

NO. 38408-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 MAR 26 PM 3:45

STATE OF WASHINGTON,

Respondent,

v.

JAMES SCHOEN,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2009 MAR 27 AM 9:27  
BY [Signature]

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

The Honorable RONALD CULPEPPER

OPENING BRIEF OF APPELLANT

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ORIGINAL

**TABLE OF CONTENTS**

I. SUMMARY OF ARGUMENT .....1

II. ASSIGNMENTS OF ERROR ..... 1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 3

IV. STATEMENT OF THE CASE ..... 4

V. ARGUMENT ..... 11

THE USE OF THE THERMAL IMAGER WAS WITHOUT  
AUTHORITY OF LAW BECAUSE THE SEARCH WARRANT  
AUTHORIZING IT WAS BASED UPON LESS THAN  
PROBABLE CAUSE.

1. *Standard of Review* .....11

2. *Search warrants for thermal imagers may not be issued  
on less than probable cause*.....11

3. *The complaint in support of the thermal imager warrant  
in this case fails to establish probable cause under  
well- established Washington Law*.....12

    a. *The magistrate erred in considering information  
from the power company employee*.....12

    b. *The magistrate erred in considering information  
from the power company* .....16

    c. *When evaluating informants' tips,  
a structured analysis is required*.....17

    d. *The reliability of the informants' is not established* . .18

    e. *The basis of the informants' knowledge is not  
established*.....19

*f. The complaint fails to establish probable cause  
under controlling Washington law..... 20*

*g. The court's Findings of Fact as to Undisputed Facts are  
not supported in the record (the complaint)..... 23*

VI. CONCLUSION ..... 24

**TABLE OF AUTHORITIES**

**DECISIONS OF THE WASHINGTON SUPREME COURT**

City of Pasco v. Shaw, 161 Wn.2d 450, 166 P.3d 1157 (2007)..... 15

In re Personal Restraint of Maxfield, 133 Wn.2d 332,  
945 P.2d 196 (1997)..... 13-15

Seattle v. McCready, 123 Wn.2d 260, 868 P.2d 134 (1994) ..... 12

State v. Chenoweth, 160 Wn.2d 454, 158 P.3d 595 (2007)..... 19

State v. Huft, 106 Wn.2d 206, 720 P.2d 838, (1986)..... 21, 22

State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984) ..... 17, 18, 20

State v. Neth, 165 Wn.2d 177, 196 P.3d 658 (2008) ..... 11, 21, 23

State v. Vickers, 148 Wn.2d 91, 59 P.3d 58 (2002)..... 20

State v. White, 44 Wn. App. 215, 720 P.2d 873 (1986) ..... 11, 21-23

State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994)..... 11, 21, 22

**DECISIONS OF THE WASHINGTON COURT OF APPEALS**

State v. McPherson, 40 Wn. App. 298, 698 P.2d 563 (1985)..... 21, 22

State v. Rakosky, 79 Wn. App. 229, 901 P.2d 364 (1995)..... 21, 22

State v. Swenson, 104 Wn. App. 744, 9 P.3d 933 (2000)..... 15

State v. Wible, 113 Wn. App. 18, 51 P.3d 830 (2002) ..... 18

**FEDERAL DECISIONS**

Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1946).. 11

Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317,  
76 L. Ed. 2d 527 (1983)..... 17

Kyllo v. United States, 533 U.S. 27, 121 S. Ct. 2038,  
150 L. Ed. 2d 94 (2001)..... 11

U.S. v. Ventresca, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965).. 19

**WASHINGTON CONSTITUTION**

Article 1, § 7..... 12-15

**STATUTES**

RCW 42.56.330(6)..... 16

WAC 480.100.168 ..... 14

## I. SUMMARY OF ARGUMENT

Relying upon anonymous tips of innocuous activity and reports of excessive power consumption from a power company employee acting as a state agent, officers secured an unconstitutional search warrant authorizing the use of a thermal imager on Mr. Schoen's residence. After finding heat "anomalies" the officers sought a warrant to search the residence for growing marijuana, adding to the original Complaint for Search Warrant only the findings of the thermal imager.

Assuming all of the facts alleged in the first Complaint for Search Warrant to be true, the warrant is constitutionally defective in that it contains only facts totally consistent with lawful conduct, fails to point to probative indications of criminal activity, relies on information obtained in violation of Washington Constitution article 1, § 7, and therefore creates only a suspicion – not probable cause.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the order denying Mr. Schoen's motion to suppress the fruits of the search warrant issued August 6, 2007, authorizing the use of a thermal imager on the residence at 15405 133<sup>rd</sup> Ave. E, Puyallup, Washington, and the fruits of the search warrant issued August 13, 2007 authorizing the search of that residence.

2. The trial court erred in entering the following Findings Of Fact:

No. IB5: The residence remained unoccupied prior to the sale of the residence and through the time the warrant was executed. There did not appear to be any remodeling or similar type of work being done to the residence.

No. IB7: Neighbors also saw bags of a size and nature that they believed to be potting soil being delivered to the residence.

No. IB13: Citizen #1 worked for a power company other than the one that serviced the residence.

No. IB19: 3,000 Kilowatt hours for an unoccupied home the size of the residence is extremely high power usage.

No. IB29: The citizens reported the bags were consistent with, and they believed them to be large bags of potting soil.

No. IB38: Based upon the investigation that occurred, Det. Brockway properly requested and obtained the power records for the residence.

No. II: There are no known disputed facts.

3. The trial court erred when it entered the following Reasons and Conclusions For Admissibility of the Evidence:

IV1. Pierce County Superior Court Judge Nelson had probable cause to issue the thermal imaging search warrant.

IV3. The information obtained from the thermal imaging study of the residence, coupled with the information learned through citizen witnesses, records, and law enforcement investigation, lead to and created probable cause to search the residence.

IV4. Pierce County Superior Court Judge Worswick had probable cause to issue the warrant authorizing law enforcement officers to search the residence.

IV5. The evidence obtained pursuant to the search warrants is admissible.

IV6. The court's written ruling, incorporated by reference, is entered erroneously to the extent it is consistent with the above assignments of error.

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the warrantless disclosure of Mr. Schoen's private power consumption readings by a power company employee ("Citizen Informant #1") to law enforcement for the purpose of aiding a criminal investigation

violate Washington Constitution Article 1, § 7? (Assignments of Error 1-3.)

2. A search warrant must be issued upon a determination of probable cause based on facts sufficient to establish a reasonable inference the defendant is probably involved in criminal activity and evidence of the crime will be found in the specified place. More than mere suspicion or personal belief is required. Did the innocuous observations of the anonymous informants combined with the officer's observation of the porch light on and blinds down during the day provide probable cause, under Washington Constitution Article 1, § 7 to search Mr. Schoen's private power consumption records? (Assignments of Error 1-3.)

3. Did the innocuous observations of the anonymous informants, the officer's observation of porch light and blinds plus high power consumption provide authority of law under Washington Constitution Article 1, § 7 to search Mr. Schoen's home with a thermal imager? (Assignments of Error 1-3.)

#### IV. STATEMENT OF THE CASE

Based on the allegations of anonymous informants who claimed to see bright lights and no steady occupation of his home, law enforcement

obtained power records for Mr. Schoen's residence.<sup>1</sup> CP 37-39 (Att. A, p. "3 of 5" to "5 of 5".) Based on the anonymous allegations and the power records, law enforcement obtained a warrant to search Mr. Schoen's home using a thermal imager. Id. Based on the results of the thermal imager, the power records, and the allegations, law enforcement obtained a warrant to physically enter and search Mr. Schoen's home. Id.

1. Citizen Informant #1's Allegations:

a. Informant #1 said that the home was sold in December 2006, approximately six months ago, but no one has moved in. CP 37 (Att. A, p. "3 of 5")

b. Informant #1 claimed that three different vehicles have shown up at the residence on the weekends for a few hours and then left. Id.

c. Informant #1 entered Mr. Schoen's private property and examined the residence's power meter and noticed it was spinning at a high rate and usage was extreme. Id.

d. Informant #1 allegedly heard a humming sound coming from the garage area of the residence. Id.

e. Informant #1 has no criminal history. Id.

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<sup>1</sup> The fact section of this brief is taken from the search warrant affidavit for the thermal imaging warrant filed on October 24, 2007, which is attached to the State's Response to Defendant's Motion To Suppress, CP 37-39, and also attached hereto as Attachment A.

f. Informant #1 works at a power company and has had training and experience in reading power meters for work purposes. Id.

g. Informant #1 checked the power meter again a couple of weeks after the previous contact with the police and found the power meter spinning and estimated consumption at 3,000 kw/hrs for a 15 day period in addition to the humming sound. Id.

h. Informant #1 alleged that porch lights were always on at the residence. Id.

i. Informant #1 alleged the yard was always mowed but no one seems to be living there. Id.

j. #1 says people had been coming over on the weekends but over the last two weeks people are showing up every day. Id.

k. Informant #1 said that a few weeks ago people were carrying in 5-gallon buckets that appeared heavy and some cardboard boxes. Id.

l. Informant #1 said he or she has seen a few vehicles park in the driveway for a short time and then leave. Id.

m. Informant #1 said there was a garage door open once, but a large truck parked in front of it, blocking the view of the garage. Id.

2. Citizen Informant #2's Allegations:

a. Informant #2 has not seen anyone move into the home. Id.

b. Informant #2 has seen very bright orange lights come on in the family room upstairs. Id.

c. Informant #2 said the lights come on at a certain time each night near dusk. Id.

d. Informant #2 said subjects come to the residence and take care of the lawn and then leave. Id.

e. Informant #2 said another, unnamed citizen told him or her that subjects were carrying heavy white bags in through the back of the residence last week. The subjects were looking around as they entered the back of the residence with 8 or 9 heavy bags. Id.

f. Informant #2 felt the bags might be potting soil. Id.

g. Informant #2 has never seen the garage doors open. Id.

h. Informant #2 has no criminal history. Id.

### 3. Power Records

Based on these facts and several occasions on which Officer Brockaway drove by the house and saw the blinds down and porch lights on during the day, the officer obtained Mr. Schoen's official power consumption records for his residence. Id. These records showed a higher consumption than the average residence of that size and higher consumption than the previous owners, with no drop in consumption during the summer months. Id.

4. Surveillance.

Officer Brockaway conducted surveillance on the residence and noted a white male with dark hair wearing shorts standing in the front yard in August. CP 38 (Att. A, p. "4 of 5".) The vehicle parked in the driveway was registered to James Schoen, the owner of the residence. Id. After ten minutes, Mr. Schoen left his residence in his vehicle. Id. Shortly after, a vehicle registered to Randy Schoen arrived at the home. Id. Officers conducted repeated surveillance, which consistently showed Mr. Schoen at his residence. Id.

5. Informant #3's Allegations:

a. Informant #3 is concerned about suspicious behavior at the residence, and has not seen anyone move into the residence. Id.

b. Informant #3 has only once observed a vehicle stay overnight at the residence. Id.

c. Informant #3 has seen a white Honda and a white truck at the residence. Id.

d. Informant #3 said the vehicles show up for a few hours then leave. Id.

e. Informant #3 said that on July 3, 2007 a white truck arrived and drove to the back of the house by the patio doors. Id. A white male with black hair unloaded large white plastic pillow size bags into the residence from the back of the truck, bags which appeared to be heavy. Id. The male kept looking around nervously as he unloaded the bags. Id. There were about six bags. Id.

f. Informant #3 said the lights in the main dining room area come on at night even though no one appears to be home. Id.

g. Informant #3 said the entire house has been lit up with very bright lights at certain times. Id.

h. Informant #3 has seen a dark Honda at the address. Id.

i. Informant #3 has maintained a list of dates and times that each vehicle has shown up at the residence. Id. They show up at night and stay a short time. Id.

j. Informant #3 has no criminal history. Id.

6. Informant #1's Further Allegations.

Officer Brockway contacted "Citizen Informant #1", who said that on August 2, 2007, two males who had been seen before at the residence were loading items from the same white truck and bringing them into the home. Id. The next day, Officer Brockway received a phone message

from #1 that there was a blue Honda at the home along with a white male.

Id.

7. Warrant For Thermal Imaging Search.

Based on this information (Attachment A), Officer Brockaway was granted a thermal search warrant for the residence. CP 74.

8. Results of Thermal Imaging Search.

Detective Oliver Hickman provided his declaration describing the results of the thermal imaging search. Some areas of the home read as “exceptionally hot.” CP 74.

9. Warrant For Physical Search Of The Home.

On the next day, August 10, a search warrant for the residence was executed at 15405 133rd Avenue E., and growing marijuana was located there. CP 69. The complaint supporting the warrant includes the information from the original complaint plus Detective Hickman’s declaration describing the results of the thermal imaging search that had been executed the day before. Id.

In Superior Court, Mr. Schoen challenged the provision of power records to law enforcement, the constitutionality of both warrants, and the credibility and reliability of the unnamed informants. CP 2-17. In an email narrative ruling and a written Findings of Fact and Conclusions of

Law, the trial court denied Mr. Schoen's motion to suppress. CP 66-68.

Mr. Schoen timely appealed. CP 91.

V. ARGUMENT

THE USE OF THE THERMAL IMAGER WAS  
WITHOUT AUTHORITY OF LAW BECAUSE THE  
SEARCH WARRANT AUTHORIZING ITS USE WAS  
BASED UPON LESS THAN PROBABLE CAUSE.

*1. Standard of Review*

A trial court's legal conclusion as to whether facts alleged in the complaint for a search warrant establish probable cause is reviewed *de novo*. The review is limited to the four corners of the affidavit (complaint). State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). While deference to the magistrate is the general rule, this deference is not without limits. Aguilar v. Texas, 378 U.S. 108, 114-15, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964); State v. White, 44 Wn.App. 215, 218, rev. denied, (1987).

*2. Search warrants for thermal imagers may not be issued on less than probable cause.*

A thermal imager may not be applied to a private residence without prior judicial approval in the form of a search warrant. State v. Young, 123 Wn.2d 173, (1994). Kyllo v United States; 533 U.S. 27 (2001). Search warrants must be based upon probable cause. Warrants

based on less than probable cause are void. Seattle v. McReady, 123 Wn.2d 260 (1994).

3. *The complaint in support of the thermal imager warrant in this case fails to establish probable cause under well established Washington law.*
  - a. *The magistrate erred in considering information from the power company employee that was unlawfully obtained in violation of Article I, Sec. 7.*

The primary informant in this case is characterized by the state as “Citizen Informant #1.” This anonymous “Citizen Informant” is an employee of a power utility company. While the trial court found that the power company for which “Citizen Informant #1” works is a different power company than the one that services Mr. Schoen’s residence, this finding is completely unsupported in the record. Nowhere in the complaint does it state that this informant works for a different power company nor is there any fact in the record whatsoever regarding which power company this informant works for.

“Citizen Informant #1” trespassed on Mr. Schoen’s private property and examined his power meter, once before and at least once after having spoken with police about his or her previous examination of the power meter and his or her concerns that the meter reading might indicate suspicious activity. “Citizen Informant #1” provided law enforcement with his or her professional judgments about Mr. Schoen’s

power usage based upon his or her capacity as a power utility employee, and repeatedly provided Mr. Schoen's private meter readings to the police for the purpose of assisting them with a continuing criminal investigation of Mr. Schoen.

In re Personal Restraint of Maxfield, 133 Wn.2d 332, 343, 945 P.2d 196 (1997), considered a case where a power company employee called a member of a drug task force and stated that there was high power usage at a particular address. Id. at 335. Specifically, the power company employee stated that a meter near the garage indicated high readings. Id. Because it was new power service, no comparison with previous usage levels was provided. Id.

Our Supreme Court found that the disclosure of information by the power company employee to the drug task force was an unconstitutional warrantless search under Article 1, section 7 of the Washington Constitution. 133 Wn.2d at 338. The Maxfields' power usage was private information not subject to disclosure to law enforcement without authority of law, i.e., a warrant. Id. at 344.

The action of the power company employee in this case is governed by Maxfield. In Maxfield, the information was provided in an open and aboveboard manner to the drug task force. The power company employee gave his name to the police and admitted that he was acting in

an official capacity. In this case, however, the power company employee attempted to engage in the very conduct prohibited in Maxfield by adopting the pose of a “Citizen Informant.” There is nothing in the complaint suggesting that “Citizen Informant #1” is a neighbor, or lives nearby. Indeed, the facts compel the conclusion that “Citizen Informant #1” was acting as an agent of the state, using the knowledge and training he or she acquired as an employee of power company for a law enforcement purpose, repeatedly invading a private area with law enforcement’s knowledge and encouragement. The power company employee even behaved as though he or she had the authority granted to him by WAC 480.100.168, which grants power company employees the authority to access private property for purpose of reading meters. The holding of Maxfield renders his or her conduct unconstitutional.

Even if the court concludes that the power company employee was not a state agent by virtue of his government employment, he may become subject to Article I § 7 if his conduct is encouraged or adopted by the state. The dispositive questions in determining whether “Citizen Informant #1” is a state actor are (1) whether the police knew of or acquiesced in the intrusive conduct to obtain the power readings, and (2) whether he or she performed the search of power readings with the intent to assist law enforcement efforts. City of Pasco v. Shaw, 161 Wn.2d 450, 460, 166

P.3d 1157 (2007); State v. Swenson, 104 Wn. App. 744, 754, 9 P.3d 933 (2000). The record establishes that the search here fulfills both prongs. After the first time “Citizen Informant #1” trespassed upon Mr. Schoen’s property to read his meter, he or she provided the meter information to the police. “Citizen Informant #1” again trespassed on Mr. Schoen’s property to read his meter a second time; he or she provided the second meter reading to the police as part of his or her ongoing participation in the law enforcement investigation. The police clearly knew of the intrusive conduct, approved of it, and made full use of it. For constitutional purposes “Citizen Informant #1” acted as an agent of the state.

The protections of Maxwell and Maxfield are all the more important since power company employees enjoy the rarely granted authority to enter private property without prior judicial approval to conduct their business.

Approval of the challenged conduct would encourage power company employees to resume the conduct prohibited by Maxfield and teach them to immunize their conduct from judicial review by identifying themselves to the police only as “Citizen Informants.” The jealously guarded privacy rights of Washington Constitution article 1 § 7 should not be so easily evaded. Accordingly, the magistrate should not have considered the power readings by “Citizen Informant #1” when making

the probable cause determination and this Court's *de novo* determination should not include the power readings.

*b. The magistrate erred in considering information from the power company in the absence of any showing that this private record was lawfully obtained under RCW §42.56.330(6).*

The trial court erred in entering Finding No. 38: “Based upon the investigation that occurred, Det. Brockway properly requested and obtained the power records for the residence.” CP 73. This finding lacks factual support because the complaint merely states that Det. Brockaway applied for and was granted the power records. CP 37 (Att. A, p. “3 of 5”). Nothing in the complaint shows that this private record was lawfully obtained. Law enforcement access to such records is governed under RCW §42.56.330(6), which creates conditions for access and prohibits use of the records if they are obtained in violation of those conditions:

**§ 42.56.330. Public utilities and transportation**

The following information relating to public utilities and transportation is exempt from disclosure under this chapter:

\* \* \*

(6) Records of any person that belong to a public utility district or a municipally owned electrical utility, unless the law enforcement authority provides the public utility district or municipally owned electrical utility with a written statement in which the authority states that it suspects that the particular person to whom the records pertain has committed a crime and the authority has a reasonable belief that the records could determine or help determine whether the suspicion might be true. Information obtained in

violation of this subsection is inadmissible in any criminal proceeding;

There are no facts showing that law enforcement complied with this statute. Det. Brockaway merely states that he obtained the records, not how he obtained them. Because the complaint simply states that Det. Brockaway received the records, the trial court's Finding No. 38 that the records were properly requested and obtained lacks factual support. Because there is no evidence of any written request satisfying the statutory requirements, this finding must be stricken. And because the state failed to make any showing that the records were obtained in accordance with the statute, under the plain language of the statute, the records were not properly admitted in the criminal proceeding. Accordingly, this court must analyze probable cause without considering the power consumption records.

*c. When evaluating probable cause in relation to informants' tips a structured analysis is required.*

Where the adequacy of search warrant affidavits based in part upon information from informants' tip is at issue, Washington has invoked its own constitution as a basis to reject the "totality of circumstances" test of Illinois v. Gates, 462 U.S. 213 (1983), in favor of the "two prong" (reliability/basis of knowledge) test. State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984). This more structured analysis of probable cause in

search warrant affidavits is intended to provide better protection for the right of privacy guaranteed by the Washington Constitution. Under Washington law, where the affidavit is based on hearsay from an informant, the magistrate must have before him some facts by which he can judge both whether the hearsay declarant is probably telling the truth, ("reliability"), and whether the declarant has some basis for his accusation that evidence of crime will be found at the place to be searched ("basis of knowledge.") Under Washington law a failure to satisfy either "prong" of this functional test is fatal to a search warrant and requires suppression of its fruits. State v. Jackson, 102 Wn.2d 432.

*d. The reliability of the informants is not established.*

Here, none of the three anonymous informants' reliability was established. They were all unnamed; yet only named "citizen informants" are presumed reliable. State v. Wible, 113 Wn. App. 18, 51 P.3d 830 (2002). Accordingly, these anonymous informants were not presumptively reliable and additional facts were required to establish their reliability. Despite this, no facts establishing reliability were provided to the magistrate. There is simply nothing from which to infer that the informants were telling the truth. No name, no address, no past reliable information given to the police, nothing. State v. Chenoweth, 160 Wn.2d

454, 483, 158 P.3d 595 (2007). The anonymous informants were not shown to be reliable.

*e. The basis of the informants' knowledge is not established.*

The complaint must set forth more than mere conclusions; the underlying facts and circumstances leading to the conclusions must be included. Otherwise, the magistrate becomes no more than a rubber stamp for the police. United States v. Ventresca, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965).

It is unknown whether any of the citizen informants live anywhere near 15405 133rd Avenue East in Pierce County, Washington. None of these citizen informants state that they have a clear view of 15405 133rd Avenue East. We do know that "Citizen Informant #1" is willing to repeatedly trespass on private property to spy on the private activities occurring on that property, behavior which detracts from his or her credibility. We do not know anything at all about these informants – do they have adequate eyesight? Are they of sound mind? Very little is known about the manner in which the informants acquired their information. We know only that they have no criminal history and that #1 works for "a power company." The complaint contains insufficient

information upon which to conclude that these informants are credible and their information is reliable.

f. *The complaint fails to establish probable cause under controlling Washington law.*

The complaint supporting issuance of a search warrant must be based on more than suspicion or mere personal belief that evidence of the offense will be found on the premises searched. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). As the Jackson court pointed out:

[E]ven if 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.

State v. Jackson at 102 Wn.2d 442-3. The corroboration, however, must specifically point to criminal activity:

The independent police investigations should point to suspicious activity, "*probative indications of criminal activity* along the lines suggested by the informant".

Jackson, 102 Wn.2d at 438. (Emphasis in original.) Here, despite focused attention, police corroboration failed to produce any observations of conduct "probative" of criminal activity. No informant and no officer saw anything justifying more than suspicion. All conduct observed was consistent with the lawful activity one might expect when a person purchases a home as an investment and undertakes to improve it prior to

renting or selling it. As our Supreme Court has recently reminded us, unusual facts *consistent* with legal activity are not sufficient to establish probable cause. State v. Neth, 165 Wn.2d 177, 184, 196 P.3d 658 (2008).

Investigation confirmed that power use was high. Yet well established Washington cases hold that high power consumption, even when considered with facts much more probative than those here, does not establish probable cause. See, e.g, State v. White, (The affidavit established only suspicion, not probable cause); State v. Huft, 106 Wn.2d 206 (1986); State v. McPherson, 40 Wn.App. 298 (1985); State v. Rakosky, 79 Wn.App. 229 (1985); State v. Young, 123 Wn.2d 173 at 196. An analysis of the fact patterns in these cases shows that the warrant here falls far below minimum standards for probable cause:

////////////////////////////////////  
///////

<u>White</u>	<u>Huft</u>	<u>McPherson</u>	<u>Rakosky</u>	<u>Young</u>
<u>citizen informant</u> <ul style="list-style-type: none"> <li>• bright lights emanating from garage</li> <li>• noises from a fan in the garage</li> <li>• heavy foot and vehicle traffic</li> <li>• visitors' stays short in duration</li> <li>• garage windows covered</li> <li>• twofold increase in power consumption over two-month period</li> </ul>	<u>confidential informant</u> <ul style="list-style-type: none"> <li>• increased power consumption</li> <li>• citizen informant</li> <li>• police corroboration of innocuous facts</li> <li>• "extremely high-intensity light" emitting from basement window</li> </ul>	<u>anonymous tip</u> <ul style="list-style-type: none"> <li>• condensation on windows</li> <li>• potting soil piled next to garage door</li> <li>• black plastic covering garage door windows</li> <li>• two- to threefold increase in power consumption</li> </ul>	<ul style="list-style-type: none"> <li>• electric wired fences &amp; gates no livestock</li> <li>• 2 large guard dogs</li> <li>• large windowless shed, no vehicle tracks to/ from, only footprints</li> <li>• no snow on shed</li> <li>• property owner prior marijuana offense &amp; alias</li> <li>• power records under false name</li> <li>• 3X – 4X increased power consumption</li> <li>• no continuous occupancy</li> </ul>	<u>anonymous tip</u> <ul style="list-style-type: none"> <li>• dramatic increase electric consumption over last 3 years</li> <li>• no large electric appliances</li> <li>• basement windows constantly covered</li> </ul>
<u><b>NO PROBABLE CAUSE</b></u>	<u><b>NO PROBABLE CAUSE</b></u>	<u><b>NO PROBABLE CAUSE</b></u>	<u><b>NO PROBABLE CAUSE</b></u>	<u><b>NO PROBABLE CAUSE</b></u>

Absent some indication of criminal activity, the high power bills (assuming they can be considered), strange comings and goings and other facially curious or inexplicable behavior do not amount to probable cause. The observations here are consistent with lawful behavior and no "objective" facts "support the belief that [a crime was taking place.]"

White at 44 Wn.App. 218. That is the difference between mere suspicion and probable cause. State v. Neth; *see also* State v. Maxwell, where a nearly identical fact situation was held to be inadequate to establish probable cause.

*g. The court's Findings of Fact As To Undisputed Facts are not supported in the record (the complaint).*

*Finding No. 5:* The residence remained unoccupied prior to the sale of the residence and through the time the warrant was executed. There did not appear to be any remodeling or similar type of work being done to the residence.

*The complaint:*

The complaint establishes that although no one was seen moving in, the residence was visited regularly by persons whose purpose is unknown. The residence was not “unoccupied.” Nothing in the complaint supports the conclusion that no remodeling or other similar work was being done.

*Finding No. 7:* Neighbors also saw bags of size and nature that they believed to be potting soil being delivered to the residence.

*The complaint:*

That any of the three informants may have been a neighbor is not established in the complaint. As to the potting soil, the person who saw it

was an unidentified “third” citizen, who mentioned it to citizen number 2, who, though s/he had not seen the bags “felt the bags might be potting soil.” Citizen number 3, the person who actually saw the bags said merely “the bags appeared to be heavy.” [CP ??]

*Finding No. 29:* The citizens reported the bags were consistent with, and they believed them to be large bags of potting soil.

*The complaint:*

Only one citizen saw the bags. His/her conclusion was merely that they were “heavy.”

The thermal imaging warrant was therefore based upon less than probable cause. Its fruits - - the results of the thermal imager and authority for the officers to enter the property -- should have been suppressed.

## VI. CONCLUSION

Because the search warrant complaint (1) included information from unreliable informants, (2) included illegally obtained information about Mr. Schoen’s private meter readings, (3) included improperly obtained information from the power utility company, and (4) did not establish probable cause, the decision of the trial court should be reversed,

and the case should be reversed and dismissed.

DATED this 26<sup>th</sup> day of March, 2009.

Respectfully submitted:

A handwritten signature in black ink, appearing to be 'JS', is written over a horizontal line.

---

Jeffrey Steinborn, WSBA # 1938  
Sharon J. Blackford, WSBA #25331  
JEFFREY STEINBORN PLLC  
Attorneys for Appellant James Schoen

# ATTACHMENT A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE  
SEARCH WARRANT  
(EVIDENCE)

FILED  
IN COUNTY CLERK'S OFFICE

07-1-50945-5

STATE OF WASHINGTON )

NO.

) A.M. OCT 24 2007 P.M.

County of Pierce )

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, COUNTY CLERK  
BY AK DEPUTY

THE STATE OF WASHINGTON: To any Peace Officer in said state:

WHEREAS, Deputy Byron Brockway #96082/339, has this day made complaint on oath to the undersigned Judge of the entitled Court in and for said County that during August 2007, in Pierce County, Washington, a felony, to-wit: **UNLAWFUL MANUFACTURE OF A CONTROLLED SUBSTANCE (MARIJUANA) R.C.W. 69.50.401**, was committed by the act, procurement or omission of another, and, that the following evidence, to-wit:

**THE RELATIVE SURFACE HEAT EMITTED FROM A BROWN WITH BRICK FACADE SINGLE STORY RESIDENCE COMMONLY KNOWN AS 15405 133<sup>RD</sup> AVENUE EAST IN PIERCE COUNTY, WASHINGTON. THE RESULT WHICH WILL BE EVIDENCE OF AN ATTEMPT TO COMMIT AN OFFENSE UNDER THE UNIFORM CONTROLLED SUBSTANCE ACT, IN VIOLATION OF R.C.W. 69.50.401.**

The Affiant verily believes that the above evidence is concealed in or about a particular house or place, person or thing to-wit:

DESCRIPTION OF PROPERTY TO BE SEARCHED

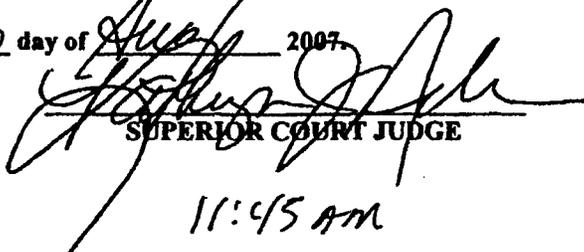
USING A RAYTHEON PALM IR OR OTHER HEAT IMAGERY DEVICE

**THE RELATIVE SURFACE HEAT EMITTED FROM A BROWN WITH BRICK FACADE SINGLE STORY RESIDENCE COMMONLY KNOWN AS 15405 133<sup>RD</sup> AVENUE EAST IN PIERCE COUNTY, WASHINGTON. THE NUMBERS 15405 ARE PROMINENTLY DISPLAYED ON A PLACARD ON THE FRONT PORCH.**

THEREFORE, in the name of the State of Washington, you are commanded that within ten days from this date, with the necessary and proper assistance, to enter into and/or search the said house, person, place or thing and then and there diligently search for said evidence, and any other, and if same, or evidence material to the investigation or prosecution of said felony or any part thereof, be found on such search, bring the same forthwith before me, to be disposed of according to law.

A copy of this warrant shall not be served upon the person or persons found in or on said house, or place: since doing so could compromise the pending investigation. A copy of this warrant and inventory shall be returned to the undersigned judge or his agent promptly after execution.

GIVEN UNDER MY HAND this 6 day of August 2007.

  
SUPERIOR COURT JUDGE  
11:45 AM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE  
Complaint for search warrant  
(Evidence)

FILED  
IN COUNTY CLERK'S OFFICE 07-1-50945-5

STATE OF WASHINGTON  
OCT 24 2007 P.M.

County of Pierce  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, COUNTY CLERK  
BY AR DEPUTY

COMES NOW DEPUTY BYRON BROCKWAY #96082/339, who being first duly sworn on oath complains and says: That during August 2007, in Pierce County, Washington, a felony, to-wit: UNLAWFUL MANUFACTURE OF A CONTROLLED SUBSTANCE (MARIJUANA) R.C.W. 69.50.401, was committed by the act, procurement or omission of another, and that the following evidence, to-wit:

THE RELATIVE SURFACE HEAT EMITTED FROM A BROWN WITH BRICK FACADE SINGLE STORY RESIDENCE COMMONLY KNOWN AS 15405 133<sup>RD</sup> AVENUE EAST IN PIERCE COUNTY, WASHINGTON. THE RESULT WHICH WILL BE EVIDENCE OF AN ATTEMPT TO COMMIT AN OFFENSE UNDER THE UNIFORM CONTROLLED SUBSTANCE ACT, IN VIOLATION OF R.C.W. 69.50.401.

That the above material is necessary to the investigation and/or prosecution of the above described felony for the following reasons: As evidence of the crime of UNLAWFUL MANUFACTURE OF A CONTROLLED SUBSTANCE (MARIJUANA) R.C.W. 69.50.401

AFFIANT'S BACKGROUND AND EXPERIENCE

Your Affiant, Deputy Byron Brockway, is a Deputy Sheriff employed by the Pierce County Sheriff's department. He has been so employed for over 10 years. He is currently assigned to the Special Investigations Unit as a Narcotics Investigator and had spent 3 years as an Investigator in SIU in the past. He is responsible for Criminal and Narcotics Investigations. Before being assigned to the Special Investigations Unit, your Affiant was assigned to the Patrol Division of the Sheriff's Department. In patrol, your Affiant had been involved in numerous narcotics related arrests. Your Affiant has been involved in hundreds of criminal investigations. Your Affiant has also gained specific training and accreditation by completing the following courses of instruction related to various aspects of criminal investigations:

- Washington State Basic Corrections Officer Academy
- Basic Law Enforcement Academy
- 40 hour Cadre Clandestine Laboratory Operations Course
- 90 hour Undercover Operations Course
- DEA Clandestine Laboratory Re-certification Training
- Clandestine Laboratory Supervisor Training
- Monthly Clandestine Laboratory Training
- Washington State University Criminal Justice Course
- Eyewitness Testimony Research at Washington State University
- REID Interviewing and Interrogation Course
- 24 hour Undercover Drug Investigations Course
- 16 hour Indoor Marijuana Investigations Course
- California Narcotics Officer Association Training
- SWAT Basic

1  
2 Your Affiant was a certified member of the Pierce County Clandestine Laboratory Team. Your Affiant  
3 has assessed and processed over numerous clandestine labs over a 6 year period. Your Affiant has assisted in  
4 searching and documenting the service of numerous narcotic search warrants. Your Affiant has personally  
5 written and served over 40 narcotics related search warrants. These search warrants have resulted in criminal  
6 charges being filed. Your affiant has contacted, interviewed, and arrested numerous subjects for the possession,  
7 use and distribution of controlled substances. Your affiant has purchased different drugs in controlled  
8 deliveries.  
9

10 Based upon my training, experience, and participation in these and other narcotics investigations, and  
11 based upon the knowledge derived from other experienced narcotics officers, with whom I am associated, your  
12 Affiant knows that:  
13

14 (A) That with respect to indoor marijuana cultivation and propagation operations, suspects routinely utilizes the  
15 following items, and methods, among others, in their attempts to avoid detection from law enforcement  
16 authorities:

- 17 (1) blackened out or covered windows, doors or other visibly detectable areas to avoid outsiders from  
18 identifying any portion of the grow operation. Guard dogs are used to protect their growing operations  
19 from theft and to alert them to subjects, including law enforcement, who are approaching their  
20 property;
- 21 (2) fixed, movable, or other type venting systems, usually located away from detection or upon high areas  
22 of buildings to vent heat and odors escaping the cultivation structure;
- 23 (3) Fictitious names on utility records and/or fictitious business names associated with the suspect's  
24 property;
- 25 (4) the alteration of the electrical system on the property by bypassing the utility meter, so that the excess  
26 usage of power caused by the indoor lighting equipment does not register with the utility company;
- 27 (5) the use of deodorizers to mask the odor of growing marijuana that is emitted from the venting system;
- 28 (6) remote locations and buildings which are detached from the main residence to prevent discovery. This  
29 may also include rooms built underground to house the growing operation;

30 (B) That marijuana cultivation is a complex enterprise that:

- 31 (1) takes at least 7-10 days to take the plant from a clone to the vegetative stage, can take 3-8 weeks to take  
32 the plant from the vegetative to the flowering stage, and takes at least 3-6 weeks to take the plant from  
33 the flowering stage to harvest;
- 34 (2) takes approximately three gallons of potting soil per plant and that the soil is used only once and then  
35 discarded;
- 36 (3) if hydroponically grown, no soil is required. This method would require a root medium, large  
37 quantities of water, and water soluble fertilizer. The root mediums most commonly found are rock  
38 wool, large size gravel, lava rock, to name a few;
- 39 (4) requires a high heat, high humidity or tropical type environment to thrive;
- 40 (5) uses high intensity halide or high pressure sodium lights that require large amounts of power and emit a  
41 very bright white light and a high amount of heat. The heat from these halide lights often cause a  
42 visible difference in the moisture collecting on the roof of the structure in which the grow is located;
- 43 (6) causes some of the heat from this environment dissipates into other objects and the structure in which  
44 the growing operation is being conducted. As a result of this, the temperature on the outside walls of  
45 the portions of the property containing the marijuana grow are substantially higher than the outside  
46 walls of the portion of the structure used for normal living or storage space;
- 47 (7) needs to be vented to allow some heat to escape and fresh air to enter. This vent or the high heat  
48 dissipating through the structure can be detected using thermal imaging. Thermal imaging is the  
49 technique of using non-contact, non-intrusive, non-destructive scanning equipment that detects  
50 invisible infrared radiation (Heat) at surface levels and converts this energy into visible light;
- 51 (8) are commonly divided into two or more rooms for different stages of the growing operation, i.e.:  
52 growing rooms, drying rooms, supply rooms;
- 53 (9) the odor associated with growing marijuana has been compared to an odor which is a "skunk" or a  
54 "pungent sweet musty" like smell;

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5 **PROBABLE CAUSE**  
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7

8 On 05-30-07, a concerned citizen reported to the Pierce County Sheriff's Department Narcotics  
9 Hotline suspicious activity occurring a 15405 133<sup>rd</sup> Ave E. The caller indicated the listed residence was sold  
10 in December of 2006, but no one has officially moved in. The caller indicated three different vehicles have  
11 shown up at the residence on the weekends for a few hours and then leave. The caller walked over to the  
12 residence and looked at the power meter to see if there was any power usage. The caller noticed the power  
13 meter was spinning at a high rate and usage was extreme based on the caller's training and experience. The  
14 caller also heard a humming sound coming from the garage area of the residence.

15 According to the assessor treasurer, the house was purchased by a James Schoen and Dale Porter  
16 in November of 2006.

17 On 07-05-07 at around 1140 hours, I contacted the concerned citizen #1 by phone who called in  
18 the original complaint. Citizen #1 has no criminal history and works at a power company. Citizen #1 has  
19 had training and experience in reading power meters for work. Around the second week of June, the citizen  
20 went over to check the power meter to see if anyone was living there. Citizen #1 noticed the power meter  
21 spinning and estimated the power consumption to be 3,000 kilowatts hours for a 15 day period. Citizen #1  
22 indicated this was very high power reading for the listed residence. Citizen #1 also heard a humming sound  
23 coming from the garage of the residence. (The humming sound could be associated with the electric ballasts  
24 and high powered halide lights used in the illegal production of marijuana).

25 Citizen #1 indicated the porch lights on the residence are always on at the residence. The yard is  
26 always mowed but no one appears to be living there. Citizen #1 reported subjects had been coming over on  
27 the weekends but over the last two weeks are showing up twice a day. A few weeks ago the citizen #1  
28 noticed subjects carrying in 5-gallon buckets that appeared heavy and some cardboard boxes. Citizen #1 has  
29 seen a few vehicles park in the driveway for a short time and then leave. The citizen saw a garage door open  
30 once, but a large truck parked in front blocking the view of the garage.

31 On 07-09-07 at around 0745 hours, I drove by the listed residence. I noticed all the blinds were  
32 down on the front of the residence. The front porch lights were also on.

33 On 07-11-07 at around 1200 hours, I contacted citizen #2 by phone. Citizen #2 does not have any  
34 criminal history. Citizen #2 has not seen anyone move into the listed residence. Citizen #2 indicated very  
35 bright orange lights come on in the family room upstairs. Citizen #2 indicates the lights come on at a certain  
36 time each night near dusk. (this is consistent with the lights being on timers). Citizen #2 indicated subjects  
37 come to the residence and take care of the lawn and then leave. Citizen #2 talked to a third citizen that  
38 noticed subjects carrying in heavy white bags in through the back of the residence last week. The subjects  
39 were looking around as they entered the back of the residence with 8-9 heavy bags. The citizen #2 felt the  
40 bags might be potting soil. Citizen #2 has never seen the garage doors open.

41 On 07-12-07, 07-13-07, 07-16-07, 07-18-07, 07-30-07, 08-06-07 between 0800 and 0900 hours, I  
42 drove by the listed address. All the blinds were down and the porch lights were on even though it was  
43 daylight. No vehicles were around.

44 On 07-16-07 I applied for and was granted a request for power records for the listed residence, the  
45 previous occupant of the listed residence and comparable residence. I received the power records on 07-17-  
46 07. According to the assessor/treasurer, the listed residence parcel #0419238047 is listed as 1,860 square feet  
47 with a 484 square foot attached garage. The heat is forced air and was built in 1986. There is no gas service  
48 at the residence. The comparable residence is 2,200 square feet with a 550 square foot attached garage. The  
49 heat is forced air and was built in 1978. There is no gas service at this residence. There is a graph showing  
50 the power consumption attached. The comparable address showed an average power consumption from  
51 December 2006 though June 2007 of 1,725 kilowatt hours per month totaling 12,080. The highest  
52 consumption was in February and consumption down as the weather warmed up for the spring to summer

1 months. The listed address showed an average power consumption from December 2006 to June 2007 of  
2 5,375 kilowatt hours per month totaling 37,620. This is a difference of 25,540 kilowatt hours. It is important  
3 to note the power consumption stayed at this high consumption rate as the weather warmed up for the spring  
4 to summer months. It is also important to note the comparable house is a little bigger but using much less  
5 power.

6 I reviewed the power records from the previous occupant at the listed residence. There is a graph  
7 showing the previous occupant compared to the current power consumption attached. The previous occupant  
8 at the listed residence showed an average power consumption from December 2005 to June 2006 of 1,954  
9 kilowatt hours per month totaling 13,680. The power was consistent with the weather and the consumption  
10 decreased during the spring to summer months. The current power consumption showed an average power  
11 consumption from December 2006 to June 2007 of 5,375 kilowatt hours per month as listed above totaling  
12 37,620. It is important to note comparing one month the reading for the previous occupant in June 2006 was  
13 1,370 kilowatt hours compared to 6,390 June 2007 for the current occupant of the same residence.

14 The total power consumption from December 2005 to June 2006 for the comparable address is  
15 13,040 kilowatt hours and the total for the previous occupant of the listed address for the same period was  
16 13,680. These numbers are consistent.

17 The power consumption at the listed residence that appears to be vacant is consistent with an  
18 indoor marijuana growing operation.

19 On 07-18-07 at around 1415 hours, Det. Shaviri #131 and I responded to the listed residence and  
20 attempted a knock and talk. I stood in the driveway as Det. Shaviri knocked on the door. The porch lights  
21 were on. There was no answer at the door. We could not smell marijuana at that time.

22 I drove by the listed residence several times listed above. On 08-01-07 at around 1945 hours, I  
23 conducted surveillance on the listed residence. There was a white male with dark hair wearing shorts in the  
24 front yard of the residence. There was a vehicle parked in the driveway with Washington license #312-NCL  
25 a white Honda, registered to James Schoen who is listed as the owner of the residence. The vehicle is  
26 registered to 10815 210<sup>th</sup> Ave Ct E. The subject went back into the residence via the front door. At around  
27 1955 hours, the subject left in the listed vehicle. I obtained a picture of the registered owner of the vehicle  
28 through the Department of Licensing. The subject was similar in appearance to the registered owner James  
29 Schoen. The vehicle left the residence and I lost sight of the vehicle in the neighborhood. At around 2030  
30 hours, Deputy Johanson #472 and I responded to 10815 210<sup>th</sup> Ave Ct E to see if the listed Honda was there.  
31 The listed Honda was not there but there was a dark colored Honda license #087-LNG registered to James  
32 Schoen at the 210<sup>th</sup> address.

33 On 08-03-07 at around 0430 hours, on 08-04-07 at 0430 hours, on 08-05-07 at 0515 hours,  
34 Deputy O'Neil noticed the listed vehicle #312-NCL at 10815 210<sup>th</sup> Ave Ct E.

35 During previous phone calls with citizen #1, they talked about seeing a white Honda and dark  
36 colored Honda at the listed residence. They also mentioned seeing a white Ford truck at the residence. The  
37 vehicles only stay for an hour or two and then leave.

38 On 08-01-07, I contacted concerned citizen #3. Citizen # does not have any criminal history.  
39 Citizen #3 was also concerned about the suspicious behavior at the listed residence. Citizen #3 has not seen  
40 anyone move into the listed residence. Only one night has a vehicle stayed over. Citizen #3 mentioned  
41 seeing a white Honda and a white truck at the residence. Citizen #3 indicates the vehicles show up for a few  
42 hours and then leave. Citizen mentioned on 07-03-07 they noticed the white truck arrive at the listed address.  
43 The truck drove around the back of the house to the patio doors. Citizen #3 noticed a white male with black  
44 hair unloading large white plastic pillow size bags into the residence from the back of the truck. Citizen #3  
45 said the bags appeared to be heavy. (Through training and experience, the bags could have been soil). The  
46 male kept looking around nervously as he was unloading the bags. Citizen #3 thought there were around six  
47 of these described bags. Citizen #3 also mentioned that the lights in the main dining room area come on at  
48 night even though no one is appears to be home. It has been my experience that marijuana growers often put  
49 the house lights on timers at night to make it appear as though someone is home.

50 Citizen #3 also mentioned the entire house has been lit up with very bright lights at certain  
51 times. Citizen #3 has also seen the same dark Honda described by Citizen #1 at the listed address.

52 On 08-03-07, I contacted citizen #1. On 08-02-07 citizen, #1 noticed two male seen before at the

1 residence loading items from the same white truck and bring them into the listed residence.

2 According to an investigative plan, Detective Hickman a certified thermographer, will use a heat  
3 imagery device from the ground and/or the air, not trespassing on the property at 15405 133<sup>rd</sup> Ave E. in Pierce  
4 County, Washington.

5 If, as a result of this warrant, the thermal image is indicative of or consistent with an indoor marijuana  
6 growing operation, your affiant intends to use this information as one piece of evidence in supporting probable  
7 cause for a search warrant of the above described premises. Your affiant is requesting that after the execution of  
8 this search warrant, your affiant be excused from the service requirements of RCW 69.41.060. This request is  
9 based on the fact that your affiant will not physically enter the premises described above and remove physical  
10 property from the location. In addition, should your affiant comply with the service requirements of RCW  
11 69.41.060, this could lead to the investigation becoming public knowledge and will likely cause the destruction  
12 and/or movement of evidence vital in this case.

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14  
15 **DESCRIPTION OF THE PROPERTY TO BE SEARCHED**

16  
17  
18 **USING A RAYTHEON PALM IR OR OTHER HEAT IMAGERY DEVICE, THE**  
19 **RELATIVE SURFACE HEAT EMITTED FROM A BROWN WITH BRICK FAÇADE**  
20 **SINGLE STORY RESIDENCE COMMONLY KNOWN AS 15405 133<sup>RD</sup> AVENUE EAST**  
21 **IN PIERCE COUNTY, WASHINGTON. THE NUMBERS 15405 ARE PROMINENTLY**  
22 **DISPLAYED ON A PLACARD ON THE FRONT PORCH.**

23  
24 **CONCLUSION**

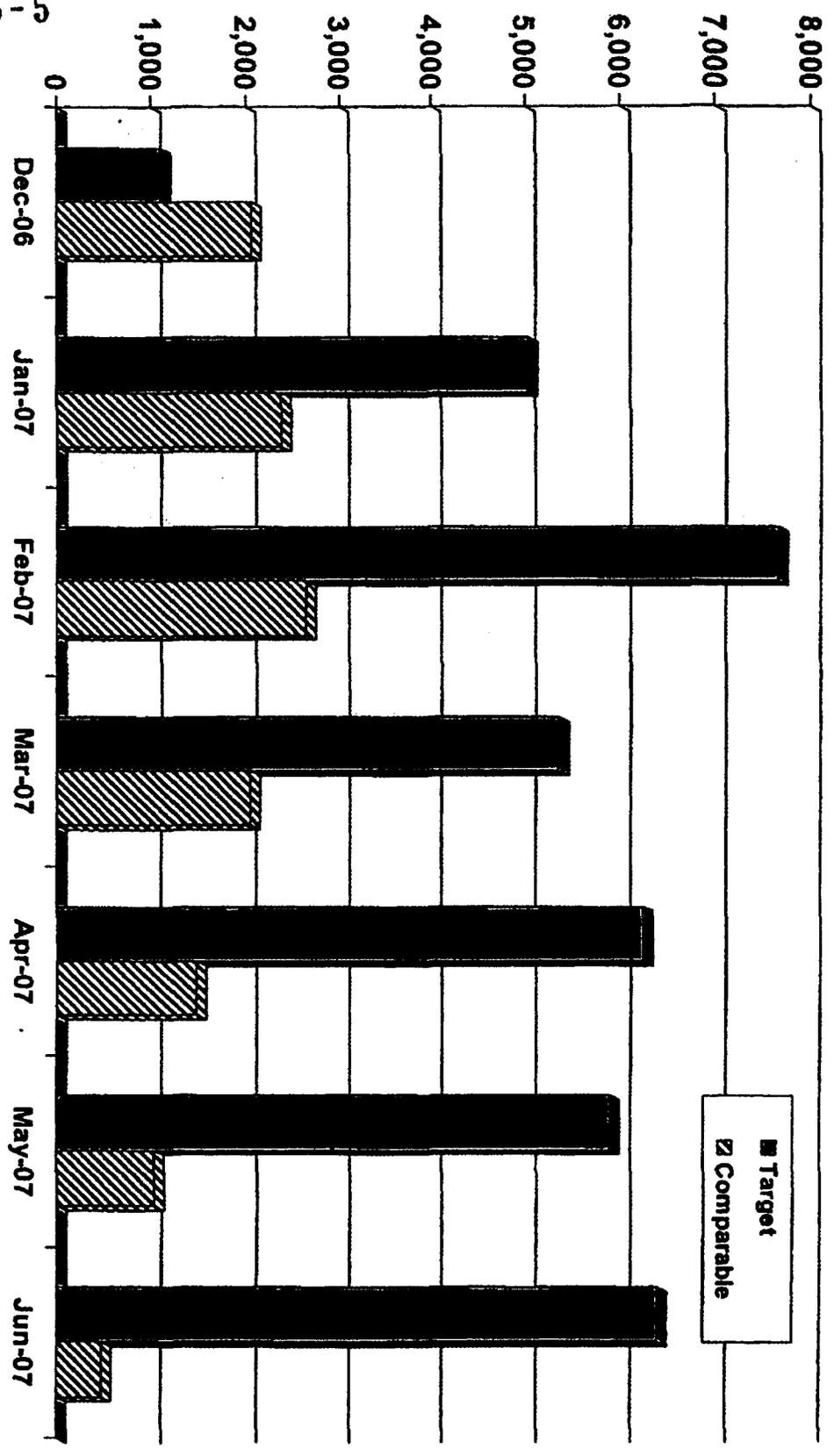
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26 Based on all of the foregoing information your Affiant verily believes that the illegal cultivation of  
27 marijuana exists at the above described property and that there is probable cause to search the property (in  
28 regards to the heat source emitting from this property using a Thermal Heat Imagery Device) located at: 15405  
29 133<sup>rd</sup> Avenue East, to include those structures as described in the preceding section. The cultivation and  
30 propagation of marijuana is a violation of the Revised Code of Washington, section 69.50.401.

31  
32 *B. Brockway #96-082/339*  
33 **DEPUTY Byron Brockway #96-082/339**  
34 **Deputy/Affiant**  
35 **Special Investigation Unit**  
36 **Pierce County Sheriff's Department**

37  
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39  
40 **SUBSCRIBED AND SWORN to before me this 6 Day of Aug, 2007.**

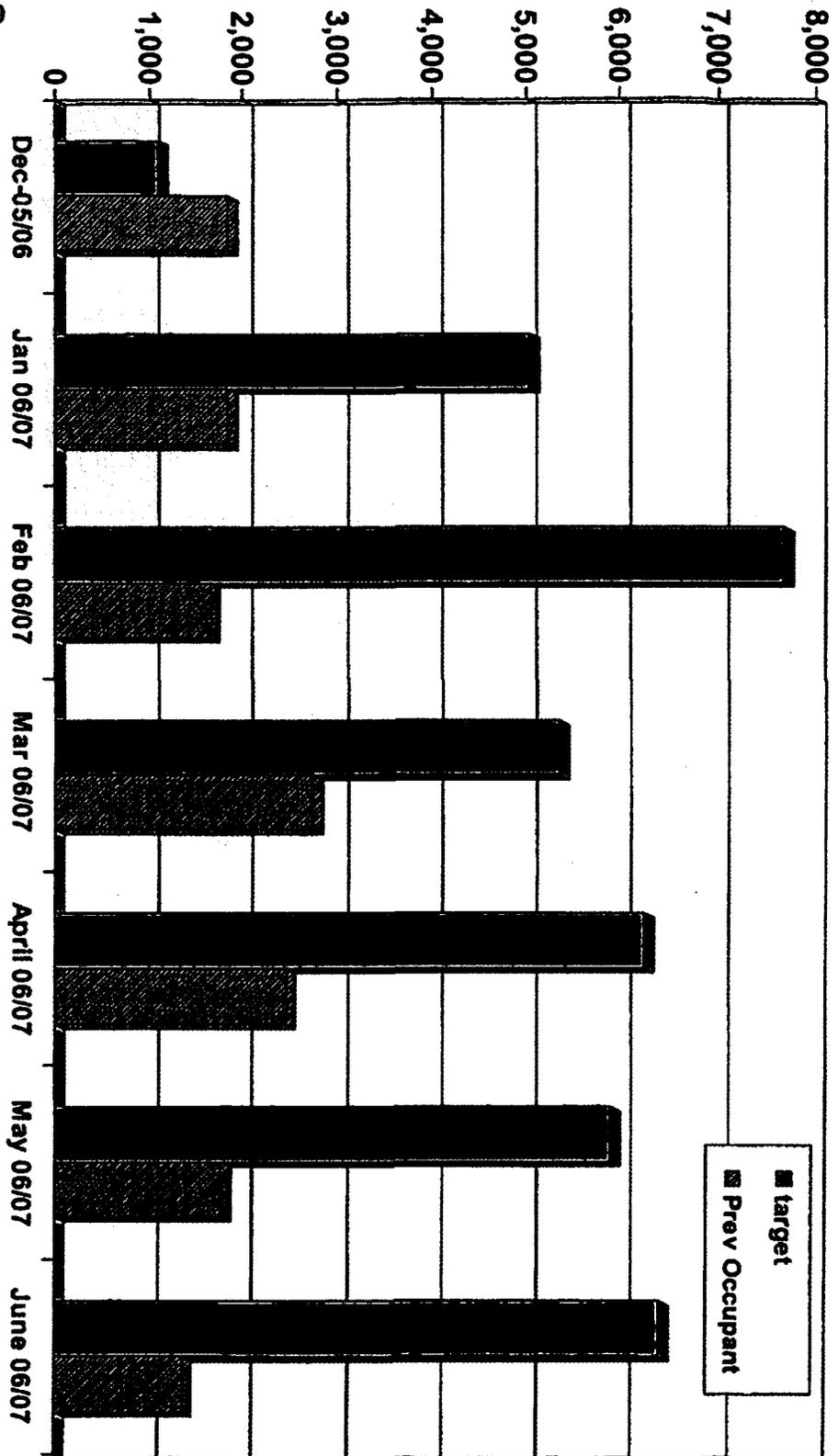
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**SUPERIOR COURT JUDGE**  
*11:45 AM*

07-1-50945-5



■ Target  
▨ Comparable

07-1-50945-5





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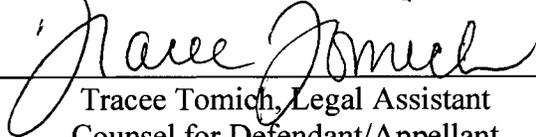
Defendant/Appellant  
James Schoen  
10815 20<sup>th</sup> Avenue Court East  
Bonney Lake, WA 98391

And by messenger delivery to:

Clerk of the Court  
Court of Appeals Division II  
950 Broadway, #300  
Tacoma, Washington 98402  
Via Court of Appeals, Division I  
600 University Street  
Seattle, Washington 98101

DATED this 26<sup>th</sup> day of March, 2009.

JEFFREY STEINBORN, PLLC

  
Tracee Tomich, Legal Assistant  
Counsel for Defendant/Appellant