**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| **STATE OF WASHINGTON,** | ) | **No. 28693-2-III** |
| **Appellant,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **PATRICK JIMI LYONS,** | ) | |
| | ) | **PUBLISHED OPINION** |
| **Respondent.** | ) | |
| | ) | |

Sweeney, J. — The State appeals a superior court order suppressing evidence of a marijuana grow operation. The trial judge concluded that the affidavit used to support the search warrant was not sufficiently clear on whether the phrase "within the last 48 hours" referred to the time frame within which the informant saw the grow operation or whether, instead, the phrase referred to the time within which the informant reported the information to police. The judge concluded that it referred to the latter not the former because of the sentence structure. We conclude that this was a hypertechnical reading of this affidavit that ultimately did not extend the deference required by a court of review to the issuing magistrate. And we therefore reverse the order of the trial court and remand

for further proceedings.

FACTS

Yakima City/County Narcotics Unit (YCNU) Officer Gary Garza requested a search warrant based on his affidavit. He wanted to search the residence of Patrick Lyons. Officer Garza believed Mr. Lyons was manufacturing marijuana with the intent to deliver based on information provided by an informant.

In his affidavit, Officer Garza outlined his training and experience investigating drug crimes, described the residence, and identified an individual believed to be living at the residence known as "Jimmy." The affidavit went on to relate the officer's probable cause to believe that "Jimmy" was manufacturing, or possessed with intent to deliver, marijuana. Clerk's Papers (CP) at 58-60; Br. of Appellant at 3. Officer Garza represented that his probable cause was based upon the following information:

> Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address. The CS knows the suspect and homeowner as "Jimmy". The CS observed the growing marijuana while inside an outbuilding on the property of the listed residence. The CS observed the marijuana growing in potted soil under active lighting designed to promote plant growth.

CP at 60.

Judge Donald Engel issued a warrant to search the property. Police found a fully

operational marijuana grow operation along with a number of plastic baggies containing marijuana and two large containers of mushrooms. The State charged Mr. Lyons with one count of manufacturing a controlled substance (marijuana), one count of possession of a controlled substance with intent to deliver (mushrooms), and one count of possession of a controlled substance with intent to deliver (marijuana).

Mr. Lyons moved to suppress the drug evidence. The superior court judge made some preliminary observations: "I suspect that Judge Engel did not have the benefit of your briefing or the opportunity to hear a critical discussion about the language that was used . . . . [W]e have these procedures so we can review more carefully the warrants that are applied for." Report of Proceedings (Nov. 3, 2009) (RP) at 18. And the superior court then went on to analyze Officer Garza's affidavit and the specific language in question as follows:

> If you call that a run on sentence or two sentences blended together with the conjunctive and, but if you break it apart, it's within the last 48 hours a reliable confidential source of information contacted detectives, period. He observed narcotics being grown. So it shifts – as I read it, it shifts to the word being, but there is no – to use [defense counsel's] phrase, no temporal reference to what being means.

RP at 18-19. The judge then concluded that "Officer Garza has simply said that he contacted law enforcement within the last 48 hours. We have absolutely no idea when he made the observation." RP at 19. The superior court then concluded that the affidavit was not sufficient to support the search

warrant and the court suppressed the drug evidence. The State now appeals this ruling.

DISCUSSION

The superior court judge sat in the same capacity that we sit, in an appellate capacity. *See State v. O'Connor*, 39 Wn. App. 113, 123, 692 P.2d 208 (1984). So the standard of review we bring to bear on Judge Engel's warrant and the canons of construction that dictate how we read and interpret Officer Garza's affidavit were the same for the superior court as they are for this court. *See id.*

The State contends that Judge Engel's reading of Officer Garza's affidavit reflects common sense rather than a prohibited hypertechnical reading of the affidavit. The State argues that, when so read, the logical and reasonable inference is that the informant both observed the growing marijuana and related that fact to the detective within the 48-hour period before the affidavit was signed. Br. of Appellant at 10. Mr. Lyons responds that Officer Garza's affidavit simply told Judge Engel that the informant reported his information to the officer within 48 hours; it did not tell the judge with any precision when the informant saw the growing marijuana. And, therefore, the affidavit fails to establish probable cause to believe that the drugs would be present on the property when Judge Engel issued the warrant.

Standard of Review—Canons of Construction

We will not reverse a magistrate's determination of probable cause absent a showing that the judge abused his discretion. *State v. Condon*, 72 Wn. App. 638, 642, 865 P.2d 521 (1993). We are required to give the magistrate's determination of probable cause great deference. *State v. Griffith*, 129 Wn. App. 482, 487, 120 P.3d 610 (2005).

> Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," ibid., and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present."

*Aguilar v. Texas*, 378 U.S. 108, 111, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) (alteration in original) (quoting *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980)). Simply put, the courts should encourage police officers to seek judicially sanctioned search warrants. And deferring to a judicially sanctioned search warrant does just that. *State v. Chenoweth*, 160 Wn.2d 454, 477-78, 158 P.3d 595 (2007).

Just as importantly, the information collected here "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

"The support for issuance of a search

warrant is sufficient if, on reading the affidavits, an ordinary person would understand that a violation existed and was continuing at the time of the application." *State v. Clay*, 7 Wn. App. 631, 637, 501 P.2d 603 (1972).

Officer Garza's Affidavit

The difficulty here is that the warrant does not clearly state the time between the informant's observations and the filing of the affidavit. It states, "Within the last 48 hours a reliable and confidential source of information (CS) contacted YCNU Detectives and stated he/she observed narcotics, specifically marijuana, being grown indoors at the listed address." CP at 60. But the superior court's approach would bring a rigor to the appellate analysis that we conclude is discouraged by both the deferential standard of review and the canons by which we are required to read these affidavits. Again, the superior court reasoned in part:

> I suspect that Judge Engel did not have the benefit of your briefing or the opportunity to hear a critical discussion about the language that was used . . . . [W]e have these procedures so we can review more carefully the warrants that are applied for.

RP at 18. The court was correct no one filed a brief or argued over what appeared clear on the face of the affidavit.

The superior court then felt free to parse the words used by Officer Garza in the affidavit to conclude there was no time reported for the observation:

> If you call that a run on sentence or two sentences blended together with the conjunctive and, but if you break it apart, it's within the last 48 hours a reliable confidential source of information contacted detectives, period. He observed narcotics being grown. So it shifts – as I read it, it shifts to the word being, but there is no – to use [defense counsel's] phrase, no temporal reference to what being means.

RP at 18-19.

This analysis would be appropriate and helpful if the court were analyzing a contract, where the language was the product of negotiation by business people and their lawyers. *See Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004). But this is not a contract between business people and their lawyers. Mr. Lyons and the police did not sit down with lawyers and draft the language of this affidavit. Indeed, the affidavits are prepared by police officers, not lawyers, on short notice, and sometimes without any input by lawyers at all. *State v. Patterson*, 83 Wn.2d 49, 57-58, 515 P.2d 496 (1973). So both the superior court and this court, sitting in an appellate capacity, must give great weight to a magistrate's determination that probable cause exists, and doubts are to be resolved in favor of the warrant. *O'Connor*, 39 Wn. App. at 123.

This affidavit certainly could be read as Mr. Lyons and, ultimately, the superior court judge read it. But the standard of review (abuse of discretion) and canons of construction (nontechnical reading, commonsense reading, with great deference to the magistrate, with doubts resolved in favor of

the warrant) would require a reading in favor of the warrant. When so viewed, we conclude the language can be read to support both the observation and the reporting of that observation within 48 hours and therefore we conclude this warrant passes constitutional muster.

> "[W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common-sense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

*State v. Walcott*, 72 Wn.2d 959, 962, 435 P.2d 994 (1967) (emphasis omitted) (alteration in original) (quoting *United States v. Ventresca*, 380 U.S. 102, 109, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965)).

We reverse the superior court and remand for further proceedings.

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Sweeney, J.

I CONCUR:

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Korsmo, A.C.J.