

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Amador)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL OLIVER RUSSELL,

Defendant and Appellant.

C048339

(Super. Ct. No.
03CR4750)

Defendant Michael Russell pleaded guilty to violating Health and Safety Code section 11377, subdivision (a) (possession of a controlled substance, psilocybin mushrooms) and to being a convicted felon in possession of ammunition in violation of Penal Code section 12316, subdivision (b)(1).¹ His guilty plea followed an unsuccessful motion to suppress evidence seized at his residence pursuant to a search warrant, and an unsuccessful motion to set aside the information pursuant to section 995.

¹ Further undesignated statutory references are to the Penal Code.

At issue in this case is whether probable cause to issue a search warrant exists where the only facts known to law enforcement are that a suspect is cultivating marijuana legally pursuant to the Compassionate Use Act (Health & Saf. Code, § 11362.5). Defendant claims under these circumstances there was no probable cause to support the search warrant of his residence, and the trial court should have granted his motion to suppress the evidence recovered as a result of the search or should have set aside the information. We agree.

FACTUAL AND PROCEDURAL BACKGROUND

Superior Court Judge, Susan Harlan, issued a search warrant for defendant's residence located at 25452 Highway 88, Pioneer, California. Officer James Wegner submitted the affidavit in support of the warrant. The affidavit related the following pertinent information.

"On July 28, 2003 I was contacted by Amador County Sheriff's Dispatch. I was advised Amador County Code Enforcement was at 25452 Highway 88, Pioneer and had located a cannabis cultivation site.

"I contacted Amador County code Enforcement Officer Scott Meyers via cellular telephone. Meyers told me he was at the premise . . . with the permission of the property owner . . . regarding a septic system problem. Meyers told me the occupants of the property were Michael and Melissa Russell. Meyers told me while at the property he observed six to seven cannabis plants being cultivated Meyers told me the cannabis plants were located in plain view from the front of the residence. Based upon Myer's statement that the cannabis was in plain view, I suspected

the cannabis cultivator may have a doctor's recommendation or prescription to possess cannabis.

"I contacted Amador County Sheriff's Deputy Elgin Bowers and requested he respond to 25452 Highway 88, Pioneer to obtain a description of the premise for a search warrant Deputy Bowers told me he observed a sign attached to the trailer which indicated the cannabis was being cultivated for medicinal purposes. Deputy Bowers said the note indicated the medical recommendation was made by William R. Turnispeed M.D. for Michael O. Russell. Deputy Bowers told me he went to the residence front door to contact the occupants but found no one responded to his knocks at the door

"Next, I telephoned the telephone number listed on medicinal cannabis recommendation for William Turnispeed, The telephone was answered by a female subject whom responded 'doctor's office'. I asked if the office was that of Dr. Turnispeed. She said it was. I asked her if this was the correct telephone number to get a prescription for marijuana. She told me to hold on and a male subject got onto the telephone. The subject identified himself as Dr. Turnispeed. I told Turnispeed I wanted to use cannabis. He asked what my medical situation was which required the use of cannabis. I told him I had a sore back from playing collegiate sports. He asked if I had sought treatment for my back. I told him I went to a chiropractor once several years ago. Turnispeed told me I would have to have sought treatment for the ailment or the 'judge won't buy it'

"I checked the Automated Criminal History System for Michael Oliver Russell The record shows no controlled substance related arrests or convictions. The record does show Russell has two prior

felony convictions, one for 20001 VC [hit and run] on 02-24-1992 in Sacramento County and one for 12021(a)(1) PC [convicted felon in possession of firearm] on 09-27-1996 in Sierra County.

"On Tuesday August 5, 2003 I was conducting aerial reconnaissance of Amador County in effort to locate unlawful cannabis cultivation sites. This was accomplished utilizing a California Army National Guard OH58 helicopter

"At approximately 1100 hours, I directed the pilot to fly the helicopter near the premise at 25452 Highway 88, Pioneer. During this over flight, I observed cannabis being cultivated north west of the residence, adjacent to a vessel

"I have learned based on my training and experience that cannabis is cultivated both indoors and outdoors. I know cannabis can be cultivated indoors year round. I know cannabis cultivated outdoors is generally cultivated between the months of April and October, based upon the local climate. I also know subjects who cultivate cannabis outdoors will frequently start cultivating the cannabis plants indoors, prior to the outdoor cannabis cultivation season,"

The search of defendant's residence resulted in the discovery of ammunition and psilocybin mushrooms. Defendant was not charged with any crime relating to the cultivation or possession of marijuana. The only charges against him were for possession of psilocybin mushrooms and ammunition.

Defendant brought a motion to suppress the evidence found as a result of the search, arguing there was no probable cause for the warrant since the marijuana cultivation was legal. The

trial court denied the motion to suppress. Defendant then brought a motion to set aside the information, arguing the suppression motion should have been granted, and if it had, there would be insufficient evidence to support the charges against him. The trial court denied the motion.

Defendant then pleaded guilty to the charges, and the trial court sentenced him to 16 months in state prison.

DISCUSSION

Defendant argues the trial court erred in denying his motion to suppress the evidence discovered in the search and in later denying his motion to set aside the information. He argues there was no probable cause to support the issuance of the search warrant because his cultivation of marijuana was legal under the Compassionate Use Act (the Act), and there was no evidence he was cultivating marijuana in his house for illegal purposes.

In *People v. Mower* (2002) 28 Cal.4th 457, the Supreme Court explored the nature of the Act. The court rejected Mower's, claim that the Act provided a complete immunity, shielding him from arrest and prosecution and requiring a reversal of his conviction because of the failure of law enforcement officers to conduct an adequate investigation prior to his arrest. (*Id.* at pp. 467-468.) Instead, the court held the Act granted a defendant a limited immunity from prosecution, which allows a defense at trial and permits a motion to set aside an indictment or information prior to trial. (*Id.* at p. 470.)

The court emphasized, however, that law enforcement "must have probable cause before they lawfully may arrest a person for any crime [Citations.] Probable cause depends on all of the surrounding facts [citations], including those that reveal a person's status as a qualified patient or primary caregiver under section 11362.5(d) [of the Act]." (*Id.* at pp. 468-469.) This means that a person's status as a qualified patient under the Act must be considered in determining whether probable cause exists to arrest, or in this case to search.

Probable cause to issue a search warrant must be based on the issuing magistrate's determination that the totality of the circumstances set forth in the affidavit supports "a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238 [76 L.Ed.2d 527, 548].) The duty of the reviewing court "is simply to ensure that the magistrate had a 'substantial basis for . . . [concluding]' that probable cause existed. (*Id.* at pp. 238-239.) The function of probable cause is "to guarantee a substantial probability that the invasions involved in the search will be justified by discovery of offending items. Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched." (Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment* (1961) 28 U.Chi.L.Rev. 664, 687.)

In the present case, there were no facts to indicate defendant was involved in any criminal activity, or that any items related to criminal activity would be found at his residence. The only facts presented by the affidavit related to activity that, by all appearances, was lawful. This was not a case in which law enforcement officers observed the cultivation of marijuana, but had no indication such cultivation was pursuant to the Act. Instead, defendant had clearly posted his status as a qualified patient under the Act, and listed his physician's name and telephone number. Law enforcement officers could have verified defendant's status as a qualified patient with his physician at the time the physician was contacted, but did not. The number of plants observed was no more than reasonable for personal use.² Defendant's prior convictions were unrelated to possession of controlled substances. Since the Act renders possession and cultivation of marijuana noncriminal for a qualified patient (*People v. Mower, supra*, 28 Cal.4th at p. 471), the totality of the circumstances indicated there was no criminal activity occurring on defendant's property.

This case is analogous to *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, in which a search warrant was issued based solely upon two reports from informants that there was "a lot of foot traffic to and from the front door" of the defendant's

² Six marijuana plants were discovered as a result of the search. Shortly after defendant's arrest, the Legislature added Health & Safety Code section 11362.77, which limits to six the number of mature plants a qualified patient may maintain.

apartment, and that the informants believed narcotics sales and prostitution were occurring in the apartment. (*Id.* at pp. 1110, 1112.) On appeal the court held that "[h]eavy foot traffic' does not necessarily engender criminal behavior." (*Id.* at p. 1112.) There were no facts that either informant witnessed any criminal activity. (*Id.* at p. 1113.) The court held that heavy foot traffic could just as likely reflect innocent activity, and that law enforcement had a duty to gather further evidence to corroborate suspicious activity before applying for a search warrant. (*Id.* at p. 1113.)

Here, there was even less indication defendant's actions were criminal. The only evidence set forth in the affidavit was the observance of marijuana plants outside defendant's residence, and defendant had clearly indicated to any observer that the plants were being cultivated lawfully. The affidavits' boiler plate language that, "subjects who cultivate cannabis outdoors will frequently start cultivating the cannabis plants indoors, prior to the outdoor cannabis cultivation season, so the cannabis plants are larger," does not add to the probable cause determination under the facts of this case. The typical actions of an illegal cannabis cultivator are not necessarily the same as those of qualified patients or caregivers cultivating the plants legally. Moreover, the affidavit indicated indoor cultivation usually takes place before the outdoor cultivation season, which lasts from April to October. The search took place in August, during the outdoor cultivation season when there was no reason to suspect indoor cultivation.

Under the circumstances of this case, where the defendant clearly posted his status as a qualified patient in a manner that was susceptible of verification, and the only facts presented by the affidavit were of legal activity occurring on the premises, there was no probable cause to issue the search warrant.

This does not end the matter. In *United States v. Leon* (1984) 468 U.S. 897 [82 L.Ed.2d 677], the United States Supreme Court held that the exclusionary rule does not necessarily bar the use "of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." (*Id.* at p. 900.) However, "[i]f a well-trained officer should reasonably have *known* that the affidavit failed to establish probable cause (and hence that he should not have sought a warrant), exclusion is required under . . . *Leon*, and a court may not rely on the fact that a warrant was issued in assessing objective reasonableness of the officer's conduct in seeking the warrant." (*People v. Camarella* (1991) 54 Cal.3d 592, 596.)

The affidavit in this case lacks any facts to establish probable cause, and reliance on it was unreasonable. No facts indicated defendant was engaged in the unlawful cultivation of marijuana. Even if the law enforcement officers acted in good faith, their actions were not objectively reasonable.

DISPOSITION

The judgment is reversed.

BLEASE, Acting P. J.

We concur:

DAVIS, J.

CANTIL-SAKAUYE, J.

CERTIFIED FOR PUBLICATION

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ORDER OF PUBLICATION

APPEAL from a judgment of the Superior Court of Amador County, Don F. Howard, Judge. Reversed.

Robert Charles Schell, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Carlos A. Martinez, Supervising Deputy Attorney General, Ruth M. Saavedra, Deputy Attorney General, for Plaintiff and Respondent.

BY THE COURT:

The opinion in the above entitled matter filed March 16, 2006, was not certified for publication in the advance sheets and official reports.

For good cause it now appears that the opinion should be published and accordingly, it is ordered that the opinion be

published in the advance sheets and official reports.

(CERTIFIED FOR PUBLICATION.)

For The Court:

BLEASE, Acting P. J.

DAVIS, J.

CANTIL-SAKAUYE, J.