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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

No. 36382-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RANDY REGINALD HARKNESS

APPELLANT

RESPONDENT'S BRIEF

L. MICHAEL GOLDEN
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by: _____
Lori Smith, Deputy Prosecutor

P.M. 3-16-2009

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STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

B. THE TRIAL COURT WAS CORRECT WHEN IT DENIED HARKNESS'S *FRANKS* MOTION AND HIS MOTION TO SUPPRESS.

Harkness claims that the search of his property was illegal because the search warrant was allegedly based upon an "affidavit containing materially false statements and information illegally obtained." Brief of Appellant 13. Harkness further claims that absent these so-called false statements, there is no probable cause to support the search warrant. Id. Harkness also claims that there were no exigent circumstances for officers to enter his property once the officers saw that Harkness was trying to destroy evidence by tossing the marijuana plants over an embankment. All of Harkness's arguments are without merit and this Court should so find.

"A search warrant may be issued only upon a determination of probable cause, which exists when an affidavit supporting the search warrant sets forth sufficient facts to lead a reasonable

person to conclude that the defendant probably involved in criminal activity." State v. Gore, 143 Wn.2d 288, 296, 297, 21 P.2d 262 (2001), citing In re Pers. Restraint of Yim, 139 Wn.2d 581, 594, 989 P.2d 512, 1999; State v. Cord, 103 Wn.2d 361, 365-66, 692 P.2d 81 (1985). Affidavits for search warrants are presumptively valid. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed. 667 (1978). To invalidate a search warrant, a defendant must show reckless or intentional omission of material information. State v. Chenoweth, 160 Wn.2d 454, 479, 158 P.3d 595 (2007). See also Franks v. Delaware, 438 U.S. 154, 155-156, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); State v. Garrison, 118 Wn.2d 870, 873-74, 827 P.2d 1388 (1992)(a mere showing of omission is insufficient to invalidate a warrant). To succeed on a claim of intentional or reckless omission, a defendant must allege a deliberate falsehood or a reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. Franks, 438 U.S. at 171. In the offer of proof, a defendant should point out specifically the part of the warrant affidavit that is claimed to be false, and it should be accompanied by a statement of supporting reasons. Id. Assertions of mere negligence of innocent mistake are insufficient. Id. at 171.

The defendant must allege deliberate falsehood or reckless disregard for the truth. Id.

In Washington, courts have consistently held that misstatements or omissions in affidavits supporting search warrants only affect a warrant's validity if they were material and made deliberately or recklessly. State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992); State v. O'Connor, 39 Wn.App. 113, 116-117, 692 P.2d 208 (1984), review denied, 103 Wn.2d 1022(1985). To prove recklessness, a defendant must show that the affiant "'in fact entertained serious doubts as to the truth' of facts or statements in the affidavit." O'Connor, 39 Wn.App. at 117 (quoting United States v. Davis, 617 F.2d 677 (D.C. Cir. 1979), *cert. denied,* 455 U.S. 967 (1980)). To be material, misstatements or omissions must be "necessary to the finding of probable cause." State v. Gentry, 125 Wn.2d 570, 604, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). Importantly, a search warrant based on an affidavit that contains illegally obtained information may nonetheless be valid if the affidavit contains facts sufficient to establish probable cause independent of the illegally obtained information. State v. Maxwell, 114 Wn.2d 761, 769, 791 P.2d 223 (1990)

"A magistrate's determination that a warrant should issue is given deference and, since the issuance of the warrant is a matter of judicial discretion, it is reviewed under the abuse of discretion standard." State v. Remboldt, 64 Wn.App. 505, 509, 827 P.2d 282 (1992). In other words, a search warrant's validity is reviewed for an abuse of discretion, giving great deference to the magistrate's probable cause determination and resolving all doubts in favor of the warrant's validity. State v. Kennedy, 72 Wn.App. 244, 248, 864 P.2d 410 (1993), In sum, "[a] search warrant is entitled to a presumption validity." State v. Chenoweth, 160 Wn.2d at 477. The reviewing court will read a search warrant affidavit as a whole, in a common sense, non-technical manner, and resolve all doubts in favor of the validity of the warrant. State v. Vickers, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002).

A search warrant may issue only upon a determination of probable cause. 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 involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). To

establish probable cause, the affidavit for a search warrant "must set forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity." Cord, 103 Wn.2d at 355-66. Probable cause requires only a probability of criminal activity, not a prima facie showing. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). When determining probable cause, the judge makes a practical, commonsense decision, and is entitled to draw reasonable inferences from all the facts and circumstances set forth in the affidavit. Id. In reviewing a probable cause determination, the information considered is that which was before the issuing magistrate. State v. Patterson, 83 Wn.2d 49, 55, 515 P.2d 496 (1973). The question of probable cause should not be viewed in a hyper technical manner. State v. Remboldt, 64 Wn.App at 510.

"The experience and expertise of an officer may be taken into account in determining whether there is probable cause. In fact, what constitutes probable cause is viewed from the vantage point of a reasonably prudent and cautious police officer." Id, 64 Wn.App. at 510. "An officer's particular expertise is thus critical." Id., citing State v. Smith, 93 Wn.2d 329, 352, 610 P.2d 869, *cert denied*, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980); State v.

Compton, 13 Wn.App. 863, 866, 538 P.2d 861(1974). But, a police officer's detection of a marijuana odor will not support a probable cause finding unless the officer provides "information from which a disinterested magistrate could conclude that, based on the officer's training and experience, what the officer believed to be the odor of marijuana probably was marijuana." State v. Rose, 75 Wn.App. 28, 40, 876 P.2d 925 (1994), *rev'd on other grounds*, 128 Wn.2d 388, 909 P.2d 280 (1996). Additionally, the search warrant affidavit must contain sufficient facts to justify the conclusion that there is marijuana in the identified location. State v. Johnson, 79 Wn.App. 776, 782-83, 904 P.2d 1188 (1995); State v. Bittner, 66 Wn.App. 541, 545, 832 P.2d 529 (1992)

In applying all of the above-set-out law to the case at hand, one can see that the Judge was correct when he denied Harkness's Franks, and 3.6 motions. CP 88-97. Here, Harkness has not met any of the above-set-out tests for determining the validity of the search warrant affidavit in this case. The trial court held a "combination" Franks and 3.6 hearing. 2/18/05 RP -2/18/05 RP; 3/11/05 RP; 3/14/05 RP; 5/23/07 RP; 1/17/07 RP 193-212. The trial court issued a multiple page opinion denying Harkness's

motions. CP 88-97. The trial court summed up its decision as follows:

> Although Defendant's witnesses have disputed the facts as presented by the State's witnesses, this Court finds, other than as mentioned above, that the factual allegations made by Detective Engelbertson were sufficient to form a basis for probable cause to issue the search warrant, were correct to the best of Detective Engelbertson's knowledge and belief, and were not made with reckless disregard for the truth. Detective Engelbertson had the right to rely on the information provided to him by the other deputies. Neither the facts as presented, nor any authority cited required him to made an independent investigation as to the truth or falsity of the information before he related the information to Judge Brosey in support of the search warrant.

CP 96, 97. Obviously, Judge Hall believed the State's witnesses rather than Harkness's witnesses. Furthermore, the Judge who heard the Franks hearing also physically visited the scene to try to determine what the officers could see from their vantage point. 5/23/07 RP 4 (counsel discussing Judge's visit to scene). Obviously, after visiting the scene, the Judge chose to believe the testimony of Deputy Weinreich that he could see Harkness destroying evidence from a lawful vantage point. 3/11/05 29. Likewise the Judge also chose to believe the officers rather than Harkness's brother Todd Harkness when it came to the story Todd gave to officers as to whether he had a key to the locked room in the shed. Officer Weinreich had heard Randy Harkness tell officer

Muller that his brother had a key to the locked room in the shed. 3/11/05 RP 62. Officer Weinreich decided to call Randy's brother, Todd Harkness. 3/11/05 RP37, 38. Todd Harkness told the deputy that he did not have anything stored in his brother's building and that he did not have a key to any room in that shed. 2/18/05 RP 33. Todd Harkness first told officer Weinreich in a phone conversation that he did not have a key to the room, but Todd Harkness changed his story at the hearing where he had to testify in front of his brother Randy. 2/18/05 RP 76; 3/11/05 RP 23-25. After listening to these various conflicting stories regarding entry onto Harkness's property and who did, or who did not, have a key to the room in the shed, the Judge was in the best position to determine the credibility of the witnesses since he listened to their testimony and could weigh various factors affecting credibility. The Judge obviously believed the State's witnesses over defense witnesses—and he was in the best position to do so. The Judge also obviously kept in mind that he must resolve doubts in favor of the validity of the warrant. Vickers, supra.

As to the allegations made by Randy Harkness that the Deputies acted with "reckless disregard for the truth" –the Judge once again did not agree. The Judge found only a couple of minor

discrepancies on the part of Detective Engelbertson: one was that the Detective had not taken a "taped statement" of Harkness during his prior arrest, and that the Detective had "subpoenaed" the power records for Harkness's property. CP 90, 91. Instead, the Detective was remembering an oral statement made by Harkness (rather than a taped statement) and the Detective got the power records by sending a letter to the power company (rather than a subpoena). CP 91. Accordingly, the Judge simply struck those two statements from the search warrant affidavit. But the search warrant affidavit was still sufficient to establish probable cause—even without these minor misstatements. Significantly, the Judge noted that these statements were not material when viewed in the context of the entire search warrant affidavit. CP 91. The Judge thus knew that any errors or omissions would have to be necessary to the finding of probable cause before the affidavit would be ruled insufficient. Gentry, supra. In other words, the Judge found that the remaining facts in the affidavit for search warrant were sufficient to establish probable cause independent of the misstatements that were excised. Maxwell, supra.

The Judge also made it clear that as to the elevated power consumption at Harkness's shed, he believed Detective

Engelbertson, noting that "Engelbertson is an experienced investigator of indoor marijuana grow operations" and that "the court does not find the detective's statement in this regard to be false or misleading or made with reckless disregard for the truth." CP 92. Then, as to one of the main alleged falsehoods claimed by Harkness—that the officers were not in a place they could lawfully be when they saw Harkness carrying the "green bushes" over to the embankment—the Judge again chose to believe the officer's version of events. Significantly, in this instance, the Judge even made a visit to the site. After weighing all of the evidence, the Judge found that officers had been on a public right of way and were not intruding on Harkness' property at the time they saw Harkness removing what appeared to be marijuana plants and throwing the plants over the bank. RP 208-212; CP 95. In other words, Harkness was obviously trying to destroy evidence. 2/18/05 RP 80-84; 3/11/05 RP 28, 29. Preventing the destruction of evidence is an exigent circumstances and a valid exception to the warrant requirement. State v. Hendricksen, supra. This being the case, the Judge found that the deputies were legally justified when they jumped over Harkness' gate so that the officers could prevent Harkness from destroying further evidence while all were waiting for

a search warrant. CP 95, 96. The trial court also found that even absent the portion of the affidavit excised after the Franks hearing that the affidavit nonetheless still established probable cause sufficient to issue the search warrant. CP 88-97. Again, the need to preserve evidence that is about to be destroyed is a proper circumstance for officers to enter property. State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). That is what happened in the present case. Officers saw Harkness throwing what looked like marijuana plants over an embankment. 2/18/05 RP 81, 82. These facts show that Harkness was at least attempting to get rid of the evidence by tossing the marijuana plants over the hill. 3/11/05 RP 29. Thus, it was proper for officers to go onto Harkness's property to prevent Harkness from destroying any further evidence while other officers went to get a search warrant.

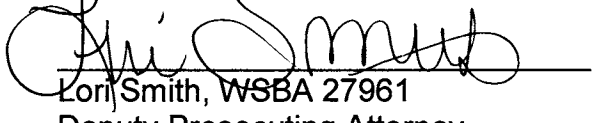
The officers acted appropriately in this case. And the Judge was correct when he denied Harkness's motions. Harkness's arguments to the contrary are without merit and his conviction should be affirmed.

CONCLUSION

Officers who were on Harkness's property were there pursuant to the "exigent circumstances" exception to the warrant requirement. The exigent circumstance here was that officers saw Harkness "destroying" or disposing of evidence while the officers were viewing Harkness's actions from a public right of way. Once they saw Harkness attempting to destroy evidence, the officers rightfully approached Harkness and "froze the scene" while other officers obtained a search warrant. Because there were no material misstatements in the search warrant affidavit, the trial court correctly found that the remaining facts set out in the affidavit were sufficient to form the basis for probable cause to issue the search warrant. As such, Harkness's arguments to the contrary are without merit, and his conviction should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 16th day of March, 2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

By: 
Lori Smith, WSBA 27961
Deputy Prosecuting Attorney

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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent,	)	NO. 36382-8-II
vs.	)	
RANDY REGINALD HARKNESS Appellant.	)	DECLARATION OF MAILING

LORI SMITH, Deputy Prosecutor for Lewis County, Washington, on behalf of Respondent State of Washington, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: on 3/16/09 I served a copy of the RESPONSE BRIEF upon the Appellant by depositing the same in the United States Mail, postage pre-paid, addressed to the attorney for the Appellant addressed as follows:

John A. Hays
1402 Broadway
Suite 103
Longview, WA 98632

Dated this 16 day of March, 2009, at Chehalis, Washington.

Lori Smith, Deputy Prosecutor
WSBA No. 27961
Attorney for the Respondent