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COURT OF APPEALS
DIVISION II

NO. 39053-1-II

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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DARA RUEM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Frederick Fleming (suppression motion)
The Honorable Judge Lisa Worswick (trial)

No. 08-1-02685-1

Supplemental Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the independent source doctrine supports the validity of the warrant and subsequent search in this case where officers smelled the odor of burnt marijuana before entering the trailer?

2. Whether the independent source doctrine supports the validity of the warrant and subsequent search in this case where Sergeant Seymour observed 52 starter plants outside the trailer?

B. STATEMENT OF THE CASE.

1. Procedure

The State incorporates by reference the statement of procedural posture included in the Brief of Respondent. To that, the State only adds that on December 9, 2010, the court issued an order to provide additional briefing on the application of the independent source doctrine. This is the State's response to that order.

2. Facts

The State incorporates by reference the facts as presented in the brief of respondent. Any additional facts that are relevant will be incorporated into the argument. A copy of the search warrant is attached

as Appendix A. It was included as an Exhibit at the suppression hearing. *See*, CP 43 (misabeled as Exhibit Record 3.5 hearing); Ex. 1 (12-11-08).
no.

C. ARGUMENT.

In *State v. Winterstein*, the court affirmed the applicability of the independent source doctrine under Article I, section 7 of the Washington Constitution. *State v. Winterstein*, 167 Wn.2d 620, 631-34, 220 P.3d 1226 (2009)(citing *State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993 (2005); *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987).

Under the independent source doctrine, where evidence is obtained based on a search warrant affidavit that included illegally obtained information, the warrant will still be valid if the remaining information independently supports probable cause after the illegally obtained evidence is excluded. *Winterstein*, 167 Wn.2d at 633 (citing *seriatim Coates*, 107 Wn.2d at 886-889).

1. PROBABLE CAUSE SUPPORTED THE WARRANT AND THE SUBSEQUENT SEARCH WAS VALID WHERE OFFICERS SMELLED THE ODOR OF MARIJUANA PRIOR TO ENTERING THE TRAILER.

The odor of marijuana alone is sufficient to support a finding of probable cause to conduct a search of a home. *See State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010) (citing *State v. Olson*, 73 Wn. App. 348, 356,

869 P.2d 110 (1994) (citing *State v. Huff*, 64 Wn. App. 641, 647-48, 826 P.2d 698 (1992))).¹

Here, upon speaking to the defendant at the front door of the trailer, Deputies could smell marijuana in the air. They could also smell marijuana on the defendant's clothes. When they asked the defendant about it, he claimed it was for personal use. However, such a claim does not affect probable cause for the warrant.

2. PROBABLE CAUSE ALSO SUPPORTED THE WARRANT AND SUBSEQUENT SEARCH WHERE SERGEANT SEYMOUR OBSERVED MARIJUANA PLANTS OUTSIDE THE TRAILER AND THE DEFENSE DID NOT CHALLENGE THOSE OBSERVATIONS BELOW.

The findings indicate that Deputy Seymour also located fifty-two starter plants growing outside the motor home. CP 208. The findings do not further elaborate, but the record shows that Sergeant Seymour observed these plants after speaking to Deputy Nordstrom on the telephone in anticipation of obtaining the warrant. RP 12-10-08, p. 58, ln. 12-24.

¹ Although *Fry* is a split decision, in his dissenting opinion, Justice Sanders agrees that based upon the smell of burnt marijuana, the officers initially had probable cause to believe Fry was involved in criminal activity. *Fry*, 168 Wn.2d at 20 (Sanders dissenting). This makes that portion of the lead opinion controlling. See *In re Francis*, No. 82619-6, --- Wn.2d ---, --- P.3d --- (2010).

Deputy Nordstom had asked Sergeant Seymour if there were any distinguishing marks on the mobile home that he could put in the warrant. RP 12-10-08, p. 58, ln. 13-17. Sergeant Seymour walked around the exterior of the mobile home looking for identifying marks, when, on the West side, between the garbage cans, he noticed two flats of starter plants. RP 12-10-08, p. 58, ln. 20-24. Sergeant Seymour didn't even notice the plants until he walked right up on them. RP 12-10-08, p. 58, ln. 22-23.

In a challenge to the warrant in a *Franks* context, the defendant has the burden of showing by a preponderance of the evidence that the evidence was illegally obtained. See *State v. Hashman*, 46 Wn. App. 211, 729 P.2d 651 (1986); *State v. Stephens*, 37 Wn. App. 76, 678 P.2d 832 (1984). Here, the defense made no showing that Sergeant Seymour unlawfully observed the starter plants observed outside the trailer. Accordingly, those plants serve as an independent source establishing probable cause for the search.

Moreover, at the suppression hearing, the defense motion challenged whether the police had probable cause to believe that the defendant's brother was actually present in the home at the time, and by implication that the resulting search was unlawful. CP 14-16; 29-36. In neither of the defense filings was there a challenge to Sergeant Seymour's observation of the starter plants located outside the trailer. Suppression issues not raised before the trial court are waived. See *State v. Millan*, 151 Wn. App. 492, 496ff, 212 P.3d 603 (2009). Accordingly, the defense

cannot now for the first time on appeal raise a challenge to Sergeant Seymour's observation of the starter plants he observed outside the trailer.

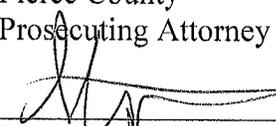
D. CONCLUSION.

Because the officers smelled the odor of marijuana coming from the trailer before they entered it, and because that observation was included in the probable cause declaration for the warrant, the validity of the warrant and the subsequent search should be upheld under the independent source doctrine.

The validity of the warrant and the subsequent search should also be upheld under the independent source doctrine based on the starter plants Sergeant Seymour observed outside the trailer, particularly where the defense did not challenge those observations below.

DATED: December 23, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-23-10 
Date Signature

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APPENDIX "A"

7. Tangible and intangible personal property; stolen property, proceeds or assets acquired in whole or in part with proceeds traceable to an exchange or series of exchanges for Marijuana, and/or any controlled substances;
8. Moneys, Negotiable instruments, and securities used, or intended for use to facilitate the furtherance of the violations listed above;
9. Firearms, pistols, rifles, and/or any other dangerous weapons including but not limited to as defined in Chapter 9.41 RCW which are possessed, used, or intended for use, in the furtherance of the violations listed above;
10. Computers and equipment including hard drives, floppy disks, monitors, keyboards, printers, software and/or computer manuals used, or intended for use, in the furtherance of the violations listed above;
11. Digital pagers, cellular telephones, and any other communications equipment used, or intended for use, in the furtherance of the violations listed above;
12. Indicia of ownership or use of the residence and/or vehicles described in this search warrant including, but not limited to, cancelled envelopes, registration certificates and keys;
13. Addresses and/or telephone numbers of conspirators, drug associates, or any other people related to the manufacture, distribution, transportation, ordering, or purchasing of Marijuana and/or any other controlled substances;
14. Medical records, receipts, prescriptions, and/or documents pertaining to any medical condition concerning the use, possession, manufacture, cultivation, distribution, or sale of marijuana.

Deputy Nordstrom's Training

I, Deputy Kristian J. Nordstrom, being first sworn on oath deposes and says; that I am a Deputy Sheriff employed by the Pierce County Sheriff's Department. I have been so employed for the last 14 years. I am currently assigned to the Special Investigations Unit as a Narcotics Investigator. Prior to my employment with the Pierce County Sheriff's Department, I obtained a Bachelor of Arts degree in English. In addition to the twelve week Field Training Program and all in-house training provided by the Pierce County Sheriff's Department, I have also attended the following schools and training:

- Basic Law Enforcement Academy
- Washington State Clandestine Lab Operations Certification – CADRE
- Street Drugs and Enforcement
- Street Operations and Tactics
- Weapons of Mass Destruction Awareness and Public Safety
- Indoor Marijuana Cultivation Course
- Basic and Advanced Undercover Operations
- Rave Culture and Drugs
- THC Extractions

IV. Deputy Nordstrom's Experience

Your affiant has been the case officer, Affiant, and/or assisted in over 100 Superior Court narcotics and evidence search warrants for illicit substances, documents, and various forms of evidence. These search warrants have resulted in numerous convictions. In addition to the listed training, I have experience with drug related investigations. I have initiated, planned, and

executed many controlled substance search warrants that resulted in the arrest of suspects and the seizure of evidence. I have contacted, interviewed, and arrested numerous subjects for the possession, use, sale, distribution, delivery, and manufacture of controlled substances. I have become very educated, trained and experienced with the terms; trends, habits, commonalties, methods, and idiosyncrasies surrounding illicit drug possession, use, distribution, manufacture, business and culture.

Based on my training and experience, and upon the training and experience of knowledgeable Law Enforcement officers with whom I associate with, I recognize that the listed items of evidence are material to the investigation or prosecution of the above described felonies for the following reasons:

That with respect to indoor marijuana cultivation and propagation operations, suspects routinely utilize the following items, and methods, among others, in their attempts to avoid detection from law enforcement authorities:

- (1) blackened out or covered windows, doors or other visibly detectable areas to avoid outsiders from identifying any portion of the grow operation. Guard dogs are used to protect their growing operations from theft and to alert them to subjects, including law enforcement, who are approaching their property;
 - (2) fixed, movable, or other type venting systems, usually located away from detection or upon high areas of buildings to vent heat and odors escaping the cultivation structure;
 - (3) Fictitious names on utility records and/or fictitious business names associated with the suspect's property;
 - (4) the alteration of the electrical system on the property by bypassing the utility meter, so that the excess usage of power caused by the indoor lighting equipment does not register with the utility company;
 - (5) the use of deodorizers to mask the odor of growing marijuana that is emitted from the venting system;
 - (6) remote locations and buildings which are detached from the main residence to prevent discovery. This may also include rooms built underground to house the growing operation;
- (B) That marijuana cultivation is a complex enterprise that:
- (1) takes at least 7-10 days to take the plant from a clone to the vegetative stage, can take 3-8 weeks to take the plant from the vegetative to the flowering stage, and takes at least 3-6 weeks to take the plant from the flowering stage to harvest;
 - (2) takes approximately three gallons of potting soil per plant and that the soil is used only once and then discarded;
 - (3) if hydroponically grown, no soil is required. This method would require a root medium, large quantities of water, and water soluble fertilizer. The root mediums most commonly found are rock wool, large size gravel, lava rock, to name a few;
 - (4) requires a high heat, high humidity or tropical type environment to thrive;
 - (5) uses high intensity halide or high pressure sodium lights that require large amounts of power and emit a very bright white light and a high amount of heat. The heat from these halide lights often cause a visible difference in the moisture collecting on the roof of the structure in which the grow is located;
 - (6) causes some of the heat from this environment dissipates into other objects and the structure in which the growing operation is being conducted. As a result of this, the temperature on the outside walls of the portions of the property containing the marijuana grow are substantially higher than the outside walls of the portion of the structure used for normal living or storage space;
 - (7) needs to be vented to allow some heat to escape and fresh air to enter. This vent or the high heat dissipating through the structure can be detected using thermal imaging.

Thermal imaging is the technique of using non-contact, non-intrusive, non-destructive scanning equipment that detects invisible infrared radiation (Heat) at surface levels and converts this energy into visible light;

- (8) are commonly divided into two or more rooms for different stages of the growing operation, i.e.: growing rooms, drying rooms, supply rooms;
- (9) the odor associated with growing marijuana has been compared to an odor which is a "skunk" or a "pungent sweet musty" like smell;

In addition to the controlled substances being sought in this search warrant, drug manufacturers, dealers and users often possess more than one controlled substance; for variety in personal use, to diversify and monopolize the illicit drug market, to supply a broader base of clients, and to maximize their potential profits;

1. Drug dealers, manufacturers, and users will have materials, products, and equipment in their possession to further their business or habit. This could include, but is not limited to, bags, scales, and packaging materials for distribution of narcotics; and pipes, bongs, torches, and assorted drug paraphernalia for usage;
2. Controlled substances are commonly hidden in various types and sizes of containers, which are often disguised to avoid detection;
3. Drug manufacturers, dealers, and users utilize their or other person's vehicles to conceal controlled substances, deliver drugs, transport their person to purchase drugs, transport coconspirators to purchase drugs, transport materials used in production, and to further their drug trade/habit;
4. Information regarding the manufacture, distribution, sale and use of controlled substances are found in books, records, receipts, notes ledgers, research products, papers, microfilms, video/audio tapes, films developed and undeveloped and other assorted media;
5. Drug manufacturers, dealers and users will trade, exchange, and sell anything for controlled substances including money, food stamps, food, electrical equipment, jewelry, clothing, stolen property, guns/firearms, other drugs, cigarettes and any tangible or intangible property;
6. Guns, firearms, rifles, pistols, shotguns, and all types of dangerous weapons are utilized by drug manufacturers, dealers, and users to protect themselves from robbery, police intervention, and for self defense; to protect their profits, assets, and narcotics; and to assist in the furtherance of their drug habits;
7. Computers are used to log delivery records, gain media access to information, communicate with coconspirators, transfer funds, store information, and enhance the efficiency of controlled substance transactions;
8. Digital pagers, telephones, cellular phones and other communications equipment assist manufacturers to negotiate deals, contact coconspirators, conduct business transactions, and communicate with potential customers;
9. Papers showing ownership, residency, occupancy and other indicia corroborate the length of time narcotics activity has occurred, location of occurrence, coconspirator's involvement, and constructive possession of evidence;
10. Drug manufacturers, dealers and users commonly keep the names, addresses, and phone numbers of other conspirators, drug associates, and sources for equipment, chemicals or other controlled substances. This information is valuable in the furtherance of other related drug and/or controlled substance investigations;

Based on your Affiant's training and experience with people that are engaged in distributing controlled substances, and upon the training and experience of knowledgeable

law enforcement personnel with whom he associates, your Affiant recognizes that computers have become the equivalent of paper and filing systems previously used by persons involved in the production and distribution of illegal drugs. Illegal drug recipes and production methods are commonly found on the internet which is accessed via computers. Documents tending to show the identity of persons involved, suppliers, distributors, drug manufacturing recipes, accounting documents, notes, correspondence and research documents that were kept in paper form are now commonly kept in digital form on digital media created by computers, cell phones and PDA's. The possession of computers in the same location as drugs, drug paraphernalia, and areas where drug transactions are taking place is very common and is indicative of items and circumstances involved in the illegal sales of controlled substances.

Based upon this information your Affiant believes that an examination of the described computers and digital data storage devices will produce evidence of the previously stated offenses.

II. Probable Cause to Search Property

On June 4, 2008, at about 1815 hours, I was contacted by members of the Pierce County Sheriff's Department Community Support Team. Deputy Fries #244 relayed the following information to me:

On June 4, 2008, at about 1750 hours, Deputy Fries, along with other members of the Pierce County Sheriff's Department Community Support Team and Department of Corrections, responded to 10318 McKinley Ave E, in unincorporated Pierce County. Deputy Fries and his team were trying to serve a Superior Court arrest warrant on Chantha NMN Ruem (01-14-81). I check with LESA Records; they confirmed that Chantha Ruem has an outstanding felony warrant for Attempted Unlawful Delivery of a Controlled Substance with a Minor Involved. LESA Records advised that the address listed on the arrest warrant was 10318 E. McKinley Ave.

Deputy Fries told me that they believed that Chantha lived in the trailer behind the main house. Deputy Fries and his team contacted the trailer and spoke with a male who identified himself as Dara NMN Ruem (09-02-81). Deputy Fries told me that when Dara identified himself to Deputy Fries, he mentioned that his brother, Chantha, sometimes used his name. Dara also identified a white car on the property, which he said belonged to Chantha. Dara told Deputy Fries that if the car was there, Chantha should be as well.

Deputy Fries asked for permission to search the trailer for Chantha. Deputy Fries told me that Dara originally consented to the search, then told Deputy Fries "maybe now's not a good time." While he was having this discussion with Dara, Deputy Fries told me that he could smell burned marijuana.

Deputy Fries and his team secured Dara and entered the trailer. When Deputy Fries and his team found 6 "starter" marijuana plants, which were about 6"-8" tall, in the kitchen, and a locked bedroom, they stopped their search for Chantha and secured the trailer.

I talked with Sgt. Seymour who told me that the team also found 52 "starter" marijuana plants outside the trailer in the yard. Sgt. Seymour said that these plants were 4"-8" tall.

Deputy Fries told me that Dara was advised of, then invoked, his Miranda Rights.

Sgt. Seymour advised me that members of his team had contacted Dara and Chantha's mother, who lives in the main house on the property. Sgt. Seymour told me that, based on the contact with the mother in the main house, they did not believe that any marijuana was being cultivated inside the house. Sgt. Seymour said that his team did not try to enter the detached garage to determine whether or not marijuana was being cultivated inside it (Deputy Fries did note, however, that the garage had electricity running to it). I asked Sgt. Seymour if he thought that, considering the amount of space, light, and water it would take to cultivate them, 58 marijuana plants could grow to maturity in the locked room in the trailer. Sgt. Seymour did not think that the room in the trailer was large enough to accommodate such a crop of marijuana.

CONCLUSION

Based on all of the foregoing information your Affiant verily believes that the illegal cultivation of marijuana exists at the above described property and that there is probable cause to search the properties listed above, to include those structures as described in the preceding section. The cultivation and propagation of marijuana is a felonious violation of the Revised Code of Washington, section 69.50.401.

Deputy Kristian J. Nordstrom #295/94-006
Pierce County Sheriff's Department.
Special Investigations Unit

Subscribed and sworn to before me this _____ Day of _____ 2008.

Superior Court Judge