

2002

# Utah v. Robert Barney : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

Brief of Appellee, *Utah v. Barney*, No. 20020031 (Utah Court of Appeals, 2002).

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
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 Plaintiff/Appellee, :  
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 v. : Case No. 20020031-CA  
 :  
 ROBERT BARNEY, :  
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 Defendant/Appellant. :

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BRIEF OF APPELLEE

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APPEAL FROM A CONDITIONAL GUILTY PLEA TO UNLAWFUL  
POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO  
PRODUCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH  
CODE ANN. § 58-37-8(1)(a)(i) (Supp. 2001); IN THE FOURTH  
JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH,  
THE HONORABLE GUY R. BURNINGHAM PRESIDING

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**FILED**  
Utah Court of Appeals

SEP 20 2002

Paulette Stagg  
Clerk of the Court

**FILED**  
UTAH SUPREME COURT

SEP 20 2002

PAT BARTHOLOMEW  
CLERK OF THE COURT

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BRIEF OF APPELLEE  
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**JURISDICTION AND NATURE OF PROCEEDINGS**

This is an appeal from a conditional guilty plea to unlawful possession of a controlled substance with intent to distribute, a third degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(i) (Supp. 2001) in the Fourth Judicial District Court of Utah County, State of Utah, the Honorable Guy R. Burningham presiding. This Court has jurisdiction pursuant to Utah Code Ann. §78-2a-3(2)(e) (1996).

**STATEMENT OF ISSUES PRESENTED ON APPEAL  
AND STANDARDS OF APPELLATE REVIEW**

**Issue No. 1:** Whether the officer's affidavit, when read in a common sense manner, establishes probable cause for issuing a search warrant for defendant's residence.

**Standard of Review:** "Utah appellate courts review an affidavit supporting a magistrate's determination of probable cause for issuance of a search warrant 'in its



entirety and in a common sense fashion,' and accord great deference to the magistrate's decision." *Salt Lake City v. Trujillo*, 854 P.2d 603, 606 (Utah App. 1993) (citing *State v. Thurman*, 846 P.2d 1256, 1260 (Utah 1993)) (additional citations and quotations omitted).

**Issue No. 2:** Whether the officer acted in good faith, reasonably relying on a warrant issued by a neutral and detached magistrate.

**Standard of Review:** An officer's good faith reliance on a defective warrant is subject to de novo review. *See State v. Horton*, 848 P.2d 708, 711 (Utah App.), *cert denied* (Utah 1993).

## **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

## **STATEMENT OF THE CASE**

Defendant was charged by information with unlawful production of a controlled substance in a drug-free zone, a second degree felony, possession or use of a controlled substance in a drug-free zone, and possession or use of drug paraphernalia in a drug-free zone, both class A misdemeanors. R. 1-2. Defendant filed a motion to suppress evidence obtained through a search of his residence. R. 57-75. No testimony was

presented at the hearing on defendant's motion to suppress. R. 146-47. The trial court denied defendant's motion. R. 147:22.

Defendant entered a conditional guilty plea to Count I of the charges, reserving his right to appeal the trial court's denial of his motion to suppress. R. 115-25. Defendant was sentenced to an indeterminate prison term of zero to five years. R. 130-33. That sentence was stayed, however, and defendant was ordered to serve thirty-five days in jail and 36 months probation. *Id.* Defendant timely appeals his conviction. R. 136-37.

### **STATEMENT OF THE FACTS<sup>1</sup>**

On June 23, 2000, armed with a search warrant, Officer Robert Welcker searched defendant's house for illegal contraband. R. 104-06, 111-12. In defendant's basement, police found 14 mature marijuana plants, 25 marijuana seedling plants, numerous marijuana seeds, and apparatus used in growing and harvesting marijuana. R. 104-06. The search also revealed four marijuana pipes, scales, Zig Zag papers, a roach clip, a roach clip pen, two glass snort tubes with heavy white residue, correspondence addressed to defendant and to his girlfriend, Annette Petro, and several weapons with live rounds in their chambers. *Id.*

The night prior to the search, Officer Welcker presented the magistrate, Honorable Fred D. Howard, with a four-page affidavit in support of the search warrant. R. 104-10.

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<sup>1</sup>The facts are recited in a light most favorable to the trial court's ruling denying defendant's motion to suppress. *See State v. Tetmeyer*, 947 P.2d 1157, 1158 (Utah App. 1997).

A copy of that affidavit is included at **Addendum A**. The affidavit contained ten paragraphs which detailed information supplied to Officer Welcker within the past 72 hours by a “reliable confidential informant [CI] who had provided reliable information in the past.” *Id.* This individual had been supplying officers with the Utah County Major Crimes Task Force with reliable information over the past year, and was responsible for recovery of narcotics in several cases. *Id.* In the past, Officer Welcker and the other detectives of the Major Crimes Task Force had proven the CI’s prior information to be true. *Id.* In fact, the CI had never provided misleading or wrong information. *Id.*<sup>2</sup>

The CI gave Officer Welcker defendant’s address and described the residence as a “grayish green,” slat tile single family dwelling facing east and on the west side of State Road 198. *Id.* The CI described the house number as white, made of wood, and displayed on the front porch on an awning support pole. *Id.* Adjacent to the southwest corner of defendant’s house, the CI observed a brown and creme trailer home. *Id.* The CI also noted that defendant’s house is also located across the street from two separate schools where children frequent the nearby playground. *Id.*

The CI told Officer Welcker that he/she had been in defendant’s house within the past 72 hours, mostly during the evening hours. *Id.* During that time, defendant

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<sup>2</sup>In his brief, defendant quotes the prosecutor’s statement in his Supplemental Motion in Opposition to the Defendant’s Motion to Suppress that the CI “was working off charges by working for the police and therefore was not a private citizen[.]” See Br. of Aplt. at 4, 8, 14. However, that fact was not included in Officer Welcker’s affidavit. See R. 86-92, 107-10.

confessed to the CI that he is growing his own marijuana in and around his residence. *Id.* The CI observed a large amount of marijuana inside defendant's residence and witnessed defendant sell a half ounce of the drug for \$120.00. *Id.* The CI recognized the marijuana from hundreds of previous experiences with the drug. *Id.*

The CI also stated that he/she had been with defendant and Petro inside defendant's house within the past thirty days. *Id.* On those occasions, defendant confided in the CI that he was growing marijuana in his house and in a barn to the rear of the house. *Id.* The CI witnessed the "wet and fresh" marijuana inside defendant's residence. *Id.* Defendant also told the CI that he sells a great amount of the drug and that he usually sells it for \$60.00 for one-eighth of an ounce. *Id.* Defendant then attempted to sell some of the drug to the CI. *Id.* During the last three months, the CI made several visits to defendant's house and observed individuals arriving at and leaving defendant's residence in vehicles while transporting marijuana and drug paraphernalia. *Id.*

Additionally, the CI expressed a familiarity with the individuals living in the trailer next to defendant's residence. *Id.* In particular, the CI indicated that those individuals were a party to defendant's criminal acts, and that if they were to notice any police surveillance, the individuals would alert defendant and the officer's safety would be in jeopardy. *Id.*

Based on Officer Welcker's three years of experience and specialized training in investigating narcotics offenses, the officer noted in the affidavit that "persons involved with the distribution of narcotics often have weapons and surveillance equipment to

protect themselves from police and other persons selling drugs in competition with themselves.” *Id.* Given his experience and the CI’s information, the officer requested permission to serve a no-knock warrant during the night-time hours “to allow a window of safety for officers and for children in the area.” *Id.* After reviewing the affidavit, the magistrate granted the officer’s request and issued a warrant to search defendant’s residence. R. 111-12.

### **ARGUMENT SUMMARY**

Officer Welcker’s affidavit established probable cause to search defendant’s house for contraband. When considering a challenge to an affidavit, this Court weighs (1) the type of informant, (2) the detail of the information, and (3) the investigating officer’s corroboration efforts under a totality-of-the-circumstances test.

Here, the affidavit contained information offered by a CI who had consistently provided Officer Welcker and other detectives with accurate information regarding the existence of contraband over the past year, and therefore was proven to be a reliable source of information. The CI’s reliability, veracity, and basis of knowledge are also apparent through his/her personal observation of defendant’s criminal acts, and the understood risk of providing false information to police. Thus, the CI’s veracity, reliability, and basis of knowledge support the magistrate’s finding of probable cause to issue a search warrant.

The information presented in the affidavit is also sufficiently detailed to provide a fair probability that the contraband would be found in the specified place. The affidavit

reveals a great deal about the CI and his/her extensive knowledge of defendant's illegal activities. Moreover, the CI provided sufficient information to indicate that defendant's drug activities were both recent and ongoing. Accordingly, the magistrate had sufficient evidence to raise a fair probability that the contraband was located at defendant's house.

Finally, although Officer Welcker did not make any additional investigative efforts to confirm the CI's information, such efforts were unnecessary to establish probable cause. In *State v. Deluna*, this Court held that where "the opportunity for independent corroboration was limited and the informant['s] tip[ was] reliable, [the officer's] lack of independent investigation does not outweigh the other two factors in [its] analysis." 2001 UT App 401, ¶ 21. Here, the CI indicated that any perceived police investigative efforts would lead to serious safety concerns for police and the public. Given the proven reliability of the CI and the limited opportunity for independent corroboration, the lack of any additional investigative efforts is not fatal to the magistrates finding of probable cause.

Accordingly, in light of the information provided in the affidavit, the magistrate had a substantial basis for determining there was a fair probability that the evidence sought would be found in defendant's house.

## ARGUMENT

### POINT I

#### **THE TOTALITY OF THE CIRCUMSTANCES AND A COMMON-SENSE READING OF OFFICER WELCKER'S AFFIDAVIT SUPPORT A FINDING OF PROBABLE CAUSE TO SEARCH DEFENDANT'S HOUSE**

Defendant claims that the trial court erred in denying his motion to suppress evidence obtained through a search of his house. Br. of Aplt. at 6-15. Specifically, defendant objects to the warrant used to search his house, claiming that the Detective Welcker's affidavit does not support a finding of probable cause. *Id.* Although defendant briefly asserts that the CI's reliability is "at the low end of the [reliability] scale[.]" defendant's main claim is that Officer Welcker's lack of corroboration is fatal to this case. *Id.* Defendant's claims lack merit.

"When issuing a search warrant, a magistrate is required 'simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that the contraband or evidence of a crime will be found in a particular place.'" *State v. White*, 851 P.2d 1195, 1198 (Utah App. 1993 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1985))).

"[Where] a search warrant is challenged on the basis of lacking probable cause for issuance, 'the fourth amendment does not require that the reviewing court conduct a de novo review of the magistrate's probable cause determination.'" *Id.* (citing *State v.*

*Babbell*, 770 P.2d 987, 991 (Utah 1989)). “Instead, the reviewing court is required to give great deference to the magistrate’s determination, and ‘will find the warrant invalid only if the magistrate, given the totality of the circumstances, lacked a substantial basis for determining that probable cause existed.’” *Id.* (quoting *State v. Thurman*, 846 P.2d 1256, 1260 (Utah 1993)).

Where, as in this case, information obtained from an informant is the primary support for the search warrant, an analysis of the totality of the circumstances requires an appellate court to weigh (1) the type of tip or informant involved, (2) whether the informant gave enough detail about the observed criminal activity to support probable cause to search, and (3) whether the police officer’s personal observations confirm the informant’s tip. *See State v. Deluna*, 2001 UT App 401, ¶ 11, 40 P.3d 1136 (citing *Kaysville City v. Mulcahy*, 943 P.2d 231, 235-38 (Utah App.), *cert. denied*, 953 P.2d 449 (Utah 1997)). Accordingly, “the significance of each factor involved in a finding of probable cause differs on a case-by-case basis.” *State v. Singleton*, 854 P.2d 1017, 1020 (Utah App. 1993).

**A. Notwithstanding the CI’s status as a “police informant,” the affidavit clearly establishes his/her veracity, reliability, and basis of knowledge as sufficient to support a finding of probable cause.**

In general, “a police informant . . . ‘is lower on the reliability scale than a citizen-informant’” *State v. McArthur*, 2000 UT App 23, ¶ 31, 996 P.2d 555 (citation omitted).

For this reason, under a totality of the circumstances test, “[w]hen probable cause to search is predicated upon facts supplied by [a police] informant, the ‘informant’s veracity,



reliability, and basis of knowledge' must be evaluated." *Id.* In the instant case, defendant correctly labels the CI as a "police informant," yet ignores strong evidence of the CI's veracity, reliability, and basis of knowledge contained in the affidavit. *See Br. of Aplt. at 6-9.*

***Reliability and veracity.*** Strong evidence of the CI's reliability and veracity is found in the second paragraph of the affidavit, which states:

That within the past 72 hours your affiant has received information from a reliable confidential informant who has provided reliable information in the past. That this reliable confidential informant has supplied officers with the Utah County Major Crimes Task Force with information for the past year. That this informant has been responsible for the recovery of narcotics in several cases. That his information supplied by this informant has always been proven true through independent investigation by myself and other detectives of the Major Crimes Task Force. That this informant has provided information which has proven to be reliable in the past. That this informant has never provided information that has been wrong or misleading. That this informant is not party to this investigation.

R. 107-10. A common-sense reading of that paragraph indicates that Officer Welcker and other detectives have previously worked with the CI, and are therefore extremely familiar with him/her. Where a confidential informant's identity is known to police, that informant is more likely to offer true information out of concern for the possible penalties for providing false information to police. *See St. George City v. Carter*, 945 P.2d 165, 169 (Utah App. 1997) (a tip from an informant who has provided his or her name is "highly reliable because the police may verify the information and it subjects the informant to penalty if the information is false."). Accordingly, the CI's reliability is

further enhanced the fact that he/she revealed the instant information despite the officers' knowledge of his/her identity .

Moreover, “[a]ccording to the affidavit, the informant had previously given truthful information to the police concerning the existence of contraband, an accepted method for establishing and informant’s veracity.” *State v. Bailey*, 675 P.2d 1203, 1206 (Utah 1984) (citing *McCray v. Illinois*, 386 U.S. 300 (1967) (holding that a substantial basis for probable cause of an arrest existed where the informant had a history of giving reliable information to the police)). *See also State v. Hansen*, 732 P.2d 127, 130 (Utah 1987) (reaffirming the holding in *Bailey*). Based on the CI’s history of providing truthful and reliable information to the police over an extended period of time, the magistrate correctly concluded that the CI’s information provided a substantial basis to support a finding of probable cause. *See id.*

In addition to that strong evidence of the CI’s veracity and reliability, the CI’s personal observations of defendant’s criminality also serve to reinforce the CI’s reliability. *See Mulcahy*, 943 P.2d at 236 (“A tip is more reliable if it is apparent that the informant observed the details personally, instead of simply relaying information from a third party.”). Here, the affidavit indicates that the CI personally witnessed defendant growing and selling marijuana. *See* R. 107-10. Thus, “[t]he reliability of the confidential disclosure was also enhanced by the informant’s personal observation of a large quantity of marijuana that was being sold in small quantities.” *Hansen*, 732 P.2d at 130.<sup>3</sup>

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<sup>3</sup>Defendant claims that the CI’s reliability was negatively affected by the fact that he/she was “working off charges by working for the police[.]” *See* Br. of Aplt. at 8, 14.

***Basis of knowledge.*** “Courts have consistently approved the issuance of search warrants where the informant’s knowledge is based on personal observation.” *State v. Purser*, 828P.2d 515 (Utah App. 1992). As mentioned above, the affidavit clearly states the basis of the CI’s knowledge was his/her first hand observation of defendant’s criminality. *See* R. 107-10. Specifically, the affidavit indicates that during the past three months, the CI had been to defendant’s house and interacted with defendant on numerous occasions. *See id.* In fact, the CI was so familiar with defendant that he/she was able to describe in detail defendant’s house, his shed, his barn, his female companion, his visitors and their vehicles, his hours of operation, the trailer parked next to his house, and its occupants. *See id.* While spending time with defendant, the CI observed “wet and fresh” marijuana inside defendant’s house. *See id.* The CI also saw defendant sell marijuana on

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However, that fact was not presented to the magistrate in the affidavit, and is therefore, not relevant to a determination of probable cause. *See* R. 107-10. In the event that defendant is alleging bad faith under *Franks v. Delaware*, 438 U.S. 154 (1978), his claim fails. Because defendant failed to preserve this issue in the trial court his claim cannot be considered by this Court. *See State v. Carter*, 707 P.2d 656, 660 (Utah 1985) (“[W]here a defendant fails to assert a particular ground for suppressing unlawfully obtained evidence in the trial court, an appellate court will not consider that ground on appeal.”). Additionally, defendant’s claim is inappropriate where he has failed to adequately brief the issue. *See Utah R.App. P. 24(a)(9)* (“The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on.”). Furthermore, even when considering the omitted information together with the information contained in the affidavit, the CI’s proven reliability overcomes the fact that he/she was working off charges for the police. *See State v. Lee*, 863 P.2d 49 (Utah App. 1993), (under the *Franks* doctrine a defendant must show that with the information inserted, the affidavit does not support probable cause).

several occasions. *See id.* Indeed, on one occasion defendant attempted to sell some of the drugs to the CI. *See id.* Defendant even admitted to the CI that he grows the drugs in and around his house and that he sells “a lot of marijuana.” *See id.* Most importantly, the CI had witnessed marijuana in defendant’s house and in his shed within 72 hours of speaking with Detective McCarthy. *See id.* Accordingly, the CI’s “information, relied upon by police, was not some remote hearsay or assumption based on circumstantial events. The statement that the drug and its sale were personally observed in defendant’s [house] adequately sets forth the informant’s basis of knowledge.” *Hansen*, 732 P.2d at 130. *See also Singleton*, 854 P.2d at 1020 (finding an informant who had previously purchased drugs from the defendant to be reliable based on her personal observation and knowledge of the defendant’s criminal acts).

**B. The substantial detail offered by the reliable CI establishes a fair probability that the contraband would be found at defendant’s house.**

Although defendant acknowledges the three *Mulcahy* factors, his analysis ignores the second factor: “whether ‘the informant gave enough detail about the observed criminal activity to support [a finding of probable cause to search].’” *Deluna*, 2001UT App 401, ¶ 19 (citing *Mulcahy*, 943 P.2d at 236). The detail is sufficient where it provides “a fair probability that the contraband or evidence of a crime will be found in a particular place.” *White*, 851 P.2d at 1198. *See also United States v. Feliz*, 182 F.3d 82, 87 (1st Cir. 1999) (In determining whether there is probable cause to believe that evidence of a crime will be found at the subject premises, “[t]here is no requirement that

the belief be shown to be necessarily correct or more likely true than false.”) (citing *Spinelli v. United States*, 393 U.S. 410, 419 (1963) (holding that “only the probability, and not a prima facie showing” is required)).

Here, the CI told Officer Welcker that he/she had been in defendant’s house within the past 72 hours, mostly during the evening hours. *See* R. 107-10. During that time, defendant confessed to the CI that he was growing his own marijuana in and around his residence. *See id.* The CI observed a large amount of marijuana inside defendant’s residence and witnessed defendant sell a half ounce of the drug for \$120.00. *See id.* The CI recognized the marijuana from hundreds of previous experiences with the drug. *See id.* Thus, in light of the short period of time between the CI’s personal observation of the drugs and the point at which he/she provided the information to Officer Welcker, it is reasonable to believe that the contraband would be found at defendant’s house. *See United States v. Dill*, 693 F.2d 1012, 1014 (10th Cir. 1982) (“Probable cause for a search warrant is nothing more than a reasonable belief that the evidence sought is located at the place indicated by the [officer’s] affidavit.”) (quoted with approval in *State v. Brooks*, 849 P.2d 640 (Utah App.), *cert. denied*, 860 P.2d 943 (Utah 1993)).

The detail offered by the CI also suggested the continuing nature of defendant’s criminal activities at his residence. *See State v. Anderton*, 668 P.2d 1258 (Utah 1983) (affirming a finding of probable cause where a common-sense reading of the affidavit suggested the continuing nature of the drug’s presence). The CI told Officer Welcker that he/she had been with defendant and his female companion inside defendant’s house

within the past thirty days. *Id.* On those occasions, defendant confided in the CI that he was growing marijuana in his house and in a barn to the rear of the house. *Id.* The CI witnessed the “wet and fresh” marijuana inside defendant’s residence. *Id.* Defendant also told the CI that he sells a great amount of the drug and that he usually sells it for \$60.00 for one-eighth of an ounce. *Id.* Defendant then attempted to sell some of the drug to the CI. *Id.* Additionally, the CI indicated that during the last three months, he/she had made several visits to defendant’s house and observed individuals arriving at and leaving defendant’s residence in vehicles while transporting marijuana and drug paraphernalia. *Id.* Accordingly, “[i]n applying a common-sense interpretation, the affidavit presented a substantial basis . . . for the magistrate to conclude that with sufficient probability, some quantity of the illegal drug would still be found in the [house during the search].”

*Hansen*, 732 P.2d at 131.

**C. Where the CI was shown to be reliable and the opportunity for police investigation was severely limited, Officer Welcker’s lack of corroboration is not fatal to this case.**

Defendant’s primary claim is that Officer Welcker’s lack of corroboration is fatal to a finding of probable cause. *See* Br. of Aplt. at 9-15. In support of his claim, defendant cites various cases which recognized independent police investigation in confirming the reliability of an informant’s information. *See id.* However, defendant’s claim is refuted by this Court’s recent controlling precedent.

In *State v. Deluna*, this Court held that where “the opportunity for independent corroboration was limited and the informants’ tips were reliable, [the officer’s] lack of

independent investigation does not outweigh the other two factors in [its] analysis.” 2001 UT App 401, ¶ 21. There, an officer obtained a warrant to search Deluna’s apartment based on tips from a confidential informant and his niece regarding the defendant’s meth production. *Id.* at ¶ 2-4. The officer developed little or no corroboration. *See id.* at ¶¶ 20-21. The only independent investigation he performed was to search Deluna’s criminal record. *Id.* at ¶ 20.<sup>4</sup> In analyzing the officer’s lack of corroborative efforts, this Court held that although the officer could have corroborated the informants’ information, his failure to do so was not fatal to the warrant. *Id.* at ¶ 20 (citing *State v. Markus*, 478 N.W.2d 405, 408 (Iowa App. 1991) (cited in *Mulcahy*, 943 P.2d at 236 for the proposition that corroboration of the inculpatory details of a tip is not mandatory)). In its reasoning, this Court noted that the officer was prevented from observing the illegal activity occurring inside defendant’s apartment and was therefore unable to confirm the material facts as described by the informants. *Id.* Accordingly, the Court found that where the opportunity for independent investigation was limited and the tips were extremely reliable, no additional corroboration was necessary. *Id.* at ¶¶ 21.<sup>5</sup>

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<sup>4</sup>Interestingly, in *State v. Vigh*, this Court reaffirmed its holding that “criminal histories are not properly part of probable cause determinations . . .” *Vigh*, 871 P.2d at 1033 (citing *State v. Brooks* 849 P.2d 640, 644 (Utah App.) *cert. denied*, 860 P.2d 943 (Utah 1993)). Perhaps it was for that reason that the *Deluna* court did not honor the officer’s criminal history search as a legitimate corroborative effort. *See Deluna*, 2001 UT App 401, ¶ 20.

<sup>5</sup>This Court’s holding in *Deluna* is in harmony with Utah Supreme Court precedent. In *State v. Hansen*, the supreme court upheld a search warrant based on a tip from a previously reliable police informant in which the only police corroboration was

Here, as in *Deluna*, the opportunity for independent corroboration was extremely limited. Clearly, the police could not enter defendant's house, shed, or barn to observe his production of marijuana, and coincidentally, they could not confirm that the material facts were as described by the CI. More importantly, however, the police were prevented from monitoring defendant's house and activities by legitimate safety concerns. The CI told Officer Welcker that the individuals living in the trailer next to defendant were a party to defendant's illegal activities, and were vigilant in watching for and informing defendant of any perceived police activity. *See* R. 107-10. Based on this information and on his experience as a trained narcotics officer, Officer Welcker knew "that persons involved with the distribution of narcotics often have weapons and surveillance equipment to protect themselves from police[.]" *Id. See Gates*, 462 U.S. at 241 ("[P]robable cause deals 'with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (Citation omitted)). Given the legitimate concern for police safety as outlined in his affidavit, Officer Welcker's opportunity for corroboration was limited.

Any investigative efforts were also hampered by a legitimate concern for public safety. The affidavit indicates that any corroboration by police would present a clear risk to public safety. *See* R. 107-10. According to the affidavit, two schools with

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the officer's memory of the defendant's prior drug violations. *Hansen*, 732 P.2d at 129-32.



playgrounds are located across the street from defendant's house. *See id.* Based on the location of those schools, Officer Welcker requested a nighttime warrant to "afford a safer environment for children in the area attending these [sic] schools or frequenting the school playgrounds." *Id.* In the likely event that police investigative efforts were discovered by defendant, a possible gun battle could have erupted, placing the nearby children at risk. Given that and other possible scenarios, this Court has held that independent police corroborative efforts are only required where there is no risk to public safety. *See State v. Valenzuela*, 2001 UT App 332, ¶ 30 n. 8, 37 P.3d 260 ("Absent a risk to public safety, we expect police officers to make significant independent corroborative efforts to confirm information from a tip.").

Furthermore, "[w]here the reliability of the information is increased, less corroboration is necessary." *Mulcahy*, 943 P.2d at 236 (citation omitted) (alteration in original). As noted in Section A. above, the tip here was extremely reliable because it involved the personal observations of defendant's drug operations by an informant who was known to Officer Welcker and who had previously provided him and other officers with truthful and reliable information on various occasions throughout the past year. Accordingly, where Officer Welcker's "opportunity for independent corroboration was limited and the informant[s] tip[ was] reliable, [Officer Welcker's] lack of independent investigation does not outweigh the other two [*Mulcahy*] factors[.]" *Deluna*, 2001 UT App 401, ¶ 21.

\* \* \*

In sum, given “the Fourth Amendment’s strong preference for searches conducted pursuant to a warrant,” *Gates*, 462 U.S. at 236 (quotations omitted), when all of the significant facts set forth in the affidavit are viewed together in a common sense fashion, the magistrate had a substantial basis for determining there was “a fair probability that the contraband . . . [would] be found [at defendant’s home].” *White*, 851 P.2d at 1198 (citations omitted). Thus, the trial court correctly held that the affidavit established the requisite probable cause to issue a search warrant, and appropriately denied defendant’s motion to suppress the warrant.

## **POINT II**

### **NOTWITHSTANDING THE VALIDITY OF THE SEARCH WARRANT, OFFICER WELCKER ACTED IN GOOD FAITH, REASONABLY RELYING ON A WARRANT ISSUED BY A DETACHED AND NEUTRAL MAGISTRATE**

Even if this court holds that the warrant was defective, it should nevertheless affirm on the alternative ground that the police officer acted in good faith. See *State v. Moreno*, 910 P.2d 1245, 1247 n.1 (Utah Ct. App. 1996), *cert. denied*, 916 P.2d 909 (1996) (“[T]his [C]ourt may affirm the trial court’s decision on any proper ground.”).

In cases where a search warrant is found to be unlawful, the exclusionary rule requires suppression of the evidence obtained through the use of the defective warrant. See *State v. Fixel*, 744 P.2d 1366, 1368-69 (Utah 1987). However, in *United States v. Leon*, 468 U.S. 897 (1984), the United States Supreme Court articulated a “good faith”

exception to the suppression remedy of the exclusionary rule. Under that exception, if an officer relies in good faith on a search warrant that is later deemed to be unlawful, the evidence obtained in connection with the warrant need not be suppressed. *See Leon*, 468 U.S. at 922. Accordingly, “there is a presumption that when an officer relies upon a warrant, the officer is acting in good faith.” *State v. Horton*, 848 P.2d 708, 711 (Utah App.), *cert. denied*, 857 P.2d 948 (Utah 1993)

“*Leon* describes four scenarios in which the exclusionary rule applies and good faith cannot be found: (1) the issuing magistrate is misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) the issuing magistrate wholly abandons his judicial role and fails to perform his neutral and detached function; (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; (4) the warrant is so facially deficient that it failed to particularize the place to be searched or the things to be seized, that the executing officer cannot presume it to be valid.” *Id.* (citing *Leon*, 468 U.S. at 923). None of those scenarios apply here.

Notwithstanding the validity of the instant search warrant, Officer Welcker acted in good faith, reasonably relying on a warrant issued by a detached and neutral magistrate. No evidence suggests that Officer Welcker knew the CI’s information to be false, or that the officer recklessly disregarded the truth. *See R. 107-10*. Indeed, the officer expressly indicated that the CI’s previous information had always proven to be true and reliable. *See id.* Therefore, where Officer Welcker had no reason to disbelieve

the CI, the officer could not have either intentionally or recklessly misled the magistrate.

Additionally, no evidence suggests that the magistrate wholly abandoned his judicial role and failed to act in to perform his neutral and detached function, or that the warrant was so facially deficient that it failed to particularize the place to be searched or the items to be seized. *See* R. 107-12. In fact, the warrant was extremely detailed as to the place to be searched and the items to be seized. *See id.* (describing in detail defendant's house, his shed, his barn, his visitors' vehicles, and the trailer parked next to his house, in addition to each of the particular items to be seized).

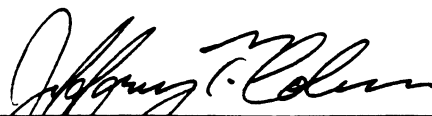
Finally, the affidavit was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. As explained in Point I, the affidavit contains four pages of information based on the detailed and recent personal observations of a CI who had been proven to be truthful and reliable over the past year. *See* R. 107-10. Thus, the affidavit was much more than a "bare bones" affidavit, and was certainly not "devoid of facts." *See Leon*, 468 U.S. at 926 (where a warrant provides sufficient evidence to create disagreement as to the existence of probable cause and is supported by much more than a "bare bones" affidavit, an officer's reliance upon the warrant is objectively reasonable); *United States v. Cook*, 854 F.2d 371 (10<sup>th</sup> Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989) (affidavit was not so "devoid of facts" so as to negate good faith, even though it failed to establish probable cause). Accordingly, even if this Court finds the instant warrant to be defective, the officer's good faith reliance on that warrant prevents the exclusionary rule from applying to this case.

## CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court affirm the trial court's denial of defendant's motion to suppress.

Dated this 20<sup>th</sup> day of September, 2002.

MARK L. SHURTLEFF  
Utah Attorney General



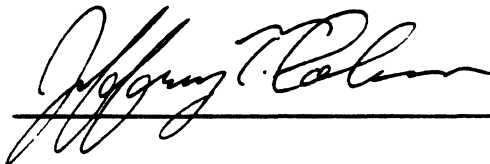
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JEFFREY T. COLEMERE  
Assistant Attorney General  
Attorneys for Appellee

## CERTIFICATE OF SERVICE

I hereby certify that on the 20<sup>th</sup> day of September, 2002, I served two copies of the attached Brief of Appellee upon the defendant/appellant, ROBERT BARNEY, by causing the same to be [ ] hand delivered [ ☒ ] mailed, via first class mail, postage prepaid, to his counsel of record, as follows:

MARGARET P. LINDSAY  
Aldrich, Nelson, Weight & Esplin  
43 East 200 North  
P.O. Box "L"  
Provo, Utah 84603-0200



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## **ADDENDUM A**

KAY BRYSON  
UTAH COUNTY ATTORNEY  
100 E. CENTER, SUITE 2100  
PROVO, UTAH  
PHONE: (801) 370-8026

FOURTH CIRCUIT COURT, STATE OF UTAH  
UTAH COUNTY

00 JUL -5 PM 1:33  
FILED  
Fourth Judicial District Court  
of Utah County, State of Utah  
10/12/01 TK Deputy

-----  
STATE OF UTAH :  
Plaintiff, : AFFIDAVIT IN SUPPORT OF  
-vs- : A SEARCH WARRANT

NARCOTICS INVESTIGATION : Criminal No.  
1136 South State Road 198  
Payson, Utah 84651

Defendants :

-----  
STATE OF UTAH )  
: ss.  
COUNTY OF UTAH )

Comes now Robert Welcker, having been duly sworn, who deposes and states as follows:

1. I am a police officer for the city of American Fork, I have been a peace officer since 1994. That I am a graduate of the Utah Police Academy (POST) and have received specialized training for law enforcement work including training specific to narcotics work. I am currently assigned to the Utah County Major Crime Task I have been investigating narcotics since 1998. I am certified as a clandestine lab first responder. I have work several hundred narcotic cases and I have worked with dozens of confidential informants.
2. That within the past 72 hours your affiant has received information from a reliable confidential informant who has provided reliable information in the past. That this reliable confidential informant has supplied officers with the Utah County Major Crimes Task Force with information for the past year. That this informant has been responsible for the recovery of narcotics in several cases. That this information supplied by this informant has always been proven true through independent investigations by myself and other

detectives of the Major Crimes Task Force. That this informant has provided information which has proven to be reliable in the past. That this informant has never provided information that has been wrong or misleading. That this informant is not party to this investigation.

3. That this reliable confidential informant told your affiant that within the past 72 hours the informant was at the residence located at 1136 South State Road #198 Payson, Utah. That while at the residence the informant did observe a substance known to the informant as marijuana inside the residence. That the informant has had hundreds of experiences with marijuana and knows the substance well. That the marijuana was located in the residence and in a shed near the house. That the informant did tell your affiant that the owners of the residence, Robert Barney and Annette Petro are distributing marijuana from the residence. That within the past 72 hours the informant did observe Robert Barney sell a quantity of approximately  $\frac{1}{2}$  ounce to an individual for approximately 120 dollars. That Robert Barney did tell the informant that he is growing his own marijuana in and around the residence. That this informant knows Robert Barney and Annette Petro to live in the residence at 1136 South SR #198.
4. That within the past 30 days the reliable confidential informant was inside the residence with Annette Petro and Robert Barney. That while in the house Robert Barney did tell your informant that he is growing marijuana in his house and in a barn to the rear of the house. That Robert Barney did tell your informant that he sells a lot of marijuana and that he usually gets \$60.00 per  $\frac{1}{8}$  ounce sold. That your informant did observe marijuana in the residence and that it was very wet and fresh. That Robert Barney did attempt to sell a quantity of marijuana to the confidential informant.
5. That this informant stated that the informant has been at the residence several times in the past three months when individuals arriving to and leaving the residence in vehicles were transporting marijuana and paraphernalia and that individuals at the residence have marijuana and paraphernalia secreted on their persons. That failure to search persons at and arriving to the residence during the execution of this warrant as well as vehicles associated with people present or arriving to the address of 20 north 100 west #6 American Fork, Utah will result in officers missing valuable evidence pertinent to this investigation.
6. That the informant told your affiant that the subjects living in a



trailer next to the residence are party to the subjects living in the residence at 1136 south SR #198 . That if notice of intent is given that officers safety will be at risk due to the subjects living in the trailer next to the residence may alert the persons living at 1136 south SR#198. That the residence is located across the street from Two separate schools located directly east of the residence located at 1136 south SR #198. That serving this warrant in the nighttime hours will afford a safer environment for children in the area attending these schools or frequenting the school playgrounds. Therefore your affiant respectfully request permission to serve this warrant during the nighttime hours and without intent or authority to allow a window of safety for officers and for children in the area.

7. That the amount of narcotics observed in the residence is an amount large enough for distribution but small enough to be easily secreted, destroyed, damaged or otherwise altered if notice of intent or authority is given. That the amount of narcotics observed can also be secreted, destroyed, damaged or otherwise altered if notice of intent or authority is given. That the informant observed the illegal activity occurring mostly during the evening hours. That it is your affiants experience that persons involved with the distribution of narcotics often have weapons and surveillance equipment to protect themselves from police and other persons selling drugs in competition with themselves.
8. That this informant has provided information which has proven to be reliable in the past. That this informant has never provided information that has been wrong or misleading. That this informant is not party to this investigation.
9. Your affiant believes that failure to search the residence, outbuilding, curtilage, and persons and vehicles of individuals present and arriving to the residence of 1136 south SR# 198 Payson, Utah will result in officers missing valuable evidence pertinent to this investigation. Your affiant expects to locate the following items, marijuana, paraphernalia, buy-owe sheets, cash, packaging material, scales, items used for the ingestion or cultivation of the above mentioned narcotics and other items associated with the use/distribution of controlled substances and related paraphernalia.
10. The residence is more particularly described as single family dwelling facing to the east and is on the west side of State Road

#198. That the residence is grayish green in color and the outside of the house is made of a slat tile. The house is the second house south of 1070 south on the west side of SR #198. That there is a brown and creme trailer parked to the rear of the house near the south , west corner. The house number 1136 is displayed on the front porch on a awning support pole and the numbers are made of wood, white in color.

Wherefore, your affiant requests that a warrant be issued by this court authorizing a search of the residence, together with the curtilage, outbuildings, and persons and vehicles of individuals present and arriving to the residence of 1136 South SR#198 Payson, Utah for the following items, narcotics, marijuana, paraphernalia, buy-owe sheets, electronic equipment, cash, packaging material, scales, items used for the ingestion or the cultivation of the above mentioned narcotics and other items associated with the use/distribution of controlled substances and related paraphernalia.

Dated this 22<sup>nd</sup> day of June 2000 <sup>8:27</sup> P.M.

  
AFFIANT-ROBERT WELCKER

Subscribed and sworn before me on the 22<sup>nd</sup> day of  
June 2000, 8:27, P.M.

  
MAGISTRATE

KAY BRYSON  
UTAH COUNTY ATTORNEY  
100 EAST CENTER, SUITE 2100  
PROVO, UTAH 84601  
PHONE: (801) 370-8026

00 JUL -5 PM 1:33

FOURTH CIRCUIT COURT, STATE OF UTAH  
UTAH COUNTY

FILED  
Fourth Judicial District Court  
of Utah County, State of Utah  
10/12/01 TR Deputy

-----  
STATE OF UTAH,  
Plaintiff,

vs.

: SEARCH WARRANT

NARCOTICS INVESTIGATION  
1136 South State Road 198  
Payson, Utah 84651

: Criminal No. 001403161

Defendants  
-----

THE STATE OF UTAH TO ANY PEACE OFFICER OF THE STATE OF UTAH:

Magistrate's  
Endorsement

It has been established by oath or  
affirmation made or submitted to me this  
22<sup>nd</sup> day of June 2000, that there is probable  
cause to believe the following:

LSA

1. The property described below:

was unlawfully acquired or unlawfully possessed;

has been used or is possessed for the purpose of being  
used to commit or conceal the commission of an offense;  
or

is evidence of illegal conduct.

LSA

2. The property described below is most probably located at  
the premises also set forth below.

LSA

3. The person or entity in possession of the property is a  
party to the alleged illegal conduct.

LSA

4. That this warrant may be served without notice of prior  
intent or authority due to the fact that items sought  
may be easily secreted, disposed of, destroyed or  
otherwise altered if notice of intent or authority is  
given. That execution of this warrant without notice of  
intent or authority will afford officers a window of

safety while securing the residence.

NOW, THEREFORE, YOU AND EACH OF YOU, are hereby directed to search the residence as more particularly described as single family dwelling facing to the east and is on the west side of State Road #198. That the residence is grayish green in color and the outside of the house is made of a slat tile. The house is the second house south of 1070 south on the west side of SR #198. That there is a brown and creme trailer parked to the rear of the house near the south , west corner. The house number 1136 is displayed on the front porch on a awning support pole and the numbers are made of wood, white in color.

That you are also hereby directed to search the residence together with the curtilage, outbuildings, and persons and vehicles of individuals present and arriving to the residence of 1136 South SR #198 Payson, Utah for the following items, narcotics, marijuana, paraphernalia, buy-owe sheets, electronic equipment, cash, packaging material, scales, items used for the ingestion and cultivation of the above mentioned narcotics and other items associated with the use/distribution of controlled substances and related paraphernalia.

IF YOU FIND THE DESCRIBED PROPERTY, you are directed to bring the property forthwith before me at the above Court or to hold the same in your possession pending further order of this court. You are instructed to leave a receipt for the property with the person in whose possession the property is found or at the premises where the property was located. After execution of the warrant you shall promptly make a verified return of the warrant to me together with a written inventory of any property seized identifying the place where the property is being held.

ACM

THIS WARRANT MAY BE SERVED DURING THE NIGHT TIME HOURS.

ACM

THIS WARRANT MAY BE SERVED WITHOUT NOTICE OF PRIOR INTENT OR AUTHORITY.

THIS WARRANT MUST BE SERVED WITHIN TEN (10) DAYS FROM THE DATE OF ISSUANCE.

DATED this 22nd day of June 2000, 8:27 P. M.

[Signature]  
MAGISTRATE



## SEARCH WARRANT RETURN

STATE OF UTAH       )  
                                  ) ss  
COUNTY OF UTAH    )

00 JUL -5 PM 1:33

FILED

Fourth Judicial District Court  
of Utah County, State of Utah

10/12/01 TK


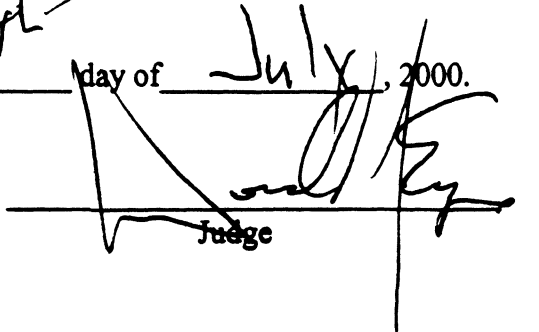
Deputy

INVENTORY OF PROPERTY TAKEN FROM THE RESIDENCE OF ~~ROBERT BARNEY~~  
AND ANNETTE PETRO HALES, 1136 South Hwy 198, Payson, Utah, June 23, 2000, by  
authority of within SEARCH WARRANT, issued by JUDGE HOWARD, District Court Judge  
of Utah, 2000.

- 
1.     Wooden marijuana pipe
  2.     Marijuana plant, 1' tall
  3.     Marijuana plant, 2' tall, with buds
  4.     Marijuana plant, 1' tall, no buds
  5.     Marijuana plant, 2' tall, several buds
  6.     Marijuana plant, 2' tall, several buds
  7.     Marijuana plant, 3' tall, several buds
  8.     Marijuana plant, 2' tall, several buds
  9.     Marijuana plant, 10" tall, no buds, in 8" diameter pot
  10.    Marijuana plant, 12" tall, no buds
  11.    Marijuana plant, 2" tall, no buds
  12.    Marijuana plant, 10" tall, no buds
  13.    Marijuana plant, 2" tall, no buds
  14.    Two marijuana plants, 2" tall, no buds, in white flat
  15.    Black flat containing 25 seedling plants, ranging from 0 to 3" tall
  16.    Black flat

17. Brillo solar flourescent tube
18. 4.4 grams marijuana buds, + test
19. Yellow vial holder with two vials in root hormone
20. Two white high pressure sodium grow lights
21. 4' flourescent tube light
22. Four gallon bottles of distilled water
23. Miracle Grow plant food
24. Intermatic Rain Tight outdoor timer
25. Honeywell fan
26. 25 pound bottle of carbon dioxide with gauge
27. Drawer containing numerous marijuana stems and seeds
28. Small bag of marijuana seeds
29. Tanita digital scale
30. Two glass snort tubes with heavy white residue
31. Correspondence to Robert Barney
32. Correspondence to Annette Hales
33. Bowl
34. Zig Zag papers, three marijuana pipes, one roach, one roach clip pen, & two pink dishes
35. Correspondence to Annette Hales
36. Springfield, model 82, .22 caliber, long rifle
37. Winchester M-94, 30-30 caliber rifle, serial # 1886223
38. 30-30 rifle and gun belt with 30-30 rounds inside

I, DETECTIVE DET. ROBERT WELCKER, the police officer by whom this warrant was executed, do swear that I have served the warrant and the above inventory contains a true and detailed statement of all property taken by me on the said warrant.

  
SUBSCRIBED and sworn to before me this 5<sup>th</sup> day of July, 2000.  
  
Judge