

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 17, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2015AP291-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2013CM2365

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL TAWAN SMITH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
JAMES P. DALEY, Judge. *Affirmed.*

¶1 LUNDSTEN, J.¹ Daniel Smith appeals the circuit court's judgment convicting him of possession of cocaine, possession of THC, and unlawfully

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2013-14 version.

carrying a concealed weapon. The issue is whether there was probable cause to support Smith's arrest. I agree with the circuit court and the State that there was, and affirm.

¶2 At a suppression hearing, the sole witness was an officer involved in Smith's September 6, 2013 arrest. The officer testified that, on that date, police executed a search warrant for a residence associated with Smith at 1223 1/2 Bluff Street in Beloit. A copy of the warrant affidavit, completed by the same officer on the same date, served as additional evidence at the suppression hearing.

¶3 According to the officer's testimony and the search warrant affidavit:

- Police had received "4 separate pieces of intelligence" that Smith was selling prescription pills and marijuana.
- In the prior 72 hours, police had received information from a "reliable" confidential informant that Smith was selling marijuana and cocaine from his address along the 1200 block of Bluff Street in Beloit.
- On September 3, 2013, police conducted an operation in which they recovered a trash bag from the boulevard area in front of 1223 Bluff Street.
- The trash bag contained a medical billing statement addressed to Daniel T. Smith at 1223 1/2 Bluff Street in Beloit, Wisconsin, and another billing statement addressed to a second individual at the same address.
- The trash bag also contained a small quantity of marijuana stems and "roach cigarettes."
- A field test on a sample of one of the marijuana stems yielded a positive result for the presence of THC.

¶4 The officer testified that, as police were preparing to execute the search warrant, the officer observed a vehicle registered to Smith leaving the

1223 1/2 Bluff Street residence. The officer followed the vehicle and stopped it approximately two blocks, or three-tenths of a mile, away from the Bluff Street residence. The driver and sole occupant of the vehicle was identified as Smith. The officer testified that the police “got [Smith] out of the vehicle,” placed him in handcuffs, and informed him that they were executing a search warrant at the Bluff Street address. The police searched Smith’s person and vehicle and found marijuana and other incriminating evidence.

¶5 The State acknowledged at the suppression hearing that the United States Supreme Court’s decision in *Bailey v. United States*, 133 S. Ct. 1031 (2013), limited police authority to conduct detentions as an incident to the execution of a search warrant. In *Bailey*, the Court held that such detentions are limited to “the immediate vicinity” of the searched premises. *Id.* at 1042. The State argued, instead, that the police had probable cause to arrest Smith, thus putting them in a lawful position to stop, arrest, and search Smith and his vehicle. The circuit court agreed with the State.

¶6 On appeal, Smith challenges the circuit court’s conclusion that there was probable cause to arrest. I agree with the circuit court and the State that probable cause to arrest was present.²

¶7 “There is probable cause to arrest ‘when the totality of the circumstances within that officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a

² The parties dispute whether Smith was already under arrest, or only temporarily detained, when Smith made an admission to the police that he possessed marijuana, thus providing probable cause to arrest if it did not already exist. I assume, without deciding, that Smith was under arrest before he made the admission.

crime.” *State v. Sykes*, 2005 WI 48, ¶18, 279 Wis. 2d 742, 695 N.W.2d 277 (quoted source omitted). “The objective facts before the police officer need only lead to the conclusion that guilt is more than a possibility.” *Id.* (quoted source omitted). Whether a given set of facts satisfies the constitutional standard for probable cause to arrest is a question of law for de novo review. See *State v. McAttee*, 2001 WI App 262, ¶8, 248 Wis. 2d 865, 637 N.W.2d 774.

¶8 Applying these common sense standards, I agree that there was, at a minimum, probable cause to believe that Smith *possessed* marijuana. To begin, the police had recent information from an informant that they thought was reliable that Smith was selling marijuana from an address on the 1200 block of Bluff Street. And, by examining the trash bag contents obtained from the boulevard area in front of 1223 Bluff Street, police reasonably connected Smith to the 1223 1/2 Bluff Street address and obtained evidence of the presence of at least a small amount of marijuana at that location in recent days. In addition, Smith had just left the 1223 1/2 Bluff Street location, further confirming his connection to that address and, therefore, to marijuana. Finally, the police had additional “intelligence” that Smith was selling prescription pills and marijuana.³

¶9 Smith complains that the record lacks information to show that the confidential informant was reliable. As I understand it, Smith’s point is that the information police received from the informant adds nothing to the probable cause analysis. I disagree.

³ The State agrees with Smith that the search warrant affidavit’s reference to “4 separate pieces of intelligence” adds little if anything to the probable cause determination. I agree that the value is marginal, but conclude that this information adds at least slightly to the totality of the circumstances supporting probable cause.

¶10 It is true, as Smith argues, that a police officer’s mere *assertion* of a confidential informant’s reliability is not enough. See *State v. Romero*, 2009 WI 32, ¶¶22-23, 317 Wis. 2d 12, 765 N.W.2d 756. However, an informant’s reliability may be demonstrated by independent corroboration of the information the informant provides. *Id.*, ¶21. Here, there is some corroboration prior to the stop and arrest of Smith because the items police found in the trash bag plausibly supported the informant’s claim that Smith was selling marijuana from Smith’s residence on the 1200 block of Bluff Street. Thus, contrary to Smith’s argument, the information police received from the informant contributes to probable cause.

¶11 Smith also argues that the “illegal act” in this case—by which Smith apparently means possession of marijuana—is too “temporally” and “spatially” remote from any connection to Smith. Smith asserts that the presence of a small amount of marijuana in a trash bag, found 72 hours earlier, is insufficient to link him to a crime. I again disagree.

¶12 As to temporal remoteness, Smith suggests no good reason why evidence that he possessed marijuana a few days before his arrest is too remote in time. As to spatial remoteness, Smith’s more specific argument is that other individuals, such as visitors or the other person whose information police found in the trash, could have possessed the marijuana stems and “roach cigarettes” found there. That is a possibility, but an inference that is at least as likely under the circumstances is that Smith possessed them.

¶13 For the reasons stated above, the judgment is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

