



DPS TRAINING BULLETIN

LEGAL BULLETIN NO. 215
March 16, 1997

PROBABLE CAUSE FOR SEARCH WARRANTS BASED ON
ANONYMOUS TIP, SENSE OF SMELL, ELECTRICAL USAGE
RECORDS AND NATIONAL GUARD ASSISTANCE

Reference: John Benjamin Wallace, Jr.
v.
State of Alaska

Alaska Court of Appeals
Opinion No. 1514
P.2d
February 28, 1997

FACTS:

Anchorage Police Detective Robinson received a telephone call from an anonymous female, who reported that there was a marijuana-growing operation located at 14201 Specking Road. The caller said, "You can smell the marijuana outside of the building and you can hear fans running inside."

Robinson telephoned the power company and learned that the address is a duplex and that Wallace paid the electric bills. Robinson was informed that the average monthly consumption for one apartment was 3092 kilowatt hours (KWH) and 2557 KWH for the other. Robinson knew from prior investigations that the average consumption for the power company customers was about 700 KWH per month.

Robinson and another officer drove to the Specking Road address. The second officer stayed in the car. Robinson smelled the odor of marijuana when he walked up the driveway. He also heard fans running inside the residence. Robinson rang the doorbell; Wallace answered the door. Robinson asked Wallace if a fictitious person lived there and Wallace said he did not. The smell of marijuana was much stronger when the door was open. When Robinson returned to his police vehicle, the other officer said he could smell the marijuana odor on Robinson's clothing.

A search warrant was issued for the Specking Road residence. When police executed the warrant, they were accompanied by two members of the Alaska National Guard, who assisted them in the search. During the search, police found evidence linking Wallace to a warehouse where they suspected another "grow operation" was taking place. A warrant was obtained for the warehouse and a marijuana-

growing operation was discovered. Nine members of the Alaska National Guard assisted police in executing the search of the warehouse.

ISSUE NO. 1:

Did police need a warrant to obtain electrical usage records from the power company?

HELD: No.

ISSUE NO. 2:

Did the officer commit a trespass when he contacted Wallace at his place of residence?

HELD: No.

ISSUE NO. 3:

May probable cause be established by the sense of smell?

HELD: Yes.

ISSUE NO. 4:

Did police violate the "Posse Comitatus Act" or Federal or State Statutes by using the Alaska National Guard to assist in the executions of the search warrants?

HELD: No.

REASONING:

1. Utility records are maintained by the utility and do not constitute information in which society is prepared to recognize a reasonable expectation of privacy. Wallace had no reasonable expectation of privacy pertaining to his utility records.

2. Robinson approached Wallace's residence via the driveway, a normal means of ingress and egress--see Pistro v. State, Legal Bulletin No. 20.

3. Robinson was not required to be completely candid with Wallace by informing him that he was investigating whether or not Wallace was harboring a marijuana-growing operation. Police have the leeway to conceal the purpose of their investigation to avoid alerting suspects to the fact that they are being investigated.

4. In his affidavit in support of the search warrant, Robinson set out his extensive background in drug enforcement, including participation in serving thirty-five search warrants involving indoor marijuana-growing operations. He smelled the fresh odor of growing marijuana as he approached Wallace's residence and the even stronger smell of marijuana at the opened door. The second officer also smelled marijuana on Robinson's clothing when he returned to the police car--see McClelland v. State, Legal Bulletin No. 212, and McGahan v. State, Legal Bulletin No. 155.

5. When the Guardsmen participated in the search of Wallace's home and warehouse, they were acting as members of the Alaska National Guard and were not in the service of the United States (also known as being "federalized"). (emphasis added)

6. Under constitutional language, the Governor is authorized to use National Guard soldiers to execute the laws.

7. The record in this case sufficiently establishes that the use of National Guard soldiers to aid the police in executing the search warrants was properly authorized.

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