

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 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. 99-2155-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAMONT D. TATE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Lamont D. Tate has appealed from a judgment convicting him of possession of cocaine with intent to deliver in violation of WIS. STAT. § 961.41(1m)(cm)1 (1997-98).¹ Tate alleges that his conviction must be set

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

aside because the search of his residence was based upon a warrant that was not supported by probable cause. We reject his argument 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 with the commission of a crime, and that the objects sought will be found in the place to be searched." *DeSmidt*, 155 Wis. 2d at 131-32 (quoting *State v. Starke*, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978)). The totality of the circumstances must be considered. *See id.* 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 before him [or her], 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.” *DeSmidt*, 155 Wis.2d at 131 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

¶4 “The duty of the reviewing court is to ensure that the magistrate had a substantial basis for concluding that the probable cause existed.” *Higginbotham*, 162 Wis.2d 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.* “[R]esolution of doubtful or marginal cases regarding [an issuing magistrate’s] determination of probable cause should be largely determined by the strong preference that law enforcement officers conduct their searches pursuant to a warrant.” *Id.* at 990.

¶5 The evidence against Tate was derived from the search of a residence located at 3007 Chain Drive, Apartment 16, in Appleton, Wisconsin. According to the complaint, Tate shared the residence with Tamara Smith. A search warrant for the residence was issued on December 9, 1998. It was based upon an affidavit submitted by J.M. Russell, a police officer who worked with the Lake Winnebago Area Metropolitan Enforcement Group-Drug Unit. Tate argues that the magistrate lacked probable cause to issue the warrant because Russell’s affidavit was based upon conclusory allegations and hearsay statements given by confidential informants whose reliability was not established. We disagree.

¶6 Russell’s affidavit contained statements from three confidential informants. Two of the confidential informants alleged that Smith was selling crack cocaine out of her residence at 3007 Chain Drive. The third admitted purchasing crack cocaine from Smith at her residence within the week before the

filing of Russell's affidavit. The confidential informants thus corroborated each other. In addition, some of the information was corroborated by independent police investigation.

¶7 Examining the affidavit in more detail, it alleges that confidential informant (CI) #1 told an officer working with the Lake Winnebago Area Drug Unit that Smith, a black female living in an apartment at 3007 Chain Drive in Appleton, was involved in the sale of crack cocaine out of her residence. Russell further attested that he interviewed CI #2, who told him that Smith, a black female living at 3007 Chain Drive, Apartment 16, was involved in the sale of crack cocaine out of her residence. CI #2 also told Russell that Smith's husband used to live at the residence but was now in the Outagamie county jail. Russell independently corroborated through police records that Michael Smith had a prior address of 3007 Chain Drive, Apartment 16. Russell then interviewed Michael Smith at the jail, and Smith confirmed that he was married to Tamara Smith and previously lived at 3007 Chain Drive, Apartment 16.

¶8 Russell's affidavit also set forth a statement made by CI #3, who was interviewed by another drug unit officer and admitted to the officer that within the previous week he or she had purchased approximately \$100 of crack cocaine from Smith at her apartment at 3007 Chain Drive. CI #3 admitted to being a crack cocaine addict and stated that Smith represented that the substance she was selling to CI #3 was crack cocaine.

¶9 In his affidavit, Russell also alleged that he observed a controlled buy of crack cocaine from the residence at 3007 Chain Drive and observed a person matching Smith's description speaking to the confidential informant who made the controlled buy. The parties dispute whether the affidavit provided

sufficient information regarding the controlled buy to render the information reliable. However, even ignoring the allegations concerning the controlled buy, we conclude that the affidavit was sufficient to justify issuance of the search warrant.

¶10 The information provided by CI #3 was derived from CI #3's personal observation, establishing a reliable basis of knowledge. *See State ex rel. Bena v. Crosetto*, 73 Wis. 2d 261, 266, 243 N.W.2d 442 (1976). CI #3's credibility in identifying the substance purchased as crack cocaine was established because he was a crack cocaine addict, and thus familiar with the substance. In addition, the admission by CI #3 that he or she purchased crack cocaine was a statement against penal interest and thus established his or her veracity and credibility. *See id.* at 267.²

¶11 The information provided by CI #3 corroborated, and was corroborated by, the information from the other two confidential informants indicating that Smith was selling crack cocaine from her residence at 3007 Chain Drive. In addition, the information provided by CI #2 was corroborated by independent police investigation, verifying that Michael Smith was in jail, that he was married to Tamara Smith, and that he formerly resided with her at 3007 Chain Drive, Apartment 16. Russell's corroboration of some of the details of CI #2's statement rendered the remainder of the information provided by CI #2 reliable. *See State v. Falbo*, 190 Wis. 2d 328, 337, 526 N.W.2d 814 (Ct. App. 1994).

² Contrary to Tate's contention, the information provided by CI #3 could be deemed reliable regardless of whether the crack cocaine he or she purchased still existed. *Cf. State ex rel. Bena v. Crosetto*, 73 Wis. 2d 261, 265-67, 243 N.W.2d 442 (1976) (information provided by a confidential informant who purchased heroin was deemed reliable, even though the heroin was injected by the informant after the purchase).

¶12 Under the totality of the circumstances, the information permitted the magistrate to reasonably conclude that evidence of drug dealing would probably be found in Smith's residence at 3007 Chain Drive, Apartment 16. The search warrant therefore was properly issued.

By the Court.—Judgment affirmed.

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

