33833-9-III
Consolidated with No. 33834-7-III

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

STATE OF WASHINGTON, APPELLANT

v.

MICHAEL K. HURLBURT, RESPONDENT

STATE OF WASHINGTON, APPELLANT

v .

NANCY L. ST. PIERRE-WALSH, RESPONDENT.

APPEAL FROM THE SUPERIOR COURT
OF LINCOLN COUNTY

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

A. Both Defendant Hurlburt and St. Pierre-Walsh argue that *Aguilar/Spinelli* was not satisfied because the anonymous informant was not identified. This is a non-issue because law enforcement sufficiently corroborated the anonymous informant's tip before applying for the search warrant.

A significant portion of both Defendant Hurlburt's and Defendant St. Pierre-Walsh's responses are dedicated to a recitation of the legal standard required by *Aguilar-Spinelli* in order for law enforcement to predicate probable cause on an anonymous informant's tip. Hurlburt Resp. Br. at 9-12; St. Pierre-Walsh Resp. Br. at 6-10. However, the State did not argue in its opening brief that the informant's tip, alone, was sufficient to establish probable cause. It is the informant's tip, *plus* the additional investigation corroborating that tip which "cur[e] the deficiency" in the basis of knowledge and reliability requirements of *Aguilar-Spinelli* that established probable cause in this case. *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002). As discussed in the State's opening brief, the tip was corroborated by Deputy Steadman's independent observation of growing marijuana plants at Mr. Hurlburt's residence and Detective Singer's knowledge of Mr. Hurlburt's criminal history of possessing marijuana with intent to manufacture or deliver.

Defendant Hurlburt challenges the State's argument that these two additional facts suffice to corroborate the anonymous informant's tip.

However, any doubts regarding the validity of the warrant should be resolved in favor of the warrant. *See e.g.*, *State v. Clark*, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001).

First, Defendant Hurlburt challenges the independent observation of Deputy Steadman as providing probable cause to search his residence because "the observing officer surely would have reported there was probable cause to search the house had he 'smelled marijuana emanating from [Hurlburt's] residence'" and therefore there was no reason to believe "criminal activity [was] likely taking place in the house or the garage." Hurlburt Resp. Br. at 13. But the smell of marijuana is not a requirement for probable cause where other facts would lead a reasonably prudent officer to believe a crime is occurring or has occurred. Certainly Mr. Hurlburt is not advancing an argument that officers must ignore what they can see with their eyes, if they are unable to detect evidence of the same crime with their other senses.

The defendant also challenges Detective Singer's use of the defendant's criminal history to support his request for a finding of probable cause to search the residence. However, he acknowledges that contrary authority to his position exists. Hurlburt Resp. Br. at 14. Both *Clark* and *State v. Stone*, 56 Wn. App. 153, 782 P.2d 1093 (1989), stand for the proposition that a defendant's criminal history may be used to establish

probable cause, where, as here, other facts are known to law enforcement that would lead a reasonably prudent individual to believe evidence of a crime would be located in the defendant's residence.

B. *Constantine*, not *Thien*, is the controlling case that should be considered by this Court.

Ms. St. Pierre-Walsh does not address the applicability of this Court's holding in *State v. Constantine*, 182 Wn. App. 635, 330 P.3d 226 (2014), to this case. Rather, she relies on *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999), for the proposition that there was an insufficient nexus between the outdoor marijuana grow on Mr. Hurlburt's property, and the inside of his residence or garage. While *Thien* is a Supreme Court case, (as opposed to the Division Three's decision in *Constantine*), Ms. St. Pierre-Walsh's reliance on it is misplaced because in *Thien*, law enforcement attempted to search a *different* property belonging to the defendant based on their observation of growing marijuana at another residence far across town. In rejecting the State's argument that "a search warrant is properly issued at a drug trafficker's residence even absent proof of criminal activity at the residence," *id*. at 141, the court held that "probable cause must be grounded in *fact*, and that 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. Generalizations regarding the "common habits of drug dealers" without any specific facts linking illegal activity to the residence to be searched are insufficient for a finding of probable cause. *Id*. at 148.

Unlike *Thien*, this case does not present bare common habits of drug dealers as the basis for the search warrant. A marijuana grow operation was found on Mr. Hurlburt's property, the same property upon which the residence and garage to be searched pursuant to the warrant, were situated. *Thien* does not govern the issue presented here. *Constantine* does.

Mr. Hurlburt's attempt to distinguish *Constantine* (and its companion case, *State v. Davis*, 182 Wn. App. 625, 331 P.3d 115 (2014)) from his own case also fails. There are sufficient facts included in the declaration and supporting materials that would allow a neutral and detached magistrate to determine an adequate nexus between the marijuana garden and Mr. Hurlburt's house and garage. "Judges looking for probable cause in an affidavit may draw reasonable inferences about where evidence is likely to be kept, including nearby land and buildings under the defendant's control." *State v. Gebaroff*, 87 Wn. App. 11, 16, 939 P.2d 706 (1997). Deputy Steadman was physically present at Mr. Hurlburt's residence and observed the growing marijuana shortly before the search warrant was requested. Mr. Hurlburt was known to possess controlled substances with intent to manufacture or deliver – as he had previously been

convicted of that offense. It is that information, along with the Detective's knowledge that "harvested plants are usually taken into buildings near the grow site to hang and let dry before the usable portion … is processed for consumption," and through his experience individuals with marijuana grows often keep their records indoors "to avoid having them destroyed by the elements" that developed probable cause for the search of the buildings that were also situated on Mr. Hurlburt's property. The trial court erred in reversing its decision to issue the search warrant for Mr. Hurlburt's property based on this information.

C. Defendant Hurlburt's argument that there is discrepancy in the address listed in the declaration in support of the warrant and the warrant itself was not argued below; in any event, it is a scrivener's error that is immaterial to the validity of the warrant.

In support of his argument that the warrant was deficient, the defendant claims that the declaration in support of the warrant and the warrant itself contain two different addresses, and therefore, the warrant is deficient. Hurlburt Resp. Br. at 17. However, there was no dispute at the trial court that the search warrant was executed at the correct address. RP at *passim*; CP 4-10;[1] CP 88-91. The validity of the warrant was not challenged on this basis below.

[1] Interestingly, even Defendant Hurlburt's trial counsel made a scrivener's error in his motion to suppress by stating that the warrant listed the address as "41841 Paradise Lane" rather than "41840" or "41836" as listed in the warrant or declaration in support thereof. CP 10.

In any event, the test to determine the sufficiency of a search warrant's description is whether the place to be searched is described with sufficient particularity so as to enable the executing officer to find and identify the location with reasonable effort, and whether there is any reasonable probability that another site might be mistakenly searched. *See State v. Bohan*, 72 Wn. App. 335, 338, 864 P.2d 26 (1993) citing *State v. Fisher*, 96 Wn.2d 962, 967–68, 639 P.2d 743, *cert. denied*, 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.2d 1355 (1982). Cases applying this standard to warrants containing a wrong address decline to give primary emphasis to the technical accuracy of the address, but there must be assurances that a mistaken search would not likely occur. *Id*.

Information concerning the location of the premises based on the officer's personal knowledge of the location or its occupants may be considered when a correct address is missing. *Fisher*, 96 Wn.2d at 967. Where it is established that the officers already knew where the defendant lived, an error in the address listed on the warrant was immaterial. *State v. Andrich*, 135 Wash. 609, 612, 238 P. 638 (1925).

Furthermore, ministerial or clerical errors in search warrants are grounds for invalidation of a search warrant only if prejudice is shown. *See Vickers*, 148 Wn.2d at 111; *State v. Wibble*, 113 Wn. App. 18, 25, 51 P.3d 830 (2002).

This issue has not been litigated below, however, it is clear from the record below that law enforcement was familiar with Mr. Hurlburt and his property. Detective Singer had previously arrested the defendant in 2008. CP 73. Deputy Steadman had been to Mr. Hurlburt's residence on an unrelated call shortly before the warrant issued. CP 74. The warrant, as written, not only includes the numeric address of Mr. Hurlburt's residence, but also includes the parcel number and a brief description of where and how the residence is situated on Paradise Lane. CP 75. Furthermore, it is probable that both addresses belong to the defendant and the same piece of property as the street numbers listed are separated by only four digits – that likelihood was not developed below because the issue was never raised below. And, again, there has been no dispute that the correct residence was *actually* searched. The warrant here does not fail because of the discrepancy or scrivener's error in the address listed in the warrant and the declaration in support thereof.

D. Defendant St. Pierre-Walsh's argument that the contents of her purse were not included within the scope of the warrant has been insufficiently developed for review as it was not fully litigated below. If the State prevails on appeal, the defendant may raise the issue in the trial court.

In her response brief, Defendant St. Pierre-Walsh has raised the issue of whether the search of her purse pursuant to the execution of the search warrant for Mr. Hurlburt's house was constitutionally valid; her trial

counsel briefed the issue for the trial court and the State responded. St. Pierre-Walsh Resp. Br. at 15-17; CP 88-91, 100-102. However, the trial court never considered either party's arguments regarding the search of Ms. St. Pierre-Walsh's purse because the defendant ultimately bootstrapped that argument to Defendant Hurlburt's argument that the warrant itself was defective and uncorroborated. RP at *passim*. It was upon the latter issue that the trial court predicated its ruling suppressing the evidence against Ms. St. Pierre-Walsh.

As to the search of her purse, the trial court briefly discussed the proper procedure for considering that argument. All parties agreed in the event the Court of Appeals reverses the trial court on the suppression motion regarding the warrant, the parties would bring the issue of the search of Ms. St. Pierre-Walsh's purse to the court's attention on remand. RP 61-64. The trial judge indicated that he had some "questions" regarding the "locked vault" issue posed by Ms. St. Pierre-Walsh, RP 64, and as a result, the court never made any findings of fact or conclusions of law that would assist this Court on review. It is probable that testimony would be needed from law enforcement for a full understanding of the information known to the officers at the time of the search, including whether they knew anything about the ownership of the purse. Because none of this was fully developed below, nor actually considered by the trial court, this argument should not

be considered for the first time on appeal. No error has occurred regarding any ruling on the search of the defendant's purse because no ruling has actually been made. However, that does not preclude the defendant from re-raising the issue if the decision at issue here is reversed and the matter remanded for further proceedings.

E. If the State is the substantially prevailing party, this Court should require the defendants to affirmatively establish a claim of continued indigency as set forth in this Court's June 10, 2016 Order before determining whether to award costs as authorized in RCW 10.73.160 and RAP 14.2.

If the State is the prevailing party in this appeal, Defendant Hurlburt requests this Court decline to impose the appellate costs authorized in RCW 10.73.160 and RAP 14.2.[2] This Court should require the defendant to provide the requested information as set forth in this Court's General Order dated June 10, 2016, regarding his claim of continued indigency.

Should this Court exercise its discretion and impose costs against the defendants, that judgment would not become enforceable until the defendants are convicted and there is a judgment of guilt from the Superior Court. RCW 10.73.160(1) and (3) ("The court of appeals … may require an adult offender *convicted* of an offense to pay appellate costs"; "An award of costs shall become part of the trial court judgment and sentence")

[2] It appears this Court has addressed this issue in its General Order dated June 10, 2016, dealing with motions on costs.

(emphasis added); *see also*, RCW 10.01.160(1) ("Costs may be imposed only upon a *convicted* defendant," except for costs for a deferred prosecution, pretrial supervision or failure to appear warrant costs) (emphasis added).

II. CONCLUSION

The State respectfully requests this court reverse the trial court's decision suppressing the fruits of the search of Mr. Hurlburt's house; this search was conducted pursuant to a validly issued search warrant, supported by probable cause and a sufficient nexus between the outdoor marijuana garden and the defendant's residence and garage. The warrant and the trial court's initial decision to issue the warrant were entitled to deference at the suppression motion that neither received. These matters should be remanded to the trial court for further proceedings.

Dated this 9 day of August, 2016.

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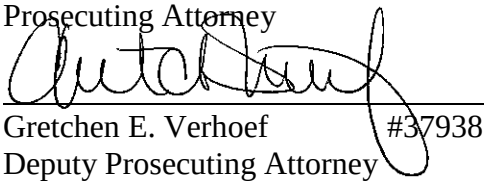
Prosecuting Attorney



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

STATE OF WASHINGTON, Appellant, v. MICHAEL K. HURLBURT, Respondent.	NO. 33833-9-III (Consol. w/COA 33834-7-III) CERTIFICATE OF MAILING
STATE OF WASHINGTON, Appellant, v. NANCY L. ST. PIERRE-WALSH, Respondent.	

I certify under penalty of perjury under the laws of the State of Washington, that on August 9, 2016, I e-mailed a copy of the Reply Brief of Appellant in this matter, pursuant to the parties' agreement, to:

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