

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 23, 1998

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. 97-2430-CR
97-2431-CR

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-
CROSS-RESPONDENT,

v.

SANDRA L. BARRETTE,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Richland County: KENT C. HOUCK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Deininger and Bartell,¹ JJ.

BARTELL, J. The State appeals an order suppressing evidence obtained in the execution of two search warrants, and Sandra Barrette cross-appeals an order denying her motion to suppress evidence taken from a car parked in the driveway of one of the locations searched pursuant to the warrants in question. Because there was sufficient reliably obtained information from reliable persons provided to the issuing judge to support a search of two of the three locations requested, the order suppressing evidence seized pursuant to these warrants is reversed in part. Since the officers were therefore lawfully on the premises pursuant to a valid warrant when they made plain view observations of the contents of the car, the cross-appeal is moot, and the order denying suppression of the evidence taken from the car is affirmed.

Procedural and Factual Background.

The first warrant authorized the search of a farm at the end of Rusk Road in the Town of Seneca, Crawford County, and a restaurant named the “Highway Grill”² located on Marquette Road, Prairie du Chien, for evidence of criminal contempt in violation of §§ 785.03(1)(b) and 785.01, STATS., and of theft in violation of § 943.20(1)(a), STATS. This warrant is supported by the sworn complaint of Richland County Sheriff's Deputy Daniel H. Krueger. Deputy Krueger relies on the unsworn hearsay statements of Janith Engen, acting as court appointed receiver for defendant’s mobile home business, Kershner Homes LLC

¹ Circuit Judge Angela B. Bartell is sitting by special assignment pursuant to the Judicial Exchange Program.

² These appeals raise no challenge to the search conducted at the “Highway Grill.”

partnership; the unsworn statements and also an affidavit from Brian Turner; two affidavits of Crystal G. Moreland regarding the ownership of certain property by Kershner Homes; the unsworn statement of Barb Ewing, an employee of the Royal Bank in Lone Rock, Wisconsin; and unsworn hearsay statements made to Janith Engen (receiver) by Mike Swanson, a loan officer with the Peoples State Bank in Mazomanie, Wisconsin. The body of the search warrant complaint contains information about the following premises: “farm sheds on land believed [by Crystal Moreland] to be owned by Mark and Sandra Barrette near Steuben, Wisconsin”; and “Citron Valley Road, Steuben, Wisconsin ... a farm, which Sandra Barrette stated was hers.” Based on these references, the warrant authorized the search of the following premises:

[A] farm consisting of approximately 220 acres in the Town of Seneca, Sections 24 and 25, located at the end of Rusk Road, being the only farm or farmette at the end of Rusk Road, and having on it a pole shed, a two car garage, and a trailer home.

A second warrant for the search of Lot #25 of the old Dieter Trailer Court in Sextonville, Town of Buena Vista, Richland County, was based upon the identical sworn complaint of Deputy Krueger, supplemented by two additional items: a handwritten statement at the foot of the complaint by Deputy Krueger reporting that Bonnie Paskin, a neighbor of defendant Sandra Barrette, had pointed out to him the specific location of defendant’s trailer in the Dieter Trailer Court; and one of the sworn affidavits of Crystal G. Moreland. Otherwise, the affidavits mentioned in each of the search warrant complaints were not attached, but their contents were recounted to the court by Deputy Krueger, who states he personally observed those affidavits.

The trial court suppressed evidence seized pursuant to the two search warrants on the grounds that the search warrant complaints did not expressly state

the reasons that the various witnesses providing information to the complainant were believed to be reliable. Later, the court ruled that an officer executing one of the warrants, and who parked her car on a gravel “turn out” in a trailer park provided for the trailer tenants, was parked in an “open field” as opposed to the “curtilage” of the trailer, and therefore constitutionally utilized the “plain view” doctrine when she observed items through the windows of a car parked at that location.

Analysis and Decision.

This court reviews the decision made by the warrant-issuing judge, not the trial judge who granted the suppression motion. *State v. DeSmidt*, 155 Wis.2d 119, 132, 454 N.W.2d 780, 785 (1990). The standard of review is not de novo, but rather gives “great deference” to the determination of the issuing judge, and requires affirmance if the warrant-issuing judge was provided with “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.” *Id.* at 131-32, 454 N.W.2d at 785; *State v. Higginbotham*, 162 Wis.2d 978, 989, 471 N.W.2d 24, 29 (1991). The duty of the reviewing court is to ensure that the issuing judge had a substantial basis for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983). Once a magistrate has issued a warrant, there is a preference accorded to such warrant even in doubtful or marginal cases. *DeSmidt*, 155 Wis.2d at 133, 454 N.W.2d at 786, citing *United States v. Ventresca*, 380 U.S. 102, 109 (1965).

There is no longer a requirement that the reliability of the persons providing information be established in a separate paragraph dealing with reliability or credibility. This requirement was abolished in favor of a “totality of

the circumstances test” in which hearsay information may be used, provided the judge can reasonably conclude under the totality of the circumstances that the informants are credible and the information is obtained in a reliable manner. *Gates*, 462 U.S. at 238-39. This contrasts with the previous more rigid “two prong” test employed in *Aguilar v. Texas*, 378 U.S. 108 (1964).

In the instant case, most of the information reported in the complaint by Deputy Krueger relies on sworn affidavits of persons who personally observed actions of the defendant, or who personally participated in transactions which appear to violate the stipulation and order for appointment of receiver Janith Engen. The fact that the statements were made under oath establishes a basis of reliability or truthfulness; the fact of personal observation and involvement establishes an adequate basis for knowledge. As for those informants that Deputy Krueger spoke to personally, in each instance the informant’s apparent truthfulness is established by his or her status (Janith Engen, as court-appointed receiver; Barb Ewing and Mike Swanson, as bank employees reporting the content of business conversations they had during the course of their duties as bank employees). The issuing judge therefore had a substantial basis for concluding there was a fair probability that evidence of a crime would be found at the locations specified.

The complaints for search warrants are also sufficient to find probable cause to believe that the defendant committed theft contrary to § 943.20(1)(a), STATS. It is reliability reported in those complaints that Sandra Barrette stipulated to the appointment of a receiver of Kershner Homes; that thereafter she intentionally and knowingly sold, transferred and removed property belonging to Kershner Homes without the consent of either her partner or of the receiver who, by operation of law, had the right to its possession; and that the

removal and transfer of the partnership property was under circumstances suggesting an intent to permanently deprive Kershner Homes of the possession of those items.

The search warrant complaints are sufficient in all regards but one. The factual support provided by Deputy Krueger contains no facts from which the issuing judge could conclude that the contraband in question would be located on “a farm consisting of approximately 220 acres in the Town of Seneca, Sections 24 and 25, located at the end of Rusk Road, being the only farm or farmette at the end of Rusk Road” The factual portion of the complaint for that warrant refers only to “land believed to be owned by Mark and Sandra Barrette near Steuben, Wisconsin,” and to “a farm, which Sandra Barrette stated was hers” located on Citron Valley Road, Steuben, Wisconsin. The factual material presented provides no clue as to why the warrant authorizes the search of a farm in the Town of Seneca on Rusk Road. A search of the entire record reveals no evidence or circumstances suggesting that the Rusk Road farm in the Town of Seneca is physically the same property as the farm owned by Sandra Barrette located on Citron Valley Road near Steuben as described by witnesses in the factual portion of the search warrant complaint.³ This *non sequitur* is nowhere explained in the record.⁴ In the absence of probable cause to believe that contraband would be

³ This case is distinguishable from *State v. Nicholson*, 174 Wis.2d 542, 497 N.W.2d 791 (Ct. App. 1993). In *Nicholson*, the police officer complainant mistakenly used the wrong street number to describe a building specifically pointed out to him by a confidential informant to obtain a warrant, which also used the wrong street number. Officers executing the warrant, however, went to the correct location previously pointed out by the informant and searched the correct premises based upon probable cause to search the correct premises.

⁴ The State’s assertions in argument before the trial court are not evidence and provide no adequate explanation that the property referred to by witnesses in the search warrant complaint is the same as the Rusk Road farm:

(continued)

located at the Rusk Road farm in the Town of Seneca, the warrant improperly authorized the search of that premises. Any evidence seized as a result of the search warrant issued for the Rusk Road farm must be suppressed as not supported by probable cause.

Conclusion.

For the reasons stated above, the order suppressing evidence seized at the Rusk Road farm in the Town of Seneca, Crawford County, is affirmed, as is the order denying the motion to suppress evidence seized from the car. The order suppressing evidence seized at the remaining locations pursuant to the two search warrants in question are reversed. The causes are remanded for further proceedings not inconsistent with this opinion.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

One of the difficulties, of course that I have is that I've got to take the description as provided to me by the witness as they are. Near Steuben is what we had to work with; although I think that reasonable police officers, with the investigation that we had obviously done to describe the property in the beginning of the search warrant, sufficiently described it. We knew what property we were talking about; although it was, in fact, in the Town of Seneca. I don't even know -- I don't know Crawford County -- how close that is to Steuben or not to Steuben, but it was property that matched the description.

Recommended for publication in the official reports.

