

FILED

APR 18, 2013

Court of Appeals
Division III
State of Washington

No. 31052-3-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MORGAN HALE DAVIS,
Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
Honorable Christopher E. Culp, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding, “There was a clear legal nexus and logical close connection between the Morgan Davis home, the greenhouses, the garden area, the yard, outbuildings and immediately surrounding areas. The information presented within the search warrant affidavit established probable cause to search all the described property of Morgan Davis for marijuana, documents, paraphernalia, controlled substances and the similar items specifically listed. The warrant was properly issued.” Conclusion of Law No. 4, CP 70.

2. The trial court erred in concluding, “The search warrant was properly executed.” Conclusion of Law No. 5, CP 70.

3. The trial court erred in denying Mr. Davis’ motion to suppress evidence that was illegally seized pursuant to a search warrant that was illegally issued without probable cause.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the search warrant not supported by probable cause that a crime was being committed where the supporting affidavit alleged only that law enforcement observed 20 marijuana plants growing in a greenhouse?

2. Should the evidence obtained from searching the home and shed have been suppressed because it did not have a sufficient nexus to be included in the search warrant?

C. STATEMENT OF THE CASE

On June 30, 2010, drug task force agents flew their government helicopter over 44 Reeves Basin Road in rural Okanogan County, a property owned by Morgan Davis. RP¹ 330-31, 336. During the flyover, agents noticed this property had two greenhouses, some outbuildings, and a home, and they saw approximately 20 large marijuana plants growing in one of the greenhouses. RP 332, 337. About a week later, agents conducted another flyover, but the plastic covers were over both greenhouses, and they could only see a dark green color through the plastic tops that seemed consistent with their earlier observation of marijuana. RP 333. Based on these facts, law enforcement obtained a warrant to search the home, greenhouses and all outbuildings at 44 Reeves Basin Road for evidence of manufacturing marijuana, including any ownership and identifying information. RP 337-38, CP 80-89.

¹ “RP” refers to verbatim report of proceedings of the trial and suppression motion, consisting of four volumes.

Numerous law enforcement officers executed the search warrant on July 8, 2010. RP 338-340. They seized 121 marijuana plants from in or around the greenhouses and additional plants found hanging in a shed (pump house) on the property. RP 345-50, 376, 396. From throughout the house, officers seized marijuana plants and plant matter in various stages of maturity and packaging, documentation in Mr. Davis' and Ms. Constantine's² names, a medical marijuana card, cash, and various household items containing marijuana. RP 347-51, 387-96.

Before trial, Mr. Davis moved to suppress evidence. CP 120. He argued in pertinent part that evidence obtained from the house and shed should have been suppressed due to a lack of nexus between the greenhouses and the home and shed. RP 265-68. The court denied the motion. CP 67-71.

The jury convicted Mr. Davis of manufacturing marijuana. CP 27. This appeal followed. CP 1.

² Adrienne Constantine is Mr. Davis' wife and was also charged. Her case was initially consolidated with this one but the two cases were later severed for trial. RP 382, CP 55.

D. ARGUMENT

Issue No. 1. The search warrant was not supported by probable cause that a crime was being committed where the supporting affidavit alleged only that law enforcement observed 20 marijuana plants growing in a greenhouse.

Standard of Review. In reviewing a trial court's findings of fact following a suppression hearing, the reviewing court makes an independent review of all the evidence. *State v. Apodaca*, 67 Wn. App. 736, 739, 839 P.2d 352 (1992) (citing *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990)). Findings of fact on a motion to suppress are reviewed under the substantial evidence standard. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Conclusions of law in an order pertaining to suppression of evidence are reviewed *de novo*. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Two different standards apply to the review of a probable cause determination. *State v. Emery*, 161 Wn.App. 172, 201, 253 P.3d 413, *rev. granted*, 172 Wn.2d 1014 (2011) and *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012). The first standard, abuse of discretion, applies to whether information in the affidavit has enough reliability and credibility to qualify

as “‘historical facts’ in the case, i.e., the events ‘leading up to the stop or search.’” *Emery*, 161 Wn.App. at 201–202; *In re Det. of Petersen*, 145 Wn.2d 789, 799–800, 42 P.3d 952 (2002). Under the second standard, the legal conclusion that “‘the qualifying information as a whole amounts to probable cause.’” is reviewed *de novo*. *Emery*, 161 Wn.App. at 202 (quoting *Petersen*, 145 Wn.2d at 800).

Substantive Argument. The warrant clause of the Fourth Amendment to the United States Constitution and Wash. Const. article I, section 7 requires that a search warrant be issued upon a determination of probable cause. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). “The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual’s right to privacy.” *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)). “Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

Accordingly, probable cause requires (1) a nexus between criminal activity and the item to be seized, and also (2) a nexus between the item to be seized and the place to be searched. *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). “It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause.” *Maddox*, 152 Wn.2d at 505.

“[T]he existence of probable cause is to be evaluated on a case-by-case basis. Thus, general rules must be applied to specific factual situations. In each case, ‘the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness.’ General, exploratory searches are unreasonable, unauthorized, and invalid.” *Thein*, 138 Wn.2d at 150 (internal citations and footnote omitted). The issuance of a warrant is proper only if a reasonable, prudent person would understand from the facts contained in the affidavit that a crime has been committed, and evidence of the crime can be found at the place to be searched. *State v. Garcia*, 63 Wn. App. 868, 871, 824 P.2d 1220 (1992) (citing *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743, cert. denied, 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.2d 1355 (1982)).

In July of 2011, the Washington State Legislature amended the medical marijuana statute converting what had been an affirmative defense

to an exception to the general controlled substances statute. The amendment decriminalizes the possession, use, and manufacture of medical marijuana, so long as certain criteria are met. While the old statute makes explicit reference to an affirmative defense (former RCW 69.51A.040(2) (2007)), the new statute clearly states that “[t]he medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime.” RCW 69.51A.040 (2012); Laws of 2011 c 181 § 401, eff. July 22, 2011.

This statute provides an exception to the general controlled substances statute which makes possession, use, and manufacture of marijuana a crime. RCW 69.50.401 (2012). Therefore, in order to establish probable cause to believe that a person has committed or is committing the crime of unlawful use, possession, or manufacturing of marijuana, it is not enough to merely show that the person used, possessed, or manufactured marijuana. Instead, probable cause can be established only by showing that such use, possession or manufacturing failed to comply with the terms and conditions of RCW 69.51A.³

³ In *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010), the court held that the affirmative defense provided under the former statute does not per se legalize an activity and therefore does not negate probable cause that a crime has been committed. The *Fry* case was decided before the 2011 amendment to RCW 69.51A.040, which is at issue here. In

In the present case, the affidavit does not allege or provide any information whatsoever as to whether Mr. Davis was a qualified medical marijuana patient or whether any person associated with the residence was an authorized medical marijuana patient or designated provider pursuant to RCW 69.51A.040. The affidavit establishes nothing more than that marijuana was probably being grown at Mr. Davis' address. There is nothing in the affidavit from which the reviewing judge could determine with any degree of certainty or probability whether persons residing at the address were qualified medical marijuana patients or were designated providers for qualifying patients.

The affidavit fails to provide any facts or circumstances from which the issuing judge could make a determination that there was a fair probability that the possession and/or manufacturing of marijuana observed by law enforcement was not in compliance with Washington's medical marijuana laws. See CP 80-85. Thus, the affidavit fails to

Fry—unlike in this case—there was no contention that the facts, including the information and smell of marijuana, did not support a finding of probable cause to search the Fry's residence. Instead, Fry contended the probable cause was negated once he produced the medical marijuana authorization. The court rejected this argument. *Fry*, 168 Wn.2d at 6, 10.

establish probable cause for a violation of law, i.e., that a crime was likely being committed.⁴

Under article I, section 7 of the Washington State Constitution, there is no “good faith” exception to the exclusionary rule. *State v. Afana*, 169 Wn.2d 169, 179-81, 233 P.3d 879 (2010); *State v. Crawley*, 61 Wn.App. 29, 34, 808 P.2d 773, *rev. denied*, 117 Wn.2d 1009 (1991).

It is undisputed that while the affidavit supporting the warrant included evidence of a marijuana grow, there was no mention of the medical marijuana statute or any assertion that the grow operation violated the medical marijuana statute. This omission is fatal to the warrant as the warrant then does not show probable cause that a crime had been committed. There is no good faith exception to rescue the warrant. Thus, subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). The conviction must be reversed.

⁴ State officers cannot obtain a valid state search warrant where there is not probable cause of a state crime. *See, e.g., United States v. \$186,416.00 in U.S. Currency*, 590 F.3d 942, 948 (9th Cir. 2010) (finding that because the evidence supporting the grow did not show probable cause of a crime in California law, even though it was illegal federally and was prosecuted federally, the search warrant had to be quashed).

Issue No. 2. The evidence obtained from searching the home and shed should have been suppressed because it did not have a sufficient nexus to be included in the search warrant.

The trial court erred by denying Mr. Davis' motion to suppress evidence that was obtained from the residence and shed. This evidence included marijuana and paraphernalia, packaging, and an arguably large quantity of cash. Those items that were seized from the home and shed should have been suppressed because there was not probable cause establishing a nexus between the greenhouse where marijuana was seen in the flyovers and the home and the shed. Without the evidence from the home and shed there is insufficient evidence to sustain a conviction for manufacturing marijuana.

A search warrant may only issue upon a determination of probable cause grounded in fact by a detached magistrate. *State v. Thein*, 138 Wn.2d 133, 140, 146-47, 977 P.2d 582 (1999) (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995) (other citations omitted)).

“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.” *Id.* “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.’” *Id.* (quoting *State v. Goble*, 88 Wn.App. 503, 509, 945 P.2d 263 (1997)).

The latter requirement is at issue here – nexus between the item to be seized and the place to be searched. This nexus “must be established by specific facts; an officer’s general conclusions are not enough.” *Thein*, 138 Wn.2d at 145-46. “Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.” *Id.* at 147. Probable cause must be based on more than conclusory predictions; blanket inferences that evidence of drug dealing is likely to be found in the homes of drug dealers lacks the necessary factual nexus. *Id.* at 147-48 (internal citations omitted). “[S]tanding alone, an officer’s belief that [drug involved persons] hide evidence at other premises under their control does not authorize a warrant to search those places.” *State v. Perez*, 92 Wn.App. 1, 7-8, 963 P.2d 881 (1998) (citing *State v. Olson*, 73 Wn.App. 348, 357, 869 P.2d 110, *review denied*, 124 Wn.2d 1029 (1994)).

In *State v. Thein*, the warrant to search the defendant’s home was based on generalized statements about the habits of drug dealers. 138

Wn.2d at 148-49. There was no evidence of drug activity at the defendant's home as opposed to some other place. *Id.* The Court concluded it was unreasonable to believe that, since there was no other known place in the defendant's control where drugs were located, his home was likely to reveal evidence of drug dealing. *Id.* at 150. The Court contrasted the *Thein* case with cases where facts showed sufficient nexus to the home, such as the defendant dealing drugs and then immediately returning to the house in question. *Id.* at 148 (citing *State v. Mejia*, 111 Wn.2d 892, 898, 766 P.2d 454 (1989)).⁵ Even if "common sense and experience inform the inferences" pertaining to drug activity, such "broad generalizations do not alone establish probable cause." *Id.* at 148-49. In sum, since the facts did "not establish a nexus between evidence of illegal drug activity and [the defendant's] residence..., [and since the] officer's general statements regarding the common habits of drug dealers were not alone sufficient to establish probable cause....," the Court reversed that defendant's conviction. *Id.* at 151.

Similarly, in *State v. Goble*, the magistrate who issued the warrant had no information that the defendant had previously dealt drugs out of his

⁵ See also *State v. G.M.V.*, 135 Wn.App. 366, 372, 144 P.3d 358 (2006) (the warrant was to search the place that the defendant left from and returned to before and after selling drugs – his residence –; i.e., there was sufficient factual nexus to search the home). And

house, stored drugs at his house, or transported drugs from the house, as opposed to some different place such as “his car, at his place of employment, at a friend’s house, or buried in the woods.” *Goble*, 88 Wn.App. at 512. Therefore, the court reversed for lack of a factually-supported nexus to search the defendant’s house as opposed to some other place. *Id.*

The State may argue that probable cause to search the greenhouses automatically extended to search the house and shed located on the same property. But probable cause to search outbuildings does not necessarily furnish probable cause to search a house, and vice versa. *See e.g., State v. Gebaroff*, 87 Wn.App. 11, 16-17, 939 P.2d 706 (1997); *State v. Kelley*, 52 Wn.App. 581, 586-87, 762 P.2d 20 (1988) (rejecting State’s argument that probable cause to search outbuildings leads to probable cause to search the house).

In *State v. Kelley*, all of the information in the search warrant affidavit related to observations about the outbuildings, and there was “no information which furnished probable cause for a search of the house.” 52 Wn.App. at 586. The State reasoned that, “given the information known about the outbuildings, it follow[ed] that the house probably would have

see *Perez*, 92 Wn.App. at 7-8 (specific facts supported an inference that the defendant’s homes were safe houses, or places where he kept evidence of drug dealing activities).

contained information relating to the identity of the occupant of the outbuildings or materials used in the manufacturing or distribution of controlled substances.” *Id.* But the Court found that the State’s argument lacked any legal support and refused to infer probable cause to search the house from facts pertaining to the outbuildings. *Id.* at 586-87.

Here, the search warrant was based on two helicopter fly-overs by law enforcement over the rural property at “44 Reeves Basin Road,” which was registered to Morgan Davis. During the first flyover, agents said they saw a greenhouse that had the plastic top pulled half-way back, revealing what appeared to be approximately 20 large growing marijuana plants. During the next flyover a week later, plastic covered both greenhouses. A dark green color could be seen through the greenhouses’ plastic tops that could have been consistent with the marijuana seen before.

Nothing in the search warrant affidavit specifically referenced the house or shed or provided any basis for finding incriminating evidence at those separate locations. The officers did not observe marijuana plants growing outside the two greenhouses during either fly-over. Agents had no independent factual basis for searching the home itself or any other outbuildings. The affidavit may have established probable cause that marijuana would be found in the greenhouses, but it did not establish

probable cause for a general exploratory search for any other evidence of a crime in any and all buildings on the same property. Specifically, there were no particular facts that provided the nexus for probable cause to search the home or shed.

Without facts to otherwise show a nexus to search the home and shed, the search warrant was overly broad. Accordingly, all evidence obtained in searching the home should have been suppressed. This included all evidence of drugs, drug paraphernalia, documentation, money, and other identifying information. Mr. Davis's conviction cannot stand without the unlawfully obtained evidence. Absent this evidence there is arguably only evidence of simple possession.

E. CONCLUSION

For the reasons stated, the conviction should be reversed or reduced to simple possession.

Respectfully submitted April 18, 2013,

s/David N. Gasch
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on April 18, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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