

FILED

JUN 01 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 286932

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Appellant,

vs.

PATRICK JIMI LYONS,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE DAVID A. ELOFSON, JUDGE

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BRIEF OF APPELLANT

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**I.**  
**ASSIGNMENTS OF ERROR**

1. The trial court erred in finding that the affidavit for search warrant supplied no information about when the informant observed growing marijuana plants at the address in question.

**(Findings of Fact Nos. 3 and 4)**

2. The trial court erred in finding that the affidavit failed to set forth the existence of timely probable cause to believe that the presence of the contraband was contemporaneous with issuance of the search warrant. **(Findings of**

**Fact No. 5)**

3. The trial court erred in concluding that the affidavit was legally insufficient, and that the resulting search was unlawful. **(Conclusions of**

**Law Nos. 1 and 2)**

4. The trial court erred in granting the Defendant's motion to suppress evidence.

## **II. ISSUE**

Whether, evaluated in a common sense manner, an officer's affidavit for a search warrant supported a finding of probable cause that growing marijuana plants were still present at the address to be searched, where such affidavit set forth that the information had been provided to the officer by a confidential informant within 48 hours prior to the signing of the affidavit?

## **III. STATEMENT OF FACTS**

On August 15, 2009, Officer Gary Garza requested a search warrant for a residence located at 3230 Thorp Road in Yakima. In his affidavit, Officer Garza outlined his training and experience in investigating drug crimes, described the

residence, as well as an individual believed to be residing at the residence, known as “Jimmy”. The affidavit went on to relate the officer’s probable cause to believe that “Jimmy” was manufacturing, or possessed with intent to deliver, marijuana.

**(CP 58-60)** The officer stated that his probable cause was based, in relevant part, upon the following information:

Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address. The CS knows the suspect and homeowner as “Jimmy”. The CS observed the growing marijuana while inside an outbuilding on the property of the listed residence. The CS observed the marijuana growing in potted soil under active lighting designed to promote plant growth.

**(CP 60)**

A warrant to search the Thorp residence was issued by a district court judge on the same date as the affidavit, August 15, 2009. **(CP 55-57)**

As a result of the search, Mr. Lyons was charged by amended information with one count of manufacturing a controlled substance-marijuana, one count of possession of a

controlled substance with intent to deliver-mushrooms, and one count of possession of a controlled substance with intent to deliver-marijuana, under Yakima County Superior Court cause number 09-1-01569-0. **(CP 63-64)**

Mr. Lyons moved to suppress evidence gathered as a result of the search. **(CP 65-75; 76-87)** The State filed a response. **(CP 47-62)** A suppression hearing was held on November 3, 2009. **(11-3-09 RP 1-20)**

At the conclusion of the hearing, the court granted the motion to suppress, finding that the affidavit did not provide information about when the CS observed the growing marijuana, and that therefore, “[t]he temporal proximity of the informant’s actual observation was not set forth nor were other factually sufficient indicia of probable continuation recited . . .” **(CP 10)** The court concluded that the affidavit was legally insufficient, the resulting search was unlawful, and items seized pursuant to the search were suppressed. **(CP 11)**

The State moved for reconsideration. (CP 17-46) The defendant responded. (CP 12-16) That motion was denied, and the case was dismissed without prejudice. (CP 8)

The State filed this timely appeal. (CP 3-7)

#### IV. STANDARD OF REVIEW

The issuance of a search warrant is generally reviewed for abuse of discretion. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citations omitted). Great deference is afforded the issuing magistrate. Id.

Additionally, because a trial court reviews the magistrate's determination of probable cause in a quasi-appellate capacity, and an appellate court is equally bound by the four corners of the affidavit's supporting probable cause, a trial court's legal determination of probable cause is reviewed *de novo*. State v. Chamberlin, 161 Wn.2d 30, 41 n. 5, 162 P.3d 389 (2007) (citations omitted). Any doubts as to the existence

of probable cause will be resolved in favor of the warrant. State v. J-R Distributors, 11 Wn.2d 764, 774, 765 P.2d 281 (1988).

## V. ARGUMENT

### A. The information in the affidavit was not stale at the time the search warrant was issued.

A police officer may obtain a valid search warrant to obtain evidence of a crime or contraband, if its issuance is supported by probable cause. Wash. Const. Art. I, s. 7; City of Seattle v. McCready, 123 Wn.2d 260, 271-72, 868 P.2d 134 (1994); CrR 2.3.

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. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007), *citing* State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

The affidavit or sworn statement should be evaluated in a commonsensical manner rather than hyper-technically. State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). The issuing magistrate is “entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

Information is not stale for probable cause purposes if the facts and circumstances in the affidavit support a commonsense determination that there is a continuing and contemporaneous possession of the evidence intended to be seized. Maddox, 152 Wn.2d at 506. *See, also*, State v. Bohannon, 62 Wn. App. 462, 470, 814 P.2d 694 (1991). In evaluating whether the facts underlying a search warrant are stale, the court looks at the totality of circumstances. Id.

It is the nature and scope of the criminal activity which are the primary factors to be considered in determining if too much time has passed for the information to be reliable. Two weeks’ time may be too long for the sale of small amounts of

marijuana, but still sufficient to establish probable cause where an informant observes an extensive growing operation. State v. Smith, 39 Wn. App. 642, 651, 694 P.2d 660 (1984).

Indeed, the “likelihood that the evidence sought is still in place is a function not simply of watch and calendar”, but of other variables as well: the character of the crime, of the thing to be seized, the place to be searched. “The hare and the tortoise do not disappear at the same rate of speed.” 2 Wayne R. LaFave, Search and Seizure Sec. 3.7(a), at 374 (4<sup>th</sup> ed. 2004); Andresen v. Maryland, 427 U.S. 463, 478 n.9, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976).

The affidavit here meets this standard by asserting that there was “marijuana growing in potted soil under active lighting designed to promote plant growth.” While additional details such as the number of plants would have been helpful, the nature of the growing operation is such that there was probable cause to believe it was still ongoing 48 hours after the information was imparted to the detective.

The decision in State v. Hall, 53 Wn. App. 296, 300, 766 P.2d 512 (1989) is persuasive. There, the court rejected the defendant's argument that the facts supporting the search warrant were stale. As a result of surveillance of a marijuana grow operation, the police arrested an individual named Mason, who identified the defendant, Hall, as the supplier of the plants. It had been two months since Mason had last been in Hall's residence to purchase plants. The Court of Appeals held that probable cause to search existed because it was reasonable to believe that a grow operation was still in existence considering the number of plants found in Mason's possession and information provided about the size of plants remaining at the residence. Id., at 300. *See, also*, State v. Payne, 54 Wn. App. 240, 247, 773 P.2d 122 (1989); United State v. Landis, 726 F.2d 540, 542 (9<sup>th</sup> Cir. 1984).

In the instant case, the information provided by the CS to Detective Garza about the presence of the marijuana being grown at the defendant's residence was not stale. Read in a

commonsense manner, rather than hyper-technically, it is logical to interpret the affidavit as meaning that the CS both observed the growing marijuana, and related that fact to the detective, within the 48-hour period prior to the signing of the affidavit. In any event, there was probable cause to believe that a grow operation would be ongoing at the time the warrant was issued. The affidavit was legally sufficient, and the search was lawful.

**VI.  
CONCLUSION**

For all the foregoing reasons, this court should reverse the orders of suppression and dismissal, and remand this matter to the superior court for trial.

Respectfully submitted this 28<sup>th</sup> day of May, 2010.

  
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