IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DARREN JAMES HARRELL, Appellant.	)	No. 64329-1-I DIVISION ONE UNPUBLISHED OPINION FILED: November 15, 2010

Appelwick, J. — Darren Harrell was found guilty of manufacturing marijuana in violation of the Uniform Controlled Substances Act, chapter 69.5 RCW, following a bench trial on stipulated evidence. Harrell contends that the police lacked probable cause to obtain the warrant authorizing the use of a thermal heat imaging device and a narcotics detection dog to search his property. Harrell also claims that misstatements in the affidavit supporting the warrant render the warrant invalid. We affirm.

FACTS

On May 1, 2008, a confidential informant contacted Detective Matthew Volpe of the King County Sheriff's Office to provide information about a marijuana grow operation in exchange for leniency on his pending nonviolent

misdemeanor marijuana charge. The informant provided a description of Harrell and the car he drove. He claimed that he had been to a house in Bothell where Harrell showed him a marijuana grow operation. The informant believed that Harrell did not live in the house full-time. He reported that Harrell has been known to use video surveillance equipment, has a long drug history, and has access to weapons. The informant feared retaliation from Harrell if his identity were revealed.

Detective Volpe's investigation confirmed Harrell's name, physical description, address, and license plate. Detective Volpe visited the Bothell house and found it very unkempt compared to other houses in the neighborhood. He observed several newspapers on the driveway and porch and noted that all the windows were covered with curtains or blinds. He knocked on the door several times and heard noises from inside, but nobody answered.

Detective Volpe also spoke with two neighbors, both of whom wished to have their identities kept confidential. One neighbor described Harrell and his car and indicated that Harrell did not socialize with the other neighbors, that Harrell seemed suspicious, and that Harrell once joked that he had a marijuana grow operation in his house. The other neighbor kept in contact with Detective Volpe over a two month period, identified Harrell's car, reported being unsure of whether Harrell actually lived in the house, and stated that the lights were on constantly inside the house.

Detective Volpe also learned from a records search that Harrell had reported a burglary a year earlier at his previous apartment, involving a theft of

guns. The report indicated that Harrell had a video camera recording of the break-in and that the suspects were identified and charged.

On July 3, 2008, Detective Volpe described his investigation in an affidavit requesting a search warrant authorizing the use of a thermal heat imaging device and a narcotics detection dog on the outside of the Bothell house. A district court judge issued the warrant. The thermal heat image indicated an unusually large amount of thermal energy emitting from the chimney. Deputy Miller of the K-9 Unit recognized the odor of growing marijuana and Narcotics Detection Dog Copper displayed multiple alerts outside the house.

On July 7, 2008, based on the original affidavit plus an additional description of the results of the limited searches authorized in the first warrant, Detective Volpe obtained a warrant to search the house, Harrell, and Harrell's car. Police found a marijuana grow operation in the house and arrested Harrell, who admitted that he had been growing marijuana.

The State charged Harrell with manufacturing marijuana. Harrell moved to suppress all evidence obtained in the search on the same grounds he asserts here. The trial court denied the motion. Harrell appeals.

DISCUSSION

We review the issuance of a search warrant for abuse of discretion, giving great deference to the issuing judge's determination of probable cause. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004); State v. Chenoweth, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). We will generally resolve doubts about the existence of probable cause in favor of the validity of the search warrant.

Chenoweth, 160 Wn.2d at 477. Review of the issuance is "limited to the four corners of the affidavit supporting probable cause." State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Although we defer to the issuing judge's determination, the trial court's assessment of probable cause on a motion to suppress is a legal conclusion that we review de novo. State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007).

A judge may issue a search warrant only upon a determination of probable cause. State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). Probable cause exists when the application sets forth "facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." State v. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007). The affidavit should be evaluated in a commonsensical manner rather than hypertechnically. Jackson, 150 Wn.2d at 265. The issuing judge "is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." Maddox, 152 Wn.2d at 505. But the supporting affidavit must be based on more than mere suspicion or personal belief that evidence of a crime will be found on the premises to be searched. Jackson, 150 Wn.2d at 265.

Harrell first attacks the validity of the warrant on the ground that the informant was not credible. He maintains that the warrant fails to set forth facts that establish the informant's veracity and basis of knowledge about criminal activity at Harrell's house as required by Spinelli v. United States, 393 U.S. 410,

89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). State v. Jackson, 102 Wn.2d 432, 443, 688 P.2d 136 (1984) (rejecting Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) abrogation of Aguilar/Spinelli). The Aguilar/Spinelli test requires the issuing judge to make a threshold determination about whether an informant has truthfully related facts (veracity) and whether an informant has personal knowledge of the facts (basis of knowledge).

As to the basis for the informant's knowledge, Harrell claims that an observation "within the last three years" is too stale and indefinite and that the affidavit lacks any indication that the informant was familiar with living marijuana plants or grow operations. But, the affidavit indicates that the informant claimed to have been in the house "on several occasions within the last three years," that Harrell "showed him/her his marijuana growing operation in the house," and that "he/she was very familiar with the appearance and odor of marijuana." An informant's personal observation of marijuana in the house at issue satisfies the basis of knowledge prong of the Aguilar/Spinelli test. State v. Duncan, 81 Wn. App. 70, 76, 912 P.2d 1090 (1996) (informant who reported personally seeing marijuana, which defendant identified as marijuana, had sufficient basis of knowledge).

Acknowledging that the informant had been arrested and hoped to trade information for leniency, Harrell complains that the affidavit does not include sufficient circumstances of the arrest to indicate truthfulness. Without citation to relevant authority, Harrell claims that the timing of the arrest, the identity of the

arresting officer, or the circumstances under which the informant came into contact with Detective Volpe "could influence the assumption that an arrested informant bears some indicia of reliability." But, where an informant who has been arrested agrees to give information in exchange for favorable treatment, "'it is the "clearly apprehended threat of dire police retaliation should he not produce accurately" more so than the admission of criminal conduct which produces the requisite indicia of reliability.'" State v. O'Connor, 39 Wn. App. 113, 121-22, 692 P.2d 208 (1984) (quoting 1 W. LaFave, *Search and Seizure* § 3.3, at 528-29 (1978) and citing State v. Bean, 89 Wn.2d 467, 469-71, 572 P.2d 1102 (1978) (informant who traded information for favorable sentencing recommendation had a strong motive to be accurate)).

Detective Volpe confirmed that the informant had no criminal convictions, lived in King County, had been arrested for a misdemeanor crime, and offered information in exchange for leniency. Detective Volpe also stated in his affidavit that the informant "admitted to criminal activity related to possession and use of marijuana and said that he/she was very familiar with the appearance and odor of marijuana." While such an admission may not qualify as a statement against penal interest per se, it does provide some indicia of reliability, because a reasonable person in the informant's position would not have made such admissions without believing they were true. See ER 804(b)(3).

In addition, the State argues that Detective Volpe's independent investigation discloses corroborating evidence to shore up any deficiency in the veracity prong by pointing to suspicious activities or indications of criminal

activities along the lines suggested by the informant rather than merely public or innocuous facts. State v. Jackson, 102 Wn.2d 432, 438, 688 P.2d 136 (1984). In particular, Detective Volpe confirmed by his own investigation and statements provided by the neighbors that (1) Harrell used a car and a house owned by a woman named Devonne Iao; (2) Harrell did not appear to live in the house full-time, showing up periodically, parking his car in the closed garage, and allowing papers to pile up; (3) the same lights were on constantly in the house and the windows were always covered; (4) Harrell had had video surveillance equipment and a gun at a previous address; and (5) from Detective Volpe's training and experience, the conditions and activities observed at the house were consistent with a marijuana grow operation.

Harrell contends that the neighbors' statements could not be found reliable under the veracity prong of the Aguilar/Spinelli test. But where, as here, citizen informants are known to the police but not disclosed to the court, the Aguilar/Spinelli test is relaxed as long as the affidavit contains background facts to support a reasonable inference that the information is credible and without motive to falsify. Atchley, 142 Wn. App. at 162 (credibility established where informant provided name and contact information to police, received no compensation or reward, background check revealed no reason to suspect falsehood, and informant came forward to assist police in ridding community of drug manufacturers and dealers). Here, Detective Volpe contacted the two neighbors, confirmed that neither had criminal records, and made observations consistent with their statements in his own investigation. These facts are

sufficient to establish the veracity of the neighbors.

Harrell also complains that Detective Volpe's investigation revealed only innocuous facts establishing only that Harrell was less neat and social than his neighbors and was frequently not home. While the investigation corroborated innocuous facts such as Harrell's identity, car, and address, it also revealed facts that, taken together, support at least a suspicion that the house was being used for a marijuana grow as reported by the informant. Considering these facts together with the fact that the informant could be expected to provide accurate information when he admitted to criminal activity and sought leniency in his own case in return for information, we conclude that the affidavit established the informant's reliability. Accordingly, there was probable cause to issue the warrant.

Harrell next contends that two errors in the affidavit invalidate the warrant. In particular, Detective Volpe stated in his affidavit that Harrell reported a burglary in 2007 involving the theft of three guns, but the incident occurred in 1997 and involved only one gun.

To succeed in this claim, Harrell must show reckless or intentional misstatements of material information. Chenoweth, 160 Wn.2d at 478-79; Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). A misstatement is material if it was necessary to the finding of probable cause. State v. Copeland, 130 Wn.2d 244, 277, 922 P.2d 1304 (1996). A reckless disregard for the truth may be shown where the affiant "'in fact entertained serious doubts as to the truth of facts or statements in the affidavit.'"

State v. Clark, 143 Wn.2d 731, 751, 24 P.3d 1006 (2001) (quoting O'Connor, 39 Wn. App. at 117-18)(internal quotation marks omitted). "Serious doubts" can be "'shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.'" Id. (quoting O'Connor, 39 Wn. App. at 117).

At the CrR 3.6 hearing, Detective Volpe admitted that the burglary occurred in 1997, not 2007, and involved only one gun. He testified that he knew that the burglary "occurred some time ago," but he was not aware of the mistaken date when he prepared the affidavit and he would have realized the error if he had noticed it. Detective Volpe also testified that when he reviewed the burglary case report, "there was the same gun entered three times and I thought that that was three separate guns."

Harrell claims these misstatements are material because the affidavit presented Harrell in a much more negative light than the actual facts would support, and because the burglary report was the only corroboration of the informant's claim that Harrell had access to weapons. But, the burglary report showed that Harrell had been the victim of a crime and the affidavit did not indicate whether Harrell had recovered any gun after the burglary or whether he violated any law by possessing guns before the burglary. And, as the State points out, although the burglary report provided some corroborative value concerning the informant's credibility, it was only minimally relevant to the question of probable cause to believe that Harrell was growing marijuana.

Similarly, Harrell fails to establish that Detective Volpe provided an

incorrect date and number of guns in his description of the burglary report with reckless disregard for the truth. Contrary to Harrell's unsupported claim, Detective Volpe's apparent failure to sufficiently proofread the affidavit to catch his two mistakes does not establish recklessness. Citing State v. Jones Harrell also invites us to infer recklessness from the omission of facts "'clearly critical to the finding of probable cause.'" 55 Wn. App. 343, 346-47, 777 P.2d 1053 (1989) (quoting United States v. Martin, 615 F2d 318, 329 (5th Cir. 1980)) (emphasis omitted). Our Supreme Court has rejected such an inference as improper because it collapses the two independent elements of intentionality and materiality into a single inquiry. State v. Garrison, 118 Wn.2d 870, 873, 827 P.2d 1388 (1992). The trial court correctly determined that the errors did not invalidate the warrant.

Affirmed.

Appelwick, J.

WE CONCUR:

Spearman, J.

Becker, J.