IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RANDY REGINALD HARKNESS, Appellant.	No. 36382-8-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Randy Reginald Harkness appeals his conviction for manufacture of a controlled substance, marijuana, arguing that the trial court erred when it denied his motion to suppress evidence seized under a search warrant. He argues that exigent circumstances did not exist to justify the police's initial warrantless entry, which preceded the issuance of a search warrant, and that absent the information gathered during the warrantless search, the search warrant affidavit did not establish probable cause to support the magistrate's decision to issue the search warrant. We affirm.

Facts

In February of 2004, Harkness and his wife lived on property in rural Lewis County located at 343 Halliday Road that included a residence and a detached shop. During the previous year, Harkness had been convicted of manufacturing marijuana after the police executed a search

warrant at the Halliday Road residence and found a marijuana grow operation inside a room in the detached shop. In February of 2004, Harkness was still on active probation with the Washington State Department of Corrections (DOC) regarding his 2003 conviction.

For several months prior to February of 2004, Detective Kevin Engelbertson of the Lewis County Sheriff's Office had developed information that led him to believe Harkness might again be growing marijuana on his property. This information included a report of elevated electricity usage at the property and Engelbertson's observations of excessive heat coming from a vent on the detached shop where the previous grow operation had been found. Engelbertson shared this information about Harkness, as well as unrelated information about other individuals, during a routine meeting with DOC personnel.

DOC subsequently decided to conduct a routine probationary check at Harkness's home. On February 18, 2004, two DOC officers visited Harkness's property and took along as security Lewis County Sheriff's Deputies William Adkisson and Eric Weinreich because police had found firearms on Harkness's property during the 2003 search. The deputies stood by at their vehicles in Harkness's driveway as the DOC officers contacted Harkness and inspected his property. Although the DOC officers found nothing amiss, they could not enter a locked room in the detached shop where the grow operation had been found in 2003. Harkness said that his brother was using the room for storage and had the key but that Harkness could get the key and open the room for the DOC officers within 48 hours. The officers and deputies left the property but the deputies called Harkness's brother, who denied having anything to do with the locked room in the shop. The deputies then contacted Detective Engelbertson, who told them to return to Harkness's property and "freeze the scene" while he tried to obtain a search warrant. Report of

Proceedings (Feb. 18, 2005) at 65. When the deputies returned, they found the gate across the entrance to Harkness's driveway had been locked. The deputies contacted Engelbertson and all agreed that the deputies would wait on the public right-of-way, keep the buildings on Harkness's property under surveillance, and await the warrant.

Soon, however, the deputies observed Harkness come out of the detached shop with an armload of green bushy foliage and walk out of sight around the building. The deputies conferred about what they had seen from different vantage points outside the fence of Harkness's property and agreed that Harkness was taking marijuana out of the building. Believing that Harkness was trying to destroy evidence, the deputies then went over the locked gate and fence and apprehended, handcuffed, and arrested Harkness. After being informed of his *Miranda*[1] rights, Harkness told the deputies that he had thrown the marijuana over the bank. The deputies then called Detective Engelbertson, who arrived, observed the marijuana taken from the shop, talked with Harkness, and then sought a telephonic warrant to search the shop.

Detective Engelbertson called Lewis County Superior Court Judge Brosey and gave a sworn statement in support of his request for a search warrant. The statement included the following specific allegations concerning criminal activity:

> My probable cause is on January 30th, 2003, I applied for and received a search warrant for the outbuilding at 343 Halliday Road, Centralia, Lewis County, Washington, the residence of Randy Harkness, for the manufacture of marijuana. Upon execution of the search warrant, I found approximately 208 marijuana plants, numerous growing lights and a C02 generator and various other evidence used in the manufacture of marijuana. Mr. Harkness was also contacted during the search warrant. Mr. Harkness gave a *taped* statement admitting the marijuana grow was his and he sold the marijuana for approximately $10,000 a crop. During the last several months, I have again been investigating Mr. Harkness for the manufacture of marijuana. I have *subpoenaed* the power records for 343 Halliday

[1] *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> Road and have noticed the power consumption for the building, buildings on the property was again *elevated*. I also have conducted surveillance on the residence and outbuilding and noticed that during times of frost and snow, the ice has been melted around a large industrial vent coming out of the previous grow room. This told me there was an excessive amount of heat coming out of the grow room. Growers use high power lights, grow lights for their grow which creates an excessive amount of heat. On February l8, 2003 (sic 2004) I was contacted by Deputy Weinreich who had told me, who had been to the Halliday Road address with [DOC]. [DOC] had conducted a contact with Mr. Harkness due to his active status from the previous manufacture of marijuana conviction. Deputy Weinreich told me he heard Mr. Harkness tell members of DOC he would not let them search the previous grow room as the door was locked and he did not have a key and his brother had been storing some of his belongings in the room and he had the key. Deputy Weinreich told me Mr. Harkness seemed nervous when being asked about the room. Deputy Weinreich also saw numerous black plastic grow pots next to the outbuilding. I contacted Deputy Weinreich after they had left Mr. Harkness'[s] residence and believed with this current information coupled with the current investigation I was already conducting, I had enough to apply for a search warrant for manufacture of marijuana. Deputy Weinreich also contacted Mr. Harkness'[s] brother by phone and was told by his brother he did not have any belongings in the room and did not have a key to it. I instructed Deputy Weinreich and Atkisson [sic] to contact Mr. Harkness and tell him I was applying for a search warrant as I wanted to freeze the scene for destruction of evidence purposes. When they arrived to [sic] the driveway, Mr. Harkness had put a cable around the gate and had padlocked the entry. [I] instructed them to watch the outbuilding from the road and not to make entry on the property unless they saw Mr. Harkness destroying evidence. As I began applying for the search warrant, I was advised by Deputy Weinreich, they saw Mr. Harkness coming out of the outbuilding, dragging marijuana plants and throwing them over a steep bank. At that time the deputies made contact with Mr. Harkness detaining him. I also contacted Mr. Harkness who had been read his *Miranda* Warnings. Mr. Harkness told me he knew he was in trouble, that he wasn't growing as many marijuana plants as before. He also stated he did have a key to the room and there was a grow in the room. Mr. Harkness then said he would like to talk to a lawyer at which time I did not ask any further questions of Mr. Harkness. I did see the marijuana plants Mr. Harkness had been taking out of the grow room for destruction.

2 Clerk's Papers (CP) at 350-52 (emphasis added).

During Detective Engelbertson's telephonic testimony, Judge Brosey asked whether or not the deputies were on the county right-of-way when they saw Harkness taking the marijuana

plants out of the building and throwing them over the bank. Engelbertson testified that they were.

Based upon Detective Engelbertson's testimony, Judge Brosey authorized a telephonic search warrant of Harkness's detached shop and surrounding area. Executing the warrant, Engelbertson entered the locked room of the shop and found a marijuana grow operation including some 500 marijuana plants in pots and various equipment to facilitate that enterprise.

The State charged Harkness with one count of manufacturing marijuana within 1,000 feet of a school bus stop. Prior to trial, Harkness moved to suppress evidence, including observations made during the DOC officers' entry onto his property, the deputies' observations of Harkness taking plants out of the shop, evidence seized when the deputies entered Harkness's property without a warrant, and evidence seized during the search warrant's execution. Harkness argued that the DOC officers' entry onto his property was a ruse, that when the deputies later observed him leaving his shop carrying plants, they were illegally on his property, that the deputies did not have exigent circumstances sufficient to permit their warrantless entry onto his property, and that Detective Engelbertson's sworn statement supporting the search warrant contained material misrepresentations without which there was no probable cause to issue the search warrant.

In challenging Detective Engelbertson's sworn statement, Harkness also moved for a hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). He argued in part that Engelbertson's statement contained misrepresentations in that the deputies had been intruding on his property when they observed him removing plants from his shop, Engelbertson never took a "taped" statement from Harkness during his prior criminal case, Engelbertson had not "subpoena[ed]" Harkness's power records, Harkness's power records did not show elevated power usage, and the deputies did not claim that the plants they observed

Harkness removing from his shop were marijuana. 2 CP at 345.

The court held a joint *Franks* and CrR 3.6 hearing. After considering testimony from witnesses for both sides, the trial court ruled that Detective Engelbertson had taken an oral statement from Harkness during the prior criminal case rather than a taped statement as he averred, and that Engelbertson had obtained Harkness's power records via another's written request, rather than by subpoena. The court ruled that these inaccuracies should be stricken but that, even so altered, the sworn statement was still sufficient to show probable cause and supported issuance of the search warrant. The trial court otherwise rejected Harkness's contentions, ruling that in the detective's opinion, the power records showed elevated power usage at Harkness's residence and that the detective had the right to rely on the information as provided by the other deputies in seeking the warrant. Thus, the court denied Harkness's motion to suppress.[2]

The case proceeded to a jury trial at which witnesses testified to events as above described. At the end of the State's case in chief, the defense renewed its motion to suppress, arguing that it had found a new witness who would testify that he saw the deputies on Harkness's property during the time they claimed they were on the public right-of-way observing Harkness taking plants out of his shop. Based upon this claim, the judge who had heard the original suppression motion retook the bench and heard testimony from the defense's new witness, as well as two witnesses called by the State. The court again denied the suppression motion, ruling that it

[2] Prior to trial, the defense also gave notice that it would rely on the affirmative defense of medical use of marijuana. The State moved in limine to preclude any evidence on this defense because Harkness could not meet the minimum statutory requirements for asserting such defense and the trial court granted the State's motion. Harkness does not challenge that determination and we do not discuss it further.

was still convinced that the officers were on the public right-of-way when they observed Harkness taking plants out of his shop. Trial resumed and the jury ultimately returned a verdict of guilty.[3] The trial court sentenced Harkness within the standard range.[4] This appeal followed.[5]

Discussion

Harkness contends that the trial court erred in denying his motion to suppress evidence seized during execution of the search warrant. He contends that the warrant was improperly issued because Detective Engelbertson's statement, supporting the probable cause determination upon which the warrant was based, contained materially false statements and illegally obtained information. He contends that when such improper information is excised from the detective's statement, the remaining information is insufficient to establish probable cause, thereby rendering invalid the consequent warrant and ensuing search. We disagree.

Our review of the magistrate's legal determination of probable cause is de novo and is limited to the four corners of the affidavit supporting probable cause. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008); *see also State v. Murray*, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988) ("When adjudging the validity of a search warrant, we consider *only* the information that

[3] The jury did not find that the offense occurred within 1,000 feet of a school bus stop.

[4] Prior to sentencing, the defense moved for dismissal under CrR 8.3, arrest of judgment under CrR 7.4, relief from judgment under CrR 7.8, a new trial under CrR 7.5, and for supplemental discovery. The trial court denied the motions and proceeded to sentencing. Harkness does not challenge that determination and we do not discuss it further.

[5] This case has been subject to considerable delay. When the record remained unperfected, we dismissed Harkness's appeal as abandoned and issued our mandate on March 7, 2008. Harkness subsequently obtained indigent status and successfully moved to recall the mandate and reinstate his appeal. Thereafter, delays ensued in securing the parties' briefing and this court issued multiple orders for supplementation before the record was finally adequate to permit our review.

was brought to the attention of the issuing judge or magistrate at the time the warrant was requested.").[6]

Probable cause exists where the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. *State v. Maddox*, 152 Wn.2d 499, 505-06, 98 P.3d 1199 (2004); *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. *Maddox*, 152 Wn.2d at 505-06. The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. *Maddox*, 152 Wn.2d at 505-06. On review, we evaluate the affidavit supporting the warrant in a commonsense manner, rather than hypertechnically. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003).

Before the trial court, Harkness challenged inaccuracies in Detective Engelbertson's sworn statement to Judge Brosey when the detective sought the telephonic warrant. But the trial court determined that the inaccuracies were not material to the probable cause determination and

[6] A de novo standard of review permits the legal rules of probable cause to "'acquire content'" through appellate scrutiny. *State v. Chamberlin*, 161 Wn.2d 30, 41 n.5, 162 P.3d 389 (2007) (quoting *Ornelas v. United States*, 517 U.S. 690, 697, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)). Such review "ensures that appellate courts remain the expositors of law and ensures the unity of precedent." *Chamberlain*, 161 Wn.2d at 41 n.5; *see also In re Det. of Petersen*, 145 Wn.2d 789, 799-801, 42 P.3d 952 (2002) (clarifying the de novo standard of review as appropriate for review of probable cause determinations).

excising them had no effect on the warrant's validity.[7] Although in his assignments of error Harkness contends that the affidavit contained material false statements and illegally obtained information, he only provides argument regarding the latter issue. Accordingly, we only address the latter issue. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986) (an assignment of error unsupported by argument and without citation to authority is deemed waived); *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (appellate courts need not consider arguments that are not developed in briefs and for which a party cites no authority).

Exigent Circumstances

Harkness argues that the entry of Deputies Adkisson and Weinreich onto his property was illegal and therefore all of the evidence obtained following that entry should be excluded from the affidavit supporting the subsequent search warrant. We disagree.

Absent an exception to the warrant requirement, a warrantless search is impermissible under article I, section 7 of the Washington Constitution. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). Exceptions to the warrant requirement include (1) consent, (2) exigent circumstances, (3) search incident to a valid arrest, (4) inventory searches, (5) plain view, and (6) investigative stops under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *State v. Athan*, 160 Wn.2d 354, 406 n.4, 158 P.3d 27 (2007).

[7] Detective Engelbertson stated to Judge Brosey in part that he had a taped statement from Harkness made at the time of his prior arrest in January 2003, wherein Harkness admitted that he grew marijuana and sold a four-pound crop for $10,000. The detective verified the content of Harkness's admission at the *Franks* hearing but admitted that Harkness's statement was not taped. Engelbertson had also stated to Judge Brosey that he had subpoenaed Harkness's power records and determined that they showed elevated power usage, when in fact the detective obtained the power records by way of a written request by another officer in the detective's unit. In determining the *Franks* motion, the trial court struck these inaccuracies from Engelberton's statement but determined that the inaccuracies were immaterial.

The exigent circumstances doctrine applies to a narrow range of circumstances that present a real danger to the police or the public or a real danger that evidence might be lost. *State v. Counts*, 99 Wn.2d 54, 63, 659 P.2d 1087 (1983). Recognized exigent circumstances are (1) hot pursuit, (2) fleeing suspect, (3) danger to arresting officer or to the public, (4) mobility of a vehicle, and (5) mobility or destruction of evidence. *Counts*, 99 Wn.2d at 60; *see also State v. Welker*, 37 Wn. App. 628, 633, 683 P.2d 1110 (applying exigent circumstances or destruction of evidence exception to warrant requirement), *review denied*, 102 Wn.2d 1006 (1984). In evaluating exigency, factors to be considered include: (1) the gravity of the offense, particularly whether it is violent; (2) whether the suspect is reasonably believed to be armed; (3) whether police have reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) the suspect is likely to escape if not swiftly apprehended; (6) the entry is made peacefully; (7) the police are in hot pursuit; (8) the suspect is fleeing; (9) the officers or public are in danger; (10) the suspect has access to a vehicle; and (11) there is a risk that the police will lose evidence. *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986). Not all factors must be met in order to find exigent circumstances; however, the circumstances must show that the officer needed to act quickly. *State v. Cardenas*, 146 Wn.2d 400, 408, 47 P.3d 127, 57 P.3d 1156 (2002), *cert. denied*, 538 U.S. 912 (2003).

The determination of whether exigent circumstances exist justifying a warrantless search is necessarily tied to the individual facts of each case. *State v. Lynd*, 54 Wn. App. 18, 22, 771 P.2d 770 (1989). Whether a police officer's acts in the face of a perceived emergency were objectively reasonable is a matter to be evaluated in relation to the scene as it reasonably appeared to the officer at the time, not as it may seem to a "'scholar after the event with the benefit of leisured

retrospective analysis.'" *Lynd*, 54 Wn. App. at 22 (quoting *State v. Bakke*, 44 Wn. App. 830, 837, 723 P.2d 534 (1986), *review denied*, 107 Wn.2d 1033 (1987)); *see also United States v. Echegoyen*, 799 F.2d 1271, 1278 (9th Cir. 1986) (exigent circumstances are those circumstances that would cause a reasonable person to believe that entry was necessary to prevent physical harm to the officers and other persons, the destruction of relevant evidence, the escape of the suspects, or some other consequence improperly frustrating legitimate law enforcement efforts). Moreover, whether exigent circumstances existed must be determined by considering the totality of the circumstances. *State v. Carter*, 151 Wn.2d 118, 128, 85 P.3d 887 (2004).

Relying on *State v. Wheless*, 103 Wn. App. 749, 757, 14 P.3d 184 (2000), Harkness argues that the existence of the exigent circumstances warranting the warrantless entry must be "objectively reasonable," but *Wheless* does not assist him. Br. of Appellant at 17. In *Wheless*, the defendant sold drugs to an undercover officer in the parking lot of a local tavern. The officer paid for the drugs with marked currency. After the transaction, the defendant walked to his truck, which was parked in the tavern's parking lot, and got into the driver's seat. Immediately thereafter, a woman left the tavern and got into defendant's truck, stayed for less than a minute, and left. Defendant then got out of his truck and went into the tavern where police arrested him based on the drug sale to the undercover officer. When police did not find the marked currency on the defendant's person, they searched the truck in the parking lot looking for the currency but found only drug paraphernalia, which defendant sought to suppress prior to trial. *Wheless*, 103 Wn. App. at 752-53.

Division One rejected the State's assertion that exigent circumstances (possible destruction or mobility of evidence) justified the search of defendant's truck. "The focus of this exception is the impracticality of obtaining a warrant in time." *Wheless*, 103 Wn. App. at 757. Because no one was in the truck and the defendant was in custody, there was no pressing threat that the evidence, if in the truck, might be moved or destroyed. Thus, there was no justification for not waiting for a warrant. *Wheless*, 103 Wn. App. at 757-58.

By contrast, deputies here observed Harkness taking marijuana plants from the shop and throwing them over an embankment. It reasonably appeared to the deputies at the time and under the circumstances that Harkness was destroying evidence. Harkness contends that what the deputies observed indicates only that he was moving plants and provides no basis for a reasonable conclusion that he was trying to destroy anything. But the deputies observed Harkness throwing leafy green plants down an embankment. The evidence indicates that the plants had been ripped out of the pots in which they had been growing and, once disposed of over the embankment, the discarded plants were difficult to see among other vegetation.[8] We hold that there was sufficient evidence to support the finding that the deputies reasonably believed that evidence was being destroyed and that their entry onto Harkness's property fell within the exigent circumstances exception to the warrant requirement.

Harkness contends that when the evidence obtained by the deputies' entry onto his property is excluded from Detective Engelbertson's affidavit, there was no probable cause to issue the arrest warrant. But as described above, the deputies' entry was not improper and thus the

[8] The record also indicates that one of the deputies observing Harkness's activities from the roadway had executed the search warrant in 2003 that led to Harkness's prior conviction. Through his training and experience, the deputy recognized the green material that Harkness carried from his shop as marijuana.

evidence gained subsequent to that event need not be deleted from the affidavit supporting the search warrant.

Harkness additionally contends, citing *State v. Matlock*, 27 Wn. App. 152, 616 P.2d 684 (1980), that the affidavit is insufficient because it fails to set forth the officers' skill, training, or experience to identify marijuana plants. In so arguing, Harkness focuses on the deputies' expertise in identifying marijuana plants. Aside from the fact that the record shows that the deputies had such expertise, the point of the *Matlock* case is that the officer affiant who identified the marijuana made no showing in the affidavit supporting the search warrant application regarding his ability to so identify marijuana. 27 Wn. App. at 155-56. That is not the case here. The affidavit submitted by Detective Engelbertson included a recitation of his extensive training and job experience at identifying controlled substances including marijuana. Engelbertson also averred that he saw the marijuana plants that Harkness had taken out of the shop and, based on his observation and Harkness's post-*Miranda* admission that he was growing marijuana in the locked room of the shop, Engelberton sought a warrant to search the outbuilding and surrounding property for evidence of a marijuana grow operation. When reviewing the affidavit in support of the application for a search warrant, the magistrate is entitled to draw commonsense inferences from the stated facts. *Maddox*, 152 Wn.2d at 509. It is only the probability of criminal activity and not a prima facie showing of it that governs the determination of probable cause. *Maddox*, 152 Wn.2d at 510. Under these facts, we hold that the affidavit was sufficient to establish probable cause and that the search warrant based thereon was valid.

Affirmed.

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

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

PENOYAR, A.C.J.