

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 99-0495-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NEIL P. GATES,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Iowa County:
WILLIAM D. DYKE, Judge. *Affirmed.*

ROGGENSACK, J.¹ Neil P. Gates appeals from misdemeanor convictions for possession of marijuana, contrary to § 961.41(3g)(e), STATS., and possession of drug paraphernalia, contrary to § 961.573(1), STATS., on the grounds that evidence obtained during the search of Paul Gates's residence, where Neil

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

also resided, should have been suppressed. Neil contends there was not probable cause to issue the search warrant. However, we conclude that there were sufficient facts from which the warrant-issuing magistrate could have determined there was probable cause to believe that evidence of a crime would be found within the residence. Accordingly, we affirm.

BACKGROUND

In December 1996, a search warrant was issued for the residence of Paul Gates, Neil's father. Neil slept in a remodeled tool shed located behind the main building. Inside the tool shed, law enforcement officers found a glass pipe, a bong, and a plastic bag containing marijuana. These items formed the bases of Neil's misdemeanor convictions. Neil contends that there was insufficient evidence to issue the search warrant; therefore, the evidence found must be suppressed and his convictions overturned. The circuit court denied his suppression motion and after the trial at which he was convicted, Neil appealed.

The search warrant was based on the affidavit of United States Customs Service agent Elizabeth Hanson. She stated that in May 1996, a citizen informant told her that George T. Randolph had been smuggling marijuana seeds into the United States from Holland. Randolph would travel to Holland, purchase the seeds, and then mail them to acquaintances in Wisconsin. The informant also told her that Randolph had previously sent parcels suspected of containing marijuana seeds to Paul Gates.

In November 1996, Hanson received information that Randolph and Paul Gates had traveled to Holland together. In December, Customs Service in Chicago intercepted a parcel containing 5.5 grams of marijuana seeds. That parcel was addressed to Paul Gates at his residence in Arena.

DISCUSSION

Standard of Review.

Our review of the magistrate's probable cause determination is not *de novo*, even though it presents a question of law; rather, we give "great deference" to the magistrate's decision. See *Illinois v. Gates*, 462 U.S. 213, 236 (1983); *State v. DeSmidt*, 155 Wis.2d 119, 132, 454 N.W.2d 780, 785-86 (1990). "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca*, 380 U.S. 102, 109 (1965) (citation omitted). The deferential standard of review is "'appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant.'" *State v. Kerr*, 181 Wis.2d 372, 379, 511 N.W.2d 586, 589 (1994) (citations and quoted sources omitted).

Probable Cause.

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, 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.

Article I, § 11 of the Wisconsin Constitution is virtually identical. *DeSmidt*, 155 Wis.2d at 129, 454 N.W.2d at 784. When probable cause for the issuance of a search warrant is challenged on appeal, our focus is not on the circuit court's decision to grant or to deny a suppression motion but on the issuing

magistrate's determination that the application for the warrant was sufficient to conclude there was probable cause to believe that evidence of a crime would be found. *State v. Ward*, 222 Wis.2d 311, 318, 588 N.W.2d 645, 648 (Ct. App. 1998). The person challenging the warrant bears the burden of demonstrating that the evidence before the issuing magistrate was clearly insufficient. *See Ritacca v. Kenosha County Court*, 91 Wis.2d 72, 78, 280 N.W.2d 751, 754 (1979).

The test for the issuance of a search warrant is whether, considering the totality of the circumstances set forth in support of the warrant, probable cause exists to believe that objects linked to the commission of a crime are likely to be found in the place designated in the warrant. *See State v. Ehnert*, 160 Wis.2d 464, 470, 466 N.W.2d 237, 239 (Ct. App. 1991). Probable cause is not a technical or legalistic concept, nor is it susceptible of "stringently mechanical definitions." *State v. Tompkins*, 144 Wis.2d 116, 125, 423 N.W.2d 823, 827 (1988) (citation omitted). Rather, it is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *Kerr*, 181 Wis.2d at 379, 511 N.W.2d at 588. The issuing magistrate is required only to "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238.

In considering the totality of the circumstances set forth in support of the warrant in this case, we conclude that the issuing magistrate had probable cause to believe that objects linked to the possession of marijuana were likely to be found at Paul Gates's residence. First, the affidavit demonstrated that Paul Gates received mail and subscribed to telephone service at the address identified in the warrant. Paul Gates also listed that address when registering his vehicle.

Additionally, the Customs Service in Chicago seized a parcel containing 5.5 grams of marijuana seeds that was addressed to Paul Gates at the address designated in the warrant. The citizen informant had told Hanson that George Randolph had previously sent parcels suspected of containing marijuana seeds to Paul Gates at his residence. Furthermore, Randolph had told this citizen informant that a higher quality marijuana plant could be cultivated from these smuggled seeds, leading to the inference that marijuana would be grown from them at Paul Gates's residence.

Therefore, given that Paul Gates recently had returned from a trip to Holland with Randolph, that Customs had found marijuana seeds that were addressed to Paul Gates's residence, and that parcels containing marijuana seeds had been mailed to Paul Gates in the past, we conclude that the issuing magistrate could have reasonably believed that Paul Gates was or would use the seeds to grow marijuana. The totality of these circumstances provided sufficient facts for the issuing magistrate to have believed that evidence of a crime would be found at the residence of Paul Gates.

CONCLUSION

We conclude that there were sufficient facts from which the issuing magistrate could have concluded there was probable cause to believe that evidence of a crime would be located within the residence searched. Accordingly, we affirm.

By the Court.—Judgments affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4., STATS.

