FILED
SEPTEMBER 16, 2014
Court of Appeals
Division III
State of Washington

No. 32306-4-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

SERVANDO ALONSO FLORES,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John D. Knodell, Suppression Motion Judge
Honorable Evan E. Sperline, Trial Judge

BRIEF OF APPELLANT

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2. The trial court erred in concluding,

> But after controlled buys on June 7 and June 11, 2013, officers observed the seller returning directly to the trailer. These observations are sufficient to establish probable cause to search the trailer. *See United States v. El-Alamin*, 574 F.3d 915 (8th Cir. 2009).

Letter Ruling dated November 15, 2013, at CP 66.

3. The trial court erred in denying the motion to suppress the search warrant for 16528 NW Road 1, Quincy, WA and the subsequent search warrant for a red 1990 Chevy K1 pickup.

4. There was insufficient evidence to sustain the conviction of manufacturing marijuana.

Issues Pertaining to Assignments of Error

1. Was there lack of probable cause to issue the search warrant for the 16528 NW Road 1, Quincy, WA property because the supporting affidavit contained no facts to indicate the criminal activity was connected with this address?

2. In the absence of any evidence the defendant participated in its production, is evidence that someone was growing marijuana in a chicken

coop outside a trailer insufficient to support the defendant's conviction for manufacturing marijuana and in violation of his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment?

B. STATEMENT OF THE CASE

Servando Alonso Flores was found guilty by a jury of possession of methamphetamine with intent to deliver with a school zone enhancement, manufacture of marijuana and possession of methamphetamine. CP 121. The charges arose from law enforcement execution of a search warrant at 16528 NW Road 1, Quincy, WA. CP 4–12.

Several months prior to trial, defense counsel moved under CrR 3.6 to suppress evidence obtained during searches of the person of Flores, the person of his co-defendant [Vianey Villa Ambriz, hereinafter "Villa"], the residence located at 16528 NW Road 1, Quincy, WA [hereinafter "trailer"],[1] and the subsequent search of the red 1990 Chevy K1 pickup[2] in

[1] This search warrant was issued on June 12, 2013, by Chelan County Judge Lesley A. Allan. Copies of the affidavit for search warrant, search warrant and search warrant inventory and return are attached as Exhibit A to defense counsel's memorandum in support of suppression motion at CP 29–49.

[2] This search warrant was issued on June 17, 2013, by a Grant County judge. Copies of the affidavit for search warrant, search warrant and search warrant inventory and return

which Flores was traveling. CP 21–22. Counsel asserted there was lack of probable cause to issue the initial search warrant because the confidential informant [hereinafter "CI"] merely provided unsubstantiated information to police and the facts alleged in the affidavit did not establish a nexus between Flores, Villa or the trailer to drugs sold by someone else to the CI at a location other than the trailer. CP 23–28. The State did not file any briefing. 10/23/14 RP[3] 3.

The Honorable John D. Knodell heard argument on the suppression motion (10/23/130 RP 2–17) and later issued the court's letter ruling. CP 65–66. The court summarized the lengthy affidavit, noting that "members of the Columbia River Task Force (hereinafter CRTF] used a confidential informant with no prior history of cooperation with law enforcement to make a series of controlled buys with a number of people in both Chelan and Grant counties. *CRTF made none of the controlled buys with either [Flores or Villa] or at the [trailer]*." CP 65 (emphasis added). It further noted "[t]he informant's observation of [Flores] in

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are attached as Exhibit B to defense counsel's memorandum in support of suppression motion at CP 51–59.

[3] The trial proceedings are contained in four volumes with pages numbered sequentially and will be cited to as "RP __". The suppression motion and sentencing hearings will be cited to by date, e.g. "10/23/13 RP __".

possession of drugs, particularly in an amount consistent with personal use, at one location, even if taken at face value, is not probable cause to search [Flores] at another location several weeks later." CP 66. The court granted the motion to suppress evidence seized from the persons[4] of Flores and Villa. CP 65–66.

The court denied the motion to suppress evidence seized from the trailer. The court first noted the "[CI] also reports seeing [Villa] trafficking methamphetamine in the trailer for over a year" and concluded "[t]his conclusory statement by one with no track record of reliability is insufficient to establish probable cause." The court continued:

> But after controlled buys [not involving Flores or Villa] on June 7 and June 11, 2013, officers observed the seller returning directly to the trailer. These observations are sufficient to establish probable cause to search the trailer. *See United States v. El-Alamin*, 574 F.3d 915 (8th Cir. 2009). [Comment added by undersigned counsel]

CP 66. Upon reconsideration and the State's provision of a signed copy of the June 12, 2013 affidavit for search warrant, the court amended its earlier ruling the warrant was not supported by probable cause on the basis of lack of a sworn statement. The court re-affirmed its substantive rulings on the suppression motion. 12/3/13 RP 17–19; 12/4/13 RP 23–37; CP 66.

[4] During the search of Flores, police found a small baggie containing crystal meth and $243. CP 49. On Villa, police found $130. CP 48.

Defense counsel renewed his motion to suppress evidence found in the search of the trailer prior to trial, which was presided over by the Honorable Evan E. Sperline. 2/12/14 RP 58–59. At trial the following evidence was presented.

On June 12, 2013, law enforcement officers served a search warrant at 16528 NW Road 1, Quincy, Grant County, Washington. RP 74–76, 275–76, 301, 322, 416–18, 465–66. No one was found inside the two-bedroom, two-bath, single-wide mobile home. RP 302–03, 419. The locked door to the first bedroom was kicked open during the security clearance. RP 420–23. Inside police found an unemployment stub bearing Flores' name on the bed and prescription bottles bearing his name on a closet shelf. RP 114–18, 424–25, 481. No other "dominion and control" documents were found in the house. RP 234–35. Police also found in the closet a plastic bin containing a digital scale with a white powdery substance on it beneath some clothing items, a package containing 22 grams of crystal methamphetamine inside a toy stuffed duck puppet lying on top of the bin, and a paper with a few numbers jotted on it inside a small safe. RP 124–26, 137–41, 385–87, 470, 473–75, 477–80. In police experience, drug dealers often keep ledgers/notes on their business transactions. RP 124–26. They found a smaller scale with traces of white

powdery substance on it on a shelf in the bathroom. RP 425–27, 470. A single empty plastic baggie was found on the bed. RP 119–20, 433.

In the second bedroom police found some money transfer receipts. They found a bag of root starter material for plants. In the closet was a wooden table and what appeared to be a grow light. RP 102, 348–49.

In the hallway police found some plastic starter plant trays. They saw a few empty strands of twine draped across a portion of the living room ceiling and a bag of chicken feed. In police experience, people will run a string in this manner to dry marijuana. RP 82–85.

In the kitchen police found Villa's name on a title for a 1990 Chevy K1 pickup. RP 351–52. They found coffee filters but no coffee pot. RP 150–51, 332–33. Police also found a container of MSM, a container of inositol powder and a jug of acetone. In police experience, MSM can be used not only for health or animal husbandry purposes but also as a cutting agent to combine with cocaine or meth to increase its volume in order to make a profit, and coffee filters are often used to strain out by-products or in the filtering process. RP 109–10, 150–51, 332–41, 360–61. They found some liquid plant fertilizer which in police experience is often used in the growing of marijuana. RP 149–50.

Police found no evidence in the house of personal usage of drugs such as needles, smoking devices or straws. RP 143, 304–05, 353–54, 483.

Outside the trailer police saw a number of animal pens and chicken coops and evidence there were yard animals around. RP 240–41, 324. In one covered coop police discovered 49 marijuana starter plants approximately six to twelve inches tall and in containers that looked larger than those trays found in the hallway of the trailer. RP 312–15, 324, 432–33.

While police were executing the search of the trailer, Villa with Flores as his passenger drove into the driveway in an older truck later identified as a red 1990 Chevy K1 pickup.[5] RP 343–44. The officers who came outside immediately recognized Flores and Villa as the two men for whom they had search warrants. As they approached the car, the officers saw two marijuana plants near Flores' feet. RP 344–46, 371, 427–28. Defense counsel did not object to one witness' characterization of the type of plant as violating the ruling on the suppression motion. Over defense objection as being in conflict with Judge Knodell's prior ruling on the

[5] The title to this truck is the title found in the kitchen (CP 47) and the truck is the subject of the subsequent search warrant obtained by police and executed on June 17, 2014 while the truck was held in impound after the arrest of Flores and Villa. CP 51–59. In the suppression motion defense counsel also sought to suppress this search as obtained through the illegal search of the trailer. CP 21–28.

suppression motion, a second officer was allowed to testify the two plants observed at Flores' feet were similar in size and appearance to the marijuana plants discovered in the chicken coop. RP 167–69, 295–99, 428.

Flores and Villa were arrested as a result of the search of the trailer. RP 171.

Flores timely filed this appeal. CP 140–41.

C. ARGUMENT

1. There was no probable cause to issue the search warrant for the 16528 NW Road 1, Quincy, Washington, property because the supporting affidavit contained no facts to indicate the criminal activity was connected with this address.

A search warrant may issue only upon a determination of probable cause. *State* v. *Cole,* 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An application for a warrant must state the underlying facts and circumstances on which it is based to facilitate a detached and independent evaluation of the evidence by the issuing magistrate. *State* v. *Smith,* 93 Wn.2d 329, 352, 610 P.2d 869 (1980). The affidavit in support of the search warrant must adequately show circumstances that extend beyond suspicion and mere personal belief that evidence of a crime will be found on the premises to

be searched. *State* v. *Klinger*, 96 Wn. App. 619, 624, 980 P.2d 282 (1999) (citing *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)).

Probable cause requires not only a nexus between criminal activity and the item to be seized but also a nexus between the item to be seized and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." *Id.* at 147.

A trial court ruling on the probable cause to support a magistrate's warrant sits in an appellate-like capacity, with its review limited to the four corners of the affidavit supporting probable cause. *State* v. *Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Although deference is given to the magistrate's determination, the assessment of probable cause is a legal conclusion. *State* v. *Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).

In this case, Judge Knodell properly determined the affidavit for search warrant failed to establish probable cause to search the persons of Flores and Villa where the facts showed none of the controlled buys arranged by the Columbia River Task Force (CRTF) involved Flores or Villa or occurred at the trailer location and the CI had no track record of reliability to support the unproven claims he made.

However, the issuing court improperly granted and Judge Knodell improperly upheld the search warrant permitting law enforcement officers to search the trailer. The deficiency in the affidavit as to search of Flores' and Villa's persons applies equally to search of the trailer -- none of the controlled buys arranged by CRTF involved Flores or Villa or occurred at the trailer location and the CI had no track record of reliability to support the unproven claims he made. While the CI claimed that drug sales/transaction s involving the trailer occurred in the past, law enforcement set forth no recent facts corroborating that such events ever occurred. It is also suspect that the CI boasted to law enforcement he had purchased in the past from either Flores, Villa or at the trailer on a daily basis for the prior year and a half, yet he was unable to complete any controlled buys/transactions from these sources or at the trailer after becoming a CI.

More importantly, the affidavit for search warrant failed to establish a nexus between criminal activity and the items to be seized and the items to be seized and the place to be searched. The criminal activity—selling drugs to the CI—occurred near a Shell gasoline station and not at the trailer. The controlled buy did not involve Flores or Villa or anyone who had recently been at the trailer.

Judge Knodell upheld the warrant as to the trailer because after the two most recent controlled buys, the "seller return[ed] directly" to the trailer:

> But after controlled buys [not involving Flores or Villa] on June 7 and June 11, 2013, officers observed the seller returning directly to the trailer. These observations are sufficient to establish probable cause to search the trailer. *See United States v. El-Alamin*, 574 F.3d 915 (8th Cir. 2009). [Comment added by undersigned counsel]

CP 66.

The court's use of the singular "seller" is misleading. The CI identified Gordo as the seller for the June 7 transaction and a male named Pena as the driver of the gray Ford pickup, WA license B27875U, in which the seller arrived.[6] He identified Pena, who was again driving the gray Ford pickup, as the seller for the June 11 transaction.[7] The CI identified two sellers.

The court's choice of the phrase "return[ed] directly" is similarly misrepresentative of the facts. Returning directly to some place implies one has been at a location, departed from it and then arrived back at the location. According to the affidavit Gordo and Pena or his truck were not mentioned as being seen at the trailer by the CI in the third week of May

[6] CP 39 at ¶ ¶ 5, 6.
[7] CP 41 at ¶ 3.

2013[8], the CI hadn't been at the trailer for several months prior to that time[9], and the CI last saw Gordo at the trailer in early 2013.[10] Law enforcement officers who drove by the trailer on their way to monitor these two controlled buys saw only an inoperable silver sedan in the driveway (June 7) and a red Chevrolet pickup and two white compact carts in front (June 11).[11] The evidence in the affidavit does not establish either seller was at the trailer before the controlled buy or left and then returned to the trailer at any time relative to the controlled buys.

The court's reliance on *United States v. El-Alamin*, 574 F.3d 915 (8th Cir. 2009) is unfounded. In *El-Alamin*, the court determined an affidavit was sufficient to establish probable cause where it provided enough facts "to determine that the stated location was El–Alamin's residence, that he went immediately to that residence following a controlled buy and, therefore, contraband in the form of drug proceeds might be found there, and that such transactions had occurred there in the past." El–Alamin also argues that information learned from the CRI [confidential reliable informant] should only be given 'slight' weight because the affidavit did not provide information about the confidential

[8] CP 37 at ¶ 4–6.
[9] CP 38 at first full paragraph.
[10] CP 34 at ¶ 5.
[11] CP 38 at ¶ 7, 40 at ¶ 3.

informant's reliability or criminal history. The affidavit, however, provided indicia of the CRI's reliability by explaining how the CRI's knowledge of El–Alamin's telephone number was corroborated and led to a successful controlled buy" *El-Alamin*, 574 F.3d at 924 [explanation added]. Here, unlike in *El-Alamin*, the trailer was not Gordo's or Pena's residence nor had any past drug sales by them or other sellers been made from within the residence and the affidavit establishes the CI's unreliability. Reliance upon *El-Alamin* is unwarranted

Judge Knodell cited to *El-Alamin* because he "could not find a case from the State of Washington that was on point" regarding whether police observations of a seller going to the trailer directly after the June 7 and June 11 controlled buys was sufficient to establish probable cause. 12/14/13 RP 32. As discussed in the preceding paragraph, the *El-Alamin* decision is not helpful to the court's erroneous conclusion that probable cause existed to issue a search warrant for the trailer in this case.

A 2006 decision of this Court is instructive. In *State v. G.M.V.*, 135 Wn. App. 366, 144 P.3d 358 (2006), *review denied* 160 Wn.2d 1024, 163 P.3d 794 (2007), the defendant's boyfriend stayed at her house several days a week, but he did not live there. A confidential informant working with the police, arranged to buy marijuana from the boyfriend on two

occasions. The first time, the boyfriend left G.M.V.'s house to meet the informant and then returned to the house after the sale. The second time, the boyfriend came from a different location but again returned to G.M.V.'s house after the sale. Based on this information, the police obtained a warrant to search G.M.V.'s house and discovered marijuana. G.M.V. was convicted of possession of marijuana.

On appeal, G.M.V. alleged her lawyer had been ineffective because he did not challenge the warrant. She contended that had he done so, the challenge would have been successful because there was no nexus between her boyfriend's drug dealing and her parent's house. Relying on *Thein,* she argued the warrant was based only on generalized notions of the supposed practices of drug dealers. This court affirmed her conviction because "the affidavit supporting this warrant did not rely on generalized beliefs about the habits of drug dealers as in *Thein.* The warrant was to search the place [the boyfriend] left from *and* returned to before *and* after he sold drugs. This was a nexus that established probable cause that [the boyfriend] had drugs in the house." *G.M.V.,* 135 Wn. App. at 372 (emphasis added).

G.M.V. focused on the fact that, at least on one occasion, the suspect was seen going directly from the residence to a controlled buy and

back again. Thus, there was no other place from which he could have obtained the drugs sold other than the house. This evidence in addition to the fact the suspect regularly stayed at the house was sufficient to infer that additional drugs would likely be found inside. By contrast, in this case, there was no evidence in the affidavit that Gordo or Pena resided at the trailer or had recently been there before the controlled buys. The affidavit indicates Gordo had not been observed at the trailer since early 2013 and neither Pena nor the vehicle associated with him was observed at the trailer prior to the June 7 and June 11 controlled buys. Unlike in *G.M.V.* and *El-Alamin*, the sellers had not left from the trailer before they sold drugs and did not return to the trailer after they sold drugs. Simply going to the trailer directly after the June 7 and June 11 controlled buys was insufficient to establish probable cause.

Here, the affidavit for search warrant failed to establish a nexus between the criminal activity and the trailer. Absent a specific factual basis to believe that evidence of criminal activity could be found in the trailer, the application is insufficient to support probable cause as a matter of law. *Thein* at 147.

All evidence obtained directly or indirectly through the exploitation of an illegal search including a suspect's post arrest statements must be suppressed. *Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 413, 9 L.Ed.2d 441 (1963); *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); *State v. Avila-Avina*, 99 Wn. App. 9, 13–14, 991 P.2d 720 (2000) ("When police obtain physical evidence or a defendant's confession as the direct result of an unlawful seizure, the evidence is ' tainted' by the illegality and must be excluded. "), *abrogated by State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009). Even a voluntary statement must be suppressed if it is the product of illegal police intrusion, inextricably bound up with the illegal conduct. *Florida v. Royer*, 460 U.S. 491, 501, 75 L.Ed. 2d 229, 103 S. Ct. 1319 (1983).

The' search of the trailer was an unlawful and illegal search. All fruits of the search including items seized from the trailer and the subsequent search of the red 1990 Chevy KI pickup and observations of marijuana plants in the car made during the search and statements made to police should be suppressed. Without the illegally obtained evidence, the evidence is insufficient to support the convictions and they must be reversed.

2. The State failed to present evidence Flores was manufacturing marijuana.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id*. "Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the

requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the state, could have found the elements of the crime charged beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d 418, 421–22, 894 P.2d 403 (1995).

To convict Flores of the crime of manufacture of a controlled substance, the State had to prove (1) he manufactured marijuana, (2) he knew the substance manufactured was marijuana, and (3) this act occurred in the State of Washington. RCW 69.50.401(2)(c); CP 105; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.11 (3d Ed).

"Manufacture" is defined as "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance … and includes any packaging or repackaging of the substance or labeling or relabeling of its container." RCW 69.50.101(s). "Production" includes the "manufacturing, planting, cultivating, growing, or harvesting of a controlled substance." RCW 69.50.101(gg).

In *State v. Olson*, a marijuana grow was discovered in a brick building on property on which Olson owned a mobile home. Agents

conducting surveillance observed him visiting the property two times. On one occasion, Olson went to the brick building, procured a key from underneath a container and used the key to open a padlock on the door to the brick building. He entered the building and remained inside for 30 minutes. Olsen's fingerprints were found on several items connected to the grow operation inside the building. The court found this evidence sufficient to establish Olson knowingly participated in the grow operation in the brick building. 73 Wn. App. 348, 358-59, 869 P.2d 110 (1994).

Here, the State's evidence shows police officers found 49 marijuana plants in one of several chicken coops located outside a trailer. Inside the trailer police found a few strands of twine draped from a ceiling, some plastic starter plant trays and liquid fertilizer. The evidence shows Flores rented a room in the trailer[12], the room contained two scales with unidentified white powder on them, and Flores arrived in a car with two plants similar in appearance to marijuana plants at his feet while police were executing a search warrant of the trailer. The State did not present evidence Flores had previously been seen inside the trailer or on the real property or that he possessed a key to the trailer. The State did not present evidence Flores' fingerprints were found in the coop or on the twine,

[12] RP 446.

planting trays or container of fertilizer, or that he knew what was in the chicken coop.

No rational trier of fact could find Flores was engaged in the manufacture of marijuana based on his unobserved presence in a trailer outside of which someone was growing marijuana in a chicken coop. Unlike in *Olson*, there was no evidence Flores ever went near the chicken coop, no evidence he ever touched anything related to the growing of marijuana, and no evidence he watered, planted, harvested or did anything else to "propagate" the marijuana. Although the facts potentially support other crimes, Flores was not charged with possession of marijuana or possession of marijuana with intent to deliver. In the absence of any evidence he participated in the manufacture of marijuana, Flores' conviction violated due process.

D. CONCLUSION

For the reasons stated, the convictions must be reversed.

Respectfully submitted on September 16, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 16, 2014, 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:

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