

# Court says fly-over didn't warrant raid

By CYNTHIA TANK  
The Columbian

Clark County Superior Court Judge John Skimas was right to throw out the evidence — including 28 marijuana plants — in a 1983 marijuana fly-over case, the state Court of Appeals has ruled.

The court upheld Skimas' ruling that a police officer who flies over an area and spots what he thinks is marijuana does not have probable cause for a search warrant unless he has more information.

The case involved Michael McDonald, 20, charged with possessing marijuana. Clark County sheriff's deputies and a Washington State Patrol detective flew over McDonald's La Center home after receiving an anonymous tip that marijuana was being cultivated in a greenhouse behind the barn.

The WSP detective, Donald Morrison, had specialized in marijuana fly-overs across the state. He told Skimas he saw the greenhouse and what he believed to be marijuana plants pushing their way out of its plastic roof.

Morrison's suspicion, plus the anonymous tip, provided the basis for the search warrant, signed by Clark County District Court Judge Robert Moilanen. Police raided the La Center home and seized 28 marijuana plants from the greenhouse.

Skimas ruled the search warrant was based on insufficient facts. The Court of Appeals agreed.

Morrison stated it was his expert opinion that there was marijuana on the premises. (In fact, some plants growing outside the greenhouse — also identified by Morrison as marijuana — turned out to be sunflowers.)

"Mere suspicion, belief and

guess are not enough," the court said. Had the anonymous tip come instead from a reliable informant, probable cause might have existed, the court said.

"The officer's suspicions that led to the formation of his 'expert opinion' are not sufficient to establish probable cause," said the court.

The state Supreme Court in 1984 ruled that the so-called fly-overs are legal and are not unreasonable invasions of privacy. That 1984 ruling, however, "did not dispense with the necessity of obtaining a subsequent warrant," the appeals court noted.

At the time Skimas heard the case, defense attorneys Tom Phelan and Steve Thayer expressed serious doubt that anyone could identify the plants in a covered greenhouse from 1,000 feet up.

Phelan Wednesday said the ruling upholds a citizen's constitutional rights. Without that ruling, he said, "If I had a grudge against a pal who had a greenhouse full of tomato plants, I could write an anonymous letter, get the police to do a fly-over and get a warrant, and have his house raided."

Phelan said the opinion "ensures that even with the growth of technology, the timeless requirements of the constitution still need to be met" before law enforcement can invade someone's home.

"This case is a reaffirmation of our commitment to protect the right to liberty and privacy guaranteed to all of us by our state and federal constitutions," said Thayer.

In a 5-4 opinion last week, the U.S. Supreme Court said aerial searches for marijuana are not invasions of privacy.