COURT OF APPEALS
DECISION
DATED AND FILED

August 2, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2445-CR **Cir. Ct. No. 2011CF86**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL L. LINDE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County: FRED W. KAWALSKI, Judge. *Reversed and cause remanded*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 SEIDL, J. Paul Linde appeals a judgment of conviction for manufacture of THC and felony bail jumping. Linde argues the circuit court erroneously denied his motion to suppress evidence, wherein he argued a search warrant was not supported by probable cause. We agree with Linde that the facts

were clearly insufficient to support a finding of probable cause. Further, we reject the State's argument that the good-faith exception to the exclusionary rule should apply in this case. Accordingly, we reverse the judgment and remand for the circuit court to grant Linde's suppression motion.

BACKGROUND

¶2 Forest County sheriff's deputy Jeffery Marvin prepared an August 30, 2011 search warrant application, seeking evidence of the manufacture of a controlled substance and possession of drug paraphernalia. The application explained Marvin was a member of the North Central Drug Enforcement Group Task Force and, as relevant, stated the following information:

> I make this affidavit in support of an application for a Search Warrant for the Paul L. Linde … residence that is located [at] 3479 Lake Lucerne Drive, in the Township of Lincoln in Forest County. This is … a brown in color, single story residence of wood construction with a white door and deck off the back, a full basement and a brown detached garage.
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> … On July 9th, 2010 at approx. 10:04 AM, Oconto County Deputy Ryan Zahn was dispatch[ed] to a report by DNR Warden Joe Paul. Warden Paul observed … [m]arijuana plants in the bed of a pick up truck parked at the gas pumps of a station located at Highway STH 32 and STH 64. The truck … was registered to Paul L. Linde of Green Bay. The plants were in burnt orange pots and approx. 2 1/2 to 3 feet in height. [Linde] was questioned about the plants. [Linde] advised Deputy Zahn they were a friend[']s and he was tending to the plants and had watered and fertilized and pruned the plants. [Linde] advised Deputy Zahn they had been located at his cabin in Forest County Wisconsin. Deputy Zahn had contacted … Forest County [deputies] and advised [them] of his findings. Through our in[-]house records it was determined the cabin was located at 3479 Lake Lucerne Drive …. [Linde] was arrested for possession [of] the plants and had paraphernalia in his possession. [Linde] also had a journal about plant cloning, soil supplements and notes pertaining to the care of marijuana plants.

> ….
>
> On August 26th, 2011 I Captain/Deputy Jeffery A. Marvin received a complaint from dispatch, a[n] anonymous report had been called in from a cell phone that Paul L. Linde had a large marijuana grow at his cabin which is located at 3479 Lake Lucerne Drive. The reporting party stated they had been at the cabin approx. 1 week prior and seen the marijuana plants. Due to current technology the reporting party's phone number was able to be obtained.
>
> ….
>
> I was able to determine that Paul L. Linde frequents this residence/cabin through our in-house records and information from friends and acquaintances.

¶3 Based on the application, a court commissioner issued a search warrant for Linde's cabin. Law enforcement executed the warrant and recovered marijuana and drug paraphernalia. Linde moved to suppress the fruits of the search, arguing probable cause was lacking because the information regarding his prior arrest was too remote in time and the anonymous tip was unreliable. Although it recognized that the informant was anonymous, the circuit court denied the motion. Linde entered into a plea agreement, and he now appeals.

DISCUSSION

¶4 Linde renews his argument that the search warrant was not supported by probable cause. A magistrate presented with a warrant application must determine whether, "given all the circumstances set forth in the [warrant application], 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." ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517 (quoting ***Illinois v. Gates***, 462 U.S. 213,

238 (1983)). Our supreme court has stated the following standard of review for search warrants:

> A search warrant may issue only on a finding of probable cause by a neutral and detached magistrate. We accord great deference to the warrant-issuing judge's determination of probable cause and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause.
>
> In reviewing whether there was probable cause for the issuance of a search warrant, we are confined to the record that was before the warrant-issuing judge …. The duty of the reviewing court is to ensure that the magistrate had a substantial basis for concluding that the probable cause existed.

State v. Higginbotham, 162 Wis. 2d 978, 989, 421 N.W.2d 24 (1991).[1] "[A] probable cause determination must be based upon what a reasonable magistrate can infer from the information presented by the police. … The subjective experiences of the magistrate are not part of the probable cause determination." ***Ward***, 231 Wis. 2d 723, ¶26. "Therefore, we must consider whether objectively viewed, the record before the warrant-issuing judge provided '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 they will be found in the place to be searched.'" ***Id.***, ¶27 (citations omitted).

¶5 "Considered within the totality of the circumstances, the value and reliability of an informant's tip 'may usefully illuminate the commonsense, practical question whether there is probable cause to believe that contraband or

[1] Both parties mention various facts that were not set forth in the warrant application. Because such facts are irrelevant to our analysis, we do not address them. *See* ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 421 N.W.2d 24 (1991).

evidence is located in a particular place.'" ***State v. Robinson***, 2010 WI 80, ¶27, 327 Wis. 2d 302, 786 N.W.2d 463 (quoting ***Gates***, 462 U.S. at 230). However, all informants' tips are not equal with respect to the probable cause inquiry; two factors are relevant:

> The first is the quality of the information, which depends upon the reliability of the source. The second is the quantity or content of the information. There is an inversely proportional relationship between the quality and the quantity of information required to reach the threshold of [probable cause]. In other words, if an informant is more reliable, there does not need to be as much detail in the tip or police corroboration in order for police to rely on that information …. On the other hand, if an informant has limited reliability—for example, an entirely anonymous informant—the tip must contain more significant details or future predictions along with police corroboration.

State v. Miller, 2012 WI 61, ¶31, 341 Wis. 2d 307, 815 N.W.2d 349.[2]

¶6 Regarding the first factor, the informant's reliability turns on his or her classification as either a citizen/confidential[3] informant or an anonymous informant. ***State v. Kolk***, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337; *see also* ***Miller***, 341 Wis. 2d 307, ¶31 n.18. Citizen and confidential informants are known persons. *See* ***Kolk***, 298 Wis. 2d 99, ¶12. "[A] confidential

[2] ***State v. Miller***, 2012 WI 61, ¶31, 341 Wis. 2d 307, 815 N.W.2d 349, addressed whether, under the totality of the circumstances, there was reasonable suspicion to conduct a traffic stop. While the legal threshold is lower there compared to probable cause, the process of assessing informant reliability is unaffected by that difference. *But see*, ***State v. Eason***, 2001 WI 98, ¶19, 245 Wis. 2d 206, 629 N.W.2d 625 ("The information necessary to establish reasonable suspicion can be less in both content and reliability than the information needed to establish probable cause.")

[3] "[T]he distinction is that a confidential informant is a person, often with a criminal past him- or herself, who assists the police in identifying and catching criminals, while a citizen informant is someone who happens upon a crime or suspicious activity and reports it to police." ***State v. Kolk***, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337.

informant may be trustworthy where he or she has previously provided truthful information, while a citizen informant's reliability is subject to a much less stringent standard." ***Id.*** (citations omitted). We view citizen informants "as reliable, and allow the police to act accordingly, even though other indicia of reliability have not yet been established." ***State v. Williams***, 2001 WI 21, ¶36, 241 Wis. 2d 631, 623 N.W.2d 106. On the other hand, both confidential and citizen informants "may be distinguished from an anonymous informer, one whose identity is unknown even to the police and whose veracity must therefore be assessed by other means, particularly police corroboration." ***Kolk***, 298 Wis. 2d 99, ¶12 (citing ***Alabama v. White***, 496 U.S. 325, 329 (1990)).

¶7 Additionally, there is variation "within the realm of informants who wish to remain anonymous depending upon whether the informant risked disclosing his or her identity to police." ***Miller***, 341 Wis. 2d 307, ¶33. An informant "who reveals some self-identifying information is likely more reliable than an [entirely] anonymous informant because '[r]isking one's identification intimates that, more likely than not, the informant is a genuinely concerned citizen as opposed to a fallacious prankster.'" ***Id.*** (citing ***Williams***, 241 Wis. 2d 631, ¶35).

> The key to this analysis is the informant's knowledge or presumed knowledge that a consequence of disclosing his or her identity is accountability for providing a false tip. Stated differently, police may infer that an informant who risks disclosing his or her identity is more likely to be providing truthful information because the informant knows that police can hold him or her accountable for providing false information.

Id., ¶34. Consequently, an entirely anonymous informant is subject to the most stringent test of reliability. *See* ***id.***, ¶37 ("Where an investigatory stop is based on

an entirely anonymous tip, it is critical that the informant provide significant, specific details and future predictions that police are able to corroborate.").

¶8 Turning to the present case, we agree with Linde that the tip was entirely anonymous and unreliable. As we explain below, because the information was unreliable and lacked sufficient corroborated detail, it provided no support for a probable cause finding. The State relies on several cases to argue a tip need not contain significant details or predictions that are corroborated by police for it to support probable cause. However, the cited cases are inapposite here because they concern known informants, rather than anonymous informants—whose veracity can be neither known nor presumed. *See, e.g.*, ***Ward***, 231 Wis. 2d 723, ¶26; ***Kolk***, 298 Wis. 2d 99, ¶12; ***State v. Powers***, 2004 WI App 143, ¶9, 275 Wis. 2d 456, 685 N.W.2d 869; ***State v. Sisk***, 2001 WI App 182, ¶8, 247 Wis. 2d 443, 634 N.W.2d 877. Further, ***Robinson*** is the primary basis for the State's argument, but it did not involve an entirely anonymous informant. There, the informant significantly risked disclosing his identity by walking into the police station to provide the tip. ***Robinson***, 327 Wis. 2d 302, ¶¶4, 28 ("[T]he fact that he personally walked into the police station supported his credibility. Indeed, the informant was 'anonymous' only to the extent that he was nameless.").

¶9 The State suggests the informant in this case was comparable to that in ***Robinson*** because here the informant jeopardized anonymity by "use of a traceable phone number." That argument fails for multiple reasons. First, the warrant application does not explain what "current technology" the police used to obtain the anonymous tipster's phone number. Thus, there was no basis to determine the tipster knew, or would likely know, that the phone number could be traced and potentially expose his or her identity. Second, the traced number was for a cell phone, which, unlike a landline, is not tied to a physical location.

Finally, there is no indication whether the traced cell phone number belonged to an identifiable phone carrier account or was instead from a prepaid "burner phone"[4] that preserves anonymity. Considering these factors, the informant here was entirely anonymous and did not risk exposing his or her identity.[5]

¶10 The informant also failed to provide any details about the purported grow operation; any other verifiable, nonpublic information; or any predictions. For instance, the informant did not explain whether the grow operation was indoors or outdoors or identify any peculiar details about the property or the grow operation, such as whether it utilized artificial lighting or how many plants were observed. The only information that could be, and was, corroborated, was that the informant gave Linde's accurate address. Such basic information, however, is readily available in phone books or online property records. Thus, the corroboration has minimal value. *See* ***Florida v. J.L.***, 529 U.S. 266, 272 (2000) ("An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal

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[4] Burner phones came to fame with the television show "The Wire," when drug dealers used the phones to communicate. …

> Since prepaid phones can be bought with cash (and without a contract), they're much harder to track. So it's easy for people to use them for certain (illegal) activities and then simply dump the phone—and more importantly, the phone number—when it's considered "burned," or too risky to use.

What is a burner phone?, PURE TALKUSA BLOG (Feb. 19, 2015) https://www.puretalkusa.com/blog/what-is-a-burner-phone/.

[5] As in any case involving an anonymous tip, Marvin was unable to establish the tip's reliability by vouching for the informant's credibility in the warrant application. *See supra* ¶6.

activity."); *see also* ***United States v. Danhauer***, 229 F.3d 1002, 1006 (10th Cir. 2000).

¶11 Ultimately, this case is easily distinguished from ***Robinson***, where the partially anonymous informant provided the *suspect's* cell phone number, which police then corroborated by calling it. *See* ***id.***, ¶28. Unlike knowing a person's address, a cell phone number is more difficult to obtain, and knowledge of it therefore suggests a personal relationship with the person to whom the number belongs. In ***Robinson***, the suspect's address was an additional detail relied on for corroboration. However, the suspect there was an apartment dweller, residing in "Apartment 8." ***Id.*** Here, the warrant application reveals the address in this case was for a single-story cabin. We contrast this to a multi-unit apartment, for which a tenant's address may be more difficult to ascertain due to transiency and the inability to rely on property records. Moreover, in ***Robinson***, the court emphasized the interplay of the corroborated details—the named suspect's apartment address and cell phone number, *see* ***id.***, ¶29 (phone rang inside apartment when cell phone number was called)—whereas here there is only the named suspect's address. While an informant's tip may support probable cause if it has low quality but high quantity, or vice versa, *see* ***Miller***, 341 Wis. 2d 307, ¶31, here the tip lacked both quality and quantity. Accordingly, we reject the State's assertion that "[t]his case is on all fours with ***Robinson***."

¶12 The State also relies, to a lesser degree, on the thirteen-month-old referral concerning Linde's arrest with marijuana plants in his truck at a gas station. We agree that, in certain circumstances, dated information such as this could still support probable cause, particularly given Linde had allegedly cared for his friend's marijuana plants at the same cabin referenced in the subsequent anonymous tip. However, there are no facts from the referral indicating Linde was

engaged in an ongoing, "large marijuana grow" operation. While the warrant application refers to marijuana "plants" in the truck, it does not state how many plants were found there. It would be mere speculation to conclude Linde possessed more than a few plants. Importantly, the only evidence from the referral was that the marijuana plants in Linde's care were *no longer at* his cabin. Further, at that point, Linde already knew police were aware he had tended plants at his cabin. After police had arrested Linde for possessing the plants from his cabin, it would be unreasonable to conclude from the referral alone that, in the absence of any other supporting evidence in the intervening thirteen months, there was an ongoing grow operation.[6]

¶13 The anonymous tip, which we have already determined to be unreliable on its face, did not provide any information suggesting improvements to the cabin or land that would indicate a long-standing grow operation. Thus, even if reliable, there was no detail that could have reinvigorated the otherwise stale arrest referral.[7] In the end, there were two sources of information in the warrant

[6] The State asserts the referral was not stale because marijuana growing is a long-term, continuous activity and the informant's tip provided recent evidence that a marijuana grow was ongoing. However, the State merely supports its assertion with a "see" citation to ***State v. Jones***, 2002 WI App 196, ¶23, 257 Wis. 2d 319, 651 N.W.2d 305, and ***State v. Loranger***, 2002 WI App 5, ¶4, 250 Wis. 2d 198, 640 N.W.2d 555. Those cases are both distinguishable; however, given the State's cursory argument and failure to discuss those cases, we likewise do not address them in detail. In ***Loranger***, old, detailed information of a large marijuana grow operation was recently reported and then supported by new, reliable information. ***Loranger***, 250 Wis. 2d 198, ¶¶3-5, 24. ***Jones*** was a drug trafficking—not growing—case; the trafficking was presumed to be of long-standing because the interior of a semi-trailer was substantially altered and the trafficking had not been interrupted, and newer information tied the suspect to the dated information. ***Jones***, 257 Wis. 2d 319, ¶23. Unlike both ***Loranger*** and ***Jones***, here Linde was already aware the "old" information was known to police.

[7] We further note that the thirteen-month-old arrest for marijuana possession was likely publicly available information, which further diminishes any potential reliability of the combined information sources, i.e., the stale referral and the fresh tip.

application, both of which were clearly deficient individually and which did not gain synergistic value when combined. Considering the totality of the circumstances set forth in the warrant application, we conclude the magistrate lacked a substantial basis for concluding probable cause existed. *See* ***Higginbotham***, 162 Wis. 2d at 989.

¶14 The State argues, in the alternative, that the fruits of the search of Linde's cabin should not be suppressed because law enforcement acted in good-faith reliance upon the issued warrant. We reject this argument.

¶15 Because the primary purpose of the exclusionary rule is to deter unlawful police conduct, *see* ***State v. Foster***, 2014 WI 131, ¶47, 360 Wis. 2d 12, 856 N.W.2d 847, an exception to the rule exists "where police officers act in objectively reasonable reliance on a search warrant issued by a neutral and detached magistrate." ***State v. Eason***, 2001 WI 98, ¶27, 245 Wis. 2d 206, 629 N.W.2d 625. Objectively reasonable reliance on a search warrant requires that: (1) officers conduct a significant investigation prior to obtaining a warrant; (2) a knowledgeable police officer or government attorney reviews the warrant application; and (3) a reasonably well-trained police officer would not know the search was illegal despite the magistrate's authorization. ***State v. Scull***, 2015 WI 22, ¶38, 361 Wis. 2d 288, 862 N.W.2d 562.

¶16 The State's argument fails here on the first prong. Officers did not conduct a significant investigation prior to seeking the warrant. They merely ran a records check on Linde and confirmed his address, requesting the warrant within

days of the anonymous tip.[8] Given the time lag of the arrest record and vague, anonymous tip, such investigation cannot reasonably be described as significant.

¶17 The State relies on ***Eason*** and ***Scull*** to argue these facts constitute a significant investigation, but in both cases police took additional steps prior to obtaining the warrant. *See* ***Eason***, 245 Wis. 2d 206, ¶70 (police arranged a controlled buy and later tested the substance); ***Scull***, 361 Wis. 2d 288, ¶¶6-8 (police took a drug-sniffing dog to suspect's front door and verified vehicle registration). It cannot reasonably be argued that the instant investigation is on par with ***Eason*** and ***Scull***, particularly because—unlike those cases—it centered on a tip from an anonymous informant.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.

[8] The State does not contend the police did any further investigation.