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Court of Appeals Cause No. 33242-6-II

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

STATE OF WASHINGTON, Respondent

v.

JASON GREGORY EISFELDT, Appellant

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jason Eisfeldt, the Petitioner herein, asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of that decision of the Washington State Court of Appeals, Division II, cause number 33242-6-II, filed in the Court of Appeals on February 21, 2007. A copy of that decision is in the Appendix at pages 1-10.

C. ISSUES PRESENTED FOR REVIEW

1. Does a landlord, or an agent of a landlord, have authority to allow police to search the garage of a tenant and search a closed garbage bag within that garage, because the landlord's agent had been given permission to enter the premises solely to clean a diesel spill in the living room of the tenant's premises?
2. If a landlord, or an agent of a landlord, finds a substance or materials he believes to be contraband, on his tenant's premises, and so informs the police of his discovery, are the police not required to attempt to obtain a search warrant, based on that information provided by the landlord, before entering the premises

to look at the substances or materials mentioned by the landlord or his agent?

3. Because the police believed a marijuana grow operation had been moved from a particular house, then learned that the tenant from that house had purchased a second house, is that a sufficient nexus under *State v. Thein*, 138 Wn. 2d 133; 977 P.2d 582 (1999), to justify obtaining a warrant for the search of the second house?

D. STATEMENT OF THE CASE

This case involves the authority of a landlord¹ who had entered his tenant's premises for a specific purpose, who then allowed the police to also enter the tenant's premises, without a search warrant, and to observe what the landlord believed to have been marijuana. The case further involves the police subsequently discovering that one of the defendants (not the appellant herein) who had actually signed the lease to this particular house (hereinafter referred to as Lacey house) had purchased a second house in Olympia (hereinafter referred to as Olympia house).

Based on that information, and little else, the police also obtained a search warrant for the Olympia house and discovered a marijuana grow operation.

¹ Mr. Piper was a contractor for the landlord, Walt Cox, and an agent of that landlord who had been called by one of the tenants to repair a diesel spill in the living room of the leased premises. The landlord, himself, did not enter the premises.

In 2003, James Wege, a defendant, but not the appellant herein, leased premises located at: 5015 – 21st Avenue SE, Lacey , Washington, (Lacey house), from his landlord, Walt Cox.

Approximately five weeks prior to the search, Mr. Piper, the landlord's agent and handyman, received a call from Mr. Wege indicating that they needed to have a diesel spill cleaned up in the living room of the residence. (CP 41,42; Ex 1) Mr. Piper was informed by an individual by the name of "Jason" (presumably the appellant herein, Jason Eisfeldt) that a key would be left for Mr. Piper's entry. (RP 13-15) Approximately five weeks later, Mr. Piper arrived at the Lacey house, entered the residence, discovered the diesel spill in the living room, and then walked through the house and into the garage from the house entrance, and discovered that the garage door was sealed and there was a garbage bag on the floor in the garage. Mr. Piper opened the garbage bag and discovered what he believed to be marijuana. Mr. Piper then called law enforcement and made contact with the Thurston County Narcotics Task Force, who responded to the scene. (CP 41; RP 13-16; Ex 1)

Members of the drug task force, upon arrival, entered the house and garage without a search warrant, looked inside the garbage bag, and agreed with Mr. Piper that the substance appeared to be consistent with marijuana. (CP 42; Ex 1) There is absolutely nothing in the record to indicate what, if any, knowledge, training, or experience Mr. Piper had in the use of, growing of, or identification of marijuana.

Only then did law enforcement obtain a search warrant to search the Lacey house. (CP 37-44; Ex 1; RP 19 L 11-25) They discovered numerous documents and papers belonging to all three defendants, including the appellant herein, Jason Eisfeldt. They did not find any additional marijuana, other than what was in the closed garbage bag in the sealed garage, but did believe, based on the condition of the house, that it had been utilized for growing marijuana. (RP 20-21; CP 45-61 Ex 2)

One of the documents discovered in their search of the Lacey house, was a power bill, in the name of the tenant of the Lacey house, James Wege, for a house in Olympia. (CP 54 L 25-28) Law enforcement also discovered that James Wege had purchased that house, which was located at: 1601 Eastside Street SE, Olympia, Washington (hereinafter referred to as Olympia house) in April of 2003. (CP 58 L 4-8; Ex 2)

Based on that information and having identified a truck at the Olympia house belonging to James Wege, they obtained a search warrant for the Olympia house and discovered a marijuana grow operation at the Olympia house. (Ex 2)

The appellant, Jason Eisfeldt, moved to suppress the evidence from both houses, and a hearing was conducted in Thurston County Superior Court on August 23, 2004, before the Honorable Richard Hicks. The court denied the appellant's Motion to Suppress and entered Findings of Fact and Conclusions of Law on April 1, 2005. (CP 155-164)

A trial on stipulated facts was conducted on January 10, 2005, (CP 147-154) and the appellant was found guilty and sentenced to 27 months with the Department of Corrections on April 12, 2005.

On May 10, 2005, the appellant filed this appeal to Division II of the Washington State Court of Appeals. (CP 175-203) On February 21, 2007, the Court of Appeals affirmed the denial of the Motion to Suppress by the Thurston County Superior Court.

The appellant petitions this court for review, because the Court of Appeals' decision ignores and is contrary to decisions from the Washington State Supreme Court and the Courts of Appeals, and is further contrary to the provisions of Article One Section Seven of the Washington State Constitution and the Fourth Amendment to the United States Constitution.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. A LANDLORD DOES NOT HAVE THE AUTHORITY TO INVITE POLICE INTO HIS TENANT'S PREMISES FOR PURPOSES OF CONDUCTING A SEARCH WITHOUT A SEARCH WARRANT.

The decision of the Court of Appeals in this case is in direct conflict with the Washington State Supreme Court's holding in *State v. Mathe*, 102 Wn.2d 537; 688 P.2d 859 (1984), and this Court's rationale in *State v. Christian*, 95 Wn.2d 655; 682 P.2d 806 (1981). It is submitted that the Court of Appeals misstated this particular issue. The issue in this case is not whether the search of the leased premises was a private search, as opposed to a search by the government, but the issue rather, is the extent

of a landlord's authority to allow or consent to a search of a tenant's premises, by law enforcement without the necessity of a warrant.

The *Mathe* and *Christian* cases, *supra*, squarely address that issue. The Court of Appeals ignored those cases completely and, instead, relied on another appellate court case, *State v. Dold*, 44 Wn. App. 519; 722 P.2d 1353 (1986) to get where the Court of Appeals wanted to go.

This court's decision in *State v. Christian, supra*, addressed the authority of the landlord as follows:

“Although a landlord may not consent to a search and seizure on behalf of a tenant where the tenant is in undisputed possession of the property...”

The decision in *Christian* is one of a long line of cases, both in this jurisdiction and others, dealing squarely with the authority, or lack thereof, of a landlord, entering its tenant's premises, and then allowing, or consenting to law enforcement, also entering and searching the premises.

In the present case, the landlord's agent entered the living room, where the diesel spill was, to clean up the diesel spill. The agent then walked through the house to the inside entrance to the garage and entered the

garage. There is no evidence that the agent needed to go into the garage for any purpose. While in the garage, the agent opened a garbage bag that was lying on the floor in the sealed garage. The agent then called the police and allowed them to come into the house and garage and look into the garbage bag.

Under this court's decision in *State v. Mathe, supra*, the sealed garage clearly would not have been a common area. See also *United States v. Brown*, 961 Fed.2d 1039 (2nd Circuit); *United States v. Whitfield*, 939 Fed.2d 1071 (D.C. Circuit); and *United States v. Warner*, 843 Fed.2d 401 (9th Circuit), all of which are in accord with this court's decision in *Mathe* and *Christian*, and contrary to the rationale adopted by the Court of Appeals.

The Court of Appeals ignored all of the above cited authority, and relied on *State v. Dold*, 44 Wn. App. 519; 722 P.2d 1353 (1986). However, the *Dold* case had to do with a person to whom a letter had mistakenly been delivered by the United States Postal Service, and which had been inadvertently opened by the person who received it. Because of the apparent contents of the letter, that person then took the letter to law enforcement, who also read the letter. That case has absolutely nothing to

do with a landlord's entry into the private residence of his tenant and then allowing the police to enter without a warrant, as is the case here.

Unlike *Dold*, nothing about Piper or the police's activity was accidental or inadvertent and it involved a direct invasion into the private residence of the tenant's premises. Simply put, there is a long line of cases involving a landlord's authority to enter the premises of his tenant and to allow the police to do the same without a warrant, which the Court of Appeals ignored and instead followed the rationale of inapplicable authority to reach a decision that is contrary to this court's prior decisions and to the line of cases cited. The Court of Appeals decision in this case, and on this issue, is also in direct conflict with another decision of the Court of Appeals. The decision in this case is in direct conflict with the Division I case of *State v. Rose*, 75 Wn. App. 28; 876 P.2d 925 (1994). Although that case was reversed by this court, it was reversed on grounds not relevant to this petition. *State v. Rose*, 128 Wn.2d 388 (1996). In the *Rose* case, Division I directly addressed the landlord's authority in allowing the police to search a tenant's premises. Interestingly enough, Division I, that decided the *Rose* case, is also the same division that had earlier rendered the decision in *State v. Dold*, *supra*, and, obviously, did not consider *Dold* as precedent in anyway on their decision in *Rose*. In fact, *Dold* wasn't

even cited in the *Rose* decision and should not have been relied on by the Court of Appeals in this case. The issues simply are not the same.

In the *Rose* case, the landlord had an agreement with the tenant that, not only was the landlord entitled to use the garage for storage, since he had agreed to perform maintenance on the property, he could also enter the property, without notice, for those purposes. The landlord came onto the premises and, while on the property, apparently noticed an odor that he believed to be marijuana. This information was reported to the police, who then arrived on the property, without a warrant, and the landlord took them to the area where he had smelled what he believed to be marijuana. The officers, with the landlord, walked around the premises and made other observations that they believed were consistent with a marijuana grow. Unlike the present case, the *Rose* case did not involve a personal invasion of the home itself.

The *Rose* court determined:

“A tenant does not lose his or her expectation of privacy where a landlord is permitted to enter the premises for certain specified reasons. The limited right of entry reserved for a landlord does not translate into a general waiver of constitutional protections by the defendant.” 75 Wn. App. at 34.

As stated, Division I, in reaching its decision in *Rose*, apparently rejected the rationale in *State v. Dold*, its own decision, as not being applicable to the facts in *Rose*. The Court of Appeals in the present case, however, chose to ignore *State v. Rose*, as it did the other cases cited, and relied on the rationale of *State v. Dold*, which Division I had specifically rejected.

The facts of this case are squarely within the parameters of *Rose*, *Mathe*, *Christian*, and the other cited authority.

2. THE LANDLORD HAD NO AUTHORITY TO OPEN THE GARBAGE BAG AND PEER INSIDE, NOR DID HE HAVE AUTHORITY TO CONSENT TO THE POLICE TO LOOK INSIDE THE GARBAGE BAG, WHICH THE LANDLORD HAD FOUND IN A CLOSED, SEALED GARAGE WITHIN THE CONTROL OF THE TENANT.

The Court of Appeals' decision in this case is contrary to this Court's holding in *State v. Boland*, 115 Wn.2d 571; 800 P.2d 1112 (1990), wherein this Court specifically determined that Article One, Section Seven of the Washington State Constitution implies that a person has a reasonable expectation of privacy in their garbage. If a person had a

reasonable expectation of privacy in their garbage located outside their house, in a can, at the curb of their street, can it be said that they don't have a reasonable expectation of privacy in their garbage located in a closed garbage bag, within a sealed garage, attached to their house?

Without citing any direct authority, the Court of Appeals in this case found it acceptable for law enforcement to look into a closed garbage bag that had been located in a sealed garage attached to the tenant's house, without first obtaining a search warrant, only because the landlord's agent had previously looked in that same garbage bag.

The Court of Appeals' decision in this case is also contrary to the rationale of Division III of the Washington State Court of Appeals' decision in State v. Rodriguez, 65 Wn. App. 409; 828 P.2d 636 (1992). That case follows the rationale of this court's decision in *Boland, supra*, but determined that a search of the defendant's garbage was not violative of Article One, Section Seven of the Washington State Constitution because, under the facts of *Rodriguez*, the defendant's garbage was placed in a 300 gallon garbage bag receptacle, which is a community dumpster for an entire apartment complex. It was that court's rationale that the defendant gave up his right to privacy by combining his garbage with the garbage of the

entire apartment complex. In the present case, the closed garbage bag in a sealed garage, is a far cry from the facts outlined in *State v. Rodriguez*, but the Court of Appeals in this case chose to ignore both the decision in *Boland* and the rationale in *Rodriguez*.

3. THERE WAS NO PROBABLE CAUSE FOR THE ISSUANCE OF A WARRANT TO SEARCH THE OLYMPIA HOUSE.

The Court of Appeals' decision in this case is contrary to this court's decision in *State v. Thein*, 138 Wn.2d 133; 977 P.2d 582 (1999). In the *Thein* case, this court stated:

“A search warrant may issue only upon a determination of probable cause...an application for a warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate...probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched...accordingly, ‘probable cause requires a nexus between criminal activity and the item to be seized and also a nexus between the item to be seized and the place to be searched.’” 138 Wn.2d at 141.

If this court were to determine that the search of the Lacey house was appropriate, that does not answer the question of whether the search of the Olympia house was appropriate.

In order to determine the appropriateness of the Court of Appeals' ruling in this case, this court must be aware of the evidence the officers had that allegedly was the nexus between the apparent previous grow operation in the Lacey house, the items expected to be seized (marijuana) in the Olympia house, and the nexus between that and the Olympia house itself.

While a number of items were discovered during the search of the Lacey house, for purposes of this argument, it is only pertinent to view the items that would support the connection to the grow having been moved to the Olympia house. First, they found numerous documents that identified each of the three defendants as having been at the Lacey house. Secondly, during the search of the Lacey house, they found a power bill addressed to the Defendant Wege for power that had been consumed by the residence at the Olympia house. They also learned, during their superficial investigation following their search of the Lacey house, that Mr. Wege had purchased the Olympia house in April of 2003. The detectives also drove by the Olympia house and observed a pick-up truck, which they later determined belonged to the Defendant Wege, and that his residence was listed as being with his parents, which was neither the Lacey house, nor the Olympia house.

Finally, it was the detective's opinion, without providing any statistics, evidence, or back-up documentation, that the power consumed at the Olympia house was higher than it should have been, and higher than what had been utilized by the previous occupant over the same period of time.

That information was the extent of the basis to establish probable cause for the search of the Olympia house.

It should be noted that while the police discovered conditions in the Lacey house during their search that lead them to believe that there had been a marijuana grow operation located in that house at some point in time (remember that the complaint of a diesel spill made approximately five weeks prior to the search). Even if it was reasonable for the officers to conclude that there had been a marijuana grow operation at the Lacey house at one time, there was no more evidence that the grow operation had been moved, than there was that it simply had been terminated. The fact that one of the defendant's purchased another house, a power bill for that house located in the Lacey house, and the defendant's truck having been observed at the Olympia house simply do not amount to probable cause that a suspected marijuana grow from the Lacey house had been moved to

the Olympia house sufficient for a search warrant. While it establishes a connection between the Defendant Wege and both houses, it does not establish any semblance of a nexus between the marijuana grow and the Olympia house. There simply is no connection between the suspected marijuana grow at the Lacey house and marijuana grow at the Olympia house.

A close analysis of the facts and cases discussed by this court in *Thein*, clearly reveals that there was considerably more evidence of the connection of drug activity in house #1 in *Thein* to house #2, than there is in the present case between the Lacey house and the Olympia house. The mere fact that a defendant has another house, which is really the extent of the information they had in this case, cannot be sufficient to merit a warrant to search that other house. There is no evidence that the detectives surveiled the Olympia house and discovered any indication, or any hint of criminal activity, particularly a marijuana grow, at the Olympia house. There is no evidence of deliveries to or from the Olympia house. There is no evidence of unusual activity at the Olympia house. There was no evidence of equipment being delivered to the Olympia house, or even purchased by the defendants for the Olympia house. There is no evidence

of covered windows at the Olympia house. There is no evidence of the Defendants Charles and Eisfeldt at the Olympia house.

The police simply learned that the Defendant Wege had purchased another house, concluded the grow operation must be at that house, and obtained a warrant to search. The Court of Appeals' decision is contrary to both the *Thein* case, and the cases relied upon by this court in reaching its decision in *State v. Thein*.

As this court stated in *Thein*:

“We disagree with the Court of Appeals that the evidence and information gathered at South Brandon, and the reasonable inferences drawn therefrom, establishes a nexus between illegal drug activity and Thein’s Austin Street residence. Indeed, in our review of the record we find no incriminating evidence linking drug activity to the Austin Street home. The only evidence linked to the Austin Street residence is innocuous: A box of nails and vehicle registration. Thus, even assuming Thein was McKone’s “supplier” none of the evidence found at South Brandon or any of the information supplied by the informants linked this activity to the Austin Street residence.

We also disagree with the Court of Appeals reasoning that since no grow operation was found at South Brandon, it was likely marijuana “would be found at the other place Thein controlled-his home.” ...the court’s conclusion is not drawn from any independent evidence linking Thein’s supposed drug dealing to his Austin Street residence (e.g., no observations of him leaving the Austin Street residence with packages, no sealed windows, no power records, no other suspicious activity at Austin Street). As such, the court’s conclusion amounts to a generalized conclusion

that drug dealers are likely to keep evidence of illegal drug dealing in their homes.

Nor do we find it reasonable to infer evidence is likely to be found in a certain location simply because police do not know where else to look for it.” 138 Wn.2d at 150.

That language is almost interchangeable with the facts in the present case, with the exception that there is even less evidence of the criminal activity and the nexus to the Olympia house than there was in the *Thein* case.

F. CONCLUSION

Based upon the foregoing authorities and arguments, it is submitted that the decision of the Division II of the Court of Appeals, should be reversed and the searches of the Lacey and Olympia houses should be suppressed.

Dated this 10th day of March, 2007.

Respectfully submitted,



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Attorney for Appellant
WSBA #5582

APPENDIX

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JASON GREGORY EISFELDT,

Appellant.

No. 33242-6-II

UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — When he went to repair damage from a diesel spill in the living room of a landlord's rental house in Lacey, Michael Piper, a private citizen, discovered a garbage bag containing what appeared to be marijuana and reported his discovery to the Thurston County Narcotics Task Force. Task Force officers interviewed Piper, confirmed that the green vegetable matter appeared to be marijuana, and obtained a warrant to search the unoccupied house in Lacey. Finding documents linking the Lacey house with an Olympia home owned by James Stephen Wege, one of the Lacey house tenants, police continued their investigation and, 22 days later, sought and served a search warrant for the Olympia house. In the Olympia house, police seized more than 100 growing marijuana plants. One of the suspected operators of the marijuana grow operation, Jason Gregory Eisfeldt, was questioned, and he admitted growing marijuana in the Lacey home until a diesel spill made it necessary to relocate to Olympia.

Following a bench trial on stipulated facts, Einfeldt was convicted of two counts of manufacturing marijuana with a school zone sentencing enhancement and sentenced to serve 27 months on each count concurrently. We hold that the evidence was lawfully seized from both the Lacey and Olympia houses and affirm.

FACTS

Wege leased a house located at 5015 21st Avenue S.E., Lacey, Washington, from Walter Cox. Sometime in July 2003, Wege phoned Cox to report that diesel fuel had spilled in the living room of the house and that repairs were needed.

On August 5, 2003, Piper, of C.P.I. Construction, went to the Lacey house to repair the damage. Someone who identified himself as "Jason" told Piper that he would leave a key to the house under the door mat. Clerk's Papers (CP) at 147. Before beginning necessary repairs, Piper opened the garage door to ventilate the house. Piper noted that the garage door had been sealed shut with foam. The house had no furniture or personal belongings and a garbage bag Piper found in the garage had dry "green leafy material," that he thought was marijuana. CP at 147.

After discovering the bag, Piper called the Thurston County Narcotics Task Force. In response to Piper's call, Sergeant Doug Price, Detective Glen Stahl, and Detective Ben Elkins went to the Lacey house without a warrant. After Piper showed the officers what he had seen, the officers called the Thurston County Prosecutor's office to obtain a search warrant for the Lacey house.

Police served the warrant and seized (1) documents, notes, and records, including rental receipts for the Lacey house in Wege's name; (2) a letter to Northwest Harley Davidson signed by "Ben Charles"; (3) a letter addressed to Einfeldt; and (4) receipts for items sold to Einfeldt.

CP at 148. In addition, the officers found a power utility bill addressed to Wege; a receipt for a “How to Grow Medical Marijuana” book; and paperwork for light bulbs and equipment used to grow marijuana. CP at 149. The officers later discovered that Charles rented a Ryder moving truck with a lift gate to move a (diesel operated) generator.

On August 27, the Task Force officers used evidence they found in the Lacey house to support their request for a warrant to search a house Wege had purchased at 1601 Eastside Street in Olympia, Washington. The search of the Olympia house uncovered a 100-plus plant, indoor marijuana-grow operation powered by a diesel generator and set up according to a diagram found in the Lacey house. Other records found in the Lacey house matched the growing lights, halide light shields, air filters, and climate and humidity control devices used in the Olympia grow operation. The Olympia house also contained records, including Wege’s Nextel records for a telephone system connecting “Jason,” “Ben,” and “James.” CP at 149. The “Jason” number matched that listed on some purchase orders for equipment used to grow marijuana.

Before trial, Eisfeldt moved to suppress this evidence, arguing that Piper, the diesel spill repairman, and the Task Force members who responded to Piper’s call, had conducted unconstitutional warrantless searches of the Lacey house. The trial court denied the suppression motion and, following a bench trial on stipulated facts, convicted Eisfeldt of two counts of manufacturing marijuana with a school zone sentencing enhancement. Eisfeldt appeals.

ANALYSIS

In this appeal, Eisfeldt challenges the constitutionality of the seizure of evidence at the Lacey and Olympia houses on three grounds. First, he argues that Piper exceeded his authority as a diesel spill repairman when he entered the garage and called the police. Second, he argues that probable cause did not support the Lacey warrant. And third, he argues that there was no

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nexus between the Lacey and Olympia houses, and so probable cause did not support the search warrant for the Olympia house. -We disagree.

PIPER'S DISCOVERY

Initially we note that Cox, the landlord and owner of the Lacey house, gave Piper permission to enter and repair diesel spill damage to his rental property and that a tenant, "Jason," had left a key under the door mat for Piper to use to gain access to the Lacey house. Eisfeldt asserts that his constitutional rights were violated when Piper discovered marijuana in a garbage bag the tenants had left in the garage. But Piper is a private citizen and was acting for a private purpose. Neither the State nor the federal constitutions protect Eisfeldt against unreasonable searches by private individuals. *Compare State v. Clark*, 48 Wn. App. 850, 856, 743 P.2d 822, *review denied*, 109 Wn.2d 1015 (1987) (no agency relationship exists between private person and the State by mere fact that there are contacts between them unless the State actively encouraged or instigated the citizen's actions); *State v. Dold*, 44 Wn. App. 519, 523, 722 P.2d 1353 (1986) (no State action existed when police read letter sent to them anonymously from a private citizen because the citizen, not the State, had opened letter addressed to defendant and forwarded it to police; burden is on defendant to present evidence of collusion.); *United States v. Reed*, 15 F.3d 928, 930-31 (9th Cir., 1994) (hotel manager lacked legitimate motive, other than crime prevention, to search guest's room and the fruits of that search were inadmissible because, although the officers did not ask him to conduct the search, they stood guard in the doorway and listened as the manager described his finds).

Here, Eisfeldt has presented no evidence showing that the Task Force instructed, encouraged, or acquiesced in Piper's search of the garbage bag. Because Piper was not a State

agent, Eisfeldt has no cognizable claim that Piper violated Eisfeldt's constitutional privacy rights.

SEARCH OF THE LACEY HOUSE

As discussed above, a private search conducted by a private citizen acting on his own initiative does not violate the State or federal constitutions. In addition, a subsequent warrantless search by the government that does not exceed the scope of the prior private search is not a constitutional violation. *Dold*, 44 Wn. App. at 522 (citing *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 1657, 80 L. Ed. 2d 85 (1984); *Walter v. United States*, 447 U.S. 649, 100 S. Ct. 2395, 65 L. Ed. 2d 410 (1980); *State v. Bishop*, 43 Wn. App. 17, 20, 714 P.2d 1199 (1986)). After discovering the garbage bag containing what he believed was marijuana in a sealed garage, Piper called Task Force members to the Lacey house and showed them what he had seen. Task Force detectives confirmed Piper's suspicions that the green vegetable matter appeared to be marijuana and obtained a warrant to search the unoccupied Lacey house. The Task Force executed the warrant and seized evidence linking several persons to the Lacey property and the now defunct marijuana manufacturing activity that had been conducted there. Eisfeldt contends that the information Piper gave the Task Force was insufficient to establish probable cause to support the search warrant. Again, we disagree.

Probable cause supports a search warrant if the affidavit contains sufficient facts and circumstances to establish that evidence of a crime will be found at the place to be searched. See *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). We review a probable cause statement in its entirety, in a commonsense, nontechnical manner and resolve all doubts in favor of the validity of the warrant. *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002).

Eisfeldt argues that the affidavit failed to satisfy the *Aguilar-Spinelli*¹ test. Because Piper was a reporting witness and not an informant—confidential, unidentified, or anonymous—we question whether *Aguilar-Spinelli* applies. Assuming, without deciding, that it does, we hold that Piper’s account satisfies both prongs of the *Aguilar-Spinelli* test. To satisfy *Aguilar-Spinelli*, the affidavit must (1) sufficiently identify the basis for the informant’s information, and (2) establish the informant’s credibility. *State v. Cole*, 128 Wn.2d, 262, 287, 906 P.2d 925 (1995). The affidavit here established that Piper’s information was based on personal knowledge and direct observations that Detective Elkins, a 12-year law enforcement veteran, corroborated. Moreover, Piper was a known, identified, reporting citizen named in the warrant application. *State v. Northness*, 20 Wn. App. 551, 557, 582 P.2d 546 (1978) (named citizen informants presumed reliable). On this basis, Eisfeldt’s challenge to probable cause fails.

Eisfeldt also argues that because Piper waited five weeks to respond to the diesel spill repair call, his information was stale. This claim is meritless. Piper’s information was fresh the day that he discovered what he believed to be marijuana in the sealed garage. To be timely, the facts and circumstances referred to in the affidavit must establish to a reasonable probability that evidence of criminal activity will be found at the place to be searched at about the time the warrant is issued. *State v. Perez*, 92 Wn. App. 1, 3-5, 963 P.2d 881 (1998), *review denied*, 137 Wn.2d 1035 (1999). Here, the warrant was obtained and executed on the same day Piper found what he believed to be a garbage bag containing marijuana and called the Task Force. Piper’s information was not stale and the search of the Lacey house was not unlawful. The trial court did not err in admitting evidence seized at the Lacey house.

¹ *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).

SEARCH OF THE OLYMPIA HOUSE

Eisfeldt raises two challenges to the search of the Olympia house. First, he argues that there was no nexus between the information found at the Lacey house and the Olympia house and, second, he argues that even if a nexus may have existed on August 5, 2003, the information garnered from the Lacey house was so stale by August 27, 2003, that it was inadequate to support a finding of probable cause to justify issuing a search warrant for the Olympia house.

The search warrant for the Lacey house was issued and executed on August 5, 2003. In the Lacey house, the Task Force discovered evidence leading officers to believe that Wege, Eisfeldt, and Charles had operated the marijuana grow operation. The Task Force also believed that the operation was continuing and was connected to Wege's residence in Olympia. The Task Force investigated this connection and on August 27, 2003, obtained and executed a search warrant for the Olympia house.

Whether information is timely and whether evidence is likely to remain at the place sought to be searched depends on the nature of the evidence sought. *State v. Dobyms*, 55 Wn. App. 609, 620, 779 P.2d 746, *review denied*, 113 Wn.2d 1029 (1989). Common sense is the test for staleness and a sophisticated marijuana grow operation is more likely to remain at a specific location than a bloody knife. *See State v. Maddox*, 152 Wn.2d 499, 506, 98 P.3d 1199 (2004). Information is not stale for purposes of probable cause if the facts and circumstances support a common sense determination that there is continuing and contemporaneous possession of the property sought. *Maddox*, 152 Wn. 2d at 506. Here, the task force investigation indicated that there had been a marijuana grow operation at the Lacey house of such size that a moving van was required to relocate the diesel generator that powered the operation. This information gave rise to a reasonable inference that the grow operation is not portable and was likely to remain in

one place and that information regarding the location of the operation would not become stale quickly. We agree with the trial court that the evidence indicating the possible relocation of the grow operation seized from the Lacey house was not stale 22 days later when the Task Force requested a warrant to search the Olympia house.

We also agree that the information found during the search of the Lacey house established an ongoing criminal enterprise in manufacturing marijuana—a nexus between the growing of marijuana at the Lacey house and Wege’s house in Olympia. This nexus was sufficient to justify searching the Olympia house for further evidence of an ongoing marijuana grow operation. A search warrant affidavit must state facts sufficient to establish a nexus between the place to be searched and the evidence sought. *Perez*, 92 Wn. App. at 5. Washington courts have held that if evidence establishes that an individual is dealing in drugs, a sufficient nexus exists to search their residence.

[A] nexus is established between a suspect and a residence if the affidavit provides probable cause to believe the suspect is involved in drug dealing and the suspect is either living there or independent evidence exists that the suspect may be storing records, contraband, or other evidence of criminal activity at the residence.

Perez, 92 Wn. App. at 5 (quoting *State v. O’Neil*, 74 Wn. App. 820, 825, 879 P.2d 950 (1994), review denied, 125 Wn.2d 1016 (1995)).

A sufficient nexus may be established by direct observation or through normal inferences as to where the items sought would be found. *Perez*, 92 Wn. App. at 5. A warrant is properly issued “when the nexus between the items to be seized and the place to be searched rests not upon direct observation, but on the type of crime, nature of the items, and normal inferences [about] where a criminal would likely hide contraband.” *Perez*, 92 Wn. App. at 5 (quoting *O’Neil*, 74 Wn. App. at 825). Here, the affidavit contained both the officers’ direct observations

from the search of the Lacey house, their subsequent investigation of Wege, and normal inferences indicating a link between the marijuana grow operation, the residents of the Lacey house, and the residents of the Olympia house. As our Supreme Court noted, the Ninth Circuit recognizes that “in the case of drug dealers, evidence is likely to be found where the dealers live.” *State v. Thein*, 138 Wn.2d 133, 145, 977 P.2d 582 (1999) (quoting *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993)). Here, it was reasonable that the evidence of a marijuana grow operation similar to that which had been removed from the Lacey house would be located in the Olympia house.

Eisfeldt contends that *Thein* negates a finding of nexus in this case. In *Thein*, police found a box of nails and money order receipts addressed to the defendant at another location. Our Supreme Court ruled that generalized statements concerning the customs of drug dealers, the box of nails, and the money order receipt were insufficient to establish a nexus between the drug house and the defendant’s residence to justify a search warrant for the defendant’s home. In contrast here, Task Force officers found much more than a box of nails and money order receipts linking the Olympia residence to the Lacey house. First, although Wege owned and occupied the Olympia house, he leased the empty Lacey house from Cox. Second, the power bill for Wege’s Olympia house was found at the Lacey house addressed to Wege. Other documents and receipts addressed to Eisfeldt and Charles, such as a Ryder rental agreement, receipts for items frequently used when growing marijuana, and a receipt for a book titled, “How to Grow Medical Marijuana” were found in the Lacey house and listed in the affidavit requesting a search warrant for the Olympia house. CP at 149. After the Task Force searched the Olympia house, they arrested Eisfeldt, who does not dispute on appeal that he freely admitted his involvement in the marijuana grow operation when questioned.

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The searches were lawful, the voluntariness of the confession unchallenged, and we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

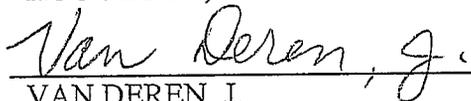


QUINN-BRINTNALL, J.

We concur:



HOUGHTON, C.J.



VAN DEREN, J.