UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RHONDA FIRESTACK-HARVEY, LARRY HARVEY, MICHELLE GREGG, ROLLAND GREGG, and JASON ZUCKER,

Defendants.

No. CR-13-24-FVS

ORDER DENYING THE DEFENDANTS' MOTION TO SUPPRESS BASED UPON DETECTIVE ERDMAN'S ALLEGED FAILURE TO DISCLOSE EXCULPATORY EVIDENCE

THE DEFENDANTS have filed a number of motions. The Court considered their motions at a pretrial conference that was held on April 22 and 23, 2014. This order addresses the defendants' allegation that a state law enforcement officer failed to disclose exculpatory evidence to a state superior court judge when he applied for a search warrant.

BACKGROUND

In 1971, the State of Washington adopted the Uniform Controlled Substances Act, chapter 69.50 RCW. *State v. Reis*, No. 69911-3-I, 2014 WL 1284863, at *2 (March 31, 2014). Since then, marijuana has been a Schedule I controlled substance as a matter of state law. *Reis*, 2014 WL 1284863, at *2 (citing RCW 69.50.204(c)(22)). In 1998, the citizens of the state adopted the Washington State Medical Use of Cannabis Act ("MUCA"), chapter RCW 69.51A, through the initiative

process. *Reis*, 2014 WL 1284863, at *2. As Division I of the Washington Court of Appeals explained in *Reis*, the purpose of the MUCA "was to allow certain individuals suffering from terminal or debilitating medical conditions to use marijuana medicinally." 2014 WL 1284863, at *2 (citing RCW 69.51A.005). In *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010), the supreme court of the State of Washington addressed an issue that had arisen under the then-existing version of the MUCA; namely, "whether a search warrant was supported by probable cause where police officers were informed that marijuana was being grown at a certain residence and smelled marijuana upon arrival but the defendant . . . presented a purported medical authorization form for marijuana." *Reis*, 2014 WL 1284863, at *3 (citing *Fry*, 168 Wn.2d at 5). Mr. Fry argued probable cause was negated by the medical authorization form. A plurality of the Washington supreme court disagreed, concluding the MUCA created an affirmative defense. "'An affirmative defense,'" said the plurality, '"does not per se legalize an activity and does not negate probable cause that a crime has been committed.'" *Reis*, 2014 WL 1284863, at *3 (quoting *Fry*, 168 Wn.2d at 10, 228 P.3d 1). In 2011, the Washington legislature passed amendments to the MUCA. *Id.* However, the governor vetoed a number of provisions. *Id.* at *4. The Washington supreme court has not interpreted the MUCA in light of the governor's veto, nor has the state supreme court indicated whether *Fry* remains authoritative. Two divisions of the state Court of Appeals have issued opinions in that regard. Both divisions agree *Fry* remains authoritative and the 2011 version of the MUCA continues to create what is, in effect, an

affirmative defense to an alleged violation of the state Controlled Substances Act. *Reis*, 2014 WL 1284863, at *7; *State v. Ellis*, --- Wn. App. ----, 315 P.3d 1170, 1173 (2014). As both divisions read *Fry*, the existence of a potential affirmative defense does not negate probable cause. *Reis*, 2014 WL 1284863, at *7; *Ellis*, --- Wn. App. at ----, 315 P.3d at 1173. That being the case, a law enforcement officer who is applying for a search warrant need not rebut the potential applicability of MUCA in order to establish probable cause. *Ellis*, --- Wn. App. at ----, 315 P.3d at 1173-74.

This case arose during 2012, *i.e.*, after the 2011 amendments to the MUCA, but before any Washington appellate court had interpreted the MUCA as amended. On or about July 19, 2012, Stevens County Sheriff's Detective Loren A. Erdman was advised by Anne E. Minden, a Special Agent with the United States Forest Service, that members of the Civil Air Patrol ("CAP") had flown over an area that is located near Colville, Washington. The CAP flight crew observed and photographed plants that they thought were marijuana plants. They submitted their photographs to Agent Minden, who forwarded them to Detective Erdman, who began an investigation. (Erdman Affidavit for Search Warrant at 6-7.)

Detective Erdman studied the photographs that had been taken by the CAP flight crew. He counted approximately 70 marijuana plants in a cleared area. In addition to the plants, he observed, "[w]ater tanks, a pump, hoses, and other equipment[.]" (Erdman Affidavit at 7.) That was not all:

It appeared an overhead power line was installed and ran to

> the grow site from the area of the residence/outbuildings. I also observed what appeared to be a dark haired female in the grow area using a weed trimmer. . . . I could see that the grow was located at the end of a well travelled private road which led directly to a residence and outbuildings.

Id. Based upon what he observed in the photographs, Detective Erdman concluded "[t]he residence and outbuildings appeared to be associated with the grow site." *Id.*

Detective Erdman learned Larry Harvey owns the property that is located 939 Clugston-Onion Creek Road and Rhonda Firestack-Harvey lists that address as her residence. (Erdman Affidavit at 8.) Detective Erdman obtained Ms. Firestack-Harvey's driver's license photo. Although he could not say with certainty that Ms. Firestack-Harvey is the woman whom he observed in the aerial photograph, he thought Ms. Firestack-Harvey's appearance was at least consistent with that of the woman whom he observed. *Id.*

Detective Erdman arranged for Stevens County Sergeant Brad Manke to fly over the area in question on August 8, 2012. (Erdman Affidavit at 9.) Sergeant Manke took at least one photograph of the area. *Id.* Both he and Detective Erdman have been trained to identify marijuana plants. *Id.* at 2-6, 6, and 9. Sergeant Manke concluded the plants he observed were marijuana plants. Detective Erdman agreed. He counted approximately 68 marijuana plants in the photograph that Sergeant Manke took. *Id.*

Detective Erdman was looking for evidence of violations of the state Controlled Substances Act. He knew the reach of the CSA had been curtailed, at least to some extent, by the MUCA. Consequently,

he made at least some effort to ascertain the marijuana growers' motivation:

> I have received no information to suggest that Larry and Rhonda Harvey or any other occupants at that location are alleging medicinal reasons for manufacturing marijuana. Even if that allegation was being presented, the number of marijuana plants clearly visible on an over flight was in excess of the maximum allowed in accordance with the Washington State Medical Use of Marijuana Act (15 plants per authorized person or a maximum of 45 plants with multiple authorizations).

(Erdman Affidavit at 9.)

On August 8, 2012, Detective Erdman submitted an affidavit to a state superior court judge in support of an application for a search warrant. The parties have filed several copies of Detective Erdman's affidavit. *See, e.g.*, Attachment A to ECF No. 203. Based upon the evidence that was set forth in Detective Erdman's affidavit, a state superior court judge issued a warrant authorizing law enforcement officers to search the property and buildings at 939 Clugston-Onion Creek Road. Officers executed the search warrant on August 9, 2012. The defendants challenge the validity of the search warrant.

ISSUE

The defendants suspect Detective Erdman uncovered evidence during his investigation suggesting the persons who were growing marijuana at 939 Clugston-Onion Creek Road were attempting to comply with the terms of the state Medical Use of Cannabis Act. In the defendants' opinion, such evidence would indicate the growers were not violating the state CSA. They maintain Detective Erdman had a duty to disclose such

evidence to the issuing judge. *Franks v. Delaware*, 438 U.S. 154, 171-72, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Had he done so, say the defendants, the judge would have been unable to find probable cause.

ANALYSIS

A. Federal Law Governs

Whether evidence should be excluded from a federal criminal action pursuant to the exclusionary rule is an issue that is controlled by federal law, not state law. *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir.1987). It matters not that the evidence was seized by a state law enforcement officer acting pursuant to a state-issued search warrant. *See, e.g., United States v. Beals*, 698 F.3d 248, 263-64 (6th Cir.2012). The purpose of the federal exclusionary rule "is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. ––––, ----, 131 S.Ct. 2419, 2428, 180 L.Ed.2d 285 (2011). A state law enforcement officer's violation of state law is irrelevant in determining whether his conduct was objectively reasonable under the Fourth Amendment. *See, e.g., Virginia v. Moore*, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008) (hereinafter "*Moore*").

In *Moore*, a state law enforcement officer had probable cause to believe a motorist was driving with a suspended license. While it is a crime to drive with a suspended license in the Commonwealth of Virginia, the Commonwealth does not allow its law enforcement officers to arrest a motorist who commits that crime. Instead, the officer must issue a summons. That is not what happened in *Moore*. There, a state law enforcement officer exceeded the authority he possessed

under Virginia law. Not only did he arrest a motorist who was driving with a suspended license, but also he searched the motorist subsequent to the arrest. During the search, the officer discovered contraband. The Virginia Supreme Court held that since the officer lacked authority under state law to arrest the motorist, the search violated the Fourth Amendment. *Id.* at 167, 128 S.Ct. 1598. The United States Supreme Court reversed. In doing so, the Supreme Court noted it is constitutionally reasonable for an officer to arrest a person who commits a crime in his presence. The Fourth Amendment does not forbid an arrest in such circumstances even though the crime may be a minor one. *Id.* at 171, 128 S.Ct. 1598 (citations omitted). Of course, the Commonwealth of Virginia is free to place restrictions upon its law enforcement officers that are more stringent than the restrictions that are imposed by the Fourth Amendment. *Id.*, 128 S.Ct. 1598 (internal punctuation and citations omitted). However, state law does not "alter the content of the Fourth Amendment." *Id.* at 172, 128 S.Ct. 1598. If a state law enforcement officer seizes evidence in a manner that is reasonable under the Fourth Amendment, a court may not suppress the evidence pursuant to the federal exclusionary rule on the ground the seizure violated state law. *Id.* at 176, 128 S.Ct. 1598.

The Ninth Circuit has applied *Moore* in various contexts. *See, e.g., Martinez-Medina v. Holder*, 673 F.3d 1029, 1036-37 (9th Cir.2011) (a state law enforcement officer's seizure of an illegal alien did not violate the Fourth Amendment even assuming the seizure violated state law); *Edgerly v. City and County of San Francisco*, 599 F.3d 946, 956 and n.14 (9th Cir.2010) (a state law enforcement

officer's arrest of a trespasser did not violate the Fourth Amendment even though custodial arrest was not authorized by state law). Neither *Martinez-Medina* nor *Edgerly* involved a state-issued search warrant. The distinction is immaterial. As the Sixth Circuit observed in *Beals*, "[t]he commonly-held position is that federal, not state, law governs the question of the validity of a state-issued search warrant in a federal criminal proceeding." 698 F.3d at 263 (internal punctuation and citations omitted). The Ninth Circuit had reached the same conclusion in unpublished rulings well before *Moore* was decided. *See, e.g., United States v. Gill*, Nos. 94-30370, 95-30031 and 95-90043, 1996 WL 121739, at *2 (9th Cir. March 19, 1996) (citing *Chavez-Vernaza*, 844 F.2d at 1374).

B. Detective Erdman's Subjective Intent Is Irrelevant

The defendants place great weight upon Detective Erdman's subjective intent. His subjective intent can be discerned from the papers he submitted to the state superior court judge. *See Devenpeck v. Alford*, 543 U.S. 146, 154, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004) ("subjective intent is *always* determined by objective means") (emphasis in original). As the defendants point out, Detective Erdman sought permission from a state superior court judge to search for violations of state law. The defendants argue the constitutionality of Detective Erdman's actions must be assessed in light of his subjective intent. Since he sought permission from a state judge to search for violations of state law, the judge's decision to issue a search warrant can be justified, in the defendants' opinion, only if Detective Erdman's affidavit established probable cause to believe the

cultivation of marijuana at 939 Clugston-Onion Creek Road violated state law. *See United States v. $186,416.00 in U.S. Currency*, 590 F.3d 942, 948 (9th Cir.2010). In other words, according to the defendants, the constitutionality of the judge's decision to issue a search warrant does not depend upon whether it was objectively reasonable in light of all of the facts that were set forth in Detective Erdman's affidavit. Instead, the judge's decision was constitutional only if Detective Erdman's subjective purpose for seeking a search warrant was vindicated by the information he included in his affidavit. The defendants' reliance upon Detective Erdman's subjective intent to challenge the constitutionality of his actions is controversial. The Supreme Court has repeatedly admonished, "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren v. United States*, 517 U.S. 806, 813-14, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Considering the Supreme Court's repeated admonitions in that regard, it seems safe to say Detective Erdman's subjective expectation of what he would accomplish by obtaining a search warrant -- *i.e.*, that he would uncover violations of state law -- is irrelevant in determining the existence of probable cause. *Devenpeck*, 543 U.S. at 153, 125 S.Ct. 588. The issue is whether Detective Erdman's affidavit, viewed objectively, justified the action that the defendants now challenge. *See Ashcroft v. al-Kidd*, 563 U.S. ----, ----, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011). The action in question was the issuance of a search warrant by a judicial officer. The standard is set forth in the Fourth Amendment. "[N]o Warrants shall issue, but upon probable

cause, supported by Oath or affirmation[.]" U.S. Const. amend. IV. The term "probable cause" means "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (hereinafter "*Gates*"). The term "contraband" is commonly understood to include "any property which is unlawful to produce or possess." Black's Law Dictionary 322 (6th ed. 1990).

C. Detective Erdman's Affidavit Established Probable Cause

Detective Erdman's affidavit stated he and Sergeant Manke are qualified to identify marijuana. (Erdman Affidavit at 2-4, 6, and 9.) Sergeant Manke flew over 939 Clugston-Onion Creek Road. *Id.* at 9. He observed growing plants, and he photographed them. *Id.* Detective Erdman spoke to Sergeant Manke, and he examined the photograph Sergeant Manke took. The two law enforcement officers agreed approximately 68 marijuana plants were growing at 939 Clugston-Onion Creek Road. *Id.* When a law enforcement officer submits an affidavit to a judicial officer indicating he has been trained to identify marijuana plants, and when the officer avers he has flown over a particular place and observed plants he believes are marijuana plants, the officer's sworn opinion is sufficient to create probable cause to believe marijuana plants are growing in the place indicated by the officer. *United States v. Burge*, 683 F.3d 829, 832 (7th Cir.2012).[1]

[1]Although *Burge* is a Seventh Circuit decision, there is no reason to think the Ninth Circuit would disagree with its sister circuit. *See, e.g., United States v. Motz*, 936 F.2d 1021, 1024 (9th Cir.1991).

Here, the evidence suggested the plants were part of an organized effort to manufacture marijuana. It is unlawful to manufacture marijuana or possess it with the intent to distribute. 21 U.S.C. §§ 802(6), 812 Schedule I(c)(10), 841(a)(1). Thus, Detective Erdman's affidavit easily established probable cause to believe law enforcement officers would find contraband or evidence of a crime at 939 Clugston-Onion Creek Road. Furthermore, Detective Erdman's affidavit connected the contraband to the buildings that are present at that location. He explained the process of manufacturing marijuana is a long one. (Erdman Affidavit at 5.) Growers need water, power, and tools. *Id.* They frequently hide manufactured marijuana in buildings near the growing plants, and they maintain records of their transactions. *Id.* at 4. Given the information that Detective Erdman provided, the state superior court judge had a substantial basis for determining the persons who were growing the marijuana were using the buildings to support their activities. *Cf. United States v. Dozier*, 844 F.2d 701, 707 (9th Cir.1988) ("In this case, marijuana cultivation is a long-term crime and the affidavit includes an experienced DEA agent's opinion that cultivators often keep the equipment at their residences between growing seasons. The documentary records sought are the type of records typically found to be maintained over long periods of time.").

RULING

Unless the Washington Supreme Court reverses *State v. Ellis*, --- Wn. App. ----, 315 P.3d 1170 (2014), and *State v. Reis*, No. 69911-3-I, 2014 WL 1284863 (March 31, 2014), the Harveys' alleged compliance with

the MUCA would not have negated probable cause to believe they were violating the state CSA. Of course, the state Supreme Court may reverse *Ellis* and *Reis*. The state Supreme Court may decide Detective Erdman had a duty, under state law, to disclose any evidence of which he was aware indicating the Harveys were attempting to comply with the MUCA. Such a ruling on the part of the state Supreme Court would not affect the analysis of Detective Erdman's conduct under the Fourth Amendment. *Moore*, 553 U.S. at 176, 128 S.Ct. 1598. As far as the Fourth Amendment is concerned, the issue is whether Detective Erdman's affidavit provided the state superior court judge with a substantial basis for concluding probable cause existed. *Gates*, 462 U.S. at 238-39, 103 S.Ct. 2317 (internal punctuation and citation omitted). Probable cause means "a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238, 103 S.Ct. 2317. Detective Erdman's subjective expectation that he would uncover violations of state law is irrelevant. *al-Kidd*, 563 U.S. at ----, 131 S.Ct. at 2080. No matter how the Washington Supreme Court interprets the MUCA, manufacturing marijuana is unlawful. 21 U.S.C. §§ 802(6), 812 Schedule I(c)(10), 841(a)(1). In view of the information that is set forth in Detective Erdman's affidavit, the state superior court judge had a substantial basis for concluding contraband or evidence of a crime would be located at 939 Clugston-Onion Creek Road. He did not violate the Fourth Amendment by issuing a warrant to search that location. That conclusion does not depend upon a determination Detective Erdman complied with state law. The search warrant would be valid under the Fourth Amendment even if

Detective Erdman knew on August 8, 2012, but failed to disclose, the Harveys were fulfilling every requirement of the MUCA. Why? Because the limitations the MUCA imposes upon prosecutions that are brought under the state CSA do not apply to prosecutions that are brought under the federal CSA. Consequently, the Harveys' fulfillment of the MUCA's requirements, even if true, is not exculpatory in this context.

IT IS HEREBY ORDERED:

1. Jason Zucker's "Motion to Suppress" (**ECF No. 203**) is **denied**.

2. "[Defendant Michelle Gregg's] Motion . . . to Suppress Evidence" (**ECF No. 213**) is **denied** to the extent it argues the August 8, 2012, search warrant was not supported by probable cause.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

DATED this 28th day of April, 2014.

s/ Fred Van Sickle
Fred Van Sickle
Senior United States District Judge