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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-1825**

State of Minnesota,
Respondent,

vs.

Nicholas David McPherson,
Appellant.

**Filed June 23, 2014**
**Affirmed**
**Larkin, Judge**

Hennepin County District Court
File No. 27-CR-12-3742

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

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

**LARKIN**, Judge

On appeal from his conviction of fifth-degree possession of a controlled substance, appellant argues that the warrant that authorized the search of his townhouse was not supported by probable cause. We affirm.

## FACTS

Police officers found tablets containing Vicodin and Tylenol 3 while executing a search warrant at appellant Nicholas David McPherson's residence. Respondent State of Minnesota charged McPherson with two counts of fifth-degree possession of a controlled substance. McPherson moved the district court to suppress all evidence discovered as a result of the search, arguing that the search warrant was not supported by probable cause. The district court denied McPherson's motion.

McPherson stipulated to the state's case pursuant to Minnesota Rule of Criminal Procedure 26.01, subd. 4, to obtain appellate review of the district court's order denying his motion to suppress. The district court found McPherson guilty of both charges, but concluded that the charged conduct constituted a single behavioral incident. The district court therefore sentenced McPherson for only one offense and placed him on probation. This appeal follows.

## D E C I S I O N

McPherson contends that because the search warrant in this case "was issued on less than probable cause, the trial court erred when it ruled that the prescription drugs police seized from [his] townhouse were admissible."

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. Generally, a search is lawful only if it is executed pursuant to a valid search warrant issued by a neutral and detached magistrate after a finding of probable cause. *See* Minn. Stat. § 626.08 (2010); *State v. Harris*, 589 N.W.2d 782, 787 (Minn. 1999). "When determining whether a search warrant is supported by probable cause, we do not engage in a de novo review." *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). Instead, "great deference must be given to the issuing [magistrate's] determination of probable cause." *State v. Valento*, 405 N.W.2d 914, 918 (Minn. App. 1987). When reviewing a decision to issue a search warrant, we limit our review to whether the judge issuing the warrant had a substantial basis for concluding that probable cause existed. *See State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014).

To determine whether the issuing magistrate had a substantial basis for finding probable cause, we look to the "totality of the circumstances."

> The task of the issuing magistrate is simply to make a practical, common-sense 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.

*State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). In reviewing the sufficiency of a search-warrant affidavit under the totality-of-the-circumstances test, "courts must be careful not to

review each component of the affidavit in isolation." *Id.* "[A] collection of pieces of information that would not be substantial alone can combine to create sufficient probable cause." *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004). "Furthermore, the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded warrants." *Wiley*, 366 N.W.2d at 268 (quotation omitted).

In this case, the search-warrant affiant, Eden Prairie Police Detective Mike Harrington, stated in the search-warrant application that he met with two citizen informants (CIs), whose names and addresses were known, within the last 72 hours, and that the CIs "wished to provide information on a marijuana growing operation in a town house located in the City of Eden Prairie." The CIs provided McPherson's name, physical description, and address. They indicated that they knew McPherson and that he lived in their neighborhood. The CIs told Harrington that McPherson was growing marijuana inside his residence and in a nearby wooded area. The CIs stated that they are familiar with what marijuana looks and smells like, had been inside McPherson's residence within the last three weeks, and had seen at least five marijuana plants both in McPherson's bedroom and in the garage. The CIs further stated that several marijuana plants were visible on the exterior balcony of the residence. Both CIs said that they had seen McPherson watering marijuana plants on the balcony, which were behind a grill and another plant.

In the search-warrant application, Harrington swore that within the past 72 hours, he conducted surveillance on the residence at the address provided by the CIs. Harrington observed that the residence had a balcony, which "was approximately 20

yards from the public street at an elevation of about 10 feet." There was a grill and a potted tree on the balcony, and behind the potted tree was "another darker plant, approximately three feet tall that in [Harrington's] training and experience appeared to be a marijuana plant or plants." Harrington stated that "[t]he marijuana plant was clearly visible with the naked eye and has seven oblong leaves with the center [leaf] being longer than the rest."

McPherson argues that "probable cause was . . . lacking because the affidavit failed to establish [the CIs'] reliability." When a search-warrant application is based on an informant's tip, we will not assume that the informant is credible. The supporting "affidavit must provide the magistrate with adequate information from which he can personally assess the informant's credibility." *State v. Siegfried*, 274 N.W.2d 113, 114 (Minn. 1978). The issuing judge must consider the informant's basis of knowledge and veracity. *State v. Souto*, 578 N.W.2d 744, 750 (Minn. 1998) (citing *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332). The Supreme Court has stated that the basis of knowledge and veracity should not be viewed as "entirely separate and independent requirements." *Gates*, 462 U.S. at 230, 103 S. Ct. at 2328. "[T]hey should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question [of] whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." *Id.*

McPherson cites *State v. Ross*, which lists

> six factors for determining the reliability of confidential, but not anonymous, informants: (1) a first-time citizen informant is presumably reliable; (2) an informant who has given

> reliable information in the past is likely also 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 narcotics 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.

676 N.W.2d 301, 304 (Minn. App. 2004) (emphasis added).

McPherson asserts that "[n]ot one of the reliability factors listed in [*Ross*] suggested the information the CIs gave Harrington was worthy of belief." We disagree because Harrington corroborated the CIs' report that McPherson possessed marijuana plants in his residence and on his balcony by personally observing a marijuana plant on McPherson's balcony. *See State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998) (stating that an "informant's reliability may be established by sufficient police corroboration of the information supplied, and corroboration of even minor details can 'lend credence' to the informant's information where the police know the identity of the informant").

McPherson argues that a "single observation from 20 yards away of what 'appeared to be' marijuana"—but "which may or may not have been marijuana"—does not "sufficiently corroborate[] the CIs' claim that [he] was involved in a 'marijuana growing operation.'" McPherson's argument is not persuasive. First, for the purposes of corroboration, our caselaw does not require an officer to be within a specific distance from suspected marijuana or to conduct field testing to verify the presence of THC. It is sufficient that an officer is able to recognize the plant as marijuana. *See State v. Kessler*, 470 N.W.2d 536, 537, 540 (Minn. App. 1991) (concluding that a search warrant was

supported by probable cause where an officer corroborated an informant's tip by flying over the suspect's land in an airplane and, "[u]sing binoculars . . . observed plants which had the color and shape of marijuana and which were growing in areas consistent with the informant's diagram"). Second, it was not necessary for Harrington to personally observe an entire "marijuana growing operation." *See Wiley*, 366 N.W.2d at 268 (stating that probable cause is established if "there is a fair probability that *contraband* or *evidence of a crime* will be found in a particular place" (emphasis added)).

In sum, the issuing judge had a substantial basis to conclude that probable cause existed. We therefore affirm.

**Affirmed.**