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Sept 26, 2011
Court of Appeals
Division III
State of Washington

NO. 29736-5-III

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

RESPONDENT

v.

ERWIN W. HULL

APPELLANT

RESPONDENT'S BRIEF

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecuting Attorney's Office, is the Respondent herein.

II. RELIEF REQUESTED

Reversal is not warranted and Appellant's conviction must be affirmed.

III. ISSUES

1. Whether the Court erred in denying Appellant's motion to suppress.
2. Whether the Court erred in granting the State's motion *in limine* prohibiting Appellant from raising the affirmative defense of Medical Marijuana.
3. Whether in addition to proving that the Appellant knowingly manufactured marijuana, it was also incumbent upon the State to prove that the Appellant knew that such behavior was illegal.

IV. STATEMENT OF THE CASE

On January 12, 2010, the Honorable Judge John Antosz approved a search warrant presented by Interagency Narcotics Enforcement Team (INET) Detective Jeff Wentworth. That search warrant was based upon the detective's affidavit, and provided for a search of appellant Erwin Hull's residence at 550 South Grand Drive in Moses Lake, Washington. Upon execution of that warrant on January 12, 2010, law enforcement located a marijuana grow room accessible through a trap door in the southwest bedroom closet of the Hull residence.

Detective Wentworth referenced the following information in his application for the warrant:

1) In April of 2009, INET received two tips from the Washington State Patrol (WSP) Marijuana Hotline. The tips were from anonymous callers. Caller 1 left a message stating that Erwin Hull had dug out under his house and had a marijuana grow operation. Caller 1 described a trap door in appellant's bedroom that led to the grow. Caller 1 also stated that he/she had personally seen the grow. Caller 2 stated that Hull had dug out under his house where he had a marijuana grow operation. Caller 2 referred to the trap door and

stated that he/she had personally seen it. Caller 2 also gave additional information regarding seeing some of the plants and that Hull only sells to "1 guy". Caller 2 also stated he/she had seen 25 marijuana plants a month earlier; CP 14-15.

2) power checks in June of 2009 of two separate residences which were comparable to the appellant's, showed much lower power usage at those residences; CP 15.

3) a July 2009 report from Drug Enforcement Agency (DEA) Agent Fay out of the Spokane office which stated that a confidential source, who had done work for the DEA in the past, and had given information that had led to arrests for narcotics violations, had firsthand knowledge based upon personal observation, that the appellant and his wife were growing marijuana at their residence; CP 16.

4) an inquiry to the WSP Marijuana Hotline by the original tipster indicating that he/she believed that the grow was still operational and checking on the status of the case; CP 16.

5) a thermal image result which showed no historical heat changes or differences in the appellant's home or the comparables

confirming that the appellant's residence consistently showed higher power usage consistent with an underground grow as reported; CP 35

6) contact with a citizen informant on January 12, 2010, who wanted to give the officer information about a marijuana grow at the appellant's residence. The citizen informant reportedly knew the appellant and his wife, had seen the grow, and had confirmed familiarity with the packaging and appearance of narcotics. Furthermore, this citizen informant was willing to have his or her identity disclosed to the magistrate; CP 35-37.

7) a subsequent power check in January of 2010 which again confirmed that the power usage at residences comparable to the appellant's during the same period of time was considerably less than that used by the appellant. CP 37.

Additionally, innocuous information had also been confirmed by Detective Wentworth to include several different sources that the appellant and his wife resided at 550 South Grand Drive in Moses Lake. CP 14-16

Upon receipt of the warrant on January 12, 2010, at approximately 7:00 P.M., members of the INET with the assistance of the Grant County

Sheriff's Office (GCSO), and the Moses Lake Police Department (MLPD) served the search warrant at 550 South Grand Drive. CP 3. The appellant, Erwin Hull, was alone in the residence. *Id.* Upon learning why the officers were present, and in response to a specific inquiry by MLPD Sergeant Brian Jones, Mr. Hull told Sergeant Jones, in the presence of GCSO Detective Wentworth, and GCSO Detective Chris Lloyd that 1) he was growing marijuana for his father; 2) that he had no paperwork; and 3) that his Dad had passed away in December. CP 3, 77 Ex.#P5.

In the southwest bedroom of the residence, law enforcement discovered a trap door in the closet which led to a fairly sophisticated grow operation under the house. This area was not a basement, but rather had been excavated by the appellant himself, apparently for the sole purpose of growing marijuana. CP 77 Ex.#P3, CP 77 Ex.#P5.

More than two months after the search warrant was executed, defense counsel for Mr. Hull, Julian Trejo, provided documentation to the State that Mr. Hull was a designated provider for a Mr. Noel Callahan. RP 6, 7. That documentation indicated that Mr. Hull's authorization to grow marijuana on Mr. Callahan's behalf had expired on December 7, 2009, more than a month before the warrant had been served. RP 7, 12.

On the second day of trial, Ms. Trejo provided the court and counsel with subsequent authorization relating to Mr. Callahan which dated from January 27, 2010, more than two weeks after the search warrant had been served. RP 31, 34. N.B. At no time did Mr. Hull ever provide any documentation of any sort to law enforcement, despite a specific inquiry by them. RP 13. He had, in fact, specifically denied having any paperwork when contacted by law enforcement at the time of the warrant. CP 2.

Following the Court's granting of the State's motion *in limine* to prohibit Mr. Hull from raising an affirmative Medical Marijuana defense, the parties proceeded to a stipulated facts trial from which Mr. Hull was found guilty.

V. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS

The warrant clause of the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution impose a requirement that "a search warrant be issued upon a determination of probable cause based upon 'facts and circumstances sufficient to establish a reasonable inference' that criminal activity is occurring or that contraband exists at a certain location. *State v. Vickers*, 148 Wn.2d 91, 108 59 P.3d 58

(2002) (quoting *State v. Thein*, 138 Wn. 2d 133, 140, 977 P.2d 582 (1999). Probable cause is established if an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in criminal activity. *Id.* (citing *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981).

Although appellate review of the search warrant is *de novo*, the appellate court sits in the same capacity that the Superior Court who heard Mr. Hull's original motion, and is to apply the same standard of review. *State v. O'Connor,* 39 Wn.App. 113, 123, 692 P.2d 208 (1984). Absent a showing of abuse of discretion, a reviewing court is required to give the issuing magistrate's determination of probable cause great deference. *State v. Griffith*, 129 Wn.App. 482, 487, 120 P.3d 610 (2005).

> "Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in action on his own without a warrant.' ibid., and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present."

State v. Lyons, 160 Wn.App. 100, 247 P.3d 797 (2011) (cites omitted) (*rev.*

granted 2011 Wash.LEXIS 734 (Wash., Sept. 8, 2011). "Simply put, the courts should encourage police officers to seek judicially sanctioned search warrants. And deferring to a judicially sanctioned search warrant does just that." *State v. Chenoweth*, 160 Wn.2d 454, 477-78, 158 P.3d 595 (2007). Any doubts are to be resolved in favor of the warrant. *O'Connor*, 39 Wn.App. at 123. Even in cases where the propriety of issuing the warrant is debatable, the deference due to the magistrate's decision tips the balance in favor of upholding the warrant. *State v. Jackson*, 102 Wn.2d 432, 446, 688 P.2d 136 (1984).

When information establishing probable cause justifying a search warrant is dependent upon information supplied by an informant, the requirements of the *Aguilar-Spinelli* test must be met.[1] The *Aguilar-Spinelli* test has two prongs: (1) "basis of knowledge" and (2) "veracity." *Jackson*, 102 Wn.2d at 437.

Under the "basis of knowledge" prong of the *Aguilar-Spinelli* test, facts must be revealed which permit the judicial officer to determine whether the informant had a basis for his allegation that a certain person

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1 See *State v. Jackson*, 102 Wn.2d 432, 435-436, 688 P.2d 136 (1984); The *Aguilar-Spinelli* test has acquired its names from the United States Supreme Court decisions of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969). This test was abrogated for purposes of the Fourth Amendment by *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed. 2d 537 (1983). Washington courts, however, continue to apply the *Aguilar-Spinelli* test under article 1, section7. See *State v. Jackson*, 102 Wn.2d 432.

had committed a crime. *Id.* That "basis of knowledge" prong is satisfied if the informant has personally seen the facts asserted or passed on first-hand information. *Id.*

Under the "veracity" prong of the *Aguilar-Spinelli* test, facts must be presented to determine either the inherent credibility of the informant or the reliability of his information on that particular occasion. *Jackson*, 102 Wn.2d at 437. This prong may be satisfied in either of two ways: "(1) the credibility of the informant may be established; or (2) even if nothing is known about the informant, the facts and circumstances under which the information was furnished may reasonably support an inference that the informant is telling the truth." *State v. Lair*, 95 Wn.2d 706, 709-710, 630 P.2d 427 (1981).

The credibility of a confidential informant rests on whether the informant is a private citizen or a professional informant. *State v. Atchley*, 142 Wn.App. 147, 162, 173, P.3d 323 (2007) (citing *State v. Ibarra*, 61 Wn.App. 695, 699, 812 P.2d 114 (1991). If the informant is a citizen, the analysis changes depending on whether his or her identity is known to the police. *Id.* (citing *State v. Gaddy*, 152 Wn.2d 64, 72-73, 93 P.3d 872 (2004). Where the identity of the informant is known to the police but not

disclosed to the magistrate, the affidavit must contain "background facts to support a reasonable inference that the information is credible and without motive to falsify." *Id.* (citing *State v. Cole*, 128 Wn.2d at 262, 287-88) (quoting *Ibarra*, 61 Wn.App. at 699-700): See also, *State v. Rodriguez*, 53 Wn.App. 571, 576, 769 P.2d 309 (1989).

Even if either or both prongs of the *Aguilar-Spinelli* test are not met, probable cause may be established by independent police work that corroborates the informant's tip to such an extent that it supports the missing elements. *State v. Atchley*, 142 Wn.App. at 163 (citing *Jackson*, 102 Wn.2d at 437).

In this case, Detective Wentworth had a myriad of sources which confirmed each other, as well as confirming the presence of a marijuana grow. The anonymous tips, in and of themselves, had scant meaning, but were somewhat corroborative of the surrounding facts and evidence. The consistent pattern of excessive power usage, in and of itself, could have been innocuous, but placed in context with the other information was highly corroborative of a marijuana grow. Additionally, Detective Wentworth had information from DEA Agent Fay out of Spokane indicating that a confidential source who had done work for the DEA in the

past, and who had provided information which had previously led to arrests for narcotics violations, had identified that he/she had been at Mr. Hull's residence and observed a portion of Mr. Hull's grow operation. Information contained in an affidavit in support of a search warrant can include other police officers, victims, citizen witnesses, and professional informants. In the matter of the DEA informant, this individual had the opportunity to collect the information that was provided, had the knowledge necessary to understand what he/she had seen and had provided viable tips to law enforcement in the past which had led to arrests for narcotics violations. *State v. Fischer*, 96 Wn.2d 962, 639 P.2d 743 (1982); *State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977).

Detective Wentworth had also received information from a citizen informant regarding the purported grow at Mr. Hull's home. That individual indicated that he/she knew the appellant and his wife; had been at the home and observed the grow; was familiar with the appearance of marijuana; was familiar with the specifics of Mr. Hull's operation; and was willing to have his/her identity disclosed to the issuing magistrate.

Considering the great deference given to the issuing magistrate, the search warrant should be upheld. At a minimum, Detective Wentworth had

information from another law enforcement agency (the DEA) which had information from a confirmed informant, power records which indicated long term excessive power usage at the appellant's home, and a citizen informant who had personal knowledge of the grow, and who was willing to be identified to the issuing magistrate. Detective Wentworth's affidavit in this case set forth facts and circumstances sufficient to establish a reasonable inference that the appellant was involved in a marijuana grow, and that proof of such could be located at his residence. There was sufficient probable cause upon which the warrant could issue and appellant's motion to suppress the evidence in this case was properly denied.

B. THE STATE'S MOTION *IN LIMINE* TO PROHIBIT APPELLANT'S USE OF THE AFFIRMATIVE DEFENSE OF MEDICAL MARIJUANA WAS PROPERLY GRANTED, AND THE APPELLANT WAS PROPERLY PRECLUDED FROM RAISING SUCH A DEFENSE.

Whether to grant a motion *in limine* is discretionary with the trial court. *Renimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 89-90, 549 P.2d 483 (1976). A review of a trial court's decision on the admissibility of evidence, and its rulings on motions *in limine*, is for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An abuse of

discretion occurs where the trial court's action is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Id.*

Counsel correctly states the statutory requirements under RCW 69.51A.040 for an individual to assert the affirmative defense of medical marijuana. However, Mr. Hull did not qualify under the statute. RCW 69.51A.040(4) provides that for an individual to qualify he or she must:

> Present valid documentation to any law enforcement official who questions the provider regarding his possession or manufacture of marijuana by providing:
>
> (a) a statement signed by a qualifying patient's physician or a copy of the qualifying patient's pertinent medical records that, in the physician's professional opinion, the patient may benefit from the medical use of marijuana;
>
> (b) proof of identity, such as a Washington state driver's license; and
>
> (c) a writing in which the qualifying patient has designated the person as his or her designated provider.

In general, a trial court must instruct on a party's theory of the case if the law and the evidence support it; the failure to do so is reversible error.

State v. Otis, 151 Wn.App 572, 578, 213 P.3d 613 (2009) (cites omitted). A defendant raising an affirmative defense must offer sufficient evidence to justify the giving of an instruction. *Id.* In order to affirmatively defend a criminal prosecution for possessing or manufacturing marijuana, a defendant must show by a preponderance of the evidence that he has met the requirements of the Act. *Id.*

An individual claiming a defense under the Washington State Medical Use of Marijuana Act, must present valid documentation when questioned by law enforcement officers. In *State v. Adams*, 148 Wn.App. 231, 198 P.3d 1057 (2009) and *State v. Hansen*, 138 Wn.App. 322, 157 P.3d 438 (2007), the court held that the respective appellants had possessed valid documentation at the time of their respective arrests, but had been prevented by circumstances from presenting such to law enforcement.

In Mr. Hull's case, appellant specifically told MLPD Sergeant Brian Jones when asked that he had no documentation. This exchange by the two was heard by GCSO Detectives Lloyd and Wentworth. Mr. Hull also told them that he had been growing the marijuana for his father who had passed away. It was defense counsel who presented documentation regarding Mr. Callahan, which had expired in December of 2009, to the Prosecuting

Attorney's Office more than two months after Mr. Hull had been arrested. And it was defense counsel again, who presented at trial, documentation regarding Mr. Callahan, which did not take effect until more than two weeks after Mr. Hull had been arrested. Mr. Hull never provided any qualifying documentation to law enforcement whatsoever, and therefore cannot make a *prima facie* showing of eligibility for the defense. Mr. Hull did not present, or even possess, valid documentation at the time the warrant was served. Trial counsel argued that the expiration date on the card authorizing Mr. Hull to grow marijuana for Mr. Callahan was superfluous and should therefore be disregarded. While the statute does not speak to any specific time or time limit, the Court accurately noted, that having placed that date upon the authorization, Mr. Hull was aware of its limitation. The State would argue that as the authorization to the provider is granted by an authorizing physician, that same authorizing physician has the authority to set the parameters of that authorization. The Washington State Department of Health at http://www.doh.wa.gov.hsqa/medical-marijuana/FAQmore.htm answers frequently asked questions about Medical Marijuana in Washington State. In response to the inquiry "(d)oes my written recommendation expire? the Washington State Department of

Health responded, "(y)our written recommendation only expires if your health care provider has included an expiration date on it". The documentation which purportedly authorized Mr. Hull to grow marijuana on Mr. Callahan's behalf expired on December 7, 2009 and was not re-activated until January 27, 2010. The warrant was served on January 12, 2010.

C. APPELLANT INCORRECTLY STATES THE KNOWLEDGE REQUIREMENT TO SUSTAIN THE CHARGE OF MANUFACTURING MARIJUANA.

Mr. Hull was charged under RCW 69.50.401(1) with knowingly manufacturing a controlled substance, to wit: marijuana. Thus it was the State's burden to show that Mr. Hull knowingly manufactured marijuana. Appellant acknowledged to law enforcement that he was, in fact, growing marijuana. The facts and circumstances of the execution of the warrant and the marijuana grow and paraphernalia located at the appellant's home clearly support this fact. Appellant can cite no case which stands for the proposition that a belief that the behavior is legal absolves the actor from the culpability of his or her *actus reas*. Instead Mr. Hull argues that his imperfect defense negates his culpability. The State would argue that a more proper analogy than the cases cited by appellant in which an

individual is ignorant of the act that he or she is engaged in, would be the individual found guilty of assault after asserting an imperfect claim of self defense.

VI. CONCLUSION

For the foregoing reasons, the State would respectfully request that the search warrant in this case be upheld as being legally sufficient; that the appellant's claim of error regarding the Court's denial of a medical marijuana defense be denied, and that this Court find that the appellant knowingly manufactured marijuana in contravention of RCW 69.50.401(1) without legal authority to do so, and so uphold appellant's conviction of guilt.

DATED THIS 26th day of September, 2011.

Respectfully submitted:

D. ANGUS LEE, WSBA #36473
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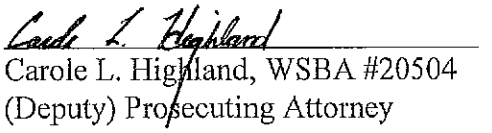

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, vs. ERWIN W. HULL, Appellant.	))))))))))	No. 29736-5-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Respondent's Brief in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Andrea Burkhart
Andrea@BURKHARTANDBURKHART.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Respondent's Brief in the above-entitled matter.

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Dated: September 26, 2011.

Kaye Burns