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NO. 68238-5-I

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

STATE OF WASHINGTON,

Appellant,

v.

ROBIN OSLIN,

Respondent,

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

The Honorable Richard T. Okrent, Judge

2012 MAY 29 PM 4:38
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
ENCL 1

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

When an affidavit for a search warrant is based primarily on an officer smelling what was believed to be marijuana outside a home, but the affidavit fails to state the officer is had training or experience in identifying the smell of growing marijuana, was the trial court correct in concluding there was no probable cause because the affidavit failed to demonstrate the officer's basis of knowledge?

B. STATEMENT OF THE CASE

The Snohomish County prosecutor charged respondent Robin Oslin with one count of manufacturing marijuana. CP 44-45. Before trial, Oslin moved to suppress the evidence on the grounds that the affidavit supporting the search warrant did not establish probable cause. CP 29-41. For purposes of the CrR 3.6 hearing, the parties stipulated to the facts contained in Officer Wantland's affidavit for a search warrant and the administrative letter requesting utilities records. CP 6.

Wantland's affidavit stated that in 2010, Officer Fagerstrom was at Oslin's Everett address investigating non-permitted construction when a Public Utilities District (PUD) employee approached him and told him the residence was using unusually large amounts of power. CP 39. Officer Fagerstrom passed this information on to Wantland, who obtained power records and observed the kilowatt-hour usage was high. CP 39. On

February 4, 2011, Wantland went to the address to discuss the power usage.
CP 39.

The affidavit states he “began to walk up the steps to the house from the sidewalk which is on the east side and smelled the strong odor of fresh growing marijuana.” CP 39. It further states he “went back to the sidewalk and slightly south and again smelled the strong odor of fresh growing marijuana.” CP 39.

Regarding Wantland’s qualifications for identifying the odor of fresh growing marijuana, the affidavit states:

Your affiant has been a police officer for the Everett Police Department since September of 1986. Your affiant has attended the 440 hour Basic Law Enforcement Academy, graduating in 1985.

Your affiant was assigned to the Everett Police Special Investigations unit in June of 1996 to investigate drug crimes. Your affiant attended the 80 hour Drug Enforcement Administrations (DEA) Basic Narcotics Investigator’s Course in 1996. In January 2000, your affiant was assigned to the Snohomish Regional Drug Task Force as a drug detective and continued at that until January of 2010. Your affiant has been formally trained in drug recognition and drug investigations through numerous drug investigator’s conferences, seminars, schools and courses. Your affiant has been involved in hundreds of investigations relating to trafficking, manufacturing, packaging, and/or possession of Marijuana, Cocaine, Methamphetamine, Heroin, LSD, and other controlled substances. Your affiant is familiar with the appearance of these drugs as well as their related paraphernalia and packaging through personal observations and training. Your affiant has investigated and assisted in investigations of numerous marijuana grows, indoor and

outdoor. Your affiant is currently assigned to the Everett Police Department ACT Anti-Crime Team.

CP 40.

Oslin argued this statement did not sufficiently establish Wantland had the necessary training and experience to accurately identify the smell of growing marijuana. CP 30-31. He also argued the PUD employee's tip violated his right to privacy under Article I, Section 7 of the Washington Constitution and Wantland's request for his power records failed to comply with RCW 42.56.335. CP 31-33.

The Snohomish County Superior Court agreed with Oslin that the warrant application was insufficient and suppressed the evidence. CP 7. The court concluded the affidavit must "provide a foundational statement to back up every assertion." CP 7. It reasoned that in previous cases the affiants set forth some statement of experience with either the smell or appearance of marijuana (depending on which sense was used to identify it). CP 7. However, in this case, the court "cannot derive or imply experience with the smell of marijuana from the information set forth in the four corners of the warrant affidavit." CP 7. The court further concluded, "The information in the four corners of the affidavit for the search warrant in this case did not establish that Officer Wantland's statement that he smelled marijuana was founded on the requisite training and experience to rise above

the level of mere personal belief.” CP 7. Without more, the court ruled the affidavit did not establish probable cause to issue a search warrant and suppressed the evidence obtained as a result of execution of the warrant. CP 7. The court did not rule on Oslin’s other grounds for suppression based on the privacy interest in public utility records and violation of RCW 42.56.335.

Finding that suppression of the evidence had the practical effect of terminating the State’s case, the court ordered the case dismissed. CP 4.

The State filed notice of appeal from the order of dismissal. CP 1.

C. ARGUMENT

THE COURT CORRECTLY RULED THERE WAS AN INSUFFICIENT SHOWING OF PROBABLE CAUSE TO SUPPORT ISSUANCE OF THE SEARCH WARRANT.

The federal and state constitutions require search warrants be issued only upon a showing of probable cause. U.S. Const. amend. 4; Const. art. 1, § 7; State v. Patterson, 83 Wn.2d 49, 51-52, 515 P.2d 496 (1973). When a search warrant is issued without probable cause, any evidence gathered should be suppressed. Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); State v. Crawley, 61 Wn. App. 29, 33-34, 808 P.2d 773 (1991). A search warrant affidavit establishes probable cause by setting forth facts from which a reasonable person could conclude the defendant is probably involved in criminal activity. State v. Maxwell, 114 Wn.2d 761, 769, 791 P.2d 222 (1990).

Review of a search warrant's validity is limited to the information the magistrate had when the warrant was issued. State v. Stephens, 37 Wn. App. 76, 80, 678 P.2d 832 (1984). While deference is given to the magistrate issuing the warrant, "that deference is not unlimited." State v. Lyons, ___ Wn.2d ___, ___ P.3d ___, 2012 WL 1436677 at *4 (No. 85746-6, filed April 26, 2012) (citing United States v. Leon, 468 U.S. 897, 915, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)). The magistrate's decision cannot be based on information insufficient to establish probable cause. Id. Review of the superior court's ruling on probable cause at the suppression hearing is generally de novo; however, appellate courts should grant some deference to determinations of historical fact and inferences drawn by the trial court. Ornelas v. United States, 517 U.S. 690, 699-700, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

a. The Affidavit Failed to Show Probable Cause Because It Did Not State the Officer Had Training or Experience in Identifying Marijuana by Smell.

"When an officer bases a probable cause affidavit only on detection of controlled substance odor, a search warrant is justified if that officer's experience and training in detecting such odors is in the search warrant affidavit." State v. Jacobs, 121 Wn. App. 669, 678, 89 P.3d 232 (2004) (emphasis added). The affidavit must set forth a sufficient basis, grounded in the affiant's expertise and experience, for believing the substance smelled

is contraband. See, e.g., State v. Cord, 103 Wn.2d 361, 366, 693 P.2d 81 (1985) (identification of contraband by officer with considerable training and experience was sufficient basis for probable cause finding); State v. Matlock, 27 Wn. App. 152, 155-56, 616 P.2d 684 (1980) (no probable cause where affidavit did not mention officer's training in recognizing marijuana). The officer's particular expertise is critical to such a determination. State v. Johnson, 79 Wn. App. 776, 780, 904 P.2d 1188 (1995); State v. Olson, 73 Wn. App. 348, 356, 869 P.2d 110 (1994).

Wantland's training, as described above, was generic. No statement in the affidavit ties the odor of marijuana to the officer's training or experience. As the trial court noted, nowhere does the affiant declare he knew the odor to be marijuana based on his training and experience. RP 25. Certainly, it would be hyper-technical to reject the affidavit for lack of that specific wording. But there must be some connection drawn between the officer's training or experience and the odor of marijuana. Without that link, there is no way to know, based on the affidavit, whether Wantland had ever smelled marijuana before. The magistrate is left only with the officer's personal belief. There is no reasonable basis for a conclusion Wantland was able to identify growing marijuana by its smell.

No information in the affidavit shows whether Wantland could accurately recognize the smell of growing marijuana. That lack is fatal to a

finding of probable cause. See Matlock, 27 Wn. App. at 155-56; Jacobs, 121 Wn. App. at 678; State v. Holley, 899 N.E.2d 31, 35 (Ind. Ct. App. 2008). In Matlock, a police officer stated he had visited a house across the street from Matlock's. As stated in the affidavit, from that vantage point, he

noticed some plants growing [at Matlock's house] which appeared to be Marijuana, a Controlled Substance; That such plants were in plain view and were noticed when the informant took a walk around school property, that it has been reported that gatherings have occurred [at Matlock's house] where participants smoked what was term [sic] by the participants as "roaches".

That [Matlock] has on other occasions been reported to have sold Marijuana.

That Stan Matlock's two children have admitted watering plants in the attic of the above described premises.

27 Wn. App. at 154. Matlock argued the affidavit failed to state the observing officer's background or training regarding his ability to recognize marijuana. This Court agreed, holding:

the fatal flaw in this affidavit is the lack of any information to support [the officer's] claim the plants he saw were marijuana. See Aguilar v. Texas, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509 (1964). Absent some showing that [the officer] had the necessary skill, training, or experience to identify marijuana plants on sight, the affidavit was insufficient to establish probable cause for the issuance of a warrant.

27 Wn. App. at 155-56. This Court found the affidavit insufficient and reversed Matlock's conviction. The Indiana Court of Appeals came to the same conclusion when the affidavit showed the officer had been shown raw

marijuana in a seminar and had encountered it in the course of his duties, but there was no indication in the affidavit that he was qualified to recognize it by smell. Holley, 899 N.E.2d at 35.

In State v. Vonhof, by contrast, the basis of knowledge was properly established when the affidavit stated the county property appraiser had smelled the distinct odor of marijuana at least 10 times before. State v. Vonhof, 51 Wn. App. 33, 41-42, 751 P.2d 1221 (1988). In that case, the appraiser entered the defendant's property to assess its value, smelled growing marijuana coming from an air vent, and gave a statement to the sheriff. Id. at 34-35. The sheriff's affidavit included the appraiser's statement, where the appraiser

said he had smelled the strong odor of marijuana. ... It was a strong odor that smells like a skunky, musty odor. I have smoked & been around marijuana in the past years & around the type that is grown indoors & is highly cultivated & that is the type of odor I smelled coming from this area of the building. I have smelled mature &/or mature growing marijuana in the past on at least 10 occasions [sic]. It has a very distinct odor.

Id. at 35. The magistrate found the appraiser's statement established probable cause. This court affirmed, reasoning that the appraiser's

belief that what he smelled was growing marijuana was presented to the magistrate as more than a mere personal belief. He specifically described the odor, and he stated he had smelled mature or growing marijuana at least 10 times before.

51 Wn. App. at 41-42.

In other cases where the officers' qualifications have been found sufficient, there is at least some information in the affidavit indicating actual personal contact as a basis for the officer's familiarity with the odor of marijuana. See, e.g., State v. Cole, 128 Wn.2d 262, 289, 906 P.2d 925 (1995) (affidavit stated officer involved in investigating marijuana grow operations and was familiar with the smell); State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981) (officer had seen marijuana plants and crushed leaves regularly for the past eight years); State v. Johnson, 79 Wn. App. 776, 780-81, 904 P.2d 1188 (1995) (officer had personally assisted in at least 30 search warrants involving growing marijuana and stated he was familiar with the characteristic odor); State v. Olson, 74 Wn. App. 126, 130-31, 872 P.2d 64 (1994) (affidavit included information that officer had personally handled marijuana); State v. Olson, 73 Wn. App. 348, 356, 869 P.2d 110 (1994) (officers familiar with growing marijuana from participating in seizures of it); State v. Solberg, 66 Wn. App. 66, 79, 831 P.2d 754 (1992) (affidavit stated officer recognized distinctive odor of marijuana from prior arrests and controlled substance training), rev'd on other grounds by 122 Wn.2d 688 (1994); State v. Huff, 64 Wn. App. 641, 648, 826 P.2d 698 (1992) (officer testified he recognized distinctive smell of methamphetamine based on his training and 50-75 contacts with it in his career); State v. Remboldt, 64 Wn. App. 505, 506-07, 827 P.2d 282 (1992) (officer recognized smell of

marijuana from his training and experience); State v. Petty, 48 Wn. App. 615, 617, 740 P.2d 879 (1987) (affidavit stated officer was familiar with marijuana in its growing state and he had been present for executions of 50 or more search warrants where marijuana was grown); State v. Compton, 13 Wn. App. 863, 864, 538 P.2d 861 (1975) (officer testified he was trained to identify controlled substances including raw and burning marijuana and was familiar with the odor).

Wantland's affidavit, by contrast, contains no mention of personally ever smelling or even handling growing marijuana. CP 39-41. Even looking elsewhere in the affidavit, the officer does not specifically refer to the odor or smell or aroma of growing marijuana. The affidavit does not say the officer was trained in recognizing the smell. CP 39-41. The specific references to training refer to only appearance and packaging, information that could certainly be obtained without learning to recognize the odor. CP 40. The vague references to involvement in drug cases do not indicate whether he was personally present and actually smelled growing marijuana or instead assisted in the investigation in other ways such as by investigating power records. CP 39-40. In fact, the discussion of his actual experiences focuses on power usage. CP 39.

The State argues that one can infer training and experience regarding the smell of growing marijuana from the officer's more general statements of

his experience and training regarding marijuana grow operations. Brief of Respondent at 11. But, as the Washington Supreme Court recently declared, “[A]n inference alone does not provide a substantial basis for determining probable cause.” State v. Lyons, ___ Wn.2d ___, ___ P.3d ___, 2012 WL 1436677 at *4 (No. 85746-6, filed April 26, 2012).

In Lyons, the affidavit stated, “Within the last 48 hours a reliable and confidential source of information (CS) contacted [narcotics] Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address.” Id. The State argued one could infer the source’s information was contemporaneous with the tip. Id. But the court held that inference was insufficient to show the information was recent enough to constitute probable cause. Id. On the contrary, the court concluded, “[T]his affidavit provides no facts to support an inference of recency.” Id. Therefore, the court concluded the trial court did not err in suppressing the evidence. Id. at *7.

Here, the trial court also correctly suppressed the evidence. The affidavit contains no facts showing the officer had the training or experience to recognize the smell of growing marijuana. CP 39-41. The mere possibility that one might infer such experience is insufficient to show probable cause when there are no specific supporting facts in the affidavit. Lyons, ___ Wn.2d at ___, 2012 WL 1436677 at *4.

b. The Search Warrant Was Additionally Invalid Because It Relied on Power Records Obtained in Violation of RCW 42.56.355.

This Court should also affirm the trial court's ruling because the search warrant affidavit included information from public utility records obtained in violation of the Public Records Act. See Maxwell, 114 Wn.2d at 768-69. RCW 42.56.355 governs disclosure of public utilities records to law enforcement. It requires a written statement that "the particular person to whom the records pertain has committed a crime." RCW 42.56.355. Evidence obtained in violation of this statute may not be considered as part of a search warrant affidavit. RCW 42.56.355; Maxwell, 114 Wn.2d at 768-69.

In Maxwell, the officer circumvented the statutory requirements by telephoning the utility and requesting the information. 114 Wn.2d at 768. Former RCW 42.17.314, like the current statute RCW 42.56.355, required a written statement and declared information obtained in violation of this provision to be "inadmissible in any criminal proceeding." RCW 42.56.355; Maxwell, 114 Wn.2d at 768. The court rejected the Court of Appeals' conclusion the search warrant affidavit was not a criminal proceeding. Maxwell, 114 Wn.2d at 768. "Issuance of a search warrant is part of criminal process and involves a matter of procedure. Logically, then, application for and issuance of a search warrant is a "criminal proceeding."

Id. (citations omitted). The court held the magistrate should not have considered the information illegally obtained from the utility company. Id. at 769.

The officer in this case also violated the statute in obtaining power use records pertaining to Oslin's house. To prevent fishing expeditions, the statute requires the police provide the utility with a written statement that it suspects "the particular person" to whom the records pertain is involved in criminal activity. RCW 42.56.355; State v. Maxfield, 125 Wn.2d 378, 393, 886 P.2d 123 (1994). But Wantland's request failed to identify any specific person. CP 37. It merely identified an address. CP 37. Therefore, the power use information contained in the affidavit was obtained illegally.

This court should reject any argument that the statute was substantially complied with because no case has held that anything less than strict compliance is sufficient. Cf. State v. Cole, 128 Wn.2d 262, 289-90, 906 P.2d 925 (1995); State v. Rakosky, 79 Wn. App. 229, 237, 901 P.2d 364 (1995). In Cole, the court held that a public utility may release power records when presented with a search warrant issued by a neutral magistrate upon showing of probable cause as an alternative to compliance with former RCW 42.17.314 because the search warrant requires an even greater showing of cause than the statute. 128 Wn.2d at 289-90. In Rakosky, the court held a second utility record request did not violate RCW 42.17.314

because it was a continuation of the proper first request. Rakosky, 79 Wn. App. at 237. Here, there was no greater showing of cause and no previous proper request stating reasonable suspicion relating to the person, rather than the address.

Under Maxwell, the magistrate cannot consider this illegally obtained information in determining probable cause. 114 Wn.2d at 769. When the power use information is properly stricken from the affidavit, the only remaining information is the odor, which is insufficient due to the lack of training or experience discussed above. This Court can affirm the trial court's ruling suppressing the evidence on the alternative grounds that the public utility records were included in the affidavit in violation of RCW 42.56.355. See State v. Jones, 71 Wn. App. 798, 824, 863 P.2d 85 (1993) (trial court's exclusion of evidence may be upheld on any proper basis).

The power records must be stricken from the affidavit because they were obtained in violation of RCW 42.56.355. The only remaining support for probable cause was the odor, which is insufficient because the affidavit does not show the officer was qualified to identify the odor of fresh growing marijuana. Therefore, the search warrant was invalid. The Superior Court correctly excluded the evidence found as a result of the search warrant must be suppressed. CP 6-7. Wong Sun, 371 U.S. at 484-85. Because the

evidence seized pursuant to the search warrant comprised the sole basis for the prosecution, the Superior Court correctly dismissed the charge.

D. CONCLUSION

The Superior Court correctly concluded the affidavit did not set forth sufficient information to support a finding of probable cause. Oslin asks this Court to affirm the rulings suppressing the evidence and dismissing the case. Alternatively, Oslin asks this Court to remand for consideration of the other stated grounds for suppression.

DATED this 29th day of May, 2012.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68238-5-1
)	
ROBIN OSLIN,)	
)	
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 29TH DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

- ROBIN OSLIN
720 E. MARINE VIEW DRIVE
EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF MAY 2012.

x *Patrick Mayovsky*

2012 MAY 29 PM 4:38
COURT OF APPEALS DIV 1
STATE OF WASHINGTON