STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0579

State of Minnesota,
Respondent,

vs.

Allen Michael Stark,
Appellant.

Filed December 17, 2012
Affirmed
Kirk, Judge
Dissenting, Klaphake, Judge

Mille Lacs County District Court
File No. 48-CR-10-2507

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janice S. Jude, Mille Lacs County Attorney, Mark J. Herzing, Daniel Rehlander, Assistant County Attorneys, Milaca, Minnesota (for respondent)

Mark D. Kelly, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Kirk, Judge; and Klaphake, Judge.[*]

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

U N P U B L I S H E D O P I N I O N

KIRK, Judge

Appellant challenges his conviction of fifth-degree possession of a controlled substance in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2010), and possession of drug paraphernalia in violation of Minn. Stat. § 152.092 (2010), on the basis that evidence used to convict him was obtained using a defective search warrant. We affirm.

FACTS

On October 7, 2010, Special Agent Patrick Broberg and other agents of the North Central Drug Task Force executed a search warrant on appellant Allen Michael Stark's premises in Mille Lacs County and recovered numerous marijuana plants weighing a total of more than four pounds, marijuana-growing equipment, drug paraphernalia, and a glass pipe and light bulb containing methamphetamine residue.

Special Agent Broberg was the affiant on the search warrant application. He described receiving information from an unnamed "cooperating individual." According to the informant, appellant was actively engaged in growing, selling, and distributing marijuana from appellant's property. Within four days before the application was submitted to the judge who issued the search warrant, the informant reported seeing a large quantity of marijuana in appellant's residence packaged in baggies. The informant had also seen a digital scale, marijuana plants growing near the river running to the east of appellant's property, and a drying facility inside a tin shed located to the east of the residence on the property. The informant admitted having received marijuana from

appellant in the past, and also reported knowing that the drug task force had been on the property last year and confiscated two marijuana plants.

Special Agent Broberg verified through a nonpublic electronic records search and through his own personal recollection that the drug task force was at the property in July 2010, about three months before the search warrant issued. According to the affidavit, Special Agent Broberg was the task force member who seized the two marijuana plants, and also seized drug paraphernalia from appellant. Special Agent Broberg also verified that appellant lists the address described by the informant on his driver's license.

At a contested omnibus hearing, appellant moved to suppress the evidence obtained through the search warrant on the basis that the warrant application failed to establish probable cause because the informant's tips were not sufficiently corroborated. The district court denied appellant's motion. Appellant then waived his right to a jury trial and stipulated to the prosecution's case pursuant to Minn. R. Crim. P. 26.01, subd. 4, and the district court found him guilty of fifth-degree possession of a controlled substance and possession of drug paraphernalia. This appeal follows.

D E C I S I O N

I. The search warrant was based on sufficient probable cause established by the informant's evidence.

Following a stipulated-facts proceeding under Minn. R. Crim. P. 26.01, subd. 4, this court's review is limited to the question of whether the district court properly denied appellant's pretrial motion to suppress evidence. Minn. R. Crim. P. 26.01, subd. 4(f). When conducting this analysis, "we review the district court's factual findings under a

clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quoting *State v. Jordan*, 742 N.W.2d 149, 152 (Minn. 2007)) (quotation marks omitted).

The United States and Minnesota Constitutions provide that no warrant shall issue without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. This court gives great deference to the probable cause determination of the court issuing the search warrant. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001); *State v. Holiday*, 749 N.W.2d 833, 839 (Minn. App. 2008). Review is limited "to ensuring that the issuing judge had a substantial basis for concluding that probable cause existed." *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006).

The issuing judge is expected to consider the totality of the circumstances set forth in the affidavit of the applicant seeking the warrant. *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985) (citing *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). This means that the judge makes "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 evidence of a crime will be found in a particular place. *Id.* (quoting *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332). In order for the judge issuing the search warrant to evaluate the totality of the circumstances, "the affidavit must provide the [judge] with adequate information from which he can personally assess the informant's credibility." *State v. Siegfried*, 274 N.W.2d 113, 114 (Minn. 1978).

Where, as here, the affidavit relies on an informant who is confidential but not anonymous to the police, six considerations bear on the informant's reliability: (1) a first-time citizen informant is presumptively reliable; (2) an informant who has given reliable information in the past is likely also to be currently reliable; (3) an informant's reliability can be established if the police can corroborate the information; (4) the informant is presumably more reliable if the informant voluntarily comes forward; (5) in drug cases, "controlled purchase" is a term of art that indicates reliability; and (6) an informant is minimally more reliable if the informant makes a statement against the informant's interests. *State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998). If the informant is a first-time citizen informant who has not been involved in the criminal underworld, this must be specifically averred in the affidavit. *Siegfried*, 274 N.W.2d at 115. Similarly, an informant who has previously given police correct information must also be so described in the affidavit. *Wiley*, 366 N.W.2d at 269.

a. Basis of the informant's knowledge.

Turning first to the informant's basis of knowledge, the affidavit contained statements that the informant had personally observed large quantities of marijuana packaged in baggies within four days prior to the application for the search warrant. The informant also provided Special Agent Broberg with firsthand observations of a digital scale for weighing the marijuana, marijuana plants growing on the property, a marijuana-drying facility, and harvesting activities. The district court concluded that the informant had an "intimate and reliable knowledge of the Defendant's illicit activities." Appellant argues that the district court's conclusion was in error because it weighed the informant's

knowledge in favor of the informant's veracity, and that the information is inherently unreliable because the informant is a member of the criminal underworld. The state argues that personal, firsthand knowledge supports the conclusion that the informant had a reliable basis of knowledge for the purposes of a probable cause finding.

"Recent personal observation of incriminating conduct has traditionally been the preferred basis for an informant's knowledge." *Wiley*, 366 N.W.2d at 269. And "even if [the issuing judge] entertain[s] some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." *Gates*, 462 U.S. at 234, 103 S. Ct. at 2330.

Moreover, it is appropriate to consider the informant's firsthand knowledge as both a sign of a basis of knowledge and veracity. "[T]he elements of basis of knowledge and veracity should not be 'understood as entirely separate and independent requirements to be rigidly exacted in every case . . . .'" *Holiday*, 749 N.W.2d at 840 (quoting *Gates*, 462 U.S. at 230, 103 S. Ct. at 2328). Because Special Agent Broberg was relaying the firsthand, detailed observations of the informant, the issuing judge was justified in concluding that the informant had a sufficient basis of knowledge.

b. The informant's veracity.

We are, however, concerned because the informant's veracity was only weakly established in the affidavit. The affidavit does not contain any statement that the informant is a reliable citizen informant or has provided reliable information to the police in the past. Appellant urges that, because the affidavit lacks an averment that the

informant is not from the criminal underworld, it can be safely assumed that the informant is receiving some sort of consideration from law enforcement—most likely the avoidance of unrelated criminal penalties—and his veracity is thereby hobbled.

Just because the informant "[does] not qualify as a citizen informant of presumed reliability does not mean that the informant was an informant of doubtful reliability from the criminal subculture." *State v. McCloskey*, 453 N.W.2d 700, 703 (Minn. 1990). "[E]ach informer is different" and "all of the stated facts relating to the informer should be considered in making a totality-of-the-circumstances analysis." *Id.*

The affidavit does not disclose how Special Agent Broberg made contact with the informant or whether the informant was facing charges on an unrelated crime. The affidavit does indicate that appellant has given the informant marijuana in the past. The mere fact that the informant has received marijuana from the appellant does not mean that the information comes from an informant of doubtful reliability from the criminal subculture. *See id.* (citing *State v. Zernechel*, 304 N.W.2d 365, 366 (Minn. 1981)) (stating that "it is true that the informant admitting having bought marijuana from defendant, so we know that the informant was someone who apparently had used marijuana. However, we have said that a *conviction* of simply possessing a controlled substance arguably has little probative value on the issue of a witness' credibility.").

Appellant correctly notes that much of the information that the informant provided police, including the address where appellant lives, is easily obtained from public sources. Easily obtained public information cannot by itself support probable cause for a search warrant to issue. *State v. Albrecht*, 465 N.W.2d 107, 109 (Minn. App. 1991). But

Albrecht, where the appellant successfully argued that a warrant was invalid when based on an informant's tips that were only corroborated with publicly available information, is distinguishable. *See id.* Here, the informant also provided some limited corroborated information not easily accessible by the public. The informant knew of an incident when the drug task force was at appellant's residence and confiscated two marijuana plants growing on the property. This information was not publicly disclosed by law enforcement. Special Agent Broberg was the officer who confiscated the marijuana in that earlier incident, and also corroborated the information through an electronic records search. Appellant argues that the informant could have this information because it was spread to him through the small-town rumor mill. Its reliability is also questionable, urges appellant, because the informant characterized the confiscation as occurring "last year" when it had actually occurred only a few months prior.

Special Agent Broberg's corroboration of the informant is troublingly thin. Although these circumstances come dangerously close to the line between sufficiency and insufficiency of probable cause, we are satisfied that the evidence, taken in its totality and with the deference due to the issuing judge, supported issuing the search warrant.

First, we note that it would not be reasonable for the issuing judge to conclude that the informant, who reported firsthand knowledge of appellant's marijuana-growing activities and having actually received marijuana from appellant, only knew of the earlier confiscation of marijuana by Special Agent Broberg through the rumor mill. Moreover, even if the informant's knowledge was acquired through hearsay, the issuing judge need not categorically reject this double hearsay information, but instead must decide if there

is sufficient information so that both levels of hearsay may be properly relied upon. 2 Wayne R. LaFave, *Search & Seizure* § 3.3(d) (4th ed. 2004). Here, the informant was reporting nonpublic information that was verified with Special Agent Broberg's firsthand experience and a nonpublic records search.

Second, the fact that the informant misstated the date of the earlier incident does not render the information summarily unreliable. Even if key details are not corroborated, the mere knowledge that the confiscation had occurred in the past lends credence to the informant's tip. *McCloskey*, 453 N.W.2d at 704. Moreover, corroboration of only "part of the informer's tip as truthful may suggest that the entire tip is reliable." *Siegfried*, 274 N.W.2d at 115. And innocent and even negligent misrepresentation will not invalidate a search warrant. *McGrath*, 706 N.W.2d at 540. Here, the fact that the informant knew that the confiscation of marijuana had occurred is more significant than whether the informant correctly described the date of the occurrence.

Third, we note that the informant made a statement against his own interest by admitting to having received marijuana from the defendant in the past. Again, the circumstances surrounding this admission are not laid out in the affidavit. But, while not technically a statement against penal interest, "[t]he mere fact that the statement was in some way against the informant's interest is of some minimal relevance in a totality-of-the-circumstances analysis of probable cause." *McCloskey*, 453 N.W.2d at 704.

Finally, the fact that Special Agent Broberg had been on the property in the past confiscating marijuana lends a minimal but relevant independent basis for probable

cause. Although the confiscation did not lead to any criminal charges (the affidavit indicates that appellant had no criminal history), even a defendant's "relatively minor trouble with the law" is of "some slight probative value" in making a probable cause determination. *Id.*

Reviewing the totality of the circumstances in the affidavit describing probable cause for the warrant to issue and recognizing our deferential approach to the issuing judge's decision, *Rochefort*, 631 N.W.2d at 804, we conclude that the district court did not err in denying appellant's motion to suppress.

Affirmed.

KLAPHAKE, Judge, dissenting

I respectfully dissent from the majority's conclusion that the first search warrant was supported by probable cause. The majority concedes the weaknesses in the search warrant affidavit, both as to the informant's veracity and as to police corroboration of the tip. I would go further and hold that the weaknesses are fatal and consequently the warrant was not supported by probable cause.

The relevant circumstances to consider in determining whether an informant's tip satisfies the probable cause standard include the informant's basis of knowledge and the reliability of the informant. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983). The informant here claimed firsthand observations of illegal drug activity, but that does not necessarily make those claims "reliable."

The majority concedes that the showing of the informant's reliability was weak. It acknowledges that the informant admitted receiving marijuana from appellant in the past, but suggests that the informant could nevertheless enjoy some of the stature of a "citizen informant of presumed reliability" under *State v. McCloskey*, 453 N.W.2d 700, 703 (Minn. 1990).

McCloskey holds that an informant who admits buying or using marijuana in the past is not *necessarily* someone of questionable reliability, and notes that even a conviction for drug possession may have little bearing on a person's credibility. *Id.* But in *McCloskey*, the informant had come forward with a concern about the suspect's selling of marijuana to juveniles. *Id.* at 701. The informant,

therefore, held the same basic motivation as the "concerned citizen" whose reliability is presumed. *See State v. McGrath*, 706 N.W.2d 532, 540 (Minn. App. 2005) ("A concerned citizen acts with an intent to aid law enforcement out of concern for society or for personal safety."), *review denied* (Minn. Feb. 22, 2006).

Absolutely no evidence of such an altruistic motivation was presented here. The affidavit describes the informant as a "cooperating individual," which suggests that he or she had some reason for "cooperating," such as an unrelated pending criminal matter in which "cooperating" would be personally beneficial. *See McCloskey*, 453 N.W.2d at 703 (noting that the "typical 'stool pigeon'" "agrees to cooperate" in order to "curry favor with the police").

McCloskey also notes that "not all anonymous informants are the same," and suggests that not all admitted drug users are unreliable informers. *Id.* In *McCloskey*, not only was there considerable information about the informant, who revealed his or her motivation, but also the informant agreed to ride with police to the suspect's residence to corroborate part of the tip. *Id.* at 701. Here, there is no information about the informant's activity that would support a finding of reliability.

In short, this informant was not a "citizen informant," had no cloak of a "concerned citizen," and the information provided did nothing to further his or her credibility.

The majority further concludes that the informant's knowledge of the earlier search at appellant's residence corroborates the tip. However, that

knowledge was as likely to have come from the "rumor mill" in the community, or, perhaps more significantly, by word-of-mouth among the local drug subculture to which the informant appeared to belong. The majority rejects the likelihood that the information came from the "rumor mill" by assuming the veracity of the informant's account of having seen marijuana inside appellant's residence. But the whole issue here is whether the informant was reliable. Assuming veracity simply begs the question.

Just as troubling is that the informant's knowledge of the prior seizure was vague. First, the informant described the prior seizure as occurring "last year," when in fact it had occurred just three months previously. Second, his information of what was seized at the time was vague, and significantly omitted major items seized. As such, this information added nothing to the informant's credibility.

Police did verify appellant's address. However, this information is not a "key detail" and provides only "minimal corroboration." *McCloskey*, 453 N.W.2d at 704. Police ran a criminal history check, but discovered no prior record. *Cf. id.* (noting that the suspect's "relatively minor trouble with the law" provided some corroboration). The informant described a tin shed on appellant's property, and marijuana growing along a river near the property. But the police did not verify the presence of the shed or the location of the river.[1]

[1] Special Agent Broberg may have checked these details against his own memory of the July 2010 search. But he did not include these details in the search warrant application, and this court must assess probable cause based on the information provided to the issuing magistrate.

Upholding the search warrant in this case encourages over-reliance on tips from informants are connected to criminal behavior, and whose reliability remains unestablished. This court should not relax the traditional requirement that police corroborate such tips. Accordingly, I dissent.