

FILED

OCT 29 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29188-0-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Appellant,

v.

KIMBERLEE ANN MOYER,
a/k/a KIMBERLY ANN MOYER,
Defendant/Respondent.

BRIEF OF APPELLANT

Gary A. Riesen
Chelan County Prosecuting Attorney

James A. Hershey WSBA #16531
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I. STATEMENT OF THE CASE

On January 8, 2009, Detective Josh Mathena of the Columbia River Drug Task Force received information that Kim Moyer, the defendant herein, was growing marijuana in the basement of her house located at 807 Orondo Street in Wenatchee. (CP 35). The informant said that the defendant was a long time marijuana user and continues to use marijuana. (CP 35). In response to this information, Detective Mathena checked the local data base and found that the defendant was listed as living at 807 Orondo Street in Wenatchee. (CP 35). A check of the defendant's criminal history by Detective Mathena showed an arrest in 2002 for driving under the influence and possession of 40 grams or less of marijuana. (CP 35). The record indicated that the defendant had been convicted in 2003 in that matter of negligent driving in the first degree and the marijuana charge was dismissed. (CP 35).

After receiving the information on January 8 of the defendant growing marijuana, Detective Mathena had Officers Miller and Reiber of the Wenatchee Police Department stop by 807 Orondo Street under a ruse. (CP 36). When the officers knocked on the

defendant's door, she answered but only cracked the door slightly open. (CP 36). They had a brief conversation during which the defendant appeared very suspicious and nervous and watched the officers as they left. (CP 36).

Officers Miller and Reiber then drove around the block and through the alley behind the defendant's house. (CP 36). As they drove by in the alley, they saw the defendant retrieve a garbage bag from her garbage can in the alley and take the bag inside the house. (CP 36).

According to the warrant affidavit, Detective Mathena's training and experience has taught him that indoor marijuana growers will often throw away evidence relating to the grow, such as marijuana leaves and stems as well as marijuana growing equipment. (CP 36).

On January 13, 2009, Detective Mathena spoke with Scott Erickson of the Chelan County Public Utility District concerning the power usage by the defendant at the 807 Orondo residence. (CP 36). According to Erickson, Moyer was the only person on the account for the residence and her power usage was unusually and consistently higher than it should be. (CP 36).

On January 14, 2009, Detective Mathena spoke with the property owner, Edward Wendt, and he confirmed that Moyer was the renter at 807 Orondo and that the house had a basement. (CP 36).

On March 18, 2009, at 9:30 a.m., Detective Mathena spoke with Corporal Tim Lykken of the Wenatchee Police Department. Lykken told Detective Mathena that on March 15, 2009, at 8:44 p.m., he and two other officers responded to 807 Orondo regarding a domestic violence incident. (CP 37). Moyer was the suspect and the victim was her daughter, Sierra Evans. (CP 37). Moyer was arrested for assault fourth degree domestic violence. (CP 37).

Detective Mathena asked Lykken if, while in the house, he smelled any odor of marijuana. (CP 37). Lykken said that he had. He said once he walked in the front door, he smelled a faint odor of marijuana. (CP 37). Corporal Lykken had been a law enforcement officer for 9 years, 7 years with the Wenatchee Police Department. (CP 37). Lykken said he had been around marijuana over 100 times and can identify the smell of marijuana from his training and experience. (CP 37). There was no doubt in Lykken's mind that

the odor he smelled inside the house was indeed marijuana. (CP 37).

With this information, Detective Mathena applied for a search warrant for 807 Orondo Street. (CP 32). The search warrant was granted and signed by the magistrate on March 18, 2009, at 10:58 a.m. (CP 32, 38-39).

On March 20, 2009, at approximately 10:28 a.m., Detective Mathena, along with the assistance of other officers, served the search warrant at 807 Orondo Street. (CP 33). During the search, officers found 43 small marijuana plants as well as processed marijuana. (CP 40).

On June 22, 2009, the defendant was charged with manufacture of marijuana, possession of marijuana with intent to deliver, and maintaining a drug property. (CP 1-3, 33).

The defendant subsequently filed a motion to suppress, asserting that the affidavit in support of the search warrant contained insufficient facts to support probable cause to search, contending that the officer's smell of marijuana did not provide probable cause. (CP 13, 14-29). The trial court, however, concluded that an officer's smell of marijuana could provide a sufficient basis for probable cause to search; but, nevertheless,

ruled that the information was stale based on the officer only smelling a "faint odor" of marijuana. (CP 33). Thus, the court ordered the suppression of the evidence and the dismissal of charges. (CP 41-43).

The State now appeals.

II. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN CONCLUDING IN ITS JUNE 9, 2010, FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT THE AFFIDAVIT DID NOT PROVIDE PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT BECAUSE THE INFORMATION AS TO THE ODOR OF MARIJUANA WAS STALE.
2. THE TRIAL COURT ERRED IN CONCLUDING IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW OF JUNE 9, 2010, THAT AN ORDER SUPPRESSING ALL EVIDENCE SEIZED AND DISMISSING THE CHARGES SHOULD BE ENTERED.

3. THE TRIAL COURT ERRED IN ORDERING THE SUPPRESSION OF EVIDENCE ON JUNE 9, 2010.
4. THE COURT ERRED IN ORDERING THE DISMISSAL OF THE CAUSE ON JUNE 9, 2010.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. WAS THE INFORMATION CONTAINED IN THE AFFIDAVIT AS TO A FAINT ODOR OF MARIJUANA STALE AT THE TIME THE SEARCH WARRANT WAS ISSUED?
2. DID THE MAGISTRATE ABUSE HIS DISCRETION IN ISSUING THE SEARCH WARRANT?

IV. ARGUMENT

THE AFFIDAVIT PROVIDED PROBABLE CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT AND THUS THE ISSUANCE OF THE WARRANT WAS NOT AN ABUSE OF DISCRETION BY THE MAGISTRATE.

It is well settled in Washington that great deference is accorded a decision to grant a warrant. As stated in State v. Vickers, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002):

A magistrate exercises judicial discretion in determining whether to issue a warrant. That decision is reviewed for abuse of discretion. This court generally accords great deference to the magistrate and views the supporting affidavit in the light of common sense. Doubts concerning the warrant are generally resolved in favor of issuing the search warrant.

(Citations omitted). This standard requires that a reviewing court give great deference to the magistrate's determination of probable cause exists and resolve all doubts in favor of the warrant. State v. Merkt, 124 Wn. App. 607, 612, 102 P.3d 828 (2002). A warrant should not be viewed in a hypertechnical manner. State v. Partin, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977).

In the present case, the trial court erred in concluding that the information contained in the affidavit as to Corporal Lykken smelling the faint odor of marijuana in the residence was stale. "The test for staleness of information in a search warrant is common sense." State v. Huff, 33 Wn. App. 304, 307, 654 P.2d 1211 (1982). The facts and circumstances recited in an affidavit of probable cause must establish a reasonable probability that the criminal activity is occurring at or about the time the warrant is issued. State v. Perez, 92 Wn. App. 1, 8-9, 963 P.2d 881 (1998). The amount of time between the known criminal activity and the issuance of the warrant is only one factor and it should be considered by the magistrate with all the other circumstances, including the nature and scope of the suspected criminal activity. State v. Petty, 48 Wn. App. 615, 621-22, 74 P.2d 879, *review denied*, 109 Wn.2d 1012 (1987).

"A marijuana grow operation is hardly a 'now you see it, now you don't' event." State v. Payne, 54 Wn. App. 240, 246, 773 P.2d 122, *review denied*, 113 Wn.2d 1019 (1989) (informant's tip about marijuana growing operation, three weeks old on date of search warrant affidavit, not too stale to establish probable cause, where reported extensive growing operation allowed magistrate to

reasonably infer that operation was continuing); State v. Hall, 53 Wn. App. 296, 766 P.2d 512, *review denied*, 112 Wn.2d 1016 (1989) (lapse of two months since informant had been present in house to make marijuana purchase did not render information stale for purpose of search warrant affidavit because it was reasonable to believe that established growing operation was still in existence based on the number of plants found at another location and informant's comment regarding size of plants remaining at house); State v. Petty, 48 Wn. App. at 621-22 (information in affidavit in support of a search warrant based on an informant's observation of marijuana plant growing in house two weeks earlier was not stale, given nature and scope of activity and fact that police officer detected odor of marijuana from doorway of house on day before he sought warrant); State v. Dobyms, 55 Wn. App. 609, 779 P.2d 746, *review denied*, 113 Wn.2d 1029 (1989) (information contained in search warrant affidavit alleging growing marijuana at a residence not stale, even after lapse of six weeks, in light of the ongoing nature of growing operations).

In the instant case, only approximately 63 hours had passed from the time Lykken smelled the marijuana in the defendant's house until the search warrant was issued. Though the odor may

have been faint, there was no question in Lykken's mind that it was marijuana he smelled. (CP 37). Nevertheless, the trial court, in making its decision to suppress, appears to reason that the odor was faint because it was a dissipating odor. However, it could just as easily have been a faint odor of marijuana because the smell was masked or because the marijuana odor was emanating from a different room or the basement. In any event, the search warrant was obtained just 63 hours after Lykken was certain he smelled marijuana in the house.

Furthermore, this very brief period of time must be considered in conjunction with all the circumstances outlined in the search warrant affidavit, including the report to Detective Mathena that the defendant was growing marijuana; the "unusually and consistently higher" power usage as determined by the employee of the public utility district; and the nervous and suspicious activity of the defendant when the police contact her as part of a ruse. (CP 36).

Hence, the magistrate did not abuse his discretion in issuing the search warrant in this case when considering all of the circumstances outlined in the affidavit in addition to Corporal Lykken smelling the marijuana just 63 hours prior to the issuance of

the search warrant. Growing marijuana is not done in a matter of hours or days; rather, it is a matter of weeks and months.

In making its decision to suppress, the trial court reasoned:

The officer asked the folks there whether they had been smoking marijuana that day or were in possession of it, indicating to the court that the reasonable inference was not that this was the smell of growing marijuana, which might have created a different situation, but the smell of consumed marijuana or dried marijuana that might be ready for consumption.

(RP 45). However, the search warrant affidavit establishes that this investigation started with a report of a marijuana grow operation.

On 01/08/2009 I received information regarding a possible marijuana grow operation in the Wenatchee area. The caller advised they believed a person, Kim Moyer, was growing marijuana at her house, 807 Orondo Street in Wenatchee. This grow was reportedly in the basement of the house

(CP 35). And, this information is corroborated by the information in the affidavit as to excessive power usage and its connection to growing marijuana. The reporting party also told Detective Mathena:

The caller said Moyer was a long time marijuana user and continues to use marijuana. The caller also said Moyer's 16-year-old son is also a marijuana user and the

caller believed Moyer supplied her son with marijuana.

(CP 35).

The trial court's inference that any smell of marijuana must have been from "consumed marijuana or dried marijuana" is unsound for two reasons: First, this inference is not supported by the totality of circumstances and information in the affidavit; the more correct inference is that the smell was of fresh or growing marijuana. Second, rather than making its own inference as to consumed marijuana, the trial court should have addressed whether it was an abuse of discretion for the magistrate to infer, based on the totality of circumstances, that growing marijuana was the cause of the odor and, thus, that marijuana would be found in the residence just 63 hours after it was smelled in the residence. It clearly was not an abuse of discretion for the magistrate to make that determination and issue the warrant.

V. CONCLUSION

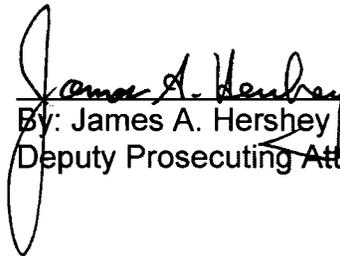
For the reasons set forth above, the trial court erred in suppressing the evidence and dismissing the case. Consequently,

this court should reverse the trial court's orders of suppression and dismissal.

DATED this 28th day of October, 2010.

Respectfully submitted,

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