

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 16, 2002

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. 02-0573-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CM-222

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT F. PAGAC,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Robert Pagac appeals a judgment convicting him of possession of marijuana, contrary to WIS. STAT. § 961.41(3g)(e). Pagac argues that the trial court should have granted his motion to suppress evidence derived

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

from what Pagac contends was an illegally executed search warrant. This court concludes, however, that the trial judge had probable cause to issue the search warrant and therefore affirms the judgment and order.

BACKGROUND

¶2 On July 7, 2001, City of Ashland police officer James Gregoire requested a search warrant based upon information he received from a confidential informant who had provided him with truthful and accurate information in the past. Gregoire attached an affidavit to the application describing the facts the informant provided. It averred that the informant came to the police department and voluntarily offered information regarding drug activity at a home in Ashland where Pagac lived with Allan Katon and another roommate. The informant, within seventy-two hours of the warrant application, had attended a party at the house. While at the party, the informant observed bags of marijuana and pills described as methamphetamine. Also while at the party, several people, including Katon, told the informant that “the really big party” would be on July 7. The informant was told that a shipment of methamphetamines was coming to that residence from Eau Claire at 10 or 10:30 p.m. on July 7.

¶3 The trial judge granted Gregoire’s application and issued a search warrant. Gregoire obtained the warrant on July 7 and executed it shortly after midnight on July 8 while the party was in progress. Gregoire and other officers discovered some underage guests drinking and found drugs throughout the house, including marijuana in Pagac’s bedroom. Pagac was charged with encouraging or contributing to the delinquency of a minor. Later, the charges were amended to possession of marijuana. Pagac filed a motion to suppress the evidence obtained at his house, claiming the judge lacked probable cause to issue the search warrant.

The court denied his motion, Pagac pled no contest, and the trial court entered judgment and sentenced Pagac to one year of probation. Pagac now appeals.

DISCUSSION

¶4 Pagac again argues on appeal that the trial court should have suppressed the search warrant and evidence obtained by its execution because the judge lacked probable cause to issue the warrant.² He contends that the statement from the confidential informant was not specific enough, did not allege continuing criminal activity and was not sufficiently reliable to support a finding of probable cause and the issuance of a search warrant. This court disagrees.

¶5 “Appellate review of an affidavit’s sufficiency to support the issuance of a search warrant is limited.” *State v. Ehnert*, 160 Wis. 2d 464, 468, 466 N.W.2d 237 (Ct. App. 1991). This court accords great deference to the warrant-issuing judge’s determination of probable cause. *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). “[T]hat determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause.” *Id.* “Whether probable cause exists is to be determined by analyzing the totality of the circumstances.” *Illinois v. Gates*, 462 U.S. 213, 238 (1982).

² Pagac repeatedly refers to the search warrant as anticipatory and argues that the judge granting this search warrant gave “unfettered discretion to law enforcement.” In *State v. Falbo*, 190 Wis. 2d 328, 526 N.W.2d 814 (Ct. App. 1994), we concluded that anticipatory search warrants, issued “before the necessary events have occurred which will allow a constitutional search of the premises,” *id.* at 334 (citation omitted), are not unconstitutional per se and, in the proper circumstances, may be an effective tool in fighting criminal activity as well as protecting individual Fourth Amendment rights. *Id.* at 335. Here, the warrant arguably was not anticipatory. In any event, the “probable cause determination in an anticipatory search warrant is the same as the probable cause determination in a conventional search warrant.” *Id.* at 336.

¶6 When determining whether probable cause existed to issue a search warrant, this court is confined to the record that was before the warrant-issuing judge. *State v. Kerr*, 181 Wis. 2d 372, 378, 511 N.W.2d 586 (1994). An appellate court has a duty to ensure that the judge had a substantial basis for concluding that probable cause existed. *Id.* This court also determines whether the judge who issued the warrant was “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 they will be found in the place to be searched.” *Id.* (quoting *State v. Starke*, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978)).

¶7 “Probable cause is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *Id.* at 379 (quoting *State v. Petrone*, 161 Wis. 2d 530, 547-48, 468 N.W.2d 676 (1991)). The task of the judge “is simply to make a practical, common-sense 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.” *Gates*, 462 U.S. at 238.

¶8 In examining whether probable cause existed, this court first considers the “veracity” and “basis of knowledge” of persons supplying the hearsay information. *Id.* at 381. Here, these concerns are satisfied. As part of the warrant request, Gregoire informed the judge that this confidential informant had provided him with truthful and accurate information in the past. Also, the informant’s knowledge was based on first-hand observations and conversations during the informant’s presence at a party at the house.

¶9 Further, the information establishes probable cause. The informant saw and heard information regarding drugs in the house less than three days before Gregoire sought the search warrant. The informant also provided details about drugs in the house and conversations at the party. The informant gave Gregoire details about the party to be held on July 7, the same day Gregoire applied for the search warrant. There was a close chronological proximity between the informant's observations and the subsequent party. Therefore, it is a reasonable inference that there would be drugs at the July 7 party, independent of the shipment of methamphetamines scheduled to arrive. The affidavit provided a substantial basis for concluding that probable cause existed, and the judge had sufficient facts to believe that drugs would be found in the house. *See Kerr*, 181 Wis. 2d at 378.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

