No. 33833-9-III
(consolidated with No. 33834-7-III)
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Appellant,
vs.

MICHAEL HURLBURT and
NANCY ST. PIERRE WALSH
Respondents.

APPEAL FROM THE LINCOLN COUNTY SUPERIOR COURT
Honorable John F. Strohmaier, Judge

AMENDED BRIEF OF RESPONDENT MICHAEL KEVIN HURLBURT

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A. ISSUE IN RESPONSE

Was the search warrant unsupported by probable cause, requiring suppression of evidence recovered from the residence and garage?

B. COUNTERSTATEMENT OF THE CASE

In August 2014, Lincoln County Superior Court Judge John Strohmaier issued a warrant authorizing the search of "property located at 41840 Paradise Lane North, Creston, Washington" and the seizure of drug-related evidence, including "marijuana plants being grown on or in the premises that are in violation of the state Medical Marijuana Act." CP 77–79.

Lincoln County Sheriff's Deputy Roland Singer had applied for the search warrant seeking evidence of the crimes of "possession of a controlled substance (Marijuana) with the intent to manufacture and unlawful possession of a firearm 2nd degree." CP 72–76; 9/16/15 RP 16. In his declaration Deputy Singer set forth the following facts:

> On 4-29-14, the Lincoln County Sheriff's Office received an anonymous report of a possible Marijuana grow located at 41836 Paradise Lane N., Creston WA 99147. The reporting party stated they believe Michael K. Hurlburt (02-11-1965) is growing Marijuana at his house. The anonymous caller stated they do not believe Hurlburt possesses a Medical Marijuana Card to grow the Marijuana. The anonymous caller also informed me that Hurlburt is a convicted Felon and in possession of a handgun at that residence. The caller informed me of a picture that was circulated of Hurlburt kneeling in front of a cougar he had killed with a

handgun and the handgun was also resting on the cougar in the picture with Hurlburt.

NOTE: I am familiar with Michael Hurlburt and aware he is a convicted felon from a previous case I investigated and arrested him for his involvement in July of 2008.

I contacted Wildlife Officer Curt Wood regarding the report of the cougar killed. Wood checked his computer system and informed me Hurlburt has never purchased a cougar tag or a hunting license to date.

I attempted to find a copy of the photograph of Hurlburt and the cougar the anonymous caller informed me about but was unable to locate it.

On 8-16-2014, the Lincoln County Sheriff's Office received an anonymous call from an individual who provided us with a copy of the previously mentioned photograph that was printed from online. In the photograph was Hurlburt kneeling in a building of some kind with gravel on the ground. In front of Hurlburt in the photograph was a barrel with a freshly skinned cougar pelt with the head still attached to the pelt draped over a barrel with a piece of wood holding up the head of the cougar. The pelt also had the left front foot still attached to it. On top of the cougar pelt was a black semi-automatic handgun (unknown caliber) with the clip still in the hand gun.

The anonymous caller also informed me that there has been a large amount of traffic traveling in and out of Hurlburt's residence recently at 41836 Paradise Lane N., Creston WA 99147 and Hurlburt is reportedly selling live Marijuana plants to individuals. The caller stated the traffic is usually between midnight and two in the morning and are entering Hurlburt's property with their vehicle lights turned off.

I ran a Criminal History on Hurlburt and confirmed he is a convicted Felon with 22 Felony convictions on his history dating from 1985 to 2009. These Felonies include trafficking in stolen property, forgery, thefts, burglary, possession of controlled

substances, and possession of marijuana with the intent to manufacture and/or deliver.

On 8-18-2014 I received a report from Deputy Steadman stating that on 8-1-2014 at approximately 1746 hrs, Deputy Steadman responded to 41836 Paradise Lane N., Creston WA 99147 to contact Michael Hurlburt on an unrelated investigation. While Deputy Steadman was at the residence, he observed what he recognized through his training and experience to be growing Marijuana plants approximately four feet tall in the garden area located on the north side of the unattached garage located on the east side of the residence. The garden was surrounded by a short chain link fence.

I again contacted Wildlife Officer Curt Wood on 8-18-2014 who also viewed the photograph. Wood again checked his computer record and informed me that Hurlburt has never purchased a cougar tag or a hunting license to date; only fishing licenses. Wood also informed me per state law, a cougar pelt has to be inspected within 48 hrs after the animal is killed by a Wildlife Officer and he has never inspected a cougar pelt for Hurlburt.

Per Washington State Law regarding Medical Marijuana, an individual is allowed to grow 15 Marijuana plants for personal use. That individual is also allowed to grow an additional 15 Marijuana plants for another Medical Marijuana patient if that patient is identified as the second patient[‘]s care provider. Washington State Law also allows a Community Garden which allows up to 10 patients to grow Medical Marijuana in one location. In a Community Garden, Washington State Law only allows up to 45 Marijuana plants to be grown in a Community Garden. From the initial investigation in this case, if this grow is a Medical Marijuana Grow and has the proper documentation no enforcement will be taken.

NOTE: I know through my experience with Marijuana Grows that none of the processed Marijuana is ever kept inside a grow enclosure that is located outside and open to the

> elements. I also know that harvested plants are usually taken into buildings near the grow site to hang and let dry before the usable portion of the Marijuana plants is processed for consumption. It is also a common practice for individuals that have a Marijuana Grow with Marijuana plants as mature as this one, to have a starter room located on the property with young Marijuana plants under grow lights to replenish their numbers once they harvest the mature Marijuana plants. I also know through my experience with Medical Marijuana Grows, individuals often keep their medical records inside a residence or building near the grow site to avoid having them destroyed by the elements.

CP 73–75.

In his declaration, Deputy Singer described the premises to be searched as follows:

> The property located at 41840 Paradise Lane North, Creston WA 99147 has a legal description of PT RY 611 (PT NE) with a parcel number 2734001500052 in the County of Lincoln, State of Washington. This property is at the very end [of] Sterling Valley Road on Paradise Lane. There are three houses on Paradise Lane and Hurlburt lives in the third residence with an unattached garage located on the property to the south east of the residence. The legal owner is listed as Michael K. Hurlburt.

CP 75 (alteration added).

Upon Detective Singer's application for the search warrant, Judge Strohmaier reviewed the declaration and supporting documents, which included an undated aerial Google earth photograph of the area to be searched: 41840 Paradise Ln., Creston WA. CP 67–68 at Findings of Fact 5 and 11; CP 80. Judge Strohmaier signed the search warrant on August

25, 2014 (CP 66 at Finding of Fact 1; CP 77–79) and the warrant was executed on August 26, 2014. CP 60–61, "Inventory and Return of Search Warrant"; CP 68 at Finding of Fact 13. "[L]aw enforcement officers did not find any of the property to be seized as set forth in the warrant. The officers did find and seized[1] powder, cylinders, and fuse material they believed could be fashioned into explosive devices in the detached garage, and glass pipers they believed were used to smoke methamphetamine in the residence." CP 60–61, "Inventory and Return of Search Warrant;" CP 68 at Finding of Fact 13.

In February 2015 the Lincoln County Prosecuting Attorney charged respondent Michael Kevin Hurlburt with possession of bomb-making materials found in his detached garage and possession of methamphetamine found in his residence. CP 1–2, 68 at Finding of Fact 13.

Pre-trial, Hurlburt and co-defendant Nancy St. Pierre Walsh moved to suppress[2] all fruits of the search, alleging the search warrant was not supported by probable cause because the supporting declaration was defective. CP 3–13.

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[1] Pursuant to a requested and telephonically approved amendment of the search warrant. CP 59.

[2] The motion was filed by counsel for Hurlburt. Counsel for St. Pierre Walsh was present at and contributed argument to the suppression hearing. *See generally* 9/16/15 RP 4–65.

In September 2015 a hearing was held and Judge Strohmaier granted the motion to suppress. The court considered only the evidence presented in the declaration for the initial search warrant. CP 69 at Conclusion of Law 1. The trial court determined the declaration provided sufficient information to support a search warrant of Hurlburt's fenced yard based on an officer's observation of growing marijuana plants in a fenced garden area on the property four weeks before. CP 67 at Finding of Fact 7; CP 70 at Conclusion of Law 70.

However, the court concluded the declaration was legally insufficient to establish probable cause to search Hurlburt's residence or garage because (1) the information did not establish the anonymous informant's credibility or basis of belief that evidence of a crime would be found in the residence or garage; (2) the officer's observation of an outdoor marijuana grow and confirmation of Hurlburt's status as a convicted felon did not corroborate the informant's statements or establish the informant's veracity; and (3) the officer's generalized training and experience with marijuana grows provided no specific factual information that evidence of a crime could be found in the residence or detached garage. CP 67 at Finding of Fact 9; CP 68 at Finding of Fact 12. The court entered findings of fact and conclusions of law in support of its order

granting defendants' motion to suppress and dismissed the cases with prejudice. CP 65–71; 83, 104. The State appealed.[3]

On appeal, the state concedes and "agrees with the trial court's conclusion that the information provided by the informant regarding the handgun, the cougar pelt, and the photograph of [Hulburt] with those items did not have sufficient nexus to [Hulburt's] residence or garage, as there was no information provided as to when or where the photograph was taken. CP 70 (Conclusion of Law 4; Conclusion of Law 5)." Brief of Appellant, p. 14.

C. ARGUMENT IN RESPONSE

1. The search warrant was unsupported by probable cause, requiring suppression of evidence recovered from the residence and garage.

The search warrant affidavit did not establish probable cause to search the residence and garage. First, the reliability and basis of knowledge of the anonymous informant was not established and the police investigation did not otherwise corroborate the informant's tips beyond the

[3] There is no citation to the record because the state did not designate its notices of appeal as part of the clerk's papers, as required by RAP 9.6(b)(1). *See* CP 84–85, 123–24.

fact of an outdoor marijuana grow. Second, the affidavit does not establish the requisite nexus between the outdoor marijuana grow and the other places to be searched. The warrant therefore did not satisfy the requirements of article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. The trial court correctly concluded the evidence found in the residence and garage must be suppressed.

1. Standard of Review.

Normally the issuance of a search warrant is reviewed for abuse of discretion (*State v. Maddox,* 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)) and deference is given to the issuing judge or magistrate. *State v. Young,* 123 Wn.2d 173, 195, 867 P.2d 593 (1994). However, at the suppression hearing the trial court acts in an appellate-like capacity and its review, like that of the reviewing court, is limited to the four corners of the affidavit supporting probable cause. *State v. Neth,* 165 Wn. 2d 177, 182, 196 P.3d 658 (2008) (citations omitted). The affidavit is viewed in a commonsense manner rather than hypertechnically. *State v. Chenoweth,* 160 Wn.2d 454, 477, 158 P.3d 595 (2007). All doubts are resolved in favor of the validity of the warrant. *Maddox,* 152 Wn.2d at 509. However, "[w]hile [the reviewing court] give[s] great deference to the magistrate, that deference is

not unlimited." *State v. Lyons*, 174 Wn.2d 354, 362, 275 P.3d 314 (2012). The reviewing court "cannot defer to the magistrate where the affidavit does not provide a substantial basis for determining probable cause." *Lyons*, 174 Wn.2d at 363. The trial court's assessment of probable cause is a legal conclusion that is reviewed de novo." *Neth*, 165 Wn. 2d at 182.

2. The *Aguilar-Spinelli* test is unsatisfied.

A search warrant must not issue unless there is probable cause to conduct the search. U.S. Const. amend. IV; Wash. Const. art. 1, § 7; *Lyons*, 174 Wn.2d at 359. "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." *Lyons*, 174 Wn.2d at 359. In determining whether the supporting affidavit establishes probable cause, review is limited to the four corners of the affidavit. *Neth*, 165 Wn.2d at 182. "When adjudging the validity of a search warrant, we consider *only* the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested." *State v. Murray*, 110 Wn.2d 706, 709–10, 757 P. 2d 487 (1988).

When the existence of probable cause depends on an informant's tip, the affidavit in support of the warrant must establish the basis of the

informant's information as well as the veracity of the informant under the *Aguilar-Spinelli* test. *State v. Jackson*, 102 Wn.2d 432, 433, 688 P.2d 136 1984) (citing *Aguilar v. Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U. S. 410, 89 S. Ct. 584, 21 L.Ed. 2d 637 (1969)). To satisfy both parts of the *Aguilar - Spinelli* test, the affidavit must state circumstances from which the issuing magistrate "may draw upon to conclude the informant was credible and obtained the information in a reliable manner." *State v. Vickers*, 148 Wn.2d 91, 112, 59 P. 3d 58 (2002).

Where the informant's identity is not revealed, courts require heightened demonstrations of reliability." *State v. Rodriguez*, 53 Wn. App. 571, 575–576, 769 P.2d 309 (1989); *see also State v Ollivier*, 178 Wn.2d 813, 850, 312 P. 3d 1 (2013), cert. denied, 135 S. Ct. 72 (2014) ("an identified informant's report is less likely to be marred by self-interest") (internal quotation marks and citation omitted). Where an informant is acting out of self-interest, there is a risk that she or he has a motive to falsify. *State v. Aase*, 121 Wn. App. 558, 568, 89 P. 3d 721 (2004). Courts are concerned about anonymous informants who are "involved in the criminal activity or motivated by self - interest." *State v. Cole*, 128 Wn.2d 262, 287–88, 906 P. 2d 925 (1995).

Here, the anonymous informant was not named in the declaration; accordingly, the declarant was required to demonstrate heightened reliability. CP 72–76. Instead, the declaration is silent regarding any basis for an independent determination by the issuing magistrate of the "anonymous caller's" veracity.

Further, the knowledge prong of the *Aguilar-Spinelli* test is unsatisfied in regard to the informant's statements, including that "they believe [Hurlburt] is growing Marijuana at his house," "Hurlburt is … in possession of a handgun at that residence," "that there has been a large amount of traffic traveling in and out of Hurlburt's residence recently … and Hurlburt is reportedly selling live Marijuana plants to individuals," and that "the traffic is usually between midnight and two in the morning and are [sic] entering Hurlburt's property with their vehicle lights turned off." CP 73–74.

To satisfy the "basis of knowledge" prong, the officer must explain how the informant claims to have come by the information given to police. *Jackson*, 102 Wn.2d at 437. That is, "the informant must declare that he personally has seen the facts asserted and is passing on first-hand information." *Id*.

The declaration lacked any factual basis for the anonymous caller's purported knowledge that contraband could be found at Hurlburt's residence and/or garage. The informant's tip fails the knowledge prong of the *Aguilar– Spinelli* test.

Having failed both prongs of the test, the trial court was correct in its assessment that the informant's tips were insufficient to establish probable cause to search the residence and garage.

3. The informant's information is not sufficiently corroborated to establish probable cause.

If an informant's tip fails under either or both parts of the test, "probable cause may yet be established by independent police investigatory work that corroborates the tip to such an extent that it supports the missing elements of the *Aguilar-Spinelli* test." *Jackson*, 102 Wn.2d at 438. "The independent police investigations should point to suspicious activity, 'probative indications of criminal activity along the lines suggested by the informant.' " *Id.* at 438 (quoting *United States v. Canieso*, 470 F.2d 1224, 1231 (2d Cir. 1972)).

Here, the state argues the requisite corroboration needed for probable cause to search the residence and garage was provided by police observation of marijuana plants growing in an outdoor fenced area, verification that Hurlburt was a convicted felon, and awareness that his

criminal history included felony drug convictions including possession of marijuana with the intent to manufacture and/or deliver. Brief of Appellant, p. 19.

In the absence of evidence of criminal activity likely taking place in the house or garage, police observation of the marijuana grow corroborated the informant's tip but only provided probable cause to search the yard. The observing officer surely would have reported there was probable cause to search the house had he "smelled marijuana emanating from [Hurlburt's] residence" when he contacted Hurlburt at the residence on an unrelated investigation. CP 74; *see* Brief of Appellant, p. 17–18; *see State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010).

In the absence of any underlying facts or circumstances, the status of being a convicted felon who is prohibited from possessing or using a handgun does not make it more likely that criminal activity was likely taking place at, or that the photograph depicted events connected with, the yard, residence or garage. The status is a fact consistent with both lawful and unlawful conduct and does not constitute probable cause to search. *Neth*, 165 Wn.2d at 185.

The fact of a prior conviction for possession of marijuana with intent to manufacture or deliver would be unhelpful in establishing

probable cause where the declaration—as here— merely establishes marijuana being grown ostensibly on Hurlburt's property and does not implicate him in criminal activity regarding the grow operation or at the garage or residence. *Cf. State v. Clark*, 143 Wn.2d 731, 748–49, 24 P.3d 1006 (2001) (Factual information in affidavit established probable cause for a warrant to search defendant's van for trace evidence relating to missing girl, where affidavit alleged that defendant had been near girl's house on night she disappeared, that he had a prior conviction for unlawful imprisonment of another young girl for ostensibly sexual purposes, and that he had given deceptive answers to FBI officer during polygraph examination relating to girl's disappearance); *State v. Stone*, 56 Wn. App. 153, 158–59, 782 P.2d 1093 (1989) (Mere observation of defendant's vehicle at the scene of the crime might be insufficient to establish probable cause to believe he had committed the burglary. However, coupled with police officer's knowledge of the similarity between the method employed in this burglary and that employed in previous burglaries by defendant, and the observation of items in his vehicle at the time of his arrest of the sort taken in this burglary, a reasonably prudent person would conclude evidence of the burglary would likely be found in his vehicle).

Information gleaned from the investigation does not sufficiently corroborate the informant's tips to establish probable cause to believe criminal activity was taking place in the residence or garage. Search warrant affidavits should not be read in a hypertechnical manner, but "establishing probable cause is not hypertechnical; it is a fundamental constitutional requirement." *Lyons*, 174 Wn.2d at 362. The trial court correctly concluded the investigation provided insufficient evidence to corroborate the informant's statements or establish the veracity of the informant. CP 67 at Finding of Fact 9.

4. The search warrant also fails for lack of nexus between the criminal activity and the place to be searched: there was no probable cause to believe evidence of a marijuana grow would be found in the residence and garage.

The declaration established probable cause to believe marijuana was being grown in an outdoor garden area. However, the search warrant still fails for lack of a nexus between the crime and the residence or garage. Search warrants are valid only if supported by probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause to search requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). The affidavit in support of the warrant

must set forth facts and circumstances sufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched. *Thein*, 138 Wn.2d at 140.

A warrant to search for evidence in a particular place must be based on more than generalized belief of the supposed practices of the type of criminal involved. *Id*. at 147–48. Rather, the warrant must contain specific facts tying the place to be searched to the crime. *Id*. "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; *see also, State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869 (1980) ("If the affidavit or testimony reveals nothing more than a declaration of suspicion and belief, it is legally insufficient"); *State v. Helmka*, 86 Wn.2d 91, 92, 542 P.2d 115 (1975) ("Probable cause cannot be made out by conclusory affidavits"); *State v. Patterson*, 83 Wn.2d 49, 52, 61, 515 P.2d 496 (1973) (record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant). Probable cause for a search requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched. *Thein*, 138 Wn.2d at 140.

The warrant to search the residence and garage fails for lack of nexus. The declaration did not establish probable cause that evidence of the marijuana grow operation was at the residence or garage. As an initial matter the declaration establishes doubt on its face as to whose residence and garage police could legitimately be authorized to search. The possible criminal activity reported by the anonymous caller was attributed to property at 41836 Paradise Lane North allegedly owned by Hurlburt. CP 73–74. Police stated they observed the marijuana grow while contacting Hurlburt at his residence at the 41836 Paradise Lane North address. CP 74; 9/16/15 RP 22. But police sought and obtained the search warrant for 41840 Paradise Lane North and stated Hurlburt was its legal owner. CP 75, 77. They searched and seized property from the 41840 Paradise Lane North address. The declaration is defective due to this discrepancy between place of alleged criminal activity and place to be searched.

Even if the place searched is treated as the equivalent of Hurlburt's residence for purposes of determining probable cause, the nexus is still missing. The standard is whether there is probable cause to believe contraband will be found in the specific place to be searched. *Thein*, 138 Wn.2d at 140. "The affidavit in support of the search warrant must be based on more than suspicion or mere personal belief that evidence of the

crime will be found on the premises searched." *Vickers*, 148 Wn.2d at 108. "Probable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for the suspect's home." *United States v. Ramos*, 923 F.2d 1346, 1351 (9th Cir. 1991), overruled on other grounds by *United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001).

In *Thein*, for example, the Washington Supreme Court held there was insufficient nexus between evidence that a person engaged in drug dealing and the fact that the person resided in the place searched. *Thein*, 138 Wn.2d at 150. The affidavit in that case contained specific information tying the presence of narcotics activity to a certain residence, but not the address to be searched pursuant to the warrant. *Id.* at 136 -138, 150. The affidavit also contained generalized statements of belief, based on officer training and experience, about drug dealers' common habits, particularly that they kept evidence of drug dealing in their residences. *Id*. at 138–39. The affidavit expressed the belief that such evidence would be found at the suspect's residence. *Id.* at 139. The Court held such generalizations do not establish probable cause to support a search warrant for a drug dealer's residence because probable cause must be grounded in fact. *Id*. at 146–47.

A similar consideration guides the analysis here. The declaration contains no observations that Hurlburt tended or was otherwise involved in the grow operation or that he used the detached garage or residence to further the operation. Nothing in the declaration shows anyone, including the anonymous caller, observed any grow-associated items or contraband in the garage or house. The declaration simply fails to make the necessary connection between a grow operation and the residence or garage.

Information insufficiently grounded on fact to ensure reliability will not suffice to establish a nexus between the place to be searched and suspected illegal activity. *Thein*, 138 Wn.2d at 147. Specific facts in the supporting affidavit must establish the nexus between the item to be seized and the place to be searched. *Id.* at 145. The declaration here lacks specific facts tying the residence and garage to the crime. The trial court correctly concluded the declaration failed to establish the requisite nexus.

Despite the lack of *Thein's* required nexus in the search warrant declaration, the State maintains this court's decision in *State v. Constantine*, 182 Wn. App. 635, 220 P.3d 226 (2014) offers an alternative basis to uphold the search of Hurlburt's residence and garage. Brief of Appellant, pp. 21–27. In *Constantine* the court found the search of a house and shed based upon a marijuana grow spotted in two law

enforcement flyovers did not offend *Thein*'s prohibition against general assumptions of where evidence may be kept if based upon reasonable inferences about nearby land and buildings that are adequately shown to be under the defendant's control. *Constantine*, 182 Wn. App. at 647–48. Ms. Constantine's husband, Morgan Hale Davis, also appealed the denial of the motion to suppress. *State v. Davs*, 182 Wn. App. 625, 331 P.3d 115 (2014).

The information provided in the declaration in Hurlburt's case falls far short of the detailed affidavit relied upon in *Constantine* and *Davis*. There, the affidavit contained narrative information that two Task Force officers flew in a helicopter over property near Tonasket, Washington, and saw two greenhouses with approximately 20 large marijuana plants visible through the partially uncovered roof of one of them. They noted other buildings on the property, including a small stick built house located just east of the greenhouses and a small stick built shed west of the greenhouses. The officers confirmed that the property's address was 44 Reevas Basin Road and that it was owned by Mr. Davis. A week later one of the officers flew over the property a second time and took an aerial photograph, noting the greenhouses were both covered with plastic through which he saw dark green coloring he believed to be growing

marijuana plants. The officer obtained a warrant to search the two greenhouses, the house, and the shed on Reevas Basin Road for evidence of manufacturing marijuana and related items. *Constantine*, 182 Wn. App. at 639–40; *Davis*, 182 Wn. App. at 628.

The *Constantine/Davis* affidavit also included an aerial photograph with the affiant's explanation to the magistrate of its content and context.[4] "In this photo you can clearly see the green houses to the left of the house. The larger of the two greenhouses was half opened when the initial flight was done. This is the one that I could see growing marijuana plants in. Everything in the photo including the outbuildings is on the same parcel of property. There are no other driveways or houses except for the one in the photo that have access to these marijuana plants." *Constantine*, 182 Wn. App. at 640; *Davis*, 182 Wn. App. at 628–29.

The aerial photograph in *Constantine/Davis* "showed the residence, greenhouses, garden area, and outbuildings all within a clearly defined living compound. The compound is well separated from other structures or homes. The residence was approximately 50 to 70 feet from the greenhouses and there were no other houses nearby. Also, only one access

[4] In contrast, a poorly reproduced Google earth aerial map was submitted herein for property at 41840 Paradise Lane, Creston, WA, with no accompanying explanation. CP 80.

road approaches the property and ends there." *Davis*, 182 Wn. App. at 629; *see Constantine*, 182 Wn. App. at 641.

This court determined *Thein*'s prohibition against assumptions was not implicated where "It was not unreasonable for the issuing judge to believe that evidence of the crime would be found in the house based on [(1)] Mr. Davis's ownership and control of the property where both the observed criminal activity and the house were located, [(2)] the proximity of the home to the criminal activity, and [(3)] the type of evidence sought in the warrant." *Constantine*, 182 Wn. App. at 647–48 (alterations added).

In concluding the nexus requirement was met, the court noted:

> The relevant facts are that officers observed at least 20 marijuana plants growing in a greenhouse on Mr. Davis's property. Located close to the greenhouses were a home and a shed. These buildings were on a clearly defined living compound owned by Mr. Davis. Only one road driveway accessed both the greenhouses and the house, and dead ended on the property.

Constantine, 182 Wn. App. at 647.

> The warrant established that the house and shed were located on the same defined parcel of land as the greenhouses and were close in proximity to one another. The parcel of land was owned by Mr. Davis. Access to both greenhouses and the home was from the same, single driveway. The officers observed at least 20 marijuana plants in one exposed part of the greenhouses.

Davis, 182 Wn. App. at 633.

The scarce facts presented here are very dissimilar. In the declaration, Detective Singer indicates Hurlburt owns a residence at 41836 Paradise Lane North. CP 73. Deputy Steadman saw four-foot tall marijuana plants growing in a fenced "area located on the north side of the unattached garage located on the east side" of the residence at 41836 Paradise Lane North. CP 74. The deputy did not specify how many plants he saw or estimate any distances between the grow garden and the structures. Nor did he estimate any distances between the garden/residence/garage and any other nearest structures located on Paradise Lane. The declaration also does not establish the residence was on the same defined parcel of land as the fenced garden enclosure and detached garage, or that Hurlburt owned the land on which the enclosure and garage sat. *Cf. Constantine*, 182 Wn. App. at 647; *Davis*, 182 Wn. App. at 633.

The declaration's description of the property to be searched indicates Hurlburt instead owns a residence at 41840 Paradise Lane North with an unattached garage "to the southeast of the residence" and the residence is situated "at the very end of Sterling Valley Road on Paradise Lane" and "there are three houses on Paradise Lane." CP 75. The description does not specify the distance between the residence and the

unattached garage, and does not mention any grow garden. It does not convey proximity between the garage (or the grow garden) and the residence and does not establish the garage (or the grow garden) was on the same parcel as the residence. The description does not disclose the proximity of the other two houses or the nearest house to the garage (or the grow garden) and the residence. The description also does not establish that access to the grow garden (which, again, is not mentioned) and the garage and residence was from the same single driveway. *Cf. Constantine*, 182 Wn. App. at 647; *Davis*, 182 Wn. App. at 633.

Thein establishes that general statements regarding the common habits of drug dealers are not sufficient to establish probable cause. *Thein*, 138 Wn.2d at 150–51. The limited details contained in the declaration and supporting materials provided to the issuing magistrate here fail to provide the measure of ownership, control and proximity found sufficient by the *Constantine* and *Davis* courts to overcome *Thein* and permit reasonable inferences alone to establish an adequate nexus that evidence of the crime of possession of marijuana with the intent to manufacture would be found in the residence and garage. *Cf. Lyons*, 174 Wn.2d at 364 (inferences alone do not provide a substantial basis for determining probable cause); *State v. Gebaroff*, 87 Wn. App. 11, 16–17, 939 P.2d 706 (1997) (probable

cause to search a house does not provide probable cause to search outbuildings when the outbuildings may be under the control of other persons); *Lyons*, 174 Wn.2d at 359 ("In particular, the affidavit must set forth the underlying circumstances specifically enough that the magistrate can independently judge the validity of both the affiant's and informant's conclusions" (quoting *Spinelli*, 393 U. S. at 413, 89 S. Ct. 584, 21 L.Ed. 2d 637)).

Specific facts in the supporting affidavit must establish the nexus between the item to be seized and the place to be searched. *Thein*, 138 Wn.2d at 145. The declaration here lacks specific facts tying the residence and garage to the crime. The trial court correctly concluded the declaration failed to establish the requisite nexus.

2. Appeal costs should not be imposed.

Mr. Hurlburt is the co-respondent in this matter and is currently 51 years old. CP 1[5]. The state filed its notice of appeal in November 2015[6] Trial court found Mr. Hurlburt indigent and unable to pay for the expenses of appellate review and entitled to appointment of appellate counsel at

[5] Mr. Hurlburt's date of birth is February 22, 1965, and he was 49 years old at the time of the incident at issue here. CP 1.
[6] *See* footnote 3.

public expense.[7] CP 5–7. If Mr. Hurlburt does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. *See* General Court Order of Court of Appeals, Division III (filed June 10, 2016); *see also State v. Sinclair*, __ P.3d __, 2016 WL 393719 (filed January 27, 2016) (instructing defendants on appeal to make this argument in their opening briefs). Appellate counsel anticipates filing a report as to Mr. Hurlburt's continued indigency and likely inability to pay an award of costs no later than 60 days following the filing of this brief, as required by the General Court Order.

RCW 10.73.160(1) states the "court of appeals … may require an adult … to pay appellate costs." (Emphasis added) "[T]he word 'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case" analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.* Accordingly, Mr. Hurlburt's

[7] *See* Lincoln County Superior Court Order of Indigency filed in this court on November 4, 2015.

ability to pay must be determined before discretionary costs are imposed. The charges against Mr. Hurlburt were dismissed below and he was found indigent for purposes of responding to the state's appeal. RAP 15.2(f) provides there is a presumption of continued indigency throughout the appeal. In the event he does not substantially prevail on the state's appeal, Mr. Hurlburt asks the court to consider his present or future inability to pay and not assess appellate costs against him

D. CONCLUSION

For the reasons stated, Mr. Hurlburt requests this Court to affirm the trial court's order of suppression and dismissal. If Mr. Hurlburt is not deemed the substantially prevailing party on appeal, this Court should decline to assess appeal costs should the State ask for them.

Respectfully submitted on July 20, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 20, 2016, 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 brief of respondent Michael Hurlburt:

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