No. 29885-0-III

Korsmo, C.J. (dissenting) — After suppressing all of the evidence, the majority inexplicably and unnecessarily decides to construe the former medical marijuana statute despite the fact that the defense did not challenge the jury instructions below and did not propose any instructions. The issue is moot a couple of times over and was never preserved. There simply is no reason for an advisory opinion on the topic. I also believe that the search warrant for the Mansfield address was supported by probable cause. However, I agree with the majority's disposition of the rest of the case and would remand for resentencing on count II alone.

Search Warrant

The time has come to permit lay witnesses to identify marijuana plants without requiring them to establish expertise in identifying the plant. The issuing magistrate was permitted to consider and credit the neighbor's statement that she saw marijuana growing at the Mansfield residence. There also was much more in the probable cause calculus than the neighbor's statement and, even without it, the warrant was valid for that address.

"Great deference is accorded the issuing magistrate's determination of probable

cause." *State v. Cord*, 103 Wn.2d 361, 366, 693 P.2d 81 (1985). Even if the propriety of issuing the warrant were debatable, the deference due the magistrate's decision would tip the balance in favor of upholding the warrant. *State v. Jackson*, 102 Wn.2d 432, 446, 688 P.2d 136 (1984). In light of the deference owed the magistrate's decision, the proper question on review is whether the magistrate *could* draw the connection, not whether the magistrate *should* do so.

Washington continues to apply the former *Aguilar-Spinelli*[1] standards to assess the adequacy of a search warrant affidavit. *Jackson*, 102 Wn.2d at 446.[2] As applied in Washington, probable cause based upon an informant's information requires that an affidavit establish both the informant's reliability and basis of knowledge. *Id*. at 443. Where one or both of those factors is weak, independent police investigation can supply corroboration. *Id*. at 445. Despite the development of the *Aguilar-Spinelli* standards as a basis for testing the reliability of tips from unidentified professional informants, Washington has chosen to apply those standards to any person who is not in law enforcement, although a "relaxed" showing relates to the nonprofessional "citizen" informant.[3] *State v. Riley*, 34 Wn. App. 529, 532-33,

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[1] *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), *abrogated by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), *but adhered to by Jackson*, 102 Wn.2d 432.

[2] Federal courts now apply a totality of the circumstances test in evaluating the sufficiency of a search warrant. *Gates*, 462 U.S. at 238.

663 P.2d 145 (1983).

The person who reported the marijuana plant was not identified by name, so his/her reliability needed to be established. The police identified this informant as a neighbor, which meant that he/she was not a paid professional informant or some anonymous troublemaker. These facts put the person closer to the reliability side of the continuum. *Riley*, 34 Wn. App. at 533 (quoting *State v. Northness*, 20 Wn. App. 551, 557, 582 P.2d 546 (1978)). Police investigation can further corroborate the neighbor's reliability. *Jackson*, 102 Wn.2d at 445. Here, among other things, the search warrant affidavit explains that Mr. Shupe had prior marijuana grow operations at the Mansfield address. The police also confirmed the neighbor's statement that the house owner, Mr. Shupe's mother, ran an antique business. Mr. Shupe told the press that he was growing marijuana in support of his business. On these facts, the magistrate could conclude that the neighbor was a reliable person.

The critical issue is the neighbor's report of the growing marijuana plant. This information was based on the neighbor's own observations. In this day and age, where billboards and television advertisements for decades have shown growing marijuana plants as part of law enforcement encouragement to report grow operations and many people have

[3] However, a named citizen informant is presumptively reliable. *State v. Wible*, 113 Wn. App. 18, 24, 51 P.3d 830 (2002) (quoting *State v. Northness*, 20 Wn. App. 551, 557-58, 582 P.2d 546 (1978)).

personal knowledge of growing marijuana plants, the identity of a marijuana plant is sufficiently in the public consciousness that a magistrate could credit a citizen's statement that he or she saw a marijuana plant. A statement of how the person knew it was marijuana is no longer necessary.

With that information, there was no question that probable cause existed for the search of the Mansfield house. But even if that information is totally excised from the affidavit, there still was probable cause. The warrant established the following facts in support of searching the Mansfield address:

> (1) Scott Shupe publicly admitted growing marijuana for his business, which involved selling marijuana;
> (2) Scott Shupe, up until shortly before the search warrant was served, was living at the Mansfield location;
> (3) Every time he was under surveillance, including the period after he moved to the Eleventh Avenue location, he still drove from his business and brought his light blue duffel bag into the Mansfield house and always brought it back with him to Change;
> (4) On prior occasions, police had found Scott Shupe growing marijuana at the Mansfield address;[4]
> (5) Multiple police officers could identify the smell of "fresh" (i.e., processed) marijuana at Change, but none identified growing marijuana there;
> (6) Police surveillance identified two other grow operation locations, connected to codefendant Christopher Stevens rather than Mr. Shupe, that appeared to provide marijuana for Change.

[4] Inexplicably, the affidavit does not further detail these prior grow operations, which may well have established probable cause in conjunction with Mr. Shupe's public statements. The judgment and sentence includes prior convictions for manufacturing a controlled substance in both 1994 and 2007.

From these facts alone the magistrate could conclude that Mr. Shupe was growing marijuana to supply his business, he was not doing so at the business, he was still living at or using the Mansfield address where he previously had been caught growing marijuana, he continued to bring a duffel bag to work every day and continued to bring that same duffel bag to the Mansfield location even after he stopped living there, and he was not personally connected to two other locations where his codefendant appeared to be growing marijuana. In short, Mansfield looked to be the place where Scott Shupe was once again growing marijuana. At a minimum, his ubiquitous duffel bag continued to commute there to and from his business even after he no longer lived on Mansfield, a fact that suggested he was ferrying supplies from the location.[5]

This evidence was sufficient to establish probable cause. The magistrate was permitted to exercise discretion and issue the search warrant. Accordingly, I would affirm the conviction on count II related to the Mansfield house. There was sufficient evidence to allow the magistrate to issue the warrant for that address. The evidence discovered there supported the verdict on count II.

Affirmative Defense Statute

As noted, after suppressing the evidence and dismissing the charges for insufficient

[5] Not surprisingly, the duffel bag contained four pounds of marijuana when police found it. That evidence sufficiently supported the conviction on count II.

evidence, the majority decides to construe the definition of "designated provider" in RCW 69.51A.010(1)(d). I dissent from this needless exercise for several reasons: (1) Mr. Shupe cannot be retried; (2) the statutory scheme has been superseded by the newly approved Initiative 502 (Laws of 2013, ch. ___) (effective Dec. 6, 2012); (3) the discussion is totally divorced from Mr. Shupe's trial since he never sought any instructions that would have been impacted by construing the statute nor was he prohibited from making his argument to the jury; and (4) the quantity of marijuana in Mr. Shupe's possession precluded his affirmative defense.

This discussion is unnecessary for the basic reason that Mr. Shupe is free from any criminal liability by the dismissal of all charges against him due to the deficient search warrant (in the majority's view) and the insufficient evidence of the delivery count. There is nothing left to discuss. The case against him is gone and he cannot be retried without running afoul of the double jeopardy protections of our constitutions. The opinion could have stopped there. There is no reason to address any additional issues.

A second reason this discussion is unnecessary involves the recently passed Initiative 502. It imposes a new regime with respect to medical marijuana that will, among other things, divorce marijuana production from marijuana distribution. *See* Initiative 502, § 5. Mr. Shupe's business model will not be possible under the new law and there really is no

need to discuss whether or not it was proper under the 2007 version of the statute. The legislature similarly tried to eliminate the challenged definition in 2011, but that section of the bill was vetoed by the Governor. *See* Laws of 2011, ch. 181, § 201. There is no reason to construe a statute that, while technically still alive, soon will serve no purpose.

The third reason this discussion is unnecessary is that no aspect of this case presents the issue. While Mr. Shupe did challenge the statute in this appeal, he did not claim that the trial court erred in some manner concerning the statute. He never presented any jury instructions addressing the topic. He did not argue that the trial court precluded him from arguing his theory of the case. Even if this case had been returned for trial instead of being dismissed, the discussion would have no practical effects for Mr. Shupe.

Mr. Shupe does belatedly challenge instruction 23 in this appeal as being incomplete for failing to define the meaning of "one patient at any one time," but his complaint comes too late. He did not object below. He also did not proffer a definitional instruction. Accordingly, he has waived any instructional challenge. *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988); RAP 2.5(a). And, even if he had not waived it, the trial court is under no obligation to provide definitional instructions in the absence of a request. *State v. Allen*, 101 Wn.2d 355, 358, 361-62, 678 P.2d 798 (1984). There was no request here.

The final reason this discussion is unnecessary is that Mr. Shupe was not entitled to the affirmative defense provided by the statute because he vastly exceeded the limits of marijuana that could be possessed by a caregiver. The statute required that the combined marijuana of the provider and the patient not exceed the statutory limits for the patient. Former RCW 69.51A.040(3)(b) (2007).[6] Because he far exceeded those limits with the four pounds of marijuana in the blue duffel bag, he was not entitled to the statutory affirmative defense instructions in this case and can hardly benefit from construing the statute.[7] Thus, whether or not the "one patient at any one time" language could bear the construction Mr. Shupe urges, it simply does not aid people who want to employ the fiction of serving only one customer while having the resources to serve many.

For all of these reasons, the discussion of the statute is unnecessary dicta. It is not our job to issue advisory opinions and, even if it were, this case is not the vehicle to do so. The majority having dismissed the case, I dissent from its unnecessary discussion of the statute.

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Korsmo, C.J.

[6] Although the amounts have changed under the 2011 legislation, the statute still combines the marijuana possessed by the patient and the provider for meeting the statutory limits. RCW 69.51A.040(1).

[7] One additional point worth noting is that the observation that the prosecutor failed to rebut Mr. Shupe's prima facie medical marijuana defense is incorrect. The evidence of the large quantities Mr. Shupe possessed absolutely obliterated the defense.