69357-3

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CASE #: 69357-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ARON CLARK HOVANDER,

Appellant.

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

The Honorable Steven J. Mura

BRIEF OF APPELLANT

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7. Whether the search warrant was defective because law enforcement failed to establish that the suspected grow operation was not a legal, medical grow operation; and whether Mr. Hovander can raise this argument not presented at trial?

C. STATEMENT OF THE CASE

This is an appeal from the decision of the Whatcom County Superior Court upholding a search of Aron Hovander's Milk Barn located at 5268 Olson Road, in Ferndale, Washington, in which numerous growing marijuana plants were discovered.

Aron Hovander lives at 5206 Olson Road in Ferndale, Washington. Mr. Hovander owns property down the street, including a Milk Barn located at 5268 Olson Road.

This case involves three applications for search warrants. The search warrants were authorized on October 12, 2011 and October 13, 2011. The first two search warrants authorized the search of the Milk Barn property, and the third warrant authorized the search of Mr. Hovander's adjoining property at 5206 Olson Road, his home. Transcripts of the testimony presented in the three search warrants are attached to this brief as Appendices, 1, 2 and 3.

Whatcom County Deputy Sheriff Anthony Paz is one of the three deputies involved in the Crime Interdiction Team, which is an adjunct to the Northwest Regional Drug Task Force. VRP April 17, 2012, page 84, lines 1-12.

1. The First Search Warrant

On Friday, October 7, 2011, Whatcom County Deputy Sheriffs Paz and Taddonio were situated along Olson Road in Ferndale, Washington. They detected the odor of growing marijuana and believed it to be coming from the defendant's Milk Barn. Transcript of First Search Warrant 10/12/11 search warrant, page 4, top paragraph.

After dark on Tuesday, October 11, 2011, Deputy Paz returned to the same location with Deputy Sheriff Bonsen. From a location along Olson Road where there was a break in the tree line, the two deputies scaled a fence and walked approximately 376 feet north to the defendant's

Milk Barn. VRP April 17, 2012, page 70, line 5. In the process, the two officers climbed over two additional fences in order to approach the exterior of the Milk Barn. VRP April 17, 2012, page 32, line 17-20. When the deputies got to the Milk Barn, they were able to confirm the odor of growing marijuana coming from vents in the barn. Transcript of First Search Warrant 10/12/11 search warrant, page 5. With this information, Deputy Paz applied for and secured the first search warrant.

But before executing the search warrant, the deputies informed Craig Chambers, the lead drug prosecutor, that they had climbed fences during the previous night in order to determine that the Milk Barn did contain growing marijuana. Mr. Chambers advised the officers to not execute the warrant as it stood, but instead to return to the public road and to keep sniffing. VRP April 17, 2012, page 33, Line 15 to 25. Mr. Chambers remonstrated Deputy Paz about his trespass, and told him not to trespass in the future. VRP April 17, 2012, page 57, Line 10-13.

2. The Second Search Warrant

Deputy Paz then returned to Olson Road. From the same vantage point, at the break in the tree line south of the Milk Barn, Deputy Paz waited about 20 minutes. Deputy Paz testified that at that time he was again able to smell the odor of growing marijuana. The wind was blowing

from the north to the south. Transcript Second Search Warrant 10/13/11, page 3, 4; VRP April 17, 2012, page 44, lines 11-19.

Based upon this information, Deputy Paz secured a second search warrant. In executing the warrant, Deputy Paz and a team of officers first stopped at Mr. Hovander's residence at 5206 Olson Road. The officers wanted Mr. Hovander present when they searched the Milk Barn Property. VRP April 17, 2012, page 39, Line 7 to 24. In order to get to Mr. Hovander's residence, Deputy Paz and the other officers scaled a chain-locked fence marked with a "No Trespassing" sign. VRP April 17, 2012, page 37, Line 11 to 25; page 38. After climbing the fence, the officers approached Mr. Hovander's residence. Deputy Paz was able to smell the odor of growing marijuana coming from inside Mr. Hovander's house. Deputy Paz questioned Mr. Hovander about the smell. Mr. Hovander responded that he was legally growing medical marijuana and had 30 plants in the house. VRP April 17, 2012, page 38, 39. Deputy Paz and the officers continued on to execute the second warrant. They searched the Milk Barn and discovered growing marijuana.

3. The Third Search Warrant

Deputy Paz acquired a third search warrant for Mr. Hovander's residence. In the third search warrant application, Deputy Paz failed to disclose several facts. First, Deputy Paz didn't mention that he and the

other officers had scaled the locked gate marked "No Trespassing." Second, Deputy Paz failed to disclose that he had walked some distance from the locked gate to the Hovander residence, and that only in the process of talking with Aron Hovander, who had come out of the house, detected the smell of growing marijuana coming from inside. VRP April 17, 2012, page 33, Line 15 to 25, Page 38, lines 13-21. Third, Deputy Paz did not disclose that Mr. Hovander had explained himself to be a medical marijuana provider, and that the 30 plants he claimed to have inside the house were for medical purposes. VRP April 17, 2012, page 39, lines 7-25, page 40, lines 1-12. Though Deputy Paz failed to divulge any of this information in his testimony for the third search warrant application, his written report confirms it, VRP April 17, 2012, page 39, 40, Line 1 to 15. Deputy Paz executed the search warrant and discovered growing marijuana plants inside Mr. Hovander's residence.

4. Summary of The Search Warrants

The State conceded at the outset that the third search warrant for the Hovander residence should be suppressed. VRP April 17, 2012, page 3 lines 9-14; VRP, page 121, lines 6-8. Mr. Hovander had argued that under State v. Ross, 141 Wn. 2d 304, 4 P.3d 130 (2000), Deputy Paz's illegal entry onto Mr. Hovander's property required that Deputy Paz's testimony concerning the marijuana smell coming out of Mr. Hovander's

residence should be excised from the search warrant affidavit. Mr. Hovander argued that this compelled a complete suppression of the fruits of the search of the Hovander residence.

The State also abandoned any effort to justify the search of the Milk Barn based upon information obtained by trespassing officers. The State conceded that the search warrants could not be upheld on any information acquired by the deputies after they scaled the fence onto the Hovander property. VRP April 17, 2012, page 121, lines 6-8.

5. Review of Suppression Hearings

The Superior Court convened an evidentiary hearing on April 17-18, 2012. Several police officers and the defendant testified.

Mr. Hovander objected to the warrants. First, Mr. Hovander objected under the contravention rule of Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), because Deputy Paz, the search warrant affiant, should have disclosed that he knew the Milk Barn to be the site of a medical marijuana grow operation, as it had been investigated by the Sheriff's Department a year prior. Second, Mr. Hovander objected to the warrants under Franks, because Deputy Paz recklessly and inaccurately testified that the nearest building to the Milk Barn was a house about three quarters of a mile north; actually, another building, Mr. Hovander's residence, was only 197 feet to the south of the

location where Paz was positioned at the time he smelled the odor of growing marijuana. Third, Mr. Hovander objected to the warrants under Franks because Deputy Paz failed to testify that he was a considerable distance away (376 feet) from the Milk Barn when he detected an odor of growing marijuana coming from inside. See Declaration of Aron Hovander, CP 62-66; VRP April 17, 2012 page 70, lines 1-16.

The court entered written findings denying the motion to suppress. A copy of the Superior Court findings is attached to this brief as Appendix 4. First, the court found that Deputy Paz withheld no relevant information, because whether Mr. Hovander's property was the site of a medical marijuana grow operation was not relevant under State v. Fry, 168 Wn. 2d 1, 228 P.3d 1 (2010). Second, the court found that there was no harm in Deputy Paz's failure to disclose a possible alternative source of the marijuana smell. Deputy Paz had testified that the closest alternative source of the marijuana smell was three quarters of a mile to the North of where he stood; Hovander's residence was only 197 feet away from where he stood. The court reasoned that there was no need for Deputy Paz to disclose this fact because at the time the wind was blowing from the North to the South, so the odor must have been coming from the North. VRP April 17, 2012, page 70, 12-15. Third, the court found that Deputy Paz's expertise in detecting the odor of growing marijuana was adequate to

support his conclusion that the Milk Barn was the source of the odor, even though he was standing a considerable distance – more than a football field away – from the Milk Barn when he detected the odor. VRP April 17, 2012, page 136, line 11; page 137, lines 6-23. Mr. Hovander argued that Deputy Paz lacked the expertise to identify the odor of marijuana from such a distance, and that regardless, his expertise did not give him the capacity to identify one specific structure among several as the source of the odor. Mr. Hovander also argued that Deputy Paz failed to provide to the magistrate the necessary information because he did not mention the presence and location of other buildings in the area. Mr. Hovander filed a declaration setting out a fuller description of the many houses and buildings in the area, and testified at the suppression hearing to the same effect. CP 62-66, Declaration of Aron Hovander.

6. Deputy Paz's Testimony At The Suppression Hearing

Deputy Paz's testimony before Judge Mura at the suppression hearing on April 17-18, 2012 was different from the testimony he gave to secure the search warrants to search Mr. Hovander's Milk Barn.

To secure the first search warrant for the Milk Barn, Deputy Paz testified to the search warrant magistrate that he had been at a location along Olson Road on October 7, 2011, but gave no details. 10/12/11 at 3:30 pm Search Warrant Application, page 5. Deputy Paz returned to

Olson Road on Tuesday, October 11, 2011 to check again for the odor of marijuana. His vantage point was then a break in the tree line along Olson Road, 376 feet south of the Milk Barn.

The next day, to secure the second search warrant for the Milk Barn, Deputy Paz testified to the search warrant magistrate that he had on two occasions detected the odor of growing marijuana in the vicinity of Mr. Hovander's property, and that he attributed the odor to the Milk Barn:

> The first occasion was last Friday and it was from exact same spot that I could smell it from last night. That was at nighttime, and the wind was blowing in the same direction from north to south. That was when Deputy Taddonio was with me. And then on this past Tuesday night, again in the same location on Olson Road, we could smell it again, and then last night.

Search Warrant Application 10/13/11 at 11:45 am.

In this statement to the search warrant magistrate, Deputy Paz confirmed that he had detected the odor of growing marijuana multiple times from the same vantage point – a break in the tree line along Olson Road to the south of the Milk Barn.

However, at the suppression hearing six months later, Deputy Paz had a different recollection as to where he stood on the night of Friday, October 7, 2011. In front of Judge Mura, Deputy Paz testified that on that night, he smelled marijuana when he stepped out of his vehicle on Olson Road near the driveway leading east to the Milk Barn. To Judge Mura,

Deputy Paz testified that he was on duty and driving a marked patrol unit. He testified that the wind was blowing from east to west and the Milk Barn and other buildings on the defendant's property were located to the east of his position. See Findings 1, VRP page 52, lines 8-11; page 58, lines 7-10. But Deputy Paz also testified that the wind was blowing from the west. See VRP page 61, lines 22-24. The Superior Court adopted as a finding that the wind was blowing from the east to west; Findings 1, line 35-37. But in his oral opinion upon which the findings are based, Judge Mura stated that the wind was blowing from the west, see VRP page 138, lines 8, lines 22-24.

At the conclusion of the suppression hearing, Judge Mura again questioned Deputy Paz. He provided Deputy Paz with a copy of the second search warrant application, in which Deputy Paz testified that each time he smelled marijuana it was from the "exact same spot." Judge Mura asked Deputy Paz to clarify the disparate testimony he had provided in the second application for a search warrant, and the testimony he had just given before the Superior Court. Deputy Paz again testified that on Friday, October 7, 2011, he was at the intersection of Olson Road and the driveway leading east to the Milk Barn. He testified that on October 11, and October 12, 2011, he was in a different location, at the break in the tree line along Olson Road; see VRP page 96, lines 19-23.

Deputy Paz's explanation was that it was "maybe a mistake in the transcript." VRP page 99, lines 7-21.

The audiotapes of the testimony Deputy Paz gave before the search warrant magistrate have been included in the record. CP 86-99. The tapes confirm that no mistake was made in the transcription, and as a result, Deputy Paz's testimony at the suppression hearing as to where he was when he smelled marijuana on October 7, 2011 is inconsistent with his testimony before the search warrant magistrate.

7. Judge Mura's Findings

At the conclusion of the suppression hearing, the court entered Findings which have been attached to this brief as Appendix 4. Finding of Fact, No. 1 provides:

> On October 7, 2011 Deputy Paz was on Olson Road at the end of the driveway leading to the defendant's milking parlor at 5968 Olson Road. The wind was blowing from east to west and the milking parlor and other buildings on defendant's property were located to the east of his position. Deputy Taddonnio was also in the immediate area and detected the odor of growing marijuana. The detection of the odor on this occasion, by itself, would not have provided probable cause for the search of the milking parlor because of the other buildings located upwind of the deputy's location. When Deputy Paz provided information in support of the search on October 13, 2011 concerning these events, the court finds that he misspoke as to his location and is satisfied that the odor was detected at the entrance to the milking parlor driveway on Olson Road.

In Finding of Fact 1, the court reformed the second search warrant application. The court replaced the testimony that Deputy Paz provided to the search warrant magistrate as to his location on October 7, 2011, with Deputy Paz's in-court testimony given at the suppression hearing six months later.

That Judge Mura decided to replace and improve this testimony was critical to the resolution of the issue of suppression. This is made clear in Finding of Fact 4, which provides:

> This is a rural area and the likely source of growing marijuana odor can be isolated by triangulating the wind direction and location of the deputy at the times the odor was detected from the Olson Road public right of way. The location where the deputy detected the odor on October 7 and 12th, given the wind direction at each time, satisfies the court that the deputy's identification of the milking parlor was its source was both reasonable and reliable. *The smelling standing alone from one location would not justify a warrant but the combined smell from different locations did.*

Finding of Fact 4, emphasis added.

Finding of Fact 4 demonstrates that the search warrant would not have survived had Deputy Paz only been standing in one location, which is what his search warrant testimony provides.

8. Motion for Reconsideration

On June 12, 2012, Mr. Hovander moved for reconsideration. First, Mr. Hovander argued that in reviewing the sufficiency of probable cause,

the court was limited to looking within the four corners of the search warrant. Mr. Hovander argued that the court erred when it considered Deputy Paz's testimony at the suppression hearing, because this testimony directly contradicted the testimony Deputy Paz gave in front of the search warrant magistrate. Thus the court went outside of the four corners.

Second, Mr. Hovander argued that the court's own Finding of Fact 4 established that a single reference point alone was insufficient to justify the warrant. VRP June 12, 2012, page 6, 13 to 25. Mr. Hovander argued that when reviewing the evidence as presented within the search warrant's four corners, Deputy Paz only established one reference point - the break in the tree line along Olson Road.

The court denied the motion for reconsideration:

> Bottom line really is this. If Judge Grant had been given all of the information available at least to this court at the time of the evidentiary hearing, I think a reasonable magistrate would have inquired further before issuing the warrant. Had the magistrate inquired further before issuing the warrant, and all of the additional facts had come up, the warrant would have been issued. That is the bottom line. The information given to the magistrate at the time was incomplete as far as all the available facts. But had it been complete, the warrant would have issued. That's really how I see it.
> So I think I feel compelled—because within the four corners of the warrant, just looking at that without having knowledge of all these additional facts, I can't say that based upon what the magistrate had that the warrant was invalid and the hearing was to develop all of the facts to determine if there were false or misleading statements

being made to the magistrate and I just didn't find any under the facts of the case.

So I hope I don't get reversed months but won't be around to see it. Really I feel under the law, Mr. Johnston, I feel compelled to deny the motion to reconsider. But it will be a fun one for the Court of Appeals to hear. VRP June 12, 2012 pages 16, lines 8-25; page 17, lines 1-7.

D. ARGUMENT

At the outset of the case, the State conceded that evidence obtained by the third search warrant was inadmissible. In addition, the State conceded that any information acquired after the trespass by Deputy Paz and Deputy Bonsen should also be excluded. So for the purpose of analyzing the validity of the three search warrants, this Court should consider *only* the testimony as presented in the first two applications. And this court should not consider any of the information acquired by Deputy Paz and Bonsen after they scaled the fence on October 11, 2011.

1. If The Attenuation Doctrine And The Independent Source Doctrine Violate Article 1, Section 7 Of The Washington State Constitution, Then The Search Warrants Collapse.

The first issue pertaining to Mr. Hovander's assignment of errors is whether Article 1, Section 7 of the Washington State Constitution recognizes any longer the attenuation doctrine and the independent source doctrine, or whether they can no longer be supported under state law. The attenuation and independent source doctrines are rules created by the

United States Supreme Court in its application of the Fourth Amendment of the Constitution of the United States.

Mr. Hovander asserts that the attenuation doctrine and the independent source doctrine are prohibited under Article 1, Section 7 of the Washington State Constitution in the same manner as was the inevitable discovery rule, which was abrogated in State v. Winterstein, 167 Wn. 2d 620, 220 P.3d 1226 (2009).

This issue is currently before the state supreme court in State v. Smith, 173 Wash. 2d 1034, 277 P.3d 669 (2012). In Smith, police officers randomly inspected registry lists at motels without the benefit of a warrant, a practice the court had found to be in violation of Article 1, Section 7 in State v. Jorden, 160 Wash. 2d 121, 156 P.3d 893 (2007). After inspecting the motel records, the police determined one of the guests had an arrest warrant outstanding. The police went to his motel room, knocked on the door and asked the person who opened the door, Christopher Smith, to step outside. They arrested him. But before the police left the scene, a disoriented woman came out of the motel room limping and sobbing. The police reacted and entered the room. The female occupant told the police that she had been tied up, and that her twelve-year-old daughter, who was also present in the motel room, had been sexually assaulted. The police entered the room without a warrant,

searched it and seized items of evidentiary value. The state conceded that the police entry into the room was unlawful. All evidence removed from the room was suppressed, but all other evidence, including the testimony of the victim witnesses, was admissible because the trial court found that the victim would have eventually called the police. The Court of Appeals for Division 2, with one judge dissenting, affirmed the conviction. State v. Smith, 165 Wn. App. 296.

In his dissent, Judge Armstrong wrote that the attenuation doctrine and its close cousin, the independent source doctrine, are incompatible with Article 1, Section 7 in light of State v. Afana, 169 Wn. 2d 169, 179–81, 233 P.3d 879 (2010), and State v. Winterstein, 167 Wn. 2d 620, 631–36, 220 P.3d 1226 (2009).

Smith was argued before the Washington Supreme Court in September of 2013. In the event the Washington Supreme Court abrogates the attenuation doctrine and the independent source doctrine, the resolution of this case may be dictated by considering only the information in the First Search warrant up to the point of the illegal trespass. Such a drastic constriction of evidence available to the State would ensure the search warrant's collapse. Counsel notes this position in the event of the elimination or limit of the attenuation and independent source doctrines.

2. The Evidence Acquired Outside Of The Unlawful Trespass As Contained In The Search Warrant Testimony Does Not Establish Probable Cause. There Was Insufficient Foundation Presented To Credit Deputy Paz's Conclusion That The Source Of The Odor Of Growing Marijuana Was The Defendant's Milk Barn.

The adequacy of a search warrant must be determined by an analysis of the evidence and testimony contained within the four corners of the search warrant. State v. Neth, 165 Wn. 2d 177, 182, 196 P.3d 658, 661 (2008). See also State v. Murray, 110 Wn. 2d 706, 709–10, 757 P.2d 487 (1988); Wong Sun v. United States, 371 U.S. 471, 481–82, 83 S. Ct. 407, 414, 9 L. Ed. 2d 441 (1963).

The Superior Court erred in considering additional testimony to "complete" the testimony originally presented. The Superior Court should have only considered the testimony as presented to the search warrant magistrate, Whatcom County District Court Judge David Grant. The Superior Court erred in failing to modify its findings after the defendant filed for reconsideration, even though in the Court's final comment it appears to admit that the Four Corners Rule of search warrant interpretation should apply.

The Findings of Fact by the Superior Court rely on evidence that was first presented at the suppression hearing itself. The findings propose that Deputy Paz was able to "triangulate" and identify the Milk Barn as

the source of the odor of growing marijuana because Deputy Paz had smelled marijuana at two different times and two different locations. This is not what happened. Deputy Paz was able to identify the Milk Barn as the location of the smell of growing marijuana because he trespassed, not because he "triangulated." Deputy's Paz's testimony before the search warrant magistrate does not support the Superior Court's triangulation theory. This was an improper reformation of the search warrant. See Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971).

Deputy Paz provided to the search warrant magistrate insufficient evidence of his special expertise to support the conclusion that he could determine, from a distance of 376 feet, the source of the smell of growing marijuana.

In the transcript of the First Search Warrant, 10/12/11, page 2 bottom, page 3 top, Deputy Paz was asked:

> Q. And do you have experience with that (odor of growing marijuana) or training?
> A. I do.
> Q. Tell us about that?
> A. I have been involved with well over hundred marijuana-growing investigations. Investigations that were started by the Drug Task Force, Drug Administration and through my normal duties through the Criminal and Addiction Team.
> Q. Okay was that is where you learned about the odors of marijuana?
> A. Yes.

As a prerequisite to any determination of probable cause, the deputies must establish their credentials or expertise in detecting the source of the odor of growing marijuana coming from closed structures considerable distances away. Here, the deputies did not explain how they were able to pinpoint the Milk Barn, a specific structure among several other buildings, as the location of the source of an odor of growing marijuana, from a considerable distance away.

In applying for the Second Search Warrant, 10/13/11, page 3, Deputy Paz was questioned again:

> Q. Can you also indicate the odor of growing marijuana? Is there a difference between growing marijuana versus the odor of burnt marijuana?
> A. Yes there is.
> Q. And you have training experience with the difference between growing marijuana and burned marijuana?
> A. My initial experience comes from a test where they let you smell packaged marijuana, dried marijuana, and also a new class on marijuana grows. And I have extensive field experience with marijuana grows. Being able to recognize when it is an actual grow and when they are just drying marijuana or smoking marijuana.
> Q. You have told yesterday that you were involved in over 100 cases of growing marijuana.
> A. At least, at least.

In determining the sufficiency of probable cause, a court must take into account the experience and expertise of an officer. State v. Remboldt 64 Wn. App. 505, 510, 827 P.2d 282 (1992). What constitutes probable

cause is viewed from the vantage point of a reasonably prudent and cautious police officer. "An assertion that an officer smelled marijuana must be presented to an issuing magistrate 'as more than a mere personal belief.'" Remboldt quoting State v. Vonhof, 51 Wn. App. 33, 41, 751 P.2d 1221, *review denied*, 111 Wash.2d 1010 (1988), *cert. denied*, 488 U.S. 1008, 109 S.Ct. 790, 102 L.Ed.2d 782 (1989). Thus the expertise of the particular officer is critical.

Whether the expertise of the officer is sufficient to support the finding of probable cause varies from case to case. In Remboldt, the officer caught a whiff of the smell of marijuana just as the door on a front porch was being closed. Remboldt, 64 Wn. App. at 506-507. In State v. Boethin, 126 Wn. App. 695, 109 P.3d 461 (2005), a police officer went to the premises in the attempt to smell marijuana, and he put his nose within two inches of the garage door seam, sniffed, and smelled marijuana.

The facts of this case present an extreme example of a court crediting the expertise of an officer out of all proportion to the evidence actually presented. Here, all that was presented to the search warrant magistrate was that Deputy Paz was located some undefined distance from the Milk Barn when he smelled the marijuana. Deputy Paz suggested that the Milk Barn and Mr. Hovander's office were fairly close to Olson Road,

where he stood at the time. But the reality is that at a break in the tree line on Olson Road is 376 feet away, more than the length of a football field.

In State v. Johnson, 79 Wn. App. 776, 904 P.2d 1188 (1995), Federal Drug Enforcement Administration agents asserted that they smelled marijuana from the street in front of the defendant's house. Though the agents had not specified the distance between where they stood in the street and the defendant's house, the court upheld the warrant, explaining that "the agents here did provide some idea of their location when they stated they smelled the odor in front of the home while in the street." Johnson, 79 Wn. App. at 783.

But this court would have to substantially extend the Johnson analysis in order to uphold the warrant here. It requires considerable expertise to smell marijuana from outside a closed structure a great distance away:

> Had they been inside the residence, in a doorway, near an air vent or close to the building when they detected the smell of growing or freshly harvested marijuana, I would agree their observations would justify issuance of a search warrant. Under such circumstances, it would be reasonable to conclude the odor was emanating from Mr. Johnson's house and that a grow operation would be found within. That was not the case here, however.

Johnson, 79 Wn. App at 783, (SCHULTHEIS, J., dissenting).

The reasoning of the dissent in Johnson better suits the facts here

presented, because the search warrants contain "no information from which one can draw a commonsense inference that [the officers] were able to determine the source of the smell from their location. Johnson, 79 Wn. App at 786. This is demonstrated by the Superior Court's presentation of the theory of "triangulation." The triangulation theory was entirely invented by the Superior Court. It was not the investigative strategy pursued by Deputy Paz at the time of the investigation, and it was not supported by the testimony he provided to the search warrant magistrate. Instead, the triangulation theory only works if the court accepts evidence presented six months after the searches took place, to the exclusion of actual testimony Deputy Paz gave to the search warrant magistrate at the time of the investigation. A theory of probable cause entirely contingent upon evidence not presented to the search warrant magistrate cannot stand. See State v. Neth, 165 Wn. 2d at 182.

Without the theory of triangulation, Deputy Paz's search warrant testimony presented "no more than a personal belief" that the odor came from Mr. Hovander's Milk Barn. Johnson, 79 Wash. App. at 785-786. And this "personal belief" was not the result of Deputy Paz standing on a public roadway and smelling marijuana in the air as the wind changed. It was the product of Deputy Paz trespassing up to the defendant's Milk Barn and standing near an air vent. The dissent in Johnson explains why

in circumstances like this, the officers must demonstrate more than a "general" ability to recognize the odor of growing marijuana:

> The affidavit states the DEA agents smelled the odor of growing or freshly harvested marijuana while walking in the street in front of Mr. Johnson's house and, although they walked around the block, they could not detect the odor anywhere else. The affidavit establishes the agents possess the requisite training, experience and skill to identify marijuana by its odor, but it does not adequately connect the odor with Mr. Johnson's residence. The affidavit is silent with respect to their distance from his house and their ability to smell marijuana at that distance, as well as other possibly relevant factors such as landscaping, wind direction and the relative location of other residences on the street. Since the agents were standing in the street, they must also have been directly in front of the house on the north side of the street, assuming there is one there. Despite the affidavit's demonstration of the agents' general ability to recognize the odor of growing or freshly harvested marijuana, it contains no information from which one can draw a commonsense inference that they were able to determine the source of the smell from their location. Without such details, the affidavit presents no more than a personal belief that the odor came from Mr. Johnson's residence.

State v. Johnson, 79 Wn. App. at 785-786.

Similar criticisms can be made about the investigative techniques utilized in this case. Here, on two separate occasions, the officers smelled growing marijuana from the public roadway. This led them to the conclusion that a particular building or buildings—the Milk Barn—some undefined distance away was the source of the odor. In their testimony they provided no topographic description or map showing the contours of

the land and the locations of all homes and buildings in the area.

Certain cases have upheld the issuance of search warrants based wholly or in large part on olfactory observations made in these circumstances: e.g., State v. Weller, 76 Wn. App. 165, 884 P.2d 610 (officers in open doorway); State v. Solberg, 66 Wn. App. 66, 831 P.2d 754 (1992) (officers near defendant's home), *reviewed in part on other grounds*, 122 Wn. 2d 688, 861 P.2d 460 (1993); State v. Vonhof, 51 Wn. App. 33, 751 P.2d 1221 (tax appraiser near air vent of shop building), *review denied*, 111 Wn. 2d 1010 (1988), *cert. denied*, 488 U.S. 1008, 109 S.Ct. 790, 102 L.Ed.2d 782 (1989); State v. Hashman, 46 Wn. App. 211, 729 P.2d 651 (1986) (officers in defendant's home), *review denied*, 108 Wn. 2d 1021 (1987). But here, there was insufficient evidence presented related to the special skill required to determine the location of growing marijuana from an undefined distance. Such evidence was necessary to support the warrant. Also pertinent, the officers had to trespass in order to obtain cogent proof of the location of the growing marijuana operation. The first smell from the road on October 7, 2011 was obviously thought to be inadequate, as the deputies went forward with the plan to invade Mr. Hovander's property after dark. And the final smell is, in a practical sense, no different from the first as it too was from the same vantage point – at the break in the tree line along Olson Road.

The search warrant is also undermined by the allegations as contained in the Franks motion, that Paz failed to properly answer questions as to his distance from the Milk Barn when detecting the odor, and that he failed to describe the other buildings in the area as possible sources of the marijuana odor.

But the most probative point is that the state is asking the court to approve a search of a building based on an officer smelling marijuana when he standing some 376 feet away. This is three to four times the distance approved in State v. Johnson.

At the outset of this case, the State conceded that the search warrant calculus for determining probable cause to search the Hovander Milk Barn should not include any evidence acquired by Deputy Paz after he scaled a fence and illegally trespassed on the Hovander property.

When the court excludes this information and tests the remainder, the warrant lacks probable cause. There is inadequate foundation contained in the search warrant application to sustain the deputies' hypothesis that the odor of growing marijuana detected from a break in the tree line along Olson Road was coming from the Milk Barn, located a considerable distance away.

3. Deputy Paz's Final "Independent" Smell Of The Odor Of Growing Marijuana, And The Deputies' "Independent" Conclusion That The Odor Was Coming From The Milk Barn Is Fruit Of The Poison Tree Because The Deputies Had Already Definitively Determined The Odor's Source.

Even if the court finds that the amended warrant survives a probable cause challenge, in these circumstances, the second warrant itself is the poison fruit of the prior trespass. The fruit of the poisonous tree doctrine protects against the misconduct of police officers by excluding evidence obtained unlawfully. Wong Sun, 371 U.S. at 484.

The force of this doctrine should not be defeated, the misconduct should not be excused, just because an investigating officer superficially amends the search warrant.

After trespassing on Mr. Hovander's property, Deputy Paz knew with certainty that the Milk Barn was the site of a marijuana growing operation. On the advice of Mr. Chambers, Deputy Paz continued to investigate in order to acquire sufficient evidence to withstand a probable cause inquiry. But this additional investigation was entirely superficial and it yielded nothing new. Deputy Paz returned to the exact same vantage point, and again detected the odor of growing marijuana. New, adequate probable cause cannot be obtained by a later "independent" smell from the public roadway, especially when the new probable cause

duplicates evidence already in the officer's possession. In order for this new probable cause to survive, Deputy Paz had to show more.

Assuming the attenuation doctrine and/or independent source doctrine is still viable under Art. 1, Sec. 7 of the Washington State Constitution, neither doctrine affords the state a basis to sustain the search warrant for the Milk Barn.

The attenuation doctrine is recognized as an exception to the exclusionary rule. The "burden is upon the State to demonstrate sufficient attenuation from the illegal search to dissipate its taint." State v. Childress, 35 Wn. App. 314, 316, 666 P.2d 941 (1983); see also Nardone v. United States, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939).

In this case, the State argued that the investigating officers' activities of the first night – when Deputy Paz and Bonsen unlawfully trespassed on Hovander's property – were sufficiently attenuated from the activities of the next night, when Deputy Paz returned to the location, "waited out there for 20 minutes for the wind to blow in the right direction and caught the odor of growing marijuana." VRP April 18, 2013 at pages 123, lines 14-25.

The Superior Court seemed to believe that these activities were sufficiently distinct. The Superior Court's oral opinion is found at VRP April 18, 2013 at pages 136 to 145. The portion dealing with the fruit of

the poison tree is found at VRP April 18, 2013 at pages 137, lines 24-25; page 138, lines 1-14; page 139, lines 6-15.

The Superior Court admitted that if the case were one

> where the first time Deputy Paz went out he broke the curtilage without authority, walked up to the barn and smelled the marijuana, and then went out the next day and was asked to stand in the same place, I agree ... there is no way to clear that taint.

But the court reasoned that the situation was distinguished if Deputy Paz had in fact smelled marijuana at the intersection of Olson Road and the driveway leading east to the Milk Barn. The court took inventory of the probable cause:

> We have Deputy Paz on a previous occasion, actually on two previous occasions to the breaking of the curtilage, the detection of the smell of growing marijuana. We have the observation the Friday night before when he was at the intersection of Olson and the driveway to the barn, where the wind was blowing from the west[1], and we have the smell at the location of the break in the trees which occurred before he broke the curtilage and went up to verify [the source of the smell].

The court agreed that any probable cause acquired after the trespass would

> be highly suspect at that point because he already went up to the barn and verified. And I agree with you, you cannot eliminate that, that's in your brain and what you smell is

[1] As explained earlier, Judge Mura's oral opinion is inconsistent with his written Findings, which provided that the wind was blowing from the east, not the west. See Findings of Fact 1, p. 1, lines 37-39; and VRP April 17, 2012 p. 138, lines 8, 22-24. As well, Deputy Paz testified both ways on this question too, that the wind was blowing in both a westerly directly, VRP, p. 52, line 11, and that the wind was blowing *from* the west. VRP p. 61, lines 22-24.

> what you expect to smell. So I have to look at the two prior occasions here where the officer smell what you believe to be a grow operation.

VRP April 18, 2012 page 139, lines 6-10.

The court acknowledged that "if we didn't have the two prior occasions, then I would agree with the defense that if he were sent out again there and told to stand at the tree again and smell again, that his mind, his determination would be highly suspect." VRP April 18, 2012 page 139, lines 6-10.

The Superior Court here provides a road map for this Court to reverse. As previously explained, the Superior Court sustained the probable cause based on information not within the four corners of the search warrant. Deputy Paz testified in the pretrial hearing that he and Deputy Bonsen smelled the odor of growing marijuana just before they alighted over the fence; see VRP page 98, lines 8, lines 11-17. This testimony is reflected in Finding 2, line 13, where the court found that Deputy Paz detected the odor of growing marijuana before he scaled the fence and crossed onto the Hovander property. But within the four corners of the search warrant, there is only reference to one, not two other smells. The first search warrant refered to the incident when Deputy Paz was with Deputy Taddonio on October 7, 2011. Transcript of First Search Warrant, 10/12/11, page 4-5. In the second search warrant Paz referenced

an incident "last Friday." This again refers to October 7, 2011. As to the October 11, 2011, there is no precise testimony that Deputy Paz or Bonsen smelled the odor of marijuana before they climbed the fence. The claim that Deputy Paz and Deputy Bonsen smelled marijuana before they jumped the fence is not within the four corners of the search warrant. Rather, this claim was added by the Superior Court based on Deputy Paz's testimony during the suppression hearing. There is a reference to smelling marijuana in the First Search Warrant, but whether it was before or after the trespass is not stated. Transcript of First Search Warrant, 10/12/11 at page 4, top first paragraph.

This case is similar to Silverthorne Lumber Company v. United States, 251 U.S. 385, 40 S. Ct. 182 64 L. Ed. 2d 319 (1920). In that case, federal agents unlawfully seized documentary evidence from Silverthorne. Silverthorne then successfully went to court and obtained a court order to return the evidence. The documents were returned. The government then attempted to secure the same documents by a subpoena. Silverthorne refused to comply with the subpoena and was held in contempt.

The Supreme Court reasoned that the government could prevail if it could show that knowledge of the documents was obtained from an independent source. Finding no independent source, the court reversed and dismissed the case. Silverthorne, 251 U.S. at 392.

As well, in State v. Le, 103 Wn. App. 354, 12 P.3d 653 (2000), the Court of Appeals explained how evidence may be absolved from taint:

> Under the "fruit of the poisonous tree" doctrine, the exclusionary rule applies to evidence derived directly and indirectly from the illegal police conduct. Derivative evidence will be excluded unless it was not obtained by exploitation of the initial illegality or by means sufficiently distinguishable to be purged of the primary taint. To prove that the evidence was purged of taint, the State must show either that: (1) intervening circumstances have attenuated the link between the illegality and the evidence; (2) the evidence was discovered through a source independent from the illegality; or (3) the evidence would inevitably have been discovered through legitimate means.

In Le, a police officer was investigating a residential burglary call when she saw a young man leaving the front door of the house. Police chased him but were unable to apprehend him. Later, on a tip the other officers entered the home of Le and arrested him without a warrant. The first officer identified Le as the suspect earlier leaving the scene of the burglary. The trial court suppressed all physical evidence discovered in Le's home, but admitted the officer's post-arrest identification of Le because there was an independent basis for her identification. On appeal the court reversed, holding that the post-arrest identification of Le should have been suppressed. The court found that the factors of (1) temporal proximity; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct, were all lacking.

For the state to establish attenuation, it must establish that the connection between the illegal search and the last "independent" smell of the odor from the public roadway is attenuated. After Mr. Chambers instructed Deputy Paz to obtain additional evidence, Paz returned to the public roadway to further investigate. He smelled the odor of growing marijuana, and immediately concluded that the source of the smell was the Milk Barn. This attempt to obtain additional evidence was contrived. There was no attenuation to dissipate the taint because Deputy Paz had already personally verified that he knew the location of the odor's source. It is impossible to sever the first knowledge from the second, particularly when the same magistrate issued both warrants.

The remarks of the magistrate who issued the warrants for 5268 Olson Road at the conclusion of the second hearing reflect this reality. The search warrant magistrate, Judge Grant, immediately assented to the State's request that he amend the warrant to include the additional information: "Okay, will do. It doesn't change my perspective." Transcript of Second Search Warrant10/13/11 11:45 a.m. page 5 bottom.

By their action during the course of the investigation, the state's officers compromised the use of any olfactory evidence about the Milk Barn as the source of the marijuana smell. The state compromised the requirement of a neutral and detached magistrate when its officers

presented evidence secured from an illegal trespass and inspection of a curtilage property. It was implausible to expect Judge Grant to forget or disregard the evidence secured by the illegal trespass. It was equally implausible to expect Judge Grant to question Deputy Paz's later testimony as to identifying with certitude, from 376 feet away, the location of the odor of marijuana.

Perhaps the proper procedure would have been for the officers to go to another magistrate, and disclose to him or her only the untainted evidence. But the state did not do this – preferring, rather, to return to a magistrate who was familiar with the investigation, and who knew that there was marijuana inside the Milk Barn. By selecting Judge Grant as the judge to consider the issue of probable cause, the state virtually ensured that the magistrate would issue another warrant and interfered in that sense with Mr. Hovander's right to a neutral and detached magistrate.

Determining the legality of the search by warrant of the property at 5268 Olson Road must involve the application of the doctrine of the fruit of the poison tree. Once the deputy knew for sure that the Milk Barn was the source of the smell, his ability to later make an independent judgment about this same issue was inevitably compromised. Or, as Thomas Paine once explained in *The Rights of Man*, "The mind, in discovering truths, acts in the same manner as it acts through the eye in discovering objects;

when once any object has been seen, it is impossible to put the mind back to the same condition it was in before it saw it."

4. The Search Of The Milk Barn Was Unlawful Under The Independent Source Doctrine, Which Requires That The State Show That Illegal Conduct Did Not Prompt The Decision To Secure A Search Warrant.

The search warrant cannot survive the application of the independent source doctrine. The determination of probable cause contained in the second search warrant was prompted by—not independent of—the information contained in the first search warrant application. The state cannot show that it would have sought a second search warrant had not Deputy Paz unlawfully trespassed upon the property to confirm the location of the marijuana grow operation.

Even assuming that Deputy Paz's later detection of the odor of growing marijuana as coming from the Milk Barn is found to be "genuinely independent" of the earlier unlawful trespass and search, the later search is unlawful because the trespass prompted the decision to secure a second warrant. The state cannot demonstrate that without the information obtained in the illegal search, a warrant would have issued.

The independent source doctrine was considered first in State v. Coates, 107 Wn. 2d 882, 735 P.2d 64 (1987) and approved as in compliance with Article 1, Section 7 of the Washington Constitution in

State v. Gaines 154 Wn. 2d 711, 116 P.3d 993 (2005). The origin of the doctrine is the Supreme Court's decision in Murray v. United States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).

In Murray, federal agents forced entry into a warehouse containing the defendant's vehicle. They discovered marijuana and returned with a warrant. The issue before the Court was "whether the search pursuant to warrant was in fact a genuinely independent source of the information." Murray, 487 U.S. at 542. The court found that there was no independent source "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." Murray, 487 U.S. at 542.

Murray presents a subjective test of the agents' motivations to determine whether the independent source doctrine will apply. The court determines (1) whether "the agents' decision to seek the warrant was prompted by what they had seen during the initial entry," and (2) whether "the agents would have sought a warrant if they had not earlier entered the warehouse." Murray, 487 U.S. at 542–43. Under Murray, the state must satisfy both prongs, and failure to satisfy either is independently sufficient to suppress the warrant.

In State v. Miles, 159 Wn. App. 282, 244 P.3d 1030 (2011), the court addressed how this second motivation prong of Murray is to be considered. The Miles case had been remanded by the Washington Supreme Court. State v. Miles 160 Wn. 2d 236, 156 P.3d 864 (2007). The case established the requirement of a judicially issued search warrant for the seizure of bank records. Upon remand, the state secured a judicial warrant for the bank records. But Miles contested the warrant under the independent source doctrine, and the Court of Appeals again remanded to the trial court for a factual determination of the question of motivation. The Court of Appeals explained that the state must affirmatively address the motivation requirement in pursuing the second warrant. In other words, the state must demonstrate that it would have pursued the warrant anyway, regardless of the illegal search:

> The trial court's finding that the bank records were not admissible under the independent source doctrine "because there is no evidence that [the] State would have come upon the evidence other than from referral by the Securities Division after its flawed investigation" does not address either formulation of the motivation prong under Murray. That is, whether the State's decision to seek the warrant was prompted by the illegal search or whether the State would have sought a warrant if the Securities Division was not authorized to do so.

Miles, 159 Wn. App. at 296-297.

In Miles, the State's motivation to seek the warrant was prompted

by the appeal itself, a state supreme court decision. Though the court explained that it was not likely that the independent source exception would apply, this was still a question of fact that needed to be addressed by the lower court: "Because the determination of whether the motivation prong is met is a question of fact, and the trial court did not address the motivation prong under Murray, we remand." Miles, 159 Wn. App. at 298.

The same insight applies in this case. For the second search warrant to survive as a lawful basis to search the Milk Barn property, the trier of fact must address the motivation prong of the Murray analysis.

The state fails to satisfy the first prong of the Murray motivation test, because the illegal activity *was* the decision to seek both the first and the second warrant. It is obvious that the purpose of Deputy Paz's trespass was to acquire probable cause to search the Milk Barn. This information was included in the first search warrant and the police would have executed that warrant had it not been for the intervention of Deputy Prosecutor Chambers. The record shows, and it is uncontested, that Mr. Chambers perceived it to be an illegal search, and that this recognition prompted the decision to seek a second, amended warrant. VRP April 18, 2012, page 121, lines 6-8. The prosecutor directed the deputies to get more evidence from a public right of way.

The state also fails to satisfy the second component of the Murray

test, whether "the agents would have sought a warrant if they had not earlier entered the warehouse." Murray, 487 U.S. at 542–43. This second prong requires a court finding that the deputies would have secured a search warrant if Deputy Paz had not trespassed and determined to a matter of certainty that the Milk Barn was the site of a marijuana grow operation. This area of factual inquiry is akin to the quagmire of speculation under the now deceased "inevitably discovered" rule; see State v. Winterstein, 167 Wn. 2d 620, 636, 220 P.3d 1226 (2009). The fact of the matter is that the deputies found that it was necessary to their investigation to trespass, and so they did. Only after they trespassed did they believe they possessed the necessary probable cause to apply for a search warrant. If we assume that the deputies had never trespassed and determined that the source of the growing marijuana was the Milk Barn, would they have nevertheless later sought a search warrant anyway? The necessity for the finder of fact to decide the motivation prong of Murray involves the same speculation inherent in the application of the inevitable discovery doctrine and ought to be modified in Washington for the same reason. Whether they would have sought a search warrant at a later date without trespassing and inspecting the Milk Barn is speculation. That the deputies would climb over fences and trespass at night upon private property for the express purpose of searching demonstrates their belief that

such audacious action was necessary for their investigation. Based upon this conduct, the more probable explanation is that they would *not* have sought a search warrant had Deputy Paz not illegally trespassed. The second warrant cannot survive the rigor of the independent source doctrine of Murray v. United States.

Another disconnect with the independent source doctrine is the command in Murray that no independent source exists "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant." Murray, 487 U.S. at 542. Here, instead of trying to obtain a new warrant from a different magistrate, the deputy returned to the same magistrate and presented the additional evidence regarding an independent smell of the odor of marijuana merged with the evidence of the first search warrant. In other words, Judge Grant was in fact again presented with the evidence obtained from the unlawful trespass.

5. Deputy Paz Was Reckless In (a) Failing To Disclose To The Search Warrant Magistrate That He Believed That The Milk Barn Had Been The Site Of A Medical Marijuana Grow Operation In The Past; (b) Testifying To The Search Warrant Magistrate That The Closest Alternative Source Of The Odor Of Marijuana He Detected Was A Mile Farther North, When Another Building Was Much Closer, Located Only 197 Feet Away; and (c) Failing To Disclose To The Search Warrant Magistrate That He Was A Considerable Distance Away (376 Feet) From The Milk Barn When He Detected An Odor Of Growing Marijuana Emanating From Inside It.

The Superior Court erred in failing to recognize that Deputy Paz acted recklessly by withholding information from the search warrant magistrate. Deputy Paz's conduct cannot, as a matter of law, be characterized as mere negligence. At all points during the investigation, Deputy Paz demonstrated conduct that went beyond the bounds of zealous policing. Deputy Paz repeatedly, recklessly, and willfully trespassed, even after his superior, Prosecutor Chambers, directed him not to. Deputy Paz climbed a locked fence with a "No Trespassing" sign. He failed to disclose this trespass to the search warrant magistrate when applying for the third search warrant to search Mr. Hovander's home.

a. The Superior Court erred in concluding that, as a matter of law, Deputy Paz did not recklessly fail to disclose his knowledge and belief that the Milk Barn was the site of a medical marijuana.

The amendments of April 29, 2011 to the Washington Medical Use of Cannabis Act, now codified in RCW 69.51A.040, decriminalized medical marijuana. As a consequence, an officer's detection of the odor of marijuana, without more, cannot establish probable cause to search.

The Superior Court found that Deputy Paz was not obligated to advise the search warrant magistrate that he believed the Milk Barn to be the site of a medical marijuana grow because this information was both irrelevant and inaccurate:

> It was neither a reckless or intentional omission of material fact to not provide the issuing magistrate with information regarding the year earlier medical marijuana investigation and the showing has not been made requiring a hearing under Frakes v. Delaware. The medical marijuana information would, at best, have provided a potential defense or mitigating circumstance for a charging decision. Deputy Paz was under no duty to advise the magistrate that in the prior year he believed that there was a marijuana growing operation in the milking parlor. Two reasons support this conclusion. First this information is inaccurate. Secondly, in the occasions when Deputy Paz visited Olson Road, he would not have detected the odor of growing marijuana emanating from the residence at 5208 Olson Road due to the wind direction at the location where he was conducting his investigation. (Location of sniffing).

Findings of Fact and Conclusions of Law Re Suppression, Conclusion of Law 1.

The court's position is supported by State v. Fry, 168 Wn. 2d 1, 228 P.3d 1 (2010), in which the state supreme court held that the state did not have to present evidence that the target of a search claimed to be growing

medical marijuana legally. But the vitality of Fry has been called into question by the 2011 amendments to the Medical Use of Cannabis Act.

In the 2011 amendments, the legislature decriminalized the medical use of marijuana. Before the amendments, the Act provided an affirmative defense for medical users, so that those users accused of violating the law could, with proper documentation, raise a defense. The affirmative defense structure was removed and replaced with the legislature's statement that growing marijuana and possessing it within the strictures of the Medical Use of Cannabis Act was no longer a crime.

If Deputy Paz believed the Milk Barn to be the site of a medical marijuana growing operation, that information would have directly affected the validity of any probable cause to search that property for a *criminal* violation. What Deputy Paz knew, or thought he knew, concerning Mr. Hovander's work as a medical marijuana provider, was clearly material to the search warrant magistrate. This court can reverse the Superior Court on this ground. This court can require the Superior Court to reassess its conclusion that Paz's decision not to disclose this information was negligent.

Deputy Paz's extreme behavior during the course of this investigation reveals his zeal and determination to do whatever he thought was necessary to secure the search warrant. The officer failed to disclose his belief that the Milk Barn was the site of a reported medical marijuana grow operation because a

magistrate who knew all the facts would be less likely to approve the search warrant. But it was more than just a failure to disclose his belief; Deputy Paz also did not mention his conversation with Mr. Hovander, in which Hovander explained that he was growing 30 medical marijuana plants in his house.

b. Deputy Paz was reckless in testifying to the search warrant magistrate that the closest alternative source of the odor of marijuana was a mile farther north, when another building was much closer, located only 197 feet away.

Deputy Paz recklessly and inaccurately testified that the nearest building to the Milk Barn was a house about three quarters of a mile north. Actually, another building was only 197 feet to the south of the location where Paz was positioned at the time he smelled the odor of growing marijuana from the break in the tree line along Olson Road. The Superior Court erred in finding that there was no harm in Deputy Paz's failure to disclose a possible alternative source of the smell. The court reasoned that there was no need for Deputy Paz to disclose this fact because at the time the wind was blowing from the North to the South, so the odor must have been coming from the North. VRP April 17, 2012, page 70, 12-15.

The determination of probable cause to search the Milk Barn could have been materially affected if Paz had disclosed that there was an alternative structure that could have been the source of the marijuana. This is especially true considering the substantial distance – more than a

football field – between his location and Mr. Hovander's Milk Barn. Deputy Paz's obligation to provide the magistrate with a full picture was not relaxed just because the wind was blowing in a particular direction.

c. Deputy Paz was reckless in failing to disclose to the search warrant magistrate that he was a considerable distance away (376 feet) from the Milk Barn when he detected an odor of growing marijuana emanating from inside it.

Deputy Paz was also deceptive when asked when he was smelling the odor of marijuana, how far away was he from the milk parlor and the office and his response suggested that he was very close rather than stating the actual distance, 376 feet. Transcript of Second Search Warrant 10/13/11 11:45 am, page 3 top.

6. The Evidence Of The Milk Barn's Consumption Of Electrical Power Was Not Probative Of Probable Cause, And Was The Fruit Of A Prior Unlawful Seizure, Which Was The Service Of A Subpoena Upon The Power Company.

In the process of applying for the second search warrant, the state introduced the records of the defendant's power consumption. Page 4 of the Second Search Warrant. At the suppression hearing it was established that the privately owned utility, Puget Sound Energy, released Mr. Hovander's power records for the Milk Barn to the Sheriff upon written request signed by a Sergeant with the Whatcom County Sheriff's Office. VRP April 17, 2011, page 6, 10-19. While the seizure of power and other

records by a subpoena is lawful under federal law, Mr. Hovander asserts that a subpoena or letter from the police directing a seizure of power records is not lawful under Article 1, Section 7 of the Washington State Constitution.

RCW 42.56.330, which applies to public utilities, states: "Personally identifying information may be released to law enforcement agencies if the request is accompanied by a court order."

Release of information by a public utility in violation of RCW 42.56.330 to law enforcement should merit the remedy of suppression.

In State v. Miles 160 Wn. 2d 236, 156 P.3d 864 (2007), the Washington Supreme Court held that bank records were protected by the privacy provision of Article 1, Section 7 of the Washington State Constitution, and cannot be seized except by a judicially issued warrant or subpoena. In Miles, the police investigation followed a similar route as the present case. A subpoena was issued for banking records, and directed the target to not reveal the disclosure of the information to its client.

Mr. Hovander argues that the same protection is afforded to records of power consumption as to bank records. If the request for the power records required a judicial warrant, as it did here, the state illegally acquired the information when they bypassed the requirements of state

law. For this reason, this power record information should be excised from the search warrant application of October 13, 2011.

The Superior Court did "not know the electrical consumption of a milking operation so it is impossible to ascertain if the electric consumption was unusually high." Finding 7, lines 43-45. Power records have little weight for probable cause purposes. State v. McPherson, 40 Wn. App. 298, 698 P.2d 563 (1985).

7. The Search Warrant Were Defective Because Law Enforcement Failed To Establish That The Suspected Grow Operation Was Not A Legal, Medical Grow Operation.

For the search warrant to be upheld, the burden is upon the state to show probable cause that the target is an illegal marijuana grow. The 2011 amendments to RCW 69.51A.040 decriminalized medical marijuana, and law enforcement now bears the additional burden to show that a suspected marijuana grow operation is not, in fact, for the purposes of growing legal, medical marijuana. Because the State did not demonstrate this, the search warrant is defective.

In 2011, the legislature amended RCW 69.51A.040 to provide:

> The medical use of cannabis in accordance with the terms and conditions of this chapter *does not constitute a crime* and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession,

> manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, or have real or personal property seized or forfeited for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, and investigating peace officers and law enforcement agencies may not be held civilly liable for failure to seize cannabis in this circumstance...

RCW 69.51A.040.

The language of this section expresses the legislature's intention to decriminalize marijuana. In passing the 2011 amendments, the legislature changed the rule of State v. Fry. Fry interpreted the 2007 Medical Use of Cannabis Act to allow the issuance of a search warrant for marijuana even in circumstances where a medical user presented evidence of compliance with the Washington Medical Marijuana Law to the police. The court in Fry justified this because the possession or manufacture of marijuana remained a crime; medical users were just provided the opportunity to raise an affirmative defense:

> Possession of marijuana, even in small amounts, is still a crime in the state of Washington. See RCW 69.50.4014. A police officer would have probable cause to believe Fry committed a crime when the officer smelled marijuana emanating from the Frys' residence. Fry presented the officer with documentation purporting to authorize his use of marijuana. Nevertheless, the authorization only created a potential affirmative defense that would excuse the criminal act. The authorization does not, however, result in making the act of possessing and using marijuana noncriminal or negate any elements of the charged offense. Therefore, based on the information of a marijuana

> growing operation and the strong odor of marijuana when the officers approached the Frys' home, a reasonable inference was established that criminal activity was taking place in the Frys' residence. Therefore, the officers had probable cause and the search warrant was properly obtained.

State v. Fry, 168 Wn. 2d at 7-8.

The 2011 amendments to RCW 69.51A.040 were intended to protect the use of marijuana by persons legally qualified to do so. This legislative intention would be severely undermined if law enforcement may obtain search warrants without first addressing the reality that some marijuana is for legal, medical purposes. To lawfully acquire a search warrant to search a residence or building for marijuana, law enforcement should, under the 2011 amendments, include testimony in a search warrant application that negates the proposition that the grower under criminal investigation is legally growing marijuana pursuant to state law.

In addition, by removing the language providing an affirmative defense for medical marijuana users, the legislature signaled an expansive understanding of the protections for medical marijuana users. The burden of proof was shifted from the medical user to investigating law enforcement. Thus, even if Deputy Paz's detection of the smell of growing marijuana from 376 feet away is found to be legally reliable, his search warrant testimony is still insufficient to establish probable cause

because it did not account for the very real possibility that the smell he detected was the product of legal medical marijuana. Here, the state presented no evidence on the issue of whether Mr. Hovander's suspected grow operation was pursuant to the Medical Cannabis Users Act.

Though this precise argument was not presented to the Superior Court, the court rejected its merit anyway in finding that it was irrelevant, due to Fry, that Deputy Paz's failed to disclose his knowledge that Mr. Hovander was a medical provider, and that the Milk Barn may be the site of a medical marijuana grow operation. Conclusion of Law No. 1, Finding and Conclusion re Search. And under In re Nichols, 171 Wn. 2d 370, 256 P.3d 1131 (2011), this issue may be properly considered on direct appeal.

D. CONCLUSION

For the reasons set forth above, Mr. Hovander respectfully requests that this Court reverse the conviction and remand for suppression of evidence.

Dated this 19th day of April, 2013

WILLIAM JOHNSTON, WSBA 6113
Attorney for Appellant ARON CLARK HOVANDER

Transcription of Search Warrant #2011A21411

Date: 10/12/2011 at 3:30 p.m.

Event #: 2011A21411

Present: Eric Richey, (Whatcom County Prosecutor's Office)

Grant Chambers, (Whatcom County Judge)

Tony Paz, (Deputy)

Richey: This is Eric Richey from the Whatcom County Prosecutor's Office. It is approximately 3:30 p.m. and the date is October 12, 2011. I am here with Judge Grant Chambers and with Deputy Paz of the Sheriff's Office and we are seeking a search warrant. Its looks like we have an event number of 2011A21411. Is that right?

Paz: That is correct.

Chambers: Raise your right hand please. Do you solemnly swear or affirm that in this matter before the court today you will tell the truth, the whole truth, and nothing but the truth?

Paz: I do.

Richey: Deputy Paz, are you investigating a crime at this time?

Paz: I am.

Richey: And what is that?

Paz: Manufacturing marijuana.

Richey: Where are you investigating the crime?

Paz: At 5268 Olson Road, Ferndale WA.

Richey: Do you know who owns that property?

Paz: Aaron C. Hovander.

Richey: Okay, and can you tell us what led you to this property and what your investigation has shown?

Appendix 1

Paz: We had information, through the drug taskforce I believe, that there was a marijuana grow at this particular location and we had conducted two previous investigations in marijuana grows associated with Hovander property. Me and Deputy Bonson, yesterday, went to this particular address, 5268 Olson Road, to investigate whether or not there was a marijuana grow on this property.

Richey: Okay, and did you learn that when you went there?

Paz: We did, we did. We walked the property and we went to these two particular buildings that are described as milking parlor and office and equipment area. We could smell an obvious odor of growing marijuana and we could even hear what we believed to be fans running on the inside of these two buildings.

Richey: Can you describe the milking parlor and what else?

Paz: Equipment and Office building.

Richey: Okay so this Aaron Hovander, or anyone whoever might live there, would they be running any cows on that property?

Paz: There are actually cows on the property that are in one of the barns.

Richey: And is that the milking parlor that you referred to?

Paz: No, this particular piece of property has four barns and two buildings attached to these four barns. And the two buildings that I wish to search don't hold any cattle or livestock or anything like that. It is as best as I know it and as described on the Whatcom County Assessor's page as the milking parlor and the office and equipment building.

Richey: Okay, and you indicated that you had heard the fans going on in this area?

Paz: Yes.

Richey: And did you notice any odors when you were there?

Paz: We did.

Richey: And can you describe those?

Paz: It smelled to me as an obvious odor of growing marijuana.

Richey: And do have experience with that or training?

Paz: I do.

Richey: Tell us about that.

Paz: I have been involved with well over a hundred marijuana-growing investigations. Investigations that were started by the Drug Taskforce, Drug Enforcement Administration and through my normal duties through the Criminal and Addiction team.

Richey: Okay, and that is where you learned about the odors of marijuana?

Paz: Yes.

Richey: Okay, and so you want to search this building is that correct?

Paz: Yes, there are two buildings but they are attached to each other so they do look like one building but on the Assessor's page there they are described as two separate buildings. So I don't know if that makes a difference or not but they look like one building but they are described as two.

Richey: How do you describe them in the warrant then?

Paz: Again the address is 5268 Olson Road, Ferndale WA 98248 owned by Aaron C. Hovander. There are two buildings on this property that I wish to search. They are described in the Whatcom County Assessor's records as building 4, the milking parlor, and building 5, the equipment and office building. These two buildings are connected and are located on the western edge of the property closest to Olson Road. The equipment and office building is painted two shades of green and the darker shade of green "Hovander Dairy Farms" is painted across the front of the equipment and office building. And the milking parlor is attached to the southeast wall of the equipment and office building.

Richey: This area, you just described the areas of which you would like to search, now this area that where the buildings are did you go on other roads to these buildings?

Paz: It's right next to the road, right next to Olson Road.

Richey: Uh huh are there driveways that go up to the building?

Paz: There is, there is a main gate.

Richey: Was the gate open?

Paz: It was open.

Richey: Okay, so you went on the driveway to get to the building?

Paz: We actually had to go around the, from Olson Road, go through a brush line because we discovered when we walked towards the gate that there were two cameras, infrared cameras actually, watching the driveway. And based on my experience its when you are locating surveillance equipment if you are wanting to get a search warrant for a particular house or structure, you don't necessarily want the people to know that you are there walking around the property. And again I don't think I mentioned it on the record, the week prior, myself and Deputy Tudonio were on Olson Road, not on the property, and could actually smell marijuana from Olson Road. And there are not a lot of house around in that area, as a matter of a fact there are no houses in that area, no other structures around in that area, so it led us to believe that it had to be coming from that piece of property. And then I came back last night with Deputy Bonson to investigate it further.

Richey: Okay, and what is it that you want to search for?

Paz: I want to search for marijuana plants, alive or dead, processed marijuana, high intensity grow lights, light ballasts, fans, ventilation equipment, irrigation equipment, miscellaneous plant growing equipment, packaging equipment, scales, drying racks, drug paraphernalia, and documents of dominion and control.

Richey: Why do you think that that stuff would be there?

Paz: In my experience with marijuana grows, obviously there are the live plants. You have to have the equipment in order to grow the plants, the high intensity lights. The ventilation equipment usually, they want to take the heat out of the building, the room where they are growing, so you need ventilation equipment to move the air outside of the building.

Richey: From the lights?

Paz: Yes, from the lights. You have to basically control the environment, the humidity, heat, things of that nature. To be able to grow the equipment, or to be able to grow the marijuana.

Richey: Is that how the odor gets out?

Paz: It is one of the ways the odor gets out, through the venting. It can also get out just like any other odor through ya know window seams. Again this isn't a house, it is just basically a farm building, so how air tight it is it is not just necessarily coming out just from the vent. It could come out from just natural cracks in the....

Richey: And from fans?

Paz: Fans.

Richey: Okay, and you had been there on the road for how long before?

Paz: It was Friday, last Friday.

Richey: The 7th?

Paz: It would have been October 7th.

Richey: Today is the 12th. How long does it take to grow marijuana?

Paz: It depends on the cycles that they use. It could be two months to three months for one cycle.

Richey: Alright, I was sorry to interrupt you. I don't have any more questions I think that we have established probable cause for marijuana and or evidence of marijuana to be found in these buildings that you have described before the court.

Paz: Are we calling someone else for a different warrant?

Richey: Oh okay, I thought we were going to call someone else on this warrant. Alright, we find probable cause to issue a warrant as requested.

Chambers: Let me review it here real quick. Okay dominion and control, okay you added that. So documents of dominion and control are obvious, evidentiary value. There you go.

Richey: Thank you your honor, it is approximately 3:39 and we are off the record.

Transcription of Search Warrant Application #11A21411

Date: 10/13/2011 at 11:45 p.m.

Present: Eric Richey, (Whatcom County Prosecutor's Office)

Grant Chambers, (Whatcom County Judge)

Tony Paz, (Deputy)

Richey: This is with the Eric Richey from the Whatcom County Prosecutor's Office. Today is October 13, 2011 at approximately 11:45 a.m. I am here with Grant Chambers and I have Deputy Paz on speakerphone. Judge can you place this witness under oath?

Chambers: Do you solemnly swear or affirm that in this matter before the court that you are telling the truth, the whole truth and nothing but the truth?

Paz: I do.

Chambers: And what's your name?

Paz: It is Anthony Paz, P-A-Z.

Chambers: Okay, go ahead.

Richey: Okay, Deputy Paz we talked about some information regarding a search warrant yesterday for the Hovander farm, is that correct?

Paz: Yes.

Richey: And Judge Grant you were involved in that, you heard evidence of some, you heard some testimony regarding the Hovander farms, where Deputy Paz had smelled the odor of marijuana and he was wanting to search the barns at the Hovander farm on the [inaudible] road is that correct?

Paz: Olson Road.

Richey: The Olson Road.

Chambers: What's the case number again?

Richey: It is 2011A21411.

Chambers: Okay go ahead.

Appendix 2

Richey: Okay, Deputy Paz have you made some observations regarding these barns other than what we talked about yesterday?

Paz: Yes.

Richey: Can you tell us about that?

Paz: There are four large barns located on the property, and from Olson Road, from the road you can see through these barns and see that they are either empty or there is some cattle, I don't know what kind of cows, is in the barns. And it is obvious from the road that none of those buildings are being used to grow marijuana.

Richey: Okay, and did you make any observations, did you smell any marijuana while you were on the Olson Road?

Paz: Yes, last night at about 9:00 o'clock, no I'm sorry it was 9:30 till about 10:30, I was out on Olson Road at the 5200 block outside of the property and I could smell an obvious odor of growing marijuana emanating from that property.

Chambers: I thought the only thing on the property were the barn buildings.

Paz: There are four barns and then there is a milk parlor and an equipment office building attached to the western portion of the barns. So there are four barns in a row, basically going east to west, and then on the western side there is a milk parlor and an office, that would be described as an office on the front of the milk parlor. There are listed six buildings on the property, on the Assessor's page. And four of those are barns.

Chambers: Okay.

Paz: I hope that makes sense.

Richey: Yeah, I think so. So you have an attached milk parlor to one of the barns and an attached office as well is that correct?

Paz: Yes.

Richey: Okay, so yesterday when we applied for a search warrant you were wanting to search the milk parlor and the office is that correct?

Paz: That's correct.

Richey: And when you indicated that you were smelling the odor of marijuana from the Olson Road, were you near the milk parlor and the office.

Paz: Uh, not last night. That was from the road.

Richey: Okay, but you were on the road. How far away were you from the milk parlor and the office?

Paz: The milk parlor and the office are fairly close to Olson Road. And there is a row of fairly large trees separating the property and Olson Road. On the southwest portion of the property, there is basically a tree missing and I stood there on the county right of way, on the eastern side of the road, I stood there probably about a half an hour, I stood there in that particular location and about 20 minutes into it I could smell, when the wind started actually blowing, I could actually smell the fresh odor of marijuana.

Richey: Can you also indicate the odor of growing marijuana? Is there a difference between growing marijuana versus the odor of burned marijuana?

Paz: Yes, yes there is.

Richey: And you have a training experience to tell you the difference between those two things?

Paz: Yes.

Richey: And can you tell us about your training experience with the difference between growing marijuana and burned marijuana?

Paz: My initial experience comes from a test where they let you smell packaged marijuana, dried marijuana, and then also the new class on marijuana grows. And I have extensive field experience with the marijuana grows. Being able to recognize when it is an actual grow and when they are just drying marijuana or smoking marijuana.

Richey: You told me yesterday that you were involved in over 100 cases of growing marijuana.

Paz: At least, at least.

Richey: Okay, so now have you smelled the marijuana from Olson Road on other occasions?

Paz: Uh, I'm sorry say that again.

Richey: Have you smelled the odor of marijuana at the Olson Road, in that location that you just talked about, on other occasions?

Paz: Yes, I have on two prior occasions.

Richey: Can you tell us about that?

Paz: The first occasion was last Friday and it was from the exact same spot that I could smell it fro last night. That was at nighttime, and the wind was actually blowing in the same direction from north to south. And that is when Deputy Tudonio was with me. And then on this past Tuesday night, again in the same location on Olson Road, we could smell it again, and then last night.

Richey: Okay, I think you said yesterday, you were telling us that there are no other buildings other than the Hovander farm buildings, is that correct?

Paz: That's correct.

Richey: Okay, and how far away would other buildings be, because there is some building somewhere from some distance....

Paz: Yes, yes.

Richey: Where is the next building? How far away?

Paz: The closest house is farther north on Olson Road. And that would be at least a half a mile, maybe three-quarters of a mile at the north.

Richey: Okay, alright. And have you had an opportunity to review the power bills for the Hovander farm?

Paz: Yes, there was a request by the Northwest Regional Drug Taskforce for the power records for that specific address at 5268 Olson Road.

Richey: Okay and what kind of information did you learn?

Paz: They sent us the power bill dating back all the way to 2008. But I guess in particular this year, starting in January, the average monthly consumption since January is over 10,000 kilowatts an hour. And that is a very significant, the average power bill, the average Washington power bill is a 1,000 kilowatts an hour so they are at least ten times above the average for the state of Washington.

Richey: And that's for the milk parlor and the office building as well as anything else or...?

Paz: Yes, it is.

Richey: Is that for other things there on farm as well?

Paz: Just those four barns and the milk parlor and office building.

Richey: Okay, and from your observations did you notice whether the milk parlor was being used as a milk parlor?

Paz: No, well from the road I honestly couldn't tell you, but what purpose it was being used for, from observations from the road I can't tell you the observations that I made with the four barns that are attached. The only electrical usage I could see was some low power lights that they turn on at night.

Richey: Okay and can tell me whether the cattle that you saw were milk cows or were they beef cows?

Paz: I didn't see what type of cows they were.

Richey: Okay, your honor based on the testimony regarding the odor of marijuana coming from this area and the Deputy's smell three times, from the Olson Road, and based on the testimony from the officer telling us that it was the smell of growing marijuana I am going to ask that the court authorize a search warrant that you have already previously authorized for that area.

Chambers: So you have not yet served the warrant authorized yesterday?

Paz: That is correct, I have not yet served it.

Chambers: It seems to me that the information received today just makes that application sounder.

Richey: Okay.

Chambers: Frankly, it doesn't seem to detract from the application. So there is no need to issue a [inaudible], do we recall the other one?

Richey: No, at this point we not going to ask you to recall the other warrant that your Honor already signed, we will ask that this be incorporated as an amendum to the information that we put on the record yesterday.

Chambers: Okay, will do. It doesn't change my perspective.

Richey: Alright, well Deputy Paz do you have anything else to add regarding that, that search warrant?

Paz: No that it is it, thank you.

Richey: Okay, well it is 10:55 and we are off the record.

Transcription of Search Warrant Application #11A21411

Date: 10/13/2011 at 3:45 p.m.

Present: Eric Richey, (Whatcom County Prosecutor's Office)

Grant Chambers, (Whatcom County Judge)

Tony Paz, (Deputy)

Richey: This is with the Eric Richey from the Whatcom County Prosecutor's Office. Today is October 13, 2011 at approximately 3:45 p.m. I am here with Judge Grant Chambers and I have Deputy Tony Paz on the speakerphone. Judge can you place the witness under oath?

Chambers: Sure. Deputy Paz do you solemnly swear or affirm that in this matter before the court that you are telling the truth, the whole truth and nothing but the truth?

Paz: I do.

Richey: Deputy Paz, are you currently executing a search warrant?

Paz: Yes.

Richey: And what is your event number?

Paz: 2011A21411.

Richey: Now in your execution of the search warrant did you discover some illegal activity?

Paz: I did.

Richey: And what was that?

Paz: The search warrant was executed at 5268 Olson Road, we discovered over 200 marijuana plants.

Richey: And that was located in the barns that you referred to earlier?

Paz: Yes.

Richey: And specifically was it the milking parlor in the office?

Paz: It was in the milking parlor, was the primary operation.

Appendix 3

Richey: So this is an extension of that previously issued warrant of mine?

Paz: Yes, this is going to have to do with the residence that is attached to the property.

Richey: What kind of information have you learned that there might be some criminal activity at the residence?

Paz: Prior to executing the search warrant we knew that the suspect in the suspected marijuana grow was Aaron Hovander and lived at 5206 Olson Road, which is just south of the farm. I went to his residence and contacted him in the driveway and while we were contacting him talking about his farm and the marijuana grow that he had there, we could smell the odor of growing marijuana coming from his house. And he did admit that he had 30 plants inside the house, 30 marijuana plants.

Richey: In the house which the address is what?

Paz: 5206 Olson Road in Ferndale, Washington.

Richey: Okay, so this is a separate location than the warrant that we already issued, right?

Paz: It is, it is. It's an address just south of the farm address.

Richey: Okay, and what is his connection with the place that you searched again? He was registered, as the owner on the assessor's record, is that it?

Paz: Yes.

Richey: Okay, and that is where you located the 200 plants?

Paz: Yes.

Richey: Okay so what is it that you would like to search with specificity?

Paz: I want to search for marijuana plants, alive or dead. Processed marijuana, high intensity grow lights, light ballast stands, ventilation equipment, irrigation equipment, miscellaneous plant growing equipment, packaging equipment, scales, drying racks, drug paraphernalia and documents of dominion and control.

Richey: And in your experience, you have already testified earlier about your experience regarding these kinds of crimes, in your experience do you typically find these items in places where marijuana is manufactured?

Paz: Yes, this is common equipment that you will find in a marijuana grow.

Richey: I take it you have found this sort of stuff in executing the warrant that we already authorized across the road?

Paz: Yes, we haven't done a full inventory, it was just a cursory search, they are actually doing the dismantling right now but yes there are live marijuana plants, lights, ventilation equipment, irrigation equipment, I did see those things.

Richey: Oh okay, that is what I was wondering. Okay so now with specificity can you describe the location that you would like to search?

Paz: I would like to search 5206 Olson Road in Ferndale, Washington 98248. 5206 Olson Road is a two-story tan with multi-color trim brown structure, with a wood shingle roof. There are two rock pillars at the front of the house, with wood double doors. Each attaining a large half moon, with cloudy windows and the doors and pillars are facing northwest.

Richey: Is that how your search warrant is written?

Paz: Yes.

Richey: Okay and the next section on your warrant is things to search for and tabulate?

Paz: Yes.

Richey: What did you write in there?

Paz: Marijuana plants, alive or dead. Processed marijuana, high intensity grow lights, light ballasts, stands, ventilation equipment, irrigation equipment, miscellaneous plant growing equipment, packaging equipment, scales, drying racks, drug paraphernalia, and documents of dominion and control.

Richey: I don't have any other questions. Okay I apply probable cause to issue this warrant as described and you can sign my name to it at this point in time. Are you going to serve it today?

Paz: Yes, we are right in front of the residence right now.

Richey: Okay, why don't you then?

Paz: Alright.

Richey: So this is going to be a separate warrant but we are using the same event number as previously noted and it is approximately 3:50 p.m. and we are off the record.

SCANNED 5

FILED IN OPEN COURT
5-15 2012
WHATCOM COUNTY CLERK
By M Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,	
	No.: 11-1-01216-9
Plaintiff.	
vs.	**FINDINGS OF FACT AND CONCLUSIONSOF LAW RE:SUPPRESSION**
ARON CLARK HOVANDER,	
Defendant.	

This matter having come regularly before the court upon the motion of defendant to suppress evidence and the court, having considered the testimony of Deputy Paz and defendant and heard the argument of counsel, makes the following Findings of Fact:

1. On October 7, 2011 Deputy Paz was on Olson Road at the end of the driveway leading to defendant's milking parlor at 5968 Olson Road. He was on duty and driving a marked patrol unit. He detected the odor of growing marijuana. The wind was blowing from east to west and the milking parlor and other buildings on defendant's property were located to the east of his position. Deputy Taddonnio was also in the immediate area and detected the odor of growing marijuana. The detection of the odor on this occasion, by itself, would not have provided probable cause for the search of the milking parlor because of the other buildings

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Appendix 4

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located upwind of the deputy's location. When Deputy Paz provided information in support of the search on October 13, 2011 concerning these events, the court finds that he misspoke as to his location and is satisfied that the odor was detected at the entrance to the milking parlor driveway on Olson Road.

2. Deputy Paz returned to Olson Road adjoining defendant's property on October 11, 2011. He walked south from the driveway to a break in the tree line. This location is to the south and west of the milking parlor. He detected the odor of growing marijuana at this time. To investigate this odor, he crossed the tree line onto defendant's property and continued further to the east, crossing two fences. He approached the milking parlor from the west in an attempt to avoid detection by the surveillance cameras directed at the driveway entrance. As he approached the milking parlor, he made the observations set forth in the first search warrant application.

3. On October 12th, 2011, Deputy Paz returned to 5968 Olson Road and stood at the break in the tree line where he had been the night before. He waited for about twenty minutes until the wind shifted direction and began to blow from north to south. He was then able to smell the odor of growing marijuana. The milking parlor was the first building in the direction of the blowing wind. Deputy Paz stood approximately 376 feet from the milking parlor when he detected the odor.

4. This is a rural area and the likely source of the growing marijuana odor can be isolated by triangulating the wind direction and location of the deputy at the times the odor was detected FROM THE OLSON RD. PUBLIC RIGHT OF WAY The location where the deputy detected the odor on October 7 and 12th, given the wind direction at each time, satisfies the court that the deputy's identification of the milking parlor was its source was both reasonable and reliable. The court ~~believes~~ finds that Deputy Paz has sufficient training and experience with marijuana investigations to provide a magistrate with reliable

THE SMELLING STANDING ALONE FROM ONE LOCATION WOULD NOT JUSTIFY A WARRANT BUT THE COMBINED Smell from differed Locations D/D.

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information sufficient to establish probable cause. The court makes this determination in light of the absence of any authority being provided concerning limitations upon a trained person's ability to detect the odor of growing marijuana a over certain distances.

5. In October of 2010, Deputy Roosma and Deputy Walcker investigated a medical marijuana growing operation at 5608 Olson Road. This investigation involved marijuana being furnished by defendant to Mr. Mase pursuant to a valid prescription. Defendant provided the deputies with marijuana provider credentials in conformance with RCW 69.51 et seq. and admitted he was growing marijuana inside the residence. The deputies did not seek a search warrant to confirm that the growing operation was in conformance with RCW 69.51 et seq. Deputy Paz was aware of this incident and spoke with Deputy Walker about it. He was not able to obtain much specific information from the deputy. Deputy Paz also examined available data bases and was unable to obtain additional information as only a brief report had been written. ~~From what he was able to find out,~~ Deputy Paz MISTAKENLY believed that the incident involved growing marijuana in the milking parlor. Had he provided this information to the issuing magistrate, it would have been inaccurate.

6. The information flowing from the power records, surveillance cameras and the detection of the odor of growing marijuana on multiple occasions from multiple locations by multiple officers would have influenced Deputy Paz to continue his investigation and seek search warrants, even if he had not crossed the property line and fences on October 11, 2011.

7. Puget Sound Energy is the electric utility providing electrical power to the Hovander barns and milking parlor. It is a private company and is not a public or municipal utility. The court does not know the electric consumption requirements of a milking operation so it is impossible to ascertain if the electric consumption was unusually high. ~~The court finds that~~

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~~the recent increase in electric consumption described in the search warrant testimony is suspicious enough to provide some additional probable cause.~~

From the foregoing Findings of Fact, the court makes the following:

II. CONCLUSIONS OF LAW

1. It was neither a reckless nor intentional omission of material fact to not provide the issuing magistrate with information regarding the year earlier medical marijuana investigation and the showing has not been made requiring a hearing under Franks v. Delaware. The medical marijuana information would, at best, have provided a potential defense or mitigating circumstance for a charging decision. Deputy Paz was under no duty to advise the magistrate that in the prior year he believed that there was a marijuana growing operation in the milking parlor. Two reasons support this conclusion. Firstly, this information is inaccurate. Secondly, on the occasions when Deputy Paz visited 5268 Olson Road, he would not have detected the odor of growing marijuana emanating from the residence at 5208 Olson Road due to the wind direction at the location where he was conducting his investigation.
2. After excluding the information provided in support of the search warrant for 5268 Olson Road acquired on October 11, 2011 concerning the odor of growing marijuana which was obtained by entering the property by crossing the tree line and climbing fences, there remains sufficient information providing probable cause to justify the search of 5268 Olson Road on October 13, 2011.
3. The requirements of the independent source doctrine have been met and the investigation would have continued despite some actions being taken in violation of Article I, Sec. 7. On the October 11, 2011 visit to the property.

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4. It was unnecessary for law enforcement to comply with any statutory procedures to obtain the electric power records for 5268 Olson Road.

DATED this 15 day of ~~April~~ MAY, 2012.

Judge Steven J. Mura

Presented by:

CRAIG D. CHAMBERS, WSBA #11771
Deputy Prosecuting Attorney

Copy Received:

William Johnston,
Attorney for Defendant

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