

NO. 85746-6

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

PATRICK JIMI LYONS,

Defendant/Petitioner.

STATE'S RESPONSE TO AMICUS CURIAE BRIEF

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I. ISSUES RAISED BY AMICUS CURIAE

1. Whether the search warrant affidavit at issue was *per se* defective in that it did not relate precisely when the confidential informant observed marijuana growing on the defendant's property?

2. Whether the Court of Appeals' decision runs counter to its own established precedent?

3. Whether *State v. Partin* should be disavowed or overruled by this court?

II. ANSWERS TO ISSUES RAISED

1. The affidavit was not defective, as it related current observations made by the informant, and communicated to the detective, made within 48 hours prior to issuance of the warrant.

2. Even though the Court of Appeals did not address its own prior decisions, the affidavit, and the issuance of the warrant, is supported by those decisions.

3. *State v. Partin* adequately articulates the constitutional principle that the underlying facts alleged must be current, and not remote in time. The court should decline the invitation to overrule that decision.

III. STATEMENT OF THE CASE

A complete recitation of the facts is contained in the parties' briefs filed in the Court of Appeals. (**Appellant's Brief at 2-5, Respondent's Brief at 3-7**)

IV. ARGUMENT.

1. **The information provided by the informant was current, and justified the issuing judge's conclusion that the marijuana would be on the premises to be searched at the time the warrant was issued.**

It is useful to once again review the language of Detective Garza's affidavit:

Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address. The CS knows the suspect and homeowner as "Jimmy". The CS observed the growing marijuana while inside an outbuilding on the property of the listed residence. The CS observed the marijuana growing in potted soil under active lighting designed to promote plant growth.

It is well-established that a search warrant must be supported by facts which are "so closely related to the time of the issue of the warrant as to justify a finding of probable cause *at that time.*" United States v. Hython, 443 F.3d 480, 485 (6th Cir. 2006) (emphasis in the original), quoting Sgro v. United States, 187 U.S. 206, 210 (1932). Stated another

way, there must be “temporal proximity” of the facts relied upon to the warrant application. Hython, 443 F.3d at 488-89.

As the amicus brief points out, Washington decisions have recognized the constitutional principle that an individual’s privacy may not be violated based upon out-of-date or stale information provided to an issuing magistrate. The courts have not hesitated to hold that warrants are invalid on the basis of staleness. State v. Spencer, 9 Wn. App. 95, 97, 510 P.2d 833 (1973); State v. Higby, 26 Wn. App. 457, 613 P.2d 1192 (1980).

Likewise, probable cause may not be based upon an affidavit which provides no information as to when an informant’s observations were made. State v. Larson, 29 Wn. App. 669, 671, 630 P.2d (1981).

These decisions describe what is required under both the Fourth Amendment, as well as Art. I. sec. 7 of the Washington State Constitution. Where more specific information is provided as to an informant’s observations, Washington courts have not surprisingly upheld the issuance of warrants as timely, as the informants’ information was current. State v. Payne, 54 Wn. App. 240, 773 P.2d 122 (1989); State v Petty, 48 Wn. App. 615, 740 P.2d 879 (1987). These cases do not require more than is articulated by Hython, Spencer, and the other cases cited, however.

WACDL urges this court to adopt a bright-line rule beyond that which is necessary to safeguard these constitutional rights, which would require that the affiant officer “explicitly advise when the informant made the relevant factual observations.” To that end, the amicus engages in a survey of decisions from other states which is not persuasive, as in each of these cases, the court examined the four corners of the affidavit, determined whether it was unambiguously deficient as to the currency of the information provided by the informant, and if so, found that the warrant was invalid. This is precisely the fact-specific process in which the Court of Appeals engaged in here, and the analysis does not lend itself to a bright-line rule.

Indeed, the language of the affidavits in the cases cited is different in subtle, yet significant ways. In Nelms v. State, 568 So.2d 384 (Ala.Crim.App. 1990), for example, the affiant related that “[W]ithin the last seventy-two hours a confidential informant . . . stated to the affiant that they have seen Crack-Cocaine in the residence. . . .”

Similarly, the Colorado Supreme Court found this language unambiguously deficient: “[W]ithin the last 24 hours I have received information from a first time informant that he had seen marijuana . . . inside the apartment.” People v. Bauer, 191 Colo. 331, 552 P.2d 512 (Colo.Sup.Ct. 1976)

Contrast the “have seen” and “had seen” of those affidavits, which related to past activity at a time unknown, to the Lyons affidavit, which combines the communication to the detective, with the observations of the informant, within the prior 48 hours, when it is read in a common sense, and realistic, fashion.

At worst, the statement is ambiguous, as the Court of Appeal majority observed, and as such, it does not afoul of Spencer or the other cases previously decided by Division III. The district court judge should accordingly be accorded deference in concluding that evidence of the marijuana grow operation would still be present.

The amicus brief also urges that this court disavow or overrule its previous decision in State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977). However, the court correctly stated the constitutional test adopted from Spencer, that the underlying facts alleged must be current, not remote in time, and sufficient to justify a magistrate’s conclusion that the property to be sought was probably on the premises to be searched at that time. Id., at 904.

This court determined that the detective’s statement that he had received his information from an informant, on the very date the warrant application was made, was a reference point by which the issuing judge could determine that the informant information was likewise current. Id.,

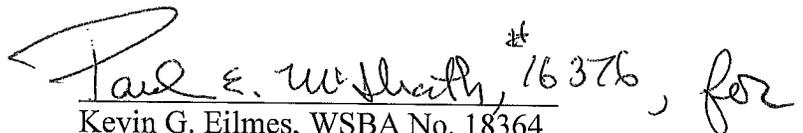
at 904-05. Far from ignoring the temporal proximity requirement of the informant's information, the court determined that it was present after testing it in a commonsense manner. Id.

In any event, the affidavit here can likewise be tested in the same manner, under current Washington precedents. Partin should remain good law, as it provides adequate constitutional safeguards for the issuance of search warrants.

V. CONCLUSION

This court should affirm the decision of the Court of Appeals.

Respectfully submitted this 12th day of January, 2012.


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IN THE SUPREME COURT OF THE
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STATE OF WASHINGTON,)	NO. 85746-6
)	
Plaintiff/Respondent,)	SWORN STATEMENT OF SERVICE
)	BY ATTORNEY MESSENGER SERVICE
vs.)	AND BY MAIL
)	
PATRICK JIMI LYONS,)	
)	
Defendant/Petitioner)	

I, Elaine Chartrand, state that I am and was at the time of the service of the State's Response to the Amicus Curiae Brief herein referred to, a citizen of the United States, residing at Yakima, Yakima County, Washington; that I am over the age of twenty-one years and am not a party to the within entitled action.

That on the 12th day of January, 2012, I served upon Adam Moore, 217 North Second Street, Yakima, WA 98901, Attorney for Defendant/Petitioner, a copy of the aforementioned instrument, by leaving said copies with Attorney Messenger Service, and to Tom P. Conom, Conom Law Firm, 20016 Cedar Valley Road, Suite 201, Lynwood, WA 98036, by mail.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Elaine Chartrand
January 12, 2012
at Yakima, WA