IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 68238-5-I
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
ROBIN O. OSLIN,	)	
	)	
Respondent.	)	FILED: December 10, 2012

Spearman, J. — The State charged Robin Oslin with one count of manufacturing marijuana. Before trial, Oslin moved to suppress evidence found during the search of his home, arguing the affidavit of probable cause did not provide a sufficient basis to establish that the officer could identify the odor of marijuana. Oslin also argued the warrant relied on power records obtained in violation of RCW 42.56.335. The trial court granted the motion to suppress and dismissed the case.

We reverse the trial court. Viewing the officer's experience, training, and background in a commonsense manner, the affidavit contained sufficient information for a magistrate to infer that the officer was qualified to identify marijuana by smell. Likewise, a law enforcement agency making a written request for power usage records

is not required to specify the name of the subscriber to comply with RCW 42.56.335. Rather, the agency must simply indentify a "particular person," and a request, such as the one made in this case, seeking records from a power subscriber located at a specific address satisfies this requirement.

Reversed and remanded for further proceedings.

FACTS

The State charged Robin Oslin with one count of manufacturing marijuana. Before trial, Oslin moved to suppress the evidence obtained in the search of his home on grounds the affidavit supporting the search warrant did not establish probable cause. For purposes of the CrR 3.6 suppression hearing, the parties stipulated to the facts contained in Officer Wantland's affidavit for a search warrant and the administrative letter requesting utilities records.

Officer Wantland's affidavit stated that in 2010, Officer Fagerstrom was at Oslin's home investigating non-permitted construction when a Public Utilities District (PUD) employee approached him and told him the residence was using unusually large amounts of power. Fagerstrom passed this information to Wantland, who obtained power records and observed the kilowatt-hour usage was high.

On February 4, 2011, Wantland went to the address to discuss the power usage. The affidavit states he "began to walk up the steps to the house from the sidewalk which is on the east side and smelled the strong odor of fresh growing marijuana." Clerk's Papers (CP) at 39. It further states he ''went back to the sidewalk and slightly

south and again smelled the strong odor of fresh growing marijuana." CP at 39. Wantland sought updated power usage records and received them on February 7, 2011.

Wantland's affidavit detailed his background, qualifications, and experience relevant to identifying the odor of marijuana:

> Your affiant has been a police officer for the Everett Police Department since September of 1986. Your affiant has attended the 440 hour Basic Law Enforcement Academy, graduating in 1985.
>
> Your affiant was assigned to the Everett Police Special Investigations unit in June of 1996 to investigate drug crimes. Your affiant attended the 80 hour Drug Enforcement Administration's (DEA) Basic Narcotics Investigator's Course in 1996. In January 2000, your affiant was assigned to the Snohomish Regional Drug Task Force as a drug detective and continued at that until January of 2010. Your affiant has been formally trained in drug recognition and drug investigations through numerous drug investigator's conferences, seminars, schools and courses. Your affiant has been involved in hundreds of investigations relating to trafficking, manufacturing, packaging, and/or possession of Marijuana, Cocaine, Methamphetamine, Heroin, LSD, and other controlled substances. Your affiant is familiar with the appearance of these drugs as well as their related paraphernalia and packaging through personal observations and training. Your affiant has investigated and assisted in investigations of numerous marijuana grows, indoor and outdoor. Your affiant is currently assigned to the Everett Police Department ACT Anti-Crime Team.

CP at 40.

Oslin argued at the suppression hearing that this statement did not sufficiently establish Wantland had the necessary training and experience to accurately identify the smell of marijuana. Oslin also argued the PUD employee's tip violated his right to privacy under art. I, sec. 7 of the Washington Constitution, and Wantland's request for his power records failed to comply with RCW 42.56.335.

The trial court agreed the affidavit was insufficient. The court reasoned that it

could not "derive or imply experience with the smell of marijuana from the information set forth in the four corners of the warrant affidavit." CP at 7. The court concluded the affidavit "did not establish that Officer Wantland's statement that he smelled marijuana was founded on the requisite training and experience to rise above the level of mere personal belief." CP at 7. The court thus ruled the affidavit did not establish probable cause to issue a search warrant, and suppressed the evidence obtained as a result of execution of the warrant. The court did not rule on Oslin's other grounds for suppression. Finding that suppression of the evidence had the practical effect of ending the State's case, the court ordered the case dismissed. The State appeals.

DISCUSSION

Affidavit for search warrant. The State argues the trial court erred in concluding the affidavit for a search warrant did not show probable cause to believe there was evidence of a marijuana grow operation at Oslin's house. We agree for the reasons described herein.

A search warrant must be supported by an affidavit that particularly identifies the place to be searched and items to be seized. State v. Lyons, 174 Wn.2d 354, 359, 275 P.3d 314 (2012) (citing U.S. Const. amend. IV; Wash. Const. art. I, § 7). To establish probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched. Id. (citing State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)).

Affidavits for search warrants are to be interpreted "'in a commonsense manner, rather than hypertechnically, and any doubts are resolved in favor of the warrant.'" Id. (quoting State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003)); see also United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). When reviewing an affidavit the magistrate is not engaged in an adversarial proceeding. State v. Patterson, 83 Wn.2d 49, 515 P.2d 496 (1974):

> His is the duty to ascertain whether the warrant sought is being reasonably requested and on reasonable grounds. At that juncture, the judge is not dealing with such concepts as reasonable doubt, preponderance of the evidence, the competence of the witnesses or defendant's right to confrontation and cross-examination of witnesses, nor should the judge invoke other concepts of due process inherent in the Bill of Rights or the common law other than those necessarily included in the idea of reasonableness of the search.

Patterson, 83 Wn.2d at 53.

A reviewing court gives great deference to the issuing magistrate's determination that the affidavit supports probable cause. State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). Thus when the warrant details the circumstances on which the officer's belief of criminal activity is based, and provides reasons for crediting the source of that information, courts should not invalidate the warrant with a hypertechnical interpretation. Ventresca, 380 U.S. at 108. The validity of a search warrant is reviewed for an abuse of discretion. State v. Creelman, 75 Wn. App. 490, 493, 878 P.2d 492 (1994).

Here, the trial court concluded the affidavit failed to show probable cause, in that it did not explicitly state the officer had training or experience in identifying marijuana

by smell. This was error. The court's interpretation, that the officer did not explicitly say he had training or experience in identifying marijuana by smell, was an overly-stringent and hypertechnical reading of the affidavit. The affidavit detailed more than a decade of work with the Everett Police investigating drug crimes, 80 hours of training with the DEA, a decade of work on the Snohomish Regional Drug Task force, specific training in "drug recognition and drug investigations," experience in "numerous" of investigations relating to drug possession, trafficking, and manufacturing, including experience in marijuana-related crimes and "marijuana grows, indoor and outdoor." CP at 11. When viewed "in a commonsense manner, rather than hypertechnically, . . ." Lyons, 174 Wn.2d at 360, it was this experience on which the officer based his statement that he "smelled the strong odor of fresh growing marijuana" coming from Oslin's house. CP at 10.

Oslin cites numerous cases in which affidavits included more detail than the affidavit at issue here and were upheld by the courts. He cites only three cases, however, where the trial court rejected an affidavit as failing to establish probable cause, and none of them are factually comparable to situation here. For example, Oslin cites State v. Matlock, 27 Wn. App. 152, 616 P.2d 684 (1980), where we found no probable cause. But in that case, the affidavit made no mention whatsoever of any officer training or experience. See Matlock, 27 Wn. App. at 154-56.

Oslin also cites Lyons. The issue in that case was whether the affidavit provided any information at all about when a confidential informant provided a tip about a

marijuana grow operation. The affidavit stated "Within the last 48 hours a reliable and confidential source of information (CS) contacted [narcotics] Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address." Lyons, 174 Wn.2d at 363. The Supreme Court held that the affidavit did not support a finding of probable cause because it contained no information at all about when the confidential informant observed the operation:

> This natural, commonsense reading of the affidavit reveals that the CS contacted detectives and relayed the tip within the last 48 hours but reveals nothing about when the CS observed marijuana growing.

Id. This is unlike the affidavit at issue here, which provides great detail about the officer's training and experience.

Oslin also quotes State v. Jacobs, 121 Wn. App. 669, 89 P.3d 232 (2004), where we stated:

> When an officer bases a probable cause affidavit only on detection of controlled substance odor, a search warrant is justified if that officer's experience and training in detecting such odors is in the search warrant affidavit.

Jacobs, 121 Wn. App. at 678. But in that case, because the affidavit contained no reference to any of the detectives' backgrounds or experiences, the issuing magistrate relied instead on a detective's live testimony. In his testimony, the detective did not describe his specific experience identifying controlled substances by smell, but rather, much like the affidavit in this case, described his experience in such detail that the ability to identify the drug in question by smell could reasonably be inferred. Jacobs is thus of no help to Oslin.

We previously rejected an argument almost identical to Oslin's in State v. Olson, 74 Wn. App. 126, 872 P.2d 64 (1994). In that case, the trial court held that the affidavit did not demonstrate probable cause and dismissed the case. Although the affidavit did not explicitly say the officer was trained to recognize the odor of growing or burning marijuana, it did describe the officer's experience involving marijuana-related crimes:

> [The Officer] graduated from the Basic Drug Enforcement Administration (DEA) course for controlled substances in February 1992. As of this date he has attended one controlled substances investigation seminar [sic]. He graduated from a 36 hour patrol officer course in controlled substances investigation . . . .
>
> As of this date, while assigned to the task force, he participated in approximately 60 controlled substances investigations. In investigating these cases he has handled substances later identified as cocaine and marijuana. He has investigated approximately five cases involving the manufacture of marijuana.

Olson, 74 Wn. App. at 131. We reversed the trial court, holding the detail about the officer's experience, training, and background was sufficient to demonstrate probable cause:

> The most commonsense interpretation of this experience is that the affidavit contained sufficient information for the magistrate to infer that Detective Brossard was qualified to identify both growing and burning marijuana by smell. Any other construction of the language would be strained, hypertechnical, and contrary to common sense. . . . We find no requirement that the officer be explicitly trained to identify the smell of marijuana; Brossard's experience was sufficient.

Id. According to the affidavit in this case, the officer here had even more training and experience than the officer in Olson.

In sum, as was the case in Olson, a commonsense interpretation of the affidavit at issue here demonstrates probable cause to believe there was evidence of a marijuana grow operation at Oslin's house.

Power usage records. Oslin argues that even if the affidavit for a search warrant sufficiently described the officer's training and experience in identifying marijuana by smell, the warrant was nevertheless faulty, because it relied in part on power usage records obtained in violation of RCW 42.56.335. We disagree.

RCW 42.56.335 governs disclosure of public utilities records to law enforcement, and requires a written request before a law enforcement agency can obtain such records:

> A law enforcement authority may not request inspection or copying of records of any person who belongs to a public utility district or a municipally owned electrical utility unless the authority provides the public utility district or municipally owned electrical utility with a written statement in which the authority states that it suspects that the particular person to whom the records pertain has committed a crime and the authority has a reasonable belief that the records could determine or help determine whether the suspicion might be true. Information obtained in violation of this section is inadmissible in any criminal proceeding.

RCW 42.56.335.

Oslin focuses on the phrase "particular person" in this statute. According to Oslin, the police request for power usage records here "failed to identify any specific person" and instead "merely identified an address." Brief of Respondent at 13. Oslin cites in support of his argument three cases involving former RCW 42.17.314 (1987), the previous version of the statute, which contained identical language. But none of the cases he cites address what constituted compliance with regard to the phrase "particular person."

In State v. Cole, 128 Wn.2d 262, 289-90, 906 P.2d 925 (1995), the issue was whether the statute was the sole means for law enforcement to obtain power records.

The meaning of the phrase "particular person" was not discussed. Likewise, the phrase "particular person" was not discussed in State v. Rakosky, 79 Wn. App. 229, 237-38, 901 P.2d 364 (1995). There, the issue was whether a second public records request was a continuation of an earlier written request, or a separate request on its own.

Oslin also cites State v. Maxwell, 114 Wn.2d 761, 791 P.2d 223 (1990). But in Maxwell, the police circumvented the statute entirely, providing no written request, and instead calling the power company to request records by telephone. Maxwell, 114 Wn.2d at 768. The issue was whether an application for a search warrant was a "criminal proceeding" such that the information telephonically obtained in violation of the statute was "inadmissible in any criminal proceeding." Maxwell, 114 Wn.2d at 767.

Although Oslin claims the written request here did not identify a particular person, and identified only an address, he is mistaken. As the State notes, the request does identify a particular person, albeit not by name. The subject line of the request identifies topic as: "Request for Subscriber Records." CP at 37. The request goes on to specify the address and the suspected criminal activity:

> The Everett Police Anti-Crime Team has reason to suspect criminal activities taking place at the property located at: **720 E. Marine View Dr., Everett, WA 98203.**
>
> Information gathered leads this agency to suspect that the crime of **Manufacture/Delivery of a Controlled Substance**, contrary to RCW 69.50.401, is being committed at the above address.

Id. In other words, the "particular person" identified by this request is the "subscriber" located at the address listed on the request; specifying the name of the subscriber is not a requirement of the statute.

When construing a statute we give effect to the Legislature's intent and purpose. In re Detention of Jones, 149 Wn. App. 16, 24, 201 P.3d 1066 (2009). The above interpretation of the RCW 42.56.335 (and former RCW 42.17.314) comports with its purpose, which is to "restrict the ability of law enforcement agencies to conduct 'fishing expeditions' into the records of particular individuals." State v. Maxfield, 125 Wn.2d 378, 392-93, 886 P.2d 123 (1994). "A general fishing expedition would occur when law enforcement agents targeted a particular individual for investigation, without having a reasonable suspicion of criminal activity, and scoured utility records for evidence of any crime." Id. at 393. There was no suspicionless fishing expedition here, and the police were not haphazardly scouring utility district records in an attempt to find evidence of any crime.[1]

But even if we declined to consider the portion of the affidavit that discusses the power records, the remainder of the affidavit supports a finding of probable cause. Where information contained in an affidavit of probable cause for a search warrant was obtained by an unconstitutional search, that information may not be used to support the warrant. State v. Eisfeldt, 163 Wn.2d 628, 640, 185 P.3d 580 (2008). Instead, the court must view the warrant without the illegally gathered information to determine if the remaining facts support the probable cause finding. Id. Although Oslin contends the remaining facts do not support a probable cause finding, this argument is premised on his erroneous assertion that the affidavit insufficiently describes the officer's training to

[1] Oslin has abandoned his argument that the initial tip about power usage from a PUD employee violated his right to privacy.

recognize the odor of marijuana.

In sum, the affidavit supports a finding of probable cause, and the trial court erred by dismissing the case.

Reversed and remanded.

Spearman, J.

WE CONCUR:

Leach, C.J.

Dwyer, J.