FILED
FEB 07 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 29188-0-111

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Appellant,

v.

KMIBERLEE ANN MOYER,
a/k/a KIMBERLY ANN MOYER,
Defendant/Respondent

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

On January 8, 2009, Deputy Josh Mathena (hereinafter "Mathena") received a telephone call from a person who requested to remain anonymous. (CP 35, 73).

This informant stated that the defendant, Kim Moyer (hereinafter "Moyer") is growing marijuana in the basement of a house located at 807 Orondo and that Moyer was a longtime marijuana user who continued to use marijuana. (CP 35). The informant also indicated that Moyer's son, Riley was also a marijuana user and the informant believed that Moyer supplied Riley with marijuana. (CP 35, 74). There is no indication in the search warrant affidavit as to where the defendant's son, Riley, was living.

Mathena checked Moyer's criminal records and discovered an arrest for DUI and possession of marijuana under 40 grams in 2002 out of Okanogan County. However, Moyer only plead guilty to negligent driving first degree. The marijuana charge was dismissed. (CP 35).

At approximately 5:30 p.m. on January 8, 2009 Mathena directed Wenatchee Police Department Officers Miller and Reiber to Moyer's house. (CP 36).

Moyer answered the door but did not open the door all the way. (CP 36). Officer Miller stated Moyer acted "very suspicious and nervous." No specific details were given as to how it was that Moyer was acting "suspicious and nervous." (CP 36, 75).

No reports were ever prepared by Officers Miller and Reiber. Neither Miller nor Reiber smelled an odor of marijuana while at the house. (CP 36, 76).

After talking to Moyer both Miller and Reiber drove to the alley and observed Moyer "retrieving a garbage bag from the alley and taking the bag inside the house". Miller again stated this was very suspicious and showed how nervous Moyer was and also that Moyer was attempting to conceal from law enforcement whatever she had thrown away in the garbage." (CP 36, 76).

Five days later on January 13, 2009 (although the search warrant indicates 2008) Mathena spoke with Scot Erickson of

the Chelan County PUD having previously obtained power records at 807 Orondo Street. (CP 36, 78).

According to the search warrant affidavit Erickson viewed the records and said the power reading was definitely on the high end. Erickson compared a four bedroom house with a family of six to Moyer's house and Moyer's house was 1,000 kilowatt hours over a family of six during the month of June, 2008. In addition, the affidavit states that "Erickson obviously could not say for sure but agreed that the power usage for Moyer's residence was unusually and consistently higher than it should be". Mathena indicated that Erickson told him that there might be other reasons for the power usage "being high". (CP 36, 79).

Mr. Erickson was interviewed on February 10, 2010. (CP 52). When asked whether the usage looked unusual, Mr. Erickson indicated that it depends on the context, the size of the house, how many people live there, how many water heaters are in the house, what kind of insulation is in the house, whether it is an old or a new house, etc. (CP 56, 60-63). The records do not show the size of Moyer's house, and Erickson does not recall being told the size of the house nor how many people

lived there. (CP 57, 60-63). Mr. Erickson also does not recollect doing any comparison with a four bedroom house with six people in it. (CP 58).

Mathena took no notes from this conversation nor are any conversations reflected in the search warrant affidavit. (CP 79).

The search warrant affidavit indicates that on January 14, 2008 (it should be 2009) Mathena spoke with the owner of 807 Orondo, Edward Wendt, who confirmed that Moyer was a good tenant and that the house had a basement. Mathena did not receive any information as to the number of people who lived with Moyer. The search warrant affidavit is silent as to this fact also. (CP 80).

The search warrant affidavit next reflects activity on this case by Mathena on March 18, 2009. However, between January 14, 2009 and March 18, 2009 Mathena spent several nights walking through the alley of Moyer's residence attempting to get an odor or smell of marijuana from the house and was never able to do so. He also did not observe any unusual activity at the residence. (CP 80).

On March 18, 2009 at approximately 9:30 a.m. Mathena talked to Wenatchee Police Department Corporal Lykken in

reference to Lykken's observations at 807 Orondo Street on March 15, 2009 at approximately 10:44 p.m.

> "I asked Lykken while inside the house did he smell any odor of marijuana. Lykken said it was funny I asked and said he did. He said once he walked in the front door he smelled a faint odor of marijuana ... Lykken said he has been around marijuana over 100 times and can identify the smell of marijuana from his training and experience ... Lykken said he asked several of the occupants if they had smoked marijuana today or were in possession of marijuana. All denied smoking or being in possession of marijuana. Lykken did mention that Sierra had told him several times to search the house. ... (Sierra) never said why. I asked Lykken why they did not follow up on the marijuana odor. Lykken explained that he was currently into an 18 hour shift and the patrol had calls of service pending. He said there was no time to follow up." (CP 37).

What is not disclosed in the affidavit but confirmed in the police reports is that there were two other officers present at Moyer's house on March 15, 2009, Officers Vasquez and Thompson. Officer Vasquez is the only one who prepared a report on the incident. (CP 68).

Neither Officer Vasquez nor Officer Thompson smelled any marijuana while in the residence and they were there longer than Corporal Lykken. (CP 68-69).

A search warrant was obtained on March 18, 2009 at 10:58 a.m. and executed on March 20, 2009 resulting in Ms. Moyer being charged with unlawful manufacture of a controlled substance – marijuana; unlawful possession of a controlled substance – marijuana with intent to deliver; and maintaining a drug property. (CP 33).

Three separate hearings took place; on May 6, May 12 and May 19, 2010 regarding the Defendant's motion to dismiss. (RP 1).

On May 6, 2010 the State had to concede that both individually and when taken as a whole the following do not amount to probable cause: 1) the affidavit for issuance of a search warrant pertaining to the criminal history of the Defendant; 2) the failure of defendant to open the door and invite officers in at her residence; 3) the Defendant acting nervous when the officers were at her door; 4) the Defendant retrieving a garbage bag from the garbage can; 5) and the alleged high power usage at the Defendant's residence. (RP 15). When all other arguments failed the State then and now, argue that the faint smell of marijuana detected by Officer Lykken, in and of itself constitutes probable cause to issue the search warrant for the Defendant's home.

The trial court found the only information in the warrant that could possibly support probable cause was the allegation that corporal Lykken smelled the "faint odor" of marijuana and; that after March 15th Officer Lykken did not follow up on the odor; and the affidavit did not indicate if the smell was fresh, burnt or growing marijuana. (CP 33). The State only challenges the trial courts conclusion that the faint odor of marijuana was stale and thus could not provide probable cause for the issuance of the search warrant. See Conclusions of law number 1. (CP 33).

II. STANDARD OF REVIEW

A. THE TRIAL COURT'S DETERMINATION OF PROBABLE CAUSE ON A MOTION TO SUPPRESS/DISMISS IS REVIEWED DE NOVO.

Under the United States Constitution a search warrant is invalid unless it is supported by probable cause. State v. Nusbaum, 126 Wn.App. 160, 167, 107 P.3d 768 (2005). Pursuant to the Washington State Constitution no person "shall be disturbed in his private affairs or his home invaded without authority of law." Article I, Section 7 of the Washington State Constitution.

A search warrant application must state the underlying facts and circumstances under which it is based. Nusbaum, supra, citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1989).

Probable cause exists if the affidavit supporting the warrant presents sufficient facts for the issuing magistrate to reasonably infer that criminal activity is occurring or that contraband exists at the place to be searched; "thus, we look for a nexus between the criminal activity and the contraband and the place to be searched." State v. Nusbaum, 126 Wn. App. 160, 166 (citations omitted). An officers unsupported conclusions or speculations are not enough. Id, (other citations omitted.) *Whether facts set in out in an affidavit are sufficient to conclude that probable cause exists is question of law; thus, our review is de novo.* Nusbaum at 166 -167 citing In re Detention of Peterson, 145 Wn.2d 789, 799 to 800, 42 P.3d 952 (2002). (Emphasis added).

The State in its brief cites State v. Merkt, 124 Wn.App 607, 102 P.3d 828 (2004) in setting forth the standard which gives great deference to the magistrates determination of probable cause. However, State v. Merkt was a Washington Appellate decision which does not appear to take into consideration the standards imposed by the Washington State Supreme Court in In re Detention

of Peterson, 145 Wn.2d 798 (2002). Review of the issuance of a search warrant is "limited to the four corners of the affidavit supporting probable cause". State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

An application for a warrant must state the underlining facts and circumstances on which it is based in order to facilitate an independent evaluation of the evidence by the issuing magistrate. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1989). The warrant should not be issued on lose, vague or a doubtful basis of fact. State v. Perrone 119 Wn.2d 538, 545, 834 P.2d 611 (1992).

While the issuing Judge is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit, it must be based upon more than mere suspicion or personal belief that evidence of a crime will be found on the premises to be searched. State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 264 (2003).

III. ARGUMENT

Since the amount of time between criminal activity and issuance of a search warrant is only one factor to be considered in determining whether criminal activity is occurring, each factor

contained in the warrant at issue is discussed below. See State v. Petty, 48 Wn.App. 615, at 621-622, 740 P.2d 879 (1987)

A "summary" of the probable cause "facts" can be found on page 3 of the affidavit for search warrant in the first full paragraph which states:

> "Both Moyer and her son have a history of marijuana usage dating back to 2002 to the present ... when contacted at her residence by officers, Moyer refused to open the door all the way or invite the officers inside ... once the officers left Moyer ... she went to the alley behind her house and retrieved a large black garbage sack ... and carried the garbage sack back inside her house ... power records show Moyer has higher than normal power usage and this usage is consistent throughout the year". (CP 37).

The last "factual basis" for asserting probable cause is that Corporal Lykken on March 15, 2009 was in 807 Orondo and "smelled a faint odor of marijuana". (CP 37). This is the sole factual basis upon which this appeal is based.

Each of these "factual basis" will be discussed in the order presented above. While the Appellant has not challenged the trial court's finding that none of these basis support probable cause except the odor of marijuana, all of the facts set forth in the warrant should be considered on appeal. (CP 33; finding of fact #5).

A. THE TRIAL COURT DID NOT ERROR IN FINDING THAT THE CRIMINAL HISTORY OF THE RESPONDENT AND HER SON DID NOT SUPPORT PROBABLE CAUSE FOR THE ISSUANCE OF THE WARRANT:

Moyer's criminal history consists of a plea of guilty to negligent driving first degree in 2003. Moyer was never convicted of DUI nor possession of marijuana. She has no further criminal history. Her criminal history then does not reflect "a history of marijuana usage" at all. (CP 37).

As to Riley, no criminal history is shown in the affidavit for search warrant, except an arrest in 2008 for possession of marijuana under 40 grams and a incident where he was suspected of being under the influence of marijuana in November of 2008. No criminal conviction is presented in reference to Riley nor, are any of these previous contacts related to 807 Orondo Street in Wenatchee in any way.

As noted in State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001) and State v. Hobart, 94 Wn.2d 437, 617 P.2d 429 (1980), a history of the same or similar crimes may be helpful in determining probable cause, but without other evidence it also falls short of

probable cause to search. Certainly the criminal history referenced in the affidavit for search warrant is not history of the same or similar crimes for which the search warrant was requested, i.e., an indoor grow operation. The criminal history evidence in the affidavit was found not to support probable cause.

B. THE RESPONDENT'S REFUSAL TO OPEN THE DOOR OR INVITE OFFICERS IN, AND THE RETRIEVAL OF A GARBAGE BAG FROM OUTSIDE, WAS NOT SUFFICIENT TO SUPPORT PROBABLE CAUSE.

On January 8, 2009, at 5:30 p.m., under a ruse, Officers Miller and Reiber at the direction of Mathena made contact with Ms. Moyer at 807 Orondo Street. The ruse was an alleged receipt of a 911 call. (CP 36).

When answering the door Moyer did not open the door all the way. Since no 911 telephone call was actually made, opening the door part way is not suspicious activity. As to Moyer's alleged "nervousness", an officer must have some basis beyond a suspect's nervousness and suspicious activity to even justify a frisk, or to detain an individual. State v. Setterstrom, 163 Wn.2d 621, 183 P.3d 1075 (2008) State v. Coyne, 99 Wn.App. 566, 995 P.2d 78 (2000). "Most people, even innocent ones, are nervous when

pulled over by police". United States v. Wald, 208 F.3d 902 (10th Cir. 2000). As stated in Neth: "We do not permit searches merely because people ... are nervous...". Neth, 165 Wn.2d at 184.

Retrieving a garbage bag from one's garbage occurs on occasion. This innocuous activity does not justify the leap as set forth in the affidavit for probable cause that "Moyer was attempting to conceal from law enforcement whatever she had thrown away in the garbage". There is no indication that Moyer was even aware that the officers were in the alley. This "suspicious activity" does not amount to probable cause. (CP 36).

The affidavit goes on to state that from Mathena's training and experience with indoor marijuana grows, growers will often throw away evidence relating to the marijuana grow. (CP 36). As stated in State v. Thein, an officer's general averments based on training and experience do not, standing along, constitute a basis for the issuance of a search warrant. State v. Thein, 138 Wn.2d, 133, 146-148 (1989). In Thein, the search warrant was suppressed with the court stating that the police did not observe any coming and goings from the home; there was no evidence of any controlled buys occurring at the home; nor did the officers recount

surveillance of the suspect leaving his home to participate in drug transactions and then returning. Id. The same is true here.

C. THE CONCLUSORY STATEMENT THAT THE POWER USAGE AT THE RESPONDENT'S RESIDENCE WAS "UNUSUALLY HIGH" DOES NOT SUPPORT PROBABLE CAUSE.

High electrical usage in and of itself is insufficient to establish grounds for the issuance of a search warrant. State v. Nickle, 53 Wn.App. 39, 765 P.2d 331(1988) citing State v. Huft, 106 Wn.2d 206, 720 P.2d 838 (1986).

The PUD employee, did not recall making any comparison of the usage at 807 Orondo Street with a four bedroom house with a family of six. (CP 58-59). Even if he had, however, there is no indication in the affidavit for search warrant of the size of the house located at 807 Orondo Street nor how many people actually live there. There is really nothing to compare the power records to as no details were given to anybody regarding 807 Orondo Street. This basis for probable cause was attacked in State v. Olson, and in that case the court did not excise the portion of the affidavit regarding power usage, but, unlike this case, the affidavit "compared defendant's power consumption to that of similar

residences, considering both square footage and the appliances probably used inside the residences" and the "normal power consumption. State v. Olson, 74 Wn.App. 126, 872 P.2d 64 (1994).; State v. McPherson, 40 Wn.App. 298, 698 P.2d 563 (1985); State v. Sterling, 43 Wn.App. 846, 719 P.2d 1357 (1986).

In this case none of that is present. There is a mere conclusion that the power usage at 807 Orondo Street was "unusually high". Without any comparison to a similar sized house with the same number of people living inside the statement that there was high power usage is not in any way accurate and is a mere conclusion on the part of law enforcement. (CP 36).

D. IN LIGHT OF THE OTHER INSUFFICIENT FACTS DISCUSSED ABOVE, THE ALLEGATION THAT A "FAINT" ODOR OF MARIJUANA WAS SMELLED AT THE PREMISES 5 DAYS EARLIER DOES NOT SUPPORT PROBABLE CAUSE.

According to the affidavit for search warrant, Officer Lykken, stated he smelled the "faint" odor of marijuana inside 807 Orondo Street on March 15, 2009 at approximately 8:44 p.m. when two other officers, Officer Vasquez and Officer Thompson were present.

The specific language in the affidavit for search warrant is as follows:

> "On 03-18-2009 @ 0930 hours I spoke with WPD Cpl T Lykken. On 03-15-2009 @ 2044 hours Lykken and two other officers responded to 807 Orondo Street in Wenatchee regarding a disturbance. Upon arrival the officers entered the home and found a physical domestic had occurred. Kim Moyer was the suspect and the victim was her daughter, Sierra Evans. After an investigation Moyer was arrested for assault 4th domestic violence.
>
> I asked Lykken while inside the house did he smell any odor of marijuana. Lykken said it was funny I asked and said he did. He said once he walked in the front door he smelled a faint odor of marijuana. Lykken has been a law enforcement officer for 9 years, 7 years with the Wenatchee Police Department. Lykken said he has been around marijuana over 100 times and can identify the smell of marijuana from his training and experience. There was no doubt in Lykken's mind the odor he smelled inside the house was indeed marijuana. Lykken said he asked several of the occupants if they had smoked marijuana today or were in possession of marijuana. All denied smoking or being in possession of marijuana." (CP 37).

Lykken apparently can identify the smell of marijuana from "his training and experience". No details of his training and experience other than being around marijuana over 100 times and being a law enforcement officer for 9 years is given. There is no indication in the affidavit as to Lykken's experience in investigating

controlled substances crimes, any personal participation in marijuana manufacturing cases, nor any specific training in reference to detecting the odor of marijuana. Additionally the two other officers present at 807 Orondo Street, who were there for a longer period of time, did not smell any marijuana. (CP 36).

The identification of the smell of marijuana must consist of more than a "mere personal belief". State v. Seagull, 95 Wn.2d 898, 632 P.2d 44 (1981).

In State v. Olson, the court refused to excise from the affidavit for search warrant an officer's detection of the odor of marijuana. The basis of the attack on that warrant was because of the affidavit did not detail the officers qualifications for smelling marijuana. However, in Olson, the qualifications of the officer were set forth; including graduating from the basic drug enforcement administration course for controlled substances, attendance at one controlled substances investigation seminar, graduation from a 36 hour patrol officer course in controlled substances investigation, participation in approximately 60 controlled substances investigations, handling substances such as cocaine and marijuana, and direct investigation of approximately five cases

involving the manufacture of marijuana. State v. Olson, 74 Wn.App.126, 131, 872 P.2d 64 (1994).

In this case no details regarding any specific drug training or drug investigation was set forth. As a result this factual basis was considered by the trial court and rejected as a basis for probable cause. (CP 33).

In another Olson case, two search warrants were issued on premises owned by the defendant. The first property was the "Madrona Road" property and the second property was the "Fairview" property. , State v. Olson, 73 Wn.App. 348, 869 P.2d 110 (1994)

The court upheld the issuance of the search warrant on the Madrona property but not the Fairview property.

The search warrant affidavit in reference to the Madrona property set forth several days of surveillance of the property which resulted in the defendant visiting the property, the defendant entering the property for a brief period of time and then leaving, Mr. Olson's felony conviction for possession of marijuana and an inordinately high power usage at the Madrona property. On two different occasions, two different officers "detected a strong odor of marijuana emanating from the direction of (the Madrona property)"

and "the odor of marijuana from the direction of the (Madrona property)". State v. Olson, 73 Wn.App. 348, 869 P.2d 110 (Div. II 1994) at 351. In the affidavit, the qualifications for the law enforcement personnel who smelled the moderate odor detailed that one officer was "familiar with the odor of growing marijuana and (had) participated in the seizure of indoor grows". Id. at 365 The other detective had been "involved with approximately 60 investigations" involving the seizure of marijuana but also "attested to his own training and experience involving the detection of marijuana". Olson at 365.

The qualifications of law enforcement personnel are vitally important when submitting an affidavit for the issuance of a search warrant which involves the odor of marijuana. As stated in State v. Johnson, 79 Wn.App. 776, 904 P.2d 1188 (Div. III, 1995).

> "In considering the adequacy of smell observations to support probable cause, we consider the experience and the expertise of the DEA agents. **In fact, the agent's particular expertise has been called critical.**" (Emphasis added). .

The affidavit in Johnson, in reference to the qualifications of the officer smelling the marijuana indicated that one officer:

> "had been involved for over 7 years as the marijuana eradication coordinator for the Eastern District of Washington. He had personally investigated or assisted in investigations culminating in the seizure of several thousand cannabis plants. In addition, he had graduated from Marijuana Aerial Spotting School, Indoor Cannabis Investigation School, and had participated in at least 30 search and/or seizure warrants in the preceding year, all involving the manufacture of cannabis by indoor propagation." State v. Johnson, 79 Wn.App. 776, 787-789, 904 P.2d 1188 (Div III, 1995).
>
> In addition, Special Agent Destito:
>
> "had been with the DEA since 1991 and had an additional six years of experience as a police officer. During that time, he attended the Washington State Criminal Justice Center, Basic Law Enforcement Academy, and the United State Department of Justice DEA/FBI Academy. He participated in and directed police operations targeting both indoor and out door marijuana cultivation."

Compare the details in Johnson to the details in reference to Officer Lykken's qualifications: Lykken was a law enforcement officer for 9 years. He had been around marijuana over 100 times and can identify the smell of marijuana from his training and experience. (CP 37).

There is nothing in the affidavit pertaining to specific education and training and experience that Lykken has. There is no indication he attended the Basic Law Enforcement Academy nor had any specific training in the detection of marijuana nor in the

detection of the odor of marijuana. At a minimum he should be able to distinguish fresh, burnt or smoked marijuana, as the trial court found. (CP 33). There is no indication of any type of involvement of Lykken in indoor grow operations. All we know is that during Lykken's lifetime he has been around marijuana over 100 times but know nothing of his training and experience as to detecting the odor of marijuana.

Given the critical nature of the expertise of the individual who allegedly smelled marijuana and the fact it was a "faint" odor, as opposed to "moderate" or "strong", this information is insufficient to support probable cause. This is particularly true when two other officers were also at the residence at the time Officer Lykken was, yet did not smell any marijuana (with one of the officers formerly working on the Drug Task Force); when two officers were at the Moyer residence on a ruse and did not smell marijuana and when Detective Mathena over a period of two months attempted to smell marijuana at the residence and was not able to do so. (CP 80).

In State v. Higby, 26 Wn.App. 457, 613 P.2d 1192 (1980) (Div. II, 1980), the Court of Appeals determined that the Affidavit for Issuance of Search Warrant was insufficient to establish probable

cause to believe that marijuana was in the Higby household at the time of the search.

The affidavit in Higby set forth that on March 17, 1978 an individual was arrested for possession of marijuana and hashish while a passenger in another person's vehicle. The passenger indicated that he had purchased hashish from the driver of the vehicle and that, apparently in an unrelated incident, two weeks earlier he had purchased marijuana from Anita Higby at her residence. Anita Higby's residence was kept under observation and on several occasions officers had observed a considerable amount of vehicular traffic and pedestrians visiting the Higby home for two to three minutes at a time "at all hours of the day". The affidavit indicated that six months earlier the officer had been told by a different informant he had observed the packaging and sale of a ground leafy green vegetable matter by Anita Higby in her home.

The court determined that the affidavit did not contain sufficient factual information to establish probable cause to issue a search warrant of the Higby home. The court stated "We do not believe that one sale of a small quantity of marijuana provides probable cause to search two weeks later", State v. Higby, 26

Wn.App. 457, 613 P.2d 1192 (1980) (Div. II, 1980). The court concluded:

> "A single observation of possible marijuana activity 6 months in the past, combined with one small marijuana sale 2 weeks in the past and observations of marginally suspicious activity at unspecified times is insufficient to establish a reasonable belief that marijuana will be found on the premises at the time of the search." Higby at 462-463.

In this case, a faint odor of marijuana in a home five days prior to the issuance and execution of the search warrant is insufficient information to form probable cause. The unchallenged findings of the trial court are that Officer Lykken smelled the "faint odor" on March 15, 5 days prior to execution of warrant. (CP 33).

The transient faint odor of marijuana would indicate that if a crime has been committed, it was committed in the presence of Officer Lykken but not necessarily that a crime occurred five days later, and certainly not the crime of unlawful manufacture of a controlled substance.

The amount of time between the known criminal activity and the issuance of the warrant is only one factor and should be considered along with all the other circumstances, including the nature and the scope of the suspected criminal activity. The test for staleness of information in the search warrant affidavit is one of

common sense. State v. Petty, 48 Wn.App. 615, 740 P.2d 879 (1987). Evidence indicating expansive criminal activity is slower to become stale than evidence indicating minor criminal activity. State v. Smith, 39 Wn.App. 642. 694 P.2d 660 (1984).

Since the only fact that even remotely supports probable cause, is the faint odor of marijuana, the nature and scope of the suspected criminal activity is very minor. Evidence of such a minor violation becomes stale very quickly and as found by the trial court five days is too long for the issuance of a search warrant based upon one officer's statement that he smelled a "faint odor" of marijuana with no clarification as to whether it was previously smoked, came from individuals that he questioned or emanated from any other source. (CP 37).

IV. CONCLUSION

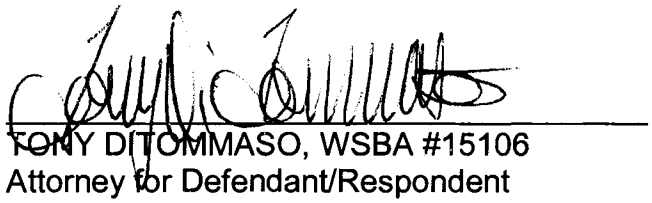
On review this Court, taking all the facts that were presented to the trial court, will come to the same conclusion: The affidavit in this case falls short of probable cause to issue a search warrant of the Respondent's home.

As a result the trial courts order of suppression and dismissal should be upheld.

DATED this 4th day of February, 2011.

Respectfully submitted,

LAW OFFICE OF TONY DITOMMASO, P.S.



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