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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0671**

State of Minnesota,
Respondent,

vs.

Joshua George Bauernfeind,
Appellant.

**Filed March 4, 2013
Reversed
Hudson, Judge**

Steele County District Court
File No. 74-CR-10-275

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

Daniel A. McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and
Kirk, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

In this appeal from his conviction of fifth-degree possession of marijuana, appellant Joshua George Bauernfeind argues that the evidence obtained pursuant to a flyover search warrant and a search warrant of appellant's residence should have been

suppressed because the warrant application failed to demonstrate probable cause. Because the warrant application did not provide the basis for the first-time citizen informant's tip, the warrant lacked probable cause, and therefore the evidence should have been suppressed. Accordingly, we reverse appellant's conviction.

FACTS

Sometime prior to February 2009, Detective Bob Vogelsberg of the Faribault Police Department informed Deputy Sheriff Scott A. Hanson of Steele County that a first-time citizen informant (FTCI) provided a tip that an indoor marijuana-growing operation was located at appellant's residence. Detective Vogelsberg verified the name, address, phone number, and occupation of the FTCI and told Deputy Hanson that he believed the FTCI to be reliable. The FTCI accompanied Detective Vogelsberg to the location of the alleged marijuana grow operation, which was at appellant's address. Deputy Hanson verified that appellant and his wife were listed as the taxpayers for this address. An administrative subpoena was obtained to acquire the electrical records for appellant's address. The records indicated that appellant and his wife were the account holders and that, according to Deputy Hanson, the electrical consumption was "roughly over twice the monthly usage of a comparable residence."

Based on this information, Deputy Hanson obtained a warrant to conduct flyover surveillance of appellant's residence using a forward looking infrared (FLIR) camera in order to observe heat emitted from the property. The warrant was executed on February 17, 2009, and the images obtained indicated that appellant's residence had "significant heat loss on all sides of the foundation." Later that same day, Deputy

Hanson contacted the prior owner of appellant's residence, who stated that appellant's residence had a high-efficiency furnace and that the basement was normally cool. Based on this new information, Deputy Hanson applied for and obtained a warrant to search appellant's residence and outbuildings for evidence related to the production and sale of marijuana.

When the police executed the search warrant, they found that the home was being heated by space heaters, which in part explained the high energy consumption. While conducting a search of appellant's outbuildings, the police discovered one building that was padlocked. When Deputy Hanson requested the key to obtain access to the outbuilding, appellant "got nervous" and advised Deputy Hanson that he was growing marijuana inside the outbuilding. Inside the outbuilding, the officers observed "growing materials including soil, pots, straw, and old Marijuana root balls/stems lying around." Nine marijuana plants were seized, as well as other drug paraphernalia. Appellant denied selling the marijuana, stating that it was for personal use and that he gave some of it to his friends.

In February 2010 appellant was charged with one count of fifth-degree sale of marijuana and one count of fifth-degree possession of marijuana. Appellant moved to suppress the evidence seized pursuant to the two search warrants and to dismiss the charges for lack of probable cause. The district court denied appellant's motions, and a bench trial was held on stipulation to the prosecution's evidence pursuant to Minn. R. Crim. P. 26.01, subd. 4. Appellant was found guilty of one count of fifth-degree possession pursuant to Minn. Stat. § 152.025, subd. 2(1) (2008); the count of fifth-degree

sale was dismissed. Appellant was sentenced to 30 days in jail and three years' probation, which was stayed during the pendency of this appeal. This appeal followed.

DECISION

Appellant argues that the warrant application lacked probable cause because no basis was given for the FTCI's information, and therefore it is impossible to discern whether the information was obtained in a reliable way or to otherwise verify the FTCI's credibility. On appeal, we afford the district court's probable-cause determination great deference. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). Our review considers "whether the issuing judge had a substantial basis for concluding that probable cause existed," based on examining the totality of the circumstances. *Id.*; *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998). Our review is limited to the facts as stated in the warrant application. *State v. Secord*, 614 N.W.2d 227, 229 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000).

Evidence obtained by an unconstitutional search and seizure is inadmissible. *State v. Mathison*, 263 N.W.2d 61, 63 (Minn. 1978). In general, a search is valid only if it is conducted pursuant to a valid search warrant issued by a neutral and detached magistrate after a finding of probable cause. *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999). If a warrant is void for lack of probable cause, the evidence seized during the execution of the search warrant must be suppressed. *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989).

In general, information obtained from an FTCI is presumed to be reliable so long as the informant is not involved in criminal activity. *State v. Ward*, 580 N.W.2d 67, 71

(Minn. App. 1998). Appellant concedes that the informant whose tip provided the basis for the flyover warrant was presumptively reliable. However, our inquiry does not end there. To establish probable cause, the warrant application must also state the FTCI's basis of knowledge. *State v. Cook*, 610 N.W.2d 664, 668 (Minn. App. 2000), *review denied* (Minn. July 25, 2000).

This basis of knowledge may be supplied directly, by first-hand information, such as when a [confidential reliable informant] states that he purchased drugs from a suspect or saw a suspect selling drugs to another; a basis of knowledge may also be supplied indirectly through self-verifying details that allow an inference that the information was gained in a reliable way and is not merely based on a suspect's general reputation or on a casual rumor circulating in the criminal underworld.

Id.

We observe that nowhere in the flyover warrant application did Deputy Hanson state a basis for the FTCI's knowledge. Without this information, the FTCI's credibility cannot be verified except by reference to other facts corroborated by the police. *See State v. Albrecht*, 465 N.W.2d 107, 109 (Minn. App. 1991) ("An informant's credibility can be established by sufficient police corroboration of the informant's information."). "Corroboration of information that is not a key detail can be a relevant factor in making a probable cause determination." *Id.* But, where the facts corroborated are easily obtained or merely innocent details not tending to show criminal activity, such corroboration is not sufficient. *See id.*; *Cook*, 610 N.W.2d at 668 (concluding that police failed to sufficiently corroborate informant's tip because the "details [offered] did not predict any suspicious behavior on [defendant's] part"). We conclude that, in this case, the evidence obtained

by the police was insufficient to corroborate the FTCI's credibility. The police merely confirmed that appellant owned the residence identified by the FTCI and obtained records that suggested a higher-than-normal electricity usage. Increased use of electricity may be consistent with criminal activity, but it may just as likely be consistent with innocuous home heating in winter. Because the warrant application presents insufficient facts from which to conclude that the FTCI's tip was reliable, we conclude that the warrant lacked a substantial basis on which to find probable cause.

Because the flyover warrant lacked probable cause, the evidence obtained pursuant to the warrant must be suppressed. This includes evidence seized from the execution of the warrant to search appellant's residence because that warrant would not have been obtained but for the evidence acquired pursuant to the flyover warrant. Because the evidence seized from appellant's residence provided the sole basis for appellant's conviction, the conviction must be reversed.

Reversed.