69357-1

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No. 69357-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

vs.

ARON CLARK HOVANDER, Appellant.

BRIEF OF RESPONDENT

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By KIMBERLY THULIN
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #21210 / Admin. No. 91075

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

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2. Whether the court erred concluding Deputy Paz did not intentionally or recklessly misstate or omit facts material to the search warrant application and addendum based on the unchallenged findings below.

1. Substantive facts

On October 7th 2011, Deputy Paz of the Whatcom County Sherriff's office detected the odor of marijuana coming from a building, later identified as a milk parlor at 5968 Olson Road. CP 138-142,138-142, FF 1. The wind was blowing from east to west and the milking parlor. CP 138 FF 1. On the same day, around the same location on Olson Road but at a separate time than Deputy Paz, Deputy Taddonio detected an odor of marijuana. Id., FF 1, VRP 49 (April 17th suppression hearing transcript.)

On October 11th Deputy Paz returned to Olson road, saw the driveway to the milk barn was open and walked towards it to investigate the odor. Br. of App. App 1, pp 3. After noticing infrared cameras at the milk parlor driveway however, Deputy Paz went around the tree line, crossed two fences and approached the milk parlor building to investigate. CP 138-142, FF 2. Deputy Paz erroneously thought it was ok to walk the tree line instead of staying on the curtilage of the milk parlor building to investigate the marijuana grow odor he had detected. VRP 46. (4/17 suppression hearing transcript). Based on this information and the odor detection from October 7th 2011, Deputy Paz sought authorization to search the milk parlor and attached office. Br. of App. Appendix 1.

Prior to execution of this warrant however, on the advice of law enforcement's counsel, Paz was directed to go back to the public right away on Olson road to determine what if anything he could smell or discern from the roadway regarding a marijuana grow operation suspected to be in the milk parlor. VRP 33 (4/17 suppression transcript).

On October 12th, 2011 Deputy Paz returned to the 5200 block of Olson Road on the advice of counsel. Id. Paz stood in a break in the tree line south of the milk parlor driveway on the public roadway (Olson) and again detected an obvious odor of growing marijuana. CP 138, FF 3. The wind was blowing from north to south. Id. The milk parlor and attached barns on the Hovander farm were the closest building in the direction the wind was blowing to Deputy Paz's position 376 feet away. Id. Paz could see through the open barn buildings and determined the odor was emanating from the milk parlor and attached office. Br. of App. App 2, pp 2-3 (addendum to first search warrant application for Hovander farm on 10/13/11 at 11:45 a.m.)[1].

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[1] Hovander attached three appendices-transcripts of the search warrant applications. The first and second transcripts (initial application and addendum) pertain to one search warrant-the search warrant for the Hovander milk parlor at 6958 Olson Road. Appendix 2 however, erroneously states the addendum to the milk parlor search warrant was made at 11:45 p.m.. A review of the actual search warrant tapes and suppression motion demonstrates this application was made at 11:45 a.m. There are other minor discrepancies in the transcription-thus, a quick review of the actual tapes of the warrant application may

Deputy Paz thereafter provided this additional information and the electrical records for the milking parlor buildings –that showed consumption of ten times the average amount –to the magistrate requesting to make an addendum to the first warrant application for the search of the Hovander milk parlor. See, Br. of App. Appendix 2. The magistrate, after listening to this additional information, re-authorized a search warrant for the milk parlor. Br. of App. Appendix 2. Following execution of the search warrant on the Hovander milk parlor, deputies discovered a large scale marijuana growing operation in four rooms. Id. There were over five hundred marijuana plants under cultivation at various stages of development-a certified technician tested and confirmed they were marijuana plants. CP 184-186 (findings of fact conclusions of law re guilt) FF 1.

The second warrant application-made after the Sheriff's office executed the search warrant of the milk parlor was for the Hovander residence at 5608 Olson Road is not the subject of this appeal-though it is referenced by Hovander throughout his brief. See, Br. of App. Appendix 3-warrant application for Hovander residence.

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be warranted and helpful. The third search warrant transcript pertaining to the Hovander residence is not the subject of this appeal.

Following the execution of the search warrants, Hovander was initially charged with one count of unlawful manufacturing of a controlled substance. Supp CP ___ (sub nom 10). On November 29th 2011, the State amended the information to charge Hovander with two counts of unlawful possession of a controlled substance with intent to deliver, two counts of unlawful manufacturing of a controlled substance and two counts of maintaining a dwelling for drug purposes. Supp CP 17.

Hovander thereafter filed a motion to suppress both warrants and a contravention motion. CP 4, 5, 43-59. Prior to the suppression hearing, the State conceded suppression of the second search warrant pertaining to the search of the Hovander residence was appropriate. VRP 3 (8/13/11 hearing transcript). A suppression hearing pertaining only to the search warrant authorizing a search of the milk parlor and Hovander's farm on Olson road proceeded.

Hovander challenged the milk parlor warrant maintaining that if the information pertaining to the trespass was eliminated, the remaining warrant application was insufficient to establish probable cause. CP 124-131, 6-42, 43-59. Alternatively, even if probable cause, Hovander argued the search warrant violated the independent source doctrine pursuant to article 1, section 7 of the Washington State constitution. Id. Hovander

also asserted a Franks hearing was warranted because Deputy Paz should have advised the magistrate he was 476 feet away from the milk parlor when he detected the marijuana grow odor, for allegedly misstating where the closest building was when he detected the odor when that there was another home, the Hovander residence nearby. Id.

After taking testimony, hearing argument and considering the parties submissions, the trial court denied Hovander's motion to suppress evidence found pursuant to the first search warrant pertaining to the milk parlor. CP 138-142. Specifically, the trial court concluded, after excluding the information initially provided to support the milk parlor search warrant obtained by entering the Hovander farm property, there remained sufficient probable cause to justify the search warrant for the milk parlor. CP 138-142, conclusion 2. The court also determined the evidence obtained to support the warrant was obtained independently from the illegality when Deputy Paz entered the Hovander property and approached the milk parlor without legal authorization and therefore did not violate the independent source doctrine. Id, conclusion 3. Moreover, the trial court determined the evidence did not demonstrate the obvious odor of marijuana was coming from the Hovander residence but was emanating from the milk parlor. Id. The court also determined the independent

information from the power records, fact of surveillance cameras and detection of the odor of growing marijuana on multiple occasions from multiple locations, by multiple deputies would have influenced Deputy Paz to continue his investigation and seek search warrants, even if he had not crossed the Hovander property line and fences on October 11th 2011. Id, FF 7.

The trial court also determined a Franks hearing was unwarranted. Id. The court concluded Deputy Paz was neither reckless nor made intentional omissions of material facts by failing to advise the issuing magistrate that he believed (the deputies belief was later determined to be incorrect) there previously was a medical marijuana investigation in 2010 regarding the Hovander milk parlor. At the suppression hearing, Deputy Paz testified that in in October 2010 Deputy Roosma and Deputy Walker investigated a medical marijuana growing operation at 5608 Olson Road, the Hovander residence, after an individual disclosed he was being provided medical marijuana by Hovander. CP 138-142, FF 5. When contacted, Hovander provided his permit to grow medical marijuana but declined to permit deputies to search his residence. Id. A search warrant was not sought. CP 138-142, FF 5. Deputy Paz was remotely aware of this incident during his 2011 investigation, spoke with Deputy Walker to

try to obtain more specific information but Walker could not provide much information and he could only find a brief report about the incident in the Sheriff's office data base. Id. Deputy Paz mistakenly believed this incident involved a growing operation in the milking parlor-when in fact the medical marijuana investigation involved the Hovander residence. Thus, if Paz had provided the limited information he thought he knew, it would have been inaccurate. Id.

The court finally concluded, after finding that PSE is a private electric utility that provides power the Hovander property, that it was unnecessary for investigating officers to comply with statutory procedures pertaining to public or municipal electrical companies to obtain the electrical power records for 5268 Olson Road. CP conclusion of law 4.

Thereafter, Hovander filed a motion for reconsideration. CP 143. On reconsideration, the trial court explained, to the extent it considered matters outside the four corners of the search warrant, the court was determining whether there were material reckless or intentional omissions for purposes of determining if a Franks hearing was warranted. VRP 16 (June 12 2012). Hovander thereafter filed multiple additional motions for reconsideration, including arguing that pursuant to a decision for the Eastern District of Washington, U.S. v. Kynaston, CR-12-0016-WFN,

Deputy Paz was obliged to inform the magistrate of the limited information, later determined to be erroneous, that the milk barn had been the subject of a medical marijuana investigation in 2010. CP 136, 143, 144, 164, 165. The trial court denied this final motion for suppression. VRP 14 (September 20th 2011 transcript)

After electing to proceed with a stipulated bench trial following the failed suppression motions, Hovander was found guilty of one count of unlawful manufacturing of a controlled substance, marijuana pursuant to RCW 69.50.401. CP 187-94. Hovander timely appeals. CP 195-204.

Hovander does not assign error to the trial court's findings of fact, therefore they-as opposed to Hovander's lengthy recitation of the facts, are verities for purposes of evaluating the issues raised on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

B. ARGUMENT

1. The trial court did not abuse its discretion upholding the validity of the search warrant.

Hovander asserts the trial court erred denying his motion to suppress evidence obtained pursuant to a search warrant of a milk parlor on his farm at 5869 Olson road. Br. of App. at 1. Specifically, Hovander argues the search warrant application was insufficient to establish probable cause because law enforcement failed to establish that the suspected grow

operation was not a legal medical grow operation, because the evidence supporting the issuance of the warrant was not sufficiently independently obtained from the information gleaned when the deputy entered onto the Hovander farm property, and because the search warrant application provided inadequate foundation to show Deputy Paz had sufficient training and experience to smell growing marijuana from the milk parlor while standing on the public roadway next to the farm where the milk parlor was located.Br. of App. at 1, see also for reference, Supp CP __(def. exhibit 2).

This Court reviews search warrants and the finding of probable cause for an abuse of discretion. State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). A search warrant is entitled to a presumption of validity and great deference is given to the issuing magistrate's determination of probable cause. Id. Appellate court's generally resolve doubts concerning the existence of probable cause in favor of the validity of the search warrant. Id. Material misstatements or omissions will invalidate a search warrant only when made recklessly or intentionally. Chenoweth at 484. A trial court's conclusion that the affiant did not recklessly omit material facts in obtaining a search warrant will be upheld where such determination is not clearly erroneous. Id.

Hovander does not challenge the trial court's findings of facts. Therefore, the trial court's findings are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The trial court's contested conclusions of law stemming from a suppression hearing are reviewed de novo on appeal. State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

A search warrant may be issued only upon a determination of probable cause. State v. Atchley, 142 Wn.App. 147, 161, 173 P.3d 323 (2007), (*citing* State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). 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 such criminal activity can be found at the place sought to be searched. Id at 161, *citing* State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

To establish probable cause for a search warrant, the application for a search warrant "must set forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant or place is involved in criminal activity." State v. Atchley, 142 Wn.App. at 161, *quoting* State v. Cord, 103 Wn.2d 361, 365-66, 693 P.2d 81 (1985). Probable cause requires only a probability of criminal activity. State v. Maddoz, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). When determining

probable cause, the magistrate makes a practical, common sense decision and is entitled to draw reasonable inferences from all of the facts and circumstances described in the application. Id at 505.

The issuance of a search warrant is reviewed on appeal for abuse of discretion, with great deference on appeal with any doubts resolved in favor of the warrant's validity. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002), State v. J.R. Distributors, 111 Wn.2d 764, 774, 765 P.2d 281 (1988). When reviewing the validity of a search warrant, the reviewing court considers only the information that was brought to the attention of the issuing magistrate at the time the warrant was requested. State v Murray, 110 Wn.2d 706, 707, 757 P.2d 487 (1988). The facts and circumstances described to the magistrate in the first warrant application and the addendum, independent from the information obtained when Deputy Paz went onto the Hovander farm property later redacted, sufficiently supports the magistrate's authorization of a search warrant. See, Supp CP __ (sub nom 69, plaintiff's exhibit 1).

a. *The search warrant application and addendum demonstrate Deputy Paz had sufficient training and experience and was at a location where, based on wind direction and the rural area, that the court could rely on his determination that he could detect the odor of growing marijuana coming from the milk parlor.*

When an officer with training and experience actually detect the odor of marijuana, this can itself "provide sufficient evidence to constitute probable cause justifying the search." State v. Olson, 73 Wn. App. 348, 356, 869 P.2d 110, *review denied*, 124 Wn.2d 1029, 883 P.2d 327 (1994). So long as the identification of the smell is based on more than personal belief and the court considers the officer's experience and expertise in marijuana odor detection when the trial court relies on the odor to support its determination. State v. Olson, 74 Wn. App. 126, 130, 872 P.2d 64 (1994), *aff'd,* 126 Wn.2d 315 (1995); State v. Remboldt, 64 Wn.App. 505, 510, 827 P.2d 282, *review denied*, 119 Wn.2d 1005, 832 P.2d 488 (1992).

In Olson, the court held that a statement outlining the officer's training and experience with marijuana investigations and the actual detection of the odor of marijuana will provide sufficient evidence, by itself, to constitute probable cause to justify a search. Similarly, in State v. Cole, 128 Wn.2d 262, 289, 906 P.2d 925 (1995), the court determined that language in the warrant application stating the investigating officer had

"been a King County police officer with over two years' experience, had been involved with marijuana from operations in that time and was familiar with the smell of growing marijuana" was sufficient to establish probable cause to issue a search warrant.

As in Cole and Olson, Deputy Paz's training, experience and factual observations set forth in his application to search the milk parlor both on October 11th and October 12th were sufficient for the issuing magistrate to rely on Deputy Paz' ability to identify the odor of growing marijuana from the milk parlor. See, CP 138-142, (FF 4). Paz detailed to the issuing magistrate that he was familiar and trained in the odor of growing versus burned or dry marijuana, that he had been extensively involved and learned about the odors of marijuana from his experience in over a hundred grow operation investigations with the drug task force, DEA and through his normal duties through the criminal and addiction team. See, Br. of App., App 1, page 3, App 2 at 3. Deputy Paz also detailed that he had taken a class on marijuana grows. Id.

Deputy Paz also detailed that on three different occasions he could smell obvious odor growing marijuana while on Olson road at the 5200 block of Olson road and that based on the direction of the wind and his location, he detected the odor was emanating from the milk parlor. Id. Paz

explained that the other barns in the same property area as the milk parlor, as noted on the assessor's page, he could see through and observed that these other buildings were either empty or had some cattle in them. Id, See page 2, see also Supp CP ___(D ex2), Br of App. Appendix 2, page 2 .

These details outlined in Deputy Paz warrant application and addendum demonstrate the suspicion of a marijuana grow operation in the milk parlor was based on more than personal belief, that the magistrate had sufficient information to reasonably rely on Deputy Paz's training and experience and observations that supported the issuance of the search warrant. The trial court therefore, did not err upholding the validity of the warrant.

To the extent the trial court's findings of fact, conclusions of law could be construed as reconfiguring the four corners of the search warrant, this Court can affirm on any basis supported by the record-in this case the warrant application and addendum to determine that the trial court did not abuse its discretion in determining the search warrant application was supported by probable cause. State v. Costich, 152 Wn.2d 463, 477, 98 p.3d 795 (2004).

Hovander nonetheless contends that pursuant to State v. Johnson, 70 Wn.App. 776, 904 P.2d 1188 (1988), the warrant is insufficient because Deputy Paz detected marijuana from the roadway, some unspecified distance from the milk parlor. Br. of App. at 21. Deputy Paz did specify that he was standing on the 5200 block of Olson road when he detected the smell of marijuana on October 12th 2011. See addendum to warrant application, Appendix 2, page 2. Moreover, Deputy Paz explained why he could detect the odor from that specific building-because of his location and the direction of the wind from the milk parlor and because he could see that nothing was contained in the other barn structures-they were open through the sides-and finally, there was no other buildings in the direction the wind was blowing, that could account for the obvious odor. Johnson requires only that the magistrate be able to draw a reasonable inference from the information supplied that the odor is emanating from the location to be searched. The lawful information in the warrant application and addendum in this case permits this reasonable inference. Hovander's argument should be rejected.

b. *The issuance of the search warrant for the Hovander milk parlor was based on lawfully obtained information and was not predicated directly or indirectly from evidence obtained illegally. Therefore, the trial court did not abuse its discretion concluding the evidence was admissible under the independent source doctrine.*

Next, Hovander asserts the addendum to the search warrant application is the poisonous fruit of the prior trespass and should have been suppressed. Relatedly, he also contends the search warrant fails because the findings are insufficient to demonstrate that the lawfully obtained evidence to support the warrant was sufficiently attenuated or independent from the illegal trespass. Br. of App. at 28, *citing* State v. Childress, 35 Wn.App. 314, 316, 666 P.2d (1983), State v.Le, 103 Wn.App. 354, 12 P.3d 653 (2000), State v. Gaines, 154 Wn.2d 711, 116 P.23d 993 (2005), Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), State v. Smith, 177 Wn.2d 533, 303 P.3d 1047 (2013).

The exclusionary rule requires courts to suppress evidence obtained directly and indirectly through violation of a defendant's constitutional rights. State v. Le, 103 Wn.App. 354, 12 P.3d 653 (2000); c*iting*, State v. White, 97 Wn.2d 92, 111-112, 640 P.2d 1061 (1982). This doctrine however, is not applied in a 'but for' manner. In Wong Sun v.

United States, 371 U.S. 471, 487, 88 S.Ct. 407, 9 L.Ed.2d 441 (1963), the court explained:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Consistently, under the independent source doctrine, an unlawful search does not result in suppression of evidence ultimately obtained using "a valid warrant or other lawful means independent of the unlawful action." State v. Smith, 177 Wn.2d at 539-40, *citing* State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005). The lawfully gained information must however, be independent of the illegal search. Id at 721, *citing* Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed. 472 (1988).

The rationale behind the independent source doctrine is not to deter police conduct so much as to ensure and protect individual privacy rights. *See*, State v. Winterstein, 167 Wn.2d 620, 634, 220 P.3d 1226 (2009). Thus, the undercurrent of the rule is "that police should not be in a worse position than they otherwise would have been because of the error." In re Hinton, 164 Wn.App. 81, 90-91, 261 P.3d 683 (2011).

In Le, relied on by Hovander, the court analyzed the case primarily under the attenuation doctrine determining that a post arrest identification was not sufficiently attenuated from an illegal arrest and warranted suppression because the identification occurred immediately after the defendant's arrest and therefore the identification was not from an independent source because the pretrial identification was only possible because of the illegal arrest. Id.

In contrast to Le, the information that supports the search warrant in this case was obtained separately and in a manner distinct from the unlawful entry onto the Hovander property. Deputy Paz and others had already detected a marijuana odor prior to the unlawful conduct and after being told to continue to investigate –did not rely on the limited information unlawfully obtained when he walked onto the Hovander farm property. Deputy Paz also sought to obtain electrical consumption records for the milk parlor, to determine if they supported the inference that there was a marijuana grow operation consistent with the odor that had been detected. Thus, the evidence that lawfully supports the search warrant was sufficiently attenuated and independent from the unlawful conduct, notwithstanding that it was obtained close in time.

Recently, in State v.Smith, *supra*, the state Supreme Court declined to apply the independent source doctrine to justify the admissibility of evidence obtained as a result of a unlawful motel registry search. There, officers unlawfully searched a motel registry and determined a motel guest had an outstanding warrant. When officers subsequently apprehended Smith at the doorway to his motel room, they observed a woman bloodied and limping inside. Officers immediately entered the motel room to render aid. A warrantless search of the motel room followed-wherein the woman and her 12 year old daughter described being assaulted and led police to evidence that corroborated the assault. Smith, 177 Wn.2d at 537.

The court reversed the Court of Appeals determination that the evidence at issue was admissible under the independent source doctrine concluding that it was impossible, under these facts, to extricate the officers' presence at Smith's motel room from the unlawful search of the motel registry. The court determined instead, that the evidence at issue was admissible pursuant to the "save life" exception to the warrant requirement, as a subset of the community caretaking function exception to the warrant requirement. Importantly though, the court reiterated with approval that the independent source doctrine does not require suppression

in Washington so long as the evidence at issue is obtained through lawful means independent of the unlawful action. Id. at 544-45.

Here, in contrast to Smith and Le, the trial court did not abuse its discretion determining that the evidence obtained pursuant to the search warrant of the milk parlor is admissible pursuant to the independent source doctrine. The unlawful search- the unlawful entry onto Hovander's farm property to take a closer look at the milk parlor -did not taint the independently obtained information-obtained before and after that incident- that otherwise supports the warrant. Half of the information learned from the unlawful conduct, Deputy Paz already knew-that there was a smell of a marijuana grow operation emanating from the milk parlor. The fact that the deputy heard fans-the only new information-was irrelevant to Deputy Paz later determination that he could in fact, when the wind was blowing in the right direction, again detect an odor of marijuana emanating from the milk parlor when he was standing on Olson road.

In contrast to Smith, Deputy Paz did not search the building or seize any evidence. Most importantly, the findings of fact demonstrate, Paz did not exploit the illegality by using the information he gleaned to obtain additional evidence to support a warrant. Nor was Deputy Paz motivated to continue investigation because of his unlawful conduct. The

trial court found that Deputy Paz would have, based on the odor detection from the road on multiple occasions and infrared cameras on the open driveway to the milk parlor that he observed, would have influenced Deputy Paz to continue to independently investigate the Hovander milk parlor even if he had not crossed the property line and fenced area on October 11. CP 138-142, FF 6. This finding has not been challenged on review.

Moreover, the findings demonstrate, contrary to Hovander's argument, that Deputy Paz was not motivated to obtain the warrant based on the unlawful conduct that resulted in limited information-namely, that the milk parlor still emanated a marijuana grow smell when on the property and he could hear fans working from within the building.. See, Br. of App. at 37, *citing* State v. Miles, 159 Wn.App. 282, 244 P.3d 1030 (2011). Given the prior detection of the marijuana grow odor emanating from the milk parlor area on October 7th, 2011, the court also found the deputies would have followed up notwithstanding the limited additional information learned when Paz entered the property. CP 138, FF 1, 3.

These findings –that have not been challenged on appeal, support the trial court's conclusion that the evidence obtained pursuant to the search warrant is admissible under the independent source doctrine. *See*,

State v. Gaines, 154 Wn.2d at 718.(unlawful search does not result in the suppression of evidence ultimately obtained using a valid warrant so long as the lawfully obtained information obtained independent of the illegal search and the decision to seek a lawful basis to search is not motivated by the previous unlawful search and seizure.).

Here, the unlawfully suppressed conduct-and limited information derived from going onto the Hovander property was entirely separate from the October 7th and October 12th detection of the marijuana grow odor from the public roadway and later power consumption records that were obtained. And, while Deputy Paz did unlawfully approached the milk parlor, he did not search the building, look into it or otherwise unlawfully seize anything. Instead, he merely determined the building did have an odor of marijuana-information he already had-and that it sounded like there were fans operated within-consistent with a grow operation. Given that Deputy Paz had already obtained the critical odor detection evidence separately and from a lawful location before and after he unlawfully obtained this limited information, this court can conclude the search warrant was lawfully authorized. Particularly, where the stipulated findings of fact demonstrate Paz did not unlawfully exploit the illegality to obtain the independent information that supports the warrant. The trial

court did not abuse its discretion denying Hovander's suppression motion on this basis.

c. The trial court did not err denying Hovander's motion to suppress electrical consumption record related to the milk parlor.

Next, Hovander maintains the trial court should have suppressed power records for the milk parlor released by Puget Sound Energy. Br. of App. at 45.

Hovander contends that privately owned power records should be considered similarly to bank records pursuant to State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007). The Washington state court however, when given the opportunity to do so, has declined to hold that there is a privacy interest in power records. In re Maxfield, 133 Wn.2d 332, 945 P.2d 196 (1997). Moreover, to the extent Hovander relied on RCW 46.52.330, such reliance is misplaced. RCW 46.52.330 as part of the Public Records Disclosure Act restricts the manner in which law enforcement may access publicly held information. The power records obtained in this case were held privately by Puget Sound Energy. Therefore, this statute does not apply to the records of private utility companies. State v. Weller, 76 Wn.App. 165, 884 P.2d 610 (1994). Hovander's argument should be rejected.

d. The trial court appropriately denied Hovander's request to suppress search warrant evidence based on U.S. v. Kynatston and the 2011 amendments to RCW 69.51A.040.

Next, Hovander asserts that in order for the search warrant to be upheld, the State has the burden to "show probable cause that the target is an illegal marijuana grow" pursuant to the 2011 amendments to RCW 69.51A.040 and the nonbinding decision in U.S. v. Kynaston. Br. of App. at 47. Hovander argues that because the State did not demonstrate that the milk parlor was not growing medical marijuana, the search warrant is defective. Id. Hovander's reasoning is flawed and should be rejected. Moreover, Hovander did not make this argument below. See, concession Br. of App. at 50. Instead, Hovander asserted below that the warrant should have been suppressed pursuant to Kynatson because Deputy Paz should have told the magistrate that he believed, albeit mistakenly, that the milk parlor had been the subject of a limited medical marijuana grow investigation in 2010. CP 181-183. This Court should decline to review this issue pursuant to RAP 2.5(a)(3) when Hovander fails to demonstrate or sufficiently argue this issue is manifest and of constitutional dimensions.

Even if reviewed, Hovander's argument should be rejected. Hovander's decriminalization argument is based on an incomplete, misleading citation of RCW 69.51A.040 that ignores the fact that the proposed legislation expressly predicated arrest immunity on registration with a government entity, which was rendered legally impossible because the Governor vetoed portions of the 2011 legislative amendments related to that registry.

In 2011, the legislature attempted to create a medical marijuana industry with tight state regulation and control from the point of manufacture to the point of end consumption. With E2SSB 5073 sections 401 and 901, the legislature attempted to create immunity from arrest and prosecution for a narrow class of qualifying patients who opted into a medical marijuana registry to be maintained by the Department of Health. However, the Governor vetoed section 901, so no such registry was created, but the registration requirements for immunity under 69.51A.040 were not vetoed, and still exist. It is thus not legally possible to comply with either 69.51A.040(2) or (3), and the immunity tied to the legislature's registry under 69.51A.040 is an impossibility. Portions of E2SSB 5073 sec. 401 escaped the partial veto, and were codified in current RCW 69.51A.040, which still contains the registration requirements necessary

for medical marijuana users to enjoy immunity. (The complete text of RCW 69.51A.040 is referenced in App. D at p. 3.) The legislative language Hovander relies on from the beginning of 69.51A.040 is an artifact of the legislative/partial veto process.

RCW 69.51A.040 states that persons *in compliance with the terms and conditions* of Chapter 69.51A RCW may not be arrested or prosecuted *if* they are a qualified individual or designated provider, and *if* they satisfy *all* of the other enumerated conditions of the act. *See*, HJS Dev., Inc. v. Pierce County, 148 Wn.2d 451, 61 P.3d 1141 (2003) (statutory phrases separated by the word "and" are construed to be conjunctive). Thus, in addition to the other listed requirements, individuals seeking the immunity from arrest and prosecution created by 69.51A.040 must: "present proof of registration with the Department of Health, to any peace officer who questions the patient or provider regarding his or her medical use of cannabis;" *and* keep "a copy of proof of registration with the registry established in *section 901 of this act...next to any cannabis plants, cannabis products, or useable cannabis located at his or her residence."

Thus, even if the original E2SSB 5073 had been enacted as drafted, Hovander's claim of blanket "decriminalization" for all medical marijuana users would be incorrect. The bill would have created a system where

qualified patients who opted into the registry and were otherwise compliant with all the terms of the act would be immune from arrest ***if*** they could show proof of registration with the registry under section 901. If unable to do so, they would then have to assert one of the affirmative defenses detailed in sections 402 and 406. See E2SSB 5073.

However, the Governor vetoed Section 901 of the act that created the registry. The practical effect of the Governor's veto is that qualifying patients must now default to the protection *from conviction* provided in RCW 69.51A.043 and 69.51A.047. This was articulated by the Governor in her Veto Message[2]:

> I am not vetoing Sections 402 (ultimately codified as 69.51A.043 RCW) or 406 (ultimately codified as 69.51A.047 RCW), which establish affirmative defenses for a qualifying patient or designated provider who is not registered with the registry established in section 901. Because these sections govern those who have not registered, this section is meaningful even though section 901 has been vetoed. See Governor's Partial Veto Message (April 29, 2011).

The Legislature acknowledged this in its Final Bill Report:

> Qualifying patients may assert an affirmative defense, whether or not the patient possesses valid documentation, if the patient possesses no more than the permissible levels of cannabis, the patient exceeds the permissible levels of cannabis but is able to establish a medical need for the

[2] The Governor's Veto message is part of legislative intent. State Department of Ecology v. Theodoratus, 135 Wn.2d 582, 957 P.2d 1241 (1998).

> additional amounts; and an investigating peace officer does not possess evidence of an unlicensed cannabis operation, theft of electrical power, illegal drugs, frequent visits consistent with commercial activity, violent crime, or that the subject of the investigation has an outstanding warrant...
>
> ...The Governor vetoed provisions that would establish a patient registry within the Department of Health (DOH) and provide arrest protection for those patients who register. See Final Bill Report, 2-3.

As such, at the time of the search warrant application in the instant case, any possession, sale, delivery, etc. of marijuana constituted a violation of Washington law, subject to the affirmative defenses enumerated in 69.51A RCW. Moreover, the potential existence of a medical marijuana affirmative defense-or that a limited medical marijuana grow is not criminal does not negate probable cause in this case where the building was large-and the odor detected from a distance away inferring a large commercial operation, notwithstanding the 2011 Amendments. State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010).

Moreover, due to the vetoed portions of the bill, there is no registry for investigators to confirm one way or another whether an individual is growing marijuana legally or not. In this case, Deputy Paz did try to look into the 2010 medical marijuana investigation he was vaguely aware of and was unable to find accurate information that was relevant to provide the magistrate when he sought the search warrant that subsequently

revealed Hovander was operating an illegal large marijuana grow operation in the milk parlor. Kynaston is not controlling and its reasoning, to the extent relied upon by Hovander, should not be adopted to require law enforcement to obtain unavailable information before seeking a search warrant that is intended to be predicated on probabilities of criminal activities.

2. A Franks hearing was not warranted where the unchallenged findings of fact demonstrate there is insufficient evidence that Deputy Paz intentionally or with reckless disregard made a false material misstatement or omission in the search warrant application.

A defendant is entitled to a Franks hearing if he makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in applying for a warrant, and if the allegedly false statement or omission is necessary to the finding of probable cause. State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992), *citing* Franks v. Delaware, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978), *see also*, State v. Chenoweth, 160 Wn.2d at 484. There must be allegations of *deliberate omissions* or a *reckless disregard for the truth.* Allegations of negligence or innocent mistake are insufficient. State v. Garrison, 118 Wn.2d at 872.

If the defendant fails to meet this threshold the inquiry ends. Id., State v. Chenoweth, 160 Wn.2d 454, 158 P.3d 595 (2007).

If the defendant makes this showing, then the next question is whether the facts allegedly intentionally or recklessly misstated or omitted were material or relevant to the magistrate's determination. State v. Taylor, 74 Wn.App. 11, 115, 872 P.2d 53 (1994). In determining materiality, the "challenged information must be necessary to the finding of probable cause." State v. Garrison, 118 Wn.2d at 874. It is not enough to say that the information tends to negate probable cause. Id. Typically, if an omission was made knowingly or intentionally or with reckless disregard for truth, the court will add the information and retest the affidavit in support of the application for probable cause. Id.

In Franks v. Delaware, the court explained the purpose behind the Franks test:

> When the Fourth Amendment demands a factual showing sufficient to comprise "probable cause", the obvious assumption is that there will be a *truthful* showing. This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it has to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Franks, 438 U.S. at 165. This test prevents investigating officers from manipulating the warrant hearing, not to guarantee factually perfect warrant applications. State v. Thetford, 109 Wn.2d 392, 399, 745 P.2d 496 (1987). The independent requirement of intentionality/reckless prong acknowledges that a criminal case is not jeopardized when investigating officer's make innocent or even negligent mistakes in the rush to obtain the warrant.

A trial court's conclusion that the affiant did not recklessly omit material facts in obtaining a search warrant would be upheld where such determination is not clearly erroneous. Chenoweth at 484.

> The trial court found no actual deliberation no effort to omit material information by [the investigating detective] or obvious reasons to doubt his veracity in making the affidavit. The trial court's finding on whether the affiant deliberately excluded material facts is a factual determination, upheld unless clearly erroneous. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(*citing*, In re Welfare of Sego, 82 Wn.2d 736, 513 P.2d 831 (1973).

State v. Clark, 143 Wn.2d 731, 752, 24 P.3d 1006 (2001).

Hovander asserts a Franks hearing was warranted below based on his allegations that Deputy Paz intentionally or recklessly failed to disclose to the magistrate that he was 376 feet away from the Hovander milk parlor when he detected the odor of growing marijuana from the roadway, that he intentionally stated that the closest alternative source of the marijuana odor

was much farther north of the milk parlor when the Hovander home was 197 feet away and because, he allegedly intentionally did not tell the issuing magistrate that he *erroneously* believed the Hovander milk parlor was the site of a medical marijuana grow operation investigation in 2010.

First, with respect to Hovander's contention Deputy Paz intentionally omitted erroneous information that the milk parlor had been the subject of a medical marijuana grow investigation in 2010, the trial court concluded that this information did not invalidate the warrant because this information was inaccurate, limited–and therefore immaterial-since 2010 Deputies Roosma and Walker investigated a medical marijuana grow operation at the Hovander home at 5608 Olson road, not at the Hovander milk parlor. The trial court also concluded the facts demonstrating the odor was coming from the milk parlor, not the Hovander home based on the direction of the wind. Therefore, this previous medical marijuana investigation information, even if accurately known to Deputy Paz and disclosed to the magistrate, would not have any impact-was not material to the issuance of the search warrant for the milk parlor at the Hovander farm.

Moreover, Deputy Paz had limited erroneous information of this investigation because, despite efforts, he was unable to verify details of the

prior 2010 investigation even after talking to Deputy Walker, reading a brief report and finding nothing else in available data basis. Therefore, instead of providing incomplete or inaccurate information, Deputy Paz focused on providing relevant confirmed information he obtained during his current investigation demonstrating the basis for issuing a search warrant of the milk parlor. Thus, Deputy Paz alleged failure to alert the magistrate, with such limited erroneous information, supports the trial court's conclusions that Deputy Paz did not intentionally or recklessly misstate or omit facts material to the issuance of the search warrant. Nothing in the trial court's findings demonstrates the trial court's conclusions are clearly erroneous.

Hovander contends that while trial court's conclusion is supported by State v. Fry, 168 Wn.2d 1, 228 P.3d 1 (2010) wherein the court determined the State did not have to present evidence that the target of the search claimed to be growing medical marijuana legally, Fry's analysis is questionable in light of the 2011 amendments to the Medical Use of Cannabis Act. Hovander asserts this Court should remand for reconsideration in the trial court as to whether Deputy Paz intentionally or recklessly omitted a material fact, in light of the 2011 amendments, pursuant to Fry, by failing to inform the issuing magistrate Hovander had

previously been investigated for a medical marijuana grow operation in his home. Br. of App. at 43. Hovander fails however to cite or provide any authority for his request. Therefore, this Court should decline further review of this issue. State v. Christensen, 40 Wn.App. 290, 297, 698 P.2d 1069, *review denied*, 104 Wn.2d 1003 (1985) (failure to cite to relevant authority waives review).

Next, Hovander asserts the trial court erred finding Deputy Paz intentionally or with reckless disregard for the truth failed to disclose that he was 376 feet away from the milk parlor when he detected the odor of growing marijuana from Olson road. Br. of App. at 45. Specifically, Hovander contends Paz was " deceptive" when he responded to the inquiry regarding how far away he was from the milk parlor when he detected the marijuana grow odor. Paz testified in the warrant application:

> The milk parlor and the office are fairly close to Olson road. And there is a row of fairly large trees separating the property and Olson road. On the southwest portion of the property, there is basically a tree missing and I stood there on the county right away, on the eastern side of the road, I stood there probably about a half hour, I stood there in that particular location and about 20 minutes into it I could smell, when the wind started actually blowing, I could actually smell the fresh odor of marijuana.

Supp CP__ (addendum to first search warrant application, October 12 at 11:30 am at p. 3), see also, Br. of App. Appendix 2.

Deputy Paz' response, in addition to his earlier statement to the magistrate wherein he informed him that he was standing in the 5200 block of Olson roadway when he detected the growing marijuana odor reflect no deception on behalf of this officer when he provided information to the magistrate. Id. Particularly when the magistrate knew the milk parlor was within that block and that it was in a rural area. See also, CP 138-142, regarding unchallenged findings of fact, see also, Supp CP __ (Plaintiff's exhibit 1). Thus, a 376 foot distance would be within the realm of plausible distances based on this information. There is no legal requirement that the exact distance from the road the building be included in the warrant application. It is enough that Deputy Paz informed the magistrate where he was on at least two occasions and did not intentionally materially mislead or misstate his location. At the suppression hearing, Deputy Paz clarified that he misspoke to the magistrate that he had been in the same location on the multiple occasions wherein he detected the odor of growing marijuana and that he had in fact, been in different locations on Olson road-but this distinction does not evidence deliberate material misstatement. Moreover, it does not otherwise negate probable cause.

Finally, Hovander contends the trial court was clearly erroneous because Deputy Paz intentionally misstated that the next nearest building to the milk parlor was much farther north when the Hovander residence was 197 feet away. Br. of App. at 44. While the trial court did not make any conclusions regarding Hovander's current claim that Deputy Paz intentionally or recklessly omitted this alleged material information, the unchallenged record on appeal demonstrates the fact that the Hovander residence was further downwind from where Paz was standing when he smelled growing marijuana and therefore this alleged omission was not material. Moreover, the unchallenged record does not evidence deputy Paz' failure to explain this to the magistrate was reckless or intentional. Simply put, that fact was not relevant to the magistrate's determination of probable cause because the unchallenged findings of fact demonstrate that the milk parlor was the first building in the direction the wind was coming from when the marijuana odor was detected. Therefore, the fact that the Hovander home was technically closer, given the wind direction and location the deputy, this information was not intentionally omitted, it was omitted because it was irrelevant and immaterial to the magistrates finding of probable cause.

Nothing in the unchallenged record establishes that Deputy Paz deliberately or with reckless disregard sought to mislead the magistrate as to his location, his training or his observations. To the contrary, Deputy Paz informed the magistrate that he detected the obvious odor of marijuana at separate times from the Olson roadway, explained where he was when he detected the odor of growing marijuana, described the area and his training and expertise in marijuana grow operations. The trial court found the milking parlor, 376 feet away, was the first building in the direction of the blowing wind and Deputy Paz, and based on Deputy Paz' training and experience, it was reasonable for the court to determine deputy Paz was able to detect growing marijuana. The trial court's conclusion that deputy Paz did not intentionally misstate or omit these alleged material facts to the magistrate was not clearly erroneous.

C. CONCLUSION

The State respectfully requests that this Court affirm Hovander's conviction for unlawful possession of a controlled substance.

Respectfully submitted this 23rd day of August 2013.

Helen A Thomas for #22007

Kimberly Thulin, WSBA#21210
Senior Appellate Deputy Prosecutor
Attorney for Respondent
Admin. No. 91075

CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel, William Johnston, addressed as follows:

WILLIAM JOHNSTON
Attorney at Law
PO Box 953
Bellingham, WA 98225-0953

Sydney A. Koss
Legal Assistant

08/23/2013
Date