

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2012

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. 2012AP339-CR

Cir. Ct. No. 2010CF5

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

HARVEY EDWARD BAKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County:
FRED W. KAWALSKI, Judge. *Reversed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Harvey Baker appeals a judgment of conviction for possession of a firearm by a felon. He argues the circuit court erred by denying his motion to suppress evidence seized pursuant to a search warrant. Baker

contends the warrant was defective because: (1) the affidavit supporting it was insufficient to give rise to probable cause for the search; and (2) the affidavit was based on old information, so any probable cause was stale. We agree that any probable cause for the warrant was stale.¹ We therefore reverse.

BACKGROUND

¶2 On January 15, 2010, investigator Dan Bauknecht of the Langlade County Sheriff's Department applied for a warrant to search Baker's residence for evidence of drug paraphernalia, prescription medications, marijuana, and equipment associated with marijuana cultivation. Bauknecht submitted an affidavit in support of the warrant application. The affidavit stated that, on June 13, 2009, Kevin Gravitter was picked up by emergency medical services in connection with a medical problem. "[I]n the months that followed[,]" Gravitter told lieutenant John Schunke that his medical problem stemmed from a drug overdose caused by drugs Baker provided. Gravitter also stated that, after he overdosed, Baker refused to call an ambulance and instead drove Gravitter home. Gravitter told Schunke that Baker sold 100 milligram morphine pills, as well as Percoset and Vicodin pills.

¶3 The affidavit also stated that "as many as seven other informants" had reported to Bauknecht that Baker sells prescription medications. "In the past[,]" Bauknecht had attempted to use confidential informants to purchase prescription medications from Baker on three occasions. The attempts were

¹ Because we conclude any probable cause was stale, we do not reach Baker's alternative argument that the affidavit did not contain sufficient facts to give rise to probable cause. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

unsuccessful, though, because Baker required buyers to ingest the medications at his house and would not allow them to leave the premises with the pills. Bauknecht further averred that he interviewed Clint Novak, who reported purchasing Percoset from Baker “numerous times.” Bauknecht also stated that, on October 21, 2008, the sheriff’s department received a tip that Baker “may be selling” prescription medications.

¶4 The affidavit next stated that investigator Mark Hoerman told Bauknecht that Baker “had a room in his house that he used to grow marijuana[,]” and he “would then transplant the marijuana outside in the summer.” After speaking with Hoerman, Bauknecht subpoenaed Baker’s power consumption records, which indicated that “at times” Baker’s residence used “as much as 4 times the normal use for a single family dwelling in Wisconsin.” Bauknecht also interviewed Aaron Mientke,² who reported seeing as many as twelve to fifteen bags of potting soil at Baker’s home. Mientke further stated that Baker’s residence was equipped with a security camera system and that he had seen “lots of guns” in the home. Finally, Mientke reported “being an eyewitness to marijuana” at Baker’s residence.

¶5 As further evidence that Baker was involved in growing marijuana, the affidavit stated that, in December 2008, a ledger was recovered during the search of another Langlade County home, along with marijuana and drug paraphernalia. The ledger “ha[d] the letters ‘HB 484-5413’ on it.” The phone

² In the affidavit, this individual’s last name is spelled both “Mientke” and “Meintke.” The preliminary hearing transcript reveals that Mientke is the proper spelling.

number 484-5413 was listed to Baker's daughter, Dolly Bothum, who lived on Baker's property.

¶6 The affidavit also stated that, on August 28, 2007, investigator Hoerman prepared a report detailing a conversation with a confidential informant. The informant told Hoerman that "a man named Claudio Volpi sells marijuana and may be getting it from Harvey Baker." The informant had also "heard that Baker grows marijuana but ha[d] not seen it." Bauknecht averred he had investigated Volpi "in the past" and had found marijuana and drug paraphernalia in Volpi's house and garbage.

¶7 Bauknecht also averred that, at some point in the past, lieutenant Schunke and investigator Hoerman went to Baker's house to ask about stolen boat motors. Baker "came outside and made a statement about the marijuana plants on Piela Lane not being his." This behavior "struck [the] officers as odd[.]"

¶8 The affidavit next stated that, on January 6, 2010, Bauknecht interviewed Mientke, who provided new information about Gravitter's June 13, 2009 overdose. Mientke stated he had been to Baker's house "several times in the past." On one occasion, he saw Gravitter sitting in the yard in a lawn chair. Baker's wife and daughter were taking care of Gravitter by "making sure he didn't choke and keeping him moving[.]" as well as forcing him to drink water and helping him urinate. Mientke heard Baker, his wife, and his daughter talking about Gravitter going into the bathroom and not coming out for forty-five minutes. They stated that, afterwards, they found a needle in the bathroom. The Bakers were "agitated" about the possibility of police coming to their residence. Mientke estimated Gravitter was in an overdose state for twenty-four to thirty hours.

¶9 On January 11, 2010, Bauknecht spoke to a confidential informant, CI 601. The informant reported visiting Baker's residence several times with another man, who purchased drugs from Baker. The informant stated he had also purchased drugs from Baker, and had done so as recently as August 2009.

¶10 On January 13, 2010, Bauknecht spoke to Judy Panko, Gravitter's mother. Panko stated that, when she went to the hospital following Gravitter's overdose, a nurse informed her Gravitter was being transferred to the intensive care unit because his vital organs were shutting down. Gravitter remained in the intensive care unit for several days. Hospital records confirmed that Gravitter had opiates in his system. Panko also stated she heard that Gravitter "passed out on a wood pile at Baker's house for a long time[,]” which caused a loss of blood flow to his arm. Panko asserted Gravitter “still does not have use of his arm.”

¶11 Finally, Bauknecht averred he spoke to Gravitter on January 13, 2010. Gravitter stated that he had purchased pills from Baker hundreds of times and that Baker charged twenty dollars for a 100 milligram morphine pill. Gravitter told Bauknecht that, on June 13, 2009, he ingested valium before going to Baker's residence. He then purchased a morphine pill from Baker and used a needle to inject himself with the morphine in Baker's bathroom. Gravitter stated he drifted in and out of consciousness, and when he came to he asked Baker to call an ambulance. Baker refused to call an ambulance “because they didn't need that there.” Baker and his daughter later drove Gravitter home. Gravitter stated he believed Baker still had the needle Gravitter used to inject the morphine that day. Gravitter also stated “he knows [Baker] sells a lot of prescription medication” and “has seen other people buy drugs ... from Baker.”

¶12 A warrant to search Baker’s residence was issued on January 15, 2010 and executed the same day. Officers recovered two metal pipes “that appeared to have been used for smoking marijuana[,]” as well as thirty-two guns and “numerous rounds of ammunition.” They did not find any evidence of a marijuana growing operation.

¶13 Baker was charged with possession of a firearm by a felon and possession of drug paraphernalia. In a separate case, Langlade County case No. 2010CF8, he was charged with first-degree recklessly endangering safety, in connection with Gravitter’s overdose. Baker moved to suppress evidence discovered during the search of his home, arguing that Bauknecht’s affidavit was insufficient to give rise to probable cause for the search and that any probable cause was stale. The circuit court denied Baker’s motion after a hearing. A jury ultimately found Baker guilty of possession of a firearm by a felon but not guilty of the other two counts.

DISCUSSION

¶14 Baker claims the circuit court erred by denying his motion to suppress. Our review of a motion to suppress presents a mixed question of fact and law. *State v. Casarez*, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We uphold the circuit court’s findings of historical fact unless they are clearly erroneous, but the application of the law to those facts presents a question of law subject to independent appellate review. *Id.*

¶15 In reviewing whether probable cause exists to issue a search warrant, we give great deference to the issuing magistrate and “consider whether he or she was 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 they will be

found in the place to be searched.” *State v. Sloan*, 2007 WI App 146, ¶8, 303 Wis. 2d 438, 736 N.W.2d 189) (quotation marks omitted). We uphold the issuance of the warrant unless the facts in the supporting affidavit “were clearly insufficient to support a finding of probable cause.” *Id.* (quotation marks omitted).

¶16 However, a warrant may not rest on stale probable cause. *See Sgro v. United States*, 287 U.S. 206, 210 (1932). Stale probable cause is “probable cause that would have justified a warrant at some earlier moment that has already passed by the time the warrant is sought.” *State v. Moley*, 171 Wis. 2d 207, 213, 490 N.W.2d 764 (Ct. App. 1992) (quoting *State v. Valenzuela*, 536 A.2d 1252, 1264 (N.H. 1987)). In other words, “the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.” *Sgro*, 287 U.S. at 210.

¶17 We agree with Baker that any probable cause supporting the warrant to search his residence was stale. The affidavit supporting the warrant application provides information about alleged drug activity at Baker’s residence, but it generally fails to disclose the age of the information. For instance, according to the affidavit: (1) seven informants told Bauknecht that Baker sold prescription medications; (2) confidential informants unsuccessfully attempted to purchase prescription drugs from Baker three times; (3) Novak purchased Percoset from Baker “numerous times[;]” and (4) Gravitter purchased prescription drugs from Baker hundreds of times. However, the affidavit does not reveal the dates when any of these sales or attempted sales occurred.

¶18 Additionally, the affidavit states that Mientke observed twelve to fifteen bags of potting soil, a security camera system, guns, and marijuana at

Baker's residence, but there is no indication of when Mientke made these observations. The affidavit also describes Baker's power use as "4 times the normal use for a single family dwelling in Wisconsin[.]" but it does not disclose when Baker's power records were subpoenaed or the time period covered by the records Bauknecht reviewed. Similarly, there is no indication of when Baker told investigators that the marijuana plants on Piela Lane were not his.

¶19 The rest of the information in the affidavit describes events that occurred either years or months before the warrant was issued. The affidavit states that a confidential informant reported "that a man named Claudio Volpi sells marijuana and may be getting it from [Baker]" and that the informant "heard that Baker grows marijuana[.]" However, the informant reported this information to law enforcement on August 28, 2007, over two years before the warrant was issued. The affidavit also relies on a tip received on October 21, 2008, more than one year before the warrant was issued, that Baker "may be selling" prescription medications. Additionally, while the affidavit states that Baker's daughter's phone number was present on a ledger that was found near marijuana and drug paraphernalia, the ledger was found in December 2008, over one year before the issuance of the warrant.

¶20 Moreover, Mientke, Panko, and Gravitter each provided information about Gravitter's overdose, but that event occurred on June 13, 2009, almost seven months before the warrant was issued. The most recent information about drug activity at Baker's property came from CI 601, who reported purchasing drugs from Baker as recently as August 2009. However, that still leaves a gap of about five months between the most recent reported drug activity at Baker's property and the issuance of the search warrant. Because of this substantial gap, we conclude the affidavit did not contain proof of facts "so closely related to the time

of the issue of the warrant as to justify a finding of probable cause at that time.” See *Sgro*, 287 U.S. at 210.

¶21 The State points out that we have previously stated there is no “dispositive significance in the mere fact that some information offered to demonstrate probable cause may be called stale, in the sense that it concerns events that occurred well before the date of the application for the warrant.” See *Moley*, 171 Wis. 2d at 213 (quoting *Valenzuela*, 536 A.2d at 1264). This is not a case, though, where *some* of the information offered to demonstrate probable cause is stale. Here, all of the information in Bauknecht’s affidavit is stale. The affidavit fails to disclose when many of the events it describes occurred, and where dates are provided, the events significantly preceded the issuance of the warrant.

¶22 In some cases, old information may give rise to probable cause when combined with new information. See *State v. Loranger*, 2002 WI App 5, ¶24, 250 Wis. 2d 198, 640 N.W.2d 555 (WI App 2001) (eighteen-month-old tip from confidential informant gave rise to probable cause that marijuana growing operation was ongoing when combined with more recent electricity records and thermal imaging); *Moley*, 171 Wis. 2d at 213-24 (1990 tip, combined with 1991 aerial identification of marijuana plants, supported inference of marijuana cultivation on defendant’s property during 1991 growing season). However, the most recent information about drug activity at Baker’s residence was about five months old by the time the warrant to search his residence was issued. Consequently, Bauknecht’s affidavit failed to combine old information with any current information about drug activity on Baker’s property. It did not, for instance, specify that Baker used an abnormally high amount of electricity during the last months of 2009. Any probable cause to search Baker’s residence was

therefore stale by the time the warrant was issued, and the circuit court erred by denying Baker's motion to suppress.³

By the Court.—Judgment reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

³ The circuit court reasoned that, because Baker was accused of participating in an ongoing criminal enterprise, probable cause to search his residence could be based on old information. We acknowledge that, in cases involving ongoing criminal activity, older information may be sufficient to give rise to probable cause that is not stale. See, e.g., *State v. Stank*, 2005 WI App 236, ¶34, 288 Wis. 2d 414, 708 N.W.2d 43. However, we conclude that, in this case, the complete lack of any recent information in Bauknecht's affidavit outweighs the ongoing nature of Baker's alleged criminal activity.

