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Case No. CR 13-862

Dept. No. 2

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR ESMERALDA COUNTY

THE STATE OF NEVADA,

Plaintiff,

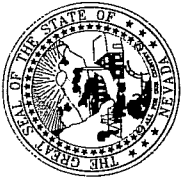
vs.

[REDACTED]

Defendant.

COURT ORDER

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA, MINERAL AND NYE COUNTIES



On July 10, 2013, a preliminary hearing was held in the Esmeralda Justice Court for the Defendant. During the hearing, Defendant objected to the search warrant issued in this case and anything that was recovered pursuant thereto. The Court granted Defendant's objection and did not bind Defendant over to District Court.

On July 31, 2013, the State filed a Motion for Leave of Court to File an Information by Affidavit. On September 18, 2013, Defendant filed an Opposition. A hearing was held on September 24, 2013. This Order follows.

FACTS

On the morning of June 1, 2013, Deputy Matthew Kirkland ("Kirkland") and Deputy Byrum went to the Tonopah Apartments in order to conduct a welfare check on a woman and child. As they ascended the stairs to the apartment, they noticed the smell of marijuana coming from the door and window of the home. Kirkland knocked on the door



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and Defendant responded by asking who it was. Kirkland stated that he was from the Sheriff's Office. Defendant asked Kirkland if he had a search warrant and Kirkland responded that he did not.

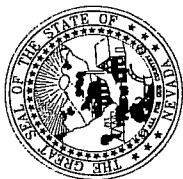
Kirkland then began knocking on the door again, requesting that Defendant open the door. Defendant eventually opened the door about two inches and the smell of marijuana grew stronger. Kirkland asked Defendant to step outside and when Defendant complied, Kirkland entered the apartment, removed four other persons and secured the premises in order to prevent the destructions of evidence.

After the apartment was secured, Kirkland obtained a telephonic warrant. Upon searching the apartment, the deputies found several individually wrapped bags of marijuana, scales, and paraphernalia.

ARGUMENT

In the case at bar, the State stipulates that the police entered Defendant's home without a warrant to remove the people present. The State submits it was lawful to do so due to exigent circumstances, namely that Defendant or others may have destroyed the evidence the officer smelled. The State submits the officers did not do a search and locate the evidence until after they obtained a telephonic search warrant.

The defense argues that the officers violated the Constitution when they entered the home to remove the parties on the basis of preserving evidence, because there were no exigent circumstances. Therefore the evidence should be suppressed and case dismissed.

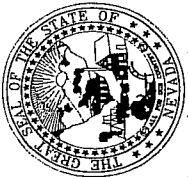


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HOLDING

In Howe v. State, 112 Nev. 458, 916 P.2d 153 (1996), the Nevada Supreme Court held that (1) where a defendant does not consent to a warrantless entry into his home; and (2) exigent circumstances of imminent destruction were not present and could not justify violating a person's federal and state constitutional right to privacy, the evidence must be suppressed. The Fourth Amendment of the United States Constitution and Article 1, Section 18 of the Nevada Constitution guarantee the right to privacy and forbid the government from entering a citizen's home without a search warrant. The exceptions are: (1) consent or (2) when there is probable cause and exigent circumstances. In this case there was no consent; however, there was probable cause, based on the smell of marijuana coming from Defendant's apartment. Thus the Court must determine if there was an exigent circumstance of imminent destruction of evidence.

The Supreme Court of Nevada has provided a five factor test to determine whether the exigency of destruction of evidence exists, namely: (1) the degree of urgency involved and the amount of time necessary to obtain a warrant; (2) reasonable belief that the contraband is about to be removed; (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband and the knowledge "that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic. Id. at 467.



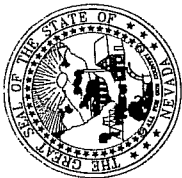
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When considering these factors a court's primary concern is the competing interests of an individual's Constitutional right to privacy and protection from warrantless searches of their home, and the need of law enforcement to prevent the destruction of evidence. With this issue in mind, a court applies the factors provided by the Supreme Court to the case before it and will, in its discretion, determine whether the risk of destruction of evidence actually outweighed the individual's Constitutional rights.

In Howe, the Nevada Supreme Court applied these factors to a case with facts similar to this case and found that there was no exigent circumstance of imminent destruction of evidence and that the warrantless entry of a home by law enforcement was in violation of an individual's right to privacy as guaranteed by the U.S. and Nevada constitutions. Id. at 468. Because the Supreme Court made this determination, this Court has no discretion and is required to also find that the warrantless entrance of Defendant's apartment was unjustified.

In Howe, law enforcement officers went to a defendant's home based on a complaint that the defendant was in possession of marijuana and might be selling it. When the defendant answered the door, the officers could smell marijuana burning and entered the home based on their belief that evidence might be destroyed. Once inside, the officers discovered a plastic baggie of marijuana and other incriminating evidence. Id. at 461-65.

In applying the factors, the Supreme Court found: (1) There was no urgency because the officers had no objectively reasonable belief that the marijuana was actually about to be destroyed. The reasonable inference based on the smell of marijuana was that



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it was being smoked, not burned in larger quantities in order to destroy it; (2) there was no evidence that any of the officers would have been in danger had they guarded the site of the contraband while a search warrant was obtained; and, (3) if the officers truly believed that the information they had that led to the investigation amounted to probable cause, they should have sought a warrant and then no danger of destruction would have existed, because the defendant would have been unaware that he was under suspicion. Id. at 467-468.

This case is similar to Howe as: (1) even though the officers had probable cause based on the smell of marijuana coming from Defendant's apartment; the reasonable inference from the smell was that Defendant was smoking the marijuana as there is nothing to indicate that Defendant was aware of the officers' presence. As such, the situation was not so urgent that a search warrant could not have been obtained beforehand; (2) there is no evidence that the officers would have been in danger while waiting for a warrant, especially given the fact that they were initially present for a routine welfare check; and, (3) if the officers had applied for a search warrant upon smelling the marijuana, no danger of destruction would have existed and Defendant would have been unaware that the officers were preparing to search.

As such, Defendant's rights of privacy and protection from warrantless searches of his home was not outweighed by a need to prevent destruction of evidence, because simply smelling the marijuana does not create an exigent circumstance and the officers could have obtained a warrant prior to notifying Defendant and others in the house of their presence.




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As this case so closely resembles the facts of Howe, this Court must follow the decision of the Supreme Court. Therefore,

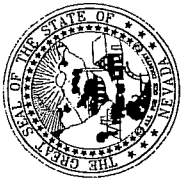
ORDER

IT IS HEREBY ORDERED that the State's Motion for Leave of Court to File an Information is **DENIED**.

DATED this 3rd day of October, 2013.



District Court Judge



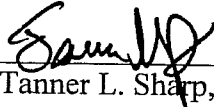
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CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 30 day of October, 2013, he mailed copies of the foregoing Court Order to the following:

ROBERT E. GLENNEN, ESQ.
P.O. BOX 339
GOLDFIELD, NV 89013

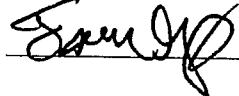
CHRISTOPHER R. ARABIA, ESQ.
601 S. 10TH ST.
LAS VEGAS, NV 89101



Tanner L. Sharp, Esq.
Law Clerk to Judge Robert W. Lane

AFFIRMATION

The undersigned hereby affirms that this Court Order does not contain the social security number of any person.



Tanner L. Sharp, Esq.
Law Clerk to Judge Robert W. Lane