No. 28693-2-III

Siddoway, J. (dissenting) — I understand the concerns of my colleagues. "[A] policeman's affidavit should not be judged as an entry in an essay contest nor subjected to microscopic examination." *State v. Patterson*, 83 Wn.2d 49, 55, 515 P.2d 496 (1973) (citing *Spinelli v. United States*, 393 U.S. 410, 438, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) (Fortas, J., dissenting)). I am satisfied, however, that this is not a case where an affidavit is being given a hypertechnical, rather than a commonsense, reading. The problem is not with the inferences drawn but with the fact that critical information is missing, depriving the magistrate of information critical to its neutral determination of probable cause.

The State argued that the district court could have interpreted the affidavit to mean that the confidential source's observations had taken place within the last 48 hours, despite what the prosecutor conceded to be inartful wording.[1] Report of Proceedings

[1] The prosecutor urged, e.g., "[I]t would be very reasonable for the issuing Magistrate, in this case Judge Engel, to interpret the affidavit as describing that the confidential informant not only came to the detective within the last 48 hours, but also observed the marijuana growing in the last 48 hours. Granted it wasn't the best, or I should say the most clear wording by the detective in this matter, but it would be

(RP) (Nov. 3, 2009) at 13; RP (Nov. 30, 2009) at 3. But there was no recording or other evidence that the district court was told this by the officer or otherwise came to this conclusion. Only by a strained reading can the informant's observation be wrapped into the 48-hour time frame and couching the separate events in one outside time frame is an unnatural way to present the information. As pointed out by Patrick Lyons, recency of the informant's observation would be less important if the affidavit set forth any facts from which permanence could be inferred but the affidavit is unusually nonspecific in this respect as well; Mr. Lyons contrasts it to affidavits present in *State v. Smith*, 39 Wn. App. 642, 643, 694 P.2d 660 (1984), *review denied*, 103 Wn.2d 1034 (1985), and *State v. Payne*, 54 Wn. App. 240, 242, 773 P.2d 122 (providing specific details of large-scale growing operations), *review denied*, 113 Wn.2d 1019 (1989). As noted by the superior court, "We have absolutely no idea when [the confidential source] made the observation." RP (Nov. 3, 2009) at 19.

Most concerning to me is to see from the State's motion for reconsideration in the superior court that this was not an isolated case of inartful wording, but a manner in which information was presented in other cases and for which sanction was being requested. The State pointed out in moving for reconsideration that other departments of

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perfectly within the Judge's -- or I should say the issuing Magistrate's discretion to interpret it accordingly." Report of Proceedings (Nov. 30, 2009) at 3-4.

the superior court had denied motions to suppress evidence obtained by search warrants supported by similar affidavits.[2] It expressed concern about inconsistent results and the possibility of forum shopping. RP (Nov. 30, 2009) at 4. It asked for a reexamination of the suppression decision "in order [to] provide precedent and guidance for future cases and consistency amongst judges confronted with similar issues." Clerk's Papers (CP) at 20.[3]

This court has stated:

> An affidavit supporting a search warrant must be sufficiently comprehensive to provide the issuing magistrate with facts from which he can independently conclude there is probable cause to believe the items sought are at the location to be searched. Further, these facts must be current facts, not remote in point of time, and sufficient to justify a conclusion by the magistrate that the property sought is probably on the person or premises to be searched *at the time* the warrant is issued.

State v. Spencer, 9 Wn. App. 95, 96-97, 510 P.2d 833 (1973) (citations omitted). An

[2] The affidavit in a case cited by the State had similarly stated, "'Within the last 48 hours, a reliable and confidential source of information (CS) contacted Narcotics Detectives and stated he/she could purchase narcotics, specifically Cocaine, from a person who lives at [address omitted].'" Clerk's Papers at 20. As with the affidavit in this case, the affidavit went on to generally describe what the confidential source had seen, and where, but without identifying any time frame for the confidential source's observations.

[3] The superior court denied the motion, noting that it had reviewed the reportedly inconsistent decision cited by the State, and said "I also examined the reasoning that went behind it. I think there is more uniformity than one would expect." RP (Nov. 30, 2009) at 5. He added that "I believe I made the right decision the first time and I think it is consistent with what would happen in other departments." *Id*.

important aspect of probable cause that we rely upon the magistrate to weigh is whether the information of criminal activity is too stale. *See, e.g.*, *State v. Larson*, 29 Wn. App. 669, 671, 630 P.2d 485 (1981) (court cannot determine sufficient recency without dates for "recent" marijuana purchases).

An apt summary of the problem with the type of affidavit presented to the district court in this case is cited by author Wayne LaFave:

> "Here, the affiant's information merely asserted that at some point in the past, which could have been a day, a week or months prior to the date of the affidavit, appellant had sold informant-Lohn marijuana. If we were to sustain the magistrate's determination [that this shows probable cause], the issuance of search warrants would be allowed solely upon suspicion of criminal conduct, a standard far less demanding than that embodied in the Fourth Amendment. We cannot countenance such a deviation from explicit constitutional norms. 'Indeed, if the affidavit [and sworn testimony] in this case be adjudged valid, it is difficult to see how any function but that of a rubber stamp remains for [the magistrate].' * * * 'It is one thing to expect the magistrate to give a commonsense reading to facts set forth and to draw inferences from them. It is quite another thing to expect the magistrate to reach for external facts and to build inference upon inference in order to create a reasonable basis for his belief that a crime is *presently* being committed.'"

2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.7(b) at 392 (4th ed. 2004) (alterations in original) (quoting *Commonwealth v. Simmons*, 450 Pa. 624, 631, 301 A.2d 819 (1973)).

If there had been additional facts included in the affidavit from which recency could arguably be inferred, I would accept the magistrate's inferences. I would accept the

magistrate's finding of probable cause if the State could offer a cogent explanation of how the affidavit can be read to be a grammatically flawed communication that it was the *informant's observations* that took place "within the last 48 hours." But neither circumstance exists here. I agree with the trial court that given this form of affidavit, the magistrate is forced to assume that the officer must have intended to communicate that the confidential source's observation was recent. This is not the role of a neutral magistrate envisioned by the federal and Washington constitutions.

I respectfully dissent.

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Siddoway, J.