COURT OF APPEALS
DECISION
DATED AND RELEASED

November 29, 1995

No. 94-3084-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN J. LEWANDOSKE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Brian J. Lewandoske appeals from a judgment convicting him of possession of tetrahydrocannabinol (THC) with intent to deliver contrary to § 161.41(1m)(h)1, STATS. On appeal, Lewandoske challenges the issuance and execution of the search warrant. Because we conclude that the warrant was supported by probable cause and the police were not required to knock and announce before entering Lewandoske's home, we affirm.

On or about June 23, 1994, Officer James Tetzlaff filed an affidavit in support of a search warrant for Lewandoske's residence, two vehicles and a "pop-up" camper to locate evidence relating to the following crimes: possession of THC, possession of THC with intent to manufacture or deliver, and keeping or maintaining a drug house.

The affidavit stated that Tetzlaff received a telephone call from an anonymous informant on June 20, 1994. The informant stated that he knew Lewandoske and that ten days earlier he had observed Lewandoske at the latter's residence with one-quarter ounce of marijuana. The informant also stated that Lewandoske was friendly with Michael DeBecker, whom the informant knew kept approximately one pound of marijuana in his basement and had sold one ounce of marijuana within the last ten days. The informant believed Lewandoske was obtaining marijuana from DeBecker.

On June 21, Tetzlaff picked up garbage bags in the alley near Lewandoske's residence and located identifiers for Larue King, Lewandoske's girlfriend, and a portion of a check imprinted with King's and Lewandoske's names. The garbage also contained two marijuana plant stems, a marijuana seed and a small screen which, in Tetzlaff's training and experience, is commonly used for marijuana pipes. The material tested positive for the presence of THC. While observing DeBecker's residence on June 23, Tetzlaff saw a car registered to Lewandoske parked at the house. A court commissioner issued the warrant.

At the hearing on Lewandoske's motion to suppress evidence seized pursuant to the warrant, Tetzlaff testified that he was one of four officers who went to Lewandoske's home to execute the search warrant. He knocked on the outer door of the residence, waited three to five seconds, "heard some activity in the house" and then entered the inner hallway of the residence. When Lewandoske opened the inner door, Tetzlaff stated, "Police, search warrant."[1]

[1] According to the complaint, Lewandoske allowed the officers to enter and told them where he kept drugs.

Lewandoske argued to the trial court that there was insufficient probable cause to support the issuance of the warrant, the warrant was overly broad and the information upon which the warrant was based was stale. The trial court acknowledged that it was required to pay great deference to the official who issued the warrant. The trial court made factual findings in line with Tetzlaff's testimony regarding the manner in which the search warrant was executed. The trial court also found that Lewandoske's vehicle was seen at DeBecker's residence on or about June 23, the date the warrant was issued. The trial court rejected Lewandoske's staleness argument and determined that the warrant was supported by probable cause because the anonymous informant had observed Lewandoske with one-quarter ounce of marijuana two weeks before the warrant was issued, and marijuana debris was found in Lewandoske's garbage on June 21, three days before the warrant issued. The trial court deemed this evidence of marijuana processing at Lewandoske's home. Additionally, Lewandoske was "well acquainted" with DeBecker, a suspected drug dealer.

Turning to the officers' failure to knock and announce before entering Lewandoske's residence, the trial court considered ***State v. Stevens,*** 181 Wis.2d 410, 511 N.W.2d 591 (1994), *cert. denied*, 115 S. Ct. 2245 (1995), and concluded that this was a "very, very close case." However, because the police had a warrant relating to drug dealing, the trial court concluded that they properly executed it even though they did not knock and announce their presence.

We agree with the trial court. The police entered the outer door of Lewandoske's residence without knocking and announcing their identity and purpose. Our supreme court held in ***Stevens*** that "a no-knock search is reasonable any time the police have a warrant, supported by probable cause, to search a residence for `evidence of drug dealing.' Under these circumstances, the police may dispense with the rule of announcement." ***Id.*** at 426, 511 N.W.2d at 596. The court characterized this as a "blanket" exception to the rule of announcement. ***Id.*** The police had a warrant to search Lewandoske's home for evidence of drug dealing. Accordingly, under ***Stevens,*** the police had authority to dispense with the knock-and-announce rule. Having so held, we turn to the remaining question on appeal: whether the warrant was supported by probable cause.

Appellate review of the sufficiency of an affidavit submitted in support of the issuance of a search warrant is limited. ***State v. Ehnert,*** 160 Wis.2d 464, 468, 466 N.W.2d 237, 238 (Ct. App. 1991). Our duty is to ensure that the warrant-issuing commissioner had a substantial basis for concluding that probable cause existed. ***State v. Kerr,*** 181 Wis.2d 372, 378, 511 N.W.2d 586, 588 (1994), *cert. denied*, 115 S. Ct. 2245 (1995). We must determine whether the commissioner 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.*** (quoted source omitted).

Great deference is due the commissioner's probable cause determination. ***Id.*** at 379, 511 N.W.2d at 589. Probable cause is a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***Id.*** at 379, 511 N.W.2d at 588 (quoted source omitted). The warrant issuer "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." ***Id.*** (quoted source omitted). Probable cause depends on the totality of the circumstances. ***Ehnert,*** 160 Wis.2d at 469, 466 N.W.2d at 238.

With regard to staleness, we look for proof "of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." ***Id.*** at 469, 466 N.W.2d at 238 (quoted source omitted). Timeliness is not determined by counting the number of days between the occurrence of the facts relied upon and the issuance of the warrant. ***Id.*** at 469, 466 N.W.2d at 239. Rather, timeliness depends upon the nature of the underlying circumstances. ***Id.***

We agree with the trial court that while this is a "very, very close case," the warrant application provided the commissioner with sufficient facts to "excite an honest belief" that the items sought were linked with the commission of the crimes suggested in the application and that the items would be found in the places to be searched. A common-sense reading of the warrant application permits a probable cause determination that drug dealing was occurring at Lewandoske's residence.

Lewandoske argues that the information upon which the application for the search warrant was based was stale. Based upon our review of the circumstances of this case, we conclude that the information was not stale. Lewandoske argues that the informant was reporting an occurrence (possession of one-quarter ounce of marijuana) which was ten days old. However, we note that two days before the warrant was issued, marijuana debris was found in Lewandoske's garbage, and Lewandoske's vehicle was observed at DeBecker's house the day Tetzlaff applied for the warrant. Old information can combine with new data to establish probable cause. *See* ***State v. Moley,*** 171 Wis.2d 207, 213-14, 490 N.W.2d 764, 766 (Ct. App. 1992). A nontechnical reading of the application suggests that it is plausible that Lewandoske was engaged in drug manufacturing or sale. The warrant application supported a reasonable inference that there was more than mere possession of marijuana going on at Lewandoske's residence.

Lewandoske's argument that the search warrant was overbroad is premised upon his contention that there was no probable cause of drug dealing. Having already concluded that the warrant was supported by probable cause, we do not address this argument.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.