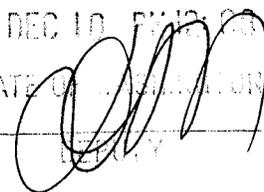


FILED  
COURT OF APPEALS  
DIVISION II

CO DEC 10 PM 12:00  
STATE OF WASHINGTON  
BY 

NO. 36382-8-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**RANDY REGINALD HARKNESS,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

The trial court erred under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when it refused to suppress evidence the police seized pursuant to a search warrant issued in reliance upon an affidavit containing materially false statements and information illegally obtained.

### ***Issues Pertaining to Assignment of Error***

Does a trial court err under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, if it refuses to suppress evidence the police seize pursuant to a search warrant issued in reliance upon an affidavit containing materially false statements and information the police illegally obtained when the absence of that information vitiates probable cause?

## STATEMENT OF THE CASE

### *Factual History*

In February of 2004, the defendant Randy Harkness and his wife were living at 343 Halliday Road in rural Lewis County on a large property that includes a long tree-lined driveway, a residence, a large detached shop, and other outbuildings. RP 40-45, 96-99, 175-178<sup>1</sup>. In 2003, the defendant pled guilty to one count of manufacturing marijuana after the police executed a search warrant on his property and found a marijuana grow inside a room in the detached shop. CP 34-36<sup>2</sup>; RP 254-258. As of February of 2004, the defendant was on active probation with the Washington State Department of Corrections (DOC) on that conviction. RP 40-41; CP 92.

For a few months prior to February of 2004, Lewis County Deputy

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<sup>1</sup>The record in this case includes the following nine volumes of verbatim reports: (a) four volumes of the combined *Franks* and CrR 3.6 hearings held on 2/18/05, 3/11/05, and 3/14/05, referred to herein as “RP 2/18/05-I” “RP 2/18/05-II”, “RP 3/11/05” and “RP 3/14/05”; (b) one volume of the report of the state’s motion seeking to exclude a medical marijuana defense held on 11/18/05, referred to herein as “RP 11/18/05”; (c) three continuously numbered volumes of the trial held on 1/16/07, 1/17/07, and 1/18/07 referred to herein as “RP,” and (d) one volume of the verbatim of the post-trial motions and sentencing held on 5/23/07 and referred to here as “RP 5/23/07.”

<sup>2</sup>The record in this case also includes Clerk’s Papers as filed by the original appellate attorney, referred to herein as “CP” and Supplemental Clerk’s Papers filed by the current appellate attorney, referred to herein as “SCP.”

Sheriff Engelbertson developed information that led him to believe that the defendant might again be growing marijuana on his property. CP 34-36. This information included a report of an “elevated” use of electricity and the Deputy’s observations that a vent coming out of defendant’s shop seemed warm as it melted ice on the outside of the building where the vent exited the roof. *Id.* However, not having probable cause to obtain a search warrant, Deputy Engelbertson told two DOC officers what he suspected. CP 92. Although neither DOC officer supervised the defendant’s community custody, they decided to search the defendant’s shop for evidence of “criminal activity.” CP 92-93. They also asked Deputy Atkisson and Deputy Weinreich to go with them for safety reasons because Deputy Engelbertson had told them that the defendant had firearms in his possession when he was arrested during the execution of the first search warrant. CP 93. Deputy Engelbertson and the two DOC officers denied that the DOC officers’ search was simply a ruse to help Deputy Engelbertson effect a search for which he did not have probable cause and could not obtain a search warrant. RP 3/11/05 53-66, 67-84; CP 93.

Ruse or no, during the late morning of February 18, 2004, Deputies Atkisson and Weinreich accompanied two DOC officers to the defendant’s property. RP 40-45, 77-81; CP 93-95. Deputy Weinreich waited out in the driveway as Deputy Atkisson and the DOC officer contacted the defendant

and went into the detached shop with him. RP 42-43. Once in the shop, the officers found a locked room. RP 79-81; CP 93-94. The defendant told them that his brother had property in the room and had the key. CP 35. At this point, the DOC officers left the property. RP 42-43, 79-81. Deputy Weinreich and Deputy Atkisson also left the property and immediately reported what they had seen to Deputy Engelbertson. RP 42-45, 81-82. For his part, Deputy Engelbertson decided to attempt to get a telephone warrant based upon the information he had. RP 97-98. He told Deputy Weinreich and Deputy Atkisson to stand just off the defendant's property, and only enter if they thought the defendant was going to "destroy evidence." RP 42-45, 81-82.

While the other deputies stationed themselves outside the defendant's property, Officer Engelbertson called Lewis County Superior Court Judge Brosey and gave a sworn statement in support of his request for a search warrant. CP 32-38. This statement began at 1:38 in the afternoon. *Id.* It included the following specific allegations of criminal conduct.

My probable cause is on January 30<sup>th</sup>, 2003, I applied for and received a search warrant for the outbuilding at 343 Halliday Road, Centralia, Lewis County, Washington, the residence of Randy Harkness, for the manufacture of marijuana. Upon execution of the search warrant, I found approximately 208 marijuana plants, numerous growing lights and a CO2 generator and various other evidence used in the manufacture of marijuana. Mr. Harkness was also contacted during the search warrant. Mr. Harkness gave a taped statement admitting the marijuana grow was his and he sold the marijuana for

approximately \$10,000.00 a crop. During the last several months, I have again been investigating Mr. Harkness for the manufacture of marijuana. I have subpoenaed the power records for 343 Halliday Road and have noticed the power consumption for the building, buildings on the property was again elevated. I also have conducted surveillance on the residence and outbuildings and noticed that during times of frost and snow, the ice has been melted around a large industrial vent coming out of the previous grow room. This told me there was an excessive amount of heat coming out of the grow room. Growers use high power lights, grow lights for their grow which creates an excessive amount of heat. On February 18, 2003(sic2004) I was contacted by Deputy Weinreich who told me, who had been to the Halliday Road address with Department of Corrections. Department of Corrections had conducted a contact with Mr. Harkness due to his active status from the previous manufacture of marijuana conviction. Deputy Weinreich told me he heard Mr. Harkness tell members of DOC he would not let them search the previous grow room as the door was locked an he did not have a key and his brother had been storing some of his belongs in the room and he had the key. Deputy Weinreich told me Mr. Harkness seemed nervous when being asked about the room. Deputy Weinreich also saw numerous black plastic grow pots next to the outbuilding. I contacted Deputy Weinreich after they had left Mr. Harkness' residence and believed with this current information coupled with the current investigation I was already conducting, I had enough to apply for a search warrant for manufacture of marijuana. Deputy Weinreich also contacted Mr. Harkness' brother by phone and was told by his brother he did not have any belongings in the room and did not have a key to it. I instructed Deputy Weinreich and Atkisson to contact Mr. Harkness and tell him I was applying for a search warrant as I wanted to freeze the scene for destruction of evidence purposes. When they arrived to the driveway, Mr. Harkness had put a cable around the gate and had padlocked the entry. I instructed them to watch the outbuilding from the road and not to make entry on the property unless they saw Mr. Harkness destroying evidence. As I began applying for the search warrant, I was advised by Deputy Weinreich, they saw Mr. Harkness coming out of the outbuilding, dragging marijuana plants and throwing them over a steep bank. At that time the deputies made contact with Mr. Harkness detaining him. I also contacted Mr. Harkness who had been read his Miranda Warnings. Mr. Harkness told me had knew he was in trouble, that he

wasn't growing as many marijuana plants as before. He also stated he did have a key to the room and there was a grow in the room. Mr. Harkness then said he would like to talk to a lawyer at which time I did not ask any further questions of Mr. Harkness. I did see the marijuana plants Mr. Harkness had been taking out of the grow room for destruction.

CP 34-36.

During Officer Engelbertson's telephonic testimony, Judge Brosey asked whether or not the officers were on the county right of way when they saw the defendant taking the marijuana plants out of the building and throwing them over the bank. CP 36. Officer Engelbertson testified that they were. *Id.*

Based upon Officer Engelbertson's testimony, Judge Brosey authorized the placement of his signature upon a warrant to search the defendant's detached shop. CP 37. With this warrant, Officer Engelbertson entered the shop and found a number of small marijuana plants in the locked room, along with two grow lights, a CO2 generator, potting soil, and empty pots. RP 99, 118-121.

#### ***Procedural History***

By information filed February 19, 2004, the Lewis County Prosecutor charged the defendant Randy Reginald Harkness with one count of

manufacturing marijuana. CP 1-2.<sup>3</sup> The defendant thereafter moved to suppress (1) the deputy and DOC officers' initial observations while in the defendant's shop, (2) the officers observations of the defendant taking plants out of the shop, (3) the evidence the officers seized when they entered his property without a warrant, and (4) the evidence the officer seized pursuant to the execution of the warrant. CP 3-4, 9-49. The basis for the first claim was that the DOC officers entry into the defendant's property was a ruse and not a valid DOC search. *Id.* The basis for the second request was the claim that the officers had illegally entered upon his property when they made the observations of him leaving his shop carrying plants. *Id.* The basis for the third claim was that the officers did not have exigent circumstances sufficient to allow them to make a warrantless entry onto his property. *Id.* The basis for the fourth claim was that Officer Engelbertson's sworn statement contained material misrepresentations and that without those misrepresentations there was not probable cause to issue the search warrant. *Id.*

In making the fourth argument, the defense specifically claimed that Officer Engelbertson had made the following misrepresentations in his sworn

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<sup>3</sup>In fact, the state later amended the information to add a school bus stop enhancement. However, the jury was never able to render a verdict on this allegation and the court ultimately ordered a mistrial on this issue. The state did not seek to retry the defendant on this claim.

statement to Judge Brosey: (1) that the officers had been intruding on the defendant's property at the time they observed him taking plants out of his shop and throwing them over an embankment, (2) that during the prior criminal case, Officer Engelbertson had never taken a "taped statement" from the defendant, (3) that Officer Engelbertson had not "subpoenaed" the defendant's power records, (4) that the power records did not show an "elevated" power usage, (5) that the officers who observed the defendant taking plants out of his shop did not claim that they could tell it was marijuana. CP 9-49. In support of these claims, the defendant made a preliminary motion asking the court to hold a hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). *Id.*

The court granted the defendant's preliminary request and held a joint *Franks* and CrR 3.6 hearing on 2/18/05, 3/11/05, and 3/14/05. *See* RP 2/18/05, RP 3/11/05, and RP 3/14/05. During this joint hearing, the state called a number of witnesses, including Deputy Engelbertson and Deputy Weinreich. *Id.* The defense called the defendant and his wife. *Id.* Following the hearing, the court deliberated and eventually issued a written decision, holding as follows for the purpose of the *Franks* portion of the hearing: (1) that the officers had actually been on the public right of way and not intruding on the defendant's property at the time they observed him taking plants out of his shop and throwing them over an embankment, (2) that during the prior

criminal case, Officer Engelbertson had not taken a “taped statement” from the defendant, but had taken an oral statement from the defendant, (3) that Officer Engelbertson had not “subpoenaed” the defendant’s power records, but had obtained them in another manner, (4) that the power records did show an “elevated” power usage in Officer Engelbertson’s opinion, (5) that the officers who observed the defendant taking plants out of his shop did not tell Officer Engelbertson that they were marijuana; rather, they told him that they “suspected” it was marijuana. CP 88-97. Based upon these findings, the court excised the word “taped” and “subpoenaed” from Officer Engelbertson’s sworn statement. *Id.* The court also appeared to insert the word “suspected” between the word “dragging” and the words “marijuana plants” in Officer Engelbertson’s sworn statement. *See* Ruling of Judge Hall, page 8 (“Deputy Weinrich suspected the vegetation to be marijuana based on the Defendant’s previous grow operation in the outbuilding.”) CP 95.

With the *Franks* portion of the motion completed, the trial court made a number of factual findings as part of the CrR 3.6 motion, and then ruled, either explicitly or implicitly, as follows on each part of the defendant’s arguments on the motion to suppress: (1) that the DOC officers’ initial entry onto the defendant’s property was not a ruse and was a legitimate DOC search and the information should remain in the statement given in support of the warrant, (2) that the deputies observations of the defendant leaving the

shop were made legally from a public right of way and should remain in the statement given in support of the warrant, (3) that the deputies were legally justified when they jumped over the defendant's locked gate in order to detain him until Officer Engelbertson could obtain a warrant and this information should remain in the statement given in support of the warrant, and (4) that even absent the portion of the statement excised following the *Franks* hearing, Officer Engelbertson's sworn statement still established probable cause sufficient to issue the search warrant. CP 88-97. Thus, the court denied the motion to suppress. *Id.*

Prior to trial, the defense gave notice to the state that it would rely upon a claim that the defendant's propagation and possession of marijuana was legal under RCW 69.51A. CP 98-112. In response, the state moved *in limine* to preclude any evidence on this claim, arguing that the defendant could not meet the minimum statutory requirements to establish such a defense. *Id.* Prior to trial, the court heard argument from counsel on the state's motion. *See* RP 11/18/05. The court later entered a written order granting the state's motion and precluding the defense. RP 200, SCP 40-45.

This case later came on for trial before a jury, with the state calling and recalling 6 witnesses in its case-in-chief. RP 27, 30, 40, 67, 77, 96, 167, 176, 180. These witnesses testified to the facts set out in the preceding *Factual History*. *See Factual History*. At the end of the state's case-in-chief,

the defense renewed its motion to suppress, arguing that it had just found a new witness who would testify that he saw the officers on the defendant's property during the time they claimed they were on the right of way observing the defendant taking plants out of his shop. RP 17-26, 54-64. Based upon this claim, the Judge who had heard the original suppression motion retook the stand and heard testimony from the defendant's new witness, as well as two witnesses called by the state. RP 189-208. After hearing argument from counsel, the court again denied the defendant's motion, ruling that it was still convinced that the officers were on public right-of-way when they observed the defendant taking plants out of his shop. RP 208-212.

After the state rested its case, the defendant and his father took the stand as the only witnesses for the defense. RP 213, 229. The state then called one witness in rebuttal. RP 254. At this point, the court instructed the jury with neither party making any objections to the instructions given, or taking any exceptions to the refusal to give any proposed instructions. RP 259. In fact, the defense did not propose any instructions on its medical marijuana defense claim. CP 220-244, 269-296. Following argument by counsel, the jury retired for deliberation and eventually returned a verdict of "guilty." CP 321.

Prior to sentencing in this case, the defense moved for a new trial under CrR 7.5, for relief from judgment under CrR 7.8(b), and for dismissal

under CrR 8.3. CP 324-326, 327-329, and 330-332. In essence, the defense argued that at the time he testified at trial, Deputy Weinreich had been dismissed from the Sheriff's Office for misconduct, that the state had failed to inform the defendant of this fact, and that this failure constituted prosecutorial misconduct. *Id.* The defense also moved for further discovery on this issue. *Id.* CP 336-337. The state responded with an affirmation from ex-deputy Weinreich, stating that he had not be disciplined by the sheriff's office, and that he had voluntarily resigned and taken a job with the Monteseno Police. CP 339. The court denied the defendant's motions and sentenced the defendant within the standard range. RP 5/23/07 1-39; CP 345-353. The defendant thereafter filed timely notice of appeal. CP 354.

## ARGUMENT

### **THE TRIAL COURT ERRED UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT, WHEN IT REFUSED TO SUPPRESS EVIDENCE THE POLICE SEIZED PURSUANT TO A SEARCH WARRANT ISSUED IN RELIANCE UPON AN AFFIDAVIT CONTAINING MATERIALLY FALSE STATEMENTS AND INFORMATION ILLEGALLY OBTAINED.**

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment, search warrants may only be issued upon a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582, 585 (1999); *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). In order for the judge, rather than the requesting officer, to make that determination, the affidavit must state the underlying facts and circumstances so that the judge can make a “detached and independent evaluation of the evidence.” *Id.* “Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” *Id.*

In the case at bar, the defense argues that (1) the trial court erred when it found that the sheriff's deputies had legally entered upon the defendant's property when they climbed over his locked gate and detained him as he was taking some plants out of his shop and throwing them over an embankment,

and (2) that absent the inclusion of this information into Officer Engelbertson's statement, there was no probable cause to issue a search warrant in this case. The following addresses these two related arguments.

***(1) The Deputies Did Not Have Sufficient Exigent Circumstances to Justify a Warrantless Entry onto the Defendant's Property.***

Under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment, warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets its burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988). One of the recognized exceptions to the warrant requirement arises when the police face exigent or emergency circumstances, including the need to preserve evidence that is about to be destroyed. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

In determining whether or not exigent circumstances justify an officer's failure to obtain a warrant, the courts evaluate whether or not the officer's act in the face of a perceived emergency were objectively reasonable. *State v. Lynd*, 54 Wn.App. 18, 22, 771 P.2d 770 (1989). In

*United States v. Echegoyen*, 799 F.2d 1271, 1278 (9th Cir.1986), the Ninth Circuit Court of Appeals similarly defined “exigent circumstances” under the Fourth Amendment as “those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers and other persons, the destruction of relevant evidence, the escape of the suspects or some other consequence improperly frustrating legitimate law enforcement efforts.” (quoting *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir.1984)). Consequently, an objectively reasonable perception of a substantial risk to persons or property, including property with evidentiary value, is required for the emergency exception to apply and vitiate the need for a warrant. *Id.*

For example, in *State v. Wheless*, 103 Wn.App. 749, 14 P.3d 184 (2000), the defendant was arrested for delivery of cocaine. In this case, a police officer claimed that he met the defendant in a bar and purchased cocaine from him in return for two marked twenty dollar bills. According to the officers, the defendant then walked out to the parking lot and got into a truck, where he sat for a few minutes with a female, before they returned to the bar. Once in the bar, the officers arrested the defendant. However, during a search incident to arrest, they did not find the buy money. They then went out and searched the truck, looking for the missing evidence. Although they didn’t find the money, they did find a crack pipe with residue in it.

The defendant later moved to suppress the pipe, arguing that the police had illegally made a warrantless search of the truck. The state argued, and the trial court agreed, that the search of the truck was justified as a search incident to arrest, and as a search justified under exigent circumstances to avoid the possible destruction of evidence. Thus, the court denied the motion. The defendant was later convicted and he appealed, renewing his arguments on the suppression of the crack pipe.

Initially, the court of appeals noted that the search of the truck could not be justified as a search incident to arrest because the defendant was back in the bar at the time he was arrested. Thus, he had no access to anything of evidentiary value in the truck. Although the court did find it reasonable to believe that there might be evidence in the truck, the court also held that the search could not be justified under the emergency exception to the warrant requirement. The court held:

There were no exigent circumstances to justify the warrantless search in this case. The State claims there was “a risk that evidence remained in the car [and] that important evidence was getting further and further from the scene in the hands of the woman.” But while both of those claims may have been true, the record contains no indication that evidence in the truck might have been destroyed or that the officers were prevented from pursuing the woman while waiting for a warrant. The case on which the State relies to support its exigent circumstances argument presented a radically different scenario. In *State v. Patterson*, the Supreme Court reviewed a warrantless search of a parked, secured, unoccupied vehicle where witness information and physical evidence indicated strongly that the suspect was nearby, demonstrating the “freshness of the pursuit.”

Upholding the search, the court reasoned that “[h]ad the officers delayed the search by applying for a warrant, the suspect could have moved far from the immediate scene” and that “[t]here was a need to proceed as quickly as possible to apprehend the defendant who had burglarized the store only minutes before the search.” In contrast, Wheless was under arrest. No comparable exigent circumstances were present here.

*State v. Wheless*, 103 Wn.App. at 757-758 (footnotes omitted).

Similarly, in the case at bar, the officers’ belief that the defendant was going to destroy evidence was also not objectively reasonable. First, the officers did not know that what the defendant had was evidence. Even with binoculars they were too far away to see what type of plants the defendant was carrying. Thus, they only “suspected” it was evidence based upon the fact that the defendant had grown marijuana in the past.

However, even had they been able to identify it as marijuana, they did not see the defendant attempting to destroy it. Rather, they saw him move it out of a building and throw it over a bank. They didn’t come up with any explanation as to how and why they thought this constituted “destroying” what they believed might be evidence. Thus, not only was it not objectively reasonable for the officers to conclude that what the defendant was carrying was evidence, it was also not objectively reasonable for the officer to conclude that the defendant was in the act of destroying anything at all. Consequently, the emergency exception to the warrant requirement did not justify the officers’ illegal intrusion onto the defendant’s property.

Since there was no legal justification for the officers actions in entering onto the defendant's locked property and detaining him, these facts must be excised from Deputy Engelbertson's sworn statement. These facts include the following: (1) that the plants the defendant was carrying were marijuana, and (2) all statements the defendant gave upon the officers illegal entry onto the defendant's property

***(2) Absent the Information the Deputies Obtained During Their Warrantless Entry onto the Defendant's Property, There Was No Probable Cause to Issue a Search Warrant.***

Taking out the information the deputies obtained during their illegal entry onto the defendant's property and their illegal detention of the defendant's person leaves the following facts in Deputy Engelbertson's sworn statement: (1) that the defendant had a previous conviction for growing marijuana, (2) that he refused to allow the DOC officers to enter a locked room in the shop, apparently employing a lie in his justification of this refusal, (3) that a vent out of this room was exhausting hot air out of the building, (4) the total electrical usage for the defendant's property was "elevated," and (5) deputies sitting off the property and looking through binoculars saw the defendant take what the deputies "suspected" were marijuana plants out of the shop and throw them over an embankment.

The last of these facts is particularly suspect because Deputy Engelbertson's affirmation fails to establish a basis from which the issuing

judge could conclude that the deputies had any training and experience in the identification of growing marijuana. Under our case law, the police must establish an informant's basis of knowledge before the informant's claims may be used to establish probable cause. *State v. Sieler*, 95 Wn.2d 43, 47-48, 621 P.2d 1272 (1980). This requirement is usually met if the informant was an eyewitness to the criminal activity. *See generally Utter, Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, §2.1(a) (1988). In addition, when the informant claims to have seen controlled substances, the police must also establish that the informant has the requisite expertise in the identification of the particular controlled substances he or she claimed to identify, even when the informant is a police officer. *State v. Matlock*, 27 Wn.App. 152, 616 P.2d 648 (1980).

For example, in *State v. Matlock, supra*, a police officer went to visit his sister in Colville. While at his sister's house he saw a marijuana plant growing in the neighbor's window. The Colville police later obtained a search warrant based upon this information, searched Defendant's house, and seized the marijuana. Defendant was later convicted and appealed. The Court of Appeal reversed, stating as follows:

Notwithstanding the credibility or veracity which might be attached to [the] Officer's position, the fatal flaw in this affidavit is the lack of any information to support his claim the plants he saw were marijuana. *See Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964). Absent some showing that [the] Officer had

the necessary skill, training or experience to identify marijuana plants of sight, the affidavit was insufficient to establish probable cause for the issuance of a search warrant. The affidavit is insufficient; seizure was improper. Therefore, the conviction must be reversed.

*State v. Matlock*, at 155-56 (footnote omitted).

The requirement from *Matlock* that the police demonstrate the informant's expertise in the identification of the controlled substance allegedly seen was subsequently reaffirmed in *State v. Ibarra*, 61 Wn.App. 695, 812 P.2d 114 (1991).

In *State v. Ibarra, supra*, the police obtained a search warrant based upon an officer's affidavit stating that a confidential informant had seen cocaine in the defendant's house, and that he or she "knew" what cocaine was. Defendant moved to suppress the evidence seized upon execution of the warrant, and the trial court denied the motion. Defendant was later convicted, and appealed, arguing, inter alia, that the affidavit failed to set out the informant's expertise in the identification of cocaine. In addressing this issue, the court first noted:

Although great deference is accorded the issuing magistrate's determination of probable cause, the affidavit must still inform the magistrate of the underlying circumstances that led the officer to conclude the informant obtained the information in a reliable manner. In our opinion, the affidavit must show either (1) that the observer had the necessary skill, training or experience to identify the controlled substance, (2) that the observer provided enough firsthand, factual information to an individual who possesses the necessary skill, training or experience to identify the controlled substance, or (3) that the observer provided enough firsthand factual information to the

magistrate so that the magistrate could independently determine that the informant had a basis for the allegation that a crime had been committed. In short, the affidavit must contain more than the informant's personal belief that what he or she observed was a controlled substance; it must also set forth the underlying facts upon which the belief was premised.

*State v. Ibarra*, 61 Wn.App. at 701-02 (citations omitted).

Following this recitation of the rule, the court reversed the conviction, finding that the police officer's affidavit failed to set out how the informant came by his or her information, much less how the informant had sufficient expertise in the identification of cocaine. Similarly, in the case at bar, Deputy Engelbertson's sworn statement fails to set out the qualifications for the deputies who suspected that the defendant was carrying marijuana plants out of his shop. Thus, this information does not help create probable cause.

In addition, the first four facts listed above also do not establish probable cause. First, the fact that the the defendant had a previous conviction for growing marijuana does not support a conclusion that he was growing marijuana again. Second, the fact that the defendant refused to allow the DOC officers to enter a locked room in the shop only supports a conclusion that he did not want them to see what was inside the room. It does not support a conclusion that there was marijuana in the room. Third, the fact that a vent out of this room was exhausting hot air out of the building means nothing and does not support a conclusion that there was marijuana

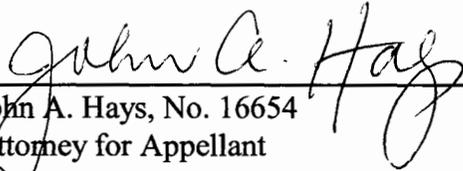
grown in the room. After all, the purpose of the vent out of a building is to take air out of the building and vent it to the outside. Thus, to the extent there was any source of heat in the shop, it would vent hot air. In this case, it is interesting to note that Deputy Engelbertson did not even claim that the shop was not heated generally. Finally, Deputy Engelbertson's conclusory statement that the total electrical usage for the defendant's property was "elevated" is not useful in a probable cause determination because the officer did not say how "elevated" that usage was, and he did not correlate that "elevated" usage to the cultivation of marijuana. Even taken together, all of these facts only create a suspicion that the defendant was growing marijuana. They do not rise to the level of probable cause. As a result, the trial court erred when it denied the defendant's motion to suppress.

**CONCLUSION**

The court should vacate the defendant's conviction and remand with instructions to grant the defendant's motion to suppress evidence.

DATED this 8th day of December, 2008.

Respectfully submitted,

  
\_\_\_\_\_  
John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

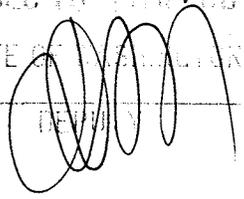
**UNITED STATES CONSTITUTION,  
FOURTH AMENDMENT**

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

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DIVISION II

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STATE OF WASHINGTON  
BY 

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II**

**STATE OF WASHINGTON,**  
**Respondent,**  
  
**vs.**  
**HARKNESS, RANDY REGINALD,**  
**Appellant,**

**LEWIS CO. NO. 04-1-00165-4**  
**APPEAL NO: 36382-8-II**  
  
**AFFIDAVIT OF MAILING**

**STATE OF WASHINGTON** )  
**COUNTY OF LEWIS** ) **vs.**

CATHY RUSSELL, being duly sworn on oath, states that on the **8TH day of DECEMBER 2008**, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTING ATTY  
345 W. MAIN STREET  
CHEHALIS, WA 98532

RANDY R. HARKNESS  
343 HALLIDAY ROAD  
CENTRALIA, WA. 98531

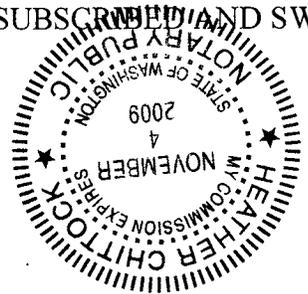
and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 8TH day of DECEMBER, 2008.

  
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 8TH day of DECEMBER, 2008.



  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: KELSO/LONGVIEW  
Commission expires: 11-04-2009

**John A. Hays**  
Attorney at Law  
1402 Broadway  
Longview, WA 98632  
(360) 423-3084