COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0904-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GREGORY M. SANDERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Crawford County: GEORGE S. CURRY, Judge. *Affirmed.*

EICH, J.[1] Gregory Sanders appeals from a judgment convicting him of possession of marijuana with intent to deliver, a misdemeanor. He pled to the charge, reserving for appeal the denial of his motion to suppress evidence. His arguments on appeal, which do not necessarily coincide with the arguments he

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(c), STATS.

made to the trial court, are: (1) that some of the information included in the affidavit which resulted in issuance of a search warrant for his property was obtained by police officers as a result of an "unlawful search"; and (2) that the affidavit in support of the warrant's issuance was insufficient to establish probable cause in several respects. We reject Sanders's arguments and affirm the judgment.

The facts are not in dispute and, as Sanders states, may be "derived entirely from the affidavit in support of [the issuance of the] search warrant." That affidavit, executed by LaDon Trost, a Grant County Deputy Sheriff, states the following facts. In June 1996, another sheriff's deputy, Robert Floerke, received information from an anonymous source—a "citizen informant"—that Gregory Sanders and "Ron Sanders," (Sanders's father, apparently misidentified in the affidavit as his brother) had been "operating a large-scale marijuana growing operation" on their farm, that there were outbuildings on the farm equipped for growing the crop on a year-round basis, and that there was "possibly marijuana growing outside also." The informant also stated that Sanders uses "commercial seeds" to grow his plants and "sells a lot of the marijuana in Prairie du Chien," where he resides. According to the affidavit, Trost and Floerke went to the farm, noticing a "water wagon" (which, according to the officers, could be used for a variety of crop-watering uses), and little else. Returning to the property during "growing season," the officers entered a field, where they noticed two standing female marijuana plants which obviously had been tended by someone,[2] and also areas where it was apparent that "plants had been removed from the soil." Trost stated in the affidavit that, based on his twenty years' experience in investigating

[2] The officers noticed, for example, that the weeds growing around the plants had been "trimmed away."

controlled-substance charges, where "wild marijuana" grows naturally, both male and female plants will be found together, growing "in large clump areas," whereas where marijuana is being "cultivated," only isolated female plants will generally be found. According to Trost, the two female plants were growing "in tall grass" in an area that would be difficult to see from the adjoining road. Based on his experience, Trost concluded that the plants they observed were not growing wild, but had been cultivated; although they were not yet ready for harvest. He also stated, again based on his experience, that marijuana dealers will frequently maintain records and growing charts relating to their crops.

Based on Trost's affidavit, the circuit court issued a warrant for the search of Sanders's Grant County farm and also one for his residence in Prairie du Chien. While the parties don't describe it, we assume evidence was found in the course of executing the warrant in both locations that led to the filing of the instant charge and Sanders's eventual conviction.

Sanders filed a motion to suppress the evidence, arguing: (1) that the affidavit did not present sufficient facts to warrant a finding of probable cause to search his residence in Prairie du Chien because (a) it contains no information as to the "veracity" and "basis of knowledge" of the citizen informant, and (b) it contains no "independent corroboration" of the informant's statements; and (2) that the affidavit was made by Trost "with reckless disregard for the truth," in violation of ***Franks v. Delaware***, 438 U.S. 154 (1978), and similar Wisconsin cases.

The circuit court denied the suppression motion, concluding that Sanders had not made the required "substantial preliminary showing" that Trost had made false statements in the affidavit. In so ruling, the court emphasized that

Sanders had not filed any affidavits or other proof to that effect in support of his motion, but had "simply criticize[d] the … statements made by … Trost." The court went on to conclude that the affidavit was sufficient to establish probable cause to search both the farm and Sanders's residence, reasoning that there was a "fair probability" that relevant evidence would be found in both places. Sanders moved the court to reconsider its decision, raising essentially the same arguments it had put forth earlier,[3] and the court denied the motion, concluding that Sanders had not shown any "manifest error" in the court's original decision.

Sanders, apparently abandoning his challenge to Trost's veracity, argues first that because he had not given Trost and Floerke permission to enter his farm field—an area in which he says he had a reasonable expectation of privacy—their observation of the marijuana plants itself constitutes an unlawful warrantless search and seizure. As a result, he maintains the information so gleaned may not properly be considered in the issuing judge's subsequent decision to issue the warrant. The State argues that Sanders waived any such objection by not raising it in the trial court, citing the familiar rule that an appellate court will generally not consider issues raised for the first time on appeal. *See, e.g.*, ***State v. Whitrock***, 161 Wis.2d 960, 969, 468 N.W.2d 696, 700 (1991). In ***State v. Caban***, 210 Wis.2d 597, 563 N.W.2d 501 (1997), the supreme court explained the reasons underlying the rule:

> The reasons for the waiver rule go to the heart of the common law tradition and the adversary system. By limiting the scope of appellate review to those issues that were first raised before the circuit court, [the appellate]

[3] Accompanying the reconsideration motion were several affidavits and photographs purporting to show, in Sanders's words, "that the plants found [by the officers] were wild and within the 'curtilage'" of a camper on the farm property.

> court gives deference to the factual expertise of the trier of fact, encourages litigation of all issues at one time, simplifies the appellate task, and discourages a flood of appeals. Thus, when a party seeks review of an issue that it failed to raise before the circuit court, issues of fairness and notice, and judicial economy are raised.

Id. at 604-05, 563 N.W.2d at 505(citation omitted).

The defendant in ***Caban*** was found by police in an apartment at which they were executing a controlled-substance search warrant. After discovering a large amount of cash in the defendant's pockets, the officers searched his car, finding several large bags of marijuana, and he was eventually charged with possession of a controlled substance with intent to deliver. He moved to suppress the evidence, arguing generally that the search was invalid for a variety of reasons. ***Id***. at 602-03 n. 2, 563 N.W.2d at 504. According to the supreme court, the defendant's motion "did not include a request to suppress the evidence on the ground that there was no probable cause for the search of his vehicle." ***Id***. at 602-03, 563 N.W.2d at 504. Thus, when he tried to argue lack of probable cause on appeal, the court, looking to his written motion and supporting papers filed in the trial court, and the transcript of the hearing on his motion, held that the issue had not been raised below and was therefore waived. ***Id***. at 608, 563 N.W.2d at 506.

We think a similar situation obtains here. We have outlined the arguments made by Sanders in support of his suppression motion. We have also examined his briefs to the circuit court,[4] and we agree with the State that he never challenged the search of the farm on the basis that the officers' observations were

[4] There was no evidentiary hearing on Sanders's motion.

themselves an unlawful search of property in which he had a reasonable expectation of privacy. As we have noted, his arguments centered on the lack of probable cause to search his Prairie du Chien residence, a since-abandoned claim of Trost's untruthfulness, and the absence of corroborating evidence of the citizen-informant's reliability. He has waived the "illegal entry" issue for appellate review and has not persuaded us that we should relieve him of that waiver.[5]

Sanders next argues that the circuit court erred in ruling that Trost's affidavit was sufficient to establish probable cause for issuance of a search warrant. Probable cause is, of course, a non-technical, common-sense test.

> The warrant-issuing judge must be apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the[y] … will be found in the place to be searched….
>
> The quantum of evidence necessary to establish probable cause to issue a search warrant is less than that required to support bindover for trial at the preliminary examination…. [It] is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior.

[5] Even so, we believe the trial court was correct in ruling as it did that Sanders's motion papers were inadequate. His argument on appeal is, as indicated, that the officers' entry onto his field—an area in which he claims he had a legitimate and reasonable expectation of privacy—was itself a "warrantless search of the ... property" which "should not be used as factual support" for the subsequent warrants. He acknowledges that, under the supreme court's decision in ***Bies v. State***, 76 Wis.2d 457, 251 N.W.2d 461 (1977), the fact that the officers may have trespassed on his property is in itself insufficient to nullify the warrant. He argues instead that, in these circumstances, the State must prove the existence of some undefined "legitimate purpose" for their presence in the area. He offers no legal authority for such a proposition, and we find the argument unpersuasive. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis.2d 239, 244-45, 430 N.W.2d 366, 369 (Ct. App. 1988) (appellate court will not consider arguments that are unexplained or undeveloped, or unsupported by citations to authority or references to the record).

State v. Higginbotham, 162 Wis.2d 978, 989, 471 N.W.2d 24, 29 (1991) (internal quotation marks and quoted and cited sources omitted). The duty of the issuing judge is thus confined to making

> a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her], including the veracity and basis of knowledge of persons supplying hearsay information, [that] there is a fair probability that contraband of evidence of a crime will be found in a particular place.

Id. at 990, 471 N.W.2d at 29 (internal quotation marks and quoted sources omitted). The ***Higginbotham*** court went on to state that the issuing judge's review of the supporting affidavit should not be "overly severe."

> Affidavits for search warrants … must be tested and interpreted … in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity ... have no proper place in this area….
>
> Recital of some of the underlying circumstances in the affidavit is essential if the [issuing judge] is to perform his [or her] detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when [an issuing judge] has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.

Id. at 991-92, 471 N.W.2d at 30 (quoting ***State v. Starke***, 81 Wis.2d 399, 410, 411 N.W.2d 739, 745-46 (1978)). The issuing judge's determination will not be upheld, of course, if the affidavit "provides nothing more than the legal conclusions of the affiant." ***Id***. at 992, 471 N.W.2d at 30. The affidavit must provide an adequate basis for the judge to "make an informed determination" that probable cause exists for the search. ***Id***.

Appellate courts will, however, "accord great deference to the warrant-issuing judge's determination of probable cause and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." ***Id***., 162 Wis.2d at 989, 471 N.W.2d at 29. Accordingly, the supreme court has said that "it is the established policy … that the resolution of doubtful or marginal cases regarding a warrant-issuing judge's determination of probable cause should be largely determined by the strong preference that law enforcement officers conduct their searches pursuant to a warrant." ***Id***. at 990, 471 N.W.2d at 29. It is thus our duty, as a reviewing court, to ensure that the issuing judge had a "substantial basis" for concluding that probable cause existed.

Finally, it is well settled that a police officer's experience-based conclusions may be considered in determining whether probable cause exists. ***State v. DeSmidt***, 155 Wis.2d 119, 134-35, 454 N.W.2d 780, 787 (1990).

Sanders first challenges the "reliability" and "veracity" of the citizen informant who informed Deputy Floerke about the marijuana-growing operations on the Sanders farm property in Grant County, and that Sanders was selling marijuana from his residence in Prairie du Chien. In particular, he criticizes Trost's affidavit for its failure to include information by which the informant's reliability might be verified. And he claims the informant's information was insufficiently corroborated. It is true, as Sanders says, that, in determining probable cause, the warrant-issuing judge must consider "all of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information." ***State v. Lopez***, 207 Wis.2d 413, 425-26, 559 N.W.2d 264, 268 (Ct. App. 1996). It is also true, however, that "elaborate specificity is not required, and the officers are entitled to the support of the usual inferences which reasonable people draw from facts." ***Id***.

In this case, as we have indicated above, the affidavit identified the informant as a "citizen-informant," and it is well established that, unlike anonymous police informants, "citizen informants," who have witnessed criminal activity, are considered reliable sources of information even though their personal reliability has not previously been proved or tested. ***State v. Doyle***, 96 Wis.2d 272, 286-87, 291 N.W.2d 545, 552 (1980).

> [A]n ordinary citizen who reports a crime which as been committed in his presence, or that a crime is being or will be committed, … is a witness to criminal activity who acts with an intent to aid the police in law enforcement because of his concern for society …. *He does not expect any gain or concession in exchange for his information.*

State v. Knudson, 51 Wis.2d 270, 276, 187 N.W.2d 321, 325 (1971) (quoted source omitted). And while there still must be "some safeguard" as to the reliability of the citizen-informant's information, "this can be satisfied by verification of some of the details of the information reported." ***State v. Paszek***, 50 Wis.2d 619, 631-32, 184 N.W.2d 836, 843 (1971).

Here, the trial court cited the officers' observation of crop-watering machinery at the farm, together with the obviously "cultivated" female marijuana plants as corroborating information. To this may be added the evidence that other plants had been removed from the ground in the immediate area and the officers' observations, based on their experience in such matters, that "when marijuana is being cultivated, only the female plants will be found." We think this information provides sufficient corroboration for the informant's information that marijuana was being grown on the Sanders farm.

Sanders also questions the trial court's determination that the information in the affidavit provided a sufficient "nexus" between the growing

operations in Grant County and Sanders's residence in Prairie du Chien to establish probable cause that relevant evidence might also be found at the latter location. Here, too, he contends that the citizen informant's statements that he was selling marijuana from his home were insufficiently corroborated. As indicated, however, it is not necessary that every single element of the informant's statement be independently corroborated; it is enough that "some of the details" of the reported information are verified. ***Id.*** at 631-32, 184 N.W.2d at 843. Trost's affidavit indicated that, in his experience, marijuana growers keep records not only of their sales, but also of their crop-growing activities, and we agree with the State that it is logical to infer that such records may well be kept in the grower's residence—even if that residence is not in the same location as the growing fields.

The trial court discussed the "nexus" between the farming operations and Sanders's residence in some detail.

> The [affidavit] … indicated that, unlike the usual situations where the residence and the farm operation would be at the same location, the defendant's residence was separated from the farm he was leasing. If the residence had been on the farm, there would be little question that the search of the residence was proper, since there was a logical nexus between the place of work and the place of residency. Both are intimate places where the defendant would have close contact and [would be] likely to conduct the business of growing a controlled substance, if he was growing it.
>
> The question is whether there is a logical nexus when the residence is separated from the place of the work of raising marijuana.
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> The court concludes that there is a logical nexus, even though the residence is separated by several miles from the place of work. It is logical that both places would yield evidence of drug manufacturing. It would be folly for police officers to only search the growing spot and not expand the request for a search warrant to the home/business office, since searching one place would tip off the person, giving [him] an opportunity to destroy

> evidence of drug manufacturing at the second place. Whether the residence is on or off the premises where the marijuana is growing, it is nevertheless logically connected to it because of the form of the crime being committed. Marijuana manufacturing requires a growing location, packaging location and storage location, plus a distribution center.
>
> Probable cause for searching both places existed, since there was a fair probability that evidence would be found both at the residency and the growing place/farm.…
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> In the present case, there were more than indications that the farm had been used to raise marijuana. There was also direct evidence, namely "cultivated" marijuana plants, found on the defendant's farm. There was probable cause to search the farm, and likewise, there was probable cause to search the residence, since the … defendant had an intimate contact or "close connection" to both.
>
> Secondly, due to the nature of manufacturing and growing marijuana as recited in ... Trost's affidavit, there were logical and substantial rains which created a fair probability that evidence would be found in the defendant's home. This was not just the mere hunch of the anonymous source, because there had been an actual finding of criminal activity on the farm.

We cannot improve on that rationale.

By the Court.–Judgment affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4, STATS.