

64329-1

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NO. 64329-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DARREN HARRELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. FOX

BRIEF OF RESPONDENT

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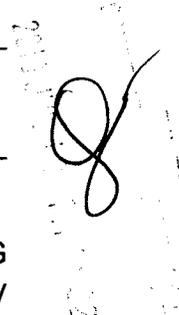


TABLE OF CONTENTS

I.	<u>ISSUES PRESENTED</u>	1
II.	<u>STATEMENT OF THE CASE</u>	1
	A. PROCEDURAL BACKGROUND	1
	B. FACTUAL BACKGROUND	2
III.	<u>ARGUMENT</u>	4
	A. THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE	4
	1. Relevant facts: affidavit for search warrant	4
	2. Legal standard: search warrants	10
	3. Legal standard: confidential informants	12
	4. The informant had an adequate basis of knowledge to support the claim that Harrell was growing marijuana	14
	5. Reliability and veracity of informant	16
	B. TWO ERRORS IN THE SEARCH WARRANT AFFIDAVIT DO NOT RENDER THE WARRANT INVALID	21
	1. Legal standard: errors in search warrant affidavit	22
	2. Relevant facts: errors in search warrant affidavit	23
	3. The errors were not made deliberately or with a reckless disregard for the truth	25

4.	The errors were not material to the determination of probable cause.....	26
IV.	<u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

Table of Cases

Federal:

<u>Aguilar v. Texas</u> , 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).....	12, 13, 14, 16, 19
<u>Brinegar v. United States</u> , 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).....	10, 11
<u>Franks v. Delaware</u> , 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).....	22
<u>Spinelli v. United States</u> , 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).....	12, 13, 14, 16, 19
<u>United States v. Burke</u> , 517 F.2d 377 (2 nd Cir. 1975).....	19
<u>United States v. Wilson</u> , 479 F.2d 936 (7 th Cir. 1973)	19
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).....	17

Washington State:

<u>State v. Chamberlin</u> , 161 Wn.2d 30, 162 P.3d 389 (2007).....	11, 12
<u>State v. Chenoweth</u> , 160 Wn.2d 454, 158 P.3d 595 (2007).....	11, 22, 26
<u>State v. Clark</u> , 143 Wn.2d 731, 24 P.3d 1006 (2001).....	23
<u>State v. Copeland</u> , 130 Wn.2d 244, 922 P.2d 1304 (1996).....	23

<u>State v. Cord</u> , 103 Wn.2d 361, 693 P.2d 81 (1985).....	22
<u>State v. Duncan</u> , 81 Wn. App. 70, 912 P.2d 1090 (1996).....	15, 16
<u>State v. Estorga</u> , 60 Wn. App. 298, 803 P.2d 813 (1991).....	17
<u>State v. Fry</u> , 168 Wn.2d 1, 228 P.3d 1 (2010).....	11
<u>State v. Garrison</u> , 118 Wn.2d 870, 827 P.2d 1388 (1992).....	22, 23
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	23
<u>State v. Huff</u> , 33 Wn. App. 304, 654 P.2d 1211 (1982).....	16
<u>State v. Ibarra</u> , 61 Wn. App. 695, 812 P.2d 114 (1991).....	14
<u>State v. Jackson</u> , 102 Wn.2d 432, 688 P.2d 136 (1984).....	13, 15, 17
<u>State v. Jackson</u> , 150 Wn.2d 251, 76 P.3d 217 (2003).....	12
<u>State v. Kennedy</u> , 72 Wn. App. 244, 864 P.2d 410 (1993).....	13
<u>State v. Lair</u> , 95 Wn.2d 706, 630 P.2d 427 (1981).....	13, 16
<u>State v. Maddox</u> , 152 Wn.2d 499, 98 P.3d 1199 (2004).....	11
<u>State v. Neth</u> , 165 Wn.2d 177, 196 P.3d 658 (2008).....	10, 12

<u>State v. O'Connor</u> , 39 Wn. App. 113, 692 P.2d 208 (1984).....	23
<u>State v. Olson</u> , 73 Wn. App. 348, 869 P.2d 110 (1994).....	13
<u>State v. Seagull</u> , 95 Wn.2d 898, 632 P.2d 44 (1981).....	22
<u>State v. Smith</u> , 110 Wn.2d 658, 756 P.2d 722 (1988), <u>cert. denied</u> , 488 U.S. 1042, 109 S. Ct. 867, 102 L. Ed. 2d 991 (1989).....	14, 15
<u>State v. Tarter</u> , 111 Wn. App. 336, 44 P.3d 899 (2002).....	14
<u>State v. Thein</u> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	11
<u>State v. Vickers</u> , 148 Wn.2d 91, 59 P.3d 58 (2002).....	10
<u>State v. Wolken</u> , 103 Wn.2d 823, 700 P.2d 319 (1985).....	14
<u>State v. Young</u> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	13, 16

Constitutional Provisions

Federal:

U.S. Const. amend. IV	10, 22
-----------------------------	--------

Washington State:

Const. art. I, § 7.....	10
-------------------------	----

Rules and Regulations

Washington State:

CrR 3.5..... 2, 3
CrR 3.6..... 1, 2, 9, 24

Other Authorities

2 Wayne R. LaFave, Search and Seizure
§ 3.3 (4th ed. 2004) 17

I. ISSUES PRESENTED

1. Was a search warrant seeking authority to conduct a thermal image and narcotics dog sniff of the defendant's residence supported by probable cause?

2. Do two errors in the affidavit for the search warrant – one relating to the date of a prior burglary of the defendant's apartment and one relating to how many handguns were stolen during the burglary – invalidate the search warrant?

a. Were these errors intentional or reckless?

b. Setting aside the two erroneous statements, was the warrant nevertheless supported by probable cause?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

Darren Harrell was charged with a Violation of the Uniform Controlled Substances Act for manufacturing marijuana. CP 1. At the conclusion of a CrR 3.6 hearing, the trial court denied Harrell's motion to suppress the evidence obtained upon the execution of a search warrant. CP 72-76. Harrell agreed to a stipulated trial. RP 106-08. He was found guilty as charged, and received a standard range sentence of 30 days home detention and 240 hours

community service. RP 119-20; CP 50-52, 53-54, 55-62. Harrell has now filed a timely appeal. CP 63-71.

B. FACTUAL BACKGROUND.¹

On July 3, 2008, after receiving a tip from a confidential informant, and conducting a preliminary investigation, King County Sheriff's Detective Volpe sought and obtained a search warrant to conduct a thermal image of, and to use a narcotics detection dog on, the property located at 12809 NE 185 Court in Bothell, Washington.² CP 72-73.

On July 7, 2008, based on the positive results from the thermal imaging device and narcotics dog sniff, Det. Volpe obtained a search warrant for the residence at that same location. CP 73.

On July 9, 2008, the search warrant was executed. CP 2. Inside the residence detectives found a marijuana grow operation. CP 2-3, 53. This included two rooms of growing marijuana plants, a hydroponics system and light hoods, carbon dioxide tanks, air

¹ This summary of the facts is derived from the Certification for Determination of Probable Cause (CP 2-4); the Written CrR 3.5 Findings of Fact and Conclusions of Law (CP 77-79); the Written CrR 3.6 Findings of Fact and Conclusions of Law (CP 72-76); and the Order on Stipulated Facts (CP 53-54).

² Whether this warrant was supported by probable cause is the sole basis on which Harrell appeals his conviction. The warrant and associated affidavit are discussed in detail in the argument section of this brief.

conditioning units, and a system to blow air out of the chimney. CP 2. Two video cameras were set up to monitor the exterior of the home. CP 3. Mail and other "dominion and control" evidence established that the house was the residence of Darren Harrell. CP 3, 53. Detectives seized 97 live plants and 268 grams of processed marijuana. CP 2, 53.

As the search was being conducted, detectives observed Harrell approaching the residence in a vehicle. CP 3. Harrell was placed under arrest and advised of his constitutional rights. CP 3, 78. Harrell agreed to give a statement to detectives.³ CP 3, 78. Harrell admitted to growing marijuana, telling detectives that he was the only individual involved in the grow operation. CP 3, 78. Harrell told detectives that he rented the house from a former girlfriend. CP 3, 78.

The suspected marijuana seized from Harrell's residence was tested and confirmed to be marijuana by the Washington State Patrol Crime Lab. CP 53.

³ The trial court admitted this statement after conducting a CrR 3.5 hearing, and over Harrell's objection. Harrell has not pursued this issue on appeal.

III. ARGUMENT

A. THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

Harrell argues that the initial search warrant sought by Det. Volpe – seeking authority to conduct a thermal image and dog sniff – lacked probable cause. This argument is without merit.

1. Relevant facts: affidavit for search warrant.

Prior to trial, Harrell moved to suppress the evidence found during the search on the grounds that the initial search warrant – that sought approval to conduct the thermal imaging and narcotics dog sniff – was not supported by probable cause. RP 12-16. Both Harrell and the State submitted briefs on the issue, which were reviewed by the court. CP 8-48 (Defense Brief), 80-107 (State's Brief); RP 9.

Det. Volpe's affidavit in support of the first search warrant request is attached as Appendix A (hereafter, the "affidavit"). The affidavit stated in relevant part:

On 5-01-08 I was contacted by a confidential informant (CI) who told me that he/she had knowledge of marijuana manufacturing. CI was arrested for a non-violent misdemeanor marijuana crime and wanted to provide information regarding marijuana manufacturing in exchange for leniency in his/her pending criminal case. CI has no criminal convictions and works in King County. CI said that he

knew a male named "Darren Harrell" who has a long drug history and has access to weapons. The CI is very afraid of retaliation for cooperating with the police. CI was adamant about keeping his/her identity secret out of fear of Harrell. During my conversations with CI I found nothing to lead me to believe that anything he/she told me was untrue.

CI told me that he/she knew a black male, about 36 years old, named "Darren Harrell." CI said that Harrell has been manufacturing marijuana for a number of years. CI said that Harrell drives a black Lincoln Navigator and lives at the address 12809 NE 185 CT, Bothell WA. I have talked with CI on several occasions. CI told me that he/she has been to the listed address on several occasions within the last three years. CI told me that Harrell showed him/her his marijuana growing operation in the house. CI admitted to criminal activity related to possession and use of marijuana and said that he/she was very familiar with the appearance and odor of marijuana. CI told me that he/she did not think that Harrell lived full time at the address and believed that Harrell lives in Redmond. CI told me that Harrell has been known to use video surveillance equipment in the past and he believes that equipment may be set up at the 12809 NE 185 CT address.

I have been able to verify some of the information that CI provided me regarding Darren Harrell. I checked Washington Department of Licensing (DOL) and found that a Darren James Harrell, Date of Birth 01-14-69 (39 years old), is registered as living at 12809 NE 185 CT, Bothell WA and that address was last updated as current in DOL on 1-11-08. Nobody else is listed in WA DOL as living at that address. I obtained a WA DOL photograph of Harrell and he shows to be a black male. Your affiant checked King County District Court records and found that Darren Harrell was issued an HOV infraction on 10/19/07 while driving a Black Lincoln Navigator, WA license 317RVQ, belonging to Devonne Iao.

I checked King County Public Records and found that the address 12809 NE 185 CT, Bothell WA is owned by Devonne W. Iao. The property is listed as 1 story 1,940 square foot residential home with a 1,940 square foot basement, 1660 square feet is unfinished. The home shows to be heated with gas.

I checked the King County Sheriff's Office Incident Reporting System (IRIS) and located a report taken from Darren Harrell on 02/10/07 reporting a burglary at his residence. Harrell reported that his apartment was burglarized and several items of value, including three handguns, were stolen. Harrell had a video camera recording the incident and the two suspects were identified and charged. This information corroborated what CI told me about Harrell having guns and video surveillance equipment.

On 5-3-08 at about 7:30 pm I went to 12809 NE 185 CT, Bothell WA to try and contact the occupants. The house is towards the end of a dead end cul-de-sac. I knocked several times at the front door, heard noises like people moving around, but nobody would answer the door. The house seemed to stick out in the neighborhood. The property was very unkempt, compared with the well manicured homes and yards in the neighborhood. The lawn hadn't been mowed in weeks, there were weeds taking over the gardens, and there were branches, pine needles, leaves, and junk on the roof and driveway. All the windows had curtains that were tightly drawn and nothing was visible inside. From the street I could see all of the windows on the south, east, and north sides of the house and every one of them was covered by blinds or curtains. There were several newspapers on the driveway and front porch that had been delivered, but not picked up.

I spoke with several neighbors in the cul-de-sac. One neighbor, a confidential citizen informant, wished to remain anonymous for fear of retaliation. The citizen has no criminal history and has lived on the street for many years. The citizen informant told me that a

black male named "Darren" lived at the residence 12809 NE 185 CT, Bothell WA and had a girlfriend or wife, which he/she has seen on occasion. The citizen said that "Darren" moved into the home about 3 years ago. This citizen told me that "Darren" keeps to himself and is not social with the rest of the neighbors. The citizen said that was unusual because the cul-de-sac is a very close. The citizen told me that "Darren" drives a black Lincoln Escalade, which he parks in the garage. The citizen informant told me that he/she thought "Darren" was suspicious and at one point joked that there was a marijuana growing operation in his home.

Another neighbor, a confidential informant, told me that a black male named "Darren" lives at 12809 NE 185 CT. I spoke with him/her initially on 5-3-08 and have maintained contact with him/her on several occasions through 6-22-08. This citizen told me that "Darren" drives a Black Lincoln Navigator and has lived at the house for about three years. This neighbor has lived in the community for many years and has no criminal record that I could find. This neighbor wanted to remain anonymous for fear of retribution and spoke with me for the sole reason of being a responsible citizen. I found the information provided by this citizen to be believable and found no reason to believe that he/she was lying. I asked him/her to write down any license plates of people coming to or from the house. The citizen wrote down the license plate WA 317RVQ, which he/she said was the Navigator that "Darren" was driving. Washington DOL shows that vehicle to be a Black Lincoln Navigator registered to a female named Devonne W. lao, with an address in Seattle. This is the same name as the owner of the property. I asked the citizen if he/she thought "Darren" was actually living in the house and the citizen said he/she wasn't sure. The citizen said that he/she sees "Darren" only when he drives home. The citizen told me that he/she periodically sees "Darren" drive up in the Navigator, open the garage remotely, drive in, then close the

door. The citizen says he/she never sees "Darren" get the mail, do yard-work, or spend any time outside. The citizen told me that when "Darren" moved into the neighborhood he didn't see much activity like people moving furniture, property, or other items inside. The citizen told me that over the years he/she has seen in the upstairs windows. The citizen said that there isn't any furniture or personal items except a couple chairs in the upstairs of the house. The citizen told me that the lights are on constantly during the night and he/she has not seen any changes such as lights going on or off. The citizen said that things appear the same every night at the house.

On 5-16-08 at about 7:00 pm Det. Cooper and I went to the address 12809 NE 185 CT and attempted to speak with the occupants a second time. I knocked on the door and rang the doorbell several times, but received no answer. The house appeared to be empty. The house was still in the same condition I had observed on my previous visits.

Your affiant knows from his training and experience that marijuana growers often rent or buy homes to grow marijuana and do not live in them permanently. The growing operations often times take up a portion of the home and people stop by periodically to tend the plants and give the illusion that the home is occupied. I have seen no activity at the house and have knocked on two occasions to try and speak with any occupants. I have maintained surveillance on the house on several occasions at different times of the day. I have not seen any lighting changes or other signs of occupancy. Each night the same lights are on and nothing appears to change at night. I have seen flyers and local newspapers build up on the walkway and porch for a few days. This leads me to believe that the occupants were gone for days at a time. With the statements from CI and from the neighbors, as well as my own observations it appears that nobody lives at the house full time and is

consistent with a subject using the home for marijuana growing.

CP 95-96.⁴

Harrell and Det. Volpe testified at the CrR 3.6 hearing.

RP 19-23 (Harrell), 59-60 (Det. Volpe). Harrell's testimony established the following: That his house had not been burglarized in 2007, as stated in the search warrant affidavit, but in 1999.

RP 21-23. That only a single handgun was stolen in this burglary.

RP 21. In addition, Harrell admitted that he had placed video surveillance cameras in his home. RP 23. Finally, Harrell stated that he wrote a letter in 2004, which he attached to the doors of approximately nine neighbors, complaining that people were watching his house. RP 21-22.

Det. Volpe testified and admitted that he mistakenly set forth the wrong date for the burglary of Harrell's home in the search warrant affidavit. RP 59. The burglary occurred on February 10, 1997; not on February 10, 2007. RP 59. Det. Volpe was not aware of this mistake when he prepared the affidavit. RP 59, 78, 82-83.

⁴ The State conceded below that obtaining power records via an administrative procedure was improper. RP 10. Accordingly, the State argued that there was probable cause for the thermal imaging device and narcotics dog sniff without the public records obtained from Puget Sound Energy. RP 10-12. The portion of the affidavit discussing the power records has not been quoted and is not relied upon by the State on appeal.

Also, Det. Volpe conceded that only one handgun was taken during the 1997 burglary, not three. RP 59-60. The report for the 1997 burglary listed the same handgun three times, and the detective mistakenly concluded that three different guns had been taken. RP 59-60.

After hearing oral argument, the court denied the motion to suppress. RP 10-16, 26-44, 92-96. The court found that the two misstatements relating to the burglary were not deliberate and that even without these statements the affidavit was supported by probable cause. RP 95.

2. Legal standard: search warrants.

The warrant clause of the Fourth Amendment to the United States Constitution and article I, section 7 of the state constitution requires that a search warrant be issued upon a determination of probable cause. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). “The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual's right to privacy.” State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing Brinegar v. United States, 338 U.S. 160, 176, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949)). “Probable cause

exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)). “It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause.” Maddox, 152 Wn.2d at 505, 98 P.3d 1199; see generally State v. Fry, 168 Wn.2d 1, 5, 228 P.3d 1, 4 (2010).

The issuance of a search warrant is a “highly discretionary” act. State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). It is grounded in a commonsense reading of the warrant affidavit and the reasonable inferences that can be drawn therefrom. Id. Once issued, a warrant is entitled to a presumption of validity, and courts will give “great deference to the magistrate's determination of probable cause” and resolve any doubts in favor of the warrant. Id.

On appeal, appellate courts review *de novo* the trial court's legal conclusion on a suppression motion that probable cause supported the issuance of a warrant. State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007). Generally, review 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).

Appellate courts evaluate the affidavit for a search warrant in a commonsense manner. State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). Courts look for more than mere suspicions and personal beliefs of criminal activity; but for facts and reasonable inferences from the facts that support a determination that probable cause exists. Id. at 264-65. “Probable cause exists where the affidavit. . . 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 may be found at a certain location.” Id. at 264. Any doubts are resolved in favor of the warrant. Jackson, 150 Wn.2d at 265.

3. Legal standard: confidential informants.

Harrell argues that the affidavit failed to establish the informant’s credibility and thus failed the Aguilar-Spinelli requirements. See Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

The affidavit in support of a search warrant must first contain information sufficient to establish an informant's trustworthiness

based on the underlying circumstances and sources of his or her knowledge. The affidavit must next contain information that establishes the informant's veracity. State v. Lair, 95 Wn.2d 706, 709, 630 P.2d 427 (1981). In other words, the affidavit must establish the informant's basis of knowledge and reliability. State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 136 (1984).

However, if an informant's tip fails one or the other prong, probable cause may yet be established by independent police investigation that corroborates the tip. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). The additional investigation must do more than merely verify innocuous details, commonly known facts, or easily predictable events. The police investigation must point to indications of criminal activity along the lines suggested by the informant. State v. Kennedy, 72 Wn. App. 244, 864 P.2d 410 (1993); State v. Olson, 73 Wn. App. 348, 869 P.2d 110 (1994).

When the informant is an ordinary citizen, as opposed to a criminal or professional informant, and his or her identity is revealed to the magistrate, the veracity prong of Aguilar-Spinelli is relaxed. Such citizens will rarely have a "track record" of prior tips with which to show reliability; instead, reliability may be inferred from the details of the affidavit setting forth the basis of knowledge, and from

the citizen's willingness to come forward and be identified. See, e.g., State v. Tarter, 111 Wn. App. 336, 44 P.3d 899 (2002). The information must still satisfy the independent basis of knowledge test.

A different analysis applies when the identify of the citizen informant is made known to police but withheld from the affidavit and the magistrate for fear of discovery and reprisal. In such cases, it is necessary for the police to interview the citizen and independently verify background information, such as lack of criminal record and ties to the community. State v. Ibarra, 61 Wn. App. 695, 812 P.2d 114 (1991).

4. The informant had an adequate basis of knowledge to support the claim that Harrell was growing marijuana.

An informant's personal observations can satisfy the basis of knowledge prong of the Aguilar-Spinelli test. State v. Wolken, 103 Wn.2d 823, 827, 700 P.2d 319 (1985). Information showing the informant personally has seen the facts asserted and is passing on firsthand information satisfies the basis of knowledge prong. State v. Smith, 110 Wn.2d 658, 663, 756 P.2d 722 (1988), cert. denied, 488 U.S. 1042, 109 S. Ct. 867, 102 L. Ed. 2d 991 (1989);

State v. Jackson, 102 Wn.2d 432, 437, 688 P.2d 136 (1984); State v. Duncan, 81 Wn. App. 70, 76, 912 P.2d 1090 (1996).

In this case, the first Confidential Informant ("CI-1") told Det. Volpe that he/she had been to Harrell's residence at the address listed in the search warrant affidavit on several occasions within the last three years and had seen, firsthand, a marijuana grow operation. CP 95. In addition, CI-1 stated that Harrell had shown him/her the grow operation. CP 95. Finally, CI-1 admitted to "criminal activity related to the use of marijuana and said that he/she was very familiar with the appearance and odor of marijuana." CP 95. This clearly satisfies the "basis of knowledge" requirement.

Indeed, this case is essentially identical to State v. Duncan, 81 Wn. App. 70, 76, 912 P.2d 1090 (1996), a case relied upon by Harrell in his opening brief. In Duncan, the court stated:

Here, Ms. DaVee said she was with Mr. Duncan at the storage facility and personally observed a quantity of marijuana in the storage unit. She also said Mr. Duncan told her the storage unit contained 20 pounds of marijuana. Mr. Duncan complains that her information is insufficient because it does not show how she was familiar with marijuana. We disagree. Ms. DaVee said Mr. Duncan told her it was marijuana. And she reported personally seeing the marijuana. That is sufficient.

Duncan, 81 Wn. App. at 76 (citing State v. Huff, 33 Wn. App. 304, 307, 654 P.2d 1211 (1982) (finding statement that “informant had personally observed a quantity of Marijuana in the above described residence” sufficient)).

5. Reliability and veracity of informant.

Under the veracity prong, police must present the issuing magistrate with sufficient facts to determine either the informant's inherent credibility or reliability. Huff, 33 Wn. App. at 307-08. The veracity prong is satisfied in either of two ways: (1) the informant's credibility may be established, or (2) if nothing is known about the informant, the facts and circumstances surrounding the information may reasonably support an inference that the informant is telling the truth. Lair, 95 Wn.2d at 709-10. If a police investigation reveals suspicious activity along the lines of the criminal behavior proposed by the informant, then the corroborating investigation may satisfy the requirements of Aguilar-Spinelli. Young, 123 Wn.2d at 195; see also Duncan, 81 Wn. App. 76-77.

It ‘can be said. . . that one who knows the police are already in a position to charge him with a serious crime will not lightly undertake to divert the police down blind alleys.’ 2 Wayne R. LaFave, Search and Seizure § 3.3(c), at 139 (4th ed. 2004). If an

informant provides information while knowing that discrepancies “might go hard with him,” that knowledge can be a reason to find the information reliable. 2 LaFave, supra, § 3.3(c), at 139 (quoting Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (dissent by Justices Clark, Harlan, Stewart and White)). Washington’s courts have adopted this reasoning. In Jackson, our Supreme Court stated that a declaration against the informant’s penal interest can establish indicia of reliability. State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984). A magistrate can attach greater reliability to admissions against penal interest after the informant has been arrested because the informant risks disfavor with the prosecutor if he or she lies. State v. Estorga, 60 Wn. App. 298, 304, 803 P.2d 813 (1991).

In this case, the information provided by CI-1 was appropriately verified by the detective’s investigation and other sources. CI-1 is a “criminal informant.” He/she had been arrested for a non-violent misdemeanor marijuana charge and wanted to cooperate with the authorities in exchange for leniency in his/her own case. As discussed above, Washington courts have recognized that criminal informants have a strong incentive to provide accurate information. Det. Volpe also confirmed that CI-1

works in King County and does not have a criminal record. CP 95. The lack of prior criminal history suggests that CI-1 did not have the sort of track record of prior tips that could be used to measure reliability. Accordingly, Det. Volpe sought to independently confirm CI-1's allegations.

Det. Volpe first confirmed that the basic information provided by CI-1 about Harrell was true; this included, that he was a black male about 36 years old (DOL records indicated that Harrell was 39 years old); that Harrell listed the address given by CI-1 as his residence; and that Harrell drove a Lincoln Navigator (the detective discovered that Harrell had a prior infraction in which he was driving a Lincoln Navigator).⁵ CP 95.

In addition, Det. Volpe visited Harrell's residence on several occasions and made observations that were consistent with CI-1's allegations. CP 95-96. Specifically, when the detective knocked, despite hearing individuals moving around inside, no one answered the door. Newspapers were uncollected on the porch and driveway. The house and yard was unmaintained. All of the

⁵ Det. Volpe also sought to verify CI-1's allegations concerning Harrell's access to handguns and use of video surveillance. However, for the reasons discussed below, this information will not be relied upon in the probable cause determination.

windows on the three sides of the house that the detective could see were covered up with blinds and curtains. The house was in the same state when the detective returned to view it thirteen days later. CP 95-96.

In addition, Det. Volpe spoke to two neighbors (CI-2 and CI-3) about the house and its occupants. CP 96. CI-2 and CI-3 are neighbors of Harrell who only became involved in the case because they were contacted by Det. Volpe. CP 96. Neither CI-2 or CI-3 had any criminal history. CP 96.

Courts have determined that a strict application of the Aguilar-Spinelli two-prong test is unwarranted where a citizen informant, rather than a professional informant is involved. United States v. Burke, 517 F.2d 377, 380 (2nd Cir. 1975). The necessity for relaxing the second prong of the test when information is supplied by citizen informants stems from the citizen's lack of opportunity to establish a record of previous reliability. United States v. Wilson, 479 F.2d 936 (7th Cir. 1973).

CI-2 and CI-3 corroborated information about Harrell, his vehicle, activities, and his involvement in the neighborhood. For example, CI-3 confirmed that Harrell drove a Lincoln Navigator and got the license plate of that car. CP 96. Det. Volpe used this

information to confirm that the Navigator was registered to a female named Devonne lao, at an address in Seattle. CP 96. The detective then confirmed that lao was the owner of the residence in question. CP 96.

CI-2 and CI-3 also confirmed that the house was largely vacant and that they rarely saw Harrell. CP 96. CI-3 stated that when Harrell moved in he did not observe people moving furniture, property, or other items inside the house. CP 96. CI-3 also stated that over the years he/she had seen inside the upstairs windows and there did not appear to be any furniture or personal items – except a couple of chairs – upstairs. CP 96. In addition CI-3 told Det. Volpe that the lights were constantly on during the night and that he/she had not seen any changes with lights going on or off. CP 96.

CI-2 stated that Harrell kept to himself, parked his vehicle (which he/she believed was a Lincoln Escalade) in the garage. CI-2 thought Harrell was “suspicious” and at one point joked that there was a marijuana grow operation in the house. CP 96.

Det. Volpe also conducted surveillance of the house at various times during the night and day; he did not observe any change in lighting or other signs of occupancy. CP 95-96.

Det. Volpe also stated in the search warrant affidavit that he knew, based on his own extensive experience and training investigating narcotics crimes, that marijuana growers often rent or buy homes to grow marijuana and do not live in them permanently. Growers then stop by the operation periodically to check on the plants and to give the illusion that the home is occupied. CP 96.

In sum, the information provided by CI-1, coupled with Det. Volpe's own independent investigation (consisting of his visits to Harrell's home and his conversations with CI-2 and CI-3), provided sufficient probable cause for the search warrant authorizing the narcotics detection dog and the use of a thermal heat image.

B. TWO ERRORS IN THE SEARCH WARRANT AFFIDAVIT DO NOT RENDER THE WARRANT INVALID.

On appeal, Harrell argues that two errors in the search warrant affidavit – the date of a prior burglary reported by Harrell and the facts that only one, not three, handguns were stolen from Harrell during this burglary – renders the warrant invalid. This argument is without merit. These errors were not made deliberately or with a willful disregard for the truth. Moreover, as the trial court

correctly found, the errors were not material to the ultimate determination of probable cause.

1. Legal standard: errors in search warrant affidavit.

Under the Fourth Amendment, factual inaccuracies or omissions in a warrant affidavit may invalidate the warrant if the defendant establishes that they are (a) material and (b) made in reckless disregard for the truth. Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); State v. Cord, 103 Wn.2d 361, 366-67, 693 P.2d 81 (1985). A showing of mere negligence or inadvertence is insufficient. Franks, 438 U.S. at 171, 98 S. Ct. 2674; State v. Seagull, 95 Wn.2d 898, 908, 632 P.2d 44 (1981); State v. Chenoweth, 160 Wn.2d 454, 462, 158 P.3d 595, 599 (2007).

A defendant challenging a warrant on this basis is entitled to an evidentiary hearing, known as a “Franks” hearing, if he or she makes a substantial preliminary showing of the omissions and their materiality. Franks, 438 U.S. 154; State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992).

Significantly, however, if the affidavit supports probable cause even when the omitted information is considered, “the suppression motion fails and no hearing is required.” Garrison,

118 Wn.2d at 873. An omission or misstatement is material if it was necessary to the finding of probable cause. State v. Copeland, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996); State v. Gentry, 125 Wn.2d 570, 604, 888 P.2d 1105 (1995).

Finally, recklessness may be shown by establishing that the affiant actually entertained serious doubts about the informant's veracity. State v. Clark, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001) (citing State v. O'Connor, 39 Wn. App. 113, 117, 692 P.2d 208 (1984)). "Serious doubts" may be inferred from either (a) an affiant's actual deliberation or (b) the existence of obvious reasons to doubt the informant's veracity or the information provided. Clark, 143 Wn.2d at 751, 24 P.3d 1006 (quoting O'Connor, 39 Wn. App. at 117).

2. Relevant facts: errors in search warrant affidavit.

In the search warrant affidavit, Det. Volpe wrote:

I checked the King County Sheriff's Office Incident Reporting System (IRIS) and located a report taken from Darren Harrell on 02/10/07 reporting a burglary at his residence. Harrell reported that his apartment was burglarized and several items of value, including three handguns, were stolen. Harrell had a video camera recording the incident and the two suspects were identified and charged. This information corroborated what CI told me about Harrell having guns and video surveillance equipment.

CP 95.

Harrell testified at the CrR 3.6 hearing. RP 19-23. His testimony established the following: First, that his house had not been burglarized in 2007, as stated in the search warrant affidavit, but in 1999. RP 21-23. He stated that only a single handgun was stolen in this burglary. RP 21. Harrell admitted that he had placed video surveillance cameras in his home. RP 23.

Det. Volpe testified and admitted that he mistakenly set forth the wrong date for the burglary of Harrell's home in the search warrant affidavit. RP 59. The burglary occurred on February 10, 1997; not on February 10, 2007. RP 59. Det. Volpe was not aware of this mistake when he prepared the affidavit. RP 59, 78, 82-83. Also, Det. Volpe conceded that only one handgun was taken during the 1997 burglary, not three. RP 59-60. The report for the 1997 burglary listed the same handgun three times, and the detective mistakenly concluded that three different guns had been taken. RP 59-60.

In its oral ruling, the trial court stated:

Defense makes much of the fact that the officer put down a wrong date, that the date of this previous burglary was February 10, 1997, and the detective represented it as February 10, 2007.

I did indicate [earlier in the court's oral ruling] that in the same paragraph where the date is off by exactly ten years, the residence is indicated as an apartment as opposed to a stand-alone residence. And the affidavit in this case makes clear that the residence attributed to Mr. Harrell at the time of the execution of the search warrant is a stand-alone residence in a suburban cul-de-sac.

There is no question that there was only one handgun involved in the theft from Mr. Harrell in 1997, not three that are mentioned in the report.

I don't find these misrepresentations to be willful. I also don't find them to be key facts, both either the date or the number of handguns involved, that would have anything to do with whether or not there is probable cause to issue a search warrant in this case.

RP 95.

3. The errors were not made deliberately or with a reckless disregard for the truth.

The two errors were clearly neither deliberate or reckless. Misstating the date of the prior robbery by exactly ten years is a natural mistake. Det. Volpe testified that he put the wrong date down by mistake and had he noticed that it was wrong he would have put the correct date. CP 59. Det. Volpe also testified that because the burglary report listed the serial number for the same gun three times, he thought that three guns had been stolen.

CP 60.

This is not the sort of deliberate or intentional misconduct that requires voiding of the warrant. At best, it is a negligent

mistake. But negligence is not the standard to be applied when considering errors in an affidavit for a search warrant. See Chenoweth, 160 Wn.2d at 479-80. In sum, the trial court did not abuse its discretion when it determined that Det. Volpe did not deliberately or willfully insert errors into the search warrant affidavit.

4. The errors were not material to the determination of probable cause.

Finally, as the trial court also correctly recognized, these two errors were minimally relevant to the question of probable cause. At best, they provided some corroborative value concerning CI-1's credibility (confirming the allegation that Harrell had access to weapons and used surveillance cameras). It is also worth pointing out that the two errors were not complete misstatements of fact. Harrell had been robbed of a handgun and he did have a surveillance camera operating at the time of the robbery. In any event, as outlined above, the warrant was supported by probable cause even without consideration of these two inaccurate statements.

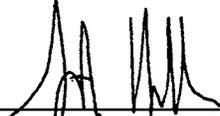
IV. CONCLUSION

The State of Washington respectfully requests that Harrell's conviction for a Violation of the Uniform Controlled Substances Act be affirmed.

DATED this 13 day of July, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

STEPHEN P. HOBBS, WSBA #18935
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

APPENDIX A

FIRST AFFIDAVIT FOR SEARCH WARRANT

DATED: JULY 3, 2008

CP 94-99

KING COUNTY DISTRICT COURT

SCOTTE LINE

STATE OF WASHINGTON)

NO. SAO 025 58

:

AFFIDAVIT FOR SEARCH WARRANT

COUNTY OF KING)

The undersigned by oath states, I believe that:

- (X) Evidence of the crime of Violation of the Uniform Controlled Substances Act (RCW 69.50.401)
- () Contraband, the fruits of a crime, or things otherwise criminally possessed, and
- () Weapons or things by means of which a crime has been committed or reasonable appears to be committed, and
- () A person for whose detention there is a probable cause, or who is unlawfully restrained

Is/Are located in, on, or about the following described premises, vehicles, persons, or property:

A thermal heat image and the use of a Narcotics Detection Dog on the exterior of the buildings and property located at 18209 NE 185 CT, Bothell, King County, WA 98011, a tan with green trim two story residence with "12809" in gold letters next to the front door, to include any sheds, outbuildings, and/or structures located on the property described. The result will be evidence of an attempt to commit an offense under the Uniformed Controlled Substance Act, in violation of RCW 69.50.401.

My belief is based on the following facts and circumstances:

I am your affiant, Detective Matthew Volpe. I have been employed as a Deputy with the King County Sheriff's Office since August of 2002. Your affiant is currently assigned to the North Precinct Special Emphasis Team as an undercover, plainclothes detective. Your affiant has been a law enforcement officer over for 8 years. Your affiant worked for 3 years as a police officer with the City of Bellevue. Your affiant has been employed by the King County Sheriff's Office for over 5 years. Your affiant has investigated in excess of 150 narcotics related offenses, including, but not limited to: marijuana, cocaine, various opiates, MDMA, schedule drugs, and methamphetamine. These investigations have spanned from simple narcotics possession, to manufacturing and/or possession with intent to deliver a controlled substance. Your affiant has attended and successfully completed the Washington State criminal justice training academy, which consisted of not less than 440 hours of law enforcement instruction. Your affiant has completed numerous narcotics training classes including: Advanced training in narcotics detection/identification, and narcotics related crime investigation given by KCSO; 40-hours of Reed Interviewing Instruction; 8-hours DEA Concealment Techniques; 16-hour Drug Interdiction; 40-hour Drugs, Guns and Gangs Conference by Heartland Law Enforcement Training Institute, 32-hour California Narcotics Officer Association Conference (2007). Your affiant's present responsibilities include the investigation of property crimes, street level narcotics, surveillance, competing follow-up narcotics related investigations, and assisting department deputies with their investigations as required.

Deputy Salvadalena has been employed as a police officer/detective with the King County Sheriff's Office since June 1990. After successfully completing the Washington State Criminal Justice Training Academy, he was assigned to Precinct # 2. He has been assigned to patrol, where he investigated approximately one hundred cases for possession of marijuana, one hundred for cocaine, fifty for heroin, fifty for methamphetamine, as well as "acid" and illegal possession of prescription medications. Deputy Salvadalena has also been assigned to the precinct # 2 pro-active unit where he had dealt with street level narcotics to include, but not limited to, the previously listed narcotics. He has purchased controlled substances, himself and through the use of police informants, on numerous

occasions. Deputy Salvadalena has attended and completed the sixteen hour narcotics investigation school, hosted by the Washington State Patrol. He is a field training officer, and has trained over fourteen recruits in the ability to recognize and field test street level narcotics. He has personally used the smell of growing/processed marijuana as the basis of obtaining at least twelve search warrant(s) for person(s) and/or premises. He has been assigned as a plain-clothes street crimes detective at Precinct #2 from June 1993 to December 1994, and was then assigned as a plain-clothes street crimes detective at Precinct #5, from 1996 to 2001. He was then assigned as a plain-clothes street crimes detective at Precinct #2 from March 2003 to September 2006. He is currently assigned to Precinct #2 as a Master Police Officer and Police Training Officer. He has conducted undercover operations where he has purchased controlled substances himself directly, and through the use of police informants on at least one hundred occasions. Deputy Salvadalena has written approximately twenty-five search warrants for person(s) and premises to include, but not limited to, marijuana growing operations, heroin possession and/or sales, methamphetamine possession and/or sales, and cocaine possession and/or sales.

On 5-01-08 I was contacted by a confidential informant (CI) who told me that he/she had knowledge of marijuana manufacturing. CI was arrested for a non-violent misdemeanor marijuana crime and wanted to provide information regarding marijuana manufacturing in exchange for leniency in his/her pending criminal case. CI has no criminal convictions and works in King County. CI said that he knew a male named "Darren Harrell" who has a long drug history and has access to weapons. The CI is very afraid of retaliation for cooperating with the police. CI was adamant about keeping his/her identity secret out of fear of Harrell. During my conversations with CI I found nothing to lead me to believe that anything he/she told me was untrue.

CI told me that he/she knew a black male, about 36 years old, named "Darren Harrell." CI said that Harrell has been manufacturing marijuana for a number of years. CI said that Harrell drives a black Lincoln Navigator and lives at the address 12809 NE 185 CT, Bothell WA. I have talked with CI on several occasions. CI told me that he/she has been to the listed address on several occasions within the last three years. CI told me that Harrell showed him/her his marijuana growing operation in the house. CI admitted to criminal activity related to possession and use of marijuana and said that he/she was very familiar with the appearance and odor of marijuana. CI told me that he/she did not think that Harrell lived full time at the address and believed that Harrell lives in Redmond. CI told me that Harrell has been known to use video surveillance equipment in the past and he believes that equipment may be set up at the 12809 NE 185 CT address.

I have been able to verify some of the information that CI provided me regarding Darren Harrell. I checked Washington Department of Licensing (DOL) and found that a Darren James Harrell, Date of Birth 01-14-69 (39 years old), is registered as living at 12809 NE 185 CT, Bothell WA and that address was last updated as current in DOL on 1-11-08. Nobody else is listed in WA DOL as living at that address. I obtained a WA DOL photograph of Harrell and he shows to be a black male. Your affiant checked King County District Court records and found that Darren Harrell was issued an HOV infraction on 10/19/07 while driving a Black Lincoln Navigator, WA license 317RVQ, belonging to Devonne Iao.

I checked King County Public Records and found that the address 12809 NE 185 CT, Bothell WA is owned by Devonne W. Iao. The property is listed as a 1 story 1,940 square foot residential home with a 1,940 square foot basement, 1660 square feet is unfinished. The home shows to be heated with gas.

I checked the King County Sheriff's Office Incident Reporting System (IRIS) and located a report taken from Darren Harrell on 02/10/07 reporting a burglary at his residence. Harrell reported that his apartment was burglarized and several items of value, including three handguns, were stolen. Harrell had a video camera recording the incident and the two suspects were identified and charged. This information corroborated what CI told me about Harrell having guns and video surveillance equipment.

On 5-3-08 at about 7:30 pm I went to 12809 NE 185 CT, Bothell WA to try and contact the occupants. The house is towards the end of a dead end cul-de-sac. I knocked several times at the front door, heard noises like people moving around, but nobody would answer the door. The house seemed to

stick out in the neighborhood. The property was very unkempt, compared with the well manicured homes and yards in the neighborhood. The lawn hadn't been mowed in weeks, there were weeds taking over the gardens, and there were branches, pine needles, leaves, and junk on the roof and driveway. All the windows had curtains that were tightly drawn and nothing was visible inside. From the street I could see all of the windows on the south, east, and north sides of the house and every one of them was covered by blinds or curtains. There were several newspapers on the driveway and front porch that had been delivered, but not picked up.

I spoke with several neighbors in the cul-de-sac. One neighbor, a confidential citizen informant, wished to remain anonymous for fear of retribution. The citizen has no criminal history and has lived on the street for many years. The citizen informant told me that a black male named "Darren" lived at the residence 12809 NE 185 CT, Bothell WA and had a girlfriend or wife, which he/she has seen on occasion. The citizen said that "Darren" moved into the home about 3 years ago. This citizen told me that "Darren" keeps to himself and is not social with the rest of the neighbors. The citizen said that was unusual because the cul-de-sac is a very close. The citizen told me that "Darren" drives a black Lincoln Escalade, which he parks in the garage. The citizen informant told me that he/she thought "Darren" was suspicious and at one point joked that there was a marijuana growing operation in his home.

Another neighbor, a confidential informant, told me that a black male named "Darren" lives at 12809 NE 185 CT. I spoke with him/her initially on 5-3-08 and have maintained contact with him/her on several occasions through 6-22-08. This citizen told me that "Darren" drives a Black Lincoln Navigator and has lived at the house for about three years. This neighbor has lived in the community for many years and has no criminal record that I could find. This neighbor wanted to remain anonymous for fear of retribution and spoke with me for the sole reason of being a responsible citizen. I found the information provided by this citizen to be believable and found no reason to believe that he/she was lying. I asked him/her to write down any license plates of people coming to or from the house. The citizen wrote down the license plate WA 317RVQ, which he/she said was the Navigator that "Darren" was driving. Washington DOL shows that vehicle to be a Black Lincoln Navigator registered to a female named Devonne W. Iao, with an address in Seattle. This is the same name as the owner of the property. I asked the citizen if he/she thought "Darren" was actually living in the house and the citizen said he/she wasn't sure. The citizen said that he/she sees "Darren" only when he drives home. The citizen told me that he/she periodically sees "Darren" drive up in the Navigator, open the garage remotely, drive in, then close the door. The citizen says he/she never sees "Darren" get the mail, do yard-work, or spend any time outside. The citizen told me that when "Darren" moved into the neighborhood he didn't see much activity like people moving furniture, property, or other items inside. The citizen told me that over the years he/she has seen in the upstairs windows. The citizen said that there isn't any furniture or personal items except a couple chairs in the upstairs of the house. The citizen told me that the lights are on constantly during the night and he/she has not seen any changes such as lights going on or off. The citizen said that things appear the same every night at the house.

On 5-16-08 at about 7:00 pm Det. Cooper and I went to the address 12809 NE 185 CT and attempted to speak with the occupants a second time. I knocked on the door and rang the doorbell several times, but received no answer. The house appeared to be empty. The house was still in the same condition I had observed on my previous visits.

Your affiant knows from his training and experience that marijuana growers often rent or buy homes to grow marijuana and do not live in them permanently. The growing operations often times take up a portion of the home and people stop by periodically to tend the plants and give the illusion that the home is occupied. I have seen no activity at the house and have knocked on two occasions to try and speak with any occupants. I have maintained surveillance on the house on several occasions at different times of the day. I have not seen any lighting changes or other signs of occupancy. Each night the same lights are on and nothing appears to change at night. I have seen flyers and local newspapers build up on the walkway and porch for a few days. This leads me to believe that the occupants were gone for days at a time. With the statements from CI and from the neighbors, as well as my own observations it appears that nobody lives at the house full time and is consistent with a subject using the home for marijuana growing.

On 6/18/08 your affiant prepared an administrative subpoena requesting the power usage records for 12809 NE 185 CT, Bothell, WA and faxed it to Puget Sound Energy. On 6/18/08 your affiant received a response from Puget Sound Energy representative, Vera Fuchs. The report detailed the power and gas usage of that address for the last two years, from 7/14/05 to 6/12/08. The current account is in the name "Devonne Weng Iao," which was activated on 10/30/99. Specifically, the report showed the following data for this time frame:

Date of readings
 Power usage (per one month cycle)
 Number of Days in cycle
 Average Usage per Day
 Average Exterior Temperature
 Billed amount (per billing cycle)

Through your affiant and MPO Salvadalena's training and experience we know that it is common for marijuana growers to grow their plants under large electric lights; for that proper growth only a few plants can be grown under any one light. That growers have banks of these lights to facilitate plant growth. That the types of these lights favored by marijuana growers are metal halide and high-pressure sodium. These types of lights require large amounts of electricity when they are in operation, subsequently if a marijuana grower is not diverting power or using a gas or diesel powered generator, the power consumption for the residence will be well above normal. According to the DEA training that MPO Salvadalena received, he knows that the average square foot home in this area (approx. 1800-2000 square feet), uses approximately between 700 and 1200 KWH of electrical energy per billing cycle. Through King County Public Records we know that the residence at 12809 NE 185 CT, Bothell WA uses gas, not electricity, for heating purposes. Also the gas records for the house provided by PSE show that gas usage to fluctuate inversely with the average monthly temperature, which is consistent with a home heated with natural gas. As the average monthly temperature goes up, gas usage goes down and vice versa. The electrical power records for the above address are between 3520 KWH and 4280 KWH for each billing cycle (29-32 day cycle) for the last 3 years. This is over 3 to 5 times the power usage when compared to an average home electrical usage. This is a very large amount of power, especially when the house is not heated with electricity. Based on your affiant and MPO Salvadalena's training and experience we know that an average 1000 watt bulb needed for effectively growing any vegetable matter indoors will use about 550 KW per month when running an average of 18 hours per day. Based on the power consumption at 12809 NE 185 CT, Bothell WA for the last 3 years, your affiant and MPO Salvadalena conclude there is enough electric power being consumed at the address to support multiple large bulbs of various sizes commonly used for growing marijuana. This figure takes into consideration, and is well above, the normal amount of power commonly used with a residence of this size with an electric radiant heat source.

Based on our training and experience in investigating marijuana growing operations MPO Salvadalena and I have learned the following:

Marijuana growers must exhaust the air from within a marijuana grow and bring in fresh air from outside the residence. This is accomplished using industrial strength intake/out-take fan systems and air filtration systems to attempt to hide the odor of the exhausted air from the marijuana grow.

We know that it is common for power usage to be significantly higher at marijuana grow locations than at "normal" residences due to use of lights, fans, automatic watering equipment that is used in marijuana cultivation. I also know that power diversion is sometimes used on premises to divert attention from increased power usage. Generators are also sometimes used to supplement normal power.

That is common to find marijuana plants in different stages of maturity in order to maintain even production, and to provide for continuous rotation of crops. It is common for marijuana plants to take 8-12 weeks to reach maturity (harvest), and that grow operations often continue for years, crop after crop, until intervention of law enforcement.

We know that is common to find individuals maintaining growing operations in outbuildings and other structures separate from the main living residence. It is common for the living area of the property to be used for processing, storage and sales, as well as containing evidence of dominion and control, proceeds and records of sales. It is also common to find that the individuals that maintain growing operation maintain several at a time at different locations.

It is common for windows to be covered to prevent operations from being seen from the outside of a building, and to shield high intensity light from radiating outward from a building. Window coverings also shield from view, excess humidity being emitted from growing marijuana plants and forming on windows.

I know that typical lighting equipment, heaters, fans used in venting odors and humidity, all common to marijuana grow operations require large amount of electricity. Sodium halide lights, usually in 500 or 1000 watt variations are usually used to provide growing light for marijuana plants. These lights generate tremendous heat, and in turn this heat needs to be vented from any structure being used to grow marijuana. Venting heat leaves a "signature" that can be detected by a thermal imaging device.

Based on the above I believe that marijuana is being cultivated at the property:

- 12809 NE 185 CT, Bothell, King County, WA 98011

I am also aware of the availability of and the investigative advantages of gathering evidence through the use of a thermal imaging device. This device would show unusual temperature differences on the exterior walls of rooms, and outbuildings being used to grow marijuana and also the external venting pipes and ducts used to evacuate warm/humid air from these locations. These unusual heat patterns are consistent with the common characteristics found in indoor marijuana grow operations. A thermal image device is a passive, non-intrusive system, which detects differences in temperature of an object being observed. This system does not send any beams or rays into an area, nor does it enter a structure. The use of this device in the early morning or late evening hours, without solar loading will highlight man-made heat sources as a white color and cooler temperatures by shades of gray and black. This instrument is off-the-shelf technology and is commercially available to the general public. Similar devices such as this have been used in other applications such as locating missing persons in a forest, and locating fire through smoke, detecting overloaded electrical circuits and wires and identifying inefficient insulation. The use of a thermal imager is accomplished from a distance and using the device does not require that the operator to enter or remain upon the structure being viewed. The image is used from a vantage point or area in which police officers would have a legal right to be. I believe that the use of a thermal imaging device to observe the surface temperatures of the residence listed in this affidavit would result in further evidence of the crime of Violation of the Uniform Controlled Substances Act.

In *State vs Young*, 125 Wn 2d 173 (1994), the Washington State Supreme Court stated that the use of a thermal image constitutes a search. Use of a thermal image is less intrusive than other means of investigation, but would still provide valuable evidence confirming the presence of a marijuana grow.

For this reason I request court authority to use a thermal imaging device to view the property and record surface temperature differences on the structures located at 12809 NE 185 CT, Bothell, King County, State of Washington. I also request authority to compare thermal images from the above residence and outbuildings to those of other similar structures in the area. This request is made to assist in creating a baseline of comparison. Also due to weather conditions and ability to compare readings at different times to show consistency, the need for several applications of the thermal image may be required.

Your affiant also requests authority to use a Narcotics Detection dog that has been accredited by the Washington State Police Canine Association as a Narcotics Detection dog. That the Narcotics Detection Dog is trained to detect the odor and/or presence of cocaine, rock cocaine, heroin, methamphetamine, and marijuana. That the Narcotics Detection Dog will be used to gain a positive

confirmation that the odor of narcotics is or is not present while standing outside the residence located at 12809 NE 185 CT, Bothell, King County, State of Washington.

In State V. Dearman, 92.WN.APP.630 (1998), the Court of Appeals held that a police officers use of a trained Narcotics Dog to detect the presence of a controlled substance in a locked dwelling or associated structure under circumstances in which the presence of the controlled substance cannot be detected by the police officers using one or more of their own senses from a lawful vantage point constitutes a search for purposes of Const. Art. I, § 7.; But that it is less intrusive than an infrared thermal detection device.

Additionally, I request authority to leave no return of warrant service as: (1) No physical items will be removed from the premises and (2) providing return of service of this warrant will alert the occupants of the residence that an investigation is being conducted. Providing this information to the residents will compromise this investigation. I also request authority to trespass upon the properties to obtain the thermal images and use the Narcotics Detection Dog.

Based on the above, I believe that evidence of the crime of Violation of the Uniform Controlled Substance Act is located in, on, or about the following described premises, vehicles, and persons: A thermal Heat Image and the use of a King County Sheriff's Narcotics Detection Dog on the exterior of the buildings and property located at 12809 NE 185 CT, Bothell, King County, State of Washington, the result which will be evidence of an attempt to commit an offense under the Uniformed Controlled Substance Act, in violation of RCW 69.50.401.

M. Volpe
Affiant, Detective Matthew Volpe
King County Sheriff's Office, 09180

Subscribed and sworn to before me this 3RD day of JULY 2008

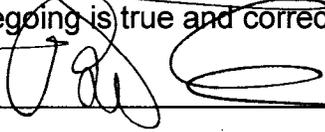
Douglas J. Smith
Judge
DOUGLAS J. SMITH
KING COUNTY DISTRICT COURT
SHORELINE DIVISION

Issuance of Warrant Approved:
Dan Satterburg
By Alice Degen, Deputy Prosecuting Attorney

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to VANESSA LEE, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE v. DARREN HARRELL, Cause No. 64329-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

07-13-10

Date

2010 JUL 13 PM 4:52