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Court of Appeals
Division I
State of Washington

No. 70338-2-I

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

STATE OF WASHINGTON, Respondent,

vs.

STEVE HOVANDER AND STARLANE HOVANDER, Appellant.

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion denying Hovander's motion to suppress a search warrant predicated on an alleged illegal trespass onto the Hovanders' private property by not considering the search warrant or warrant application in addition to considering testimony and pleadings submitted by each party.
2. Whether the trial courts finding and conclusion that the deputies were not illegally trespassing on the Hovanders' private property when they detected the odor of growing marijuana and sound of an electrical fan from a impliedly public access pathway in front of the Hovanders cabin is supported by substantial evidence in the record.
3. Whether the trial court erred concluding spontaneous statements made by Starlare Hovander, not challenged below that were made in a non-custodial setting after she had been advised of her MIRANDA warnings, were admissible.

2. **FACTS**

On May 27th 2011, Whatcom County Sherriff deputies investigated an anonymous tip regarding a marijuana grow operation in Glacier Washington. Supp. CP 68-72 (FF1). Specifically, deputies were investigating the allegation the Hovanders had a grow operation in a trailer located on their property.

Deputies, once in Glacier, parked their vehicle in a condominium parking lot that adjoined the Hovander property and walked up a gravel driveway that forked into two pathways; one that led to three cabins located at 10453 Mt.Baker Highway, the other that led to an RV park located at 10443 Mt. Baker Hwy. Supp. CP 68-72 (FF2). Deputies observed no ‘no trespassing or private property signs as they walked down this open driveway and believed the pathway was open to the public. Id. At the RV park deputies observed nothing that arose their suspicions regarding a grow operation. Id (FF3). An occupant at the RV Park however, told deputies that the Hovanders resided in one of three cabins on the adjoining area of the property; one cabin was occupied by renters that were being evicted, another was empty and the Hovanders lived a third. Supp. CP 68-72 (FF3). Deputies then walked back on the path on the driveway access they had used to enter the RV Park and followed the fork

in the driveway that led the opposite direction toward the cabins. Id (FF4). While standing on the driveway near the front of the cabins, the deputies could hear the sound of a high electrical output electrical fan that they, in their experience investigating marijuana grow operations, associated with often being used to circulate air and dissipate the odor of marijuana grow operations. Supp. CP 68-72 (FF5). The deputies then walked along the driveway and stood in front of the middle cabin that they had been told was vacant. Supp. CP 68-72 (FF6). There deputies intermittently detected the odor of growing marijuana. Id. One of the deputies approached the front door of the cabin and noticed the windows were completely covered up and that there were items on the porch that could be associated with marijuana grow operations. Id. Deputies did not detect an odor of marijuana at the front door of the cabin but could when they stepped off the cabin porch onto the driveway. Id. They surmised the odor was likely coming from a chimney on the second floor of the cabin that was venting the odor from the cabin. Id.

At no time during their investigation did any of the deputies observe no trespass or private property signs or have to climb over fences or gates when they approached the front of the cabins from the driveway.

Id. Deputies made these observations from the driveway and front porch of the cabin they thought were impliedly open to the public. Id.

Based on the information deputies gathered from their senses while on the pathway and driveway area of this property, deputies obtained telephonic authorization to search the vacant cabin. Inside the cabin, deputies discovered a marijuana grow operation that contained 256 plants.

While deputies were executing the search warrant, Steve and Starlare Hovander arrived at the cabins and asked what officers were doing. Supp. CP 65-67 (FF 2, 3). The Hovanders told officers they owned the cabins and that the marijuana grow operation was ‘legal.’ Id. The Hovanders provided five prescriptions for medical marijuana use in the cabin; three of the prescriptions were expired and another was for a person who was then deceased. Supp. CP 765-67. (FF2).

After deputies advised the Hovanders’ of their Miranda rights Steve Hovander agreed to talk to deputies while Starlare chose not to and walked away. Id. Deputy Taddonio advised Steve that the quantity of marijuana plants suggested they were being cultivated for resale. Starlare, overhearing the question interjected “yeah” but then quickly denied she was selling marijuana. Supp. CP 65-67. Steven Hovander subsequently

acknowledged he knew several of the marijuana prescriptions on the premises were invalid. Id (FF 5, 6).

Prior to trial, the Hovanders filed a motion to suppress arguing deputies obtained the information to support the issuance of a search warrant (the odor of marijuana and sound of electrical fan) by illegally trespassing on their private property. Supp. CP 111-121. Following a suppression hearing, the trial court concluded the deputies did not illegally trespass when they investigated the cabins from areas, the court concluded, that was impliedly open to the public. Id.

Following a stipulated bench trial, Steve and Starlare Hovander were convicted of one count of manufacturing a controlled substance; to wit, marijuana and given a three month standard range sentence, that permitted electronic home detention and an option to convert 30 days of ordered confinement to community service. CP 78-85. Steve and Starlare Hovander timely filed a notice of appeal. CP 88-90. Their respective appeals have been consolidated.

B. ARGUMENT

1. The trial court did not abuse its discretion denying the Hovanders' motion to suppress evidence obtained pursuant to a search warrant of their cabin.

The Hovanders assert the trial court erred denying their motion to suppress evidence found pursuant to a search warrant of their properties at 10453 Mt. Baker Highway. Br. of App. at 1. First, the Hovanders argue the trial court erred denying their motion to suppress the fruits of an allegedly unlawfully obtained search warrant without considering the warrant or warrant application. Br. of App. at 11. The Hovanders' also challenge that the trial court's finding and conclusion that deputies did not illegally trespass on the Hovander private property but detected the odor of marijuana and sound of an electrical fan from impliedly open curtilage near the Hovanders' cabin. (FF7). Finally, for the first time on appeal, Hovanders' challenge the admissibility of statements made by the Hovanders during the execution of the search warrant.

- a. *Hovanders' provide no persuasive basis for this court to suppress evidence obtained pursuant to valid search warrant based on the trial court's alleged failure to consider the warrant or warrant application where neither were challenged below because the Hovanders' chose instead to argue deputies obtained information later relied on in the warrant application by illegally trespassing on the Hovander property.*

The Hovanders did not challenge the search warrant or the warrant application in the trial court. Instead, the Hovanders asserted below that deputies obtained information to support obtaining a search warrant for their cabin by illegally trespassing on the Hovanders' property. The illegal trespass, they argued, required the trial court to suppress the evidence obtained from the otherwise facially valid search warrant.

The trial court rejected the Hovanders' claim concluding deputies did not trespass but were on impliedly open to the public areas when they detected the smell of growing marijuana and heard a sound they suspected of an electrical fan coming from one of the Hovander cabins. Supp. CP 68-72.

A search warrant may be issued only upon a determination of probable cause. State v. Atchley, 142 Wash. App. 147, 161, 173 P.3d 323 (2007), (*citing* State v. Cole, 128 Wash. 2d 262, 286, 906 P.2d 925 (1995)). Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of such criminal activity can be found at the place sought to be searched. Id. at 161, (*citing* State v. Thein, 138 Wash. 2d 133, 140, 977 P.2d 582 (1999)).

To establish probable cause for a search warrant, the application for a search warrant “must set forth sufficient facts to lead a reasonable person to conclude there is a probability that the defendant or place is involved in criminal activity.” Atchley, 142 Wash. App. at 161, *quoting State v. Cord*, 103 Wash. 2d 361, 365-66, 693 P.2d 81 (1985). Search warrants are reviewed for an abuse of discretion. State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).

A search warrant is entitled to a presumption of validity and great deference is given to the issuing magistrate’s determination of probable cause. State v. Chenoweth, 160 Wash. 2d 454, 158 P.3d 595 (2007) Material misstatements or omissions will invalidate a search warrant however, when a defendant demonstrates preliminarily by a preponderance of the evidence that such statements are made recklessly or intentionally. Chenoweth, 160 Wash. 2d 454. Additionally, if information used to support the finding of probable cause was obtained by an unconstitutional search, that information may not be used to support the warrant. State v. Ross, 141 Wash. 2d 304, 311-12, 4 P.3d 130 (2000).

Hovander asserts on appeal that the state “assumed the burden of proof” at the suppression hearing below and failed to meet its burden of proving the constitutionality of the authorized search warrant by failing to

admit the underlying warrant or warrant application allegedly at issue in the trial court. Br. of App. at 10. While the state has the burden of justifying a search or seizure conducted *without a warrant*, the burden shifts to the defendant to demonstrate a warrant is not supported by probable cause or to make a preliminary showing that the warrant application contained material omissions or misrepresentations, when the search is conducted pursuant to a search warrant. State v. Weaver, 38 Wash. App. 17, 683 P.2d 1136 (1984), *review denied*, 102 Wn.2d 1019 (1984). The trial court then has discretion whether to take oral testimony on a motion to suppress evidence. State v. Kipp, 171 Wash. App. 14, 286 P.3d 68 (2012) *rev'd on other grounds*, 179 Wash. 2d 718, 317 P.3d 1029 (2014).

Moreover, a defendant may only assign evidentiary error on appeal on a specific ground made at trial. State v. Guloy, 104 Wash. 2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). RAP 2.5(a) generally precludes review of an unpreserved claim in the trial court unless the defendant can demonstrate the alleged error is a “manifest error affecting a constitutional right.” State v. Scott, 110 Wash. 2d 682, 757 P.2d 492 (1988), State v. Contreras, 92 Wash. App. 307, 966 P.2d 915 (1998).

Hovander cannot demonstrate the error he now asserts, failure to consider the warrant or the warrant application, was relevant and necessary to the challenge he made below or that his attorneys failure to have the trial court consider this information constitutes an error of constitutional magnitude that should now be reviewed, let alone provide a basis to warrant suppression of the evidence obtained pursuant to the warrant on appeal. Hovander's challenge should be denied.

The Hovanders argue nonetheless, based on State v. Myers, 117 Wash. 2d 332, 815 P.2d 761, 671 (1991), suppression is warranted where the sworn statements used to support the issuance of the warrant are not considered by the trial court in a suppression hearing. Myers is not applicable here. In Myers the court determined that the failure to make a contemporaneous recording of the search warrant application as required by law deprived the parties of a record sufficient to subsequently challenge and review the magistrate's probable cause determination. Here, there is no allegation that the search warrant application wasn't recorded contemporaneously or that the recording was lost or destroyed¹. Instead,

¹ Hovander's trial attorney had a copy of the search warrant transcript as mentioned during the suppression hearing. RP 48 (November 26th 2012). As the prosecutor summarized the warrant was

the Hovanders argued the deputies obtained information used to obtain the search warrant illegally. And that the illegal trespass required suppression of the warrant and the evidence found pursuant to the warrant. Once the trial court determined the evidence presented demonstrated deputies did not engage in any illegal activities or trespassed on private property when they detected the odor of marijuana or heard the electrical fan, Hovanders' challenge was resolved. Only if the Court had determined deputies had trespassed would the search warrant application itself become relevant. Under those circumstances, the trial court would then determine if the deputies had information independent of the alleged trespass in the warrant application, to support the issuance of the search warrant. In light of Hovanders' narrow challenge below and the trial court's conclusion, the warrant and warrant application were not relevant to the hearing. Hovanders' novel challenge to the sufficiency of the suppression hearing record should be denied short of demonstrating this alleged error constitutes a manifest error of constitutional magnitude.

predicated on marijuana smell, noise of high output electrical fan and a windows that were boarded up.
Id.

- b. Hovanders cannot demonstrate the trial court erred finding and concluding deputies were not illegally trespassing when they detected the odor of marijuana and heard the sound of an electrical fan from the pathway near the Hovander cabin prior to applying for a search warrant.

Next, the Hovanders' contend as they did in the trial court, that deputies obtained the information to support the issuance of the search warrant by illegally trespassing on the Hovanders' private property. Br. of App. at 12.

The exclusionary rule requires courts to suppress evidence obtained directly and indirectly through violation of a defendant's constitutional rights. State v. Le, 103 Wash. App. 354, 12 P.3d 653 (2000); *citing*, State v. White, 97 Wash. 2d 92, 111-112, 640 P.2d 1061 (1982). If information in an affidavit of probable cause for a search warrant is obtained by an unconstitutional search, that information may not be used to support the warrant. State v. Johnson, 75 Wash. App. 692, 879 P.2d 984 (1994). Warrantless searches are per se unreasonable under the Fourth Amendment and article 1, section 7 of our State Constitution unless the search falls within a few well established exceptions. Ross, 141 Wash. 2d 304.

While the home is afforded constitutional protections, police with legitimate business, when acting in a manner as a reasonably respectful citizen, are constitutionally permitted to enter the curtilage areas of a private residence that are impliedly open, such as access routes to the house. State v. Seagull, 95 Wash. 2d 898, 902, 632 P.2d 44 (1981). Areas of curtilage impliedly open to the public include a driveway, walkway or access route leading to a residence or to the porch of a residence. State v. Hoke, 72 Wash. App. 869, 874, 866 P.2d 670 (1994). If deputies detect something with their senses while lawfully present on areas of impliedly open curtilage, that detection does not constitute a search under the state or federal constitution. Seagull, 95 Wash. 2d at 902.

Following a suppression hearing in this case, the trial court concluded the officers did not trespass illegally on the Hovander property when they detected the odor of marijuana and sound of an electrical fan coming from one of the Hovanders' cabins. Supp. CP 68-72. Hovander nonetheless assigns error to one of the trial courts findings of fact that states deputies did not walk past or observe any signs restricting access to the impliedly public areas around the Hovanders' cabins when they detected the strong odor of marijuana and heard the whirring of what

sounded like a high output electrical fan; facts later used support obtaining a telephonically approved search warrant. Br. of App. at 12.

When reviewing the denial of a suppression motion, the appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law. State v. Hill, 123 Wash. 2d 641, 644, 870 P.2d 313 (1994). Evidence is substantial when it is enough “to persuade a fair-minded person of the truth of the stated premise.” State v. Reid, 98 Wash. App. 152, 156, 988 P.2d 1038 (1999). Where there is substantial evidence in the record to support a challenged finding, that finding will be binding on appeal. Hill, 123 Wash. 2d 641. A trial court’s conclusions of law stemming from a suppression hearing are reviewed de novo on appeal. State v. Carter, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

FINDINGS OF UNDISPUTED FACT No.7; The deputies then went to the adjoining Chair 9 restaurant where they used its telephone to secure a search warrant. From the time they left their parked vehicles until they retreated from the front door of the middle cabin, the deputies did not open a gate, climb over a fence *or walk past or observe any signs restricting public access to their location. Their route was impliedly open to the public and they acted in a manner of any reasonably respectful member of the public who might be visiting or transacting business at the cabin.*

Supp. CP 68-72. (CrR 3.6 findings of fact conclusions of law)²

Substantial credible evidence in the record supports the courts finding that deputies did not encounter restrictive no trespassing or private property signs and that the deputies were on the driveway when they detected the marijuana odor and heard the sound of an electrical fan coming from the Hovander cabin. See, RP 19-20(11/26/12) (Jeremy Moxley testifies he was not aware of a no trespassing sign or fence at the Hovander property on May 27th 2011.), RP 29, 41-44, 61 (Deputy Taddonio testifies pictures of the Hovander property from April 2012 showing fences, gates and signs were not present when deputies went to the Hovander property on May 27th 2011.), RP 83-84, 87 (Deputy Bonson testifies there were no signs or gates across the driveway area at the Hovander property on May 27th 2011), see also RP 110, 112,126 (Deputy Paz testifies there were no signs, gates or fences when they accessed the Hovander property using the impliedly open driveway that led to the cabin.)

² The Hovanders object to the portion of the finding italicized; the remaining portion of the finding and additional findings not challenged are verities on appeal. State v. Broadaway, 133 Wash. 2d 118, 942 P.2d 363 (1997)..

During the suppression motion hearing, several photos were admitted into evidence that depicted the driveway and Hovander cabins from the driveway of the RV park and Condominium complex that reflected a fence line, a gate and private property and no trespassing signs. RP 42-43. Deputies and two disinterested witnesses from the restaurant Chair 9 testified however, that neither the fences, a gate or the ‘no trespassing’ and private property signs were present on May 27th 2011. RP 43, (November 26, 2012.), Supp. CP 68-72 (FF8). Two of the disinterested non law enforcement witnesses testified the gates and no trespass signs were put up on the property *after* the Hovanders were released from custody following their arrest in this case. (FF8). This finding of fact has not been challenged and is a verity for purposes of this appeal. The Hovanders’ challenge to one of the trial court’s findings of fact is therefore without merit.

Next, Hovander challenges the trial court’s conclusion that the deputies pre-warrant detection of the marijuana odor and fan noise from the cabin were lawfully obtained while deputies were on areas impliedly open to the public; including the driveway and front porch that accessed the Hovander cabin.

The unchallenged findings established deputies went to the Hovander property on May 27th 2011 with the legitimate purpose to investigate an anonymous tip that alleged the Hovanders had a marijuana grow operation and accessed the property via a gravel driveway that forked into two driveways; one of which led to the Hovander cabin. (FF1). (FF1,2) The cabins were visible from the highway and adjacent to the Chair 9 restaurant in Glacier Washington. RP 24 (11/26/12), RP 96 (1/22/13).

Deputy Taddonio explained the officers did not ever walk around the back or the sides of the cabin and that all of the information deputies gathered during the initial investigation was done while officers were on one of two paths that went in front of and behind the Hovanders' cabin. RP 59, 61, 71. (November 26th 2012). Deputy Taddonio clarified that one of the paths led right up to the door of one of the cabins where he also observed materials often used in marijuana grow operations right on the front porch. Id. Taddonio explained that if a UPS was delivering a package, the delivery service would likely drive the same path they walked up to go right up to the cabin front door. RP 73.

Given this testimony, consistent with the unchallenged findings of fact, the Hovanders' cannot demonstrate they had a legitimate expectation

of privacy in the impliedly open area of the driveway and front porch of the Hovander cabin on May 27th 2011 when deputies detected the odor of growing marijuana. Thus, the Hovanders aren't entitled to the protections of the exclusionary clause. United States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547, 65, 65 L. Ed. 2d 619 (1980) P.3d.2d 619 (1980).

Nothing in the unchallenged findings demonstrates the deputies' purpose was unlawful or that they acted in a manner inconsistent with their legitimate purpose or in a manner that violated any privacy expectation the Hovanders reasonably had. The deputies parked and approached the area on foot on a well- marked gravel driveway, First to the RV park and then, after receiving additional information, walking to the fork in the road and taking that pathway that led right up to three cabins. While there deputies noticed the allegedly vacant cabin was emitting a smell of growing marijuana, the windows were blacked out and they could hear the sound of a electronic fan. While making these observations, the deputies remained respectful of the property by staying on the path or front porch where the path ended at the cabin; all areas they believed appeared open to the public. Moreover, none of the deputies or witnesses testified that at the time the deputies came to visit, there were any no trespass or private

property signs that would signal that the public was not welcome in these impliedly open areas that led to the Hovanders' cabin.

Given these undisputed facts, the trial court did not error concluding the deputies did not illegally trespass on the Hovander property when they detected the odor of marijuana and sound of an electrical fan. The state respectfully requests this court affirm the trial court's decision denying the Hovanders' motion to suppress.

c. Hovander challenge to the admissibility of Starlare Hovander's spontaneous non-custodial post Miranda statements based on the alleged illegal trespass does not warrant review for the first time on appeal.

Finally, the Hovanders' assert Starlare Hovander's spontaneous statement admitted below pursuant to CrR 3.5 should be suppressed as the poisonous fruit of the alleged trespass. The Hovander's concedes this issue was not raised nor argued in the trial court. Br. of App. at 15. RAP 2.5 precludes review for the first time on appeal unless the Hovanders demonstrate this alleged error constitutes a manifest error of constitutional magnitude. Hovander has not and does not provide any meaningful argument to support his assertion that the trial court improperly admitted Starlare Hovanders' statements. This Court should therefore decline further review of this issue. State v. Christensen, 40 Wash. App. 290, 297,

698 P.2d 1069 (1985), *review denied*, 104 Wn.2d 1003 (1985) (failure to cite to relevant authority waives review).

C. CONCLUSION

The State respectfully requests that this Court affirm Steve and Starlare Hovander's conviction for unlawful manufacture of a controlled substance.

Respectfully submitted this _____ day of January 2016.



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CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel, Jeffrey Steinborn, addressed as follows:

JEFFREY STEINBORN
PO Box 78361
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Legal Assistant

2/2/16

Date