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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 45632**
Plaintiff-Respondent,	)	
	)	**Bannock County Case No.**
v.	)	**CR-2017-2120**
	)	
JOHN MULLINS,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HONORABLE ROBERT C. NAFTZ
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

John Mullins appeals the district court's Minute Entry & Order Of Probation entered after Mullins pled guilty to possession of a controlled substance, methamphetamine. Mullins argues the district court erred when it denied his motion to suppress.

Statement Of The Facts And Course Of The Proceedings

On March 1, 2017, John Mullins and his wife arrived at the federal courthouse in Pocatello in their pickup truck. (Tr., p.20, Ls.21-24; p.35, L.15 – p.37, L.3.) Mullins walked through the courthouse door carrying a backpack and then handed it off to his wife. (Tr., p.24, Ls.9-20.) The Mullinses placed their personal effects, including the backpack, on the x-ray machine used by the court security officers. (Tr., p.22, L.20 – p.23, L.13.)

CSO Bunderson used the x-ray machine to scan the items. (Id.) He saw "three dark spots that had no definite outline" that he could not identify in the x-ray scan of the backpack. (Tr., p.23, L.14 – p.24, L.8.) He asked Mullins's wife if he could look in the backpack to identify the objects. (Tr., p.24, L.24 – p.26, L.13.) She said, "yeah." (Id.)

When CSO Bunderson opened the bag, he saw "a brownish vial" that had "a white powdery substance inside." (Tr., p.24, L.24 – p.26, L.13; p.26, L.24 – p.27, L.5.) Based on CSO Bunderson's 34 years of experience with the Idaho State Police, the substance in the vial "appeared to be a controlled substance." (Tr., p.24, L.24 – p.26, L.19.) CSO Bunderson immediately radioed a Deputy U.S. Marshall, and the Deputy U.S. Marshall called the Pocatello Police. (Tr., p.28, L.1 – p.29, L.1.)

As CSO Bunderson continued looking through the backpack to identify the three objects, he found "50 to 100" small baggies, which were consistent with baggies "used in an illegal drug trade." (Tr., p.28, L.1 – p.29, L.13.) He put everything back in the backpack except the vial and the baggies. (Tr., p.29, L.17 – p.30, L.8.) He "put the vial and those little baggies just on the counter in plain view . . . and within a few minutes the police department was there." (Id.)

Officer Edwards from the Pocatello Police Department conducted a field test of the suspected controlled substance, and it tested presumptive positive for methamphetamine. (Tr., p.61, L.18 – p.62, L.3.) Officer Diekemper from the Pocatello Police Department placed Mullins and his wife under arrest for possession of methamphetamine. (Id.) The officers seized the suspected methamphetamine, the baggies, and $403 from the Mullinses. (Tr., p.64, L.15 – p.65, L.10.) At the request of Mullins's wife, Officer Edwards placed the rest of the Mullinses' personal effects, including the backpack, back in the pickup. (Id.)

The officers called a K-9 unit to conduct an exterior sniff of the pickup. (Tr., p.62, L.9 – p.63, L.8.) They believed that the Mullinses could have more drugs in the pickup because the small amount of methamphetamine in the vial "would be more of a personal use amount, but the sixty-five unused, clean baggies with that vial is . . . indicative of a person that could be distributing or selling methamphetamine." (Tr., p.63, L.9 – p.64, L.1.) The drug dog alerted on the pickup. (Tr., p.65, L.19 – p.66, L.8.)

Armed with the information from the investigation, Officer Diekemper sought a search warrant for the pickup. (Id.) In his affidavit, Officer Diekemper provided a factual basis for the search warrant, including the following:

> 4. Pocatello Police Detective Edwards examined the tray of personal effects that [Mullins] and [his wife] had submitted to the Court Security Officers

> for inspection. Detective Edwards observed 65 small plastic baggies, $403 in US currency and a small brown vial with a white crystalline substance. Detective Edwards located identifying documents for both [Mullins] and [his wife] in the pink and brown backpack.
>
> 5. Detective Edwards conducted a field test of the material in the vial and this test resulted in a presumptive positive for methamphetamine. . . .
>
> 6. . . . The suspected methamphetamine, US currency, and drug paraphernalia were seized by Detective Edwards. At the request of [Mullins's wife], Detective Edwards placed the Mullins' personal effects into their pickup . . . .
>
> 7. [Mullins and his wife were incarcerated.]
>
> 8. Your affiant called Pocatello Police Officer Sean Peterson and requested he respond to the Federal Courthouse . . . for the purpose of deploying his state certified drug detection dog on an exterior sniff of the aforementioned pickup . . . . Officer Peterson did deploy his state certified drug detection dog on an exterior sniff of the pickup resulting in a positive indication to the presence of illegal controlled substances, either heroin, methamphetamine, cocaine or marijuana.

(R., pp.16-17.)

A magistrate signed a search warrant for the pickup. (R., p.18.) Pursuant to the warrant, the officers searched Mullins's pickup. (Tr., p.101, Ls.15-19.) They found "two additional vials or glass containers that had suspected methamphetamine," two pipes that "appeared to be suspected methamphetamine pipes," $1000 in U.S. currency, and other miscellaneous items. (Tr., p.101, L.25 – p.103, L.2.)

The state charged Mullins with possession of a controlled substance with intent to deliver, methamphetamine. (R., p.57.) Mullins moved to suppress "any and all evidence obtained by officers resulting from the search of defendant's vehicle." (R., p.91-92.) According to Mullins, "the search warrant issued in this case was partly based upon tainted evidence utilizing a drug dog's alert on the vehicle after police placed a backpack that contained drugs into the vehicle." (Id.)

After an evidentiary hearing, the district court denied Mullins's motion to suppress on two separate, independent grounds. (R., p.103-06.) First, the district court found that Mullins "failed to prove by a preponderance of evidence that the information . . . omitted from the affidavit was done intentionally or recklessly in order to mislead the magistrate in his determination of probable cause to issue the search warrant." (R., p.106.) Second, the district found that, even without the drug dog detection, "there is still sufficient information for the magistrate to conclude probable cause existed to issue the search warrant." (Id.)

Mullins pled guilty to possession of a controlled substance, methamphetamine, and reserved his right to appeal the district court's denial of his motion to suppress. (R., pp.140-41.) The district court withheld judgment and placed Mullins on probation for a period of four years. (R., p.153.) Mullins timely appealed. (R., pp.163-66.)

ISSUE

Mullins states the issue on appeal as:

Did the district court err when it denied Mr. Mullins' motion to suppress?

(Appellant's brief, p.4.)

The state rephrases the issue as:

Has Mullins failed to show that the district court erred when it denied his motion to suppress?

ARGUMENT

Mullins Failed To Show The District Court Erred By Denying His Motion To Suppress

A. Introduction

The district court properly rejected Mullins's attack on the affidavit underlying the warrant that authorized a search of his truck. In Franks v. Delaware, 438 U.S. 154 (1978), the U.S. Supreme Court held that a defendant may invalidate a search warrant by showing: (1) the search-warrant affidavit "contain[ed] a deliberately or reckless false statement" and (2) the false statement was material to the probable cause determination.[1] 438 U.S. at 164-65, 171. The Idaho Supreme Court subsequently held that "*Franks* should apply to the omission as well as the inclusion of information in affidavits." State v. Guzman, 122 Idaho 981, 983-84, 842 P.2d 660, 662-63 (1992). Mullins attempted to satisfy his two-prong burden under Franks by arguing that Officer Diekemper failed to inform the magistrate that the officers put a backpack from which they had retrieved methamphetamine back into Mullins's truck prior to using the drug dog and that the drug dog could alert to the residual

[1] The Supreme Court held in Franks that, before a court holds an evidentiary hearing on an attack of a search warrant affidavit, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." 438 U.S. at 171. That did not happen here. Instead, Mullins filed a motion to suppress based on a different theory: "the search warrant was based upon tainted evidence." (R., p.91.) At the evidentiary hearing on the motion, the state expressed confusion as to the type of motion Mullins had filed. (Tr., p.8, L.24 – p.9, L.14.) Mullins responded that he was "not sure" but that it was "[m]aybe" a motion to dismiss. (Tr., p.10, L.25 – p.11, L.5.) He explained that he was relying on State v. Bunting, 142 Idaho 908, 136 P.3d 379 (Ct. App. 2006). (Tr., p.17, Ls.10-20.) Bunting is not a Franks case. See Bunting, 142 Idaho at 915, 136 P.3d at 386 (invalidating warrant because it was procured based on evidence obtained in violation of the Fourth Amendment). At some point during the evidentiary hearing that Mullins, frankly, did not deserve under Franks, his argument morphed into an attack on the veracity of the underlying affidavit. (E.g., Tr., p.115, Ls.3-17.) Having never mentioned Franks, or any case related to Franks, in the district court, Mullins now features it front-and-center on appeal: "He claims the warrant was invalid under *Franks* . . . ." (Appellant's brief, p.1.)

odor of the methamphetamine found in the backpack. The district court correctly found that Mullins failed to satisfy either prong.

Mullins failed to show Officer Deikemper deliberately or recklessly omitted any relevant information from the affidavit. The affidavit informed the magistrate that the officers found methamphetamine in the backpack and that the officers put the Mullinses' "personal effects" back into the truck before using the drug dog. (R., p.16.) Officer Deikemper's decision to use the general phrase "personal effects" instead of listing out each item returned to the truck does not show an intentional or reckless omission of the truth. Moreover, Mullins failed to prove that Officer Deikemper knew or should have known that the drug dog could alert on the residual odor in the backpack. He could not have deliberately or recklessly omitted information that he neither knew nor should have known.

Mullins also failed to show the information allegedly omitted from the affidavit was material to the magistrate's probable cause determination. As the affidavit explained, prior to using the drug dog, the officers seized a vial containing methamphetamine, 65 small baggies, and a large sum of money from the Mullinses. That evidence gave the officers probable cause to search Mullins's truck for additional contraband. Because the drug dog alert was not necessary to establish probable cause, the information allegedly omitted from the affidavit that undermined the drug dog's alert was not material to the probable cause determination.

B. Standard Of Review

This Court reviews the two Franks inquiries using different standards of review. "The [first] inquiry—whether a statement or omission was intentional or reckless—

presents a question of fact, and [this Court] will not disturb the lower court's finding without clear error." State v. Brown, 155 Idaho 423, 428, 313 P.3d 751, 756 (Ct. App. 2013). "Factual Findings supported by substantial and competent evidence are not clearly erroneous." State v. Downing, 163 Idaho 26, ___, 407 P.3d 1285, 1288 (2017). "Substantial and competent evidence is 'relevant evidence that a reasonable mind might accept to support a conclusion.'" Huff v. Singleton, 143 Idaho 498, 500, 148 P.3d 1244, 1246 (2006) (quoting Jensen v. City of Pocatello, 135 Idaho 406, 412, 18 P.3d 211, 217 (2000)).

"The second query—whether the statement or omission was material—is an issue of law that [this Court] review[s] freely." Brown, 155 Idaho at 429, 313 P.3d at 757. But, "[i]n reviewing the district court's determination that misstatements and omitted information were immaterial and unnecessary to a finding of probable cause, [this Court] defer[s] to factual findings which are supported by substantial evidence." State v. Thompson, 121 Idaho 638, 640, 826 P.2d 1350, 1352 (Ct. App. 1992).

C. Mullins Failed To Carry His Burden On Either *Franks* Inquiry

The district court did not err when it denied Mullins's challenge to Officer Diekemper's affidavit. To successfully attack a search-warrant affidavit under Franks, a defendant must show a "false representation or omission was made knowingly and intentionally or with reckless disregard for the truth *and* . . . the facts wrongfully included or omitted were material to the magistrate's finding of probable cause for issuance of the warrant." State v. Rozajewski, 159 Idaho 261, 264, 359 P.3d 1058, 1061 (Ct. App. 2015) (emphasis in original). Mullins failed to make either showing.

1. Mullins Failed To Show Clear Error In The District Court's Finding That Any Omission Of Relevant Information From The Affidavit Was Not Done Intentionally Or Recklessly

Mullins failed to show Officer Diekemper omitted relevant information in the affidavit intentionally or with reckless disregard for the truth. "[T]he defendant bears the burden to prove, by a preponderance of the evidence, that . . . material exculpatory information was deliberately or recklessly omitted" from the affidavit. State v. Peterson, 133 Idaho 44, 47, 981 P.2d 1154, 1157 (Ct. App. 1999). "[M]erely negligent or innocent mistakes . . . do not invalidate a warrant." Id. The district court found any omission of relevant information in the affidavit was not "done intentionally or recklessly." (R., p.106.) Mullins can thus prevail on appeal only if he shows clear error in the district court's finding. Brown, 155 Idaho at 428, 313 P.3d at 756. He cannot do so.

Mullins's argument on appeal that the district court's finding was clearly erroneous is foreclosed by his concession at the evidentiary hearing that the evidence did not rise even to the level of negligence on the part of Officer Diekemper. After the presentation of the evidence, the district court asked Mullins's counsel whether he "believe[d] that the detectives placed that backpack back in there and purposely did not disclose that to the magistrate." (Tr., p.121, Ls.15-19.) Mullins's counsel responded: "I can't say that, Your Honor. I mean, I don't know. It could have been just, you know, just – not negligence but just, you know, them thinking personal effects and not thinking that they needed to specify." (Tr., p.121, Ls.20-25.)

The record confirms the wisdom of Mullins's fatal concession. The affidavit informed the magistrate that the officers found the suspected methamphetamine in the backpack. (R., p.16.) The affidavit also disclosed to the magistrate that, after finding the suspected methamphetamine and prior to the officers using the drug dog, "[a]t the request

of [Mullin's wife], Detective Edwards placed the Mullins' [sic] personal effects into their pickup." (Id.)

Mullins takes issue with Officer Diekemper's use of the "generalized term 'personal effects'" and argues he should have specified the backpack had been placed back in the truck. (Appellant's brief, p.7.) But Officer Diekemper testified at the hearing that, although "it may not be clear," the phrase "personal effects . . . is an intended reference back to the backpack and personal effects in the trays." (Tr., p.77, L.20 – p.78, L.10.) Officer Diekemper's testimony, which is entirely consistent with the language of the affidavit,[2] proves he did not deliberately or recklessly omit information from his affidavit and constitutes substantial evidence in support of the district court's finding.

Furthermore, while listing out the personal effects that were placed back into the truck may have been more informative, the issue is not whether Officer Diekemper could have written a better affidavit but whether Mullins has shown that Officer Diekemper deliberately or recklessly omitted information. See Rozajewski, 159 Idaho at 264, 359 P.3d at 1061. "A 'poor choice of words' alone doesn't meet this standard . . . ." United States v. Huang, No. 12-1246 WJ, 2014 WL 12796916, at *5 (D.N.M. Apr. 16, 2014); see United States v. Curry, 911 F.2d 72, 76 (8th Cir. 1990) (holding defendant could not satisfy Franks burden where officer "admitted that his choice of words in the challenged portion of the affidavit was poor . . . [a]bsent other evidence demonstrating more than negligence"); State v. Tuttle, 515 S.W.3d 282, 309 (Tenn. 2017) (holding officer's erroneous use of

[2] A backpack falls well within the scope of the phrase "personal effects." See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/personal%20effects (last visited July 18, 2018) (defining personal effects as "privately owned items (such as clothing and jewelry) normally worn or carried on the person").

"residence" instead of "property" in affidavit, "although admittedly imprecise and perhaps resulting from negligence, does not constitute a false statement"). Officer Diekemper "us[ing] the generalized term 'personal effects' to describe what was placed in the truck" (Appellant's brief, p.7), at worst, amounts to a poor choice of words, which does not invalidate a search warrant affidavit. See Curry, 911 F.2d at 76; Tuttle, 515 S.W.3d at 309.

Mullins also argues that Officer Diekemper should have included in the affidavit that the drug dog was "able to detect the residual odor" in the backpack. (Appellant's brief, p.7.) But there is no indication in the record that Officer Diekemper knew or should have known that the drug dog was able to detect the residual odor in the specific circumstances of this case. Only Officer Peterson testified to the drug dog's capabilities, and he testified that his knowledge was based on specialized training for officers assigned to the K-9 unit. (Tr., p.81, Ls.9-12; p.84, Ls.15-24.) Nothing in the record suggests Officer Diekemper is or has ever been assigned to the K-9 unit, and Officer Peterson's only involvement in the investigation was deploying his drug dog and informing Officer Diekemper of his drug dog's positive indication.[3] (Tr., p.86, L.3 – p.88, L.3.) Officer Diekemper could not have deliberately or recklessly omitted information that he neither knew nor should have known. See, e.g., Franks, 438 U.S. at 163 (observing that "claimed misstatements in the search warrant affidavit . . ., 'not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit'"); United States v. Barnes, 126 F. Supp. 3d 735, 741 (E.D. La. 2015) ("In this situation, the officer's sole responsibility is to attest to facts within his or her personal knowledge."); cf. Chism v. Washington State, 661 F.3d 380, 388 (9th Cir.

[3] The two investigating officers were Officer Diekemper and Officer Edwards. (Tr., p.64, Ls.2-5.) Officer Peterson arrived on the scene after Officer Edwards had placed the backpack in the truck. (Tr., p.98, Ls.8-10; p.100, L.11 – p.101, L.14.)

2011) ("The most commonsense evidence that the officers acted with at least a reckless disregard for the truth is that the omissions and false statements contained in the affidavit were all facts that were within [the affiant's] personal knowledge.").

Furthermore, Mullins points to no evidence showing this so-called omission was intentional or reckless. Instead, citing Peterson, he erroneously attempts to rely solely on an inference he asks this Court to draw based on the relative importance of the alleged omission. (Appellant's brief, pp.7-8.) In Peterson, the Idaho Court of Appeals held that "[w]hether an omission was intentional or reckless might be inferred, *in part*, from the relative importance of the information and its exculpatory power." 133 Idaho at 48, 981 P.2d at 1158 (emphasis added). The court's "in part" qualification makes clear that a defendant cannot rely wholly on the inference to prove deliberateness or recklessness. See id. Were it otherwise, the first Franks prong (i.e., whether the omission was intentional or reckless) would collapse entirely into the second Franks prong (i.e., whether the omission was material). In any event, there is no inference to draw here because the information that Officer Diekemper allegedly omitted from the affidavit is neither relatively important nor exculpatory. See infra Part I.C.2.

The district court found that Mullins failed to prove any omission from the affidavit "was done intentionally or recklessly." (R., p.106.) That finding is supported by the record, including Officer Diekemper's testimony. Mullins has failed to point to any evidence to the contrary on appeal. He has fallen far short of showing clear error.

2. Mullins Failed To Show That The Information Allegedly Omitted From Officer Diekemper's Affidavit Was Material

Mullins's attack on Officer Diekemper's affidavit also fails because Mullins failed to show the information allegedly omitted from the affidavit was material. See

Rozajewski, 159 Idaho at 264, 359 P.3d at 1061. "Omitted information is material only if there is a substantial probability that, had the omitted information been presented, it would have altered the magistrate's finding of probable cause." Brown, 155 Idaho at 428, 313 P.3d at 756. Mullins alleges that Officer Diekemper omitted information that undermined the drug dog's alert on the vehicle. (Appellant's brief, pp.8-11.) That information is not material, however, because the affidavit provided the magistrate with a sufficient factual basis for probable cause without the drug dog's alert.

The evidence seized from the Mullinses inside of the courthouse—long before the drug dog appeared on the scene—was sufficient, standing alone, to support the magistrate's probable cause determination. The probable cause standard to search a vehicle "is satisfied when a police officer lawfully searches a vehicle's recent occupant and finds contraband on his person." United States v. Baker, 719 F.3d 313, 319 (4th Cir. 2013); see United States v. Barnett, 414 F. App'x 17, 19 (9th Cir. 2011) (holding vial containing a white residue found on the defendant's person "gave the officer probable cause to think that there were more drugs in the truck"); United States v. Johnson, 383 F.3d 538, 545-46 (7th Cir. 2004) ("[The officer's] discovery of a banned substance (drugs) on Johnson's person clearly provided him with probable cause to search the trunk of the vehicle . . . ." (footnote omitted)).

Here, the methamphetamine and suspected drug paraphernalia seized from the Mullinses in the courthouse shortly after they got out of their truck gave the magistrate a factual basis to find probable cause. The affidavit presented to the magistrate contained the following facts: Mullins and his wife arrived at the courthouse in a "pickup." (R., p.16.) They "admitted . . . that they entered the Federal Courthouse together with [Mullins's wife]

in possession of a pink and brown backpack that [Mullins's wife] had submitted for search." (Id.) The officers "located identifying documents for both [Mullins and his wife] in the pink and brown backpack." (Id.) A search of the backpack revealed "65 small plastic baggies and a vial containing a white crystalline substance." (Id.) The white crystalline substance weighed 0.2 grams, and a field test on the substance "resulted in a presumptive positive for methamphetamine." (Id.) The officers also found "$403" in the tray submitted to courthouse security by the Mullinses. (Id.)

The affidavit also contained observations from Officer Diekemper "[b]ased upon [his] training experience and participation in these and other financial/drug trafficking investigations." (R., p.13.) These observations included that "[i]ndividuals involved in the manufacture or distribution of controlled substances almost always keep paraphernalia for . . . packaging . . . and distribution of their illegal drugs" including "glassware, tubing, . . . and packaging materials" (R., p.14); that "[i]ndividuals involved in the manufacture or distribution of illegal controlled substances commonly maintain amounts of money . . . which are proceeds from or intended to be used to facilitate drug transactions" (id.); and that "[i]ndividuals who manufacture and distribute illegal controlled substances commonly secrete contraband, including other illicit drugs, the proceeds of drug sales and records of drug transactions . . . in their vehicles" (R., p.15.).

As the district court found, "$403, the sixty-five clean baggies, and the suspected methamphetamine certainly gave them probable cause" to search the truck. (Tr., p.116, L.6-12.) The methamphetamine, the large amount of cash, and the 65 baggies is "indicative of a person that could be distributing or selling methamphetamine." (Tr., p.63, L.9 – p.64, L.1.) That drug evidence sufficed for the magistrate to determine that the officers had

probable cause to search for additional contraband in the truck the Mullinses had just exited immediately prior to entering the courthouse.[4] See Baker, 719 F.3d at 319 ("[H]aving found drugs, as well as other items indicating involvement in the drug trade, on Brown's person, [the officer] had probable cause to search the passenger compartment of the vehicle in which Brown had just been sitting for additional contraband."); United States v. Pineda, 999 F. Supp. 2d 982, 990 (M.D. Tenn. 2014) ("Upon finding drugs on the Defendant's person, officer's had probable cause to seize the Defendant's cell phone and search the vehicle that the Defendants drove to the residence."). Because the magistrate could have found probable cause without the drug dog's alert at all, the information allegedly omitted from the affidavit that undermined the reliability of the drug dog's alert was not material to the probable cause determination.

Mullins argues that "the test for materiality of a wrongful omission . . . is not whether the magistrate could still have issued the warrant, but whether there is a 'substantial probability' that the magistrate would have decided not to." (Appellant's brief, p.8-9 (quoting Brown, 155 Idaho at 428, 313 P.3d at 756).) That is a distinction without a difference. If the omitted information had been presented to the magistrate and, even in light of the omitted information, probable cause still would have existed, there is *no likelihood* that the magistrate would have reached a different conclusion—much less a *substantial likelihood*. Indeed, in practice, Idaho's appellate courts have applied the

[4] Mullins suggests this evidence is not sufficient because the police found only "a personal use amount of suspected methamphetamine." (Appellant's brief, p.10.) But as Officer Diekemper explained, they believed Mullins had more contraband, at least in part, *because* they had only found a personal use amount of methamphetamine in the backpack whereas the baggies and large amount of cash strongly indicated that Mullins was involved in selling methamphetamine. (Tr., p.63, L.9 – p.64, L.1.)

materiality test for omitted information by asking whether probable cause still would have existed if the omitted information had been provided. See, e.g., State v. Kay, 129 Idaho 507, 514, 927 P.2d 897, 904 (Ct. App. 1996) ("Having determined that there are statements in Detective Dudley's affidavit which must be disregarded and that exculpatory information was improperly omitted, we must examine whether, after correcting these flaws, the affidavit still demonstrates probable cause."); Thompson, 121 Idaho at 641, 826 P.2d at 1353 (finding omitted information immaterial because, "[e]ven if" the district court had been presented the omitted information, "there was probable cause to issue the search warrant"); State v. Jardine, 118 Idaho 288, 293, 796 P.2d 165, 170 (Ct. App. 1990) ("The question remaining is whether there was a substantial basis to support a finding of probable cause if the omitted information had been supplied in the affidavit."). Here, the information allegedly omitted from the affidavit cannot be material because, even if Officer Diekemper had included the information in his affidavit, probable cause still would have existed based on the methamphetamine and suspected drug paraphernalia seized in the courthouse.

Mullins also erroneously asserts that the information allegedly omitted from the affidavit that undermined the drug dog's alert "was crucial to the magistrate's determination" because "a reliable drug dog alert is deemed *sufficient*, in and of itself, to establish probable cause to search a vehicle." (Appellant's brief, p.9. (emphasis added).) His assertion misses the point. Even assuming, as Mullins suggests, that the information allegedly omitted from the affidavit proved the drug dog alert unreliable, the relevant question for materiality is not whether the drug dog alert was *sufficient* to establish probable cause but whether it was *necessary*. See, e.g., Jardine, 118 Idaho at 293, 796 P.2d

at 170. As explained above, the drug dog alert was not necessary to establish probable cause given the evidence already seized from the Mullinses.

Furthermore, the allegedly unreliable drug dog alert could not have extinguished the already-established probable cause. Probable cause "may be dissipated if the investigating officer later learns additional information that decreases the likelihood" that evidence will be found. State v. Anderson, 154 Idaho 703, 707, 302 P.3d 328, 332 (2012) (quoting United States v. Ortiz-Hernandez, 427 F.3d 567, 574 (9th Cir. 2005)). "The police may learn, for instance, that contraband is no longer located at the place to be searched." United States v. Grubbs, 547 U.S. 90, 95 n.2 (2006).

Unlike a drug dog's failure to alert, a drug dog's unreliable positive alert cannot *decrease* the likelihood that drugs will be found. A drug dog's failure to alert may affirmatively indicate the *absence* of drugs because it suggests the dog could not smell any drugs. See Anderson, 154 Idaho at 708, 302 P.3d at 333 ("[T]he drug dog's subsequent failure to alert may call its initial alert into some question in the mind of a reasonable person."). A drug dog's positive alert, on the other hand, affirmatively indicates the *presence* of drugs. See Anderson, 154 Idaho at 706, 302 P.3d at 331 ("A reliable drug dog's alert on the exterior of a vehicle is sufficient, in and of itself, to establish probable cause for a warrantless search of the interior."). Evidence "that may detract from the reliability of the dog's performance properly goes to the 'credibility' of the dog—that is, the *weight* to be given the dog's alert." United States v. Howard, 621 F.3d 433, 447 (6th Cir. 2010) (emphasis in original) (internal quotation marks and citation omitted). Thus, even overwhelming evidence of the unreliability of a drug dog's positive alert may lessen (or completely eliminate) the probative value of the drug dog's positive alert in proving the

presence of drugs, but it does not somehow transform the nature of the drug dog's positive alert to affirmatively indicate the *absence* of drugs. Cf. In re St. John's Estate, 296 N.Y.S. 613, 618 (N.Y. Sur. 1937) ("[H]is utter unreliability as a witness[] does not furnish affirmative proof that the reverse of his statements represents the fact.").

Here, for example, assume the drug dog alerted on the residual odor in the backpack. While his alert had no probative value in proving the presence of other drugs in the truck, it in no way proved the absence of other drugs in the truck. This means the (supposedly) unreliable drug dog alert could not have affected the probable cause already established by the evidence seized in the courthouse because it could not have decreased the likelihood that the officers would find additional contraband in the truck. See Anderson, 154 Idaho at 707, 302 P.3d at 332. Given that the information allegedly omitted from the affidavit only undermined the drug dog alert and not the evidence seized in the courthouse, it was not material to the probable cause determination. See Brown, 155 Idaho at 428, 313 P.3d at 756.

CONCLUSION

The state respectfully requests this Court affirm the district court's Minute Entry & Order Of Probation entered after Mullins pled guilty to possession of a controlled substance, methamphetamine.

DATED this 31st day of July, 2018.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 31st day of July, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

KIMBERLY A. COSTER
DEPUTY STATE APPELLATE PUBLIC DEFENDER
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/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

JN/dd