COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1511-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

STEVEN H. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lafayette County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. Steven Robinson appeals from a judgment, entered on his plea of guilty, convicting him of manufacturing a controlled substance. His plea followed the trial court's denial of his motion to suppress the fruits of a search of his residence. He argued to the trial court that the application for the search warrant lacked probable cause because it contained "presumptively

unreliable" statements of a police informant which were not sufficiently corroborated by independent police investigation. He renews the argument on appeal. We affirm.

The warrant was issued pursuant to the affidavit of Green County Sheriff's Deputy Jeffery Skatrud, which contained an account of the arrest of Nelson Ellis, who provided the information that led to Robinson's arrest. Skatrud and other officers had executed a search warrant at Ellis's home and found equipment and supplies used in the manufacture of controlled substances. Ellis was charged with possession of marijuana with intent to deliver and with a marijuana tax-stamp violation. After his arrest Ellis told Skatrud that he wished to provide information on a "marijuana grow" in Blanchardville and asked for "consideration on pending criminal charges." After speaking with an assistant district attorney, Skatrud told Ellis that if the information led to a successful search warrant and criminal prosecution of the grower, he would recommend that Ellis's wife not be charged with being a party to the controlled substance violations and, further, that Ellis would not be charged with possession of a firearm by a felon.

According to Skatrud's affidavit, Ellis then provided specific information about Robinson's marijuana-growing enterprise, describing in considerable detail Robinson's house and the growing room, its lighting and equipment, the plants, and paraphernalia.[1] He also described Robinson's two

[1] According to Skatrud's affidavit, Ellis had visited Robinson's home, which he described in detail, and had

> been shown a basement marijuana grow room, concealed in the corner of Robinson's basement, where about twelve marijuana plants were growing. Robinson also reportedly possessed grow lights, pots, and other growing equipment. Ellis continued to indicate that Robinson possessed … processed marijuana … in ice cream containers in a freezer in the basement. Ellis said that

(continued)

automobiles. Skatrud verified Robinson's ownership of the automobiles and drove past Robinson's house, ascertaining that it, too, matched the location and description provided by Ellis. Skatrud also checked out a prior "tip" received by his department that Robinson may have been growing marijuana at that location and researched court records indicating that Robinson had a past arrest for a marijuana violation. Finally, Skatrud states in the affidavit that Ellis's information about indoor marijuana cultivation—such as growing seasons, seed production, and heat and light sources—was consistent with his own knowledge gained over several years' experience as a narcotics officer.

On the basis of Skatrud's affidavit, a search warrant was issued for Robinson's residence. There officers found various and sundry items associated with the manufacture of controlled substances—including dried and growing marijuana plants, heat lamps, and cash and other records relating to the production and sale of marijuana.

> on or about February 20, 1995, Robinson had visited his home and that Robinson had told him that he was still growing the plants, with the intent to have them produce seeds. Robinson then apparently intended to germinate the seeds, start the plants and replant them outside on his farm when the weather permitted. Ellis indicated that to the best of his knowledge, Robinson had been growing marijuana outdoors for a long time and had recently rebuilt his grow room, concealing it in the corner of his basement. Ellis indicated that based on his experience growing marijuana, that Robinson would still have the grow room in operation, as if he was waiting for the plants to provide seeds, they would not have reached that stage of growth as of this time. Ellis further indicated that when he had seen the plants, which he knew to be marijuana plants, that they were one to two feet in height, and again, would probably not yet [have] matured to the point that they would produce seeds. Ellis …. also indicated that Robinson owns two vehicles that he knows of, one being an older beat up Chevrolet Malibu, white in color with wood grain sides, and the other an older Chevrolet station wagon, maroon in color.

The ultimate test for issuance of a search warrant is whether there is probable cause to believe that objects linked to the commission of a crime are likely to be found in the place designated in the warrant. ***State v. Ehnert***, 160 Wis.2d 464, 470, 466 N.W.2d 237, 239 (Ct. App. 1991). Stated another way, the warrant-issuing magistrate "must be 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[y] … will be found in the place to be searched.'" ***State v. DeSmidt***, 155 Wis.2d 119, 131-32, 454 N.W.2d 780, 785 (1990) (quoted source omitted). The magistrate "is entitled to go beyond the averred facts [in the affidavit] and draw upon common sense in making reasonable inferences from those facts." ***Id***. at 135, 454 N.W.2d at 787 (quotations and quoted sources omitted).

The existence of probable cause is determined by an analysis of the "totality of the circumstances." ***Id.*** at 131, 454 N.W.2d at 785 (quoting ***Illinois v. Gates***, 462 U.S. 213, 238 (1983)). Because probable cause "is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior," the evidence necessary to establish its existence in support of a search warrant is less than that required to support a bindover following a preliminary examination. ***State v. Kerr***, 181 Wis.2d 372, 379, 511 N.W.2d 586, 588 (1994) (quotations and quoted source omitted). "What is required is more than a possibility, but not a probability, that the [magistrate's] conclusion is more likely than not." ***DeSmidt***, 155 Wis.2d at 132, 454 N.W.2d at 785 (quotations and quoted source omitted).

Thus, the task of the warrant-issuing magistrate "is simply to 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." ***Kerr,*** 181 Wis.2d at 379, 511 N.W.2d at 588 (quoting ***Gates***, 462 U.S. at 238).

A reviewing court will pay "great deference" to the magistrate's determination of probable cause, and his or her determination will prevail unless the defendant is able to establish that the facts are clearly insufficient to support a finding of probable cause. ***Id***. at 380, 511 N.W.2d at 589. Indeed, the supreme court has said that "doubtful or marginal cases" should be resolved in favor of the magistrate's decision that probable cause existed. ***DeSmidt***, 155 Wis.2d at 133, 454 N.W.2d at 786 (quoting ***United States v. Ventresca***, 380 U.S. 102, 109 (1965)).

Citing generally to ***State v. Myren,*** 133 Wis.2d 430, 395 N.W.2d 818 (Ct. App. 1986), Robinson argues that the information Ellis provided was "presumptively unreliable" because it was given "in consideration for the [S]tate agreeing not to issue certain charges against [Ellis] and his wife." In ***Myren***, a co-defendant's confession implicated Myren in the crime for which both were arrested. The co-defendant also testified at Myren's preliminary hearing, implicating him in a number of offenses, including the one with which he had been charged. Over Myren's objection, the co-defendant's confession and preliminary-hearing testimony were read to the jury. On appeal, Myren argued that admission of the confession violated his constitutional right to confront witnesses. We agreed, quoting as follows from ***Lee v. Illinois***, 476 U.S. 530, 541 (1986): "[W]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-

examination."[2] ***Myren***, 133 Wis.2d at 436, 395 N.W.2d at 821. We concluded that because Myren had no opportunity to face and "contradict" his co-defendant's accusations, his confrontation rights were abridged.[3]

Because ***Myren*** involved factual and legal issues wholly distinct from those before us here, the case is of slight, if any, precedential value. That is not to say, however, that an inquiry into Ellis's veracity and the basis of his knowledge of the facts he provided to Skatrud is not material to our discussion, for the supreme court has held that the veracity and basis of knowledge of persons supplying hearsay information in support of a search-warrant application are among the totality of the circumstances to be considered in determining the existence of probable cause. ***Kerr***, 181 Wis.2d at 379, 511 N.W.2d at 588. It is equally true that, in considering the reliability of information provided by an informant, the totality-of-the-circumstances test permits a strong showing of other indicia of reliability to compensate for a deficiency in one indicator of reliability. ***State v. Anderson***, 138 Wis.2d 451, 469, 406 N.W.2d 398, 406 (1987). We have also stated, "When an informant is shown to be right about some things he has alleged, it is probable that he is also right about others," and "[i]ndependent police corroboration of the informant's tip imparts a degree of reliability to the unverified details." ***State v. Marten***, 165 Wis.2d 70, 75, 477 N.W.2d 304, 306 (Ct. App.

[2] We went on to note: "The presumption of unreliability may be rebutted and such a statement may meet Confrontation Clause standards if it is supported by a 'showing of particularized guarantees of trustworthiness.'" ***State v. Myren***, 133 Wis.2d 430, 436, 395 N.W.2d 818, 821-22 (Ct. App. 1986) (quoting ***Lee v. Illinois***, 476 U.S. 530, 543 (1986)).

[3] We rejected—unfortunately without explanation or discussion—the State's argument that the co-defendant's statements were trustworthy because other evidence substantially corroborated them. ***Myren,*** 133 Wis.2d at 436, 395 N.W.2d at 822. And we went on to hold that the error was harmless because of other evidence of Myren's guilt and his acquittal on three counts "where there was no physical evidence to corroborate [the co-defendant]'s confession." ***Id***. at 442, 395 N.W.2d at 824.

1991). We also may consider the officer's experience in similar investigations in determining the existence of probable cause. ***DeSmidt***, 155 Wis.2d at 135, 454 N.W.2d at 787.

We are satisfied that Skatrud's affidavit sufficiently indicates the overall reliability of the information Ellis provided. Ellis had personally observed Robinson's marijuana-growing operation and, in a conversation occurring just two weeks before the warrant was issued, Robinson verified that the operation was ongoing. Additionally, as described above, Ellis's description of Robinson's operation was extremely detailed, down to the number and size of the plants, a list of equipment and drug-related paraphernalia, and the quantity of processed marijuana on the premises. As the United States Supreme Court stated in ***Gates***, 462 U.S. at 234, "[E]ven [where courts might] entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." Finally, we note that both Ellis and Skatrud were quite knowledgeable about the process of growing marijuana.

As to Robinson's argument that Ellis was seeking favor from the authorities, we agree with the State that this fact does not undermine the magistrate's determination of probable cause for issuance of the warrant. First, Skatrud did not, as Robinson suggests, "agree" that, in exchange for the information, the State would not charge the additional offenses. Indeed, we do not see how Skatrud, a deputy sheriff, on his own could bind the district attorney in the ultimate charging decision. Skatrud's only "agreement"—as he made clear to Ellis—was that he would *recommend* to the prosecutor that the additional charges not be brought. Second, Skatrud's recommendation was conditioned upon Ellis's information bearing fruit: not only must it lead to the issuance of a warrant and the

seizure of evidence from Robinson's residence, but the evidence must be sufficient to permit Robinson to be charged. Thus, even if these conditions were met—if Ellis's information led to Robinson's prosecution—Ellis would receive in exchange only Skatrud's recommendation to the district attorney that the two ancillary charges be dropped.

Nor do we believe, as Robinson suggests, that we must presume that Ellis was lying to Skatrud. The police knew Ellis well and had him in custody on his own drug charges. Ellis might face additional charges for lying, or, at a minimum, his misconduct could be used against him in some other fashion—at sentencing, perhaps, or with respect to parole consideration. This is not a situation, as in ***Myren*** and ***Lee***, where a co-defendant's blame-shifting testimony was considered suspect. Ellis was not trying to shift the blame for a joint criminal act to a co-perpetrator. He had accepted responsibility for his actions in his own case, and the circumstances were such that incorrect or false information provided to the police could only harm him, not help him.

In addition, Skatrud personally corroborated some of the information Ellis gave him—the location and description of Robinson's house and automobiles, and Robinson's previous involvement with marijuana—and we believe this bolsters Ellis's veracity. In ***State v. Falbo,*** 190 Wis.2d 328, 526 N.W.2d 814 (Ct. App. 1994), a police officer's affidavit in support of a search warrant relied on information from an informant that Falbo was selling cocaine. The informant said he had accompanied another man, Creasy, in a Buick automobile to an address he said was Falbo's and waited outside while Creasy entered the house and came out with a packet of cocaine. The officer ascertained Creasy's full name and address from a telephone book and confirmed that he owned a Buick. He also confirmed the address the informant said was Falbo's and

obtained an "anticipatory" search warrant for Falbo's residence. We held that the officer's affidavit—which was, as indicated, based on the informant's information—"established circumstances from which the [officer] could conclude that the information was reliable." ***Id***. at 337, 526 N.W.2d at 817 (citation omitted). And we concluded that the affidavit satisfied the test for probable cause.

> [The police officer] independently verified the informant's information about the type of car Creasy owned and the street where Creasy lived. [He] also independently observed Creasy's residence and saw a blue Buick on the premises. Additionally, he confirmed Falbo's address through the Racine Police Department Record Bureau files as well as through the Wisconsin Department of Transportation. We conclude that the veracity element of the probable cause determination is satisfied.[4]

Id. at 337, 526 N.W.2d at 817-18.

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[4] Robinson argues that ***Falbo*** is inapposite because it involved an "anticipatory" search warrant—one that is issued "before the necessary events have occurred which will allow a constitutional search of the premises." ***State v. Falbo***, 190 Wis.2d 328, 334, 526 N.W.2d 814, 816 (Ct. App. 1994) (quotations and quoted source omitted). If the events do not transpire, the warrant is void. ***Id***. In ***Falbo***, execution of the warrant was conditioned on surveillance of Falbo's house on a certain date, the presence of a Buick at the house, and a man fitting Creasy's description entering the residence. If those conditions were met, the warrant authorized searching the men and Creasy's car, and if drugs were found, police could then search Falbo's residence for additional drugs and paraphernalia. ***Id***. at 332-33, 526 N.W.2d at 816.

We agree that an anticipatory warrant—where probable cause is, in effect, established in stages—differs from the warrant at issue in this case. Our probable cause analysis, however, addresses a narrower issue: whether under the totality of the circumstances the complainant's statement was reliable. That was the issue we considered in ***Falbo***: (1) "whether the ... affidavit established circumstances from which the affiant could conclude that the information was reliable"; and (2) "whether the trial court had enough information upon which to determine that the underlying circumstances or the manner in which the informant obtained his or her information was reliable." ***Id***. at 337-38, 526 N.W.2d at 817-18. In framing those "reliability" issues, we referred to ***State v. Anderson,*** 138 Wis.2d 451, 406 N.W.2d 398 (1987), a "regular" search-warrant case, as this one is. We consider our discussion of the reliability of the information in the affidavit supporting issuance of the warrant in ***Falbo*** to be equally applicable here. The differences between a "regular" and an "anticipatory" search warrant were not implicated in ***Falbo***'s limited discussion of the reliability of the informant's information recounted in the affidavit supporting the warrant.

Finally, Robinson makes a cursory argument that Skatrud's affidavit was insufficient to establish probable cause that the described items were likely to be in Robinson's home at the time of the search because Ellis's visit to Robinson's residence occurred some two months earlier and "no evidence [was] presented to the magistrate to prove that the grow operation was still progressing."

As we noted above, the affidavit must provide probable cause to believe that contraband would be on the premises at the time of the search. *See* ***DeSmidt***, 155 Wis.2d at 131-32, 454 N.W.2d at 785. Timeliness, of course, depends on the nature of the underlying circumstances. ***Ehnert,*** 160 Wis.2d at 469, 466 N.W.2d at 239. Probable cause is, after all, "a fluid concept, turning on the assessment of probabilities in a particular factual context." ***Id***. at 469, 466 N.W.2d at 238 (citation omitted). And where, as here, the activity involved is of "a protracted and continuous nature, the passage of time diminishes in significance." ***Id***. at 469-70, 466 N.W.2d at 239. Robinson's enterprise, as Ellis described it, was not an isolated event but was large in scale and, as Robinson told Ellis two weeks before the search, ongoing. Ellis, himself experienced in growing marijuana, stated that the plants he saw in Robinson's basement were still several weeks away from producing seeds, which was Robinson's stated intention in growing them. Skatrud, who also was knowledgeable about marijuana growth and use, stated that indoor marijuana plants require several months to produce seeds and the operation Ellis described requires large and bulky equipment that could not be easily or quickly dismantled and moved.

The totality of the circumstances surrounding the issuance of the search warrant for Robinson's residence satisfies us that Skatrud's affidavit contained information that was sufficiently reliable, and was such as would excite an honest belief in a reasonable magistrate's mind that the sought-after objects

were linked with the commission of a crime and would likely be found at Robinson's home at the time the warrant was to be executed.

By the Court.–Judgment affirmed.

Not recommended for publication in the official reports.