

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 26, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1255-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRANDON J. GREEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Brandon J. Green has appealed from a judgment convicting him of one count of possession of cocaine with intent to deliver and one count of maintaining a drug house. Green alleges that his convictions must be set aside because the warrant for the search of his home was not based upon probable cause and because the trial court failed to reveal the identity of

confidential informants whose allegations led to the issuance of the warrant. We reject these arguments and affirm the judgment of conviction.

¶2 When an appellant contends that a warrant was not supported by probable cause, our focus is not on the trial court's decision granting or denying the suppression motion, but on the issuing magistrate's determination that the application for the warrant stated probable cause. *See State v. Ward*, 222 Wis. 2d 311, 318, 588 N.W.2d 645 (Ct. App. 1998), *rev'd on other grounds*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517. The burden is on the person challenging the warrant to demonstrate that the evidence before the issuing magistrate was clearly insufficient. *See State v. DeSmidt*, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990). We pay great deference to the magistrate's decision, rather than reviewing the matter de novo. *See id.*

¶3 We are confined to the record that was before the issuing magistrate. *See State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). Probable cause exists if the issuing magistrate is apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked to the commission of a crime and will be found in the place to be searched. *See id.* The totality of the circumstances must be considered. *See DeSmidt*, 155 Wis. 2d at 131. Probable cause is a flexible, commonsense measure of the plausibility of particular conclusions about human behavior, not a technical or legalistic concept susceptible of stringently mechanical definitions. *See Ward*, 222 Wis. 2d at 319. All that is required is that the issuing magistrate make a practical, commonsense 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. *See Higginbotham*, 162 Wis. 2d at 990.

¶4 Our duty as the reviewing court is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *See id.* at 989. The quantum of evidence necessary to establish probable cause for a search warrant is less than that required to support a bindover following a preliminary hearing. *See id.* Resolution of doubtful or marginal cases regarding an issuing magistrate's determination of probable cause must be largely determined by the strong preference that law enforcement officers conduct their searches pursuant to a warrant. *See id.* at 990.

¶5 A search warrant for Green's residence was issued on March 6, 1998. It was based upon an affidavit submitted by James Veaser, an investigator for the Sheboygan police department. Green argues that the magistrate lacked probable cause to issue the warrant because Veaser's affidavit was based upon hearsay statements given by confidential sources whose reliability and basis of knowledge were not established and whose statements were not corroborated by independent police investigation. We disagree.

¶6 Veaser's affidavit contained statements from six confidential informants and one unnamed citizen informant, alleging that Green was dealing narcotics from his home at 912 Ontario Avenue in Sheboygan. Two of the confidential informants had provided reliable information to the police in the past, and two others alleged that they personally observed Green dealing narcotics. Although the remaining two confidential informants provided information in exchange for consideration, all corroborated each other. In addition, the information provided by them was corroborated by independent police investigation.

¶7 Examining the affidavit in more detail, it alleges that confidential informant (CI) 940 conducted a controlled buy of marijuana at Green's residence on May 2, 1997. The police provided CI-940 with money and observed him entering Green's residence at 912 Ontario Avenue. He subsequently returned to the police with marijuana which he said he purchased at 912 Ontario Avenue. A record check conducted by police at the time indicated that Green lived at this address.

¶8 Police observation of CI-940's actions renders the information highly reliable. In addition, although the events described took place ten months before the search warrant was issued, the law is well established that if old information in a search warrant affidavit contributes to an inference that probable cause exists at the time the warrant is issued and executed, its age is no taint. *See State v. Moley*, 171 Wis. 2d 207, 210, 490 N.W.2d 764 (Ct. App. 1992). Here, the information concerning the May 2, 1997 drug buy, combined with the remaining information in the affidavit, contributed to an inference that drugs and other evidence of drug dealing would be found in Green's residence in March 1998. *See id.* at 213-14.

¶9 Information involving direct observation of criminal activity was also provided by CI-977, who informed Veaser that he knew a black male named Brandon who lived at 912 Ontario Avenue was selling crack cocaine. CI-977 further stated that he accompanied a friend to 912 Ontario Avenue in November 1997 when the friend purchased cocaine from the person named Brandon. This information could be deemed reliable because it was based upon the informant's personal observation and was corroborated by facts known to the police regarding Green's first name and address. In addition, Veaser attested that CI-977 had provided information to the police in the past which led to successful search

warrants for narcotics. The credibility of an informant can be established by a statement that he or she has given reliable information to the police on past occasions. See *Ritacca v. Kenosha County Court*, 91 Wis. 2d 72, 79-80, 280 N.W.2d 751 (1979).

¶10 CI-940 and CI-977 cross-corroborated each other. In addition, the information they provided to the police corroborated, and was corroborated by, the remaining information in the affidavit. The remaining information included statements to the police from CI-326 and CI-985, both of whom were properly deemed credible because they had provided reliable information to the police in the past. CI-326 told police in December 1997 that he knew a person by the name of Brandon Green who was selling marijuana to interested buyers and that he heard that Green was also selling cocaine. In addition in January 1998, CI-985 advised Veaser that a party living in a white house across from an elderly living complex in the Ontario/North 9th Street area was selling crack cocaine. CI-985 subsequently advised the police that the person's name was Brandon Green. This information was consistent with the information the police already had from the other informants. In addition, police surveillance indicated that the description of a white house across from an elderly complex was consistent with the 912 Ontario Avenue address.

¶11 Two additional informants, CI-987 and CI-989, provided information in exchange for possible consideration on pending charges. CI-987 advised the police that Brandon Green was a major cocaine dealer, that he lived with his girlfriend in a white house on Ontario Avenue at North 9th Street and that the entrance to the residence was on Ontario Avenue with the door located to the left. CI-989 provided similar information but identified Green's address as being in the area of North 9th Street and Erie. While their credibility was diminished

because they were seeking consideration, the information they provided could be deemed reliable because it was corroborated by the other informants and by Veaser's observation of Green's residence and his discovery that a female also lived at the residence.

¶12 In addition to the information provided by the six confidential informants, Veaser indicated in his affidavit that he was advised by another detective that a citizen informant told the detective that Brandon Green was selling narcotics in Sheboygan. Although this constituted double hearsay, it was corroborated by the information from the confidential informants. In addition, the information was corroborated by independent police investigation. Veaser stated that he participated in an attempted undercover buy from Green on January 9, 1998. Veaser stated that he drove with a man named George Harris to the vicinity of Green's residence and watched Harris enter the 912 Ontario Avenue residence. Veaser stated that Harris returned after a few minutes and told him that the residents had cocaine but were presently packaging recently purchased quantities of it. While Harris did not identify the residents and his credibility was diminished by the fact that he was a drug purchaser, the information was again consistent with that provided by the confidential and citizen informants.

¶13 Veaser also independently verified that Green lived at 912 Ontario Avenue, that the house was white, that its door was on the left side and that the utilities were registered in the name of a female named Angela Puddy. In addition, while conducting surveillance of 912 Ontario Avenue in February 1998, he observed several people enter the residence and leave after five to ten minutes. He stated that the people he observed were individuals suspected by the police of being involved in drug distribution in the area. He also observed someone

matching Green's description at the residence during this time. Such high volume, short duration visits were further evidence of possible drug dealing.

¶14 In summary, the information provided by the various informants was consistent with each other, corroborated by information obtained through independent police investigation and contained sufficient indicia of reliability and truthfulness. In the aggregate, the information permitted the magistrate to reasonably conclude that evidence of drug dealing would probably be found in Green's residence at 912 Ontario Avenue. The search warrant therefore was properly issued.

¶15 We also reject Green's claim that the trial court erred by failing to reveal the identity of the confidential informants. Green relies on *Roviaro v. United States*, 353 U.S. 53 (1957), to support this argument.

¶16 *Roviaro* is inapplicable when, as here, the defendant seeks disclosure of an informant's identity during a preliminary hearing related to probable cause and the defendant's guilt or innocence at trial is not involved. See *McCray v. Illinois*, 386 U.S. 300, 311-12 (1967). Instead, this situation is governed by WIS. STAT. § 905.10(1) and (3)(c) (1997-98).¹ Section 905.10(1) permits the State to refuse to disclose the identity of a person who has furnished information relating to an investigation of criminal conduct. Section 905.10(3)(c) creates an exception to the privilege of nondisclosure. It provides that a judge may require disclosure of an informer's identity if information from the informer is relied upon to

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

establish the legality of the seizure of evidence and the judge is not satisfied that the informer was reasonably believed to be reliable or credible.

¶17 For all the reasons discussed above, the information from the confidential informants was properly deemed reliable and credible. The trial court therefore did not err in refusing to order disclosure of the informants' identities.

By the Court.—Judgment affirmed.

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

