

FILED

MAY 23 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29567-2-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON

Respondent,

v.

DALE HIGHTOWER

Appellant.

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

APPELLANT'S OPENING BRIEF

TODD V. HARMS
Attorney for Appellant
503 Knight Street, Suite A
Richland, WA 99352
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A. SUMMARY OF ARGUMENT.

Police responded to an anonymous caller who reported that he could smell the odor of marijuana coming from Apartment D9, Mr. Hightower's residence. RP at 3, CP at 32. Upon observing the odor coming from D9, police detained Mr. Hightower and a companion as they were walking towards them. RP at 5.

Police arrested and search Mr. Hightower, finding a small amount of marijuana in his pocket. RP at 9, CP at 32. Mr. Hightower denied that there would be marijuana in his apartment. RP at 9.

Police applied for a telephonic warrant based upon the marijuana found on Mr. Hightower's person and the odor of marijuana coming from his apartment. CP at 32-33. The affidavit mentions the officer's training in narcotics investigations generally but fails to include the necessary training and experience in the detection of marijuana required for probable cause. CP at 32. Slocombe later testified that he has never received training in the detection of marijuana odor. RP at 11.

Upon the search of Mr. Hightower's apartment, police discovered additional marijuana and a small amount of cocaine. Mr. Hightower was

convicted of marijuana and cocaine possession. CP at 73.

B. ASSIGNMENTS OF ERROR.

1. The trial court erred in finding that there was probable cause to arrest Dale Hightower for possession of marijuana.
2. The trial court erred in finding that Mr. Hightower's custodial statements were made free and voluntary.
3. The trial court erred in finding that the search warrant affidavit contained probable cause to search Mr. Hightower's apartment.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Must an arresting officer possess training in the detection of marijuana odor to establish probable cause?
2. Are custodial statements made freely and voluntary where the arrest is unlawful?
3. Does a search warrant lack probable cause for evidence of marijuana based on the resident's possession of marijuana outside of the residence and officer's observation of the odor of marijuana without stating he has specific training and experience in the detection of marijuana odor?

D. STATEMENT OF THE CASE.

On January 13, 2009, Detective Slocombe of the Kennewick Police Department responds to an anonymous call reporting the odor of marijuana coming from 3320 W. 9th, Apartment D9. CP at 32, RP at 3. Slocombe reports that he can smell the odor of marijuana coming from the door of Apartment D9. CP at 32. As the officer is knocking on the door, Mr. Hightower and another male walk towards the apartment. The officers detain the two men.

Slocombe reports that he can detect the odor of fresh marijuana coming from Mr. Hightower's person. Slocombe testified that his experience in detecting marijuana is through "hundreds of cases where (he) contacted people that have had marijuana". RP at 4. Slocombe was not trained in detecting the odor of marijuana. RP at 11.

Upon his arrest, police report that Mr. Hightower is read his Miranda rights. RP at 5. Mr. Hightower denies that he was read his Miranda rights. RP at 19. Upon questioning, Mr. Hightower admits that he has a small amount of marijuana in his pocket. He denies that there will be any marijuana in the apartment but admits there is a bong in there.

Mr. Hightower denies consent to search his apartment so Slocombe applies for a telephonic search warrant. Slocombe includes in the affidavit that he was responding to an anonymous call regarding marijuana odor, that he has training in “narcotics investigations”, that he can smell marijuana coming from Apt. D9, and that Mr. Hightower has marijuana on his person. CP at 32. The affidavit lacks any specifics regarding the officer’s experience or training in detecting the odor of marijuana. CP at 32-33

A search warrant is issued for Mr. Hightower’s apartment and police find marijuana and a small amount of cocaine. Mr. Hightower is convicted at a bench trial of marijuana and cocaine possession.

E. ARGUMENT.

1. SEARCH OF APPELLANT, INCIDENT TO ARREST, WAS UNREASONABLE

A lawful arrest necessary for a search incident to that arrest to be lawful. *State v. Ortega*, 159 Wn. App. 889, 893, 248 P.3d 1062 (2011). Probable cause to arrest based upon the odor of marijuana requires that the officer possess both training and experience in the detection of marijuana odor. *State v. Grande*, 164 Wn.2d 135, 146, 187 P.3d 248 (2008); *State v.*

Remboldt, 64 Wn. App. 505, 510, 827 P.2d 282 (1992) (Assertion that marijuana was smelled by an officer must be presented to an issuing magistrate “as more than a mere personal belief”), *quoting State v. Vonhof*, 51 Wn. App 33, 41, 751 P.2d 1221 (1988).

An officer’s particular expertise in the detection of marijuana odor is “critical” in a determination of probable cause. *State v. Johnson*, 79 Wn. App. 776, 780, 904 P.2d 1188 (1995). *Johnson* involved the smell observations of fresh marijuana by two DEA agents and describes their training and experience in the identification of marijuana.

The affidavit here amply identifies the specific *training and experience* of each agent involved in the investigations. It thereby adequately dispels any notion that the representation in the affidavit was merely personal belief. Special Agent Levy had been involved for over seven years as the Marijuana Eradication Coordinator for the Eastern District of Washington. He had personally investigated or assisted in investigations culminating in the seizure of several thousand cannabis plants. In addition, he had graduated from marijuana aerial spotting school, Indoor Cannabis Investigation School, and had participated in at least thirty search and/or seizure warrants in the preceding year, all involving the manufacture of cannabis by indoor propagation. Agent Levy represented

that he was familiar with the characteristic odor associated with growing or freshly harvested marijuana.

Special Agent Destito has been with the DEA since 1991 and had an additional six years of experience as a police officer. During that time, he attended the Washington State Criminal Justice Center, Basic Law Enforcement Academy, and the United States Department of Justice DEA/FBI Academy. He participated in and directed police operations targeting both indoor and outdoor marijuana cultivation. He also represented that as the result of this *training and experience* he knew the distinctive odor associated with the marijuana plant. This representation is likewise unchallenged by Johnson. The sense observations here are based on more than personal belief.

Id. It's clear that an arresting officer must possess both experience and training in the detection of the odor of marijuana.

Officer Slocombe testified that his experience in detecting marijuana is through "hundreds of cases where (he) contacted people that have had marijuana". RP at 4. However, Officer Slocombe testified that he has not received training in the detection of marijuana odor. RP at 11.

Mr. Hightower was detained, read his Miranda rights, questioned, and then searched based upon the officer's detection of

marijuana odor. CP at 32, RP at 5. Officer Slocombe lacked training in the detection of marijuana odor therefore lacked probable cause to arrest Mr. Hightower. The arrest was unlawful, therefore the search incident to that arrest was also unlawful. The marijuana in Mr. Hightower's pocket should be suppressed.

2. APPELLANT'S ADMISSIONS WERE TAINTED BY THE UNLAWFUL ARREST

When police obtain physical evidence or a defendant's confession as the direct result of an unlawful seizure, the evidence is "tainted" by the illegality and must be excluded. *State v. Avila-Avina*, 99 Wn. App. 9, 14, 991 P.2d 720 (2000), rev'd on other grounds. The relevant question in determining if evidence obtained following an illegal detention must be excluded, is whether police obtained the evidence by exploiting the illegality, or whether the means of obtaining the evidence were sufficiently distinguishable from the illegality to purge the primary taint. *Id* at 15. If the evidence is obtained as the result of a defendant's consent to search or confession, the voluntariness of the consent or confession is a threshold requirement but is not alone sufficient to purge the evidence of the primary

taint. *Id.*, citing *Brown v. Illinois*, 422 U.S. 590, 602, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). Thus, the giving of Miranda warnings is not dispositive in determining whether the evidence must be excluded. The court must determine whether the means of obtaining the evidence are distinguishable from the illegality based on the facts of each case. *Id.*

When police obtain evidence as the result of a defendant's consent to search or confession, four factors are relevant in determining whether police obtained the evidence by exploiting an illegal arrest: (1) the temporal proximity of the arrest and the subsequent consent or confession; (2) the presence of significant intervening circumstances; (3) the purpose and flagrancy of the official misconduct; and (4) the giving of Miranda warnings. *Id.* at 15-16.

In the present case police obtained the marijuana in Mr. Hightower's pocket by exploiting the illegal detention. His admission to the marijuana was shortly after the detention. There are no intervening circumstances. It's unclear whether Slocombe knew that training in marijuana odor detection was required. Mr. Hightower disputes the States position that he was read his *Miranda* rights. RP at 19.

Mr. Hightower was unlawfully detained immediately prior to admitting to the marijuana in his pocket. This illegal detention taints evidence of the marijuana.

3. SEARCH OF APPELLANT'S RESIDENCE WAS UNREASONABLE

Trial court's assessment of probable cause is a legal conclusion reviewed de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Review of the search warrant is limited to the four corners of the affidavit of probable cause. *Id.*

The probable cause standard for a search warrant affidavit based upon the odor of marijuana is the same as the standard for arrest discussed above. The affidavit must establish that marijuana or related paraphernalia is likely to be found in Apartment D9. *Remboldt*, 64 Wn. App. 505. Probable cause to search a residence based upon the odor of marijuana requires that the officer possess both experience and training in the detection of marijuana. *Id.*

Slocombe includes in the affidavit that he was responding to an anonymous call regarding marijuana odor, that he has training in "narcotics

investigations”, that he can smell marijuana coming from Apt. D9, and that Mr. Hightower has marijuana on his person. CP at 32. The affidavit lacks any specific experience or training in detecting the odor of marijuana. CP at 32-33.

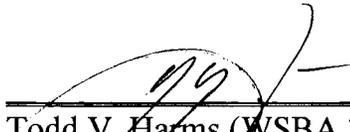
F. CONCLUSION

Officer Slocombe lacks training in the detection of marijuana odor. This training is necessary to establish probable cause to arrest Mr. Hightower therefore the arrest is unlawful. This unlawful arrest taints Mr. Hightower’s admission to possessing marijuana as well as the search incident to his arrest which lead to the discovery of the marijuana.

The search warrant affidavit in support of the search of Mr. Hightower’s residence lacked any indication that officers possessed training or experience in the detection of marijuana odor. Therefore the search of his residence was unlawful. All evidence gained by the search of Mr. Hightower and his residence should be suppressed. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

DATED this 10 day of May, 2011.

Respectfully submitted,



Todd V. Harms (WSBA 31104)
Attorney for Appellant

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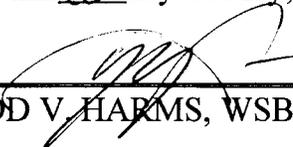
CERTIFICATE OF SERVICE

I, TODD V. HARMS, State that on the 20 day of May, 2011, I caused the original opening brief of Appellant to be filed in the Court of Appeals - Division III and a true copy of the same to be served on the following in the manner indicated below:

[X] ARTHUR BIEKER, DPA
Legal Messenger
C/o Benton County Prosecutor's Office
Kennewick, WA 99336

[X] DALE HIGHTOWER
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Signed in Richland, Washington this 20 day of May, 2011.



TODD V. HARMS, WSBA 31104