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DPS TRAINING BULLETIN

LEGAL BULLETIN NO. 286
September 9, 2004

MARIJUANA SEARCH WARRANT
MUST ESTABLISH EXCESS OF FOUR OUNCES OR
POSSESSION FOR COMMERCIAL PURPOSES

Reference: State of Alaska
v.
Leo Richardson Crocker Jr.

Alaska Court of Appeals
Opinion No. 1949
_____P.3d_____
August 27, 2004

FACTS:

State Troopers received a tip from an unidentified confidential source that marijuana cultivation was being conducted in a residence. Two officers visited the residence and, from the front door, smelled "a strong odor of growing marijuana." The Troopers had also conducted a check of the utility usage at the residence. The officer who applied for the search warrant asserted that, based on his training and experience, the electricity consumption at the residence was higher than average for a home of its size. Based on these facts, a search warrant was issued. Troopers executed the warrant and seized marijuana plants, harvested marijuana and marijuana-growing equipment.

Upon review, a Superior Court Judge suppressed all of the evidence and dismissed the charges (fourth-degree controlled substance misconduct) against Crocker.

ISSUE:

Was there probable cause to believe this marijuana was being grown for commercial purposes or the amount of marijuana inside the house exceeded the four ounces protected under the Ravin (537 P.2d 494) and Noy (83 P.3d 538) decisions?

HELD: No--not all possession of marijuana is a crime.

REASONING:

1. Evidence that a person possesses an unspecified quantity of marijuana in their home does not, standing alone, establish probable cause to believe the person is breaking the law. Thus, the search and seizure provisions of our State Constitution prohibit the issuance of a search warrant without some additional indication of illegality, such as evidence suggesting that the marijuana is being sold or the amount of marijuana equals or exceeds the statutory ceiling of four ounces.

2. We cannot simply assume that there is a direct proportionality between the strength of the odor (smelled by the officers) and the amount of marijuana giving rise to that odor.

3. Although the officer asserted in his affidavit that the electricity usage at the home was higher than average for a house of its size, the officer did not say how much higher than average this usage was.

4. In several prior decisions, this Court had accepted the premise that the smell of growing marijuana could establish probable cause for a search. In those prior instances, the smell of growing marijuana emanating from a house was persuasive evidence that someone was breaking the law; this is no longer the case. (emphasis added)

NOTES:

Ravin v. State (537 P.2d 494) allowing possession for personal use of marijuana under Alaska's Constitution was decided in 1975. The Noy v. State (83 P.3d 545), which reaffirmed Ravin, was decided in 2003.

Some of the cases that had allowed for probable cause based on smelling marijuana and excess electrical usage included:

McGahan & Seaman v. State, Legal Bulletin No. 155
McClelland v. State, Legal Bulletin No. 212
Wallace v. State, Legal Bulletin No. 215
Michael v. State, Legal Bulletin No. 228

The State Attorney's Office has indicated they will file an appeal on this case to ask the Alaska Supreme Court to reverse the Court of Appeals' decision.

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