COURT OF APPEALS DECISION DATED AND FILED

July 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-2539-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

ROLANDO M. TONG,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Clark County: THOMAS T. FLUGAUR, Judge. *Order affirmed; order reversed.*

Before Eich, C.J., Deininger and Nowakowski,[1] JJ.

EICH, C.J. The State appeals from an order suppressing evidence comprising various controlled substances found at Rolando Tong's home during

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[1] Circuit Judge Michael N. Nowakowski is sitting by special assignment pursuant to the Judicial Exchange Program.

execution of a search warrant, and from an order precluding evidence of Tong's romantic liaison with one of the State's witnesses.[2] We agree with the State that, contrary to the trial court's ruling, the complaint for the warrant stated probable cause to believe that materials related to the commission of a crime were likely to be found at Tong's residence, and we thus reverse the suppression order. We affirm the order excluding the "other acts" evidence as a proper exercise of the trial court's discretion.

The warrant was issued on August 3, 1996, on the basis of an affidavit of Clark County Detective Sergeant Robert Powell, which recounted interviews with Jaynee Wewerka and Raven Van Horn. Wewerka told Powell that she had had a sexual relationship with Tong, a physician, and that on two occasions he delivered controlled substances "without a prescription and not as part of a medical examination." According to Wewerka, she first received the substances from Tong on March 22, 1996, when she met him at a hospital where he was on call and stayed with him overnight. She said that, while she was with him, Tong gave her a pill, which she later learned was midazolam, a controlled substance. A second incident occurred at Tong's residence on April 10, 1996, when he gave her pills that she recognized as midazolam and Xanax, also a controlled substance.

Van Horn told Powell that over the weekend of July 26–29, 1996, she spent the night with Tong at the hospital, and that after she told him she had a sore throat, he "pulled out what appeared as a 'zip lock' bag of pills," and told her

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[2] We note that the State is permitted to appeal from any pre-trial order denying the admission of evidence if the ruling would exclude evidence that would "normally determine the successful outcome of [the prosecution]." ***State v. Eichmann,*** 155 Wis.2d 552, 565, 456 N.W.2d 143, 148 (1990).

he was a "walking pharmacy," carrying pills and medications with him to "dispense out—give them to his friends." According to Van Horn's recorded statement, which was incorporated into Powell's affidavit, when Tong "pulled" a package of ten or so pills out of the bag, she told him: "I'm not taking any of those," and left the room.

The warrant was issued and the August 3, 1996, search of Tong's residence uncovered several packets of various drugs—including midazolam—in his shaving kit and elsewhere throughout his home. As a result, he was charged with both possession and delivery of controlled substances.

The trial court granted Tong's motion to suppress the drugs found at his home, ruling that the information in the complaint for the warrant was "stale" and failed to establish any connection between Tong's possession of controlled substances and his home. The State also sought to admit "other acts" evidence detailing a sexual encounter between Tong and Van Horn, arguing that it was relevant as showing a plan or motive "to use [controlled substances] as part of his relationship with women outside of a doctor/patient relationship." The trial court denied the State's request, ruling that any marginal relevance the evidence might have was substantially outweighed by its potential prejudice.

I. The Search Warrant

Tong asserts, "Each of the issues raised in the state's appeal challenges the exercise of discretion by the trial court." He is wrong in this regard. When probable cause for issuance of a warrant is challenged on appeal, our focus is not on the trial court's decision on the suppression motion but on the issuing magistrate's determination that the complaint for the warrant stated probable cause. And the person challenging the warrant bears the burden of

demonstrating that the evidence before the issuing magistrate was clearly insufficient. ***Ritacca v. Kenosha County Court***, 91 Wis.2d 72, 78, 280 N.W.2d 751, 754 (1979).

Our review of the magistrate's probable-cause determination is not *de novo*; rather, we pay "great deference" to the magistrate's decision. ***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." ***U. S. v. Ventresca***, 380 U.S. 102, 109 (1965). It has been said that such a 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).

The test for the issuance of a search warrant is whether, considering the totality of the circumstances set forth in the complaint, 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. ***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). 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. All that is required of the issuing magistrate is that he or she "simply … 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 the particular place." ***Gates,*** 462 U.S. at 238.[3]

As indicated, in this case the trial court overturned the magistrate's determination largely because it believed that the allegations in the complaint for the warrant were too "stale" to support a finding of probable cause. We base our evaluation of the timeliness of information in an affidavit supporting a search warrant on "the nature of the underlying circumstances and concepts" of each individual case. ***Ehnert,*** 160 Wis.2d at 469, 466 N.W.2d at 239.

Powell's affidavit recites two instances—occurring approximately four months before issuance of the warrant—when Tong was said to have delivered controlled substances to Wewerka. The timeliness of the information in the affidavit, however, "is not determined by a counting of the days or months between the occurrence of the facts relied upon and the issuance of the search warrant." ***Id***. The requirement is simply that the facts in the affidavit must be "so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." ***Id***. at 469, 466 N.W.2d at 238 (citation omitted).

We have set forth the facts giving rise to the magistrate's issuance of the warrant in this case. As to "staleness," the cases hold that the passage of time "diminishes in significance" when the activity in question "is of a protracted and continuous nature." ***Id***. at 469-70, 466 N.W.2d at 239. Conversely, "[w]here the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time." ***United***

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[3] Wisconsin has adopted and utilized the ***Gates*** statement of the rule in many cases. *See, e.g.*, ***State v. Lopez***, 207 Wis.2d 413, 425, 559 N.W.2d 264, 268 (Ct. App. 1996).

States v. Johnson, 461 Fed.2d 285, 287 (10th Cir. 1972). As indicated, Powell's affidavit recites two occasions—one in a hospital room and one at Tong's home—when Tong gave controlled substances to Wewerka, and a third when he offered pills to Van Horn under similar circumstances. The events with Wewerka were in March and April, and the one with Van Horn occurred less than a week before the warrant was issued. While the affidavit does not indicate a lengthy course of drug-dealing on Tong's part, it does indicate considerably more than a single, "isolated" incident. Giving the issuing magistrate's determination the deference to which it is entitled, and remembering that the probable-cause determination is, at bottom, a common-sense undertaking, we are satisfied that a magistrate could reasonably determine from the affidavit that the information from Wewerka and Van Horn was not stale, and that it was probable that Tong's drug-related activities were of a continuing nature.

Tong next argues that the information in the affidavit was insufficient to connect his possession of controlled substances to his residence, the site of the search. He claims there is nothing in Powell's affidavit from which it reasonably may be inferred that any controlled substances or related materials were likely to be found at his home. As we noted above, however, Wewerka told Powell that Tong took the pills he gave her at the hospital from "his shaving kit or little bag of personal items," and described himself as a "walking pharmacy." And since at least one of the occasions on which he provided controlled substances to Wewerka occurred at his home, we believe the magistrate could reasonably conclude that there was a "fair probability" that evidence of the nature sought in the warrant could be found among his personal belongings at his home.

> [W]here there is evidence that would lead a reasonable person to conclude that the evidence sought is likely to be in a particular location—although there may be other

> evidence that could lead a reasonable person to conclude that the evidence may instead be in another location—there is probable cause for a search of the first location.

Tompkins, 144 Wis.2d at 125, 432 N.W.2d at 827.

We conclude, therefore, that Powell's affidavit set forth sufficient information to lead a magistrate to conclude that probable cause existed to issue a search warrant on Tong's residence.[4]

II. "Other Acts" Evidence

The State challenges the trial court's ruling barring it from presenting evidence of Tong's attempts to foster a romantic relationship with Van Horn—particularly Van Horn's detailed recounting of the sexual advances he allegedly made toward her when she visited him at the hospital room.

Generally, evidence of other crimes or wrongful acts "is not admissible to prove the character of a person in order to show that he [or she] acted in conformity therewith" on a given occasion. Section 904.04(2), STATS. Such evidence is allowed, however, when offered for certain other purposes, such

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[4] Citing ***Franks v. Delaware,*** 438 U.S. 154 (1978), for the proposition that accurate information is essential to a finding of probable cause, Tong claims that a statement in Powell's affidavit that midazolam in tablet form does not have Food and Drug Administration approval demonstrates "a reckless disregard for the truth" and thus "seriously undermines the ultimate finding of probable cause." He states that, according to a medical publication, the fact that the FDA has not "approved" a drug does not make its possession by a physician illegal, nor does it imply improper usage. In order to warrant suppression on that basis, however, Tong must show that the information not only was incorrect but was something more than merely a product of "negligence or innocent mistake." ***Franks***, 438 U.S. at 171. No such showing has been made in this case. Beyond that, according to ***Franks***, even if a statement is found to have been made with "deliberate falsity or reckless disregard" of the truth, if, without it, "there remains sufficient content in the warrant affidavit to support a finding of probable cause," the search will still be upheld. ***Id.*** at 171-72. The challenged statement is not central to a finding of probable cause in this case.

as to show motive, opportunity, intent, preparation, plan, or "the absence of mistake or accident." ***Id***. In deciding to reject or allow such evidence, the trial court must first determine whether it fits one of the exceptions to the rule and, if it does, the court must then determine whether it is relevant. Finally, "if relevancy for an admissible purpose is established, the evidence will be admitted unless the opponent … can show that the probative value of the … evidence is substantially outweighed by the danger of undue prejudice." ***State v. Speer***, 176 Wis.2d 1101, 1114, 501 N.W.2d 429, 433 (1993).

The proffered evidence describes in detail Tong's sexual advances to Van Horn on the night in question—discussing how, despite her resistance, he touched her body in several places, attempted to kiss her and eventually ejaculated in his trousers. It goes on to recount how he withdrew the "zip lock" bag of pills from a drawer and told her he was a "walking pharmacy," carrying pills with him to "dispense" to his friends. The State argued that this evidence was "highly probative" of Tong's "'motive' to use the pills as part of his relationship with women outside of a doctor/patient relationship," and was admissible in order to "complete the story" of the charged offense. Objecting to the evidence, Tong argued to the trial court that the evidence adds nothing to the State's case, which was based on the two deliveries to Wewerka, emphasizing that Tong did not give any pills to Van Horn that evening. He argued in particular that because the "sexual" evidence was irrelevant and could go only to his character, it is thus inadmissible under § 904.04(2), STATS.

The trial court began by noting its disagreement with the State's position that the pharmaceuticals were part of Tong's "social romantic pursuits," stating that the "overwhelming majority" of his encounters with Wewerka "had nothing to do with him dispensing any controlled substances to her." The court

also noted that Tong, a physician, withdrew the pills from the hospital-room drawer only after Van Horn complained of a sore throat and earache. Then, after emphasizing that it had read the transcript of the preliminary hearing, where the proposed evidence was put forth by the State, as well as the briefs of counsel, the court summarized the provisions of § 904.04(2), STATS., and concluded:

> And the court is of the opinion that it has not been shown that … the offering of controlled substances were a regular part of the relationship with either Ms. Wewerka or Ms. Van Horn.
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> The Court found it interesting in looking at the transcript [of Van Horn's testimony] from the preliminary hearing, [where defense counsel] was objecting as the testimony was coming in, and Judge Brennan overruled the objections, stating that he had read the search warrant application and he knew what was coming and that he thought it had some relevance, and at the end of that hearing, [he] stated, … "[A]fter I heard all of the evidence, even though I seemed … sure at the time [of the objection] what was coming, it wasn't as near as good as it was, and I would agree that the [trial court] certainly needs to make a determination as to whether this marginal admissibility [is] so overwhelming its prejudice to the defendant needs to be made, but it's not important now…"
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> Now the … court is being asked whether or not this type of testimony is unduly prejudicial and of limited relevance, and the Court although it does feel that there may be an issue with regard to intent … when you balance that testimony within its context, the Court is of the opinion that its probative value is substantially outweighed by the prejudicial effect of it.

Balancing the probative effect of proffered evidence against the possibility of undue prejudice from its admission is peculiarly within the trial court's discretion. ***Speer***, 176 Wis.2d at 1119, 501 N.W.2d at 433-34. We will not reverse a discretionary determination by the trial court "if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376

(Ct. App. 1987). Where the record establishes that the trial court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree. ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991). Indeed, we generally look for reasons to sustain discretionary decisions. ***Id***. at 591, 478 N.W.2d at 39. We have said, for example, that we do not test a trial court's discretionary determinations by some subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case; rather, the trial court's decision will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion. ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995).

It is true, as the State has argued, that other-acts evidence may be admissible to "complete the story" of a crime. ***State v. Pharr,*** 115 Wis.2d 334, 348, 340 N.W.2d 498, 504 (1983). The record satisfies us, however, that the trial court considered the applicable facts and law in arriving at its decision to exclude the evidence, and we cannot say that, in doing so, it reached an unreasonable result. It follows that its ruling barring the proffered evidence was a proper exercise of discretion.

We therefore reverse the order suppressing the evidence gathered in the execution of the search warrant, and affirm the order denying the State's other-acts evidence motion.

By the Court.—Order affirmed; order reversed.

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