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DIVISION II
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No. 36579-1-II

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

STATE OF WASHINGTON,

Appellee,

v.

DAVID H. HILL,

Appellant.

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact No. 2 in its Order denying suppression (CP 282).
2. The trial court erred in entering Finding of Fact No. 4 in its Order denying suppression (CP 282).
3. The trial court erred in entering Finding of Fact No. 5 in its Order denying suppression order (282).
4. The trial court erred in entering Finding of Fact No. 6 in its Order denying suppression (CP 283).
5. The trial court erred in entering Finding of Fact No. 7 in its Order denying suppression (CP 283).
6. The trial court erred in entering Finding of Fact No. 12 in its Order denying suppression (CP 283).
7. The trial court erred in entering Finding of Fact No. 15 in its Order denying suppression (CP 283).
8. The trial court erred in entering Finding of Fact No. 18 in its Order denying suppression (CP 283).

9. The trial court erred in entering and applying Conclusion of Law No. 2 (CP 284)¹.

10. The trial court erred in entering Conclusion of Law No. 10 in its Order denying suppression (CP 283).²

11. The trial court erred in entering Conclusion of Law No. 11 in its Order denying suppression (CP 283).

12. The trial court erred by refusing to enter the proposed Findings and Conclusions granting the motion to suppress (CP 269 ff).

13. The trial court erred by denying Appellant's motion to suppress evidence seized in the search of his home on August 3, 2006. CP 181, 285; Supp. RP 15-16.³

14. The trial court erred by denying Appellant's motion to suppress statements allegedly made by him in response to police interrogation questions put to him while he was detained during the search

¹ Appellant assigns error to written Conclusion of Law No. 2 because it set forth a review standard Appellant contends was incorrect. *See* Argument IA, below.

² Appellant assigns error to the trial court's written Conclusions of Law Nos. 9 and 10 because they can be interpreted as Findings of Fact incorrectly labeled as Conclusions of Law. *See Steele v. Queen City Bread Co.*, 59 Wn.2d 402, 408, 341 P.2d 499 (1959).

³ Appellant has moved to supplement the record with transcripts of the trial court's oral suppression rulings and the stipulated bench trial. Respondent has agreed to this supplementation. This Brief therefore cites to this Supplemental Report of Proceedings on the assumption that the motion will be granted.

of his home. CP 262, 285; Supp. RP 16-17.

15. The trial court erred by entering judgment finding Appellant guilty of manufacturing marijuana. CP 286; Supp. RP 34.

Issues Related to Assignments of Error:

Assignments of Error Nos. 1-3:

1. Are the trial court's written Findings in its Order denying defendant's suppression motion internally consistent and supported by evidence?

Assignment of Error Nos. 4-7 and 9-13:

2. When key factual components of a search warrant affidavit are tainted by illegality that was not disclosed to the issuing magistrate, should the sufficiency of the affidavit to establish probable cause nonetheless be reviewed under an abuse of discretion standard?

3. When a search warrant affidavit relies in part on hearsay reports of other officers and statements of citizen informants, are direct observations by the affiant officers that contradict or fail to corroborate those statements and reports material to the probable cause determination?

4. When a search warrant affidavit rests in part on conclusory allegations that a smell of growing marijuana came from the direction of a target residence, are observations that the smell came from the direction of

a different residence material to the probable cause determination?

5. When large portions of a search warrant affidavit are immaterial, inadequately supported, or unlawfully obtained, should it nonetheless assume the materiality of any are not misstatements or omissions affecting the truthfulness of the remaining portions of the warrant affidavit particularly material to the issue of probable cause?

6. Under Washington Constitution Article I Section 7, does the defendant or the State bear the burden of proof on the question of whether material factual misstatements and omissions in a search warrant affidavit were made with reckless disregard for the truth?

Assignment of Error Nos. 8 and 14:

7. Does a police officer engage in interrogation when he asks a suspect, whom there is probable cause to believe has committed a crime, and who is being forcibly detained during a residential search, to disclose the location of evidence of that crime in order to facilitate the search?

8. Is possession or knowledge about a key or the means to open a place where drugs are being manufactured, evidence that a person was involved in that manufacture?

Assignment of Error No. 14:

9. Were the trial court's suppression rulings all correct?

STATEMENT OF THE CASE

This is an appeal from a judgment entered after a stipulated bench trial on a charge of growing marijuana. CP 286. In entering judgment based on the stipulated bench trial, the trial court considered evidence observed during a search, and evidence obtained during police questioning, that the defense had moved to suppress on constitutional grounds. *See* CP 285, Supp. RP 34. The issues on appeal all involve the rulings denying those suppression motions.

1. **The First Search Warrant for Appellant's Home.**

On August 3, 2006, officers from the Olympic Peninsula Narcotics Enforcement Team (OPNET) served a search warrant on the home of Appellant David Hill in Port Townsend. RP 101-104. The search warrant had been issued the day before by Judge Kenneth Williams of the Clallam County Superior Court. RP 100; CP 9. The search warrant was issued on the basis of a warrant affidavit signed by two OPNET officers, Washington State Patrol Det. Michael Grall and Port Angeles Police Det. Brian Raymond. CP 24 ff.

a. Structure of the Warrant Affiant's Submission.

The warrant affidavit was accompanied by and incorporated police reports by two Port Townsend Police officers (Jason Greenspane and Jason Avery) and a Port Townsend Police "Cadet Sergeant" (Brandon Przygocki). CP 31-37. The affidavit had attached unsworn documents mistitled "Affidavits of Expertise" for each of the officers (except Cadet Przygocki). CP 25-30. Cadet Przygocki's "Supplemental Report" was attached to the warrant affidavit and said that after the officers told the cadet they smelled marijuana, "[b]ased on my training and experience," he could identify it, too. CP 37.

The affidavit also incorporated a graph of kilowatt usage at the defendant's house from December 2004 through June 2006. CP 38. It also contained an aerial photo of Mr. Hill's house and its vicinity, marked with locations purporting to show where the Port Townsend officers and cadet had reported smelling growing marijuana on May 5, 2006 and where Det. Raymond and Clallam County Det. Charles Fuchser said they smelled it in the wee hours of the morning of July 28, 2006. CP 39.

b. Information and Allegations in the Warrant Affidavit.

The main body of the warrant affidavit related and organized the contents of the above described documents into several sections.

Under the heading “INITIAL INFORMATION TOLD THE PORT TOWNSEND POLICE DEPARTMENT” the affidavit reported “that a citizen named Chad Witheridge” had “contacted” Port Townsend Police Officer Jason Greenspane and told him that he “suspected that marijuana was being grown at the neighbor to his parent’s home in the city of Port Townsend.” CP 13.⁴ The affidavit incorporated by reference Officer Greenspane’s report regarding the alleged bases for the suspicions of Mr. Witheridge and his parents: alleged undated observations of Mr. Hill bringing large amounts of fertilizer onto his property, “high intensity” lights in upstairs windows late at night, an unidentified wooden section on the roof of the house, sounds of Mr. Hill leaving the house in his truck late at night, and reports that “Hill is constantly hooking up vehicle to wires that run into the house.” CP 31-32.

In a section titled “SUMMARY OF SMELL DETECTED BY OFFICER GREENSPAN, AVERY AND PRZYGOCKI,” the affidavit described reports by those Port Townsend officers and cadet of detecting the smell of “fresh marijuana in the area of Hill’s residence” on the night of May 5, 2006. CP 14. However, the affidavit noted that “their reports

⁴ In fact, Chad Witheridge was a young man seeking to become a Port Townsend police reserve and his “contacts” with officer Greenspane were during ride alongs. RP 7.

did not specify or conclude that the smell of fresh marijuana was coming from Hill's residence" on an "east breeze." *Ibid.* The affidavit stated that in response to a followup inquiry, Officer Greenspane said these officers "could smell the odor of fresh marijuana while on the corner of Reed and Jackson Street and as they walked along Jackson Street." *Ibid.* The aerial photo attached to the affidavit showed the corner of Reed and Jackson to be a half block to a block away from Mr. Hill's house (which is on Monroe Street) and not east, but northeast, of it. CP 39.

In a section entitled "UTILITY CONSUMPTION AT HILL'S RESIDENCE," the affidavit reported that Det. Grall had "obtained utility consumption records for the residence of David Hill at 2030 Monroe Street" and found in those records "some typical and nontypical power use patterns compared to the changing of the seasons and temperature." CP 15. This section stated, on the basis of Det. Grall's "training and experience," that "[i]t is typical for a residence that does not have some type of commercial business or commercial activity to have electrical consumption patterns that co-inside [sic] with the seasons and outdoor temperatures." *Ibid.* Appended to the affidavit was a graph showing that Mr. Hill's power usage did not vary much seasonally compared to temperatures. CP 16, 38.

In a section titled “SMELL OF GREEN GROWING MARIJUANA DETECTED COMING FROM HILL’S RESIDENCE BY RAYMOND AND FUCHSER,” the affidavit described how two OPNET officers—affiant Brian Raymond and Det. Charles Fuscher—had gone to Mr. Hill’s neighborhood “on July 28, 2006 at about 0412 hours,” walked around his block and entered onto the property of Mr. Hill’s neighbor to the east, Violet Swinhoe, to smell marijuana. CP 16. During this visit, the affidavit said, these officers had detected an “electrical humming sound” and “a noise that sounded like air movement” coming from the north side of Mr. Hill’s house—noise “loud enough that it should ruin the quality of life for any persons living inside the residence, whenever the equipment generating the noise is in operation.” CP 18. The affidavit also said that these two officers had smelled “the faint but distinct odor of green growing marijuana” “several ... times” over a space of “five to ten minutes,” while standing on Ms. Swinhoe’s property. CP 17-18.

Finally, the affidavit included a litany of “INFORMATION KNOWN TO AFFIANTS CONCERNING INDOOR MARIJUANA GROWING OPERATIONS BASED ON TRAINING AND EXPERIENCE.” CP 19-23. This consisted of several pages of information known to “affiant”—it did not say which one—regarding

evidence that could be expected to be found in searches of marijuana growing operations. CP 19-22. This section also indicated that, in the affiant's experience, marijuana growing typically is a continuous and "cyclic" activity. CP 23. The training and experience from which this information was allegedly known was described in separate, unsworn "affidavits of expertise" regarding Dets. Grall and Raymond. CP 25-30. Similar unsworn "affidavits" described the training and experience of Det. Fuchser and Officers Greenspane and Avery. CP 40-45.

c. Facts Omitted From the Warrant Affidavit

In the suppression hearing below, Appellant presented evidence showing that key facts in the warrant affidavit were misstated, numerous facts learned in the investigation by the affiant officers were omitted from the warrant affidavit, and a major part of the information submitted to Judge Williams in support of the warrant was unlawfully obtained.

One such misrepresentation had to do with the location in which the Port Townsend officers whose report initiated the investigation actually smelled marijuana in May 2006. *See* CP 271 (Prop. FF 9). The Port Townsend officers' reports actually stated that they had perceived growing marijuana not outside Appellant's house but around the corner, in front of "1715 Jackson Street," Ms. Swinhoe's south side neighbor. *See*

CP 35, 36, 39. But the warrant affidavit indicated the Port Townsend officers had changed this, saying to “the east side of Hill’s residence.” CP 14. In his testimony at the suppression hearing one of the Port Townsend officers, Officer Greenspane, supported this change. RP 16. But the other officer, Officer Avery, who was not part of the search team, reiterated his original statement that he encountered the smell at 1715 Jackson and not at 2030 Monroe. RP 60-61.

Even more significantly, the affidavit completely failed to tell Judge Williams about most of what the OPNET detectives had seen and learned in their followup investigation. Although the affidavit featured a description of one of the detectives’ visits to the scene, it nowhere disclosed that on at least three other occasions in July 2006,⁵ these same officers, and others, went to Mr. Hill’s house and his neighbors’ houses to investigate the reports they had received—and on *every one of those undisclosed investigative visits the officers smelled no marijuana*. See RP 95-96, 138, 189, 209, 219; CP 85, 116, 146. Both of the officers who signed the search warrant affidavit were involved in at least one of these undisclosed visits. CP 116. One of them, Det. Grall, was the most

⁵ There was some testimony from one of the officers indicating there were four rather than three additional undisclosed visits to the property, but that apparently was an error. See RP 242-43.

experienced of any of the officers in detecting marijuana by smell, but on both his visits to the scene he smelled nothing. RP 138; CP 116, 122. But the warrant affidavit these two officers signed and gave to Judge Williams contained no hint of these investigative findings. This was so although the warrant affidavit told Judge Williams that in the officers' experience marijuana growing was typically a continuous, staged activity. CP 23.

Similarly, the affidavit did not inform the judge that in these additional visits—and in the original investigative visit to the scene made by the Port Townsend police—there was no sign of the kind of loud, suspicious noise coming from Mr. Hill's house that is featured aspect of the warrant affidavit. *See* RP 138, 146, 182-3; CP 78, 80, 116, 165; *compare* CP 17-18. Nor did the affidavit mention that no such noise was reported by the neighbor witnesses who were initially interviewed by the Port Townsend police. RP 217-18; CP 69-70, 71-73. Nor did it mention that one of the OPNET officers, Det. Raymond, interviewed Mr. Hill's immediate neighbor Violet Swinhoe, and in that interview she *denied* having made any of the observations attributed to her in the Port Townsend police reports that were incorporated in the warrant affidavit. RP 190.

Similarly, in none of these visits did any of the officers observe any

of the allegedly “constant” suspicious activity at Mr. Hill’s house reported by the Witheridges: no high intensity lights, no covered windows, no trucks moving fertilizer, no late night departures, no vehicles wired up to the house electrically. RP 32-33, 219, 222, 251-52, 258, 261; CP 72, 80; CP 116, 120, 129; CP 146. Nor did the affidavit mention that, contrary to the statement to Officer Greenspane, there is an extensive, highly cultivated garden surrounding Mr. Hill’s property. *See* RP 36-37, Ex. 7-8; CP 72, 99-104.

Nor did the affidavit tell the issuing judge how Det. Grall had obtained the power use information for Mr. Hill’s house that was included in the warrant affidavit. *See* CP 15, 38. In fact, information had been obtained without a warrant, although Mr. Hill’s utility provider, Puget Power, is a private company that cannot be required to divulge such information without a warrant or subpoena or any other legal authority. *See* RP 123-24, 278-79; CP 76.

None of these critical facts were known to Judge Williams when he signed the warrant for Mr. Hill’s home on August 2, 2006.

2. The Search of Appellant’s Home.

Det. Grall, Det. Raymond, and a number of other officers from various departments that are involved in OPNET went to Mr. Hill’s home

on Monroe Street early the next morning. The officers knocked and were met at the door by Mr. Hill. RP 101-104. The OPNET search team entered Mr. Hill's house with guns drawn, handcuffed him and placed him under arrest on suspicion of marijuana growing. RP 66-7, 107-08, 156. When the officers asked him if there was anyone else inside the house, he responded that a female houseguest was upstairs. RP 102. The officers went to get her and put her on the ground; she started to show signs of an epileptic seizure, and paramedics were called. RP 199-200, 240.

As the officers fanned out through the house, they encountered a locked door on the second floor. RP 108. Det. Grall then went to Mr. Hill, who was still in handcuffs, and "told him I had encountered a locked door on the second floor and asked him how to get in it. Is there a key? If there is, where is it at?" RP 108. Det. Grall did that while Mr. Hill was still in handcuffs, without any warning of his right to remain silent. RP 157. Mr. Hill told Det. Grall where he could find the key, the room was opened and marijuana was found there. RP 170. The officers went on searching and encountered another locked door with a padlock on it outside the house. Again, Officer Grall returned to Mr. Hill, who was being detained in handcuffs, and asked "Where's the key to the lock?" RP 170. Again, Mr. Hill told him. *Ibid.* Again, marijuana was found there.

Mr. Hill was then taken outside to a police vehicle, where Det. Grall and another officer questioned him further, before taking him off to jail. RP 69-72.⁶

3. The Proceedings Below.

After he was charged, Appellant timely filed motions to suppress both the evidence seized in the search of August 3 and the statement allegedly made by him at the time of the search. CP 181 ff. The trial court conducted a two day evidentiary hearing on the motions and then took the matter under advisement. RP 2-297. It then granted the motions in part and denied them in part. *See* 2d RP 2-18.

In its oral ruling, the trial court first found that

[T]he initial information told to the Port Townsend Police Department—oh, including those statements from the Withridges and the statements that were attributed to Ms. Swinhoe ... which Det. Raymond asked her about, and she said, “No, I never saw that stuff,” that those things, all of those things I’ve just mentioned, and the lights—and they said, “Gee, we’ve seen strange lights,” but there was no ... notice of the lights by the officers when they were out there late at night and early in the morning—that those things

⁶ Mr. Hill was released the next day on his own recognizance. While on recognizance after his release from jail after his arrest on these charges, he complied with all the court’s conditions and encountered no problems until the morning of October 2, 2006, when armed OPNET officers once again appeared at his door. The officers were there with another search warrant issued by Judge Williams, again based on an affidavit from Det. Grall and a report of marijuana smell from Officer Greenspane. CP 170 ff. Mr. Hill and his girlfriend, Ms. Yessenegger, were again taken down at gunpoint. However, a search of his property found no marijuana grow, and nothing for the officers to seize. *Ibid.*; *see* CP 122, 129.

were not material to the issuance of the search warrant. That the search warrant would not have been issued with just those things, nor would the inclusion of the fact that some of those things were not supported by the officers' observations or by the—some of the people themselves, would not have affected Judge Williams' opinion.

Supp. RP 5 (emphasis added). Similarly, the trial court then found insufficient that Port Townsend Officers Greenspane and Avery could identify the smell of fresh growing marijuana" (Supp. RP 6-7), so that their statements would "be ignored by ... this Court in determining whether there's probable cause." Supp. RP 7.⁷

Similarly, with regard to what the trial court called "the utility consumption part," the trial court found that defendant was correct that the information had been illegally obtained and "that has got to be redacted from the affidavit." Supp. RP 8.

Despite all this, the court went on to find that probable cause was established by the reported smell of marijuana by Officers Raymond and Fuscher on the night of July 28, 2006, and their related observations on that same night. Supp. RP 9-10. It said "that doesn't take any particular expertise or training to conclude where ... an odor is coming from. That's

⁷ The trial court said it found otherwise with regard to Cadet Przygocki, because of the cadet's statement that he could identify the marijuana smell "based on my training and experience." Supp. RP 7. This was clearly wrong. See note 8, below.

pretty much—A lay person, when you smell something, you can figure out where it’s coming from.” Supp. RP 12. “The fact that they were there other times and didn’t smell marijuana doesn’t detract from the fact that they were there on the 28th and smelled marijuana.” Supp. RP 14.

The court then stated that “doubts as to the existence of probable cause have to be resolved in favor of the warrant.” Supp. RP 13. It went on to say “assuming everything that Mr. Hill says is correct, that there were a lot of omissions, either negligently or intentionally,” but that the observations of the two officers on July 28 were sufficient. Supp. RP 13. The court found that all the other observations “about cars going in and out, or whether cars were attached to wires, or fertilizer, all of that is really superfluous.” Supp. RP 14. The court said it also didn’t matter that Det. Raymond had made two daytime visits to the scene in clear, calm weather: “had that been included ‘I was there during the daytime, Judge Williams, on those two dates, and I didn’t smell any marijuana,’ that still would not detract from the four o’clock in the morning visit....” Supp. RP 15.

With regard to the CrR 3.5 issue regarding the key, the trial court stated that Det. Grall’s questions to Mr. Hill “where are the keys to these rooms? Was not designed to illicit [sic] an incriminating response.... I can’t see how that would be an incriminating factor in this case, that he

knows where the keys are. So, I don't consider that to be an interrogation designed to ... get a incriminating response." Supp. RP 16.

After the trial court announced that opinion, both sides presented proposed Findings and Conclusions. The trial court signed the Findings submitted by the State, with one change. *See* CP 282-284. In that change, the judge struck the Conclusion of Law that said that the officers' failure to include information relating to probable cause had not been negligent. CP 284; *see* Supp. RP at 23.

With a few exceptions, the written findings tracked the oral decision and echoed its main conclusions—that none of the illegalities, errors or omissions it had found were material, and that the questioning about the keys was not "interrogation." *See* CP 282-83.

Reserving his right to appeal from these rulings, Appellant waived his right to jury trial and the case proceeded to a stipulated bench trial in which Appellant agreed that, in light of the court's suppression rulings, there was sufficient evidence to convict, and the trial court found him guilty on that basis. Supp. RP 33-34. Judgment was entered accordingly (CP 286), and Appellant then timely appealed (CP 296).

ARGUMENT

I. BECAUSE THE SEARCH WARRANT FOR THE SEARCH OF APPELLANT’S HOME WAS FILLED WITH FALSE, INCOMPLETE, MISLEADING, UNRELIABLE AND UNLAWFULLY OBTAINED INFORMATION, THE TRIAL COURT SHOULD HAVE EXCLUDED ALL EVIDENCE SEIZED IN THAT SEARCH.

The trial court denied Appellant’s challenge to the search warrant for the first search of his home even though it recognized and agreed—at least *arguendo*, that most of the information in the affidavit supporting that search warrant unreliable or tainted. *See* Supp. RP 5-8, 13-14.

It nonetheless found the warrant valid. It did so by at once deferring to Judge Williams and declaring that none of the deficiencies in the affidavit would have mattered to him, and none had been shown to be reckless. *Ibid.*; CP 283-4. In all those determinations, it erred.⁸

⁸The written order signed by the trial court also contained several findings that appeared self contradictory and lacked evidentiary support. There was no real evidence that the Mr. Hill’s neighbors actually observed the suspicious activities they reported (FF 2, CP 282). The only support for that were their hearsay reports that the actual investigation contradicted. *See* FF 3; pages 10-11, above.

Similarly, the finding that the Port Townsend Officers “did smell” marijuana (FF 4, CP 282) contradicts itself, as it says the report to that effect should be “ignored” because of the officers’ inexperience. (It also contains a typographic error about the location where they reported the smell [“1750 Jackson”]).

The finding that Cadet Przygocki’s conclusory statement that he recognized marijuana smell “from his training and experience” constitutes a “resume” of “relevant experience” is clearly wrong, whether considered as a finding or a conclusion of law. *See, e.g., State v. Woodall*, 100 Wn.2d 74, 76, 666 P.2d 364 (1983) (conclusory statements of reliability insufficient); *State v. Matlock*, 27 Wn. App. 152, 155-56, 616

A. Although Issuance of Search Warrants is Discretionary, A Decision to Issue a Warrant Based on Information that is Inaccurate or Illegal for Reasons Unknown to the Issuing Magistrate Should Not Be Reviewed for Abuse Of Discretion.

It is settled and sensible that a search warrant affidavit should be “*evaluated* in a commonsense manner with doubts resolved in favor of validity, and with considerable deference being accorded to the issuing judge's determination.” *State v. Kalakosky*, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993) “Generally, *the probable cause determination of the issuing judge* is given great deference.” *In re Yim*, 139 Wn.2d 581, 595, 989 P.2d 512 (1999), *quoting State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). “*The determination of probable cause* should be given great deference by reviewing courts.” *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). (emphasis added throughout).

Several Washington decisions have taken that principle a step further to apply a presumption of validity and an abuse of discretion review standard even where a search warrant affidavit contained information the magistrate knew or should have known was unlawfully obtained, *see, e.g., State v. Cole*, 128 Wn.2d 262, 270, 286, 906 P.2d 925

P.2d 684 (1980) (“Absent some showing that Officer Richart had the necessary skill, training or experience to identify marijuana plants on sight, the affidavit was insufficient to establish probable cause ...”).

(1995) (unlawful entry described in affidavit); or incorrect, *State v. Vickers*, 148 Wn.2d 91, 109, 59 P.3d 58 (2002) (“scrivener's error” in date in warrant affidavit); or incomplete, *In re Yim*, 139 Wn.2d 581, 989 P.2d 512 (1999) (failure to address an element of the crime). This deferential standard properly keeps the focus on “the reasonableness of the magistrate's probable cause determination” *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

The trial court in this case lost that focus by taking this deference principle a step further still, to a point where it makes no sense and actually tends to undermine the magistrate’s authority. It did that when it accorded deference not only to the “magistrate’s determination that probable cause exists” but also to the determination that “a warrant should issue” (*see* Supp RP 12-13, CP 284)—even though, in making those determinations, Judge Williams had no way of knowing that the information before him was shot through with misrepresentations, omissions and illegalities.

Although some cases involving affidavits with similar defects have recited a similarly broad deference, their analysis of the sufficiency of such partly invalid affidavits after redaction has been *de novo*. *See, e.g., State v. Coates*, 107 Wn.2d 882, 888, 735 P.2d 64 (1987); *State v. Johnson*, 75

Wn. App. 692, 709-710, 879 P.2d 984 (1995); *see also* *Chenoweth*, 160 Wn.2d at 459 (*dictum*).

Indeed, *State v. Coates* said that it was only by determining whether “the remaining information in the warrant affidavit *independently* established probable cause” a reviewing court could avoid “undermin[ing] the constitutional role of the magistrate” and “run[ning] afoul of the court's stated view that Const. art. 1, § 7 serves to protect personal privacy rights, rather than curb governmental actions.” *Coates*, 107 Wn.2d at 888.

To do otherwise would make little sense. To decide based on misinformation—or, unknowingly, based on tainted information—is not an exercise of discretion reviewable for abuse. As the Supreme Court recently wrote, and has often written:

Abuse of discretion occurs where *the trial court's action* is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (*quoting State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A ““manifestly unreasonable”” decision results if “*the court ... adopts a view* “that no reasonable person would take.”” *Id.* at 424 (*quoting State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (*quoting State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990))).

Olver v. Fowler, 161 Wn.2d 655, 663, 168 P.3d 348 (2007). When a magistrate makes a decision on the basis of legal improprieties and misrepresentations of which he has no knowledge, his discretion is not

abused; his mistake is reasonable, based on grounds that are legally tenable but tainted by misrepresentations or unlawful conduct of others. In such circumstances, the magistrate's discretion is not so much exercised as subverted.

To defer to a warrant decision without regard to the fact it was influenced by unlawful conduct or misrepresentations by police officers would be to impermissibly allow "the prosecution ... [to] us[e] the fruits of a Fourth Amendment violation." *Alderman v. United States*, 394 U.S. 165, 177, 22 L. Ed. 2d 176, 89 S. Ct. 961 (1969). To presume correct a decision to issue a warrant procured by the use of false or misleading information would be to reward the deception that produced that decision and undermine the independence of the magistrate who made it.

It is troubling enough that, under prevailing jurisprudence, the exclusionary rule provides no disincentive for the submission of false or illegally acquired information in support of a warrant. *Coates, supra*. If the misconduct is discovered, the tainted information is merely disregarded. If it is not, the warrant application is strengthened. There is nothing to lose and something to gain. Yet that is, for now, the law.

Still, to take the next step, as the trial court did, and defer to a warrant decision that was made by a magistrate who was deceived and did

not know he was acting in part on tainted information, is even worse: it provides a positive incentive for police misconduct.

Because Judge Williams was not aware that the information in the warrant affidavit was misleading and unlawfully acquired, he never ruled on whether probable cause was made out by the facts that the affiant officers had actually and lawfully acquired in their investigation. The decision to which the trial court purported to defer to was a decision the magistrate never made. The trial court should have reviewed the sufficiency of the affidavit, and the materiality of the parts of it that were unlawful, false or misleading, *de novo*; and so should this Court. *See State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

B. The Misstatements, Omissions and Illegality in the Warrant Affidavit Were Material.

“[F]actual 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.” *State v. Chenoweth*, 160 Wn.2d at 462, *citing Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) and *State v. Cord*, 103 Wn.2d 361, 366-67, 693 P.2d 81 (1985). This is a corollary of the constitutional requirement that warrants must be issued by neutral and detached magistrates and require authority of law. *Franks*, 438 U.S. at 165; *Chenoweth*, 160 Wn.2d

at 469; *Seagull*, 95 Wn.2d at 908.

Washington common law generally defines a material fact as "a fact to which a reasonable man would attach importance in determining his choice of action in the transaction in question." *Clausing v. De Hart*, 83 Wn.2d 70, 73, 515 P.2d 982 (1973), *Shermer v. Baker*, 2 Wn. App. 845 at 855.; 472 P.2d 589 (1970). In 1995 the legislature enacted that provision into Washington's criminal law: "Material statement' means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties." RCW 9A.76.175. Anomalously, then, under prevailing law, a false sworn statement in a warrant affidavit may be material enough to support a criminal prosecution of the affiant officer, but not material enough to warrant application of the exclusionary rule.⁹

But that does not mean that the determination of materiality of misstatements or omissions in a warrant affidavit is completely devoid of

⁹ Because statutory enactments inform the constitutional requirement of "authority of law," *see, e.g., Seattle v. McCready*, 123 Wn.2d 260, 274, 868 P.2d 134 (1994), and criminal misrepresentations obviously undermine that authority, Appellant would argue that the standard of materiality under Article I section 7 should be reexamined, and should include false and misleading statements "reasonably likely to be relied upon" by magistrates. Appellant recognizes that Supreme Court precedent on this issue binds this Court, however; and he submits that the misrepresentations here were material even under the narrower, prevailing standard.

reason. At the least, the test of materiality should be the same as that for whether a warrant is tainted by illegally acquired information: no misrepresentation, just as “nothing seen or found [in an illegal search]... may legally *form the basis* for an arrest or search warrant” *Alderman v. United States*, 394 U.S. at 177 (emphasis added). Thus, where misleading omissions are concerned, the question is whether probable cause would have been made out even if complete and accurate information would have been provided.

If relevant false representations are the basis of attack, they are set aside. If it is a matter of deliberate or reckless omission, those omitted matters are considered as part of the affidavit. If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. However, if the altered content is insufficient, defendant is entitled to an evidentiary hearing.

State v. Garrison, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992); *accord*

State v. Gentry, 125 Wn.2d 570, 604, 888 P.2d 1105 (1995) (the warrant fails if "probable cause to issue the warrant would not have been found had those false statements been deleted and the omissions included.").

“Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” *State v.*

Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The affidavit that was before Judge Williams appeared to set forth a number of such facts and circumstances. Mr. Hill's neighbors reported suspicious nighttime activity, bright lights and unusual electrical connections around his house. Local police reported the smell of marijuana coming from there. Drug investigators went to the scene and heard loud noises from across the street and caught intermittent whiffs of marijuana smell when standing in a neighbor's yard. And detectives checked Mr. Hill's power records and found indications of unusual and telling patterns of power use.

But if the affidavit had reported the facts completely and accurately, and omitted information that was unlawfully acquired or insufficiently reliable, Judge Williams would have been shown a completely different picture. He would have been told that in several investigative trips to Appellant's house by several officers, *none* of the reports of suspicious activities could be confirmed—no bright lights, no large amounts of fertilizer, no strange late night comings and goings. He would have been told that a detective spoke to one of the alleged sources of these citizen reports—Mr. Hill's neighbor Violet Swinhoe—and she flatly denied seeing or smelling anything suspicious. He would have known that, contrary to what the warrant affidavit indicated, Mr. Hill's

house has an extensively cultivated, unusual garden that both requires fertilizer and emits unusual vegetable smells.

In addition, Judge Williams would have learned that the Port Townsend officers who first reported a marijuana smell around Mr. Hill's neighborhood had little or no relevant experience and they actually smelled whatever they smelled half a block away, in front of a house around the corner. He would have known that trained drug investigators walked around Appellant's house four times, and only on the one occasion did they notice a loud noise and the intermittent smell they thought was indicative of marijuana growing at Appellant's house. He would have learned that none of the neighbors questioned by police said they heard these loud noises from Mr. Hill's house the detectives heard on one of their visits. And he would not have had any objective information, like the evidence of power use typically corroborative of marijuana growing, to corroborate any of the officer's suspicions.

With respect, the trial court's conclusion that *none of this* would have made any difference to Judge Williams is, at best, pure speculation. The things that were left out of this warrant affidavit were known, directly relevant facts, not "mere possibility[ies] ..." *State v. Chenoweth*, 160 Wn.2d at 480. Nor were they irrelevancies: to the contrary, they went

directly to the assertions on which the warrant was being sought.

The affiants presumably included their extensive descriptions of the neighbor's alleged observations because they believed them material; and there is no reason to believe Judge Williams thought otherwise. How, then, could the trial court find that if Judge Williams had known that three months of investigation had produced no corroboration for those reports, and in fact negated them, it would have made no difference? The officers' conclusions that they smelled marijuana coming from Mr. Hill's house was obviously the key to their claim of probable cause; how then could it not matter that two of the officers lacked experience and smelled what they smelled a half block away? True, caselaw (or at least *dictum*) supports the idea that a trained officer's conclusion about smell—even an elusive, swirling, intermittent smell—may support probable cause, and it is possible Judge Williams might have found that to be enough. But how can it be said he would have done so if he knew that in at least three other hour-long visits to the scene, none of the investigating officers smelled anything? And how, when probable cause was so thin, can it be said that the unlawfully acquired power records (and the misleading statements in the affidavit about them) in no way “form[ed] the basis for [the]... search warrant,” *Alderman*, 394 U.S. at 177, in Judge Williams' mind.

“Given the reliance that ... Washington courts place on an experienced officer's perceptions of sight, smell, and sound,” courts “must be exceptionally vigilant” to misrepresentations or fabrications regarding such perceptions. *Hervey v. Estes*, 65 F.3d 784, 791 (9th Cir. 1995). Such vigilance is impossible under a standard of materiality that allows a single report of a fleeting whiff to sustain a warrant affidavit that, unbeknownst to the issuing magistrate, is filled with misrepresentations and unlawfully acquired evidence.

C. The Burden Should Be On The State To Show These Material Misstatements And Omissions Were Not Material, and that Burden is Not Sustained Here.

Although under the Fourth Amendment it is a defendant's burden to show that material misrepresentations were recklessly made, “[o]ur State's more protective exclusionary rule, which strictly requires suppression of evidence obtained through illegal governmental conduct, may require that the State carry the burden of establishing that material misstatements or omissions were not made recklessly or intentionally.”

Chenoweth, 160 Wn.2d at 475 (dictum).¹⁰ Appellant submits that Article I

¹⁰ “It is well established that article I, section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. *State v. McKinney*, 148 Wn.2d 20, 29, 60 P.3d 46 (2002). Thus, a *Gunwall* analysis is unnecessary to establish that this court should undertake an independent state constitutional analysis. *State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).” *Chenoweth*, 160 Wn.2d 462-63.

section 7 of our state constitution does require the State to bear that burden, for the reason stated in *Chenoweth* and because a recklessly false warrant application undermines the “authority of law” provided by an independent magistrate. *Cf. State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984).

Wherever the burden of proof lies, though, recklessness should have been found here. There is no showing here that the affiant officers “were not aware of [the omitted material facts] ... when [they] ... applied for the search warrants.” *Compare Chenoweth*, 160 Wn.2d at 481. To the contrary, here it is clear “the police affiant[s] knew more ... than was disclosed during the warrant application” and they did not merely “gloss over” contrary information but left it out completely. *Id.* at 482. In similar circumstances, where the misstatements and omissions tend directly to undermine probable cause, courts have not hesitated to find recklessness. *See, e.g., Turngren v. King County*, 104 Wn.2d 293, 298, 705 P.2d 258 (1985) (affiants’ failure to include information about house’s occupants that appeared to contradict informant’s story was reckless); *see also Burke v. Town of Walpole*, 405 F.3d 66, 88 (1st Cir. 2005) (no reasonable officer would have included in warrant affidavit only inculpatory bite mark evidence and not mention directly contradictory

DNA results); *Liston v. County of Riverside*, 120 F.3d 965, 974-975 (9th Cir. 1997) (no reasonable officer would have failed to inform magistrate of “For Sale” sign that tended to contradict affiant’s conclusion that suspect lived at premises); *Golina v. New Haven*, 950 F.2d 864, 867-68 (2d Cir. 1991) (no reasonable officer would have omitted from his warrant affidavit conflicting and uncertain eyewitness descriptions and fingerprint evidence); *United States v. Jacobs*, 986 F.2d 1231, 1234-35 (8th Cir. 1993) (officer acted with reckless disregard when he told the magistrate that a drug sniffing dog showed "interest" in the bag of the defendant but failed to inform the magistrate that it had not gone into "alert."); *Ramirez v. County of Los Angeles*, 397 F. Supp. 2d 1208, 1217-18 (D. Cal. 2005) (affiant left out inconsistencies between victim’s description of suspect and car and officer’s observations).

To be sure, recklessness cannot be inferred from the mere fact that information relevant to probable cause was omitted from the affidavit. *State v. Garrison*, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992). But “omissions are made with reckless disregard if an officer withholds a fact in his ken that "any reasonable person would have known that this was the kind of thing the judge would wish to know.” *Wilson v. Russo*, 212 F.3d 781, 788 (3d Cir. 2000), quoting *United States v. Jacobs*, 986 F.2d 1231,

1235 (8th Cir. 1993).” A pattern such as that here, in which the affidavit includes *only* inculpatory facts and does not mention *any* of the direct observations by officers which were logically inconsistent with probable cause, is particularly indicative of reckless or intentional misleading. *See Turngren v. King County*, 104 Wn.2d at 307-08; *Liston v. County of Riverside*, 120 F.3d at 974-975; *Golina v. New Haven*, 950 F.2d at 867-68; *Ramirez v. County of Los Angeles*, 397 F. Supp. 2d at 1217-18; *cf. Herron v. King Broad. Co.*, 112 Wn.2d 762, 776 P.2d 98 (1989), and cases there cited (inference of recklessness in defamation cases). Whatever the governing proof standard, the trial court erred by not recognizing that.

II. APPELLANT’S INCLUPATORY STATEMENTS DURING THE SEARCH, AND THE FRUITS THEREOF, SHOULD HAVE BEEN SUPPRESSED BECAUSE, CONTRARY TO THE TRIAL COURT’S RULING, THEY WERE THE PRODUCT OF POLICE INTERROGATION.

The trial court similarly erred in admitting Mr. Hill’s responses to Det. Grall’s incriminating questions about the suspected grow rooms—“Is there a key? If there is, where is it at?” (RP 108) “Where’s the key to the lock?” (RP 170)—and the fruits thereof. CP 284. When those questions were put to him, Mr. Hill was in handcuffs, guarded and questioned by heavily armed police officers—confronted, in short, with circumstances so coercive Appellant claimed that they made the statements involuntary. CP

266-68. Det. Grall made no pretense of telling Mr. Hill he did not have to answer, or giving him *Miranda* warnings. But the trial court found no error on either score, because, it held, these questions were not “interrogation.” Supp. RP 16; CP 284. That was clearly wrong.

“[W]here a police officer's questioning or requests induce a suspect to hand over or reveal the location of incriminating evidence, such nonverbal act may be testimonial in nature; the act should be suppressed if done while in custody in the absence of *Miranda* warnings.” *State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797 (1988), *citing State v. Dennis*, 16 Wn. App. 417, 558 P.2d 297 (1976) and *State v. Moreno*, 21 Wn. App. 430, 585 P.2d 481 (1978).

As the trial court recognized, Mr. Hill was plainly “in custody,” in handcuffs and under arrest, when Det. Grall’s asked him about the keys. Supp. RP 16; *see United States v. Newton*, 369 F.3d 659, 676 (2d Cir. 2004), and cases there cited; *accord, e.g., State v. Sargent*, 111 Wn.2d 641, 660, 762 P.2d 1127 (1988) (custody turns on curtailment of freedom of movement). What the trial court failed to recognize is that the questioning of Mr. Hill about the keys constituted an “interrogation” “because it was reasonably likely to elicit an incriminating response.” *State v. Bradley*, 105 Wn.2d 898, 904, 719 P.2d 546 (1986). “[T]he

constitutional privilege against self-incrimination protects [a person] from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence.” *United States v. Hubbell*, 530 U.S. 27, 43, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000).

In *United States v. Green*, the Fifth Circuit reversed the district court’s denial of a motion to suppress statements made by a defendant who, despite an invoked right to counsel, was questioned by police regarding the whereabouts of a lockbox containing weapons and his unlocking the combination locks at the officer’s request. 272 F.3d 748, 750-52 (5th Cir. 2001). In holding the police violated the Fifth Amendment, the Fifth Circuit emphasized,

There is no serious question but that Green’s actions in disclosing the locations and opening the combination locks of the cases containing firearms were testimonial and communicative in nature. These compelled acts disclosed Green’s knowledge of the presence of firearms in these cases and of the means of opening these cases. The ATF agents elicited these testimonial acts in violation of Green’s Fifth Amendment right to counsel, and their admission at trial was reversible error.

Id. at 753-54.

There can be similarly no doubt that Appellant Hill’s statements about the location of the keys to two rooms, which the police probably knew contained marijuana, were incriminating. Courts have routinely held

that a key may be evidence linking its possessor to any incriminating contents contained in a corresponding locked room or area.¹¹ Mr. Hill's statements about the keys were not volunteered or spontaneous; they were in direct response to questions put to him about the very crime for which the officers had taken him into custody. *See ibid.*, citing *United States v. Gonzalez-Mares*, 752 F.2d 1485, 1489 (9th Cir. 1985). Those statements and their fruits therefore plainly should have been excluded from evidence.

¹¹ *See, e.g., United States v. Holmes*, 505 F.3d 1288 (D.C. Cir. 2007) (illegal seizure of defendant's car key during *Terry* stop led police to defendant's car and the weapon); *United States v. Cotton*, 261 F.3d 397 409-10 (4th Cir. 2001) (defendant's possession of the key incriminated him as a burglar or drug possessor); *United States v. Hill*, 142 F.3d 305, 312 (6th Cir. 1998) (finding insufficient evidence to support conviction for drug possession with intent to distribute marijuana where defendant gave officers key to bedroom that contained drugs); *United States v. Ortiz*, 942 F.2d 903, 908 (5th Cir. 1991) (listing among other incriminating evidence supporting marijuana conspiracy a key to airplane suspected of transporting marijuana); *United States v. Perkins*, 937 F.2d 1397, 1403-04 (9th Cir. 1991) (keys to the getaway car discovered on the defendant evidence of guilt of bank robbery); *United States v. Lopez*, 898 F.2d 1505, 1509-10 (11th Cir. 1990) (key to warehouse that contained narcotics held to be evidence supporting conviction for conspiracy to distribute); *United States v. Chesher*, 678 F.2d 1353, 1358 (9th Cir. 1982) (possession of key to room with drug manufacturing equipment was "incriminating" where defendant lived in house with mother and an unrelated adult). *State v. Evans*, 45 Wn. App. 678, 685, 726 P.2d 1027 (1986) (improperly admitted past conviction was harmless error because police witnessed defendant throw away "incriminating" keys to apartment that had been robbed); *United States v. Downing*, 665 F.2d 404, 407 (1st Cir. 1981) (holding that after defendant invoked his right to counsel, "questions about [defendant's] keys and airplane were reasonably likely to elicit an incriminating response . . . [and] statements about the existence and location of his airplane were properly excluded") (internal quotation marks and citations omitted).

CONCLUSION

Appellant's conviction should be reversed and the charge against him dismissed, or a new trial ordered.

DATED this 17 day of December, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

DEPUTY

The undersigned hereby certifies that on the 17 day of December, 2007, copies of the Appellant's Opening Brief were sent by United States Mail, first class postage prepaid, to:

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