63034-2

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NO. 63034-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALEX J. TANBERG,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Based on a tip that the defendant's girlfriend's daughter was being deprived of a bedroom until the "plants are done growing," officers contacted the defendant at the threshold and smelled marijuana as they did so. The defendant acted furtively during the contact. A front room window was covered with cloth, with light visible behind it, and the sound of a tank or generator emanated from inside. A subsequent search pursuant to warrant uncovered a marijuana "grow operation" of some 60 plants.

The officer-affiant based his ability to recognize the odor of marijuana on training and on experience gleaned in three prior "grow op" searches, the last one conducted a day before. He did not disclose to the magistrate that the last one had yielded nothing. The trial concluded that the inclusion of this omission did not negate probable cause, based on all the other evidence. Did it err in doing so?

II. COUNTER-ASSIGNMENTS OF ERROR

1. The trial court erred in finding that the affiant sheriff's deputy had "mistakenly" identified the odor of marijuana in a prior affidavit and search (Finding of Fact # 4).

2. The trial court erred in finding that the deputy had implied to the magistrate that he had never mistakenly identified the odor of marijuana (Finding of Fact # 5).

3. The trial court erred in concluding the unsworn Howson letter was an "otherwise reliable statement" of a witness, and in considering it (Conclusion of Law # 1).

4. The trial court erred in concluding Timothy Luce was not reliable (Conclusion of Law # 2).

5. The trial court erred in concluding the current warrant affidavit included a "false statement by omission" (Conclusion of Law # 3).

6. The trial court erred in concluding the "false statement" was made with a reckless disregard for the truth (Conclusion of Law # 4).

III. ISSUES RELATED TO COUNTER-ASSIGNMENTS OF ERROR

1. Because the prior "grow op" search, yielding no drugs, had been conducted the day before the officer-affiant made the current affidavit, the trial court concluded omitting its negative results was done in reckless disregard of the truth. Did it err in

doing so, when the matter involved an omission, not an affirmative statement, and was on a collateral matter?

2. To challenge the accuracy of an affidavit by impeaching a government affiant, a defendant must present "affidavits or sworn or otherwise reliable statements of a witness." Instead, he offered an unsworn and conclusory statement (a letter) from the owners of the property that was the subject of the last of three prior "grow op" searches. The trial court found the unsworn statement reliable. Did it err in doing so?

IV. STATEMENT OF THE CASE

A. DEFENDANT'S FRONT-ROOM "GROW OP."

Appellant Alex Tanberg (defendant below) was charged with one count of manufacturing marijuana – i.e., conducting a "grow op" – in his residence. 1 CP 136-38. He was found guilty at a bench trial on stipulated police reports. 1 CP 55-58; 12/2/08 Stip. Bench Trial RP 3-15; 2 CP 140-229 (stipulated police reports). He agreed to a stipulated bench trial after losing a pretrial motion challenging the sufficiency of the search warrant that had led to the discovery of his "grow op." 1 CP 67-73, 87-135 (defense briefing); 1 CP 74-86 (State's response); 1 CP 45-48, 83-86, and 100-103 (the search

warrant affidavit in question);[1] 1 CP 59-66 (transcript of trial court's oral ruling at 10/30/08 pretrial hearing); 2 CP 232 (minute entry, re same); 1 CP 39-43 (Findings of Fact and Conclusions of Law, re same).

The "grow op" was in a single family residence in Bothell/Mill Creek. 1 CP 45; 2 CP 143, 156, 197 (reports pp. 2, 15, 55). One of the front rooms had been divided into two parts, with ten mature budding marijuana plants in one section, and fifty immature marijuana plants in a separate second section. 2 CP 144, 150, 162, 196 (reports pp. 3, 9, 21, 54). There was also a lot of growing equipment, such as lights, heater, timers, and a humidifier gauge. 2 CP 162, 169-72, 196, 228 (reports pp. 21, 28-31, 54. 83). Police also found a book on how to grow marijuana indoors. 2 CP 222, 228 (reports pp. 78, 83). Three officers separately recalled a strong or overwhelming odor of marijuana throughout the house. 2 CP166, 196, 228 (reports pp. 25, 54, 83).

The trial court commented on, and summarized, this evidence at the stipulated bench trial. 12/2/08 Stip. Bench Trial RP 7-8. It found the defendant guilty. Id. at 8-9. The trial court

[1] The affidavit appears in clerk's papers in three different places; the cites for all three locations are listed here.

sentenced the defendant to a three-month standard-range sentence. 1 CP 23; 2/5/09 Sent'g RP 10-11. It stated its biggest concern was that this "grow op" had been conducted while the defendant's girlfriend's now seven-year-old daughter was living in the house. 2/5/09 Sent'g RP 6.

B. THE SEARCH WARRANT AND AFFIDAVIT.

The affidavit for the search warrant that allowed officers to enter the defendant's home had been sworn out by Snohomish County Sheriff's Deputy Ryan Phillips, a new officer with one year's field experience. 1 CP 45. He had completed the standard 720-hour basic law enforcement academy course at the State Criminal Justice Training Center as well as multiple classes in the recognition of illicit drugs. 1 CP 45; 1 CP 40 (Finding of Fact #14). He had two bachelor's degrees, one in criminal justice and one in sociology. He had served seven prior search warrants, three of which were for marijuana grow operations. 1 CP 45.

Deputy Phillips had received an inquiry from a named concerned citizen, Timothy Luce, concerning the welfare of his six-year-old daughter K.L., who lived with her mother (Luce's ex-wife) and the mother's boyfriend (the defendant) at the Bothell residence at issue here. 1 CP 45-46. The daughter complained to her father

that she did not have her own room there, adding that her mom's boyfriend had told her she'd get her own room once "the plants are done growing." 1 CP 46. K.L.'s father thought his daughter was being exposed to a marijuana "grow op." Id.

Deputy Ryan decided to try a "knock and talk" at the Bothell residence. Accompanied by Deputy Troy Koster, he stood at the front door of the residence and detected a "faint odor" of marijuana. 1 CP 46. A window to the left was covered with some type of cloth. Deputy Phillips could see light around the edges. He also could hear something inside that sounded like a generator or tank. Leaning over to the window he again detected a faint odor of marijuana. Id. 1 CP 46; 1 CP 40 (Finding of Fact #8).

The officer knocked on the door. A man (later identified as the defendant) opened the door just wide enough to squeeze through, then closed it behind him. Deputy Phillips detected a strong smell of growing marijuana as the defendant opened and shut the door. Phillips said neighbors had reported shots fired or firecrackers going off and the police were just checking with residents to see if anyone else had heard them. (This was a ruse.) The defendant said he hadn't heard anything, and contact ended. 1 CP 46; 1 CP 40 (Findings of Fact #10, 11).

Deputy Phillips then swore to an affidavit with the above information and obtained a warrant to search, signed by Snohomish County District Court Commissioner Paul Moon. 1 CP 45-48. The results of the search were as described above. 2 CP 140-229; 1 CP 106.

C. PRETRIAL MOTION CHALLENGING SUFFICIENCY OF WARRANT.

The defendant brought a pretrial motion attacking the sufficiency of the search warrant affidavit. He argued he was entitled to a "Franks hearing" based on an alleged material omission by the officer. 1 CP 68. Deputy Phillips had stated, when standing at the defendant's front porch, and again when leaning over to the window to the left, that he had detected a faint odor of marijuana. He then detected a strong odor of marijuana when the defendant opened the door. 1 CP 46. He had added:

> Based on my training and experience and having written and served three previous search warrants for marijuana grow operations, I immediately identified the smell as growing marijuana..

1 CP 46. The defendant asserted this "overstated his ability to detect the odor of marijuana[.]" 1 CP 93. He based this on the facts of three prior "grow op" warrants that the officer had sworn out

and served, and in particular on the last of the three (where no marijuana ended up being found).

Because the three prior warrants, involving other suspects, figure prominently in the defendant's argument, both below and here, they are set forth in some detail.

1. "Gerard/Mero Road warrant," 1 CP 109-114. Officers were seeking to arrest an individual on a felony warrant and entered a residence per consent. Deputy Phillips smelled "mold" or "vegetable matter" and then came across a marijuana plant in the basement. Officers left and obtained a search warrant. 1 CP 110-11. A subsequent search disclosed, and resulted in seizure of, 20 plants, paraphernalia, grow equipment, four handguns, and a sawed-off shotgun. 1 CP 115.

2. "Brayman/6th Ave. W. warrant," 1 CP 116-21. A named informant and admitted frequent marijuana user with no criminal history told police a former friend (Brayman) was growing marijuana in a utility closer by the balcony at the latter's apartment. Brayman had shown the informant 16-20 marijuana plants under lights, calling them "my babies." 1 CP 117-18. The informant described the set-up with particularity. 1 CP 118. He was telling the police this because he was unhappy with Brayman for faking disability to

get government benefits. Neighbors reported frequent foot traffic, and short-stay vehicle traffic, at the apartment. Id. Officers obtained a warrant backed by this information. A subsequent search yielded, and resulted in seizure of, the plants, grow equipment, and paraphernalia. 1 CP 122.

3. "Howson/East Scouten Loop Rd. warrant," 1 CP 123-27, 129. Officers responded to a domestic violence call. While trying to find the particular residence associated with the possible domestic violence incident, Deputy Phillips and another officer came upon a neighbor's shed that had a red light on inside it, some sort of insulated tank, some plastic plant pots, and with a portion of the shed separated by floor to ceiling sheeting. Deputy Phillips thought he could smell marijuana and his colleague, Deputy Randall Murphy, thought he could too. 1 CP 124. In the end, a total of four officers, including Phillips and Murphy, thought they could smell marijuana, either by the shed or downwind from it. 1 CP 124-25. Officers located the neighboring residence involved in the domestic violence call, and dealt with that, arresting a male, and left the premises. After checking with his sergeant, Phillips then obtained a warrant to search the shed with the red heat lamp and served it the following day. 1 CP 123-27, 129-30, 131. No

marijuana was found. 1 CP 131. In fact, nothing was seized at all. Id. Neither the main residence nor two other outbuildings were searched, just the shed. 1 CP 129.

Howson letter alleging conspiracy, 1 CP 50-53, 132-35 (duplicate). The shed searched pursuant to the third prior warrant was on the property of Roy and Jennifer Howson, husband-and-wife criminal defense attorneys who practice in Mt. Vernon. They wrote a letter to the Snohomish County Prosecutor's office alleging they were the targets of a conspiracy, asserting that the four officers who had allegedly smelled marijuana had conspired to perjure themselves in order to conduct an ostensibly legal search on the Howsons' property. 1 CP 50-51. The Howsons described the shed as containing a red heat lamp, pressure t ank, pump, sheeting insulation, a 55-gallon barrel, and an insulated and duct-taped water pipe. 1 CP 53, 135. They said there were no plastic pots in the shed, but were some outside a separate outbuilding some 40 feet away. Id. They stressed the shed was much smaller than as described in the warrant. Compare 1 CP 53, 135 (8' x 8') with 1 CP 129 (16' x 30'). They explained the heat lamp was on inside to keep things from freezing. 1 CP 53, 135. The Howsons denied there had ever been any marijuana in the shed. Id.

Based on all this, the defendant argued pretrial that all Deputy Phillips had encountered in his first "grow op" search had been a smell of "mold" or "vegetable matter;" that the second search hadn't involved a pre-search "sniff" at all; and that the third search (of the Howson's shed) had turned up nothing. 1 CP 93. He argued this all should have been included in the affidavit involving his property. 1 CP 93-95. He added Deputy Phillips' leaving out information about the unsuccessful Howson search was intentionally misleading or with reckless disregard of the truth, noting that the Howson return of service (stating nothing found) indicated that search was done the day before Phillips swore out the warrant involving the defendant's property. 1 CP 93-95; compare 1 CP 48 (current affidavit signature page, dated 9/23/07) with 1 CP 131 (return of service on Howson search, dated 9/22/07). He argued that, consequently, *all* of Dep. Phillips' statements about detecting the smell of marijuana should be excised, 1 CP 95, and that the warrant lacked probable cause without the "sniff." 1 CP 97-98. Alternately, he asserted that the deputy's statements concerning his experience from search warrants should be deleted,

and with that gone, his ability to detect marijuana was so compromised as to defeat a finding of probable cause. 1 CP 70-71.

The State responded that no false statement was ever made; that a mere proximity in date between the two search warrants was insufficient to show intentional falsehood or a reckless disregard for the truth; and that, even with the additional disclosure about the Howson search added in (or with the experience gleaned from prior warrants taken out) the officer's having smelled marijuana was still part of the warrant, and, coupled with the information from Luce and his daughter K.L. and the defendant's furtive behavior, provided probable cause. 1 CP 77-80. The State also objected to the court's considering the unsworn hearsay of the Howson letter. 1 CP 80-81.

The trial court, in both an oral ruling and written findings, denied the defense motion. 1 CP 39-43 (Findings of Fact and conclusions of Law); 1 CP 61-66 (transcript of oral ruling). It stated it would consider the Howson's letter as sufficiently reliable, and concluded that Mr. Luce's information, standing alone, did not satisfy the two-pronged basis-of-knowledge and reliability test of

Aguilar-Spinelli.[2] 1 CP 39, 41, 61. It found that the deputy had acted with a reckless disregard of the truth by implying to the commissioner that he had made no mistakes in identifying marijuana in prior searches, when in fact he had made a mistake just one day earlier. 1 CP 40, 41, 61-62. Nonetheless, the trial court concluded this material omission was not necessary to a finding of probable cause:

> Deputy Phillips had successfully identified the odor of marijuana during two prior search warrants, for which he wrote the affidavit and warrant and served the warrant. . . . Deputy Phillips had training and experience in general drug detection.
>
> * * *
>
> Even if [Snohomish County District Court Commissioner Paul] Moon had known that Deputy Phillips had made one mistaken identification of the odor of marijuana, this was not a fatal error which would have caused Commissioner Moon to reject the warrant for failure to establish probable cause.
>
> Even with the addition of the fact that Deputy Phillips had mistakenly identified the odor of marijuana the day before, the Deputy's training and experience as laid out in the warrant affidavit to include his two prior successful warrants for marijuana growing operations, his observations of the house to include the window and sound of a generator or tank and the faint odor of marijuana, the corroborating statements of Brian Luce that his 6 year-old daughter [K.L.] is disturbed and very upset because she is not allowed to go in her

[2] Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

> own room because her mother's boyfriend is growing plants in there and that as soon as the plants are taken out she can have her room back, the defendant's furtive behavior in answering the door so that the officer couldn't see inside and odor did not escape, and the extremely strong and obvious smell of growing marijuana when the door opened briefly create probable cause.
>
> The defendant has not made a substantial preliminary showing by sufficient evidence . . . that insertion of the omission would have caused Commissioner Moon to reject the warrant.

1 CP 40-42, citing State v. Jacobs, 121 Wn. App. 669, 678, 89 P.3d 232 (2004)[3] (absence of information re officer's training and experience in drug detection not fatal to "sniff" case, given other facts). This appeal followed. 1 CP 5-17.

V. ARGUMENT

A. REVIEW OF SEARCH WARRANTS GENERALLY; PRESUMPTION OF VALIDITY.

Search warrants are a favored means of police investigation. Consequently, when they are challenged, supporting affidavits or testimony are reviewed in a manner which will encourage their continued use. United State v. Harris, 403 U.S. 573, 29 L. Ed. 2d

[3] Reversed on other grounds, 154 Wn.2d 596, 115 P.3d 281 (2005) (whether school-zone enhancements on multiple counts are imposed concurrently or consecutively).

723, 91 S. Ct. 2075 (1971); United States v. Ventresca, 380 U.S. 102, 108-09, 85 S. Ct. 741, 13 L. Ed. 2d 284, (1965). When a search warrant is properly issued by a judge, the party attacking it has the burden of proving its invalidity. State v. Fisher, 96 Wn.2d 962, 639 P.2d 743, cert. denied, 457 U.S. 1137 (1982); State v. Smith, 50 Wn.2d 408, 314 P.2d 1024 (1957). A "magistrate's determination that a warrant should issue is an exercise of judicial discretion that is reviewed for abuse of discretion. This determination generally should be given great deference by a reviewing court." State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995); State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) ("Generally, the probable cause determination of the issuing judge is given great deference."). "[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant." State v. J-R Distribs., Inc., 111 Wn.2d 764, 774, 765 P.2d 281 (1988).

B. "FRANKS HEARINGS" GENERALLY; TWO-STEP PROCESS; BURDEN OF PROOF.

The United States Supreme Court in Franks v. Delaware provided for a specific two-step procedure to challenge parts of a search warrant allegedly predicated on deliberate falsehoods or on statements made with reckless disregard for the truth. Franks v.

Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

> Where [a] defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, *and* if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment . . . requires that a hearing be held at the defendant's request.

Franks, 438 U.S. at 154 (emphasis added). Allegations of negligence or innocent mistake are insufficient. Franks, 438 U.S. at 171; State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992); State v. Seagull, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). If the defendant makes this preliminary showing, and at the subsequent hearing establishes the allegations by a preponderance of the evidence, the material misrepresentation will be stricken from the affidavit and a determination made whether as modified the affidavit supports a finding of probable cause. If the affidavit fails to support probable cause, the warrant will be held void and evidence obtained pursuant to it excluded. Franks, 438 U.S. at 155, 171-72; State v. Vickers, 148 Wn.2d 91, 114, 59 P.3d 58 (2002); State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). At both stages the burden is on the defendant. Franks at 171-72; State v. Hashman, 46 Wn. App. 211, 729 P.2d 651 (1986), review denied, 108 Wn.2d

1021 (1987); State v. Stephens, 37 Wn. App. 76, 678 P.2d 832, review denied, 101 Wn.2d 1025 (1984). Any fair doubt as to whether allegations of the affidavit on which a search warrant issued were perjurious is to be resolved in favor of the warrant. People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644 (1965). For a discussion of the Franks procedure generally, see LaFave, 2 Search & Seizure § 4.4 at 530-62 (4th ed. 2004).

C. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION.

A magistrate's issuance of a search warrant is reviewed for abuse of discretion. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008); State v. Smith, 93 Wn.2d 329, 352, 610 P.2d 869, cert. denied, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980). A trial court's grant or denial of a Franks hearing is reviewed for an abuse of discretion as well. State v. Wolken, 103 Wn.2d 823, 829-30, 700 P.2d 319 (1985) (reviewing trial court's determination of lack of substantial showing of falsehood). Findings of fact made at a suppression hearing are reviewed for substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

The defendant ignores Wolken and posits a different standard, that of de novo review. BOA 6-7. He draws this from other contexts. It is true that at a suppression hearing where the

trial court acts in an appellate-like capacity, and where its review is limited to the four corners of the affidavit, its assessment of probable cause is a legal conclusion reviewed de novo. Neth, 165 Wn.2d at 182. But the decision whether to grant or deny a Franks hearing involves the weighing of proffered impeachment evidence, an inherently trial-court function. See, e.g., State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (admissibility of evidence within sound discretion of trial court). Consequently, the abuse of discretion standard is the appropriate one. See Wolken, 103 Wn.2d at 829-30. This standard is especially appropriate here, where defendant argues that the trial court should have weighed facts differently. A deferential standard of review (either abuse of discretion or "clear error") applies in at least four of the federal circuits.[4]

[4] The federal circuits are split on the standard for reviewing a denial of a Franks hearing. Four circuits employ the deferential standards of either abuse of discretion or "clear error," while only two contemplate de novo review. U.S. v. Snyder, 511 F.3d 813, 816 (8th Cir.), cert. denied, __ U.S. __, 128 S. Ct. 2947, 171 L. Ed. 2d 874 (2008) (abuse of discretion standard); U.S. v. Smith, 576 F.3d 762, 764, (7th Cir. 2009) ("clear error" standard); U.S. v. One Parcel of Property, 897 F.2d 97, 100 (2d Cir.1990) ("clear error" standard); U.S. v. Hicks, 575 F.3d 130, 138 (1st Cir. 2009) (same, defining "clear error" as existing only when court left with definite and firm conviction mistake has been committed); compare U.S. v. Homick, 964 F.2d 899, 904 (9th Cir.1992) (de novo review); U.S. v. Mueller, 902 F.2d 336, 341 (5th Cir.1990) (same); see U.S. v. Arbolaez, 450 F.3d 1283, 1293 (11th Cir.2006) (noting split without resolving it, since de novo standard met); U.S. v. Stewart, 306 F.3d 295, 304 (6th Cir., 2002) (same); U.S. v. Dale, 991 F.2d 819, 843 n.44 (D.C. Cir. 1993) (same).

D. FRANKS PROCEDURE APPLIED TO OMISSIONS.

While Franks dealt only with affirmative misstatements, its procedure has also been extended to material omissions of fact, such as that alleged here. State v. Chenoweth, 127 Wn. App. 444, 455-59, 111 P.3d 1217, 1223 (2005); Garrison, 118 Wn.2d at 872; State v. Cord, 103 Wn.2d at 367; U.S. v. Martin, 615 F.2d 318, 327-29 (5th Cir.1980).

> But some care is required in applying the Franks intentional-or-reckless requirement to omissions, as "an affidavit which omits potentially exculpatory information is less likely to present a question of impermissible official conduct than one which affirmatively includes false information."

LaFave, 2 Search & Seizure § 4.4(b) at 545, quoting U.S. v. Atkin, 107 F.3d 1213 (1997). Only in "rare instances" is a Franks hearing merited in cases of omissions, because "an allegation of omission potentially opens officers to endless conjecture about investigative leads, fragments of information, or other matter that might, if included, have redounded to defendant's benefit." U.S. v. Graham, 275 F.3d 490, 506 (6th Cir. 2001). A failure to list every possible fact or conclusion does not taint a warrant. Rather,

> Franks protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead, the magistrate.

U.S. v. Coalkley, 899 F. 2d 297, 301 (4th Cir. 1990). The process does not contemplate *excision* of an alleged misstatement, but rather, *inclusion* of an allegedly material omission. The inquiry is then to see if the affidavit, with the inclusion, still establishes probable cause, or is now so compromised as to require a hearing to determine if the warrant must be voided and all evidence seized pursuant to it suppressed. Garrison, 118 Wn.2d at 873 Cord, 103 Wn.2d at 365; Martin, 615 F.2d at 327-28; U.S. v. House, 604 F.2d 1135, 1141 (8th Cir. 1979). Like for affirmative misstatements, the challenger still must show the omission was made intentionally or with a reckless disregard for the truth. Martin, 615 F. 2d at 229. If the affidavit with the matter inserted remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. If, as modified, the affidavit does not support a probable cause finding, the search warrant is invalid. Garrison, 118 Wn.2d at 873; Cord, 103 Wn.2d at 365; State v. Gore, 143 Wn.2d 288, 296-97, 21 P.3d 262 (2001).[5]

[5] Overruled on other grounds, Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

E. NO GREATER PROTECTION UNDER STATE CONSTITUTION.

The Franks procedure is a creature of the 4th Amendment. E.g., Franks, 438 U.S. at 155, 160, 164. Our State constitution does not provide greater protection in this regard. Chenoweth, 127 Wn. App. at 458-60 (rejecting argument that Art. 1 § 7 mandates Franks hearing for merely negligent omissions of material information).

F. THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT A FRANKS HEARING.

As stated above, the trial court considered the Howson letter, all three prior warrants, and concluded that Deputy Phillips' leaving out the negative results of the shed search showed a reckless disregard for the truth. 1 CP 39-41, 61-62. Nonetheless, it concluded there was sufficient evidence, *with the omission included*, to sustain a finding of probable cause. It based this on: 1) the faint odor of marijuana detected by the front door and front-room window; 2) the window being covered by cloth, with light behind; 3) the sound of a tank or generator coming from within the room, behind the window; 4) the furtive movement of the defendant as he came out; 5) the strong odor of marijuana coming from within the residence as the defendant did so; 6) the officer's experience in

serving the first two warrants and seizing marijuana evidence pursuant thereto; 7) the officer's training and experience in drug detection; 8) the detection of the odor of marijuana not requiring a high degree of sophistication; and 9) the initial tip from Mr. Luce, based on his daughter's complaints of not having her own room until "the plants were done growing." 1 CP 40-42, 63-65.

These nine factors indeed establish probable cause. The information was not stale, see State v. Hall, 53 Wn. App. 296, 299-300, 766 P.2d 512 (1989) (two month lapse between tip of "grow op" and execution of warrant still established probable cause); there was the reported odor of marijuana, coupled with training and experience in recognizing it, see State v. Cole, 128 Wn.2d 262, 289, 906 P.2d 925 (1995) (this alone can establish probable cause), and State v. Olson, 73 Wn. App. 348, 869 P.2d 110 (1994) (same); there was a clear nexus between the specific place to be searched and the suspected crime, see State v. Helmka, 86 Wn.2d 91, 542 P.2d 115 (1975) (growing marijuana plant seen through apartment window justified search of entire premises); and the defendant's furtive movements gave rise to additional suspicions, see State v. Pimintel, 55 Wn. App. 569, 779 P.2d 268 (1989) and State v. Goodin, 67 Wn. App. 623, 631-32, 838 P.2d 135 (1992).

These observations corroborated a "tip" from one informant (Luce) who was reliable and from a second informant (his daughter K.L.) who had a basis of knowledge (about "plants" growing in the house). See State v. Tarter, 111 Wn. App. 336, 44 P.3d 899 (2002) (named citizen informant deemed reliable) and State v. Smith, 39 Wn. App. 642, 694 P.2d 660 (1984) ("basis of knowledge" can be satisfied by informant's direct personal observations). All these factors are read together, rather than examined in isolation. Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. State v. Cole, 128 Wn.2d at 286.

Adding a 10th factor – that in his most recent prior search, the officer thought he detected the smell of marijuana, but found none the next day – does not vitiate the finding of probable cause. Even if employing de novo review as defendant argues, the trial court did not err when it found that

> Even with the addition of the fact that Deputy Phillips had mistakenly identified the odor of marijuana the day before . . . [t]he defendant has not made a substantial preliminary showing by sufficient evidence . . . that insertion of the omission would have caused Commissioner Moon to reject the warrant.

1 CP 41-42. It did not abuse its discretion in denying a Franks hearing in these circumstances. Omitted information that is potentially relevant but not dispositive is not enough to warrant a Franks hearing. State v. Garrison, 118 Wn.2d at 874; U.S. v. Colkley, 899 F.2d at 301.

The defendant disagrees, raising several factual arguments. First, he argues that the first and second prior search warrants and their affidavits (the "Gerard" and "Brayman" searches) must be disregarded because in neither instance did Deputy Phillips affirmatively state he first smelled the odor of marijuana and then found it. BOA 9-11. But in the first warrant the deputy certainly had identified a "mold" or "vegetable matter" smell, and then found marijuana. 1 CP 110-11. Both searches had yielded up to twenty plants each, 1 CP and Deputy Phillips was involved in their seizure and dismantling. 1 CP 115, 122. The trial court noted that this afforded one the opportunity to familiarize oneself with the smell:

> [T]he officer has been on two successful marijuana grow operation busts where he was personally involved with other officers in tearing down the grow operations, and that obviously would familiarize him with the smell as he had it in his immediate presence on both of those occasions.

1 CP 64. And there is no reason not to consider this as true.

Secondly, the defendant argues the trial court erred in noting that the smell of marijuana is within common experience from adolescence onward, and not "rocket science" or anything that requires sophisticated training. See 1 CP 40 (Finding of Fact #13); 1 CP 65. The defendant complains this is not borne out by the record. BOA 22. But a trial court evaluates probable cause in a common-sense, real-life manner. State v. Vickers, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002); State v. Patterson, 83 Wn.2d 49, 55, 515 P.2d 496 (1973). And the trial court was right, insofar as some familiarity with marijuana is shared by a broad segment of the lay population.[6] Even the Howsons, in their letter, describe its odor as "readily identifiable." 1 CP 51.

Thirdly, the defendant argues that the officer's training, both at the academy and at separate courses in drug detection, should be given no weight, because it is not set forth with detail. BOA 19-20. The deputy had stated he had attended "multiple" drug identification classes and completed the 720-hour "Basic Law

[6] More than 94 million Americans (some 40 percent) age 12 and older have tried marijuana at least once, according to a 2003 national survey. Nat'l Institute on Drug Abuse, Research Reports Series – Marijuana Abuse (2008), citing Substance Abuse and Mental Health Services Administration, 2003 National Survey on Drug Use and Health: National Findings, NSDUH Series H-25. DHHS Pub. No. (SMA) 04-3964. Rockville, MD: SAMHSA (2004); see also U.S. v. Arrasmith, 557 F.2d 1093, 1094 (5th Cir.1977) (within common knowledge that "marijuana smells like marijuana").

Enforcement Academy." The first category is clear enough; and as for the second, the curriculum for the Academy is public.[7] The defendant seems to argue the specific drugs the officer was taught to recognize ought to have been listed, too. BOA 19-20. But an affiant cannot be expected to include every fact and piece of information in the affidavit. Coalkley, 899 F.2d at 300-01. And the trial court cited Jacobs for the proposition that leaving out a recitation of training and experience altogether was not fatal, provided there were other facts to establish probable cause. 1 CP 41 (Conclusion of Law #5); 1 CP 62, citing Jacobs, 121 Wn. App. at 678-79. If that was true for the specialized chemical odor of methamphetamine, the court reasoned, it holds all the more true for the odor of marijuana. Id.

The defendant seeks to distinguish Jacobs, because there officers not only had a tip and odor, but also had an admission of use, and had found a vial with white powder prior to conducting the search. BOA 21. Here the odor was stronger, involved a more common drug, the defendant behaved furtively at the threshold, and the front window was covered with cloth, with light emitting

[7] https://fortress.wa.gov/cjtc/www/records/downloads/BLEA_720_Sept_2009.pdf at 4 (Module 04, class code 405, "drug recognition and testing, symptoms of use, RCWs," 5 hrs.).

around the edges and the sound of a generator or tank coming from behind it. Like the additional facts in Jacobs, the trial court reasoned these additional facts, coupled with and corroborating the original tip, provided probable cause. 1 CP 41, 62. This result obtains all the more since here, unlike Jacobs, the officer who smelled the drug also *did* indicate he had training in drug recognition. And there is no reason to believe Deputy Phillips' recitation of his training is not accurate.

Fourthly, the defendant notes the return of service on the Howson warrant (1 CP 131) was dated 9/22/07 (but not filed until 9/26/07, after the deputy had sworn out the warrant to search Tanberg's residence. He says this shows a clear intent to deceive the magistrate, and the trial court should have noted so. BOA 13. He had argued this below as well. 1 CP 94. This is far-fetched and unwarranted speculation – for example, we do not know who was actually responsible for filing the return on warrant – and the trial court did not rely on it. Instead, it simply focused on the deputy's knowing the Howson search was unsuccessful on September 22, but not disclosing this on the new Tanberg affidavit sworn the following day. 1 CP 40 (Findings of Fact # 4, 5, & 6). It did not

abuse its discretion in not citing the additional offered impeachment evidence concerning the Sept. 26 filing date.

Fifthly, the defendant believes the trial court should have focused on the discrepancies between the deputy's description of the shed, and that offered by the Howsons. BOA 12; compare 1 CP 53 with 1 CP 124, 129. The Howsons described an 8' x 8' shed, with an electric wire and a hose running out of it. Inside it, they said, was a pressure tank and a pump atop a 55-gallon barrel. A water pipe leading to the pump was wrapped in insulation and duct tape. There was loose insulation in garbage bags and sheets of insulation affixed between the studs of the walls. 1 CP 53. There were no plant pots in the shed, but there were some by another outbuilding some 40' away. Id.

Deputy Phillips in his affidavit and search warrant described a shed with a large tank with a pressure gauge on top. The tank had tubes coming out of it and was wrapped in something. There were sheets of plastic and cardboard from floor to ceiling and wall to wall, secured with duct tape, which divided off part of the shed. There were some plastic plant pots. 1 CP 124. There was an electric wire running to the shed from another outbuilding. The

deputy described the size of the shed in the warrant as 16' x 30'. 1 CP 129. (No dimensions are given in the affidavit. See 1 CP 124.)

Viewed side by side, there are a number of similarities in the two descriptions. The biggest differences between the two are the shed's reported dimensions and, according to the deputy, a portion of it being divided off by sheeting. The defendant argues the trial court should have given more weight to these discrepancies. But which facts to weigh in deciding whether to grant a Franks hearing lay within the trial court's discretion. Wolken, 103 Wn.2d at 829-30. The defendant thinks it ought to have weighed the facts differently. He was free to argue this below and did so. But absent a showing of abuse of discretion, it does not afford him a basis for relief now on appeal.

Lastly, the defendant argues that Deputy Phillips' not informing the magistrate that his third prior "grow op" search had yielded nothing so tainted everything else that all references to odor of marijuana in the current affidavit (underlying the search of Tanberg's own house) should be deleted. BOA 14-17. This is the core of his argument. He asserts that because the trial court deemed this failure to disclose a "false statement by omission," 1 CP 41 (Conclusion of Law #3), this somehow transforms an

undisclosed matter from a *prior* search, of different premises, into an affirmative misstatement about marijuana odor in the *current* search, which then must be excised.[8] Id_. But this is not the standard for the treatment of allegedly material omissions in Franks analysis. Rather, the omission is *included* in the affidavit, to assess if the magistrate would still have found probable cause and signed the warrant. Garrison, 118 Wn.2d at 873 Cord, 103 Wn.2d at 365; Martin, 615 F.2d at 327-28; House, 604 F.2d at 1141; accord, State v. Morris, 444 So.2d 1200, 1204 (La. 1984) (test is whether probable cause to search still would have been apparent if additional relevant facts had been included within the warrant affidavit); State v. Lockett, 232 Kan. 317, 654 P.2d 433, 436-37 (1982) (same, in context of failing to mention prior unsuccessful search).

Consistent with this uniform guidance from appellate courts, that is what the trial court did. 1 CP 41-42 (Conclusions of Law # 7, 8); 1 CP 64-65. The trial court did not find that Deputy Phillips did

[8] Respondent agrees that without the odor of marijuana emanating from the residence, there are insufficient bases to establish probable cause. While Luce as a named citizen is a reliable informant, he has no basis of knowledge; his young daughter has a basis of knowledge, but we know nothing of her reliability. The Luce tip, coupled with the defendant's furtive movements and cloth over the window, gives rise to suspicions, but is not enough to establish probable cause.

not smell marijuana at Tanberg's residence, or that he had lied about it. Rather, it felt the issuing magistrate should have been told in addition that the deputy thought he had smelled marijuana in a prior pre-search situation and then found nothing. This is the correct approach. The defendant disagrees, saying all of the deputy's statements about odor of marijuana now must be excised. He proposes this novel standard in four pages of argument, but cites no authority for it. See BOA 14-17. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn. App. 907, 911 n. 1, 10 P.3d 504 (2000) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). A reviewing court should decline to consider an argument unsupported by any cited legal authority. RAP 10.3(a)(5); State v. McInally, 125 Wn. App. 854, 865, 867 n.19, 106 P.3d 793 (2005). This argument fails.

G. THE TRIAL COURT ERRED IN CONCLUDING THE DEPUTY'S OMISSION WAS MADE IN RECKLESS DISREGARD OF THE TRUTH.

Deputy Phillips had relied in part on his past three "grow op" searches to establish a basis for recognizing the odor of growing marijuana. 1 CP 46. Yet on the last of the three prior searches he

had thought he had smelled marijuana beforehand, yet found nothing in the subsequent search. Compare 1 CP 124-25 with 1 CP 131. Respondent agrees this omission was relevant and material. But the trial court concluded further that the omission was made in reckless disregard of the truth. 1 CP 41 (Conclusion of Law #4). While not dispositive to the outcome, this was error.

First of all, the trial court's conclusion was premised on a finding that Deputy Phillips had "mistakenly" smelled marijuana on the Howson property. 1 CP 40 (Finding of Fact #4). Actually we do not know this. What we do know is that the deputy *and three other officers* thought they smelled marijuana in or near the shed. 1 CP 124-25. Conducting a search the following day, they found nothing. 1 CP 131. That could mean that they had all been completely mistaken about the smell; or it could mean that the source of the smell had been removed; or it could mean that the source was somewhere other than the shed.

It is useful to look at the affidavit itself. The Howson property was the first of three off East Scouten Loop Road, all three reached by a gravel road. Apparently none of the residences bore house numbers. The deputies certainly had not targeted the Howsons, because they had come down the gravel road on a neighbor's

unrelated domestic-violence call. It took them some time to find the neighbor's property, and they ended up traversing the Howsons' property to do so. As they first came up the gravel road, they saw numerous signs warning of "surveillance cameras." The Howson property had three outbuildings, including the shed. 1 CP 124-25. While the Howsons implied in their letter that they were gone at the time, 1 CP 53, a truck and a car registered to them were on the premises. 1 CP 124. Four deputies had thought they could smell the odor of marijuana either by the shed or even up to 300 yards downwind from it. 1 CP 124-25.

The police sought a warrant *only* to search the shed, 1 CP 129, and when they did so the following day they found nothing, 1 CP 131. Because the search was conducted the day before swearing out the Tanberg warrant, the trial court felt omitting its results showed a reckless disregard for the truth.

Recklessness is shown where the affiant "in fact entertained serious doubts as to the truth of the facts or statements in the affidavit." See State v. O'Connor, 39 Wn. App.113, 117, 692 P.2d 208 (1984), review denied, 103 Wn.2d 1022 (1985), quoting U.S. v. Davis, 617 F.2d 677, 694 (D.C. Cir.1979), cert. denied, 445 U.S. 967 (1980). Such serious doubts can be shown by (1) actual

deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports. O'Connor, 39 Wn. App. at 117.

Reckless disregard generally will not be established solely from the omission of a material fact. State v. Garrison, 118 Wn.2d at 873; Colkley, 899 F.2d at 301. Yet this is what the trial court did. It inferred recklessness merely from the proximity in date. Even had the omitted fact been "critical" to a finding of probable cause (which it was not), relying on such an inference to establish that an omission was made in reckless disregard is not proper. Garrison, 118 Wn.2d at 873. As it is, *this involved a collateral matter.* This was not an omission that dealt with *this* search, and *this* defendant. There the outcome can be different. See U.S. v. Jacobs, 986 F.2d 1231, 1233, (8th Cir. 1993) (drug dog showed interest in package addressed to defendant, but did not "alert;" second drug dog didn't even show interest; omitting latter two facts in affidavit showed reckless disregard, and ultimately invalidated warrant). This is not a situation like Jacobs. While the trial court made a careful ruling that ultimately upheld the warrant, its concluding that an omission on a relevant but collateral matter was done in reckless disregard of the truth was error.

H. THE TRIAL COURT ERRED IN CONCLUDING THE HOWSON LETTER WAS AN "OTHERWISE RELIABLE STATEMENT."

Franks instructs that a defendant, when mounting a challenge to the four corners of an affidavit, must point out the portion of the affidavit alleged to be false and make an offer of proof. Franks, 438 U.S. at 171. In the latter regard, "[a]ffidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." Id. The trial court, over the State's objection, considered the Howson letter as an "otherwise reliable statement." 1 CP 39, 41 (Finding of Fact # 1; Conclusion of Law # 1). This was error.

That officers thought they had smelled marijuana on the Howson property yet found nothing when they searched a day later was certainly properly before the court. The Howsons' "fact sheet" at 1 CP 53, describing the interior of the shed, could have been considered as well if it had been sworn or attested to. The unsworn Howson letter at 1 CP 50-52 added nothing to this, instead claiming that four officers, responding on an unrelated domestic-violence call, had somehow engaged in a deliberate conspiracy of lies in order to search their property. Given the facts of the officers' initial entry, this accusation carries no reliability at all, and added nothing

to the inquiry. It is hard to see how the trial court concluded otherwise. And there was no reason the defendant could not have obtained an affidavit from the Howsons. While not dispositive to the outcome, the trial court erred in considering these materials, especially the letter. See U.S. v. Hall, 171 F.3d 1133, 1143-44 (8th cir. 1999) (defendants' unsworn statements impeaching affiant "fall far short as an offer of proof"); U.S. v. Feola, 651 F.Supp. 1068, 1108-09 (S.D.N.Y. 1987) (unsworn statements not "otherwise reliable statements," although treated as such to address defendant's argument).

VI. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on December 7, 2009.

JASON J. CUMMINGS
Snohomish County Prosecutor

by: _____
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