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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-629**

State of Minnesota,
Respondent,

vs.

Peter Eric Sand,
Appellant.

**Filed January 4, 2011
Reversed
Shumaker, Judge**

Clay County District Court
File No. 14-CR-09-2612

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

Brian Melton, Clay County Attorney, Heidi M. F. Davies, Chief Assistant County
Attorney, Moorhead, Minnesota (for respondent)

Jamison W. Cichosz, Svingen, Karkela, Cline, Haugrud, Hunt, Larson & Jensen, Fergus
Falls, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and
Minge, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

This appeal is from the district court's denial of his motions to (1) suppress evidence discovered during the execution of a search warrant at his residence on the ground that the search warrant lacked probable cause to believe appellant was engaging in unlawful activity, and (2) disclose the identity of the confidential informant who provided information to officers for purposes of obtaining the search warrant. We reverse.

FACTS

On June 11, 2009, Moorhead police officers executed a search warrant at the home of appellant Peter Eric Sand and seized marijuana, marijuana plants, various drug paraphernalia, and a firearm. As a result of the search, the state charged Sand with several counts of controlled-substance crimes, possession of a firearm by an ineligible person, and child endangerment, the latter charge being based on the presence of Sand's child in the home at the time of the search.

Sand moved to suppress the evidence obtained in the search on the ground that the warrant was not supported by probable cause. He also moved to compel the state to disclose the identity of a confidential informant who had supplied information upon which the warrant was, in part, based. The district court denied both motions, and Sand agreed to a stipulated-facts trial, after which the court found him guilty of one count of fifth-degree possession of a controlled substance and possession of a firearm by an ineligible person.

The facts upon which the issuing magistrate found the existence of probable cause for the search warrant were set forth in the affidavit of a Moorhead police detective assigned to drug investigations. The affidavit stated that a confidential informant (CI), who had visited Sand's house at a particular address, told the affiant that "an individual named Pete sells marijuana and cocaine." The next day, the affiant and another detective "conducted a refuse inventory" at the address the CI had given, and they found "[i]ndicia for Pete Sand" as well as remnants of marijuana plants. About six weeks later, the CI told the affiant that while the CI was visiting Sand's residence the previous day, Sand "was smoking the hash off of a table knife," and put that knife and a broken marijuana pipe into the garbage. The next day, another Moorhead detective "conducted a refuse inventory" at the address the CI had given and found "[i]ndicia for Peter Sand"; a green substance that was shown in a field test to be marijuana; a table knife with burn marks; and a "piece of a glass pipe." The affiant determined that there was an active utilities account at that address in Sand's name and that the state motor vehicle services department lists Sand's address as being that which the CI had provided.

No other facts or specifics about Sand or the address were contained in the affidavit and no other factual information in any form was provided in support of probable cause. Sand argues that the warrant does not state probable cause and that his motion to suppress should have been granted.

DECISION

Because Sand's appeal followed a stipulated-facts trial, our review is limited to the question of the propriety of the district court's denial of Sand's suppression motion. *See*

Minn. R. Crim. P. 26.01, subd. 4 (2009). That question, in turn, depends on whether there was probable cause for the issuance of a warrant to search Sand's home. No search warrant may be issued except upon probable cause. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. Probable cause exists when the facts submitted to the magistrate show that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). Affidavits in support of search warrants must include "specific facts to establish a 'direct connection, or nexus,' between the crime alleged and the place to be searched, 'particularly in cases involving the search of a residence for evidence of drug activity.'" *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005) (quoting *State v. Souto*, 578 N.W.2d 744, 747-48 (Minn. 1998)). When a "search-warrant application is clear and unambiguous, we do not look beyond the four corners of the document . . ." to determine probable cause. *Id.*

The four corners of the affidavit here presented the issuing magistrate with two types of information, namely, (1) allegations by a confidential informant that Sand was likely in possession of illegal controlled substances, and (2) descriptions of two searches of trash receptacles at Sand's residence that yielded evidence of drug activity at the residence.

The CI's first allegation and the trash search that followed occurred approximately six weeks before the date the warrant was issued. Because "[t]he evidence supporting a finding of probable cause must be closely related in time to the issuance of the search warrant so as to justify a finding of probable cause at the time the search is to be

conducted,” the CI’s first allegation and the fruits of the consequential search may not be considered. *McGrath*, 706 N.W.2d at 544. The district court at least impliedly acknowledged the insufficiency of this first set of facts to establish probable cause but then held that “the second garbage inventory is still sufficient for probable cause for the issuance of a search warrant.” The second trash search was prompted by the CI’s allegation that Sand had been smoking marijuana “hash” at the address in question and that he deposited a knife and a broken marijuana pipe in the garbage.

In some circumstances, an informant’s tip can provide a basis for finding probable cause to search premises, but the informant’s reliability is a critical factor to be considered in making the probable-cause determination. *See State v. Cook*, 610 N.W.2d 664, 667 (Minn. App. 2000) (stating that “[p]olice may rely on an informant’s tip if the tip has sufficient indicia of reliability”), *review denied* (Minn. July 25, 2000). Although the affidavit here indicated that “[t]he CI stated that Sand was smoking marijuana hash while the CI was there,” and even though the CI’s tip six weeks earlier was corroborated by the trash search, the district court appeared not to find probable cause on the basis of the tips, stating, “there is no evidence of a history of reliability of the [CI] outside of the investigation into [Sand] and [Sand’s] residence, the CI’s tips are essentially corroborated tips from a source of unknown reliability.” The court instead relied on the second trash search as providing probable cause for the search warrant. Our standard of review is not *de novo* but rather is a “deferential, substantial basis standard.” *State v. Rochefort*, 631 N.W.2d 802, 805 (Minn. 2001). Even applying that standard of review, we, like the district court in its suppression ruling, doubt that the affidavit discloses sufficient facts

upon which to conclude that the CI was reliable, without factoring in the searches of the trash. In other words, the uncorroborated tips of the CI cannot provide probable cause because no indicia of reliability of the CI have been provided.

We are brought then to the question of whether the search of a trash receptacle at the address in question one day prior to the date on which the warrant was issued provided probable cause for the warrant. “[A]n examination of garbage by the police is a search and is therefore subject to the constraints imposed by the Fourth Amendment.” *State v. Oquist*, 327 N.W.2d 587, 590 (Minn. 1982). “However, when a police officer searches trash, set on the curb for routine pickup, without trespassing on the premises, no illegal search has occurred.” *State v. Goebel*, 654 N.W.2d 700, 703 (Minn. App. 2002) (citation omitted). Sand agrees that “garbage left outside of the curtilage of a home is considered abandoned and therefore searchable without [a] warrant.”

Thus, a warrantless trash search, as were the two searches here, may be legal or illegal, depending on the location of the trash. It seems axiomatic that an illegal search may not become the basis of probable cause for another search. *See State v. Hardy*, 577 N.W.2d 212, 216 (Minn. 1998) (stating that a warrantless search “may precede arrest as long as the results of the search are not necessary to establish probable cause for the arrest”). Nothing within the four corners of the affidavit supporting the warrant to search Sand’s home allows the issuing magistrate to determine whether the trash search that became the basis for probable cause was legal or illegal because the location of the trash is not revealed. The magistrate was left to assume that the trash was outside the curtilage of Sand’s home, but probable cause must be based on facts and fair inferences from facts

and not on speculation. Thus, the warrant to search Sand's home was not based on probable cause. Evidence seized as a result of a warrant lacking probable cause must be suppressed. *See State v. Jackson*, 742 N.W.2d 163, 178 (Minn. 2007). The district court erred in denying the motion to suppress the evidence obtained through an unlawful search and seizure.

Because our holding is dispositive of the case, we need not address Sand's motion to compel disclosure of the identity of the CI or motion to strike portions of the respondent's brief and appendix.

Reversed.