

62415-6

62415-6

NO. 62415-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER T. BAKKEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLAS McBROOM

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The trial court found probable cause for the warrant to search the house located at 22908 SE Street, Sammamish, Washington. The issue is concerning whether there was probable cause for the search warrant authorizing a search of this address?

2. The trial court found probable cause for the warrant to search the residence located at 526 Yale Avenue North, apartment number 606, Seattle, Washington. The issue is concerning whether there was probable cause for the search warrant authorizing a search of this address?

B. PROCEDURAL FACTS

Christopher T. Bakken was charged with Manufacturing Marijuana, Possession of Marijuana with intent to deliver, and Possession of Cocaine with intent to deliver. CP¹ 10-12. The case was assigned to trial and the defendant raised a motion to suppress the evidence collected as a result of the execution of the warrant on 22908 SE Street, Sammamish, Washington and 526 Yale Avenue North, apartment number 606, Seattle, Washington. This motion was denied by the court. CP 13-15; 19-21. The defendant then

¹ CP refers to the clerk's papers designated in the first appeal, number 55742-4-I.

decided to then waive his right to a jury trial and agreed to a stipulated trial and was found guilty of all three charges listed on the amended information. CP 16-18. The defendant was then sentenced to a total of 16 months confinement. The sentence was stayed pending the outcome of appeal.

C. STANDARD OF REVIEW

The standard of review is to review the issuing magistrate's probable cause determination for abuse of discretion. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). All doubts should be resolved in favor of the warrant's validity. Maddox, 152 Wn.2d at 509 (citing State v. Kalakosky, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993)).

An affidavit establishes probable cause if it sets forth sufficient facts for a reasonable person to conclude (1) the defendant is probably involved in criminal activity, and (2) the police will find evidence of the criminal activity at the place to be searched. Maddox, 152 Wn.2d at 509 (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

D. ARGUMENT

1. THE SEARCH WARRANT FOR 22908 SE 37th STREET, SAMMAMISH, WASHINGTON, WAS SUPPORTED BY PROBABLE CAUSE AND THE FRUITS OF THAT SEARCH SHOULD NOT BE SUPPRESSED.

A search warrant may issue only upon a determination of probable cause, based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location. State v. Smith, 93 Wn.2d 329, 352, 610 P.2d 869, cert. denied, 449 U.S. 873, 101 S. Ct. 213, 66 L. Ed. 2d 93 (1980); State v. Patterson, 83 Wn.2d 49, 58, 515 P.2d 496 (1973). Probable cause exists when an affidavit supporting a search warrant sets forth facts sufficient for a reasonable person to conclude that the defendant probably is involved in criminal activity. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); State v. Maxwell, 114 Wn.2d 761, 769, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. State v. Garcia, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992).

In the case at hand the affidavit makes it clear that the detectives were able to smell “the odor of fresh growing marijuana.”

Ap 6². The training and experience of detective Oskierko appears to be extensive in relation to illegal substances, marijuana specifically, and is not challenged by the appellant. Ap 1-3.

Courts have held that evidence of this nature is sufficient to establish probable cause. In State v. Cole, the defendant argued that the trial court erred in finding probable cause based on the warrant affidavit's assertion that a state patrol detective smelled the odor of growing marijuana when investigating the suspect's property. State v. Cole, 128 Wn.2d 262, 289, 906 P.2d 925 (1995). The warrant affidavit also stated that the officer had investigated several marijuana grow operations and was familiar with the smell of marijuana. Cole, 128 Wn.2d at 289. In finding that the trial court did not abuse its discretion in finding probable cause, the Washington Supreme Court stated:

"Acknowledging that such an assertion must be based on more than a mere statement of personal belief, the Olson court [State v. Olson, 73 Wn. App. 348, 869 P.2d 110 (1994)] held a statement that an officer with training and experience actually detected the odor of marijuana provides sufficient evidence, by itself, constituting probable cause to justify a search." Cole, 128 Wn.2d at 289. See also State v. Huff, 64 Wn. App. 641, 826 P.2d 698 (1992); State v. Remboldt, 64 Wn. App. 505, 827 P.2d 282 (1992).

² The Appellant's brief includes the affidavit in question as "Attachment A." This brief will include reference to this document as Ap followed by the page number being referred to.

With that aspect of the question addressed all that is left to determine if this location was properly searched under a warrant based on probable cause is to address the appellant's argument that the officers were somehow not where the law allowed them to be. Detectives Oskierko and Christiansen went to the location at about 2:30 p.m. and approached the front door using the driveway and detected the smell of growing marijuana before they even reached the front door. Ap 6.

The appellant implies that the detectives are less than honest in this witnessed scent and states that the detective's smelling marijuana is "not surprising" since they went to the location to discover if they could smell marijuana. This argument is directly opposed by appellant's own argument when referring to the Seattle location and pointing out the detectives did not smell marijuana at that location. The fact is there is no evidence in record to challenge the credibility or qualifications of these detectives and the appellant's implication is erroneous.

The appellant has claimed that the detectives were not legally on the property in question. The appellant makes this claim with no case law to support this position but merely asserts that this Court should find the detectives unlawfully on the property.

Precedent in this matter is on point and opposes this erroneous unsupported argument by the appellant.

A police officer may enter areas around a home that are impliedly open to the public, such as an access route or walkway leading up to the home. State v. Ross, 91 Wn. App. 814, 818, 959 P.2d 1188 (1998), aff'd, 141 Wn.2d 304, 4 P.3d 130 (2000). If while in those areas he or she 'is able to detect something by utilization of one or more senses,' he or she does not conduct an unlawful search. ³But if he or she substantially and unreasonably departs from such areas, he or she does conduct an unlawful search. State v. Myers, 117 Wn.2d 332, 345, 815 P.2d 761 (1991); Seagull, 95 Wn.2d at 903. He or she may intrude to the same extent as a reasonably respectful citizen, Seagull, 95 Wn.2d at 902-03, but not to a greater extent, and the extent to which a reasonably respectful citizen may intrude depends on the facts and circumstances of each case. Seagull, 95 Wn.2d at 903.

³ State v. Seagull, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). Although this case interprets the Fourth Amendment to the United States Constitution, the Washington State Supreme Court has applied its holding to cases interpreting Article I, § 7. State v. Vonhof, 51 Wn. App. 33, 751 P.2d 1221, review denied, 111 Wn.2d 1010 (1988), cert. denied, 488 U.S. 1008, 109 S. Ct. 790, 102 L. Ed. 2d 782 (1989).

This case is even clearer when taken in the light of the information that was supplied by the confidential informant (CI). Under Aguilar/Spinelli⁴, where police seek a warrant based upon information supplied by an informant, the supporting affidavit must demonstrate the informant's (1) basis of knowledge and (2) veracity. State v. Vickers, 148 Wn.2d 91, 112, 59 P.3d 58 (2002).

Here, the appellant argues that the State fails to meet the standard in any way and all information provided by the CI should be discounted.

The State may satisfy the Aguilar/Spinelli test's veracity prong in two ways: 1) by establishing the informant's credibility; or 2) demonstrating that the circumstances under which the informant furnished the information may support the informant's credibility. State v. Lair, 95 Wn.2d 706, 709-10, 630 P.2d 427 (1981); State v. McCord, 125 Wn. App. 888, 893, 106 P.3d 832 (2005). The informant taken in a vacuum may fail to meet this standard.

The State may, however, also satisfy the Aguilar/Spinelli test and establish probable cause through an independent police

⁴ 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).

investigation that corroborates the informant's tip. State v. Jackson, 102 Wn.2d 432, 438, 688 P.2d 136 (1984); Vickers, 148 Wn.2d at 112. Here, the officers smelled marijuana at the house the CI pointed out as the residence the appellant was supposed to be growing marijuana in. The detectives also witness one of the cars belonging to appellant at the suspected marijuana grow location. Ap 5. In addition, the detectives confirm the existence of the apartment the CI states the appellant is selling narcotics out of and that the CI has a Camaro that is registered at that very apartment. Ap 5-6. These facts sufficiently corroborate CI's story and the magistrate did not err in finding probable cause.

Probable cause clearly exists for the 22908 SE 37th Street, Sammamish, Washington. The detectives were properly trained in the detection of marijuana by scent and were lawfully on the property of the appellant so the convictions should be affirmed.

2. THE SEARCH WARRANT FOR 526 YALE AVENUE NORTH, APARTMENT NUMBER 606, SEATTLE, WASHINGTON, WAS SUPPORTED BY PROBABLE CAUSE AND THE FRUITS OF THAT SEARCH SHOULD NOT BE SUPPRESSED.

Bakken contends that Detective Oskierko's affidavit was insufficient to support a belief that evidence of criminal activity

would be found at 526 Yale Avenue North, apartment number 606, Seattle, Washington. He relies on State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999). In Thein, the officers while in the course of a drug bust at a residence of someone other than Thein found evidence suggesting that Thein was dealing drugs. They found money order receipts made out to him for 'rent', and a packing slip bearing his name and home address. The packing slip was for materials the officers believed to be commonly associated with the cultivation of marijuana.

The officers obtained a warrant to search Thein's residence based on their suspicion that Thein was a dealer and their generalized conclusion that drug dealers are likely to keep evidence of illegal drug dealing in their homes. The Court held that the evidence discovered at the first residence was insufficient to support a reasonable conclusion that there was illegal activity being carried out in Thein's residence. Thein, 138 Wn.2d at 150-51. In Thein the officers had nothing more than a suspicion and some paperwork showing residence.

This case is distinguishable from Thein in multiple ways. First of all this case has a CI that has had some evidence already proven. The CI already properly identified a marijuana grow at the

other residence, the type of car the person identified involved drives and an apartment that the CI identified as a sale point for narcotics; specifically cocaine. While this alone may or may not be able to meet the Aguilar/Spinelli for reliability of this CI, the detectives have further investigation in regards to the apartment. Ap 5-6.

A known witness to the police in the form of the apartment manager was able to identify which apartment the detectives were interested in without prompting from the detective. Ap 6. The manager identified this apartment correctly because he/she went to the apartment and smelled a “strong odor of marijuana” and told the officers that he/she knew the smell of marijuana and that it was “skunky.” The manager also stated that they have received “several complaints about the strong odor of marijuana coming from the apartment” and that they have called the police on “several occasions.” Ap 6.

Bakken properly points out that we have no way to determine that the manager can independently identify the smell of marijuana, but the appellant forgets that Bakken is already connected to the current marijuana grow at another location. The probable cause for the one location already secured corroborates the accusations made by the manager and the “several complaints”

that the smell of “burnt marijuana” is coming from apartment 606. Ap 6. This combined with the accusations of drug sales coming from the apartment by the CI provides the probable cause for the apartment.

The next argument that the appellant attempts in regards to this property is that the information from the manager is “at a minimum” stale. While it is true we do not have an exact timeline as to the manager’s personal smell of the marijuana we do have several indications that this discovery is not only recent but ongoing. The manager tells detective Oskierko that there have been several complaints and that the police were called several times. Ap 6. This indicates a pattern over a period of time. There is also the fact that the manager was able to identify which apartment the detectives were interested in. This also indicates that the problem of marijuana odor was recent. Lastly, there is the marijuana grow that is current at the other location. This indicates that marijuana is immediately available.

The last issue raised by Bakken is the one that argues that the entire warrant should be discounted because it includes “boilerplate.” This is a gross misreading of Thein. Thein states that “[w]e conclude the generalized statements contained in the

affidavits in this case were, standing alone, insufficient to establish probable cause.” Thein at 149. Appellant wishes you to ignore the “standing alone” portion of the ruling. In this case the training and experience of the officer is valuable when examined as part of the whole of the document. In fact, if the detective were to leave this portion out Bakken would likely suggest that the smell of marijuana the detective witnessed from the Sammamish property was invalid.

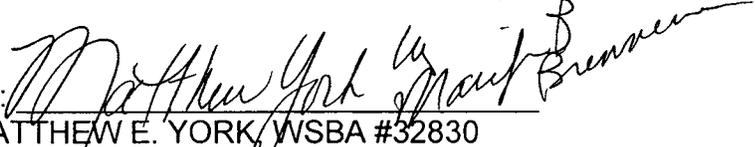
When taken as a whole detective Oskierko’s extensive training is extremely valuable. This training and experience combined with the smell of marijuana from the Sammamish property corroborating the CI’s statement, the CI’s assertion that Bakken sells drugs from his apartment, the CI’s corroborated assertion of the type of vehicle driven and the apartment of the appellant, the CI’s corroborated assertion that Bakken is unemployed, the manager’s personal experience smelling the marijuana from apartment 606, the complaints from the residence of the apartment building about the smell of marijuana from apartment 606 clearly distinguish the case at hand from Thein. The warrant to search the apartment was supported by probable cause and the convictions should be affirmed.

E. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reject Bakken's arguments that no probable cause existed to obtain the warrants for residence located at 22908 SE Street, Sammamish, Washington, and the residence located at 526 Yale Avenue North, apartment number 606, Seattle, Washington, and affirm his convictions.

DATED this _____ day of October, 2009.

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Antonio Salazar, the attorney for the appellant, at 8917 Lake City Way NE, #1, Seattle, WA 98115, containing a copy of the Brief of Respondent, in STATE V. CHRISTOPHER T. BAKKEN, Cause No. 62415-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Wenita Schwantes
Name
Done in Seattle, Washington

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