

NO. 286932

IN THE COURT APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,
Petitioner

v.

PATRICK JIMI LYONS,
Respondent

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

JOHN ADAMS MOORE, JR.
ATTORNEYS FOR RESPONDENT
WSBA # 4458
217 NORTH SECOND ST
YAKIMA, WA 98901
(509) 575-0372

NO. 286932

IN THE COURT APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,
Petitioner

v.

PATRICK JIMI LYONS,
Respondent

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

JOHN ADAMS MOORE, JR.
ATTORNEYS FOR RESPONDENT
WSBA # 4458
217 NORTH SECOND ST
YAKIMA, WA 98901
(509) 575-0372

TABLE OF CONTENTS

	PAGE
I. TABLE OF AUTHORITIES.....	ii
II. INTRODUCTION.....	1
III. STATEMENT OF THE CASE.....	3
A. HISTORY OF THE CASE.....	3
B. STATEMENT OF ADDITIONAL FACTS... ..	4
IV. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....	8
V. ARGUMENT OF RESPONDENT.....	10
A. STANDARD OF REVIEW.....	10
B. ARGUMENT.....	11
1. ARGUMENT IN SUPPORT OF JUDGMENT.....	11
2. ARGUMENT IN ANSWER TO APPELLANT.....	19
VI. CONCLUSION.....	33
VII. APPENDIX.....	35

I
TABLE OF AUTHORITIES

	PAGE
State Cases	
<u>In re Pers. Restraint of Davis,</u>	
152 Wn.2d 647, 682-83 (2004).....	10
<u>State v. Cole,</u>	
128 Wn.2d 262, 906 P.2d 925 (1996)	29-32
<u>State v. Hall,</u>	
53 Wn.App. 296, 766 P.2d 512 (1989).....	24-25
<u>State v. Hett,</u>	
31 Wn.App. 849, 646 P.2d 1187 (1982).....	14
<u>State v. Higby,</u>	
26 Wn.App. 457, 460, 613 P.2d 1192 (1980).....	14, 19-20
<u>State v. Hill,</u>	
123 Wn.2d 641, 644 (1994).....	10
<u>State v. Huff,</u>	
106 Wn.2d 206, 720 P.2d 838 (1986)	24
<u>State v. Hunnell,</u>	
52 Wn.App. 380, 382 (1988).....	10
<u>State v. Johnson,</u>	
17 Wn.App. 153, 156, 561 P.2d 701 (1977).....	14
<u>State v. Levy,</u>	
156 Wn.2d 709, 733 (2006).....	10

<u>State v. Maxwell,</u>	
114 Wn2d 761, 791 P.2d 223 (1990).....	24
<u>State v. Murray,</u>	
110 Wn.2d 706, 757 P.2d 487 (1988).....	24
<u>State v. Payne,</u>	
54 Wn. App. 240, 773 P.2d 122 (1989).....	25-28
<u>State v. Petty,</u>	
48 Wn.2d 615, 740 P.2d 879 (1987).....	22-23
<u>State v. Smith,</u>	
39 Wn. App. 642, 650, 694 P.2d 660 (1984).....	13-14, 21-22
<u>State v. Spencer,</u>	
9 Wn.App. 95,96-97, 510 P.2d 833 (1973).....	12-13, 32
Federal Cases	
<u>Durham v. United States,</u>	
403 F.2d 190, 193 (9 th Cir. 1968).....	34
<u>Harris v. United States,</u>	
331 US 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947)	
(Frankfurter’s Dissent).....	1
<u>Sgro v. United States,</u>	
287 U.S. 206, 77 L. Ed. 260, 53 S. Ct. 138 (1932).....	33
<u>United States v. Bailey,</u>	
458 F.2d 408, 411 (9 th Cir. 1972)	33

Other Authorities

“Search Warrant: sufficiency of showing as to time of
occurrence of facts relied on,” 100 ALR 2d 525 (1965)
and current later case service12, 17

Fourth Amendment to the United States Constitution 11

Washington Constitution, Article 1, section 7.....11

E. Fisher, Search & Seizure, § 72 (1970).....33

II. INTRODUCTION

The Fourth Amendment requires that probable cause be shown, supported by “oath or affirmation.” There must also be a showing that the illegality is probably on-going at the time the warrant is to be executed. That is all common sense. Any contrary interpretation would lack fidelity to an amendment which enjoys “a place second to none in the Bill of Rights” (Harris v. United States, 331 US 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947, Frankfurter’s Dissent)). In the case under review, a sub-par boilerplate affidavit has been found inadequate with regard to the showing of the timing of persistent illegality. In a run-on sentence, actually, “two sentences blended together with the conjunctive ‘and’” the Superior Court struck down the affidavit. In doing so, and regarding the recency of the informant’s observations, the Court concluded: “we have absolutely no idea when he made the observation.” (R.P. Vol. 1,

p 19)¹. After an extensive review of caselaw on the timeliness issue, the lack of corroborative detail is striking. To begin with, the officer qualified his belief in the informant with the odd statement that the informant had never provided false or misleading information, “to my knowledge.” As if to confirm the boilerplate nature of the form affidavit, the sentence “I am familiar with the appearance, packaging, common usage and terminology regarding controlled substances through my training, experience and observation,” is set out twice, in identical back to back sentences. No corroboration was mentioned of “Jimmy’s” involvement, or shown: no surveillance, no electric power surge records, no observations of suspicious patterns of in and out traffic at the premises, no controlled buy from “Jimmy,” not even a scant rumor of his involvement in criminal activity. These concerns, the state suggests, are “hypertechnical,” and lack “common sense.”

¹ “RP” refers to the Verbatim Transcript of Hearing; “Vol. 1” refers to the hearing held on November 3, 2009.

III.
STATEMENT OF THE
CASE

In addition to those facts set forth in the appellant's brief (App's Br. 2-5) the Respondent submits the following:

A. HISTORY OF THE CASE

On August 15, 2009, a Yakima County District Court Judge issued a warrant to search the Respondent's premises, resulting in his arrest. On August 17, 2009, the Respondent appeared at a preliminary hearing and an arraignment date was set. On August 19, 2009, an Information was filed, on which the Respondent was arraigned August 21, 2009. On September 29, 2009, the Respondent's Motion to Suppress and Supporting Memorandum were filed. An Amended Information was filed on October 14, 2009. On October 30, 2009, the State's Memorandum in Opposition to the Defendant's Motion to Suppress was filed. The Suppression Motion came on for hearing on November 3, 2009, and the Court ruled in favor of the defendant. The state moved for Reconsideration on

November 10, 2009, to which the defendant responded on November 18, 2009. The state's Motion for Reconsideration came on for hearing on November 30, 2009, and was denied. On that date the Court signed the defendant's proposed Findings of Fact, Conclusions of Law, and Order, and also signed a dismissal of the charges. This appeal followed upon the state's filing a Notice of Appeal on December 24, 2009.

B. STATEMENT OF ADDITIONAL FACTS

In the affidavit for search warrant, the following was stated:

Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and states 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. This source of information, hereafter referred to as CS, has provided information regarding the identity of people and locations where controlled substances are located, being manufactured, being sold and or being possessed.

The confidential and reliable informant, to my knowledge, has never provided false or misleading information. I am familiar with the appearance, packaging, common usage and terminology regarding controlled substances through my training, experience and observation.

I am familiar with the appearance, packaging, common usage and terminology regarding controlled substances through my training, experience and observation.

Your affiant has talked with the CS from whom this information was received and through conversation has determined that the CS is familiar with the appearance, packaging, common usage, and terminology regarding said controlled substance, as well as the appearance, terminology and common methods and equipment used to grow/manufacture marijuana.

Your affiant believes the C/S is reliable in that he/she had previously provided information concerning narcotics trafficking, usage, manufacture and/or possession to your affiant and/or other members of law Enforcement. This information has been additionally verified through concurring investigations. The controlled substances recovered during the investigation field-tested positive.

Following the consideration of counsels' oral arguments and submissions at the initial suppression hearing, the trial Court reasoned as follows:

THE COURT: Thank you. Well, I -- in looking at this, I believe that it was Judge Engel that signed the warrant. I suspect that Judge Engel did not have the benefit of your briefing or the opportunity to hear a critical discussion about the language that was used and I believe that he signed it with all good intention, but the fact that he found probable cause on that occasion doesn't govern what we do here and I think that's why we have these procedures so we can review more carefully the warrants that are applied for.

Unfortunately, Mr. Kennedy, you are restrained by the abilities of your officers. You didn't -- this is something that he puts together. The warrant is -- or the application is largely boiler plate. There are only a few areas where his individual writing skills are needed and I think that's the big problem here, that the operative sentences, as Mr. Moore pointed out, is the first sentence in the middle of, you know, one of the pages. It says within the last 48 hours a reliable and confidential source of information contacted YCNU detectives and stated he or she observed narcotics, specifically marijuana being grown indoors at the listed address. If you call that a run on sentence or two sentences blended together with the conjunctive and, but if you break it apart, it's within the last 48 hours a reliable confidential source of information contacted detectives, period. He observed narcotics being grown. So it shifts -- as I read it, it shifts to the word being, but there is no -- to use Mr. Moore's phrase, no temporal reference to what being means. I don't know when he saw or observed. I do know when he contacted detectives and I think had he rephrased it and said

within the last 48 hours, I observed and left off entirely when he contacted, one could reasonably infer that the contact with law enforcement was somewhere between the date of the application for the warrant and observation, and I wouldn't have a problem but in the way I read this application, this affidavit, Mr. -- or Officer Garza has simply said that he contacted law enforcement within the last 48 hours. We have absolutely no idea when he made the observation.

The cases that were all cited talk about all the extra detail that you can put into an affidavit. I'm not sure it's necessary that I think you get into that conflict to being hypertechnical and reasonable and obviously there's some latitude but in every one of the cases there was at least some observation and what I'm left with is a detective who didn't phrase his affidavit very well, use poor communication skills and because of those poor communication skills, I'm forced to rely on the word to try to interpret the word being as being something of a very immediate term, and I can't -- I don't know when he saw it and I recognize that you are constrained by what the detectives bring to you but the way I read this is there is no anchor point. There is no time here and there's no other detail provided in this statement that would give us a time sense as to when the observation occurred, so motion to suppress is granted.

- RP Vol. I, at pp.
18-19.

IV.
ISSUES PERTAINING
TO THE
ASSIGNMENTS OF
ERROR

1. Is it reasonable to conclude that the modifier “within the last 48 hours” qualifies both the events of “contacted YCNU detectives and stated” and “observed narcotics?”

2. Can the policy of interpreting a vague affidavit in favor of the search be extended to allow the state to conflate these disparate events, given the wording of the affidavit in this case?

3. Did the affidavit actually set forth (as claimed by the appellant) that the information had been provided to the officer by a confidential informant within 48 hours prior to the signing of the affidavit?

4. Did the affidavit support a finding that marijuana plants were still present at the address to be searched when the warrant was signed?

5. Does “common sense” require additional investigative corroboration in order to establish a constitutionally sufficient statement of the probability of ongoing and continued illegal activity at the place to be searched?

6. Which has primacy, the policy regarding the construing of vague warrant applications to favor the affidavit, or the rule that the Fourth Amendment requires a sufficient statement of the probability that the illegal conduct will be on-going at the time the search warrant is issued?

7. Under these circumstances, did the affiant have a duty to corroborate the informant’s tip in order to provide probable cause that the illegal activity was ongoing at the time the warrant was issued?

V.
ARGUMENT OF
RESPONDENT

A. THE STANDARD OF REVIEW

The Courts of Appeal review a trial court decision on a suppression motion by determining whether its Findings of Fact are supported by substantial evidence and by reviewing its Conclusions of Law de novo. State v. Levy, 156 Wn.2d 709, 733 (2006). The rule that credibility determinations are within the discretion of the trial court and appellate courts will not review such findings does not apply, since no witnesses were called in this case. In re Pers. Restraint of Davis, 152 Wn.2d 647, 682-83 (2004). Unchallenged findings are verities on appeal, State v. Hill, 123 Wn.2d 641, 644 (1994), and the trial court's findings resolving disputed inferences from the evidence are also accepted as verities on appeal. State v. Hunnell, 52 Wn.App. 380, 382 (1988).

B. ARGUMENT

1. ARGUMENT IN SUPPORT OF JUDGMENT

The Fourth Amendment to the United States Constitution and our State Constitution (Wash. Constit., Art. 1, section 7) both require that an application for a search warrant must set forth facts showing the existence of probable cause justifying the intrusion sought. One essential component of the probable cause determination under both Constitutions is the proximity of the occurrence of the facts to be relied on by the issuing judge, and the time the warrant is applied for. When the timeline is known, issues can arise based upon staleness where the time elapsed from the observation of culpable activity to the issuance or execution of the warrant is too long to establish the probability of the continuation of the illegality. Moreover, “this question may be raised in two distinct and separate situations: It may be necessary to determine whether a specific term used to describe the time when the offense occurred is sufficiently clear and definite, or, this point granted, it may be questionable

whether the time mentioned in the affidavit is sufficiently close to the time of the making of the warrant to satisfy the requirement of probable cause.” - Anno. “Search Warrant: sufficiency of showing as to time of occurrence of facts relied on,” 100 ALR 2d 525, 527 (1965), and current later case service supplement.

In an early case, our Court found that staleness was established by a delay of approximately two months between the drug purchase and the execution of the search warrant:

An affidavit supporting a search warrant must be sufficiently comprehensive to provide the issuing magistrate with facts from which he can independently conclude there is probable cause to believe the items sought are at the location to be searched. State v. Withers, 8 Wn. App. 123, 504 P.2d 1151 (1972); State v. Portrey, 6 Wn. App. 380, 492 P.2d 1050 (1972); United States v. Harris, 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971). Further, these facts must be current facts, not remote in point of time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the person or premises to be searched *at the time* the warrant is issued. United States v. Bailey, 458 F.2d 408, 411 (9th Cir. 1972); Durham v. United States, 403 F.2d 190, 193 (9th Cir. 1968).

The affidavit executed March 9, 1972 relies upon alleged sales of controlled substances made by the defendant on December 23, 1971 and January 7, 1972. These sales are too remote in point of time to constitute probable cause for the issuance of a search warrant on March 9, 1972. United States v. Bailey, supra; Durham v. United States, supra.

- State v. Spencer,
9 Wn.App. 95,
510 P.2d 833
(1973), at 9
Wn.App. pp. 96-
97.

The rule requiring a showing of the probability of the presence of the items sought at the time the warrant is issued is firmly established in our case law:

The facts underlying the determination of probable cause for issuance of a search warrant must be sufficient to justify the conclusion that the property to be seized probably is on the premises to be searched at the time the warrant is issued. State v. Partin, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977). The support for issuance of a search warrant is sufficient if, considering the affidavits and testimony offered, an ordinary person would understand that a violation existed and was continuing at the time of the warrant application.

State v. Clay, 7 Wn. App. 631, 637, 501 P.2d 603 (1972).

- State v. Smith,
39 Wn. App.
642, 650, 694
P.2d 660 (1984)

Those cases had provided a precise timeline with scalpel accuracy, so that the Court could measure the temporal proximity between the warrant's execution and the occurrence of facts to be relied on by the issuing magistrate. The rule remains:

A search warrant may be issued only upon information establishing the probable contemporaneous presence of property to be seized on the described premises. The key is whether the property sought is on the premises to be searched *at the time* the search warrant issued.

- State v. Johnson,
17 Wn.App. 153,
156, 561 P.2d
701 (1977); see
also State v.
Higby, 26
Wn.App. 457,
460, 613 P.2d
1192 (1980);
State v. Hett, 31

Wn.App. 849,
646 P.2d 1187
(1982);
(emphasis
original).

In the case sub judice, the affidavit does not provide the Court with sufficient precision. The affidavit recites that an informant told the officer of the marijuana grow within 48 hours prior to the affidavit. The critical fact of the temporal proximity of the informant's actual observation to the warrant application is not set forth. Accordingly, the affidavit fails to establish the existence of timely probable cause to believe that the presence of contraband is contemporaneous with the issuance of the Warrant. The affidavit stated:

Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and states 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. This source of information, hereafter referred to as CS, has provided information regarding the identity of people and locations where controlled substances are located, being manufactured, being sold and or being possessed. The confidential and reliable informant, to my knowledge, has never provided false or misleading information. I am familiar with the appearance, packaging, common usage and terminology regarding controlled substances through my training, experience and observation.

- Affidavit herein,
Appendix and
C.P. 58

While the affidavit states that “within the last 48 hours” the information was conveyed, it says nothing about the timing of the informant’s observation.

Because the Fourth Amendment adheres to a standard of probability and reasonableness, the emerging case law since the early prohibition era cases has not evolved into a bright line rule. As stated in 100 ALR 2d 525, supra, the courts have adopted a fact-specific approach to the timing requirement assessment:

(4) With the expansion of the doubtful zone in which the decisions of the courts vacillate as respects proximity of the time of the making of the search warrant, increased emphasis has been placed on the nature of the unlawful activity. The question is whether or not a reasonable presumption of continuing violation may be made.

- 100 ALR 2d,
supra, at p. 527
(emphasis
supplied)

In the case under this Court's review, the temporal relationship of the informant's observation was not expressly set forth, nor was it discernable per quod. Nothing at all is set forth regarding the number or maturity of the plant or plants, or their proximity to being harvested; nothing is said regarding the size or area taken up by the illegal activity, or the size or number of soil planters, or the number of "active lighting" sources. Moreover, there are no other corroborative details concerning any of the following:

1. "Jimmy's" reputation as a drug dealer or grower among other sources known to the police; or,

2. Electric power records establishing a surge in power consumption, and the recency and sustained nature of such a surge, and if it has continued up to the time of the warrant application; or,
3. Surveillance by the police or citizens, revealing suspicious traffic patterns in and out of the premises, or the odor of marijuana; or,
4. A controlled buy of marijuana from the premises, or from “Jimmy.”

At best, the affidavit recites only that the anonymous informant (who had, the affiant stated, “to my knowledge” never provided false or misleading information) claimed to have observed in an outbuilding a marijuana grow of uncertain size or age “in potted soil under active lighting.” As to when that observation took place, the affidavit supplies nothing. Information this sketchy failed to set forth the probability of the continued presence of contraband in the place to be searched. The Superior Court Judge correctly interpreted this Constitutional principle, and suppressed the evidence. The Court’s decision should be affirmed.

2. ARGUMENT IN
ANSWER TO
APPELLANT

The appellant steps away from reason and fails to address the central core issues of this case, in suggesting that a “common sense” view favors the state’s position, and that any other result can be arrived at only “hypertechnically.” (App.’s Br. at p.2 the issue formulation, and at pp. 7 and 10)

A review of Washington case law in which the temporal proximity issue has been raised in marijuana grow cases will place this case in proper perspective. A comparative analysis of the choice influencing criteria by which our courts have found or rejected the existence of a reasonable presumption of continuing violation clearly trumps the appellant’s arguments. In the case under review, the affidavit’s failure to address the timing issue with a sufficient factual basis will be clear beyond cavil.

In State v. Higby, 26 Wn. App. 457, 613 P.2d 1192 (1980), a traffic stop led to the arrest of a driver for possession

of marijuana. The driver (apparently to help himself) informed on the source of the marijuana, which he had purchased two weeks prior. A search warrant was issued, based on this report and other corroborative information which was later determined to be insufficient. The officers observed high vehicular traffic at the residence, and repeated a statement made by an informant six months earlier that he observed leafy green materials at the residence. In reversing the conviction, the Court found that the affidavit was insufficient to establish probable cause to search the residence. The passenger's statement regarding one sale of a small quantity of marijuana did not provide probable cause to search two weeks later. A single observation of possible marijuana activity six months in the past was held not to be sufficient. The second informant's reliability was also not established. The officers' observations of marginally suspicious activity at unspecified times were insufficient to establish a reasonable belief that marijuana would be found on the premises at the time the warrant was served.

A staleness issue was raised in State v. Smith, 39 Wn. App. 642, 694 P.2d 660 (1984). As to this issue, the Court was persuaded that the detailed description of the grow operation overcame the staleness claim:

In his affidavit, Denson stated that Gerrold or Jerrold Smith and Mary Van Laanen owned the property and that it contained three buildings: a mobile home, a log cabin under construction on one side of the mobile home and a metal pole building on the other side, in which marijuana plants and growing equipment were to be found. The affidavit set forth the legal description of the property and listed the evidence sought as 100 to 150 3- to 4-foot marijuana plants, 4 to 6 halide lights, garden tools, a ventilation system and the ownership records of these items and of the property itself.

- 39 Wn. App. at
p. 643

and

The facts underlying the determination of probable cause for issuance of a search warrant must be sufficient to justify the conclusion that the property to be seized probably is on the premises to be searched at the time the warrant is issued. State v. Partin, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977). The support of issuance of a search warrant is sufficient if, considering the affidavits and testimony offered, an ordinary person would

understand that a violation existed and was continuing at the time of the warrant application. State v. Clay, 7 Wn. App. 631, 637, 501 P.2d 603 (1972). In this case, even if Denson's testimony that the informant had visited the property 4 or 5 days before the warrant application is not considered, Denson also testified that the informant had visited the property 2 months before and 1 month before. Denson also testified that the informant had observed an extensive growing operation: 100 to 150 3- to 4-foot plants, together with the requisite lighting and other equipment. We find that given the nature of the operation observed 1 and 2 months previously, probable cause existed to issue a search warrant. See State v. Johnson, 17 Wn. App. 153, 561 P.2d 701, review denied, 89 Wn.2d 1001 (1977)(information 4 months old held not too remote). We hold that no hearing was required because, if the testimony challenged by Smith is set to one side, there remains sufficient evidence in the testimony and affidavit to support a finding of probable cause.

- 39 Wn. App. at
p. 651

In State v. Petty, 48 Wn.2d 615, 740 P.2d 879 (1987), the Court dealt with a staleness challenge to an affidavit for a search warrant. Again, the Court combed the record for corroborative detail, found it, and concluded that the stated two (2) week delay from the informant's tip to the affidavit was

constitutionally sufficient. The affidavit provided corroboration as follows:

That within the past two weeks of the above date, this informant went to the above listed residence and did observe a quantity of growing Marijuana. This Marijuana was being cultivated in the basement under a number of halide lights. Further, Marijuana could be smelled not only from the front door, but in the alley located directly north of the premise.

On 10/14/85 at approx. 2000 hours your affiant responded to the above described location, walked through the alley north of the premise in question and detected a [sic] odor of Marijuana. The premise in question borders the alley. Further, your affiant went to the front door and knocked. A moment later a W/M approx. 30 years of age, 6'1", 220lbs with facial hair answered the door opening it wide open. Your affiant was approx. three feet from the open door and detected a strong odor of Marijuana coming from inside the premise.

- 48 Wn. App. at p. 616-617

It is worth noting that the State v. Petty Warrant was issued on October 15, 1985, the very next day after the officer had conducted his (valid) plain-smell observation.

A prudent and thorough investigator can also access electric power records, and rule in or rule out a surge pattern consistent with maintaining a grow over time; or, upon its cessation, note that a reduction of power cautions that the operation has ceased. This was not done in the case at bar. In State v. Murray, 110 Wn.2d 706, 757 P.2d 487 (1988), increased electrical consumption combined with evidence of electric fan usage, extreme levels of heat observed in the basement and the basement's notable darkness, as well as the informant's statement that marijuana was being grown in the house, combined to establish sufficient probable cause for issuance of a search warrant. See, also, State v. Huff, 106 Wn.2d 206, 720 P.2d 838 (1986); State v. Maxwell, 114 Wn2d 761, 791 P.2d 223 (1990). That level of detail is missing in the case at bar.

In State v. Hall, 53 Wn.App. 296, 766 P.2d 512 (1989) the Court stated:

The test for staleness of the information in an affidavit is common sense. State v. Petty, 48 Wn. App. 615, 621, 740 P.2d 879, review denied, 109 Wn.2d 1012 (1987); State v. Hashman, 46 Wn. App. 211, 217, 729 P.2d 651 (1986), review denied, 108 Wn.2d 1021 (1987); Hett, at 852 (citing State v. Worland, 20 Wn. App. 559, 582 P.2d 539 (1978)). The tabulation of the number of days is not the deciding factor; rather, it is only one circumstance to be considered with all the others, including the nature and scope of the suspected activity. Hett, at 852 (citing State v. Higby, 26 Wn. App. 457, 460, 613 P.2d 1192 (1980)). Here, it was reasonable to believe the established grow operation was still in existence because of the number of plants found at Kaiser and Mr. Mason's comment regarding the size of the plants remaining at the house.

- 53 Wn. App. at p. 300 (emphasis added; this was a 2-month delay).

A marijuana growing operation was also at issue in State v. Payne, 54 Wn. App. 240, 773 P.2d 122 (1989), which involved a delay from within 3 weeks prior to 5/15/87, to 5/19/87, the date the warrant was served. The Appellate Court held as follows:

We disagree with the trial court's conclusion the information was too stale to establish probable cause. State v. Petty, 48 Wn. App. 615, 621, 740 P.2d 879, review denied, 109 Wn.2d 1012 (1987). A marijuana grow operation is hardly a "now you see it, now you don't" event. A magistrate may look at all the circumstances, including the nature and scope of the suspected criminal activity. Petty, at 621; see generally 2 W. LaFave, Search and Seizure § 3.7(a) (2d ed. 1987). Here, the informant reported an extensive grow operation, involving approximately 11 4- by 6-foot trays, lights and fans. These facts clearly indicate the criminal activity was ongoing, and the issuing magistrate could reasonably infer the operation was continuing at the time. See State v. Hall, 53 Wn. App. 296, 300, 766 P.2d 512, review denied, 112 Wn.2d 1016 (1989); Petty, at 621-22; State v. Smith, 39 Wn. App. 642, 651, 694 P.2d 660 (1984), review denied, 103 Wn.2d 1034 (1985).

- 54 Wn. App. at p. 246-247.

Prior to reaching that conclusion, the Appellate Court vetted the affidavit and noted, inter alia, that:

The warrant authorizing the search was obtained solely on the basis of an affidavit by Deputies Bryan Pratt and Michael Shay. This affidavit recited the following facts: The sheriff's office on October 17, 1986, had received a teletype notice from the Washington State Patrol regarding a

possible marijuana grow operation at the dwelling. On November 28, 1986, deputies observed tall weeds outside the dwelling and noticed there had been some traffic in the driveway and lights turned on inside the house. Neighbors said they were not sure if anyone lived there. Deputies learned the power bill for November 1986 was approximately \$ 11 more than the previous November, and power consumption had been "relatively high" all summer.

- Id., 54 Wn. App.,
at 241.

The affidavit also contained the following corroborative statement:

A citizen informant who wishes to remain confidential contacted me on 5/15/87 at approximately 2000 hours and he stated that within the past 3 weeks he was in the residence listed in this search warrant and did observe in the basement of the residence numerous growing marijuana plants. These plants were growing in wooden trays approximately 4x6 feet each tray had a grow type light over it. The citizen informant stated that he saw approximately 11 sets of trays. He also observed several fans. The citizen informant also stated that he had observed 2 persons in the basement, those persons being identified by the citizen informant as Pat Payne a white male, approximately 40 years of age, and Dick Carpenter, a white male, approximately 40 years of age. These two subjects are known on

sight by the citizen informant. Citizen informant stated that he wished to remain confidential because he feared for his own safety. The reason being he had observed one of the subjects in possession of a firearm in the past. Citizen informant also stated that the plants were approximately 2 feet tall. Citizen informant also stated that there was no one living in the residence. The citizen informant stated he is familiar with marijuana and can identify marijuana due to the following experiences, which the citizen informant has relayed to the affiant (material omitted)

- 54 Wn. App. at pp.
241-244.

State v. Payne, supra, a leading case on the issue in our state, based its analysis on 2 prior reports, power surge records, and a detailed verbal portrait of the extensive grow operation (11 sets of 4x6 trays, supporting plants that were “approximately 2 feet tall;” each 4x6 tray had a grow light above it; and fans had been installed). To find that this operation was probably still in operation 3 weeks later is indeed to state the obvious. No information even approaching that level of detail regarding the scope and probable persistence of the activity is presented in the affidavit now challenged before this Court.

In the case of State v. Cole, 128 Wn.2d 262, 906 P.2d 925 (1996), our Supreme Court upheld a search warrant and noted:

A search warrant may issue only upon a determination of probable cause, based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location. State v. Smith, 93 Wn.2d 329, 352, 610 P.2d 869, cert. denied, 449 U.S. 873, 101 S. Ct. 213, 66 L. Ed. 2d 93 (1980); State v. Patterson, 83 Wn.2d 49, 58, 515 P.2d 496 (1973). Probable cause exists when an affidavit supporting a search warrant sets forth facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994); State v. Maxwell, 114 Wn.2d 761, 769, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. State v. Garcia, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992).

The Court went on to recite, in a detailed analysis, the choice influencing criteria upon which it based its decision:

According to the affidavit, the informant's information was quite specific, describing appearances of automobiles and persons, their activities, and even the license plate numbers of

the vehicles. Clerk's Papers at 75, 77. The affidavit also described subsequent investigation by police officers that corroborated the information given by the informant, including the suspicious appearance of the residence, a pattern of visitation to the residence consistent with drug-related activities, and a link between the vehicles reported by the informant and observed by officers and persons with prior convictions for narcotics violations. Clerk's Papers at 75-80.

- Id., at 128 Wn.2d
262, p.288.

Further references in the State v. Cole affidavit were based upon olfactory “plain smell” evidence:

2. Smell of Growing Marijuana

Cole contends the trial court erred in finding probable cause based on the affidavit's assertion that Hall smelled growing marijuana on the suspect property. Cole argues the affidavit did not contain information sufficient to demonstrate Hall had the necessary skill, training, or experience to identify the odor of growing marijuana. The affidavit states Hall had been a King County Police Officer for over two years, had been involved with marijuana grow operations in that time, and was familiar with the smell of growing marijuana. State v. Olson, 73 Wn. App. 348, 869 P.2d 110, review denied, 124 Wn.2d 1029, 883 P.2d 327 (1994) is on point. The court held as sufficient an affidavit's statement that a state patrol detective was familiar with the odor of growing marijuana and had

participated in the seizure of indoor grows. Olson, 73 Wn. App. at 356. Acknowledging that such an assertion must be based on more than a mere statement of personal belief, the Olson court held a statement that an officer with training and experience actually detected the odor of marijuana provides sufficient evidence, by itself, constituting probable cause to justify a search. Olson, 73 Wn. App. at 356 (citing State v. Huff, 64 Wn. App. 641, 647-48, 826 P.2d 698, review denied, 119 Wn.2d 1007, 833 P.2d 387 (1992)). Gaddy's affidavit adequately sets forth Hall's training and experience; the trial court did not abuse its discretion in finding probable cause.

- Id., at 128 Wn.2d
p. 289

Even more corroborative detail was based upon a power records analysis:

The affidavit supporting the search warrant for Cole's residence stated there was "extremely high" power consumption "averaging approximately 7,000 KWH per two month billing period," compared with about 1,900 KWH per previous billing periods. Cole contends there are many legitimate explanations for high power consumption, so that this information does not tend to establish probable cause.

While an increase in electrical consumption by itself does not constitute probable cause to issue a search warrant, the increase, when combined

with the other suspicious facts, is a proper factor in determining whether probable cause exists. Sterling, 43 Wn. App. at 851-52.

- Id., at 128 Wn.2d
p. 291.

Finally, our Supreme Court noted the following corroborative indicia:

In this case, the affidavit for a search warrant contained numerous other suspicious facts, including information provided by the anonymous informant corroborated by independent police investigation; identification of particular suspects with prior narcotics convictions; a fictitious name and social security number given to the utility by the subscriber for service at the suspect residence; and the appearance and condition of the suspect residence (overgrown yard and unlivid-in appearance, interior and exterior lights on during the day, basement windows covered, a new metal vent on the roof, the odor of marijuana, the sound of electric motors running in the garage). Clerk's Papers at 75-80. The trial court properly concluded power consumption was simply one factor among many that together justified issuance of the search warrant. Clerk's Papers at 70 (conclusion of law 2).

- Id., at p. 291

The cases cited above, from State v. Spencer (supra, Resp's. Br. At 8) through State v. Cole, (supra, Resp's. Br. At

18-20), provide the analytical approach which frames the issues here. The outcomes of these cases are less important than the rigorous analysis by which those results have been reached. Cases with the very least corroborative detail place this case now under review in proper context. The scanty details of the present case, the lack of investigative effort and attention to detail, summon the need for court oversight and the remedy of suppression.

VI. CONCLUSION

The rule requiring the statement of facts that are current in an affidavit for search warrant can be simply stated: There must be a disclosure of facts showing that an unlawful situation existing on the premises sought to be searched is probably occurring at the time of the issuance of the warrant. Sgro v. United States, 287 U.S. 206, 77 L. Ed. 260, 53 S. Ct. 138, 85 A.L.R. 108 (1932); E. Fisher, Search and Seizure § 72 (1970). United States v. Bailey, 458 F.2d 408, 411 (9th Cir. 1972);

Durham v. United States, 403 F.2d 190, 193 (9th Cir. 1968).

The application of the rule, the rigor and degree of corroboration actually required, is provided by stare decisis. A comparison of the case under review, its absence of a timeline and the lack of any corroborative detail, establish that the Superior Court properly ordered the evidence suppressed.

For all of the foregoing reasons, this Court should affirm the Superior Court.

Respectfully submitted this 29th day of July, 2010


John Adams Moore, Jr. WSBA 4458
Attorney for Respondent

VII.
APPENDIX

Entire Affidavit for Search Warrant (C.P. at 58-62)

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON

2008 AUG 17 PM 3:36

IN AND FOR YAKIMA COUNTY

FILED
YAKIMA COUNTY

STATE OF WASHINGTON }

} ss. AFFIDAVIT FOR SEARCH WARRANT

County of Yakima }

900458

I, Gary Garza, your affiant, being first duly sworn upon oath, before the undersigned Judge of the Yakima County District Court, deposes and says:

That I am a duly commissioned law-enforcement officer with the Yakima Police Department, currently assigned to the Yakima City/County Narcotics Unit (CCNU).

Your affiant has been a law enforcement officer for the Yakima Police Department since 1988. During the course of your affiant's law enforcement career, your affiant has worked as a street level drug investigator for the Street Crimes Attack Team from 1992 through 1994 then assigned to CCNU from 1996 through 1999 targeting major drug trafficking. In December of 2008 I was assigned to CCNU

During the time your affiant has worked as a drug investigator your affiant has written and executed numerous search and seizure warrants for narcotics, dangerous drugs, and the records, books, and proceeds derived as a result of this illicit activity. Further, your affiant has arrested numerous individuals for violations of the state and federal narcotics statutes.

During the time your affiant has worked as a drug investigator your affiant has received 40 hours of training from the Washington State Criminal Justice Training Center in basic drug investigations. Your affiant has attended a 40 hour street level drug investigators school. Your affiant has received 40 hours of basic drug investigations from the Drug Enforcement Administration. Your affiant has also received much more training from the Western States International Network. These classes covered many hours of drug investigations involving drugs known as Methamphetamine, Heroin, Cocaine, Marijuana, Hashish, Stimulants, Depressants, Inhalants and Solvents, Hallucinogens, Designer and Prescription drugs.

Based upon your affiant's training, experience, and participation in other financial investigations involving large amounts of cocaine and or other controlled dangerous substances your affiant knows that:

- a) Drug traffickers very often place assets in names other than their own to avoid detection of these assets by government agencies.
- b) Drug traffickers very often place assets in corporate entities in order to avoid detection of these assets by government agencies.
- c) Even though these assets are in other person's names, the drug dealers actually own and continue to use these assets and exercise dominion and control over them.

- d) Large scale narcotics traffickers must maintain on finance their ongoing narcotics business.
- e) Narcotics traffickers maintain books, records, receipts, notes, ledgers, airline tickets, money orders, and other papers relating to the transportation, ordering, sale and distribution of controlled substances. That narcotics traffickers commonly "Front" (provide narcotics on consignment) to their clients; that the aforementioned books, records, receipts, notes, ledgers, etc. are maintained where the traffickers have ready access to them.
- f) It is common for large-scale drug traffickers to secrete contraband, proceeds of drug sales, and records of drug transaction in secure locations within their residence and/or their businesses for their ready access and to conceal from law enforcement authorities.
- g) The persons involved in large-scale drug trafficking conceal in their residences and businesses caches of drugs, large amounts of currency, financial instructions, precious metals, jewelry, and other items of value and/or proceeds of drug transactions; and evidence of financial transactions relating to obtaining, transferring, secreting, or the spending of large sums of money from engaging in narcotics trafficking activities.
- h) When drug traffickers amass large proceeds from the sale of drugs that the drug traffickers attempt to legitimize these profits. That to accomplish these goals, drug traffickers utilize domestic banks and their attendant services, securities, cashiers checks, money drafts, letters of credit, brokerage houses, real estate, shell corporations and business fronts.
- i) Traffickers commonly maintain addresses or telephone numbers in books or papers which reflect names, addresses and/or telephone numbers of their associates in the trafficking organization.
- j) Drug traffickers take or cause to be taken photographs of them, their associates, their property, and their product. Drug traffickers usually maintain these photographs in their possession.
- k) Your affiant is aware that the courts have recognized that unexplained wealth is probative evidence of crimes motivated by greed, in particular, trafficking in controlled substances.
- l) Based on your affiant's training and experience, your affiant knows that drug traffickers commonly have in their possession, on their person, at their residences and /or their businesses, firearms, including but not limited to handguns, pistols, revolvers, rifles, shotguns, machine guns and other weapons. Said firearms are used to protect and secure a drug trafficker's property. Such property may include, but is not limited to, narcotics, jewelry, narcotics paraphernalia, books, records, U.S. currency, etc.

Your affiant has probable cause to believe, and believes, that controlled substance(s), to-wit: MARIJUANA, is being possessed, manufactured, delivered, sold and/or possessed with intent to deliver, in violation of the provisions of R.C.W. 69.50 et. seq., Uniform Controlled Substances Act.

Your affiant has probable cause to believe that the above violations are being committed at:

3230 Thorp Rd. Yakima, Wa. 98901

State of Washington

Which is more particularly described as follows:

This is a single level dwelling that is tan in color with white trim. The house has a brown composition roof. The house is located on the end of a private road off of Thorp Rd. at the top of a steep hill and it is the last house on the road which allows for one way in and one way out. The address numbers to the house are not posted on the marking post at the entrance to the property. There is metal chain link gate at the entrance to the property driveway leading to the house. The mail boxes at the bottom of the hill display the numbers to the properties on the private road and after a process of elimination, 3230 are the numbers that belong to the target house. The address was confirmed using the County Assessors Web Site.

Further, I have probable cause to believe that the above-described violations are being committed by the following named and/or described individual(s);

- 1. A Caucasian male in his early 30's who is approximately 6' 0" tall and 160 pounds with blonde hair. The male is known only as "Jimmy".**

The individual(s) connection to the above-described premises is: The subject/s described above is currently residing at this residence.

My probable cause is based upon the following facts:

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. This source of information, hereafter referred to as CS, has provided information regarding the identity of people and locations where controlled substances are located, being manufactured, being sold and or being possessed. The confidential and reliable informant, to my knowledge, has never provided false or misleading information. I am familiar with the appearance, packaging, common usage and terminology regarding controlled substances through my training, experience and observation.

I am familiar with the appearance, packaging, common usage and terminology regarding controlled substances through my training, experience and observation.

Your affiant has talked with the CS from whom this information was received and through conversation has determined that the CS is familiar with the appearance, packaging, common usage, and terminology regarding said controlled substance, as well as the appearance, terminology and common methods and equipment used to grow/manufacture marijuana.

Your affiant believes the C/S is reliable in that he/she had previously provided information concerning narcotics trafficking, usage, manufacture and/or possession to your affiant and/or other members of law-enforcement. The information has been verified by your affiant and/or other members of law Enforcement. This information has been additionally verified through concurring investigations. The controlled substances recovered during the investigation field-tested positive.

WHEREFORE, your affiant prays that a Search Warrant be issued directly to the Sheriff of Yakima County, Washington, or any peace officer in the county duly authorized to enforce, or assist in enforcing, any law herein, commanding him to search the above described premises. Also to be searched are any/all vehicles, vessels, and conveyances and out buildings contained within the property, including all room's closets cellars or sub cellars. Also, your affiant is to safely keep all seized items, as provided by law, and make the return within three (3) days of service, showing all acts and things done hereunder. The return will particularly list all articles seized and the names of all persons from whom the items were seized or in whose possession they were found, if any. If no person is found in possession of said articles, the return will so state.

Items to be seized: See Exhibit A



AFFIANT

SUBSCRIBED AND SWORN to before me this 15 day of August, 2009



JUDGE

EXHIBIT A

1. Books, records, receipts, notes, ledgers, and other papers relating to the transportation, ordering, purchase and distribution of controlled substances.
2. Books, records, invoices, receipts, records of real estate transactions, bank statements and related records, passbooks, money drafts, letters of credit, money orders, bank drafts, and cashier's checks, bank checks, safe deposit and box keys, money wrappers, and other items evidencing the obtaining, secreting, transfer, and/or concealment of assets and the obtaining, secreting transfer and/or concealment of assets and the obtaining, secreting transfer concealment and/or expenditure of money.
3. Electronic equipment, such as facsimile machines, currency counting machines, telephone answering machines, and related manuals used to generate, transfer, count, record and/or store the information described in items 1, 2, 3 and 5.
4. United States currency, precious metals, jewelry, and financial instruments, including stocks bonds money orders and travelers' checks.
5. Photographs, including still photos, negatives, video tapes, films, undeveloped film and the contents therein, slides, in particular photographs of co-conspirators, of assets and/or controlled dangerous substances.
6. Addresses and or telephone books, rolodex indices and any papers reflecting names, addresses, telephone numbers, pager numbers, fax numbers and or telex numbers of co-conspirators, sources of supply, customers, financial institutions, and other individuals or businesses with whom a financial relationship exists.
7. Indicia of occupancy, residency, rental and or ownership of the premises described herein, including, but not limited to, utility and telephone bills, cancelled envelopes, rental, purchase or lease agreements and keys.
8. All United States currency, negotiable instruments, precious metal, or stones, jewelry and financial instruments that may have been obtained through the trafficking of narcotics.
9. Controlled substances; including, but not limited to, cocaine, marijuana, methamphetamine, LSD and heroin.
10. Equipment, tools, chemicals, glassware or hardware used, or intended to be used, to manufacture controlled substances.
11. Paraphernalia for packaging, using, weighing, cutting or distributing controlled substances, including, but not limited to, pipes, sifters, spoons, scales, wrapping materials, bags and/or baggies. Any/all firearms, which may have been used to further narcotics or drug related activities, or to threaten, coerce or intimidate others for the same purpose.