

68283-5

68283-5

NO. 68283-5-I

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

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STATE OF WASHINGTON

Appellant

v.

ROBIN O. OSLIN,

Respondent

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BRIEF OF APPELLANT

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Prosecuting Attorney

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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## **I. ASSIGNMENT OF ERROR**

1. The trial court erred in entering conclusion of law number one.<sup>1</sup>
2. The trial court erred in entering conclusion of law number two.
3. The trial court erred in entering conclusion of law number five.
4. The trial court erred in suppressing evidence obtained as a result of the search warrant approved by an independent magistrate in this case.
5. The trial court erred in dismissing the charge of manufacturing a controlled substance, marijuana.

## **II. ISSUES**

Where an officer's affidavit in support of a search warrant includes information about the officer's training and experience in recognizing drugs including marijuana, and a statement that the officer smelled the strong odor of fresh growing marijuana coming from a particular home, did the affidavit support a finding that there was probable cause to issue a warrant to search for marijuana grow operation in that home?

### **III. STATEMENT OF THE CASE**

Officer Wantland has been a police officer since 1986. He has been investigating drug crimes since 1996. He has been formally trained in drug recognition and drug investigations through the DEA and other drug investigator's conferences, seminars, schools, and courses. He has been involved in hundreds of investigations relating to the trafficking, manufacturing, packaging, and possession of Marijuana as well as other controlled substances. He has investigated or assisted in numerous investigations involving indoor and outdoor marijuana grow operations, and is familiar with marijuana as well as its related paraphernalia. He is familiar with the appearance of marijuana. <sup>1</sup> CP 40.

In 2010 Everett Code Enforcement Officer Fagerstrom went to 720 E. Marine View Drive in Everett to follow up on a potential code violation concerning unauthorized construction on the residence at that address. While there Officer Fagerstrom contacted a PUD employee who told the officer that he was checking the meter at that residence because of abnormally high

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<sup>1</sup> A copy of the trial court's findings and conclusions is attached as appendix B.

power consumption. The Officer turned this information over to Officer Wantland of the Everett Police Department Anti Crime Team (ACT). 1 CP 39.

Officer Wantland reviewed the assessor's records for that property and found the property owner was the defendant, Robin Oslin. The property description showed the house had 672 square feet and a detached garage had 282 square feet. In late January 2011 Office Wantlend went to the address and observed some construction on the back of the house which appeared to be the unpermitted construction. 1 CP 39.

On February 4, 2011 about 9:30 p.m. Officer Wantland went to 720 E. Marine View Drive to talk to the resident about his seemingly high power usage. While walking up the stairs to the residence the officer smelled a strong odor of fresh growing marijuana. The officer went back to the sidewalk and again smelled the strong odor of fresh growing marijuana. The officer believed that the odor was coming from the residence. 1 CP 39.

Officer Wantland obtained power records from the PUD for the residence. Based on his training and experience the power consumption for that residence from June 2009 to December 2010 was high. Officer Wantland was aware that marijuana indoor grow

operations use electricity in order to operate grow lights, ballasts, fans, and exhaust fans. 1 CP 40.

Officer Wantland prepared an affidavit in support of a search warrant to search the residence at 720 E. Marine View Drive. The warrant was reviewed and approved by Commissioner Moon on February 10, 2011. 1 CP 39-41. A copy of the search warrant affidavit is attached as appendix A.

The warrant was served on February 18, 2011. Police found seven containers of "budder" (a concentrated form of THC), three pounds of processed marijuana, and 168 marijuana plants in various stages of development spread through three rooms, a hallway, and the basement. The defendant arrived home while police were serving the search warrant. He admitted the house was his. He stated that he was part of a marijuana growing cooperative. 1 CP 42-43.

The defendant was charged with one count of manufacturing a controlled substance; marijuana. 1 CP 44-45. Before trial the defendant moved to suppress evidence found pursuant to the search. In part the defendant argued the affidavit did not provide a

sufficient basis to establish that Officer Wantland could identify the odor of growing marijuana.<sup>2</sup> 1 CP 29-30; 1 RP 2-4.

At a CrR 3.6 hearing the court considered the arguments from the defendant and the prosecutor. 1 RP 2-4, 15-17. The court granted the motion to suppress. The court said that every statement made by a police officer in a search warrant affidavit requires a foundational statement with “every assertion that might be subject to cross-examination and an objection for speculation or lack of foundation.” 1 RP 24. The court concluded that it could not imply that foundation from the recitation of the officer’s training and experience. It concluded that requirement could only be met with the statement “based on my training and belief, I knew this to be marijuana.” 1 RP 25-26. The court then entered findings of fact and conclusions of law suppressing the evidence found as a result of the search warrant. 1 CP 6-8, Appendix B. The court then entered an order dismissing the case finding the practical effect of the order to suppress evidence was to terminate the State’s case. 1 CP 4-5.

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<sup>2</sup> The defendant raised two other arguments in support of his motion to dismiss. The trial court did not rule on those alternative arguments, finding his decision regarding the sufficiency of the search warrant affidavit was dispositive. 1 RP 26.

#### IV. ARGUMENT

##### A. THE SEARCH WARRANT AFFIDAVIT PROVIDED SUFFICIENT INFORMATION FROM WHICH A NEUTRAL AND DETACHED MAGISTRATE COULD FIND THERE WAS PROBABLE CAUSE TO BELIEVE THAT THERE WAS EVDIENCE OF A MARIJUANA GROW OPERATION AT THE DEFENDANT'S HOUSE.

A valid search warrant must be supported by probable cause to believe criminal activity is occurring or that contraband exists at a certain location. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause is established when there is sufficient information set out in an affidavit in support of the warrant to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

Affidavits for search warrants must be interpreted in a commonsense and realistic fashion. United States v. Ventresca, 380 U.S. 102, 108, 85, S.Ct. 741, 13 L.Ed.2d 684 (1965). When reviewing an affidavit the magistrate is not engaged in an adversarial proceeding. State v. Patterson, 83 Wn.2d 49, 53, 515 P.2d 496 (1974).

His is the duty to ascertain whether the warrant sought is being reasonably requested and on reasonable grounds. At that juncture, the judge is not dealing with such concepts as reasonable doubt, preponderance of the evidence, the competence of

the witnesses or defendant's right to confrontation and cross-examination of witnesses, nor should the judge invoke other concepts of due process inherent in the Bill of Rights or the common law other than those necessarily included in the idea of reasonableness of the search.

Id.

A reviewing court gives great deference to the issuing magistrate's determination that the affidavit supports probable cause. State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). Thus when the warrant details the circumstances on which the officer's belief of criminal activity is based, and provides reasons for crediting the source of that information, then the court should not invalidate the warrant. Ventresca, 380 U.S. at 108. Doubts about the validity of a warrant should be resolved in favor of upholding the warrant. State v. Partin, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977). The validity of a search warrant is reviewed for an abuse of discretion. State v. Creelman, 75 Wn. App. 490, 493, 878 P.2d 492 (1994).

At the suppression hearing the trial court acts in an appellate like capacity, where review is limited to the four corners of the affidavit supporting probable cause. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). On review the trial court's assessment

of probable cause is a legal conclusion which is reviewed de novo.

Id.

The trial court here erred by failing to give adequate deference to the commissioner's determination that probable cause existed to support the warrant for marijuana in the defendant's home. The trial court's decision applied a hypertechnical reading of the warrant by treating the commissioner's review of the warrant as if it were an adversarial proceeding that required specific language to pass muster.

The Court has rejected any such formulaic requirements for determining whether probable cause existed to issue a search warrant. Instead, the Court has held that a reviewing magistrate is permitted to draw reasonable inferences from the facts and circumstances set forth in the affidavit. State v. Chasengnou, 43 Wn. App. 379, 385, 717 P.2d 288 (1986).

In Smith the Court rejected the argument that a chemical test was required in order to support probable cause to search for marijuana. State v. Smith, 93 Wn.2d 329, 351-52, 610 P.2d 860, cert. denied, 449 U.S. 873, 01 Ct. 213, 66 L.Ed.2d 93 (1980). There an officer stated that he had gone to the defendant's home on a report that marijuana was growing in the defendant's yard.

The officer went to the home and observed the plants which he identified as marijuana. The officer satisfied the magistrate issuing the warrant that he had sufficient familiarity with marijuana plants when he stood within 10 feet of it. Id.

In Petty the officer attested to smelling the odor of marijuana coming from the defendant's home. State v. Petty, 48 Wn. App. 615, 616-617, 740 P.2d 879, review denied, 109 Wn.2d 1012 (1987). The Court held this supported finding the affidavit established probable cause when the officer also stated that he familiar with marijuana in both its growing and packaged states. Id. at 622-23.

Similarly the court was permitted to infer that a grow operation was still present even though the information provided was several weeks old. State v. Payne, 54 Wn. App. 240, 247, 733 P.2d 122, review denied, 113 Wn.2d 1019, 781 P.2d 1321 (1989). There the search warrant affidavit outlined an extensive amount of equipment had been seen being used in a marijuana grow operation sometime before the affidavit was presented. Noting that a marijuana grow operation is not a "now you see it, now you don't" event, the Court held the reasonable inference from the amount

and type of equipment observed was that the information was not stale. Id. at 246-247.

Like Petty and Smith there was a reasonable basis on which the issuing magistrate in this case could conclude that there was probable cause to believe that there was evidence of marijuana grow operation in this case. The inference from the officer's stated training and experience was that he was familiar not only with what marijuana and marijuana grow operations looked like, but also what marijuana smelled like. The increased power consumption further added to the conclusion that probable cause existed to search for a grow operation. State v. Sterling, 43 Wn. App. 846, 719 P.2d 1357, review denied, 106 Wn.2d 1017 (1986).

The Court warned that probable cause cannot be made from an officer's conclusory statement, unsupported by any details of the circumstances on which the officer's belief is based. Ventresca, 380 U.S. at 108. Thus in Matlock the Court invalidated a warrant based only on the statement that an officer had been in the vicinity of the place to be searched and "noticed some plants growing on the premises of Stan Matlock which appeared to be Marijuana, a Controlled Substance." State v. Matlock, 27 Wn. App. 152, 161 P.2d 684 (1980).

The affidavit in this case is far different than the one at issue in Matlock. The affidavit here did not include a bare assertion that the officer smelled marijuana coming from the defendant's house. Rather it outlined the officer's training and experience with marijuana. From that information the reviewing court was permitted to infer that the officer was familiar with the odor of fresh growing marijuana when he smelled it coming from the defendant's house. The trial court erred when it concluded the affidavit did not support finding probable cause because it lacked specific language that the officer was familiar with the odor of marijuana.

#### **V. CONCLUSION**

For the foregoing reasons the State asks the Court to reverse the decision of the trial court suppressing evidence found as a result of the search warrant and dismissing the case. The

State asks the Court to reinstate the charge and remand to the trial court for further proceedings.

Respectfully submitted on March 27, 2012.

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By:   
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Attorney for Appellant

EVERETT POLICE DEPARTMENT  
FAX COVER SHEET



ANTI CRIME TEAM

3002 WETMORE AVENUE  
EVERETT, WA 98201

PHONE: (425) 257-7525  
FAX: (425) 257-6580

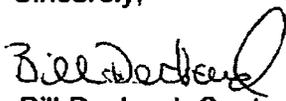
DATE: 09-08-10 / 2-4-11 *UPDATED RECORDS FROM 9-8-10*  
TO: Janet Keefe  
FAX NUMBER: (425) 267-6423  
SUBJECT: Request for Subscriber Records  
FROM: Officer D Wantland #DD224 *425-568-6833*

The Everett Police Anti-Crime Team has reason to suspect criminal activities taking place at the property located at: 720 E Marine View Dr. Everett, Wa. 98203

Information gathered leads this agency to suspect that the crime of **Manufacture/Delivery of a Controlled Substance**, contrary to RCW 69.50.401, is being committed at the above address. Manufacturing a Controlled Substance is a C Felony in the State of Washington.

As part of its investigation, the Everett Police Department requests subscriber records and power usage records for the previous two-year period through the current billing, including Schedule 7, Schedule 11 and Schedule 20, for the address listed above. **Please provide billing information, power usage records and reference records for past accounts as well.** This agency reasonably believes that power usage records pertaining to the above address could help determine whether the suspicion is true.

Sincerely,

  
Bill Deckard, Capt.

Everett Police Department

IF YOU EXPERIENCE ANY PROBLEMS DURING THIS TRANSMISSION,  
CONTACT Sgt. R. Marshall DD# 242 AT: (425) 754-5567

**APPENDIX A**

CASCADE DIVISION DISTRICT COURT FOR SNOHOMISH COUNTY

STATE OF WASHINGTON

NO. PFM 6304

COUNTY OF SNOHOMISH

AFFIDAVIT FOR A SEARCH WARRANT

The undersigned on oath states that the affiant believes that:

- Evidence of the crime of: Manufacture of Marijuana
- Contraband, the fruits of a crime, or things criminally possessed, and
- Weapons or other things by means of which a crime has been committed or reasonably appears about to be committed, and
- A person for whose arrest there is probable cause, or who is unlawfully restrained

are located in, on, or about the following described premises, vehicle or person: the residence, out buildings and curtilage at 720 E. Marine View Dr in Everett, WA, County of Snohomish. Further described, as a light green house with a light trim. The numbers "720" posted prominently above the front door.

That affiant's belief is based upon the following facts and circumstances: In 2010, your affiant received a complaint from Everett Code Enforcement Officer Fagerstrom concerning the property at 720 E Marine View Dr. In Everett, Wa. Officer Fagerstrom had some code enforcement action on the property due to some un-permitted construction on the residence. Officer Fagerstrom stated that he was going out to the property for a follow up inspection and observed a Snohomish County PUD truck in the driveway of 720 E Marine View Dr. Officer Fagerstrom stated that the PUD employee stated that he was checking the meter to the residence because of the abnormally high power consumption. Officer Fagerstrom passed on the information to the Everett Police ACT unit. Your affiant obtained power records from the Snohomish County PUD through administrative letter and observed that the kilowatt hour (KWH) usage appeared to be quite high. The investigation was put on hold due to other investigations ongoing.

Your affiant ran a property check on 720 E Marine View Dr through the Snohomish County Assessor web site and confirmed that the property owner was a Robin O. Oslin. The description of the property showed that the structure's square footage was 672 sq. ft. and a detached garage with 282 sq. ft. Records also showed that the residence had electric baseboard heat. In late January 2011, your affiant had pulled in the driveway of the residence in the evening before 2200 hrs. Your affiant saw that there appeared to be some other construction on the back of the house and believed this to be the un-permitted construction on the structure. It appeared that some possible extra square footage had been added.

On 2-4-11 your affiant went to 720 E Marine View to knock and talk the resident on the high usage of power. This occurred at approx 2130 hours. The residence faces east with the driveway on the north side. The temperature was approx. 48 F with a medium wind out of the NW to the SE. Your affiant began to walk up the steps to the house from the sidewalk which is on the east side and smelled the strong odor of fresh growing marijuana. Your affiant went back to the sidewalk and slightly south and again smelled the strong odor of fresh growing marijuana. Your affiant was off the SE corner of the residence on the sidewalk. Your affiant believed that the odor of the marijuana was coming from the 720 E. Marine View Dr. residence and could not be coming from any other location.

Your affiant has been by the residence on several occasions and has not seen any activity around the residence. Your affiant saw that there was a note or envelope for Robin Oslin taped to the front door.

Your affiant received the power records for 720 E marine View Dr through administrative letter from the Snohomish County PUD on 2-7-11. The power for the residence is in Robin O. Oslin's name. The PUD records show that the Robin Oslin has been the power subscriber in the house since April of 2002. The

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power consumption in the house has been extremely high since June of 2009. The KWH usage from June of 2009 until 12/30/10 is listed below:

5/1/09-6/30/09	8415 kilowatt hour usage	
7/1/09-9/1/09	9989 kilowatt hour usage	
9/2/09-10/29/09	9685 kilowatt hour usage	
10/30/09-1/5/10	9090 kilowatt hour usage	
1/6/10-3/2/10	9000 kilowatt hour usage	
3/3/10-4/30/10	11551 kilowatt hour usage	
5/1/10-6/30/10	13428 kilowatt hour usage	
7/1/10-8/30/10	16713 kilowatt hour usage	
8/31/10- 9/1/10	1012 kilowatt hour usage	1 day reading
9/2/10-9/30/10	13534 kilowatt hour usage	
10/1/10-12/30/10	15035 kilowatt hour usage	

Your affiant has investigated marijuana grow operations in the past and know this to be very high power consumption, especially for this small square footage residence.

Your affiant knows through training and experience that marijuana grown indoors requires grow lights, ballasts, fans, and exhaust fans that all require electricity to operate. Your affiant knows that marijuana growers use 1000 watt halide and/or high pressure sodium bulbs in their grows to imitate the natural sunlight on the plants and grow shields to reflect the light better onto the plants. Your affiant knows that the lights are on the plants in cycles to imitate the natural sun and are on 12-18 hours a day. Your affiant through training knows that a 1000 watt bulb that is on 12 hours a day for 30 days will use 360 KWH. Four lamps will use 1440 KWH and five lamps 1800 KWH. Your affiant saw that the kilowatt hour usage was high, even during the summer months.

Your affiant knows through training and experience that indoor marijuana grows leave evidence of their existence or past existence. Your affiant knows that used potting soil and marijuana plant root balls are often on the property used for growing as well as marijuana leaves or partial leaves. Your affiant knows that there are many times marijuana stems that are discarded after the bud has dried and been trimmed off. Your affiant knows that it is difficult for growers to discard these items without being discovered because of the smell and bulk of the waste that accumulates from the marijuana grows. Your affiant knows that sometimes residences are used entirely as structures for the marijuana propagation and know one resides in them.

Your affiant ran a NCIC III criminal history check on Oslin and found no past marijuana possession or growing history.

Your affiant has been a police officer for the Everett Police Department since September of 1986. Your affiant has attended the 440 hour Basic Law Enforcement Academy, graduating in 1985.

Your affiant was assigned to the Everett Police Special Investigations Unit in June of 1996 to investigate drug crimes. Your affiant attended the 80 hour Drug Enforcement Administrations (DEA) Basic Narcotics Investigator's Course in 1996. In January 2000, your affiant was assigned to the Snohomish Regional Drug Task Force as a drug detective and continued at that until January of 2010. Your affiant has been formally trained in drug recognition and drug investigations through numerous drug investigator's conferences, seminars, schools and courses. Your affiant has been involved in hundreds of investigations relating to the trafficking, manufacturing, packaging, and/or possession of Marijuana, Cocaine, Methamphetamine, Heroin, LSD, and other controlled substances. Your affiant is familiar with the appearance of these drugs as well as their related paraphernalia and packaging through personal observations and training. Your affiant has investigated and assisted in investigations of numerous marijuana grows, indoor and outdoor. Your affiant is currently assigned to the Everett Police Department ACT Anti-Crime Team.

2/3 (PFM)

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Given the details observed and described, your affiant has probable cause to believe that evidence of the crimes of Manufacture of Marijuana to-wit: All marijuana there found together with the vessels in which they are contained and all implements, furniture and fixtures used or kept for the illegal manufacture, sale, barter, exchanging, giving away, furnishing, or otherwise disposing of such illicit drugs and controlled substances, papers showing occupancy or ownership of residence, sales transactions, those items covered under RCW 69.50.505, will be found in the residence, out buildings and curtilage at 720 E. Marine View Dr in Everett, WA, County of Snohomish. Further described, as a light green house with a light trim. The numbers "720" posted prominently above the front door.

I certify (or declare) under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 10th day of February, 2011 at 0800 hours at County of Snohomish, Washington.

EVERETT P.O. 90224 [Signature]  
Affiant Police Officer  
Agency, Title and Personnel Number

Subscribed and Sworn to before me on this 10 day of 2  
2011

[Signature]  
Judge Comm.

Issuance of Warrant Approved:

J Albert  
Deputy Prosecuting Attorney

3/3 (PFM)

FILED

12 JAN 13 PM 4:27

SNOHOMISH COUNTY CLERK  
SNOHOMISH CO. WASH



CL15162462

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO. 11-1-01012-5
	)	
vs.	)	FINDINGS OF FACT
	)	CONCLUSIONS OF LAW
ROBIN OSLIN,	)	
	)	
Defendant.	)	

This matter having come before the Honorable Richard Okrent for hearing on the Defendant's Motion to suppress evidence obtained from the execution of a search warrant pursuant to CrR 3.6, the Court hereby makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. For purposes of the 3.6 hearing only, both parties stipulated to the facts contained in Affidavit for a Search Warrant prepared by Officer Wantland and the administrative letter request for power records. These documents are provided as exhibits.

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## CONCLUSIONS OF LAW

1. The affiant must lay a foundation for assertions in the affidavit for the warrant. It is not a hypertechnical reading of the warrant to require the affiant to provide a foundational statement to back up every assertion contained in the warrant that would normally be subject to cross-examination.
2. The Court has to give deference to the magistrate signing the warrant, but if there is clear error on the face of the warrant the reviewing Court can overturn determination of the signing magistrate.
3. In the cases cited by the parties, *State v Vonhof*, 51 Wn.App. 33 (1988), and *State v. Seagull*, 95 Wn.2d 898 (1981), the affiants set forth some statement of experience with either the smell (*Vonhof*) or appearance (*Seagull*) of marijuana. Here, the reviewing Court cannot derive or imply experience with the smell of marijuana from the information set forth in the four corners of the warrant affidavit.
4. The Court did not reach the other legal issues argued by the parties at the State's request.
5. The information in the four corners of the affidavit for the search warrant in this case did not establish that Officer Wantland's statement that he smelled marijuana was founded on the requisite training and experience to rise above the level of mere personal belief.
6. The search warrant affidavit, read without the assertion that Officer Wantland smelled the odor of marijuana, does not establish probable cause for the issuance of a search warrant.
7. Any evidence obtained as a result of the execution of the search warrant is hereby suppressed.

DATED this 13 day of January 2012

  
HONORABLE RICHARD OKRENT

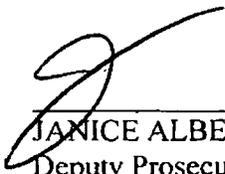
Presented by:

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