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Court of Appeals
Division III
State of Washington

No. 32623-3-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

STEPHEN R. SANDBERG,
Defendant/Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding, “Officers are not required to provide probable cause of failure to comply with the medical marijuana statute when seeking a search warrant for marijuana.” Conclusion of Law No. 3.4, CP 207.

2. The trial court erred in concluding, “The search of the defendant's shed and the results there of should not be suppressed.” Conclusion of Law No. 3.6, CP 207.

3. The trial court erred in denying the motion to suppress evidence that was illegally seized pursuant to a search warrant that was issued without probable cause.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Was the search warrant not supported by probable cause that a crime was being committed where the supporting affidavit failed to provide any evidence Mr. Sandberg's small grow operation was in violation of the state's medical cannabis laws?

C. STATEMENT OF THE CASE

Police officers were informed by a confidential informant (CI) that Stephen Sandberg had a marijuana grow operation in his shed in which was living. CP 205. Officers corroborated this tip by evaluating power

records and visiting Mr. Sandberg's shed. *Id.* When they visited the shed they smelled the odor of Marijuana. *Id.* Based on this information, officers submitted an affidavit for a warrant to search Mr. Sandberg's shed. *Id.* Officers did not discuss the medical marijuana statute in their affidavits. *Id.*

The officers knew from an audio recorded conversation¹ that Mr. Sandberg provides medical marijuana for the CI'S wife and that Mr. Sandberg had been asking the CI for his wife's medical marijuana card. *Id.* Detective Chris Lloyd was also present when this conversation was recorded. 10/23/13 RP 21-22. During the audio recorded conversation the CI can be heard advising Mr. Sandberg that Detective Lloyd's wife, just like the CI' S wife, has a medical marijuana card. The CI and Detective Lloyd asked Mr. Sandberg for some marijuana for one of their wives claiming she was ill. CP 205.

Officer's subsequently executed the search warrant on Mr. Sandberg' s property. The search revealed 9 mature marijuana plants and 24 immature marijuana plants. CP 206.

Before trial, Mr. Sandberg moved to suppress all evidence obtained as a result of the search, arguing the warrant was issued without probable

¹ The recorded conversation was ultimately suppressed pursuant to the parties' agreement. CP 206-07.

cause because the supporting affidavit failed to provide any evidence Mr. Sandberg's small grow was in violation of the state's medical cannabis laws. CP 5-13. The court denied the motion. CP 207.

The jury convicted Mr. Sandberg of manufacturing marijuana and possession of over 40 grams of marijuana. CP 179. This appeal followed. CP 198-99.

D. ARGUMENT

The search warrant was not supported by probable cause that a crime was being committed where the supporting affidavit failed to provide any evidence Mr. Sandberg's small grow operation was in violation of the state's medical cannabis laws.²

Standard of Review. In reviewing a trial court's findings of fact following a suppression hearing, the reviewing court makes an independent review of all the evidence. *State v. Apodaca*, 67 Wn. App. 736, 739, 839 P.2d 352 (1992) (citing *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990)). Findings of fact on a motion to suppress are reviewed under the substantial evidence standard. Substantial evidence is

² Appellant is aware this argument is contrary to this Court's opinion in *State v. Ellis*, 178 Wn. App. 801, 315 P. 3d 1170 (2014), review denied, No. 89928-2 (June 6, 2014). However, this issue is now pending before the Washington Supreme Court in *State v. Reis*, 90281-0, argued February 10, 2015. Therefore, this issue is raised in order to

evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Two different standards apply to the review of a probable cause determination. *State v. Emery*, 161 Wn.App. 172, 201, 253 P.3d 413, rev. granted, 172 Wn.2d 1014 (2011) and aff'd, 174 Wn.2d 741, 278 P.3d 653 (2012). The first standard, abuse of discretion, applies to whether information in the affidavit has enough reliability and credibility to qualify as “‘historical facts' in the case, i.e., the events ‘leading up to the stop or search.’” *Emery*, 161 Wn.App. at 201–202; *In re Det. of Petersen*, 145 Wn.2d 789, 799–800, 42 P.3d 952 (2002). Under the second standard, the legal conclusion that “‘the qualifying information as a whole amounts to probable cause.’” is reviewed de novo. *Emery*, 161 Wn.App. at 202 (quoting *Petersen*, 145 Wn.2d at 800).

Substantive Argument. The warrant clause of the Fourth Amendment to the United States Constitution and Wash. Const. article I, section 7 requires that a search warrant be issued upon a determination of

preserve the argument, should the Washington Supreme Court overrule this Court’s opinion in *Ellis*.

probable cause. *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002).

“The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual's right to privacy.” *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)). “Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

Accordingly, probable cause requires (1) a nexus between criminal activity and the item to be seized, and also (2) a nexus between the item to be seized and the place to be searched. *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). “It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause.” *Maddox*, 152 Wn.2d at 505.

“[T]he existence of probable cause is to be evaluated on a case-by-case basis. Thus, general rules must be applied to specific factual situations. In each case, ‘the facts stated, the inferences to be drawn, and

the specificity required must fall within the ambit of reasonableness.’
General, exploratory searches are unreasonable, unauthorized, and
invalid.” *Thein*, 138 Wn.2d at 150 (internal citations and footnote
omitted). The issuance of a warrant is proper only if a reasonable, prudent
person would understand from the facts contained in the affidavit that a
crime has been committed, and evidence of the crime can be found at the
place to be searched. *State v. Garcia*, 63 Wn. App. 868, 871, 824 P.2d
1220 (1992) (citing *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743,
cert. denied, 457 U.S. 1137, 102 S.Ct. 2967, 73 L.Ed.2d 1355 (1982)).

In July of 2011, the Washington State Legislature amended the
medical marijuana statute converting what had been an affirmative defense
to an exception to the general controlled substances statute. The
amendment decriminalizes the possession, use, and manufacture of
medical marijuana, so long as certain criteria are met. While the old
statute makes explicit reference to an affirmative defense (former RCW
69.51A.040(2) (2007)), the new statute clearly states that “[t]he medical
use of cannabis in accordance with the terms and conditions of this chapter
does not constitute a crime.” RCW 69.51A.040 (2012); Laws of 2011 c
181 § 401, eff. July 22, 2011.

This statute provides an exception to the general controlled substances statute which makes possession, use, and manufacture of marijuana a crime. RCW 69.50.401 (2012). Therefore, in order to establish probable cause to believe that a person has committed or is committing the crime of unlawful use, possession, or manufacturing of marijuana, it is not enough to merely show that the person used, possessed, or manufactured marijuana. Instead, probable cause can be established only by showing that such use, possession or manufacturing failed to comply with the terms and conditions of RCW 69.51A.³

In the present case, the affidavit does not allege or provide any information whatsoever as to whether Mr. Sandberg was a qualified medical marijuana patient or whether any person associated with the residence or grow operation was an authorized medical marijuana patient or designated provider pursuant to RCW 69.51A.040. Even though the officers had ample evidence that Mr. Sandberg was providing medical

³ In *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010), the court held that the affirmative defense provided under the former statute does not per se legalize an activity and therefore does not negate probable cause that a crime has been committed. The *Fry* case was decided before the 2011 amendment to RCW 69.51A.040, which is at issue here. In *Fry*—unlike in this case—there was no contention that the facts, including the information and smell of marijuana, did not support a finding of probable cause to search the Fry’s residence. Instead, Fry contended the probable cause was negated once he produced the medical marijuana authorization. The court rejected this argument. *Fry*, 168 Wn.2d at 6, 10.

marijuana for qualified patients (CP 205), the affidavit establishes nothing more than marijuana was probably being grown at Mr. Sandberg's address. CP 16-18. There is nothing in the affidavit from which the reviewing judge could determine with any degree of certainty or probability whether persons residing at the address were qualified medical marijuana patients or were designated providers for qualifying patients.

The affidavit fails to provide any facts or circumstances from which the issuing judge could make a determination that there was a fair probability that the possession and/or manufacturing of marijuana observed by law enforcement was not in compliance with Washington's medical marijuana laws. See CP 16-18. Thus, the affidavit fails to establish probable cause for a violation of law, i.e., that a crime was likely being committed.⁴

Under article I, section 7 of the Washington State Constitution, there is no "good faith" exception to the exclusionary rule. *State v. Afana*, 169 Wn.2d 169, 179-81, 233 P.3d 879 (2010); *State v. Crawley*, 61 Wn.App. 29, 34, 808 P.2d 773, rev. denied, 117 Wn.2d 1009 (1991).

⁴ State officers cannot obtain a valid state search warrant where there is not probable cause of a state crime. See, e.g., *United States v. \$186,416.00 in U.S. Currency*, 590 F.3d 942, 948 (9th Cir. 2010) (finding that because the evidence supporting the grow did not show probable cause of a crime in California law, even though it was illegal federally and was prosecuted federally, the search warrant had to be quashed).

It is undisputed that while the affidavit supporting the warrant included evidence of a marijuana grow, there was no mention of the medical marijuana statute or any assertion that the grow operation violated the medical marijuana statute. This omission is fatal to the warrant as the warrant then does not show probable cause that a crime had been committed. There is no good faith exception to rescue the warrant. Thus, subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986) (citing *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)).

E. CONCLUSION

For the reasons stated, the convictions should be reversed.

Respectfully submitted March 20, 2015,

s/David N. Gasch
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on March 20, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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