

No. 32450-8-III

COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION III

STATE OF WASHINGTON,

Plaintiff/Appellant,

v.

WILLIAM ALEXANDER,

Defendant/Respondent.

ON APPEAL FROM OKANOGAN COUNTY SUPERIOR COURT
(Hon. Christopher Culp)

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1.	RCW 69.51A.010 (Medical Marijuana Statute)
2.	RCW 69.50.401 (Manufacturing Marijuana)
3.	RCW 69.51A.040 (Medical Marijuana Statute)
4.	RCW 69.51A.085 (Collective Gardens)

I. Introduction.

Mr. Alexander is a very sick 67-year-old man who has been diagnosed with pancreatitis. He was 180 pounds; now he averages 120-130 pounds. He was 6'3"; now he is 6'1." He takes the prescribed drug Ondansetron to control violent vomiting, and is also licensed to possess and use medical cannabis pursuant to RCW 69.51A.010 to control nausea. The Okanogan County Sheriffs Department has been aware of Mr. Alexander's use of medical cannabis in the past, and has conducted site visits to inspect his greenhouse—which has always been found in compliance with Washington law.

Recently, however, a Tribal Detective received a report from an anonymous caller about a marijuana grow operation in Mr. Alexander's greenhouse that could be seen from the highway—approximately 50 feet away. Mr. Alexander's greenhouse was missing roof panels that had torn off during a high wind several days prior. After visiting the site, the Detective saw "six to ten foot tall marijuana plants (sic)," but could not count the number of plants. She took photographs of the greenhouse and then drafted an affidavit for a search warrant. She failed to identify any facts supporting a violation of criminal law, or state that she believed the law had been broken.

First, her affidavit noted Mr. Alexander may lawfully possess 15 plants or 24 ounces—but she did not state that she saw more than 15 plants or 24 ounces or that she suspected he had more than 15 plants or 24 ounces.

Second, she stated Mr. Alexander had “plants” in his greenhouse—but she did not state that she believed Mr. Alexander was in violation or suspected he was in violation of the number of plants or ounces he was permitted to possess.

Third, she requested a warrant to “verify the number of growing marijuana plants and any documents to **prove or disprove a violation** of RCW 69.50.401”—but she did not state she believed or had evidence to believe Mr. Alexander was in violation of Washington law.

Fourth, the affidavit did not contain a conclusion or statement that Detective Barcus, or any other witness, believed or had probable cause to believe Mr. Alexander was in violation of RCW 69.50.401 (Manufacturing Marijuana), RCW 69.51A.040 (Medical Marijuana Statute), or RCW 69.51A.085 (Collective Gardens) (collectively referred to as Uniform Controlled Substances Act or “CSA”).

Despite these warrant deficiencies, the district court issued a warrant to search Mr. Alexander’s home, outbuildings and property “to prove or disprove” a criminal law violation. Although Mr.

Alexander was in compliance with the medical marijuana laws, police found four guns on the property shared with his wife and adult children. Mr. Alexander is prohibited from possessing a firearm, and was charged with four counts of felony possession/control of a firearm. The trial court granted Mr. Alexander's motion to dismiss on the basis the warrant lacked probable cause. The State's motion for reconsideration was denied and this appeal ensued.

II. Issue Statement.

Whether, when the officer asked for a warrant to "prove or disprove" a violation of the law, the trial court properly ruled the warrant failed to set forth facts sufficient to establish a reasonable inference that Mr. Alexander was probably involved in criminal activity or contain a statement that the officer believed she had probable cause to believe a crime had been committed? **Yes.**

III. Statement of the Case.

On September 10, 2013, an anonymous party reported a possible marijuana grow at Mr. Alexander's home. *CP 25, EXHIBIT A*. The reporting party claimed they had seen plants from Monse Bridge Road and could smell marijuana. *Id.*

On September 12, 2013, Detective Jodie Barcus visited Mr. Alexander's home but saw nothing but an enclosed greenhouse from HWY 97. *CP 25, EXHIBIT A*. She changed locations to Monse

Bridge Road, and “was able to see what [she] believed, based on [her] training and experience to be six to ten foot tall Marijuana plants (sic).” *Id.* She noted that Mr. Alexander may lawfully possess 15 plants or 24 ounces of usable cannabis, but she did not state that she saw more than 15 plants or 24 ounces. *Id.* Neither did she state that she believed Mr. Alexander was in violation of the number of plants or ounces he was permitted to possess. *Id.*

Later that day, Detective Barcus submitted an affidavit for a search warrant to District Court Judge Heidi Smith requesting a warrant to search Mr. Alexander’s home and outbuildings for marijuana. *CP 25, EXHIBIT A.* The affidavit was accompanied by grainy and hard-to-discern photographs of Mr. Alexander’s greenhouse that were taken from approximately 300 feet away on Monse Bridge Road. *Id.* The greenhouse was missing roof panels that had torn off during a high wind several days prior. *Id.* The Detective could see “six to ten foot tall marijuana plants;” however, she could not count the number of plants. *Id.*

The facts identified in Detective Barcus’ affidavit did not contain a statement that the Detective believed, or had probable cause to believe, Mr. Alexander had violated a criminal law. *CP 25, EXHIBIT A.* The Detective stated in her affidavit that if Mr. Alexander was in compliance with Washington State Medical Use of Cannabis Act (“MUCA”), she intended to write Mr. Alexander an

infraction for display of medical cannabis in a manner or place that was open to view of the general public (RCW 69.51A.060). *Id.* In other words, if there was not a criminal violation, she would issue Mr. Alexander a *civil* infraction. *Id.*

The District Court issued the warrant to search Mr. Alexander's home for marijuana. *CP 25, EXHIBIT A.*

On September 12, 2013, Detective Barcus executed a warrant on Mr. Alexander's property. *CP 25, EXHIBIT A.* After removing Mr. Alexander and his family from their home, she began to interrogate them after issuing Miranda Warnings and telling them they were not free to go. *Id.* During interrogation, Mr. Alexander reportedly stated that there were weapons in the home. *Id.* At Detective Barcus' direct order, Mr. Alexander was forced to enter his home and open a closet in the living room where a rifle was located. *Id.* Detective Barcus asked Mr. Alexander if he was a convicted felon, to which Mr. Alexander replied affirmatively. Only then did the search of Mr. Alexander's property cease. *Id.*

Detective Barcus then drafted an amended affidavit requesting a warrant to recover all firearms and ammunition. *CP 25, EXHIBIT A.* The district court issued an amended warrant to search Mr. Alexander's home for firearms and ammunition, and four firearms were located. *Id.*

Mr. Alexander moved for dismissal on the basis the warrant lacked probable cause. At oral argument, the trial judge asked the State, "...why on earth would you put a sentence in there that says we want a warrant to prove or disprove...that to me is incomprehensible." VRP pg. 8, ll 5-9. The State replied, "Yeah. It is to me. It is badly drafted at giving the benefit of the doubt to the officer at that point." VRP pg. 8, ll 8-11.

The Court entered an order that held in part, "The stated purpose of Detective Barcus's search was merely to 'verify the number of growing marijuana plants, usable marijuana, and any documents to prove or disprove a violation of RCW 69.50.401.'" CP 33, pg. 2. Additionally, "At no point did Detective Barcus, or any other witness, state that she had probable cause to believe Mr. Alexander was in violation of RCW 69.50.401 or any other criminal law." CP 33, pg. 5. The Court continued at length:

Detective Barcus did not request a warrant based upon inferences that Mr. Alexander was growing marijuana on his property; instead her extensive discussion over the Medical Marijuana Statutes demonstrate the Detective requested the warrant to "verify" the number of plants. Her affidavit was not couched in terms that there was a probable violation of the law, but rather that she merely wanted a warrant to check and **see whether there was a violation of law**. CP 33, pg. 5-6. (emphasis supplied).

The State moved for reconsideration, but that motion was denied.

IV. Argument

A. Mr. Alexander has the right to be free from unreasonable searches.

The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, homes, papers, and effects against unreasonable searches and seizures. The due process clause of the Fourteenth Amendment extends this right to protect against intrusions by state governments. *Mapp v. Ohio*, 100 Wn.2d 814, 817 (1984). “It is by now axiomatic that Article I, Section 7, provides greater protection to an individual’s right of privacy than that guaranteed by the Fourth Amendment.” *State v. Parker*, 139 Wn.2d 486, 493 (1999). The Washington Constitution has consistently provided greater protection of individual rights than its federal counterpart. *State v. Ladson*, 138 Wn.2d 343 (1999). Indeed, the scope of the protections offered by Article I, Section 7, is “not limited to subjective expectations of privacy but, more broadly, protects ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’” *Parker*, 139 Wn.2d at 494 (quoting *State v. Myrick*, 102 Wn.2d 506, 511 (1984)).

B. The search warrant lacked probable cause.

A search warrant may be issued only upon a showing of probable cause to believe that contraband or other evidence of a

crime will be found at a particular location. *State v. Goble*, 88 Wn. App. 503, 508-09 (1997). Issuance of a search warrant is a matter of judicial discretion, and great deference is accorded a magistrate's determination of probable cause. *State v. Perrone*, 119 Wn.2d 538, 549 (1992).

Prior to issuance, a neutral detached magistrate must evaluate the search warrant application to determine whether the underlying facts and circumstances are sufficient to establish probable cause to search. *State v. Smith*, 93 Wn.2d 329, 352 (1980). An affidavit is sufficient if it contains information from which an ordinarily-prudent person would conclude that evidence of a crime can be found at the place to be searched. *State v. Goble*, 88 Wn. App. at 509 (1997). Review of a magistrate's probable cause determination is normally limited to the facts on the face of the warrant affidavit. *State v. Perez*, 92 Wn.App. 1 (1998), review dnd, 137 Wn.2d 1025 (1999).

In order to justify issuance of a search warrant, the affidavit must establish "a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *State v. Goble*, 88 Wn. App. at 509 (1997) (citing Wayne R. LaFave, *Search and Seizure*, 3.7(d) at 372 (3d Ed. 1996)). The warrant application must identify specific facts and circumstances from which the reviewing magistrate can draw the required inference that evidence of a crime will be found in the

premises to be searched. *State v. Thein*, 138 Wn.2d 133, 147 (1999).

Probable cause to believe that an individual has committed a crime “is not by itself adequate to secure a search warrant for the suspect’s home.” *United States v. Ramos*, 923 F.2d 1346, 1351 (9th Cir. 1991); *Cole* at 286; *State v. Dalton*, 73 Wn. App. 132, 136 (1994). Indeed, probable cause to search a residence must be based on more than conclusory predictions that evidence will likely be found there. *Thein*, 138 Wn.2d at 147. Mere suspicion and personal belief do not establish probable cause. *State v. Klinger*, 96 Wn. App. 619, 624 (1999).

In our case, there are no facts that provide probable cause to believe that William Alexander was involved in *criminal* activity because the Detective was actively looking at MUCA compliance. She was acting almost as an administrative agent when she stated she wanted to verify the number of plants. For example, the Detective could have stated she believed Mr. Alexander had more than 15 plants or 24 ounces. She could have stated that the height of the plants (that she viewed from 300 feet away, likely with binoculars), in her training and experience, indicated he had more than 24 ounces of useable cannabis. But she did not identify any crime she believed had been committed under the CSA.

Contrary to the State's brief, the detective did not "cite the statute she believed was being violated and the crime therein." Appellant's Brief, pg. 9, ¶ 2. She actually cited to the medical marijuana statutes and the CSA—she was not sure which may apply, if any! Neither did she "indicate what crimes she believed were probably happening." *Id.* She merely listed a number of statutes and requested a warrant to see if any of them were being violated.

To the extent Detective Barcus had a "hunch" a crime was being committed, she did not even indicate that in her affidavit. Furthermore, probable cause requires more than a hunch or an inference. It requires "information from which an ordinarily-prudent person would conclude that evidence of a crime can be found at the place to be searched." *Goble*, supra, 88 Wn. App. at 509.

This case is not like *State v. Fry*, 168 Wn. 2d 1 (2010), where the Court held the medical use affirmative defense did not vitiate probable cause supporting a search warrant. Mr. Alexander is not trying to assert an affirmative defense after probable cause has been established—the very basis of the Detective's affidavit failed to establish probable cause.

In the current case, the Detective was not sure whether any criminal law had been broken, but decided the government had the

right to intrude into Mr. Alexander's residence to determine whether or not he was breaking the law. This type of search cannot stand.

The current warrant is akin to a police officer who walks past a bathroom window and notices a large number of prescription drug containers in the cabinet, and requests a warrant to see if they are legally prescribed to the person. Just as possession of prescribed drugs is legal in this State, so is the possession of medical marijuana. Police are not permitted to obtain a warrant merely to see "whether or not" a person is violating a statute. A warrant should only issue if there is probable cause that a statute has been violated.

C. The *Ellis* line of cases are inapplicable to the facts of this case.

The State relies in part on *State v. Ellis*, 178 Wash. App. 801, (2014), but *Ellis* and its progeny do not control this case because *Ellis* is factually inapplicable for below reasons. Primarily, the affidavit did not report Mr. Alexander was in violation of the CSA.

In *Ellis*, a Deputy visited Mr. Ellis's residence to arrest a third party on local warrants. He smelled a marijuana odor with increasing potency as he approached the house. *Ellis*, 178 Wash. App. at 803 (2014). Because two unfriendly dogs prevented him from accessing the front door, he began looking for another way to contact the residents. Near the garage, he again smelled a

marijuana odor and saw a very bright light emitting from the edges of windows mostly covered by black plastic. Peering inside, he saw walling and insulation encompassing about a quarter of the interior space. Based on his training and experience, he believed Mr. Ellis was growing marijuana at his residence. *Id.*

The Deputy submitted an affidavit and obtained a warrant to search the residence for evidence of marijuana manufacturing in violation of the CSA. *Ellis*, 178 Wash. App. at 803 (2014). But nowhere in the affidavit did the Deputy discuss the applicability or inapplicability of MUCA, indicate Mr. Ellis may be out of compliance with MUCA, or discuss MUCA. Instead, the Deputy strictly cited evidence regarding a possible violation of the CSA. *Id.*

While executing the search warrant, law enforcement found marijuana growing rooms, two valid MUCA growing permits, and a loaded shotgun. Mr. Ellis is a convicted felon. *Id.* Division III held that “an affidavit supporting a search warrant presents probable cause to believe a suspect committed a CSA violation where, as here, it sets forth enough details to reasonably infer the suspect is growing marijuana on his or her property.” *Ellis*, 178 Wash. App. at 808 (2014).

The legal issue in *Ellis* (and other subsequent unpublished opinions based on the reasoning in that case) was whether an affidavit requires law enforcement to affirmatively allege a violation

of MUCA in order to establish probable cause for a CSA violation. The answer was no. An officer need only establish probable cause to believe that the suspect violated the CSA, and “need not show the MUCA’s exception’s inapplicability.” *Id.*

1. **Unlike *Ellis*, the Detective never stated her belief as to probable cause or pointed to facts that Mr. Alexander was actually in violation of the CSA.**

Unlike *Ellis*, our Detective did not take a position about whether a violation of the CSA occurred. If, hypothetically, the Detective claimed she smelled (which she did not) and saw marijuana, and *followed up by stating she believed Mr. Alexander was in violation of the CSA*, then under *Ellis*, the warrant would be supported by probable cause. But that is not what happened in our case. In other words, if Detective Barcus had not known that Mr. Alexander was a medical marijuana patient and had instead stated in her affidavit that she had probable cause to believe he was in violation of the CSA, then the court’s decision in *Ellis* would apply and the evidence gathered in a search of his property would be admissible. But because medical marijuana was specifically mentioned in this affidavit, and the officer sought a warrant to “prove or disprove” a violation, no probable cause exists.

Here, the Detective stated that she knew marijuana was present in the home, but she also stated in effect that she knew that as a medical marijuana patient Mr. Alexander was lawfully permitted to

do so. The Detective's affidavit reflects an internal dialogue about whether a crime occurred. Was this an administrative action or a law enforcement action. We can only guess. Unlike *Ellis*, compliance with the MUCA is thoroughly considered in the affidavit as a real probability, and the Detective had a plan if neither the CSA nor MUCA applied (write a ticket to Mr. Alexander).

2. Unlike *Ellis*, the Detective asked for a warrant to “prove or disprove” a violation of the CSA or in the alternative to write a MUCA ticket.

The warrant requested was to “verify the number of growing marijuana plants and any documents to prove or disprove a violation of RCW 69.50.401.” So clearly evident was the Detective's *hesitation* to state there may be evidence of a violation of the CSA, that she “hedged her bets” and stated that if no crime had been committed, then she would write an infraction ticket to Mr. Alexander.

Detective Barcus did not state that she had probable cause to believe Mr. Alexander was in violation of the CSA because she knew that he was a medical marijuana patient and may lawfully possess 15 plants or 24 ounces, as stated in her affidavit. In *State v. Ellis*, medical marijuana was never mentioned in the officer's affidavit.

D. All evidence from the amended search warrant should be suppressed as fruit of the poisonous tree.

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *State v. Ladson*, 138 Wn.2d 343 (1999). Evidence will not be suppressed unless the unlawful search "is at least the 'but for' cause of the discovery of the evidence." *Segura v. United States*, 468 U.S. 796, 815 (1984). Not all evidence is "fruit of the poisonous tree" simply because it would not have come to light "but for the illegal actions of the police." *Wong Sun v. United States*, 371 U.S. 417, 488 (1963).

In the present case, an illegal search occurred by a warrant that was issued without probable cause. But for the tainted warrant, the police would not have searched Mr. Alexander's residence and discovered the weapons because they never would have had the right to enter Mr. Alexander's home. The Government would never have uncovered evidence of a rifle in Mr. Alexander's home on its own because, but for the warrant, it would not be permitted to enter Mr. Alexander's home, conduct a "safety sweep," interrogate Mr. Alexander, and demand he give them a guided tour.

E. Mr. Alexander is entitled to an award of fees and costs on appeal.

Mr. Alexander respectfully asks this Court to award his attorney fees and costs incurred in responding to this Brief of Petitioner. Pursuant to RAP 18.1(d), Mr. Alexander will provide an affidavit of fees and expenses within ten days of an award of fees from this Court.

F. Conclusion

Considering the foregoing, Mr. Alexander respectfully requests the Court affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 30th day of January, 2015.

Thomason Law & Justice, PS

By 

Alex Thomason, WSBA #35975
Attorney for Defendant/Respondent

CERTIFICATE OF SERVICE

I, Nichole Varrelman, certify that on the 30th day of January, 2015 a copy of the foregoing Defendant/Respondent Brief of Respondent was electronically served upon:

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Dated this 30th day of January, 2015.

By 
Nichole Varrelman