No. 13-110191-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellant

v.

TIMOTHY D. MALONE
Defendant-Appellee

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
HONORABLE JAMES FRANKLIN DAVIS, DISTRICT JUDGE
DISTRICT COURT CASE NO. 12CR2411

NATURE OF THE CASE

On April 8, 2011, Olathe Police executed a search warrant for the residence located at 11921 South Troost Street in Olathe, Kansas. During the execution of the warrant, police discovered marijuana plants and items associated with indoor plant cultivation. During the course of the search, police also observed tattoo equipment in the basement of the residence, but did not observe a Kansas Tattoo License on display. Officers seized the equipment as evidence of Tattooing Without a License.

Of note, neither the search warrant nor the affidavit in support made reference to the alleged offense of Tattooing Without a License or evidence thereof. At no time prior to seizure of the tattoo equipment did law enforcement submit a separate affidavit or otherwise seek to obtain a secondary search warrant authorizing seizure of the tattoo equipment.

Prior to trial, the Defendant/Appellee filed a Motion to Suppress Evidence challenging the sufficiency of the affidavit in support of said search warrant. The District Court sustained the Defendant's motion and suppressed all evidence recovered during execution of the search warrant. The State filed a Motion to Reconsider the District Court's Order Suppressing Evidence and the Court denied said request.

STATEMENT OF ISSUES TO BE DECIDED ON APPEAL

Did the Trial Court Correctly Grant Defendant's Motion to Suppress Evidence?

STANDARD OF REVIEW

When reviewing a trial court's ruling on a motion to suppress evidence, an appellate court gives great deference to the factual findings of the trial court. *State v. Vandiver*, 257 Kan. 53, 57-58, 891 P.2d 350 (1995). Appellate courts will not reweigh the evidence but will review the trial court's factual findings using the 'substantial competent evidence' standard. The ultimate determination on the suppression of evidence, however, is a question of law, requiring independent appellate determination. See: *State v. Porting*, 281 Kan. 320, 324, 130 P.3d 1173 (2006).

"Where the district court, itself, is reviewing the propriety of the issuance of a search warrant by a magistrate, a district court and any other subsequent reviewing court assume a different role. The determination is made by examining the warrant and its supporting affidavit to determine if the issuing magistrate had a substantial basis for concluding that probable cause existed." *State v. Gilbert*, 256 Kan. 419, 421, 886 P.2d 365 (1994). However, application of the good-faith exception presents a question of law subject to unlimited appellate review. See: *State v. Hoeck*, 284 Kan. 441, 447 (2007).

STATEMENT OF FACTS

On April 8, 2011, Olathe Police executed a search warrant for the residence located at 11921 South Troost Street in Olathe, Kansas. During the course of the search, police discovered marijuana plants and items and accessories associated with indoor plant cultivation. (Vol. I, p. 6-9)

The Affidavit for Search Warrant submitted by Olathe Police Detective Nicholas Stein states in pertinent part:

> On 04/04/11, the affiant attended a meeting hosted by Missouri State Highway Patrol Narcotics Unit Supervisor Sergeant Jim Wingo in reference to possible indoor marijuana grow houses located inside the city limits of Olathe, Johnson County, Kansas. During the meeting, Sergeant Wingo provided information that indicated a young white male (identity unknown) was observed purchasing an unknown quantity of perlite soil conditioner and liquid fertilizer from the Green Circle Garden Center. This transaction occurred on 02/08/2011 at approximately 1235 hours. Sergeant Wingo also advised the young white male was observed driving a 2007 Toyota Rav4 (271ADJ-KS). A records check on this license plate revealed the registered owner was Mai Lin Malone of 11921 South Troost Street, Olathe, Johnson County, Kansas. (Vol. III, p. 1-3)

The Affidavit continues:

> On 04/07/2011, the affiant responded to 11921 South Troost Street, Olathe, Johnson County, Kansas, in reference to curbside trash. Upon arrival the affiant recovered the trash from the residence. The trash was placed curbside in one grey City of Olathe plastic garbage can. The affiant later sorted through the trash at the station. Inside the trash the affiant recovered the following items: three suspected marijuana plants, a glass pipe that contained a small quantity of suspected marijuana and other burnt residue, an empty one gallon jug of General Hydroponics brand Diamond Nectar, three red plastic cups (two labeled "OG" and one labeled "church") with potting soil, two seedling starter plugs each containing one suspected marijuana stem that had been cut, and a University of Central Missouri mailer addressed to Melissa Sayer of 11921 South Troost Street, Olathe, Kansas 66061. ***The indicia was not found in the same bag as the contraband***. However, the bags searched were all recovered from the same address. Id. (Emphasis added)

During execution of the warrant, police observed tattoo equipment in the basement of the residence. (Vol. II, p. 44, l. 4-11) Specifically, Officer David Schroeder testified: "There was a table that had numerous bottles with different color ink out on top of that table. There was also some tattooing equipment, a chair set up with stools, I'll describe them as stools, on both sides." (Id.) Officer Schroeder continued: "It appeared that Mr. Malone was tattooing individuals in his basement without having a city of Olathe license." (Id. at l. 21-3) Of note, neither the affidavit nor the warrant made *any* reference *whatsoever* to the alleged offense of Tattooing Without a License or evidence thereof. (Vol. III, p. 1-3) At no time prior to seizure of the tattoo equipment did law enforcement submit a separate affidavit or otherwise seek to obtain a secondary search warrant authorizing seizure of the tattoo equipment. (Id.)

SUMMARY OF ARGUMENT

The State of Kansas has filed an Interlocutory Appeal challenging the Order of the district court suppressing evidence. The district court found the warrant was not supported by probable cause and further found that the affidavit did not provide a substantial basis to support the search. The only basis for the warrant was contraband evidence discovered during an isolated trash pull at the listed residence. Of specific importance to the district court's Order was that the affidavit clearly stated that the sole indicia of residency discovered in the trash "*was not found in the same bag as the contraband*." (Vol. III, p.p. 1-3) The affidavit referenced no additional trash pulls prior or subsequent to the isolated trash pull at the subject residence.

Moreover, the affidavit contained no proffer of additional information commonly associated with narcotics activity, to wit: no controlled narcotics transactions at the

subject residence; no reports of a high volume of visitors to and from the subject residence at unusual hours of the day; no information of unusually high water or electricity usage associated with the residence; no criminal history for anyone associated with the residence; and no reports of unusual odors or suspicious activity associated with the residence. (Vol.III, p.p. 1-3)

District Court's Order Suppressing Evidence

In its Order of May 10, 2013, the district cited the following language from *State v. Hicks*, 282 Kan. 599, 616-17, 14 P.3d 076 (2006): "Generally, some evidence establishing a nexus between drug evidence discovered in a garbage bag and a residence to be searched is necessary to support the conclusion that the drug evidence came from the home. We note that this requirement has been consistently applied by our Court of Appeals. See, e.g., *State v. Droge*, No. 92,501, unpublished opinion filed February 25, 2005, 2005 WL475264." (Vol. I, p. 56-7)

The district court noted in its Order that "[t]he affidavit does not specify the nexus between the trash and residence besides stating that the trash bags 'were all recovered from the same address.'" (Vol. I, p. 55) The district court determined that "[t]he affiant's statement that the trash belonged to the residence is merely a conclusory belief without any factual basis." (Id.) Thus, the district court correctly found: "This bare bones affidavit 'contains only suspicions, beliefs or conclusions without providing some underlying factual circumstances regarding veracity, reliability and basis of knowledge.' *State v. Hoeck*, 284 Kan. 441, 454, 163 P.3d 252 (2007) (quoting *United States v. Laughton*, 409 F.3d 744, 752 [6th Cir. 2005])" (Id.)

Consistent with Kansas Supreme Court Precedent as set forth in *Hicks*, supra., the district court correctly held:

> "Under the totality of the circumstances, the court cannot find that the affidavit provided a substantial basis for the existence of probable cause. Because the affidavit did not establish a nexus between the contraband and the Defendant's residence, there was not a fair probability that evidence of contraband would be found in Defendant's residence. Any evidence obtained during the search of Defendant's residence is inadmissible as fruit of the illegal search. *State v. Jones*, 279 Kan. 71, 76 106 P.3d 1(2005)" (Vol. I, p.p. 58-9)

State's Motion to Reconsider

After issuing the foregoing written Order of May 10, the State filed a Motion to Reconsider, asking the district court to consider application of the 'good faith' exception to suppression established in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (19840. Of note, the State elected not to include its Motion to Reconsider in the Record on Appeal for this Court's consideration. However, in that motion, the State offered no challenge whatsoever to the findings of fact or rulings of law set forth in the district court's written Order as to the failure of the affidavit to provide a substantial basis for the existence of probable cause to support issuance of the subject warrant. The state's motion was limited to a request for analysis under *Leon*.

District Court's Denial of State's Motion to Reconsider

In its Order of June 3, 2013, the district court initially acknowledged that it need not consider the merits of the State's Motion to Reconsider. The court noted that "[a] motion to reconsider is generally treated as a motion to alter under K.S.A. 60-259(f)." (Vol. I, p. 60) The court stated: "Motions to alter judgments may be denied where the State could have, with reasonable diligence, presented the argument prior to the court's judgment. *Wenrich v. Employers Mutual Ins. Companies*, 35 Kan.App.2d 582 Syl ¶. 6,

132 P.3d 970 (2006)." (Id.) The district court continued: "Here, the state could have, with reasonable diligence, brought to the court's attention any arguments concerning the exclusionary rule. Motions to reconsider should generally not be brought due to oversight by a party. See: *Antrim, Piper, Wenger, Inc. v. Lowe* 37 Kan.App.2d 932, 159 P.3d 215 (2007)." (Id.)

Notwithstanding the foregoing, the district court did elect to fully consider whether the 'good faith' exception set forth in *Leon* should apply to the facts of the subject case. In finding that *Leon* did not apply to the case at bar, the district court initially noted that "[t]he only *Leon* factor applicable here is whether there was so little indicia of probable cause contained in the affidavit that it was entirely unreasonable for the officers to believe the warrant was valid." (Vol. I, p.p. 63-4)

In denying the state's Motion to Reconsider, the district court reiterated: "This court cited *State v. Droge*, 106 P.3d 515 (Kan. App. 2005) (unpublished), in its previous order. As Defendant notes, the *Droge* Court also rejected a similar argument from the state. *Id*. at slip op. 5-6. The *Droge* Court reasoned, in part, that because the trash was not linked to the residence, law enforcement had not acted reasonably when they relied on the warrant. *Id*." (Vol. I, p. 63)

The district court continued: "Here officers could have easily realized that the indicia of residence found in the garbage was not a sufficient nexus to provide probable cause for a warrant. In fact, the *affidavit even noted* that the indicial of residence were found in a separate bag than the contraband." (Id.) (Emphasis in original Order)

The district court also noted: "*Leon's* 'objective standard' required the affiant to have a 'reasonable understanding of what the law prohibited.' As Defendant notes, this

area of the law is not a recent development, but rather documented by the Kansas Supreme Court in 2006, five years prior to the affiant's application for a search warrant. The state fails to cite any statutes or case law that affiant could have reasonably relied upon when seeking the search warrant." (Vol. I, p.p. 63-4) Thus, the district court correctly held: "The *Hoeck* court opined the exclusionary rule should still apply to such bare bones affidavit. This Court agrees. Any evidence obtained during the search of Defendant's residence is still inadmissible as fruit of the illegal search. *State v. Jones*, 279 Kan. 71, 76, 106 P.3d 1 (2005)."

State's Interlocutory Appeal

In its brief, the State makes no citation *whatsoever* to the May 10 or June 3, 2013 written Orders of the district court and offers no viable challenge whatsoever to the findings of fact or conclusions of law set forth therein. Instead, the State's appellate brief cites several comments made by the District Judge during oral argument on the Motion to Suppress Evidence. Initially, the District Judge indicated orally that he would have been inclined to sign the subject warrant had it been presented for his review, stating: "I've reviewed the affidavit. To me, if this were presented to me … it would satisfy the requirement I think of probable cause…" (Vol. II, p. 6)

The State also cites the following statement by the District Judge: "I have real trouble with the logic that unless somebody's street address and name [is] inside the bag with the dope, you can't connect the dots here. All someone has to do is make sure they [put] all their marijuana trash in one bag and everything else in another bag and they can defeat a search warrant." (Vol. II, p. 19) The State further cites the following statement: "So in this case, because some of the trash was in this bag and some of the trash was in

this bag, all in the same bin in front of the house, there should be a different result. That to me just seems idiotic, quite frankly." (Vol. II, p. 25)

The State presents the foregoing statements to this Court in support of its position that the district court's ultimate ruling on the subject Motion to Suppress was in error. However, of far *greater* significance is the following statement made during the hearing wherein the District Judge admitted unfamiliarity with established precedent addressing indicia of residency in trash-pull investigations: "I don't know where the appellate courts have come down on this, and I kind of *glanced* at these authorities submitted by Mr. Cramm" (Vol. II, p. 19) (Emphasis added). There, the district court conceded on the record unfamiliarity with the material issue and admitted to having only 'glanced' at the relevant legal authority and precedent cited by the Defendant prior to the evidentiary hearing. Thus, the State's interlocutory appeal is based exclusively on what amounts to mere *dicta* uttered by the district court during the motions hearing *after conceding unfamiliarity with relevant legal precedent*.

To the district court's credit, the court did elect to take the matter under advisement, stating: "My preliminary thinking here is I think the search warrant is valid, *but I will keep an open mind and Mr. Cramm's legal authorities [and] will revisit this in writing*." (Vol. II, p. 29) Having considered the evidence presented and after fully and carefully reviewing the relevant case law and applicable precedents, the district court properly sustained the Defendant's Motion to Suppress Evidence in its written order of May 10, 2013, and properly denied the state's Motion to Reconsider in its written order of June 3, 2013.

ARGUMENTS AND AUTHORITIES

I. The Trial Court Correctly Granted Defendant's Motion to Suppress Evidence.

Under the Fourth and Fourteenth Amendments to the United States Constitution, a search conducted without a warrant is "*per se* unreasonable... subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967). Upon the hearing of a motion to suppress evidence, the State bears the burden of proving to the trial court the lawfulness of the search and seizure. *Mincey v. Arizona*, 437, U.S. 385, 390-91, 98 S.Ct. 2408, 2412-13 (1978); *State v. Schur*, 217 Kan. 741, 743, 538 P.2d 689 (1975). See also: K.S.A. §22-3216(2); *State v. Houze*, 23 Kan.App. 2d 336, 337, 930 P.2d 620, rev. denied 261 Kan. 1088 (1997).

The foregoing well-established principles of law are codified by K.S.A. §22-3216 which provides:

> "(1) Prior to the trial a defendant aggrieved by an unlawful search and seizure may move for the return of property and to suppress as evidence anything so obtained.
>
> (2) The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were lawful shall be on the prosecution. If the motion is granted then at the final conclusion of the case, the court shall order the suppressed evidence restored to the party entitled thereto, unless it is otherwise subject to lawful detention.
>
> (3) The motion shall be made before trial, in the court having jurisdiction to try the case, unless opportunity therefore did not exist or the defendant was not aware of the ground for the motion, but the court in its discretion may entertain the motion at the trial.
>
> (4) A motion to suppress illegally seized evidence may be made before or during a preliminary examination. If the motion is granted the suppressed evidence shall be held subject to further order of the magistrate. If the defendant is bound over for trial, the suppressed

> evidence shall thereupon become subject to the orders of the district court. If the defendant is not bound over and if no further proceedings are instituted on the particular charge or involving the particular suppressed evidence within ninety (90) days after the granting of the order, then the magistrate shall order the suppressed evidence restored to the party entitled thereto, unless it is otherwise subject to lawful detention."

A. The Affidavit Herein Provides Neither "Probable Cause" Nor a "Reasonable Basis" to Support the Search Warrant.

K.S.A. 22-2502 provides in pertinent part:

> "A search warrant shall be issued only upon the oral or written statement, including those conveyed or received by electronic communication, of any person under oath or affirmation which states facts sufficient to show probable cause that a crime has been or is being committed and which particularly describes a person, place or means of conveyance to be searched and things to be seized."

In interpreting and applying the foregoing statutory language, the Kansas Court of Appeals has held: "Before a search warrant may be issued, there must be a finding of probable cause by a neutral and detached magistrate." *State v. Hendricks*, 31 Kan.App.2d 138, 141, 61 P.3d 722 (2003).

On review, a court's determination of the sufficiency of a search warrant affidavit *must be determined from the four corners of the affidavit*. See: *State v. Bowles*, 28 Kan.App.2d 488, 492, 18 P.3d 250 (2001). A magistrate may not simply ratify the suspicions of police when reviewing an affidavit for search warrant. *State v. Lum*, 27 Kan.App.2d 113, 120, 998 P.2d 137, rev. denied 269 Kan. 938 (2000). "Bald conclusions, mere affirmations of belief, or suspicions are not enough ... there must be sufficient affirmative allegations of fact as to an affiant's personal knowledge to provide a rational basis upon which a magistrate can make a judicious determination of probable cause." *State v. Probst*, 247 Kan. 196, 202, 795 P.2d 393 (1990).

B. Contraband Recovered From Trash Does Not Provide Independent Support for a Warrant to Search the Associated Residence.

In *California v. Greenwood*, 486 U.S. 35, 37, 108 S.Ct. 1625 (1988), the United States Supreme Court held that the Fourth Amendment to the United States Constitution does not prohibit warrantless searches of trash left by the curb for collection. The Kansas Supreme Court endorsed the *Greenwood* rationale in *State v. Kimberlin*, 267 Kan. 659, 666, 984 P.2d 141 (1999) stating: "Once defendant placed his trash out for collection, adjacent to a public thoroughfare, he defeated any reasonable expectation of privacy in the garbage."

However, although seizure of trash left for collection does not violate the 4th Amendment, merely locating contraband therein does *not* provide independent support for the issuance of a warrant to search the associated residence. In order for contraband recovered from trash to provide the necessary probable cause to issue a search warrant, an affidavit must contain sufficient information to establish a fair probability that contraband or evidence of a crime will be found *in the residence named in the search warrant application*. See: *State v. Morris*, 27 Kan.App.2d 155, 159, 999 P.2d 283, rev. denied 269 Kan. 938 (2000). In other words, the affidavit must establish a nexus between the contraband items discovered in the trash and the suspected residence. See *United States v. Griffith*, 362 F.Supp.2d 1263, 1268 (D.Kan.2005).

The Kansas Court of Appeals addressed the issue of probable cause arising from contraband and indices of residency discovered in residential trash in the unpublished opinion *State v. Dickerson*, 92 P.3d 613 (2004). Although not favored for citation pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions *may* be cited as persuasive authority on a material issue not addressed by a published Kansas Appellate

Court opinion. Attached hereto is a copy of the written opinion in *State v. Dickerson*, supra. Consistent with the analysis set forth in *Kimberlin*, *Morris* and *United States v. Griffith*, the *Dickerson* Court concluded that probable cause did exist to issue the search warrant for the subject residence based on the contents of the trash. Specifically, drug residue was found in a single trash bag which *also* contained Defendant Dickerson's work schedule and a prescription medication sack bearing his name. Because law enforcement discovered contraband evidence and indicia of residency in the *same* trash bag, the Court found that the affidavit established a sufficient nexus between the contraband and the listed residence to support issuance of the subject search warrant.

The following year, the Kansas Court of Appeals again addressed the validity of a search warrant premised upon contraband evidence discovered in residential trash. In the unpublished opinion *State v. Droge*, 106 P.3d 513 (2005), this Court upheld the trial court's decision to suppress evidence recovered pursuant to a warrant issued as the result of a 'trash pull' because *nothing in the affidavit conclusively linked the contraband or the trash to the defendant or his residence*. Pursuant to Supreme Court Rule 7.04(f), a copy of the written opinion in *State v. Droge* is attached to Appellee's brief.

In its opinion, the *Droge* Court cited with favor the following language of the Illinois Court of Appeals in *People v. Burmeister*, 313 Ill.App.3d 152, 728 N.E.2d 1260 (2000). There, the Court upheld suppression of evidence seized pursuant to a residential search warrant predicated upon recovery of contraband from trash left at the curbside of the suspect residence. Because there was no direct observation of the suspect personally placing the trash at the curbside of his residence, *and because there was nothing in the trash conclusively linking it or the contraband to the defendant or his residence*, the

Illinois Court of Appeals agreed with the trial court's decision that the affidavit provided insufficient probable cause to support the search warrant.

On appeal, the People argued that garbage taken from the front of a home should be 'presumed' to be the garbage of that particular residence. The Court disagreed, stating: "When a resident terminates his privacy interest in his trash by placing it on the curb for collection, *anyone may rummage through it and deposit incriminating items* ... the police may not presume that the evidence they discovered originated from the nearest residence." 313 Ill.App.3d at 155. (Emphasis added) The Court further noted that if it were to endorse the People's position, "anyone could deposit contraband in the trash, alert the police, and watch as the victim's residence was searched." Id. at 158.

The *Droge* panel also cited the *Burmeister* Court's analysis of situations where law enforcement does not directly observe the suspect placing the trash to be seized on the curbside. In such cases, the Court held that evidence obtained from said refuse *may* still support issuance of a search warrant for the residence if the trash contains contraband items as well as "indices of residency" linking the contraband to the residence. 313 Ill.App.3d at 157, quoting *State v. Erickson*, 496 N.W.2d 555 (N.D.1993). By way of explanation, in *Erickson*, police seized trash from a dumpster containing evidence of marijuana trafficking along with several objects linking the garbage and contraband to the defendant's residence. Specifically, officers located a letter addressed to the defendant and a traffic ticket issued to him in the same bag as the contraband evidence. The *Erickson* Court concluded that the "indices of residency" found in the trash bag established a sufficient nexus between the contraband recovered from the trash and the residence to justify issuance of a search warrant for the subject residence. Id. at 559.

The Illinois Court of Appeals has consistently applied the "indices of residency" analysis set forth in *Burmeister* - and adopted by the Kansas Court of Appeals - in subsequent appellate case law. In *People v. Balsey*, 329 Ill.App.3d 184 (2002), the Illinois Court of Appeals reversed the trial court's order suppressing evidence seized pursuant to a search warrant issued based upon contraband evidence recovered from defendant's trash. Specifically, the Illinois Court of Appeals noted that the contraband evidence recovered from the trash was found *in the same bag* as two pieces of mail addressed to the defendant at the listed address. This result is entirely consistent with the analysis in *Burmeister*, where failure to discover indices of residency *in the same trash bag* as the contraband resulted in a determination by the Court that there was insufficient probable cause to support issuance of the subject warrant.

Although *Droge* is an unpublished opinion, our Supreme Court cited *Droge* with favor in *State v. Hicks*, 282 Kan. 599, 617 (2006) stating: "Generally, some evidence establishing a nexus between drug evidence discovered in a garbage bag and a residence to be searched is necessary to support the conclusion that the drug evidence came from the home. We note that this requirement has been consistently applied by our Court of Appeals. ***See, e.g., State v. Droge, No. 92,501, unpublished opinion filed February 25, 2005***, 2005 WL 475264. The affidavit in this case falls short in this respect as well."

Later in 2005, the Kansas Court of Appeals again addressed the sufficiency of probable cause to support a search warrant issued following discovery of contraband in residential trash in the unpublished opinion *State v. Bennett*, 113 P.3d 274 (2005). Attached hereto is a copy of the written opinion. There, the affidavits in question failed to state whether or not police actually observed the defendants take the trash from their

residences and place it out for collection. Thus, the establishment of probable cause and the validity of the warrants depended upon the discovery of 'indices of residency' associated with the contraband recovered from the trash. In suppressing the evidence recovered pursuant to the challenged search warrants, the Court noted that the "affidavits failed to mention whether the indices of residency were found *in the same trash bag* as the contraband." *Id*. (Emphasis in Original Opinion) The Court found this to be "important because the trash outside each residence was accessible to the public where anyone could have passed by and deposited contraband." *Id*. This decision is entirely consistent with the analysis and results in all of the foregoing cases.

By comparing the Court's analysis and rulings in *Dickerson*, *Droge* and *Bennett*, it is evident that when considering the validity of a search warrant issued after discovery of contraband in residential trash, the location of the contraband in relation to the location of any indices of residency is dispositive to the validity of the warrant. Where "indices of residency" are found *in the same trash bag* with contraband evidence – as was the case in *Dickerson* – the subject warrant is deemed to be supported by valid probable cause. However, where "indices of residency" are not found *in the same trash bag* with contraband evidence – as was the case in *Droge* and *Bennett* – the subject warrant is unsupported by probable cause and deemed invalid.

C. Affidavit in the Case at Bar

The affidavit in the case at bar provides the following information: On February 8, 2011, a Missouri Highway Patrol Officer observed an unidentified male purchase an unknown quantity of 'perlite' soil conditioner at the Green Circle Garden Center. The unidentified male was driving a vehicle registered to 'Mai Lin Malone' at 11921 South

Troost in Olathe, Kansas. On April 7, 2011, affiant Nicholas Stein recovered ***2 separate trash bags*** from the listed residence. In one trash bag, Stein recovered 3 suspected marijuana plants, a glass pipe containing a small quantity of suspected marijuana and burnt residue, and a 1 gallon jug of General Hydroponics brand Diamond Nectar. No 'perlite' soil conditioner was found. Testing of the residue in the glass pipe yielded a presumptive – but not conclusive – indicator for the presence of marijuana. *The suspected marijuana plants were not tested*.

In the second, *separate* trash bag, affiant Stein recovered a University of Central Missouri mailer addressed to 'Melissa Sayer' at the listed address. Stein concedes in the written affidavit "***[t]he indicia was not found in the same bag as the contraband***." Moreover, the indicia recovered from the separate bag did not bear the name of the registered owner of the vehicle observed 2 months earlier at the Green Circle or the address associated with the vehicle registration – Mai Lin Malone. Additionally, the name associated with the vehicle – Mai Lin Malone – and the name on the lone indicia of residency – Melissa Sayer – are clearly female names and do not provide any additional information about the 'unidentified *male*' observed purchasing the 'perlite' brand soil conditioner 2 months prior to the issuance of the search warrant.

Because the bag containing the contraband in the case at bar contained *no* 'indicia of residency' *whatsoever* and because the only indicia of residency listed in the affidavit was recovered in a *separate bag*, the affidavit fails to establish a substantial basis to support a finding of probable cause herein. This analysis is entirely consistent with *Dickerson*, *Droge*, *Bennett*, *Burmeister*, *Erickson*, *Balsey* and *Hicks*, supra. Moreover, the only 'indicia of residency' discovered in the second trash bag – separate from the

contraband evidence – did not name the *current* resident of the listed address *or* the registered owner of the subject vehicle. This disparity further attenuates any substantial basis for issuance of the warrant herein.

In its brief, counsel for the State of Kansas places great emphasis on comments made by the District Court during the hearing on Defendant/Appellee's Motion to Suppress Evidence. Specifically, the state cites the following statement: "I have real trouble with the logic that unless somebody's street address and name [is] inside the bag with the dope, you can't connect the dots here. All someone has to do is make sure they [put] all their marijuana trash in one bag and everything else in another bag and they can defeat a search warrant." (Vol. II p. 19, l. 7-13) The state further cites the following statement by the district court: "So in this case, because some of the trash was in this bag and some of the trash was in this bag, all in the same bin in front of the house, there should be a different result. That to me just seems idiotic, quite frankly." (Vol. II p. 25, l. 2-6)

The State presents the foregoing statements to this Court in support of its position that the district court's ultimate ruling on the subject Motion to Suppress was in error. However, based on the analysis and rulings of *Dickerson*, *Droge*, *Burmeister* and *Bennett*, supra., the foregoing statements of the district court – which are merely dicta – constitute misapprehension of the law. The state advances this misapprehension of the law further by arguing in its brief with some degree of sarcasm and incredulity the probability that an unknown subject (unsub) would deposit contraband in the trash receptacle at the Troost residence.

In response to the foregoing argument – based wholly on misapprehension of the law – this Court need only consider the language from *Burmeister* cited with favor in *Droge*, supra: "When a resident terminates his privacy interest in his trash by placing it on the curb for collection, anyone may rummage through it and deposit incriminating items ... the police may not presume that the evidence they discovered originated from the nearest residence." 313 Ill.App.3d at 155. Thus, the State argues with some degree of sarcasm the very risk that this Court has identified and sought to prevent - the risk that "Anyone could deposit contraband in the trash, alert the police, and watch as the victim's residence was searched." *Id*. at 158.

Of far greater significance is the following statement made by the district court during the hearing on Defendant's Motion to Suppress Evidence: "*I don't know where the appellate courts have come down on this, and I kind of glanced at these authorities submitted by Mr. Cramm* …" Vol. II, p. 19, l. 14-16. (Emphasis added). Thus, the district court conceded unfamiliarity with the legal issue and admitted to have only 'glanced' at the relevant legal authority prior to the evidentiary hearing.

However, to the district court's credit, the court did elect to take the matter under advisement and invited supplemental briefing by the parties: "My preliminary thinking here is I think the search warrant is valid, *but I will keep an open mind and Mr. Cramm's legal authorities [and] will revisit this in writing*." Vol. II, p. 29, l. 7-10. Having considered the evidence presented and having fully and carefully analyzed the relevant case law precedent, the district court properly ruled on Defendant's Motion to Suppress Evidence in its written order of May 10, 2013.

II. The Tattoo Equipment is Inadmissible

A. The Tattoo Equipment Constitutes "Fruit of the Poisonous Tree"

In *Wong Sun v. United States*, 371 U.S. 471 (1963), the United States Supreme Court held that evidence discovered incidental to or derivative from an unlawful search is inadmissible as "fruit of the poisonous tree." Here, officers observed and elected to seize tattoo equipment based solely on incidental observation of the equipment during execution of an unlawful search warrant. But for the unlawful warrant, incidental observation of the tattoo equipment would not have occurred. As observation and seizure of said equipment arises exclusively from execution of the *unlawful* search warrant, introduction of said equipment as evidence against Defendant Malone must be prohibited.

B. Seizure of the Tattoo Equipment Exceeds the Scope of the Warrant.

Assuming *arguendo* that the underlying search warrant is valid – an assumption unsupported by this Court's previous decisions – seizure of the tattoo equipment impermissibly exceeded the scope of the underlying search warrant. Both the Fourth Amendment to the United States Constitution and §15 of the Kansas Constitution Bill of Rights provide that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, *particularly describing* the place to be searched and the persons or *property to be seized*." (Emphasis added). U.S. Const. amend. IV; Kan. Const. Bill of Rights, §15. K.S.A. 22–2502(a) also requires a search warrant to 'particularly' describe a person, place, or means of conveyance to be searched and things to be seized.

"The purpose of the constitutional requirement that search warrants particularly describe the place to be searched and the person or property to be seized is to prevent general searches and the seizure of items at the discretion of the officer executing the

warrant." *State v. LeFort*, 248 Kan. 332, Syl. 1, 806 P.2d 986 (1991). "Thus general or blanket warrants which give the executing officers a roving commission to search where they choose are forbidden." (Emphasis added.) 248 Kan. at 335, 806 P.2d 986 quoting *State v. Gordon*, 221 Kan. 253, 258, 559 P.2d 312 (1977). In *State v. Dye*, 250 Kan. 287, 293, 826 P.2d 500 (1992), the Kansas Supreme Court held that the particularity requirement of search warrants is equally applicable to the specificity in the items to be seized.

Pursuant to *U.S. v. Gahagan*, 865 F.2d 1490, 1496 (1989) "an unlawful seizure of items outside a warrant does not alone render the whole search invalid and require suppression of all evidence seized, including that lawfully taken pursuant to the warrant." However, "[w]hen law enforcement officers *grossly* exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant." *U.S. v. Medlin* (Medlin II), 842 F.2d 1194, 1199 (10th Cir.1988). See *U.S. v. Foster*, 100 F.3d 846, 849-50 (10th Cir.1996).

Thus, although "flagrant disregard for the terms of the warrant" is required to result in exclusion of *all* evidence seized pursuant thereto, seizure of items not described with particularity *does* result in exclusion of those items from admissibility. See *Waller v. Georgia*, 467 U.S. 39, 43 n. 3, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *U.S. v. Medlin* (Medlin I), 798 F.2d 407, 411 (10th Cir.1986). Consistent with the foregoing, the Kansas Supreme Court has held that seizure of items outside scope of the search warrant and accompanying affidavit did not require suppression of *all* items seized, but did require

suppression of the items *not mentioned in the warrant or affidavit*. See: *State v. Kleypass*, 272 Kan. 894, HN 14 (2001).

Here, law enforcement observed tattooing equipment in the basement of the subject residence while executing the primary warrant. Neither the primary warrant *nor* the affidavit in support thereof made any mention whatsoever of the alleged offense of Tattooing Without a License or tattooing equipment. At no time did officers seek or obtain a supplemental, secondary or "piggyback" warrant proffering their observations of the tattooing equipment to a neutral and detached magistrate. Thus, seizure of this equipment exceeded the scope of the initial warrant and was unlawful. Said items must be excluded from admissibility against Mr. Malone.

Moreover, seizure of the tattooing equipment cannot be justified under the 'plain view' exception to the warrant requirement. Unlike illegal narcotics and drug cultivation paraphernalia, possession of tattooing equipment is not *per-se* unlawful. Only the *performance* of tattoo services to a customer in the state of Kansas without a valid license is unlawful. Thus, in the absence of a verified 'victim' who was receiving or had received a tattoo from defendant Malone within the jurisdiction, mere possession of the tattoo equipment does not constitute a per-se violation of the law sufficient to justify seizure under the plain view exception.

III. The *Leon* "Good Faith" Exception is Inapplicable.

In *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677, reh. denied 468 U.S. 1250, 105 S.Ct. 52, 82 L.Ed.2d 942 (1984), the Supreme Court reviewed the Ninth Circuit Court of Appeals decision to uphold the district court's suppression of evidence. Specifically, the appellate court determined that the subject search warrant was

not supported by probable cause because "the affidavit included no facts indicating the basis for the informants' statements concerning defendant Leon's criminal activities and was devoid of information establishing the informants' reliability." See: *Leon*, 701 F.2d 187 (9th Cir.1983).

In its petition for certiorari, the Government "expressly declined" to seek review of the Ninth Circuit's 'probable cause' determination. Thus, the Supreme Court limited its review to the question of whether courts should adopt a "good faith" exception to the Fourth Amendment exclusionary rule. 468 U.S. at 905, 104 S.Ct. 3405. In reversing the Ninth Circuit Court of Appeals suppression of evidence, the United States Supreme Court held that "the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers *acting in reasonable reliance* on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." (Emphasis added) 468 U.S. at 900.

Although the Supreme Court acknowledged that great deference should be given to the issuing magistrate's decision, the Court concluded that said deference is not boundless. 468 U.S. at 914, 104 S.Ct. 3405. The *Leon* Court recognized the following three situations when a reviewing court may determine that deference should not be accorded to the issuing magistrate's probable cause determination: (1) where the probable cause determination is based on the knowing or reckless falsity of the affidavit supporting the warrant. 468 U.S. at 914, (citing *Franks v. Delaware*, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed.2d 667 [1978]); (2) where the issuing magistrate was not "neutral and detached" but instead served "merely as a rubber stamp for the police." *Id*. (quoting

Aguilar v. Texas, 378 U.S. 108, 111, 84 S.Ct. 1509, 12 L.Ed.2d 723 [1964]); and (3) where the warrant is "based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause.'" Id. at 915, (quoting *Illinois v. Gates*, 462 U.S. 213, 239, 103 S.Ct. 2317, 76 L.Ed.2d 527, reh. denied 463 U.S. 1237, 104 S.Ct. 33, 77 L.Ed.2d 1453 [1983]).

Based on the foregoing, the *Leon* Court recognized that there would be cases where the exclusionary rule *would apply* even "where an officer has obtained a warrant and abided by its terms." 468 U.S. at 922. The Court enumerated four circumstances where the officer's belief in the validity of a search warrant would not be objectively reasonable such that suppression "remains an appropriate remedy." 468 U.S. at 922–23. Pursuant to *Leon*, the exclusionary rule still applies where: "(1) the magistrate issuing the warrant was deliberately misled by false information; (2) the magistrate wholly abandoned his or her detached or neutral role; (3) there was so little indicia of probable cause contained in the affidavit - in other words, the affidavit was so "bare bones" - that it was entirely unreasonable for the officer to believe the warrant was valid; or (4) the warrant so lacked specificity that officers could not determine the place to be searched or the items to be seized." 468 U.S. at 923.

In providing guidance for the determination of whether the good faith exception applies, the *Leon* Court emphasized that the 'good faith' basis of the officer must be assessed objectively, stating:

> "We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. 'Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement

> profession as a whole to conduct themselves in accord with the Fourth Amendment.'" Citing *Illinois v. Gates*, 462 U.S., at 261, n. 15 (1983).

The *Leon* Court continued: "The objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits. *United States v. Peltier*, 422 U.S. 531, 542 [95 S.Ct. 2313, 2320, 45 L.Ed.2d 374] (1975)." 468 U.S. at 919 n. 20 [104 S.Ct. at 3418–19 n. 20]. (Emphasis added)

In *State v. Hoeck*, 284 Kan. 441 (2007), the Kansas Supreme Court examined its prior analysis of *Leon* and held: "The *Leon* good faith exception applies when an affidavit does not supply a substantial basis for the determination of probable cause but does provide some indicia of probable cause sufficient to render official reliance reasonable." In so holding, the Court specifically affirmed the foregoing language from *Leon* enumerating the 4 circumstances wherein the exclusionary rule still applies. *Hoeck* effectively abrogates prior analysis and application of the *Leon* 'good faith exception' as set forth in *State v. Longbine*, 257 Kan. 713, 721–22, 896 P.2d 367 (1995), *State v. Ratzlaff*, 255 Kan. 738, 754–55, 877 P.2d 397 (1994), and *State v. Doile*, 244 Kan. 493, 495, 769 P.2d 666 (1989).

A. Application to the Facts of the Case at Bar

Support for this Court's determination that *Leon* does not apply to the case at bar is set forth in the analysis and holding of *State v. Droge*, supra. There, this Court affirmed the trial court's suppression of evidence recovered pursuant to a search warrant issued in part on the basis of contraband recovered during a 'trash pull.' In denying the State's interlocutory appeal and *affirming* the trial court's suppression of evidence, the Court held:

> "A magistrate may not simply ratify the suspicions of police when reviewing an affidavit for search warrant. *State v. Lum*, 27 Kan.App.2d 113, 120, 998 P.2d 137, rev. denied 269 Kan. 938 (2000). "Bald conclusions, mere affirmations of belief, or suspicions are not enough ... there must be sufficient affirmative allegations of fact as to an affiant's personal knowledge to provide a rational basis upon which a magistrate can make a judicious determination of probable cause." *State v. Probst*, 247 Kan. 196, 202, 795 P.2d 393 (1990).

In *Droge*, the State argued that even in the absence of a 'substantial basis' for issuance of the subject search warrant, the evidence seized pursuant to the warrant should be admissible under the *Leon* 'good faith' exception to the exclusionary rule. This Court rejected that argument and noted that following the hearing on the motion to suppress, the district court held: "our search warrant has so little indicia of probable cause contained in its supporting affidavit that *it was entirely unreasonable for the officers to believe it to be valid*." This finding directly satisfied the third circumstance enumerated by the *Leon* Court such that application of the exclusionary rule was required. To wit: "There was so little indicia of probable cause contained in the affidavit - in other words, the affidavit was so 'bare bones' - that it was entirely unreasonable for the officer to believe the warrant was valid." 468 U.S. at 923.

In response, the State argued that because the same detective prepared the affidavit and participated in the search after the magistrate approved the warrant, the detective acted reasonably in concluding that the warrant was valid. However, the *Droge* panel noted: "That Detective Hanchett both prepared the affidavit and executed the warrant with knowledge … that [the] trash was not linked to the residence does not demonstrate that he acted reasonably. Quite to the contrary, the detective's knowledge shows that he acted unreasonably." The *Droge* Court cited and affirmed the trial Court's determination that "the search warrant contained so little indicia of probable cause that it

was entirely unreasonable for Detective Hanchett to believe that the warrant was valid." On review, this Court agreed that the affidavit submitted in *Droge* constituted a mere "bare bones affidavit" and found that the third circumstance enumerated in *Leon* was satisfied such that application of the exclusionary rule was the appropriate remedy.

The foregoing facts are directly analogous to those in the case at bar. The affiant, Detective Nicholas Stein, is the same law enforcement officer who executed the warrant in reliance on the judge's approval thereof. Detective Stein was aware that the contraband could not be reasonably associated with the subject residence, as he concedes in the affidavit, stating: '*the indicia was not found in the same bag as the contraband*.' Directly analogous to the foregoing factors in *Droge*, Detective Stein both prepared the affidavit and executed the warrant *with knowledge that the trash was not linked to the residence*. Said facts do not demonstrate that he acted reasonably. Quite to the contrary, Detective Stein's knowledge shows that he acted unreasonably.

In its appellate brief, the state emphasizes Detective Stein's experience, stating: "In reviewing the affidavit, Judge Ruddick knew that Detective Stein had extensive experience in narcotics investigations. He had been a law enforcement officer for the previous 5 years. He attended numerous training and identification classes dealing with the packaging of illegal narcotics. He made over 75 drug related arrests. He had three completed investigations involving marijuana cultivation operations."

Detective Stein's proffered experience supports the decision of the district court to sustain the Defendant's Motion to Suppress Evidence. The requirement that trash be reasonably linked to the suspect residence by indicia of residency found *in the same bag* as the contraband was set forth by this Court in *Droge* (2005) and *Bennett* (2005) and

later cited with favor by the Kansas Supreme Court in *Hicks* (2006). It is not as though this requirement was a recent or esoteric procedural development when Detective Stein submitted the subject affidavit in April of 2011.

As set forth in *Leon* and *Peltier*, supra., "[t]he objective standard we adopt, moreover, requires officers to have a reasonable knowledge of what the law prohibits." This 'objective standard' required Stein – with his extensive experience – to have a reasonable knowledge of what the law prohibits in preparing and submitting affidavits seeking authority to search residences. Since 2005, the law in Kansas has consistently prohibited search of a residence premised upon contraband found in residential trash without indicia of residency found in the same trash bag as the contraband.

The trial court acknowledged this requirement in its Order denying the State's Request for Reconsideration by reiterating: "This court cited *State v. Droge*, 106 P.3d 515 (Kan. App. 2005) (unpublished), in its previous order. As Defendant notes, the *Droge* Court also rejected a similar argument from the state. *Id*. at slip op. 5-6. The *Droge* Court reasoned, in part, that because the trash was not linked to the residence, law enforcement had not acted reasonably when they relied on the warrant. *Id*." (Vol. I, p. 63) The district court correctly noted: "Here officers could have easily realized that the indicia of residence found in the garbage was not a sufficient nexus to provide probable cause for a warrant. In fact, the *affidavit even noted* that the indicia of residence were found in a separate bag than the contraband." (Id.) (Emphasis in original order)

The district court also noted: "*Leon's* 'objective standard' required the affiant to have a 'reasonable understanding of what the law prohibited.' As Defendant notes, this area of the law is not a recent development, but rather documented by the Kansas

Supreme Court in 2006, five years prior to the affiant's application for a search warrant. The state fails to cite any statutes or case law that affiant could have reasonably relied upon when seeking the search warrant." (Vol. I, p.p. 63-4)

This Court recently addressed analogous issues involving the *Leon* 'good faith' exception in *State v. Althaus*, No. 106,813. In its analysis, this Court stated:

> "Application of the good-faith exception presumes a "well trained" law enforcement officer "hav[ing] a reasonable knowledge of what the law prohibits." 468 U.S. at 919 n.20, 923; see *United States v. Gonzales*, 399 F.3d 1225, 1230 (10th Cir. 2005). A law enforcement officer, therefore, should be conversant in the broad precepts implicated in a Fourth Amendment search and, likewise, should recognize an obviously deficient warrant. *United States v. Roach*, 582 F.3d 1192, 1204 (10th Cir. 2009). And good faith is measured by how a "reasonable" law enforcement officer would view the circumstances. *So an officer poorly versed on basic search and seizure requirements may not rely on the good-faith exception solely because he or she subjectively believes the judge acted properly in signing a warrant*. *Leon*, 468 U.S. at 919-20." (Emphasis Added)

In *Althaus*, this Court ultimately framed the *Leon* issue as follows: "Would a reasonable law enforcement officer have recognized the affidavit to be so lacking in indicators of probable cause that he or she could not have held a good-faith belief in the validity of the warrant, notwithstanding the issuing judge's decision to sign it?" See *Hoeck*, 284 Kan. at 465: good-faith exception inapplicable when affidavit contains "so little indicia of probable cause" that it would be "entirely unreasonable for the officers to believe the warrant was valid." In *Althaus*, this Court found that no reasonable officer would have relied upon the warrant, regardless of the fact that a judge had reviewed and signed it.

B. Affidavit in the Case at Bar

The affidavit in the case at bar (Vol. III, p. 1-3) established the following information: (1) On February 8, 2011, an unknown male had purchased gardening

supplies which could be used to grow any indoor plant. The unknown male was driving a car registered to a female at the subject residence; (2) On April 7, 2011, *two months later*, law enforcement officers discovered contraband comingled with curbside trash in proximity to the subject residence. The contraband could not be reliably associated with the residence as no one had observed anyone from the residence place the trash at curbside for collection and no indicia of residency was discovered in the bag containing the contraband. The fact that an unidentified individual had been seen 2 months earlier purchasing gardening supplies offers no reliable nexus to the subject residence as the bottle of soil conditioner recovered from the trash was in the same bag as the contraband with no indicia of residency in said trash bag.

Of note, the only indicia of residency in the trash barrel was located in a *separate* bag that contained *no* contraband. Moreover, the name on the lone indicia of residency (Melissa Sayer) did *not* match the name of the registered owner of the vehicle that the 'unknown male' had been driving on February 8 (Mai Lin Malone) and did *not* match the name of the current owner of the residence (also Mai Lin Malone). Moreover, the fact that the lone indicia of residency was a female name (Melissa Sayer) further attenuates it from any meaningful identification of the unknown male observed at the gardening store 2 months prior to execution of the search warrant.

The foregoing constitutes the sum total of substantive information contained in the subject affidavit. The affidavit referenced no additional trash pulls prior to or subsequent to the isolated trash pull at the subject residence. The affidavit referenced no controlled narcotics transactions at the subject residence. The affidavit referenced no reports of a high volume of visitors to and from the subject residence at unusual hours of

the day. The affidavit referenced no information of unusually high water or electricity usage associated with the residence. The affidavit referenced no criminal history for anyone associated with the residence. The affidavit referenced no reports of unusual odors or suspicious activity associated with the residence.

In the case at bar, the district court considered and correctly rejected the State's request for reconsideration pursuant to the 'good faith' exception set forth in *Leon*. The district court correctly concluded that Detective Stein submitted a 'bare bones affidavit' containing only "suspicions, beliefs or conclusions, without providing some underlying factual circumstances regarding veracity, reliability or basis of knowledge." *State v. Hoeck*, supra. at 441 Kan. 454 quoting *U.S. v. Laughton*, 409 F.3d 744, 752 (6th Cir. 2005). The *Hoeck* Court held that a search warrant issued pursuant to a 'bare bones affidavit' satisfies the third circumstance enumerated in *Leon* wherein an officer's reliance on the warrant would be objectively *unreasonable* and suppression remains the appropriate remedy.

This Court's decision in the *Althaus* opinion is also analogous to the facts and circumstances of the case at bar. There, this Court held: "The Fourth Amendment protects against unreasonable government searches, particularly of a citizen's home. When a judge signs a search warrant unsupported by facts indicating contraband or evidence may be found in that citizen's home, the resulting search is constitutionally unreasonable. A well-trained law enforcement officer necessarily must recognize that a warrant issued without factual support violates the Fourth Amendment, and the State, therefore, *may not* rely on the good-faith exception to the exclusionary rule to use any

materials seized as evidence in the criminal prosecution of that citizen. This is such a case." *Althaus* supra.

The limited substantive information set forth in the subject affidavit constitutes the very type of 'bare bones' affidavit described in *Leon*, *Hoeck* and *Althaus*, supra., wherein "[t]here was so little indicia of probable cause contained in the affidavit - in other words, the affidavit was so 'bare bones' - that it was entirely unreasonable for the officer to believe the warrant was valid." This circumstance squarely satisfies the third circumstance enumerated by *Leon* and affirmed in *Hoeck* and *Althaus* wherein the exclusionary rule is the appropriate remedy. For this reason, the *Leon* 'good faith' exception does not apply and the exclusionary rule remains the appropriate remedy. The District Court correctly sustained the Defendant's Motion to Suppress Evidence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this ____ day of October, 2013, 2 true and correct copies of the foregoing Brief of Appellant were delivered via Hand Delivery to:

Shawn E. Minihan
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Olathe, KS 66061

I certify that on this ____ day of October, 2013 one true and correct copy of the foregoing Brief of Appellant was delivered via United States Mail, First Class postage prepaid to:

Attorney General Derek Schmidt
Kansas Judicial Center, 2nd Floor
301 S.W. 10th Avenue
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_____
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