

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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. 2009AP1164-CR

Cir. Ct. No. 2007CF169

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

AARON E. APPLEWHITE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County:
TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. The State of Wisconsin appeals an order suppressing evidence. The issue is whether the search warrant affidavit provided probable cause to search the defendant's residence. We conclude it did not, and therefore we affirm.

¶2 The warrant authorized a search of Aaron Applewhite's residence. The warrant was based on a telephonic affidavit heard by a court commissioner after Applewhite was arrested while carrying marijuana, knives, and \$501 in cash.

¶3 One issue the parties address is whether we should rely on a particular statement by the officer who made the telephonic affidavit in our review of the affidavit. The officer stated that Applewhite admitted after his arrest that he sold marijuana for money. We conclude that this statement has little bearing on the ultimate resolution of the suppression motion. Even without Applewhite's alleged admission, the affidavit contained a reasonable inference that Applewhite was a dealer, based on the way the marijuana was packaged, the amount of cash, and the knives. However, we also need not resolve this issue because we conclude that, even if we consider Applewhite's alleged admission, the affidavit still does not show probable cause.

¶4 The parties do not dispute the general legal principles related to a magistrate's review of a warrant application, or to our review of the magistrate's decision, and so we do not repeat those here. See *State v. Romero*, 2009 WI 32, ¶¶17-27, 317 Wis. 2d 12, 765 N.W.2d 756. Applewhite concedes that, if his alleged statement is relied on, there is sufficient evidence for the magistrate to have regarded him as a dealer. The dispute between the parties then boils down to the question of whether the State showed a sufficient nexus to Applewhite's residence to justify a search there.

¶5 The core of the State's argument can be found in two sentences. The first is: "Because the court commissioner could reasonably conclude from ... the affidavit that Applewhite was a drug dealer, the commissioner could also find probable cause to believe that evidence relating to drug-dealing would be found in

Applewhite's residence." The second sentence is: "While the affidavit did not state that officers knew Applewhite dealt drugs from his home, the court commissioner could infer that, as a drug dealer, Applewhite likely had drugs or paraphernalia in his home."

¶6 The problem with the State's argument is that the Wisconsin Supreme Court has rejected precisely the inference the State proposes. After upholding a search of the residence of an alleged dealer, the court cautioned that "we are not suggesting that when there is sufficient evidence to identify an individual as a drug dealer, as all the parties conclude there was, that there is sufficient evidence to search the suspect's home." *State v. Ward*, 2000 WI 3, ¶36, 231 Wis. 2d 723, 604 N.W.2d 517.

¶7 Accordingly, if the warrant is to be valid in this case, there must be something more than this inference. That something more must be reflected in the affidavit, because the magistrate must consider only the facts presented in the affidavit. *Id.*, ¶26. The State argues that other material in the affidavit supports a connection to Applewhite's residence, but we disagree.

¶8 Without attempting to describe or separately analyze the specifics of the affidavit here, we conclude that there is not sufficient information to show a nexus between drug dealing and Applewhite's residence aside from Applewhite's status as an alleged drug dealer. The information about his connections to others who were involved with controlled substances, or with dealing from a different residence, is not sufficient to connect dealing with Applewhite's residence. In addition, the affidavit is vague as to the sources and reliability of at least some of the information. We also note that the affidavit does not include what might have

been a relevant category of testimony often seen in such affidavits, in which an officer with experience in such matters testifies as to common practices of dealers.

¶9 In summary, we conclude that even with Applewhite's alleged admission about selling marijuana, the search warrant affidavit does not show a sufficient nexus to his residence to establish probable cause for a search there. Therefore, the evidence from that search was properly suppressed.

By the Court.—Order affirmed.

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

