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State v. Cunningham Appellant's Brief Dckt. 41167

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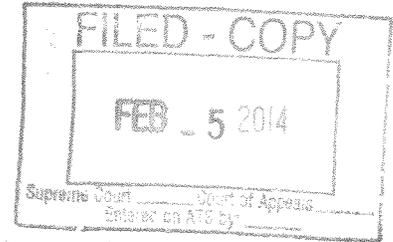
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 **COPY**

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
Plaintiff/Respondent,)
vs.)
)
MICHAEL T. CUNNINGHAM,)
)
Defendant/Appellant.)
_____)

S.C. NO. 41167 -2013



APPELLANT'S BRIEF

**APPEAL FROM THE DISTRICT COURT
OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF BONNER**

HONORABLE JEFF BRUDIE
District Judge

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STATEMENT OF THE CASE

Defendant was charged with possession of paraphernalia and possession of marijuana subsequent to the search of his home pursuant to a search warrant. The magistrate denied his motion to suppress the evidence, and Defendant pleaded guilty, conditional upon appeal. Defendant now appeals to the Supreme Court from the decision of the district court, affirming the magistrate's finding of probable cause.

STATEMENT OF FACTS

In or around January, 2011, Sandpoint Police Detective Beers received a telephone call from Carrie Bomar, complaining that she smelled marijuana in her home, "coming from her attached neighbor's unit". Search Warrant Tr. p. 5, Ll. 4-7. Bomar also claimed that "there was a lot of short-term traffic at her neighbor's house." Search Warrant Tr. p. 12, Ll. 6- 7. An investigation was opened, and Defendant's residence was surveilled, however no traffic was observed coming to and from the residence, and there was no evidence of trafficking. Search Warrant Tr. p.5 Ll. 14-18. Bomar began taking license plate numbers of the alleged traffic but states that she became overwhelmed with the task after recording four plates. Search Warrant Tr. p. 12, Ll. 4-24. Bomar did not live alone, no other resident of the home appears to have been interviewed, however most of the statements appear to originate with her sons. Search Warrant Tr. p. 14, L. 1. All information was obtained from Bomar via email or over the telephone. Search Warrant Tr. p. 6, Ll. 5-8. Bomar was requested to call in the event she smelled the odor again. Search Warrant Tr. p. 5, Ll. 19-20.

On March 30, 2011, at approximately 7:30 p.m., Bomar again reported coming home to the smell of marijuana. Search Warrant Tr. p. 10, Ll. 12-13. Detective Sanger responded to the residence at approximately 9:00 p.m., and confirmed the odor of marijuana in Bomar's home, at the location of her front door, and that there was a heating duct above the door. Search Warrant Tr. p. 11, Ll. 10-12. Sanger

testified that Bomar showed him all the rooms in her house, including the "heating ducts that come in through the ceiling..." Search Warrant Tr. p. 11, Ll. 3-6. Bomar goes on to explain that the vents are, "shared with the attached apartment next door, and that is where she could smell the marijuana." Search Warrant Tr. p. 11, Ll. 5-9. Detective Sanger testified that no odor could be detected in the back room, Search Warrant Tr. p. 11, Ll. 18-19, or anywhere in the house other than by the front door.

Bomar's residence is described as a single-family dwelling. Search Warrant Tr. p. 14, L. 10. Defendant's residence is described as an attached apartment, sharing one back wall. Search Warrant Tr. p. 14, Ll. 19-21. The odor could be detected only near the door at the front of Bomar's home, and the two residences share only the back wall. Supp. Tr. p. 11, Ll. 12-19. Defendant was never observed smoking marijuana, and there is no allegation that any odor was ever detected in or around Defendant's unit, only inside Bomar's residence. During the Application for Search Warrant (3/30/2011), the State provided no evidence of any interview with other residents of Bomar's home including no evidence corroborating whether or not the ducts were in fact connected.

At approximately 9:00 o'clock p.m., the sworn testimony of police detectives Robert Beers and Kit Sanger was offered in support of an application of a search warrant. Search Warrant Tr. p. 2. The magistrate found probable cause and issued a warrant to search Defendant's home. Search Warrant Tr. p. 18.

STANDARD OF REVIEW

When probable cause to issue a search warrant is challenged on appeal, the reviewing court's function is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. Illinois v. Gates, 462 U.S. 213, 238-39 (1983). The test for reviewing the magistrate's action is whether he or she abused his or her discretion in finding that probable cause existed. State v. Holman, 109 Idaho 382,

387, 707 P.2d 493, 498 (Ct. App. 1985). When a search is conducted pursuant to a warrant, the burden of proof is on the defendant to show that the search was invalid. State v. Kelly, 106 Idaho 268, 275, 678 P.2d 60, 67 (Ct. App. 1984). With due regard for the district court's decision, the reviewing court accepts the magistrate's factual findings which are supported by substantial evidence, but freely reviews the application of constitutional principles to the facts as found. State v. Atkinson, 128 Idaho 559, 561, 916 P.2d 1284, 1286 (Ct. App. 1996).

ISSUE PRESENTED

1. **Is the Defendant entitled to suppression of evidence where the application for the search warrant was based upon unsubstantiated witness' statements and there was no nexus between the Defendant's home and the suspected criminal activity?**

BRIEF ANSWER: A search warrant is invalid where there is no nexus between the home of the Defendant and the suspected criminal activity, therefore evidence should be suppressed.

ARGUMENT AND AUTHORITY

1. **Is the Defendant entitled to suppression of evidence where the application for the search warrant was based upon unsubstantiated witness' statements and there was no nexus between the Defendant's home and the suspected criminal activity?**

Under the great weight of authority of both state and federal courts, a search-warrant issued upon "information and belief," unsupported by facts submitted to the magistrate, and based upon the conclusions of the affiant rather than the facts, is illegal, and a search conducted thereunder is unlawful and in violation of the constitutional provisions with relation to searches and seizures. State v.

Arregui, 44 Idaho 43, 254 P. 788 (1927). In order for a search warrant to be valid, it must be supported by probable cause to believe that evidence or fruits of a crime may be found in a particular place. State v. Josephson, 123 Idaho 790, 792-93, 852 P.2d 1387, 1389-90 (1993). When the information provided to the magistrate was largely derived from an informant, the veracity, reliability, and basis of knowledge are "...all highly relevant in determining the value of an informant's report. Illinois v. Gates, 462, U.S. 213, at 230-33 (1983). In order to provide an adequate basis for a determination of probable cause to issue a search warrant, the assertions in the affidavit must establish a sufficient nexus between (1) criminal activity, (2) the thing to be seized, and (3) the place to be searched. State v Sholes, 120 Idaho 639, 818 P.2d 343 (Idaho App. 1991). In *Sholes*, the court had proof that Wilson had personally arranged to have "a substantial quantity of a controlled substance delivered to him at his Morgan Road residence".

In this case, there is no evidence of any criminal activity in the home of the Defendant at all. The smell of marijuana is discovered in the witness' home. Tr.P.5, Ll 22-23. The witness is not the only person who lives in the home, and her thirteen-year-old son is unsupervised before the witness gets home. Tr.P.5, Ll 22-25, p.6, Ll. 1-3. The smell of marijuana was allegedly detected by the witness after the son had been home, or by the son when he is home alone. Tr.P.5, Ll 22-23. The son is the source of most of the accusations against the Defendant. Tr.p..5, Ll. 22-23; p.13, Ll. 15-19. There is no evidence that the son was ever seen or interviewed.

The investigating detective, Sanger, stated that there were vents, or ducts, in the ceiling of the witness' home, and that the witness, "...indicated that the vents, which are the heating ducts that come in through the ceiling, are shared with the attached apartment next door, and that is where she could smell the marijuana." Tr. p. 11, Ll. 5-9. There is no information regarding the "basis of knowledge" of the

construction of the heating ducts and whether or not they are actually connected between the two homes. Other than the informant's statement that she is a prior user of marijuana, there is no information regarding the informant's veracity, and there does not appear to be any prior experience regarding this informant. Tr. p. 11, Ll. 24-25.

The witness alleged that the odor comes from the home next door. Tr. p. 5, Ll. 4-5. The witness alleged that the vents are connected. Tr.p.8, Ll 5-8. This evidence is intended to support the theory that the odor of marijuana emanated from Defendant's home, and came into the home of the witness through the vents. However, Sanger stated that he smelled the odor of marijuana *near* one of the vents, by the front door. Tr. p. 11, Ll. 11-12. He did not state that he smelled the odor coming *from* that vent. The smell could not be detected near any other of the hearing ducts or vents, or anywhere else in the witness' home. The witness' house is a single family residence, and the defendant's house is a later addition. There is no information as to how either of the homes are heated, where the furnace is located, or any evidence of shared heating bills. There is no evidence that the heating ducts of the two homes truly are connected, or that the odor really comes from the house next door.

The facts actually negate the witness' theory; if the odor had in fact been ventilated from Defendant's home, through the circulating heating system, into the home of the witness next door, the smell would necessarily travel to each and every heating vent. It would not have been concentrated in only one location in the witness' home, in proximity to only one of the vents. Sanger stated that he could not smell marijuana anywhere else in the home, including in the one room that shared a door with the Defendant's home: "...I went back to the back bedroom where there was an adjoining wall between her apartment and her neighbor's apartment, and that happens to be her thirteen-year-old son's room, there's a door that they [the witness' home and the Defendant's home] share, however she's placed a blanket over the door to keep the smell out, I was not able to smell any marijuana in that room." Tr. p.11, Ll.12-19. From

this testimony, it appears that the only odor of marijuana that could be detected in the witness' home, was located at the front of the house, while the wall that is shared with Defendant's home is located at the rear of the house.

Much of the testimony in support of the warrant was unsubstantiated hearsay upon hearsay. Detective Beers testified that the witness said that her son said he smelled the odor of marijuana. Tr.p..5, Ll. 22-23. Detective Sanger testified that the witness said her son(s) said that his friends said that marijuana was being sold out of Defendant's home. Tr. p.13, Ll. 15-19. Detective Sanger also testified that the witness said that "...there was a lot of short-term traffic at her neighbor's house." However, when the matter was first investigated by Detective Beers, months earlier, the police did not notice any traffic. Tr. p. 5, Ll. 14-19. The witness gave the police the license plate numbers of four vehicles that she had seen parked in Defendants' driveway, however these were not connected to any known users or dealers. Tr. p.12, Ll. 22- p. 13, Ll. 2

Much of the information stems from statements allegedly made by the witness' son who should have been questioned directly. Where an informant's motive are in doubt, an explicit and detailed description of an alleged wrongdoing, along with firsthand observation, will entitle the informant's information to greater weight that might otherwise be the case. Gates, supra, at 234. Such explicit detail and observation are missing in this case.

In *Chandler*, the search warrant was upheld by the Court of Appeals where informants gained the knowledge reported to police through "direct contact with Chandler, and/or direct observation of drugs at his residence". State v. Chandler, 140 Idaho 760, 762, 101 P.3d 704, 706 (Ct. App. 2004). In *Sholes*, the Court of Appeals found that no nexus had been directly observed between the Defendant's residence and the crime charged, however the Defendant was observed with large amounts of a controlled substance which he picked up at the post office, and the court found that evidence is likely to be found where the

dealers live. Sholes, supra, at 642. The Court of Appeals upheld the magistrate's finding of probable cause supporting issuance of a search warrant in *Rigoulot* as well, where officers followed a trail from a marijuana grow operation, leading directly to the defendant's home. State v. Rigoulot, 123 Idaho 267, 846 P.2d 918 (Idaho App. 1992). Personal observation by a defendant is "one of the strongest possible indications of a basis of knowledge." State v. Vargovich, 113 Idaho 354, 356, 743 P.2d 1007, 1009 (Ct. App. 1987). Such direct observation is absent in the officer's testimony in the present case before the court.

CONCLUSION

The testimony in support of the application for a search warrant of Defendant's home lacked sufficient indicia of reliability, veracity, and basis of knowledge. It did not allege personal observation of the Defendant committing any crime. It did not provide any nexus, or link, between the Defendant and the alleged crime of possession of marijuana. The odor of marijuana was only detected in the house belonging to the witness. The unsubstantiated allegation that the heating ducts or vents were connected between the two homes, was not supported by any independent observation, or by any delineation of a basis of knowledge, and comprised the only allegation linking the Defendant to the crime of which he was accused. Most particularly, the Defendant's principal accuser appears to be a teenage son whose word is taken verbatim by his mother, and whose accusations appear to have been accepted and were repeated in sworn testimony by officers who had never interviewed him.

The alleged probable cause given to the magistrate was that there was an odor of marijuana. The officer testified that he smelled marijuana in the informant's home. The informant's teenage son is familiar with the smell of marijuana and has personal friends whose family members use marijuana. Yet Bromar's son was never interviewed by the detectives. No evidence was presented to the magistrate regarding whether or not the ventilation ducts in fact were connected. No evidence was presented to the magistrate connecting the Defendant to the alleged odor. There was no testimony that the odor of marijuana was

from the vent, no evidence connecting Defendant's home with the smell or the sale of marijuana, and no evidence connecting the Defendant with the crime of possession of marijuana. Therefore, there was no probable cause justifying the issuance of a warrant to search Defendant's home.

WHEREFORE, IT IS PRAYED that the Court reverse the decision of the district court and suppress all evidence seized from Defendant as well as any statements obtained and all other fruits of the search of his home conducted the 30th day of March, 2011.

DATED this 3rd day of February, 2014.


Val Thornton, Attorney for Plaintiff

CERTIFICATION OF MAILING

I hereby certify that a true and correct copy of the foregoing instrument was delivered as indicated this 3rd day of February, 2014, to:

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