IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ENRIQUE LINO, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12224 Trial Court No. 3AN-12-6213 CR MEMORANDUM OPINION No. 6579 — February 7, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, and Philip R. Volland, Judges.

Appearances: Marjorie A. Mock, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

After receiving a tip that someone was carrying drugs from New Mexico to a known drug dealer in Cordova, troopers located Enrique Lino at the Anchorage airport and ultimately found over 90 grams of heroin and methamphetamine in his possession. Lino was later convicted of second- and third-degree misconduct involving a controlled substance for possessing heroin and methamphetamine with the intent to deliver.[1]

On appeal, Lino argues that the superior court should have granted his motion to suppress the heroin and methamphetamine because the informant's tip was insufficiently reliable or credible under the *Aguilar/Spinelli* test. We find no merit to this claim, and we affirm the decision of the superior court denying Lino's motion to suppress.

Lino also argues that the superior court erred when it allowed the State to introduce the substance of the informant's tip for the purported non-hearsay purpose of explaining the course of the investigation. Lino further asserts that his confrontation rights were violated by the admission of this evidence. We conclude that the introduction of this evidence was error, although ultimately harmless in the context of this particular case.

Facts and proceedings

On June 20, 2012, police learned from a confidential informant in Cordova that someone was carrying drugs (either on their person or internally) from New Mexico

[1] Former AS 11.71.020(a)(1) (pre-2016 version) (second-degree misconduct involving a controlled substance for possessing heroin with the intent to deliver); former AS 11.71.-030(a)(1) (pre-2016 version) (third-degree misconduct involving a controlled substance for possessing methamphetamine with the intent to deliver).

via Anchorage to Cordova that evening, and was intending to deliver them to the informant's roommate, a known drug dealer in Cordova.

Following up on this tip, Alaska State Trooper Curtis Vik learned that only four people were on that evening's flight from Anchorage to Cordova. One of the passengers, Enrique Lino, had purchased his ticket to Cordova the day before and was flying in from New Mexico. Lino was currently on felony probation and was not permitted to leave New Mexico without the consent of his probation officer. Vik contacted Lino's probation officer and confirmed that Lino did not have permission to travel to Alaska.

The troopers later learned that Lino's itinerary had changed and that he would not be arriving in Anchorage in time to make the evening flight to Cordova. The next morning, Trooper Vik tracked down Lino at the Anchorage airport before Lino's new flight to Cordova was supposed to take off. Vik introduced himself as a trooper, and Lino agreed to talk to him. Lino appeared nervous and kept fidgeting with his ticket.

Lino told Vik that he was heading to Cordova to fish for the summer. Vik was suspicious of Lino's story. Lino was dressed inappropriately for the weather, and he could not answer basic questions about the contacts he claimed to have in Cordova or the details of his fishing job. Lino also told Vik that he had never been in trouble with the law, which Vik knew was not true.

Vik asked to search Lino's belongings. Lino declined to consent to this search and started to gather up his belongings to leave. Vik then informed Lino that he was going to detain him until he could obtain a search warrant. When Lino bolted for a nearby women's bathroom, Vik and another trooper took him to the ground and handcuffed him.

The troopers applied for, and obtained, a search warrant for Lino's bags and his person. When the troopers executed this search warrant, they found approximately

twenty-six grams of heroin and approximately sixty-seven grams of methamphetamine in Lino's bag. The drugs were encased in three balloons, and, based on the fecal matter on the balloons, it appeared that Lino had been transporting the drugs in his rectal cavity.

In addition to the drugs, the troopers found a ledger that appeared to be where Lino recorded his drug sales. The troopers also discovered text messages on Lino's cell phone indicating that he was dealing drugs.

Lino was indicted for second- and third-degree misconduct involving a controlled substance. Prior to trial, Lino filed a motion to suppress the evidence from the search at the airport, arguing that the police did not have reasonable suspicion to stop him, that the seizure exceeded the scope of a limited investigatory stop, and that the police did not have probable cause to arrest him. Lino's primary argument was that the information from the confidential informant was not sufficiently reliable or credible for purposes of the *Aguilar/Spinelli* test.[2]

After holding an evidentiary hearing, the superior court denied the motion to suppress. The court found that the confidential informant was credible because he had provided reliable information to the Cordova police in the past. The court also found that the informant's information was reliable because it was based on first-hand knowledge from the informant's roommate (the intended recipient of the drugs), and because the troopers were able to corroborate the various details of Lino's travel arrangements.

As the superior court further explained, by the time Lino bolted for the restroom, the troopers possessed a significant amount of information about Lino:

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[2] *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *see also State v. Jones*, 706 P.2d 317, 324-25 (Alaska 1985) (holding that, as a matter of state law, the *Aguilar/Spinelli* test continues to govern the evaluation of hearsay information offered to support a search or seizure).

> At this point, Investigator Vik had the informant's tip which had proven quite accurate to this point, his research on the suspect on the flight who matched the description from the informant, confirmation from the suspect's probation officer that he was out of New Mexico without permission, confirmation that the suspect had originated his flight in New Mexico, information that the suspect had delayed his departure to Cordova for half a day, contact with the suspect that verified the suspect was the person Investigator Vik had been investigating, the suspect lying to Investigator Vik about his criminal past, [and] the suspect's complete inability to form a coherent story as to why he was going to Cordova.

Following the denial of Lino's motion to suppress, Lino's case went to trial. At trial, Lino did not dispute that the drugs were found in his possession. Instead, he argued only that the State could not prove beyond a reasonable doubt that he intended to deliver the drugs or that they were not for his personal use. The jury rejected this defense and convicted Lino on both drug counts.

Lino's claim that the troopers lacked probable cause to arrest him at the airport

On appeal, Lino contends that the superior court erred in denying his motion to suppress, and he argues that the confidential informant's hearsay tip was not sufficiently credible or reliable to qualify as probable cause under the *Aguilar/Spinelli* test. Under the *Aguilar/Spinelli* test, when probable cause rests on multiple layers of hearsay information, the State must establish "(1) that each of its hearsay informants is generally a credible source of information, and (2) that each informant obtained their present information in a reliable way."[3]

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[3] *Hart v. State*, 397 P.3d 342, 344 (Alaska App. 2017) (internal quotations and citations omitted).

Lino argues that this test cannot be met here because the confidential informant, although a credible source of information for the police in the past, had no personal knowledge of the accuracy of the tip in this case; instead, he was just passing on information that he learned from his roommate. Lino further argues that, although the roommate may have had personal knowledge of the accuracy of the tip, the roommate could not be considered a credible source of information because the roommate was a member of the criminal milieu who did not have a proven track record as a confidential informant.

We find no merit to these arguments. As we recently explained in *Hart v. State*, when a person makes a statement against their own penal interest to someone they trust who is also in the criminal milieu, and the person has "no way of knowing his information would eventually arrive at police headquarters," the circumstances under which the information was conveyed can carry its own indicia of reliability and credibility.[4] Such circumstances exist in this case. Here, the record shows that the informant gained his information from a conversation with his roommate, a known drug dealer. The record also shows that the drug dealer was unaware of the informant's status as a confidential informant; instead, the drug dealer knew of the informant only as his roommate and as a habitual drug user. Under these circumstances, there was no reason to believe that the drug dealer was feeding false information to the informant, or that the information the informant received about the drug dealer's upcoming drug delivery was otherwise unreliable.

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[4] *Hart*, 397 P.3d at 344 (Alaska App. 2017) (internal quotations omitted); *see also* 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.3(c), at 179-80 (5th ed. 2012).

In addition, the detailed nature of the tip demonstrated that the drug dealer was not just passing on "a casual rumor circulating in the underworld."[5] As the intended recipient of the drug delivery, the dealer had personal knowledge of Lino's plans — including details of his travel arrangements. And, as the superior court noted, the troopers were able to directly corroborate the accuracy and reliability of those details through their phone calls to the airline and Lino's probation officer.

The troopers were also able to gather their own information on Lino that further confirmed the suspicions created by the tip. This additional information included the fact that Lino was on probation for previous drug convictions, that he did not have permission from his probation officer to leave the state of New Mexico and travel to Cordova, that he lied to the troopers about having never been in trouble with the law, and that he seemed completely unprepared to spend months fishing in Alaska.

Given the totality of this information, we conclude that the troopers had probable cause to arrest Lino by the time they detained him at the airport and applied for the search warrant. Accordingly, we uphold the superior court's denial of Lino's motion to suppress.

Lino's claim that the superior court violated his confrontation rights by admitting the substance of the informant's hearsay tip

Lino's attorney argued at trial that the State should not be able to mention that the informant told the police that the drugs were going to be delivered to a particular person in Cordova. The defense attorney asserted that this evidence was inadmissible hearsay and any mention of the contents of the tip would violate Lino's confrontation

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[5] *Spinelli*, 393 U.S. at 416; *see also Schmid v. State*, 615 P.2d 565, 574 (Alaska 1980); *Rynearson v. State*, 950 P.2d 147, 150 (Alaska App. 1997).

rights because neither the informant nor the drug dealer roommate were available for cross-examination.

The State argued that it was entitled to introduce this statement for the non-hearsay purpose of explaining the course of the trooper investigation. The superior court agreed, and the court allowed the hearsay statement to be admitted for this non-hearsay purpose over the defense attorney's objection. The superior court also instructed the jury that the information contained in the tip was "second-hand information" and that the jury should not "take it for its truth."

On appeal, Lino renews his argument that the informant's tip — specifically, the statement that someone in Cordova was waiting for the drugs to be delivered — was testimonial hearsay barred by the confrontation clause.[6] Lino also argues that the superior court erred when it allowed the prosecutor to introduce this statement for the non-hearsay purpose of explaining the course of the investigation because the probative value of that purported non-hearsay purpose was clearly outweighed by the significant risk that the jury would misuse this evidence as substantive evidence of Lino's intent to deliver.[7]

We agree with Lino that admission of this evidence was error. We also note that, more than forty years ago, in *Avery v. State*, the Alaska Supreme Court cautioned trial courts against allowing otherwise inadmissible hearsay statements to be admitted for the non-hearsay purpose of explaining "the course of the police investigation."[8] *Avery* quoted extensively from Professor McCormick, who emphasized that most police investigations can be explained through generic references to "upon

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[6] *See Crawford v. Washington*, 541 U.S. 36, 68 (2004).

[7] *Avery v. State*, 514 P.2d 637, 644-45 (Alaska 1973).

[8] *Id.*

information received," without any details about what that information was or how it was received.[9]

The updated version of Professor McCormick's treatise continues to provide the same advice, noting that the introduction of otherwise inadmissible hearsay evidence to explain "the course of the investigation" continues to be "[o]ne area where abuse may be a particular problem."[10] As the treatise explains, police officers should not be allowed "to relate historical aspects of the case, such as complaints and reports of others containing inadmissible hearsay," and that

> [s]uch statements are sometimes erroneously admitted under the argument that the officers are entitled to give the information upon which they acted. The need for this evidence is slight, and the likelihood of misuse great. Instead, a statement that an officer acted "upon information received," or words to that effect, should be sufficient.[11]

We have issued similar warnings, most recently in an unpublished memorandum decision, *Randall v. State*.[12] In *Randall*, we noted that otherwise inadmissible hearsay evidence may be relevant to show an officer's state of mind or to explain why the officer did or did not undertake investigative actions. But we cautioned trial courts that, even when such relevance exists, the trial court must still determine:

> (1) whether it is truly important for the jurors to understand the *reasons* why the police made their investigative choices or decisions, and (2) whether the probative value of explaining those reasons outweighs the risk that the jurors will improperly use the out-of-court statements for hearsay

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[9] *Id.* (quoting C. McCormick, *Law of Evidence* § 227, at 463 (1954)).

[10] 2 Kenneth S. Broun et al., *McCormick on Evidence* § 249, at 193 (7th ed. 2013).

[11] *Id.* at 193-95 (internal citations omitted).

[12] *Randall v. State*, 2016 WL 3369194, at *3 (Alaska App. June 15, 2016) (unpublished).

> purposes — *i.e.*, the risk that the jurors will treat the out-of-court statements as substantive evidence that the matters asserted in those statements are actually true.

We conclude that in the current case there is little doubt that the probative value of the challenged evidence was outweighed by its risk for unfair prejudice. There was no apparent need for the troopers to provide any details about the informant's tip or to repeat the informant's claim that there was "somebody in Cordova" waiting to receive the drugs. And there was a significant risk that the jury would treat this claim as true and would view the claim as substantive evidence that Lino intended to deliver the drugs he was carrying to this unknown person. We therefore conclude that it was error for the superior court to allow the prosecutor to introduce this evidence.

The only remaining question, therefore, is whether this error prejudiced Lino and whether reversal of his convictions is required on this basis.

On appeal, Lino argues that the error was constitutional because the informant's out-of-court statement constituted testimonial hearsay in violation of Lino's rights under the confrontation clause. Lino therefore asserts that his convictions should be reversed unless the error is found to be harmless beyond a reasonable doubt.[13] The State argues that the non-constitutional "appreciably affects the jury's verdict" standard should apply, which is the standard that appellate courts have applied in the past.[14] Neither party meaningfully briefs this question, and we conclude that we need not

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[13] *See Anderson v. State*, 337 P.3d 534, 538 (Alaska App. 2014) (explaining that the State bears the burden under the constitutional "harmless beyond a reasonable doubt" standard).

[14] *See Avery*, 514 P.2d at 645 (applying the non-constitutional *Love* standard to erroneous admission of informant's out-of-court statements); *Bermudez v. State*, 2008 WL 4367539, at *4 (Alaska App. Sept. 24, 2008) (unpublished) (Mannheimer, J., concurring) (reviewing similar error under the *Love* standard); *see also Love v. State*, 457 P.2d 622, 631-32 (Alaska 1969).

resolve it here because we are convinced, based on our review of the record, that the error was harmless under both standards.

The record makes clear that the testimony on this issue was brief and that the court's limiting instructions were timely given. Moreover, contrary to Lino's claims on appeal, the prosecutor did not misuse this evidence during closing argument as substantive evidence of Lino's intent to deliver; nor did the prosecutor encourage or even suggest that the jury should do so.

Instead, the prosecutor relied on the other evidence of Lino's intent to deliver, which was substantial and which included the following: (1) Lino was carrying twenty-six grams of heroin and sixty-seven grams of methamphetamine — approximately 900 single hits of the two drugs; (2) Lino did not display any signs of intoxication, withdrawal, or habitual drug use that would support a claim that the drugs were for his personal use; (3) the fecal matter on the balloons indicated that Lino had been carrying the drugs in his rectal cavity, and there was testimony that if any of the balloons had burst, he would have died; (4) the drugs were packaged in large quantities indicative of wholesale and not individual use; (5) Lino was carrying a ledger that appeared to include his accounting of what the drugs were worth; and (6) Lino's phone and text messages indicated that he was involved in dealing drugs. The prosecutor also emphasized that Lino was unable to provide even the most basic information about his plans in Cordova to the trooper and he appeared completely unprepared to spend the summer fishing in Cordova.

Given this essentially overwhelming evidence of intent to deliver, and the limited role that the informant's tip ultimately played in the prosecutor's presentation of the case, we conclude that there is no reasonable possibility that the outcome of Lino's trial would have been different even if the informant's out-of-court statement had been properly excluded.

Conclusion

The judgment of the superior court is AFFIRMED.