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NO. 65427-6-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D
OCT 13 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

KURT BENSHOOF,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler, Judge

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FILED
COURT OF APPEALS
DIVISION ONE

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's motion to suppress evidence.¹

2. Following the CrR 3.6 hearing, the trial court erred in entering findings of fact 8, 9, and 10. Appendix at 2-3.

3. The trial court erred in concluding "the evidence of the growing operation in the residence plus the smell from the vehicle parked in the driveway establishes probable cause to search the residence." Appendix at 4-5.

4. The trial court erred in denying appellant's motion ordering the sheriff's office to release personal property seized from appellant's home.

Issues Pertaining to Assignments of Error

1. Police suspected appellant was growing marijuana based on statements from appellant's landlord that there were 50 plants of some kind and a newly constructed nursery in the rental home. Police went to the home, smelled marijuana emanating from a rental van parked in the driveway, and obtained a search warrant for both the home and the rental van. Did police lack probable cause for a warrant to search the house

¹ Supp. CP __ (sub. no. 80, Findings of Fact and Conclusion of Law on CrR 3.6 Motion to Suppress, at 2-3, 10/5/10)(attached as an appendix).

when the landlord's statement to police was innocuous and police failed to confirm the van contained marijuana before obtaining a warrant to search the home?

2. Police seized personal property from the appellant's home while executing the search warrant on June 24, 2008. Nearly two years later, the sheriff's office served appellant with a notice of seizure and intended forfeiture. Is the appellant entitled to have his property returned where the State failed to follow the statutory requirement of serving appellant with a notice of seizure within 15 days of taking his property?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor charged appellant Kurt Benshoof with manufacturing marijuana. CP 1-5. Following a jury trial before the Honorable Ronald Kessler, Benshoof was found guilty as charged. CP 39-45. Benshoof appeals. CP 50.

2. Trial Testimony

Benshoof began renting a house from Albina Soudakova in March 2006. 4RP² 14-15. Two friends initially moved in with Benshoof. 4RP 15.

In the summer of 2006, Benshoof began cultivating hybrid willows with one of his roommates. 4RP 19. Benshoof works professionally as a residential remodeler, so he used his carpentry skills to add a small nursery above the existing laundry room in the home. 4RP 16, 20. Benshoof moved the willows into the grow room that he built in the fall of 2006. 4RP 21. Benshoof was unable to keep the willows alive and sell them as originally planned. 4RP 22-23.

Benshoof's two original roommates moved out and in December 2007, an individual Benshoof was unwilling to identify at trial for personal safety reasons moved into his home. 4RP 25. This new roommate said something to the effect of, "if you don't let me do what I want here, I will put you at the bottom of the Duwamish" and then threw a shovel at Benshoof's head. 4RP 28. The new roommate began growing large numbers of marijuana plants in the nursery built by Benshoof. 4RP 42-43.

² There are 6 volumes of verbatim report of proceedings referenced as follows: 1RP - 1/8/2010 and 1/12/2010; 2RP - 3/29/2010 and 3/30/2010; 3RP - 3/31/2010; 4RP - 4/1/2010; 5RP - 4/2/2010; and 6RP - 4/20/2010.

The landlord, Soudakova, stopped by to check the condition of the home on June 24, 2008. 4RP 54. Soudakova contacted police that afternoon and expressed concern that drug activity was taking place at her rental home.³ Supp. CP ___ (sub. no. 73, King County Sheriff's Office Response to Defendant's Request for Return of Property and Proposed Order, 6/9/10). Soudakova could not identify the plants she saw in the home as marijuana. 2RP 70. After speaking with Soudakova, police went to Benshoof's home later that day. 2RP 53-54.

Police saw a moving van in Benshoof's driveway backed up to the garage. 2RP 54. As officers approached the home, they noticed a strong smell of marijuana emanating from the van. 2RP 57-58. The officers obtained a search warrant for the home and the moving van based on Soudakova's statements and the observation that the moving van smelled like marijuana. 2RP 58-59.

While executing the warrant, officers found approximately 330 marijuana plants in the moving van. 2RP 111. Prior to searching the moving van, police did not contact the moving company for information on who had rented the van. 2RP 63. It was undisputed at trial that Benshoof did not rent the van himself. 2RP 63. Officers did not find any

³ Soudakova did not testify at trial. Her hearsay statements to police were not introduced at trial, but the information did form the basis of the search warrant. 2RP 53-54.

marijuana plants in the house, but did find marijuana leaves, also known as “shake.” 2RP 118; 3RP 43. Officers testified that the lights, fans, and ventilation setup in the makeshift grow room were consistent with a marijuana grow operation. 2RP 113-20.

The defense theory was that Benshoof had acted under duress when allowing the unnamed roommate to grow marijuana in his home. Benshoof explained he did not have the financial resources to move out of the house and did not trust police or prosecutors to assist him in any way based on past experiences. 4RP 31-36. The court issued a duress instruction to the jury in support of Benshoof’s defense. CP 33.

3. Pre-trial Rulings

Benshoof filed a CrR 3.6 motion to suppress all evidence obtained in the search. Supp. CP __ (sub. no. 33, CrR 3.6 Motion to Suppress, 3/15/10). Benshoof argued Soudakova’s statements to the police along with the smell of marijuana emanating from the van in the driveway did not rise to the level of probable cause to support the warrant for the house. Id. at 10.

Soudakova told police a new room had been built above the laundry room. CP 2. The room had been lined with reflective aluminum foil, contained large lamps, and a sprinkler system. CP 2. Electrical power and water had been routed to the room. CP 2. Soudakova found

approximately 50 small plants in the room. CP 2. Soudakova never said the plants were marijuana; she was unable to identify marijuana. 2RP 13.

Benshoof argued the smell of marijuana coming from the moving van was insufficient to corroborate Soudakova's speculation that it was marijuana growing in the house:

Furthermore, corroboration should have involved the house not the vehicle. The initial information provided to Deputy Bates from Ms. Soudakova involved the house; she did not mention a moving van. Yet no corroboration was provided concerning the house. Instead, the police said there was a smell of marijuana emanating from the moving truck. Corroboration cannot be built on speculation. The corroborating facts in this case hinge on speculation that the moving van is linked to Mr. Benshoof and linked to the house, and that both the van and house are linked to marijuana growing.

The bottom line is the smell of marijuana from the truck and information that there is a presence of materials used to grow plants in the house was not sufficient probable cause for a search warrant in this case.

Supp. CP __ (sub. no. 33, supra, at 11).

At the suppression hearing, the State agreed that Soudakova's statements alone would likely not amount to probable cause to issue the warrant:

It's clear that Ms. Sodikova [sic] never said this was marijuana. She didn't know if it was marijuana. I don't think that's what she alleged and that's certainly not in the four corners of the warrant. What she did do was she went to the police and the police knew that this, based on their training and experience, was consistent with a marijuana

grow operation. And I would agree with defense if that was it, it may be not enough. Possibly not enough.

2RP 13. The State argued, however, that the smell of marijuana emanating from a moving van was “sufficient corroboration to indicate that there certainly could have been a marijuana grow operation going on in the home.” 2RP 13.

The trial court noted neither party had presented a case squarely addressing the issue of whether smelling marijuana in a vehicle parked in the driveway amounts to probable cause to search an adjacent home for a grow operation. 2RP 20-21. The court nonetheless denied the motion to suppress. 2RP 22.

4. Notice of Seizure

Police executed the search warrant on June 24, 2008. CP 3. Police gathered evidence tending to prove that Benshoof was growing marijuana in his home, including: can filters, halide grow lamps, electrical ballasts, timer boxes, CO2 valve regulator, a thermostat, squirrel fans, light panels, and a water pump. Supp. CP __ (sub. no. 73, supra, at attached "Warrant/Affidavit to Seize" at 1-2).

Following trial, Benshoof requested that the court order the release of the property police obtained while executing the warrant as provided by CrR 2.3(e). Supp. CP __ (sub. no. 70, Revised Defense Memorandum,

6/7/10). Benshoof pointed out that the State had failed to follow the statutory forfeiture procedure by serving him with notice of seizure and intended forfeiture within 15 days of taking the property. Id. at 2-3. Benshoof had yet to receive notice of seizure from the sheriff's office at the time of sentencing. Id. at 3.

Three days after Benshoof filed the motion for return of his property, the King County Sheriff's Office served him with "Notice of Seizure and Intended Forfeiture" by certified mail. Supp. CP __ (sub. no. 73, supra, at attached "Notice of Seizure"). The trial court denied Benshoof's motion for return of evidence seized from his home and ordered that the property was subject to the forfeiture process. Supp. CP __ (sub. no. 75, Revised Order, 6/28/10).

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS BECAUSE THERE WAS NO PROBABLE CAUSE TO ISSUE A WARRANT TO SEARCH THE HOUSE.

"A search warrant may issue only upon a determination of probable cause." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "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." Thein,

138 Wn.2d at 140. “Probable cause is established if the affidavit in support of the warrant sets forth facts sufficient for a reasonable person to conclude that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” State v. Dalton, 73 Wn. App. 132, 136-37, 868 P.2d 873 (1994). An appellate court reviews a judge’s finding that probable cause exists under an abuse of discretion standard. Dalton, 73 Wn. App. at 136.

A reviewing court examines the information available to the issuing judge when determining whether there was probable cause for issuance of the warrant. Dalton, 73 Wn. App. at 136. “The affidavit in support of the search warrant must adequately show circumstances that extend beyond suspicion and mere personal belief that evidence of a crime will be found on the premises to be searched.” Dalton, 73 Wn. App. at 137. 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.” State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997). “Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. Thein, 138 Wn.2d at 147. See, e.g., State v. Smith, 93 Wn.2d 329, 352, 610 P.2d 869 (1980)(“if the affidavit or testimony reveals nothing more than a

declaration of a suspicion and belief, it is legally insufficient”); State v. Patterson, 83 Wn.2d 49, 52, 61, 515 P.2d 496 (1973) (record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant.)

In State v. Thein, the Supreme Court reversed the defendant’s conviction for possession of marijuana with intent to deliver where the facts in the affidavit for the search warrant did not establish a nexus between evidence of illegal drug activity and the defendant’s residence. Thein, 138 Wn.2d at 151. The only evidence linking a marijuana grow operation to the defendant’s residence were innocuous details. Thein, 138 Wn.2d at 150. For example, police found a box of nails addressed to the defendant and a vehicle registration at a separate location where police did find materials “they believed to be commonly associated with the cultivation of marijuana.” Thein, 138 Wn.2d at 137.

In Dalton, the trial court erred in not suppressing evidence that was seized pursuant to the warrant and Dalton’s conviction for unlawful manufacture of marijuana was reversed. Dalton, 73 Wn. App. at 133. An anonymous caller contacted police and stated that Dalton was involved in the distribution of methamphetamine. Dalton, 73 Wn. App. at 133. Four months later, police received another anonymous call reporting that Dalton would be transporting 16 pounds of marijuana on a commercial flight.

Dalton, 73 Wn. App. at 133-34. The caller gave police Dalton's phone number and home address. Dalton, 73 Wn. App. at 134.

Police flew over Dalton's home and photographed the premises, but did not observe any illegal activities taking place. Dalton, 73 Wn. App. at 134. Two weeks later, police followed Dalton to the airport, detained his luggage, and called in a certified drug dog to smell the luggage. Dalton, 73 Wn. App. at 134-35. The drug dog gave indications that controlled substances were present in the luggage, but a police did not find any controlled substances during a subsequent search. Dalton, 73 Wn. App. at 135. The next day, the post office in Seattle notified police upon receiving a package addressed to Dalton's post office box in Alaska. Dalton, 73 Wn. App. at 135. Police obtained a warrant, searched the package, and confiscated the 8 pounds of marijuana. Dalton, 73 Wn. App. at 135.

A judge then issued a search warrant authorizing the search of Dalton's "residence, vehicles, garage, and/or any unattached buildings" for evidence connecting Dalton to delivery of marijuana. Dalton, 73 Wn. App. at 135. The search yielded marijuana plants, drug paraphernalia, and drug related paperwork. Dalton, 73 Wn. App. at 135. Police also found several pounds of marijuana in a car registered to another person that was parked on Dalton's property. Dalton, 73 Wn. App. at 135.

On appeal, the reviewing court stated that the informants' tips were "of almost no value" because there was no corroboration except for innocuous details. Dalton, 73 Wn. App. at 139. Further, none of the information provided to the magistrate tied Dalton's home to controlled substances. Dalton, 73 Wn. App. at 139. The information provided to the magistrate, while creating much suspicion about Dalton, was insufficient to support a conclusion that Dalton was probably engaged in drug trafficking. Dalton, 73 Wn. App. at 140.

In State v. Vonhof, a tax appraiser smelled marijuana while walking by a shop on the property of the residence that he was appraising. State v. Vonhof, 51 Wn. App. 33, 35, 751 P.2d 1221 (1988). The tax appraiser provided a written statement to the sheriff describing what he had smelled in the shop and acknowledging that he was familiar with the smell of marijuana based on personal usage. Vonhof, 51 Wn. App. at 35. Police obtained a warrant to search only the shop building. Vonhof, 51 Wn. App. at 35. The search revealed that marijuana was growing in the shop. Vonhof, 51 Wn. App. at 35-36.

"A second warrant was issued based on evidence seized in the shop, authorizing the search of the residence and two vehicles." Vonhof, 51 Wn. App. at 36. The second search resulted in the seizure of evidence demonstrating the defendants' ownership and occupancy of the property.

Vonhof, 51 Wn. App. at 36. On appeal, the court concluded that the tax appraiser's "olfactory perceptions" coupled with his ability to identify marijuana by smell were sufficient to establish probable cause to search the shop. Vonhof, 51 Wn. App. at 41-42.

Vonhof establishes that the proper procedure for police to follow when investigating possible drug manufacturing or delivery. Smelling marijuana in one location gives rise to search for controlled substances only in that location. If police do not find any drugs in a location that smells like drugs, as in the search of luggage at the airport in Dalton, the search ends and there is insufficient probable cause to search elsewhere. If police do find drugs during the search, as in Vonhof, this discovery provides probable cause for the issuance of a second warrant to search other locations factually connected to the initial site. See also State v. Hansen, 42 Wn. App. 755, pp. 714 P.2d 309 (1986) (police observation of marijuana growing in a garden provides sufficient probable cause for issuance of search warrant for residence on the same property).

Here, the police failed to confirm if any marijuana was in the moving van before securing a warrant for the house. Before searching the van, police did not have any information that it was connected to Benshoof other than the van's physical location in the driveway. As in Vonhof, police should have first searched the van to determine whether it

actually contained marijuana before obtaining a search warrant for the house. The strong and pungent smell of marijuana can linger for some time after the actual plants have been removed, as demonstrated by Dalton. Moving vans are rented by different people for various lengths of time and the smell could have been related to a previous renter.

The contents of the van could not logically provide confirmation or a nexus to the suspected grow materials in the house because police did not know if the van contained any controlled substances prior to obtaining the warrant for the house. Requiring police to confirm their suspicions that the moving van contained marijuana before searching the house would not have been an unduly burdensome step. Police have the means to ensure that evidence in the house was not removed or destroyed while searching the van and waiting for a judge to approve a second warrant.

Because the affidavit in support of the search warrant for the house does not extend beyond “suspicion and mere personal belief that evidence of a crime will be found on the premises to be searched,” the trial court erred in denying Benshoof’s motion to suppress. Reversal and remand for a new trial with orders to suppress the evidence illegally gained is the proper remedy. Thein, 138 Wn.2d at 151.

2. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RETURN OF PROPERTY WHERE THE SHERIFF'S OFFICE FAILED TO PROVIDE NOTICE OF SEIZURE WITHIN 15 DAYS.

The notice of seizure provided to Benshoof stated that the property was seized under the "Felony Forfeiture Act, Chapter 10.105.010 RCW." Supp. CP __ (sub. no. 73, supra, at attached "Notice of Seizure"). The more tailored statute governing seizure of property involved in drug manufacturing is RCW 69.50.505. Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 297, 968 P.2d 913 (1998).

The statutes have an identical provision requiring that the sheriff's office serve the notice of seizure within 15 days of taking the property: "In the event of seizure . . . proceedings for forfeiture shall be deemed commenced by the seizure. The law enforcement agency under whose authority the seizure was made shall cause notice to be served within fifteen days following the seizure on the owner of the property seized" RCW 69.50.505(3); RCW 10.105.010(3) (emphasis added). Therefore, cases interpreting the notice requirement for RCW 69.50.505(3) apply with equal force to seizure and forfeiture under RCW 10.105.010(3).

"Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law." Bruett, 93 Wn. App. at 295, (quoting United States v. One 1936 Model Ford V-8 De Luxe Coach, 307

U.S. 219, 226, 59 S.Ct. 861, 83 L.Ed. 1249 (1939)). “Forfeitures are not favored and such statutes are construed strictly against the seizing agency.” Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way, 150 Wn. App. 387, 392, 208 P.3d 1189 (2009). An appellate court reviews the meaning of a statute de novo. Id.

Washington has a statutory forfeiture procedure. State v. Alaway, 64 Wn. App. 796, 799, 828 P.2d 591 (1992). Materials and equipment used in manufacturing any controlled substance are subject to seizure and forfeiture. RCW 69.50.505. Notice must be given within 15 days of seizure. RCW 69.50.505(3). “If the property is personal property, one claiming an interest in it then has 45 days to respond, and if a response is made, a hearing must be held.” Alaway, 64 Wn. App. at 800.

“In a case involving attempted forfeiture of real property, our Supreme Court held that due process entitles such claimants to a full adversarial hearing within 90 days of seizure.” Espinoza v. City of Everett, 87 Wn. App. 857, 865, 943 P.2d 387 (1997) (citing Tellevik v. Real Property, 125 Wn.2d 364, 367, 370-372, 884 P.2d 1319 (1994)(Tellevik II); Tellevik v. Real Property, 120 Wn.2d 68, 86, 838 P.2d 111, op. amended, 845 P.2d 1325 (1993) (Tellevik I)). “We hold that the 90-day hearing requirement of Tellevik applies to forfeiture of any property, real or personal.” Espinoza, 87 Wn. App. at 869. When a law

enforcement agency fails to strictly comply with statutory procedures proscribed for seizure, the government is estopped from proceeding in a forfeiture action. Espinoza, 87 Wn. App. at 866.

A law enforcement agency must give notice of seizure within 15 days of actually seizing the property, even if the criminal investigation is still pending. See, e.g., Espinoza, 87 Wn. App. at 861-62 (“The day after the seizure, the City notified Lopez and Ortega of its intent to forfeit the car and the \$260,000, thus providing them with 44 days to file a claim contesting the forfeiture. See RCW 69.50.505(c)(d).”); Espinoza, 87 Wn. App. at 862 (“Six days after the seizure, the City notified Arechiga of its intent to forfeit the car. The notice sent to Arechiga made no mention of the money.”)

In Alaway, sheriff’s deputies seized a substantial amount of equipment and personal property connected to a marijuana growing operation. Alaway, 64 Wn. App. at 797. The seized property included CO2 tanks, fans, grow lights, electric heaters, timers, and other materials. Alaway, 64 Wn. App. at 797. Alaway was charged with manufacturing marijuana; he pled guilty and was sentenced. Alaway, 64 Wn. App. at 797. At sentencing, no action was taken with regard to forfeiture or return of the seized property. Alaway, 64 Wn. App. at 797.

Seven months after sentencing, the State moved for an order forfeiting the property to the sheriff. Alaway, 64 Wn. App. at 797. Alaway objected and moved for return of all property. Alaway, 64 Wn. App. at 797. The State conceded that statutory forfeiture procedures had not been followed. Alaway, 64 Wn. App. at 797. The trial court concluded that it had “inherent power” to order the disposal of seized property and entered an order confiscating most of the property. Alaway, 64 Wn. App. at 797-98.

The Court of Appeals reversed: “[T]here is no authority anywhere for the State's contention that the court had the inherent power to order forfeiture of Alaway's property because he used it in his marijuana growing operation. . . .” Alaway, 64 Wn. App. at 800.

“[W]e hold that RCW 69.50.505 provides the exclusive mechanism for forfeiting property of the type involved in this case. The State having failed to comply with that statute, Alaway is entitled to have his property returned.” Alaway, 64 Wn. App. at 800.

Here, the King County Sheriff's Office did not serve Benshoof with the “Notice of Seizure and Intended Forfeiture” until nearly two years after police had seized the property. Supp. CP __ (sub. no. 73, supra, at attached "Notice of Seizure"). Law enforcement must serve the property owner with notice of seizure within 15 days of actually seizing

the property. RCW 69.50.505(3); RCW 10.105.010(3). The sheriff's office failed to comply with the statutory notice procedure. Therefore, the government is "estopped from proceeding in a forfeiture action." Espinoza, 87 Wn. App. at 866 (citing Alaway, 64 Wn. App. at 799-800). This Court should order the trial court to return Benshoof's personal property to him. Alaway, 64 Wn. App. at 801.

D. CONCLUSION

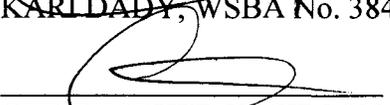
The information in the affidavit supporting the search warrant was insufficient to justify issuance of a warrant for Benshoof's house. Consequently, the trial court erred in not suppressing the evidence seized from the house pursuant to the warrant. The sheriff's office failed to follow the statutory procedure for seizing personal property. Therefore, this court should reverse Benshoof's conviction and order the court to return his personal property.

DATED this 31 day of October 2010.

Respectfully submitted,

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

KURT ALDEN BENSHOOF,

Defendant,

No. 09-1-04161-6 SEA

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.6
MOTION TO SUPPRESS PHYSICAL,
ORAL OR IDENTIFICATION
EVIDENCE

A hearing on the admissibility of physical evidence was held on March 29, 2010 before the Honorable Judge Ronald Kessler. After considering the evidence submitted by the parties and hearing argument, to wit: (1) Affidavit For Search Warrant, and (2) Search Warrant, *incorporated by reference* and attached to the "State's Response to Defendant's CrR 3.6 Motion to Suppress,"

the court makes the following findings of fact and conclusions of law as required by CrR 3.6:

1. THE UNDISPUTED FACTS:

- 1) That on June 24, 2008 Albina Soudakova contacted Deputy Paula Bates of the King County Sheriff's Office to report suspicious circumstances concerning her rental property located at 14825 North Park Avenue North in Shoreline, Washington. Ms. Soudakova had been renting a residence on this property to KURT A. BENSHOOF (hereinafter Defendant) for approximately 2 years.
- 2) That on June 24, 2008 Ms. Soudakova arrived at the residence to meet with the Defendant and noticed that a makeshift room had been constructed above the laundry room, with a ladder leading to the room. Upon viewing the makeshift

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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1 room Ms. Soudakova observed a "shiny" reflective aluminum foil lining the
2 surfaces, as well as electrical lamps, cords, ducting, pipes and wires. Ms.
3 Soudakova also noted that it appeared as though water was routed from the water
4 heater to the makeshift room. In addition, Ms. Soudakova noted that there were
5 approximately 50 small plants with an apparent "sprinkler system" in the
6 makeshift room.

7 3) Deputy Paula Bates, employed with the Sheriff's Office since 2000, is a graduate
8 of the Washington State Criminal Justice Training Center and has conducted
9 between 30 and 40 investigations for violations of the Uniform Controlled
10 Substances Act and has conducted several search warrant and undercover
11 operations as a law enforcement officer. Deputy Bates believed that these
12 observations of Ms. Soudakova were consistent with the growing and cultivation
13 of Marijuana, basing this suspicion on her training and experience.

14 4) Deputy Eric Franklin, employed with the Sheriff's Office since January of 2008,
15 is a graduate of the Washington State Criminal Justice Training Center and has
16 conducted approximately 100 investigations for violations of the Uniform
17 Controlled Substances Act.

18 5) On June 24, 2008 Deputy Bates, along with Deputy Eric Franklin, responded to
19 the residence that the Defendant rented from Ms. Soudakova. Parked in the
20 driveway to the residence was a large yellow "Handy Andy's" moving truck
21 bearing Washington State License Plate # A7615S. As the two deputies
22 approached the front door of the residence each noted a strong odor of Marijuana
23 originating from the parked Handy Andy's truck. These observations were made
24 near the rear "roll-up" door of the truck.

6) Detective Christopher Kieland, employed with the Sheriff's Office since 1999, is
a graduate of the Washington State Criminal Justice Training Center and has
conducted more than 150 narcotics related offenses, including Marijuana.
Detective Kieland has completed training Drug Enforcement Administration
(DEA) Narcotics Surveillance as well as a DEA indoor Marijuana cultivation
course. Detective Kieland's training and experience includes investigations of
reported narcotics-activity.

7) On June 24, 2008 Detective Kieland responded to the residence and noted the
extremely strong odor of Marijuana emanating from the Handy Andy's truck,
parked in the driveway leading to the front door of the residence.

8) Detective Kieland was informed of Ms. Soudakova's observations of the interior
of the residence and, based on his training and experience believed that the
residence was being used to cultivate or store Marijuana. Detective Kieland
knows that it is common for drug traffickers to conceal contraband, proceeds of
drug sales, records of such transactions within their vehicles and in their
residences.

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9) Detective Kieland knows that drug traffickers keep drug paraphernalia, such as scales, sifters, containers and other packaging materials associated with the manufacture, processing and distribution of contraband in their residences, and utilize vehicles to deliver controlled substances to customers.

10) On June 24, 2008 Detective Kieland petitioned for and was granted a judicial warrant to search the residence located at 14825 North Park Avenue, Shoreline, Washington in addition to the 1998 Ford Boxvan License # A7615S (WA) by the Hon. Judge Douglas J. Smith of the King County District Court. The warrant permitted law enforcement to enter both the residence and the truck to search for and seize evidence of Possession and Manufacture of Marijuana, and all equipment, paraphernalia and items used to aid and assist in the manufacture and distribution of Marijuana.

11) On June 24, 2008 Detective Kieland, along with other members of the King County Sheriff's Office served the search warrant and seized items from both the residence and the Handy Andy's truck parked in the driveway of the residence. Property seized from both the residence and truck form the basis of the prosecution for Violation of the Uniform Controlled Substances Act (VUCSA) in the above-captioned matter.

2. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE EVIDENCE SOUGHT TO BE SUPPRESSED:

This case is on all fours or at least on three of fours with State v. Johnson 79 Wash.App. 776 which the Court of Appeals found that where an agent is established as having sufficient familiarity with the characteristic odor associated with growing or freshly harvested marijuana and where the agent has some information about marijuana in the house, less than probable cause and then smells marijuana outside of house, that establishes probable cause.

The distinguishing factor here is that the only odor came from a vehicle parked in the driveway not from the house itself, ~~And that is~~ a significant distinguishing factor. The affidavit establishes a ~~perfectly~~ reasonable suspicion that there was growing marijuana in house based upon Bates' experience. ~~Well, I should got the other direction,~~ Based upon Soudakova's description ^{the} ~~of~~ ^{AC}

1 ~~part~~ of what she observed and then Bates' experience. ~~And we are in agreement with that by itself~~
2 wouldn't justify a warrant.

3 So the question then is whether smelling marijuana in the vehicle, or outside the vehicle,
4 parked in the driveway is enough with the Soudakova/Bates information to allow Judge Smith to
5 exercise discretion in approving the warrant. State v. Hansen, 42 Wash. App. 755, which holds
6 that where marijuana is found growing outside premises a warrant may issue to search inside the
7 premises. State v. Klinger, 96 Wash. App. 619 appears to hold that there is probable cause to
8 search a house that does not extend without more to an outbuilding. Although it also points out
9 cases State v. Helmca 86 Wash.2d 91 and State v. Christiansen, 40 Wash.App. 249 that for
10 example growing marijuana plants seen through an apartment window justified a search of the
11 entire premises and an aerial sighting of marijuana growing on property is sufficient to justify the
12 search of the entire premises. ~~So, that's not what I'm addressing at this point, that shoots down~~
13 ~~defense argument that~~ ^{if there is probable cause to search one room there is no probable cause to}
14 ~~search the entire house, unless you are dealing with multiple units, and that hasn't been presented~~
15 ~~to the court so I am assuming we are not.~~

16 State v. Niedergang, 44 Wash.App. 656, ^{lets that} goes the other direction, where there is a warrant
17 that authorizes search of ^a residence and ~~curtilage~~ and the police seized drugs from a car parked in
18 front of the residence, ~~and the court held that was not within the curtilage as it was set off from~~
19 the residence by the curb, ~~so it was suppressed.~~ ^{But here, clearly} the vehicle was within the
20 curtilage -- parked in the driveway.

21 Appellate Courts say that the court is to look at the warrant from a common sense
22 standpoint. From a common sense standpoint, the evidence of the growing operation in the
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1 residence plus the smell from the vehicle parked in the driveway establishes probable cause to
2 search the residence.

3 ~~I am hereby deny~~ the motion to suppress. *is denied.*

5 In addition to the above written findings and conclusions, the court incorporates by
6 reference its oral findings and conclusions.

7 Signed this 14 day of Oct September, 2010.

8 

9
10 RONALD KESSLER
11 The Honorable Judge
King County Superior Court

12 Presented by



13
14 PETER D. LEWICKI, WSBA #39273
Deputy Prosecuting Attorney

15 *Approved*
Per 9/16/10 Email

16 LINDSAY LENNOX, WSBA #
17 Attorney for Defendant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65427-6-1
)	
KURT BENSHOOF,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF OCTOBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KURT BENSHOOF
4241 GREENWOOD AVENUE N.
SEATTLE, WA 98103

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF OCTOBER, 2010.

x *Patrick Mayovsky*