

No. 36579-1-II

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

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STATE OF WASHINGTON,

Appellee,

v.

DAVID H. HILL,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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APPELLANT'S REPLY BRIEF

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TIMOTHY K. FORD, WSBA #5986  
MacDONALD HOAGUE & BAYLESS  
705 2nd Avenue, Suite 1500  
Seattle, WA 98104  
(206) 622-1604

ATTORNEYS FOR APPELLANT

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**I. RESPONDENT’S STANDARD OF REVIEW ARGUMENT BEGS THE QUESTION PRESENTED HERE.**

The first point in our argument regarding the search warrant for Appellant’s home is that the trial court erred in reviewing the decision to issue the warrant under an abuse of discretion standard, when that decision was based on information that was inaccurate and illegally obtained for reasons unknown to the issuing Magistrate. *See* App. Br. 20-24. The Respondent does not argue to the contrary. Instead, Respondent says only that the abuse of discretion standard generally applicable to decisions to issue a search warrant should apply “when there is *immaterial* omitted information ....” Resp. Br. 10 (emphasis added).

That is surely right: there would be no reason not to give the issuing Magistrate’s decision the usual deference when the Magistrate has been given all the material information, and nothing illegally acquired. But there is a good reason not to defer when the Magistrate, unknowingly, made his decision based on bad or incomplete information. As we have shown, in such circumstances deference makes no sense, because the Magistrate never made the decision that is under review.

In this case, for example, Judge Williams never decided whether a loud humming noise and an “intermittent” sniff from a neighbors’ yard on one scene visit out of four tries plus a prior marijuana conviction equals

probable cause. A reviewing court may properly be called on to guess how he would have answered that question, but it can't "defer" to a decision that he never made.

What Judge Williams actually decided is that a host of suspicious circumstances reported by neighbors *plus* reports of the smell of growing marijuana on every visit to the suspect property *plus* unusual patterns of power use *plus* a loud humming noise *plus* a prior marijuana conviction equals probable cause. He did not know that some of the neighbors denied making the reports and none of what they did report was corroborated. He did not know that there were numerous visits to the property where nothing was smelled. He did not know that on one of the reported occasions where marijuana was reported smelled it was in front of a different neighbor's house. And he did not know that the power use records were unlawfully obtained. *See* App. Br. 10-13.

Had Judge Williams known those things, perhaps he would have issued the warrant anyway. But it is nonsense to "defer" to a hypothetical decision. It is actually worse than nonsense, because it undermines the core constitutional requirement that the magistrate be "neutral and detached." "The Constitution requires that a detached and neutral magistrate or judge make the determination of probable cause." *State v.*

*Valdez*, 137 Wash.App. 280, 284-285, 152 P.3d 1048 (2007). If it is only the reviewing judges who actually decide whether probable cause is established by the truthful and lawfully acquired evidence presented in a given case, it is they to whom the neutrality rule must apply—and a presumption in favor of probable cause imposed by a rule of deference to a finding made on a different data base, is the antithesis of neutrality.

Thus, if as the trial court found the affidavit presented to Judge Williams contained illegally obtained information—or if as we maintain the affidavit was recklessly false and misleading—the abuse of discretion standard of review should not apply. The trial court was wrong to apply it and this Court should not do so, either.

As noted, Respondent concedes as much by limiting its counterargument to circumstances where the false or illegally obtained information is “immaterial.” The question of deference therefore collapses into the merits of the issue of materiality, on which this case turns.

## **II. RESPONDENT’S BRIEF ITSELF ILLUSTRATES HOW THE INFORMATION OMITTED FROM THE WARRANT AFFIDAVIT WAS MATERIAL.**

The Respondent’s recitation of the facts underlying the issuance of the warrant virtually makes Appellant’s point on materiality. It does so by emphasizing the very facts the police unlawfully acquired and the

affidavits failed to fully disclose. *See* Resp. Br. 1-4. Prominent among those is the “evidence provided by a citizen informant” with which Respondent begins its description of the case. Resp. Br. 1. Presumably, Respondent recites those “facts” because it views them as material to the issuance of the warrant. But if that is so, it must always also be material that in at least four (4) known investigative visits to the scene none of the allegedly suspicious facts reported by these citizens was confirmed, and several of them were contradicted. *See* App. Br. 12-13.

“Quality of information, not quantity, is what establishes probable cause.” *State v. Huft*, 106 Wash.2d 206, 212, 720 P.2d 838 (1986). Because that is so, a determination of materiality of information that was wrongly included or omitted from a warrant affidavit cannot be a mechanical process. Whether an affidavit does or “does not support a probable cause finding,” *State v. Gore*, 143 Wash.2d 288, 297, 21 P.3d 262, 268 (2001), either in its original form or with redactions, is a question that requires judgment and the weighing of competing inferences.

The evidence below showed that, for all the bulkiness of the warrant affidavit in this case, it contained none of the kind of solid, reliable support for probable cause that there was in *Gore* and the cases it follows. The observations allegedly reported by the neighbors were of

questionable significance at best; the Port Townsend police reports were less than reliable and appeared to point to another location; the one-time smells the OPNET officers reported were fleeting and intermittent; the reported humming sound was at most ambiguous.<sup>1</sup> See App. Br. 10-13. Against this flimsy background, how could it be “immaterial” that investigators made three other investigative visits to the scene and saw and smelled nothing suspicious? Would a reasonable judge not want to know that before deciding whether to authorize a forcible breach of the privacy of a home?

Certainly, this information was at least relevant, because it indisputably has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Materiality requires more than relevance, but as a general matter, “the materiality standard ... is met when ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence

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<sup>1</sup> Respondent’s Brief makes a significant factual error when it states that the investigating officers were able “on a few visits, and only at night” to “smell marijuana, see high intensity lights, and hear loud electrical conversion sounds.” Resp. Br. 8. The officers only claimed to be able to smell marijuana and hear loud electrical conversion sounds on one of their “few visits” and they never saw the “high intensity lights” alleged in the Port Townsend police reports. App. Br. 12-13.

in the verdict." *Banks v. Dretke*, 540 U.S. 668, 698, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

Here, as Respondent basically concedes, removing all the information the defense below argued was false or unlawfully acquired would put the affidavit in a completely different light. Because of that, the false, omitted and wrongly obtained information pointed to by the defense was material, and the trial court should have held it so.

**III. RESPONDENT DOES NOT ANSWER APPELLANT'S CLAIM THAT THE TRIAL COURT MISPLACED THE BURDEN OF PROOF ON WHETHER THE AFFIDAVIT'S OMISSIONS WERE RECKLESS OR DELIBERATE.**

Appellant's Brief argued that, as the Supreme Court suggested in *State v. Chenoweth*, 160 Wn. 2d 454, 475, 158 P.3d 595 (2007) the greater protections provided by Washington's Constitution should require the State to bear the burden of proving that material misrepresentations and omissions in warrant affidavits were not intentional or reckless. See App. Br. 30-33. Respondent says nothing on this point, but rests solely on its contention that the misstatements and omissions were not material. See Resp. Br. 6-9, 10-11.

For the reasons set forth above, Appellant submits that the omissions and misstatement were material. And for the reasons set out in

Appellant's Opening Brief, the State should have been required to prove those material omissions were inadvertent. The trial court did not require that but instead reached its conclusions about recklessness and intentionality applying a general presumption in favor of upholding the warrant. See CP 284. Because misstatements and omissions undermine the Magistrate's role and the "authority of law," that was error.

**IV. THE TRIAL COURT CORRECTLY HELD THAT APPELLANT'S POWER RECORDS WERE ACQUIRED WITHOUT AUTHORITY OF LAW.**

Respondent's argument that Judge Verser was wrong in holding that the warrantless acquisition of power use records for Appellant's home was done without authority of law (Resp. Br. 9-10), misses the point of the ruling and misreads the law.

The testimony below showed that the Appellant's power records were obtained from Puget Power on the basis of a fax "subpoena" issued by an officer, without any judicial process. CP 76. In the only case cited by the Respondent in defense of this, *State v. Cole*, 128 Wash.2d 262, 906 P.2d 925 (1995), the records were obtained with a search warrant issued by a judge. *See id.* at 290. The statute the demand here was based on, RCW 42.17.314, was repealed some weeks before the demand was made. See RP 278. Judge Verser was right to hold that literally deprived the

demand of “authority of law” and required exclusion of the power information.<sup>2</sup>

**IV. RESPONDENT IGNORES THE FACT THAT APPELLANT’S KNOWLEDGE OF THE WHEREABOUTS OF THE KEYS TO THE LOCKED GROW ROOMS WAS BOTH INCRIMINATING AND RELIED ON IN THE DECISION TO CONVICT HIM.**

The second major issue raised by this appeal involves the failure to give *Miranda* warnings to the defendant before demanding of him the key to a locked suspected marijuana grow room. *See* App. Br. 34. The Respondent’s answer to this argument is that there was nothing incriminating about the request, and that the response had no significance other than to facilitate the progress of the search. *See* Resp. Br. 12-13. This contradicts both common sense and the record in this case.

As we have shown, knowledge of and access to closed rooms and buildings housing contraband is clearly and incriminating fact and is often the lynchpin of drug prosecution. *See* App. Br. 36. Mr. Hill’s statements about the keys were not “unexpected voluntary admissions,” *State v. Silvernail*, 25 Wash.App. 185, 191-192, 605 P.2d 1279 (1980), but were direct answers to a direct question that the officer must have expected

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<sup>2</sup> Judge Verser also commented that, as the defense had argued, “none of [the power use information] ... really adds to probable cause anyway.” Supp. RP 8.

would elicit an incriminating response. *See State v. Dennis*, 16 Wash.App. 417, 558 P.2d 297 (1976).

Although Mr. Hill's knowledge of the keys' whereabouts and ability to secure entry to the locked rooms was not the only evidence against him in this case, it was a piece of the evidence that was offered and admitted over objection, and was thus part of the evidentiary basis for the stipulation that convicted him. *See Supp. RP 33-34*. Mr. Hill was not the only person in the house and the charge against him was manufacturing marijuana, not mere possession. *See CP 2, 286*. Although fingerprints were taken from items (RP 239) at the scene, there was no evidence Mr. Hill's were found inside the grow rooms. Indeed, there was no evidence putting Mr. Hill in the locked grow rooms except his admission to knowing where the keys were.

The incriminating nature of the keys underlies both the requirement that *Miranda* warnings be given, and establishes the prejudice from the fact that they were not. Because of the constitutional nature of the *Miranda* right, the latter determination is one that must be made beyond a reasonable doubt. *State v. France*, 121 Wash.App. 394, 401, 88 P.3d 1003, (2004). Although without his admission that he knew where the keys were, the evidence may have been overwhelming that Mr. Hill was in

possession of marijuana and must have known it was in his house, that admission added significantly to the State's case that it was he who was growing it. The elicitation of that information without proper warnings cannot be held harmless beyond a reasonable doubt, to the manufacturing conviction.

### CONCLUSION

DATED this 14 day of April, 2008.

Respectfully submitted,

MacDONALD HOAGUE & BAYLESS

By



\_\_\_\_\_  
Timothy K. Ford, WSBA #5986  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 14 day of April, 2008, a copy of the Appellant's Reply Brief was sent by United States Mail, first class postage prepaid, to:

Thomas Brotherton  
Deputy Prosecuting Attorney  
Jefferson County Prosecuting Attorney's Office  
P.O. Box 1220  
Port Townsend, WA 98368



\_\_\_\_\_  
Timothy K. Ford

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