

68238-5

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NO. 68238-5-1

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

STATE OF WASHINGTON

Appellant

v.

ROBIN O. OSLIN,

Respondent

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STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Appellant

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. SUPPLEMENTAL ISSUES

1. Did the police department's written request for records from the PUD comply with the statutory requirements set out in RCW 42.56.335?

2. Did the search warrant establish probable cause to believe the defendant's home contained evidence of manufacturing marijuana even without information from the power records?

II. ARGUMENT IN REPLY

A. THE COURT THAT REVIEWED THE SEARCH WARRANT AFFIDAVIT WAS PERMITTED TO DRAW COMMONSENSE AND REASONABLE INFERENCES FROM THE FACTS SET OUT IN THAT AFFIDAVIT.

The standard for review of a search warrant affidavit has been set out in the State's opening brief. A court that reviews an affidavit in support of a search warrant must operate in a commonsense and realistic manner. The magistrate "is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth." In re Yim, 139 Wn.2d 581, 598, 989 P.2d 512 (1999) (emphasis in the original) quoting State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). The warrant should not be viewed in a hypertechnical manner. State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

The defendant agrees that it would be a hypertechnical reading of the search warrant to require specific wording before concluding that there was probable cause for the warrant. Brief of Respondent at 6. That is precisely what the trial court did when it refused to find probable cause to support the warrant because the officer did not include the specific phrase “based on my training and belief, I knew this to be marijuana.” The trial court failed to apply the correct standard when it concluded the warrant was inadequate. In doing so it failed to accord the reviewing magistrates’ determination of probable cause the deference it deserved.

The respondent argues that there was no basis to conclude Officer Wantland was able to identify marijuana by its smell. He asserts that there was nothing in the affidavit that showed he had ever smelled marijuana before and could therefore accurately recognize the odor of marijuana. The argument ignores the reasonable inferences to be drawn from the recitation of his training and experience.

Officer Wantland’s stated training and experience included fifteen years of training and experience with drug investigations, including marijuana and marijuana grow operations. He trained

with the Drug Enforcement Administration as well as numerous drug investigator conferences, seminars, schools, and courses. He had personally been involved in “hundreds of investigations relating to the trafficking, manufacturing, packaging, and/or possession of Marijuana...” and other controlled substances. He was “familiar with the appearance of these drugs.” He had been involved in the investigation of “numerous marijuana grow, indoor and outdoor.” 1 CP 40.

A commonsense reading of these facts would lead a reasonable person to believe that Officer Wantland had been in close proximity to marijuana, both in training and while investigating marijuana grow operations. His proximity to those plants would naturally lead to the conclusion that he had previously had the opportunity to smell marijuana, and was familiar with the odor that emanated from that plant.

The defendant relies on State v. Lyons, __ Wn.2d __, 275 P.3d 314 (2012). The issue there was the sufficiency of a search warrant based on the report of a confidential informant that he/she had seen marijuana growing in the defendant’s home. The affidavit did not unambiguously state when the informant made that observation. The Court reaffirmed that search warrant affidavits

are evaluated in a commonsense, and not hypertechnical manner. Id. The Court also reaffirmed that the sufficiency was based on the totality of the facts and circumstances outlined in the warrant. It noted that any lack of direct evidence regarding when the observations were made can be remedied by reference to other facts from which timing may be inferred. Id. However the court may not infer timing when no such facts are recited in the affidavit.

The affidavit here is much different from that in Lyon. Here, as noted there are many facts from which the court could reasonably infer that the officer was familiar with the odor of marijuana. In that regard this case is much more like one of the cases cited by the defendant where the warrant was upheld.

The affiant's training and experience outlined in the affidavit at issue in Olson was similar to that outlined by Officer Wantland. State v. Olson, 74 Wn. App. 126, 131, 872 P.2d 64 (1994), affirmed, 126 Wn.2d 315, 893 P.2d 629 (1995). This Court rejected the claim that it was insufficient to establish the officer had the necessary qualifications for smelling either burning or growing marijuana. Instead the Court found the most common sense interpretation of the officer's experience was that the officer had been qualified to identify growing and burning marijuana by smell.

“We find no requirement that the officer be explicitly trained to identify the smell of marijuana; [the officer’s] experience was sufficient.” Id. at 131.

The other cases cited by the respondent are inapposite to the discussion here. In each of those cases the officer stated he recognized the odor of the particular controlled substance at issue based on his training and experience. However, none of those cases said the court could not infer the officer’s basis of knowledge from a recitation of his training and experience. Because the court was permitted to infer from the statement of Officer Wantland’s training and experience that he was familiar with the odor of marijuana when he reported smelling it coming from the defendant’s house, it was justified in finding probable cause to issue the warrant. The trial court’s order to the contrary and suppressing the evidence obtained as a result of that warrant should be reversed.

B. THE REQUEST FOR POWER RECORDS COMPLIED WITH THE STATUTORY CRITERIA. THE WARRANT AFFIDAVIT SUPPORTED THE FINDING OF PROBABLE CAUSE EVEN WITHOUT THE STATEMENT OF POWER CONSUMPTION.

The defendant next argues the order suppressing evidence should be affirmed because it contained evidence obtained in violation of the Public Records Act, without which the affidavit was insufficient to support a finding of probable cause. Specifically he contends that the evidence of power consumption was illegally obtained because the written request to the PUD from the police department did not comply with RCW 42.56.335.

RCW 42.56.335 contains the identical language of former RCW 42.17.314, repealed by Laws of Washington 2005, Ch. 274, §429. It states:

A law enforcement authority may not request inspection or copying of records of any person who belongs to a public utility district or a municipally owned electrical utility unless the authority provides the public utility district or municipally owned electrical utility with a written statement in which the authority states that it suspects that the particular person to whom the records pertain has committed a crime and the authority has a reasonable belief that the records could determine or help determine whether the suspicion might be true. Information obtained in violation of this section is inadmissible in any criminal proceeding.

The defendant contends the written request was deficient because it did not identify a particular person to whom the records

sought pertained. He states the request only identified an address. BOR at 13. The request actually does identify a particular person, albeit not by name.

The caption of the FAX cover sheet used for the written request lists in the subject line "Request for Subscriber Records". In the body of the FAX the requesting officer states "The Everett Police Anti-Crime Team has reason to suspect criminal activities taking place at the property located at: 720 E. Marine View Dr., Everett, WA 98203" Ex. 1; 1 CP 37; Appendix A to Brief of Appellant. Thus the written request identifies a specific person; the subscriber for that specific address.

The defendant argues that no case has held that anything less than strict compliance is sufficient to satisfy the statute. Response at 13. He apparently assumes that "strict compliance" means identifying the "particular person" by name. The statute does not require that. Further no reasonable interpretation of the statute would require such a narrow construction.

When construing a statute the Court will give effect to the Legislature's intent and purpose. In re Jones, 149 Wn. App. 16, 24, 201 P.3d 1066 (2009). The Court has found the Legislative intent in enacting prior RCW 42.17.314 was to prevent a general fishing

expedition by authorities through power usage records. State v. Maxfield, 125 Wn.2d 378, 392-93, 886 P.2d 123 (1994). Because RCW 42.56.335 is identical to the statute at issue in Maxwell, the legislative intent is likewise identical.

Permitting a “particular person” to be identified either by name or by other characteristics furthers that intent. The owner of a particular piece of property is not necessarily the one purchasing power from the PUD. In the case of a renter the property owner’s name would be in the assessor’s records for that property, but may not be in the PUD records for that property. Where an owner does not occupy a particular address, it would be the renter’s records that would be significant to assessing probable cause. In that case, referencing the subscriber for a particular address more specifically identifies the particular person at issue than the name of the property owner. Where that information specifically identifies a person by his or her characteristics there is no general fishing expedition by law enforcement.

The cases cited by the defendant do not support his proposition that strict compliance means naming the “particular person” because neither case addressed what constituted compliance. In Cole the Court considered whether the statute was

the sole means for law enforcement to obtain power records. State v. Cole, 128 Wn.2d 262, 289-90, 906 P.2d 925 (1995). In Rakosky the Court considered whether a second request was a continuation of an earlier written request, or a separate request on its own. State v Rakosky, 79 Wn. App. 229, 901 P.2d 364 (1995).

Even if this Court found the name of a person was necessary to comply with the statutory requirement that law enforcement “states that it suspects that the particular person to whom the records pertain has committed a crime” the remedy is not suppression. Where the Court finds some information included in a search warrant affidavit was unlawfully obtained it will consider the warrant without that information to determine if it supports the probable cause finding. State v. Eisfeldt, 163 Wn.2d 628, 649, 185 P.3d 580 (2008).

If the information regarding power consumption is not considered the remaining information established probable cause to believe the defendant’s house contained marijuana. Officer Wantland was highly trained and experienced in controlled substances investigations. His training and experience included experience with marijuana. As discussed above the magistrate was entitled to infer from his training and experience that he was

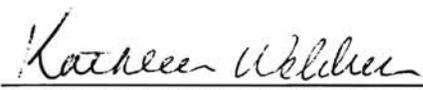
familiar with the odor of marijuana. The officer smelled the odor of marijuana coming from the defendant's house just six days before the warrant was obtained. Under these circumstances there was reason to believe that the crime of manufacturing marijuana was occurring at the defendant's home on East Marine View Drive.

III. CONCLUSION

For the foregoing reasons the State asks the Court to reverse decision of the trial court suppressing evidence and dismissing the case. The State asks this Court to remand the case to the trial court for further proceedings.

Respectfully submitted on June 20, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER, #16040
Deputy Prosecuting Attorney
Attorney for Appellant

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IN THE COURT OF APPEALS
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THE STATE OF WASHINGTON,

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No. 68238-5-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 21st day of June, 2012, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

JENNIFER J. SWEIGERT
NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Respondent of the following documents in the above-referenced cause:

REPLY BRIEF OF APPELLANT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 21st day of June, 2012.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit