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NO. 64567-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JERRI CARSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Michael T. Downes, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
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A. ARGUMENT IN REPLY

THE SEARCH WARRANT WAS INVALID BECAUSE THE AFFIDAVITS FAILED TO STATE FACTS CONNECTING THE ODOR OF MARIJUANA TO CARSON'S HOUSE.

It is an unremarkable proposition that an affidavit supporting a search warrant must contain specific facts tying the suspicion of the crime to the specific place to be searched. See, e.g., State v. Thein, 138 Wn.2d 133, 147-48, 977 P.2d 582 (1999); State v. Jackson, 111 Wn. App. 660, 677, 46 P.3d 257 (2002) (“Probable cause exists if the supporting affidavit sets forth facts sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and evidence of the crime can be found at the place to be searched”) (citing State v. Cord, 103 Wn.2d 361, 365-66, 693 P.2d 81 (1985)); State v. McReynolds, 104 Wn. App. 560, 570, 17 P.3d 608, 615 (2001).

It is similarly well-established that an officer's mere assertion of personal belief is insufficient to establish the requisite nexus. Thein, 138 Wn.2d at 147; State v. Johnson, 79 Wn. App. 776, 780, 904 P.2d 1188 (1995). The affidavit must state the facts or information forming the basis of the officer's belief so the magistrate can make an independent determination of probable cause. Johnson, 79 Wn. App. at 782-83.

The question before the court in this case is whether the affidavits in this case presented sufficient facts for the magistrate to determine the

required nexus between the offense and the house that was searched. With no information specifically connecting the odor to the house other than the officer's personal assertion that the odor was coming from the house, the probable cause standard is not met.

The State cites numerous cases in which the location of the odor was not at issue. Brief of Respondent at 11, 16, 17 (citing State v. Grande, 164 Wn.2d 135, 187 P.3d 248 (2008); State v. Helmka, 86 Wn.2d 91, 542 P.2d 115 (1975); State v. Cole, 128 Wn.2d 262, 906 P.2d 925 (1995)). Because the sufficiency of the facts tying the odor to the location was not at issue, these cases provide little guidance. For example, in Grande, the odor was coming from a car, the only place in the immediate vicinity that the odor could be coming from. 164 Wn.2d at 138-39. In Cole, police investigated a tip from a reliable citizen informant that directed them to a specific house. Cole, 128 Wn.2d at 267. In Helmka, trained officers observed growing marijuana plants in the window of a specific house. 86 Wn.2d at 91-92. None of these cases provide guidance as to the nature of the facts required to connect an odor that permeates a neighborhood to one house in particular.

Helmka also supports the general proposition that there must be specific facts connecting the odor to the house, or at a minimum, supporting the officer's ability to detect the source of an odor: "Probable cause cannot be made out by conclusory affidavits. Here, the affidavit contained a

statement of the affiant's belief that marijuana was on the premises. That alone would be insufficient. But the affidavit became sufficient when it stated the factual underlying circumstances upon which the belief was premised." 86 Wn.2d at 92.

The State claims officer Eastep's assertion that he smelled marijuana coming from the house was sufficient because he had the expertise to identify the smell of marijuana. Brief of Respondent at 13-14. But Carson does not dispute whether the officer can correctly distinguish marijuana from other odors. The question is the factual basis for his ability to determine the source of that odor, given that it appeared to be prevalent in the entire neighborhood.

The State attempts to squeeze this square peg of a case into the round hole of State v. Johnson, 79 Wn. App. 776, 904 P.2d 1188 (1995). In that case, there was no evidence of a general odor of marijuana wafting around the neighborhood. Id. at 782. On the contrary, the affidavit stated the officers could not detect the smell anywhere other than on the street directly in front of Johnson's house. Id. at 782-83. The court explained the affidavit did not need to specify the officers' exact distance from the house, but held that under the facts of that case, there were sufficient facts to support a reasonable inference connecting the odor to the house. Id.

By contrast to Johnson, the affidavits in this case failed to state sufficient facts supporting a reasonable inference connecting the odor to Carson's house. Unlike in Johnson, in this case, the odor was smelled in many different places in the neighborhood. CP 35, 36, 37. And there was no indication of where the officers were in relation to Carson's house when they smelled the marijuana "coming from the residence." CP 45.

"[W]e never authorize general exploratory searches." Helmka, 86 Wn.2d at 93. Therefore, when the odor of marijuana is detectable in many areas in a neighborhood with numerous homes and other structures, the mere existence of the odor is insufficient to support a search warrant for one individual home. Thein, 138 Wn.2d at 147-48. The supporting affidavit must contain facts, beyond mere personal belief, supporting the officer's assertion that the smell was coming from that house in particular. Id.; Johnson, 79 Wn. App. at 782-83. These facts could include the position of the officer in relation to the home when the odor was smelled, or a reason to exclude other homes in the immediate vicinity. Johnson, 79 Wn. App. at 782-83. In this case, the search warrant did not state the position of the officers when they claimed to smell marijuana coming from Carson's house. CP 45. Aside from the one house that was mistakenly searched previously, there was no reason to exclude any other house in the vicinity as being the source of the odor. On these facts, the search warrant was invalid, the

evidence should have been suppressed, and Carson's conviction should be reversed.

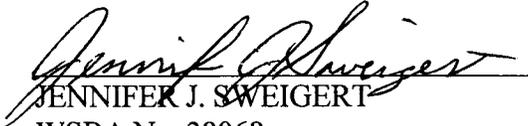
B. CONCLUSION

For the foregoing reasons and the reasons stated in the opening Brief of Appellant, Carson requests this Court reverse her conviction for manufacturing marijuana.

DATED this 6th day of October, 2010.

Respectfully submitted,

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STATE OF WASHINGTON)	
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Respondent,)	
)	
v.)	COA NO. 64567-6-1
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JERRI CARSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6TH DAY OF OCTOBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 6TH DAY OF OCTOBER 2010.

x *Patrick Mayovsky*

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