

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

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.

**Appeal No. 01-0615-CR
STATE OF WISCONSIN**

Cir. Ct. No. 98-CF-177

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD L. BOROWITZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Portage County:
JOHN V. FINN, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Richard Borowitz appeals a judgment convicting him on charges of manufacturing marijuana, and possessing it with intent to deliver. Borowitz entered a no contest plea to the charges after the trial court denied his motion to suppress much of the State's evidence against him. The issue

is whether the search warrant application established probable cause to authorize a search of Borowitz's residence. We conclude that it did, and therefore affirm.

¶2 The search warrant application of Detective Gary Koehmstedt requested authorization to search the Stevens Point home of Borowitz based on observations made during surveillance of a marijuana patch. The patch was not on property Borowitz owned, and was located twelve miles from his home. The application reported Koehmstedt's eighteen years of law enforcement experience, including three years on a drug task force. It also reported that during three months of surveillance someone removed or harvested eight of twenty-seven plants growing in the patch.

¶3 Koehmstedt and another officer were watching the site one morning when they saw Borowitz walk into the area, put on rubber gloves, open up a large plastic garbage bag, and begin picking up stems and buds of the marijuana plants and placing them into the garbage bags. Koehmstedt stated in the application that he had seen Borowitz cut the buds and stems off the plants. After observing this activity Koehmstedt and the other officer arrested Borowitz. A pat down search revealed a pair of cutting shears in a pants pocket. The affidavit further stated:

[B]ased on ... [Koehmstedt's] training, experience, review of the records and reports, and investigation in this matter, that it is probable that a search of [Borowitz's home] ... will result in recovery of evidence of [marijuana-related crimes] [Koehmstedt] believes that based upon the numerous investigations ... [he] has done regarding drug manufacturing and trafficking, that it is common for drug manufacturers and traffickers to grow marijuana plants at one location and then transfer the plants back to their residence, including their garages and outside sheds, and process and package the marijuana from their premises.

¶4 After Koehmstedt obtained the warrant to search Borowitz's residence, police found marijuana and drug paraphernalia on the premises, resulting in this prosecution and subsequent appeal on the suppression issue.

¶5 The finding of probable cause to issue a search warrant is a common sense determination that there exists a fair probability of finding contraband or evidence of a crime in a particular place. *State v. Ward*, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517. It is based on the totality of the circumstances. *Id.* at ¶26. We accord great deference to the issuing magistrate's determination, and the defendant's burden is to show that the facts are clearly insufficient to support a probable cause finding. *Id.* at ¶21. When the determination of probable cause is doubtful or marginal, we examine it in light of a strong preference that law enforcement officers conduct searches pursuant to a warrant. *Id.* at ¶24.

¶6 The search warrant application provided a sufficient basis to authorize the search of Borowitz's home. From the facts presented in the application, the issuing magistrate could infer the following: (1) that someone was regularly harvesting marijuana from the patch; (2) that Borowitz was the individual in question; (3) that Borowitz was taking the marijuana somewhere to process it and store it; and (4) there was a fair probability that the processing and storing area was located in or about Borowitz's residence. The last inference is reasonable and logical because the magistrate was entitled to rely on assertions in the application that were based on substantial police experience. *See State v. Hayes*, 196 Wis. 2d 753, 762, 540 N.W.2d 1 (Ct. App. 1995). It was not necessary for the application to assert facts directly linking Borowitz's marijuana activities to his home. *See Ward*, 2000 WI 3 at ¶33.

¶7 Borowitz contends that at the suppression hearing he proved that the warrant application contained false statements made knowingly or with reckless disregard for the truth; additionally, these false statements were, in his view, necessary to the finding of probable cause. Consequently, he contends that the trial court should have granted his motion to suppress. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (results of search must be suppressed if warrant application contains knowing and intentional or reckless misrepresentations necessary to probable cause finding).

¶8 One statement, admittedly false, was Koehmstedt's assertion that he witnessed Borowitz cutting the marijuana stalks and buds. In fact, he only observed Borowitz picking them up off the ground. However, there is a reasonable inference that Borowitz cut the stalks and buds from the fact that cutting shears were found in his pocket. Koehmstedt's misstatement was therefore immaterial, whether or not it was made knowingly and intentionally or with reckless disregard.

¶9 The second alleged false statement was Koehmstedt's representation that "numerous investigations" led him to conclude that it was common for drug manufacturers and traffickers to grow marijuana plants at one location and then transfer them back to their residences for processing and storage. Borowitz points to Koehmstedt's testimony that he could recall only one instance where drugs grown elsewhere were found at a drug trafficker's residence. However, a fair reading of the testimony is that Koehmstedt could only recall one case by name. In fact, he testified that he had been involved in other similar cases as well. Borowitz did not show that Koehmstedt recklessly or knowingly and intentionally falsified a material statement in the application.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5
(1999-2000).

