NO. 32306-4-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SERVANDO ALONSO FLORES, APPELLANT

Appeal from the Superior Court of Grant County
The Honorable John D. Knodell and the Honorable Evan E. Sperline

No. 13-1-00363-8

Brief of Respondent

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1. Did the trial court properly determine probable cause supported a search warrant for a trailer where two drug dealers immediately returned after making separate, controlled drug buys with officers at another location?

2. When considering the evidence in the light most favorable to the State, was there sufficient evidence for the jury to find defendant guilty of manufacture of marijuana beyond a reasonable doubt?

B. STATEMENT OF THE CASE.

1. Procedure

On June 13, 2013, the Grant County Prosecuting Attorney's Office (State) charged Servando Alonso Flores (defendant) with one count of manufacture of marijuana[1] and unlawful possession of methamphetamine.[2] CP 1–2. The State amended the information to include a count of unlawful possession of methamphetamine with intent to manufacture or deliver,[3] alleging the crime occurred within one thousand feet of a school bus route as an aggravating circumstance.[4] CP 18–19.

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[1] RCW 69.50.401.
[2] RCW 69.50.4013.
[3] RCW 69.50.401.
[4] RCW 69.50.435.

Before trial defendant moved to suppress physical evidence seized from his residence and from his person. CP 23–59 (Memorandum in Support of Defendant's Motion to Suppress Evidence). Defendant argued in part the warrant affidavit was insufficient to demonstrate a nexus between the alleged criminal activity and defendant's residence in Quincy, Washington. CP 23–59.

The warrant affidavit alleged that over the course of a year, law enforcement officers for the Columbia River Drug Task Force (CRDTF) investigated several individuals, including defendant, for selling methamphetamine in Wenatchee, Washington. CP 72–81. Using a confidential informant, officers set up several controlled drug buys in various locations. CP 74–78. The informant eventually provided officers evidence that the drug dealers were headquartered at a trailer located at 16258 NW Road 1, Quincy, Washington. CP 74.

In order to secure a search warrant for the Quincy trailer, officers conducted two drug buys at a gas station near the trailer on June 7 and 11, 2013. CP 72. After finishing each of the buys, both of the dealers (not including defendant) immediately returned to the Quincy residence. CP 78–80. Shortly thereafter officers obtained a search warrant for the residence.

On December 4, 2013, the Honorable John D. Knodell denied defendant's motion to suppress.[5] CP 65–66. The court found probable cause supported the warrant based on the officers' observations regarding the dealers traveling directly to the trailer after the drug buys on separate occasions. 2RP 37; CP 66 (paragraph 5).

On February 12, 2014, defendant's jury trial began before the Honorable Evan E. Sperline. RP 55–56. Before opening statements, defendant moved the court to reconsider the search warrant issue, but the court denied that motion. RP 58. After the State rested its case in chief, defendant moved to dismiss the charges involving methamphetamine (Counts 1 and 3), but the court also denied that motion. RP 499–507. The jury found defendant guilty as charged. CP 112–115.

On March 4, 2014, the court sentenced defendant to 64 months in custody for the charge of possessing methamphetamine with intent to deliver, merging count 3 (possession of methamphetamine).[6] CP 125 (Judgment and sentence, paragraph 4.1). For the charge of manufacture of marijuana, the court sentenced defendant to 12 months.[7] CP 125.

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[5] Initially, the trial court granted defendant's motion to suppress in a memorandum opinion to the parties. *See* CP 65–66. However, that ruling was based on the State's failure to provide the court with an actual copy of the signed affidavit and oath supporting the search warrant. *See* CP 66 (paragraphs 7–8). The court reconsidered the issue on the State's motion after the State proffered a signed copy of the affidavit (CP 72–81). *See* 2RP 36–37.

[6] On this count, defendant had an offender score of 3 with a standard range of 20–120 months. CP 124 (Judgment and sentence, paragraph 2.3). The court determined the school bus stop aggravator doubled the high end standard range of 60 to 120 months. 2RP 70–73.

[7] Defendant had an offender score of 3 with a standard range of 6–18 months. CP 124.

Defendant timely filed a notice of appeal. CP 140–41.

2. Facts

On June 12, 2013, several law enforcement officers for the Grant County Interagency Narcotics Enforcement Team (INET) executed a search warrant at 16258 Road 1 Northwest, Quincy, Washington, with probable cause to believe the trailer was being used for the manufacture of controlled substances. RP 73–76, 82, 169, 275–76, 318, 322, 409, 416–19, 462, 465–66. Nobody was present in the residence when officers knocked and announced their entry, so they forced their way into the single-wide mobile home. RP 417–19.

In the living room, officers first discovered a twine strung across the room—an object commonly used for drying out marijuana for use. RP 84–85; P. Ex. 4–5. Connected to the living room was the kitchen, where officers next found a bottle of liquid fertilizer, another common item for cultivating marijuana. RP 108, 150; P. Ex. 24, 60. They also found a table top burner (RP 353), a jar of dimethylsulfone (MSM) (RP 109), inositol powder (RP 334), a jug of acetone (RP 110), a dirty spoon, and coffee filters (RP 150–51)—which were described as chemical agents and objects frequently used for cutting[8] methamphetamine or cocaine. *See* RP 332–40.

[8] "Cutting" is the colloquial term for diluting a drug for purposes of resale. RP 172–73, 335–37.

The residence also had two bedrooms where officers found methamphetamine and several other items related to manufacturing drugs. In the first room, officers found digital scales (RP 96–97), white powder on one of these scales (RP 112), a plastic baggie (RP 120), a small safe under the bed containing a ledger with financial transactions inscribed inside (RP 124–26; P. Ex. 39–40), and a toy duck with a large amount of methamphetamine stuffed in it (RP 138–43, 387, 473). They also discovered a letter from the State of Washington Employment Security addressed to defendant (RP 115–16), defendant's wallet with photo identification (RP 147–48), and prescription bottles prescribed to defendant (RP 118–19).

In the second room, officers located root-starter pots (RP 102; P. Ex. 19) and a grow light system (RP 121–22; P. Ex. 36–37). More starting trays were found above the washer and dryer in the laundry room. RP 155.

Outside of the residence, 49 marijuana plants in starter pots were discovered in a chicken coop. RP 312, 324. The marijuana plants were not yet mature and appeared to be roughly three weeks to one-month old. RP 325, 378.

While INET executed its search, two men pulled up to the residence in a red Chevy truck. RP 344–45, 427–28. Defendant was the passenger in the truck. RP 344–45. When defendant stepped out of the vehicle to speak with INET officers, several of them saw a couple of

marijuana plants in starter pots—similar to those seized at the residence—sitting on the floorboard immediately under defendant's feet. RP 346, 429; P. Ex. 42. Officers subsequently arrested defendant.

A transportation supervisor for the Quincy School District, Robert Henne, confirmed defendant's residence was located within 1000 feet of two active bus stops at the time of the crime. RP 248–58.

Defendant called one witness during his case, Dawn Prince, a records custodian for the Grant County Jail. RP 510–13. She testified defendant had been arrested on a different matter during December 2012 and released from jail just weeks prior to INET's investigation. RP 510-13. Defendant presented no further evidence.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY FOUND PROBABLE CAUSE SUPPORTED THE SEARCH WARRANT FOR THE RESIDENCE BECAUSE TWO DRUG DEALERS IMMEDIATELY RETURNED THERE AFTER MAKING SEPARATE, CONTROLLED DRUG BUYS

This issue requires the court to further consider the propriety of search warrants issued for residences of drug dealers: specifically, whether a search warrant may issue for a residence where two drug dealers immediately returned after making separate, controlled drug transactions with officers at another location.

A determination of probable cause must support a search warrant. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)). An appellate court reviews the issuing magistrate's probable cause determinations de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, the reviewing court must afford deference to the magistrate's determination. *Id.* (citing *State v. Chamberlin*, 161 Wn.2d 30, 40–41, 162 P.3d 389 (2007)).

Probable cause exists if the affidavit in support of the warrant sets forth facts sufficient to establish "a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *Thein*, 138 Wn.2d at 140. In other words, there must be a nexus between both the criminal activity and the item to be seized, and the item to be seized and the place to be searched. *Id.* (citing *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). Whether a nexus exists is to be evaluated on a "case-by-case basis." *Id.* at 149 (citing *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)) (emphasis added).

In the context of search warrants for residences of drug dealers, the Washington State Supreme Court in *Thein* held that the nexus between the criminal activity and the place to be searched must be supported by more than officers' generalized statements of belief regarding the common habits of drug dealers. *See* 138 Wn.2d at 140–51. In that case, officers

executed a search warrant in a Seattle home where they discovered evidence of a marijuana grow. *See id.* at 136–38. They also found evidence and received informant tips linking Thein to the grow, even though he did not live there. *Id.* Based on that evidence, officers requested a subsequent search warrant for Thein's personal residence at a different location. *Id.* at 139–40.

The officers supported this warrant-request with the broad and vague assertion that "it is generally a common practice for drug traffickers to store at least a portion of their drug inventory and drug related paraphernalia in their common residences." *Id.* at 138–39. Nothing in their affidavit, however, indicated Thein actually possessed drugs or other items related to manufacturing marijuana at his personal residence. *See id.* at 149–51. For that very reason, the State Supreme Court overturned Thein's conviction, holding, "no incriminating evidence link[ed] drug activity to [Thein's residence]." *See id.* at 150.

Thein thus stands for the proposition that a search warrant must be supported by evidence linking the place to be searched to the criminal activity—not mere, general assertions that John Doe is a drug dealer *and therefore* John Doe has drugs at his house.

The search warrant for the Quincy residence in this case was supported by a nexus much stronger than an unfounded, conclusory belief there would be drugs located inside. Here, officers followed two different

men back to the residence immediately after they had completed controlled buys at a nearby gas station.

First, on June 7, 2013, after using an informant to conduct six controlled buys in Wenatchee with dealers headquartered at the Quincy residence, law enforcement officers successfully executed another buy at a Shell gas station within a quarter mile from the trailer in Quincy. CP 78–79. The informant exchanged $400 for 14 grams of methamphetamine with the passenger of a gray Ford truck, an individual known to the informant as "Gordo." CP 78–79. Officers subsequently followed the truck, which immediately drove back to the Quincy trailer. CP 79. When officers passed by the mobile home, they saw the truck parked directly in front of the trailer but did not observe anyone in it. CP 79.

Next, on June 11 2013, officers again set up a controlled buy with Gordo at the same location. CP 80. However, Gordo never arrived at Shell, so the informant drove over to the trailer to confront his seller. CP 80. Upon arrival the informant was invited into the trailer by "Wedo"—the individual whom officers believed to be running the drug operation. CP 80. Wedo instructed the informant to meet with defendant, who was in the trailer smoking methamphetamine, to discuss a potential sale. CP 80. However, based on a previous drug exchange gone wrong (defendant had sold the informant heroin instead of an agreed amount of methamphetamine on a prior occasion), the informant declined to deal with defendant and left the trailer. CP 80.

After leaving the trailer, the informant learned the gray Ford truck had finally arrived at the Shell station. CP 80. The informant returned to the gas station and exchanged a sum of money for 28 grams of methamphetamine from the driver of the truck. CP 80. The informant identified the driver as Pena, the same person who drove Gordo for the June-7th exchange. CP 81. Again, officers immediately followed the driver, who went directly to the trailer just a short distance away. CP 81. As officers passed by the residence in intervals to avoid suspicion, they observed Pena exit the vehicle, walk to the front door, and reach for the knob as if to enter. CP 80.

The trial court properly determined these events, which are outlined in the warrant affidavit, were sufficient to establish a nexus between illegal drug activities and the residence such that probable cause supported a warrant: "[A]fter controlled buys on June 7 and June 11, 2013, officers observed the seller returning directly to the trailer. These observations are sufficient to establish probable cause to search the trailer." CP 66.

Unlike the conclusory statements in *Thein*, the affidavit in support of the search warrant in this case articulates specific facts whereby one can reasonably infer evidence of criminal activity was located in the Quincy residence. Two different men exchanged drugs with an informant, and both men drove directly to the nearby trailer after each sale with the proceeds of that transaction (i.e., evidence of the crime).

Defendant relies on this Court's opinion from *State v. G.M.V.*, 135 Wn. App. 366, 144 P.3d 358 (2006), to argue officers *must* observe a drug dealer *both leave* a residence *and return* to a residence after a controlled drug buy in order to establish probable cause for a search. Brief of Appellant at 13–15. Admittedly, officers did not see the gray Ford truck leave from the trailer before either drug buy on June 7 and 11. But the facts in *G.M.V.* are dissimilar enough as to frustrate an identical probable cause determination here.

Nothing in *G.M.V.* limits the issuance of search warrants against residences like the one challenged in the present case. Indeed, probable cause determinations are to be made on a "case-by-case basis." *See Thein*, 138 Wn.2d at 149. The officers in this case exchanged controlled substances and money on different dates with two different individuals, each of whom immediately returned to the residence where officers ultimately sought to search. That Gordo and Pena returned to the same location immediately after separate drug transactions only strengthened the nexus for probable cause to search the residence.

Additionally, these facts should be considered against the backdrop of the remainder of the warrant affidavit (even though the following facts were not sufficient, standing alone, to establish probable cause): specifically, the confidential informant met with Wedo in the trailer to discuss the sale of methamphetamine in early 2013, the informant saw

drugs inside the trailer in defendant's possession on June 11, and defendant offered to sell the drugs to the informant. *See* CP 72–81.

The trial court properly determined probable cause existed to support the search warrant of 16258 NW Road 1, Quincy, Washington. The controlled drug buys at Shell and the dealers' subsequent, immediate travel to the trailer created a reasonable inference that criminal activity and evidence of that activity were located at the residence. This court should afford deference to the lower court and issuing magistrate's determinations and uphold the issuance of the warrant.

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[9]

When reviewing for sufficiency of the evidence, the court must view the evidence in the light most favorable to the State to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981); *see also State v. Salinas*, 119

[9] Defendant challenges the sufficiency of the evidence only in regards to his conviction of manufacture of marijuana.

Wn.2d 192, 201, 829 P.2d 1068 (1992) (holding that all reasonable inferences from the evidence must be interpreted in favor of the State and interpreted most strongly against the defendant).

Circumstantial and direct evidence are considered equally reliable on review. *Thomas*, 150 Wn.2d at 874. Determinations regarding conflicting evidence or credibility are up to the trier of fact and not subject to review. *Id.*

To convict defendant of manufacture of marijuana, the State had to prove the following elements beyond a reasonable doubt:

> (1) That on or about June 12, 2013, the defendant manufactured marijuana;
> (2) That the defendant knew that the substance manufactured was marijuana; and
> (3) That this act occurred in the State of Washington.

CP 105 (Instruction No. 6).[10] The court also defined "manufacture" for the jury in its instructions:

> "Manufacture" means the production, preparation, propagation, processing, as well as packaging or re-packaging of a controlled substance. "Production" includes planting, cultivating, growing or harvesting.

CP 106 (Instruction No. 7).[11]

Defendant does not dispute that his residence in Quincy was being used to manufacture marijuana. The State supported this claim at trial with

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[10] *See* RCW 69.50.401.

[11] These definitions comport with their statutory definitions. *See* RCW 69.50.101(s), (gg).

evidence that 49 marijuana plants in starter pots were hidden in a chicken coop, and within the residence there were objects commonly found in marijuana grows such as grow lamps, starter pots, twine that had been strung for drying marijuana, and liquid fertilizer. *See* RP 84–85, 108, 102, 121–22, 155, 312, 324. Rather, defendant argues there was not a substantial evidentiary link between the marijuana grow and himself. *See* Brief of Appellant at 19–20.

The most persuasive evidence linking defendant to the crime was testimony that, while officers performed the search warrant, defendant arrived in a pickup truck with marijuana plants at his feet. RP 344–46, 428–29. These plants were similar, if not identical, to those at the trailer's marijuana grow. *See* RP 346, 428–29; P. Ex. 42. Even the court at sentencing highlighted the importance of this evidence when defendant expressed concern he was being sentenced unjustly:

> I agree with [defendant] in regard to the absence of any evidence that he involved himself with the 49 marijuana plants in the back yard [*sic*], and was preparing myself to grant a motion to dismiss, *until there was evidence that during the search [defendant] arrived as a passenger in a pickup with two more identical plants between his feet*. And that became sufficient evidence to tie [defendant] in the mind of the jury to the marijuana growing operation.
>
> So, I at least am satisfied that there was sufficient evidence to support the verdict of the jury.

2RP 73 (emphasis added). The court openly admitted it was being critical of the State's case—but the evidence of "identical" marijuana plants at

defendant's feet directly linked defendant to the grow at the crime scene. As that court reasoned, this evidence unequivocally demonstrated defendant's knowledge and participation in the cultivation of marijuana.

Interestingly, defendant never attempted to rebut this evidence or contradict the link between the marijuana at his feet and the marijuana at the grow: he never testified or presented other testimony that the plants were not his, that he did not have any knowledge about the marijuana at his feet, etc. Of course, defendant did not have the burden to disprove the State's allegations at trial. But this court—in a sufficiency challenge—must draw all reasonable inferences in the government's favor. *Salinas*, 119 Wn.2d at 201. Defendant, now on appeal, is requesting this court to interpret the inference from the marijuana at his feet in his favor, contrary to the standard of review.

Additionally, this court should consider the maturity of the marijuana plants (both in the trailer and in the truck) coincided with defendant's release from jail. *See* RP 325, 378, 510–13. According to evidence presented by defendant during his case, defendant was released from jail in the middle of May 2013. RP 510–13. Law enforcement officers from INET executed their search just over four weeks later on June 12, 2013, when they discovered plants that appeared to be three-weeks old in size. This period matches the time defendant had to begin a grow, one more evidentiary link between defendant and the crime.

When considering the evidence in the light most favorable to the State, there was sufficient evidence for the jury to conclude defendant was guilty of manufacture of marijuana beyond a reasonable doubt. This evidence included the marijuana in his possession in the truck, the approximate time of his release from jail (which coincided with the maturity of the grow at the trailer), and the chemicals and objects used for the grow located in the residence.

D. CONCLUSION.

The trial court properly determined probable cause supported the warrant: officers' observations of two individuals completing independent, controlled drug buys and then immediately returning to the same residence were sufficient to establish probable cause to search that residence. Further, at trial, the State presented sufficient evidence for a rational trier of fact to find defendant guilty of manufacture of marijuana. The State thus respectfully requests this Court to uphold defendant's convictions.

DATED: December 12, 2014

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32306-4-III
	)	
vs.	)	
	)	
SERVANDO ALONSO FLORES,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Susan Marie Gasch
gaschlaw@msn.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Servando Alonso Flores - #372918
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Dated: December 15, 2014.

Kaye Burns