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IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

APPELLANT BRIEF

Karl Sloan
Prosecuting Attorney

Joseph Caldwell, WSBA 22201
Deputy Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

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I. ISSUES PRESENTED

Did the Court commit error by concluding that the affidavit in support of the warrant failed to set forth facts and circumstances sufficient to establish probable cause?

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On September 10, 2013, Commander Holsworth of the Colville Tribal Police Department obtained information about a possible marijuana grow in the vicinity of State Highway 97 and the Monse Bridge Road. Though the reporting party told Commander Holsworth that she wished to remain anonymous, the caller described the location with sufficient detail that Detectives Newport and Martin of the North Central Washington Narcotics Task Force (NCWNTF) were able to go to the location and observe a greenhouse type structure that had tall green plants visible from the Monse Bridge Road. *CP 25, Exhibit A.* When they spoke with Detective Barcus later, Detectives Newport and Martin told her that they believed the plants in the green house were marijuana. Detective Barcus spoke directly with Commander Holsworth, who confirmed what he had told Martin earlier. *Id.*

On September 13, Detective Barcus went to the location herself and observed the home and greenhouse at 326 Monse Bridge

Road, Brewster, Washington. While she could not see any plants from the Highway 97 side of the property, she was able to see what she believed were six to ten foot high marijuana plants in an area where the plastic on the greenhouse was missing. While she was unable to count the number of plants, she did estimate that the greenhouse was about twenty feet wide and thirty feet long, with a large industrial – type fan on the north side. *CP 25, Exhibit A.* She applied for, and was granted, a search warrant, citing a violation of RCW 69.50.401: Manufacturing of a Controlled Substance Marijuana. *Id.*

On September 13, 2013 at approximately 10:00 a.m. the NCWNTF executed the search warrant at 326 Monse Bridge Road. At the time, the defendant, his wife Teresa, and their son were at home. The officers moved them outside the home while they cleared the house. As the officers were clearing the house, Teresa, in response to a question from Detective Barcus, stated that there was a .410 shotgun that belonged to her in the house. *Id.*

Detective Barcus read the occupants their Miranda warnings and all indicated they understood their rights. *Id.* When asked by Teresa, Detective Barcus informed them that they were not under arrest, but were not free to leave at that time. *Id.*

Detective Barcus and the defendant at one point were in the greenhouse while the search was continuing. Detective Barcus asked the defendant if there were any weapons in the house. The defendant answered "yes" and told her he would show her where they were located. *Id.* While taking Deputy Davis and Detective Barcus into the home, the defendant made the statement that "he isn't supposed to mess with guns." *CP 25, Exhibit A.* When Detective Barcus asked him if he was a convicted felon, he said "yeah, but it was all bullshit." *Id.* He took the officers into the home to a closet in the living room. He opened the door, and Detective Barcus observed a rifle. *Id.* Deputy Davis took a photo of it and cleared the rifle. At this point, the search of the home stopped and an amended search warrant was applied for. *Id.*

The Amended Affidavit for Search Warrant alleged a violation of RCW 9.41.040: Unlawful Possession of a Firearm. *CP 25, Exhibit A.* According to the Affidavit, a search for felony convictions yielded two convictions: Possession of a Controlled Substance in 2008 and Intimidating a Public Servant in 2007. The Amended Search Warrant was granted on September 13, 2013, and included all firearms including shotguns, handguns, rifles and ammunition. *Id.*

Four guns were found in the house: a Stevens .410 shotgun,

a Ruger Super Blackhawk .44 caliber handgun, a Coast to Coast .22 caliber rifle, and a Marlin .22 caliber rifle. *CP 25, Exhibit A.* No apparent violation of RCW 69.50.401 was noted on the Return.

The defendant was arraigned on four counts of Unlawful Possession of a Firearm on September 30, 2013. Counsel filed a Motion to Suppress on February 10, 2014. In his motion, the defendant alleged that the warrant was issued without probable cause as the detective had stated in her affidavit that she, in essence, was not sure whether a violation of law had occurred. *CP 25.*

At the hearing before Judge Christopher Culp on February 18, 2014, the Court characterized the warrant and affidavit as akin to a "fishing expedition"". *RP 9, February 18, 2014.* The Court concluded that "the affidavit in support of the warrant failed to set forth facts and circumstances sufficient to establish a reasonable inference that Mr. Alexander was probably involved in criminal activity." *CP 33, p.4, Conclusion of Law 1.* [1] Further, the Court concluded that a warrant should at least ". . .show that criminal activity is at least *probable.*" *Id., Conclusion of Law 2.* In finding that the warrant and affidavit was insufficient to reach the lesser standard for probable cause required, the Court deemed that the search and seizure unconstitutional, and

[1] The Court, Judge Henry Rawson presiding, entered the Order On Motion to Suppress on March 31, 2014, after the reconsideration hearing.

suppressed all evidence seized. *Id., Conclusion of Law 4.* The State excepted to the Court's conclusion. *RP 10.* The Court then dismissed the case. *CP, at p. 4.*

The State moved for reconsideration and at hearing on February 28, 2014, the Court applied an abuse of discretion standard for the granting of the warrant and concluded that an abuse had occurred based on the detective's "prove or disprove" statement. *RP 17, February 28, 2014.* The Court noted that the detective should have simply gone to the house and asked to verify the number of plants that the Defendant was growing. *Id. at 17-18.* While the court withdrew its conclusion that the search amounted to a "fishing expedition", it upheld its earlier decision. *Id., at 18.* The State again noted its exception to the Court's ruling. *RP 18.* This appeal ensued.

III. STANDARD OF REVIEW

An appellate court reviews whether qualifying sworn information as a whole presents enough probable cause to support a search warrant de novo. In re Det. of Petersen v. State, 145 Wash. 2d 789, 800, 42 P.3d 952 (2002).

Further, an appellate court reviews legal conclusions regarding evidence suppression de novo. State v. Mendez, 137

Wash. 2d 208, 970 P.2d 722 (1999) abrogated on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

IV. ARGUMENT

Article I, Section 7 of the Washington State Constitution requires that a search warrant be issued upon a determination of probable cause. State v. Fry, 168 Wash. 2d 1, 4, 228 P.3d 1 (2010)(*citing* State v. Vickers, 148 Wash. 2d 91, 108, 59 P.3d 58 (2002)). Probable cause exists where there are facts and circumstances sufficient to a reasonable inference that the defendant is involved in criminal activity and that evidence can be found at the place to be searched. Fry, 168 Wash. 2d at 6(*citing* State v. Maddox, 152 Wash. 2d 499, 505, 98 P.3d 1199 (2004). *See also* State v. Ellis, 178 Wash. App. 801, 327 P.3d 1247 (2014). The affidavit does not need to make a prima facie showing of criminal activity. Rather, it must show that criminal activity is at least probable. Fry, 168 Wash. 2d at 6; Ellis, 327 P.3d at 1249.

Where a search warrant has been granted and a search conducted, the defendant has the burden of proving that the search was improper. State v. Mance, 82 Wash. App. 539, 544, 918 P.2d

527 (1996). The validity of a search warrant is reviewed on an abuse of discretion standard. State v. Garcia, 63 Wash. App. 868, 824 P.2d 1220 (1992). Great deference is given to the magistrate's determination of probable cause for the search warrant. State v. Jackson, 102 Wash. 2d 432, 442, 688 P.2d 136 (1984). An application for a search warrant should be judged practically, in light of common sense, rather than in a hyper-technical sense, with doubts resolved in favor of the warrant. State v. Perrone, 119 Wash. 2d 538, 549, 834 P.2d 611, 617 (1992);

A. THE COURT ERRED IN CONCLUDING THAT THE AFFIDAVIT IN SUPPORT OF THE WARRANT FAILED TO SET FORTH FACTS AND CIRCUMSTANCES SUFFICIENT TO ESTABLISH PROBABLE CAUSE.

As noted above, Article I, Section 7 of the Washington State Constitution requires that a search warrant be issued upon a determination of probable cause. Fry, 168 Wash. 2d, 4(*citing* State v. Vickers, 148 Wash. 2d 91, 108, 59 P.3d 58 (2002)). Probable cause exists where there are facts and circumstances sufficient to a reasonable inference that the defendant is involved in criminal activity and that evidence can be found at the place to be searched. Fry, 168 Wash. 2d at 6(*citing* State v. Maddox, 152 Wash. 2d 499, 505, 98 P.3d 1199 (2004). *See also* State v. Ellis, 178 Wash. App.

801, 327 P.3d 1247 (2014). The affidavit does not need to make a prima facie showing of criminal activity. Rather, it must show that criminal activity is at least probable. Fry, 168 Wash. 2d at 6; Ellis, 327 P.3d at 1249. Since search warrants protect against improper State intrusion, certain requirements are required to insure that the State does not use them improperly. Such requirements include (a) the review by an independent magistrate, *RCW 2.20.030*; (b) identifying the place to be search with specificity, *see e.g.,* Steele v. United States, 267 U.S. 498, 503, 45 S. Ct. 414, 69 L. Ed. 757 (1925); (c) the crime under investigation, State v. Riley, 121 Wash. 2d 22, 29-30, 846 P.2d 1365 (1993); and (d) the items to be seized, State v. Chambers, 88 Wash. App. 640, 645, 945 P.2d 1172 (1997).

In *Ellis*, the defendant contended that the search warrant used to search his residence lacked probable cause to believe his marijuana growing operation was criminal in nature, considering the tensions between the Uniformed Controlled Substances Act, RCW 69.50, and the Washington State Medical Use of Cannabis Act, RCW 69.51A. The Deputy in that case submitted an affidavit and obtained a search warrant to search the residence for evidence of the manufacturing (growing) of marijuana in violation of RCW 69.50.

While executing the search warrant, they found an active marijuana grow, two valid Medical Marijuana permits, and a loaded shotgun. Because Mr. Ellis was a convicted felon, he was arrested and charged with Unlawful Possession of a Firearm in the second degree. Ellis, 327 P.3d at 11248. Ellis moved to suppress the shotgun under the exclusionary rule, arguing that the search warrant lacked probable cause to believe a crime was being committed. The trial court disagreed, and the Court of Appeals upheld.

The Court of Appeals recognized that the Controlled Substances Act generally criminalizes growing operations. The Medical Use Cannabis Act decriminalizes growing marijuana if a person meets certain requirements. Ellis, 327 P.3d at 11249. The court ultimately affirmed that an affidavit supporting a search warrant that presents enough details to reasonably infer the suspect is growing marijuana on his or her property is enough to render the search warrant valid. *Id.*

Detective Barcus cited the statute she believed was being violated and the crime therein. She indicated what crimes she believed were probably happening. She described the information that she received from Commander Holsworth, and Detectives Newport and Martin. She described what she saw (green plants she

believed to be marijuana, other officers observing the same, etc.) while observing the residence and greenhouse, and gave enough detail so the magistrate could evaluate the request for the search warrant. She specified the address of the place to be searched, and the items to be seized. And the warrant application and affidavit was reviewed and approved by an independent magistrate (i.e., district court judge).

Certainty is not what is required for probable cause. Reasonable probability is. *Fry, supra.* The Controlled Substances Act makes it a crime to grow marijuana. The detective observed what she thought was marijuana growing in a greenhouse at the defendant's house. The court had enough information to find probable cause existed for a crime, and to issue the search warrant.

Further, the detective, in applying for an amended warrant, relied on and communicated information that led the reviewing magistrate to conclude that it was reasonably probable that guns would be found at the residence. She again presented enough information that the reviewing district court judge approved the warrant. Enough information was contained in the affidavit to present a reasonable probability that guns would be found at the residence where the defendant resided. Indeed, the defendant actually took

officers to the closet where some were kept. The Court's decision to grant the Motion to Suppress was in error.

V. CONCLUSION

The Court committed error in determining that the search warrant was not supported by sufficient evidence. A reasonable probability that the items sought are present is required for the issuance of a search warrant. Certainty is not. Detective Barcus provided enough information for a magistrate to find probable cause and authorize the search warrant. Thus, the Court improperly found that the search warrant was not supported by the Detective's affidavit. The Court's decision should be reversed and the action reinstated.

DATED this 14th day of November, 2014.

KARL F. SLOAN
Prosecuting Attorney
Okanogan County, Washington

Joseph M. Caldwell, WSBA # 22201
Deputy Prosecuting Attorney

COURT OF APPEALS
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STATE OF WASHINGTON Appellant vs. William Alexander Defendant	)	COA No. 324508 PROOF OF SERVICE

I, Yadi Godina, do hereby certify under penalty of perjury that on the 19th day of November, 2014, I electronically served a true and correct copy of the Appellant's Brief and Proof of Service to:

Court of Appeals
Division III

Alex H. Thomason
P.O. Box 307
Brewster, WA 98812

Dated this 19th day of November, 2014.

Yadi Godina
Legal Assistant
PO Box 1130
Okanogan, WA 98840