

63034-2

63034-2

NO. 63034-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALEX TANBERG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

The trial court found that a police officer hid information casting doubt on his ability to recognize the odor of marijuana plants when he applied for a search warrant based on his claim he smelled growing marijuana at Alex Tanberg's home. Even though the court acknowledged the officer omitted material information in his warrant application, the court upheld the resulting search. However, because the warrant rested almost entirely upon the officer's highly questionable ability to smell marijuana plants, his deliberate or reckless omission of critical information from the search warrant application undermined the probable cause for the search.

B. ASSIGNMENTS OF ERROR.

1. The court erroneously denied Alex Tanberg's motion to suppress unlawfully seized evidence from his home, contrary to the Fourth Amendment and Article I, section 7 of the Washington Constitution.

2. Finding of fact 8 must be disregarded on appeal because it is not supported by substantial evidence in the record.¹

¹ The findings of fact and conclusions of law following the CrR 3.6 hearing are attached as Appendix A.

3. Finding of fact 11 must be disregarded on appeal because it is not supported by substantial evidence in the record.

4. Finding of fact 12 must be disregarded on appeal because it is not supported by substantial evidence in the record.

5. Finding of fact 13 must be disregarded on appeal because it is not supported by substantial evidence in the record.

6. To the extent the Conclusions of Law repeat findings of fact and contain additional factual contentions, they are not supported by substantial evidence in the record.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

Where a police officer recklessly omits material information from a search warrant application and the falsehood undermines probable cause determination, evidence gathered from the warrant must be suppressed. Here, a police officer purposefully omitted critical information from the warrant affidavit demonstrating his unreliability and lack of expertise in detecting growing marijuana by smell alone. When the search warrant was premised upon this officer's ability to detect marijuana by smell, and available information debunks the officer's detection ability, is there

sufficient, untainted, reliable information supporting probable cause to issue the search warrant?

D. STATEMENT OF THE CASE.

On September 23, 2007, Snohomish County Sheriff's Deputy Ryan Phillips spoke with Timothy Luce. CP 45. Luce's ex-wife and daughter were living with Alex Tanberg, who was Luce's ex-wife's boyfriend. CP 46. Luce told Phillips that he was concerned because his six-year-old daughter said Alex was growing plants in the home and that her mother had promised that she would have her own room when the plants were done growing. CP 46. Luce had never been inside the house, and was not sure what Alex looked like, but told Phillips that he suspected marijuana was being grown inside the house. CP 46.

Phillips visited the Bothell home where Luce's daughter lived. CP 46. Phillips claimed that while approaching the home, he noticed the faint smell of marijuana. CP 46. Once at the home, Phillips engaged Tanberg in a ruse conversation. CP 46. Phillips claimed to smell a strong and obvious odor of marijuana when Tanberg briefly opened the door. CP 46.

Phillips asked Commissioner Paul Moon for a search warrant to search Tanberg's home. CP 45-48. In his search

warrant application, Phillips claimed he had executed three search warrants for marijuana, showing his ability to accurately detect the smell of marijuana. CP 45. Two days earlier, Phillips had sought a similar search warrant from Commissioner Moon predicated on his ability to smell growing marijuana at a different residence. Phillips did not tell Commissioner Moon that his earlier warrant turned up no marijuana and his belief he detected the strong odor of marijuana had been entirely incorrect. CP 40 (Findings of Fact 5 and 6).

Phillips seized what he claimed were marijuana plants from Tanberg's home and Tanberg was arrested for Manufacture of a Controlled Substance, Marijuana. CP 138. Following a suppression hearing, he waived his right to a jury trial and was found guilty. CP 18; CP 59-66.² The court imposed a standard range sentence of three months in jail, a \$600 fine, and ordered a chemical dependency evaluation and compliance with any recommended follow up treatment. CP 18-29.

The pertinent facts are discussed in further detail in the relevant argument sections below.

² The transcript from the suppression hearing was filed in the trial court and designated as a clerk's paper. CP 59-66.

E. ARGUMENT.

WHERE THE TRIAL COURT FOUND A POLICE OFFICER RECKLESSLY OMITTED CRITICAL EVIDENCE FROM HIS SEARCH WARRANT APPLICATION, THE UNLAWFULLY SEIZED EVIDENCE AND ITS FRUITS SHOULD HAVE BEEN SUPPRESSED

1. A warrant must be based upon probable cause under the federal and state constitutions. The Fourth and Fourteenth Amendments of the United States Constitution and Article I, §§ 3 and 7 of the Washington Constitution protect citizens from unreasonable searches and seizures and provide that a search warrant may only be issued upon a showing of probable cause. Kyllo v. United States, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); U.S. Const. amends. 6² & 14; Wash. Const. Art. I, §§ 3,³ 7.⁴

² The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

³ The Fourteenth Amendment and Article 1, § 3 guarantee due process of law.

⁴ Article 1, § 7 of the Washington Constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

When a police officer uses intentional or reckless perjury to secure a warrant, “a constitutional violation obviously occurs” because “the oath requirement implicitly guarantees that probable cause rests on an affiant’s good faith.” State v. Chenoweth, 160 Wn.2d 454, 473, 158 P.3d 595 (2007), citing Franks v. Delaware, 438 U.S. 154, 155-56, 98 S.Ct 2674, 57 L.Ed.2d 667 (1978).

The affidavit or other evidence submitted in an application for a search warrant must set forth the facts and circumstances the police assert create probable cause, so the issuing judge or magistrate may make a detached and independent evaluation of whether probable cause exists. Thein, 138 Wn.2d at 140. Probable cause is established if a reasonable, prudent person would understand from the facts contained in the affidavit that the defendant is probably involved in criminal activity and that evidence of the crime can be found in the place to be searched, at the time the search occurs. Id.

Because probable cause to issue a search warrant involves an issue of law, the appellate court reviews the probable cause determination *de novo*. In re: Detention of Peterson, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002), citing Ornelas v. United States, 517 U.S. 690, 699, 116 S. Ct. 1657, 134 L. Ed. 2d 1657 (1996).

Appellate courts review findings of fact for clear error. Ornelas, 517 U.S. at 699.

2. The court found the police intentionally or recklessly excluded information material to probable cause from the warrant affidavit. An accused person properly challenges the validity of a warrant by showing that the warrant affiant made intentional falsehoods or omitted material facts with reckless disregard for the truth. Franks, 438 U.S. at 155-56. Misstatements or omissions as a result of simple negligence or innocent mistake are insufficient. Id. at 171; Chenoweth, 160 Wn.2d at 486. The defendant's showing must be based on specific facts and offers of proof. State v. Garrison, 118 Wn.2d 870, 827 P.2d 1388 (1992).

If the defendant establishes the affiant's intentional or reckless disregard for the truth by a preponderance of the evidence, the court must strike the apparent falsehoods; and if the modified affidavit then fails to establish probable cause, the warrant is void. Franks, 438 U.S. at 155-56. The court must then suppress evidence obtained as a result of the warrant. Id.

a. Deputy Phillips intentionally or recklessly excluded information material to probable cause from the warrant affidavit.
The court found Phillips had mistakenly identified the smell of

marijuana while serving a warrant on a shed owned by the Howson family one day prior to seeking the warrant at issue; that this mistake was fresh in Phillips' mind when he applied for Tanberg's warrant; and that Phillips not only failed to inform Commissioner Moon of his mistake, but he implied that he had never erroneously identified the odor of marijuana. The court concluded that the officer's omissions constituted false statements. CP 40 (Findings of Fact 4, 5); CP 41 (Conclusion of Law 3). The court further found the false statements were made with reckless disregard for the truth, because it had been only one day since Phillips had failed to accurately detect the odor of marijuana at the Howson residence. CP 41 (Conclusion of Law 4).

Yet Phillips' intentional or reckless omissions from his search warrant application are more numerous than recognized by the trial court and undermine the factual support for the search warrant. Because the court overlooked the substantive evidence casting doubt on Phillips' overstated ability to detect growing marijuana, and instead relied on its unsupported notion that he court claimed the any teenager can recognize growing marijuana

In his warrant affidavit, Philips asserted he had been a police officer for one year, and had served three warrants for

marijuana growing operations. CP 45. He said, “Based on my training and experience and having written and served three previous search warrants for marijuana growing operations, I immediately identified the smell as growing marijuana.” CP 46. Yet further evidence presented at the suppression hearing cast doubt on Phillips’s expertise and accuracy in identifying the smell of marijuana growing inside a home.

In its Findings of Facts section, the court found that “Deputy Phillips had successfully identified the odor of marijuana during two prior search warrants, for which he wrote the affidavit and warrant and served the warrant. CP 40. Finding of Facts 12. Finding of Fact 12, however, is not supported by the record. In fact, the record reveals that Phillips never once successfully identified the odor of marijuana before preparing a warrant affidavit.

The details of Phillips’ first marijuana search warrant, the Gerard warrant, were presented to the court during the suppression hearing. They do not support Phillips’ claim of having an expert ability to smell marijuana and refute Finding of Fact 12; in fact, the warrant details suggests that Phillips might have some difficulty accurately identifying the smell of marijuana. While serving an arrest warrant on Jeffrey Gerard, Phillips entered a stairwell and

smelled "growing mold or some type of vegetable matter." CP 111 (Franks Motion, Ex. 5, p. 3). Phillips opened a closed door and noticed what he described as a marijuana plant. Phillips did not identify the odor of marijuana, despite being in an enclosed, indoor location where a marijuana plant was growing. Phillips identified the plant only after seeing it. Nothing in the record explains why Phillips might better smell marijuana outside of Tanberg's residence, among breezes and competing odors in the neighborhood, than when he was in an enclosed location where marijuana plants were growing. In his affidavit for the warrant at issue in this case, Phillips never explained that he previously detected marijuana only upon seeing it, not by its odor. He also never claimed that he subsequently developed an understanding of a unique smell attributed to growing marijuana. CP 45.

The remaining two marijuana warrants Phillips executed do not suggest that his ability to smell out marijuana growing operations evolved into an expertise or a reliable detection ability.

Phillips' second marijuana warrant, served on Alex Brayman, was based on information supplied by an informant and never involved the officer's ability to smell marijuana. Phillips had not successfully detected the odor of marijuana prior to applying for the

search warrant. CP 117 (Franks Motion, Ex. 8, p. 2). Accordingly, this warrant does not support Phillips claim of expertise in detecting the odor of marijuana growing operations and refutes Finding of Fact 12.

The gravest doubts about Phillips' ability to detect marijuana growing operations using his sense of smell and his deliberate effort to conceal any unfavorable information from the magistrate comes from the third warrant Phillips claimed as evidence of his expertise in marijuana odor detection, served on Roy and Jennifer Howson's shed on September, 22, 2007, casts. CP 123 (Franks Motion, Ex. 11, p. 1). Two days before Phillips sought a warrant in the case at bar, Phillips was investigating a domestic violence complaint near the Howson's home and came upon a shed. Id. at 2. Phillips approached the shed because he thought that the male involved in the dispute he was investigating might be hiding there. Id. As he approached, Phillips claimed he, "immediately recognized a very pungent smell of growing marijuana." Id. Phillips and his partner, Deputy Murphy, also saw a red light coming from the shed as well as some pots. Based on the red light, pots, and a perceived "strong" smell of marijuana, Phillips

sought and received a warrant from Commissioner Moon. CP 129 (Ex. 12).

But when Phillips served the Howson warrant the next day, he found no marijuana and no trace of a growing operation whatsoever. Ex. 13. Not only was Phillips' claimed ability to smell "very pungent" marijuana completely incorrect, he also grossly overstated or misperceived the appearance of the shed. Phillips described the shed as approximately 16 feet wide by 30 feet long. CP 123 (Ex. 11, p. 1). In fact, the shed was a pump house that is less than 8 feet by 8 feet, under 1/7th the size reported by Phillips. CP 132 (Franks Motion, Ex. 14). He claimed that inside the shed

was a large sheeting of what appeared to be cardboard and plastic wrap. The sheeting ran from the floor to the ceiling and from wall to wall. I observed that it was also duct taped to the ground, the walls and the ceiling. I observed that the tubes from the tank were running under the cardboard and plastic. I observed multiple plastic pots around the part of the shed that I could observe, which was shut off from the divided part of the shed.

CP 124 (Ex. 11, p. 2). Yet there was no plastic sheeting, nothing duct taped floor to ceiling and no tubes running under the non-existent sheeting. Id. There were no pots in the shed at all. CP 135. The trial court credited the Howsons' report criticizing Phillips, and consequently discredited Phillips' accuracy or truthfulness in

his claims of what he saw on the Howson's property. CP 39 (Finding of Fact 2).

Although Phillips served the warrant on the Howson's shed on September 22, 2007, he did not file the Inventory and Return of Search Warrant until September 26, thus avoiding making a public record of his failed search, predicated his incorrect or overstated ability to smell marijuana, until after Commissioner Moon granted him permission to search Tanberg's home. See CP 99 (Franks Motion Ex. 1). The trial court learned of Phillips' error and disregard for the truth only because the Howsons are criminal defense attorneys who contacted the Snohomish County prosecutor and Public Defender Association. CP 39, CP 51-53.

In his warrant affidavit in the case at bar, Phillips did not mention he had mistakenly identified the smell of marijuana only two days prior to applying for the warrant at issue here, and had discovered his serious mistake the day before he sought Tanberg's warrant. CP 45. Instead of admitting his error, Phillips relied on this very warrant to show he could accurately detect the odor of marijuana. Id. In fact, Phillips' request for a search warrant of the Howson property demonstrated he does not have a reliable expertise in detecting the odor of marijuana. Phillips' omission of

critical information regarding his claimed expertise was not only deliberate and reckless, but was designed to convince Commissioner Moon that Phillips had acquired a reliable ability to detect the odor of marijuana.

The omissions relating to the Howson warrant alone are sufficient to show by a preponderance of the evidence that Deputy Phillips made intentional falsehoods or omitted material facts with reckless disregard for the truth, as required under Franks, and the trial court was properly concerned about Phillips deliberate misleading of the commissioner when seeking the warrant in the case at bar. Franks, 438 U.S. at 155-56; CP 40 (Findings of Fact 4, 5, 6).

b. The trial court should have excised Phillips' detection of marijuana claims completely. In its Findings of Fact, the trial court incongruously acknowledged Phillips' disregard for the truth when he hid his unsuccessful search warrant application from the Commissioner, and yet at the same time the court did not question Phillips' now-suspect claim of having reliably smelled marijuana outside Tanberg's home. CP 40 (Findings of Fact 8 and 11). These findings of fact are not supported by the record.

After finding Phillips deliberately misled the Commissioner about his ability to detect the smell of growing marijuana, the trial court unreasonably and inexplicably relied on Phillips' involvement in serving the Gerard and Brayman warrants as supplying a reasonable basis to rely on Phillips' claim of expertise in detecting marijuana. The court found these two warrants were examples of "successful marijuana grow operation busts where he [Phillips] was personally involved with other officers in tearing down the grow operations, and that obviously would familiarize him with the smell as he had it in his immediate presence on both of those occasions." CP 66. Not only did those two earlier warrants fail to support Phillips' asserted expertise in smelling growing marijuana, the Howson warrant, served after the Gerard and Brayman warrants, refutes the trial court's assertion that these two warrants would have "obviously led [Phillips] to familiarize him with the smell of marijuana." *Id.* Phillips failure to find any trace of marijuana in the Howson's shed, despite his assertion of smelling a strong odor of marijuana, amply demonstrates that service of these warrants did not contribute to Philips ability to detect the odor of marijuana. Accordingly, the trial court should not have viewed Phillips' service of the Gerard and Howson warrants as convincing evidence of his

ability to detect the odor of marijuana. Nevertheless, the trial court ruled that service of these warrants was a factor that would overcome the deficiency of Phillips' reckless disregard for the truth in his search warrant application. CP 67.

In the Howson warrant affidavit, served only a day prior to the warrant at issue here and issued by the same Commissioner, Phillips claimed to have "immediately recognized a very pungent smell of growing marijuana" outside of the Howson shed. CP 124 (Ex. 11, p. 2). Phillips made nearly identical claims when outside the Tanberg residence. CP 99 (Ex. 1). Despite recognizing that Phillips misled Commissioner Moon about his ability to detect marijuana, the trial court relied on Phillips' perception of marijuana odors outside of the Tanberg home. CP 66. In fact, Phillips' failure to confess his patent error when he sought a warrant to search the Howson home render his subsequent claims regarding his ability to detect marijuana odors entirely suspect, and his limited experience otherwise does not provide probable cause for the search. Accordingly, the court should have excised all of Phillips' assertions that he recognized the odor of marijuana.

The trial court also relied on its own *sua sponte* and otherwise an unproven assertion that, "Identification of the odor of

marijuana is not sophisticated or 'rocket science.' It is commonly identified by lay persons from adolescence on." CP 40 (Finding of Fact 13). No evidence substantiates the court's claim of the unsophisticated nature of detecting growing marijuana plants by odor or that it is a feat easily accomplished by the population at large upon adolescence. This assertion appears nowhere in the record, and therefore it is not properly entered as a finding of fact. The record does, however, strongly suggest just the contrary, that marijuana odor detection is something more than a generalized knowledge that most people pick up by adolescence. Phillips, after all, failed to specifically identify the odor of marijuana in the Gerard warrant; and his claim that he smelled the strong odor of marijuana proved entirely incorrect after serving the Howson warrant. The facts suggest either that marijuana odor detection remains a difficult skill to acquire or that Phillips had yet to develop the requisite familiarity. The court's baseless assertion that a lesser threshold of accuracy governs marijuana searches is not supported by the record and must be stricken.

c. With Phillips' claims of expertise in detecting marijuana odors excised, the affidavit was insufficient to support a finding of probable cause and Tanberg should have been entitled

to an evidentiary hearing. When the challenged material is set aside, the remaining content of the affidavit is insufficient to support probable cause, and the defendant is entitled to a hearing. Franks, 438 U.S. at 172. After inserting the truth about Phillips' overstated experience and unreliable ability to detect the odor of marijuana into the affidavit, only the following three factors remain to support probable cause:

1. Phillips' conversation with Tanberg. Here, Phillips' claims to have observed Tanberg open his front door only enough to squeeze through while concealing the inside of the house. Phillips also claims to have heard something that sounded like a generator or tank and to have seen a faint light through a covered window. CP 40 (Findings of Fact 9 and 10). Tanberg's lack of keen interest in inviting a police officer into his home could be explained by a multitude of factors. A faint light inside a home, a noise that could be a fan or a clothes dryer as readily as anything else, and covered windows, are hardly rare or incriminating. This information does not provide probable cause to search Tanberg's home.

2. Phillips conversation with Timothy Luce. The trial court correctly ruled that information gleaned from Luce clearly failed the Aguilar-Spinelli test.⁵ Luce was not a reliable witness, had no first-hand information about marijuana inside the home, had never entered the home, had no experience as an informant or with marijuana plants, and had a personal bias based on an apparently less-than close relationship with his former wife as she would not even give him the address of her home and he had limited visitation with his daughter. Accordingly, this double-hearsay speculative report of undescribed “plants” in a six-year-old’s bedroom provides only the barest of suspicion. CP 41 (Conclusion of Law 2).
3. Phillips’ prior training. Although Phillips mentioned taking classes to identify narcotics he never describes what identification techniques he learned, regarding which narcotics, or how they were relevant to this case. CP 46.

⁵ Article I, section 7 “requires that, in evaluating the existence of probable cause in relation to informants’ tips, the affidavit in support of the warrant must establish the basis of information and credibility of the informant.” State v. Jackson, 102 Wn.2d 432, 433, 688 P.2d 114 (1984); see Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

Phillips' inability to identify the smell of marijuana during service of both the Gerard and Howson warrants create strong doubts about the efficacy of his prior instruction. Furthermore, Washington courts require specificity in determining whether an officer's training in detecting narcotics is sufficient for probable cause. See State v. Olson, 73 Wn.App. 348, 356, 869 P.2d 110 (1994) (DEA agents claimed they smelled marijuana and had experience involving the detection of marijuana was enough to corroborate an informant's tip); State v. Petty, 48 Wn.App. 615, 617, 622, 740 P.2d 879 (1987) (odor of marijuana detected by narcotics detective who stated in his affidavit that he was familiar with marijuana in both its growing and packaged states and that he had been on more than 50 search warrants where marijuana was grown supported probable cause finding by a magistrate).

Additionally, the trial court relied heavily on its comparison of the facts here with those of State v. Jacobs, 121 Wn. App. 669; 89 P.3d 232 (2004), as justification for overlooking the lack of information regarding Phillips' drug detection training:

[B]ecause the officer gave the magistrate other things of a reliable nature that the magistrate could use instead, and then the court went on to list all the other things the magistrate had before him. And so the court said it is therefore excusable that the officer didn't explain his experience in identifying methamphetamine labs with any detail.

CP 57. The comparison is inapt as the "things of a reliable nature" to which the Jacobs court refers have no corollary here. In Jacobs, deputies approached a couple at their residence after receiving numerous complaints that they were manufacturing methamphetamine. The officers spoke to Jacobs, who admitted to possessing chemicals required for the manufacture methamphetamine. The deputies also found a container of methamphetamine that fell from Jacobs pocket during the conversation. Jacobs, 121 Wn. App. at 674. In other words, prior to applying for a search warrant, deputies had visual proof that there was at least a small amount of methamphetamine inside the Jacobs residence. Jacobs also admitted to being in possession of ingredients required to manufacture methamphetamine. Phillips had no reasonable confirmation of marijuana growing inside the home once his dubious ability to smell marijuana is stricken from the warrant application.

Presumably based on its unsupported factual assertion that adolescents readily identify the smell of marijuana, in its Conclusions of Law the trial court entered the following general statement regarding differences between methamphetamine and marijuana identification: "Identification of the odor of marijuana is comparatively far less sophisticated, requires less specialized training, and is less difficult to identify than methamphetamine." CP 41(Conclusion of Law 6). Although the trial court relied on Jacobs for this purported principle, Jacobs contains no comparison of the challenges of methamphetamine and marijuana detection. The record is silent on the experience, sophistication, or specialization required to detect growing marijuana. The trial court concocted this comparison without any factual support. Moreover, the record indisputably establishes that a police officer may be dead wrong in his asserted ability to smell the strong odor marijuana growing inside a building.

3. Suppression of the unlawfully seized evidence following the unauthorized search is required. The trial court correctly found Phillips deliberately hid the news of his failed marijuana search from Commissioner Moon and instead pretended that his three prior search warrant experiences demonstrated his expertise

detecting marijuana. Yet the court then unreasonably and contrary to the evidence before it concluded that growing marijuana requires little skill to detect, and upheld the search based on its reliance on Phillips' ability to smell marijuana despite Phillips's recent inability to detect marijuana in a similar circumstance and his demonstrated willingness to lie about his experience. Because the evidence remaining after both striking Phillip's deliberate omissions from the search warrant application and accounting for Phillips' lack of experience or veracity in accurately identifying the smell of marijuana does not provide probable cause to search Tanberg's home, the evidence seized from Phillips's flawed search warrant application must be suppressed. Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); State v. White, 97 Wn.2d 92, 111, 640 P.2d 1061 (1982).

F. CONCLUSION.

For the foregoing reasons, Alex Tanberg respectfully requests this Court suppress the evidence seized as a result of the invalid warrant, and order new trial and sentencing proceedings.

DATED this 26th day of August 2009.

Respectfully submitted,



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APPENDIX A

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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

THE STATE OF WASHINGTON,

Plaintiff,

v.

TANBERG, ALEX JEFFREY

Defendant.

No. 07-1-03631-2

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

On October 30, 2008, a hearing was held on the defendant's motion for a hearing pursuant to *Delaware v. Franks*. The court considered the arguments and memoranda of counsel, warrants and affidavits authored by Deputy Phillips, and a letter authored by Roy and Jennifer Howson to Mark Roe. Being fully advised, the court now enters the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. The facts in the warrant affidavit in this case, No. PFM 5143, is attached as Appendix A and incorporated by reference.
2. Defense Exhibit 14 (Letter from Roy and Jennifer Howson to Mark Roe) is reliable.
3. The facts in Defense Exhibit 14 (Letter from Roy and Jennifer Howson to Mark Roe) is attached as Appendix B and incorporated by reference.

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4. Deputy Phillips mistakenly identified the odor of growing marijuana at the Howson residence. He learned of this mistake 1 day prior to authoring the Tanberg warrant affidavit.
5. Deputy Phillips failed to tell Commissioner Moon that he had mistakenly identified the smell of growing marijuana at the Howson residence the day before. He proceeded to imply to Commissioner Moon that he had never mistakenly identified the odor of growing marijuana, but he had one day prior upon execution of the Howson warrant.
6. The unsuccessful marijuana bust was fresh on Deputy Phillips' mind because it had happened one day before he applied for the Tanberg warrant.
7. Mr. Luce's statements to Deputy Phillips regarding his daughter's statements raise some suspicion that marijuana was being grown in the house.
8. Deputy Phillips smelled the faint odor of marijuana near the window of Tanberg's residence.
9. To the left of the door, Deputy Phillips heard the sound of a generator or tank.
10. The defendant acted in a furtive manner when he answered the door, opening the door only enough to allow him to come outside and immediately shutting the door behind him.
11. When the door was opened, Deputy Phillips smelled the extremely strong and obvious smell of growing marijuana.
12. Deputy Phillips had successfully identified the odor of marijuana during two prior search warrants, for which he wrote the affidavit and warrant and served the warrant.
13. Identification of the odor of marijuana is not sophisticated or "rocket science". It is commonly identifiable by lay persons from adolescence on.
14. Deputy Phillips had training and experience in general drug detection.

II. CONCLUSIONS OF LAW

1. The Court finds that Defense Exhibit 14 (Letter from Roy and Jennifer Howson to Mark Roe) is an "otherwise reliable statement" of a witness and is properly before the court for consideration pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978).
2. The Court finds that Mr. Luce's information standing alone clearly fails both prongs of the *Aguilar-Spinelli* test, but such analysis is not dispositive to this case.
3. The Court finds that the Tanberg warrant affidavit included a false statement by omission in the affidavit for a search warrant because it implied that Deputy Phillips had never mistakenly identified the odor of growing marijuana.
4. The false statement was made with a reckless disregard for the truth because it had only been one day since no marijuana was discovered at the Howson residence.
5. In *State v. Jacobs*, 121 Wn.App. 669, the officer trying to get a search warrant for a drug bust gave absolutely no details to the magistrate regarding his personal and professional training in identifying the drug in question. The court held that although it would have been more appropriate for the officer's affidavit to detail his experience with clandestine methamphetamine labs, the lack of this information is not fatal to the validity of the search warrant, because the officer gave the magistrate other things of a reliable nature.
6. Identification of the odor of marijuana is comparatively far less sophisticated, requires less specialized training, and is less difficult to identify than the methamphetamine at issue in *Jacobs*.
7. Even if Commissioner Moon had known that Deputy Phillips had made one mistaken identification of the odor of marijuana, this was not a fatal error which would have

caused Commissioner Moon to reject the warrant for failure to establish probable cause.

8. Even with the addition of the fact that Deputy Phillips had mistakenly identified the odor of marijuana the day before, the Deputy's training and experience as laid out in the warrant affidavit to include his two prior successful warrants for marijuana growing operations, his observations of the house to include the window and sound of a generator or tank and the faint odor of marijuana, the corroborating statements of Brian Luce that his 6 year-old daughter is disturbed and very upset because she is not allowed to go in her own room because her mother's boyfriend is growing plants in there and that as soon as the plants are taken out she can have her room back, the defendant's furtive behavior in answering the door so that the officer couldn't see inside and odor did not escape, and the extremely strong and obvious smell of growing marijuana when the door opened briefly create probable cause.
9. The defendant has not made a substantial preliminary showing by sufficient evidence that the false statement was necessary to the finding of probable cause or that insertion of the omission would have caused Commissioner Moon to reject the warrant.
10. The defendant is not prejudiced by the false omission in the affidavit for the search warrant.

DONE IN OPEN COURT this 2nd day of December, 2008.

J. A. Anderson
JUDGE James Allendörfer

Presented by:

Cheryl T. Johnson
CHERYL T. JOHNSON, #37811
Deputy Prosecuting Attorney

Copy received this 2nd day of
December, 2008.

Gabe E. Rothstein
GABE E. ROTHSTEIN, #36009
Attorney for Defendant

APPENDIX A:

Affidavit for Tanberg Warrant, No. PFM 5143

07-22898

Cause No.

SOUTH DISTRICT COURT FOR SNOHOMISH COUNTY

STATE OF WASHINGTON }
COUNTY OF SNOHOMISH }
SEARCH WARRANT

No. PFM 5143
AFFIDAVIT FOR

I, Ryan Phillips a Deputy Sheriff with the Snohomish County Sheriff's Office, being first duly sworn on oath, complain, depose and say:

That I have probable cause to believe, and in fact do believe, that in violation of the laws of the State of Washington, illicit drugs and controlled substances, as defined by law, are being used, manufactured, sold, bartered, exchanged, given away, furnished or otherwise disposed of or kept in, about, and upon the following described premises, vehicle, or person, designated and described as follows:

THE PREMISE LOCATED AT:

17032 24th AVE SE
Bothell, WA 98012

The residence located at 17032 24th Ave SE in Bothell, within Snohomish County. The house is located on the east side of 24th Ave, approximately 50 yards from the end of the cul-de-sac. The house is a single family dwelling, white in color with blue trim. The house has three windows that face 24th Ave. There is a two car garage attached to the residence. There is shrubbery located to the south side of the front door, beneath two of the windows. There is an overhang which starts over the front door and wraps north along the front bay window, and ends at the start of the garage.

MY BELIEF, IN PART, IS BASED UPON THE FOLLOWING TRAINING, KNOWLEDGE, AND EXPERIENCE:

Your affiant is a fully commissioned, sworn Deputy Sheriff with the Snohomish County Sheriff's Office. Your affiant has over 1 year of fulltime Law Enforcement experience. Your affiant has written and served seven other search warrants in his 1 year of experience, three of which being for marijuana growing operations. Your affiant has attended multiple drug classes, based on identifying illegal narcotics. Your affiant has attended, and graduated from, the Washington State Criminal Justice Training Center Academy; a 720-hour Basic Law Enforcement Academy 2006.

Your affiant's formal education consists of a Bachelor's Degree in Criminal Justice and a Bachelor's Degree in Sociology from Washington State University, 2005.

AFFIANT'S BELIEF IS BASED UPON THE FOLLOWING FACTS AND CIRCUMSTANCES:

On 9/23/07, at 2110 hours, I called Timothy S. Luce, DOB 6/20/82, regarding a substance complaint. Luce told me his ex-wife, Shante M. Walters, DOB 6/17/82, and her boyfriend who

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07-2288

he only knows as "Alex" live at 17032 24th Ave Se in Bothell. He stated he believed "Alex" was a Hispanic male.

Luce said he was concerned for his 6 year old daughter's welfare since she lives at that location full time with Walters, her boyfriend, and his mother. Luce told me that lately his daughter has been complaining that she does not have a bedroom at the house and is forced to sleep in the room with "Alex's" mother. Luce's daughter, Kali M. Luce DOB 8/28/01, told him that "Alex said I will have my own room as soon as the plants are done growing."

Luce explained to me that his daughter has told him she is not allowed into a certain room inside the residence because, "That is where "Alex" keeps his plants." Luce told me that he gets to see his daughter every other weekend, and the rest of the time she lives at the location with Walters and "Alex".

Luce explained to me he was concerned for his daughter because she frequently comes to him with soiled clothes, hungry, and complaining of not sleeping well due to sleeping with "Alex's mom".

I asked Luce if he has ever been to the residence. He said, "No normally my ex-wife and I will meet somewhere and exchange our daughter." He stated, "I had to convince her to give me her address today to go drop my daughter off at her house." I asked if when he dropped her off he went inside and he told me he was not allowed to go inside the house. He told me based on his conversations with his daughter and her comments on not being allowed inside a certain room in the house, and "Alex's" comments that "you'll have your own room as soon as the plants are doing grown", he believes there is marijuana being growing inside.

I advised Luce I would look into it. Dep. Koster, c1444, and I drove to the residence at 2132hours. We walked up to the front of the residence, which had all the front lights off, and I could smell a faint odor of marijuana coming from inside the residence. Based on my training and experience and having written and served three previous search warrants for marijuana growing operations, I immediately identified the smell as growing marijuana.

I stood on the front porch and leaned over to a window, just to the left of the front door. The window was covered from the inside with some type of thick cloth. Protruding from the very top portion of the window, above the top edge of the cloth, I could see a small, faint, light coming from inside the room. I leaned into the window and could hear what sounded like some type of generator or tank that was on inside the room. I could also smell a faint smell of marijuana while standing at the window.

I decided to knock on the front door and contact anyone inside. I knocked on the door and a Hispanic male answered. He opened the front door only enough so as to squeeze his body through, to the front porch, then immediately shut the door behind him. As he opened and shut the door, I could smell an extremely strong and obvious smell of growing marijuana coming from inside the residence. I told him we were in the area because someone had reported either hearing gun shots or firecrackers and I wanted to know if he heard anything. He stated he did not hear anything and asked who called. I told him a neighbor down the street thought they heard what sounded like gun shots and that I was going door to door to see if anyone heard them. He stated he did not and I thanked him for his assistance.

I then left the residence. Based on the extremely strong and obvious smell of growing marijuana coming from inside the residence when the Hispanic male opened the door, and the information that I received from Luce, I have probable cause to believe that there is marijuana growing inside the residence.

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5143

INFORMANT INFORMATION / QUALIFICATIONS:

07-2288X

BASED UPON MY TRAINING, KNOWLEDGE, EXPERIENCE AND PARTICIPATION IN DRUG INVESTIGATIONS, I KNOW THAT:

- (A) Drug traffickers maintain books, records, receipts, notes, ledgers, airline tickets, money orders and other papers relating to the transportation, ordering, possession, use, sales and distribution of drugs. The aforementioned books, records, receipts, notes, ledgers, etc., are usually maintained at the suspect's residence, outbuildings, place of business, private or public storage facilities, and/or vehicles.
- (B) Drug traffickers are frequently found to have papers on their premises, or in their vehicles, that indicate ownership and/or occupancy of the residence, vehicle and/or business.
- (C) Drug traffickers commonly secrete contraband, proceeds of drug sales, and records of drug transactions in secure locations within their residences, businesses and/or vehicles for ready access, and to conceal them from law enforcement authorities.
- (D) Drug traffickers commonly use their vehicles for storage, transportation and delivery of controlled substances. Drug traffickers commonly keep controlled substances, ledgers, and drug proceeds in their vehicles for ready access for use, transportation, delivery and concealment from law enforcement authorities.
- (E) Drug traffickers conceal in their residences, vehicles and businesses various amounts of drugs and currency, financial instruments, precious metals, jewelry and other items of value which are the proceeds of drug transactions and evidence of consequential financial transactions relating to obtaining, transferring, secreting, or spending of large sums of money made from engaging in drug trafficking activities.
- (F) Drug traffickers commonly maintain addresses or telephone numbers in books or on paper which reflect names, addresses, and/or telephone numbers of their associates and co-conspirators within the criminal organization.
- (G) Drug traffickers commonly trade drugs for property, which is easily sold for fair monetary gain. The types of property, which frequently includes stolen property, commonly includes, but is not limited to, stereos, compact discs, jewelry, firearms tools, electronic equipment, credit/debit cards, cellular phones and household items.
- (H) Drug traffickers attempt to legitimize their profits from the sale of drugs and to conceal their assets. To accomplish this goal, drug traffickers utilize, for example, domestic banks and their attendant services, safe deposit boxes, cashier's checks, money drafts, real estate, and businesses, and other financial documents both real and fictitious.
- (I) Drug traffickers also use the U.S. Postal Service and private mail services to send or receive controlled substances.
- (J) Drug traffickers commonly use electronic equipment such as personal computers and related hardware and software to maintain hidden records of the manufacture and/or distribution of controlled substances, expenditures of currency or currency equivalents and/or indebtedness to the individual(s) and/or entities acting on their behalf. Drug traffickers commonly use other

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electronic equipment such as, but not limited to, cellular phones, frequency finders, scanners, and night vision optics used to avoid detection by law enforcement and to further their criminal enterprise.

(K) Drug traffickers usually keep paraphernalia for using, manufacturing, packaging, diluting, weighing, and distributing their drugs. Paraphernalia includes, but is not limited to, scales, plastic bags, diluting agents, chemicals, smoking devices, torches, syringes, and drying and heating systems.

(L) Drug traffickers and their associates commonly keep and possess weapons for the protection of their criminal enterprises.

Based upon the above information and training, your affiant requests the authorization of a search warrant for the real property and curtilage at the aforementioned address, for evidence of the crime of Manufacture, Delivery, Distribution and/or Possession of a Controlled Substance, and financial records which would indicate the whereabouts of proceeds from the sale and/or distribution of a Controlled Substance.

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

Approved: [Signature]
AFFIANT
Deputy Ryan Phillips #1467
Snohomish County Sheriff's Office

Issuance of Warrant

Deputy Prosecuting Attorney Lisa Paul
WSEA# 16064

Subscribed and sworn to before me this 23 day of 9, 2007

[Signature]
Judge or Commissioner

Paul F. Moton
Print Name

4/4 (PFM)

APPENDIX B:

Letter from Roy and Jennifer Howson to Mark Roe

Exhibit 14, Page 1

17

ATTORNEYS AT LAW
Jenifer Howson
Roy Howson
Quentin Batjer



415 Pine Street
Mount Vernon, WA 98273
360.336.8722
Fax: 360.336.0987

www.howsonlaw.com

November 16, 2007

Mr. Mark Roe
Deputy Prosecuting Attorney
Snohomish County Prosecuting Attorney's Office
3000 Rockefeller
Everett, WA 98201

Dear Mr. Roe,

We write to you because you are the deputy prosecuting attorney who recently authorized the presentation of a search warrant request for our property, and quite frankly also because you enjoy a reputation for honesty and integrity. The warrant you authorized was issued by Commissioner Moon upon the erroneous belief that we were engaged in the criminal enterprise of growing marijuana.

Upon seeing only the search warrant we were originally angry with Commissioner Moon because it appeared that the warrant had been based only upon the presence of a red heat lamp in an outbuilding in rural Snohomish County.

However, given the statements we now find contained in the affidavit provided by the officers, it is obvious that your actions and those of Commissioner Moon were required by law, as our courts have ruled that the alleged smell of marijuana detected by a "trained" police officer provides probable cause for arrest and search.

However, you need to know (as you may have already determined) that the information contained in that affidavit about the officers detecting the obvious odor of "growing marijuana" was completely false and constituted a clear and unmistakable lie. The affidavit contains outright perjury and demonstrates that a conspiracy existed to present that perjury to a magistrate. Officer Philips, Officer Murphy, Sgt. Stemme and one other unnamed officer were all involved in the conspiracy. These gentlemen lied to you. They lied to Commissioner Moon. They did so upon oath and under penalty of perjury.

We are including herein a copy of the materials filed in the Cascade District Court together with a short "fact sheet" produced by ourselves and 3 photographs. However, reference to the fact sheet and photos is not necessary in order to determine that the lies occurred.

6-21-17 11:28 -

You will note that nothing was seized as there never existed any growing marijuana for any officer to smell or to seize. Even a "trained" officer cannot smell something which does not exist.

That fact together with what we all know from our own "training and experience" demonstrates the lie upon first reading. We know that:

1. Marijuana has a unique, distinct, and readily identifiable odor. Each type (growing, harvested or smoked) itself has a unique, distinct and readily identifiable odor similar to, but slightly different than, the other forms.

2. Any person with decent olfactory senses who has been trained or otherwise exposed more than once to the odor of growing marijuana should be able to identify that odor the instant it is happened upon.

And, as previously noted:

3. No person can identify an odor of marijuana which does not exist.

In this case, the point in time when the officers made the decision to lie is quite obvious, and it is equally obvious that the lie continued to grow and to be joined in until all the officers present had conspired to present the false information to a magistrate. This was done of course for the purpose of conducting a "legal" search which the officers knew could not be accomplished without the lie.

As attorneys and officers of the court as well as private citizens, we are deeply troubled by this occurrence. Not only because our home and property was illegally invaded and our constitutional rights trampled, but because this conduct strikes at the foundation of the criminal law and threatens the very fabric of our system. Currently of course we are concerned, among other things, about what information is contained in the Spillman data base or similar program, and whether upon any traffic stop, the officer will believe he is approaching known drug dealers.

We are trying to be sure that we act in an appropriate manner and do not respond solely from the significant emotion generated by this experience. We seek to respond from a sincere desire to correct a wrong now, and hopefully to prevent the same from occurring in the future. Therefore we have been seeking appropriate advice and counsel and are still examining all possible responses.

However, because time is passing and the individuals involved may be called to testify as witnesses or may present other sworn documents to magistrates, we believe that as officers of the court it is our absolute duty to bring this to your attention and request an immediate investigation. We are extremely concerned about these individuals continuing to testify and continuing to be given that special credibility routinely afforded to police officers by our judiciary. We assume you will have similar concerns.

Exhibit 17 page 3

Because of the unique and unusual circumstances in this case (we both being criminal defense attorneys and the misconduct being that of law enforcement officers) this is a situation where we believe that a report to law enforcement is not the appropriate place to begin an investigation.

Because the Prosecuting Attorney's office has the duty, ability, and power to investigate this occurrence, and because these statements were presumably made to you as a representative of that office before being made to the magistrate, we seek your assistance and request an investigation.

We believe that your office has a duty to investigate this matter and to take appropriate action and we trust that you will do whatever is necessary to accomplish that. We ask to be notified as to whether an investigation is undertaken and if so, to advise us periodically upon the progress and of course the final result.

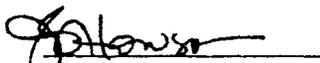
The information I am sending of course constitutes Brady material so far as any prosecution in which these officers are called to testify. We assume that at a minimum these materials will be provided by your office to defense counsel in each of those cases.

We are available to speak with you about this matter and to provide access to the property in case you or your investigator should wish to examine the area first hand. We can be reached at (360) 336-8722. We look forward to hearing from you in the near future.

Most Sincerely,



Roy Howson



Jenifer Howson

cc: Commissioner Paul Moon, Cascade District Court.

Fact sheet:

The affidavit was done near midnight of 9/21 and the warrant served on 9/22 (unknown time)

The "shed" described in the S/W materials is actually:

A *small* "pump house." A little 20 year old shed or shack approximately 8ft x 8ft square. It has an electrical wire running to the barn to provide electricity there. (not in use but temporarily hanging up after being knocked down in storm) There is a water hose coming out the bottom of the door also running to the barn. (for water for goats in barn which is open) The faucet for the hose is next to the pressure gauge for the pressure tank.

The shed is made of very flimsy materials. The door is held closed by a piece of pipe which simply drops into an 1/2 eye bolt. It is not locked in any fashion and that fact is obvious. You can easily see in through a large crack around the door.

Inside:

It houses a pump and pressure tank for a very old well system. The pressure tank is in the corner and covered in insulating material to keep it from freezing when the temperature drops. The pump sits atop an empty fifty gallon barrel. Cold and freezing is a concern, so over the pump is hanging a red heat lamp which is turned on when the temperature drops or we will be gone when it *might* drop. When on, the red light is very visible all around and above the door. It is sort of Halloween-spooky looking at night. The water pipe leading from the well to the pump is wrapped in insulation held on by duct tape. There are a lot of loose pieces of insulation lying about on the floor and one or two garbage bags containing loose insulation. The spaces between the studs are lined with insulation - In some cases hard standup Styrofoam sheets, & in others normal staple-up sheets. There were no planting pots inside, but there are some pots next to another separate building about 40 ft away.

We were to be gone to CA for several days and had just previously suffered a freak hail storm. The weather turned cold enough to keep the hail on our lawn for two days, so we turned on the heat lamp when we left just in case something like that were to happen while we were gone.

There were of course no plants of any kind inside or around this shed resulting in nothing being seized. There was nothing to produce the claimed odor, and no such odor could have existed. (note return - nothing seized)

The search warrant was left INSIDE THE MAIN RESIDENCE.

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

STATE OF WASHINGTON,)	
)	NO. 63034-2
Respondent,)	
)	
v.)	
)	
ALEX TANBERG,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 26TH DAY OF AUGUST, 2009, A COPY OF **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

Snohomish County Prosecuting Attorney
Appellate Division
3000 Rockefeller
Everett, WA 98201

Alex Tanberg
17032 24th Ave. S.E.
Bothell, WA 98012

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF AUGUST, 2009

x 