in and complete any educational; and/or vocational training as directed by the Department of Adult Probation and Parole.
Violate no laws.
Enter, participate in, and complete any program, counseling, or treatment as directed by the Department of Adult Probation and Parole.
Perform community service hours.
Submit to drug testing.
Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
Refrain from the use of alcoholic beverages.
Comply with A/D clauses per AP&P. Defendant is to maintain full time employment. Defendant is to perform 100 hours of community

service in lieu of fine.

Tab B

U. S. Constitution Amendment IV

Amendment IV

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.

Utah Constitution Article I, Section 14

Article I, Section 14. [Unreasonable searches forbidden -- Issuance of warrant.] 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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

Tab C

Teerlink

"DEFENSE COPY"

IN THE THIRD DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

AFFIDAVIT FOR SEARCH WARRANT

STATE OF UTAH)
: ss
County of Salt Lake)

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

That your affiant has reason to believe that on the premises known as 849 North Sir Phillip Drive, further described as a single family residence constructed of brown brick, tan siding and brown trim. The residence is the seventh structure south of 900 North. The residence is located on the west side of Sir Phillip Drive and faces to the east. The front door is green in color with a black metal screen door. The numbers 849 are clearly printed on the left side of the front door and are brown in color. And all rooms, attics, basements, and other parts therein and the surrounding grounds and any garages, storage rooms, and outbuildings of any kind located upon the curtilage of the residence.

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

Jewelry, further described as a "pave" diamond ring designed with yellow and white gold. The ring also has a large number of small diamonds. It is described by the owner as a custom "one of a kind" ring. (see attached list of jewelry and drawing).

Jewelry, further described as a blue turquoise stretch bracelet (see attached list of jewelry)

Jewelry, further described as miscellaneous jewelry stolen in a vehicle burglary at 145 West Pierpont Avenue on 11/5/2005. (see attached list of jewelry)

Marijuana, further described as a green leafy substance; material related to the possession or distribution of marijuana including bags, scales, measuring devices; and drug paraphernalia described as rolling papers or pipes used for smoking marijuana.

Articles of personal property tending to establish and document sales of stolen jewelry and a controlled substance including U.S. currency, buyer and seller lists, and other documentation of sales of stolen jewelry and controlled substances; articles tending to establish the identity of persons in control of the premises sought to be searched including rent receipts, utility receipts,

74

and addressed envelopes, and any other fruits or instrumentality's of the crimes of possession or distribution of stolen jewelry and controlled substances.

And that said property or evidence was unlawfully acquired or is unlawfully possessed; or has been used to commit or conceal a public offense; or is being possessed with the purpose to use it as a means of committing or concealing a public offense and consists of an item or constitutes evidence of illegal conduct possessed by a party to the illegal conduct.

Your affiant believes the property and evidence described above is evidence of the crimes of Possession of Stolen Property, Possession and or Distribution of a Controlled Substance.

THE FACTS TO ESTABLISH THE GROUNDS FOR ISSUANCE OF A SEARCH WARRANT ARE:

Your affiant is a Salt Lake City Police Officer and has been a police officer for over 5 years. Your affiant is currently assigned to the Salt Lake City Police Department's Narcotic Unit and investigates narcotic related offenses. Your affiant has had training in narcotics identification and in the investigation of narcotic related offenses through the Utah Police Academy and the California Narcotics Association. Your affiant's specialized training includes the DEA Clandestine Laboratory Course. Your affiant has worked street level drug interdiction as an arresting officer and as an undercover police officer. Your affiant has seen several different types of narcotics during these operations. Your affiant has been involved with over 400 drug related cases, many of which were felonies.

Within the last 6 hours your affiant has received information from a concerned citizen named Gary Lambson. Mr. Lambson stated that there is stolen jewelry at the address of 849 North Sir Phillip Drive. He also stated that the individuals who reside or otherwise occupy 849 North Sir Phillip Drive are engaging in an ongoing narcotics distribution operation.

On 12/6/05 Mr. Lambson met with Daniel V. Keener for the purpose of buying jewelry. Daniel V. Keener traveled with Mr. Lambson to 849 North Sir Phillip Drive. Mr. Lambson was told that this was Daniel V. Keener's son's residence. The son is named Daniel Lee Keener. Inside the residence Daniel V. Keener retrieved a bag of jewelry. Mr. Lambson said the bag contained rings, necklaces, watches and bracelets. Mr. Lambson purchased a ring for $50 from Daniel V. Keener. Mr. Lambson said Daniel V. Keener put some of the jewelry in his pocket and left most of the jewelry in the bag at the listed residence.

While in the residence of 849 North Sir Phillip Drive, Mr. Lambson observed the following items on a table in a back room; two large bags of marijuana and a triple beam scale. He said one of the bags contains chronic marijuana. Chronic is high quality marijuana. The other bag contains lower grade marijuana. Mr. Lambson said that Daniel Lee Keener is selling the marijuana out of the listed residence.

On 12/8/05 Mr. Lambson took the ring he purchased to Mike's Custom Jewelry and Repair at 254 East 6400 South for the purpose of selling it. The clerk at Mike's Jewelry recognized the ring as the one that belongs to another employee of Mike's Jewelry named Julie Baker. Mrs. Baker identified the ring to be a custom made ring that was stolen out of her vehicle along with

other jewelry on 11/5/05 at 145 West Pierpont Avenue (Salt Lake City case number 05-193011). The police responded to Mike's Jewelry and questioned Mr. Lambson.

Your affiant showed Mr. Lambson the list of Jewelry stolen during the previously mentioned vehicle burglary. Mr. Lambson identified a yellow and white gold diamond ring and a Blue turquoise stretch bracelet as items he saw in Daniel V Keener bag of jewelry at the listed residence.

Your affiant considers the information received from the concerned citizen to be accurate and reliable because:

The concerned citizen, Gary Lambson, has provided your affiant with his name, date of birth and criminal history. Your affiant informed Mr. Lambson that if he gave your affiant any false information he would be charged with interfering with an investigation.

Your affiant has checked police and state records and found that Daniel V Keener has been arrested numerous times for Possession of a Controlled Substance, the most recent arrest was on 5/5/2002. He was also arrested for Carrying a Loaded Fire Arm in a Vehicle on 6/30/89. Your affiant has also found that Daniel Lee Keener's drivers license shows the address of 849 North Sir Phillip Drive. Daniel Lee Keener has been arrested for numerous thefts including an Aggravated Burglary on 02/26/2000, numerous drug charges (the most recent on 05/12/05) and Strong Arm Robbery on 10/05/91.

Your affiant desires to enter 849 North Sir Phillip Drive and search for stolen jewelry, marijuana, marijuana paraphernalia and other items related to the distribution of marijuana. The paraphernalia includes such items as pipes, bongs or tubes used to inhale or smoke marijuana. Other related items include packaging material used to package marijuana and scales used to weigh quantities. Your affiant knows from training and experience that these items are almost always found on the premises where search warrants for controlled substances have been executed.

Your affiant desires to search for records of stolen jewelry and marijuana sales, both written and electronic, residency papers and U.S. currency. Your affiant knows from past experiences with narcotic investigations that persons sometimes record their sales to show dates, amounts purchased and drug indebtedness. Your affiant knows from training and experience that stolen jewelry and marijuana is sold for U.S. currency. The concerned citizen purchased the stolen ring with U.S. currency.

This application for search warrant has been reviewed and approved for presentation to the court by Deputy District Attorney Blake Hills.

WHEREFORE, your affiant prays that a search warrant be issued for the seizure of said items any time day or night because there is reason to believe it is necessary to seize the property prior to it being concealed, destroyed, damaged, or altered, or for other good reasons to wit:

Your affiant knows from training and experience that persons who sell stolen property or narcotic distribution operation do not keep regular business hours and commonly sell at night. Daniel V Keener sold the concerned citizen the stolen ring at night.

The residence your affiant desires to search is located in a residential community. Your affiant feels that it would be safer for children who may live in the area as well as the other residents of the neighborhood if the warrant were to be served in the evening hours, during a time when the pedestrian traffic around the neighborhood is less.

It is further requested that the officer executing the requested search warrant not be required to give notice of the officer's authority or purpose because:

Physical harm may result to any person if notice was given, and/or the property sought may quickly be destroyed, disposed of, or secreted.

This danger is believed to exist because:

Daniel V Keener has been arrested for carrying a loaded firearm in a Vehicle. Daniel Lee Keener has been arrested for Aggravated Burglary and Strong Arm Robbery. Your affiant feels it would be safer for officers serving the warrant and persons inside the residence if police officers were not required to give notice before entering the residence.

Detective Doug Teerlink
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 9 day of Dec. 2005.

Judge of the Third
District Court

Tab D

In the Third Judicial District Court, Salt Lake County, State of Utah

THE STATE OF UTAH, **Plaintiff,** **vs.** **DANIEL L. KEENER,** **Defendant.**	**MEMORANDUM DECISION RE MOTION TO SUPPRESS SEARCH WARRANT** Case No. 051909085 Hon. Deno G. Himonas

The defendant, Daniel Lee Keener, has filed a motion to suppress "evidence seized pursuant to the execution of a search warrant." *Motion to Suppress Search Warrant and Memorandum in Support Thereof* (the "Motion"), p. 1. Keener claims that the warrant is infirm because the Affidavit for Search Warrant did not disclose that the source of much of the information set forth therein was an individual detained by the police in connection with a "stolen ring," and not a "concerned citizen," as the affidavit states.[1] For the reasons set forth below, the court denies the Motion.[2]

BACKGROUND

Detectives Michael Hardin and Doug Teerlink are veteran police officers with the Salt Lake City Police Department. In December 2005, Hardin was investigating a reported vehicle burglary, and Teerlink was investigating a potential marijuana distributor.

On December 9, 2005, in connection with their investigations, Detectives Hardin and Teerlink simultaneously approached Third District Court Judge Judith Atherton and asked that she issue two search warrants. One of the warrants was for 1381 South Emery Street and the person of Daniel Vern Keener. The other warrant was for 849 North Sir Phillip Drive, the residence of Daniel Vern Keener's son, the defendant. Hardin swore to the affidavit for the Emery Street warrant, and Teerlink swore to the affidavit for the Sir Phillip Drive warrant.

The principal source of information for both affidavits is an individual named Gary Lambson. Both affidavits describe Lambson as a "concerned citizen"; however, the affidavit sworn to by

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[1]For the "concerned citizen" reference, see the Affidavit for Search Warrant of Detective Doug Teerlink ("Teerlink Affidavit"). For the "stolen ring" reference, see the Affidavit for Search Warrant of Detective Michael Hardin ("Hardin Affidavit"). Both affidavits are attached to the Motion.

[2]The Motion came on for hearing on October 11, 2006. Jacey Skinner represented the State; Andrea Garland represented Keener, who was also present.

Detective Hardin also notes that Murray Police had detained Lambson "concerning a stolen ring." Hardin Affidavit, p. 2.

Lambson told Detective Hardin that he had "purchased the ring from" Daniel Vern Keener. *Id.* More specifically, Lambson told Hardin that on December 6, 2005, he "met with Daniel Vern Keener for the purpose of buying jewelry." *Id.* To this end, Lambson traveled with Daniel Vern Keener "to 849 North Sir Phillip Drive," Daniel Lee Keener's residence. *Id.* Once "[i]nside the [Sir Phillip Drive] residence," Daniel Vern Keener "retrieved a bag of jewelry" that "contained rings, necklaces, watches, and bracelets." *Id.* Lambson purchased the ring "for $50." *Id.* Lambson also told Hardin that Daniel Vern Keener "left most of the jewelry in the bag at" the Sir Phillip Drive address. *Id.*

On December 8, 2005, Lambson attempted to sell the ring at Mike's Custom Jewelry and Repair. The clerk recognized the ring as one that belonged to "another employee of Mike's Jewelry named Julie Baker." *Id.* "Baker identified the ring to be a custom made ring that was stolen out of her vehicle along with other jewelry" on November 5, 2005, "at 145 West Pierpont Avenue (Salt Lake City case number 05-193011)." *Id.*

Detective Hardin then showed Lambson a "list of the jewelry [reported] stolen" from Baker's vehicle. *Id.* (A copy of the list is attached to the detective's affidavit.) Lambson identified two pieces as items he saw in the "bag of jewelry at the residence located" on North Sir Phillip Drive–"a yellow and white gold diamond ring and a Blue [*sic*] turquoise stretch bracelet." *Id.*

Lambson also told the detectives that "[w]hile in the residence of 849 North Sir Phillip Drive," he saw "two large bags of marijuana and a triple beam scale" sitting "on a table in a back room." Teerlink Affidavit, p. 2. According to Lambson, "one of the bags contain[ed] chronic marijuana." *Id.* ("Chronic is a high quality marijuana." *Id.*)

The detectives considered the information provided by Lambson "to be accurate and reliable." *Id.*, p. 3. For reasons, the detectives noted, among others, that Lambson provided them with his "name, date of birth and criminal history" and that they placed him on notice that they would charge him with criminal conduct if any of the information he gave them turned out to be false. *Id.*

ANALYSIS

Keener contends that the execution of the search warrant on his residence violated Article I, Section 14 of the Utah constitution and the Fourth Amendment to the United States Constitution. The Court first examines Keener's contention under the Utah constitution. *See State V. Holm,* 2006 UT 31, P 33, 137 P.3d 726 ("Because this court has endorsed the primacy approach to constitutional challenges, whereby we first attempt to resolve the constitutional challenges by appealing to our state constitution before turning to the federal constitution. . . ."); *see also* Sinead McLoughlin, *High Court Study: Choosing a "Primacy" Approach: Chief Justice Christine M. Durham*

1096

Advocating States Rights in Our Federalist System, 65 ALB. L. REV. 1161 (2002). Because the state constitutional analysis is dispositive, the Court does not address Keener's federal challenge.[3]

The primary question the Motion presents is whether an "intentional misstatement in an affidavit supporting a warrant," whether the misstatement be material or immaterial, "requires suppression of the evidence" under Article I, Section 14 of the Utah constitution. *State v. Nielsen*, 727 P.2d 188, 193 (Utah 1986). Because the Court finds no misstatement, the question remains open.

Had Detective Teerlink's affidavit stood alone, his characterization of Lambson as a "concerned citizen" would be troubling to the court. But it did not stand alone; rather, it was submitted alongside Detective Hardin's affidavit, which pointed out that Lambson had been "detained by Murray Police" regarding "a stolen ring." Hardin Affidavit, p. 2. That reference in Detective Hardin's affidavit, combined with Detective Teerlink's knowledge that Judge Atherton would be reviewing both his and Detective Hardin's affidavits together, dispelled any potential false impression. It is as if the detectives defined "concerned citizen" to mean Gary Lambson, a person of interest detained by the authorities.[4]

The secondary question is whether, assuming the accuracy of the "concerned citizen " reference, the Teerlink Affidavit provided Judge Atherton with probable cause to issue the search warrant for the Sir Phillip Drive residence. "Where a search warrant supported by an affidavit is challenged as having been issued without an adequate showing of probable cause, . . . [the court's] review focuses on the magistrate's probable cause determination." *State v. Norris*, 2001 UT 104, P 14, 48 P.3d 872 (citations omitted). "In reviewing the magistrate's decision, . . . [the court] assess[es] whether the magistrate had a substantial basis for determining that probable cause existed." *Id.* (internal quotations omitted). Further, the court affords "the magistrate's decision great deference and consider[s] the affidavit relied upon by the magistrate in its entirety and in a common sense fashion." *Id.* (internal quotations omitted).

Having reviewed Teerlink's Affidavit in its entirety, the court concludes that Judge Atherton "had a substantial basis for determining that probable cause existed and that evidence of illegal conduct would be found at the" Sir Phillip Drive location. *Id.*, P 16. The Teerlink Affidavit contained a detailed account of a transaction at the Sir Phillip Drive residence involving the purchase of reportedly stolen merchandise. It also contained an account of the existence of

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[3]The parties agree that Article I, Section 14 of the Utah constitution does not provide less protection against unreasonable searches and seizures than the Fourth Amendment to the United States Constitution. Therefore, a finding that the Sir Phillip Drive warrant was constitutionally permissible under a state constitutional analysis necessarily means that it was permissible under a federal constitutional analysis too.

[4]The State suggests that it was more accurate for the detectives to refer to Lambson as a "concerned citizen" than an "informant" as the detectives promised Lambson nothing in exchange for the information.

marijuana that was specific as to quantity, type, and location. This particularized information, combined with the fact that the detectives knew Lambson's identity and disclosed it, that Lambson obtained his information first-hand, and that he was willing to stand behind the information despite being threatened with prosecution if it turned out to be false provides the requisite substantial basis. *See, e.g., State v. Brooks*, 849 P.2d 640, 644 (Utah App. 1993) (probable cause found where "no indication in the facts that the [confidential] informant received anything from the police in exchange for the information" and where the information was "based on personal observation" and "substantiated.").

CONCLUSION

For the foregoing reasons, the court denies the Motion.[5] The matter is referred back to Judge Atherton for any further proceedings.

DATED this 8th day of November, 2006.

BY THE COURT

Deno G. Himonas
Third District Court Judge

[5]The court is of the opinion that additional oral argument would not be helpful; therefore, it is striking the hearing in this matter currently set for November 17, 2006.

170

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 051909085 by the method and on the date specified.

METHOD	NAME
Mail	STATE OF UTAH PLAINTIFF , UT
~~Mail~~ FAX	ANDREA J GARLAND ATTORNEY DEF 424 E CESAR CHAVES BLVD STE 30 SALT LAKE CITY UT 84111

Dated this 9 day of Nov, 2006.

Pat Jones
Deputy Court Clerk

171

Tab E

IN THE THIRD DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

AFFIDAVIT FOR SEARCH WARRANT

STATE OF UTAH)
: ss
County of Salt Lake)

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

that on the premises known as 1381 South Emery Street, a single family dwelling, located on the east side of Emery and faces to the west. It is the third structure south of Utahna and is brown brick, with white shutters. The front door is brown with a white screen door. The numbers '1381' are black and painted on the front stairs; to include all rooms, attics, basements, and other parts therein and the surrounding grounds and any garages, storage rooms, and outbuildings of any kind located upon the curtilage of the property.

And on the person known as Daniel Vern Keener a white male adult D.O.B. 05-19-1954, approximately 5'10" and 190 pounds with grey hair;

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

An Anne Klein wrist watch described as a silver colored watch with a black face, with the name of 'Anne Klein' printed on the face,

And that said property or evidence was unlawfully acquired or is unlawfully possessed; or has been used to commit or conceal a public offense; or is being possessed with the purpose to use it as a means of committing or concealing a public offense and consists of an item or constitutes evidence of illegal conduct possessed by a party to the illegal conduct.

Your affiant believes the property and evidence described above is evidence of the crimes of Burglary and Possession of Stolen Property.

THE FACTS TO ESTABLISH THE GROUNDS FOR ISSUANCE OF A SEARCH WARRANT ARE:

Your affiant is a Salt Lake City Police Officer and has been a police officer for over 9 years. Your affiant is currently assigned to the Salt Lake City Police Department's Burglary Unit and

investigates burglary and theft related offenses. Your affiant has had training which includes the Utah police Academy, and other POST certified investigative training, which included training concerning property crimes.

Your affiant was contacted by Murray City Detectives concerning a person detained for possession of a ring which was taken during a vehicle burglary in Salt Lake City on November 6, 2005. At the time of this burglary a large amount of jewelry was taken including a Anne Klein watch, a Pave diamond ring, a Tiffany necklace with 'Tiffany' inscribed on the necklace and matching bracelet, a Omega yellow gold necklace, a diamond yellow gold tennis bracelet, a diamond cross necklace in white gold, turquoise necklace blue with small brown beads, red and silver earrings, an antique white gold ring with a pink sapphire stone, a silver and pink ring with cubic zirconias, a blue and silver ring with cubic zirconias, and yellow gold diamond stud earrings.

Other property taken in the burglary include the victims clothing, Ipod mp3 player, Louis Vuitton bags, 'Mac' makeup, Louis Vuitton sunglasses, among other items on attached list.

Within the last 6 hours your affiant interviewed Gary Lambson, who was detained by Murray Police, concerning a stolen ring. Mr. Lambson stated that he purchased the ring from the suspect Daniel V Keener who lives at 1381 South Emery Street.

On 12/6/05 Mr. Lambson met with Daniel V Keener for the purpose of buying jewelry. Daniel V Keener traveled with Mr. Lambson to 849 North Sir Phillip Drive. Mr. Lambson was told that this was Daniel V Keener's son's residence. The son is named Daniel Lee Keener. Inside the residence Daniel V Keener retrieved a bag of jewelry. Mr. Lambson said the bag contained rings, necklaces, watches and bracelets. Mr. Lambson purchased a ring for $50 from Daniel V Keener.

Mr. Lambson said that Daniel V Keener put some of the jewelry to include the listed Anne Klein wrist watch in his pocket and left most of the jewelry in the bag at the listed residence. Daniel V. Keener then traveled back to his residence at 1381 South Emery St.

On 12/8/05 Mr. Lambson took the ring to Mike's Custom Jewelry and Repair at 254 East 6400 South for the purpose of selling it. The clerk at Mike's Jewelry recognized the ring as the one that belongs to another employee of Mike's Jewelry named Julie Baker. Mrs. Baker identified the ring to be a custom made ring that was stolen out of her vehicle along with other jewelry on 11/5/05 at 145 West Pierpont Avenue (Salt Lake City case number 05-193011). Murray police Officer Stallings responded to Mike's Jewelry and questioned Mr. Lambson. Officer Stallings contacted your affiant who responded to The Murray Police station and interviewed Mr. Lambson and obtained the above information.

Your affiant showed Mr. Lambson the list of Jewelry stolen during the previously mentioned vehicle burglary. Mr. Lambson identified a yellow and white gold diamond ring and a Blue turquoise stretch bracelet as items he saw in Daniel V Keener bag of jewelry at the residence located on 849 North Sir Phillip Dr. residence.

Your affiant considers the information received from the concerned citizen to be accurate and reliable because:

The concerned citizen, Gary Lambson, has provided your affiant with his name, date of birth and criminal history. Gary Lambson has provided your affiant information against his best interest. Your affiant has independently verified the information that Mr. Lambson has provided and found it to be true to the best of your affiants knowledge. Your affiant informed Mr. Lambson that if he gave your affiant any false information he would be charged with interfering with an investigation.

Mr. Lambson also stated that within the last 36 hours, he was in the residence at 1381 South Emery Street. While in the residence he observed several packages of methamphetamine, and knows the persons who live at or otherwise occupy the listed residence to be using methamphetamine. Mr. Lambson also stated that within the last 48 hours he overheard Daniel V Keener stating that he had a shotgun.

Your affiant knows from training and experience that persons who use methamphetamine often exhibit unpredictable, paranoid and potentially violent behavior while under the influence of the stimulant.

Your affiant verified Mr. Lambsons information by checking police and state records and found that Daniel V Keener has been arrested numerous times for Possession of a Controlled Substance, the most recent arrest was on 5/5/2002. He was also arrested for Carrying a Loaded Firearm in a Vehicle on 6/30/89. Your affiant has also found that Daniel Lee Keener's drivers license shows the address of 849 North Sir Phillip Drive. Daniel has been arrested for numerous thefts including an Aggravated Burglary on 02/26/2000, numerous drug charges (the most recent on 05/12/05) and Strong Arm Robbery on 10/05/91.

Your affiant checked police records on Daniel V Keener and showed a picture to Mr. Lambson who confirmed that this was the same individual that he/she made contact with while at the listed residence. Daniel V Keener has extensive criminal history, some of which includes possession of different controlled substances on multiple occasions, thefts, forgeries and assault.

Narcotic Detectives have conducted surveillance of the residence at 1381 South Emery St. and observed 2 females leave the listed address and get into Utah listing 160YZK. That vehicle is listed to Brian Lybarger. Your affiant checked state records on Brian who has aggravated robbery, robbery, multiple thefts, assault, possession of controlled substances, possession of weapon and forgery. Your affiant talked with Agent Olive with AP&P who located a Tammy Lybarger 1381 South Emery Street who is currently on paper with AP&P. Tammy has carrying a concealed weapon, threatening with a weapon, use of a dangerous weapon during a fight, carrying concealed weapon, forgeries, possession of meth and other controlled substance charges and forgery.

Your affiant desires to enter 1381 South Emery Street; and search for a Anne Klein watch, a Pave diamond ring, a Tiffany necklace with 'Tiffany' inscribed on the necklace and matching bracelet, a Omega yellow gold necklace, a diamond yellow gold tennis bracelet, a diamond cross

necklace in white gold, turquoise necklace blue with small brown beads, red and silver earrings, an antique white gold ring with a pink sapphire stone, a silver and pink ring with cubic zirconias, a blue and silver ring with cubic zirconias, and yellow gold diamond stud earrings, clothing, Ipod mp3 player, Louis Vuitton bags, 'Mac' makeup, Louis Vuitton sunglasses, among other items on attached list.

Your affiant also desired to search Daniel Vern Keener a white male adult D.O.B. 05-19-1954, approximately 5'10" and 190 pounds with grey hair, for the above described property which Mr. Lambson observed on the suspect Daniel V Keener.

This application for search warrant has been reviewed and approved for presentation to the court by Deputy District Attorney Blake Hills.

WHEREFORE, your affiant prays that a search warrant be issued for the seizure of said items anytime day or night because there is reason to believe it is necessary to seize the property prior to it being concealed, destroyed, damaged, or altered, or for other good reasons to wit:

The premises which your affiant desires to search is located in a residential community. Your affiant has observed children playing in the area near the listed premises during the daylight hours. Your affiant has watched the premises during the evening hours and has noted that the pedestrian traffic near the listed residence appears to be considerably less during the evening hours. Your affiant has observed other residents of the community walking in close proximity to the listed premises. Your affiant feels that it would be safer for children who may live in the area as well as the other residents of the community if the warrant were to be served in the evening hours, during a time when children were not present and the pedestrian traffic around the grounds seemed to be less.

Your affiant has also noted that there are businesses in the area of the listed residence. These businesses are open during the daytime hours and appear to have a large amount of business related traffic, which travels in close proximity to the listed address. Your affiant has watched the premises during the evening hours and has not noted that there is a decrease in such activity. A majority of the businesses in the area are closed during the evening hours. Your affiant feels that it would be safer for patrons of the nearby businesses as well as the other residents of the neighborhood if the warrant were to be served in the evening hours, during a time when pedestrian traffic around the listed premises seemed to be less.

Your affiant believes it is necessary for search teams to get as close as possible to the named premises before being discovered because persons involved in an on-going narcotics distribution operation will attempt to destroy the narcotics if they believe the narcotics will be discovered by law enforcement personnel. Your affiant believes the cover of darkness will allow search teams to get as close as possible to the premise before being discovered.

It is further requested that the officer executing the requested search warrant not be required to give notice of the officer's authority or purpose because:

Physical harm may result to any person if notice was given, and/or the property sought may

quickly be destroyed, disposed of, or secreted.

This danger is believed to exist because:

Your affiant has been informed by Mr. Lambson that there is electronic counter-surveillance equipment mounted above the doors. Your affiant knows through training and experience that this kind of activity is used as a way to forewarn of police action and that person(s) employing counter-surveillance are doing so in an attempt to flee or use force to impede officers attempts to enter the listed premises or to destroy or conceal contraband.

Your affiant has learned from other Narcotic Detectives that there is active human counter-surveillance from this address. Occupants have been observed looking out windows and coming out the front door and watching up and down the street when vehicles come onto the street.

The persons living at or otherwise frequenting the listed address are abusing stimulants, namely methamphetamine. Your affiant knows through training and experience that persons who use stimulants often exhibit unpredictable, paranoid and potentially violent behavior while under the influence of the stimulant. Your affiant believes the ability to quickly secure the drug users in the listed premises will assist in preventing the physical harm to any person during the execution of this warrant.

Your affiant has found histories on many of those residing at the listed address. Many of these criminal histories include, drug related charges, assaults and weapon violations.

M. Hardin

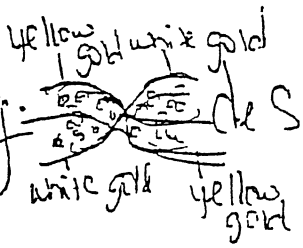
Detective Michael Hardin
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 9 day of Dec. 2005.

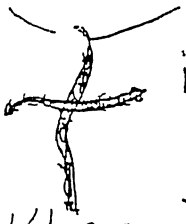
Judge of the Third
District Court

Jewelry

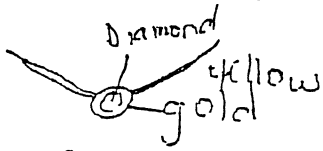
*pavé diamond ring: design w/ diamonds bottom of ring white, yellow gold



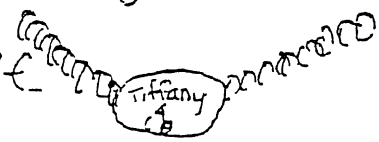
*Diamond cross necklace in white gold, custom one of a kind



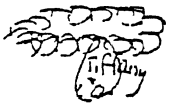
- yellow gold diamond necklace



- Tiffany + company Silver necklace

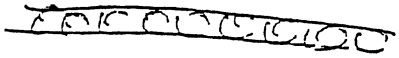


- Tiffany + company Silver bracelet



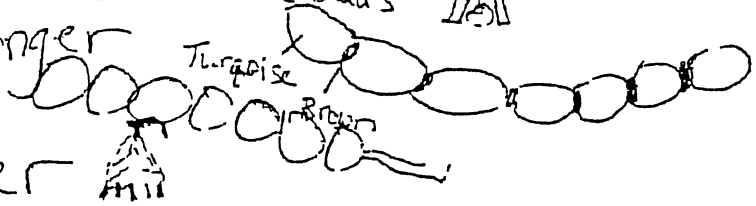
- Wide Silver bangle

- Silver watch w/black face
- yellow gold diamond bracelet

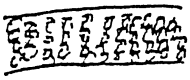


- yellow gold omega w/slide
- Turquoise necklace - blue w/brown little beads

- Black Bead necklace longer w/ ribbon tie



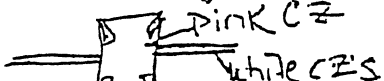
- Red earrings in Silver
- Red bracelet ~~XXXXXXXX~~
- Blue turquoise stretch bracelet



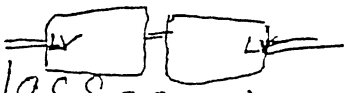
*

*Antique white gold ring w/pink sapphire stone center and diamonds, vintage one of a kind

- Pink ring in Silver w/ cz's



- Blue ring in Silver w/ cz's

-Pink mini Ipod w/white clip & headphones has serial number can get I dont have right now.
- Blue "Citizen" jeans, dark blue wash size 25 (I think 26)
- Louis Vuitton Carry Bag  Larger Bag
- Louis Vuitton small purse 
- Louis Vuitton Sunglasses in Brown and other sunglasses also 
- "Titanium Tools" Flat iron for hair, black/silver
- Lots of make up in clear plastic make-up bag mostly "mac" products
- Parafin wax machine, for manicures + pedicures
- "Nike Shox" tennis shoes teal/blue and white size 7
- gym clothes
- lots of clothes such as "wet seal", "Ardin B," Brands etc.
- Lots of Silver earings Plain Silver dangle Styles + different colored dangle Styles
- Yellow gold diamond stud earings
- Yellow gold dangle earings 
- Yellow gold Bangle Bracelet  w/ design

This is a quick list of main things I can remember and most recognized things Thank you

dh