33833-9-III
Consolidated with No. 33834-7-III

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

STATE OF WASHINGTON, APPELLANT

v.

MICHAEL K. HURLBURT, RESPONDENT

STATE OF WASHINGTON, APPELLANT

v .

NANCY L. ST. PIERRE-WALSH, RESPONDENT.

APPEAL FROM THE SUPERIOR COURT
OF LINCOLN COUNTY

BRIEF OF APPELLANT

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INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

FEDERAL COURT CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in finding insufficient corroboration for the anonymous informant's tip that Mr. Hurlburt had a marijuana grow operation on his property (Conclusion of Law 2).

2. The trial court erred in concluding that although a declaration in support of a search warrant established probable cause to search an outdoor marijuana grow yard (Conclusion of Law 6), there was not a sufficient nexus between the outdoor marijuana grow on Mr. Hurlburt's property and the residence and garage on the same property, belonging to him, that would also justify the search of those buildings to locate evidence of the crime of possession of marijuana with intent to deliver (Conclusions of Law 7 and 8).

3. The trial court erred in granting the defendants' motion to suppress all evidence, objects, articles and documents seized from the residence and garage pursuant to the challenged search warrant (Order 1).

4. The trial court erred in suppressing any statements made to law enforcement officers by the defendant during or after the execution of the search warrant (Order 2).

5. The trial court erred in entering Finding of Fact number 9. Additionally, this "finding of fact" mixes findings of facts and conclusions of law.

6. The trial court erred in entering Finding of Fact number 12. Additionally, "finding of fact" number 12 mixes both factual findings and legal conclusions.

7. The trial court erred in entering Finding of Fact number 13, which indicates that "officers did not find any of the property to be seized as set forth in the warrant" as officers did locate the outdoor marijuana grow, which was listed as evidence covered by the search warrant.

8. The trial court erred in entering Finding of Fact number 14. Additionally, this "finding of fact" mixes both findings of fact and conclusions of law.

II. ISSUES PRESENTED

1. Whether the trial court erred in concluding that it was unable to consider the anonymous informant's tip to law enforcement where that tip was corroborated by independent evidence of criminal activity?

2. Whether the trial court erred in concluding that the declaration in support of the search warrant was not supported by probable cause where law enforcement viewed growing marijuana plants on defendant's property and defendant had a criminal history of possessing marijuana with intent to manufacture or deliver?

III. STATEMENT OF THE CASE

Defendant Hurlburt was charged on February 9, 2015, in Lincoln County Superior Court, with one count of possession of a controlled substance, methamphetamine, and one count of unlawful possession of an explosive device. CP 1. Defendant St. Pierre-Walsh was charged on February 9, 2015, with one count of possession of a controlled substance, methamphetamine. CP 86. These charges were filed after law enforcement obtained and executed a search warrant for Mr. Hurlburt's property, including his residence and unattached garage. CP 57.

On April 29, 2014, Detective Roland Singer received information that Defendant Hurlburt had a possible marijuana grow operation on his property in Creston, Washington. CP 50. The reporting party indicated that he or she did not believe that Mr. Hurlburt possessed any authorization to have a marijuana grow on his property. CP 50.

Additionally, the reporting party told the detective that he or she believed that Defendant Hurlburt was a convicted felon and was in possession of a handgun at the residence, as the individual had seen a picture of Mr. Hurlburt kneeling in front of a dead cougar with a handgun resting on the cougar.[1] CP 50. The detective was familiar with

[1] Detective Singer subsequently contacted a Department of Fish and Wildlife officer, who determined based on the Department's records that the

Mr. Hurlburt and was aware that he was, in fact, a convicted felon. CP 50. At the time of the April report, the detective was unable to locate the photograph of the defendant with the cougar and handgun, and did not complete the investigation at that time. CP 50.

Approximately three and a half months later, on August 16, 2014, the Lincoln County Sheriff's Department received a second report from the earlier reporting party. CP 50. On that date, the reporting party provided the Sheriff's Department with the photograph depicting Mr. Hurlburt posing with the cougar and handgun. CP 50. The reporting party again reported that Mr. Hurlburt was selling live marijuana plants, and that a large amount of traffic had been traveling to and from the defendant's residence recently. CP 51. The reporting party stated the traffic is usually between midnight and two o'clock in the morning, and that the vehicles enter Mr. Hurlburt's property with their headlights turned off. CP 51.

Detective Singer then ran Mr. Hurlburt's criminal history, and determined that he had 22 felony convictions, including possession of marijuana with intent to manufacture or deliver. CP 51.

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defendant had never purchased a cougar tag or hunting license. CP 50. However, the detective was unable to locate the photograph online at that time. CP 50.

Two days later, on August 18, 2014, Detective Singer received information that Lincoln County Deputy Steadman had responded to Mr. Hurlburt's residence on an unrelated investigation on August 1, 2014 at 5:46 p.m.[2] CP 51. While conducting that investigation, Deputy Steadman observed growing marijuana plants on Mr. Hurlburt's property. CP 51. Those plants were approximately four feet tall and were located in the garden area of the property on the north side of the unattached garage. CP 51. The marijuana garden was surrounded by a short chain link fence. CP 51.[3]

Detective Singer prepared a search warrant for the defendant's residence, yard, and garage, including all of the above information for judicial review. Detective Singer's affidavit in support of the search warrant also set forth the detective's training and experience with

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[2] Deputy Steadman was apparently unaware of Detective Singer's investigation of Mr. Hurlburt. RP 22.

[3] After receiving this information from Deputy Steadman, Detective Singer testified he believed he had sufficient corroboration of the informant's tip.

> A. At that point in time when we had the information from Deputy Steadman referenced the marijuana grow, I didn't feel that the case handed [sic] off of the information from the informant at that time.
>
> Q. You felt that you had a sufficient independent investigation?
>
> A. Yes.

RP 25.

narcotics investigations. CP 49-52. The detective indicated that he received training in drug identification, and had been involved in marijuana, cocaine, and methamphetamine investigations. CP 41. He indicated that his training included, but was not limited to, the identification, manufacture, and packaging of these drugs. CP 41. The detective was trained in conspiracy investigations involving activities in complex drug cases with multiple suspects. CP 49. He was a certified marijuana leaf technician. CP 50. He received additional training and had investigated these types of cases, and had assisted other officers in the investigation of these types of cases as well. CP 50.

He indicated in the affidavit in support of the search warrant that he knows through his experience that processed marijuana[4] is never kept inside an outdoor grow enclosure that is exposed to the elements. CP 51. He also indicated that he knows through his experience that harvested plants are usually taken into buildings near the grow site to hang and dry before the usable portion is processed for consumption. CP 51-52. He indicated that he knows through his experience that it is a common practice for individuals growing mature marijuana plants outside, to have a starter room located on the property with young plants under grow

[4] The term "processed marijuana" connotes harvested marijuana and the product derived thereafter, as opposed to growing marijuana plants. *See generally*, *State v. Browne*, 181 Wn. App. 756, 327 P.3d 63 (2014).

lights, so that the grower may replenish their numbers when the mature plants are harvested. CP 51. The detective further indicated that he knows through his experience that medical records for medical marijuana grows are often kept inside a building or residence near the grow site to avoid having them destroyed by the elements. CP 51.

The affidavit in support of the search warrant sought authorization to search Mr. Hurlburt's property:

> The property located at 41840 Paradise Lane North, Creston, WA, 99147 has a legal description of PT RY 611 (PT NE) with a parcel number 2734001500052 in the County of Lincoln, State of Washington. This property is at the very end [of] Sterling Road Valley Road on Paradise Lane. There are three houses on Paradise Lane and Hurlburt lives in the third residence with an unattached garage located on the property to the southeast of the residence. The legal owner is listed as Michael K. Hurlburt.

CP 52.

The affidavit in support of the search warrant sought authorization to seize:

> (1) Any and all marijuana plants being grown on or in the premises that are in violation of the State Medical Marijuana Act.
> (2) Any and all documentation relating to any possible medical marijuana authorized patients that may possess and/or grow medical marijuana at the above listed residence.
> (3) Indication of occupancy, residency and/or ownership of the premises described in the search warrant above,

including, but not limited to, utility and telephone bills, canceled envelopes and keys.

(4) Any and all processed marijuana found that exceeds the amount allotted a patient under the state medical marijuana act to possess.

(5) Any and all firearms located on the property to include but not limited to a black semi-automatic pistol photographed in Hurlburt's possession.

(6) A cougar pelt photographed in Hurlburt's possession taken illegally.

CP 52.

The crimes identified as being investigated were "RCW 69.50.401 Possession of a Controlled Substance (Marijuana) with the Intent to Manufacture, and RCW 9.41.040 Unlawful Possession of a Firearm 2nd Degree." CP 50.

Detective Singer presented the search warrant to Lincoln County Superior Court Judge Strohmeier. Judge Strohmeier signed the search warrant on August 25, 2014, and the warrant was executed on August 26, 2014. CP 59-61. During the execution of the warrant, law enforcement located pipe bomb making material (pipes, powder and fuses) and drug paraphernalia that later tested positive for methamphetamine. CP 60. Based on that discovery, the detective requested a telephonic amendment to the search warrant in order to seize those items, and Judge Strohmeier granted the amendment. CP 59. The items were seized, CP 60, and Mr. Hurlburt was charged with possession of the bomb making materials

and possession of methamphetamine, and Ms. St. Pierre-Walsh was charged with possession of methamphetamine. CP 1, 86.

Counsel for both Mr. Hurlburt and Ms. St. Pierre-Walsh moved to suppress the fruits of the search. CP 3-18, 88-91. Mr. Hurlburt presented several arguments to the trial court supporting his motion to suppress all evidence obtained during the search and all statements made by the defendant during or after the search.[5] Of relevance here are defendant's arguments that (1) the search warrant was defective because it failed to state anything about the reliability of the informant, or the basis of the informant's knowledge; (2) the search warrant was defective because the declaration did not state when the defendant was allegedly engaged in criminal activity; and (3) the search of the detached outbuilding was invalid because the declaration contained no information that anyone observed any criminal activity inside the outbuilding and the outbuilding was not specified as a place to be searched.[6] CP 6-11.

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[5] Apparently Mr. Hurlburt made some verbal statements to law enforcement during and after the execution of the search warrant. CP 5. The motion to suppress those statements simply addressed the defendant's contention that an illegal search requires the suppression of both tangible evidence and defendant's statements. CP 10. Defendant ostensibly argued below that the suppression of all statements is required if the search warrant was unsupported by probable cause. CP 10. The court did not evaluate this argument. CP at passim.

[6] Other arguments were made by both Mr. Hurlburt and Ms. St. Pierre-Walsh, but are not at issue here, as the court did not consider or address those arguments in granting the motion to suppress. CP 11, 15, 88-91. Of note,

The trial court suppressed all evidence located inside the residence and the garage, reversing its *own* earlier decision from August 25, 2014 (when it issued the search warrant). The court concluded, in relevant part:

> An anonymous informant requires a higher degree of corroboration than a citizen informant to satisfy the credibility prong. The declaration does not provide a sufficient factual basis for the anonymous informant's statements that contraband or other evidence of illegal activity would be found at the premises described in the warrant contemporaneous with the issuance of the search warrant or that the informant was reliable. Therefore, the court did not rely on any of the informant's statements at the time of the application for the search warrant or at the time of the suppression hearing.

CP 69 (Conclusion of Law 2).

> The declaration does provide sufficient information to support a search warrant of Mr. Hurlburt's fenced yard. At the time of the application for the search warrant the deputy did not appear to have information whether Mr. Hurlburt was allowed to claim a legal grow for medical marijuana for himself or to maintain a community garden. Therefore, any such claim of a legal grow would be an affirmative defense but would not be a basis for suppression of the search of the yard.

CP 70 (Conclusion of Law 6).

> There was no information setting forth any specific facts that contraband or other evidence of illegal activity could be found inside the residence or detached garage, only the deputy's generalized observations from his previous training and law enforcement experience that processed

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however, is that none of Ms. St. Pierre-Walsh's arguments at the hearing were included in the court's findings of fact and conclusions of law, and rather her dismissal resulted from the court agreeing with Mr. Hurlburt's arguments at the motion.

> marijuana is not kept outside and open to the elements, that harvested plants are taken inside to hang and dry, and that it is common practice to have a room located on the property with young starter plants and grow lights.

CP 70 (Conclusion of Law 7).[7]

> Based on the foregoing conclusions, the declaration would be legally insufficient to establish probable cause to search the residence or garage, and the search was unlawful.

CP 70 (Conclusion of Law 8).

The court's ruling suppressed all tangible evidence and the statements made by the defendant during and after the search. CP 71, 111. The court then dismissed the cases against Mr. Hurlburt and

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[7] Detective Singer testified that his knowledge of the fact that marijuana paperwork, starter plants, and grow lights are generally kept indoors are "generalizations":

> Q. So these are just generalizations based on your knowledge, training and experience?
>
> A. You could say that, yes.
>
> Q. Did you have any information if there was any contraband inside the garage?
>
> A. Just off of previous investigations. It is usually associated with marijuana grows.
>
> Q. So the answer is no, you did not have any information that there was any illegal evidence, illegal materials inside the garage?
>
> A. That particular garage, no. Like I said and I testified to, just off of previous investigations, and how I have investigated several of these marijuana grows and nine of out ten of them, this is exactly how they work.

RP 36.

Ms. St. Pierre-Walsh, finding that the practical effect of the suppression order was to terminate the cases. CP 83, 104. The State appealed.

IV. ARGUMENT

In this case, the parties certainly agree on one thing: that the trial court erred during the proceedings below. It was the defendant's position during the pretrial motions that the trial court erred in authorizing the search of the defendant's property on August 25, 2014. It is the State's position on appeal that the trial judge erred in failing to give his own decision to authorize that search warrant due deference, and that it erred in suppressing all fruits of the search by order dated October 1, 2015, thereby effectively terminating the prosecution of these cases.

The court reviews a trial court's conclusions of law pertaining to the suppression of evidence de novo. *State v. Fry*, 168 Wn.2d 1, 5, 228 P.3d 1 (2010). The court also reviews de novo whether qualifying sworn information as a whole presents probable cause supporting a search warrant. *In Re Det. of Petersen*, 145 Wn.2d 789, 800, 42 P.3d 952 (2002); *State v. Ellis*, 178 Wn. App. 801, 327 P.3d 1247 (2014).

Search warrants may only be issued upon a determination of probable cause. U.S. CONST. amend IV; CONST. art I, § 7; CrR 2.3(c). Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in

criminal activity and that evidence of the criminal activity can be found in the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "It is only the *probability* of criminal activity, not a prima facie showing of it, that governs probable cause." *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (emphasis added).

A search warrant is entitled to a presumption of validity. *State v. Wolken*, 103 Wn.2d 823, 827-28, 700 P.2d 319 (1985). This presumption of validity stems from the court's "warrant preference."

> Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,'" … we have expressed a strong preference for warrants and declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail."

United States v. Leon, 468 U.S. 897, 913-914, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

The decision to issue a search warrant is highly discretionary and the court generally gives great deference to the magistrate's determination of probable cause, and views the supporting affidavit for a search warrant in a commonsensical manner rather than hypertechnically. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). Therefore, courts normally resolve doubts concerning the existence of probable cause in

favor of the validity of the search warrant. *State v. Vickers*, 148 Wn.2d 91, 108-109, 59 P.3d 58 (2002).

The State now agrees with the trial court's conclusion that the information provided by the informant regarding the handgun, the cougar pelt, and the photograph of the defendant with those items did not have a sufficient nexus to the defendant's residence or garage, as there was no information provided as to when or where the photograph was taken. CP 70 (Conclusion of Law 4; Conclusion of Law 5); RP 51-53.[8] Thus, this information will not be discussed further, and has only been included

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[8]

> I think I erred when I (inaudible) same time showed me the picture. I think I leaped to conclusions a little about the -- because it was so graphic and it was like okay, this is a convicted felon with a gun in his hand, but maybe four months earlier, not his property, I jumped to conclusion apparently, and I have to rectify that point.
>
> So … I have to say that that information is not sufficient.
>
> …
>
> So I initially hung my hat on the picture, which I shouldn't have. The anonymous report, I read it several times trying to find out what basis do I have to support the search warrant as to the marijuana grow when you don't know it was illegal, and it wasn't apparently illegal, so I don't think I can assume all grows are illegal and then subject to being legal, that may be an issue, I guess, for the courts.

RP 53-55.

in the factual statement above to provide this court with context as to what the trial court originally considered in authorizing the warrant.[9]

As discussed below, however, the trial court erred in failing to excise the information relating to the handgun and the cougar pelt from the warrant and evaluate the remainder of the warrant for its validity in light of the deference due to the court's initial decision to issue the warrant, and case law that was in effect at the time of the search.

A. THE TRIAL COURT ERRED IN DISMISSING THE INFORMATION PROVIDED BY THE ANONYMOUS INFORMANT AS UNRELIABLE, AND THEREFORE, DECLINING TO CONSIDER THAT INFORMATION IN ITS DETERMINATION OF PROBABLE CAUSE.

In cases involving anonymous tips, Washington courts use the *Aguilar-Spinelli*[10] test to analyze challenges to the validity of search warrants reviewed under Article 1, section 7 of the Washington

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[9] The trial court indicated in the findings of fact and conclusions of law that it relied on the photograph of Mr. Hurlburt with the gun and the cougar pelt (and the detective's description of the same) when making its original determination of probable cause; however, it did not rely "on any of the informant's statements at the time of the application for the search warrant or at the time of the suppression hearing" even though it was the informant who provided the photograph to law enforcement, as well as additional information that was corroborated by Deputy Steadman's unrelated investigation at Mr. Hurlburt's property at which time the marijuana garden was seen by law enforcement. CP 69-70.

[10] *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

Constitution.[11] *Vickers*, 148 Wn.2d at 112. In order to establish probable cause under that test for the issuance of a search warrant based upon an informant's tip, the affidavit in support of the warrant must demonstrate the informant's basis of knowledge and veracity. *Id*. The affidavit must state underlying circumstances upon which the magistrate may conclude that the informant was credible and obtained the information in a reliable manner.[12] *Id*. If either or both parts of the *Aguilar-Spinelli* test are deficient, probable cause may still be established by independent police investigation that corroborates the informant's tip "to the extent that it

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[11] The United States Supreme Court abandoned the *Aguilar-Spinelli* test in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and instead now applies the totality of the circumstances analysis in which deficiency in one of the two *Aguilar-Spinelli* factors may be mitigated in proving probable cause by a strong showing of the other factor. Recently, the Washington Supreme Court has somewhat retreated from its steadfast adherence to the *Aguilar-Spinelli* test in the case of *Terry* stops, and has instead indicated that "the appropriate constitutional analysis for a stop precipitated by an informant is a review of the reasonableness of the suspicion under the totality of the circumstances." *State v. Z.U.E.*, 183 Wn.2d 610, 620-621, 352 P.3d 796 (2015).

[12] Information showing the informant personally has seen the facts asserted and is passing on firsthand information satisfies the basis of knowledge prong. *State v. Duncan*, 81 Wn. App. 70, 912 P.2d 1090 (1996). Under the veracity prong of the *Aguilar-Spinelli* test, police must present the issuing magistrate with sufficient facts to determine either the informant's inherent credibility or reliability; this requirement is satisfied where law enforcement (1) establishes the credibility of the informant or (2) even if nothing is known about the informant, the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth. *State v. Lair*, 95 Wn.2d 706, 710, 630 P.2d 427 (1981).

cures the deficiency." *Id*; *see also*, *State v. Jackson*, 102 Wn.2d 432, 438, 688 P.2d 136 (1984).

Where, as here, the informant is an "anonymous informant"[13] the State must demonstrate that an independent investigation corroborates the tip to such an extent that it supports the missing elements. *State v. Olson*, 73 Wn. App. 348, 355, 869 P.2d 110 (1994). The investigation must "point to suspicious activities or indications of criminal activity along the lines suggested by the informant; it cannot merely corroborate innocuous facts or details." *Id*.

Here, the anonymous informant contacted Detective Singer twice, and both times told the detective he or she believed that Mr. Hurlburt was engaged in the illegal sale of marijuana plants from his residence. Then, Deputy Steadman *independently* viewed a garden of four-foot-tall growing marijuana plants at Mr. Hurlburt's residence while he was lawfully present on an unrelated investigation. This fact *alone* provides sufficient independent evidence to constitute probable cause to justify a search. *See*, *e.g.*, *Fry*, 168 Wn.2d at 7 ("A police officer would have probable cause to believe [the defendant] committed a crime when the officer smelled

[13] The State conceded, and the trial court found, that the informant, although known in name to the detective, qualified as an anonymous informant because nothing else was known about him or her. CP 27, 66, 69.

marijuana emanating from the [defendant's] residence");[14] *Olson*, 73 Wn. App. at 356 ("When an officer who is trained and experienced in marijuana detection actually detects the odor of marijuana, this by itself provides sufficient evidence to constitute probable cause").

The presence of a marijuana garden is not an "innocuous detail," but rather points to criminal activity consistent with that suggested by the informant. *See Olson*, 73 Wn. App. at 355.[15] It is illegal to grow marijuana on one's property in a manner that does not comply with state statute;[16] additionally, in some circumstances, assuming the legality of the marijuana grow operation, the defendant must produce documentation demonstrating its legality as an affirmative defense to criminal charges. *See* RCW 69.50.401; RCW 69.50.4013; RCW 69.51A.043; RCW 69.51A.045; *see also Ellis*, 178 Wn. App. 801. As discussed in *Fry*

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[14] *Fry* also held that a claimed medical marijuana authorization does not negate probable cause to search. *Fry*, 168 Wn.2d at 6. Here, officers noticed on the date of the execution of the search warrant, a medical marijuana permit was posted on the fence surrounding the marijuana grow. CP 68-69. This "permit" does not negate probable cause under the holding in *Fry*.

[15] Certainly seeing a marijuana grow is an equally, if not more compelling, detail than smelling one.

[16] *See* RCW 69.50.401(3) (certain acts pertaining to production, manufacture, processing, packaging, sale, and possession of marijuana do not violate State law); RCW 69.50.360 - .366 (certain acts by validly licensed marijuana retailers, processors and producers or their employees are not criminal offenses); RCW 69.51A.040 (Medical use or possession of cannabis in accordance with medical marijuana laws is not a crime); RCW 69.51A.085 (providing rules regarding collective gardens for the purpose of producing marijuana for medical use).

and *Ellis*, affirmative defenses do not per se legalize an activity, and do not negate probable cause that a crime has been committed. *Fry*, 168 Wn.2d at 10; *Ellis*, 178 Wn. App. at 807. Thus, Deputy Steadman's independent observation of Mr. Hurlburt's fenced marijuana garden was sufficient, in and of itself, to not only support the informant's tip, but to provide probable cause notwithstanding the informant's tip, as discussed below.

Additionally, the detective was aware that Mr. Hurlburt's criminal history included felony drug charges, including possession of marijuana with intent to manufacture or deliver. CP 51. This information was included in the affidavit in support of the warrant. Although a defendant's criminal history alone is insufficient to justify a search, it is additional evidence that supports the original probable cause determination of the magistrate. *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001) ("Prior convictions of a suspect are a factor which can be considered in determining whether probable cause exists" and are not only "proper" but may also be "helpful" to the issuing magistrate.)

The trial court erred in dismissing the informant's tip as uncorroborated, and therefore, unreliable. Although the facts from the informant contained in the affidavit may not satisfy the basis of

knowledge and veracity prongs of *Aguilar-Spinelli*,[17] the additional information provided in the officer's affidavit cured that deficiency. The trial court erred in failing to give any deference to his earlier decision to authorize the search warrant, and erred in failing to consider any of the other evidence presented by law enforcement as credible evidence supporting the veracity of the informant's tip. The trial court's decision to suppress all evidence obtained as a result of the execution of this search warrant should be reversed.

B. EVEN ASSUMING ANY INFORMATION PROVIDED BY THE ANONYMOUS INFORMANT WAS "UNRELIABLE" THE TRIAL COURT ERRED IN NOT EXCISING THAT INFORMATION FROM THE WARRANT, AND IT ERRED IN DETERMINING THAT THE WARRANT WAS UNSUPPORTED BY PROBABLE CAUSE TO SEARCH THE DEFENDANT'S RESIDENCE AND GARAGE.

Notwithstanding the information provided to Detective Singer by the informant, as discussed above, probable cause existed to justify the search of Mr. Hurlburt's property, including the yard, residence and unattached garage. Even if the court were to excise all of the information relating to the informant's tip from the affidavit in support of the warrant, Deputy Steadman's independent observation of the marijuana "garden,"

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[17] Arguably, the photograph of the defendant with the cougar pelt and gun provided by the informant at the time of his or her second contact with law enforcement would cure any deficiency in the basis of knowledge prong of the analysis. However, the photograph does not cure the "staleness" or "nexus" issues raised by the defendant below, because it is still unknown when or where the photograph was taken.

along with Detective Singer's training and experience in the manufacturing and packaging of marijuana for sale are still sufficient to justify issuance of the search warrant. The trial court erred in its findings and conclusions to the contrary.

Probable cause requires a nexus between criminal activity and the item to be seized and also a nexus between the item to be seized and the place to be searched. *Thein*, 138 Wn.2d at 140. "Judges looking for probable cause in an affidavit may draw reasonable inferences about where evidence is likely to be kept, including nearby land and buildings under the defendant's control." *State v. Constantine*, 182 Wn. App. 635, 646, 330 P.3d 226 (2014) (quoting *State v. Gebaroff*, 87 Wn. App. 11, 16, 939 P.2d 706 (1997).[18]

In *Constantine*, law enforcement sought a search warrant after they flew over defendant's property in a helicopter and viewed two greenhouses, one of which officers indicated contained approximately

[18] *Constantine* was decided on July 31, 2014, a little less than a month before the search warrant for Mr. Hurlburt's property was issued, and more than a year before the motion hearing after which the court suppressed the fruits of the search. Neither the trial court nor the parties appear to have been aware of *Constantine's* holding, as it was not cited or argued below. RP at passim; CP at passim.

20 growing marijuana plants. A search warrant was granted, authorizing law enforcement to search:

> the *greenhouses*, *house*, and *shed* for books, records, receipts, notes, ledgers and other papers related to the manufacture and processing of marijuana for names and addresses of others that may be involved in the illegal possession and trafficking of marijuana; ownership of the residence; any and all records and receipts showing dominion and control over the house …; and any or all other material evidence in violation of RCW 69.50.401, to include but not limited to drug paraphernalia for packaging, weighing, distributing and using marijuana.

Constantine, 182 Wn. App. at 647. (Emphasis added); *but see*, *Olson*, *supra*, 73 Wn. App. at 357 (search warrant based *solely* on officer's training and experience that drug dealers often keep *records* in premises under their control was insufficient to establish probable cause).[19]

In *Constantine*, the defendant argued that the nexus requirement was not met linking the marijuana greenhouses with her home and shed. The court held that the relevant facts in determining whether probable

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[19] *Olson* involved a search warrant that was granted for two distinct properties. The first property had been under law enforcement surveillance and officers had detected the odor of marijuana emanating from the direction of the property. Officers had seen the defendant at this property on several occasions and an anonymous informant had tipped law enforcement to the defendant's drug related activities at this address. The second property addressed in the search warrant was simply owned by the defendant and located a distance away from the first. The court held that the search warrant predicated upon the odor of marijuana justified the search of the first property, but that there was an insufficient nexus to believe evidence of criminal activity would be found at the second property, based solely on the officer's belief that persons who engaged in the cultivation of marijuana keep records and materials in safe houses. *Olson*, 73 Wn. App. at 350-357.

cause existed for the search of the residence and shed were: (1) officers observed at least 20 growing marijuana plants in a greenhouse on defendant's husband's property; (2) located close to the greenhouses were a home and a shed; (3) those buildings were on a clearly defined living compound owned by the defendant's husband; and (4) only one road accessed both the greenhouses and the house, and dead ended on the property. *Id.* at 647. The court held that it is reasonable to believe those items sought in the warrant would be found in the house adjacent to the greenhouses, and that it was reasonable to believe that the house would be used by the persons tending to the marijuana in the greenhouses to package and weigh their product. *Id.* Based on these facts, the court held that there was a sufficient nexus to lead the issuing judge to the reasonable belief that evidence of the crime would be located in the house and shed that were under the defendant's husband's control. *Id.* at 648. The court affirmed the trial court's determination that the magistrate had properly issued the warrant. *Id.*

The facts presented here are very similar. The affidavit in support of the search warrant indicated that Deputy Steadman had seen an enclosure containing four-foot-tall marijuana plants growing on Mr. Hurlburt's property on August 1, 2014. The warrant described that Mr. Hurlburt's property was situated at the "very end" of Sterling Road on

Paradise Lane and that Mr. Hurlburt lives in the third of three houses on Paradise Lane. CP 52. His property contains an unattached garage on the east side of the residence, and the marijuana garden area was located on the north side of the unattached garage. CP 51.

In light of the holding in *Constantine,* the trial court clearly erred below in finding: "the declaration *does* provide sufficient information to support a search warrant of Mr. Hurlburt's fenced yard," CP 70 (Conclusion of Law 6)(emphasis added), but did not

> set[] forth any specific facts that contraband or other evidence of illegal activity could be found inside the residence or detached garage, only the deputy's generalized observations from his previous training and law enforcement experience that processed marijuana is not kept outside and open to the elements, that harvested plants are taken inside to hang and dry, and that it is common practice to have a room located on the property with young starter plants and grow lights.

CP 70 (Conclusion of Law 7).

This court stated in *Constantine* that *Thein*'s holding that "general statements regarding common habits of drug dealers are not sufficient to establish probable cause when considered alone" is inapplicable to situations, such as this, where officers believe that marijuana is being grown on a parcel of land, and seek to search the buildings *on that parcel of land* for further evidence of the criminal activity of growing marijuana. *Constantine*, 182 Wn. App. at 647-648. To the contrary, this court held

that it was "not unreasonable" for the issuing judge to believe that evidence of the crime of possession of marijuana with intent to deliver would be found in the house based on the defendant's husband's ownership and control of the property where both observed criminal activity and house were located, the proximity of the home to the criminal activity and the type of evidence sought in the warrant. *Id.* at 648.

Such is the case here as well. The court below clearly struggled with this issue, as it concluded, as discussed above, that the search could only extend to the outdoor marijuana garden. Further evidence of the court's struggle is apparent from the record:

> What I am saying here is irrespective of the legal or lawful or illawful, illegal grow in the outside, the question is do I have the authority to allow a search of the residence for observing marijuana that may or may not be legally grown on the outside.
>
> …
>
> That how do I allow the search of the home or the search of the garage based purely on the generalization of the observation of the marijuana in the field or in the fenced yard. I think it's too far attenuated from the document itself. Or the product itself is outside, do I allow the search of the house and garage and all the buildings and vehicles on the premises, I think that could be going too far…
>
> That's how I have to rule. Frankly after I have made a ruling earlier, I signed an order – not an order a search warrant, thought was proper. After reviewing the documentation and case law, I think I was over broad and I should have limited it and I didn't, and so I don't have a proper nexus so I think I would be overturned on appeal if I

> upheld it. So if I could be overturned on this matter with the State, they have that right, so I think that's where I am at.

RP 59-60.

Constantine, uncited by the court or the parties, makes it clear that it *is* reasonable for a court to authorize a search of a residence or outbuilding on a parcel of land shared with a marijuana grow, contrary to the trial court's understanding of the law. In the application in support of the search warrant in this case, the detective provided very specific information regarding the production of marijuana that would lead any reasonable person, especially in light of *Constantine*, to believe that evidence of the crime of possession of marijuana with intent to deliver would be located inside the buildings situated on Mr. Hurlburt's property. The trial court erred in characterizing this information as "generalized observations"; rather, these details are specific and articulable facts based on the officer's training and experience, that have previously been found to provide a sufficient nexus to justify the search of buildings situated on the same parcel of land as marijuana grow operations.

Thus, the trial court should have given deference to his initial decision to authorize the search warrant because, this court has held, as a matter of law, that in situations such as this, a sufficient nexus exists between a marijuana grow outside of a residence and buildings on the

same parcel of land. Had the trial court been aware of this court's holding in *Constantine*, certainly it would not have suppressed the fruits of the search discovered as a result of the search warrant it properly authorized a year earlier. The court should reverse the lower court's decision to suppress all tangible evidence and statements obtained as a result of the properly issued search warrant in these cases.

V. CONCLUSION

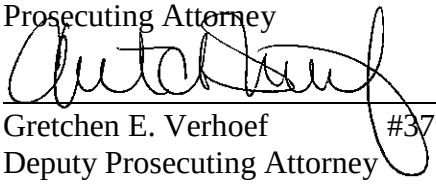
The State respectfully requests that this court reverse the lower court's decision to suppress all evidence and statements obtained as a result of the execution of the properly issued search warrant in these cases. The warrant at issue was supported by probable cause because law enforcement independently observed and corroborated the anonymous informant's tip that Mr. Hurlburt was growing marijuana on his property.

Even if the court were to excise all information regarding the anonymous informant's tip from the affidavit in support of the search warrant, probable cause exists nonetheless for not only the search of the garden itself, but the residence and garage situated on the same property. *Constantine*'s holding makes it clear that a court does not err in so finding. The court below erred in failing to give deference to its own earlier decision to authorize the search of Mr. Hurlburt's property, and erred in concluding that it had to "rectify" the error of relying on the photograph of

Mr. Hurlburt with the gun and the cougar pelt. Even without the photograph, probable cause existed for the searches that were authorized pursuant to the warrant. The State respectfully requests that this court reverse the trial court's order suppressing evidence and its order dismissing the cases.

Dated this 29 day of March, 2016.

JEFFREY BARKDULL
Prosecuting Attorney



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

STATE OF WASHINGTON, Appellant, v. MICHAEL K. HURLBURT, Respondent.	NO. 33833-9-III (Consol. w/COA 33834-7-III) CERTIFICATE OF MAILING
STATE OF WASHINGTON, Appellant, v. NANCY L. ST. PIERRE-WALSH, Respondent.	

I certify under penalty of perjury under the laws of the State of Washington, that on March 29, 2016, I e-mailed a copy of the Brief of Appellant in this matter, pursuant to the parties' agreement, to:

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