Supreme Court No. 94120-2
Court of Appeals No. 33833-9-III
(consolidated with 33834-7-III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Appellant,

vs.

MICHAEL K. HURLBURT,
Defendant/Respondent/Petitioner.

APPEAL FROM THE LINCOLN COUNTY SUPERIOR COURT
Honorable John F. Strohmaier, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Michael K. Hurlburt, is the respondent below and asks this Court to review the decision referred to in Section II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals, Division III, unpublished opinion filed January 10, 2017.[1] A copy of the opinion is attached as Appendix A.

III. ISSUE PRESENTED FOR REVIEW

Whether Division Three's application of *State v. Constantine*[2] violates *State v. Thein*'s[3] prohibition against conclusory assertions and the requirement that within its four corners the search warrant affidavit must show some factual nexus actually tying Hurlburt's residence and detached garage to the suspected criminal activity of a garden marijuana grow operation.

IV. STATEMENT OF THE CASE

In August 2014, Lincoln County Superior Court Judge John Strohmaier issued a warrant authorizing the search of "property located at

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[1] The current online version is found at *State v. Hurlburt*, No. 33833-9, 2017 WL 89141 (Wash. Ct. App. Jan. 10, 2017).
[2] *State v. Constantine,* 182 Wn. App. 635, 220 P.3d 226 (2014).
[3] *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

41840 Paradise Lane North, Creston, Washington" and the seizure of drug-related evidence. CP 77–79.

Lincoln County Sheriff's Deputy Roland Singer had applied for the search warrant seeking evidence of the crimes of "possession of a controlled substance (Marijuana) with the intent to manufacture and unlawful possession of a firearm 2nd degree." CP 72–76; 9/16/15 RP 16. In his declaration Deputy Singer set forth the following facts:

> On 4-29-14, the Lincoln County Sheriff's Office received an anonymous report of a possible Marijuana grow located at 41836 Paradise Lane N., Creston WA 99147. The reporting party stated they believe Michael K. Hurlburt (02-11-1965) is growing Marijuana at his house. The anonymous caller stated they do not believe Hurlburt possesses a Medical Marijuana Card to grow the Marijuana. The anonymous caller also informed me that Hurlburt is a convicted Felon and in possession of a handgun at that residence. The caller informed me of a picture that was circulated of Hurlburt kneeling in front of a cougar he had killed with a handgun and the handgun was also resting on the cougar in the picture with Hurlburt.
>
> NOTE: I am familiar with Michael Hurlburt and aware he is a convicted felon from a previous case I investigated and arrested him for his involvement in July of 2008.
>
> I contacted Wildlife Officer Curt Wood regarding the report of the cougar killed. Wood checked his computer system and informed me Hurlburt has never purchased a cougar tag or a hunting license to date.
>
> I attempted to find a copy of the photograph of Hurlburt and the cougar the anonymous caller informed me about but was unable to locate it.

On 8-16-2014, the Lincoln County Sheriff's Office received an anonymous call from an individual who provided us with a copy of the previously mentioned photograph that was printed from online. In the photograph was Hurlburt kneeling in a building of some kind with gravel on the ground. In front of Hurlburt in the photograph was a barrel with a freshly skinned cougar pelt with the head still attached to the pelt draped over a barrel with a piece of wood holding up the head of the cougar. The pelt also had the left front foot still attached to it. On top of the cougar pelt was a black semi-automatic handgun (unknown caliber) with the clip still in the hand gun.

The anonymous caller also informed me that there has been a large amount of traffic traveling in and out of Hurlburt's residence recently at 41836 Paradise Lane N., Creston WA 99147 and Hurlburt is reportedly selling live Marijuana plants to individuals. The caller stated the traffic is usually between midnight and two in the morning and are entering Hurlburt's property with their vehicle lights turned off.

I ran a Criminal History on Hurlburt and confirmed he is a convicted Felon with 22 Felony convictions on his history dating from 1985 to 2009. These Felonies include trafficking in stolen property, forgery, thefts, burglary, possession of controlled substances, and possession of marijuana with the intent to manufacture and/or deliver.

On 8-18-2014 I received a report from Deputy Steadman stating that on 8-1-2014 at approximately 1746 hrs, Deputy Steadman responded to 41836 Paradise Lane N., Creston WA 99147 to contact Michael Hurlburt on an unrelated investigation. While Deputy Steadman was at the residence, he observed what he recognized through his training and experience to be growing Marijuana plants approximately four feet tall in the garden area located on the north side of the unattached garage located on the east side of the residence. The garden was surrounded by a short chain link fence.

I again contacted Wildlife Officer Curt Wood on 8-18-2014 who also viewed the photograph. Wood again checked his computer

record and informed me that Hurlburt has never purchased a cougar tag or a hunting license to date; only fishing licenses. Wood also informed me per state law, a cougar pelt has to be inspected within 48 hrs after the animal is killed by a Wildlife Officer and he has never inspected a cougar pelt for Hurlburt.

Per Washington State Law regarding Medical Marijuana, an individual is allowed to grow 15 Marijuana plants for personal use. That individual is also allowed to grow an additional 15 Marijuana plants for another Medical Marijuana patient if that patient is identified as the second patient[']s care provider. Washington State Law also allows a Community Garden which allows up to 10 patients to grow Medical Marijuana in one location. In a Community Garden, Washington State Law only allows up to 45 Marijuana plants to be grown in a Community Garden. From the initial investigation in this case, if this grow is a Medical Marijuana Grow and has the proper documentation no enforcement will be taken.

NOTE: I know through my experience with Marijuana Grows that none of the processed Marijuana is ever kept inside a grow enclosure that is located outside and open to the elements. I also know that harvested plants are usually taken into buildings near the grow site to hang and let dry before the usable portion of the Marijuana plants is processed for consumption. It is also a common practice for individuals that have a Marijuana Grow with Marijuana plants as mature as this one, to have a starter room located on the property with young Marijuana plants under grow lights to replenish their numbers once they harvest the mature Marijuana plants. I also know through my experience with Medical Marijuana Grows, individuals often keep their medical records inside a residence or building near the grow site to avoid having them destroyed by the elements.

CP 73–75.

In his declaration, Deputy Singer described the premises to be searched as follows:

> 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 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 south east of the residence. The legal owner is listed as Michael K. Hurlburt.

CP 75 (alteration added).

Upon Detective Singer's application for the search warrant, Judge Strohmaier reviewed the declaration and supporting documents, which included an undated aerial Google earth photograph of the area to be searched: 41840 Paradise Ln., Creston WA. CP 67–68 at Findings of Fact 5 and 11; CP 80. Judge Strohmaier signed the search warrant on August 25, 2014 (CP 66 at Finding of Fact 1; CP 77–79) and the warrant was executed on August 26, 2014. CP 60–61, "Inventory and Return of Search Warrant"; CP 68 at Finding of Fact 13. "[L]aw enforcement officers did not find any of the property to be seized as set forth in the warrant. The officers found and seized[4] powder, cylinders, and fuse material they believed could be fashioned into explosive devices in the detached garage, and glass pipers they believed were used to smoke methamphetamine in the residence." CP 60–61, "Inventory and Return of Search Warrant;" CP 68 at Finding of Fact 13.

In February 2015 the Lincoln County Prosecuting Attorney charged Hurlburt with possession of bomb-making materials found in his detached garage and possession of methamphetamine found in his residence. CP 1–2, 68 at Finding of Fact 13. Pre-trial, Hurlburt and co-defendant Nancy St. Pierre Walsh moved to suppress all fruits of the search, alleging the search warrant was not supported by probable cause because the supporting declaration was defective. CP 3–13.

In September 2015 Judge Strohmaier, who had been the issuing magistrate, granted the motion to suppress. The court considered only the evidence presented in the declaration for the initial search warrant. CP 69 at Conclusion of Law 1. The trial court determined the declaration provided sufficient information to support a search warrant of Hurlburt's fenced yard based on an officer's observation of growing marijuana plants in a fenced garden area on the property four weeks before. CP 67 at Finding of Fact 7; CP 70 at Conclusion of Law 70.

However, the court concluded the declaration was legally insufficient to establish probable cause to search Hurlburt's residence or garage because (1) the information did not establish the anonymous informant's credibility or basis of belief that evidence of a crime would be

[4] Pursuant to a requested and telephonically approved amendment of the search warrant. CP 59.

found in the residence or garage; (2) the officer's observation of an outdoor marijuana grow and confirmation of Hurlburt's status as a convicted felon did not corroborate the informant's statements or establish the informant's veracity; and (3) the officer's generalized training and experience with marijuana grows provided no specific factual information that evidence of a crime could be found in the residence or detached garage. CP 67 at Finding of Fact 9; CP 68 at Finding of Fact 12. The court entered findings of fact and conclusions of law and dismissed the cases with prejudice. CP 65–71; 83, 104. The State appealed.

Division Three did not address whether probable cause could be based on the anonymous informant's tips. *Slip Op.* at 1–2. The court found this appeal "legally indistinguishable from *Constantine.*" There, it had distinguished *Thein* and held:

> [P]robable cause was supported by more than an implied assumption of where evidence may be kept. It was not unreasonable for the issuing judge to believe that evidence of the crime would be found in the house based on Mr. Davis's ownership and control of the property where both the observed criminal activity and the house were located."

Slip Op. at 9 (citing *State v. Constantine,* 182 Wn. App. 635, 647–48, 220 P.3d 226 (2014)). "The key fact [here] is that the structures searched were on the same property where the marijuana grow activity was observed." *Id.* [alteration added].

V. ARGUMENT IN SUPPORT OF REVIEW

This Court should accept review under RAP 13.4(b)(1) and (2) to resolve a conflict with decisions of this Court and the Court of Appeals.

The search warrant was unsupported by probable cause, requiring suppression of evidence recovered from the residence and garage.

The search warrant affidavit did not establish probable cause to search the residence and garage because it did not establish the requisite nexus between the outdoor marijuana grow and the other places to be searched. The warrant therefore did not satisfy the requirements of article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. The trial court correctly concluded the evidence found in the residence and garage must be suppressed.

1. Standard of Review.

Normally the issuance of a search warrant is reviewed for abuse of discretion (*State v. Maddox,* 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)) and deference is given to the issuing judge or magistrate. *State v. Young,* 123 Wn.2d 173, 195, 867 P.2d 593 (1994). However, at the suppression hearing the trial court acts in an appellate-like capacity and its review, like that of the reviewing court, is limited to the four corners of the affidavit

supporting probable cause. *State v. Neth*, 165 Wn. 2d 177, 182, 196 P.3d 658 (2008) (citations omitted). The affidavit is viewed in a commonsense manner rather than hypertechnically. *State v. Chenoweth,* 160 Wn.2d 454, 477, 158 P.3d 595 (2007). All doubts are resolved in favor of the validity of the warrant. *Maddox,* 152 Wn.2d at 509. However, "[w]hile [the reviewing court] give[s] great deference to the magistrate, that deference is not unlimited." *State v. Lyons,* 174 Wn.2d 354, 362, 275 P.3d 314 (2012). The reviewing court "cannot defer to the magistrate where the affidavit does not provide a substantial basis for determining probable cause." *Lyons,* 174 Wn.2d at 363. The trial court's assessment of probable cause is a legal conclusion that is reviewed de novo." *Neth*, 165 Wn. 2d at 182.

2. The search warrant fails for lack of nexus between the criminal activity and the place to be searched: there was no probable cause to believe evidence of a marijuana grow would be found in the residence and garage.

The declaration established probable cause to believe marijuana was being grown in an outdoor garden area. However, the search warrant fails for lack of a nexus between the crime and the residence or garage. Search warrants are valid only if supported by probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause to

search 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 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). The affidavit in support of the warrant must set forth facts and circumstances sufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched. *Thein,* 138 Wn.2d at 140.

A warrant to search for evidence in a particular place must be based on more than generalized belief of the supposed practices of the type of criminal involved. *Id.* at 147–48. Rather, the warrant must contain specific facts tying the place to be searched to the crime. *Id.* "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; *see also, State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980) ("If the affidavit or testimony reveals nothing more than a declaration of suspicion and belief, it is legally insufficient"); *State v. Helmka*, 86 Wn.2d 91, 92, 542 P.2d 115 (1975) ("Probable cause cannot be made out by conclusory affidavits"); *State v. Patterson*, 83 Wn.2d 49, 52, 61, 515 P.2d 496 (1973) (record must show objective criteria going beyond the personal beliefs and suspicions of the

applicants for the warrant). Probable cause for a search requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched. *Thein,* 138 Wn.2d at 140.

The warrant to search the residence and garage fails for lack of nexus. The declaration did not establish probable cause that evidence of the marijuana grow operation was at the residence or garage. As an initial matter the declaration establishes doubt on its face as to whose residence and garage police could legitimately be authorized to search. The possible criminal activity reported by the anonymous caller was attributed to property at 41836 Paradise Lane North allegedly owned by Hurlburt. CP 73–74. Police stated they observed the marijuana grow while contacting Hurlburt at his residence at the 41836 Paradise Lane North address. CP 74; 9/16/15 RP 22. But police sought and obtained the search warrant for 41840 Paradise Lane North and stated Hurlburt was its legal owner. CP 75, 77. They searched and seized property from the 41840 Paradise Lane North address. The declaration is defective due to this discrepancy between place of alleged criminal activity and place to be searched.

Even if the place searched is treated as the equivalent of Hurlburt's residence for purposes of determining probable cause, the nexus is still missing. The standard is whether there is probable cause to believe

contraband will be found in the specific place to be searched. *Thein*, 138 Wn.2d at 140. "The affidavit in support of the search warrant must be based on more than suspicion or mere personal belief that evidence of the crime will be found on the premises searched." *State v. Vickers*, 148 Wn.2d 91, 108, 59 P. 3d 58 (2002). "Probable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for the suspect's home." *United States v. Ramos*, 923 F.2d 1346, 1351 (9th Cir. 1991), overruled on other grounds by *United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001).

In *Thein*, for example, this Court held there was insufficient nexus between evidence that a person engaged in drug dealing and the fact that the person resided in the place searched. *Thein*, 138 Wn.2d at 150. The affidavit in that case contained specific information tying the presence of narcotics activity to a certain residence, but not the address to be searched pursuant to the warrant. *Id.* at 136 -138, 150. The affidavit also contained generalized statements of belief, based on officer training and experience, about drug dealers' common habits, particularly that they kept evidence of drug dealing in their residences. *Id.* at 138–39. The affidavit expressed the belief that such evidence would be found at the suspect's residence. *Id.* at 139. The court held such generalizations do not establish probable

cause to support a search warrant for a drug dealer's residence because probable cause must be grounded in fact. *Id.* at 146–47.

A similar consideration guides the analysis here. The declaration contains no observations that Hurlburt tended or was otherwise involved in the grow operation or that he used the detached garage or residence to further the operation. The declaration does not show that anyone, including the anonymous caller, observed any grow-associated items or contraband in the garage or house. Information insufficiently grounded on fact to ensure reliability will not suffice to establish a nexus between the place to be searched and suspected illegal activity. *Thein*, 138 Wn.2d at 147. Specific facts in the supporting affidavit must establish the nexus between the item to be seized and the place to be searched. *Id.* at 145. The declaration here lacks specific facts tying the residence and garage to the crime. The trial court correctly concluded the declaration failed to establish the requisite nexus.

Division Three agreed with the State that its decision in *State v. Constantine,* 182 Wn. App. 635, 220 P.3d 226 (2014) provides a basis to uphold the search of Hurlburt's residence and garage. *Slip Op.* at 2, 7–10. In *Constantine* the court found the search of a house and shed based upon a marijuana grow spotted in two law enforcement flyovers did not offend

Thein's prohibition against general assumptions of where evidence may be kept if based upon reasonable inferences about nearby land and buildings that are adequately shown to be under the defendant's control. *Constantine*, 182 Wn. App. at 647–48. Ms. Constantine's husband, Morgan Hale Davis, also appealed the denial of the motion to suppress. *State v. Davs*, 182 Wn. App. 625, 331 P.3d 115 (2014).

The information provided in the declaration in Hurlburt's case falls far short of the detailed affidavit relied upon in *Constantine* and *Davis*. There, the affidavit contained narrative information that two Task Force officers flew in a helicopter over property near Tonasket, Washington, and saw two greenhouses with approximately 20 large marijuana plants visible through the partially uncovered roof of one of them. They noted other buildings on the property, including a small stick built house located just east of the greenhouses and a small stick built shed west of the greenhouses. The officers confirmed that the property's address was 44 Reevas Basin Road and that it was owned by Mr. Davis. A week later one of the officers flew over the property a second time and took an aerial photograph, noting the greenhouses were both covered with plastic through which he saw dark green coloring he believed to be growing marijuana plants. The officer obtained a warrant to search the two

greenhouses, the house, and the shed on Reevas Basin Road for evidence of manufacturing marijuana and related items. *Constantine,* 182 Wn. App. at 639–40; *Davis*, 182 Wn. App. at 628.

The *Constantine/Davis* affidavit also included an aerial photograph with the affiant's explanation to the magistrate of its content and context.[5] "In this photo you can clearly see the green houses to the left of the house. The larger of the two greenhouses was half opened when the initial flight was done. This is the one that I could see growing marijuana plants in. Everything in the photo including the outbuildings is on the same parcel of property. There are no other driveways or houses except for the one in the photo that have access to these marijuana plants." *Constantine,* 182 Wn. App. at 640; *Davis*, 182 Wn. App. at 628–29.

The aerial photograph in *Constantine/Davis* "showed the residence, greenhouses, garden area, and outbuildings all within a clearly defined living compound. The compound is well separated from other structures

[5] In contrast, a poorly reproduced Google Earth aerial map was submitted herein for property at 41840 Paradise Lane, Creston, WA, with no accompanying explanation. CP 80. As noted previously, this was not the 41836 address that was allegedly Hurlburt's residence, which was visited by Deputy Steadman and mentioned by the anonymous caller. Division Three noted, "Although a copy of the aerial photograph is in the appellate record, the copy is of such a poor quality we are unable to discern whether the outdoor marijuana grow operation is within the parameters of the photograph." *Slip Op.* at 3, fn 1.

or homes. The residence was approximately 50 to 70 feet from the greenhouses and there were no other houses nearby. Also, only one access road approaches the property and ends there." *Davis*, 182 Wn. App. at 629; *see Constantine,* 182 Wn. App. at 641.

Division Three determined *Thein*'s prohibition against assumptions was not implicated where "[i]t was not unreasonable for the issuing judge to believe that evidence of the crime would be found in the house based on [(1)] Mr. Davis's ownership and control of the property where both the observed criminal activity and the house were located, [(2)] the proximity of the home to the criminal activity, and [(3)] the type of evidence sought in the warrant." *Constantine,* 182 Wn. App. at 647–48 (alterations added).

In concluding the nexus requirement was met, the court noted:

> The relevant facts are that officers observed at least 20 marijuana plants growing in a greenhouse on Mr. Davis's property. Located close to the greenhouses were a home and a shed. These buildings were on a clearly defined living compound owned by Mr. Davis. Only one road driveway accessed both the greenhouses and the house, and dead ended on the property.

Constantine, 182 Wn. App. at 647.

> The warrant established that the house and shed were located on the same defined parcel of land as the greenhouses and were close in proximity to one another. The parcel of land was owned by Mr. Davis. Access to both greenhouses and the home was from the same, single driveway. The officers observed at least 20 marijuana plants in one exposed part of the greenhouses.

Davis, 182 Wn. App. at 633.

Here, the scarce facts presented in the affidavit do not tie the criminal activity of the grow garden to the residence or garage. Hurlburt owns a residence at 41836 Paradise Lane North. CP 73. An undisclosed number of four-foot tall marijuana plants were observed in a chain-link fenced "area located on the north side of the unattached garage located on the east side" of the residence. CP 74. No distances are given between the grow garden and the structures or between the garden/residence/garage and any other nearest structures located on Paradise Lane. The declaration does not establish the residence was on the same defined parcel of land as the fenced garden enclosure and detached garage, or that Hurlburt owned the land on which the enclosure and garage sat. *Cf. Constantine,* 182 Wn. App. at 647; *Davis*, 182 Wn. App. at 633.

The "description of the property to be searched" indicates Hurlburt instead owns a residence at 41840 Paradise Lane North with an unattached garage "to the southeast of the residence" and the residence is situated "at the very end of Sterling Valley Road on Paradise Lane" and "there are three houses on Paradise Lane." CP 75. The description similarly does not specify the distance between the residence and the unattached garage, and does not mention any grow garden. It does not convey proximity

between the grow garden and the garage or residence, and does not establish the grow garden was on the same parcel as the garage or residence. The description does not disclose the proximity of the other two houses on Paradise Lane to the grow garden or garage or the residence. Nor does it establish that access to the grow garden (which, again, is not mentioned) and to the garage and/or residence was from the same single driveway. The Google Earth aerial map is apparently useless as a source of any information. *Cf. Constantine,* 182 Wn. App. at 647; *Davis*, 182 Wn. App. at 633.

Thein instructs that general statements regarding the common habits of drug dealers are not sufficient to establish probable cause. *Thein*, 138 Wn.2d at 150–51. The limited details contained in the declaration and supporting materials provided to the issuing magistrate fail to provide the measure of ownership, control and proximity found sufficient by the *Constantine* and *Davis* courts to overcome *Thein* and permit reasonable inferences alone to establish an adequate nexus that evidence of the crime of possession of marijuana with the intent to manufacture would be found in the residence and garage. *Cf. Lyons,* 174 Wn.2d at 364 (inferences alone do not provide a substantial basis for determining probable cause); *State v. Gebaroff*, 87 Wn. App. 11, 16–17, 939 P.2d 706 (1997) (probable

cause to search a house does not provide probable cause to search outbuildings when the outbuildings may be under the control of other persons); *Lyons,* 174 Wn.2d at 359 ("In particular, the affidavit must set forth the underlying circumstances specifically enough that the magistrate can independently judge the validity of both the affiant's and informant's conclusions" (quoting *Spinelli v. United States*, 393 U. S. 410, 413, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969)).

Specific facts in the supporting affidavit must establish the nexus between the item to be seized and the place to be searched. *Thein*, 138 Wn.2d at 145. The declaration here lacks specific facts tying the residence and garage to the crime. Probable cause was thus supported only by the implied assumption of where evidence may be kept, in violation of *Thein*. The trial court correctly concluded the declaration failed to establish the requisite nexus.

VI. CONCLUSION

For the reasons stated, Mr. Hurlburt respectfully asks this Court to accept review of his petition.

Respectfully submitted on February 9, 2017.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 9, 2017, 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 appellant's petition for review and Appendix A (opinion filed 1/10/17):

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CASE # 338339
State of Washington v. Michael Kevin Hurlburt
LINCOLN COUNTY SUPERIOR COURT No. 151000150
CASE # 338347
State of Washington v. Nancy L. St. Pierre-Walsh
LINCOLN COUNTY SUPERIOR COURT No. 151000141

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

No. 33833-9-III; No. 33834-7-III
State v. Hurlburt; State v. St. Pierre-Walsh

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
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FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Appellant, v. MICHAEL K. HURLBURT, Respondent,	)	No. 33833-9-III (consolidated with No. 33834-7-III) UNPUBLISHED OPINION
STATE OF WASHINGTON, Appellant, v. NANCY L. ST. PIERRE-WALSH, Respondent.	)	

LAWRENCE-BERREY, J. — The State of Washington appeals the trial court's orders suppressing evidence. The trial court determined that probable cause did not support the issuance of the search warrant to the extent the warrant permitted the search of Michael K. Hurlburt's residence and unattached garage. The State contends the trial court erred because (1) independent police investigation corroborated information provided by an

anonymous informant (AI), and (2) even excising the information provided by the AI, there was probable cause to search because a second officer observed the outdoor marijuana grow operation, and a sufficient nexus existed between that operation and Mr. Hurlburt's residence and unattached garage. We agree with the State's second argument and, therefore, reverse the trial court's orders suppressing evidence and remand for further proceedings.

FACTS

The following facts are taken from the declaration in support of the search warrant. An AI reported to Detective Roland Singer that Mr. Hurlburt had a possible marijuana grow operation on his property at 41836 Paradise Lane North. The AI also told Detective Singer that Mr. Hurlburt probably did not have a medical marijuana card. The AI further said that Mr. Hurlburt was a convicted felon in possession of a handgun and referenced a photograph of Mr. Hurlburt holding a gun, kneeling in front of a cougar he had killed. Detective Singer knew that Mr. Hurlburt was a convicted felon from a 2008 case in which he had arrested Mr. Hurlburt. Detective Singer investigated and learned that Mr. Hurlburt had never applied for a cougar tag or hunting license.

Four months later, the AI again contacted Detective Singer and provided him with a copy of the earlier described photograph. The AI told Detective Singer that numerous

people in cars were entering Mr. Hurlburt's property late at night, and they were driving with their headlights turned off. The AI said Mr. Hurlburt was selling live marijuana plants to these people. Detective Singer checked Mr. Hurlburt's criminal history and discovered that Mr. Hurlburt had 22 felony convictions, including possession of marijuana with intent to manufacture or deliver.

Soon after, Detective Singer received a report from Deputy Steadman, who was on Mr. Hurlburt's property two weeks earlier in furtherance of an unrelated investigation. In the report, Deputy Steadman noted he was at the residence and saw four-foot tall marijuana plants growing in a fenced garden. The report described the garden as located east of the residence, and north of the unattached garage. An aerial photograph showing Mr. Hurlburt's property and two other nearby residences was shown to the judge who issued the search warrant.[1]

In his declaration in support of the search warrant, Detective Singer stated what he knew from his training and experience pertaining to marijuana grow operations. He stated he knew that harvested plants are usually taken into a building near a grow site to hang and dry before the marijuana is processed. He further stated it is common for

[1] Although a copy of the aerial photograph is in the appellate record, the copy is of such a poor quality we are unable to discern whether the outdoor marijuana grow operation is within the parameters of the photograph.

individuals who have mature marijuana plants to have a starter room on the property where young marijuana plants under lights are grown to replenish the mature plants after they are harvested. Based on this information, the judge (who also later presided over the evidentiary hearing) issued a search warrant. The search warrant authorized law enforcement to search the outdoor grow operation as well as Mr. Hurlburt's garage and residence and seize: (1) growing marijuana plants, (2) documents relating to any authorized medical marijuana patients, (3) indication of occupancy, residency, and ownership of the premises, (4) processed marijuana found in excess of the amount allotted under state law, (5) firearms located on the premises, and (6) a cougar pelt.

Law enforcement did not seize any items related to marijuana, firearms, or the cougar pelt. We infer that Mr. Hurlburt had sufficient papers that supported the legality of his marijuana grow operation. Law enforcement did, however, find evidence of illegal activities in Mr. Hurlburt's residence and unattached garage, and after obtaining a supplemental search warrant, seized that evidence.

The State charged Mr. Hurlburt with one count of possession of a controlled substance, methamphetamine, and one count of unlawful possession of an explosive device. The State also charged Nancy St. Pierre-Walsh with one count of possession of a

controlled substance, methamphetamine. This charge was based on evidence inside her purse, which was inside Mr. Hurlburt's residence and searched.

Prior to trial, the defendants filed a motion to suppress the evidence on the basis that the search was illegal. After an evidentiary hearing, the trial court ruled that the evidence should be suppressed. The trial court later entered findings of fact and conclusions of law.

The trial court noted in its findings that when it authorized the search warrant, it disregarded all statements from the AI because there was no basis for it to determine that the AI was reliable. The trial court found and concluded it also should have disregarded the picture of Mr. Hurlburt holding a firearm posing with the dead cougar because the picture was taken four months before the search warrant, and there were no facts to suggest where the picture was taken or if the firearm or the dead cougar belonged to Mr. Hurlburt. The trial court also found and concluded it should have disregarded Detective Singer's statements concerning his knowledge of marijuana grow operations because such statements were merely statements of generalized training and experience. Based on its determinations that the above-described evidence should be disregarded, the trial court concluded that a search of the garden area was legal (because of Deputy Steadman's

observations in the unrelated investigation), but the search of the residence and unattached garage was too attenuated and, therefore, not legal.

The trial court determined that the practical effect of suppressing the evidence was that no evidence supported the charges and dismissed the charges. The State appeals the trial court's orders suppressing the evidence.

ANALYSIS

A. STANDARDS FOR REVIEW

Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. *State v. Fry*, 142 Wn. App. 456, 460, 174 P.3d 1258 (2008), *aff'd*, 168 Wn.2d 1, 228 P.3d 1 (2010). The findings of fact are reviewed for substantial evidence. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* When a conclusion of law is erroneously labeled as a finding of fact, this court reviews it de novo as a conclusion of law. *Casterline v. Roberts*, 168 Wn. App. 376, 383, 284 P.3d 743 (2012).

The State assigns error to various findings of fact. But the State fails to argue how the challenged findings are unsupported, and in one footnote actually quotes testimony that supports a challenged finding. We generally do not consider claims unsupported by

argument or citation to legal authority. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We, therefore, accept the trial court's findings and conduct a de novo review to determine whether the trial court's conclusions of law are correct.

B. THERE IS A SUFFICIENT NEXUS BETWEEN THE MARIJUANA GROW OPERATION AND THE STRUCTURES SEARCHED

The State argues that even if the picture of Mr. Hurlburt and the AI's statements are excised from the search warrant, probable cause still existed to search Mr. Hurlburt's residence and unattached garage.

A search warrant may issue only on a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *Id.* This requirement means that a nexus must exist between criminal activity and the item to be seized, and also between the item to be seized and the place to be searched. *Id.* "Facts that individually would not support probable cause can do so when viewed together with other facts." *State v. Constantine*, 182 Wn. App. 635, 646, 330 P.3d 226 (2014). "The application for a search warrant must be judged in the light of common sense, resolving

all doubts in favor of the warrant." *Id.* "'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.'" *Id.* (quoting *State v. Gebaroff*, 87 Wn. App. 11, 16, 939 P.2d 706 (1997)).

The leading case in this area of law, and the case relied on by the defendants, is *Thein*, 138 Wn.2d 133. In *Thein*, the South King County Narcotics Task Force (Task Force) found evidence of marijuana trafficking at Laurence McKone's rented residence. *Id.* at 136. The Task Force also learned that McKone's landlord, Stephen Thein, was the source of McKone's marijuana. *Id.* at 137-38. The Task Force applied for a search warrant to search Thein's residence. In the affidavit in support of the search warrant, the affiant noted it was common for drug dealers to store drug inventory, paraphernalia, and records at their residence. *Id.* at 138-39. The *Thein* court reversed the trial court and concluded there was an insufficient nexus between the criminal activity at the rental and Thein's residence to support probable cause for the issuance of the search warrant. *Id.* at 151. Central to its conclusion, the *Thein* court held that generalized statements about the common habits of drug dealers—that they store drug inventory, paraphernalia, and records at their residence—standing alone, are not sufficient to support probable cause for a search warrant. *Id.* at 148.

The State relies on *Constantine*, a recent case in which we distinguished *Thein*. In *Constantine*, officers observed marijuana plants growing inside two greenhouses on property owned by Morgan Davis, Constantine's husband. *Constantine*, 182 Wn. App. at 638-40. Near the greenhouses and on the same property were a residence and a shed. *Id.* at 639. Law enforcement obtained a search warrant that allowed the greenhouses, the residence, and the shed to be searched. *Id.* at 640. The trial court denied Constantine's motion to suppress the evidence found in the residence and the shed. *Id.* at 641. In affirming, we distinguished *Thein*:

> Despite Ms. Constantine's contention, *Thein* does not control the outcome of [this] appeal. *Thein* establishes that general statements regarding the common habits of drug dealers are not sufficient to establish probable cause when considered alone. But here, probable cause was supported by more than an implied assumption of where evidence may be kept. It was not unreasonable for the issuing judge to believe that evidence of the crime would be found in the house based on Mr. Davis's ownership and control of the property where both the observed criminal activity and the house were located . . . .

Id. at 647-48 (citation omitted).

This appeal is legally indistinguishable from *Constantine*. The key fact is that the structures searched were on the same property where the marijuana grow activity was observed.[2] This fact, together with the type of evidence sought—young replacement

[2] The marijuana grow activity here proved not to be illegal, likely because Mr.

marijuana plants, evidence of marijuana being processed, and indicia of ownership—provided probable cause to justify the search warrant of the nearby structures. We conclude there is a sufficient nexus between the outdoor marijuana grow operation observed by law enforcement and the nearby residence and unattached garage to support probable cause. The trial court erred when it concluded otherwise. We, therefore, reinstate the charges and remand for further proceedings.

C. ORDERS SUPPRESSING THE DEFENDANTS' POSTARREST STATEMENTS

The State assigns error to the trial court's orders suppressing the defendants' postarrest statements. The State does not argue how the trial court erred. To the extent our reversal of the trial court's suppression orders related to the search and seizure removes the basis for these orders, we authorize the trial court to vacate those orders.

D. MISCELLANEOUS ISSUES

The trial court did not enter findings of facts or conclusions of law on various issues raised below. One of these issues is whether the search of Ms. St. Pierre-Walsh's purse was legal. We agree with the State that there is an insufficient record for us to rule

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Hurlburt had documentation that allowed him to grow the marijuana observed on his property. Nevertheless, the presence of marijuana plants on his property provided probable cause for the search. The documentation merely provided Mr. Hurlburt an affirmative defense. *State v. Fry*, 168 Wn.2d 1, 13, 228 P.3d 1 (2010).

on these issues. We, therefore, decline to do so. On remand, the parties may argue these and other issues not considered in this opinion.

E. APPELLATE COSTS

An appellate court has discretion to deny an award of appellate costs to the prevailing party. RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). We exercise our discretion and deny an award of appellate costs to the State. First, this appeal was not instigated by either defendant. Second, the primary reason for this appeal was the State's failure to cite *Constantine* to the trial court. Mr. Hurlburt moves this court to enlarge time to file his report of continued indigency. Because we are not awarding appellate costs to the State, the motion is moot.

Reversed and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Korsmo, J.