No. 31313-1-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ADRIANE CONSTANTINE

Appellant.

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

The Honorable Judge Jack Burchard

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Adrianne Constantine accepts this opportunity to reply to the State's response brief. For issues not addressed herein, Appellant respectfully requests that the Court refer to her opening brief.

B. ARGUMENT IN REPLY

1. The State did not demonstrate a nexus between the greenhouse and the home or other outbuildings, nor did it provide an independent factual basis to search the house.

The State addressed the history and law for obtaining a search warrant. (State's Brief pgs. 5-12) But when it came to responding to the Appellant's specific argument regarding the lack of a factual nexus between outbuildings and the home, the analysis fell quite short. (*Id*. at pg. 14, n.3)

There was insufficient nexus between the greenhouses where marijuana was actually seen, and the shed or house that was located 50 to 70 feet away from the greenhouses. The cases relied upon by the Appellant state that probable cause to search outbuildings on a property does not automatically create probable cause to search a house on that same property, and vice versa. The State provided a general overview of the laws for obtaining valid search warrants, but it failed to logically distinguish Appellant's cited cases or provide any facts known to officers when obtaining the search warrant that actually connected the home or

shed with the greenhouses as a place where evidence of criminal activity was likely to be found.

State v. Thein was properly relied upon by the Appellant for the general proposition that there must be some connection between the suspected criminal activity and the place to be searched. 138 Wn.2d 133, 146-47, 977 P.2d 582 (1999). General suspicion that drug-involved persons may keep evidence of their illicit activities in their homes is not enough to obtain a warrant to search the person's home. *Id*. And, the Appellant generally agrees with the string of cases cited by the State (Response Brief pgs. 11-12) where the court found sufficient nexus to search the defendant's home based on pre-warrant information that drugs had actually been transferred from within the specific home searched. See also Appellant's Opening Brief, pg. 10, n.1)

But, there was no evidence in this case connecting the defendant's home or shed with the suspected criminal activity that was seen in the greenhouse, like existed in the cases cited by the State where defendants were reported to have left from or returned to their homes with illegal drugs. Because there was no evidence showing that drugs or other incriminating evidence was transferred from or into the house, the warrant to search the house was overly broad. Mere suspicion that those persons

growing marijuana are likely to keep incriminating evidence in their home cannot legally support a warrant.

The State failed to adequately distinguish the cases that require a specific nexus between outbuildings on a property and the home situated on the same property. The State suggests that, where there is probable cause to search outbuildings on a property, it follows that probable cause exists to search the house on the same property that is presumably under control of the same owner. (See State's Brief pg. 14) But this same argument was rejected in *State v. Kelley*, 52 Wn. App. 581, 586-87, 762 P.2d 20 (1998).

Contrary to the State's limited analysis of *State v. Kelley*, that case did not simply address a search that exceeded the scope of the warrant itself. (State's Brief, pg. 14 n.3) In *State v. Kelley*, officers applied for a warrant based on evidence of illegal activity that was seen in outbuildings on the defendant's property. 52 Wn. App. at 583-84. When the warrant issued, it was to search the home rather than the outbuildings. *Id*. The Court of Appeals affirmed the suppression order for the outbuildings because, although there was probable cause to search the outbuildings, the warrant itself did not include the outbuildings. *Id*. at 584-85. But the other half of *State v. Kelley*, which is the part actually relied upon in this case, discussed whether it was proper to issue a warrant to search the

property owner's home in the first place based on evidence of criminal activity in the property owner's outbuildings. The Court rejected the argument the State now makes in this case, stating in pertinent part:

> "All of the information contained in [Deputy] Christensen's affidavit related to observations about the outbuildings. Christensen presented no information which furnished probable cause for a search of the house. The State makes an additional argument that because the probable cause existed to search the outbuildings, it follows that probable cause existed to search the house. They reason that given the information known about the outbuildings, it follows that the house probably would have contained information relating to the identity of the occupant of the outbuildings or materials used in the manufacturing or distribution of controlled substances. The State has not cited any authority for the proposition that probable cause for a search of the house can be inferred from the fact that such materials may be found in the outbuildings."

Kelley, 52 Wn. App. at 586-87 (emphasis added).

Again, a nexus must exist between the outbuildings on a property (even if under the same person's ownership or control like in *Kelley, supra*) and the home on that same property in order to justify the search of the home. The Appellant agrees with the cases cited by the State where a warrant was justified based on evidence that the defendant left from or returned to the residence after committing illicit drug activity. But no such facts were provided that specifically connected the house in this case or the shed with any illicit drug activity suspected in and near the greenhouse. Accordingly, the evidence obtained from the home and shed should have been suppressed.

2. The State relies on misconstrued facts and unsupported legal argument to support its claimed harmless error analysis; moreover, the evidence was not lawfully admitted pursuant to a source independent of the unlawful warrant, such as Ms. Constantine's supposed consent.

The State suggests that any deficiency in the search warrant or error in searching the house was harmless because the defendant essentially invited officers into the home by asking them to retrieve her medical marijuana card. (State's Response Brief, pg. 16-17) But this argument relies on misconstrued facts and unsupported legal argument. Ms. Constantine did not ask officers to retrieve her medical marijuana card from within the home until after she was already arrested and after officers had already entered the home pursuant to the overbroad search warrant. (RP 125-26) Thus, the "facts" relied upon by the State do not support its position.

Next, the harmless error test first presumes prejudice against the defendant and then focuses on whether the untainted evidence is so overwhelming that it necessarily led to a finding of guilt. *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004). Appellant relies on the argument in her opening brief that demonstrates the lack of sufficient evidence, let alone overwhelming evidence, of her guilt.

The State appears to suggest the error was harmless in its statement of law (Response Brief pg. 16), but then its analysis focuses on whether

the illegally obtained items were actually lawfully obtained independent of a warrant because Ms. Constantine supposedly invited officers into the home. First, this Court should not consider the State's point since it is neither supported by argument or law. *Grant County v. Bohne*, 89 Wn.2d 953, 958, 577 P.2d 138 (1978). The State appears to suggest harmless error, but then frames its analysis in terms of independent source for officers discovering the evidence from within the home. The State's point has not been preserved by proper argument or citation to supporting authority and should not be considered at this time.

Regardless, law enforcement did not obtain evidence from within the house pursuant to some other lawful means, such as through – as now suggested by the State's Brief at pg. 16-17 – Ms. Constantine's consent. *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 ("Under the independent source exception, evidence tainted by unlawful government action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action.") *See also State v. Tyler*, 177 Wn.2d 690, 707, 302 P.3d 165 (2013) ("Consent is recognized as an independent basis for a warrantless search...")

Importantly, for consent to be valid, the State carries the burden of proving by clear and convincing evidence that the consent was freely and

voluntarily given. *State v. O'Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). Consent to search may be limited or revoked, and the failure to give proper warnings before searching pursuant to that consent can vitiate that consent. *State v. Kennedy*, 107 Wn. App. 972, 977, 29 P.3d 746 (2001).

The State argues that Ms. Constantine consented to the search of her home so the items obtained pursuant to an invalid search warrant would be admissible regardless of the impropriety of the warrant. State's Brief pg. 16-17. This interesting argument is clearly defeated by the facts of this case. Ms. Constantine did not freely and voluntarily consent for officers to search her home. Officers had already entered her home before any supposed consent was given, so the argument is wholly without merit. Moreover, Ms. Constantine's supposed consent was certainly not free and voluntary. She was already in custody and officers did not give any of the required warnings before gaining that supposed consent. Finally, Ms. Constantine limited the scope of the supposed consent to only finding her medical marijuana card, and officers never pursued any search to find that card. The State cannot seriously contend that the defendant's limited request to search for her medical marijuana card after she was arrested and after the officers already began executing the search warrant would excuse the constitutional suppression error in this case.

The trial court improperly issued a warrant to search Ms. Constantine's home and shed even though those places had no nexus to the greenhouse where marijuana was seen. The court erred by failing to suppress the evidence obtained from the home and shed, and the error was neither harmless nor otherwise admissible pursuant to an independent source such as Ms. Constantine's supposed consent. The suppression error in this case requires reversal.

3. Contrary to the State's argument, Ms. Constantine was not required to have valid medical marijuana documentation "at the time of the crime."

The State next argues that Ms. Constantine did not meet her threshold burden and therefore could not submit her medical marijuana defense to the jury because she did not have valid medical marijuana documentation "at the time of the crime." State's Brief pg. 20. Pursuant to RCW 69.51A.040(3)(c) (2007), a defendant may establish the affirmative medical marijuana defense if she can "Present…her valid documentation to any law enforcement official who questions the patient or provider regarding…her medical use of marijuana." Reading the statute's plain language, this Court has already rejected the State's argument and clarified that the authorizing documentation must be obtained in advance of law enforcement questioning, but not necessarily in advance of initial police contact. *State v. Hanson*, 138 Wn. App. 322, 324,

327, 157 P.3d 438 (2007). *See also State v. Adams*, 148 Wn. App. 231, 236, 198 P.3d 1057 (2009). The State's argument fails under settled law.

4. Contrary to the State's argument, live medical testimony is not required for the initial prima facie showing for raising the affirmative medical marijuana defense.

The State suggests that Ms. Constantine could not meet her threshold burden for submitting her affirmative medical marijuana defense to the jury because she failed to provide live medical testimony regarding her qualifying medical condition by the physician who originally diagnosed her, also tying this into a hearsay argument. (State's Response Brief, pgs. 22-23, 28-30) Neither case law nor statutes require such live medical testimony from the diagnosing physician in order to meet the bare threshold requirement for submitting the defense to the jury. The State's argument misconstrues the threshold burden that is necessary with the ultimate proof issue that depends on the jury weighing the evidence.

First, the State's argument conflicts with numerous cases cited by the Appellant wherein live medical testimony from the physician was never required for the initial burden to be met. Indeed, the defendant's own testimony along with documentation has been found sufficient for meeting this initial threshold burden. *State v. Brown*, 166 Wn. App. 99, 105, 269 P.3d 359 (2012) (testimony of patient along with documentation from physician was sufficient for sending issue to jury to decide if patient

had qualifying medical condition). *See also State v. Otis*, 151 Wn. App. 572, 575, 578, 213 P.3d 613 (2009) (documentation need not state what the debilitating condition was with particularity, and live testimony from the physician was not required, in order to permit defendant to submit defense to the jury). *And see State v. Ginn*, 128 Wn. App. 872, 882, 117 P.3d 1155 (2005) (rejecting State's argument that live medical testimony was necessary and instead relying on documentation from physician to meet threshold burden requirement.)

Next, the State suggests that the physicians' medical marijuana authorization forms were fatally flawed because they indicated that Ms. Constantine and Mr. Gilbert were being treated for a terminal illness or a debilitating condition rather than stating precisely that they had been diagnosed with a terminal illness or debilitating condition by that same doctor (CP 66, 69, 70). (State's Brief pg. 22) This is not a threshold burden issue. It is of no moment whether the physician issuing the medical authorization was the original physician to have diagnosed Ms. Constantine or Mr. Gilbert. It should have been submitted to the jury to decide whether this language about treating the patient for a terminal or debilitating condition also meant that the physician therein agreed with and confirmed the diagnosis that the patient suffered from the same. *State v. Fry*, 168 Wn.2d, 1, 11, 228 P.3d 1 (2010) (defendant must only make

prima facie showing, taking evidence in light most favorable to defendant, in order to submit defense to jury); *Brown*, 166 Wn. App. at 104 (trial court cannot weigh issue of fact to deny defendant the opportunity to present medical marijuana defense to jury).

5. Weighing the defendant's proof on her medical marijuana defense and assessing the number of plants possessed by the defendant were issues for the jury.

For similar reasons, the State's argument that the defendant possessed too many plants to qualify for the defense is also an issue for the jury. See cases cited at Appellant's Opening Brief pg. 27-28.

And, the State's argument that Ms. Constantine or Mr. Gilbert were not properly limited in the number of plants they could possess in the documentation itself (State's Brief pg. 24) is inconsistent with the record and imposes an unnecessary legal requirement for submitting the issue to the jury. See CP 69 (documentation did in fact limit medical marijuana to that authorized by law) and CP 70 (limiting medical marijuana possession to that authorized by RCW 69.51A(2)(b) with recommendation of 24 ounces of dried, cured marijuana). *See also* WAC 246-75-010 (presumptive 60-day supply equals no more than 15 plants unless greater supply is shown to be necessary.)

The State cites *State v. Shepherd*, 110 Wn. App. 544, for the proposition that Ms. Constantine failed to make her prima facie showing

for submitting the affirmative defense to the jury because the medical documentation did not specify how many plants she could have. This case is distinguishable on many grounds. First, this case did not decide whether a prima facie showing for submitting the defense had been established, but whether the defendant ultimately prevailed on the defense itself. Next, the defendant in *Shepherd* was trying to establish that he could lawfully possess more than the presumptive, legally-permitted 60-day supply, which he could not establish without specific evidence from the physician that the greater supply was medically necessary. Here, Ms. Constantine has never contended that she should have been permitted to possess more than the presumptive 60-day supply. And the law is already clear that, without additional evidence of greater medical necessity, the permitted 60-day supply equals 15 plants. *State v. Shepherd* has little application in this case where Ms. Constantine was only defending her presumptive 60-day supply.

Considering the evidence in Ms. Constantine's favor, she made the necessary showing for submitting her affirmative defense to the jury. Factual issues and weighing of the evidence should have then been left to the jury.

6. The parties agree on the sentencing remand.

The parties agree that remand for resentencing is required. The State conceded that the jury costs should have been assessed at $250 instead of $2,348.48. (State's Brief pg. 31) The Appellant now agrees that the $40 booking fee was properly assessed pursuant to RCW 70.48.390.

7. CONCLUSION

The Appellant has reviewed the State's remaining arguments and believes they are already sufficiently contradicted by Appellant's Opening Brief. A new trial in this case is highly warranted due to the unlawful search in this case and stifling of Ms. Constantine's defense. At a very minimum, resentencing must be ordered to reduce the jury costs to $250.

Respectfully submitted this 23rd day of October, 2013.

/s/ Kristina M. Nichols _____
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 31313-1-III
vs.	)	
	)	
ADRIANE CONSTANTINE	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
_____	)	

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 23, 2013, I deposited for mail by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

Adriane Constantine
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Having obtained prior permission, I also served Karl Sloan at ksloan@co.okanogan.wa.us, syusi@co.okanogan.wa.us, and shinger@co.okanogan.wa.us by e-mail using the electronic service feature while e-filing.

Dated this 23rd day of October, 2013.

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