case and a self-defense instruction should have been offered to the jury, the finders of fact in a jury trial.

We find, as a matter of law, the judge should have allowed Appellant to assert self-defense. We REVERSE the guilty finding and REMAND for a new trial consistent with our ruling.

Julie R. SWAN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP06-011, 5 CTCR 07

9 CCAR 24

[Steven Graham for Appellant.
Joni Bray for Appellee.
Trial Court Case Number CR-MD-2006-29075]

Decided October 5, 2007.
Before Justice Earl L. McGeoghegan, Justice Gary Bass, and Justice Howard E. Stewart.

Julie R. Swan appeals her criminal conviction because a search warrant was issued on insufficient information and that the evidence obtained by law enforcement using the warrant are "fruit of the forbidden tree", was stale, and should have been excluded from her Jury Trial. We agree that the search warrant should not have been issued. Her conviction is VACATED.

McGeoghegan, J.

SUMMARY

A tribal police officer was approached by a private citizen and was informed that he had driven her sister to Julie Swan's residence, Swan's sister went in to Swan's residence and came back with cocaine. He then drove Swan's sister to his residence where she proceeded to "cook" the cocaine and then smoke it. The tribal officer drafted an Affidavit and approached a tribal court judge with his information and requested a search warrant. The judge reviewed the affidavit and approved the issuance of a search

warrant. The warrant was executed on Julie Swan's residence where drugs were found and she was arrested. Before trial, she filed a Motion to Suppress the evidence seized as a result of the search warrant, alleging staleness and other grounds. The trial court denied the motion. A jury trial was held and Appellant was found guilty of possession of drugs.

STANDARD OF REVIEW

The case before us involves a magistrate interpreting the law. The standard of review in a case concerning only questions of law is *e novo. In Re R.S.P.V.*, 4 CCAR 68, 3 CTCR 7, 26 ILR 6039 (11-05-1998). Although the Court of Appeals will defer to the Trial Court's findings of fact, we engage in *de novo* review of when the assignments of error involve issues of law. *Wiley, et al. v. CCT*, 2 CCAR 60, 2 CTCR 9, 22 ILR 6059 (03-27-1995). The issue before the Court is a question of law. There are no disputed material facts involved at this stage of the case. For those reasons our review is *de novo*. *Simmons v. CCT*, 6 CCAR 30, 3 CTCR 45, 29 ILR 6065 (04-15-2002).

DISCUSSION

Swan's argument revolves around unreliable heresay and stale information. The informed citizen that approached the tribal police officer voluntarily described the details of an alleged drug buy by Appellant's sister. Appellant argues that the officer relied on information that was stale, and that there was no independent verification that either the informant was reliable or that potential drug activity was being conducted at Appellant's residence. Neighbors were not interviewed about any suspicious activity, a "sting" operation was not conducted by an undercover officer, nor did officers indicate that any additional investigation was done independent of the notification by the private citizen. The Tribes argue that information provided by a known citizen should be given more weight in veracity than an unnamed informant.

The eradication of drugs on our Reservation is a high priority for both the Tribe and its community members. We seldom question a magistrate's judgment when substantive facts presented for a warrant is sought by law enforcement in pursuit of that effort. However, a higher priority is placed on the individual right to be secure in our homes from unreasonable searches and seizures. The Colville Tribal Civil Rights Act,

Chapter 1-5 of the Colville Law and Order Code, states, in part:

> *The Confederated Tribes of the Colville Reservation in exercising powers of self-government shall not: ... (b) Violate the right of people within its jurisdiction to be secure in their persons, houses, papers, and effect against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.*

We have only limited material information before us in this matter. However, a close look at the affidavit and the search warrant that were issued reveals that neither meet minimum standards that should be used for the issuance of warrants on the Colville Indian Reservation.

I. Affidavits for Search Warrants

Privacy and the presumption of innocence is a right of the people and the use of a search warrant is a powerful weapon that must not be misused when dealing with the sanctity of people's homes.

To obtain a search warrant, an officer must provide sufficient information to a magistrate to make an independent determination that probable cause exists that the search will result in discovery and seizure in the warrant application. *Edenshaw v. MIC*, 5 NICS App. 156, 159 (1999), citing *llinois v. Gates*, 462 U.S. 213 (1983). The search warrant must be specific as to the place searched, and the items to be seized must be described with adequate precision so that the officer can recognize them. *Edenshaw,* id, citing *Maryland v. Garrison*, 480 U.S. 79 (1987).

There must be probable cause to enter a home and to seize evidence. In the instant case, the Affidavit for Search Warrant consisted, in part, of two short paragraphs which described Appellant and the information by which the officer concluded that a violation of the laws had occurred. Paragraph 4(a) named Appellant, listed her date of birth and gave her residence address verified by H.U.D.

Paragraph 4(b) is a short narrative by the officer of being contacted by a citizen saying that he took the Appellant's sister to the Appellant's residence; that the Appellant's sister went into the residence and came out with cocaine that she had purchased from the Appellant. The citizen then returned with the Appellant's sister to

his residence where she proceeded to "cook" the cocaine after asking for some specific materials (penny, soda powder, teaspoon and water).

A close look at the affidavit does not reveal any date or time given for when the alleged incident took place. It could have happened the day that the informant talked with the police officer or it could have happened any other day, possibly months before. There is no information that could give the independent magistrate any idea of the staleness of the information. The officer gives sufficient data as to his qualifications and knowledge, but does not remotely elaborate on any qualifications or experience of the informant citizen. The Court is left with too many unanswered questions. Has this informant been used before? Where did he obtain his knowledge of the "processing" of the alleged drugs? Was he a prior user? What was his relationship to either the sister or the Appellant? Could this voluntary information be based upon a potential grudge on the part of the informant against the Appellant? Police should not rely solely upon a citizen's allegations without some corroboration. The officer did corroborate that the residence was in the appellant's name, but apparently went no further with any additional investigation or independent corroboration of informant's information.

The final paragraph in the affidavit asks that the search warrant be issued because the officer submits that there is probable cause to believe a crime has been committed, that a search of the residence should be allowed so that the Appellant can be found. No where does the affidavit request that paraphernalia or drugs be included in the search and seizure.

The law requires that when searches are conducted, the warrant must specify, in detail, the areas to be searched. The precision of the search and seizure procedures were instituted so that "fishing expeditions" would not be conducted at the expense of an individual's basic rights. It would follow then, that in order for the warrant to specify what and where to search, that the affidavit must also state, with specificity, what is to be searched for and where.

Moreover, the affidavit only requests that the officers be allowed to enter the specified residence to search for the Appellant. The warrant, however, expands the search to include the residence, attached sheds, out buildings or storage sheds and open places where a person could reasonably hide. The Officer's Affidavit mentions that a

person could hide in various places[31], but the Affidavit does not ask to be allowed to search those places[32]. The warrant allows seizure of all illegal narcotics, paraphernalia and items related to manufacture and sale of the illegal narcotics. It also allows the seizure of "all persons involved in the sale, distribution and manufacture of said illegal narcotics."

There is a great difference between what was requested in the affidavit and what was included in the warrant. This is the very type of discrepancy that the judiciary must be wary of[33].

An independent magistrate must make every effort to make sure that the information on the affidavit matches what is contained in the warrant, and that both are as specific as necessary to ensure that both sides receive a fair and independent judicial decision.

II. Minimum requirements

What is the minimum information that should be contained in an affidavit? Each affidavit must be evaluated on a case-by-case basis, but there are some minimum standards that can apply to most affidavits.

The magistrate must be assured that a criminal act has occurred or is going to occur very soon without intervention by the police. There must be a time and place indicated when the violation is to have occurred or will occur. There must be some independent verification of the violation, or the veracity of the informant must be specified in order that the magistrate can make an independent assessment of the

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[31] Affidavit for Search Warrant, paragraph 3.

[32] Affidavit for Search Warrant, paragraph 6. "Based on the above-described information, I submit that there is probable cause to believe that ... contains evidence of the crime of ... I respectfully request that a search warrant be issued to enter the residence and search for the persons described herein."

[33] Police officers are usually the ones drafting the affidavits and proposed search warrants. When an officer is in a hurry, worried about potential disposal of key evidence, and then must draft an affidavit, it would be easy to possibly leave key information out. It is in your mind, but somehow doesn't quite make it to the paper. Many jurisdictions try to prevent this type of omission by having someone review the paperwork before it is submitted to the magistrate. This may take additional time, but may prevent potential problems down the road, such as having key evidence excluded from trial.

truthfulness of his allegations. The standard "who, what, where, when, why and how" should be addressed in every affidavit or at lease a mention of why it is not included or doesn't apply before issuance of any type of warrant is issued. This should not mean that each affidavit will need to be a 10-page document. It just means that the magistrate should not have to "fill in the blanks" in order to determine that a warrant should be issued.

In the instant case, a simple explanation that the police had verified suspicious activity through their observation or interviews with neighbors would have bolstered their case. Also, information that the informant had a successful history as a drug informant or had other training that would qualify him as a drug expert, and that he had no malicious intent to point his finger at Appellant would have helped. What relationship the informant had with Appellant's sister and why she wanted him to take her to Appellant's residence might have supported the affidavit more.
The Appellee argues that the informant is reliable because he used drug terminology and lived in the area, therefore the magistrate should have been able to determine that the informant was knowledgeable and was being truthful. While, by itself, this might have not been an issue in another warrant, combined with the utter lack of supporting information in this affidavit, this argument fails.

III. Search Warrant vs. Arrest Warrant

Was the affidavit in question requesting a search warrant or an arrest warrant? If we look at the plain language of the affidavit, it appears that the police officer is only requesting to search a residence for a specific person, the Appellant. An arrest warrant would issue for a person who is accused of committing a crime, which appears to be the case here. Yet, the magistrate issued a search warrant and expanded the search beyond what was requested in the affidavit, that is, to the person, paraphernalia and other items related to the sale, distribution and possession of narcotics. Again, magistrates need to be sensitive to not allowing law enforcement to go into people's homes and conduct unreasonable searches. Law enforcement must be specific in what they are looking for, where they want to look and it must all be reasonable to do so. If they want an arrest warrant to arrest a particular person, then that is what they must ask for. If they want to search a particular place for specific tools of a crime, then they must ask for that. If they

want both, they need to ask for both. The Court should not authorize a search beyond what is requested in the affidavit unless there is a very good reason for it. If and when it does, there should be a sound basis for it along with a brief explanation in the search warrant or some other part of the record.

IV. Totality of the Circumstances

Appellee argues that this Court should look to *U.S. v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984). The *Leon* case seems to excuse law enforcement when they "in good faith" rely on a warrant properly issued by a judge. We can distinguish this case from the *Leon* case. The difference between that case and this is the information contained in the affidavits. The affidavit in *Leon* was extensive in listing the investigation done prior to requesting a search warrant. Here, no investigation seems to have been done, except for verifying that the residence was in Appellant's name. Where an affidavit is so deficient in the basic information, a judge should not issue a warrant, and if the warrant is issued, law enforcement should not be able to hide behind a "good faith" argument. The evidence seized in such a manner must be excluded.

CONCLUSION

The community loses when law enforcement fails to take even the simplest of steps when investigating and seeking a search warrant. As much as the Court dislikes vacating a conviction when all other procedures and trial are unquestioned, it cannot tolerate the ignorance or misuse of the safeguards that provide our members their Constitutional entitlement to be secure in their homes.

There is a right way and a wrong way for government to exercise its police powers. Law enforcement cannot act with less than minimal information in seeking a search of a person's home and the judiciary cannot act with less then objectivity in the issuance of a warrant notwithstanding personal knowledge of the same to the community caused by drug use and activity. An unbiased judiciary is a key element of the Tribe's Constitutional guarantees to its members.

There were no exigent circumstances described in the affidavit which would allow deviation fro the basic requirements being met. Judges are well aware that drug activity is a constantly changing activity and what is here today may not be here

tomorrow. However, that doesn't justify cutting corners when it comes to issuing search warrants that are not properly obtained and used in violation of a person's right to privacy and to be secure in his or her home.

DECISION

The evidence gathered by law enforcement under a warrant and submitted at Julie Swan's trial was not lawfully obtained. Appellant's conviction is VACATED and this matter is remanded to the court for proper action consistent with this Order.

It is SO ORDERED.

Gilbert LUCERO and Karen CONDON, Appellants,

vs.

ERB CORP, *et al.*, Appellees.

Case No. AP07-015, 5 CTCR 08

9 CCAR 31

[Appellants appeared pro se.

R. John Sloan Jr. appeared for Appellees.

Trial Court Case No. CV-OC-2006-26368]

Before Chief Justice Anita Dupris, Justice Gary Bass and Justice Conrad Pascal

Decided on November 15, 2007.

Dupris, C.J., for the Panel

This matter came before the Court of Appeals on a Notice of Appeal filed by Gilbert Lucero and Karen Condon, Appellants, against Erb Corporation, *et.al,* Appellees. Appellants are *pro se*; Appellees are represented by R. John Sloan, attorney and spokesman. Appellees have filed a Motion to Dismiss the Appeal based on the fact that Appellants have not perfected their appeal. After a review of the record and law, we