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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1519**

State of Minnesota,
Respondent,

vs.

Joseph Edward Wobig,
Appellant.

**Filed May 14, 2012
Reversed
Stoneburner, Judge**

Wabasha County District Court
File No. 79CR091058

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

James Nordstrom, Wabasha County Attorney, Karrie S. Kelly, Assistant County Attorney, Wabasha, Minnesota (for respondent)

Howard Bass, Bass Law Firm, P.L.L.C., Burnsville, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Stoneburner, Judge; and
Toussaint, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges his convictions of controlled substance crime (possession for sale) and failure to possess controlled-substance tax stamps. Appellant argues that the warrant to search his home was not supported by probable cause and that the district court erred by denying his motion to suppress evidence that was discovered during the search. Alternatively, appellant argues that any probable cause supporting the issuance of the warrant results from deliberate or reckless material misstatements and omissions in the warrant application, without which the application lacks probable cause to support the issuance of the warrant. Because we conclude that the warrant application contained deliberate and reckless material misstatements and omissions that precluded the issuing magistrate from independently evaluating the existence of probable cause and without which the application lacks probable cause, we reverse.

FACTS

In September 2009, Wabasha County Sheriff's Department Detective Joe Schneider prepared an application and supporting affidavit for a search warrant to search the residence of appellant Joseph Edward Wobig for evidence of a marijuana-grow operation. The affidavit asserts that Schneider "has participated in numerous narcotics-related search warrants" and describes information obtained from (1) a "concerned citizen" stating that he had personal knowledge of an ongoing marijuana-grow operation in a hidden room in Wobig's residence and had personally seen the operation in the last month; (2) an email from another officer relaying a tip from an unidentified informant

who was reporting information “learned . . . from acquaintances” about Wobig cultivating marijuana in an area below his house; (3) an employee at Xcel Energy about Wobig’s average electricity usage being similar to that of a neighbor, but twice as much as other residences in the neighborhood; and (4) a state trooper relaying a tip from an individual during a traffic stop that there was a marijuana-grow operation under a fireplace and taxidermy room of a house located between Mazeppa and Zumbro Falls that is owned by a person who had “served time.” Schneider opines in the affidavit that the house described is Wobig’s house.

The affidavit also states that (1) the “concerned citizen” had “many drug related charges from March of 1998 to September of 2003”; (2) Wobig had no criminal record; (3) Wobig’s brother, Michael Riess, had been convicted of “cooking methamphetamines” and previously owned a construction company with Wobig, but due to a “falling out . . . documented in many law enforcement reports,” Riess had threatened to inform law enforcement about Wobig’s grow operation; and (4) law enforcement had information that Riess was paid off not to inform on Wobig and that Wobig disposed of the marijuana at that time.

Schneider’s affidavit failed to state that Riess is the “concerned citizen” referred to in the application. On September 2, 2009, Riess telephoned Detective Kurt Struwe to report a “pretty big size[d]” marijuana-grow operation at Wobig’s home. Riess specifically told Struwe that he did not need to remain anonymous and that he was willing to testify against Wobig. Riess explained that Wobig had “kick[ed] me out” of the family business, had stopped payment on a check purporting to buy out Riess’s

interest in the business, and described the situation as being “it’s just f*** me, I f*** you.” Riess told Struwe that he had last seen the grow operation “about a month ago” and that he knew what marijuana looked like because he “got busted with 18 pounds of weed” when he was 18 years old. Although Schneider listened to a recording of Riess’s conversation with Struwe, he deliberately concealed Riess’s identity in the warrant application and left out the details of Riess’s animosity toward Wobig.

Schnieder’s affidavit also failed to state that Wobig had obtained an emergency order for protection (OFP) against Riess on August 12, 2008, after Riess assaulted Wobig and threatened to kill everyone in Wobig’s home. The OFP precluded Riess from having any contact with Wobig or being at Wobig’s home for one year from the issuing date, and the OFP was signed by the district court judge to whom the warrant application was submitted. Unless Riess violated the OFP, he could not have seen Wobig’s grow operation in the year before his conversation with Struwe.

Schneider’s affidavit also failed to state that the Xcel Energy employee he consulted specifically stated that he did not think that there was a grow operation at Wobig’s residence based on the comparison of Wobig’s electricity use with usage in the neighborhood, noting that Wobig’s next-door-neighbor’s use, which peaked in the summer, possibly due to air conditioning, was, on average, similar to Wobig’s use. Schneider’s affidavit also did not disclose that the description of the house with the grow operation, given to the trooper during a traffic stop, most accurately applied to Wobig’s neighbor, a taxidermist who had served time for burglary.

The search warrant was issued. The search of Wobig's residence revealed a large marijuana-grow operation in a hidden room in the basement. Wobig was charged with failure to possess a controlled-substance tax stamp, in violation of Minn. Stat. §§ 297D.04, .09, subd. 1a (2008); sale of a controlled substance in the fifth degree, in violation of Minn. Stat. § 152.025, subds. 1(1), 3(a) (2008); possession of a controlled substance in the fifth degree, in violation of Minn. Stat. §§ 152.025, subds. 2(1), 3(a), 609.11 subd. 5 (2008). After the district court denied Wobig's motion to suppress evidence seized in the warranted search of his residence, Wobig agreed to submit to a court trial on a stipulated body of evidence. The district court found him guilty of all counts and stayed imposition of a five-year prison term with probation and conditions. This appeal followed, challenging the district court's denial of the motion to suppress.

D E C I S I O N

I. The warrant application, on its face, contains probable cause to support issuance of the warrant.

Wobig's first challenge to the warrant is based on his assertion that the application, on its face, does not contain sufficient probable cause to support the warrant. We disagree.

“When reviewing a district court's decision to issue a search warrant, our only consideration is whether the judge issuing the warrant ‘had a substantial basis for concluding that probable cause existed.’” *State v. Jenkins*, 782 N.W.2d 211, 222-23 (Minn. 2010) (quoting *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001)). We review the district court's factual findings for clear error and its legal determinations

de novo. *Id.* at 223. We consider the totality of the circumstances and do not review each component of the affidavit in isolation. *Id.*

The task of the issuing magistrate is simply to make a practical, commonsense, decision whether, given all the circumstances set forth in the affidavit before him, 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. (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)); see *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005) (quoting *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995)), *review denied* (Minn. Feb. 22, 2006)). “Elements bearing on this probability determination include information establishing a nexus between the crime, objects to be seized and the place to be searched.” *Jenkins*, 782 N.W.2d at 223. “[T]he resolution of doubtful or marginal cases should be largely determined by the preference to be accorded warrants.” *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985) (quotation omitted). A reviewing court should only consider the information presented in the affidavit. *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998).

A “concerned citizen” is “an informant who provides information in his or her capacity as a witness to a crime, for whom a law enforcement officer is relieved of having to establish credibility and veracity independently through corroboration or a history of providing reliable information.” *McGrath*, 706 N.W.2d at 540. It is the motive for supplying information that distinguishes a “concerned citizen” from other informants: “[a] concerned citizen acts with an intent to aid law enforcement out of concern for

society or for personal safety” while other informants “are motivated by a desire for leniency or immunity from prosecution.” *Id.* Being classified as a concerned citizen “conveys a preferred status as to the credibility of the information supplied.” *Id.*

Because the warrant application in this case purported to relay recent, specific, personally witnessed information from a “concerned citizen” about a marijuana-grow operation located in a hidden room in Wobig’s house, the application provided sufficient probable cause for issuance of a warrant. And although corroboration of a concerned citizen’s tip is not necessary, the concerned citizen’s information appeared to be corroborated by information from the Xcel Energy employee. We therefore find no merit in Wobig’s argument that the warrant application, on its face, did not contain probable cause to support issuance of the warrant.

II. The correction of intentional and reckless material misstatements and omissions in the warrant application results in an application that fails to establish probable cause to support issuance of the warrant.

Wobig argues in the alternative that the warrant application contained intentional or reckless material misstatements and omissions and that correction of the misrepresentations and addition of the omitted information results in an application that lacks sufficient probable cause to support issuance of the warrant. We agree.

Although search warrants are presumed valid, the presumption may be overcome if the affidavit supporting the application “is shown to be the product of deliberate falsehood or reckless disregard for the truth.” *McGrath*, 706 N.W.2d at 540 (citing *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684 (1978)). “A search warrant is void, and the fruits of the search must be excluded, if the application includes

intentional or reckless misrepresentations of fact material to the findings of probable cause.” *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989). “[T]he clearly erroneous standard controls our review of a district court’s findings on the issue of whether the affiant deliberately made statements that were false or in reckless disregard of the truth . . . [and] the de novo standard controls our review of a district court’s determination of whether the alleged misrepresentations or omissions were material to the probable cause determination.” *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010).

A. Schneider’s affidavit contained misrepresentations and omissions that were made deliberately or with reckless disregard for the truth.

In this case, Schneider’s affidavit (1) deliberately and unnecessarily concealed Riess’s identity and contained information specifically designed to imply that Riess was not the “concerned citizen” who provided first-hand information; (2) erroneously characterized Riess as a “concerned citizen”; (3) mischaracterized information from the Xcel Energy employee; and (4) deliberately or with reckless disregard for the truth opined that information from the traffic stop described Wobig’s home when it more accurately described the home of one of Wobig’s neighbors.

Riess did not request anonymity, and Schneider’s decision not to disclose Riess’s identity as the “concerned citizen” and to mention Riess in a manner that strongly implied he was not the “concerned citizen” can be characterized only as deliberate. At the omnibus hearing, Schneider testified that he did not include specific information about the “concerned citizen’s” criminal history because he thought it would have identified Riess as the “concerned citizen.” The state argues that Schneider was merely negligent

because he was inexperienced in drafting warrant applications. But the application was deliberately drafted to mislead the magistrate about both the identity and the credibility of the informant, which, even if caused by inexperience, cannot be considered merely negligent.

Without addressing Schneider's unilateral decision to conceal Riess's identity, the district court concluded that Schneider should have classified Riess as a "confidential informant, whose credibility and reliability must be bolstered." But the district court found that the misclassification was not deliberate or reckless. Based on the record, we conclude that the district court's finding that Schneider's representations about the concerned citizen were not made deliberately is clearly erroneous.

The district court did not specifically address whether Schneider's misrepresentation of the Xcel Energy employee's statements and the failure to disclose that the traffic-stop tip applied more accurately to Wobig's neighbor's house were reckless or deliberate. But based on the record, we conclude that these misrepresentations were, at a minimum, made with reckless disregard of the truth.

B. The warrant application, without the misrepresentations and omissions, lacks probable cause to support issuance of the warrant.

After a determination that a search-warrant affidavit included reckless misrepresentations of fact or omissions, the reviewing court determines whether the misrepresentations or omissions are material to the determination of probable cause. *McGrath*, 706 N.W.2d at 543. To do so, we set aside misleading statements and supply any omissions "to determine whether any basis for finding probable cause remains." *Id.*

If after this rehabilitation there is insufficient information to sustain a finding of probable cause, the search warrant is void. *Id.*

The district court found that the “informant’s” reliability was satisfactorily established, in part, because law enforcement officers knew that the “concerned citizen” in the warrant refers to Riess and could have prosecuted him for providing false information. This finding ignores the fact that Wobig and Riess had an acrimonious relationship and that Riess felt grievously wronged by Wobig and was anxious to wrong him in return. Riess had a motive to inform on Wobig that robbed his information of the enhancement of credibility afforded to some citizen informants whose identities are known to law enforcement. *See State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998) (“Where an informant voluntarily comes forward (without having first been arrested) to identify a suspect, *and in the absence of a motive to falsify information*, the informant’s credibility is enhanced because the informant is presumably aware that he or she could be arrested for making a false report.” (emphasis added)).

The district court also found that “prior information received from informants” corroborated Riess’s information. But altering the Xcel Energy employee’s statement to reflect that he did not consider Wobig’s electricity use indicative of a grow operation and correctly identifying the house described by the traffic-stop informant as more accurately describing Wobig’s neighbor’s house leaves only the October 2008 hearsay tip from an unidentified informant to corroborate Riess’s information. This information is stale because the affidavit states that, at the same time this unidentified informant told law enforcement about Wobig’s grow operation and his issues with Riess, law enforcement

also learned that Wobig believed Riess would inform on him and destroyed his marijuana. When an informant gives evidence of ongoing criminal activity like growing marijuana, passage of time is less of a factor in the probable-cause determination. *Souto*, 578 N.W.2d at 750. But because law enforcement had information that Wobig destroyed his marijuana, the evidence of an ongoing operation was undermined, and the informant's information was stale.

We conclude that the district court clearly erred by finding that Riess's information was sufficiently corroborated to establish probable cause for issuance of the warrant. The rehabilitated application for the warrant does not establish Riess's credibility. Riess's credibility and reliability were not that of a neutral, independent citizen-witness, and the issuing judge should have been informed about the true nature of the source of the information.¹ *See McGrath*, 706 N.W.2d at 542 (citing *State v. Siegfried*, 274 N.W.2d 113, 114-15 (Minn. 1978)).

Because the rehabilitated warrant application does not contain probable cause to support the issuance of the warrant, the warrant is void. The district court erred in denying Wobig's motion to suppress evidence discovered as a result of the search conducted under the warrant.

Reversed.

¹ Supplying Riess's identity to the district court judge who issued an OFP to Wobig precluding Riess from having any contact with Wobig or being at Wobig's house during the time that Riess claimed to have last seen the grow operation would have also undermined Riess's credibility.