

72302-2

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Court of Appeals No. 72302-2 San Juan County
Superior Court Cause No. 13-1-05039-8
San Juan County District Court Cause No. 12-71

COURT OF APPEALS
DIVISION I.
OF THE STATE OF WASHINGTON

~~COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2015 SEP 21 PM 2:14~~

ERROL CHARLES SPEED
Appellant

v.

STATE OF WASHINGTON
Respondent

APPELLANT'S BRIEF

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CONSTITUTIONAL PROVISION

- CONSTITUTION OF THE STATE OF WASHINGTON, ART. 1,
SECTION 7 23, 24, 28, 30, 32, 33, 37
No person shall be disturbed in his private affairs,
or his home invaded, without authority of law.

SAN JUAN COUNTY CODE

- SJCC 15.04.500 11
"Accessory structure" means a structure that is
incidental to and supports the use of the primary
residence. Accessory structures include, but are not
limited to, garages, carports, agricultural buildings
and woodsheds, all being less than 1,000 square feet in
area; decks and pumphouses; fences less than six feet in
height; aboveground water tanks less than 5,000 gallons
in capacity; and playhouses. Accessory structures cannot
be inhabited.

- SJCC 18.20.010 "A" 15
"Agricultural activities" means land preparation for
agricultural purposes, such as clearing, grading,
contouring, ditching, fencing, plowing, tilling,
planting, cultivating, fertilizing, weed, pest and
disease control, spraying, pruning, trimming,
harvesting, processing, packing, sales, and construction
of farm and stock ponds, irrigation ditches and systems;
livestock management, such as breeding, birthing,
feeding and care of animals, birds, honeybees, and fish;
the repair and maintenance of equipment, structures, and
machinery used to perform agricultural or husbandry
operations; and the storage of agricultural products and
machinery.
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INTRODUCTION

Based on the tip of an informant, the San Juan County building department used aerial surveillance images and applied for a search warrant for a structure on the property of appellant Mr. Errol Speed ("Speed"). When Speed challenged the legality of the images, officers from the building department obtained an aircraft and overflew the structure in an attempt to buttress the admissibility of the images it had earlier supplied to the magistrate.

Speed challenges the lack of information surrounding the informant, the legality of the aerial images, and the procedure of using the later over-flights of the property to justify the legality of the images after-the-fact.

ASSIGNMENTS OF ERROR

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1. Did the Superior Court err when it ruled that the state may avoid an inquiry into Mr. Pearson's knowledge, credibility, and veracity as an informant by not mentioning him or what he reported in its search warrant application, when the state's inquiry into the Speed property was started by a tip from Mr. Pearson?

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2. Did the Superior Court err when it ruled that the State's warrantless search of the Speed property using aerial ("Polaris" program) images created by San Juan County officers was not an unreasonable intrusion into a person's "private affairs" under Washington's Const. art.1, §7.?

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3. Did the Superior Court err when it ruled that the State's warrantless search of the Speed property using an aerial images made available to the public through a joint federal government surveillance program and the privately owned "Google Maps" business is not an unreasonable intrusion into a person's "private affairs" under Washington's Const. art.1, §7.?

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4. Did the Superior Court err when it ruled that Speed had no protection for the private affairs he conducts on his property under Washington's Const. art.1, §7.?

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5. Did the Superior Court err when it ruled that the State had probable cause to support its search warrant application even when there was no information as to when Mr. Pearson was aware of facts he conveyed to the State, and when the Polaris and Google maps images were stale?

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6. Did the Superior Court err when it ruled that the State had probable cause to support its search warrant application based on images from either Polaris or Google maps?

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7. Did the Superior Court err when it ruled that the State may perform fly-overs of the Speed property, and that the fly-overs were not tainted though the observations of the property during the fly-overs were made by the same officers who viewed the four images used in the search warrant application and who executed the search warrant on the grounds of the Speed property itself, and also when the fly-overs were conducted below lawful altitude?

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8. Did the Superior Court err when it ruled that Speed may not present the taint argument on appeal by reason that he had not raised that argument in the trial court proceeding?

STATEMENT OF THE CASE

In May 2010 Speed requested the San Juan County Community Development and Planning Department ("Department") to look into land use violations on a property in Eastsound, Washington, known as Craftsman Corner, owned by Mr. Steve Pearson (Appx. A, ¶ 3). Speed submitted his request to the Department along with a request for non-disclosure of his identity based on RCW 42.56.240(2) (Appx. A, ¶ 4; Ex.1).

Despite Speed's request for non-disclosure, at the request of Mr. Pearson in July 2010, the county sent a copy of Speed's complaint to Mr. Pearson, which identified Speed (Appx.A, ¶ 8; Ex.2).

Mr. Pearson applied for a Conditional Use Permit in late 2010. The County Hearings Examiner denied his application in April 2011. After an appeal to San Juan County Superior Court, the denial of Mr. Pearson's Conditional Use Permit was upheld on September 2011 (Appx. A, ¶¶ 13,14).

On December 16, 2011 John Genuich, a San Juan County Deputy Building Official ("DBO")¹ of the county Community Development and Planning Department ("Department") issued an Activity Report ("Report") (Appx. A, Ex.3) that stated in pertinent part:

On December 16, 2011, I observed the following activity occurring at 629 Minnow Creek Ln, Orcas Island TPN #260324003

After a conversation with Steve Pearson, owner of Craftsman corner, I was informed that the subject property had potentially engaged in construction of a single family residence without obtaining a building permit.

Direct observation of the subject property was unavailable from a public way. During the course of my investigation of the allegations, I discovered an overhead view of what appears to be a single family residence on the subject parcel.

The Report does not explain how the DBO, who claimed he "observed ... activity," could make any observation of what was on the subject property when he also stated, "observation of the subject property was unavailable from a public way." Also, the Report contained no fact to support Mr. Pearson's conclusions, presented no

¹ Any reference in this brief to a DBO is always a reference to John Genuich.

evidence or discussion of Mr. Pearson's reliability or veracity, and did not discuss the likelihood that Mr. Pearson was retaliating against Speed.

In a declaration filed by Speed, he stated that to his knowledge Mr. Pearson had never been to or seen what structures are on the subject property, which is on a private dead end road, the entrance to which is gated, locked, and clearly posted against trespass; and Mr. Pearson is not a neighbor but lives on the opposite side of Orcas Island (Appx. A, ¶ 19).

The DBO, having relied solely upon the conversation with Mr. Pearson to inquire about the subject property, then reports he "discovered an overhead view of what appears to be a single family residence on the subject parcel." *Id.* However, the DBO presents no fact to support or explain his conclusion that the structure on the property was a single family residence ("SFR").

On January 5, 2012, Speed was issued a Notice of Violation and a Stop Work Order. (Appx. B, ¶ 20). In response, he requested the Department to provide him with a copy of the evidence it had to support its actions. He was

presented with Mr. Pearson's allegations in the Report and the overhead views of the subject property (Appx. C, p.4). It was revealed later, however, that the Department had records of the San Juan County Assessor's office that contained a description of the subject structure from the Fall of 2011. (Appx.D, ¶ 15). Curiously, Mr. Pearson's name was redacted in the copy of the Report provided to Speed, though there is no evidence that Mr. Pearson had requested nondisclosure of his name. *Id.*

On February 29, 2012, Mr. Pearson submitted a broadly stated request to the San Juan County Prosecutor for a vast variety of records relating to Speed, his wife, and the Speed Family Trust. The prosecutor forwarded the request to the San Juan County Council, with a copy to the County Administrator, warning the Council that the request appeared retaliatory. (Appx. A, Ex.5)

Chris Laws, the Department's Code Enforcement Officer ("CEO")² applied for a warrant on October 16, 2012, to search the subject premises, and supported the application with his affidavit of October 10, 2012 (Appx. D).

² Any reference in this brief to a CEO is always a reference to Chris Laws.

Near the outset of his affidavit the CEO stated, "On or about December 16, 2011, I received an activity report that a single-family residence *had been constructed* at [Speed's property] without the benefit of an approved building permit." (Italics added.) The CEO did not explain why he changed the language from what was stated in the DBO's report: "...that the subject property *had potentially engaged in construction of ...*" (Italics added.) And the CEO did not alert the magistrate to the fact that he had changed the DBO's language in this regard.

The CEO did not submit the DBO's Report as part of the search warrant application; thus his repetition of the claim in the Report that the building was an SFR inferred that the Report may have actually set forth facts to support that conclusion, when that was not the case.

The CEO also did not mention Mr. Pearson, did not identify what Mr. Pearson communicated to the DBO, did not identify the role Mr. Pearson played in starting the investigation, give any explanation of the reliability or veracity of Mr. Pearson, or address the likelihood of retaliation by Mr. Pearson. However, the CEO repeated the

observation in the Report that "Direct observation of structures on this parcel is not possible from a public way." *Id.*

Apart from the overhead views of the property, the CEO referred in his affidavit to records of the Assessor's office on the subject structure from the Fall of 2011 (Appx.D, ¶ 15). The assessor's office reported the building as having 864 square feet, which was within the 1,000 square foot limit allowed for an accessory structure exempt from permitting under San Juan County Code ("SJCC") 15.04.500; however, the CEO did not mention that fact in his affidavit, and the CEO did not provide a copy of the Assessor's Office record along with his affidavit.

Instead, the CEO stated in his affidavit that the structure had "an overall *footprint* of approximately 1332.5 feet" (italics added) (*Id.*). That was misleading. The CEO did not inform the magistrate that while a footprint calculation may be used for tax assessment purposes, it does not apply to the calculation of the area of an accessory structure.

The methodology by which the floor area of an accessory structure is calculated is described in the Department's "Floor Area Determination for Accessory Structures" directive issued by Rene Beliveau in 2006,

and revised in 2007. (Appx. B, Ex.E.) The CEO either knew or should have known this policy, as it was written by his direct supervisor. (Appx. B, ¶ 13.)

By not including the records from the Assessor's Office with the search warrant application, the magistrate was not informed that the subject building is described in those records as having, "NO SEPTIC, NO ELECTRIC, NO PLUMBING ... AREA: 864.0 sq.ft." and that the size of the building was 24 X 36 (Appx. A, Ex.4).

The CEO attached to his affidavit four aerial images of the subject property (to which he attached "suspected SFR" labels to the structure in question): Attachment A, an image from Google maps taken in 2011, a year before his affidavit, and attachments B, C, and D, which are images developed by the county's own Polaris program taken in 2008, four years before his affidavit. (Appx. D, ¶ 8.) Images B and C reflect where the structure under inquiry is located in reference to other structures on the property, and D is the most highly magnified image of the four images.

The Google image was taken from an advanced, high resolution, color Earth-imaging satellite, launched from the Federal Government's Vandenberg Air Force Base in September 2008 by a joint partnership between partnership between GeoEye, Google and the National Geospatial-Intelligence

Agency, an agency of the U.S. government, which the latter also supported by providing vast sums of money to the project (Appx. E, ¶ 8). Under their partnership, the government obtains the images first, then unilaterally controls what lower resolution images it permits the private entities to sell on the open market (Appx. E, ¶ 13), which the latter obtains and places on the internet, where the state viewed and copied them.

The Polaris images were created by the county, by hiring a private company, MJ Harden, to use a Zeiss/Intergraph Digital Mapping Camera to photograph the entire county in June 2008. The county then manipulated the photographs by superimposing property lines onto the images, and then placed them on its Polaris internet web site (Appx. F; Appx. G, p.2, 11.1-7).

The Polaris images were to have been taken from an altitude of 4,800 feet above average terrain. However, there is no evidence of the actual altitude of the aircraft when it was over the subject property; further, as the Polaris images are all magnified, there is no evidence that the images of the property reflect what may be seen by the unaided eye at a lawful altitude.

The county has no information as to what size lens was in the mapping camera used for the

Polaris images. A normal lens is one that has a focal length of about 50mm because such a lens has a perspective similar to the human eye and covers the film with a field of view that corresponds approximately to that of normal vision (though a 43mm provides a better approximation) (Appx. H, ¶ 36). However, there is no evidence that the mapping camera used such a lens and there is likewise no evidence what lens was used to produce the Google image.

In the application for a search warrant the CEO gave the magistrate no information as to the altitude or elevation at which the four images were taken, or what magnification was used in the images. The CEO also did not inform the magistrate whether what was depicted in the four images could be seen with the unaided eye at a lawful altitude. As it turned out, Dr. Ward W. Carson, an expert photogrammetrist (Appx.I), found that Polaris image Attachment D was enhanced through magnification or enlargement, between 15 and 30 times (Appx.J, ¶ 10).

Referring specifically to Polaris image Attachment D, the CEO categorically stated in his affidavit in support of the warrant that it "reveals characteristics of the building that are

inconsistent with its use as an accessory building, but consistent with its use as a residence: (1) sky lights, (2) a stove, (3) a wrap-around deck, and (4) a covered porch (Appx.D, ¶ 15). However, during his testimony at a hearing in the trial court, the CEO testified that an accessory structure may also have skylights, a porch, and a deck, which directly conflicted with the information he gave the magistrate in his affidavit. He also testified that an accessory structure may have a chimney (Appx.K, Tr of Hr'g 7/23/13 at 3:46:02). Further, no image of a stove can be seen in attachment D.

In his affidavit the CEO also stated, on the basis of his view of the four images, "...the building is located a distance from agricultural activity, which is not typical of agricultural /accessory buildings" (Appx.D, ¶ 15). However, under San Juan County Code ("SJCC") 18.20.010, agricultural activities include activities that can be done indoors and so would not be seen in an aerial view. Further, at an evidentiary hearing the CEO admitted that he was not aware of agricultural activities that can be found next to an agricultural accessory structure, and what

they would look like from the air (Appx.K, Tr of Hr'g 7/23/13 at 3:51:38 and 4:06:17).

The CEO's failure to inform the magistrate that the county code would not support the statements he made in his affidavit regarding agricultural activity, and what constitutes an accessory building, is notable, as the job of the CEO (code enforcement officer) entails knowledge of the county code.

On October 16, 2012, magistrate District Court Judge Andrew issued the search warrant (Appx.L), which was executed that day by among others, the same CEO and DBO that had viewed the four images. They walked around the subject structure (Appx.M, ¶¶ 16-26), photographing its exterior (Appx.N, p.9, ¶ 2).

On January 7, 2013, Speed raised the defense that what was depicted in the four images could not be seen by the unaided eye at lawful altitude (Appx.C, pp.123-14). In response, on June 1, 2013, a Saturday, the same CEO and DBO who had initially viewed the four aerial images and who also executed the search warrant on the ground, then used an aircraft and conducted multiple fly-overs of the property, first at 500 feet Above

Ground Level ("AGL") and then at 1,000 feet AGL (Appx.Q, ¶ 4; Appx.O, ¶ 116). These fly-overs were an attempt by the CEO and DBO to illustrate what may be seen by the unaided eye at a lawful altitude.

The CEO then testified at a hearing in the District Court as to what they were able to see during the fly-overs. As to a water heater, he testified about a photograph he had taken of it during the fly-overs *using a visual enhancement device* (Appx.K, Tr of Hr'g 7/23/13 at 4:14:03.):

Q: Now, looking at the photograph, how can you tell that it is a, or the, water heater?

CEO: You can't.

Q: But you just testified that you saw the water heater.

CEO: I DID see it.

Q: But isn't that because you saw it from the ground?

CEO: Yes.

Having thus testified that he could not tell from a photograph he had taken that there was a water heater on the property, he next testified about a solar panel on the property (*Id.*; Tr of Hrg July 23, 2013, by Corpolongo & Associates, p.8, 1.19 top.10, 1.4):

Q: ...You say that in your report you saw the solar panel, right?

CEO: Yes.

Q: And is that in the photograph?

CEO: Yes.

Q: Where is it?

CEO:...It's right there.

Q: Are you referring to the little specks of something that does not appear green to the right of what you said was the water heater?

CEO: Well, remember that a photograph is something taken in a moment of time as we circled around the entire property. Yes, we could clearly see that it was a solar panel.

...

Q: ...if you were to show this to anyone who had not been on the property would they - you agree they wouldn't recognize that immediately as being a solar panel, would they?

CEO: Of course not. Not just from the picture.

Q: But you know it's a solar panel because you saw it on the ground?

CEO: Actually, in that case even at 500 to 1,000 feet you can clearly tell it's a solar panel.

Q: But you also saw the solar panel on the ground, right?

CEO: Yes.

Q: You saw it in this exact location, right?

CEO: Yes.

Turning to what "private affairs" are conducted on the subject property, it is first noted that both the DBO and CEO stated that

“direct observation of structures on this property is not possible/is unavailable from a public way.”

Speed indicated to the District Court that all areas within the 150 foot wide heavily vegetated boundaries of the accessory structure and the trailer nearby are curtilage for the reasons that depending on the season, Speed bathes in an outdoor tank and sleeps at places around the property on covered and open topped platforms and cooks out of doors. The gate is locked for protection of Speed’s privacy, as he is a lifelong naturist and goes about many of his domestic and agricultural tasks unclothed, and the property is on a dead end private road, on an 11 acre farm totally surrounded by 150 foot wide buffers of dense tree and brush growth. It is not located under an established flyway or regularly used aircraft route, and government employees, law enforcement officers, strangers, friends and neighbors do not enter unless with his permission (Appx.H, ¶ 62, 1-9).

Speed appeals from the letter decision of the San Juan County Superior Court dated July 9, 2014 (Appx.Q), affirming the final judgment of the San Juan County District Court dated November 6, 2013, and the Findings of Fact, Conclusions of

Law, And Order Denying Defendant's Motion To Dismiss and Motion To Suppress Evidence dated October 23, 2013 (Appx.0).

Speed also appeals from the ruling from the bench of the San Juan County Superior Court on August 8, 2014, denying Speed permission to make his taint ('fruit of the poisonous tree') argument on the appeal to that court, by reason that the Superior Court was uncertain that Speed had made that argument to the trial court; however, transcriptions of portions of the electronic recording of proceedings of the trial court on June 4 (at p.3, 11.8-20) and August 28 (at p.7, 1.24 to p.9. 1.25), 2013, dispel any doubt that Speed raised his claim of taint at the trial court multiple times.

Speed's motion for discretionary review by this court was granted by a letter decision of this court dated March 4, 2015, permitting Speed to address certain issues for review.

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ARGUMENT

1. The State may not avoid an inquiry into Mr. Pearson's knowledge, credibility and veracity by just not mentioning him or the content of what he reported, in its application for a search warrant.

An informant's tip must comply with the following Aguilar-Spinelli test concerning probable cause for a search warrant: (1) the officer's affidavit must set forth the circumstances from which the informant drew his conclusion, so a magistrate can evaluate the reliability of the manner in which the informant acquired his information; and (2) the affidavit must set forth the circumstances by which the officer concluded that the informant was credible or his information reliable. Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964); Spinelli v. U.S., 393 U.S. 410, 89 S.Ct. 584 (1969).

Where the affidavit is based on an unidentified informant's tip, the affidavit must contain some of the underlying circumstances that led the informant to believe that evidence could be found at the specified location and the affidavit must set forth the underlying circumstances specifically enough that the magistrate can independently judge not only the validity of the affiant's but also the

informant's conclusions. State v. Lyons, 174 Wash. 2d 354, 359, 275 P.3d 314, 316-17 (2012).

In the case at hand, the DBO initiated his search based on what Mr. Pearson told him, but the DBO's Report contained no information as to how or when Mr. Pearson knew what he told the DBO. The CEO then incorporated the DBO's conclusion in his affidavit in support of a search warrant that the structure on the Speed property was an SFR, but made no mention of Mr. Pearson, whose tip the DBO relied upon. Therefore, by avoiding mentioning Mr. Pearson, the magistrate was not made aware of any fact or circumstances that led the CEO to believe that evidence could be found at the Speed property, and no information upon which to judge the credibility of Mr. Pearson.

Further, Mr. Pearson's role was concealed from Speed when the copy of the Report sent to Speed at the outset had his name redacted. The CEO also made no mention in his affidavit that the county prosecutor had warned the county council and the head of county administration that Mr. Pearson was acting in a retaliatory manner, facts which a magistrate should have been aware of in judging both the affiant and the informant.

Based on the foregoing lack of information about Mr. Pearson, what he knew, how he knew it, when he knew it, and underlying circumstances to support the validity of both the affiant's and also the informant's conclusions, the search warrant should never have been issued.

2. The State's warrantless search of the Speed property using aerial Polaris images was an unreasonable intrusion into a person's "private affairs" under Washington's Const. art.1, §7.

The County's Polaris program utilizes aerial imagery it has manipulated and applied to its own use. However, the use of this technology to conduct a search unreasonably intrudes into a person's "private affairs" under Washington's Const. art.1, §7. In State v. Myrick, 102 Wash. 2d 506, 512, 688 P.2d 151, 154 (1984), the court reasoned at 513-514 that what is considered private does not turn on a defendant's subjective expectation of privacy: "[m]erely because it is generally known that the technology exists to enable police to view private activities from an otherwise nonintrusive vantage point, it does not follow that these activities are without protection." Thus, the fact that intrusive technology is pervasive in society does not equate to a loss of a right to privacy.

Myrick then stated: "There is no basis for the assertion that aerial surveillance of open fields at 1,500 feet above ground level, without the use of visual enhancement devices, is unreasonably intrusive or would jeopardize a reasonable person's sense of security." The important qualifier to aerial surveillance is that it is not unreasonably intrusive if the surveillance uses no visual enhancement device.

Myrick reinforced the point three sentences later, in stating, "His gardens were identifiable with the unaided eye from the lawful and nonintrusive altitude of 1,500 feet above ground level. For these reasons we find this aerial surveillance of appellant's property was not a search under Const. art. 1, § 7." Myrick at 514. This means that legal searches are only those that do not use a visual enhancement device, or which use the unaided eye.

Other cases have noted Myrick's position regarding visual enhancement devices: State v. Cord, 103 Wash. 2d 361, 365, 693 P.2d 81, 84 (1985) ("As in *Myrick*, the police here viewed the contraband without visual enhancement devices and from a lawful vantage point); State v. Wilson, 97

Wash. App. 578, 581-82, 988 P.2d 463, 465 (1999) ("Aerial surveillance is not a search where the contraband is identifiable with the unaided eye, from a lawful vantage point, and from a nonintrusive altitude").

The State has defended its use of the highly magnified images by relying on cases where binoculars have been used to "assist the unaided eye." However, none of those cases address highly magnified aerial surveillance images where there is a distance limitation - the lawful altitude requirement - and none of the cases explained that a prohibition against visual enhancement devices could be avoided by calling it "assisting the unaided eye": State v. Young, 123 Wash. 2d 173, 867 P.2d 593 (1994) (infrared thermal detection device); State v. Rose, 128 Wash. 2d 388, 909 P.2d 280 (1996) (flashlight); State v. Manly, 85 Wash. 2d 120, 530 P.2d 306 (1975) (binoculars); State v. Ludvik, 40 Wash. App. 257, 698 P.2d 1064 (1985) (binoculars and spotting scope).

Further, the "eye assistance" cases all involve police on the ground looking at a target located a short distance away: Young (looking at a home from the street in front of the home);

Rose (standing next to a mobile home looking into its window); Manly (looking into a second floor apartment window from a parking lot across the street and from the sidewalk below the window); Ludvik (across the street from a residence that had no curtain in its window). Those cases do not address or attempt to address aerial surveillance cases, for in those cases there is the additional requirement of distance - that is, lawful altitude. In short, the eye assistance rule does not apply to a Myrick type of search.

The State claims that the Polaris images may be used because Washington case law allows "sense enhancing devices" where the police are able to see more easily what is open to public view. This approach is faulty. As just discussed, the rule permitting "sense enhancing devices" does not apply to aerial surveillance cases addressed by Myrick: the cases cited that approve sense enhancing devices concerned flashlights, binoculars, and spotting scopes used when the target was a relatively short distance away *on the ground* when there is no applicable distance requirement. By contrast, no case involving highly magnified aerial images has been found to be a legal search based on the sense enhancing line of cases.

Turning to the Polaris images in the case at hand, the CEO's affidavit does not indicate whether the images illustrate what can be seen from a lawful vantage point (that is, from a nonintrusive altitude) with an unaided eye. This is a crucial omission as the only image that the CEO expressly identifies as illustrating parts of the subject structure, Attachment D, was enhanced through magnification or enlargement between 15 and 30 times.

When the search warrant was issued, the only data available to the court to support the warrant was that which came from the CEO, and the only data available to the CEO as to what was on the subject property that would support the warrant was what he saw on the images; thus, assuming the images prove anything at all (what does an overhead view of a roof show about a structure below it, or how that structure is used?), excising the images from the affidavit would leave nothing to support the warrant.

The state may claim the assessor's records would be left. However, the data from that office supported Speed's contention that the structure was *within* the square footage allowance of an accessory structure, and also revealed

characteristics of an *accessory building* rather than an SFR ("NO SEPTIC, NO ELECTRIC, NO PLUMBING ... AREA: 864.0 sq.ft." and "building ... 24 X 36"), which does not support the warrant. Further, the assessor's records were not provided to the magistrate.

The failure to provide the magistrate with evidence of the lawfulness of the images (unaided eye view from a lawful vantage point), compounded by the fact that Attachment D was augmented through significant magnification or enlargement using a visual enhancement device, rendered the use of all the Polaris images unlawful.

3. The State's search of the Speed property using aerial images available through the joint federal government surveillance program and privately owned "Google Maps" business was an unreasonable intrusion into a person's "private affairs" under Washington's Const. art.1, §7.

Art. 1, sect. 7 of the Washington Constitution does not apply to private entities; however, it may apply to the Google image by reason that the image is the product of a relationship between the federal government and private entities wherein vast sums of money and considerable technological support come from the federal government, which obtains the images and

then controls and directs how the private entities may use them.

State v. Smith, 110 Wash. 2d 658, 666, 756 P.2d 722, 727 (1988) ruled that in order to prove that a private individual acts as a government agent, it must be shown that the government in some way instigated, encouraged, counseled, directed, or controlled the conduct of the private person. Here, the federal government instigated and encouraged the private entities by its financial support, creation, launch, and operation of surveillance satellites. The satellites are controlled by the federal government which permits lower resolution version of images obtained by satellites to be sold privately, where they are put on the internet, and where San Juan County has obtained them.

The County would not have the Google images were it not for the heavy involvement of the federal government. The fact that the federal government's relationship with the private entities has a commercial aspect has no bearing according to Smith; in fact, there is never a lack of a commercial aspect to any government involvement with a private entity in business.

The two part test in United States v. Walther, 652 F.2d 788 at 791 (9th Cir. 1981) is: (1) the government must know or acquiesce in the intrusive conduct, and (2) the party conducting the search must intend to assist the government or to further its own ends. As to (1), it is a given that the government knew it was conducting intrusive high magnification surveillance of everything it can see from the sky with no benefit of a warrant; as to (2) it is also a given that the government's private entity partners knowingly assist the government to further their own ends.

The state makes the claim that because the surveillance images are on the internet, where anyone may see them, there is no violation of Art. 1, sect. 7 of the Washington Constitution. However, if the State could avoid privacy claims by simply posting private matters on the internet, it could avoid all claims of unlawful intrusion into private matters. The better rule, therefore, is that where images are obtained by satellite based high magnification telescopes that depict such things on the ground that can only be seen with an unaided eye from an unlawful vantage point, the publication of such images on

the internet does not immunize the state from a claim of invasion of privacy.

The invasiveness of the Google image is likely one of first impression in this court, especially concerning the federal government's role in providing aerial surveillance images to private parties to display on internet sites. The rule to be applied to those images should be the same as those to which state government must comply with.

In the case at hand, the Google image was also provided to the magistrate without indicating whether it illustrates what can be seen with an unaided eye from a lawful vantage point. Further, while the Google image appears to contain the least amount of detail, it was accompanied by the other three images, including Attachment D, which was the specific focus of attention by the CEO. Thus, the four images cannot be separated after-the-fact by the magistrate, and there is no evidence the magistrate attempted to do that in considering whether to issue the search warrant.

4. Speed's private affairs on his property are protected under Washington's Const. art.1, §7.

Police officers on legitimate business may enter an area of curtilage that is impliedly open to the public, such as an access route to a house or a walkway leading to a residence. State v. Seagull, 95 Wash.2d 898, 902, 632 P.2d 44 (1981). A substantial or unreasonable departure from that area then exceeds "the scope of the implied invitation and intrude[s] upon a constitutionally protected expectation of privacy." Seagull at 903. The determination of whether an officer's actions amount to an unconstitutional invasion of privacy must be based on the facts and circumstances of each case. *Id.*

Speed has claimed all areas within the 150 foot wide heavily vegetated boundaries on the subject property as curtilage, including the accessory structure. The basis for his claim was that his 11 acre farm is on a dead end private road, which is gated, locked, and clearly posted against trespass, surrounded by wide buffers of dense tree and brush growth, not observable from any public way, not located under an established flyway or regularly used aircraft route, and is entered only by people invited to enter.

Within the curtilage, Speed cooks, bathes and sleeps out of doors depending on the season, and as a lifelong naturalist goes about many of his domestic and agricultural tasks unclothed.

These private activities are now subject to indiscriminate and warrantless aerial searches using camera lenses of high magnification. The framers of the state's constitution did not envision such searches on November 11, 1889, when the state's constitution became operative. State ex rel. O'Connell v. Meyers, 51 Wash. 2d 454, 471, 319 P.2d 828, 836 (1957). In those times, aerial surveillance, using balloons, was just a tool of war, not a tool to invade privacy.

Intrusive aerial surveillance will likely increase with the use of inexpensive drones. Like satellites and high altitude photography, this is a technology that was not envisioned by the framers (whose only drones were in their beehives). Therefore, the curtilage should be protected under Washington's Const. art.1, §7 against images that can be produced by visual enhancement devices such as high magnification lenses and telescopes, and Speed's curtilage is entitled to that protection.

5. The State lacked probable cause to support its search warrant application by reason that there was no information as to when Mr. Pearson was aware of facts he conveyed to the State, and the Polaris and Google images were stale.

In determining whether a search reveals criminal activity or evidence, the magistrate must decide whether the passage of time is so prolonged that the information is stale, i.e., that it is no longer probable that a search will reveal criminal activity or evidence. State v. Lyons, 174 Wash. 2d 354, 360-61, 275 P.3d 314, 317 (2012).

Here, the CEO claimed in his affidavit that the structure on the Speed property was being used as an SFR. However, the CEO was provided no supporting information from Mr. Pearson, and did not even mention him and his conversation with the DBO that led to the investigation. The CEO simply stated, "a single-family residence had been constructed," with no statement as to when it was constructed or what the Activity Report stated as to when it had been constructed (and made no mention of his unexplained change of language from what was in the DBO's Report).

The CEO then provided four images, one was a year old, and the rest were four years old, but gave the magistrate no evidence to show that the structure was used as an SFR four years ago, and no evidence whether it continued to be used as an SFR when he wrote his affidavit in October 2012.

In view of the lack of these facts, there was no basis for the magistrate to conclude that in October 2012 there was probable cause that the structure was either constructed or being used as an SFR.

6. The State had no probable cause to support its search warrant application based on any of the images.

The CEO's affidavit states that according to records from the county assessor, the structure had "an overall *footprint* of approximately 1332.5 feet" (italics added). This did not provide probable cause because a footprint calculation does not apply to the calculation of the area of an accessory structure. The assessor's office actually reported the structure as having 864 square feet, which was within the 1,000 square foot limit allowed for an accessory structure under the county code (of which the CEO did not inform the magistrate).

The CEO categorically stated that the image of the structure "reveals characteristics of the building that are inconsistent with its use as an accessory building, but consistent with its use as a residence:" namely, skylights, a stove, a wrap-around deck, and a covered porch. However, during his testimony at a hearing in the District Court the CEO gave directly conflicting testimony that an accessory structure may also have skylights, a porch, and a deck. He also testified that an accessory structure may also have a chimney. Hence these assertions as to the characteristics of the building were untrue.

The CEO also stated that "...the building is located a distance from agricultural activity, which is not typical of agricultural/accessory buildings." However, as the county code provides that agricultural activities also include those that can be done indoors, they would not be seen in an aerial view. Thus this point adds nothing to probable cause. Further, the CEO admitted he was not aware of agricultural activities that can be found next to an agricultural accessory building, casting further doubt on the accuracy of the CEO's claims, especially as his very job entailed knowledge of the county code.

The state had no probable cause to support its search warrant application based on any of the images, as the overhead view of the roof revealed nothing of the structure beneath, or what that structure was used for.

7. The State's fly-overs were tainted because the observations of the property were made by the same officers who viewed the images in the search warrant application and who executed the search warrant on the ground of the Speed property, and because the officers used a visual enhancement device.

Under the fruit of the poisonous tree doctrine, evidence tainted by unlawful police action is to be excluded unless it is ultimately obtained by a lawful source independent from the unlawful action. State v. Gaines, 154 Wash.2d 711, 718, 116 P.3d 993 (2005). In the case at hand, the DBO and CEO had both viewed the aerial images that were unlawfully obtained in violation of Speed's right to freedom from intrusion into his private affairs under Washington's Const. art.1, §7.

Both the DBO and CEO then entered Speed's property and viewed and photographed the subject structure and its surroundings in person, with their boots on the ground. When the issue arose as to what is visible to the unaided eye from a

lawful altitude, both the DBO and CEO obtained an aircraft and circled first at 500 feet AGL over the property and made observations and took photographs of the property using a visual enhancement device, which was an aided eye view, and then circled over the property at 1,000 feet AGL, again observing and photographing the property from that altitude, and again using a visual enhancement device.

The CEO then testified at trial court as to what he observed during the fly-overs; however, his observations were tainted by the repeated unlawful views he had of the property. His observations were also not clearly separate from an independent and lawful source. For example, the CEO admitted that during the fly-overs he could not tell, from a photograph he had taken during one of the fly-overs, that there was a water heater on the property but for the fact that he had seen it earlier on the ground, while executing the warrant.

He was asked the question regarding a solar panel on the property: "...if you were to show this to anyone who had not been on the property would they - you agree they wouldn't recognize that immediately as being a solar panel, would they? He responded by testifying, "Of course not. Not

just from the picture, no." This indicates that had the CEO not first stood on the property he would not have had the ability to recognize what he was seeing from the air.

Thus the CEO was unable to illustrate that his view from the air was a source of information independent from his previous views of the property when he stood on the ground. For that reason, all the views by the CEO and DBO from the air were tainted by their previous views of the property, and were inadmissible under the fruit of the poisonous tree doctrine.

Further, at no time did the State provide evidence, without first conducting the search on the ground, as to what can be seen with the unaided eye (not using a visual enhancement device from an aircraft) from a lawful altitude. The evidence of what was seen from the two fly-overs was therefore inadmissible.

8. Speed raised the taint argument in the trial court proceeding.

The trial court proceedings were numerous and lengthy, so to avoid waste and the cost of transcribing them all, when Speed designated the record in his appeal to the Superior Court, he designated, *inter alia*, "The electronic recording

of proceedings of the trial court proceedings, reserving, upon a ruling by this court under RALJ 6.3.1, the option to transcribe only the portion of said proceedings necessary to present the issues on appeal.”

The Superior Court granted Speed’s request to not transcribe the entire electronic recording of the trial court proceedings and was given leave to attach “transcripts necessary to the presentation of the issues” (Appx.T).

Speed then raised the taint issue (addressed in the foregoing section #7) in his appellant’s brief. As the prosecution was no doubt aware that Speed had made the taint argument at trial court, it raised no objection in its Respondent’s Brief to Speed raising the taint argument.

However, the Superior Court stated at p.6, ¶ 2 of its Decision (Appx.Q) that it could not, “find anything in the record to indicate that Appellant made the argument that “what officers observed during an aerial search ... was tainted by their view of the illegal images and what they saw on the ground.” The Superior Court thus concluded that Speed was making the taint

argument for the first time on appeal, and thus did not review the argument under RAP 2.5(a).

However, Speed had made the taint argument to the trial court and as the prosecution did not object to Speed including the taint argument in his brief, Speed was not aware that a transcript of that argument (in one of many trial court proceedings) would need to be made. The first notice of that need came to Speed when the Superior Court issued its decision on the appeal.

Speed immediately moved the Superior Court to augment the record by supplying a transcript of a trial court proceeding illustrating that counsel *had argued* taint before that court. Speed's motion to augment the record was denied on the reasoning that the court found it was still correct that *evidence* of the argument was not in the record before it.

However, the Superior Court stated at p.5, ¶ 3, "What I said ... about the tainting was that I didn't find anything in the record to indicate that you made at the trial court. And that may be error in part of the Court, this Court to have said that;" (see, Att.F to Appellant's List Of Attachments To Motion For Discretionary Review). and it stated at p.6, ¶ 7, "...it may be that this

Court was in error in making this statement on page 4 [6];" and stated at p.8, ¶ 4,

It is a question whether this Court may have been in error on page 6 in saying that, I couldn't find anything in the record indicating that you made the argument at the trial court. May be that was a mistake on this Courts part which ought to be corrected. *Id.*

The Superior Court acknowledged it may have erred in stating that Speed had not made the argument, but Speed did raise the taint argument at the trial court and there is ample evidence of this in transcripts Speed has submitted to this court in his Amended Designation Of Record in the form of the proceedings of June 4, 2013 (p.3, 11.8-20 and p.9, 1.20 to p.13, 1.14) July 23, 2013 (p.7, 1.16 to p.10, 1. 4) and August 28, 2013 (p.8, 1.2 to p.9., 1.25). Therefore, Speed may renew that argument before this court consistent with RAP 2.5(a).

CONCLUSION

Speed requests reversal of the dismissal of his motion to dismiss and suppress evidence. The warrant to search the property should not have been issued: the informant's tip was improperly relied upon at the outset, and then concealed

from the magistrate, the images supporting the warrant were unconstitutionally intrusive as there was no showing that they reflect what can be seen with an unaided eye from a lawful vantage point, and one image that was heavily relied upon was more highly magnified than the others.

Beyond the fact that neither the images nor the affidavit supporting the warrant provided non-stale probable cause that the structure was an SFR, critical information was also withheld from the magistrate that showed that the structure was a proper accessory structure.

The warrant's reliance upon an image from the internet is a matter of first impression; however, the image was created by a federal government / private enterprise partnership controlled by the federal government, in which the private partner may sell a lower resolution image on the market and thus be available to all. Such an image should not be permitted to invade the private affairs of a citizen any more than a totally government-created image.

When Speed questioned the lawfulness of the images, two officers conducted multiple fly-overs of the property, during which they viewed and photographed the property using a visual

enhancement device; all of which tainted their attempt to legitimize their illegal search of the property on the ground. Thus, by using a visual enhancement device the officers avoided the requirement that they may view only what may be seen from a lawful altitude with a naked eye.

Dated this 18 day of Sept., 2015.

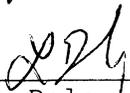


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I hereby certify that on this day I caused a copy of the foregoing document to be mailed to the following address:

Jennifer Paige Joseph
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Dated this 18 day of Sept., 2015.



Lawrence Curt Delay WSBA #20339