No. 31280-1-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DANIEL KENNETH ELLIS,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Salvatore F. Cozza, Judge

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that "[b]ased on the state of the law, as it currently exists, the search warrant was valid." Conclusion of Law No. 6, CP 36.

2. The trial court erred in concluding that "[l]aw enforcement was lawfully allowed to search the home and gather evidence." Conclusion of Law No. 7, CP 36.

3. The trial court erred in denying Mr. Ellis' motion to suppress evidence that was illegally seized. Conclusion of Law No. 8, CP 36.

Issue Pertaining to Assignments of Error

Whether a search warrant was supported by probable cause that a crime was being committed when possession and manufacture of marijuana is not a crime under some circumstances and the supporting affidavit alleged only that police officers smelled marijuana upon arriving at a residence and observed a bright light emitting from a small area sectioned out of a garage that had most of its windows covered with black plastic?

B. STATEMENT OF THE CASE

The parties stipulated to the following facts. CP 52–53. On March 5, 2012 Deputy Benner of the Spokane County Sheriff's office was on duty. He responded to 13410 E Rich, Spokane Valley, Washington, to arrest a Felicia Robles for local warrants, and arrived there with Deputy Karnitz. As Deputy Benner began walking up the driveway to the residence he began smelling the odor of marijuana. As he got closer to the residence the odor became stronger and stronger. The officer noticed two unfriendly dogs at the location that prohibited him from being able to make contact at the front door. Instead he began knocking on the exterior west wall of the residence.

Deputy Benner looked into an uncovered window and observed lights on in the residence but did not see anyone moving. He then went to the garage that was at the end of the driveway next to the residence to see if any vehicles were in the garage to help determine if there might be someone in the residence. Deputy Benner did not see any vehicle but did observe a small area sectioned out of the garage that had a bright light being emitted from it. The majority of the garage door windows had been covered with black plastic. Deputy Benner, through his training and

experience, believed that marijuana was being manufactured on the property in the garage.

Deputy Benner authored and obtained a search warrant for the premises. CP 53, 62–64. The Affidavit for Search Warrant generally alleged the facts set forth above. CP 56–61. During execution of the search warrant, police discovered two empty marijuana grow rooms, a third room with an active marijuana grow, two permits for the medical marijuana grow in Mr. Ellis' name (his own and in a representative capacity), and a loaded shotgun. Mr. Ellis had a prior felony. CP 53–54.

Mr. Ellis was arrested and charged with second degree unlawful possession of a firearm. CP 3, 54. Mr. Ellis was not charged out of the marijuana grow operation as it complied with Washington's Medical Marijuana laws. CP 8.

Mr. Ellis moved to suppress the results of the execution of the search warrant and to dismiss the charge. CP 6–20, 28–34. No testimony was taken at the suppression hearing as the facts were agreed upon, and the court heard argument of counsel. 9/20/12 RP 2–11; CP 50–51. The Court denied the motion and entered written findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

1. Courts have been struggling with the medical marijuana issues for over a decade.

2. The state legislature has attempted to fix those issues over time.

3. There is no realistic way for law enforcement to determine if someone is a medical marijuana user.

4. An authorized medical marijuana user must still comply with state law.

5. Law enforcement did not know if the defendant was in compliance with the medical marijuana statute.

CONCLUSIONS OF LAW

1. Under the medical marijuana laws, there are limits.

2. It is still a violation of the law to have excess marijuana.

3. HIPAA privacy laws prevent asking doctors about medical marijuana patients.

4. That invasion has to be justified by either a warrant or exigent circumstances.

5. Law enforcement has the authority to determine a defendant's compliance with state statutes regarding medical marijuana.

6. Based on the state of the law, as it currently exists, the search warrant was valid.

7. Law enforcement was lawfully allowed to search the home and gather evidence.

8. The Defendant's motion for suppression of evidence is denied.

CP 35–36; 9/20/12 RP 9–11.

Mr. Ellis was subsequently convicted of second degree unlawful possession of a firearm, following a trial to stipulated facts. 11/5/12 RP 13–18. This appeal followed. CP 68–69.

C. ARGUMENT

The search warrant was not supported by probable cause that a crime was being committed when possession and manufacture of marijuana is not a crime under some circumstances and the supporting affidavit alleged only that police officers smelled marijuana upon arriving at a residence and observed a bright light emitting from a small area sectioned out of a garage that had most of its windows covered with black plastic.

Standard of Review. In reviewing a trial court's findings of fact following a suppression hearing, the reviewing court makes an independent review of all the evidence. State v. Apodaca, 67 Wn. App. 736, 739, 839 P.2d 352 (1992) (citing State v. Mennegar, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990)). Findings of fact on a motion to suppress are reviewed under the substantial evidence standard. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Conclusions of law in an order pertaining to suppression of

evidence are reviewed *de novo*. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Two different standards apply to the review of a probable cause determination. State v. Emery, 161 Wn. App. 172, 201, 253 P.3d 413, *rev. granted*, 172 Wn.2d 1014 (2011) and *aff'd*, 174 Wn. 2d 741, 278 P.3d 653 (2012). The first standard, abuse of discretion, applies to whether information in the affidavit has enough reliability and credibility to qualify as " 'historical facts' in the case, i.e., the events 'leading up to the stop or search.' " Emery, 161 Wn. App. at 201–202; In re Det. of Petersen, 145 Wn.2d 789, 799–800, 42 P.3d 952 (2002). Under the second standard, the legal conclusion that " 'the qualifying information as a whole amounts to probable cause.' " is reviewed *de novo*. Emery, 161 Wn. App. at 202 (quoting Petersen, 145 Wn.2d at 800).

Substantive Argument. The warrant clause of the Fourth Amendment to the United States Constitution and Wash. Const. article I, section 7 requires that a search warrant be issued upon a determination of probable cause. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). "The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual's right to privacy." State v. Neth, 165

Wn.2d 177, 182, 196 P.3d 658 (2008) (citing Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)). "Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)). Accordingly, probable cause requires (1) a nexus between criminal activity and the item to be seized, and also (2) a nexus between the item to be seized and the place to be searched. Thein, 138 Wn.2d at 140 (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). "It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause." Maddox, 152 Wn.2d at 505.

"[T]he existence of probable cause is to be evaluated on a case-by-case basis. Thus, general rules must be applied to specific factual situations. In each case, 'the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness.' General, exploratory searches are unreasonable, unauthorized, and invalid." Thein, 138 Wn.2d at 150 (internal citations and footnote omitted). The issuance of a warrant is proper only if a reasonable, prudent person would

understand from the facts contained in the affidavit that a crime has been committed, and evidence of the crime can be found at the place to be searched. State v. Garcia, 63 Wn. App. 868, 871, 824 P.2d 1220 (1992) (citing State v. Fisher, 96 Wn.2d 962, 965, 639 P.2d 743, *cert. denied*, 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.2d 1355 (1982)).

In July of 2011, the Washington State Legislature amended the medical marijuana statute converting what had been an affirmative defense to an exception to the general controlled substances statute. The amendment decriminalizes the possession, use, and manufacture of medical marijuana, so long as certain criteria are met. While the old statute makes explicit reference to an affirmative defense (former RCW 69.51A.040(2) (2007)), the new statute clearly states that "[t]he medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime." RCW 69.51A.040 (2012); Laws of 2011 c 181 § 401, eff. July 22, 2011. This statute provides an exception to the general controlled substances statute which makes possession, use, and manufacture of marijuana a crime. RCW 69.50.401 (2012). Therefore, in order to establish probable cause to believe that a person has committed or is committing the crime of unlawful use, possession, or manufacturing of marijuana, it is not enough to merely show that the person used, possessed,

or manufactured marijuana. Instead, probable cause can be established only by showing that such use, possession or manufacturing failed to comply with the terms and conditions of RCW 69.51A.[1]

In the present case, the affidavit does not allege or provide any information whatsoever as to whether Mr. Ellis was a qualified medical marijuana patient or whether any person associated with the residence was an authorized medical marijuana patient or designated provider pursuant to RCW 69.51A.040. The affidavit establishes nothing more than that marijuana was probably being grown at the 13410 E. Rich address. There is nothing in the affidavit from which the reviewing judge could determine with any degree of certainty or probability the actual number of plants being grown, the number of persons who were involved in the grow, whether those persons were qualified medical marijuana patients or were designated providers for qualifying patients. The affidavit also fails to

[1] In State v. Fry, 168 Wn. 2d 1, 228 P.3d 1 (2010), the court held that the affirmative defense provided under the former statute does not per se legalize an activity and therefore does not negate probable cause that a crime has been committed. The Fry case was decided before the 2011 amendment to RCW 69.51A.040, which is at issue here. In Fry—unlike in this case—there was no contention that the facts, including the information and smell of marijuana, did not support a finding of probable cause to search the Fry's residence. Instead, Fry contended the probable cause was negated once he produced the medical marijuana authorization. The court rejected this argument. Fry, 168 Wn. 2d at 6, 10.

provide any facts from which the issuing judge could have determined the quantity of marijuana observed by the officer at the address.

The affidavit wholly fails to provide any facts or circumstances from which the issuing judge could make a determination that there was a fair probability that the possession and/or manufacturing of marijuana observed by Deputy Benner was not in compliance with Washington's medical marijuana laws. Thus, the affidavit fails to establish probable cause for a violation of law, i.e., that a crime was likely being committed.[2]

Under article I, section 7 of the Washington State Constitution, there is no "good faith" exception to the exclusionary rule. State v. Afana, 169 Wn. 2d 169, 179-81, 233 P.3d 879 (2010); State v. Crawley, 61 Wn. App. 29, 34, 808 P.2d 773, *rev. denied*, 117 Wn.2d 1009 (1991).

It is undisputed that while the affidavit supporting the warrant included evidence of a marijuana grow, there was no mention of the medical marijuana statute or any assertion that the grow violated the medical marijuana statute. This omission is fatal to the warrant as the warrant then does not show probable cause of a crime. There is no good

[2] State officers cannot obtain a valid state search warrant where there is not probable cause of a state crime. *See, e.g.*, United States v. $186,416.00 in U.S. Currency, 590 F.3d 942, 948 (9th Cir. 2010) (finding that because the evidence supporting the grow did not show probable cause of a crime in California law, even though it was illegal federally and was prosecuted federally, the search warrant had to be quashed).

faith exception to rescue the warrant. Thus, subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). The conviction for second degree unlawful possession of a firearm must be reversed.

D. CONCLUSION

The conviction should be reversed.

Respectfully submitted on April 3, 2013.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 3, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Daniel Kenneth Ellis
13410 East Rich Avenue
Spokane Valley WA 99216

E-mail: kowens@spokanecounty.org
Mark E. Lindsey
Deputy Prosecuting Attorneys
1100 West Mallon Avenue
Spokane WA 99260-2043

_____
s/Susan Marie Gasch, WSBA #16485