STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0598

State of Minnesota,
Respondent,

vs.

Travis Waters,
Appellant.

Filed June 17, 2008
Affirmed
Johnson, Judge

Itasca County District Court
File No. 31-CR-06-1512

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

John J. Muhar, Itasca County Attorney, Itasca County Courthouse, 123 Fourth Street Northeast, Grand Rapids, MN 55744 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and Ross, Judge.

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

JOHNSON, Judge

Travis Waters maintained 188 marijuana plants in his Itasca County trailer home. After receiving a tip from a confidential informant, a deputy sheriff gathered information to corroborate the tip and then obtained a warrant to search Waters's trailer home. The search revealed not only marijuana plants but also cocaine. Waters moved to suppress the evidence obtained in the search, and the district court denied the motion. Following his conviction by a jury, Waters appeals, arguing that the search warrant was not supported by probable cause because the warrant application allegedly contained three misstatements and because there is no information in the warrant application concerning the reliability of the confidential informant. We affirm.

FACTS

In March 2006, Deputy Aaron Apitz of the Itasca County Sheriff's Office received a tip from a confidential informant that Waters was growing marijuana in his trailer home in Bigfork. After conducting an initial investigation, Deputy Apitz applied for and obtained a warrant to search Waters's home. Deputy Apitz's affidavit accompanying the warrant application states, in relevant part:

> On 03-17-06, your affiant received information from a confidential reliable informant (CRI) [that] in the past 45 days CRI was at Travis Allen Waters[']s] trailer house located at lot 2 in the [W]oodland trailer court, in the city of Bigfork and had seen a grow operation inside the residence. CRI said there were approximately 50-60 marijuana plants approximately 5 feet tall and a number of starter plants. CRI advised marijuana plants were growing in the first two bedrooms that are to the left of the living room area.

> Your affiant knows that marijuana plants take a long time to grow. Typically marijuana plants are started out as "starter plants" and then re-potted in larger dirt pots in order to grow to maximum height. Your affiant also knows from knowledge, training, and experience that marijuana plants need light to grow and that fluorescent lights are often used as a light source, these types of lights have to be run on a continuous basis therefore causing kilowatt hours at the place of growing to increase as compared to a normal home usage. Your affiant checked with Minnesota [P]ower on the kilowatts of power used for this address for the past 3 years. Power use for the time period of January [through] March 22, 2006 has been [an] average of 1,222 kilowatts. Power use under previous ownership of this residence from January [through] March 19, 2004 was 376 kilowatts per month. Affiant spoke with account representative at North Itasca Electric and was advised the high end average kilowatt use for a trailer house from January [through] March would be approximately 500 to 550 kilowatts per month. The kilowatt usage at this home is now over twice what the average use should be or has been in the past. For this reason your affiant has reason to believe that there is and has been a lighting source for the marijuana plants to grow in this particular house. Your affiant also knows Waters works in the Minneapolis area and is only at his residence on weekends, this being information from the CRI in this case and also from Chief of Police Jon Babcock of the Bigfork Police Dept. Given the amount of kilowatt hours used at this residence it is as stated earlier over twice as much as the average and should be lower than average if Waters is only there on the weekends.

After a warrant was issued, Deputy Apitz and three other officers searched Waters's trailer home. The officers found 182 small marijuana plants in a bedroom and 6 larger plants elsewhere in the trailer. The officers also found fluorescent lights placed above all the growing marijuana plants. The lights were connected to a timer and a "step-up" transformer, which allowed for increased power usage. In addition, the officers found 4.9 grams of cocaine.

The state charged Waters with several controlled-substance offenses. Waters moved to suppress the evidence obtained during the search, and the district court denied the motion. After a two-day trial, a jury convicted Waters of fifth-degree possession of marijuana, fifth-degree distribution of marijuana, and third-degree possession of cocaine but acquitted him of two other drug-related offenses. Waters appeals, challenging only the district court's denial of his pre-trial motion to suppress.

D E C I S I O N

Waters argues that the evidence seized during the search of his trailer home should be suppressed because, first, Deputy Apitz allegedly made reckless misrepresentations or omissions when preparing the warrant application and, second, the warrant application does not establish the reliability of the confidential informant.

A warrant for a search of a home may be issued only upon "probable cause . . . , particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. A court determines whether probable cause for a search exists after examining the totality of the circumstances:

> "The task of the issuing [judge] 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. Souto, 578 N.W.2d 744, 747 (Minn. 1998) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). If a warrant is void for lack of probable cause,

the evidence seized in the search must be suppressed. *State v. Moore*, 438 N.W.2d 101, 105 (1989). This court's task on appeal is to "ensure that the issuing judge had a 'substantial basis' for concluding that probable cause existed." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quoting *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332). A district court's credibility determinations will not be overturned unless they are clearly erroneous. *State v. Smith*, 448 N.W.2d 550, 555 (Minn. App. 1989), *review denied* (Minn. Dec. 29, 1989).

A. Alleged Misrepresentations and Omissions

Waters argues that the affidavit contained misstatements and omissions. Affidavits supporting a search warrant are presumed to be valid. *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684 (1978). Nonetheless,

> 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. A misrepresentation is "material" if when set aside there is no longer probable cause to issue the search warrant. If so, then the court must determine that the police deliberately or recklessly misrepresented facts, because innocent or negligent misrepresentations will not invalidate a warrant.

Moore, 438 N.W.2d at 105 (citations omitted); *see also State v. Doyle*, 336 N.W.2d 247, 250 (Minn. 1983) (applying same analysis to alleged omissions).

Waters contends that Deputy Apitz made three material misstatements. The first alleged misstatement is based on the following statement in the warrant application:

> Your affiant checked with Minnesota [P]ower on the kilowatts of power used for this address for the past 3 years. Power use for the time period of January [through] March 22,

> 2006 has been [an] average of 1,222 kilowatts. Power use under previous ownership of this residence from January [through] March 19, 2004 was 376 kilowatts.

Waters argues that the warrant application is misleading because it does not indicate whether the electricity-usage figure for 2004 was a monthly average or the total usage for the three-month period. Deputy Apitz testified at the pre-trial hearing that he compared monthly averages in 2004 to monthly averages in 2006 but inadvertently did not use the word "average" in referring to the 2004 figure. The district court deemed this testimony to be credible. The context of Deputy Apitz's statements supports the district court's conclusion. The warrant application expressly states that the first usage number is a monthly average, so a reasonable inference is that the second usage number also is a monthly average. Thus, Deputy Apitz's failure to use the word "average" with respect to the 2004 period was not an "intentional or reckless misrepresentation[] of fact." *Moore*, 438 N.W.2d at 105. Furthermore, a judge would reach the same conclusion whether the 376-kilowatt figure was believed to be a monthly average or a cumulative total. In either event, the electricity usage would be substantially less than the 1,222 kilowatts per month that Waters averaged over a similar period in 2006. Thus, the absence of the word "average" from the 2004 figure was not material to the warrant application. *See id.*

The second alleged misstatement is Deputy Apitz's omission of a more complete history of Waters's electricity usage and information comparing Waters's electricity usage to that of other, similarly sized trailers. The suggestion that Deputy Apitz misrepresented the facts by failing to include a more complete history of Waters's electricity usage is not supported by the record. The billing history for Waters's trailer

home shows that, for the period of June 2005 through March 2006, Waters used at least 1,000 kilowatts per month. That the records show less electricity usage during an earlier period of Waters's residency, from December 2004 to May 2005, is less significant because the inquiry for the district court was whether the warrant application reflected ongoing criminal conduct at that time. Even so, electricity usage at the trailer still was unusually high during the earlier period, ranging between 591 and 2,431 kilowatts per month. The warrant application states that electricity usage in trailer homes in that area typically averages no more than 500 to 550 kilowatts per month. It is unclear from Waters's brief what other information concerning other trailer homes was within Deputy Apitz's knowledge but was not included in the warrant application. In any event, the comparative data was not material because the warrant application already contained more-specific information about electricity usage at Waters's trailer home. Thus, there is no indication that material information was omitted or that the issuing judge would have come to a different conclusion if additional information had been provided.

The third alleged misstatement is a reference in the warrant application to Deputy Apitz's conversation with an "account representative" at North Itasca Electric. Deputy Apitz testified that the person with whom he spoke was a secretary. The distinction between the two positions is not material, especially in light of the fact that the employee provided Deputy Apitz with copies of the utility's billing records for that property.

Thus, we conclude that Deputy Apitz did not intentionally or recklessly make material misrepresentations or omissions in the warrant application. *See State v. Lozar*, 458 N.W.2d 434, 440-41 (Minn. App. 1990) (affirming search warrant containing

misstatements about the date evidence was obtained and omitting information that defendants were engaged in legitimate horticultural business), *review denied* (Minn. Sept. 28, 1990).

B. Reliability of Information Obtained from Confidential Informant

Waters also argues that the warrant application is deficient because it does not include information that would demonstrate the reliability of the confidential informant who provided the tip to Deputy Apitz, such as the informant's identity, whether Deputy Apitz had had prior dealings with the confidential informant, and whether Deputy Apitz believed the confidential informant to be reliable.

The veracity of a confidential informant is just one of the "relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Gates*, 462 U.S. at 233, 103 S. Ct. at 2329. In addition to information about the informant's background, courts consider the amount of detail in a tip and whether a subsequent investigation corroborates the tip. *State v. Lindquist*, 295 Minn. 398, 401, 205 N.W.2d 333, 335 (1973). "Any possible lack of information as to informant reliability is not fatal where . . . there is other corroborative evidence sufficient to establish credibility." *State v. Eling*, 355 N.W.2d 286, 291 (Minn. 1984); *see also State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) (approving stop of vehicle based on corroboration of confidential informant's tip and stating that "further elaboration concerning the specifics of the CRI's veracity is not typically required").

The district court had sufficient grounds to find that the information provided by the confidential informant was reliable. First, the tip was fairly detailed. The confidential informant provided specific information, based on personal observation, concerning the number and size of the marijuana plants and their location within the home. *See State v. Ross*, 676 N.W.2d 301, 304 (Minn. App. 2004) (holding that specific description of suspect, suspect's car, and time and place of suspect's arrival exceeded the level of detail needed to make tip reliable). The confidential informant also had information that Waters spent time at the trailer home only on weekends. The confidential informant's tip is not the type of conclusory statement that was found insufficient in *Souto*, where the officer stated generally that the defendant "was involved in the possession and/or distribution of drugs on a wide scale." 578 N.W.2d at 749. Any discrepancy between the details provided by the confidential informant and what the officers actually found is not relevant to the sufficiency of the warrant. *See United States v. Robertson*, 39 F.3d 891, 894 (8th Cir. 1994) (noting that accuracy of tip is "essentially irrelevant to the probable cause inquiry").

Second, and more importantly, the confidential informant's tip was corroborated by the investigation Deputy Apitz conducted before preparing the warrant application. In that initial investigation, Deputy Apitz confirmed that the trailer home belonged to Waters and that Waters stayed at the home only on weekends. Deputy Apitz also obtained information showing that Waters had unusually high usage of electricity. The association of high electricity usage with a marijuana-growing operation is not only common knowledge to someone like Deputy Apitz but also has been recognized by

courts as a fact that supports a finding of probable cause for a search warrant. *See, e.g.*, *United States v. Olson*, 21 F.3d 847, 850 (8th Cir. 1994) (affirming finding of probable cause for search "notwithstanding the lack of a basis of knowledge for the informants' information" where officers obtained records showing that defendant's electrical use was abnormally high). Thus, Deputy Apitz's initial investigation supplied information that permitted the district court to conclude that the confidential informant's tip was reliable. *See Eling*, 355 N.W.2d at 291 (holding that information provided by confidential informant was reliable based on "other corroborative evidence sufficient to establish credibility"); *Ross*, 676 N.W.2d at 305 (affirming finding of probable cause in part because of corroboration of informant's tip).

In sum, the district court had a substantial basis for concluding that the warrant application was supported by probable cause. *Zanter*, 535 N.W.2d at 633. In light of all the circumstances, the warrant application reflected "'a fair probability that contraband or evidence of a crime [would] be found in a particular place.'" *Souto*, 578 N.W.2d at 747 (quoting *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332). Thus, the district court properly denied Waters's motion to suppress evidence obtained during the search.

Affirmed.