

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2010AP2827-CR

Cir. Ct. No. 2009CF595

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANASTASIA A. LUSTY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 BROWN, C.J. Anastasia A. Lusty appeals from a judgment of conviction for two drug-related felonies, mainly arguing that the affidavit in support of the search warrant was insufficient because its genesis was information from two unreliable anonymous tips. We do not agree and affirm the judgment.

¶2 The relevant facts are those which were provided to obtain issuance of the search warrant. On August 4, 2009, a police investigator received an anonymous tip of a large amount of short-term traffic at 1203A Kentucky Avenue in Sheboygan, Wisconsin. The tipster indicated that Lusty may be selling drugs. On August 25, 2009, at approximately 10:00 p.m., the investigator conducted undercover surveillance at 1203A Kentucky Avenue. He saw four separate vehicles pull up in front of 1203 Kentucky Avenue within one hour of watching the house. The vehicle occupants entered the north door of the residence, stayed for a few minutes and then left.

¶3 The investigator checked the in-house records of Sheboygan County's Multi-Jurisdictional Enforcement Group (MEG) and found that Lusty had been arrested for possession of drug paraphernalia on October 27, 1999.

¶4 The investigator additionally confirmed that Lusty lived at 1203A Kentucky Avenue as of September 1, 2009, and after conducting an electric utilities check, he found that since October, Lusty was the utilities customer for 1203A Kentucky Avenue.

¶5 On September 9, 2009, the investigator received a second anonymous tip of drug activity and short-term traffic at 1203A Kentucky Avenue. The tipster indicated that Lusty was using and selling cocaine from her apartment.

¶6 On September 10, 2009, at approximately 8:30 a.m., the investigator and another detective pulled several garbage bags located directly in front of 1203A Kentucky Avenue, along the curb on the east side of the home. The officers inspected the contents of the bags and found numerous plastic baggies with the corners cut out of them. They also found marijuana seeds and stems with a small amount of suspected marijuana along with a piece of mail addressed to

Lusty at 1203A Kentucky Avenue. The investigator tested the suspected marijuana using a NarcoPouch field test and found a positive result for the presence of tetrahydrocannabinol, the active ingredient in marijuana.

¶7 Probable cause to search a particular location exists if the facts and circumstances would lead a reasonable person to conclude the evidence sought is likely to be in that location. *State v. Ward*, 2000 WI 3, ¶¶26-27, 231 Wis. 2d 723, 604 N.W.2d 517. In reviewing a finding of probable cause to issue a search warrant, we give “great deference” to the magistrate’s probable cause determination. *State v. Marquardt*, 2005 WI 157, ¶23, 286 Wis. 2d 204, 705 N.W.2d 878. The finding stands unless the defendant shows the facts are “clearly insufficient” to support the probable cause finding. *Id.* The issuing judge applies a totality of the circumstances test to make a practical and commonsense decision whether a fair probability exists that contraband or evidence of a crime will be found in a particular place. *See State v. Marten*, 165 Wis. 2d 70, 75, 477 N.W.2d 304 (Ct. App. 1991). The reliability of an unnamed informant’s statements also is analyzed under a totality of the circumstances test. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983); *see also State v. Boggess*, 115 Wis. 2d 443, 453, 340 N.W.2d 516 (1983). Such circumstances may include the presence of detail in the information and corroboration of details of an informant’s tip by independent police work. *Boggess*, 115 Wis. 2d at 455.

¶8 On appeal, Lusty argues that the affidavit in support of the search warrant was insufficient to support probable cause because (1) it relied on two anonymous informants whose veracity and reliability were wholly unknown and (2) the police investigation failed to link the items to be searched for with Lusty’s residence.

¶9 We reject Lusty’s argument. Based on our reading of the record, we are more than satisfied that the facts before the magistrate, viewed in totality, supported the issuance of the search warrant. First, independent police work corroborated details given by the tipsters, *see id.*: police independently confirmed that Lusty lived at the address given by the tipsters and that there was short-term traffic at Lusty’s residence; second, police found—in garbage left on the curb directly outside of Lusty’s residence—drugs and evidence of dealing along with mail addressed to Lusty; third, police determined that Lusty had a drug-related arrest. Therefore, there is a direct connection between the tips and the evidence corroborating the tips, which evidence in turn connected Lusty to the sale of drugs.

¶10 Lusty attacks the garbage pick-up on the grounds that the bags were not located in front of Lusty’s specific unit, but were rather in a location common to all of the building’s units. She asserts, therefore, that the investigator made an unsupported assumption that the bags he and his fellow officer were rummaging through in fact belonged to Lusty. She also claims it to be important that there was nothing in the affidavit showing the recovered mail as having been in the same bag as the marijuana seeds and cut baggies.

¶11 This argument also fails. Reading the affidavit, we see how the affiant indicated that he and a fellow detective “pulled several garbage bags *from ... in front of the address* along the curb on the east ... side of the home.” (Emphasis added.) The magistrate had no information regarding how many units were in the building. The magistrate only had information that Lusty lived in 1203A of that building. And there is certainly sufficient nexus to lead an officer to assume that the bags came from that building. Moreover, that there were other units, assuming there actually *were* other units, is beside the point. The bags were abandoned and there was no privacy interest for unit tenants anymore, including

Lusty. The officers were free to scavenge through the contents and what they found linked the drugs to Lusty.

¶12 Lusty's claim that there is no proof showing that the marijuana and marijuana seeds were in the same bag as the piece of mail for Lusty is also a nonstarter. A reasonable person, reading the affidavit, could conclude from a commonsense reading, that the marijuana, the seeds and the letter were from the same bag.

¶13 Lusty may not think so, but we consider her arguments about the garbage bags to be a hypercritical assessment of how there should have been more exacting language in the affidavit. But we do not look at the document through her demanding lens. We instead ask whether the reasonable magistrate could have reached the conclusion that it did based on the language that the officer actually used. Here, we have no reason not to defer to the magistrate's determination. We affirm.

By the Court.—Judgment affirmed.

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