

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 27, 2012

Diane M. Fremgen
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. 2012AP336-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CF2842

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BOBBY L. TATE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Bobby L. Tate appeals the denial of his motion to suppress evidence based on what he contends was an illegal search. Specifically, Tate contends that an order allowing police to track the location of his cell phone constituted an illegal search warrant and that all evidence obtained as a result of

the location data should have been suppressed. Because we conclude that the warrant-issuing judge had a substantial basis for finding probable cause to issue the order to locate Tate's cell phone, we affirm.¹

BACKGROUND

¶2 In June 2009, Tate was charged with one count of first-degree intentional homicide, one count of second-degree reckless injury, and one count of possession of a firearm by a felon. The charges stemmed from the shooting death of Jarvis Banks, and the shooting of Demetrius Edwards, resulting in injury to Edwards. According to the criminal complaint, on June 9, 2009, the shooting took place outside of Mother's Food Market/Magic Cell Phones, 2879 North 16th Street, Milwaukee (Mother's Food Market). Witnesses described the shooter as a black male wearing a white polo shirt with large, colored stripes.

¶3 During the investigation, police spoke with employees of Mother's Food Market, one of whom told police that the store's external surveillance cameras captured the shooting. Another store employee told police that prior to the shooting, a black male wearing a white shirt with colored stripes came into the store and purchased a prepaid cellular phone. According to the store employee, the cell phone purchaser identified himself as "Bobby." A review of the exterior surveillance video showed a black male, wearing a white shirt with stripes, outside of the store firing gun shots. The video also showed the shooter walking away from the store, but continuing to fire gun shots. Internal surveillance videos

¹ To the extent Tate argues issues not addressed by this opinion, we conclude that our decision on the validity of the search warrant resolves all other issues argued by Tate. *See Patrick Fur Farm, Inc. v. United Vaccines, Inc.*, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (We decide cases on the narrowest possible grounds.).

showed the same man purchasing a cell phone from inside the store several minutes before the shooting.

¶4 A Mother's Food Market employee provided police with the phone number of the purchased cell phone. Police then applied for a court order authorizing the police to use cellular tower information to identify the physical location of the cell phone.² Specifically, the order requested court authorization to install and use a trap and trace device, a pen register device, and other means of obtaining cell tower activity and location information. Supporting this application was an affidavit from Milwaukee Police Detective Patrick Pajot, one of the officers on the scene of the shooting. In his affidavit, Pajot provided his knowledge of cell tower technology, a description of the contents of the surveillance videos, witness descriptions, explanations of the pen register and trap and trace technology, and Pajot's belief that tracking the location of the shooter's phone would "reveal evidence of the crime of First Degree Intentional Homicide." A circuit court judge granted the order approving the tracking of Tate's cell phone location.

¶5 Police tracked the location of the cell phone to an apartment building in Milwaukee. After knocking on multiple doors within the apartment unit, police eventually arrived at the apartment of Tate's mother. Tate's mother consented to a search of the apartment. Tate was subsequently located in a bedroom, as was a white shirt with colored stripes that matched the shirt seen on surveillance video, and a bloody tennis shoe. Tate was arrested and charged.

² "Order" and "warrant" are used interchangeably by the parties throughout the record; however, the relevant law cited by both parties deals with the necessary requirements for the issuance of search warrants. Because we conclude that the order issued by the circuit court in this case meets the standard required for the issuance of search warrants, we too use the terms interchangeably.

¶6 Tate subsequently filed a motion to suppress evidence relating to all items recovered from his mother's apartment, all statements given to police by people in the apartment (including him), and statements he made after his arrest. Tate argued that all evidence obtained during and after his arrest was taken as a result of an illegal search. Specifically, Tate argued that: (1) the order-issuing judge lacked statutory authority to track his cell phone for location data; (2) the statutes cited in the application for the order did not provide the requisite authority; and (3) court-ordered tracking violated his state and federal constitutional rights. The circuit court denied the motion, stating:

[Police] got a valid order from [the judge] which allowed them to track the cell phone to an area.... They're allowed to do that.... They're allowed to try and find out an area where the cell phone is.

....

What do the cops know when they go to [the judge]? Well, they know somebody was shot and killed by an unknown subject at about 6:25[p.m.] on June 9, 2009. They've got surveillance video. They've got a description of the suspect including a mostly white shirt with multi-colored stripes. They also have video that shows that same suspect is purchasing a telephone – a cell phone at the Mother's Foods Magic Cell Phone Store on North 16th Street.

They – the video shows him walking out of the store, walking up to the victim and shooting the victim in the back of the head, so they know that the guy that purchased the phone is the shooter.

They get the information about the cell phone. They go to [the circuit court] and say Judge, we'd like a track and trace so that we can find this cell phone and they're hoping that when they find the cell phone the guy in the striped shirt is there.

[The judge] gives them that order. They use their technology as ... testified to. Didn't use any GPS technology to find out where the cell phone was being used

for. With the [mobile station ID] and TESN³ numbers they narrow it to a location to an apartment building at ... West Hampton [Street].

(Some formatting altered.)

¶7 Pursuant to an amended Information, Tate pled no contest to first-degree reckless homicide and possession of a firearm by a felon. Tate was sentenced to forty-nine years on the first-degree reckless homicide charge, consisting of thirty-nine years' initial confinement and ten years' extended supervision, and eight years on the felon in possession charge, consisting of four years each of initial confinement and extended supervision. This appeal follows.

DISCUSSION

¶8 The heart of Tate's argument on appeal is that the order authorizing the tracking of Tate's phone to find its location was invalid under WIS. STAT. § 968.13 (2009-10)⁴ and multiple other federal and state statutes because the

³ We presume the circuit court meant "ESN" number, which stands for "electronic serial number."

⁴ WISCONSIN STAT. § 968.13, the search warrant statute, provides:

(1) A search warrant may authorize the seizure of the following:

(a) Contraband, which includes without limitation because of enumeration lottery tickets, gambling machines or other gambling devices, lewd, obscene or indecent written matter, pictures, sound recordings or motion picture films, forged money or written instruments and the tools, dies, machines or materials for making them, and controlled substances, as defined in s. 961.01(4), and controlled substance analogs, as defined in s. 961.01(4m), and the implements for smoking or injecting them. Gambling machines or other gambling devices possessed by a shipbuilding business that complies with s. 945.095 are not subject to this section.

(continued)

relevant statutes do not authorize courts to issue orders for location data when location is not itself evidence of a crime. Tate further contends that because his phone was located in a private residence, his Fourth Amendment right to a reasonable expectation of privacy was also violated. We disagree.

¶9 We conclude that under this set of facts, the issue before us is simply whether there was probable cause for the issuance of the tracking order. The warrant clause of the Fourth Amendment “require[s] only three things: (1) prior authorization by a neutral, detached magistrate; (2) a demonstration upon oath or affirmation that there is probable cause to believe that evidence sought will aid in a particular conviction for a particular offense; and (3) a particularized description of the place to be searched and items to be seized.” *State v. Sveum*, 2010 WI 92, ¶20, 328 Wis. 2d 369, 787 N.W.2d 317. The only issue relevant to this appeal is whether there was probable cause to believe that location data obtained from Tate’s phone would lead to evidence of the crime of homicide described by witnesses and shown on the surveillance videos.

(b) Anything which is the fruit of or has been used in the commission of any crime.

(c) Anything other than documents which may constitute evidence of any crime.

(d) Documents which may constitute evidence of any crime, if probable cause is shown that the documents are under the control of a person who is reasonably suspected to be concerned in the commission of that crime under s. 939.05(2).

(2) In this section, “documents” includes, but is not limited to, books, papers, records, recordings, tapes, photographs, films or computer or electronic data.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶10 Whether probable cause exists is “determined by examining the totality of the circumstances.” *State v. Ward*, 2000 WI 3, ¶26, 231 Wis. 2d 723, 604 N.W.2d 517 (citation and one set of quotation marks omitted). We must consider whether objectively viewed, the record before the warrant-issuing judge provided “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.” *See id.*, ¶27 (citation and quotation marks omitted). “[T]o establish probable cause to search, evidence must indicate a ‘fair probability’ that a particular place contains evidence of a crime.” *State v. Brereton*, 2011 WI App 127, ¶9, 337 Wis. 2d 145, 804 N.W.2d 243 (citation omitted). In reviewing whether there was probable cause for the issuance of a search warrant, we accord great deference to the determination made by the warrant-issuing judge. *See Ward*, 231 Wis. 2d 723, ¶21. The judge’s “determination will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding.” *See id.*

¶11 The application for the warrant in this case contained a sworn affidavit from Pajot, stating that:

based upon his personal knowledge and experience, as well as conversations with other investigating officers of the Milwaukee Police Department that on Tuesday, June 09, 2009, at about 6:25 pm, an Unknown subject intentionally shot the victim in the back of the head causing the victims [sic] death, this incident was captured on the stores [sic], Mothers Foods/Magic Cell Phone 2879 N 16th St, surveillance video. Based on surveillance video and witness descriptions, affiant states that the suspect is a black male, 20-30 years old, approximately 5’10” [sic] with a muscular build, wearing a mostly white shirt with multi colored [sic] stripes. Video also shows the suspect at the counter purchasing the phone listed on this document, walking out of the store with the phone, walking up to the victim who was standing next to a yellow car and shooting the victim in the back of the head. Affiant further bases

this affidavit upon the statement of [T.M.], the Mothers Foods/Magic Cell Phone clerk that sold the suspect the cell phone, that the phone number of the cell phone purchased by the suspect is

¶12 Pajot provided a detailed affidavit describing the contents of the surveillance video, which showed the shooter both purchase a cell phone at Mother's Food Market and then shoot the victim outside of the store. Pajot also reported witness descriptions of the shooter and the shooter's clothing. The affidavit explained Pajot's knowledge of cell tower technology, the manner in which locations are traced, and his belief that, based on his knowledge and experience, the location of the shooter's phone would probably lead to evidence of the crime of first-degree intentional homicide.

¶13 Under the totality of the circumstances, we conclude that there were sufficient facts for the warrant-issuing judge to believe that the location data from Tate's phone would probably lead to evidence of the shooting, Tate's clothing, the weapon, and ultimately, Tate himself.⁵ The phone was evidence that could help to identify the shooter. *See Warden v. Hayden*, 387 U.S. 294, 307 (1967).

¶14 Tate contends that the use of tracking devices violated his right to privacy because his phone was tracked to his private residence. However, the location of the phone was narrowed down to an apartment building, not to his individual apartment. Police knocked on the doors of multiple units prior to knocking on Tate's mother's door. The circuit court found that Tate's mother consented to the entry of her apartment. No violation of Tate's Fourth Amendment privacy rights occurred when police located and entered his mother's

⁵ We note that Tate's apprehension and the recovery of evidence of the shooting was not the result of Fourth Amendment violations, but rather, the result of well-done, systematic police work. The police in this case obtained the requisite warrant, and, in essence, followed a trail leading to Tate's vicinity.

apartment with her permission. *See Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990) (entry by the police is valid when based upon “the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so.”).

CONCLUSION

¶15 For the foregoing reasons, we affirm the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

