

65427-6

65427-6

NO. 65427-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KURT BENSHOOF,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

KRISTIN A. RELYEA
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

APPROVED
8
2011/05/11/11:59

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	2
a. The Warrant	2
b. Trial	5
c. Forfeiture	5
C. <u>ARGUMENT</u>	6
1. PROBABLE CAUSE SUPPORTED THE ISSUANCE OF THE SEARCH WARRANT	6
2. THE TRIAL COURT PROPERLY DENIED BENSHOOF'S MOTION TO RETURN HIS PROPERTY SUBJECT TO CIVIL FORFEITURE	14
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Baxter, 68 Wn.2d 416,
413 P.2d 638 (1966)..... 10

State v. Cheatam, 112 Wn. App. 778,
51 P.3d 138 (2002), aff'd,
150 Wn.2d 626, 81 P.3d 830 (2003)..... 9

State v. Cole, 128 Wn.2d 262,
906 P.2d 925 (1995)..... 7

State v. Dalton, 73 Wn. App. 132,
868 P.2d 873 (1994)..... 13

State v. Johnson, 79 Wn. App. 776,
904 P.2d (1995), review denied,
128 Wn.2d 1023 (1996)..... 8, 9

State v. Murray, 110 Wn.2d 706,
757 P.2d 487 (1988)..... 2, 7

State v. Seagull, 95 Wn.2d 898,
632 P.2d 44 (1981)..... 7

State v. Thein, 138 Wn.2d 133,
977 P.2d 582 (1999)..... 7, 10, 13

State v. Vickers, 148 Wn.2d 91,
59 P.3d 58 (2002)..... 7, 8, 11

State v. Vonhof, 51 Wn. App. 33,
751 P.2d 1221, review denied,
111 Wn.2d 1010 (1988), cert. denied,
488 U.S. 1008 (1989)..... 11, 12, 13

Statutes

Washington State:

RCW 10.105.010..... 6, 14

RCW 69.50.505..... 5, 14

Rules and Regulations

Washington State:

CrR 2.3..... 7

RAP 2.2..... 14, 15

A. ISSUES

1. Probable cause exists to issue a search warrant when the supporting affidavit sets forth sufficient facts for a reasonable person to conclude that the defendant is probably involved in criminal activity. Here, the search warrant was based on (1) the defendant's landlord's observations of a newly constructed room with "shiny, reflective aluminum foil" on the walls, electrical lamps, an apparent "sprinkler system," and approximately 50 small plants growing inside, (2) the extremely strong odor of marijuana emanating from a moving truck in the defendant's driveway, and (3) the defendant's flight out the back door when the police arrived. Given these circumstances, has Benshoof failed to show that the trial court issued the search warrant on less than probable cause?

2. A final order that affects a substantial right is appealable as a matter of right. Following his conviction, Benshoof petitioned the trial court to return his "marijuana-grow" equipment. The court denied Benshoof's motion without prejudice because of a pending civil forfeiture action involving the same property. Given that the trial court's order was not final, has Benshoof failed to show that the court order is appealable as a matter of right?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Kurt Benshoof with one count of Violation of the Uniform Controlled Substances Act - Manufacture of Marijuana. CP 1. The jury convicted Benshoof as charged and the trial court imposed a standard-range sentence. CP 36, 39-45; 6RP 13.¹ Benshoof timely appealed. CP 50.

2. SUBSTANTIVE FACTS

a. The Warrant²

On June 24, 2008 around 1:00 P.M., Albina Soudakova visited the house that she owned and had rented to Benshoof for the past two years. CP 138. During a walk-through inspection of the house with Benshoof, Soudakova noticed a "make-shift room/attic" that had been built above the laundry room. CP 138. Soudakova climbed up the ladder leading to the room and saw that

¹ The Verbatim Report of Proceedings consists of six volumes, designated as follows: 1RP (1/8/10 and 1/12/10), 2RP (3/29/10 and 3/30/10), 3RP (3/31/10), 4RP (4/1/10), 5RP (4/2/10), and 6RP (4/20/10).

² The facts supporting the warrant are taken solely from the affidavit. See State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988) (reviewing court can only consider the information available to the magistrate at the time the warrant was issued). Benshoof's reliance on the probable cause certification for these facts is misplaced. *Appellant's Br.* at 5-6.

the walls were lined with "shiny, reflective aluminum foil," and that the room contained "large lamps, ducting, pipes and wires."

CP 138. Soudakova noticed that both electrical power and water had been diverted to the room to create a "sprinkler system."

CP 138. Soudakova saw 50 small green plants growing inside the room. CP 138.

Concerned about possible drug activity at her rental house, Soudakova went to the police around 3:00 P.M. to report what she had seen. CP 138. Based on her training and experience, King County Sheriff's Deputy Paula Bates believed that Benshoof might be using the room and materials to cultivate marijuana. CP 138. That same day, Bates and another deputy went to investigate and talk to Benshoof. CP 138.

The deputies saw a large, yellow Handy Andy's moving truck parked in the driveway. CP 138. Both deputies noticed an "extremely strong" smell of marijuana coming from the truck. CP 138. The deputies walked to the back of the truck where they smelled marijuana by the rear, roll-up door. CP 138. King County Sheriff's Detective Chris Kieland detected the same "extremely strong" odor of marijuana emanating from the truck when he arrived. CP 138. All three officers recognized the smell of

marijuana from their prior training and experience. CP 138.

Soudakova saw Benshoof flee out the back of the house when the deputies arrived. CP 138. The deputies never found Benshoof to question him about the room or the moving truck. CP 138.

Just before 10:00 P.M. that night, Det. Kieland obtained a search warrant for the house and moving truck. CP 142. Police found 330 marijuana plants inside the moving truck and materials used to grow marijuana in the room described by Soudakova. 2RP 111, 116. The materials included mylar, wall siding used to maximize the amount of light reflected onto the plants, a large fan and venting to help eliminate the odor of marijuana, and high-output, halide lamps used to grow marijuana. 2RP 116-19. The ground of the room was littered with marijuana "shake." 2RP 118. In the garage, police found additional tubing, ballasts, timers, and lamps consistent with growing marijuana. 2RP 121-22.

Pre-trial, Benshoof moved to suppress the evidence. CP 58-71. The trial court denied Benshoof's motion. 2RP 20-21; CP 120-24. The court found that the evidence of the "grow operation" in the house, combined with the smell of marijuana coming from a vehicle parked in the driveway, established a

reasonable suspicion that marijuana was being cultivated in the house. 2RP 20-21; CP 122-24.

b. Trial

At trial, Benshoof claimed that his roommate grew the marijuana and that his roommate threatened to put him "at the bottom of the Duwamish" if Benshoof interfered. 4RP 28, 42-43. Benshoof denied assisting with the marijuana grow and refused to name the roommate for personal safety reasons. 4RP 25, 42-43. The jury rejected Benshoof's duress defense and convicted him as charged.³ CP 36.

c. Forfeiture

Post-sentencing, Benshoof filed a motion seeking the return of "marijuana-grow" equipment that the King County Sheriff's Office (KCSO) seized during its investigation. CP 72-81. Benshoof argued that KCSO failed to provide him with timely notice pursuant to the drug forfeiture statute, RCW 69.50.505(3). CP 73-74.

³ At Benshoof's request, the trial court instructed the jury on the duress defense. CP 33.

A couple of days after Benshoof had filed his motion, KCSO initiated civil forfeiture proceedings to seize the same property under the general felony forfeiture statute, RCW 10.105.010. CP 88-95. Based on these proceedings, KCSO argued that the trial court should deny Benshoof's motion because the status of the property would be adjudicated in the civil forfeiture action. CP 82. Without ruling on the merits, the trial court denied Benshoof's motion as "subject to [the] forfeiture process." CP 119.

C. ARGUMENT

1. PROBABLE CAUSE SUPPORTED THE ISSUANCE OF THE SEARCH WARRANT.

Benshoof renews his claim on appeal that there was an insufficient nexus between the moving truck in his driveway that smelled of marijuana, and the suspected criminal activity in the newly constructed room, to warrant searching his home. Benshoof's claim fails. Soudakova's observations in the house, the strong smell of marijuana emanating from the moving truck parked in the driveway a few hours later, and Benshoof's flight from the house upon the deputies' arrival, provided probable cause for the search warrant.

A search warrant may be issued only upon a judicial determination of probable cause. CrR 2.3(c); State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that "the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Consequently, probable cause requires a nexus between the alleged criminal activity and the place to be searched. Id. at 151. Mere suspicion or personal belief that evidence of a crime will be found at the place to be searched is insufficient to support a finding of probable cause. State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981).

On appeal, a magistrate's determination to issue a search warrant is afforded "great deference" and reviewed for an abuse of discretion. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). When determining whether probable cause existed to issue the search warrant, the reviewing court examines only the information available to the magistrate at the time the warrant was issued. State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988).

The affidavit supporting the search warrant is viewed in light of common sense and all doubts concerning the existence of probable cause are resolved in favor of issuing the warrant. Vickers, 148 Wn.2d at 108-09.

Here, the police had substantial evidence from which the magistrate, and later the trial court, could reasonably infer that Benshoof was using his home to cultivate marijuana. Soudakova's observations about the "make-shift room," combined with the "extremely strong smell" of marijuana emanating from a moving truck in Benshoof's driveway a few hours later and Benshoof's flight out the back of the house, created a sufficient nexus between the alleged criminal activity and the place to be searched. CP 138.

Given the factual similarities between this case and State v. Johnson),⁴ the trial court properly relied on Johnson to find that probable cause existed to issue the search warrant. CP 79; 2RP 20-21. In Johnson, the court upheld a search warrant where police, trained and experienced in marijuana cultivation, smelled marijuana while standing in the street in front of the defendant's

⁴ 79 Wn. App. 776, 904 P.2d (1995), review denied, 128 Wn.2d 1023 (1996).

home. 79 Wn. App. 776, 778-79, 904 P.2d (1995), review denied, 128 Wn.2d 1023 (1996).

Similarly, in this case, the court found that probable cause existed in part based on the officers' training and experience with detecting the odor of marijuana. CP 121-22. The court found that the officers who smelled the "extremely strong" odor of marijuana had conducted numerous drug-related investigations, and that Detective Kieland, in particular, had completed Drug Enforcement Administration training in indoor marijuana cultivation. CP 121, 138. Unchallenged by Benshoof, these findings are verities on appeal. State v. Cheatam, 112 Wn. App. 778, 782, 51 P.3d 138 (2002), aff'd, 150 Wn.2d 626, 81 P.3d 830 (2003). The trial court here properly found that probable cause existed to issue the search warrant under Johnson, given the officers' training and experience with marijuana and their detection of its smell in the defendant's driveway.

Further, the court reasonably inferred that Benshoof was attempting to rid the house of the fruits and instruments of his illegal labor given the few short hours between Soudakova's observations

and the deputies' arrival.⁵ Benshoof's immediate flight out the back of the house when the deputies arrived further supports the court's conclusion that Benshoof was probably engaging in illegal activities in his home. See State v. Baxter, 68 Wn.2d 416, 421-22, 413 P.2d 638 (1966) (recognizing flight is circumstantial evidence of guilt and therefore an element of probable cause).

The fact that there may have been other reasons or explanations for the "extremely strong smell" of marijuana emanating from the moving truck, such as a previous renter, bears little consequence given the relevant inquiry on review: whether the magistrate had sufficient facts from which to *reasonably infer* that the defendant was *probably* – not certainly – involved in criminal activity, and that evidence of such activity could be found in the defendant's home. Thein, 138 Wn.2d at 140.

This is particularly true in light of the deferential standard on appeal requiring courts to resolve any doubt regarding the

⁵ According to the affidavit, Soudakova met Benshoof to conduct a walk-through inspection of the home at 1:00 P.M. and reported her observations to police at 3:00 P.M. Although it is unclear exactly when the deputies arrived at Benshoof's home, the sequence of events makes clear that it happened at some point between Soudakova reporting her suspicions at 3:00 P.M., and the magistrate signing the search warrant at 9:52 P.M. CP 138, 142.

existence of probable cause in favor of issuing the search warrant. Vickers, 148 Wn.2d at 108-09. Neither the magistrate, nor the trial court, abused its discretion in finding that probable cause existed to issue the search warrant in this case. Benschhof does not acknowledge the "great deference" afforded to judicial determinations of probable cause.

Benschhof focuses instead on three inapposite cases. Benschhof primarily relies on State v. Vonhof⁶ for his proposition that "[s]melling marijuana in one location gives rise to search for controlled substances only in that location." *Appellant's Br.* at 13. Vonhof, however, does not stand for the proposition that Benschhof alleges.

In Vonhof, a county tax assessor entered the defendant's property to determine its value and noticed a strong smell of marijuana emanating from one of the buildings on the property. 51 Wn. App. 33, 34-35, 751 P.2d 1221, review denied, 111 Wn.2d 1010 (1988), cert. denied, 488 U.S. 1008 (1989). Based on the assessor's observations and familiarity with the smell of marijuana, police obtained a search warrant for the building and found

⁶ 51 Wn. App. 33, 751 P.2d 1221, review denied, 111 Wn.2d 1010 (1988), cert. denied, 488 U.S. 1008 (1989).

marijuana growing inside. Id. at 35. Consequently, police obtained a second warrant to search the defendant's house for evidence of ownership and occupancy. Id. at 35-36.

On appeal, the court considered the limited issues of whether the assessor's initial entry onto the property constituted a warrantless search and whether the assessor's belief that he smelled marijuana established probable cause to issue the first search warrant. Id. at 37, 41. The court upheld the assessor's actions and the issuance of the search warrant, but contrary to Benshoof's claim, the court did not pronounce a general rule or the "proper procedure" for police to follow when they detect an odor of marijuana emitting from one location separate than the defendant's house. Id. at 41-42; *Appellant's Br.* at 13.

The facts presented in Vonhof are significantly different than the facts presented here, where the police had information that the defendant might be manufacturing marijuana in his house. Soudakova's observations about the defendant's "make-shift room" with 50 small green plants, a sprinkler system, "shiny, reflective aluminum foil" walls, large lamps, and ducting, distinguish this case from Vonhof, where the police only knew that one of the buildings on the defendant's property smelled of marijuana, and had no

information about the defendant manufacturing marijuana in his house. CP 138. Vonhof sheds little light here given this factual disparity.

The other two cases relied on by Benshoof, State v. Thein and State v. Dalton, are equally distinguishable. In Thein, the Washington Supreme Court considered whether probable cause existed to search the defendant's home based on evidence gathered at a different location that the defendant was dealing drugs. 138 Wn.2d at 136. The court concluded that probable cause did not exist to search the defendant's home because there was no incriminating evidence linking the defendant's drug activity to the defendant's home. Id. at 150.

Similarly, in Dalton, the court determined that probable cause did not exist to search the defendant's home because none of the evidence of the defendant's alleged drug dealing was "tied" to the defendant's home. 73 Wn. App. 132, 139, 868 P.2d 873 (1994). Benshoof's reliance on Vonhof, Dalton, and Thein, is misplaced given that in each case the police had no evidence that illegal drug activity was occurring in the defendants' homes beyond mere suspicion. Here, the warrant issued based on probable cause

that defendant was manufacturing marijuana in his home. The Court should reject Benshoof's claim.

2. THE TRIAL COURT PROPERLY DENIED BENSHOOF'S MOTION TO RETURN HIS PROPERTY SUBJECT TO CIVIL FORFEITURE.

Benshoof renews his claim on appeal that KCSO failed to provide him with timely notice of its seizure of the marijuana grow equipment. Benshoof claims that under either the drug forfeiture statute or the general felony forfeiture statute, KCSO had 15 days from the date it actually seized the grow equipment to provide him with notice of the seizure.⁷ Benshoof's claim fails because the trial court's order denying Benshoof's motion is not a final order.

RAP 2.2(a) sets forth the superior court decisions that may be appealed as a matter of right. The only provision that might apply here is subsection (13), providing for the review of "[a]ny **final** order made after judgment that affects a substantial right." RAP 2.2(a)(13) (emphasis added).

⁷ Both statutes provide that forfeiture proceedings are "deemed commenced by the seizure," and require that the seizing law enforcement agency provide notice to the property owner "within fifteen days following the seizure." RCW 69.50.505(3); RCW 10.105.010(3).

Given the circumstances, Benshoof does not have a "final order" to review. Benshoof sought the return of his "marijuana-grow" equipment six weeks after being sentenced for his conviction. CP 39-45, 72-81. Benshoof's efforts to have his property returned were separate and apart from his criminal conviction. The trial court properly denied Benshoof's motion as "subject to (the) forfeiture process," in light of the civil forfeiture action involving the same property. CP 119. The court did not rule on the merits of Benshoof's claim, and its dismissal was *without prejudice*.⁸ CP 119. Thus, Benshoof does not have a final order to appeal and his claim is not ripe for review.⁹

⁸ Although the trial court's order does not state "without prejudice," the import of the court's words, "subject to forfeiture process," reflects the court's intent that the property be adjudicated in another action. CP 119.

⁹ The State has moved to supplement the record with three documents associated with the civil forfeiture of Benshoof's property in Kurt Benshoof v. King County Sheriff's Office, 10-2-43778-9 SEA: (1) Findings of Fact, Conclusions of Law, and Order of Forfeiture - Decision and Final Order, (2) Notice of Appeal and Petition for Judicial Review A, and (3) Order Setting Case Schedule (Administrative Appeal), setting the matter for trial on July 25, 2011. In a ruling dated February 11, 2011, Commissioner Mary Neel referred the motion to the panel that considers this appeal on the merits. The undersigned deputy has since learned that KCSO has filed a motion to dismiss the action. Whether it is an order dismissing the case pre-trial, or an order forfeiting the property post-trial, Benshoof will ultimately receive a final order on the merits in the forfeiture proceeding that is appealable as a matter of right. RAP 2.2(a)(1).

D. CONCLUSION

For the reasons stated above, the Court should affirm
Benshoof's conviction and the trial court's order denying the return
of his property.

DATED this 7th day of March, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
KRISTIN A. RELYEA, WSBA #34286
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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 Kari Dady and Christopher H. Gibson, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Respondent's Brief, in STATE V. KURT BENSHOOF, Cause No. 65427-6-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

Date

03/09/11

2011 MAR 9 PM 1:09
CLERK OF COURT
COURT OF APPEALS
DIVISION I
SEATTLE, WA