

No. 43784-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MARK E. D'ENTREMONT,

Respondent.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITES iii

I. ISSUES..... 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT6

 A. THE OBSERVATIONS THE OFFICERS MADE FROM OUTSIDE THE MIDDLE OUTBUILDING ON D'ENTREMONT'S PROPERTY DO NOT AMOUNT TO AN UNLAWFUL SEARCH.....6

 1. Standard Of Review.....7

 2. The Curtilage Surrounding D'Entremont's House, Including The Middle Outbuilding, Were Impliedly Open To The Public.....8

 3. The Officers' Observations Made From Outside The Middle Outbuilding Were Conducted In Open View And Therefore Are Not An Unlawful Search 18

 B. THERE WAS PROBABLE CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT FOR D'ENTREMONT'S PROPERTY FOR EVIDENCE OF UNLAWFUL MANUFACTURE OF MARIJUANA..... 19

 1. Standard Of Review..... 19

 2. The Officers' First Hand Observations Contained Within The Affidavit Of Probable Cause For The Search Warrant Were Sufficient To Establish Probable Cause20

 3. The State Concedes That The Officers Did Not Have Probable Cause For The Search Warrant Prior To Entering Onto D'Entremont's Property25

IV. CONCLUSION.....26

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Boethin</i> , 126 Wn. App. 695, P.3d 461 (2005)	15, 16
<i>State v. Campbell</i> , 166 Wn. App. 464, 272 P.3d 859 (2011)	7
<i>State v. Chenoweth</i> , 160 Wn.2d 454, 158 P.3d 595, 610 (2007)	20, 21
<i>State v. Cord</i> , 103 Wn.2d 361, 693 P.2d 81 (1985)	20
<i>State v. Daugherty</i> , 94 Wn.2d 263, 616, P.2d 649 (1980)	13
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008)	20
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	7
<i>State v. Jackson</i> , 102 Wn.2d 432, 688 P.2d 136 (1984)	21
<i>State v. Johnson</i> , 75 Wn. App. 692, 879 P.2d 984 (1994)	8, 9, 10, 11, 13, 14
<i>State v. Johnson</i> , 79 Wn. App. 776, 904 P.2d 1188 (1995)	19, 24, 25
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999)	20
<i>State v. McPherson</i> , 40 Wn. App. 298, 698 P.2d 563 (1985)	25
<i>State v. Murray</i> , 110 Wn.2d 706, 757 P.2d 487 (1988)	25
<i>State v. Ridgway</i> , 57 Wn. App. 915, 790 P.2d 1263 (1990)	8
<i>State v. Ross</i> , 141 Wn.2d 304, 4 P.3d 130 (2000)	8, 13, 14, 15
<i>State v. Sadler</i> , 147 Wn. App. 97, 193 P.3d 1108 (2008)	7
<i>State v. Seagull</i> , 95 Wn.2d 898, 632 P.2d 44 (1981)	8, 9, 10, 13, 18

State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005).....7

State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994)19, 21

Federal Cases

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723
(1964)21

Skinner v. Ry Labor Executives' Ass'n, 489 U.S. 602, 109 S. Ct.
1402, 103 L. Ed.2d 639 (1989)20

Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed.2d
637 (1969)21

Constitutional Provisions

Washington Constitution, Article I § 720, 21

U.S. Constitution, Amendment IV20

Other Rules or Authorities

CrR 3.66

I. ISSUES

- A. Were the officers acting lawfully when they entered onto D'Entremont's property and contacted the outbuilding and the residence?
- B. Was the search warrant supported by probable cause?

II. STATEMENT OF THE CASE

Detective Bruce Kimsey and Deputy Kevin Engelbertson (a detective at the time of the investigation) are long term law enforcement officers employed by the Lewis County Sheriff's Office and have training and experience in basic law enforcement as well as in the specific area of drug crimes. CP 37. During the week prior to November 23, 2010, the Lewis County Sheriff's Office was made aware of a Crime Stoppers tip regarding a suspected marijuana grow at property belonging to D'Entremont located at 122 McAtee Road in Centralia, Washington. CP 37; Ex. 3, 4. On the property there is a residence with attached car ports and separate outbuildings. CP 37; Ex. 3, 4, 5, 6, 7, 9. The events in this case occurred at the large outbuilding nearest to the residence. CP 37; Ex. 4, 5, 9. The Crime Stopper tipster was an anonymous person who said that several people were growing marijuana in the middle outbuilding. CP 37; Ex. 4, 6. The tipster said that it was not a medical marijuana grow. CP 37.

After receiving the Crime Stopper tip, but prior personally observing the property located at 122 McAtee Road, Deputy Engelbertson obtained and reviewed power records for the property. CP 37. Deputy Engelbertson noticed that the power had been consistently elevated during all of 2010 and had not fluctuated in any significant way throughout the year. CP 37.

On November 23, 2010, Deputy Engelbertson drove to 122 McAtee Road to observe the middle outbuilding and the surrounding property. CP 37. The residence and outbuildings were clearly visible from the road. CP 37; Ex. 3. On November 24, 2012 during the daytime, Deputy Engelbertson drove back to the 122 McAtee Road property with Detective Kimsey to do surveillance and attempt to contact the property. CP 37. Deputy Engelbertson noticed that the middle outbuilding was the only building on the property that did not have any snow on the roof. CP 37; Ex. 4, 5. Deputy Engelbertson believed this was a further sign of a marijuana grow based upon his training and experience in narcotics investigations. CP 37.

When the officers drove by the property they observed a vehicle parked in the driveway out front of the suspect outbuilding. CP 37. The officers parked their vehicle down the road from the

property and did surveillance for approximately twenty to thirty minutes. CP 37. The officers wanted to see if there was any traffic coming to and going from the property and any other evidence that might suggest that there was in fact a marijuana grow on the property. CP 37. The officers did not observe anything occurring at the property and after about twenty to thirty minutes the first vehicle they had seen left the property. CP 38. The officers could not see who was driving the vehicle and did not know who had left the property. CP 38.

The officers decided to make contact with the property to see if anyone was present to answer questions about the suspected marijuana grow. CP 38. The purpose of this contact was not merely to develop evidence of a criminal investigation, but rather, it was to establish what was actually occurring on the property. CP 38. The officers considered the possibility that there could be a legal marijuana grow on the property. CP 38.

The entryway to the property at 122 McAtee Road does not have any gate or fence, there is no non-trespassing or other restrictive signage and it is not closed off to the public in any way. CP 38; Ex. 3, 4. When the officers approached the property they were able to walk right into a large driveway/parking area that was

directly in front of the residence and the middle outbuilding. CP 38; Ex. 3, 4. There is also a cement walkway that is in front of the middle outbuilding, which also has a door built for people to walk through. CP 38; Ex. 3, 4, 5, 7. When Deputy Engelbertson and Detective Kimsey approached the property they observed another vehicle that was parked in the carport. CP 38; Ex. 4. The officers wanted to see if there was anyone in the middle outbuilding. CP 38. Deputy Engelbertson and Detective Kimsey walked directly to the small door at the front of the outbuilding and knocked to see if anyone was inside. CP 38; Ex. 4, 5, 7. Deputy Engelbertson could hear noise coming from inside the building but no one came to the door. CP 38. The officers also went to the front door of the main residence and attempted to see if anyone was inside the residence, but were unable to locate anyone. CP 38; Ex. 4.

While standing by the middle outbuilding Detective Kimsey noticed what he recognized from his training and experience to be the distinct odor of marijuana coming from the building. CP 38. Detective Kimsey told Deputy Engelbertson that he smelled marijuana. CP 38. Deputy Engelbertson observed a hole in the wall of the middle outbuilding near the door. CP 38; Ex. 8. Deputy Engelbertson got down on the ground and peered through the hole

in the wall to see if anything could be seen inside the building and to see if there was anyone in there. CP 38. Deputy Engelbertson observed evidence of a marijuana grow. CP 38. The officers did not stay on the property very long prior to applying for a warrant and stayed only as long as was necessary to determine if there was anyone at home. CP 38.

Based upon the tip they had obtained, the steady elevated electric bill, the lack of snow on the roof, the odor of marijuana, and the observation of evidence of a marijuana grow, the officers applied for and were granted a search warrant for the middle outbuilding. CP 38; Ex. 1, 2. Officers made a forced entry into the building and found marijuana growing in two separate grow rooms. CP 43. The evidence collected established that the grow operation had been going on for a long time. CP 43-44. The amount of marijuana present was in excess of the amount allowed under the medical marijuana law. CP 44-45. The packaged and dried marijuana located in the building weighed hundreds of grams more than forty grams. CP 44-45. D'Entremont admitted to growing marijuana with the help of another person and stated he had recently received a medical marijuana authorization. CP 44. D'Entremont acknowledged that even with the authorization, which

had been obtained 11 days prior, he could not have grown or possessed the amount of marijuana that was in the building. CP 44.

The State charged D'Entremont with one count of Manufacture of Marijuana. CP 1-2. D'Entremont filed a motion and memorandum to suppress evidence and dismiss the case. CP 4-17. A CrR 3.6 hearing was held and the trial court denied D'Entremont's motion. RP 1-57; CP 36-40. The State amended the information, charging D'Entremont with Count I, Manufacture of Marijuana, and Count II, Possession of Marijuana Over 40 Grams. CP 18-19. D'Entremont was found guilty after a bench trial. CP 41-45.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE OBSERVATIONS THE OFFICERS MADE FROM OUTSIDE THE MIDDLE OUTBUILDING ON D'ENTREMONT'S PROPERTY DO NOT AMOUNT TO AN UNLAWFUL SEARCH.

D'Entremont's property, including the residence and the middle outbuilding, are impliedly open to the public. The officers did

not violate D'Entremont's right to privacy and the observations made by the officers were lawful.¹

1. Standard Of Review.

When an appellant challenges a trial court's denial of a motion to suppress, the reviewing court determines whether there is substantial evidence to support the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859 (2011). Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). D'Entremont did not assign error to any of the findings of fact therefore they are verities on appeal.

A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).

¹ The State acknowledges that Deputy Engelbertson did unlawfully look through the hole in the wall of the middle outbuilding. CP 38. The trial court correctly ruled that this was an impermissible search and excised the information obtained from that search from the search warrant when it made its determination regarding probable cause.

2. The Curtilage Surrounding D'Entremont's House, Including The Middle Outbuilding, Were Impliedly Open To The Public.

A person has a legitimate expectation of privacy in the curtilage of their dwelling. *State v. Ridgway*, 57 Wn. App. 915, 918, 790 P.2d 1263 (1990). A police officer conducting legitimate police business is permitted to “enter areas of the curtilage which are impliedly open, such as access routes to the house.” *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). Legitimate police business includes investigating possible criminal activity. *State v. Ross*, 141 Wn.2d 304, 314, 4 P.3d 130 (2000). A police officer is allowed to intrude when he or she acts in the same manner as a reasonably respectful citizen who enters onto the property. *Seagull*, 95 Wn.2d at 902 (citation omitted). “[A] substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation” and violate a person’s right to privacy. *Id.* 903.

To determine whether an officer’s actions were reasonable the reviewing court evaluates the facts and circumstances of the case. *Id.* The court will consider the nature of property, whether it was fenced, gated or displayed signage that expressed the resident’s intent to keep the property closed off to the public. *State*

v. Johnson, 75 Wn. App. 692, 705, 879 P.2d 984 (1994). Other non-exclusive factors the court may consider are, whether the officer was acting openly, the time of day the officer entered onto the property, the route taken by the officer and if the officer actually attempted to contact the occupants of the residence. *Seagull*, 95 Wn.2d 903-06.

In *Seagull* an officer was contacting residents of a neighborhood regarding an abandoned vehicle with blood stains and a broken window. *Id.* at 900. The officer walked up to the south door of Seagull's residence, which had originally been the back door to the residence but was now the main entrance used by the residents. *Id.* The officer knocked on the door but no one answered. *Id.* The officer then recalled that he had been to the residence previously and the former occupants told the officer that they could not hear him when he knocked on that door. *Id.* The officer decided to walk towards the north door by walking through the west yard. *Id.* The officer walked down the middle of the open space, through a grassy area and did not take the most direct route. *Id.* The officer saw inside of a greenhouse what he believed to be a marijuana plant growing in the corner. *Id.* The officer applied for and was granted a search warrant. *Id.* The Supreme Court held

that given the facts and circumstances of the case the officer's actions were lawful and no search occurred because the marijuana was seen in open view. *Id.* at 901-06.

In *Johnson* the only access to Johnson's property was by a dirt road that ran through a State park. *Johnson*, 75 Wn. App. at 695-96. DEA agents were investigating Johnson regarding a marijuana growing operation. *Id.* at 695. The agents walked down the dirt road, through the State park and then through an unlocked, but gated fence that had "Private Property" and "No Trespassing" signs posted on both sides. *Id.* at 696. The agents entered the property at 1:00 a.m. under the cover of darkness. *Id.* The agents came within 10 yards of a barn, smelled marijuana, heard machinery operating and used a thermal imaging device to read the heat in the barn. *Id.* at 696-97. The agents did not approach the house and did not attempt to contact the residents or even knock on the barn. *Id.* at 697. The agents subsequently obtained the power records for the property and applied for and were granted a search warrant. *Id.* The Court of Appeals held that the access way to Johnson's property was not impliedly open to the public, the agents had no intention of approaching the house or attempting to contact the residents and the agents acted covertly. *Id.* at 704-05.

The court held that the agents' entry onto the property was an unreasonable intrusion upon the residents' private affairs and suppressed all evidence obtained from the illegal search. *Id.* at 709.

In the present case the officers were investigating whether there was an illegal marijuana growing operation on the property per the anonymous Crime Stoppers tip. CP 37-38. The officers went to D'Entremont's property during daylight hours. CP 37. The officers watched the property for 20 minutes and saw a vehicle parked in the driveway out in front of the middle outbuilding. CP 37. The house and outbuilding are clearly visible from the street. Ex. 3, 4. D'Entremont's property does not have any fencing across the driveway or around the house and outbuildings. CP 38; Ex. 3, 4, 5, 6, 9. There are no private property, do not trespass or other restrictive signage on the entryway to the property. CP 38; Ex. 3, 4. The driveway is large, wide and continues down past the middle outbuilding to another large outbuilding. CP 38; Ex. 3, 4, 5, 6. There is a cement sidewalk outside of the middle outbuilding. CP 38; Ex. 5, 9. The middle outbuilding also has a man door on the side of the building closest to the residence. CP 38; Ex. 4, 5, 7. The man door is at the front of the outbuilding and accessible by the sidewalk. Ex. 5, 7.

The officers could see there was a car parked in the carport when they contacted the property. CP 38. The officers contacted the outbuilding first by knocking on the man door. CP 38. Deputy Engelbertson explained that “I walked up and knocked on the man door because that is where the truck was just at and I assumed someone was in the shop at that point.” RP 14. Deputy Engelbertson further explained that because he knew two people were involved that he wanted to make sure “someone wasn’t in there either caregiving possible plants, working on something, so I knock on the man door first.” RP 14; CP 37. Deputy Engelbertson could hear noise from inside the building, including fans, but no one answered the door. CP 38. The officers walked over to the main residence and knocked but could not locate anyone to speak to. RP 14; CP 38. The officers then went back to the outbuilding one last time because Deputy Engelbertson had heard noises out there and knocked on the door again. RP 14. Detective Kimsey, while standing by the middle outbuilding, smelled the distinct odor of marijuana coming from the building. CP 38. There was nothing covert about the officers’ actions.

D’Entremont’s driveway is impliedly open to the public and D’Entremont does not have an expectation of privacy from intrusion

by a reasonably respectful citizen. *Seagull*, 95 Wn.2d at 902; *State v. Daugherty*, 94 Wn.2d 263, 268, 616, P.2d 649 (1980). The curtilage surrounding the residence, in regards to the carport, garage and middle outbuilding, are also impliedly open to the public. There is no signage prohibiting or fencing preventing a person from parking in the driveway, walking over to the sidewalk and knocking on the man door in the middle outbuilding. CP 37-38; Ex. 4, 5, 6, 7, 9.

D'Entremont argues that his circumstances are similar to those found in *Johnson* and in *Ross* because “the detectives entered Mr. D'Entremont's property for the express, and sole, purpose of searching for evidence of a marijuana grow operation in order to obtain a search warrant.” Brief of Appellant 17; *See Ross*, 141 Wn.2d at 304. This statement is inaccurate and untrue. First, the findings of fact, which are verities in this appeal, state:

The officers then decided to make contact with the property to see if anyone was present to answer any questions about the suspected marijuana grow. The purpose of this contact was not merely to develop evidence of a criminal investigation, but rather, it was to establish what was actually occurring on the property and the officers considered the possibility that there could be a legal marijuana grow on the property.

CP 38 (Finding of Fact 12).

Second, the facts of *Ross* are distinct from the facts in D'Entremont's case. In *Ross* the deputies went to the property twice, the first time only one of the officers, Deputy Reigle, smelled marijuana coming from the garage. *Ross*, 141 Wn.2d at 307-08. The deputies went back to their vehicle and did not contact the residence. *Id.* at 307. Deputy Bananola told Deputy Reigle that he was not comfortable stating in his affidavit for a search warrant that he had smelled the odor of marijuana coming from the garage. *Id.* at 307-08. The deputies went back to the property around midnight and walked back to the garage and confirmed the smell. *Id.* at 308. Neither deputy attempted to contact the residents. *Id.*

Reigle's trial counsel filed a suppression motion regarding the search warrant and for whatever reason the State agreed that Deputy Reigle's allegation that he smelled marijuana on the first trip to the property should be excised from the warrant. *Id.* at 312. This left the second visit to the residence as the only mention of the smell of marijuana in the affidavit of probable cause for the search warrant. *Id.* at 312-13. The Supreme Court held that the second visit was not legitimate police business because the only reason for the second visit was to confirm the smell of marijuana for the purposes of obtaining a search warrant. *Id.* at 313-14. The Court

explained that the deputies went to the property at an hour that no respectful citizen, absent an invitation, would be welcome and that the deputies had no intention of contacting Mr. Ross. *Id.* at 314.

Third, the facts of *Johnson*, as detailed above are distinct from D'Entremont's case. The agents went through a gate, with no trespassing signage, under the cover of darkness and never approached the residence. *Johnson*, 75 Wn. App. at 695-97. The officers in D'Entremont's case went to the outbuilding and residence via a large open driveway, clearly visible from the street, during daylight hours and attempted to contact D'Entremont, or whoever was at the property, by knocking on the door of the middle outbuilding and the residence. CP 38; Ex. 3, 4, 5, 6.

The facts in D'Entremont's case are also distinct from another Division II case, *State v. Boethin*. See *State v. Boethin*, 126 Wn. App. 695, 109 P.3d 461 (2005). Boethin's property was in a rural area and to access the residence one must travel down a long driveway that is part gravel and part paved. *Boethin*, 126 Wn. App. at 697. The home sat 125 yards from the public street and was secluded. *Id.* The home and its two garage doors faced south. *Id.* The closest garage door was about 20 feet from the house and had a woodpile next to it. *Id.* There was a car parked in the paved

driveway area, southwest of the woodpile. *Id.* There was also a boat and a truck parked in front of the easterly part of the garage door. *Id.* To reach the door to the house one must ascend a set of stairs. *Id.*

In *Boethin* the officers went to the house to investigate a possible indoor marijuana grow. *Id.* The officers went to the front door with the plan of attempting to smell marijuana when someone answered the door. *Id.* The officers knocked but no one answered the door. *Id.* One of the officers then walked down the steps, walked more than 20 feet to the east edge of the western garage door with the purpose of attempting to smell marijuana. *Id.* at 697-98. The officer had to walk between the house and the vehicle and the house and the woodpile to get to the garage door. *Id.* The officer put his nose a couple of inches from the garage door seam and sniffed, smelling marijuana. *Id.* at 698. This Court found that the officer “deviated substantially from what a reasonably respectful citizen would have done” by walking from the residence, around a vehicle and a wood pile and sniffing the crack of the garage door. *Id.* at 700. This Court held that in doing so, the officers unlawfully intruded upon Boethin’s private affairs. *Id.*

The officers in D'Entremont did not substantially deviate from what a reasonably respectful citizen would have done by approaching and knocking on the middle outbuilding. The officers had just observed a truck leave from in front of the outbuilding, which was accessible by the large open driveway that extended a distance past the middle outbuilding and a respectful citizen, seeing a man door on the outbuilding, could walk up and knock on the door to see if someone was still inside. RP 13-14; CP 38. Then, receiving no answer walk over to the residence and knock on the door attempting to contact someone. CP 38. It is also completely reasonable for a respectful citizen, after receiving no answer at the residence, to go back and knock on the man door of the outbuilding a second time given the officers had heard noise coming from inside the outbuilding when they originally contacted it. CP 38.

The middle outbuilding and the residence are both impliedly open to the public and the officers did not violate D'Entremont's right to privacy by entering onto the property and approaching the buildings in attempt to speak to someone on the premises.

3. The Officers' Observations Made From Outside The Middle Outbuilding Were Conducted In Open View And Therefore Are Not An Unlawful Search.

An officer observing something using his or her senses from a lawful vantage point does not constitute a search. *Seagull*, 95 Wn.2d at 900-02. In an open view situation, "the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public." *Id.* at 902.

As argued above, the officers did not unlawfully enter D'Entremont's property and their actions, contacting the middle outbuilding first by knocking on the man door, were reasonable under the facts and circumstances. Further, D'Entremont's residence and outbuilding were impliedly open to the public. Therefore, when the officers stood outside the middle outbuilding and knocked on the man door they were at a lawful vantage point. It was from this lawful vantage point that Deputy Engelbertson could hear noise coming from the middle outbuilding. CP 38. In the affidavit for the search warrant he described the noise as fans or equipment running. Ex. 2. From this lawful vantage point Detective Kimsey smelled the odor of marijuana coming from the building. CP 38.

The observations made by the officers fall under the open view doctrine and therefore do not amount to a search. The officers acted lawfully in obtaining the information. There was no unlawful search.

B. THERE WAS PROBABLE CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT FOR D'ENTREMONT'S PROPERTY FOR EVIDENCE OF UNLAWFUL MANUFACTURE OF MARIJUANA.

The officers' first hand observations were an independent investigation that corroborated the anonymous informant's information regarding the marijuana grow in D'Entremont's middle outbuilding. There was sufficient information to establish probable cause for the issuance of the search warrant.

1. Standard Of Review

The standard of review for determining if a search warrant should issue is an abuse of discretion. *State v. Johnson*, 79 Wn. App. 776, 780, 904 P.2d 1188 (1995). "The magistrate's determination that a warrant should issue is given deference." *Johnson*, 79 Wn. App. at 780. The application for a search warrant should be reviewed "in the light of common sense, with doubts resolved in favor of the warrant." *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

2. The Officers' First Hand Observations Contained Within The Affidavit Of Probable Cause For The Search Warrant Were Sufficient To Establish Probable Cause.

Citizens have the right to not be disturbed in their private affairs except under authority of the law. U.S. Const. amend IV; Const. art. I, § 7. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). Generally, a search is not reasonable unless it is based on a warrant issued upon probable cause. *Skinner v. Ry Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989). The probable cause necessary for a search warrant is established in an affidavit "setting forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity." *State v. Cord*, 103 Wn.2d 361, 365-66, 693 P.2d 81 (1985).

An affidavit in support of a search warrant can include information provided to the police by an informant. *See, State v.*

Chenoweth, 160 Wn.2d 454, 484, 158 P.3d 595, 610 (2007). Washington courts employ the two-pronged *Aguilar-Spinelli* test when evaluating informant's tips under Article I, Section 7 of the Washington State Constitution. *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723 (1964); *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984). To satisfy the two prongs of the *Aguilar-Spinelli* test the affidavit must set forth facts that establish the (1) basis of knowledge and (2) reliability of the informant. *Jackson*, 102 Wn.2d at 436-37. To find probable cause to issue a search warrant, "a magistrate requires an affidavit which informs him of the underlying circumstances which lead the officer to conclude that the informant was credible and obtained the information in a reliable way." *Id.* at 437. If the affidavit for probable cause does not establish the reliability and the basis of knowledge of the informant probable cause may still be established by independent police investigation corroborating the informants tip. *Id.* at 438. The corroborating information must be more than innocuous or public facts. *Young*, 123 Wn.2d at 195.

In the present case Deputy Engelbertson included the Crime Stoppers tip in the affidavit of probable cause for the search warrant. Ex. 2. Deputy Egelberston informed the magistrate that:

On 11-23-2010 the Lewis County Sheriff's Office received an anonymous tip through Lewis County Crime Stoppers. Where an individual said there was a marijuana growing operation at 122 McAtee Road, Centralia, Lewis County, Washington. The tipster stated the marijuana grow was not for medical purposes and was a very large marijuana grow and was located in a large metal outbuilding on the property and specified that it was the middle outbuilding where the grow was taking place.

Ex. 2. There is no information in the affidavit regarding the reliability of the informant therefore, the information from the informant must be corroborated by independent police investigation.

Deputy Engelbertson supplied the following information, beyond the anonymous Crime Stoppers tip, in his affidavit for probable cause for issuance of the search warrant:

On 11-23-2010, myself and Detective Elder conducted surveillance on the property. Due to the cold weather and snow on the ground and roofs, I noticed that on the roof of the center outbuilding, which is the tan with green metal outbuilding, there was snow melt on the roof and no snow melt on the metal outbuildings surrounding it. I also received power records from Centralia City light for the McAtee Road address. It is my opinion that the power consumption is elevated and what is more suspicious is that there is little fluctuation in power usage between summer and winter months and is relative, is a relatively constant power usage indicating there is a

large draw of power or continuous draw of power on the property.

...

After knocking on the door [of the outbuilding], I could hear fans or equipment running inside the outbuilding...During this time, I was advised by Detective Kimsey he could smell the odor of growing marijuana. Detective Kimsey is familiar with the scent of growing marijuana, as he has been involved in numerous marijuana grows and investigation and is familiar with the scent of growing marijuana.

Ex. 2.²

The information contained within the affidavit of probable cause is sufficient to corroborate the anonymous informant's information. The tipster stated the marijuana was being grown in the middle outbuilding. CP 37; Ex. 2. Deputy Engelbertson observed there was no snow on the roof of the middle outbuilding while there was snow on the roofs of the other buildings. Ex. 2. Deputy Engelbertson pulled the power records and discovered the power usage did not fluctuate throughout the year and appeared to be an elevated use of power. Ex. 2. Detective Kimsey smelled the

² The State did not include Deputy Engelbertson's observation made through the hole in the building because the State agrees that the trial court properly excised those statements from the warrant. When the State in its briefing refers to the information contained within the affidavit for the search warrant it is not including the information Deputy Engelbertson included regarding what he observed through the hole in the wall.

odor of growing marijuana from outside of the middle outbuilding.

Ex. 2.

The facts in D'Entremont's case are strikingly similar to the facts in *Johnson*. See *Johnson*, 79 Wn. App. 776. In *Johnson*, the DEA received a tip regarding a marijuana grow from an undisclosed informant. *Id.* at 778. The tip stated that Johnson was growing marijuana and also described Johnson's vehicle, giving the license plate number. *Id.* Agents confirmed the vehicle was registered to Johnson and obtained Johnson's address by checking driver's license records. *Id.* Agents conducted surveillance on Johnson's residence and could see there was no snow on the roof of Johnson's house while there was two feet of snow on the neighboring houses. *Id.* There was also no evidence that Johnson had removed the snow from his roof. *Id.* Agents checked the power records and could see Johnson's consumption was high. *Id.* at 778-79. Two agents also smelled marijuana from the street in front of Johnson's house. *Id.* at 779. The Court of Appeals held that the affidavit of probable cause for the issuance of the search warrant, which contained the information above, was sufficient to establish probable cause that Johnson was growing marijuana inside his residence. *Id.* at 780-83.

In D'Entremont's case, like *Johnson*, there was no snow on the roof of the middle outbuilding, the power consumption was elevated and there was the smell of growing marijuana by a trained and experienced officer. Ex. 2. The magistrate did not abuse his discretion by finding probable cause to issue the search warrant. This Court should find there was probable cause and the evidence seized during the execution of the search warrant is admissible. This Court should affirm D'Entremont's convictions.

3. The State Concedes That The Officers Did Not Have Probable Cause For The Search Warrant Prior To Entering Onto D'Entremont's Property.

The State agrees with D'Entremont's argument that Conclusion of Law 3 is contrary to the established case law in this state. *State v. Murray*, 110 Wn.2d 706, 757 P.2d 487 (1988); *State v. McPherson*, 40 Wn. App. 298, 698 P.2d 563 (1985); CP 39. The lack of snow on the roof and higher electric usage are innocuous facts that do not point to criminal behavior. *McPherson*, 40 Wn. App. at 300-01.

However, this concession does not invalidate the warrant. As argued above, the higher power consumption and lack of snow on the roof together with the smell of marijuana was sufficient probable cause for the magistrate to issue the search warrant.

V. CONCLUSION

The officers' observations regarding the sound of running equipment and the smell of marijuana were made from a lawful vantage point and therefore were not a search. These observations, properly incorporated into the officer's affidavit for probable cause for the issuance of a search warrant, were sufficient to corroborate the anonymous tipster and established probable cause for the search warrant. For the foregoing reasons, this court should affirm D'Entremont's convictions.

RESPECTFULLY submitted this 8th day of January, 2013.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

January 08, 2013 - 2:17 PM

Transmittal Letter

Document Uploaded: 437848-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 43784-8

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

A copy of this document has been emailed to the following addresses:

charles@lanecriminaldefense.com
paralegal@lanecriminaldefense.com