IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES WALLACE SCHOEN, Appellant.	No. 38408-6-II UNPUBLISHED OPINION

Bridgewater, P.J. — James Wallace Schoen appeals his conviction of unlawful manufacturing of a controlled substance—marijuana. We hold that probable cause did not support the search warrant that included a thermal imaging warrant because the affidavit relied on innocuous facts that did not support a probable cause finding. We reverse and remand.

FACTS

On May 30, 2007, a citizen (Citizen #1) called the Pierce County Sheriff's Department narcotics hotline about suspicious activity at a house later determined to be owned by Schoen.[1] Citizen #1 reported that the house had been sold six months prior but no one had moved in. Citizen #1 had observed three different vehicles stop at the residence for a few hours on weekends and then leave. Citizen #1, who works for an unspecified power company, had walked onto the property, checked the power meter, and noticed the power meter spinning at a high rate of usage. Citizen #1 also heard a humming sound coming from the garage.

[1] We take these facts from the affidavit filed in support of the investigating officer's request for the thermal imaging search warrant.

After receiving the report, Deputy Byron Brockway, a narcotics investigator in the Pierce County Sheriff's Special Investigations Unit, verified with the assessor-treasurer that Schoen and another person had bought the house in November 2006. He also determined that the citizen informant did not have a criminal record.

Deputy Brockway contacted Citizen #1 on July 5, and learned that in mid-June he or she had again checked Schoen's power meter. Citizen #1, who had training in reading power meters, estimated the power consumption over a 15-day period to have been 3,000 kilowatt hours. This was a "very high" power reading. CP at 38. Citizen #1 again heard a humming sound coming from the garage. Around the same time, Citizen #1 observed subjects carrying five-gallon buckets that appeared heavy and some cardboard boxes into the house. Citizen #1 also noticed that the subjects stopped by the house more frequently than before, but still stayed only a few hours.

On July 11, Deputy Brockway contacted Citizen #2 by phone. Citizen #2 had not seen anyone move into the residence. But he or she had seen very bright orange lights that always came on in the family room upstairs at the same time, as if on timers. Citizen #2 did not have any criminal history.

On July 16, Deputy Brockway applied for and was granted a request for power consumption records for Schoen, the prior occupant, and a comparable home.[2] From December 2006 to June 2007, the comparable home had an average consumption rate of 1,725 kilowatt hours per month. Schoen's consumption rate over the same period was an average of 5,375

[2] Schoen's residence was 1,860 square feet with a 484 square foot attached garage, was built in 1986, and has forced air heat with no gas service. The comparable home was 2,200 square feet with a 550 square foot attached garage, was built in 1978, and had forced air heat with no gas service.

kilowatt hours per month. The comparable home's energy use fluctuated seasonally, but Schoen's power usage remained high in the warmer months. Schoen's power use greatly exceeded the prior occupant's use as well. From December 2005 to June 2006, the prior occupant had used an average of 1,954 kilowatt hours per month with seasonal fluctuations in power consumption. Deputy Brockway concluded that the power consumption at a house that appears vacant is consistent with an indoor marijuana grow operation.[3]

Throughout the investigation, Deputy Brockway drove past the home several times in the early morning and found the blinds down and porch lights on. On July 18, Deputy Brockway and another officer attempted a "knock and talk," but no one answered the door. CP at 39. The officers did not smell marijuana.

On August 1, Deputy Brockway contacted Citizen #3. Citizen #3 did not have any criminal history. Citizen #3 had not seen anyone move into the home and observed only one vehicle stay overnight at the house. Citizen #3 had observed a white Honda, a dark-colored Honda, and a white truck at the residence. Deputy Brockway verified that Schoen owned both a white and a dark-colored Honda.

Citizen #3 had seen the white truck arrive at the house in early July. A man exited the truck and unloaded six large, white plastic pillow-sized bags into the residence. The bags appeared to be heavy and the man looked around nervously. Deputy Brockway, through training and experience, believed the bags contained soil. Deputy Brockway contacted Citizen #1 and learned that Citizen #1 had seen two men unload items from the white truck into the house.

[3] Deputy Brockway has special training in indoor marijuana investigations.

Citizen #3 also reported that lights came on at night in the dining room even though no one appeared to be home. In Deputy Brockway's experience, marijuana growers often put house lights on timers to make it appear as if someone is home.

On August 6, Deputy Brockway applied for and received a search warrant to conduct a thermal image search. The thermal scan showed an "excessive amount of heat" in the upper level of the residence's northwest corner and a "high amount of heat" emanating from the walls of the upper level and entire roof on the south side of the residence. CP at 14.

Based on the citizens' observations, the investigating officers' observations, the power records, and the thermal scan, Deputy Brockway believed that an illegal marijuana cultivation was occurring at the house. On August 9, he sought and obtained a search warrant for the home. In the house, officers found and seized over 180 marijuana plants and items consistent with an indoor marijuana grow operation.

The State charged Schoen with unlawful manufacturing of a controlled substance—marijuana. Schoen filed a CrR 3.6 motion to suppress evidence, arguing that probable cause did not support the warrant for thermal imaging and that Citizen #1 violated his rights by looking at his power meter.

The trial court found that (1) probable cause supported the thermal imaging search warrant; (2) the results of the thermal imaging search were consistent with an indoor marijuana grow operation; (3) the thermal imaging search results, coupled with information from citizen witnesses, records, and law enforcement investigation, provided sufficient probable cause for the premises search warrant; and (4) probable cause supported the premises search warrant. The trial

court found the evidence admissible and denied Schoen's CrR 3.6 motion to suppress. The parties entered a stipulated facts bench trial. The trial court found Schoen guilty.

ANALYSIS

Schoen argues that the trial court erred in denying his CrR 3.6 motion to suppress evidence because the affidavit in support of the thermal imaging search warrant was insufficient to establish probable cause to believe a marijuana grow operation would be found within the residence. Schoen challenges conclusions of law 1, 3, and 4, and 5, in which the trial court found that the magistrates had probable cause to issue the search warrants. We hold that, even considering the disputed information, probable cause did not support the thermal imaging search warrant because it contained innocuous facts not indicative of criminal activity.

We review the trial court's CrR 3.6 ruling under the familiar test outlined in *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994), and *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001), *review denied*, 145 Wn.2d 1016 (2002), reviewing the facts for sufficient evidence and reviewing whether the findings support the conclusions of law.

We review a grant of a search warrant for abuse of discretion. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Normally we give great deference to the issuing judge or magistrate. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008); *State v. Huft*, 106 Wn.2d 206, 211, 720 P.2d 838 (1986). But at the suppression hearing, the trial court acts in an appellate-like capacity; its review, like ours, is limited to the four corners of the probable cause affidavit. *Neth*, 165 Wn.2d at 182. Although we defer to the magistrate, the trial court's assessment of probable cause is a legal conclusion we review de novo. *Neth*, 165 Wn.2d at 182; *State v.*

Chamberlin, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).

A search warrant may issue only upon a determination of probable cause, based on facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location. *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869, *cert. denied*, 449 U.S. 873 (1980). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *State v. Garcia*, 63 Wn. App. 868, 875, 824 P.2d 1220 (1992). The application for a search warrant must be judged with common sense, resolving doubts in favor of the warrant. *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977).

Schoen argues that the affidavit failed to establish probable cause because all conduct observed was not probative of criminal activity. We agree.

Innocuous facts, such as the suspect's vehicle information, the suspect's physical description, the suspect's address and phone number, covered windows, frequent visitors who stay a short time, vacancy, and the use of fans or bright lights is insufficient to establish probable cause that a suspect is growing marijuana. *State v. Young*, 123 Wn.2d 173, 196, 867 P.2d 593 (1994); *Huft*, 106 Wn.2d at 210-11; *State v. Rakosky*, 79 Wn. App. 229, 239, 901 P.2d 364 (1995); *State v. White*, 44 Wn. App. 215, 217, 720 P.2d 873 (1986), *review denied*, 107 Wn.2d 1020 (1987); *State v. McPherson*, 40 Wn. App. 298, 300-01, 698 P.2d 563 (1985). Probable cause is still not established when coupled with high power consumption because "there are too many plausible reasons for increased electrical use to allow a search warrant to be issued based on increased consumption." *Huft*, 106 Wn.2d at 211.

In *Young*, an anonymous informant reported that Young was growing marijuana and provided Young's name, address, and phone number. *Young*, 123 Wn.2d at 176-77. The investigating officer confirmed Young's phone number and address. *Young*, 123 Wn.2d at 177. He also found that Young had no criminal history. *Young*, 123 Wn.2d at 177. The officer went by Young's home several times and saw that Young consistently kept his windows covered, never saw bright lights, and never smelled marijuana. *Young*, 123 Wn.2d at 177. The officer obtained Young's power consumption records for the past six years and found abnormally high usage. *Young*, 123 Wn.2d at 177.

In *Huft*, a confidential informant reported that Huft was growing marijuana in his basement, provided Huft's address, reported that Huft drove a yellow Pinto and an orange Jeep, and knew Huft's place of employment. *Huft*, 106 Wn.2d at 208. The investigating officer independently learned that Huft's residence had dramatically increased power consumption since Huft had moved in. *Huft*, 106 Wn.2d at 208. A concerned citizen had reported a few months earlier that a man named "Huff" was growing marijuana in his basement and provided a vague address. *Huft*, 106 Wn.2d at 208. In addition, the officer drove by Huft's home and verified the presence of a yellow Pinto and orange Jeep. *Huft*, 106 Wn.2d at 208. The officer also observed a high intensity light coming from the basement. *Huft*, 106 Wn.2d at 208-09.

In *White*, an anonymous informant saw bright lights in White's garage, heard fan noises in the garage, observed heavy foot and vehicle traffic to the house, and observed that visitors stayed only a short time. *White*, 44 Wn. App. at 216. The investigating officer verified these facts as well as that the residence's windows were covered. *White*, 44 Wn. App. at 216. The officer also

discovered dramatically increased power consumption during the two months that White had resided at the home. *White*, 44 Wn. App. at 216-17.

In *McPherson*, an informant reported that the occupant of a specific white house was growing marijuana in his basement and selling it. *McPherson*, 40 Wn. App. at 299. The investigating officer verified that the occupant lived at the address provided and noticed condensation on the windows, black plastic covering the garage windows, and potting soil near the garage door. *McPherson*, 40 Wn. App. at 299. In addition, the officer learned that the residence's power consumption had increased dramatically since McPherson moved in. *McPherson*, 40 Wn. App. at 299.

In *Rakosky*, the officer claimed the following facts established probable cause that Rakosky was growing marijuana: (1) the persons associated with the property had criminal histories involving marijuana; (2) they used aliases on utility accounts, vehicle registrations, and police reports; (3) the residence had an unusually high energy consumption; (4) the residence had gates and fences around the property but not livestock; (5) trained guard dogs roamed the property; (6) the house was frequently vacant yet had abnormally high power consumption; (7) snow did not accumulate on a shed's roof; (8) there were no vehicle tracks or equipment entering a shed; and (9) a windowless van and a covered rear window was used exclusively by individuals at the property. *Rakosky*, 79 Wn. App. at 234.

In *Young*, *Huft*, *White*, and *McPherson*, the courts held that these facts did not establish probable cause because the officers verified only innocuous facts that, at best, show the informant had personal knowledge of the suspect, not that the suspect engaged in illegal activity. *Young*,

123 Wn.2d at 196; *Huft*, 106 Wn.2d at 211; *White*, 44 Wn. App. at 217; *McPherson*, 40 Wn. App. at 301.[4] The existence of high power consumption did not change the courts' analyses. *Huft*, 106 Wn.2d at 211; *White*, 44 Wn. App. at 217; *McPherson*, 40 Wn. App. at 301.

The *Rakosky* court also found insufficient facts to support probable cause because the facts contained in the affidavit did not indicate marijuana was being grown on the property. *Rakosky*, 79 Wn. App. at 239. The court held, "It is not illegal to secure one's premises . . . [or] to heat a building, even if neighbors and police cannot tell whether it contains a hot tub, tomatoes, orchids, marijuana, exotic animals or nothing at all." *Rakosky*, 79 Wn. App. at 240.

Similarly, Deputy Brockway's affidavit relied on innocuous facts that did not indicate criminal activity, even when considered together. Like *White*, the informants saw bright lights at Schoen's residence, observed frequent traffic to the house that stayed a short time, and heard noises in the garage. In addition, there might have been potting soil at the home as in *McPherson*. Finally, Schoen had a very high amount of power consumption and possibly a vacant home, as in *Rakosky*. These are innocuous facts that, at best, demonstrate that the informants were familiar with Schoen's residence, and not illegal activity. *Huft*, 106 Wn.2d at 211. These facts are not indicative of "criminal activity, suspicious activity, or any activity at all." *McPherson*, 40 Wn. App. at 301.

The State contends that *Huft*, *White*, and *McPherson* were distinguishable because (1) Schoen's house was never occupied[5] so the activities are not normal; (2) officers compared power

[4] *Rakosky*, unlike the other cases, did not involve an anonymous informant. *Rakosky*, 79 Wn. App. at 232.

[5] Schoen argues that finding of fact 5, that his residence remained unoccupied, is not supported by

consumption over a longer period against the prior owner and a comparable home; (3) the informants observed persons nervously moving six large heavy bags of potting soil. The State also argues that *Rakosky* and *Young* do not apply because the facts involved high power consumption and innocuous facts. The State argues that unlike those cases, here we have high power consumption, plus an apparently vacant house, materials consistent with a marijuana grow operation being carried into the house, a humming noise, timed lights, and occasionally bright lights. But *Huft*, *White*, and *McPherson* did not rely on the fact that someone resided in the homes, nor did they consider the length of time the appellant had high power consumption. They stated plainly that high power consumption, even with the other facts, was not indicative of illegal activity. *Huft*, 106 Wn.2d at 211; *White*, 44 Wn. App. at 217; *McPherson*, 40 Wn. App. at 301. The *Young* court did consider long-term high power consumption, six years' worth, and still did not find the power consumption to be indicative of criminal activity. *Young*, 123 Wn.2d at 196. Further, vacancy coupled with high power consumption are also innocuous facts that do not support a probable cause finding. *Rakosky*, 79 Wn. App. at 239.

In addition, while Citizens #1 and #3 observed heavy, white plastic bags being moved into the home, they did not state they believed the bags contained potting soil. That is a conclusion that Deputy Brockway drew based upon his training and experience, even though he did not observe the bags. Findings of fact 7 and 29, challenged by Schoen, incorrectly states that the

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substantial evidence because although the informants did not see anyone move in, visitors frequently stopped at the house. The informants reported that they had not seen anyone move in. It is a reasonable inference that the residence remained unoccupied. Schoen's interpretation of the facts is hypertechnical. *State v. Walcott*, 72 Wn.2d 959, 962, 435 P.2d 994 (1967), *cert. denied*, 393 U.S. 890 (1968).

neighbors and informants saw bags they believed to be potting soil. The record does not support this. Finally, the existence of potting soil would not tip the balance toward probable cause because the *McPherson* court considered similar facts with potting soil near the garage and still found the facts innocuous. *McPherson*, 40 Wn. App. at 299, 301.

The facts in this case do not support a finding of probable cause to justify granting the thermal imaging search warrant. Without the results of the thermal imaging search, and the interpretation of those results, the police did not have sufficient incriminating information to obtain the premises search warrant. *Young*, 123 Wn.2d at 196. The findings of fact do not support the trial court's conclusions of law. We reverse the trial court's probable cause determination and order the exclusion of the evidence seized under the warrant. *Young*, 123 Wn.2d at 196; *Rakosky*, 79 Wn. App. at 240.

Reversed and remanded.

A majority of the panel has determined this opinion will not be published in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Bridgewater, P.J.

I concur:

Armstrong, J.

Quinn-Brintnall, J. (dissenting) — Probable cause exists when the facts lead a reasonable person to conclude there is a probability that the defendant is involved in criminal activity. *State v. Cord*, 103 Wn.2d 361, 365-66, 693 P.2d 81 (1985). Here, three ordinary citizens, presumably reasonable people, saw circumstances leading them to conclude that a neighbor was probably growing marijuana in his home. *State v. Wible*, 113 Wn. App. 18, 24, 51 P.3d 830 (2002) (In the context of a probable cause determination, named "citizen informants" are presumed reliable. (citing *State v. Rodriguez*, 53 Wn. App. 571, 574-75, 769 P.2d 309 (1989))). They told their local law enforcement agency, which investigated and, using power records and thermal imaging, obtained information which tended to corroborate the named citizen informants' reported beliefs that there was a marijuana grow operation in the house. Law enforcement officers presented all the information to an independent magistrate who issued a warrant to search the property in question. A marijuana grow operation was found.

James Wallace Schoen dissects the affidavit and argues that, because each observation taken in isolation could have an innocent explanation, the magistrate violated his right to be free from unreasonable searches and seizures and his privacy rights under article I, section 7 of the state constitution when he issued the search warrant. I respectfully disagree. We do not read the affidavit for a search warrant hypertechnically and instead evaluate sufficiency for probable cause from a common sense perspective. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). Further, once we establish that the legal standard for probable cause has been met, we give great deference to the magistrate's decision to issue a search warrant. *In re Petersen*, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002).

Law enforcement officers properly conducting their normal duties to respond to citizen reports and experienced magistrates are not required to ignore the most logical and reasonable inferences that can be drawn from facts and circumstances reported by law-abiding citizens in favor of possible but unlikely coincident innocent scenarios. Reading the search warrant affidavit in a common sense manner reveals that the search warrant issued on probable cause. Accordingly, I would affirm.

QUINN-BRINTNALL, J.