**FILED**
**JUNE 5, 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
DIVISION THREE

| | |
|---|---|
| STATE OF WASHINGTON, Respondent, v. DAVID MICHAEL WHISLER, Appellant. | No. 29821-3-III UNPUBLISHED OPINION |

Korsmo, C.J. — David Whisler challenges the search warrant used to obtain evidence against him and the court's decision to impose a standard range sentence. The warrant was supported by probable cause, and Mr. Whisler has not shown a basis for challenging the standard range sentence. His convictions for possession of marijuana with intent to deliver and second degree unlawful possession of a firearm are affirmed.

FACTS

The investigation into Mr. Whisler's activities began after a citizen contacted a drug detective and reported suspicious activity at Mr. Whisler's home. The informant, dubbed "citizen source (CS 1)"[1] in the affidavit, reported that a large number of cars—up

to 10 per day—would stop at the house for very brief visits and then depart. This activity would occur for a few days and then stop, only to have the pattern recur again a few weeks later. CS 1 described the two occupants and the residence, including a "legalize not penalize"[2] sign in one of the windows, and also told the detective that another person had seen marijuana plants being removed from the residence within the past week.

The detective talked to the second person, denominated CS 2 in the warrant application, who explained that she or he was familiar with marijuana due to "life experience"[3] and had seen several plants removed from the house that week. CS 2 also described the residence and the "legalize not penalize" sign. CS 2 also stated that most of the windows of the house were covered.

The detective determined that the residents of the house were Monte Haughey and David Whisler. Two detectives viewed the house and confirmed the description provided by the two citizen sources. They also noted that most of the windows were covered or boarded up. There were two swamp coolers attached to the residence. One of the vehicles parked at the house was registered to Mr. Haughey. A detective showed photographs of Mr. Haughey and Mr. Whisler to CS 1, who identified the two men as the

[1] Clerk's Papers (CP) at 33.
[2] CP at 33.
[3] CP at 34.

occupants of the house.

The detectives checked with the assessor's office and the public utility district. The suspected residence was 300 square feet smaller than the neighboring residence; it was only one year older. Mr. Haughey was the person listed on the utility district records. A comparison of the power usage records indicated that there was a "dramatic difference"[4] between the two houses, with the smaller residence using much more power. The power differential was as much as five times greater. A colored graph of the power usage for the two residences was included in the search warrant affidavit.

The affidavit explained that the two citizens were members of the community for more than five years, with no known criminal history, who contacted the police because of the suspected narcotics activity. Neither would benefit from reporting to the police. Their identities were known to the detective and they were willing to reveal their identities to the magistrate. The detective also stated that Mr. Whisler had a prior conviction for manufacturing marijuana as well as two drug-related misdemeanors.

The magistrate issued the search warrant. Officers discovered growing marijuana in Mr. Whisler's bedroom, a firearm in his closet, and a substantial amount of packaged marijuana and evidence of sales activity. The trial court subsequently denied a defense

[4] CP at 34.

challenge to the warrant. Mr. Whisler was convicted at trial.

At sentencing, Mr. Whisler argued that he should receive a mitigated exceptional sentence on the basis that some of his criminal history would have washed out of the offender score if he had been discovered a little bit later. The trial court, concerned that the proposed mitigating factor was not in the statutory list, ultimately denied the request for an exceptional sentence. Sentences just below the middle of the standard range sentence were imposed.

Mr. Whisler then timely appealed to this court.

ANALYSIS

This appeal presents a challenge to the search warrant and to the standard range sentence. We will address the arguments in that order.

*Search Warrant.* Probable cause to issue a warrant is established if the supporting affidavit sets forth "facts sufficient for a reasonable person to conclude the defendant probably is involved in criminal activity." *State v. Huft*, 106 Wn.2d 206, 209, 720 P.2d 838 (1986). The affidavit must be tested in a commonsense fashion rather than hypertechnically. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). The existence of probable cause is a legal question which a reviewing court considers de novo. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007). However, "[g]reat deference is

accorded the issuing magistrate's determination of probable cause." *State v. Cord*, 103 Wn.2d 361, 366, 693 P.2d 81 (1985). Even if the propriety of issuing the warrant were debatable, the deference due the magistrate's decision would tip the balance in favor of upholding the warrant. *State v. Jackson*, 102 Wn.2d 432, 446, 688 P.2d 136 (1984). In light of the deference owed the magistrate's decision, the proper question on review is whether the magistrate *could* draw the connection, not whether he or she *should* do so.

Washington continues to apply the former *Aguilar-Spinelli*[5] standards to assess the adequacy of a search warrant affidavit. *Jackson*, 102 Wn.2d at 446.[6] As applied in Washington, probable cause based upon an informant's information requires that an affidavit establish both the informant's reliability and basis of knowledge. *Id.* at 443. Where one or both of those factors is weak, independent police investigation can supply corroboration. *Id.* at 445. A named citizen informant is presumptively reliable. *State v. Wible*, 113 Wn. App. 18, 24, 51 P.3d 830 (2002) (quoting *State v. Northness*, 20 Wn. App. 551, 557-58, 582 P.2d 546 (1978)). An unnamed citizen informant is considered reliable if the record establishes that the information is credible and the informant is without motive to falsify.

---

[5] *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

[6] Federal courts now apply a totality of the circumstances test in evaluating the sufficiency of a search warrant. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

*State v. Cole*, 128 Wn.2d 262, 287-88, 906 P.2d 925 (1995).

Mr. Whisler argues that the affidavit does not establish the reliability of the unnamed citizens and the detectives did not provide sufficient corroborating information to establish probable cause. We disagree.

The initial issue is whether these sources should be treated as named or unnamed citizens. While their names were not used in the affidavit, they were willing to have the detective reveal their names to the magistrate. That fact puts the citizens between the two categories—neither totally named (and hence reliable), nor truly unnamed (due to the offer to reveal). We need not resolve the issue, however, since we conclude that even if treated as unnamed citizens, there was sufficient evidence in the affidavit to establish the reliability of the sources.

When dealing with unnamed citizen informants, courts are concerned with the issue of whether the informant is an anonymous troublemaker or is, rather, a helpful citizen who wishes to retain his or her privacy. *State v. Ibarra*, 61 Wn. App. 695, 699-700, 812 P.2d 114 (1991). Various factors have been considered in drawing the distinction, including whether there is an explanation for the citizen's reason for remaining unidentified; whether there is a motive to fabricate; whether the person might benefit from providing information; whether the affidavit provides a general description

of the citizen's place in the community, including any criminal history; whether the citizen came forward voluntarily; and the informant's stated motives for aiding police. *See, e.g.*, *Cole*, 128 Wn.2d at 288 (general description of citizen in the community, lack of criminal history, came forward voluntarily); *State v. Atchley*, 142 Wn. App. 147, 162-63, 173 P.3d 323 (2007) (motive to aid law enforcement, not profit from reporting, background check unsuspicious); *State v. Dobyns*, 55 Wn. App. 609, 612, 779 P.2d 746 (1989) (general description, lack of criminal history, motivated by interest in justice); *State v. Berlin*, 46 Wn. App. 587, 589, 731 P.2d 548 (1987) (fear of retaliation, lack of criminal history, came forward voluntarily). In each of the four just-noted cases, the information was considered sufficient to permit the magistrate to find the unnamed citizen reliable.

The affidavit here provided similar information about the citizen sources. They were described as local residents for more than five years, were not profiting from providing information, were motivated by a desire to report narcotics activity, and CS 1 had voluntarily contacted law enforcement. While that information may have been sufficient in itself, it was coupled by the offer to disclose their identities. Under these facts, the magistrate could easily have concluded that these people were concerned citizens rather than troublemakers and, thus, were reliable.

The police investigation cemented the issue. The detectives confirmed the descriptions of the residence provided by the sources and also determined the true identities of each man. They discovered that Mr. Whisler had previously been convicted for manufacturing marijuana, a fact that can be considered in the probable cause calculus. *State v. Sterling*, 43 Wn. App. 846, 851, 719 P.2d 1357 (1986). This information corroborated the information provided by the two citizen sources—apparent drug sales activity on a regular basis and observation of marijuana plants being removed from the house.

The final piece of the puzzle was provided by the power usage records. They showed that the smaller Whisler residence was using exceptionally more electricity than the larger adjoining residence. While not sufficient alone to provide probable cause, high power use can provide corroboration of marijuana manufacturing. *Cole*, 128 Wn.2d at 291; *State v. Dice*, 55 Wn. App. 489, 493-94, 778 P.2d 531 (1989); *Sterling*, 43 Wn. App. at 851-52.

The police investigation corroborated the information provided by the citizen sources. Together, the information also provided probable cause to believe that marijuana manufacturing and distribution were taking place at Mr. Whisler's residence. Accordingly, the magistrate did not abuse his discretion in issuing the warrant. The trial

court properly denied the challenge.

*Sentencing.* Mr. Whisler also argues that the trial court erred by not granting him an exceptional sentence below the standard range. He contends that the court did not believe it had discretion to act upon his request. While we agree with his characterization of the record, we also conclude that his theory lacks legal merit.

The general rule is that a standard range sentence cannot be appealed. RCW 9.94A.585(1). Accordingly, when the trial court declines to impose an exceptional sentence, the only available method of attacking that decision is to establish that the trial court failed to do something it was required to do at sentencing. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). A defendant may also challenge the trial court's usage of an impermissible basis for refusing an exceptional sentence. *State v. Garcia-Martinez*, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997).

Recognizing these limitations on his appeal, Mr. Whisler argues that the trial court appeared to believe it could not consider the mitigating factor that the defense was arguing—that his offender score would have been one point lower if the police had discovered the offenses one month later. We agree with Mr. Whisler that the statutory list of mitigating factors is not exclusive and courts can consider potential mitigating factors that are not in the statutory list. *See* RCW 9.94A.535(1) ("The following are

illustrative only and are not intended to be exclusive reasons for exceptional sentences."). To the extent the trial court may have believed otherwise, it erred.

Nonetheless, the court correctly rejected the proffered basis for the exceptional sentence. An exceptional sentence is appropriate when the facts of a case are atypical and result in harm either more or less egregious than the norm. *E.g.*, *State v. Akin*, 77 Wn. App. 575, 892 P.2d 774 (1995) (escape was less egregious than typical, justifying mitigated sentence); *State v. Harmon*, 50 Wn. App. 755, 750 P.2d 664 (1988) (rape was more egregious than typical, justifying aggravated sentence). Factors related to the defendant, as opposed to the offense itself, are not a basis for a mitigated exceptional sentence. *State v. Law*, 154 Wn.2d 85, 101-04, 110 P.3d 717 (2005). Similarly, judicial disagreement with presumptive punishment is not a basis for setting aside an exceptional sentence. *Id.* at 95-96 (citing *State v. Pascal*, 108 Wn.2d 125, 137-38, 736 P.2d 1065 (1987)). The standard ranges reflect the legislative balancing of the purposes of the Sentencing Reform Act of 1981, chapter 9.94A RCW. *Id*. Courts, therefore, may not consider factors already used by the legislature in calculating the sentence range as a basis for an exceptional sentence. *Id.* at 95.

From these basic principles, our court has repeatedly concluded that an offender score, including the absence of criminal history, is not a basis for imposing a mitigated

exceptional sentence. *State v. Ha'mim*, 132 Wn.2d 834, 842-45, 940 P.2d 633 (1997); *Pascal*, 108 Wn.2d at 137. In light of this well-settled law, there is no basis for finding mitigation in the possibility of an offender score soon being one point lower than it currently was. To do so would be to disagree with the legislature over the length of time a prior offense could be counted in the offender score. More importantly, factors relating to the offender's criminal history are not a basis for mitigation. *Ha'mim*, 132 Wn.2d 834; *Pascal*, 108 Wn.2d 125.

Any error in not considering the request for a mitigated sentence was harmless because the asserted basis is not a valid reason to impose an exceptional sentence.

The judgment and sentence are affirmed.

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.

_____
Korsmo, C.J.

WE CONCUR:

_____ _____
Brown, J. Siddoway, J.