COURT OF APPEALS
DECISION
DATED AND RELEASED

April 3, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-0884-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PENNY L. SWANSON,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Penny L. Swanson was convicted of possessing marijuana with intent to deliver as party to the crime. On appeal from the judgment of conviction, she challenges the trial court's refusal to quash a search warrant and suppress evidence gathered as a result of the search.[1]

[1] Swanson entered a guilty plea which waives nonjurisdictional defects and defenses, including claimed constitutional rights. ***County of Racine v. Smith,*** 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984). However, her right to appeal the trial court's refusal to quash the search warrant and suppress evidence is preserved under § 971.31(10), STATS.

Swanson argues that the affidavit for search warrant prepared by a Kenosha police detective did not support a probable cause determination and that the trial court erred in ruling that any errors in the affidavit were technical and did not prejudice Swanson's rights. We disagree and affirm.

The principles governing appellate review of a challenge to the issuance of a search warrant were recently set forth in ***State v. Kerr,*** 181 Wis.2d 372, 511 N.W.2d 586 (1994), *cert. denied,* 115 S. Ct. 2245 (1995). In assessing whether there was probable cause to issue the search warrant, we review the record that was before the warrant-issuing commissioner (here, the circuit court judge). ***Id.*** at 378, 511 N.W.2d at 588. We determine whether the issuing judge 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).

In assessing probable cause, the issuing judge "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***Id.*** at 379, 511 N.W.2d at 588 (quoted source omitted). "Probable cause is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior" based upon the totality of the circumstances set forth in the affidavit in support of the warrant. *See* ***id.*** at 379-80, 511 N.W.2d at 588-89 (quoted source omitted). We give great deference to the issuing judge's probable cause determination. ***Id.*** at 379, 511 N.W.2d at 589.

Turning to the record before the issuing judge at the time the search warrant was sought, we conclude that the judge had a substantial basis for concluding that probable cause existed. The detective's affidavit in support of the issuance of the search warrant stated that controlled substances and associated paraphernalia would be found at 915 - 49th Street, Kenosha, and that particular United States currency used in a controlled buy of cocaine by a confidential informant would also be found on the premises.

Paragraphs one and two of the affidavit's factual statements recite that the detective is assigned to the Kenosha County Controlled Substances Unit and has specialized training in investigating drug trafficking, including the use

and supervision of informants. Paragraph three describes the steps in a "controlled buy" by a confidential informant working with police. Paragraph four indicates that the search warrant is based, in part, upon a controlled buy made by the confidential informant within the past seventy-two hours. Paragraph five states that in the past seventy-two hours, the informant told the detective that he or she could purchase cocaine at 915 - 49th Street, Kenosha, a controlled buy was arranged, and the detective observed the informant enter and leave the 49th Street address and return to him. At that point, the informant gave the detective $80.[2] Paragraph six states that the informant told the detective that Penny Swanson and an individual named "Pepie" gave the informant a controlled substance while inside the 49th Street address, that Swanson represented that the substance was cocaine and that the informant gave Pepie the U.S. currency designated for use in the controlled buy. Paragraph seven of the affidavit states that the detective has experience in testing controlled substances and that the substance obtained by the informant from Swanson testified positive for the presence of cocaine.

The circuit court issued the warrant based upon this affidavit. A search of 915 - 49th Street yielded marijuana and cocaine. Swanson was charged with two counts of possession with intent to deliver a controlled substance (cocaine and marijuana) and moved to quash the search warrant and suppress the evidence seized.

At the hearing on the motion, Swanson argued that the error in paragraph five, i.e., the statement that the confidential informant returned from the controlled buy with $80 rather than a controlled substance, precluded a determination of probable cause that a crime occurred. The State conceded that paragraph five contained a clerical error but urged that there was probable cause based upon the totality of the circumstances set forth in the affidavit. The court agreed and ruled that the error in the affidavit was technical and did not affect Swanson's substantial rights. *See* § 968.22, STATS. In arriving at this decision, the court was influenced by a complete reading of the detective's affidavit, particularly the allegations regarding the detective's familiarity with controlled buys using confidential informants, the fact that a controlled buy

[2] The trial court found that paragraph five's reference to $80, which should have been a reference to the controlled substance purchased by the confidential informant, was a clerical error. As we hold below, we agree with this ruling.

occurred and that the substance purchased tested positive for the presence of cocaine. Therefore, the court declined to suppress the evidence seized pursuant to the search warrant. Swanson pled guilty to possession of marijuana with intent to deliver and renews her challenge to the warrant on appeal.

Section 968.22, STATS., provides that "[n]o evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant." It is apparent from the totality of the circumstances that the error in paragraph five was clerical. Other paragraphs in the affidavit described the manner in which a controlled buy is made, the role of the confidential informant and the detective, the field test result on the controlled substance received from the confidential informant, and the fact that the confidential informant gave the predetermined amount of currency to Pepie and received a controlled substance from Swanson. The clarity and totality of these statements support a determination that the error in paragraph five was merely clerical.

Swanson complains that the issuing judge violated her substantial rights by "rubber-stamping" the affidavit without noticing the error in paragraph five. We disagree. While it would have been preferable for the error to have been noticed and corrected prior to issuance of the search warrant, we nevertheless affirm the refusal to quash the warrant because the error was merely clerical.

A clerical error in an affidavit for a search warrant does not render the court's probable cause determination erroneous. ***United States v. Hyten,*** 5 F.3d 1154, 1157 (8th Cir. 1993). In ***State v. Nicholson,*** 174 Wis.2d 542, 497 N.W.2d 791 (Ct. App. 1993), this court reviewed an affidavit which misidentified the premises to be searched even though the police ultimately searched the premises they had intended to search. ***Id.*** at 545, 497 N.W.2d at 792. In reaching its conclusion that the erroneous address stated in the warrant did not invalidate the warrant, this court considered the other information supplied in the affidavit in support of the search warrant. That information made clear which location was to be searched notwithstanding the erroneous address contained in the affidavit. ***Id.*** at 546, 497 N.W.2d at 793.

As in ***Nicholson,*** the totality of the circumstances set forth in the affidavit in this case indicates that Swanson was involved in a controlled buy and that paragraph five's statement that the informant gave the $80 buy money back to the detective was a technical irregularity under the facts of this case and did not affect any substantial right of Swanson.

Finally, we disagree with Swanson that the affidavit is somehow invalid because it is largely preprinted with spaces for inserting specific information relating to the particular premises to be searched and the circumstances justifying a search. Our focus is on the content of the affidavit, not on its form. The affidavit contains factual allegations sufficient to excite an honest belief that the objects sought in the warrant were linked with the commission of a crime and that they would be found in the place to be searched. ***Kerr,*** 181 Wis.2d at 378, 511 N.W.2d at 588.

By the Court.—Judgment affirmed.

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