


RECEIVED BY E-MAIL

SUPREME COURT NO. 85746-6
COA NO. 28693-2-III

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PATRICK JIMI LYONS

Petitioner

FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR YAKIMA COUNTY
AND FROM THE WASHINGTON STATE COURT OF
APPEALS DIVISION III

SUPPLEMENTAL BRIEF OF PETITIONER

JOHN ADAMS MOORE
Attorney for Petitioner
The Adam Moore Law Firm
217 N. 2nd Street
Yakima, WA 98901
(509)575-0372

ORIGINAL

TABLE OF CONTENTS

I.	<u>THE FOURTH AMENDMENT ANALYSIS</u>	1
II.	<u>THE STATE CONSTITUTIONAL ANALYSIS</u>	11
III.	<u>CONCLUSION</u>	18

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Maxfield</u> , 133 Wn.2d 332, 945 P.2d 663 (1997)	13-15
<u>Seattle v. McCready</u> , 123 Wn.2d 260, 868 P.2d 260 (1994)	15
<u>State v. Chrisman</u> , 100 Wn.2d 814, 676 P.2d 419 (1984)	13
<u>State v. Eisfeldt</u> , 163 Wn.2d 628, 185 P.3d 580 (2008)	13
<u>State v. Huft</u> , 106 Wn.2d 206, 720 P.2d 838 (1986)	16-17
<u>State v. Maxwell</u> , 114 Wn.2d 761, 791 P.2d 223 (1990)	16, 18
<u>State v. Myrick</u> , 102 Wn.2d 506, 688 P.2d 151 (1884)	11-12,
<u>State v. Spencer</u> , 9 Wn. App. 95, 510 P.2d 833 (1973)	1,

OTHER JURISDICTIONS

Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964) 5, 6, 9, 10-11

Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983). 5, 7, 9

United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984) 5, 8-9

CONSTITUTIONAL AUTHORITIES

Fourth Amendment to the United States Constitution 1, 18

Wash Const. art. I, sec. 7 10, 13-18

I.
The Fourth Amendment Analysis

A brief review of fundamental Constitutional principles in this case begins with Judge Siddoway's observations as he read and relied upon the 1973 case of State v. Spencer, 5 Wn. App. 95, 510 P.2d 833 (1973). As noted in his dissent, the affiant must have provided (but did not provide) current and sufficient facts so the issuing magistrate could conclude that the premises to be searched probably contained the items sought at the time the warrant was issued. The dissent noted:

This court has stated:

An affidavit supporting a search warrant must be sufficiently comprehensive to provide the issuing magistrate with facts from which he can independently conclude there is probable cause to believe the items sought are at the location to be searched. Further, these facts must be current facts, not remote in point of time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the

person or premises to be searched *at the time* the warrant is issued.

State v. Spencer, 9 Wn. App. 95, 96-97, 510 P. 2d 833 (1973) (citations omitted). An important aspect of probable cause that we rely upon the magistrate to weigh is whether the information of criminal activity is too stale. See, e.g., State v. Larson, 29 Wn. App. 669, 671, 630 P.2d 485 (1981) (court cannot determine sufficient recency without dates for “recent” marijuana purchases).

- Dissent, State v. Lyons, 160 Wn. App. 100, 110, 247 P.3d 797 (2011).

The majority opinion from Division III stated:

This affidavit certainly could be read as Mr. Lyons and, ultimately, the superior court judge read it. But the standard of review (abuse of discretion) and canons of construction (nontechnical reading, commonsense reading, with great deference to the magistrate, with doubts resolved in favor of the warrant) would require a reading in favor of the warrant. When so viewed, we conclude the language can be read to support both the observation and the reporting of that observation within 48 hours and therefore we conclude this warrant passes constitutional muster.

- Opinion Below, Id., 160 Wn. App. 100, at 107 (emphasis supplied).

Whether the phrase “within the last 48 hours” described the timing of the informant’s observation or whether it referred to the timing of his/her report to the affiant, remains unclear. No matter how many times the reader mulls it over, no plain meaning ever emerges. The four judges charged with reviewing it so far have split 2 to 2. What is presented is equipoise: equal tugs from equal domains of ambiguity. In baseball we said “tie goes to the runner.” No logic there, but the game went on, the argument stopped. But this case isn’t baseball. It is something grander than a game. It involves the Constitutions, state and federal. “Tie goes to the runner” is oddly like “deferential acceptance of the magistrate’s choice,” when that choice is unsupported by reason, logic or common sense. But “probable cause” or “without authority of law” are not the stuff of mere chance or arbitrary happenstance. This case merits more than a forced outcome driven by “deference.” Probable cause summons reason, logic, and common sense.

Should the decision below in Division III be allowed to stand? Should future courts in our state issue or condone search warrants based upon "Lyons Model Affidavits?" Should prosecutors train police officers that this format is proper? The answer is easily seen through a review of certain fundamental Constitutional principles, wisdom to be drawn from a different generation of scholars, different judges.

So far, four judicial officers have passed judgment on County District Court Judge Engel's decision to issue. Of those four, two are linked to the majority opinion below. The other two did not act in concert, but separately. One was a Superior Court Judge, the other, the dissenting judge on the Division III panel. Adding Judge Engel to the Division III majority makes it 3 to 2. But this simple math provides only a simplistic answer, totally lacking in reason.

When the price of deciding wrongly is to threaten privacy, the decision should be arrived at within the proper construct of burden allocation. The burden of going forward,

the burden of advancing a change, in debate, falls upon the proponent of that change. Mr. Lyons lived in a world where his home was his castle, his private place, and the things within, the private domain of his private affairs. Allowing the police forced entry into his home represents a major change in the status quo. The proponent of that substantial change (in a democratic society that values privacy as does ours) should, as in debate, bear the burden of its justification. That burden is to establish a basis in reason, not that criminal activity once upon a time went on there, but that it would be ongoing at the time of entry.

Revisiting the pillars of 4th Amendment jurisprudence invites consideration of the teachings of Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509 at p.1512 (1964) Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983), and United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984). Benchmarks in the development of 4th Amendment jurisprudence, these cases

plainly recognized the burden to be met as a magistrate decides whether to issue a search warrant, or not. Aguilar states:

Thus, when a search is based upon a magistrate's rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," ibid., and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present ***." Id., 362 U.S. at 271, 80 S. Ct. at 736. As so well stated by Mr. Justice Jackson:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, supra, 333 U.S. at 13-14, 68 S. Ct. at 369.

- Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 at p. 1512 (1964) (Emphasis Supplied)

An affiant seeking issuance of a search warrant must provide sufficient information to the magistrate to allow that official to determine probable cause:

An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in Nathanson failed to meet this requirement. An officer's statement that "[a]ffiants have received reliable information from a credible person and do believe" that heroin is stored in a home, is likewise inadequate. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed2d 723 (1964). As in Nathanson, this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.

- Illinois V. Gates, 462 U.S. 213, at p. 239, 103 S.Ct. 2317 (1983) (emphasis supplied).

The "great deference" accorded to the magistrate by the majority opinion below should also be tested against United

State v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984). Petitioner submits that on this critical point, the Lyons majority opinion stands in marked contrast to the actual teachings of the Leon court:

Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Franks v. Delaware, 438 U.S. 154 (1978). Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." Aguilar v. Texas, supra, at 111. See Illinois v. Gates, supra, at 239. A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326-327 (1979).

Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable cause." Illinois v. Gates, 462 U.S., at 239, 103 S. Ct., at 2332. "Sufficient information must be presented to the magistrate to allow that official to determine

probable cause; his action cannot be mere ratification of the bare conclusions of others.: Ibid. See Aguilar v. Texas, supra 378 U.S., at 114-115, 84 S. Ct., at 1513-1514; Giordenello v. United States 357 U.S. 480, 78 S. Ct. 1245, 2 L.Ed2d 1503 (1958); Nathanson v. United States, 290 U.S. 41, 54 S. Ct. 11, 78 L.Ed. 159 (1993)

- United States v. Leon, 468 U.S. 897, at pp. 914-915, 104 S. Ct. 3405 (1984)

Thus, Detective Garza had a duty to provide District court Judge Engle with sufficient information concerning the recency of the time within which the observation was made by the informant. Without that information, a magistrate or issuing Judge would be unable to determine the likelihood that the evidence sought was still present at the premises to be searched. Detective Garza's failure to so provide a timeline, and Judge Engel's failure to deny issuing the warrant in the absence of additional facts, fall outside of the foundational teachings of Aguilar v. Texas, Illinois v. Gates, and United States v. Leon, suprae.

The above fundamental principles were at the core of the dissent below:

If there had been additional facts included in the affidavit from which recency could arguably be inferred, I would accept the magistrate's inferences. I would accept the magistrate's finding of probable cause if the State could offer a cogent explanation of how the affidavit can be read to be a grammatically flawed communication that it was the *informant's observations* that took place "within 48 hours." But neither circumstance exists here.

- Lyons, 160 Wn. App. 100, at 111.

The logical corollary to the issuance of a search warrant which is based upon an insufficient factual showing is the abandonment of neutrality and detachment. It may signal a law enforcement bias, or not. It may signal indifference, or a host of other factors. Whatever those may be, the act of issuance upon that flawed basis is not entitled to deference:

Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his "neutral and detached"

function and not serve merely as a rubber stamp for the police.

- Aguilar v. State of Texas, supra, 378 U.S. 108, 84 S. Ct. 1509 at p.1512 (1964)

Judge Siddoway concluded his dissent on this same pivotal

point: recognition of the role of the neutral magistrate:

I agree with the trial court that given this form of affidavit, the magistrate is forced to assume that the officer must have intended to communicate that the confidential source's observation was recent. This is not the role of a neutral magistrate envisioned by the federal and Washington constitutions.¹

- Lyons, 160 Wn. App. 100, at 111.

II. The State Constitutional Analysis

In State v. Myrick, 102 Wn.2d 506, 688 P.2d 151 (1984)

our state Supreme Court stated:

In a recent series of cases we have recognized that the unique language of Const. art. 1, § 7 provides greater protection to persons under the Washington Constitution than U.S. Const. amend. 4 provides to persons generally. See State v. Jackson, 102

¹ A discussion of the Washington Constitution follows infra.

Wn.2d 432, 688 P.2d 136 (1984); State v. Chrisman, 100 Wn.2d 814, 818, 676 P.2d 419 (1984); State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983); State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982); State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980); State v. Hehman, 90 Wn.2d 45, 578 P.2d 527 (1978).

- Id., at 102 Wn.2d p. 510-511.

The Court in State v. Myrick, supra, went on to state that the federal analysis under the Fourth Amendment can inform the interpretation of the Washington Constitution, and guide the establishment of a hierarchy of values and principles (Id., at 102 Wn.2d p. 510-511):

While we may turn to the Supreme Court's interpretation of the United States Constitution for guidance in establishing a hierarchy of values and principles under the Washington Constitution, we rely, in the final analysis, upon our own legal foundations in determining its scope and effect.

- Id.

It is respectfully submitted that the application of the above federal legal norms and values set forth in part I of this

brief should be adopted in the interpretation of the Washington State Constitution. That adoption is summoned by the additional principle that Article I, section 7 provides “heightened protection” to privacy interests:

In the area of search and seizure we rely upon independent state grounds primarily because of the difference in language between Const. art. 1, § 7 and the Fourth Amendment. Const. art. 1, § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Like the Fourth Amendment, this language requires us to find warrantless searches per se unreasonable. The substantial difference in language also allows us to provide heightened protection. See State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983) for a discussion of the historical significance of this language. See also State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982). This language has thus formed the basis for our refusal to follow United States Supreme Court decisions defining the extent of the freedom from unreasonable searches and seizures.

- State v. Chrisman, 100 Wn.2d 814 , 818, 676 P.2d 419 (1984) (Chrisman 2); accord: State v. Eisfeldt, 163 Wn.2d 628, 185 P.3d 580 (2008)

Notably, in the case of In re Maxfield, 133 Wn.2d 332, 945 P.2d 663 (1997), the conviction was vacated and the case

dismissed for ineffective assistance of counsel. The decisive issue, the application of Wash. Const. Art. I, sect. 7, was raised for the first time in the defendant's personal restraint petition. In granting this extraordinary relief, our Supreme Court stated:

In this case, the PUD had no "authority of law" to contact the Drug Task Force and disclose information about the Maxfields' electric consumption records. The "authority of law" for disclosure of such records may not require the full blown protections of a search warrant; however, some "authority of law" is certainly required. In the absence of any "authority of law," the PUD's action unreasonably disturbed the Maxfields' private affairs.

Remedy

The proper remedy for the violation of the Maxfields' privacy rights in this case is the application of the exclusionary rule. The exclusionary rule in this state has a long history, independent from that of the federal rule. See Sanford E. Pitler, Comment, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 Wash. L. Rev. 459 (1986). When an individual's right to privacy is violated, article I, section 7 requires the application of the exclusionary rule. Boland, 115

Wn.2d at 582; State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); Pitler, *supra*, at 502.

- In re Maxfield, 133 Wn.2d at p. 343-344.

The independent state constitutional analysis addresses two fundamental core elements:

Const. art. 1, § 7 breaks down into two basic components: the disturbance of a person's "private affairs" or the invasion of his or her home, which triggers the protection of the section; and the requirement that "authority of law" justify the governmental disturbance or invasion. The language of Const. art. 1, § 7, strikingly divergent from the Fourth Amendment, appears to be derived from the United States Supreme Court's decision in Boyd v. United States, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524 (1886). See Comment, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 Wash. L. Rev. 459, 521-22 (1986). There, the Court stated that the protective mantle of the constitution extended to "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." Boyd, 116 U.S. at 630. See also In re Pacific Ry. Comm'n, 32 F. 241, 251 (N.D. Cal. 1887).

- Seattle v. McCready, 123 Wn.2d 260 at p. 270-271, 868 P.2d 260 (1994)

Washington caselaw regarding search warrant affidavits in marijuana grow situations is cited and discussed in the Petition for Review (p. 18) and in Respondent's Brief below (pp. 19-32). Two cases merit further discussion, as they address and apply Washington Constitution article I, section 7 in the marijuana grow context. State v. Huft, 106 Wn.2d 206, 720 P.2d 838 (1986), and State v. Maxwell, 114 Wn.2d 761, 791 P.2d 223 (1990). In Huft, supra, a confidential informant provided a report of a marijuana grow at a particular street address, slightly misnaming the individuals involved, and describing their vehicles. Subsequent investigation led to contacting the public utility district to gain the correct spelling of the individuals' names and to obtain power consumption information, both of which were used in the affidavit for a search warrant. The officer also visited the site, observed two vehicles, and saw "an extremely high intensity light emitting from a basement window." Id., at 212. The court held that because of the scanty information establishing that criminal

activity was underfoot, the trial court's probable cause determination should be reversed. The court noted:

We also have held that if an informant's tip fails under either or both prongs, probable cause still may be established by independent police investigation. State v. Jackson, supra at 438. These investigations should point to suspicious activities or indications of criminal activity along the lines suggested by the informant. The investigation is insufficient if it only corroborates innocuous facts. State v. Jackson, supra.

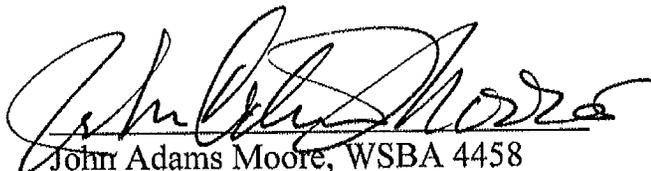
- Id., at 210

Four years later, the Huft decision was relied on by this court in State v. Maxwell, 114 Wn.2d 761, 769, FN 13, 14, 791 P.2d 223 (1990). While the court declined to decide whether or not article I, section 7 prohibited an officer's access to power consumption records (that is, whether or not such records fall into the protected "private affairs"), the court referenced Washington case law and echoed the language of Leon, supra, in its observation that "[a]lthough a magistrate reviewing an affidavit for a search warrant is accorded deference, that deference is not boundless." 114 Wn.2d at 770.

III.
Conclusion

Whether analyzed under the Fourth Amendment or under Article I, section 7 of the Washington Constitution, it is submitted with respect that the dissent below should become the majority opinion of this court. Here, the affidavit was ambiguous as to recency, and absent a few meaningless details, there was no corroborative investigation at all.

Dated this 14th day of October, 2011


John Adams Moore, WSBA 4458
Attorney for Respondent

OFFICE RECEPTIONIST, CLERK

To: Adam Moore
Subject: RE: Lyons v. Washington, No. 85746-6

All received. We treat this as the original. There is no need to mail us another copy. Thanks.

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Adam Moore [<mailto:mooreadamlawfirm@qwestoffice.net>]

Sent: Friday, October 14, 2011 3:32 PM

To: OFFICE RECEPTIONIST, CLERK

Cc: Bausch, Lisa; kevin.eilmes@co.yakima.wa.us

Subject: Lyons v. Washington, No. 85746-6

Attached, please find the scan of Petitioner's Supplemental Brief. Hard copy to the Court follows by mail.

Robin Emmans for Adam Moore