COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2016AP1289-CR **Cir. Ct. No. 2014CF819**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCUS L. PANTOJA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of conviction of the circuit court for Milwaukee County: CAROLINA STARK, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 DUGAN, J. Marcus L. Pantoja appeals the judgment convicting him of one count of possession of heroin with intent to deliver.[1] On appeal, Pantoja contends that the affidavit in support of a search warrant for his residence

[1] Pantoja was also convicted of being a felon in possession of a firearm. However, his notice of appeal does not challenge that conviction.

at 1100 South 1st Street (1st Street) did not establish probable cause for the search, and did not establish reasonable suspicion for authorization of the no-knock entry.[2] We disagree and affirm.

BACKGROUND

¶2 We briefly outline the background facts and refer to additional facts in the discussion that follows.

¶3 Based on controlled buys of heroin and corroborated information from confidential informants that Pantoja and his brother, Miguel Pantoja,[3] were running a heroin operation in the City of Milwaukee, local law enforcement officers obtained search warrants for two Milwaukee residences. The first search warrant was issued on January 17, 2014, for the upper unit at 1927 South Winona Lane (Winona Lane). The second search warrant was issued for apartment three at Pantoja's 1st Street address on January 20, 2014. Each warrant authorized its execution in a "no-knock manner."

¶4 Based on evidence seized during the execution of the 1st Street search warrant, Pantoja was charged with possession of heroin with intent to deliver, second or subsequent offense, while possessing a dangerous weapon (count one), and possession of a firearm by a felon (count two). Pantoja filed a

[2] Pantoja relies on three unpublished court of appeals decisions issued after July 1, 2009, each of which was authored by a member of a three-judge panel. However, because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state and we need not distinguish or otherwise discuss those unpublished opinions. *See* WIS. STAT. RULE 809.23(3)(b) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[3] Because Pantoja and his brother have the same surname, this court refers to Pantoja's brother by his given name.

motion to suppress the evidence seized from the 1st Street residence contending that: (1) the search warrant was not supported by probable cause; and (2) the officers executed the search warrant under circumstances that did not justify disregarding the knock and announce rule. At a December 4, 2014 motion hearing, the circuit court issued an oral decision denying the suppression motion.

¶5 In January 2015, Pantoja pled guilty to an amended charge on count one that dropped the dangerous firearm enhancement, and to count two as charged. On March 4, 2015, the circuit court imposed a global sentence of fourteen years comprised of eight years of initial confinement followed by six years of extended supervision. The judgment of conviction was entered. This appeal followed.

DISCUSSION

I. The Affidavit Established Probable Cause for Issuance of the Search Warrant.

A. Standard of Review.

¶6 Our review of an order addressing a motion to suppress presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We uphold the circuit court's findings of historical fact unless they are clearly erroneous, but the application of the law to those facts presents a question of law subject to independent appellate review. *See* ***id.***

¶7 In this case, the circuit court examined the four corners of the search warrant affidavit in determining whether there was probable cause for issuance of the search warrant. *See* ***State v. Eason***, 2001 WI 98, ¶11, 245 Wis. 2d 206, 629 N.W.2d 625. No findings of historical fact were made by the circuit court. *See* ***id.*** Accordingly, we consider the constitutional issues Pantoja raises *de novo*.

B. Legal Standards for Probable Cause.

¶8 "A search warrant may issue only on probable cause." ***State v. Romero***, 2009 WI 32, ¶16, 317 Wis. 2d 12, 765 N.W.2d 756. In deciding whether probable cause existed to issue a search warrant, this court examines the totality of the circumstances presented to the warrant-issuing magistrate to determine whether he or she "had a substantial basis for concluding that there was a fair probability that a search of the specified premises would uncover evidence of wrongdoing." *See* ***id.***, ¶3.

¶9 "A finding of probable cause is a common sense test." ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517.

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, 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.

Id. (citing ***Illinois v. Gates***, 462 U.S. 213, 238 (1983)). In reviewing whether there was probable cause to issue a search warrant, this court affords great deference to the issuing magistrate's determination. ***Ward***, 231 Wis. 2d 723, ¶21.

C. Issuance of the Search Warrant was Supported by Probable Cause.

¶10 Pantoja contends that the affidavit failed to establish (1) a nexus between the drug trafficking activities on Winona Lane and 1st Street, (2) the basis for the statements of the confidential informants that 1st Street was a stash house, and (3) the veracity—the credibility and reliability—of the informants. The State maintains that the affidavit provided (1) probable cause necessary to support the

search, (2) a nexus between Pantoja, drug trafficking, and 1st Street, and (3) a basis to believe the informants.

¶11 In asserting that the affidavit does not establish a nexus between the drug trafficking activities of Winona Lane and 1st Street, Pantoja relies on ***State v. Sloan***, 2007 WI App 146, ¶31, 303 Wis. 2d 438, 736 N.W.2d 189, which holds that "there must be some factual connection between the items that are evidence of the suspected criminal activity and the address to be searched." Here, the search warrant states that two independent and credible informants, CI-1 and CI-2, informed the affiant law enforcement officer, who has had formal training in drug trafficking organizations and sixteen years of law enforcement experience, that Pantoja and his brother were engaged in a heroin trafficking organization and that the majority of the street-level sales took place at Winona Lane. However, both informants advised the affiant that Pantoja was living with his girlfriend at the 1st Street apartment, which he was using as a stash house to hold larger quantities of heroin away from the location of the street level sales. CI-1 also said that packaging took place at that location.

¶12 CI-1 reported that, within one week of the search warrant application, CI-1 drove Pantoja to a location where CI-1 believed Pantoja made a large-scale heroin purchase. CI-1 then drove Pantoja from the transaction site to the 1st Street apartment stash/packaging location, and he verified that Pantoja entered the apartment because Pantoja was visible through its windows. CI-1 stated that a short time later, after "bagging up" street-level quantities of heroin, Pantoja exited the apartment. Then, CI-1 drove Pantoja to Winona Lane. During the drive, CI-1 observed forty bags of heroin in Pantoja's possession. Thus, CI-1's observations established first-hand knowledge of the nexus between the heroin

operation and the 1st Street apartment and its use as a stash house and place to package heroin.

¶13 This information is supplemented by the following facts: (1) CI-1 told police that within two weeks prior to the search warrant application, Miguel told CI-1 that Pantoja was living at the 1st Street apartment and they kept heroin at that location due to the fear that the Winona Lane location would be raided by police or robbed; and (2) CI-2 told police that within two weeks prior to the search warrant application, Pantoja told CI-2 that he was concerned about being raided and had moved in with his girlfriend at the 1st Street residence. Pantoja's statements to CI-2 were corroborated by CI-2's observations of Pantoja entering the 1st Street apartment and Pantoja's vehicle parked to the south of the residence.

¶14 The foregoing facts clearly establish a factual connection between the items that are evidence of the suspected drug activity and the 1st Street apartment. Thus, we reject Pantoja's first contention with respect to the probable cause showing.

¶15 Pantoja also challenges the veracity of the two informants. The State argues that "[a] rigorous controlled buy … satisfies the probable cause requirement for issuing a search warrant." *See* ***State v. Hanson***, 163 Wis. 2d 420, 424, 471 N.W.2d 301 (Ct. App. 1991). In ***Hanson***, this court rejected the contention that the reliability of a first-time informant had not been sufficiently established, holding that "there must always be a first time for the use of an informant, and if sufficient care is taken to verify his or her information, such as through a controlled buy, there is no constitutional reason for us to consider it insufficient." *See* ***id.*** Pantoja concedes as much by his failure to refute the State's

argument. *See* ***Charolis Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶16 Instead, Pantoja cites a passage from ***State v. Stank***, 2005 WI App 236, ¶34, 288 Wis. 2d 414, 708 N.W.2d 43, stating that the CI in that case had purchased drugs from the defendant on a weekly basis, had seen the same group of drug buyers every time the CI was at the defendant's home, had been to the defendant's home 500 times, and had been personally shown the defendant's firearm by the defendant and knew where drugs were hidden in the defendant's house. However, ***Stank*** was rejecting that defendant's staleness argument that passage of about two months had diminished the probability that the officers would uncover evidence of drug dealing. *See* ***id.***, ¶¶33-34. The facts Pantoja cites were not cited with respect to an informant's reliability.

¶17 Pantoja also cites three decisions of the Seventh Circuit Court of Appeals. However, the cited federal decisions are distinguishable because Pantoja's case involved two informants, multiple controlled buys, and independent police corroboration of multiple facts. *See* ***United States v. Koerth***, 312 F.3d 862, 867 (7th Cir. 2002) (the government conceded that probable cause was not established by information provided by a single informant who did no controlled buys, lacked corroboration, and had no indicia of reliability); ***United States v. Peck***, 317 F.3d 754, 756 (7th Cir. 2003) (single informant provided minimal detail, no basis was provided for the informant's identification of substance as illicit drugs, and police corroboration was limited to a record check of the defendant); ***United States v. Mykytiuk***, 402 F.3d 773, 776 (7th Cir. 2005) (single informant made statement against penal interest, but the affidavit was missing evidence of informant's reliability or evidence that he had provided reliable information in the past, and the only detail to support accuracy of the information

was the defendant's storage of materials to produce methamphetamine in two five-gallon buckets).

¶18 To be complete, we address Pantoja's veracity argument. To demonstrate veracity, facts must be brought to the issuing magistrate's attention that enable the issuing magistrate to evaluate either the credibility of the informant or the reliability of the particular information furnished. ***Romero***, 317 Wis. 2d 12, ¶21. However, as previously stated, a rigorous controlled buy can satisfy the probable cause requirement for a search warrant. ***Hanson***, 163 Wis. 2d at 424. In this case, the affidavit describes in detail two controlled buys in which CI-1 engaged. One of CI-1's controlled buys took place with Miguel within five days of the search warrant application. The other occurred in October 2013. The controlled buy that CI-2 engaged in occurred within two weeks of the search warrant application.

¶19 The affidavit describes the following protocol for each of these controlled buys: the affiant searched the person and clothing of the informant and found no money or controlled substances; the affiant gave the informant some money, watched the informant enter the residence, and saw the informant walk out of the residence a few minutes later and return directly to the affiant; the informant then gave the affiant a quantity of heroin; and the affiant searched the informant and found no money or controlled substances on the informant's clothes or person. The protocol used for the controlled buys in this investigation is identical to that this court found to be "rigorous" in ***Hanson***, 163 Wis. 2d at 423-24. The reliability of both informants is established by the descriptions of the controlled buys in which they participated. *See* ***id.*** at 424.

¶20 In addition to those rigorous controlled buys, which are sufficient to establish reliability, both informants had a history of reliability. *See* ***Romero***, 317 Wis. 2d 12, ¶21. Specifically, CI-1 made three successful controlled buys of controlled substances, which resulted in conviction of two individuals on drug charges, and CI-2 made three successful controlled buys in pending ongoing cases. Additional support for each informant's credibility is provided by the affiant and other law enforcement members' ability to corroborate information provided by review of law enforcement records. *See* ***id.***, ¶35 (independent police corroboration of some details provided by an informant helps support the reliability of unverified details). Further support for the reliability of CI-1 and CI-2's reports of Pantoja's involvement in the heroin operation is provided by the affiant's observation of Pantoja on the third-floor porch of the Winona Lane unit when Pantoja appeared to be overseeing an October 2013 controlled buy. At that time, the affiant also verified that a vehicle was present that listed to Pantoja's girlfriend at the 1st Street apartment.

¶21 The affiant was also able to corroborate the information provided by both informants regarding Pantoja living at 1st Street, by observing him leaving the residence and operating his vehicle within the seventy-two hours preceding the search warrant application. CI-1 also made a statement against interest by reporting that, after helping Pantoja with the large-scale heroin purchase, Pantoja supplied CI-1 with a quantity of heroin which CI-1 had used. This, too, serves to establish the declarant's credibility and therefore veracity. *See* ***id.***, ¶36. Additionally, the information provided by CI-1 that matched information provided by CI-2 and vice versa also helped to establish the reliability of the information each informant provided. *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.3(f) (5th ed. 2012).

¶22 Under the totality of the circumstances, the 1st Street warrant affidavit clearly established probable cause and that CI-1 and CI-2 were reliable informants.

II. The Affidavit Established Reasonable Suspicion for the No-Knock Provision.

A. Standard of Review.

¶23 In this case, the circuit court examined the four corners of the search warrant affidavit in determining whether there was reasonable suspicion to include the no-knock provision. *See* ***Eason***, 245 Wis. 2d 206, ¶11. The reasonableness of a no-knock entry is generally evaluated as of the time of the entry. ***Id.*** However, the scope of review is limited, as here, where the record does not indicate that the officers had any additional information that would have justified a no-knock entry. *See* ***id.*** Thus, our *de novo* consideration of the constitutional issue of whether there was reasonable suspicion for the no-knock entry is based only on the affidavit. *See* ***id***.

B. Legal Standards for Reasonable Suspicion.

¶24 In order to dispense with the rule of announcement, "'the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.'" ***Id.***, ¶18 (citation omitted). Reasonable suspicion is a commonsense standard that is less demanding than probable cause. ***Id.***, ¶19. The information required to demonstrate reasonable suspicion may be less in content and reliability than the information required to demonstrate probable cause. ***Id.***

"[P]articular facts must be shown to establish reasonable suspicion, and burden is upon the State to establish such particular facts." ***Id.***, ¶20.

C. Under the Particular Circumstances Described, the Police Had Reasonable Suspicion that Knocking and Announcing Would Be Dangerous.

¶25 Pantoja contends that the allegations of the affidavit do not establish reasonable suspicion for the no-knock entry at 1st Street because the bulk of the evidence relates to the Winona Lane residence. Specifically, Pantoja argues that, although CI-2 observed two armed individuals at Winona Lane, no connection between them and 1st Street was established and, although Miguel expressed a desire to purchase a gun at Winona Lane, the evidence did not establish that there would be a gun present at 1st Street. Pantoja also challenges the information in the affidavit regarding prior arrests of Pantoja and his girlfriend. Pantoja further argues that good faith does not excuse the actions of the police.

¶26 The State responds that suppression is not a remedy for a violation of the rule of announcement and therefore the court need not address whether there was reasonable suspicion for the no-knock provision. It further argues that the affidavit establishes reasonable suspicion and that, if the court finds that the affidavit is insufficient, the case should be remanded to the circuit court so that it may determine whether the good faith exception applies.

¶27 The State did not respond to Pantoja's contentions regarding the arrest records. Thus, it is deemed to have conceded the issue that the arrest records of Pantoja and his girlfriend do not contribute to the reasonable suspicion for the no-knock provision. *See* ***Charolis Breeding Ranches, Ltd.***, 90 Wis. 2d at 109.

¶28 In determining whether there was reasonable suspicion for the no-knock provision for the 1st Street warrant, we take a commonsense approach. The particular facts establish that Pantoja and his brother were engaged in a heroin distribution operation that used guns for protection. Within two weeks of the search warrant application, the operation had begun to use the 1st Street apartment as a stash house and Pantoja had moved into that apartment. Within five days of the warrant application, Miguel told CI-1 that Pantoja was living at 1st Street and that they were keeping quantities of heroin at that location for fear that they would be raided by police or robbed at the Winona Lane location. Within five days of the warrant application, CI-1 also saw Miguel ask a heroin buyer if he would be able to purchase a gun from that buyer.

¶29 These particular facts coupled with the affiant's general knowledge that "drug dealers frequently possess weapons to guard against robberies by drug abusers and rival drug dealers" and that drugs are easily destroyed establish reasonable suspicion that knocking and announcing their presence "would be dangerous or futile." *See* ***Eason***, 245 Wis. 2d 206, ¶18. We find that the warrant affidavit provided a sufficient basis to authorize the no-knock entry. Having so concluded, this court need not address the good faith issue.

CONCLUSION

¶30 We conclude that the affidavit in support of the search warrant establishes probable cause for its issuance and reasonable suspicion for the no-knock entry provision. Therefore, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

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