THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KURT BENSHOOF, Appellant.	)	No. 65427-6-I DIVISION ONE UNPUBLISHED OPINION FILED: November 14, 2011

Grosse, J. — Affidavits supporting a search warrant must be read in a commonsense manner and in light of all reasonable inferences from the facts asserted. Read in that manner, the affidavits presented in this case established probable cause to believe that marijuana would be found in Kurt Benshoof's residence. We therefore reject his challenge to validity of the search warrant issued for his residence and affirm his conviction for manufacturing marijuana. We also reject his contention that the court erred in denying his post-trial motion for the return of property taken from his home by police.

FACTS

On June 24, 2008, Albina Soudakova visited her rental property in Shoreline. She noticed that a makeshift room had been constructed above the laundry room. The room had a reflective foil lining and contained approximately 50 small plants, an apparent sprinkler system, electrical lamps, cords, ducting, pipes and wires.

That same day, Soudakova reported her observations to King County

Sheriff's Deputy Paula Bates. Deputy Bates and Deputy Eric Franklin went immediately to the property. A large "Handy Andy's" moving truck was parked in the driveway. The deputies, both of whom had training and experience in detecting the odor of marijuana, stood near the rear of the truck and noticed an "extremely strong" odor of marijuana coming from the truck. Detective Christopher Kieland, who had similar training and experience, detected the same strong odor at the rear of the truck. He applied for a search warrant for the truck and the residence. In addition to the facts set forth above, the warrant affidavit stated that when deputies approached the residence, Soudakova saw the tenant, Kurt Benshoof, flee out the back of the house.

After obtaining a warrant, police searched the truck and residence. They found 330 marijuana plants in the truck and growing equipment and marijuana particulate in the makeshift room inside the house. The State charged Benshoof with manufacturing marijuana.

Prior to trial, Benshoof moved to suppress the evidence found in his house, arguing that the search of the house was not supported by probable cause. The court denied the motion, concluding that "[f]rom a commonsense standpoint, the evidence of the growing operation in the residence plus the smell from the vehicle parked in the driveway establishes probable cause to search the residence."

A jury found Benshoof guilty as charged. After trial, he filed a request

under CrR 2.3(e) for the return of property seized from his residence. He maintained the State did not need the property as evidence since photographs of the items, rather than the items themselves, had been admitted at trial. He also alleged that the State had not given him any notice of forfeiture. That same day, the State mailed Benshoof a notice of intended forfeiture.[1] The superior court denied Benshoof's request to release his property "subject to [the] forfeiture process."

Benshoof appeals.

ANALYSIS

Benshoof first contends the trial court erred in denying his motion to suppress. He argues that the warrant affidavit did not establish probable cause to search his residence, and therefore his motion to suppress should have been granted.

The issuance of a search warrant is a "highly discretionary" act.[2] It is grounded in a commonsense reading of the warrant affidavit and the reasonable inferences that can be drawn therefrom.[3] 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.[4] We review the issuance of a search warrant for abuse of discretion,

[1] The State moves to supplement the record on appeal with pleadings from the civil forfeiture proceeding. The motion is granted.
[2] State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007).
[3] Chenoweth, 160 Wn.2d at 477.
[4] Chenoweth, 160 Wn.2d at 477.

giving great deference to the issuing judge's determination of probable cause.[5] The trial court's assessment of probable cause, however, is a legal conclusion that we review de novo.[6] Probable cause is established if the warrant application sets forth "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."[7]

Benshoof contends the warrant affidavit did not establish probable cause to search his house because it did not indicate who had rented the moving truck or whether it in fact contained marijuana. Therefore, he concludes, the affidavit failed to establish a nexus between the truck and the growing equipment observed in the house. We disagree.

The warrant affidavit established that the landlord observed growing equipment in a new, makeshift room inside the house. When deputies arrived at the house, the landlord saw Benshoof flee out the back. The deputies then smelled an "*extremely* strong" odor of marijuana emanating from the moving truck in the driveway.[8] Taken together and viewed in a commonsense manner, these facts supported reasonable inferences that there was marijuana inside the truck, that the truck was connected to the growing equipment inside the house, and that evidence of criminal activity would be found in both the truck and the

[5] State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004); Chenoweth, 160 Wn.2d at 477.
[6] State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007).
[7] State v. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007).
[8] (Emphasis added.)

house.

Benshoof also contends the court erred in denying his post-trial request under CrR 2.3(e) for the release of his property. The State responds that the trial court's decision is not a final, appealable order because the court did not decide the notice issue and instead deferred to the pending forfeiture proceedings.

Assuming without deciding that the order is appealable as a matter of right,[9] Benshoof has not demonstrated error. "CrR 2.3(e) governs motions for the return of illegally seized property and also motions for the return of lawfully seized property no longer needed for evidence."[10] When property is no longer needed as evidence, a court may still deny a motion to return it if "the property is subject to forfeiture pursuant to statute."[11] Benshoof claims that his property was not used as evidence and was not subject to statutory forfeiture because he did not receive a notice of forfeiture within 15 days of its seizure. Relying primarily on State v. Alaway,[12] he contends the superior court was required to return his property because forfeiture proceedings were not properly commenced. Alaway

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[9] RAP 2.2(a)(13) allows an appeal from "[a]ny final order made after judgment that affects a substantial right." The trial court's decision was not a determination, let alone a final determination, of the merits of Benshoof's property claim. Rather, the court expressly deferred to the forfeiture proceedings. This decision is arguably not appealable as a matter of right. See Greenlaw v. Smith, 67 Wn. App. 755, 759, 840 P.2d 223 (1992) (order that does not end litigation is not a final judgment under RAP 2.2(a)(13)).

[10] State v. Alaway, 64 Wn. App. 796, 798, 828 P.2d 591(1992) (footnote omitted); see State v. Card, 48 Wn. App. 781, 785-86, 741 P.2d 65 (1987).

[11] Alaway, 64 Wn. App. at 798.

[12] 64 Wn. App. 796, 798, 828 P.2d 591(1992)

does not support this claim.

In Alaway, the State *conceded* it had not commenced a statutory forfeiture proceeding, but argued that the trial court had inherent authority to forfeit the defendant's property. The Alaway court held that the trial court lacked such inherent authority and that in the absence of statutory forfeiture proceedings, Alaway's property was not subject to forfeiture and had to be returned to him under CrR 2.3(e).

Here, by contrast, the State argued below that it had commenced forfeiture proceedings under RCW 10.105.010 and 69.50.401. A "Notice of Seizure and Intended Forfeiture" attached to the State's response indicated that the "Date of Seizure" was June 9, 2010[13] and that a copy of the notice was mailed to Benshoof on June 10, 2010, well within the 15-day notice period. The State also attached a proposed order stating in part that the court was "not ruling on the return of the property . . . because that property is currently the subject of a civil forfeiture action which will resolve disposition of that property." The trial court's order denying relief "subject to forfeiture process" essentially adopted the State's proposed disposition. Under these circumstances, the court's order was consistent with the rule, recited in Alaway, that a request for return of property may be denied if the property is "subject to forfeiture."

We recognize that Benshoof disputes the timeliness of the State's notice.

[13] The date of seizure was the day before Benshoof filed his request for return of property. Forfeiture proceedings are commenced when the seizure occurs. RCW 69.50.505(3); RCW 10.105.010(3).

But nothing in Alaway or any authority cited by Benshoof requires a court hearing a motion under CrR 2.3(e) to resolve challenges to a pending forfeiture proceeding that can be, and in this case were, raised in the forfeiture proceeding.[14]

Affirmed.

Grosse, J

WE CONCUR:

Ellington, J

Cox, J.

[14] The supplemental clerk's papers from the forfeiture proceedings establish that the notice issue is being litigated in those proceedings. We note that Benshoof's attempt to litigate that issue in this case may run afoul of statutes allowing removal of an administrative forfeiture proceeding to a court only if statutory prerequisites to removal are followed. RCW 69.50.505(5); RCW 10.105.010(5).