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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29736-5-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
ERWIN W. HULL,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — The Grant County Sheriff's Office and the Drug Enforcement Agency (DEA) received tips that Erwin Hull was growing marijuana in a dug out room below his house. The sheriff obtained a search warrant for Mr. Hull's home and found a grow operation as described by the informants. When questioned by police, Mr. Hull did not have documentation designating him as a marijuana provider. On stipulated facts, the court found Mr. Hull guilty of one count of manufacture of marijuana. Mr. Hull appeals. He contends that the magistrate did not have probable cause to issue the search warrant, that the trial court should have allowed him to assert an affirmative defense as a designated provider, and that he did not knowingly manufacture marijuana contrary to

law. We conclude that Mr. Hull's assertions of error are unpersuasive and, therefore, affirm the conviction.

FACTS

In April 2009, the Grant County Sheriff's Office Interagency Narcotics Enforcement Team (INET) received two anonymous tips from the Washington State Patrol Marijuana Hotline. The tipsters reported an underground marijuana grow operation at Mr. Hull's home. The tipsters stated that the grow was accessible through a trapdoor in a bedroom of the residence. Detective Jeff Wentworth of INET determined that Erwin and Jacqueline Hull owned the property at 550 South Grand Drive in Moses Lake, Washington.

As part of the investigation, in June 2009, Detective Wentworth checked the power records of the Hull residence and compared the power usage with neighboring homes of comparable size and age. Detective Wentworth determined that the Hull residence used more kilowatt hours than the comparable households; one comparison established a difference of approximately 6,751 kilowatt hours. Admittedly, some of the comparable households had upgrades to insulation and windows where the Hull residence did not.

In July 2009, Detective Wentworth received a report from an agent in the Spokane

division of the DEA. The report indicated that a confidential source, who had done work for the DEA in the past, claimed that "'Jackie and Buster'"[1] who lived 550 South Grand Drive in Moses Lake, Washington, were growing marijuana in their home. According to the report, the confidential source was at 550 South Grand Drive during the first week in July. While at the residence, the confidential source was shown a trapdoor in the closet of a bedroom that led to an underground facility where approximately 50 marijuana plants were being grown under bright lights.

Later in July, the confidential source called the hotline and stated that he or she had again observed the room under the house, and the grow operation was still active as of July 30, 2009.

On August 4, Detective Wentworth received a search warrant to use a thermal imaging device on the Hull residence. Detective Wentworth did not observe any heat change differences between the Hull residence and other comparable homes. Detective Wentworth noted that this finding would be logical if the grow operation was underground.

Five months later, on January 12, 2010, Detective Wentworth spoke with a citizen informant (CI) who wanted to give information on the marijuana grow operation at 550

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[1] Clerk's Papers at 34.

South Grand Drive. The CI stated that Jackie and Erwin Hull lived at the residence. The CI said that he or she had known Jackie for more than 20 years and that Jackie struggled with drug addiction. The CI further advised that in the late spring to early summer of 2009, he or she visited the Hull house and Jackie revealed the marijuana grow operation under the house. The CI was shown a trapdoor in the closet floor of a bedroom and was invited to go under the house. The CI saw that the entire foundation had been dug out. The CI observed numerous marijuana plants in different stages of growth.

The CI's past history with the drug culture helped the CI recognize the plants as marijuana plants. The CI also provided other correct, verifiable information to Detective Wentworth, such as the date that the Hulls moved into the residence, Mr. Hull's place of employment, and specific information regarding the transfer of Ms. Hull's vehicle. The CI agreed to disclose his or her identity to the magistrate issuing the warrant.

Detective Wentworth and a colleague conducted another comparative investigation of the Hulls' power usage, using different homes from the previously-listed comparables. The officers discovered that in 2008, the Hulls used approximately 12,900 more kilowatt hours and spent approximately $130 more for power consumption than their neighbors. In 2009, the difference increased to approximately 16,500 kilowatt hours and $550.

Detective Wentworth requested and received a search warrant to enter the Hull residence and search for evidence of marijuana manufacturing, consumption, use, and/or distribution. An affidavit accompanied his request.

Upon execution of the warrant, Mr. Hull voluntarily responded to the officer's knock and complied with all orders. In the southwest bedroom closet, Detective Wentworth observed a trapdoor in the floor, which opened into an underground room where 11 marijuana plants were growing. Detective Wentworth heard Mr. Hull state that he was growing marijuana plants for his father and that his father passed away in December. Mr. Hull also stated that he did not have any paperwork authorizing him to grow marijuana. On that same day, Mr. Hull was arrested and charged in Grant County with manufacture of marijuana.

Procedural Facts. Mr. Hull filed a motion to suppress evidence obtained under the search warrant, contending the warrant was not supported by probable cause. The court held an evidentiary hearing and entered formal findings of fact and conclusions of law. The court ultimately denied Mr. Hull's motion to suppress.

On the first day of trial on January 5, 2011, the State brought a motion in limine to preclude Mr. Hull from asserting the affirmative defense of providing marijuana as a designated provider for an authorized patient. Mr. Hull sought to admit evidence that

established Mr. Hull as Noel Callahan's designated provider of medical marijuana. Mr. Hull also sought to admit documentation that authorized Mr. Callahan to use marijuana for medical purposes. Mr. Callahan's authorization was issued on December 7, 2008, and expired on December 7, 2009, one month before the search of Mr. Hull's residence. Mr. Hull did not provide this documentation to law enforcement; the first presentation occurred in March or April 2010 when Mr. Hull's counsel furnished it to the State. The trial court adjourned without a decision on the State's motion.

On the second day of trial, Mr. Hull presented new, additional documentation relating to Mr. Callahan's authorized use of medical marijuana. This subsequent authorization was issued on January 27, 2010, two weeks after the search of Mr. Hull's residence.

The trial court granted the State's motion to prohibit Mr. Hull from raising an affirmative medical marijuana defense. The trial court determined that Mr. Hull's qualifying patient did not have valid authorization that would allow Mr. Hull to grow marijuana and that Mr. Hull failed to provide documentation to law enforcement at the time of inquiry, as required by statute. The parties proceeded to a stipulated facts trial. The trial court found Mr. Hull guilty of manufacture of marijuana. The trial court sentenced Mr. Hull to 30 days in jail, with credit for one day served and the balance of 29

days converted into community service.

ANALYSIS

Motion to Suppress. A magistrate's determination that probable cause exists is reviewed for an abuse of discretion. *State v. Vasquez*, 109 Wn. App. 310, 317-18, 34 P.3d 1255 (2001) (conceding that the standard of review of a police officer's probable cause determination is not as deferential), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002). A reviewing court should give great deference to a judge's decision. *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981). Any doubts are to be resolved in favor of the warrant. *State v. O'Connor*, 39 Wn. App. 113, 123-24, 692 P.2d 208 (1984). A judicial determination of probable cause will be sustained so long as a substantial basis exists for the decision. *State v. Lyons*, 160 Wn. App. 100, 105, 247 P.3d 797 (quoting *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), *abrogated by Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), *but adhered to by State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984)), *review granted*, 172 Wn.2d 1013 (2011).

"The burden of proof is on the defendant moving for suppression to establish the lack of probable cause." *State v. Anderson*, 105 Wn. App. 223, 229, 19 P.3d 1094 (2001). The reviewing court looks to the information available to the magistrate at the

time the warrant was issued. *Id*.

"The warrant clause of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution require that a search warrant be issued upon a determination of probable cause based upon 'facts and circumstances sufficient to establish a reasonable inference' that criminal activity is occurring or that contraband exists at a certain location." *State v. Vickers*, 148 Wn.2d 91, 108, 59 P.3d 58 (2002) (footnote omitted) (quoting *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)).

"Probable cause is established when an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the criminal activity." *Id*. The magistrate is entitled to draw commonsense inferences from the stated facts in the affidavit. *State v. Kennedy*, 72 Wn. App. 244, 248, 864 P.2d 410 (1993). Facts that do not establish probable cause when considered singularly can establish probable cause when viewed together. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

When an informant's tip supplies information used in the affidavit, Washington uses the test found in *Aguilar* and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), *abrogated by Illinois v. Gates*, 462 U.S. 213, *but adhered to by*

Jackson, 102 Wn.2d 432) to evaluate whether probable cause exists in relation to the informant's tip. *Jackson*, 102 Wn.2d at 443. Under the *Aguilar-Spinelli* test, a determination of probable cause requires that the affidavit establishes both (1) the informant's basis for knowledge and (2) the informant's credibility. *Id.*

For the basis for knowledge prong, the affidavit must reveal facts that permit the magistrate to determine whether the informant had a basis for his allegation that a certain person committed a crime. *Id.* at 437. This prong is satisfied by showing that the informant obtained the information through firsthand observations. *Id.*

For the "veracity" or credibility prong, the affidavit must contain facts that allow the magistrate to determine the credibility of the informant. *Id.* "The credibility of a confidential informant depends on whether the informant is a private citizen or a professional informant and, if a citizen informant, whether his or her identity is known to the police." *State v. Atchley*, 142 Wn. App. 147, 162, 173 P.3d 323 (2007).

When the police and the magistrate know the identity of the informant, the necessary showing of reliability is relaxed. *Id*. In a situation where the police know the identity of the informant but the magistrate does not, the burden of showing reliability is raised and the affidavit must contain "'background facts to support a reasonable inference that the information is credible and without motive to falsify.'" *Id*. (quoting *Cole*, 128

Wn.2d at 287-88). The credibility prong can be satisfied by showing that the informant has a record of providing accurate information to the police. *Jackson*, 102 Wn.2d at 437.

If either or both of the prongs are not met, probable cause may still be established if an independent police investigation corroborates the informant's tip to such an extent that it supports the missing elements of the *Aguilar-Spinelli* test. *Id.* at 438. The police investigation should point to suspicious acts that indicate criminal activity as suggested by the informant. *Id.* "Merely verifying 'innocuous details,' commonly known facts or easily predictable events should not suffice to remedy a deficiency in either the basis of knowledge or veracity prong." *Id.*

While increased power usage alone is not enough to establish probable cause to support a warrant, it does provide additional evidence that supports the probable cause determination of the magistrate. *State v. Olson*, 73 Wn. App. 348, 356, 869 P.2d 110 (1994).

Here, the affidavit listed several sources of information to support a finding of probable cause. The information provided by the DEA confidential source is of primary importance. First, the DEA confidential source had a basis of knowledge through his firsthand observations of the marijuana grow. The DEA confidential source saw the underground marijuana grow operation and gave a detailed description of Mr. Hull's

sophisticated operation. This description included the location of the trapdoor in the bedroom closet, the number and size of plants, and how Mr. Hull propagated and grew the plants.

Second, the DEA confidential source was credible due to his past history with the DEA. The DEA confidential source previously provided information which led to arrests for narcotics violations. Because the affidavit established the credibility of the DEA confidential source and his firsthand knowledge of the facts, the information provided by the DEA confidential source satisfies both prongs of the *Aguilar-Spinelli* test and supports a finding of probable cause.

Furthermore, the affidavit contained additional information that supported a finding of probable cause. Another informant, the CI, also met the requirements of the *Aguilar-Spinelli* test. The CI personally observed the underground marijuana grow operation and provided Detective Wentworth with specific details that matched the information given by the DEA confidential source. The CI identified the plants as marijuana based on his history with the drug culture and marijuana magazines. The CI had personal observations sufficient to support a basis of knowledge.

As to credibility, the CI was willing to have his or her identity disclosed to the magistrate. However, the record does not support the conclusion that the magistrate knew

the identity of the CI, thereby relaxing the credibility requirement. In any case, the CI provided noninnocuous facts that established his or her credibility, such as Ms. Hull's past history with drug use, the details surrounding the transfer of Ms. Hull's car, Mr. Hull's employer, and the length of time the Hulls lived in their home. Detective Wentworth verified the information through an independent investigation. The information provided by the CI passes both prongs of the *Aguilar-Spinelli* test.

Detective Wentworth also provided corroborating evidence through an investigation into the Hulls' power usage. Two investigations using four comparable homes showed that the Hull residence consumed more power than its neighbors. Also, thermal imaging of the Hull residence did not show any heat differences between the Hull residence and other comparable homes, despite the increased energy usage. Detective Wentworth determined that it was not unusual for underground grow operations to fail to show thermal heat changes. The increased energy usage and thermal imaging corroborates the information that the Hulls maintained an underground grow operation.

Admittedly, the anonymous tips gathered from the marijuana hotline have little credibility and importance when standing alone. However, when considered with the other facts in the case, these tips provide additional evidence to support a finding of probable cause.

The court did not abuse its discretion by determining probable cause existed based on the information from the DEA confidential source, the information from the CI, the increased power usage, and the anonymous tips.

The trial court did not err by denying Mr. Hull's motion to suppress the evidence discovered through the search warrant because the search warrant was supported by probable cause.

Affirmative Defense—Provider of Medical Marijuana. Whether the trial court erred by disallowing a defendant to assert an affirmative defense is a question of law that is reviewed de novo. *State v. Fry*, 168 Wn.2d 1, 11, 228 P.3d 1 (2010).

Under former RCW 69.51A.040(3) (2007), an individual may establish an affirmative defense as a medical marijuana designated provider, if the person

> (a) Meet[s] all criteria for status as a . . . designated provider;
> (b) Possess[es] no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and
> (c) Present[s] his or her valid documentation to any law enforcement official who questions the . . . provider regarding his or her medical use of marijuana.

To be a designated provider, a person must be 18 years or older, be designated in writing by a patient to serve as a designated provider, cannot consume marijuana obtained for the personal medical use of the patient, and serve as the designated provider for one

patient at a time. RCW 69.51A.010(1).

Valid documentation requires a statement signed by a qualifying patient's physician or a copy of the qualifying patient's medical records that, in the physician's professional opinion, the patient may benefit from the medical use of marijuana. Former RCW 69.51A.010(5)(a) (2007).

Generally, a trial court must allow a defendant to present his or her theory of a case if the law and evidence support the theory. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005). "A defendant raising an affirmative defense must offer sufficient admissible evidence to justify using the defense." *State v. McCarty*, 152 Wn. App. 351, 358, 215 P.3d 1036 (2009). The defendant may not use irrelevant or inadmissible evidence. *Ginn*, 128 Wn. App. at 879. Any relevant and admissible evidence must be interpreted in favor of the defendant. *State v. Otis*, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). If the law and evidence support a defendant's theory of the case, the trial court's failure to instruct the jury on the theory results in a reversible error. *Id*.

Under the requirements of the Medical Use of Marijuana Act, chapter 69.51A RCW, a defendant must obtain the required documentation in advance of questioning by law enforcement. *State v. Butler*, 126 Wn. App. 741, 750-51, 109 P.3d 493 (2005). A defendant who fails to present the necessary documentation lacks the proof required to

assert the affirmative defense of medical marijuana. *Id.* at 744 n.2.

Mr. Hull failed to present the evidence needed to qualify for the affirmative defense. Specifically, he failed to present valid documentation to the police. According to the testimony of Detective Wentworth, when officers involved in the search questioned Mr. Hull and asked for his documentation, Mr. Hull responded that he did not have documentation. Mr. Hull failed to abide by the terms of the statute by not presenting documentation to police during questioning. He lacks the proof required to assert the affirmative defense according to RCW 69.51A.040.

Admittedly, Mr. Hull contends that the officers never asked for documentation and he never admitted to the officers that he did not have documentation. But the first time Mr. Hull presented evidence was in March or April 2010, several months after his arrest. Mr. Hull failed to produce the information even when charged with the offense.

Moreover, the documentation presented by Mr. Hull was not valid. According to former RCW 69.51A.010(5), valid documentation included a physician's statement by the qualifying patient's doctor authorizing the patient to use marijuana. The authorization presented by Mr. Hull expired on December 7, 2009. The additional physician's statement that Mr. Hull provided did not take effect until after Mr. Hull's arrest. Because the qualifying patient did not have authorization to use marijuana at the time of Mr.

Hull's arrest, Mr. Hull did not have valid documentation as required by the statute. He fails to provide the evidence needed to qualify for the affirmative defense.

The trial court properly granted the State's motion in limine that prohibited Mr. Hull from presenting the designated provider affirmative defense.

Knowingly Manufacturing Marijuana. Appellate courts review challenged findings of fact for substantial evidence. *Vasquez*, 109 Wn. App. at 318.

RCW 69.50.401(1) states that it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance. Marijuana is a controlled substance. Former RCW 69.50.204(c)(14) (1993).

Although the statutory offense of manufacturing a controlled substance does not have a knowledge element, case law suggests that guilty knowledge is considered a nonstatutory element of the crime. *State v. Warnick*, 121 Wn. App. 737, 742-43, 90 P.3d 1105 (2004). For a defendant to be found guilty of manufacturing a controlled substance, the defendant must know that the substance being manufactured is a controlled substance. *Id.* at 743-45.

Mr. Hull contends that he lacked the nonstatutory knowledge requirement because he did not know he was manufacturing marijuana contrary to law. However, the guilty knowledge requirement relates to the actual offense of growing marijuana. It does not

incorporate the medical marijuana affirmative defense. Mr. Hull admitted that the plants in his possession were marijuana. Mr. Hull knowingly grew an illegal substance. He met the guilty knowledge requirement.

We affirm the conviction.

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, C.J.

WE CONCUR:

Brown, J.

Korsmo, J.