IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALEX JEFFREY TANBERG, Appellant.	)	DIVISION ONE No. 63034-2-I UNPUBLISHED OPINION FILED: June 1, 2010

Dwyer, C.J. — The reckless omission of relevant information from a search warrant affidavit does not invalidate the warrant or require suppression of evidence if the affidavit still establishes probable cause to search when the omitted information is considered. Because the affidavit in this case established probable cause to search Alex Tanberg's residence even when omitted facts are considered, the trial court properly denied his request for a hearing on the omissions and his motion to suppress the marijuana recovered during the search. Accordingly, we affirm his conviction for manufacturing marijuana.

FACTS

On September 23, 2007, Timothy Luce told Snohomish County Sheriff's Deputy Ryan Phillips that he suspected marijuana was being grown in a Bothell residence shared by his ex-wife, her boyfriend Alex Tanberg, and Luce's six-

year-old daughter. Luce's daughter told him she did not have her own room in the house and was not allowed in a particular room because that was where Tanberg "keeps his plants." Tanberg assured her she would have a room when "the plants are done growing."

Based on this information, Deputy Phillips and Deputy Troy Koster went to the Bothell residence for a "knock and talk." As they approached the front door, Phillips detected a "faint odor" of marijuana. He also noticed that a window next to the front door was covered with some type of cloth. He saw light around the edges of the window and could hear something inside that sounded like a generator. Leaning toward the window, he again smelled marijuana.

When Phillips knocked on the door, Tanberg opened it just wide enough to squeeze through and then immediately closed it behind him. An "extremely strong" smell of growing marijuana came from inside the house. Phillips told Tanberg that neighbors had reported hearing shots or firecrackers and he was checking to see if anyone else heard them. Tanberg said he had not heard anything, and the deputies left.

Deputy Phillips then prepared a search warrant affidavit, which stated in pertinent part:

> Your affiant has written and served five other search warrants in his 1 year of experience, two of which being for marijuana growing operations. . . . Your affiant has attended multiple drug classes, based on identifying illegal narcotics. Your affiant has attended, and graduated from, the Washington State Criminal Justice Training Center Academy; a 720-hour Basic Law Enforcement Academy 2006.

> . . .
> Based on my training and experience and having written and served three previous search warrants for marijuana growing operations, I immediately identified the smell [at Tanberg's residence] as growing marijuana.

After obtaining a warrant, Phillips searched Tanberg's residence and found ten mature marijuana plants, fifty immature plants, growing lights, a heater, timers, a running box fan, and a humidifier gauge in one of the front rooms. Three officers separately detected a strong odor of marijuana as soon as they entered the front door.

The State charged Tanberg with one count of manufacturing marijuana. Prior to trial, he moved to suppress the evidence found during the search. He argued that the warrant affidavit omitted material information regarding Deputy Phillips' ability to detect the odor of marijuana, that he was entitled to a hearing on the omissions, and that, when viewed in light of the omissions, the affidavit failed to establish probable cause to search. He concluded the warrant was invalid and the evidence recovered in the search had to be suppressed.

In denying the motion, the trial court first found that Phillips had shown a reckless disregard for the truth by omitting from the warrant affidavit his mistaken identification of marijuana odor in a recent case. The court concluded, however, that the omission did not affect the sufficiency of the affidavit:

> 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 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 [the magistrate] to reject the warrant.

Tanberg subsequently waived his right to a jury and agreed to a bench trial on stipulated facts. The court convicted him as charged.

DECISION

The issuance of a search warrant is a "highly discretionary" act. State v. Chenoweth, 160 Wn. 2d 454, 477, 158 P.3d 595 (2007). It is grounded in a commonsense reading of the warrant affidavit and the reasonable inferences that can be drawn therefrom. Id. Once issued, a warrant is entitled to a presumption of validity, and courts will give "great deference to the magistrate's determination of probable cause" and resolve any doubts in favor of the warrant. Id.

A warrant may be invalidated, however, and the fruits of a search may be suppressed if there were intentional or reckless omissions of material information from the warrant affidavit. Id. A defendant challenging a warrant on this basis is entitled to an evidentiary hearing, known as a "Franks" hearing,[1] if

[1] Franks v. Delaware, 438 U .S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

he or she makes a substantial preliminary showing of the omissions and their materiality.[2] State v. Garrison, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992). If, on the other hand, the affidavit supports probable cause even when the omitted information is considered, "the suppression motion fails and no hearing is required." Garrison, 118 Wn.2d at 873. Although the issuance of a warrant and the denial of a Franks hearing are generally reviewed for abuse of discretion, the assessment of probable cause is a legal conclusion we review de novo. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (warrant); State v. Wolken, 103 Wn.2d 823, 829-30, 700 P.2d 319 (1985) (hearing). Because this case turns on the assessment of probable cause, our review is de novo.

Tanberg contends the trial court erred in denying his request for a Franks hearing and his motion to suppress because the warrant rested "almost entirely" on Phillips' ability to smell marijuana plants, and the information omitted from his affidavit undermined that ability and the court's determination of probable cause. The State counters that Phillips did not omit relevant information from his affidavit and that the trial court's conclusion to the contrary rests on an unsupported finding. It further contends that even if the omitted information was relevant, the trial court correctly concluded that the affidavit still established probable cause when the omitted facts were considered. We agree with the

[2] An omission or misstatement is material if it was necessary to the finding of probable cause. State v. Copeland, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996); State v. Gentry, 125 Wn.2d 570, 604, 888 P.2d 1105 (1995).

State that the omitted information was not material to the determination of probable cause, and that the trial court properly denied Tanberg's request for a Franks hearing and motion to suppress.[3]

"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 the criminal activity can be found at the place to be searched." State v. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007). When relevant information is recklessly omitted from a search warrant affidavit, the test for probable cause is whether the affidavit with the omission inserted remains sufficient to support a finding of probable cause. Garrison, 118 Wn. 2d at 873.

The affidavit in this case alleged that Phillips had extensive training and education in narcotics identification and had written and served prior search warrants for marijuana growing operations. It stated that Phillips had detected the odor of growing marijuana while standing in front of Tanberg's residence. From that position, he noticed a window covered in cloth with light showing around its edges. He also heard the sound of a generator coming from inside the house. When Phillips knocked on the door, Tanberg opened and closed it in a furtive manner. These observations were consistent with, and corroborated by, other information in the affidavit from a named citizen whose daughter lived

[3] Given this disposition, we need not reach the State's challenge to the court's finding of fact.

in the house. That information indicated that Tanberg was growing and harvesting plants in a room inside the house. Viewed in a commonsense manner, these facts and the reasonable inferences arising from them provided probable cause to search. Phillips' single mistaken identification of marijuana, while certainly affecting the weight to be given his identification in this case, does not alter our conclusion given the significant corroborating evidence in the affidavit.

Tanberg contends probable cause was not established because Phillips' affidavit did not expressly state that he had either been trained to detect the odor of growing marijuana or had learned to do so in prior searches. We agree that the affidavit leaves much to be desired in this respect. But, as noted above, search warrant affidavits are reviewed in a commonsense manner and in light of all reasonable inferences. Reading Phillips' affidavit in that manner, it is reasonable to infer that his "multiple drug classes based on identifying illegal narcotics" and his 720 hours of training at the Washington State Criminal Justice Training Center Academy included training in identifying the odor of growing marijuana. It is also reasonable to infer that his service of the warrants in two of his three prior searches exposed him to the odor of growing marijuana.[4]

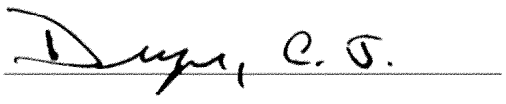
Tanberg also correctly notes that two of the court's findings are not

[4] These inferences are supported by Phillips' statement in the affidavit that "[*b*]*ased on my training and experience and having written and served three previous search warrants for marijuana growing operations*, I immediately identified the smell as growing marijuana." (Emphasis added.)

supported by substantial evidence. Finding of Fact 12, which states that "Phillips had successfully identified the odor of marijuana during two prior search warrants," is not supported by substantial evidence. The record establishes only that Phillips prepared and served three search warrants for marijuana grow operations, and that two of the three searches were successful. The court's finding that "the odor of marijuana is . . . commonly identifiable by lay persons from adolescence on" is also not supported by substantial evidence. But even assuming these findings were material to the court's decision on the motion to suppress,[5] we may sustain that decision on any basis supported by the record. State v. Avery, 103 Wn. App. 527, 537, 13 P.3d 226 (2000); State v. Carter, 74 Wn. App. 320, 324 n 2, 875 P.2d 1 (1994), aff'd, 127 Wn.2d 836, 904 P.2d 290 (1995). As discussed above, the warrant affidavit was sufficient to support a determination of probable cause despite Phillips' omission.

The trial court did not err in denying both the request for a Franks hearing and the motion to suppress.

Affirmed.



[5] It is unclear whether the unsupported findings were material to the court's decision. In its oral opinion and conclusions of law, the court did not mention Phillips' detection of the odor of marijuana in prior cases; rather, the court referred only to his training in drug identification, "his two prior successful warrants for marijuana growing operations," and the corroborating facts and circumstances. The court's oral opinion makes clear that it found the "prior successful warrants" significant because Phillips was exposed to the odor of growing marijuana during the service of those warrants. Similarly, the court's finding that the odor of marijuana is commonly identifiable is not mentioned in the court's critical conclusion of law.

We concur: