**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 17, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2012AP2646-CR** **Cir. Ct. No. 2012CM280**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DIANE M. MILLARD,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] Diane M. Millard appeals from her conviction for possessing drug paraphernalia pursuant to WIS. STAT. § 961.573(1). Millard

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

was charged with possession of drug paraphernalia and possession of an illegally obtained prescription drug after police found a marijuana pipe and prescription pill in her jewelry box. Millard moved to suppress the evidence, arguing that police seized the items during an unlawful search and seizure. Millard argued that the information supporting the warrant was stale when the warrant was issued, that probable cause was stale when the warrant was executed, that the warrant was overbroad, and that there was no other justification for seizure of the illegally obtained prescription pill. The circuit court was not persuaded by these arguments and neither are we. We affirm the denial of Millard's motion to suppress and her resulting conviction.

## BACKGROUND

¶2 Millard lives with her son, Patrick Rohde. On January 25, 2011, in the driveway of his residence (1941 Ohio Street, Oshkosh, Wisconsin) Rohde sold heroin to an undercover officer with the Lake Winnebago Area Metropolitan Enforcement Drug Group ("police") and a confidential informant. On July 6, 2011, police removed one plastic garbage bag from the terrace at Rohde's house and conducted a refuse exam. They found mail addressed to Rohde at the residence and a small, circle-shaped screen with burnt residue on it. Based on training and experience, the examining officer was aware that screens of this type are used to smoke marijuana. The screen tested positive for THC/marijuana.

¶3 Based on these two events, police requested a warrant to search the residence, which the court granted on July 7, 2011. On July 12, the police conducted the search. Inside the northwest bedroom, in a jewelry box on top of the dresser, police discovered an unlabeled pill bottle that contained one tablet. Investigators later identified the tablet as Doxepin HCL 50mg, a prescription

medication. No valid prescription for the pill was present. Police also found a marijuana pipe in the same jewelry box. In that room, police discovered a document addressed to Diane M. Millard, at the residence, which led officers to identify the room as Millard's bedroom.

¶4 Millard was charged with possession of drug paraphernalia and possession of an illegally obtained prescription. Millard initially pled not guilty and moved to suppress the evidence found during the July 12 search. Her motion was denied, and she then pled no contest to the drug paraphernalia charge. The prescription drug charge was dismissed but read in. Millard appeals her conviction.

## STANDARD OF REVIEW

¶5 In cases regarding the validity of warrants, we uphold the determination of probable cause if there exists a substantial basis for the decision. ***State v. Schaefer***, 2003 WI App 164, ¶4, 266 Wis. 2d 719, 668 N.W.2d 760. The court issuing the warrant must make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before it, there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***State v. Multaler***, 2002 WI 35, ¶8, 252 Wis. 2d 54, 643 N.W.2d 437. It is the burden of the person challenging the warrant's validity to demonstrate that the facts are clearly insufficient to support a finding of probable cause. ***Id.***, ¶7. "We accord great deference to the warrant-issuing judge's determination of probable cause, and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." ***Id.***

## ANALYSIS

*Probable Cause Supporting Warrant's Issuance—Stale Information*

¶6 Millard argues that there was not probable cause for the issuance of the warrant because the underlying information was stale. She contends that the five months that elapsed after the controlled buy rendered that event insufficient to support the warrant. And, says Millard, the screen found in the refuse exam was not enough to refresh the stale information.

¶7 Probable cause for a search warrant is not a legalistic or technical concept, but rather a "flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***State v. Herrmann***, 2000 WI App 38, ¶22, 233 Wis. 2d 135, 608 N.W.2d 406 (citation omitted). "The test for the issuance of a search warrant is whether, considering the totality of the circumstances set forth in support of the warrant, probable cause exists to believe that objects linked to the commission of a crime are likely to be found in the place designated in the warrant." ***Id.*** A "probable cause determination in the face of a staleness challenge depends upon the nature of the underlying circumstances, whether the activity is of a protracted or continuous nature, the nature of the criminal activity under investigation, and the nature of what is being sought." ***Multaler***, 252 Wis. 2d 54, ¶37. Old information can be used to establish probable cause if it contributes to an inference that probable cause existed at the time of the warrant's application. ***State v. Moley***, 171 Wis. 2d 207, 210, 490 N.W.2d 764 (Ct. App. 1992).

¶8 Millard argues that the two events—the heroin buy and the screen in the trash—are too far apart temporally and too distinct in nature to support a

finding of probable cause to issue the warrant. She contends that a screen tending to show individual marijuana use cannot refresh a controlled buy of heroin.

¶9 Regarding the staleness challenge, the two drug-related events show protracted drug activity. Given these underlying circumstances, the information provided a substantial basis for issuance of the warrant. It was reasonable for the circuit court to infer from the evidence before it that there was long-term drug activity going on. We cannot say that the evidence before the circuit court was clearly insufficient to support the warrant. We conclude that the circuit court had a substantial basis to believe that controlled substances were located in the Millard residence on the day of issuance, based on the heroin buy and the subsequent refuse-exam marijuana screen, and therefore the decision to issue the warrant was justified.

*Probable Cause Supporting Warrant's Execution—Stale Probable Cause*

¶10 Millard's next argument is that any probable cause at issuance went stale by the time the warrant was executed four days later. WISCONSIN STAT. 968.15(1) requires that the warrant be executed and returned not more than five days after its issuance. In a staleness challenge, the defendant has the burden to show that probable cause had dissipated by the time the warrant was executed. ***State v. Edwards***, 98 Wis. 2d 367, 376, 297 N.W.2d 12 (1980). Unless the defendant can show that there were circumstances that would render the probable cause at issuance void, law enforcement has five days to execute the warrant. ***Id.***, 376-77.

¶11 The execution here was within the statutory time frame. The heroin buy and the marijuana screen constituted evidence of continuing drug use at Millard's residence; there was probable cause to believe drugs were present in the

residence four days after the discovery of the marijuana screen. Millard has not made the required showing that something about this case would shorten the statutory five-day time frame.

*Pill and Pipe Seizure*

¶12 Millard argues that the warrant's inclusion of controlled substances was overly broad, and further that seizure of the prescription pill fell outside the warrant and did not fall within the plain view doctrine or any other exception to the Fourth Amendment's warrant requirement.

¶13 An officer may seize any property that is evidence of a crime, even of a different crime than that which prompted the search, if: (1) the evidence is discovered in the course of a lawful search; (2) the evidence by itself or with facts known to the officer prior to search, but without subsequent additional facts, provides a connection between the evidence and criminal activity; (3) the evidence is discovered in an area properly searchable within the purpose of the search; and (4) the evidence is discovered while the officer is actually searching for objects within the purpose of the search. ***Myers v. State***, 60 Wis. 2d 248, 261, 208 N.W.2d 311 (1973).

¶14 All four prongs in ***Myers*** are met here. First, the officers discovered the evidence during a lawful search pursuant to a warrant. Second, the evidence provided a connection to criminal activity. Prior to the search there had been heroin and marijuana activity at the house. It was reasonable to believe the lone pill, in a container with no label or prescription, found in a jewelry box with a marijuana pipe, was related to criminal activity. Third, the police discovered the pill in an area searchable pursuant to the warrant because the warrant allowed officers to search the home. Fourth, they found the pill while searching for

marijuana and heroin. It was reasonable to look in the jewelry box because this was a location where drugs could be stored.

¶15 Because the pill was lawfully seized under ***Myers***, we need not address Millard's arguments regarding overbreadth of the warrant. ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (we need not address all issues raised when deciding case on other grounds).

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.