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SEP 09, 2013

Court of Appeals
Division III
State of Washington

NO. 31052-3

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON
RESPONDENT,

V.

MORGAN HALE DAVIS

APPELLANT

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 5

B. ISSUES PERTAINING TO ASSIGMENTS OF ERROR 5

C. STATEMENT OF THE CASE 6

D. ARGUMENT 11

1. There was probable cause to issue the warrant and the judge's decision to issue the warrant was not an abuse of discretion 11

2. Medical use, possession, or manufacture of cannabis is an affirmative defense to RCW 69.50.401, and was not decriminalized by RCW 69.51A or subsequent amendments 16

3. There was a sufficient nexus from the information gathered, to find probable cause that evidence of criminal activity could be found at the residence and shed that bounded the greenhouses 23

E. CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Bokor v. Dep't of Licensing,
74 Wn. App. 523, 874 P.2d 168 (1994) 15
Brinegar v. United States,
338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) 15
Det. of Petersen v. State,
145 Wn.2d 789, 42 P.3d 952 (2002) 13
Groh v. Ramirez,
540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) 25
Johnson v. Cont'l W., Inc.,
99 Wn.2d 555, 663 P.2d 482 (1983) 18
Maryland v. Garrison,
480 U.S. 79, 107 S.Ct. 1013 , 94 L.Ed.2d 72 (1987) 25
Ornelas v. United States,
517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) 13
State v. Berlin,
46 Wn. App. 587, 731 P.2d 548 (1987) 14
State v. Brown,
166 Wn. App. 99, 269 P.3d 359 (2012) 19
State v. Carter,
79 Wn. App. 154, 901 P.2d 335 (1995) 26
State v. Chenoweth,
160 Wn.2d 454, 158 P.3d 595 (2007) 15, 16
State v. Cowin,
116 Wn. App. 752, 67 P.3d 1108 (2003) 27, 29
State v. Dykstra,
84 Wn. App. 186, 926 P.2d 929 (1996) 17
State v. Emery,
161 Wn. App. 172, 253 P.3d 413 (2011) 12, 13
State v. Emery,
174 Wn.2d 741, 278 P.3d 653 (2012) 13
State v. Fricks,
91 Wn.2d 391, 588 P.2d 1328 (1979) 14
State v. Fry,
168 Wn.2d 1, 228 P.3d 1 (2010) 24
State v. G.M.V.,
135 Wn. App. 366, 144 P.3d 358 (2006) 28

State v. Garcia,
63 Wn. App. 868, 824 P.2d 1220 (1992) 15
State v. Gebaroff,
87 Wn. App. 11, 939 P.2d 706 (1997) 30
State v. Gentry,
125 Wn.2d 570, 888 P.2d 1105 (1995)..... 16
State v. Goodman,
42 Wn. App. 331, 711 P.2d 1057 (1985) 14
State v. Gross,
57 Wn. App. 549, 789 P.2d 317 (1990) 26, 28
State v. Hardgrove,
154 Wn. App. 182, 225 P.3d 357 (2010) 17
State v. Herzog,
73 Wn. App. 34, 867 P.2d 648 (1994) 30
State v. Jackson,
150 Wn.2d 251, 76 P.3d 217 (2003)..... 15, 27, 28
State v. Kelley,
52 Wn. App. 581, 762 P.2d 20 (1988) 30
State v. Knighten,
109 Wn.2d 896, 748 P.2d 1118 (1988)..... 15
State v. Ladiges,
63 Wn.2d 230, 386 P.2d 416 (1963)..... 18
State v. Lively,
130 Wn.2d 1, 921 P.2d 1035 (1996)..... 26, 27
State v. Lyons,
174 Wn.2d 354, 275 P.3d 314 (2012)..... 15
State v. Maddox,
116 Wn. App. 796, 67 P.3d 1135 (2003) 25
State v. Maddox,
152 Wn.2d 499, 98 P.3d 1199 (2004)..... 13
State v. Martin,
169 Wn. App. 620, 281 P.3d 315 (2012) 12
State v. Maxfield,
125 Wn.2d 378, 886 P.2d 123 (1994)..... 17
State v. McGovern,
111 Wn. App. 495, 45 P.3d 624 (2002) 29
State v. Myers,
35 Wn. App. 543, 667 P.2d 1142 (1983) 26
State v. Myrick,
102 Wn.2d 506, 688 P.2d 151 (1984)..... 25

State v. Neth,
165 Wn.2d 177, 196 P.3d 658 (2008) 12
State v. O'Cain,
108 Wn. App. 542, 31 P.3d 733 (2001) 16
State v. Olson,
73 Wn. App. 348, 869 P.2d 110 (1994) 12
State v. Patterson,
83 Wn.2d 49, 515 P.2d 496 (1973) 15, 16
State v. Ramirez,
140 Wn. App. 278, 165 P.3d 61 (2007) 19
State v. Remboldt,
64 Wn. App. 505, 827 P.2d 282 (1992) 14
State v. Riley,
121 Wn.2d 22, 846 P.2d 1365 (1993) 25
State v. Rogers,
70 Wn. App. 626, 855 P.2d 294 (1993) 15
State v. Terrovona,
105 Wn.2d 632, 716 P.2d 295 (1986) 14
State v. Thein,
138 Wn.2d 133, 977 P.2d 582 (1999) 25, 26, 27, 29, 30, 32
State v. Vickers,
148 Wn.2d 91, 59 P.3d 58 (2002) 15
United States v. Mann,
389 F.3d 869 (9th Cir. 2004) 26
United States v. Spilotro,
800 F.2d 959 (9th Cir. 1986) 26

Statutes

RCW 69.50.401 ..... 10, 17, 23, 24
RCW 69.51A.040 ..... 18, 19, 20, 21, 22
RCW 69.51A.040(1) 22, 23
RCW 69.51A.043 ..... 22, 23
RCW 69.51A.047 23

Other Authorities

Wayne R. LaFave, Search and Seizure § 3.7(d), at 381-85 (3d ed. 1996) 30, 33

A. ASSIGNMENTS OF ERROR

1. Whether the reviewing trial court erred in concluding the issuing magistrate had probable cause to issue the search warrant.
2. Whether the statutory amendments enacted after the execution of the search warrant and suppression motion had any impact on the determination of probable cause.
3. Whether the reviewing trial court erred in concluding there was a nexus between marijuana observed in a greenhouse and the residence and shed.

B. ISSUES PERTAINING TO ASSIGMENTS OF ERROR

1. Did the reviewing trial court err in concluding the issuing magistrate did not abuse his discretion in issuing the search warrant for evidence of manufacture of marijuana and/or possession with intent to deliver where officers observed approximately 20 growing plants in a greenhouse.
2. Did the reviewing trial court properly consider the standard for probable cause in light of subsequent

statutory amendments that were not retroactive and did not decriminalize medical cannabis use.

3. Did the trial court err in finding a nexus between the greenhouse containing growing marijuana and the closely connected house and shed on the same tax parcel and owned by the defendant, to permit a search of the property for evidence related the crime of manufacture and/or possession with intent to deliver marijuana.

C. STATEMENT OF THE CASE

On June 30, 2010, Det. Jan Lewis, a trained aerial marijuana spotter with the North Central Washington Narcotics Task Force, and Deputy Terry Shrable were flying in an Army National Guard helicopter in the area of Revas Basin Road near Tonasket, WA. CP 82-83; RP Vol. I, July 11, 2011 (hereinafter "RP 7/11"), pg. 34-38. As the officers flew over a residence located just off Revas Basin Road they observed two greenhouses. One of the greenhouses had its plastic covering rolled back approximately half way. CP 82-83; RP 7/11 pg. 38. The officers were able to see approximately 20 large growing marijuana plants in the uncovered portion of the greenhouse. *Id.* The nearby residence was a small

stick built house with a green roof located just east of the greenhouses. A small stick built shed with a green roof was located just to the west of the greenhouses. *Id.*

Officers confirmed the property address with the growing marijuana was 44 Revas Basin Road, and that it was owned by the defendant Morgan Davis. CP 83-84, RP 7-11 pg. 46-47 RP 7/11 46.

On July 6, 2010, Det. Lewis and Det. Rubio flew over the property in a Border Patrol Helicopter and observed the buildings and greenhouses. The tops of the greenhouses were covered with plastic and dark green was visible through the plastic. Officers photographed the property from the air. CP 84-85; RP 7/11 pg. 50-52.

On July 7, 2010 Det. Lewis sought a search warrant to search the two large plastic covered greenhouses, the house to the east of the greenhouses, and shed to the west of the greenhouses. CP 80-85; RP 7/11 pg. 52.

The search warrant affidavit was reviewed and signed by Judge David Edwards on July 7, 2010, and the Judge then issued a search warrant on the same day. CP 80-89; RP 7/11 pg. 52

The greenhouses were estimated to be 50-70 feet from the residence. There were no other houses near the greenhouses. There were no other driveways or access roads permitting access to the property and greenhouses, except for the driveway leading to the residence from the east (on the opposite side of the house from greenhouses). RP 7/11 53; CP 80-85.

On July 8, 2010 the search warrant was executed on the property. Upon arrival officers made contact with Adriane Constantine outside the residence. She indicated her mother Ms. Hale was in the house. Officers entered the residence to contact Ms. Hale and had her remain outside the house in a shaded area. RP 7/11 52-54, 130-132, 137. The defendant arrived during the execution of the warrant. RP 7/11 pg. 135-136.

During the execution of the warrant, officers located approximately 121 growing marijuana plants RP 7/11 53 A few of the plants were located growing outside of the greenhouses. RP 7/11 pg. 63-64.

Officers also found in the residence various quantities of processed/packaged marijuana, marijuana seeds, paperwork and receipts, cash, electronic scale, and packaging material. Officers

found additional drying marijuana plants hanging in the small shed. CP 91-94.

The defendant Morgan Davis was charged with one count of manufacture of marijuana under RCW 69.50.401. CP 124-125.

On July 11 and 12, 2011, the trial court heard the defendant's motion to suppress and the States 3.5 motion. CP 67.

On July 18, 2011 the court issued a written decision. *Id.* The Court's findings of fact, included:

- That Det. Lewis saw two greenhouses near the Davis residence;
- That upon the second flyover on July 6, 2010 the dark green color visible to Det. Lewis indicated to him the marijuana pants were still present;
- That that the photographs and testimony showed he land, house, greenhouses, outbuildings and vegetation were located at 44 Revas Basin Road and were owned by the defendant Morgan Davis;
- That greenhouses were approximate 50-70 feet from the home;

- That the residence, greenhouses, garden and outbuildings were all located within a clearly defined living compound and were well separated from any other structures or homes;
- That the nearest other structures were over 700 yards (2,100 feet) away; and
- That there was only one access road that approached the defendant's property and the road dead ended at the defendant's property.

CP 67-70. Included in the Court's conclusions of law, the Court found:

- That there was a clear legal nexus and logical close connection between the defendant's home, the greenhouses, the garden area, the yard, outbuildings and immediately surrounding areas;
- That the information presented within the search warrant affidavit established probable cause to search all the described property of the defendant for marijuana, documents, paraphernalia, controlled substances and the similar items listed.
- That the warrant was properly issued by Judge Edwards.

CP 70-71.

The defendant was found guilty of manufacture of marijuana by a jury on November 8, 2011. CP 27.

D. ARGUMENT

1. There was probable cause to issue the warrant and the judge's decision to issue the warrant was not an abuse of discretion

At suppression hearing the trial court acts in an appellate-like capacity. The trial court's review of the issuance of a search warrant is limited to the four corners of the affidavit supporting probable cause; as is any subsequent review by an appellate court. *See e.g., State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658, 661 (2008).

The magistrate's decision to issue the warrant is matter of judicial discretion and is therefore s reviewed for an abuse of discretion. A magistrate's decision is given great deference. *State v. Martin*, 169 Wn. App. 620, 630-31, 281 P.3d 315, 320 (2012) *review denied*, 176 Wn.2d 1005, 297 P.3d 68 (2013); *State v. Olson*, 73 Wn. App. 348, 869 P.2d 110 (1994)

This is the first of two different standards that apply to review of a probable cause determination. *See e.g., State v. Emery*, 161 Wn. App. 172, 201, 253 P.3d 413 (2011) *rev. granted* 172 Wn.2d

1014, 262 P.3d 63 (2011) and *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012) and *aff'd*, *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012). Courts apply the abuse of discretion standard to "historical facts" in the case, i.e., the events "leading up to the stop or search." *Det. of Det. of Petersen v. State*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002) (quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

The second standard is applied to the courts' conclusions of law. Courts review de novo the legal conclusion that "the qualifying information as a whole amounts to probable cause." *Emery*, 161 Wn. App. at 201 (quoting *Det. of Det. of Petersen*, 145 Wn.2d at 800).

Probable cause exists where the search warrant affidavit sets forth 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. It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The issuing judge is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citation omitted).

The question whether probable cause exists is an objective inquiry. *State v. Goodman*, 42 Wn. App. 331, 337, 711 P.2d 1057 (1985).[1] Probable cause exists where the facts and circumstances within the arresting officer's knowledge, for which the officer has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed. *See e.g., State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986); *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).

Evidence, which would be inadmissible at trial, may nevertheless be relied upon in making a probable cause

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[1] The court in *State v. Remboldt*, 64 Wn. App. 505, 827 P.2d 282 (1992), succinctly stated:

> The question of probable cause should not be viewed in a hyper-technical manner. In dealing with probable cause ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved. A court should not confuse and disregard the difference between what is required to prove guilt and what is required to show probable cause for a search. *(Internal citations omitted).*

Rembolt at 511, (citing *Brinegar*, 338 U.S. 160). In cases involving witnesses or informants, it is sufficient if the affidavit shows the observer provided enough firsthand facts to an individual who possesses the necessary skill, training or experience to link the information given to criminal activity. *State v. Berlin*, 46 Wn. App. 587, 592, 731 P.2d 548 (1987) (where detective interviewed three citizens and was convinced by what they described the defendant was growing marijuana). It does not require that the witness or informant recognize the observed facts are criminal in nature. The information provided by the various informants in this case, taken as a whole clearly provided law enforcement with a basis to conclude criminal activity was occurring.

determination. *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); *Bokor v. Dep't of Licensing*, 74 Wn. App. 523, 874 P.2d 168 (1994). The officer need not have evidence sufficient to prove every element of the crime beyond a reasonable doubt.[2] *State v. Knighten*, 109 Wn.2d 896, 903, 748 P.2d 1118 (1988); *State v. Rogers*, 70 Wn. App. 626, 855 P.2d 294 (1993). Additionally, facts standing alone that would not 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).

Courts evaluate an affidavit in a commonsense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant. *State v. Lyons*, 174 Wn.2d 354, 360, 275 P.3d 314 (2012) (quoting *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003)); *State v. Chenoweth*, 160 Wn.2d 454, 477-478, 158 P.3d 595, 607 (2007). (*citing State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002).[3]

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[2] A reasonable search is one based upon probability - a likelihood that evidence of criminal activity will be found. It does not require even a prima facie showing of guilt. *State v. Patterson*, 83 Wn.2d 49, 55, 515 P.2d 496, 500 (1973).

[3] The court in *Patterson*, 83 Wn.2d 49, reiterated that a lenient standard of review is appropriate in evaluating search warrants:

> Warrants may be and frequently are sought by police officers under conditions of the utmost urgency with little time or opportunity for consultation with counsel. Supporting documents may have been

The Courts review of a decision where the trial court's findings of fact are unchallenged is limited to a de novo determination of whether the trial court derived proper conclusions of law from those findings. *State v. O'Cain*, 108 Wn. App. 542, 31 P.3d 733 (2001). Unchallenged findings of fact made by trial court at suppression hearing will be treated as verities on appeal, while challenged facts are also binding on appeal if there is substantial evidence in the record to support them. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995). Substantial evidence is evidence

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> hurriedly drafted by laymen while in the crucial phase of an investigation under the urgent necessity of obtaining the evidence before it is removed or destroyed. Thus, in order to preserve the evidence from imminent destruction, or obviate an impending crime, or to prevent further criminal activity, circumstances may demand that the application for a search warrant be presented to a judicial officer at late and unusual hours without counsel or prior consultation with counsel. The constitutional provisions against unlawful searches and seizures are not designed to discourage police and investigative officers from seeking the assessment of independent judicial officers, or to compel the police to take counsel with them at all stages of their investigations. Rather, it is the design of the constitutions to encourage investigating officers to seek the intervention of judicial officers, to require whenever and wherever it is reasonably feasible that the existence or want of probable cause to enter and search a householder's domicile be decided prima facie by a judicial officer and not by officers of the executive branch.... In essence, if in the considered judgment of the judicial officer there has been made an adequate showing under oath of circumstances going beyond suspicion and mere personal belief that criminal acts have taken place and that evidence thereof will be found in the premises to be searched, the warrant should be held good.

Patterson, 83 Wn.2d at 57-58; *Chenoweth*, 160 Wn.2d at 477-478. The *Chenoweth* Court also noted that the warrant process itself reduces the risk of an erroneous search or arrest by interposing a neutral and detached magistrate between the citizen and the officer engaged in the often competitive enterprise of ferreting out crime. *Chenoweth*, 160 Wn.2d at 478.

sufficient to convince a fair-minded person of the truth of the finding. *State v. Hardgrove*, 154 Wn. App. 182, 225 P.3d 357 (2010), *reconsideration denied*. An appellate court will not independently review the evidence because the trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying. *State v. Maxfield*, 125 Wn.2d 378, 385, 886 P.2d 123 (1994); *State v. Dykstra*, 84 Wn. App. 186, 926 P.2d 929 (1996) ((1996).

In the present case, Appellant does not challenge any of the trial court's findings of fact. Appellant challenges the trial courts conclusions of law #4 and #5. CP 70. Thus review is limited to the legal conclusion that facts taken as a whole, and the reasonable inferences from them, established a reasonable inference that evidence of the criminal activity could be found at the place to be searched.

2. Medical use, possession, or manufacture of cannabis is an affirmative defense to RCW 69.50.401, and was not decriminalized by RCW 69.51A or subsequent amendments.

a. <u>The 2011 amendments to RCW 69.51A were not retroactive</u>.

Appellant erroneously asserts the in light of amendments to RCW chapter 69.51A, that probable cause for a search warrant can only be established by the State showing that the use, possession, or manufacture of marijuana failed to comply with the requirements of the RCW 69.51A.

Despite the fact that the amendments cited by defendant do not decriminalize the medical use, possession, or manufacture of cannabis; the amendments did not go into effect until July 22, 2011. The amendments were not retroactive and had no application to the present case.

Statutory amendments are presumed to be prospective unless there is clear legislative intent to apply the statute retroactively, or the amendment is clearly curative or remedial. *See, e.g. Johnson v. Cont'l W., Inc.*, 99 Wn.2d 555, 559, 663 P.2d 482 (1983); *State v. Ladiges*, 63 Wn.2d 230, 234, 386 P.2d 416, 419 (1963).

Washington courts disfavor retroactive application of a statute but may apply an amendment retroactively if (1) the legislature intended to apply the amendment retroactively, (2) the amendment is curative and clarifies or technically corrects ambiguous statutory language, or (3) the amendment is remedial in

nature. *State v. Brown*, 166 Wn. App. 99, 103, 269 P.3d 359, 361 (2012) (citing *State v. Ramirez*, 140 Wn. App. 278, 287, 165 P.3d 61 (2007)).

There was no legislative intent to apply the 2011 amendments retroactively and the changes were substantive in nature, not simply curative or remedial. *See also Brown*, 166 Wn. App., 103-104 (finding the 2011 amendments to RCW 69.51A.040 were not retroactive). The effective date of the 2011 amendments (July 22, 2011) was long after the execution of the search warrant, and was even after the defendant's motion to suppress was decided.

b. Even if the 2011 amendments to RCW 69.51A had been retroactive, they did not decriminalize the medical use of cannabis due to a veto of portions of the legislation that were necessary to decriminalize medical cannabis.

Appellant erroneously claims that the amendments to RCW chapter 69.51A decriminalized the medical use, possession and manufacture of cannabis. Appellant cites to the language of amended RCW 69.51A.040 for support, but fails consider the language beyond the first paragraph of that section, or to consider the following sections of the chapter.

As amended by Senate Bill 5073, effective July 22, 2011, RCW 69.51A.040 reads:

The medical use of cannabis <u>in accordance with the terms and conditions of this chapter</u> does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, or have real or personal property seized or forfeited for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, and investigating peace officers and law enforcement agencies may not be held civilly liable for failure to seize cannabis in this circumstance, **<u>if</u>**:

(1)(a) **The qualifying patient or designated provider possesses no more than fifteen cannabis plants and:**
(i) No more than twenty-four ounces of useable cannabis;
(ii) No more cannabis product than what could reasonably be produced with no more than twenty-four ounces of useable cannabis; or
(iii) A combination of useable cannabis and cannabis product that does not exceed a combined total representing possession and processing of no more than twenty-four ounces of useable cannabis.
(b) If a person is both a qualifying patient and a designated provider for another qualifying patient, the person may possess no more than twice the amounts described in (a) of this subsection, whether the plants, useable cannabis, and cannabis product are possessed individually or in combination between the qualifying patient and his or her designated provider;

(2) **The qualifying patient or designated provider presents his or her proof of registration with the department of health, to any peace officer who questions the patient or provider regarding his or her medical use of cannabis;**

(3) The qualifying patient or designated provider keeps a copy of his or her proof of registration with the registry established in section 901 of this act and the qualifying patient or designated provider's contact information posted prominently next to any cannabis plants, cannabis products, or useable cannabis located at his or her residence;

(4) The investigating peace officer does not possess evidence that:

(a) The designated provider has converted cannabis produced or obtained for the qualifying patient for his or her own personal use or benefit; or

(b) The qualifying patient has converted cannabis produced or obtained for his or her own medical use to the qualifying patient's personal, nonmedical use or benefit;

(5) The investigating peace officer does not possess evidence that the designated provider has served as a designated provider to more than one qualifying patient within a fifteen-day period; **and**

(6) **The investigating peace officer has not observed evidence of any of the circumstances identified in section 901(4) of this act**.

RCW 69.51A.040(emphasis added). The "decriminalization" language claimed by defendant was conditional on meeting the requirements set out in the subsections 1 through 6. In addition to the plant limitations in subsection 1, subsections 2 and 3 specifically required the patient or designated provider to provide proof of his or her registration with the department of health and to keep a copy of

proof of registration with the registry established in section 901 of the act.

However, section 901 was vetoed by the governor and no health department registration was ever established or implemented. See *Medical Care and Treatment --Prescriptions—Marijuana,* 2011 Wash. Legis. Serv. Ch. 181 (S.S.S.B. 5073). Therefore, the defendant could not have been in compliance with the requirements of 69.51A.040, nor could law enforcement utilize such a registry to determine compliance.

Because there can be no compliance with registration required under RCW 69.51A.040, medical use, possession or manufacture of cannabis is an affirmative defense pursuant to RCW 69.51A.043 and .047. A qualifying patient or provider who is not registered falls under one of those subsequent sections. RCW 69.51A.043 as amended states:

(1) A qualifying patient or designated provider **who is not registered with the registry established in *section 901 of this act may raise the affirmative defense** set forth in subsection (2) of this section**, if:**

(a) The qualifying patient or designated provider presents his or her valid documentation to any peace officer who questions the patient or provider regarding his or her medical use of cannabis;

(b) The qualifying patient or designated provider possesses no more cannabis than the limits set forth in RCW 69.51A.040(1);

(c) The qualifying patient or designated provider is in compliance with all other terms and conditions of this chapter;

(d) The investigating peace officer does not have probable cause to believe that the qualifying patient or designated provider has committed a felony, or is committing a misdemeanor in the officer's presence, that does not relate to the medical use of cannabis;

(e) No outstanding warrant for arrest exists for the qualifying patient or designated provider; and

(f) The investigating peace officer has not observed evidence of any of the circumstances identified in *section 901(4) of this act.

(2) A qualifying patient or designated provider who is not registered with the registry established in *section 901 of this act, but who presents his or her valid documentation to any peace officer who questions the patient or provider regarding his or her medical use of cannabis, may assert an affirmative defense to charges of violations of state law relating to cannabis through proof at trial, by a preponderance of the evidence, that he or she otherwise meets the requirements of RCW 69.51A.040. A qualifying patient or designated provider meeting the conditions of this subsection but possessing more cannabis than the limits set forth in RCW 69.51A.040(1) may, in the investigating peace officer's discretion, be taken into custody and booked into jail in connection with the investigation of the incident.

RCW 69.51A.043 (emphasis added). *See also* RCW 69.51A.047 (setting out requirements to establish an affirmative defense when patient or provider is not registered or does not present valid documentation to law enforcement). Accordingly, even after the 2011 amendments, the medical use, possession, or manufacture of cannabis remained an affirmative defense to a violation of RCW 69.50.401.[4]

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[4] This fact that medical use, possession, or manufacture of cannabis remains an affirmative defense after the 2011 amendments is further illustrated by the fact that proposed legislation in 2013 sought to substitution "valid documentation" for proof of registration in RCW 69.51A.040 (and 69.51A.047) in order to provide a means to comply with the requirements. *See Senate Bill 5887*, sec. 4, Reg. Sess.

An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so. *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1, 4-5 (2010). An affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed. *Fry*, 168 Wn.2d at 10.

In the present case officers observed 20 plus large growing marijuana plants in one of two greenhouses at the defendant's residence. This observation alone established probable cause for a violation of RCW 69.50.401. There was no requirement that law enforcement address the presence or absence of medical use status in the affidavit for the search warrant.

Although a defendant who is otherwise in compliance with RCW 69.51A could have asserted an affirmative defense, here the defendant was not in compliance with RCW 69.50.401 and therefore could not assert such a defense. The availability, or unavailability, of such an affirmative defense had no bearing on the determination of probable cause and the issuance of the search warrant.

3. **There was a sufficient nexus from the information gathered, to find probable cause that evidence of**

(2013); *Substitute Senate Bill 5528* sec. 4, Reg. Sess.(2013); *House Bill 1662*, sec. 2, Reg. Sess. (2013); *House Bill 1084*, sec. 3, 5, Reg. Sess. (2013).

criminal activity could be found at the residence and shed that bounded the greenhouses.

The Fourth Amendment prohibits the issuance of any warrant except one "particularly describing the place to be searched and the persons or things to be seized." *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.Ct. 1013, 1016, 94 L.Ed.2d 72 (1987). The Washington Constitution contains a similar requirement. *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). Under the Fourth Amendment, a warrant must describe with particularity the things to be seized. *Groh v. Ramirez*, 540 U.S. 551, 557, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004); *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). This requirement serves two functions by limiting the executing officer's discretion; and informing the person subject to the search what items may be seized. *Riley*, 121 Wn.2d at 29.

A warrant may be overbroad and, therefore, violate the particularity requirement if it authorizes police to search persons or seize things for which there is no probable cause. *See State v. Maddox*, 116 Wn. App. 796, 806, 67 P.3d 1135 (2003) *aff'd*, 152 Wn.2d 499, 98 P.3d 1199 (2004). To avoid over breadth, there must be a sufficient nexus between the targets of the search and the

suspected criminal activity. *State v. Carter*, 79 Wn. App. 154, 158, 901 P.2d 335 (1995).

Three factors are relevant to determine whether a warrant is overbroad:

> "(1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued."

United States v. Mann, 389 F.3d 869, 878 (9th Cir. 2004) (quoting *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986)).

In issuing the warrant, all that is required is that the magistrate be provided with a reference point by which to determine the probability of criminal activity. A magistrate is entitled to make common sense inferences from the facts and circumstances contained in the affidavit. *See* e.g. *State v. Gross*, 57 Wn. App. 549, 555, 789 P.2d 317 (1990) *disapproved of by State v. The*in, 138 Wn.2d 133, 977 P.2d 582 (1999) *disapproved of by State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999) (*citing State v. Myers*, 35 Wn. App. 543, 549-50, 667 P.2d 1142 (1983) *aff'd*, 102 Wn.2d 548, 689 P.2d 38 (1984) *disapproved of by State v. Live*ly, 130 Wn.2d 1, 921

P.2d 1035 (1996) *disapproved of by State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996)).

In arguing against the issuance of the warrant, Appellant cites to *Thein*, 138 Wn.2d 133 to argue that "*... more than conclusory predictions; blanket inferences that evidence of drug dealing is likely to be found in the homes of drug dealers...*" is needed to establish a nexus to search a particular location. *See Brief of Appellant*, pg. 15. The *Thein*, 138 Wn.2d 133 is misplaced.

In *Thein*, 138 Wn.2d 133, the affidavit contained *only* generalized statements of belief about drug dealers' common habits, particularly that such persons commonly keep a portion of their drug inventory, paraphernalia, drug trafficking records, large sums of money, financial records of drug transactions, and weapons in their residences. *Jackson*, 150 Wn.2d, 266-67. The affidavit in *Thein*, 138 Wn.2d 133 expressed the belief that such evidence would be found at the suspect's address. *Jackson*, 150 Wn.2d 251 Apart from such statements, there was no incriminating evidence linking drug activity to Thein's home that was searched. *State v. Cowin*, 116 Wn. App. 752, 758-59, 67 P.3d 1108, 1112 (2003).

The *Thein* court found that such generalizations do not establish probable cause for issuance of a search warrant for an

alleged drug dealer's residence, since a finding of probable cause must be grounded in fact. *Jackson*, 150 Wn.2d at 266-67 (quoting *Thein*, 138 Wn.2d at 146-47. 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 between the items to be seized and the place to be searched is not established as a matter of law. *Id.* The *Thein* court in essence declined to adopt a per se rule that once a person is determined to be a drug dealer, then a finding of probable cause to search that individual's residence would automatically follow. *Jackson*, 150 Wn.2d at 266-67.

In *Jackson*, 150 Wn.2d 251, the court found there were more than generalizations, in that the affidavit included some information about evidence located inside the defendant's residence. The court found that information permitted a reasonable person to infer that the victim may have been removed from the residence, likely in a vehicle; and therefore there was a sufficient nexus to search two vehicles the defendant had *access* to and attach GPS devices to them. *Jackson*, 150 Wn.2d at 265. *See also Gross*, 57 Wn. App. 549 (finding sufficient nexus to search residence where police corroborated information from the recipients of drug shipment about location of defendant's residence); *State v. G.M.V.*, 135 Wn. App.

366, 144 P.3d 358 (2006) (a nexus to search a juvenile's home was established by evidence that the juvenile's drug dealing boyfriend, who was not a full time resident of the home, had left from and returned to the home before and after selling drugs); *State v. McGovern*, 111 Wn. App. 495, 500, 45 P.3d 624, 626-27 (2002) (a nexus existed to search defendant's residence where the defendant's husband was stopped and found to possess marijuana in his motor vehicle and he told the troopers that he had left home to go to work; that he lived about twelve miles away; and that he had bought the marijuana in Oregon. The court found the issuing judge could infer the husband had been at the residence after buying the marijuana but before being stopped, and that the amount possessed (6.4 ounces) was not an extraordinarily large amount in light of his statement he had bought too much for personal use. Therefore the issuing judge was entitled to infer he had more marijuana elsewhere); *Cowin*, 116 Wn. App., 759-60 (a nexus existed to search defendant's residence where informant reported the plants were transferred from the house into the woods and later investigation disclosed the presence of two grow sites a short distance from the defendant's residence that were accessible only by passing defendant's residence; and the same truck (which was registered to

defendant's friend), was observed at grow sites and the defendant's residence).

Contrary to the defendant's argument, *Thein*, 138 Wn.2d 133, is not analogous to his case. The court's decision in *Thein*, 138 Wn.2d 133 was explicitly limited to the question of whether or not generalizations about "the common habits of drug dealers" standing alone, established probable cause. *Thein*, 138 Wn.2d at 136, 148-149. That is not analogous to the present case. There were no generalized statements of habit or propensity contained in this affidavit to bolster probable cause.[5]

Moreover, the *Thein* Court specifically distinguished its case from cases involving searches for personal property. *Thein*, 138 Wn.2d at 149, citing *State v. Herzog*, 73 Wn. App. 34, 56, 867 P.2d 648 (1994), *Wayne R. LaFave, Search and Seizure* § 3.7(d), at 381-

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[5] Appellant's reliance on *State v. Kelley*, 52 Wn. App. 581, 762 P.2d 20 (1988) and *State v. Gebaroff*, 87 Wn. App. 11, 939 P.2d 706 (1997) to support his contention that the warrant did not establish a nexus to search residence and shed is also misplaced. Both cases are distinguishable from the present case. In *Kelley*, 52 Wn. App. 581, the Court held that a search warrant that expressly authorized a search of a house and a carport did not authorize a search of several detached outbuildings on the same property when the warrant neither referred to the outbuildings nor incorporated by reference an affidavit that referred to the outbuildings. *Kelley*, 52 Wn. App. at 586. Similarly, in *Gebaroff*, 87 Wn. App. 11, the Court held that probable cause to search outbuildings on a particular piece of property does not furnish probable cause to search a house on the same property where different people controlled the house and the outbuildings. *Gebaroff*, 87 Wn. App. at 17.

85 (3d ed. 1996); and *State v. Condon*, 72 Wn. App. 638, 644, 865 P.2d 521 (1993). The Court reasoned that personal items, unlike drugs, are of continuing utility and that it is reasonable to infer such items will likely be kept where the person lives. See *Thein*, 138 Wn.2d at 149. *Thein* expressly agreed with the tenet that a magistrate is entitled to make common sense inferences from the facts and circumstances contained in the affidavit; especially where they concern searches for personal property.

In the present case, there was probable cause for the crime of possession / manufacture of marijuana. The evidence sought in the warrant was very specific to the crime and included: records related to manufacture of marijuana; records of persons involved; evidence of ownership and dominion and control of the residence at 44 Revas Basin Road; drug paraphernalia for the packaging, weighing, distributing, manufacturing, and using marijuana; and controlled substances.

The warrant set out clear objective standards and limitations as to the places to be searched and the evidence sought. The warrant described the evidence sought with particularity.

The affidavit set out the fact that growing rows of marijuana plants were observed inside a partially uncovered greenhouse

between the residence and shed; that on a second flyover six days later the greenhouse had been re-covered and a dark green color was still visible through the greenhouse plastic; that the parcel of property where the buildings and greenhouses were located was owned by the defendant; and that there were no other nearby driveways or houses except those shown in the photos.

The defendant who owned the property had apparent dominion and control over, and continuous accesses to the residence, the greenhouses, and the shed. There was a sufficient nexus to the adjoining residence and shed to allow officers to search for evidence of dominion and control, drugs, and paraphernalia. Moreover, the issuing magistrate could clearly infer that access to the greenhouses was restricted to using the driveway to the residence; any movement of materials, paraphernalia, or drugs into or out of the property would have to use the residence driveway; the greenhouses would be reliant upon the residence and its owner for water and power needs; and there were no other residences where person(s) accessing and tending the grow would have stayed.

Additionally, items sought in the search warrant of the residence included personal property such a records, paperwork, and paraphernalia; which unlike drugs, are neither consumable nor

routinely destructible. Personal items, unlike drugs, are of continuing utility and it is reasonable to infer such items will likely be kept where the person lives. *See generally, Thein*, 138 Wn.2d 133; *Condon*, 72 Wn. App., 644; *Wayne R. LaFave, Search and Seizure* § 3.7(d), at 381-85 (3d ed. 1996).

The affidavit set forth facts sufficient for a reasonable person to conclude the defendant *probably* was involved in criminal activity; in particular - manufacture of a controlled substance and /or possession with intent to delivery.

In the present case, the judge did not abuse his discretion in issuing the search warrant, and the trial court did not commit error in denying the defendant's motion to suppress. Based on the facts presented, the judge had sufficiently reliable information to find probable cause and to issue the search warrant. The limited scope of the warrant regarding the places to be searched and the items to be seized was not overbroad and was directly connected to the observed marijuana grow.

E. CONCLUSION

The reviewing trial court properly found the issuing magistrate did not abuse his discretion in issuing the search warrant for

evidence of manufacture of marijuana and/or possession with intent to deliver, where officers observed approximately 20 growing plants in the a greenhouse. The trial court properly considered the standard for probable cause in light of subsequent statutory amendments that were not retroactive and did not decriminalize medical cannabis manufacture.

The trial court properly denied the defendant's motion to suppress where there was a nexus between the greenhouse containing growing marijuana and the closely connected house and shed that were located on the same tax parcel, owned by the defendant, and accessible only by traveling down the residence's driveway and past the nearby residence.

The Appellants conviction should be affirmed.

Dated this 7 day of Sept 20 13

Respectfully Submitted by:

KARL F. SLOAN, WSBA #27217
Prosecuting Attorney
Okanogan County, Washington

PROOF OF SERVICE

I, Karl F. Sloan, do hereby certify under penalty of perjury that on Sept 9, 2013, I provided email service by prior agreement (as indicated), a true and correct copy of the Respondent's brief:

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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. MORGAN HALE DAVIS, Appellant.	NO. 310523 MOTION FOR EXTENSION OF TIME

1. IDENTITY OF MOVING PARTY

Respondent in the above-entitled case, the State of Washington, by and through the undersigned attorney, asks for the relief designated in Part 2.

2. RELIEF SOUGHT

Respondent seeks an extension to file its response, to the date received.

3. FACTS RELEVANT TO MOTION

Due to travel and heavy caseload, the attorney for respondent was unable to transmit response briefing by the September 6, 2013.

4. GROUNDS FOR RELIEF

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An extension is necessary to the date received.

Dated this 7 day of Sept, 2013.

By: _____
KARL F. SLOAN, WSBA No. 27217
Attorney for Respondent

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PROOF OF SERVICE

I, Karl F. Sloan, do hereby certify under penalty of perjury that on Sept 9, 2013, I provided email service by prior agreement (as indicated), a true and correct copy of the Motion to Extend Time:

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