COURT OF APPEALS
DECISION
DATED AND FILED

December 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1943-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY HOPPE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Gregory Hoppe appeals from a judgment of conviction entered on his plea of no contest to the charge of manufacturing marijuana. The sole issue is the propriety of the no-knock search warrant executed at Hoppe's home. We affirm the trial court's refusal to quash the search warrant

and refusal to suppress evidence obtained during the search. Accordingly, the judgment of conviction is affirmed.

On December 15, 1996, the Racine County Metro Drug Enforcement Unit applied for a no-knock search warrant for Hoppe's home. The application included the affidavit of an agent of the Racine County Sheriff's Department. The affidavit indicated that on October 27, 1996, a confidential informant reported a "marijuana grow" consisting of forty plants in the sub-basement of the Hoppe residence. The informant had obtained the information from Hoppe's wife. The agent had received information from another confidential informant in September 1995 that there was a marijuana grow at the Hoppe residence. The agent had examined the electrical bills for the Hoppe residence and found them to be unusually high for the period of February through October 1996.

Racine County Circuit Court Judge Wayne Marik was contacted at home on the evening of December 15, 1996, to authorize the warrant. The warrant was executed on December 17, 1996. Officers recovered grow lights and a total of twenty-three marijuana plants. Judge Emmanuel J. Vuvunas heard and denied Hoppe's motion to suppress the search.

Hoppe first criticizes the trial court for not making specific findings of fact and conclusions of law when ruling on the motion to suppress. Although the trial court indicated some uncertainty as to the standard of review to be applied to a warrant issued by another court, it did find a reasonable basis for issuance of the warrant. Where the facts are undisputed, as here, the absence of an expansive rendition of probable cause by the trial court does not hamper appellate review.

We review the issuing judge's determination, not that of the reviewing trial court. *See* ***State v. DeSmidt***, 155 Wis.2d 119, 132, 454 N.W.2d

780, 785 (1990). We give substantial deference to the issuing judge's determination. *See* ***State v. Ehnert,*** 160 Wis.2d 464, 468, 466 N.W.2d 237, 238 (Ct. App. 1991). Further, because Hoppe does not challenge the truthfulness of the affidavit in support of the warrant, review of a finding of probable cause is limited to the face of the affidavit.[1] *See* ***DeSmidt***, 155 Wis.2d at 134, 454 N.W.2d at 786.

We turn to consider whether probable cause existed to support the issuance of a search warrant for Hoppe's residence. Probable cause is determined by applying the totality of the circumstances test.

> [T]he task of the issuing magistrate is simply to make a practical commonsense 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. Anderson, 138 Wis.2d 451, 468, 406 N.W.2d 398, 406 (1987) (quoted source omitted). Probable cause is concerned with probabilities and not hard certainties. *See* ***id.*** at 469, 406 N.W.2d at 406. The standard invokes the practical considerations of everyday life on which reasonable and prudent men and women, not legal technicians, act. *See* ***Ehnert***, 160 Wis.2d at 469, 466 N.W.2d at 238.

Hoppe argues that the information from the confidential informants was too old to support a finding that a marijuana grow still existed in the Hoppe residence. We disagree.

---

[1] We reject any claim by Hoppe that the issuing judge failed to conduct the proper review of the search warrant application and make the necessary findings. However, such a procedure is not necessary if the four corners of the warrant application establish probable cause. No method of making a record was available to Judge Marik when he ruled on the application at his home.

> [T]imeliness depends upon the nature of the underlying circumstances and concepts. When the activity is of a protracted and continuous nature, the passage of time diminishes in significance. Factors like the nature of the criminal activity under investigation and the nature of what is being sought have a bearing on where the line between stale and fresh information should be drawn in a particular case.

Id. at 469-70, 466 N.W.2d at 239 (citations omitted).

The confidential informant who had information about the marijuana grow from Hoppe's wife reported the presence of the grow to the investigating agent on October 27, 1996, forty-nine days before issuance of the warrant. Although the affidavit is vague about when the informant spoke with Hoppe's wife, an inference could be made that the informant had gained the information in close proximity to relaying it to the investigating agent. The informant had previously supplied the police with accurate tips about drug dealing. The informant indicated a grow of forty plants. It was probable that a sizable operation existed which would not be readily abandoned.

The information from the other informant was over a year old. However, the agent's review of Hoppe's electrical consumption supports the inference that growing was taking place throughout 1996.[2] Marijuana growing is of a continuous nature, and, therefore, greater lapses of time are justified. *See* ***United States v. Greany***, 929 F.2d 523, 525 (9th Cir. 1991). The combination of the old information and the more recent report that a grow existed established a

[2] It was not necessary for the agent's affidavit to directly link what was perceived as unusual electrical consumption with a marijuana grow. As a matter of common knowledge the issuing judge could connect increased electrical consumption with the presence of special grow lights supporting a marijuana grow. *See* ***State v. Mc Kee***, 181 Wis.2d 354, 356-57, 510 N.W.2d 807, 808 (Ct. App. 1993) (explaining that increased electrical consumption can be caused by indoor cultivation of marijuana).

possible ongoing enterprise. *See* ***State v. Moley***, 171 Wis.2d 207, 213-14, 490 N.W.2d 764, 766 (Ct. App. 1992) ("This is a prime example of old information combining with new data to create present probable cause."). Probable cause was not stale in this instance.[3]

Hoppe claims that there was no information about the reliability of the information Hoppe's wife provided to the confidential informant. This claim lacks merit. The wife's admission to the informant that marijuana was growing in her home was a statement against penal interest and inherently reliable. Credibility is established by the fact that the statement is against penal interest. *See* ***Anderson***, 138 Wis.2d at 470-71, 406 N.W.2d at 407. Moreover, the agent verified that Hoppe's wife lived at the address provided by the informant and therefore she had knowledge of the contents of the home. The veracity of the wife's admission was also corroborated by the 1995 report of a marijuana grow and the high electrical consumption. The information in the affidavit was sufficiently reliable to support issuance of the warrant.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[3] Hoppe cites § 968.15, STATS., which requires a search warrant to be executed within five days of its issuance. That requirement was not violated here. The statute does not require application for a warrant within five days of receiving information used in support of the application. It does not apply here.