COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29567-2-III**
	)	
Respondent,	)	
	)	**ORDER GRANTING MOTION**
v.	)	**FOR RECONSIDERATION**
	)	**AND WITHDRAWING**
DALE RAY HIGHTOWER,	)	**OPINION**
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration of our opinion of March 13, 2012, and the response thereto.

IT IS ORDERED that the motion for reconsideration is granted; the opinion filed on March 13, 2012, is hereby withdrawn; and a new opinion will be filed this day.

DATED:

PANEL: Judges Kulik, Sweeney, and Korsmo

FOR THE COURT:

_____
KEVIN M. KORSMO
CHIEF JUDGE

FILED
JUNE 26, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29567-2-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
DALE RAY HIGHTOWER,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, J. — A Kennewick police officer detected marijuana odor emanating from Dale Ray Hightower. The officer arrested Mr. Hightower, obtained a warrant, and searched Mr. Hightower's apartment. Mr. Hightower challenges the denial of his motion to suppress by asserting that the officer had insufficient training and experience to detect marijuana odor. But the evidence supports the court's finding that the officer had the requisite training and experience by virtue of his five years as an officer, training in narcotics, and numerous drug investigations. The court's findings support its conclusion that probable cause existed to arrest Mr. Hightower and to support a search warrant. We, therefore, affirm the trial court's denial of the motion to suppress and affirm the convictions for possession of marijuana and possession of cocaine.

FACTS

On January 13, 2010, Detective Christopher Slocombe and Detective Marco Monteblanco of the Kennewick Police Department responded to an anonymous tip that marijuana odor was coming from an apartment at 3320 West 9th in Kennewick, Washington. Detective Slocombe determined that the odor was emanating from apartment D 9. As the detectives knocked on the door, Mr. Hightower and a male companion approached the apartment.

Detective Slocombe immediately smelled marijuana coming from the men. Mr. Hightower told Detective Slocombe that he lived in the apartment. Detective Slocombe detained Mr. Hightower and read him his *Miranda*[1] rights. Detective Slocombe released the companion after determining that the marijuana smell was particularized to Mr. Hightower.

Mr. Hightower admitted to Detective Slocombe that he had marijuana on his person and that he had a bong and paraphernalia in his apartment. One of the detectives removed a small bag of marijuana from Mr. Hightower's pocket. Mr. Hightower refused to consent to a search of his apartment.

Detective Slocombe obtained a telephonic warrant to search Mr. Hightower's apartment for narcotics and paraphernalia. As a basis for the warrant, Detective Slocombe told the judge that the smell of marijuana emanated from Mr. Hightower's

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

apartment, and Mr. Hightower admitted possession of marijuana. Detective Slocombe also presented his credentials to the judge. He stated that he had served as a police officer with the Kennewick Police Department since March 2005, that he received training on narcotics investigation while completing his schooling at the Washington State Basic Law Enforcement Academy, and that he participated in numerous narcotics investigations and seizures. Detective Slocombe did not state that he received training in detecting the odor of marijuana.

Upon execution of the warrant, the detectives found marijuana and cocaine in Mr. Hightower's apartment. Mr. Hightower was taken into custody.

Prior to trial, Mr. Hightower filed a motion to suppress the evidence obtained through the search of his person, contending the evidence was the fruit of an illegal detention. He also filed a motion to suppress the evidence obtained through the search of his apartment. Specifically, he claimed that probable cause for the warrant could not be based on Detective Slocombe's detection of a marijuana odor because the affidavit did not state that Detective Slocombe received training or had experience in identifying the odor of marijuana. The court denied the motions and found Mr. Hightower guilty of possession of a controlled substance, cocaine, and possession of marijuana. Mr. Hightower appeals.

ANALYSIS

"In determining whether probable cause to arrest in a narcotics case exists, the court must consider 'the totality of the facts and circumstances within the officer's knowledge at the time of the arrest. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer.'" *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996) (quoting *State v. Fore*, 56 Wn. App. 339, 343, 783 P.2d 626 (1989)).

"A lawful arrest is a prerequisite to a lawful search." *State v. Grande*, 164 Wn.2d 135, 139-40, 187 P.3d 248 (2008). An officer is allowed to make a warrantless arrest if the officer has "'probable cause to believe *a person* has committed or is committing a misdemeanor or gross misdemeanor, involving . . . the use or possession of cannabis.'" *Id.* at 140 (quoting RCW 10.31.100(1)).

An officer's statement that he or she detected the smell of marijuana is sufficient to constitute probable cause to search if the officer has training and experience with the smell of marijuana. *State v. Cole*, 128 Wn.2d 262, 289, 906 P.2d 925 (1995) (citing *State v. Olson*, 73 Wn. App. 348, 356, 869 P.2d 110 (1994)). The sense observation must consist of more than personal belief. *State v. Johnson*, 79 Wn. App. 776, 780, 904 P.2d 1188 (1995).

In *State v. Compton*, 13 Wn. App. 863, 864-65, 538 P.2d 861 (1975), the court decided that the smell of marijuana on Mr. Compton provided the officer with probable cause to arrest Mr. Compton. The court determined that the officer's training and

experience qualified him to identify the odor as marijuana and, consequently, to form a reasonable belief that a crime was being committed. *Id*. The officer received training in the detection of controlled substances, had been on numerous marijuana arrests, and was familiar with the odor associated with marijuana. *Id.* at 864.

In *Cole*, the court determined that the officer's training and experience in detecting the smell of marijuana was sufficient when the officer "had been a . . . [p]olice [o]fficer for over two years, had been involved with marijuana grow operations in that time, and was familiar with the smell of growing marijuana." *Cole*, 128 Wn.2d at 289.

In *Johnson*, the court determined that a federal agent had sufficient training and experience when the agent had been in law enforcement for approximately eight years, attended several law enforcement academies, participated in police operations targeting marijuana cultivation, and represented that he knew the smell of marijuana through his training and experience. *Johnson*, 79 Wn. App. at 781.

Here, Detective Slocombe had been a police officer for almost five years and advanced to the rank of detective. He received training in narcotics investigation while at the Washington State Basic Law Enforcement Academy. He also had experience with numerous investigations that involved search warrants and the seizure of drugs.

The court's finding that Detective Slocombe "by virtue of his training and experience in law enforcement can detect the odor of both burnt and fresh marijuana"[2] is supported by the evidence and in turn supports the conclusion that probable cause existed

[2] Clerk's Papers at 62.

for the arrest and search of his person.

A magistrate's determination that a warrant should be issued is reviewed for an abuse of discretion. *Cole*, 128 Wn.2d at 286. "This determination generally should be given great deference by a reviewing court." *Id*. "An application for a search warrant should be judged in the light of common sense with doubts resolved in favor of the warrant." *Id*.

In reviewing probable cause, the only information to be considered is the information available to the magistrate. *Olson*, 73 Wn. App. at 354. "Probable cause is established if the affidavit in support of the warrant sets forth facts sufficient for a reasonable person to conclude that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *State v. Dalton*, 73 Wn. App. 132, 136, 868 P.2d 873 (1994).

The trial court's conclusion that the affidavit was sufficient to sustain a finding of probable cause is supported by the findings and the evidence. The trial court's findings state that Detective Slocombe included in his affidavit that he detected the odor of marijuana coming from Mr. Hightower and Mr. Hightower's apartment, and that Mr. Hightower admitted to having marijuana on his person. In addition, the affidavit included information on Detected Slocombe training and experience in detecting narcotics, that Detective Slocombe questioned Mr. Hightower outside of Mr. Hightower's apartment,

and that other persons in the neighboring apartment smelled marijuana through the air system and in hallway.

Admittedly, the affidavit does not specifically state that Detective Slocombe had specific training or experience in detecting the odor of marijuana. This lack of information is not fatal because Detective Slocombe's detection of the marijuana odor was not the sole basis to support a finding of probable cause. As noted, the affidavit offered additional facts that would sufficiently allow a reasonable person to conclude that Mr. Hightower was probably involved in criminal activity and that evidence of the crime could be found at his apartment.

Based on this compilation of evidence and the deference given to the trial court, the magistrate did not abuse his discretion in finding probable cause to issue the search warrant.

We affirm Mr. Hightower's convictions for possession of marijuana and possession of cocaine.

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

_____
Kulik, J.

WE CONCUR:

Sweeney, J.

Korsmo, C.J.