

IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON
DIVISION II

NO. 36579-1-II

STATE OF WASHINGTON

Respondent,

vs.

DAVID H. HILL

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 06-1-00128-7

BRIEF OF RESPONDENT

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ORIGINAL

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STATEMENT OF THE CASE

I Restatement of Issues Presented

- A. Was evidence provided by a citizen informant who witnessed suspicious activity consistent with growing marijuana, by police officers who smelled growing marijuana, and evidence of a prior marijuana growing conviction at the same address, sufficient to establish probable cause that a crime was committed so that a search warrant should issue?
- B. Should Mr. Hill's statements made during the search of his home be suppressed?

II Statement of Facts

On April 29, 2006, Port Townsend Police Officer Greenspane interviewed Bob and Lori Witheridge and Violet Swinhoe based on a tip from the Witheridge's son Chad, that a neighbor, David Hill, was possibly growing marijuana. The Witheridges and Ms. Swinhoe said that Mr. Hill monthly brings in a truckload of fertilizer; does not do significant gardening work; regularly takes out covered loads in his pickup late at night; routinely has high intensity lighting radiating from roof skylights; has covered his top floor windows with a translucent material; and installed a larger propane tank about 18 months previously. CP 31-33.

On May 5, 2006, at approximately 1:50 a.m. Officer Greenspane walked around the block on which Mr. Hill's residence

is located. The weather was calm with a slight breeze blowing from West to East. Officer Greenspane smelled fresh marijuana when he was East of Mr. Hill's house. Officer Greenspane contacted Officer Avery and requested him to park nearby and walk North on Jackson St, just East of Mr. Hill's house. Officer Avery and Cadet Pryzgocki complied and both smelled fresh marijuana when East of Mr. Hill's house. CP 34-37.

On July 10, 2006, Officer Greenspane contacted detectives assigned to the Olympic Peninsula Narcotics Enforcement Team (OPNET) and provided them with the information he had on a possible marijuana growing operation at Mr. Hill's house. CP 13. Officer Greenspane faxed his report to OPNET on July 11, 2006. CP 98. Officer Greenspane and OPNET detectives revisited the area around Mr. Hill's house on three occasions; July 17, 21, and 24, 2006; but did not smell marijuana on those visits. RP Vol. II 29-33.

On July 13, 2007, OPNET requested Mr. Hill's electric consumption records from Puget Sound Energy, under RCW 42.17.314. CP 50. Puget Sound Energy provided approximately 6 years of Mr. Hill's monthly electrical use records to OPNET on August 1, 2006. CP 52.

On July 28, 2006, OPNET Detectives Raymond and Fuchser revisited Mr. Hill's neighborhood, smelled fresh marijuana from the East side of Mr. Hill's house and also heard loud but unidentified sounds similar to an electrical transformer or ballast coming from the North side of Mr. Hill's house. CP 101-103.

On August 2, 2006, OPNET applied to Clallam County for a search warrant for Mr. Hill's property. The warrant application contained the following information:

- Police reports from Officer Greenspane, Officer Avery, Cadet Pryzgocki,
- A summary of the information provided to the Port Townsend police, including that they smelled fresh marijuana on the east side of Mr. Hill's house
- On July 28, 2006, OPNET detectives Fuchser and Raymond smelled green, growing marijuana in the same locations as Officers Greenspane, Avery and Cadet Pryzgocki
- Background information on Mr. David H. Hill, including a previous VUCSA violation for growing marijuana
- Electrical consumption graph and the analysis by OPNET that it was atypical for a residence
- OPNET detectives heard loud electrical noises coming from Mr. Hill's house about 4:14 a.m. on July 28, 2006
- Information known to affiants concerning indoor marijuana growing operations based on training and experience

CP 13-53.

The search warrant was issued on August 2, 2006, and executed on August 3, 2006.

Mr. Hill submitted a Motion to Suppress Evidence pursuant to CrR 3.6 on January 17, 2007, using essentially the same issues as this Appeal. A hearing was held in Jefferson County Superior Court and Findings of Fact and Conclusions of Law and Order was issued on April 17, 2007, denying the Motion to Suppress. CP 282-285.

Mr. Hill was convicted and sentenced on June 1, 2007. Mr. Hill filed a notice of this Appeal on June 21, 2007.

Argument

III Was evidence provided by a citizen informant who witnessed suspicious activity consistent with growing marijuana, by police officers who smelled growing marijuana, and evidence of a prior marijuana growing conviction at the same address, sufficient to establish probable cause that a crime was committed so that a search warrant should issue?

Mr. Hill challenges the sufficiency of the affidavit supporting the warrant, specifically asserting that some information in the application for the search warrant was “false, incomplete, misleading, unreliable, and unlawfully obtained.”

We review a magistrate's determination to issue a search warrant for abuse of discretion. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). We review an application for a search warrant

with common sense resolving any doubts in favor of the warrant. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

A search warrant may be issued only upon a determination of probable cause, based on facts from which an ordinary, prudent person could conclude that a crime has occurred and that there is evidence of the crime at the location to be searched. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869, *cert. denied*, 449 U.S. 873 (1980). “Accordingly, ‘probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.’” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citations omitted). The affidavit supporting a search warrant meets the probable cause requirement if it sets forth facts sufficient for a reasonable person to conclude that the defendant probably is involved in criminal activity. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). Facts that alone would be insufficient to support probable cause can do so when viewed together with other facts. *State v. Garcia*, 63 Wn.App. 868, 875, 824 P.2d 1220 (1992).

There was no misrepresentation (false information) of the police officer's location.

Mr. Hill alleges that the location of the Port Townsend police officers was misrepresented. This is a factual issue. Mr. Hill's house is located at 2030 Monroe Street. The next street to the east is Jackson Street. On the night the Port Townsend police smelled the marijuana, there was a wind blowing from the west to the east. In order to smell an odor emanating from Mr. Hill's house, one had to be downwind, to the east of the house. The affidavit places the police in front of 1715 Jackson Street, east of Mr. Hill's house when they smelled the marijuana. CP 34-37. In the suppression hearing below, the trial court found: That the Port Townsend Officers did smell the odor of marijuana up to and until they passed 1750 [sic] Jackson which was ignored by the court because the training and experience of the officers was not included in their resumes. Finding of Fact No. 4. CP 282. The officer's location was not misrepresented, thus Mr. Hill's argument that the search warrant issued on faulty information is, for these facts, spurious.

Was material information omitted from the affidavit?

Mr. Hill asserts it was improper that information about police visits that did not yield evidence of criminal activity was not included in the search warrant affidavit.

“[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 454, 462, 158 P.3d 595 (2007), citing *Franks v. Delaware*, 438 U.S. 154, 155-6, 98 S.Ct 2674, 57 L.Ed.2d 667 (1978) and *State v. Cord*, 103 Wn.2d 361, 366-7, 693 P.2d 81 (1985).

Here, the trial court made the following pertinent

Conclusions of Law:

3. “That the search warrant did not contain material misstatements or omissions that were omitted such that the search warrant would not have been issued under *State v. Chenoweth*, 127 Wn.App. 444 (2005).
4. That any omissions were not recklessly omitted.
- ...
6. That the affidavits were not intentionally false or misleading.”

CP 284.

During the course of the investigation, police officers made several visits to the neighborhood of Mr. Hill's house. On several of these visits they did not detect anything suggesting marijuana growing at his house. However, this is unsurprising. If Mr. Hill was engaged in a surreptitious illegal grow operation, in a residential neighborhood, surrounded by houses, he would have to take rigorous precautions to avoid detection by his neighbors. The smell of marijuana is distinctive and to contain such a smell inside a house, while providing growing plants with sufficient light, water, and food requires much effort, discipline, and investment. Protection of this investment requires serious security precautions, which were effective. Using their own senses, on a few visits, and only at night, when the winds were calm, were they able to smell marijuana, see high intensity lights, and hear loud electrical conversion sounds. Although other visits to the vicinity of the Hill house were made environmental conditions, especially wind, overwhelmed any traces that might have been present. These visits were the ones that were material because they showed that a crime was likely being committed, at Mr. Hill's house, at the times they were there. As the trial court properly found, all the rest were immaterial, failed attempts to collect evidence from a secretive, intelligent, and nearly nocturnal criminal. The trial court was correct

in determining these were immaterial because a failure to detect evidence that a criminal is hiding does not show either its absence or presence.

The search warrant was properly issued on probable cause and should not be suppressed.

Did illegally obtained information secure probable cause for the search warrant?

Mr. Hill argues that the search warrant application contained illegally obtained electrical consumption information about Mr. Hill's house. In a 3.6 suppression hearing in trial court, Mr. Hill argued, and the trial court agreed, that the administrative warrant OPNET detectives used to obtain electric consumption data for Mr. Hill's house was illegal. The trial court redacted the electric consumption data and determined it was immaterial to the search warrant. However, the determination of illegality was in error. The Washington Supreme Court approved the use of RCW 42.17.314 to obtain electric consumption records from Puget Sound Power and Light, the predecessor company to Puget Sound Energy, both private utilities. *State v. Cole*, 128 Wash.2d 262, 290, 906 P.2d 925 (1995)

Washington courts have consistently applied the *Franks* standard, requiring a showing of reckless or intentional misstatements or omissions of material facts. See, e.g., *State v. Olson*, 74 Wash.App. 126, 872 P.2d 64 (1994) (stating power consumption was twice normal usage did not materially affect probable cause and was not shown to be a reckless or intentional misstatement), *aff'd* 126 Wash.2d 315, 893 P.2d 629 (1995);

As in *Olson*, the power consumption did not affect probable cause and its inclusion was not reckless, therefore the search warrant should not be suppressed.

Issuance of Search Warrants is Discretionary and A Decision to Issue a Search Warrant When There is Immaterial Omitted Information Should 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). "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).

Mr. Hill states that the Washington Supreme Court has applied a presumption of validity and abuse of discretion review standard even where a search warrant affidavit contained

information the magistrate knew or should have known was unlawfully obtained, citing *State v. Cole*, 128 Wn.2d 262, 270, 906 P.2d 925 (1995). This is incorrect when applied to police use of RCW 42.17.314 to obtain electric consumption records from Puget Sound Energy (Puget Sound Power and Light).. In *Cole*, the court found records obtained through this process were legal and permissible for use in a search warrant affidavit.

Mr. Hill argues that the trial court's finding that "a warrant should issue" when taken together with its according of deference to the "magistrate's determination that probable cause exists" undermines the issuing magistrate's authority. In fact, this argument is erroneous. The only time in which the trial court's findings of fact and conclusions of law touch upon this topic is in conclusion of law 13:

That the information provided by Fuchser and Raymond provides sufficient evidence of probable cause that is, by itself, sufficient to issue the search warrant. *State v. Cole*, 128 Wn.2d 262, 289 (1995); *State v. Olson*, 73 Wn.app 348 (1994); *State v. Huff*, 64 Wn.App 641 (1992); *State v. Rembolt*, 64 Wn.App 505 (1992).
CP 285.

The trial court was asked to suppress a search warrant. Its determination that probable cause existed from the police affidavit validates its affirmation that the evidence was sufficient to issue the search warrant.

IV Should Mr. Hill's statements made during the search of his home be suppressed?

In a criminal case, conviction requires proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed. 2nd 368 (1970).

When a suspect was asked by the police to hand over hashish which was concealed in his car before being given Miranda warnings, the court held: "Where 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 Wash.2d 466, 471, 755 P.2d 797 (1988). The court also said that [defendant's] act of producing the hashish was a confession of knowledge concerning the hashish, and is not admissible against him.

However, the *Weathered* court also said " Our holding does not change the law with respect to situations involving consent to search. In *State v. Rodriguez*, 20 Wash.App. 876, 880, 582 P.2d 904 (1978) and *State v. Silvermail*, 25 Wash.App. 185, 191, 605

P.2d 1279, *cert. denied*, 449 U.S. 843, 101 S.Ct. 124, 66 L.Ed.2d 51 (1980), the Court of Appeals distinguished *Dennis* because in those cases the police did not ask for the contraband, but instead requested permission to search or for keys to a car trunk. Granting permission to search is consistent with innocence, whereas producing contraband from a hiding place is essentially an admission of guilt. Here, the officer did not ask for permission to search but asked Wethered to hand him contraband where doing so was an admission of knowledge of the contraband and thus incriminated Wethered.”

The instant case is distinguishable from *Wethered* because here the police had a search warrant for Mr. Hill’s house, and upon encountering a locked door they merely requested the keys to a room they were going to search anyway. The request was merely to avoid damaging the house, not to “ induce a suspect to hand over or reveal the location of incriminating evidence.”

The keys would not provide incriminating evidence since the police already had a search warrant, therefore the motion to suppress evidence is without merit and should be denied.

CONCLUSION

The State respectfully requests that this Court deny Appellant's motion and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 19th day of February, 2008

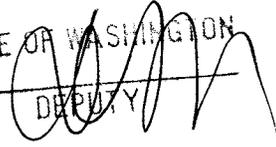
JUELANNE DALZELL, Jefferson County
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A handwritten signature in cursive script, appearing to read "Thomas A. Brotherton", written over a horizontal line.

By: Thomas A. Brotherton, WSBA # 37624
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CERTIFICATE OF SERVICE FOR
BRIEF OF RESPONDENT

I HEREBY CERTIFY that a true and correct copy of the attached BRIEF OF
RESPONDENT was placed in the U.S. mail, postage paid, this 19th day of February, 2008,
addressed to the following:

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