No. 32306-4-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

SERVANDO ALONSO FLORES,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John D. Knodell, Suppression Motion Judge
Honorable Evan E. Sperline, Trial Judge

REPLY BRIEF OF APPELLANT

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A. RESTATEMENT OF APPELLANT'S ISSUES

1. There was no probable cause to issue the search warrant for the 16528 NW Road 1, Quincy, Washington, property because the supporting affidavit contained no facts to indicate the criminal activity was connected with this address.

2. In the absence of any evidence the defendant participated in its production, the evidence someone was growing marijuana in a chicken coop outside a trailer was insufficient to support the defendant's conviction for manufacturing .

B. RESPONDENT'S ANSWER TO APPELLANT'S ISSUE

1. The trial court properly determined probable cause supported the search warrant for the residence because two drug dealers returned there immediately after making separate, controlled drug buys.

2. When considering the evidence in the light most favorable to the State, there was sufficient evidence for the jury to find defendant guilty of manufacturing marijuana.

C. ARGUMENT IN REPLY TO STATE'S RESPONSE

Mr. Flores relies primarily upon his Brief of Appellant to address all issues raised by the State. He also argues as follows in direct reply to the State's response.

> 1. <u>There was no probable cause to issue the search warrant for the 16528 NW Road 1, Quincy, Washington, property because the supporting affidavit contained no facts to indicate the criminal activity was connected with this address</u>.

Probable cause requires not only a nexus between criminal activity and the item to be seized but also a nexus between the item to be seized and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977

P.2d 582 (1999). "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." *Id.* at 147. Here, none of the controlled buys arranged by the Columbia River Task Force (CRTF) involved Flores or Villa or occurred at the trailer location. The criminal activity—selling drugs to the CI—occurred near a Shell gasoline station and not at the trailer. The controlled buy did not involve Flores or Villa or anyone who had recently been at the trailer. There is insufficient nexus to establish probable cause.

The State responds it is reasonable to infer evidence of criminal activity would be found in the trailer simply because two different men exchanged drugs with an informant and both men drove directly to the trailer after each sale. See Brief of Respondent ("BOR") at 6–10. The court in *United States v. El-Alamin*, 574 F.3d 915 (8th Cir. 2009)[1], determined an affidavit was sufficient to establish probable cause where it provided enough facts to determine the stated location was the defendant's residence and he went immediately to that residence following a controlled buy and controlled buys had occurred at the residence in the past. *El-Alamin*, 574 F.3d at 924. Similarly this Court in *State v. G.M.V.*, 135 Wn. App. 366,

[1] Relied upon by the trial court herein and not mentioned by the State in its BOR. CP 66.

144 P.3d 358 (2006), *review denied* 160 Wn.2d 1024, 163 P.3d 794 (2007) affirmed the defendant's conviction of possession of the marijuana stashed in her bedroom by a live-in boyfriend because "the affidavit supporting this warrant did not rely on generalized beliefs about the habits of drug dealers as in *Thein.* The warrant was to search the place [the boyfriend] left from *and* returned to before *and* after he sold drugs. This was a nexus that established probable cause that [the boyfriend] had drugs in the house." *G.M.V.,* 135 Wn. App. at 372 (emphasis added). Here, unlike in *El-Alamin* or *G.M.V.,* there was no evidence the sellers resided at the trailer or had left from the trailer before they sold drugs or had recently been there before the controlled buys or that any of the controlled buys occurred at the trailer location. Simply going to the trailer directly after the June 7 and June 11 controlled buys was insufficient to establish probable cause.

The State disingenuously urges this Court to additionally consider facts from the warrant affidavit attributed to the confidential informant—an informant the trial court specifically found to have no prior history of cooperation with law enforcement or track record of reliability. BOR at 11–12; CP 65–66.

The search of the trailer was an unlawful and illegal search. All fruits of the search including items seized from the trailer and the subsequent search of the red 1990 Chevy KI pickup and observations of marijuana plants in the car made during the search and statements made to police should be suppressed. Without the illegally obtained evidence, the evidence is insufficient to support the convictions and they must be reversed.

2. The State failed to present evidence Flores was manufacturing marijuana.

In *State v. Olson*, a marijuana grow was discovered in a brick building on property on which Olson owned a mobile home. Agents conducting surveillance observed him visiting the property two times. On one occasion, Olson went to the brick building, procured a key from underneath a container and used the key to open a padlock on the door to the brick building. He entered the building and remained inside for 30 minutes. Olsen's fingerprints were found on several items connected to the grow operation inside the building. The court found this evidence sufficient to establish Olson knowingly participated in the grow operation in the brick building. 73 Wn. App. 348, 358-59, 869 P.2d 110 (1994).

No rational trier of fact could find Flores was engaged in the manufacture of marijuana in a chicken coop based on his unobserved

presence in a nearby trailer. Unlike in *Olson*, there was no evidence Flores ever went near the chicken coop, no evidence he ever touched anything related to the growing of marijuana, and no evidence he watered, planted, harvested or did anything else to "propagate" the marijuana.

The State responds "The most persuasive evidence linking defendant to the crime [of manufacturing marijuana] was testimony that, while officers performed the search warrant, defendant arrived in a pickup truck with marijuana plants at his feet." BOR at 14–15. This is a reasonable assertion only if Flores had been seen *leaving* the real property with marijuana plants on the floorboard. Although the facts potentially support other crimes, Flores was not charged with possession of marijuana or possession of marijuana with intent to deliver. In the absence of any evidence he participated in the manufacture of marijuana, Flores' conviction violated due process.

D. CONCLUSION

For the reasons stated above and in the Brief of Appellant, the convictions must be reversed.

Respectfully submitted on January 20, 2015.

/s/ Susan Marie Gasch
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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 20, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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