COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2000

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3660-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PETER J. PRONOLD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Peter J. Pronold has appealed from a judgment convicting him of five counts of misconduct in public office in violation of WIS. STAT. § 946.12(5) (1997-98). He challenges the trial court's denial of his motion to suppress evidence seized pursuant to a search warrant and several subpoenas.

We conclude that the trial court properly denied Pronold's motion and affirm the judgment of conviction.

¶2 Pronold was previously employed as the superintendent of the city of Waukesha waste water treatment plant. On August 16, 1995, a search warrant was executed, authorizing the search of Pronold's office, including his desk, filing cabinets, and computer data bases, hard drives and discs. Pursuant to the search warrant, various documents and files, Pronold's signature stamp, and the hard drive from his computer were seized.

¶3 Pronold moved to suppress the seized material, contending that the search warrant was not supported by probable cause.[1] When an appellant contends that a warrant was not supported by probable cause, our focus is not on the trial court's decision granting or denying the suppression motion, but on the issuing magistrate's determination that the application for the warrant stated probable cause. *See* ***State v. Ward***, 222 Wis. 2d 311, 318, 588 N.W.2d 645 (Ct. App. 1998), *review granted,* 225 Wis. 2d 487, 594 N.W.2d 382 (Wis. Apr. 6, 1999) (No. 97-2008-CR). The burden is on the person challenging the warrant to demonstrate that the evidence before the issuing magistrate was clearly insufficient. *See* ***State v. DeSmidt***, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990). We pay great deference to the magistrate's decision, rather than reviewing the matter de novo. *See* ***id.***

[1] In his brief on appeal, Pronold argues that he has standing to challenge the search of his office. However, since the State has not objected to his standing in its brief on appeal, and since we conclude that suppression was properly denied regardless of the merits of the standing issue, we will not address the matter further.

¶4 We are confined to the record that was before the issuing magistrate. *See* ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). Probable cause exists if the issuing magistrate is "apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." ***State v. Starke***, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978). The totality of the circumstances must be considered. *See* ***DeSmidt***, 155 Wis. 2d at 131. Probable cause is a flexible, commonsense measure of the plausibility of particular conclusions about human behavior, not a technical or legalistic concept susceptible of stringently mechanical definitions. *See* ***Ward***, 222 Wis. 2d at 319. All that is required is that the issuing magistrate make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit …, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***DeSmidt***, 155 Wis. 2d at 131 (quoting ***Illinois v. Gates***, 462 U.S. 213, 238 (1983)).

¶5 Our duty as the reviewing court is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *See* ***id.*** at 133. "The quantum of evidence necessary to establish probable cause to issue a search warrant is less than that required to support bindover for trial at the preliminary examination." ***Higginbotham***, 162 Wis. 2d at 989. Resolution of doubtful or marginal cases regarding an issuing magistrate's determination of probable cause must be largely determined by the strong preference that law enforcement officers conduct their searches pursuant to a warrant. *See* ***id.***

¶6 Applying these standards, we conclude that the warrant to search Pronold's office was properly issued. The affidavit supporting the warrant was

signed by a detective investigating allegations of wrongdoing at the waste water treatment plant. The affidavit related that Pronold was the waste water superintendent. It stated that Wendy Wilson, who worked under the supervision of Pronold for two years, reported that on April 24, 1995, she observed a number of manifests in the center drawer of Pronold's desk. The affidavit explained that manifests are documents prepared by haulers who deposit waste water with the city of Waukesha waste water treatment plant. The affidavit indicated that the manifests state the name of the hauler or trucking company, the date of the deposit, and relate to an inventory number which is connected to a sample of the waste material being deposited. The affidavit set forth Wilson's statement that Pronold was the person who took possession of manifests after they were deposited in a locked mailbox by haulers, that he would enter the information into the computer to record the waste deposit, and that he would then give the manifests to Wilson for filing.

¶7 According to Wilson, the manifests found in the drawer were suspicious because they were not entered in the computer for billing. Wilson stated that at the end of the month Pronold would run a summary of billing, which she would compare to the filed manifests. Wilson stated that the billing summary must match the manifests to ensure accurate billing, but that the May 1, 1995 billing summary matched only the manifests Pronold had given her and did not include the manifests in his desk.

¶8 The affidavit further set forth Wilson's statement that at the end of April 1995, $2634 in manifests in Pronold's desk were not billed, and that a bill was not sent to Kenway Service, Inc., a trucking company, even though it deposited material in the month of April. Wilson stated that new manifests which were not entered into the computer for billing continued to be added to Pronold's

desk each day. Wilson stated that for the month of May she continued to compare the computer listing with the manifests in Pronold's drawer and found that the unbilled amount grew to more than $9000.

¶9 The affidavit further related that Wilson then contacted a supervisor and said that she was going to make copies of the manifests in Pronold's desk to compare to the computer. A fellow employee subsequently told her that he observed her making the copies and told Pronold. Wilson stated that after she learned that the employee told Pronold of her activities, the manifests were entered into the computer and filed. Wilson stated that this was unusual because the manifests were not given to her for filing.

¶10 The affidavit also set forth Wilson's statement that during the month of May she reviewed information on a copy of a computer disc obtained from Pronold's desk drawer and that the disc appeared to contain a list of manifests which were not billed as of the date of her inspection. In addition, the affidavit related Wilson's statement that it was very common for Pronold to review the discharge and monitoring results contained in the laboratory analysis reports of the treatment plant. She stated that Pronold would circle certain numbers and write in different values, instructing her to enter the revised values on the discharge monitoring report. The affidavit further set forth information provided by a warden for the Department of Natural Resources indicating that the analytical results were required to be accurately reported pursuant to WIS. STAT. § 147.21(4) (1993-94).[2]

[2] WISCONSIN STAT. § 147.21(4) (1993-94) set forth criminal penalties for its violation.

¶11 Pronold argues that the affidavit does not give rise to an inference of criminal activity. He argues that the affidavit contains no basis for inferring that he did not have a legitimate reason for retaining the manifests and failing to bill certain haulers immediately. He also argues that the affidavit is devoid of a basis for concluding that he lacked a legitimate reason for altering the numbers on the discharge monitoring report. He contends that while these activities might have been a cause for suspicion, they did not give rise to probable cause.

¶12 We disagree. The circumstances outlined in the affidavit indicated an irregularity in the normal procedures for handling manifests and billings, and that depositors of waste material, including Kenway, were not being properly billed. The fact that the manifests were billed only after being discovered by Wilson gave rise to a reasonable inference that their initial retention was improper and done for some illegal purpose, as does the fact that the unbilled amount had risen to $9000 by May 1995. The affidavit thus was sufficient to excite in a reasonable mind an honest belief that fraudulent activity was afoot. Because the manifests and computer disc had previously been found in Pronold's desk, it also provided a reasonable basis to conclude that evidence of illegal activity probably would be found in his office. Similarly, because analytical results were required by law to be accurately reported, the altering of discharge and monitoring results

by the superintendent of the waste water treatment plant permitted a reasonable inference that it was probably being done for an unlawful purpose.[3]

¶13 Pronold's next contention is that all checks and other evidence produced in response to subpoenas issued to various financial institutions for his personal financial records must be suppressed because the subpoenas were not supported by probable cause.[4] The State requested the subpoenas pursuant to WIS. STAT. § 968.135 (1997-98). The standards for determining probable cause for issuance of a subpoena under § 968.135 are the same as the standards for determining probable cause for a search warrant. *See* ***State v. Swift***, 173 Wis. 2d 870, 883-84, 496 N.W.2d 713 (Ct. App. 1993). Based upon those standards, we

[3] Citing ***In re Search of Building T.***, 684 F. Supp. 1491, 1498 n.7 (E.D. Mo. 1988), Pronold contends that if criminal activity is one plausible explanation for the facts alleged in an affidavit, but there is an equally plausible innocent explanation, then probable cause to believe criminal activity has occurred does not exist and a warrant may not be issued. However, Wisconsin law indicates that even though conduct could be innocent, if the totality of the circumstances permits a reasonable inference that criminal activity has probably occurred, then a warrant may be issued. *Cf.* ***State v. Higginbotham***, 162 Wis. 2d 978, 994-95, 471 N.W.2d 24 (1991). Because the totality of the circumstances set forth in the affidavit permitted the magistrate to reasonably infer that Pronold was probably engaged in some type of fraudulent activity and that evidence of it would be found in his office, we will not disturb his determination.

[4] Citing ***United States v. Miller***, 425 U.S. 435 (1976), the State contends that Pronold had no legitimate expectation of privacy in his bank accounts and that no basis therefore existed to suppress the seizure of them regardless of whether probable cause existed to support the subpoenas. However, we find it unnecessary to address the impact of ***Miller***. The State sought the subpoenas in the circuit court pursuant to WIS. STAT. § 968.135 (1997-98), which requires probable cause for the issuance of a subpoena. As discussed in the body of this opinion, we conclude that probable cause existed for issuance of the subpoenas here.

Based upon this conclusion and our determination that the search warrant was supported by probable cause, we also need not address the State's claim that the evidence seized pursuant to the warrant and subpoenas is admissible under a good faith exception to the exclusionary rule. If we were compelled to address the latter issue, we would decline to grant the relief requested by the State. *See* ***State v. Grawien***, 123 Wis. 2d 428, 431-32, 367 N.W.2d 816 (Ct. App. 1985) (holding that the court of appeals is without authority to adopt the good faith rule requested by the State).

conclude that the subpoenas were properly issued to review Pronold's bank and credit records.

¶14 The affidavits in support of the subpoenas contained the same statements that were contained in the affidavit in support of the search warrant, with the exception of the statements regarding the alteration of numbers on the discharge monitoring results. They also set forth additional information, including a statement by Jeff Haranda, an employee of the waste water treatment plant, indicating that two secretaries had told him that some manifests, including those from Kenway, were not being billed. Haranda stated that he had made copies of manifests in October 1994 and that twelve manifests brought in by Kenway had not been billed. The affidavits also contained a statement from the director of public works, Pronold's supervisor, indicating that Pronold told him that manifests were not being billed to Kenway because he was bartering with Kenway on behalf of the city, although he did not keep any records of the alleged bartering exchanges.

¶15 The affidavits also contained a statement from Kathy Stortz, who worked for Pronold from 1989 to 1991. She stated that she would find manifests on Pronold's desk which he did not give her until she asked for them. She also stated that Pronold commenced locking his door when she started asking him about petty cash, the manifests and other documents, and that Pronold was "real tight" with Kenway and the owner of another trucking company, A & J Trucking. The affidavits also contained a statement from an accountant and auditor at Kenway, who stated that commencing in July 1994 there were manifests included in the records of Kenway for loads delivered to the treatment plant for which Kenway was not billed.

¶16 As previously discussed, Wilson's statements established probable cause to believe that Pronold was engaged in some kind of fraudulent criminal activity. This showing was enhanced by the additional information included in the affidavits in support of the subpoenas, including information that Pronold had not billed Kenway for waste deposits even before the manifests were found by Wilson, as verified by Kenway's own records. The additional information also showed that Pronold had a close relationship with some haulers, including Kenway.

¶17 Pronold contends that nothing in the affidavits renders implausible his claim that he did not bill manifests to Kenway because he was bartering with Kenway on behalf of the city. However, the issuing court could reasonably conclude that Pronold's admitted failure to keep records of such an alleged relationship rendered it implausible. Moreover, because the statement to Pronold's supervisor constituted an implicit admission that he was not billing Kenway for all deposits, the issuing court could reasonably conclude that it rendered his involvement in wrongdoing even more likely.

¶18 Pronold also contends that even if the affidavits established probable cause of criminal activity, they did not give rise to a reasonable belief that evidence of a crime would be found in his financial records. Again, we disagree. As previously discussed, the information in the affidavits indicated that Pronold had a close relationship with Kenway, which was not being billed for certain deposits at the treatment plant. A reasonable inference was that Pronold was not billing Kenway because he was receiving payoffs from Kenway. As set forth in the affidavits, a review of Pronold's financial accounts was sought to determine if there were any deposits which could be traced to trucking firms or any unexplained increase in spending activity reflected in Pronold's accounts.

Because the facts gave rise to an inference that Pronold was being paid off, and because his bank and credit accounts would be a likely repository of checks or cash received as a payoff, probable cause existed for issuance of the subpoenas. Nothing in ***Starke***, 81 Wis. 2d at 399, or ***Swift***, 173 Wis. 2d at 870, supports Pronold's claim that probable cause required a greater nexus between his financial records and the alleged wrongdoing.

¶19 Pronold's final argument is that evidence seized from the offices of Kenway, pursuant to a search warrant, and financial records of Kenway's president, Kenneth Fugate, which were obtained by subpoena, should have been suppressed because they were derived from the illegal search of Pronold's financial records. However, because we have concluded that the subpoenas were properly issued for Pronold's financial records, this challenge fails.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.