CASE #: 69357-3-I

90498-7

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

STATE OF WASHINGTON

Respondent,

v.

ARON CLARK HOVANDER,

Petitioner.

PETITION FOR REVIEW OF THE DECISION OF THE

COURT OF APPEALS FOR DIVISION ONE

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A. Identity of Moving Party

Aron Hovander, petitioner herein, asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

Aron Hovander asks review of the decision of the Court of Appeals for Division One filed on April 21, 2014 affirming the judgment of the Superior Court convicting petitioner of the crime of manufacture of marijuana. Petitioner's motion for reconsideration was denied by order entered on June 9, 2014. A copy of the decision is attached to this petition as Appendix 1 and order denying reconsideration as Appendix 2.

C. Issues Presented for Review

1. Whether testimony of a deputy who claimed he smelled—and was trained to smell—growing marijuana located in an enclosed building many feet from where he was standing provided sufficient foundation under *State v. Johnson*, 79 Wn. App. 776, 904 P.2d 1188 (1995).

2. Whether Art. 1, Sec. 7 requires a warrant to secure records of electrical power usage held by a private utility?

3. Whether the independent source doctrine prevents a deputy from illegally trespassing onto private property to confirm the presence of growing marijuana within an enclosed building there, and then later testifying in a search warrant application that he smelled marijuana coming from the building when he was standing away.

4. Whether, if the independent source doctrine as traditionally applied sustains the search warrant, it violates Article 1, Section 7 in that leaving to the trial judge the determination whether the unlawful search motivated the state to seek a warrant is speculative in the same sense as in *State v. Winterstein*, 167 Wn2d 620, 220 P.3d 1226 (2009), because here it is uncontested that the state applied for a second search warrant and presented new testimony because the deputy prosecutor learned that most of, and the most probative testimony of Deputy Paz as to what he smelled, came as a result of his illegal trespass in the first search warrant application.

5. Whether petitioner preserved his objection to the probable cause quantum on the basis that the search testimony did not address the question of whether the situs was a medical marijuana growing site.

D. Statement of the Case

The Court of Appeals decision sets forth the facts of the case. Petitioner disagrees with some of the representations of fact found in the Court of Appeals decision, but those statements are immaterial: the Court of Appeals' resolution of the search depends solely on what is presented within the four corners of the search warrant testimony. The issue of sufficiency of information to support a finding of probable cause based upon the expertise of the deputy to locate the source of the smell of growing marijuana depends on the facts contained within the four corners of the search warrant testimony, minus that testimony of detection of the growing of marijuana of Deputy Paz which was made after he scaled the

fence and entered the Hovander property.[1] A copy of the two presentations to the search warrant magistrate which provided the probable cause to search the Milk Barn is attached to this petition as Appendix 3.

This case involves three applications for search warrants. These warrants authorized the search of several properties owned by the defendant, Aron Hovander. The first application, made on October 12, 2011, authorized the search of property known as the "Milk Barn," located at 5268 Olson Road in Ferndale, Washington. The second application, to search the same property, was made the following day, on October 13, 2011. The third application, made on October 13, 2011, authorized a search of 5206 Olson Road, a lot adjoining the Milk Barn, and the site of Mr. Hovander's home.[2] A copy of the presentation to the search warrant

[1] Petitioner takes the position that, because Paz concealed his illegal trespass in his first application for a search warrant, the state is not entitled to use any information relating to Paz's claim of smelling the odor of growing marijuana unless the *record* of the search warrant testimony clearly shows that Paz acquired this smell while standing off the property. Petitioner does not concede that the deletions made on the day of entry of findings unless the text of the search warrant testimony clearly shows that fact—Deputy Paz smelled the odor of growing marijuana coming from the Milk Barn when he was off the Hovander property.

[2] The third application was also made by Deputy Paz who acquired a search warrant for Aron Hovander's home. The search revealed a marijuana growing operation. This search warrant was obtained after the search warrant for the Milk Barn had been executed. The state conceded suppression and dismissed this charge at the outset of trial. Paz had previously been instructed that climbing fences and trespassing was illegal by deputy prosecutor Chambers. This occurred when Paz was ordered by Prosecutor Chambers to return to the site and "smell again" on October 12. On October 13 when Paz executed the search warrant for the Milk Barn, Paz and his deputies stopped at Aron Hovander's house and observed a locked fence over which was a large sign reading, " No Trespassing." Paz and his deputies scaled the fence anyway and walked some distance to the Hovander house. When in close proximity to the Hovander house, Paz smelled the odor of

magistrate which provided the probable cause to search petitioner's home is attached to this petition as Appendix 4.

The Court of Appeals decision sets forth the facts of the case. Petitioner disagrees with some of the representations of fact found in the Court of Appeals decision, but those statements are immaterial: the Court of Appeals' resolution of the search depends solely on what is presented within the four corners of the search warrant testimony. The issue of sufficiency of information to support a finding of probable cause based upon the expertise of the deputy to locate the source of the smell of growing marijuana depends on the facts contained within the four corners of the search warrant testimony, minus that testimony of detection of the growing of marijuana of Deputy Paz which was made after he scaled the fence and entered the Hovander property.

E. Argument - Why this Court should accept review:

1. This Court should accept review because this case raises an issue of substantial public interest. Washington law permits medical marijuana patients to lawfully grow marijuana. A police officer claimed that he smelled—and was trained to smell—growing marijuana in an enclosed structure in a rural setting from quite a distance away. The Court of Appeals validated this officer's testimony as sufficient probable cause to search. The court failed

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marijuana coming from therein. This incident led to Paz's presentation of testimony in support of a warrant for the Hovander home. But in the transcript of this application for a search warrant, Paz also concealed the fact that he had scaled the fence that day. Petitioner's argument to the trial court that this episode proved the intentionality or recklessness of Paz's actions failed. The trial court found that all of Paz's mistakes in presentation of information were the product of negligence.

> to provide any standards for police officers who in future seek search warrants on the basis of "I smelled it" testimony. This Court should accept review to provide standards police officers must meet when they apply for warrants to search residences for growing marijuana.This court should review this case because it holds that any profession of the expertise in the detection of the odor of growing marijuana by a trained police officer as coming from a building in a rural setting is sufficient to establish probable cause without requiring the officer to establish specific foundational facts as to his prior similar experience in the detection of the odor of growing marijuana coming from inside closed structures; and without any specific foundational facts as to distance from the law enforcement officer's location and to the suspect building, topography, wind direction and the like information. The decision of the Court of Appeals in this case extends the holding in *State v. Johnson*, 79 Wa. App. 776, 904 P.2d 1188 (1995) where the odor was detected from a distance of perhaps 60 feet whereas in this case the detection point is undisclosed and/or 376 feet distant from the suspect building.

The sufficiency of the record on this issue is muddled because the law enforcement officer with the expertise climbed the fence and traversed petitioner's property some distance to the suspect Milk Barn and smelled the odor of growing marijuana coming through its vents. This deputy (Paz) could also hear the fans inside the barn. The Court of Appeals did not address petitioner's claim that this smell, the so-called third smell, was the fruit of the poison tree and thus tainted. The Court of Appeals disregarded this smell because the Court of Appeals found other information in the two search warrant applications, the first smell on October 7, and the second smell by Paz on October 11, was sufficient to sustain the warrant. Court of Appeals Slip Opinion at page 9, last sentence.

Because petitioner did not know the Court Appeals would resolve the case in this way, he takes the position that the critical second smell of Paz on October 11—if the search testimony is sufficient to establish this—was itself the fruit of the poison tree because the testimony of the second smell was only presented in the second search warrant application after the deputy prosecutor decided the testimony in the first application was tainted and another trip to the suspect property was required to establish probable cause to search.

As a result, the second application for search warrant was the proximate result of the prosecutor's discovery of Deputy Paz' illegal entry. But for this discovery and directive by the prosecutor, the state would never have made a second application for a search warrant.

The second search warrant application is the one containing the testimony from Paz in which Paz links his smells, the first on October 7, and the second on October 11, as smells in which Paz was in the company of Deputy Taddonio and at the same location; *see* page 4 of second application.

The testimony from the second application transcript reads:

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

> on Olson Road, we could smell it again, and then last night.

Second application for search warrant page four, top paragraph.

The first search warrant application testimony shows that Paz conducted only one smell when he was standing off of the property:

> And again I don't think I mentioned it on the record, the week prior myself and Deputy Taddonio were on the Olson Road, not in the property, and could actually smell marijuana from Olson Road.

Page 4, top paragraph.

Then, a moment later, Paz mentioned again that this incident took place when he was with Taddonio on October 7. See page 5.

Both applications were merged and form the basis for the probable cause determination in this case. In the evidentiary hearing before the Superior Court, Paz testified that he was with Taddonio or near him on October 7 at a location west of the Milk Barn on the Olson Road and was only able to smell the odor coming from the Milk Barn when the wind was blowing from east to west. Paz's pretrial testimony was adopted in toto by the Superior Court and is reflected in his Findings, a copy of which are attached as Appendix 5. A copy of those findings are submitted to underscore the confusion of facts in this search warrant quantum.

The Court of Appeals referenced the excerpt of testimony from Paz in his second application as sufficient to establish probable cause and

construed the meaning of this testimony to conclude that Paz smelled marijuana off the petitioner's property on the night Paz climbed the fence and trespassed citing this excerpt:

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

See second application for search warrant page four, top paragraph.

Reduced to its essence, the search warrant is upheld on the proposition that Taddonio and Paz were together on October 7 and October 11, the night Paz scaled the fenced and on both occasions the two deputies smelled marijuana at the same place, the break in the tree line southwest of the Milk Barn. [3]

[3] In a motion to reconsider, petitioner argued that the record only supported a conclusion that Paz acquired the evidence of one smell on October 7 when Paz did not trespass. Since the last smell was deemed essential to the establishment of probable cause in the mind of the prosecutor who directed Paz to return to the suspect site and obtain another off property smell, petitioner anticipated that the case would be resolved by a determination as to whether Paz's return to the suspect site and last smell was the fruit of the prior illegal trespass smell. Instead the Court of Appeals did not address the issue of taint and poison fruit of the last smell but instead scrutinized the two applications and found that Paz had acquired two smells before he climbed the fence and approached the Milk Barn under cover of darkness and smelled the odor of marijuana coming from the vents in the Milk Barn. In his reconsideration motion, petitioner emphasized the pretrial testimony of Paz before Superior Court Judge Mura. Paz testified that he was to the west of the Milk Barn with Deputy Taddonio on October 7 when he was first smelled marijuana coming from the Milk Barn when the wind was blowing east to west. Paz also testified he was with another deputy, Deputy Bonsen, on October 11 at a different location southwest of the Milk at a break in the tree line. Petitioner argued that this conflict and the ambiguous language used in the probable cause hearing confused the issue of how many smells Paz made and precisely from what location. In his testimony

In the midst of all this confusion, petitioner filed a motion to reconsider and argued that the testimony presented was not sufficient enough to support the conclusion that Paz smelled marijuana before he climbed the fence and trespassed; see petitioner's motion to reconsider.

a. There is inadequate foundation to sustain the deputies' hypothesis that the odor of growing marijuana detected from the public roadway was coming from the Milk Barn because no information was presented as to Paz's expertise to detect the odor of growing marijuana inside a structure from outside the structure.

Petitioner contends that there are several types of expertise involved here. The first is the capacity to identify the odor of growing marijuana—as compared with the odor of recently smoked marijuana—coming from inside a closed structure, building, home from a distance. The second type of expertise is, if the first expertise is established, whether additional foundational information, such as distance, topography, wind direction and like, is required when the suspected structures is amongst other buildings, which could be sources of the odor of growing marijuana. Petitioner insists that these foundational facts are required to show more probably than not that the target building is the source of the

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before the search warrant magistrate, Paz testified he was with Taddonio on both occasions at a different location, the break in the tree line southwest of the Milk Barn. The Court of Appeals denied the motion after calling for an answer from the state; see petitioner's motion to reconsider and state's response.

odor of growing marijuana. Foundational facts also minimize possible collateral damage if the wrong house is searched.

Petitioner argues that a prerequisite to any determination of probable cause based solely upon the olfactory determination by a human that a building houses a marijuana growing operation, is that the smelling deputies must establish their credentials—their expertise is detecting the source of the odor of growing marijuana coming from closed structures from considerable distances. Deputy Paz had to possess a special expertise that goes unremarked upon in his testimony. Not only did Paz have to recognize the odor of growing marijuana (as opposed to burnt marijuana), Paz also had to identify the source of the smell from inside a closed structure – the Milk Barn – and not the other buildings in the general location which could be sources of the odor.

b. Washington cases on capacity of law enforcement officers to establish probable cause to search for marijuana based upon the detection of the odor of marijuana are all cases in which the law enforcement officer either detects the odor of burnt marijuana, observes growing marijuana or smells the odor of growing or cut marijuana when in very close promity to it. Only *State v. Johnson* 79 Wa. App. 776, 904 P.2d 1188 (1995) addresses the adequacy of foundation when the claim of detection of marijuana comes from a police officer outside of a structure detecting the odor of growing marijuana as coming from therein.

All of the cases cited by the Court of Appeals relating to expertise to detect the odor of marijuana are inapposite to the facts of this case.

The only case petitioner found dealing with probable cause based solely on the detection of the odor of growing marijuana coming from inside a closed structure is *State v. Johnson*, 79 Wa. App. 776, 904 P.2d 1188 (1995). In *Johnson*, the court upheld a warrant where Federal Drug Enforcement Administration agents asserted that they smelled marijuana from the street in front of the defendant's house. In doing so, the court rejected the argument of the defense that the agents did not specify the distance between where they stood in the street and the house. The court stated 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 Wash.App. at 783, 904 P.2d 1188.

The instant case can be differentiated from *Johnson* because here, the Court of Appeals rests its decision on two smells, which fail to give information as to the distance from suspect target when the detection was made. The location of the two smells was testified to be at a place, the break in the tree line, which is 376 southwest from the Milk barn.

Petitioner asserts that the dissenting opinion of Judge Schultheis in *Johnson* is the more practical one in this case. This Court should accept review because the evidence presented of the consumption of electrical power was not probative of probable cause, and was unlawful under Art. 1, Sec. 7.

2. This Court should accept review because the evidence presented of the consumption of electrical power was not probative of probable cause, and was unlawful under Art. 1, Sec. 7.

At page 4 of the second search warrant application, the state introduced the records of the defendant's power consumption. These records were received by subpoena. The Superior Court found the records, which showed electrical power consumption ten times more the normal consumption for a residence were not probative of how much a barn on a farm might use, noting the presence of farm animals on the property. The Court of Appeals found the power consumption records probative and that they added to probable cause, Slip Opinion at 13. The basis for the conclusion was *State v. Maxwell*, 133 Wn2d 332 945 P.2d 196 (1997).

Petitioner argues that the same protection that is afforded to records of power consumption as is afforded to bank records. *State v. Maxwell*, 133 Wn2d 332 945 P.2d 196 (1997), should be reconsidered and privacy of information should be preserved for those citizens in Washington who can only get essential services such as electrical power from private companies licensed by the state.

3. This court should grant review to determine the contours of the independent source doctrine and whether this warrant is sustainable under the application of the independent source doctrine. If necessary, this court should review this case to determine whether the independent source doctrine as applied violates Art. 1, Sec. 7.

In 1920, the United States Supreme Court decided *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920) and announced what has come to be known as the "independent source" doctrine. The most recent discussion as to the contours of this rule is *Murray v. United States*, 487 U.S. 533 (1988). *Murray* is 4-3 decision in which two justices did not participate

The independent source doctrine was considered first in *State v. Coates*, 107 Wn2d 882, 735 P.2d 64 (1987) and approved as in compliance with Art. 1, Sec. 7 in *State v. Gaines*, 154 Wn2d 711, 116 P.3d 993 (2005).

In *State v. Miles*, 160 Wn2d 236, 156 P.3d 864 (2007) the Washington Supreme Court declared that the use of an administrative subpoena of the Washington State Securities Commission to acquire bank records violated Art. 1, Sec. 7. Upon remand, the state secured Miles's bank records pursuant to a search warrant. But the state was careful to present to the search warrant magistrate none of the information that they had acquired pursuant to the administrative subpoena. From a trial court order suppressing the warrant, the state appealed which was considered in *State v. Miles* 159 Wa. App. 292, 244 P3d 1030 (2011).

In this case, the Court of Appeals quoted the rule of *Murray* as follows:

> The Court states the determinative question is whether the later, purportedly lawful search—as compared to the initial unlawful search—"was in fact a genuinely independent source of the information and tangible evidence at issue" here. Murray, 487 U.S. at 542, 108 S.Ct. 2529. The Court concluded that the search would not have been genuinely independent "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, 108 S.Ct. 2529. Thus, under Murray, the analysis of whether the independent source exception applies requires separate inquiries into (1) the affect of illegally obtained information on the decision of the state agents to seek a warrant, and (2) the magistrate's decision to issue a warrant. Murray, 487 U.S. at 542, 108 S.Ct. 2529.

The Washington Court of Appeals noted that this prong of *Murray* was satisfied stating:

> Here, there is no dispute as to the first prong under Murray. The information obtained by means of the administrative subpoena was not included in the affidavit in support of the later search warrant and consequently, did not affect the decision to issue the warrant.

This case is different from *Miles* and from *Murray* because in both cases the government was careful to screen the information presented to the search warrant magistrate to make sure that no illegal seized information was presented. Here, the prosecutor incorporated the first application almost all of which was based upon the information gained after Paz had trespassed into the second application; see second application page 5. Search warrant magistrate Grant commented, "It

seems to me that the information received today just makes the application sounder."

The Court of Appeals recognized this objection but pointed out that this prong of *Murray* was meaningless as the majority of courts have rejected this as a substantive requirement, citing *State v. Spring*, 128 Wa. App. 398, 115 P.3d 1052 (2005) and *State v. Chaney* 318 N. J. Super. 217, 723 P.2d 132 (1999).

So in this case, if the criterion from *Murray* that the illegally seized information not be presented to affect the magistrate decision has any significance, it was clearly met by petitioner. But the Court of Appeals excuses this violation citing *State v. Maxwell*, *supra*. In actual impact, the presentation of illegal evidence to the search warrant magistrate not only affected the search warrant magistrate's decision, it compelled it.

Art. 1, Sec. 7 is violated where as here an illegal trespass secures to the investigating deputy incontrovertible proof that the suspect Milk Barn houses a marijuana growing operation. 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 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."

This securing of incontrovertible proof that the suspected crime was being committed by the target of the criminal investigation by an illegal trespass by the police under color of darkness or entry into a house or building makes further determining whether evidence later acquired in the criminal investigation is independent from the securing of this incontrovertible proof subject to the same speculation defect found in the inevitable discovery rule terminated in *State v. Winterstein*, 167 Wn2d 620, 220 P.3d 1226 (2009). Petitioner posits the principle that discovery of incontrovertible proof that a person is committing a criminal propels the investigation forward for a certainty.

The independent source doctrine impinges upon Art. 1, Sec. 7 because it excuses the deprivation of the right of privacy by holding in abeyance the general rule that Art. 1, Sec. 7 prescribes a remedy, a sanction against the state not to solely to deter but to preserve the right of privacy. Independent source doctrine is a creature of 4th amendment jurisprudence of which deterrence is the only principle that compels a sanction. But nevertheless under independent source doctrine, the judicial decision to withhold a sanction is condoned or justify by the principle that the police should be put in no worse situation but for the blunder. This

justification, petitioner views, raises the interest of the executive in enforcement of the law over the privacy right protected in Art. 1, Sec. 7.

No finding by any trial court can change the reality that illegal search prompted the state's decision to seek a second, amended warrant. It is uncontested that the deputy prosecutor immediately recognized that the first warrant was bad because of the illegal trespass of Paz, and directed Paz to get more evidence and even micromanaged that the smell must come form a public right of way. Only after more evidence was gathered, did the state apply for another search warrant based upon this other evidence and during this time the search of the Milk Barn was held in abeyance. It is clear that the state fails to satisfy this prompted prong of the *Murray* motivation test, that the illegality did not prompt the decision to seek a warrant.

Likewise, whether the state would have gotten a search warrant if Paz never trespassed is pure speculation.

There is however a criterion set down in *Murray* over there can be no speculation. The court in *Murray* summarized its holding at the end of the opinion stating:

> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case 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.

Because unlike in *Murray* and in *Miles* after remand where the prosecutor screened the information to ensure that no information illegally obtained was presented to the search warrant magistrate and did not present any evidence unlawfully obtained previously, the criterion of *Murray* that information obtained during that entry be presented to the Magistrate to affect his decision to issue the warrant was satisfied in *Murray* and *Miles*. Not so in this case where both applications were used to secure the search warrant before the same magistrate. The magistrate was clearly affected by the illegal trespass here because the most cogent evidence obtained by the trespass was presented to him. The fact that the federal courts may have found this criterion to be ineffective does not detract that petitioner's right to a fair hearing on probable cause before an impartial magistrate was eliminated by the application of the federal independent source doctrine to the detriment of his right to privacy under Art. 1, Sec. 7.

4. This Court should accept review because the search warrant quantum was inadequate in that it did not eliminate the possibility that the growing marijuana was medical marijuana.

One of the issues litigated below was whether Paz intentionally

withheld information pertinent to this issue. The Whatcom County Sheriff's Department had conducted an investigation of petitioner months before in which petioner presented medical marijuana paperwork to the sheriff saying he was growing marijuana in his residence after a deputy sheriff pulled over a driver who said he obtained the marijuana from Petitioner. Paz was aware of this criminal investigation and thought that the marijuana grow that petitioner reported to the sheriff was in the Milk Bank. Paz forgot to mention this when he testified. The Superior Court found all shortcomings of Paz were based upon only negligence. Petitioner presented the argument rejected by this court in *State v. Reis* 322 P.3d 1238 (2014). Petitioner maintains that he has sufficiently preserved this argument, which has been rejected also by the Court of Appeals for Division 3 in *State v. Ellis*, _ P3d _, 2014 WL 211 8650 (2014).

F. Conclusion

In this case, an officer presented his opinion that the source of odor of growing marijuana came from enclosed structures, but failed to present an adequate foundation as to his expertise in so determining. Here, the search warrant magistrate lacked a factual basis on which to evaluate the testimony. The foundation ought to include some information disclosing the officer's prior experience in successfully identifying and locating

growing marijuana inside structures based upon smelling the odor while outside the structure. In addition, other information such as the location of the law enforcement officer when making the determination and the distance from the suspected site and other information of other buildings, which could be the possible source of the odor, should be disclosed to the search warrant magistrate.

In this case, the record is limited to identification of the odor of growing marijuana by Deputy Paz from an unidentified location when Paz was with Deputy Tudonio on October 7. Then in the second application, there are two identifications by Paz with Deputy Tudonio at a described location south west of the Milk Barn location. Unfortunately the actual facts are substantiality different than those set forth in the search warrant testimony but this is excused because the deputy was acting only negligently.

If necessary, the court should address the issue of whether Art. 1, Sec. 7 prohibits use of the independent source doctrine because it inevitably undermines privacy because it does not sanction the police for its illegal actions. Here, petitioner's right to a fair hearing on probable cause was destroyed when the illegal and most probative smell evidence was presented to the search warrant judge. This tainted evidence not only affected the magistrate's decision, it dictated it.

If this court considers this issue, it might well choose to resolve this case only by requiring that at least when prosecutors learn of evidence acquired by the police illegally, that they make sure, as was done in *Murray* and *Miles*, that this information is not presented to the search warrant magistrate and reserve other issues relating to whether the independent source doctrine violates Art. 1, Sec. 7 to another day.

Lastly, the Superior Court determination that Paz's discovery of the marijuana grow by his trespass did not prompt the later decision to secure the warrant violates Art. 1, Sec. 7 and demonstrates the limitation of privacy protections by leaving this determination to the trial court. At best it is an exercise in speculation.

Respectfully submitted this 6th day of August, 2014

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ARON CLARK HOVANDER, Appellant.	)	No. 69357-3-I DIVISION ONE UNPUBLISHED FILED: April 21, 2014

Cox, J. — Aron Hovander appeals his judgment and sentence based on his conviction of one count of unlawful manufacture of a controlled substance, marijuana. We hold that probable cause existed to support the issuance of the second warrant to search the milking parlor and office equipment building where the marijuana was seized. A Franks hearing was not required under the circumstances of this case. We also hold that the independent source doctrine supports our conclusion that the evidence was legally seized. None of the other arguments that Hovander advances warrant reversal of the denials of his motions to suppress and reconsider. We affirm.

On October 12, 2011, at 3:30 p.m., Deputy Sheriff Anthony Paz and a Whatcom County prosecutor sought a search warrant for 5268 Olson Road in Ferndale, Washington. Hovander is the owner of the property.

Deputy Paz testified that the property has six buildings—four barns and an attached milking parlor and office equipment building. He stated that he was

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investigating the crime of manufacturing marijuana and wanted to search the milking parlor and office and equipment building.

Deputy Paz described previous visits to the property. He stated that the week prior he was on Olson Road with another deputy and "could actually smell marijuana from Olson Road."

He also testified that he went back to the property with a different deputy on October 11 to investigate further. He testified that they walked up to two particular buildings—the milking parlor and office building—and could smell an obvious odor of growing marijuana and could hear fans in the buildings. Based on Deputy Paz's testimony, the judge issued the first search warrant.

The State did not execute this first warrant. The prosecutor was concerned that the deputies had trespassed during the October 11 investigation when they went up to the buildings on Hovander's property. The prosecutor told Deputy Paz to return to the farm and verify that he could smell the marijuana from public areas.

The State later conceded that some of the information acquired during the October 11 trespass was wrongfully obtained. Accordingly, the parties agreed that portions of the transcript for the first warrant would be excised. This record reflects the transcript, as excised. We consider only those portions of this record to which the parties agreed below.

On October 13, 2011, at 11:45 a.m., Deputy Paz testified again before the same judge who previously authorized the first warrant. The prosecutor stated that Deputy Paz had "some observations regarding [the barns at the Hovander

property] other than what [they] talked about yesterday." Specifically, this testimony reflected information that Deputy Paz obtained following his conversation with the prosecutor and additional investigation on his third visit to the property on October 12.

Deputy Paz testified that he was on Olson Road the night of October 12 and could again smell an obvious odor of growing marijuana emanating from the property (third smell from Olson Road). He again described the two prior occasions where he had smelled marijuana from the same location on Olson Road—October 7 (first smell from Olson Road) and October 11 (second smell from Olson Road).

Additionally, Deputy Paz described his extensive training and experience in the identification of controlled substances, including marijuana. He also testified that he reviewed power bills from the Hovander farm, and that the power consumption was 10 times above the average for the state of Washington. The testimony from this second hearing was incorporated as an addendum to the record. The court issued a second warrant.

Following execution of the second search warrant on the milk parlor and office building, the deputies discovered a large scale marijuana growing operation, with over 500 marijuana plants under cultivation.

The State charged Hovander by second amended information with one count of unlawful manufacturing of a controlled substance, marijuana. He moved to suppress all evidence seized as a result of the milk barn property search authorized by the second warrant.

Hovander also argued for a hearing pursuant to Franks v. Delaware[1] to determine if any material information as to probable cause for the issuance of the second warrant was either misrepresented or omitted. Further, he moved to suppress all evidence acquired after the "illegal seizure of electrical power consumption records."

After the suppression hearing, the superior court denied Hovander's motions. The court later entered its written findings of fact and conclusions of law.

Hovander twice moved for reconsideration. The superior court denied both motions.

Hovander agreed to a stipulated bench trial. The superior court found Hovander guilty, as charged, and entered its judgment and sentence.

Hovander appeals.

MOTION TO SUPPRESS

Hovander challenges the validity of the second search warrant, the authority for seizing the marijuana and other evidence. He argues that the evidence supporting the application for this warrant was insufficient to support probable cause. He claims that the investigating officer was reckless in failing to disclose information to the issuing judge. He also argues that the search warrant is defective because it did not establish that the suspected grow operation was not legal. Finally, he argues that the search was tainted by the prior illegal trespass. We disagree with all arguments.

[1] 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Probable Cause

Hovander first argues that "the evidence acquired outside of the unlawful trespass as contained in the search warrant testimony does not establish probable cause." We disagree.

To establish probable cause, the affidavit must set forth "sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched."[2] The judicial officer issuing the warrant is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit.[3]

In reviewing a probable cause determination, appellate courts review the same evidence presented below.[4] Review is limited to the four corners of the affidavit supporting probable cause.[5] The trial court's assessment of probable cause is a legal conclusion that an appellate court reviews de novo.[6]

Affidavits for search warrants are to be interpreted "'in a commonsense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant.'"[7]

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[2] State v. Lyons, 174 Wn.2d 354, 359, 275 P.3d 314 (2012).

[3] State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

[4] State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007).

[5] State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

[6] Chamberlin, 161 Wn.2d at 40.

[7] Lyons, 174 Wn.2d at 360 (quoting State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003)).

"When an officer who is trained and experienced in marijuana detection actually detects the odor of marijuana, this by itself provides sufficient evidence to constitute probable cause justifying a search."[8] Washington courts have upheld search warrants based solely or largely on olfactory observations.[9] Courts emphasize that when considering the adequacy of smell observations to support probable cause, the sufficiency of the observations depends on the officer's experience and expertise.[10] Such expertise is "critical" to the analysis.[11] An officer's "sense observations must consist of more than mere personal belief."[12]

Additionally, a magistrate need only draw the reasonable inference that the odor is connected to the defendant's residence.[13]

We first note that the State, in its briefing, argued that we review for abuse of discretion the determination for probable cause for issuance of a search warrant, relying on State v. Chenoweth.[14] At oral argument, the State properly

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[8] State v. Olson, 73 Wn. App. 348, 356, 869 P.2d 110 (1994).

[9] See, e.g., State v. Johnson, 79 Wn. App. 776, 782, 904 P.2d 1188 (1995); State v. Remboldt, 64 Wn. App. 505, 510-11, 827 P.2d 282 (1992); State v. Vonhof, 51 Wn. App. 33, 41-42, 751 P.2d 1221 (1988).

[10] See, e.g., Johnson, 79 Wn. App. at 780-82; Olson, 73 Wn. App. at 356; Remboldt; 64 Wn. App. at 510.

[11] Johnson, 79 Wn. App. at 780.

[12] Id.

[13] See State v. Petty, 48 Wn. App. 615, 622-23, 740 P.2d 879 (1987).

[14] Brief of Respondent at 10 (citing State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007)).

conceded that this reliance was incorrect. So too is any reliance on the trial court's findings of fact and conclusions of law regarding the question of probable cause at the suppression hearing.[15] The proper standard of review of a probable cause determination is the one previously articulated.

Here, disregarding the evidence obtained from the unlawful October 11 trespass, there was sufficient evidence before the issuing judge to support the determination of probable cause for the second warrant.

First, there was testimony that Deputy Paz smelled marijuana from Olson Road, a proper vantage point, on at least two separate occasions. He stated:

> The first occasion was [October 7] and it was from the exact same spot that I could smell it fro[m] last night. That was at nighttime, and the wind was actually blowing in the same direction from north to south. And that is when [another deputy] was with me. And then on [October 11], again in the same location on Olson Road, we could smell it again . . . .[16]

He also provided additional details about this location on Olson Road:

> 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 . . . .[17]

Hovander admits this fact in his brief. He states: "Deputy Paz confirmed that he had detected the odor of growing marijuana multiple times from the same

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[15] See State v. Perez, 92 Wn. App. 1, 4 n.3, 963 P.2d 881 (1998).

[16] Clerk's Papers at 95.

[17] Id. at 94.

vantage point—a break in the tree line along Olson Road to the south of the Milk Barn."

Second, Deputy Paz's testimony was based on more than his mere personal belief. The search warrant affidavits contained detailed information demonstrating that Deputy Paz had extensive training and experience with marijuana detection. Deputy Paz testified that he has been involved with "well over a hundred marijuana-growing investigations." He provided testimony about his specific ability to detect the odor of growing marijuana:

> [Prosecutor]: 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.
>
> [Prosecutor]: And you have a training experience to tell you the difference between those two things?
>
> Paz: Yes.
>
> [Prosecutor]: 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.
>
> [Prosecutor]: You told me yesterday that you were involved in over 100 cases of growing marijuana.
>
> Paz: At least, at least.[18]

[18] Id.

The cases uniformly hold this is sufficient to support probable cause.

Third, there was testimony to support a reasonable inference that the milk parlor was the source of the odor. Deputy Paz described the layout of the property, stated he could see that the barns were empty and said that "it is obvious from the road that none of those buildings are being used to grow marijuana." He testified that the closest house is farther north on Olson Road, at least a half a mile north. And he stated that the wind was blowing from north to south.

Further, he testified that there were two infrared cameras watching the property. And he testified that the monthly power consumption, according to records, was "at least ten times above the average for the state of Washington."

In sum, viewing the affidavits in a commonsense manner, they set forth sufficient facts to convince a reasonable person of the probability that Hovander was engaged in criminal activity and that evidence of criminal activity could be found at the milk barn.

Hovander argues that Deputy Paz's third smell from Olson Road, which occurred on October 12, the day after the trespass, is tainted because the deputies had already definitively determined the source of the smell. But, as Hovander even states, the evidence of this third smell "duplicates evidence already in the officer's possession." Thus, Deputy Paz's first and second smells from Olson Road, on October 7 and on October 11, along with the other evidence presented, is sufficient to establish probable cause.

Hovander makes a number of additional arguments that the evidence was insufficient to support probable cause. None are persuasive.

First, Hovander argues that the trial court erred in considering testimony that was first presented at the suppression hearing and was not presented to the issuing judge. But the trial court's findings and conclusions are irrelevant to our review of probable cause.[19] An appellate court reviews the determination of probable cause de novo, based on the information that was before the issuing judge. And, as previously discussed, the record before the issuing judge contained sufficient evidence to conclude that probable cause existed in this case.

Second, Hovander argues that Deputy Paz provided insufficient evidence of his special expertise to support the conclusion that he could smell growing marijuana from 376 feet away. But in State v. Johnson, Division Three rejected a similar argument.[20]

In that case, Division Three considered whether evidence that federal DEA agents smelled marijuana "from the street in front of [Johnson's] house" was sufficient to support probable cause.[21] In concluding that it was, the court looked to the agents' experience and expertise.[22] There, Johnson argued that exact distances should be included in the affidavit, but the court stated that this is

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[19] See Perez, 92 Wn. App. at 4 n.3.

[20] 79 Wn. App. 776, 782, 904 P.2d 1188 (1995).

[21] Id. at 779.

[22] Id. at 780.

"unsupported by case law."[23] The Johnson court reiterated that the magistrate need only draw the reasonable inference that the odor is connected to the defendant's residence. Hovander provides no authority holding the contrary.

Third, Hovander argues that "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.'"[24] For this argument, he relies on the dissent in Johnson.[25] Such reliance is unpersuasive.

There, the dissent stated that had the federal agents been "inside the residence, in a doorway, near an air vent or close to the building when they detected the smell," then probable cause would exist.[26] But it stated: "The affidavit is silent with respect to [the agents'] distance from [Johnson's] house and [the agents'] 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."[27] Accordingly, it disagreed with the majority that there was probable cause.[28]

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[23] Id. at 782.

[24] Brief of Appellant at 23 (citing Johnson, 79 Wn. App. at 786).

[25] Id. at 22-23 (citing Johnson, 79 Wn. App. at 783 (Schultheis, J., dissenting)).

[26] Johnson, 79 Wn. App. at 785.

[27] Id.

[28] Id. at 783.

But, as previously discussed, the affidavits in this case contained information from which one could draw a reasonable inference that the milk barn was the source of the odor. Moreover, the factors set forth in the Johnson dissent is not the test. Thus, Hovander's reliance on the dissent in Johnson is not persuasive.

Finally, Hovander argues that evidence of the milk barn's consumption of electrical power was illegally obtained and that this information should be excised from the search warrant application. Specifically, he 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.

Hovander first argues that privately owned power records should be afforded the same protection as bank records and should require a judicial warrant or subpoena. For this argument, he relies on State v. Miles, where the supreme court held that bank records are within a person's private affairs and thus require authority of law to justify an intrusion.[29] Power records were not at issue. But reliance on Miles is misplaced. In Miles, the supreme court expressly determined that individuals have a protected privacy interest in bank records.[30]

In contrast, in In re Maxfield, a supreme court case, a majority of justices held there is ***no*** protected privacy interest in power records.[31] Although the court

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[29] Brief of Appellant at 46-47 (citing State v. Miles, 160 Wn.2d 236, 247, 156 P.3d 864 (2007)).

[30] Miles, 160 Wn.2d at 244-47.

[31] 133 Wn.2d 332, 945 P.2d 196 (1997).

was split on the issue, five justices rejected Hovander's argument.[32] Accordingly, Hovander's general assertion that these power records should be afforded the same protection as bank records is not persuasive.

Hovander also relies on RCW 42.56.330 for the proposition that "[p]ersonally identifying information may be released to law enforcement agencies if the request is accompanied by a court order."[33] But this statute expressly relates to public utilities.[34] Puget Sound Energy, the utility providing power here, is neither a public utility nor a municipally owned electrical utility. Accordingly, the requirements of this statute have no relevance to this case.

Hovander next argues that power records have little weight for probable cause purposes.[35] But the issuing judge heard testimony that the property's consumption was at least ten times above the average Washington power bill. He also heard testimony from Deputy Paz that the only electrical usage he could observe was some low power lights at night. Further, "[w]hile an increase in electrical consumption by itself does not constitute probable cause to issue a search warrant, the increase, when combined with the other suspicious facts, is a

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[32] Id. at 344-49 (Madsen, J. concurring).

[33] Brief of Appellant at 46 (quoting RCW 42.56.330).

[34] See RCW 42.56.330.

[35] Brief of Appellant at 47 (citing State v. McPherson, 40 Wn. App. 298, 698 P.2d 563 (1985)).

proper factor in determining whether probable cause exists."[36] Accordingly, this evidence had some probative value.

Franks Hearing

Hovander argues that the trial court erred when it concluded that Deputy Paz neither recklessly nor intentionally failed to disclose information to the search warrant magistrate. We disagree.

A defendant is entitled to a Franks hearing to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant.[37]

A court begins with the presumption that the affidavit supporting a search warrant is valid.[38] Then, "[a]s a threshold matter, the defendant must first make a 'substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause.'"[39]

Reckless disregard for the truth occurs when the affiant "'in fact entertained serious doubts as to the truth' of facts or statements in the affidavit."[40] Such "serious doubts" are shown by "'(1) actual deliberation on the

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[36] State v. Cole, 128 Wn.2d 262, 291, 906 P.2d 925 (1995).

[37] 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

[38] Franks, 438 U.S. at 171.

[39] State v. Atchley, 142 Wn. App. 147, 157, 173 P.3d 323 (2007) (quoting Franks, 438 U.S. at 155-56).

[40] State v. Clark, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001) (quoting State v. O'Connor, 39 Wn. App. 113, 117, 692 P.2d 208 (1984)).

part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports."[41] Assertions of mere negligence or innocent mistake are insufficient.[42]

The defendant's allegations must be accompanied by an offer of proof, including "relevant statements of witnesses and reasons supporting the claims."[43]

The same test is used for material omissions of fact.[44] "In examining whether an omission rises to the level of a misrepresentation, the proper inquiry is not whether the information tended to negate probable cause or was potentially relevant, but, [rather, the court must find] the challenged information was necessary to the finding of probable cause."[45]

If the defendant succeeds in showing a deliberate or reckless omission, then the omitted material is considered part of the affidavit.[46] "If the affidavit with the matter deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required."[47]

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[41] Id. (quoting O'Connor, 39 Wn. App. at 117).

[42] Atchley, 142 Wn. App. at 157.

[43] Id.

[44] State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992).

[45] Atchley, 142 Wn. App. at 158.

[46] Id.

[47] Garrison, 118 Wn.2d at 873.

A trial court's conclusion that the affiant did not recklessly omit material facts in obtaining a search warrant should be upheld where such determination is not clearly erroneous.[48] Great deference is given to the trial court's factual findings.[49]

Here, Hovander contends that Deputy Paz acted recklessly when he: (1) failed to disclose that he believed the milk barn had been the site of a medical marijuana grow operation in the past; (2) testified that the closest building was a mile farther north when, in fact, Hovander's house was located 197 feet away; and (3) failed to disclose that he was 376 feet away from the milk barn when he detected an odor of growing marijuana.

Hovander had the burden of making a substantial preliminary showing that Deputy Paz recklessly failed to disclose information to the issuing magistrate. In his offer of proof, Hovander pointed out inconsistencies between Deputy Paz's search warrant testimony and report. He included a declaration from Hovander, which asserted that: Deputy Paz knew of a prior investigation involving a medical grow operation at Hovander's property, that the milk barn is 376 feet away from the gap in the tree line, and that Hovander's residence is 197 feet away from the gap in the tree line. He also included an aerial photograph showing these distances and other buildings.

The superior court made the following conclusion:

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[48] See Chenoweth, 160 Wn.2d at 481.

[49] Atchley, 142 Wn. App. at 154.

> 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.[50]

As the trial court correctly noted, Deputy Paz's belief that the farm was the site of a prior legal grow operation would not be material to the determination of probable cause. At best, it would have provided a potential defense. Accordingly, this conclusion was not clearly erroneous.

Additionally, none of the other alleged misstatements and omissions warranted a Franks hearing.

First, although the record shows that there were inconsistencies between Deputy Paz's report and his testimony, there is no evidence that he acted intentionally. Thus, the question is whether he acted with a reckless disregard for the truth.

Deputy Paz testified that the milk barns were "fairly close" to Olson Road. Hovander's declaration shows that the distance from the tree line to the milk barn is 376 feet. This statement does not show reckless disregard for the truth. Further, even if it did, this fact is not material because it is not "necessary" to the

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[50] Clerk's Papers at 141.

determination of probable cause.[51] The issuing judge understood Deputy Paz's location to be sufficiently close to detect the smell of marijuana and the precise distance is not critical to establish probable cause.

The next question is whether Deputy Paz acted recklessly when he testified that the closest house was "farther north on Olson Road . . . at least a half a mile, maybe three-quarters of a mile at the north." The aerial photograph and declaration submitted by Hovander showed that Hovander's house was 197 feet away to the southeast, that a neighbor's house was 360 feet to the southwest, and that a trailer was 254 feet to the east. Given this photograph, there was reason to doubt the accuracy of Deputy Paz's statement to the extent of his estimate of distance.

But even if Deputy Paz recklessly misstated the location of the closest house and omitted the fact that Hovander's house was 197 feet away, neither the misstatement nor the omission was material. Although this information could undercut probable cause, it is not "necessary" to the determination of probable cause. Even if this information was included, the affidavit still supports a reasonable inference that the milk barn was the source of the odor, given that the milk barn was the closet building to the north, the fact that the wind was blowing from north to south, the infrared cameras on the property, and the power consumption records. Accordingly, Hovander's showing simply falls short of what Franks requires.

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[51] See Atchley, 142 Wn. App. at 158.

2011 Amendments

Hovander argues that the search warrant was defective because law enforcement failed to establish that the suspected grow operation was not a legal, medical grow operation. He argues that the 2011 amendments to RCW 69.51A.040 decriminalized medical marijuana, and law enforcement now bears the additional burden of showing that the grow operation is not legal.

Although Hovander made a related argument below, Hovander concedes that this precise argument was not presented to the trial court. Thus, he did not preserve this issue for review.

Hovander cites to In re Nichols for the proposition that this issue may properly be considered on appeal.[52] But he fails to make any argument beyond that citation to show why we should consider this new argument. Thus, we decline to consider it.[53]

Independent Source Doctrine

Hovander next argues that the search of the milk barn was unlawful because "the trespass prompted the decision to secure a second warrant." We disagree.

Evidence that is seized during an illegal search is subject to suppression under the exclusionary rule.[54] The independent source doctrine is a "well-

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[52] Brief of Appellant at 50 (citing In re Nichols, 171 Wn.2d 370, 256 P.3d 1131 (2011)).

[53] RAP 2.5(a)(3).

[54] State v. Gaines, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005).

established exception to the exclusionary rule."[55] The United States Supreme Court's decision in Murray v. United States[56] is the "'controlling authority' defining the contours of the independent source exception."[57] In Murray, the court held that the Fourth Amendment does not require the suppression of evidence discovered during police officers' illegal entry if that evidence is also discovered during a later search pursuant to a valid search warrant that is independent of the illegal entry.[58] It stated that:

> The ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case 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.[59]

Accordingly, in Washington, courts have interpreted the requirements in Murray to have two prongs, both of which must be satisfied. "Under the independent source exception, an unlawful search does not invalidate a subsequent search if (1) the issuance of the search warrant is based on untainted, independently obtained information and (2) the State's decision to seek the warrant is not motivated by the previous unlawful search and seizure."[60]

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[55] State v. Miles, 159 Wn. App. 282, 291, 244 P.3d 1030 (2011).

[56] 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).

[57] Miles, 159 Wn. App. at 292 (quoting Gaines, 154 Wn.2d at 721).

[58] Murray, 487 U.S. at 542.

[59] Id.

[60] Miles, 159 Wn. App. at 284.

Washington courts have adopted the approach taken by a majority of courts, that the first prong is satisfied so long as the remaining information in the search warrant affidavit establishes probable cause.[61]

The second prong, referred to as the "motivation prong," is a question of fact that must be determined by the trial court.[62]

Findings of fact are reviewed for substantial evidence.[63] Substantial evidence is "'evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.'"[64] Conclusions of law are reviewed de novo.[65]

Here, both "prongs" of the independent source doctrine were met, and the search of the milk barn was lawful.

First, as previously discussed, there was sufficient information in the affidavits to support the determination of probable cause.

Second, the superior court concluded that "[t]he 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

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[61] See State v. Maxwell, 114 Wn.2d 761, 769, 791 P.2d 223 (1990).

[62] Miles, 159 Wn. App. at 298.

[63] State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

[64] Id. (quoting State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

[65] State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

October 11, 2011 visit to the property."[66] To support its conclusion, the court expressly made Finding of Fact 6 related to the State's motivation. It stated:

> 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.[67]

Substantial evidence supports this finding. At the suppression hearing, Deputy Paz was asked whether he would have continued to investigate the odor that he had smelled on October 7, given the power records that he received thereafter. Deputy Paz indicated that he would have. An appellate court does not review credibility determinations on appeal.[68]

Accordingly, based on the testimony at the suppression hearing, the court properly found that Deputy Paz would have continued his investigation.

Hovander argues that the State fails to satisfy the motivation test because the illegal activity was the decision to seek both the first and second warrant and because the motivation test "requires a court finding that the deputies would have secured a search warrant if Deputy Paz had not trespassed." Hovander also argues that the "more probable explanation is that [the deputies] would ***not*** have sought a search warrant had Deputy Paz not illegally trespassed." But these arguments ignore Finding of Fact 6, as previously discussed, where the trial court

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[66] Clerk's Papers at 141.

[67] Id. at 140.

[68] State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

did make such a finding and disagreed with Hovander's argument. Thus, these arguments are not persuasive.

Hovander cites to Murray and asserts that there is a "disconnect' with the command in Murray.[69] He then argues that Deputy Paz 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."[70] Hovander's argument is not fully briefed, but it appears that he is pointing to the clause in Murray that suggests that the independent source doctrine is not met "if information obtained during that entry was presented to the Magistrate ***and affected his decision to issue the warrant.***"[71]

But even if this is what Hovander argues, the majority of courts have concluded that this part of Murray is dictum and is "inconsistent with the overall tenor of the opinion and with prior case law."[72] Washington courts have agreed with the majority of other courts and have concluded that a warrant is valid if the lawfully obtained evidence in the application supports probable cause.[73]

Finally, Hovander asserts that the attenuation doctrine and the independent source doctrine are prohibited under Article 1, Section 7 of the

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[69] Brief of Appellant at 40 (citing Murray, 487 U.S. at 542).

[70] Id.

[71] Murray, 487 U.S. at 542 (emphasis added).

[72] State v. Spring, 128 Wn. App. 398, 404-05, 115 P.3d 1052 (2005) (quoting State v. Chaney, 318 N.J. Super. 217, 224, 723 A.2d 132 (1999)).

[73] Id. at 405.

Washington State Constitution "in the same manner as was the inevitable discovery rule, which was abrogated in State v. Winterstein."[74] He states that the issue "is currently before the state supreme court in State v. Smith."[75] And he "notes" that in the event the supreme court abrogates the attenuation doctrine and the independent source doctrine, then the search warrants in this case will "collapse."

But the supreme court decided State v. Smith in June 2013, and it did not abrogate these doctrines.[76] Because Hovander does not make any further argument to support his assertion that these doctrines violate the constitution, we decline to further address his claims.[77]

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Spearman, C.J.

Schindler, J.

[74] Brief of Appellant at 16 (citing State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009)).

[75] Id. (citing State v. Smith, 173 Wn.2d 1034, 277 P.3d 669 (2012)).

[76] 177 Wn.2d 533, 303 P.3d 1047 (2013).

[77] See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (declining review of constitutional issues unsupported by reasoned argument).

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024	778-587-2543	05-28 08:42	00'23	001	EC	HR	Success
025	866-829-1119	05-28 10:18	00'20	001	EC	HR	Success
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031	''	06-19 11:35	00'33	002	EC	HR	Success
032		06-25 13:02	01'03	001	EC	HR	Success
033		06-27 10:59	01'01	007	EC	HR	Success
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036	Fax	07-09 10:27	00'17	001	EC	HR	Success
037		07-11 11:50	01'14	008	EC	HR	Success
038	877-263-9852	07-14 12:02	00'28	001	EC	HR	Success
039	5184520822	07-14 13:12	00'16	001	EC	HR	Success
040		07-15 04:08	00'36	001	G3	HR	Success
041	''	07-15 15:13	00'44	002	EC	HR	Success
042	3606360011	07-16 10:47	02'54	016	EC	HR	Success
043	Fax	07-23 18:11	00'37	002	EC	HR	Success
044	Life Insurance	07-28 12:06	00'19	001	EC	HR	Success
045		07-31 14:03	00'16	001	EC	HR	Success
046		08-01 09:26	02'23	003	EC	HR	Fail
047	3606761510	08-06 11:05	00'38	006	EC	HR	Success
048	3606761510	08-06 11:10	02'01	016	EC	HR	Success
049	3606761510	08-06 11:18	01'31	013	EC	HR	Success
050	3606761510	08-06 11:22	02'59	025	EC	HR	Success

Abbreviations:

HS:Host Send	PL:Polled Local	EC:Error Correct	TS:Terminated by System
HR:Host Receive	PR:Polled Remote	MP:Mailbox Print	RP:Report
WS:Waiting Send	MS:Mailbox Save	TU:Terminated by User	G3:Group3

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

STATE OF WASHINGTON, Respondent, v. ARON CLARK HOVANDER, Appellant.	No. 69357-3-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Aron Hovander, has moved for reconsideration of the opinion filed in this case on April 21, 2014. The panel hearing the case has called for an answer from respondent. The court having considered the motion and respondent's answer has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 9th day of May 2014.

FOR THE PANEL:

Cox, J.

Judge

Appendix 2

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 3

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.

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 4

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

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 5

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 different locations DD.

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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,~~ MISTAKENLY Deputy Paz 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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