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Division I
State of Washington

NO. 72302-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERROL SPEED,

Appellant.

APPEAL FROM THE DISTRICT COURT FOR SAN JUAN COUNTY
THE HONORABLE STEWART R. ANDREW

AND FROM THE SUPERIOR COURT FOR SAN JUAN COUNTY
THE HONORABLE DONALD E. EATON

BRIEF OF RESPONDENT

RANDALL GAYLORD
San Juan County Prosecuting Attorney

JENNIFER P. JOSEPH
Special Deputy Prosecuting Attorney
Attorneys for Respondent

San Juan County Prosecuting Attorney
350 Court Street
P.O. Box 760
Friday Harbor, Washington 98250
(360) 378-4101 FAX (360) 378-3180

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A. ISSUES PRESENTED

1. Technology, including aerial surveillance, that simply allows officers to see more easily what is open to public view is not an unlawful intrusion into one's private affairs. In its investigation of suspected land use and building code violations, the County viewed publicly available aerial and satellite images of Speed's property that provided less detail than could be seen with the naked eye from a lawful elevation, and included those images in its search warrant application. Did the trial court correctly conclude that the use of these images did not violate Article I, § 7 of Washington's constitution?

2. If information contained in an affidavit of probable cause for a search warrant is obtained by an unconstitutional search, the warrant is still valid if the affidavit contains sufficient facts to establish probable cause independent of the illegally obtained information. Here, the County's affidavit established that Speed had unpermitted structures and fixtures on his property without reference to the challenged aerial images. Did the trial court correctly conclude that the search warrant was valid?

3. When probable cause for a search warrant is based upon an informant's tip detailed in an affidavit, the affidavit must

establish the informant's basis of knowledge and veracity. Where the affidavit fails to provide such information, probable cause may still be established by independent investigatory work that corroborates the tip. Here, while the County's investigation of Speed's code violations was sparked by a citizen's complaint, the County relied on its independent investigation (and not the tip) to establish probable cause. Did the trial court properly conclude that the search warrant was valid?

4. Whether information contained in an affidavit is too stale to demonstrate timely probable cause for a search warrant depends on the circumstances of the case. Here, the aerial images included in the search warrant application were one and three years old. Given that the alleged illegal activity was maintaining large, permanent structures without necessary permits, structures that indisputably still exist, were the images of those structures too stale to support timely probable cause? Given that probable cause exists without regard to those images, is the search warrant valid in any case?

B. STATEMENT OF THE CASE

After receiving a citizen complaint that Errol Speed had built an unpermitted single-family residence on his property, San Juan

County began an investigation of possible code violations. CP 175. Code Enforcement Officer Christopher Laws used existing Google Earth satellite images and the County's publicly-available on-line Polaris¹ aerial mapping imagery to verify that a large structure with skylights, a chimney, a porch, and a deck was visible on the property. CP 175. Laws consulted county tax records, which indicated that the large structure has a footprint of 1,332.5 square feet and a wood stove, but no electricity, plumbing, or septic system. CP 175-76, 215.

The San Juan County Code requires that any structure exceeding 1,000 square feet have an approved building permit. CP 176. A smaller structure may be constructed without a permit, but only if the owner/builder submits a valid Statement of Exemption that is reviewed and approved by the Community Development and Planning (CD&P) Department. CP 177. Permits are also required for a wood stove and for any inhabited structure, regardless of size. CP 177, 225. Laws determined that none of the necessary permits had been issued. CP 176-77.

¹ The Polaris system provides free public access to aerial photographs of the entire county, which the county procured through a contract with a private company in 2008. CP 352.

The County first attempted to gain Speed's code compliance through civil proceedings. CP 176, 322, 341. During this process, Speed's counsel represented that Speed resided not in the large structure, but in a 30-foot trailer on the property. CP 176. Laws determined that Speed lacked the necessary permit for the trailer. CP 177. Speed's counsel also represented that there was no wood stove in the large structure, contrary to the information that Speed had provided to the assessor. CP 176. Laws discovered that Speed had previously falsely characterized a residence he built on another property as an "accessory agricultural building" to "avoid the application of certain building codes." CP 177, 295.

In response to the County's civil code enforcement efforts, Speed submitted a one-paragraph document titled "Statement of Exemption." CP 225, 229. The County rejected the document because it was not on the required form and did not contain the necessary documentation to permit CD&P review. CP 225, 227-28. The County informed Speed's counsel of these deficits, but Speed never filed a valid affidavit. CP 225-56. The County eventually concluded that the civil action would not result in compliance and commenced a criminal investigation. CP 322.

The County applied for a warrant to search Speed's property for evidence of unpermitted structures and evidence that Speed gave false or misleading information to the assessor's office about the nature and use of the large structure. CP 171-83. Laws' declaration in support of the warrant appended four aerial images of Speed's property obtained from Google Earth and Polaris. CP 180-83.

In addition to the aerial images, Laws' declaration established that (1) a building permit is required for *any* structure used as a residence; (2) a building permit is required for any structure that exceeds 1,000 square feet, and (3) a mechanical permit is required for any wood stove. CP 176-77. Laws asserted that he found no record that Speed had the necessary permits for the large structure, the trailer, or the wood stove. CP 176-77. The failure to obtain the necessary permits is a criminal offense under San Juan County Code (SJCC) 18.100.020 and 18.100.060. CP 178.

The magistrate issued the warrant, pursuant to which two sheriff deputies and members of the CD&P department entered the property, searched the premises, and took measurements and

photographs. CP 164-70. Thereafter, Speed was charged with having an unpermitted structure, failure to have approved sewage disposal, occupying a structure without an occupancy permit, and making a false or misleading statement to a public servant.

CP 187-89, 340.

Speed moved to suppress on grounds that the use of the Google and Polaris images violated Article I, § 7 of the Washington Constitution and that the citizen complaint did not establish probable cause absent information about the citizen's veracity and credibility. CP 191-205. After an initial round of briefing, the District Court asked the parties to address whether the aerial images provided more detail than could be seen with the naked eye from a lawful elevation. CP 273. To answer this question, the County had investigators fly over Speed's property at 500 and 1,000 feet above ground level to compare the Google and Polaris images attached to the warrant affidavit with what they could see with the naked eye. CP 333, 363. Laws testified that he was able to see considerably *more* detail, not less, when he viewed the property from the air. CP 333.

Following extensive briefing and an evidentiary hearing, the District Court denied Speed's motion to suppress in a detailed letter

ruling and comprehensive factual findings and conclusions of law. CP 320-76. Among other things, the District Court concluded that the use of the Google and Polaris images was not unlawful and did not reveal anything that could not be observed with the naked eye from a lawful vantage point. CP 329-33, 349-67. "The Google and Polaris images used in this case provide less detail than if Mr. Laws had flown over the defendant's property at a lawful elevation and observed the structure in question with his unaided eye. The images do not reveal what cannot be seen with the naked eye." CP 333. In any event, the District Court concluded that Laws' declaration established probable cause "without any reference to the Google and Polaris images." CP 326-27, 349-50.

Following a jury trial, Speed was convicted of having an unpermitted structure and failing to have approved sewage disposal.² The jury could not reach a decision on the other counts. Speed appealed to the Superior Court. CP 1. That court affirmed the District Court in its own comprehensive letter ruling.

² Speed has not designated his judgment and sentence for review, but the Court received a copy of that document as Appx. K to the State's Answer to his Motion for Discretionary Review.

CP 425-35. Speed thereafter moved for discretionary review, which this Court granted in part.³

C. ARGUMENT

Appellate review of a superior court decision reviewing a decision of a district court is governed by RALJ 9.1. State v. Ford, 110 Wn.2d 827, 829, 755 P.2d 806 (1988); State v. Brokman, 84 Wn. App. 848, 850, 930 P.2d 354 (1997). An appellate court reviews the decision of the district court to determine whether that court has committed any errors of law and whether its factual determinations are supported by substantial evidence in the record. RALJ 9.1(a), (b); Brokman, 84 Wn. App. at 850.

1. THE USE OF PUBLICLY-AVAILABLE AERIAL IMAGES TO INVESTIGATE REPORTED CODE VIOLATIONS DOES NOT VIOLATE THE CONSTITUTION.

Speed contends that the County executed an unconstitutional warrantless search of his property when Laws viewed publicly-available aerial imagery in investigating suspected

³ Pursuant to the Commissioner's March 2, 2015 ruling, this Court will review "issues regarding using the Polaris and Google images to establish probable cause." The Commissioner reserved to the panel whether to consider two other issues: (1) whether the search warrant was valid absent information in the affidavit to allow the magistrate to evaluate the veracity and credibility of the citizen who initially reported the code violations at Speed's property; and (2) whether the County's evidence concerning what could be seen with the naked eye during the fly-overs was so tainted by the observers' prior knowledge of the site from the aerial images and the on-the-ground search that it should not have been admitted in the suppression hearing.

code violations on Speed's property.⁴ He argues that any use of visual enhancement devices during aerial surveillance or enlargement of the resulting images is an unreasonable intrusion into private affairs and is categorically barred by the Washington Constitution and our supreme court's decision in State v. Myrick, 102 Wn.2d 506, 688 P.2d 151 (1984). Speed appears to argue that these images, if unlawfully produced, should not have been relied upon to establish probable cause to search his property. This Court should reject Speed's claim because aerial photographs taken from at least 4,800 feet above ground level are not unreasonably intrusive even if magnified. Moreover, even if the images were illegally obtained, Speed is entitled to no relief because probable cause existed without reference to those images.

⁴ Speed claims "all areas within the 150 foot wide heavily vegetated boundaries on the subject property as curtilage" warranting enhanced protection under Art. I, § 7 "against images that can be produced by visual enhancement devices such as high magnification lenses and telescopes[.]" Brief of Appellant (9/21/15) at 33. The Commissioner's 9/10/15 ruling notes that this argument "appears to be outside the scope of the appeal," but reserves to the panel the decision whether to review it. Speed provides no legal authority for the notion that the whole of his property constitutes "curtilage," notwithstanding his proclivity to "go[] about many of his domestic and agricultural tasks unclothed." Id. In any event, while the State does not dispute that Speed has a privacy interest in his property, the question is whether aerial/satellite photography of the property is an unreasonable intrusion into his privacy. As argued herein, that answer is "no."

a. Aerial Images Taken From A Lawful Altitude
Are Not Unreasonably Intrusive.

The County's search warrant application included four aerial images of Speed's property from Google and the Polaris system. The Google image was taken from an orbiting satellite and the Polaris images were taken from 4,800 feet above ground level; both are necessarily enlarged to show detail of the ground. CP 351-52. Speed contends that this enhancement makes the images an unreasonable intrusion into his private affairs. Brief of Appellant at 38. He relies on Myrick for the proposition that "legal searches are only those that do not use a visual enhancement device, or which use the unaided eye." Brief of Appellant at 33 (underlining in original). As the District Court fully explained, however, Myrick does not so hold. CP 331-33.

In Myrick, the government investigated an anonymous tip about marijuana growing on Myrick's property by viewing the property at 1,500 feet above ground level. 102 Wn.2d at 508. The officers were able to identify marijuana, and relied on this observation along with the anonymous tip to obtain a warrant to search Myrick's property. Id. On appeal, Myrick argued that the aerial surveillance violated Art. I, § 7 of the Washington Constitution

because “aircrafts generally are overly intrusive technological devices when used for surveillance purposes.” Id. at 513. The court rejected the argument’s premise, stating, “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.” Id. at 513-14.

Speed reads this remark to mean that aerial surveillance *with* the use of visual enhancement devices is *necessarily* unreasonably intrusive. But Myrick did not involve a scenario where police used visual enhancement devices, and the legality of the use of such tools was not presented. Thus, even if the court’s remark could be construed as Speed contends, it would be nonbinding dicta. Myrick thus does not support Speed’s argument. Instead, the case applied the “open view” doctrine and stands for the proposition that aerial surveillance of open fields from 1,500 feet above ground level is not a search and does not violate Art. I, § 7 of Washington’s constitution. 102 Wn.2d at 514. See also State v. Wilson, 97 Wn. App. 578, 988 P.2d 463 (1999) (aerial surveillance from 500 feet above ground level is not a search).

Speed's reading of Myrick is also inconsistent with our supreme court's jurisprudence on visual enhancement technology. That court has repeatedly held that the use of technology that simply allows the police to see more easily what is open to public view does not violate Art. I, § 7. Thus, in State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003), the court noted that it has "affirmed as constitutional a search involving sense-enhancing devices such as binoculars or a flashlight, allowing police to see more easily what is open to public view." Id. at 260. It is only when police observe from an unlawful vantage point or use "*a particularly intrusive method of viewing*" that a violation of the right to privacy occurs. Id. (emphasis in original).

As an example of a particularly intrusive means of observation, the court cited the use of "an infrared thermal device to detect heat distribution patterns within a home that were not detectable by the naked eye or other senses." Id. (citing State v. Young, 123 Wn.2d 173, 183 n.1, 867 P.2d 593 (1994)). Such technology effectively allows officers to "see through the walls of the home," and therefore "goes well beyond an enhancement of natural senses." Young, 123 Wn.2d at 183. Similarly, the GPS device used by police to track the suspect's movements in Jackson

was particularly intrusive because “unlike binoculars or a flashlight, the GPS device does not merely augment the officers’ senses, but rather provides a technological substitute for traditional visual tracking.” 150 Wn.2d at 262.

These cases establish the rule that technology that reveals that which cannot be perceived through an officer’s senses – such as invisible heat distribution patterns or the every movement of a vehicle over a lengthy period of time – is unreasonably intrusive, but that technology that simply enhances what the officer can perceive with his or her own senses is not. Since the Google and Polaris images show only what was open to public view, it does not matter that the images were enlarged.

Speed attempts to distinguish these and other visual enhancement cases on the basis that none of those cases “address aerial surveillance, where there is the additional requirement of legal altitude.” Brief of Appellant at 35. In Wilson, Division Three of this Court considered exactly that question. Noting that no Washington case had set a specific altitude below which an aerial search is intrusive, the court adopted FAA regulations establishing a 500-foot minimum safe altitude (MSA) over the non-congested area at issue in that case. 97 Wn. App. at 582-83. Because the

aircraft in that case flew at least 500 feet above ground level, a lawful altitude, “the vantage point is therefore no more intrusive than police standing on a public street corner, or other legal vantage point.” Id. at 583.

Here, a dispute arose whether Speed's property was in a congested area, such that the FAA's MSA was 1,000 feet rather than 500 feet. Based on evidence provided by the State and largely unrefuted by Speed, the District Court found, “The Defendant does not live in a congested area. The minimum safe altitude is 500 feet above ground level.” CP 336. That issue is not subject to this Court's review. See Motion to Strike (Aug. 7, 2015) at 8-9 and Ruling on Motion (9/10/2015) (striking this issue). Because the County investigators flew at or above the lawful elevation, their observations from the aircraft do not offend Art. 1, § 7. See Wilson, 97 Wn. App. at 583.

b. The Aerial Images Revealed Less Than Could Be Seen With The Naked Eye.

The District Court asked the parties to address what could be seen with the naked eye from a lawful altitude to test whether the aerial images revealed more than could be perceived through the officers' senses from a lawful vantage point. CP 273. The

County sent two investigators to fly over Speed's property at a lawful altitude and see what was visible. Because there was a question as to whether the lawful altitude in the area was 500 or 1,000 feet above ground level, the investigators viewed the property from both elevations. Laws testified that at 1,000 feet "it was striking how much more detail he could see with his unaided eye than he had been able to see" in the aerial images. CP 363. At 500 feet, it was "incredible how much more detail he could see[.]" CP 363-64. Given this undisputed testimony, the District Court found that the aerial photographs in this case "provide less detail than if Mr. Laws had flown over the defendant's property at a lawful elevation and observed the structure in question with his unaided eye. The images do not reveal what cannot be seen with the naked eye." CP 364.

Speed has never challenged these factual findings,⁵ which are supported by Laws' undisputed testimony, so they are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). As the Superior Court concluded in its appellate review, the unchallenged findings are dispositive: "Because the Polaris

⁵ See Notice of Appeal (CP 1-5) (not assigning error to District Court's finding that the aerial images provide less detail than can be seen with the unaided eye at a lawful elevation).

images, even as enhanced, provided no greater detail than what law enforcement officers could have seen from the naked eye ... from a lawful vantage point, the Polaris images were properly considered by the issuing magistrate.” CP 428. In light of these undisputed facts, Speed’s claim that the images constituted an unlawful search must fail.

c. Probable Cause Exists Without Reference To The Challenged Images.

Even if viewing the Polaris and Google images somehow constituted an unlawful search, the search warrant is still valid because, as the District Court correctly determined, there was probable cause without reference to the aerial images. CP 349-50. This Court should affirm.

An issuing magistrate’s determination of probable cause is given great deference by the reviewing court and will be reversed only upon a showing of abuse of discretion. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). In evaluating whether probable cause supports the search warrant, a reviewing court considers only the information that was brought to the attention of the issuing magistrate at the time of the warrant request. State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988). “All doubts

are resolved in favor of the warrant's validity." Id. Probable cause exists where the affidavit sets forth facts sufficient to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity and that evidence of such activity can be found at the place to be searched. Id. "It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." Id. at 505.

When information contained in an affidavit of probable cause for a search warrant is obtained by an unconstitutional search, that information may not be used to support a warrant. State v. Eisfeldt, 163 Wn.2d 628, 640, 185 P.3d 580 (2008). The reviewing court must view the warrant application without the illegally-gathered information to determine whether the remaining information in the affidavit independently establishes probable cause. Id. Only if the application, viewed in this light, fails to establish probable cause should the evidence obtained pursuant to that warrant be excluded. Id. If the affidavit establishes probable cause independent of illegally-obtained information, it is still valid. State v. Coates, 107 Wn.2d 882, 887-88, 735 P.2d 64 (1987).

Here, the District Court carefully considered the facts and circumstances set forth in the affidavit after excising the aerial images. CP 349. The remaining information established the following:

- a) A Building Permit is required for a residence. No Building Permit could be located;
- b) A Building Permit is required for a building greater than 1,000 square feet. No Building Permit could be located;
- c) An Approved Owner Builder Exemption is required for a building less than 1,000 square feet and greater than 200 square feet. Assessor records indicate the structure in question is in excess of 200 square feet. No approved Owner Builder Exemption existed;
- d) Assessor records indicated the structure in question contained a wood stove. The defendant informed the Assessor that the structure contained a wood stove. The defendant's attorney stated that the structure did not contain a wood stove;
- e) A Mechanical Permit is required for a wood stove. No Mechanical Permit could be located for a wood stove;
- f) Defendant's counsel stated that the defendant lived in a trailer on the property. State and local law regulate the installation and permitting of trailers. No permits to use the trailer as a residence could be located. No sewage disposal permit for the trailer could be located; and,
- g) San Juan County Superior Court records from 2001 indicated that the defendant and his former partner applied for an "accessory agricultural building" on property not part of this case, constructed a residence in the accessory agricultural building, and did this to avoid application of certain building codes.

CP 349. Thus, even without the aerial images, the affidavit provides sufficient facts to demonstrate the probability that Speed violated state and local law. CP 350. Specifically, the District Court found that, "without regard to any of the statements or inferences associated with the [aerial images], there remains probable cause to believe the following:

- a) One or two unpermitted structures, the building or the trailer, were located on the property in violation of the law;
- b) The building, if over 1,000 square feet, had been constructed without a building permit in violation of the law;
- c) The building, if over 200 and less than 1,000 square feet, had been constructed without first having obtained an approved exemption in violation of the law;
- d) The defendant was residing in either the building or the trailer in violation of the law;
- e) A wood stove was located in the building on the property without a mechanical permit in violation of the law;
- f) The defendant had no approved Septic System for either the building or trailer in violation of the law; and,
- g) The defendant, by himself or through his attorney, had supplied false or misleading information to the county.

CP 350. Since Laws' affidavit established probable cause without reference to the aerial images, the search warrant is not invalid even if the images were unlawfully obtained. Coates, 107 Wn.2d at 887-88.

Speed's argument that the State lacked probable cause because the images were stale fails for the same reason. In any event, neither the images nor the initial citizen complaint conveyed information that was stale. Whether information is too stale to provide probable cause is a determination based on the circumstances of each case. State v. Lyons, 174 Wn.2d 354, 360, 275 P.3d 314 (2012). Typically, the key to that determination is the time between the observation of criminal activity and the application for a warrant and the nature and scope of the suspected activity. Id.

“While there is no fixed rule as to the permissible time lapse between the occurrence of the facts disclosed in the affidavit and the date of the application for a warrant, whether information in an affidavit supporting a search warrant is too stale to be reliable is judged by common sense.” 12 Wash. Prac., Criminal Practice & Procedure § 3009 (3d ed.). Thus, in the context of a marijuana grow operation, Division Three of this Court upheld a warrant based on a weeks-old tip, observing that an ongoing grow operation is “hardly a now you see it, now you don’t event.” State v. Payne, 54 Wn. App. 240, 246, 773 P.2d 122 (1989) (internal quotation marks omitted). That is all the more true with respect to land use code

violations – especially the construction and maintenance of the relatively large, permanent structure that indisputably still exists, without necessary permits or exemptions, on Speed’s property. Despite a substantial passage of time between production of the aerial images at issue and the search warrant application, common sense dictates that evidence of the continuing code violations would still be found on Speed’s property.

Speed also argues that the search warrant application failed to establish probable cause independent of the aerial images because statements in Laws’ declaration were inaccurate or misleading, an argument that the District Court flatly rejected. Brief of Appellant (9/18/15) at 35-37. Specifically, Laws asserted in his declaration that the large building had characteristics that were more consistent with a single family residence than with an accessory building, but later admitted in his testimony that an accessory building could also have such features; he asserted that the large structure had a footprint of 1,332.5 square feet, but failed to explain that a footprint calculation does not reflect the actual square footage of the building; and Laws asserted that the purported accessory building was located “at some distance from agricultural activity, which is not typical of agricultural/accessory

buildings,” but later admitted that some agricultural activity might occur indoors. See 7/23/2013 RP 3-7.

Speed’s argument suggests that the State could not establish probable cause to believe evidence of land use code violations would be found on his property as long as it was possible that the large structure on his property was not being used as a single family residence. But “probable cause is not negated merely because it is possible to imagine an innocent explanation for observed activities[.]” State v. Graham, 130 Wn.2d 711, 725, 927 P.2d 227 (1996) (quoting State v. Fore, 56 Wn. App. 339, 344, 783 P.2d 626 (1989)). And even if the structure was in fact used as an agricultural accessory building, it still lacked the necessary Statement of Exemption and therefore still in violation of the Code.

In any event, the District Court rejected the argument that Laws’ declaration contained false or misleading information in its decision denying Speed’s Franks⁶ motion. CP 273-77. The court pointed out that Laws’ statement that skylights, porches, and decks were “inconsistent with its use as an accessory building, but consistent with its use as a residence” was based on Laws’ training and experience in code enforcement and was not rendered false by

⁶ Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

his later admission that an accessory building might also have such features. CP 277. Similarly, the court concluded that Laws' statement that an accessory building is generally located in closer proximity to agricultural activity than Speed's building appeared to be was "true based upon [Laws'] training and experience." CP 277. The court also rejected the claim that Laws had misled the magistrate by stating that the building on Speed's property had a *footprint* of 1,332.5 square feet, without further explaining that his department calculates the *square footage* of an accessory building without regard to the footprint, or that the actual square footage of the building in question was under 1,000 square feet⁷ and therefore not subject to the building permit requirement. CP 276. As the court pointed out, Laws correctly informed the magistrate that a building under 1,000 square feet did not require a permit with a valid exemption, and that neither a permit nor an exemption had been issued. CP 276. In other words, Laws correctly informed the magistrate that Speed's structure was either under 1,000 square feet and needed an exemption, or was over 1,000 square feet and

⁷ Speed's argument suggests, without reference to any evidence, that Laws knew the structure's actual square footage when applying for a search warrant. Since the County sought the warrant in part to measure the square footage of this structure, the only reasonable inference is that Laws did not know that the structure was under 1,000 square feet. See CP 172.

needed a permit, and that neither a permit nor exemption had been obtained. Although Speed apparently challenges the District Court's conclusion, he provides no explanation for why he believes the trial court erred.⁸

To establish probable cause, it was not necessary for the State to definitively establish that the large structure was over 1,000 square feet or that it was being used as a single family residence. Rather, the State needed only to establish a reasonable probability that the building was over 1,000 square feet, requiring a permit that Speed did not have; or between 200 and 1,000 square feet, requiring a valid exemption that Speed did not have; or was being used as a residence, requiring a permit that Speed did not have; or contained a wood stove, requiring a mechanical permit that Speed did not have. The facts and reasonable inferences from Laws' declaration easily satisfy that standard. This Court should affirm.

⁸ Indeed, Speed's argument on this point is devoid of citations to the record or to legal authority. See Brief of Appellant at 34-35. Accordingly, this Court may decline to consider it. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

2. THE TRIAL COURT DID NOT ERR BY FAILING TO APPLY AGUILAR-SPINELLI BECAUSE THE SEARCH WARRANT WAS NOT BASED ON AN INFORMANT'S TIP.

In his declaration in support of the search warrant, Laws referred to "an activity report that a single-family residence had been constructed [on Speed's property] without the benefit of an approved building permit." CP 175. This report evidently came from Steve Pearson, a fellow Orcas Island resident whom Speed had earlier accused of committing land use violations. CP 191-92. Speed unsuccessfully argued in his motion to suppress that Pearson's report did not provide probable cause. CP 201-02.

Speed now contends that the lower courts erred by failing to employ the Aguilar-Spinelli⁹ test to determine whether the State properly relied on Pearson's "tip" in its search warrant application.¹⁰ Brief of Appellant at 21. "Under that test, to establish probable cause for issuance of a search warrant based upon an informant's tip detailed in an affidavit, the affidavit must demonstrate the

⁹ Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

¹⁰ The Commissioner's ruling granting discretionary review noted that review of this issue "may be warranted" as a decision in conflict with State v. Lyons, 174 Wn.2d 354, 359, 275 P.3d 314 (2012), but left it to this Panel to determine whether to consider its merits. Notation Ruling (March 2, 2015) at 3.

informant's (1) basis of knowledge and (2) veracity." State v. Vickers, 148 Wn.2d 91, 112, 59 P.3d 58 (2002).

The Superior Court declined to analyze Pearson's knowledge and veracity because "the Declaration of Christopher S. Laws, which was the only document presented to the magistrate who issued the search warrant, did not contain *any information* about what Mr. Pearson may have said to a County employee." CP 427 (emphasis added). Thus, the search warrant was not "based upon an informant's tip detailed in an affidavit" and Aguilar-Spinelli does not apply. Vickers, 148 Wn.2d at 112. The Superior Court correctly concluded that "[e]valuating the information given to the employee by Mr. Pearson is therefore not necessary or even appropriate" in determining whether the search warrant was supported by probable cause. CP 427.

In State v. Lyons, our supreme court held that an affidavit for a search warrant that was based "solely on information from a confidential informant" did not establish timely probable cause because the affidavit failed to state when the informant observed the criminal activity. 174 Wn.2d 354, 357, 275 2d 314 (2012). The court reiterated the Aguilar-Spinelli requirement that an affidavit based on an informant's tip must provide sufficient facts to allow the

magistrate to evaluate the affiant's and informant's conclusions. Id. at 359. Lyons is easily distinguishable from this case, however, because here, the search warrant affidavit was *not* based solely (or to any degree) on information from a confidential informant. Rather, Laws' declaration detailed his independent investigation to establish probable cause.

Where an affidavit is sufficient to establish probable cause without reference to information provided by an informant, the court need not even address a challenge to an anonymous informant's reliability. State v. Cord, 103 Wn.2d 361, 365, 693 P.2d 81 (1985). Further, where an affidavit fails both Aguilar-Spinelli prongs, "probable cause may yet be established by independent police investigatory work that corroborates the tip to such an extent that it supports the missing elements of the Aguilar-Spinelli test." State v. Jackson, 102 Wn.2d 432, 438, 688 P.2d 136 (1984). "[I]f a tip, standing alone or partially corroborated, does fall short of probable cause, it still has a place in law enforcement, it still may contribute to the solution of the crime, by prompting a police investigation, or further investigatory work that does establish that requisite probable cause." Id. at 443 (citation omitted).

In this case, Laws corroborated Pearson's tip by confirming the presence of the building, wood stove, and trailer on Speed's property, as well as the absence of necessary permits for those structures. This corroboration is sufficient to satisfy Aguilar-Spinelli. The warrant was valid.

3. SPEED'S PUZZLING "TAINT" ARGUMENT DOES NOT MERIT REVIEW.

Speed argues that County officials viewed the Google and Polaris images of his property, which tainted their subsequent physical search of the property, which in turn tainted their observations of the property from the air. Brief of Appellant at 37-39. For this reason, he contends that "evidence of what was seen from the two fly-overs was therefore inadmissible." Brief of Appellant at 39. The Commissioner ruled that review of this issue "may be warranted" and reserved to the panel the decision whether to consider it. Notation Ruling (March 2, 2015) at 3.

This Court should decline to review Speed's "taint" argument.¹¹ Since the State did not rely on evidence from the flyovers for any other purpose, Speed presumably means that this evidence should not have been admitted for purposes of the District

¹¹ The State concedes that Speed is not barred from raising the issue by RAP 2.5, as it does appear that he first argued the point in district court.

Court's decision whether the Google and Polaris images showed more detail than could be seen with the unaided eye from a lawful elevation, and therefore, whether those images were properly included in the warrant application. But since the District Court correctly held that the warrant was adequately supported without reference to the Google and Polaris images, it makes no difference whether the fly-overs were "tainted" by the officers' prior knowledge.

Nevertheless, Speed argues that Laws' testimony that he could not determine "just from the picture" he took during the overflight that a particular feature was a solar panel proves that his view from the air was tainted by his ground-level search of the property. Brief of Appellant at 38-39. But when Speed's counsel examined Laws on that point, Laws denied that he could only tell it was a solar panel because he saw it from the ground. "Actually, in that case even at 500 to 1,000 feet you can clearly tell it's a solar panel." 7/23/13 RP 9. Laws acknowledged that while another person looking at a photo Laws took from the air might not be able to identify the panel, "remember that a photograph is something taken in a moment of time. As we circled around the entire

property we could see clearly that it was a solar panel.” 7/23/13 RP at 9.

Speed represents that Laws also testified that “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.” Brief of Appellant at 38. But the testimony to which he apparently refers does not necessarily support that assertion.¹² Speed’s counsel asked Laws whether he saw a water heater, without specifying whether he meant during the fly-over or at some other time. 7/23/13 RP 7. Laws replied that he did. Id. Counsel asked whether the water heater is pictured in one of the photos Laws took from the air. Id. Laws replied that it is. Id. Counsel asked how Laws can tell, “looking at the photograph” that an object pictured is the water heater. 7/23/13 RP 8. Laws replied, “You can’t.” Id. Counsel asked whether “you just testified that you saw the water heater?” Id. Laws replied, “I did see it.” Id. Counsel asked, “Isn’t that because you saw it on the ground?” Id. Laws replied, “Yes.” Id. It is not clear from this exchange that Laws’ assertion that he saw a water heater was based on his fly-over at all, nor that he

¹² Speed’s brief includes numerous quotations without citing the record in support.

knew the object was a water heater only because he had seen it on the ground. As with the solar panel, he may have recognized the water heater during the flyover, even though the photo he took from the air did not capture sufficient detail to identify the object.

Speed has not established that evidence from the fly-overs – admitted solely to test whether the Google and Polaris images revealed more than could be seen with the naked eye -- was tainted by the officers' prior knowledge. And even if he had, the District Court's correct conclusion that the warrant was supported by probable cause independent of the Google and Polaris images renders the issue moot. This Court need not consider the merits of Speed's "taint" argument, but it fails in any event.

D. CONCLUSION

For the reasons set forth above, the State respectfully asks this Court to affirm.

DATED this 20th day of October, 2015.

Respectfully submitted,

RANDALL GAYLORD
San Juan County Prosecuting Attorney

By: Jennifer P. Joseph

JENNIFER P. JOSEPH, WSBA #35042
Special Deputy Prosecuting Attorney
Attorneys for Respondent

Appendix

SAN JUAN COUNTY DISTRICT COURT
BEFORE STEWART ANDREW, JUDGE

OCT 16 2012

San Juan County, Washington

DECLARATION FOR SEARCH WARRANT

(CASE NO. _____)

STATE OF WASHINGTON)
) ss
COUNTY OF SAN JUAN)

The undersigned on oath states:

1. I am Rob Nou, Sheriff of San Juan County Sheriff.
2. That declarant believes evidence relating to the crime(s) of: Making a false statement to a public servant, RCW 9A.76.175, and constructing a structure without first obtaining an approved permit, S.J.C.C. 18.100.020A and 18.100.060B, to wit:

Evidence of a crime (describe):

- A. Unpermitted structures, to include, but not limited to: (1) a building designated as "SFR" on Attachments A and B; (2) a 30 foot travel trailer shown on Attachment A; (3) any structure exceeding 200 square feet, and
- B. all utilities and fixtures requiring permitting under state or local law.

Contraband; the fruits of a crime, or things otherwise criminally possessed (consisting of): see above.

Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed (describe):

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CrR 2.3
CrRLJ 2.3
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REV: 5/96

State of Washington)
County of San Juan) ss
I, CYNTHIA ROSE Clerk of the District
Court of the State of Washington, for the County of San Juan
do hereby certify that the foregoing instrument is a true and
correct copy of the original now on file in my office.
IN TESTIMONY WHEREOF, I have hereunto set my hand
and affixed the Seal of said Court at my office at Friday Harbor
this 17th day of September, 2014.

Cynthia Rose
District Court 0-000000171

Are concealed in SAN JUAN COUNTY, WASHINGTON, in, on or about:

Certain premises (describe):

629 Minnow Creek Lane, Orcas Island, San Juan County, Washington, tax parcel number 260324003, the property within the orange lines on Attachment B.

Vehicles (describe):

Person(s) (Description(s)):

3. That affiant's belief is based upon the following facts and circumstances:

This case is being investigated by Code Enforcement Officer Christopher Laws and myself. I have reviewed Christopher Laws' attached declaration and have discussed the declaration with Mr. Laws.

For the reasons stated in Mr. Laws' declaration, I wish to search the property located at 629 Minnow Creek Lane, Orcas Island, San Juan County, Washington, tax parcel number 260324003 for evidence of building code violations on the property involving unpermitted structures, and utilities and fixtures requiring permits under state or local laws. The real property is enclosed within the orange lines on Attachment C to Mr. Laws' declaration.

"SFR" structure: In order to properly inspect the property for such violations relating to the structure marked "Suspected Unpermitted SFR" on Attachments A, B, and C, to Mr. Laws' declaration, I wish to make observations, and take measurements and photographs of the dimensions and square footage of the unpermitted structure, including taking the measurements of all exterior walls, porches, decks, roof lines, overhangs, window and door openings and other appurtenances, all interior room dimensions, hallways, countertops and cabinet spaces, closets, crawlspaces, attic spaces, and storage areas; taking measurements

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0-000000172

and examining any wood, gas or other stove or fireplace attached to the chimney visible in the aerial photographs; examining the nature and extent of any electrical wiring in the structure including any electrical panel(s); examining the nature and extent of any plumbing systems in the structure including, fixture locations, drains, waste and vent lines; examining the nature and extent of any phone, electrical, cable, satellite, water and other utility locations on the property and any associated connection and/or penetration to or through the unpermitted structures; examining the nature and extent of any appliances, fixtures, mechanical devices, electrical outlets, and smoke alarms in the structure; and examining the nature and extent of any evidence of recent construction or demolition activity on the exterior or interior of the structure. This information helps determine the purposes for which the structure is used and the nature of the permits that are required.

Travel trailer: In order to properly inspect the property for such violations relating to the approximately 30 feet travel trailer disclosed by Mr. Delay, which is designated "Suspected Trailer" on Attachment A of Mr. Laws' declaration, I wish to examine the size, type, model and location of the trailer, including any utility hookups to the trailer and any structures attached to the trailer.

Structures exceeding 200 square feet: In order to properly determine whether any other structures found on the property are unpermitted, I wish to examine such structures by taking measurements of their size to determine if they exceed 200 square feet, and, if they equal or exceed such size, I wish to inspect the structures to determine their size and purpose and to make all inspections and examinations as outlined in the above paragraph relating to "SFR structure".

I also wish to take photographs of the real property, and all structures, fixtures and utilities on the premises searched within the scope of the warrant.

I wish to have the assistance of county building inspectors and code enforcement officers, who have the knowledge, training and experience to perform such inspections.

DECLARATION FOR SEARCH WARRANT

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CrR 2.3

CrRLJ 2.3

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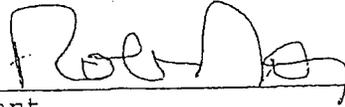
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0-000000173

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

Date: 10-16-12

Place: Friday Harbor, WA



Declarant

Rob Now

Type or Print Name

DECLARATION FOR SEARCH WARRANT

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CrR 2.3

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0-000000174

DECLARATION OF CHRISTOPHER S. LAWS

Christopher S. Laws states and declares:

1. I am of legal age and am competent to provide the following testimony.
2. I am the Code Enforcement Officer for San Juan County Community Development and Planning.
3. As Code Enforcement Officer I investigate building and land use code violations in the County. I attempt to work with property owners to remedy code violations, however if this is not successful, I then proceed to enforcement action.
4. On or about December 16, 2011, I received an activity report that a single-family residence had been constructed at 629 Minnow Creek Lane, Orcas Island, tax parcel 260324003, without the benefit of an approved building permit.
5. Building permits are required for the construction of all single-family homes in the County.
6. According to San Juan County records, San Juan County tax parcel 260324003 is owned by Errol Speed, trustee for the Speed Family Trust.
7. Direct observation of structures on this parcel is not possible from a public way.
8. An aerial view of the tax parcel 260324003 obtained from Google maps as well as San Juan County's Polaris mapping imagery show a large structure on the property that appears to have three skylights in the roof, a chimney, a small porch and a deck. The Polaris images were taken in 2008. The Google maps images were taken in 2011. Copies of these images are attached hereto as Attachments "A", "B", "C", and "D".
9. San Juan County records show that during a meeting with the San Juan County Assessor, Errol Speed provided the Assessor with information about the large structure for taxing

purposes, and claimed the structure had no electricity, no plumbing, no septic, but does have a wood stove.

10. A search of the current EDEN permit data base used by San Juan County, the previously used ACCESS permit data base and archived PARADOX data base, and a review of the Assessor's records show no building permits, plumbing permits, or mechanical permits have been issued for tax parcel 260324003.

11. On December 21, 2011, a letter of inquiry was sent to the parcel owner which stated the nature of my investigation and the permit requirements for single-family residences. I asked the parcel owner to please contact me within fourteen days.

12. On January 5, 2012, a Notice of Violation and Stop Work Order was mailed to the parcel owner for failing to respond to the letter of inquiry within fourteen days as required. The Notice of Violation and Stop Work Order was posted on the site on January 6, 2012.

13. On January, 6, 2012, I received an email from the parcel owner's attorney, Lawrence Delay. Mr. Delay stated that the building, marked as "suspected unpermitted SFR" in Attachments "A", "B" and "C", is not a residence and, as indicated in the Assessor's parcel records, has "no septic, no electric, no plumbing." Mr. Delay stated that the occupants on the property reside in a 30-foot trailer on the property and that there is no wood stove in the building. The statement regarding the wood stove is directly contrary to the information provided by Mr. Speed to the County Assessor. Attachment "A" shows a structure that appears to match the description of the trailer mentioned by Mr. Delay. The structure is marked "suspected trailer".

14. Any structure, whether it be a single-family residence or an agricultural building such as a barn or shed, which exceeds 1000 square feet requires an approved building permit from San Juan County to construct. A structure that is less than 1000 square feet may be

constructed with an Owner/Builder Exemption that is reviewed and approved by Community Development and Planning. Any residence, regardless of size, requires an approved building permit. Any structure less than 200 square feet which meets the exemption requirements listed in the San Juan County Code does not require a permit.

15. The Assessor's records show a structure on tax parcel 260324003 with an overall foot print of approximately 1332.5 square feet. This appears to be the structure marked as "suspected SFR" in Attachments "A", "B" and "C". Attachment "B" is a close up of the same structure. According to the assessor's office, Mr. Speed stated that this structure is used for accessory purposes. However, Attachment D reveals characteristics of the building that are inconsistent with its use as an accessory building, but consistent with its use as residence: (1) sky lights, (2) a stove, (3) a wrap-around deck, and (4) a covered porch. Furthermore, as can be seen in Attachments "A", "B" and "C", the building is located a distance from agricultural activity, which is not typical of agricultural/accessory buildings.

16. According to a Mediation/Arbitration Decision filed in the San Juan County Superior Court in cause number 00-2-05060-3 by Lawrence Delay, in a dispute between Errol Speed and his then-partner Libby Cook, Mr. Speed and Libby Cook built a residence on property where the couple lived, that Libby applied for a permit for an "accessory agricultural building" for the structure, rather than a permit for a residence and that "[b]oth Libby and Errol admit they did so to avoid the application of certain building codes."

17. Additionally, trailer installation and permitting is regulated by both state and local law. I have been unable to locate any permits for the trailer Mr. Delay discussed.

18. Finally, a mechanical permit is required for a wood stove.

19. It appears from the above-stated information, that there are at least two unpermitted structures on tax parcel 260324003 which is a criminal offense under S.J.C.C. 18.100.020A and 18.100.060B. Furthermore, it appears that the information provided by Mr. Speed [see #9 supra] is inconsistent with that provided by his lawyer and inconsistent with the appearance of the large structure as shown in the attachments. When considered in light of Mr. Speed's prior misrepresentation of the nature of his and Ms. Cook's residence, there is good cause to believe that Mr. Speed has provided false or misleading misinformation to the assessor's office about the nature of the large structure on his property and its use.

20. In order to verify what permits are required for this parcel to bring it into conformance with state and local requirements the following information is needed:

a. The dimensions and square footage of the unpermitted structure visible in the attachments, including measurements of all exterior walls, porches, decks, roof lines, overhangs, window and door openings and other appurtenances, all interior room dimensions, hallways, countertops and cabinet spaces, closets, crawlspaces, attic spaces, and storage areas;

b. Measurements and installation information for any wood, gas or other stove or fireplace attached to the chimney visible in the aerial photograph;

c. Nature and extent of any electrical wiring in the structure including any electrical panel(s);

d. Nature and extent of any plumbing systems in the structure including, fixture locations, drains, waste and vent lines;

e. Nature and extent of any phone, electrical, cable, satellite, water and other utility locations on the property and any associated connection and/or penetration to or through the unpermitted structure;

f. Nature and extent of any appliances, fixtures, mechanical devices, electrical outlets, and smoke alarms in the structure;

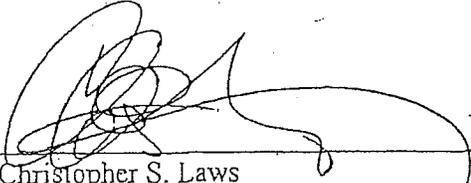
g. Nature and extent of any evidence of recent construction or demolition activity on the exterior or interior of the structure;

h. Size, type, model and location of the trailer indicated by Mr. Delay, including any utility hookups to the trailer and any structures attached to the trailer;

i. The location, size and purpose of any and all additional structures over 200 square feet in size located on the property.

I hereby declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated: 10/10/12
Friday Harbor Washington



Christopher S. Laws
Code Enforcement Officer, San Juan County

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Lawrence Delay (lcdelay@rockisland.com), the attorney for the appellant, Errol Charles Speed, containing a copy of the Brief of Respondent, in State v. Speed, Cause No. 72302-2-1, in the Court of Appeals, Division I, for the State of Washington.

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


Name
Done in Seattle, Washington

10-20-18
Date