COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3140-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID N. BURKHART,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

¶1 EICH, J. David Burkhart appeals from a judgment convicting him of five counts of burglary in La Crosse County. Burkhart pled guilty to the charges and his appeal challenges the circuit court's denial of his motion to suppress evidence seized in a search of his residence. Specifically, he claims that (a) the testimony upon which the search warrant was issued was insufficient to

establish probable cause to believe that the items listed in the warrant would be found at his residence, and (b) the warrant itself failed to list the items to be seized with sufficient particularity. We reject his arguments and affirm the conviction.

¶2 Burkhart was apprehended in the act of committing a residential burglary in Winona, Minnesota. The following day, police sought a warrant to search two properties owned by Burkhart in La Crosse. Sergeant Brad Burke, who had investigated a string of unsolved burglaries in the La Crosse area, offered testimony supporting the request. He stated that the property taken in those burglaries was listed in the several incident reports referred to on the face of the warrant. When asked by the judge "generally" what items were taken in those burglaries, Burke responded:

> In several of those burglaries there were coins taken. Some were old antique value coins, some were just money that was in the residence. There was some unusual items taken, specifically a rug was taken from one residence, a bedspread was taken from another residence. There was a telephone taken, answering machine in another residence and just numerous general items that were taken from each individual residence.

He also stated that, in his opinion, several of these items would be kept for the burglar's personal use. Then, comparing the unsolved burglaries to the one Burkhart was committing when he was apprehended, Burke said that, like the present burglary, the others all involved "forced entr[y]" into the homes at times when the owners were away.

¶3 The judge found probable cause and issued the warrant. It identified the items to be seized in the following manner:

> [T]here are now located and concealed certain things, to-wit: various items of stolen property taken during burglaries, to include a 3 ft. x 6 ft. tan rug, a lacy chattile (sic) bedspread, various coins (both antique or valuable and

> current circulation), various weapons, various jewelry to include a national champion football ring and other items. Source documents for the reported burglaries include but not limited to the following La Crosse Police Department incident numbers: 96-3092, 97-4621, 97-33938, 97-3201, 97-4205, 97-8830, 97-11136, 97-12290, 97-12280, 97-12746, 97-12963, 97-13459, 97-14591, 97-15049, 97-23886, 97-27559, 97-27881, 97-28567, 97-31012, 97-32567, 97-32865, 97-33451, and 97-34434.

Executing the warrant, police recovered several items stolen in the other burglaries.

¶4 In denying Burkhart's motion to suppress the evidence taken—on the same grounds he advances on appeal—the circuit court, while expressing its feeling that it was a "marginal case for issuance of a warrant," went on to conclude—based on the highly deferential standard of review applicable to an issuing magistrate's finding of probable cause—that Burke's testimony was adequate to support the warrant's issuance. As to Burkhart's "particularity" argument, the court concluded that the rule's purpose—which it correctly described as to avoid general searches by "enabl[ing] the searcher(s) to reasonably ascertain and identify the things which are authorized to be seized"—was fulfilled by the inclusion of the incident report references in the warrant which, said the court, "precluded the officers from conducting a general search …[but] limited the[m] to seizure of only those items of stolen property which were included in the … reports."

I. Probable Cause

¶5 In ***State v. Ward,*** 2000 WI 3, ¶¶ 20-24, 231 Wis. 2d 723, 604 N.W.2d 517, the supreme court discussed the probable cause requirement for search warrants in considerable length, stating:

> In reviewing whether there was probable cause for the issuance of a search warrant, we accord great deference to the determination made by the warrant-issuing [judge]. The [judge]'s determination will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding.
>
> A finding of probable cause is a common sense test. The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the [testimony] before him [or her] … there is a fair probability that contraband or evidence of a crime will be found in a particular place.
>
> When a warrant-issuing judge's determination of probable cause is doubtful or marginal, we examine it in light of this strong preference that law enforcement officers conduct searches pursuant to a warrant. (Internal quotation marks omitted.)

¶6 The ***Ward*** court also stated that "[w]hether there is probable cause to believe that evidence is located in a particular place is determined by examining the 'totality of the circumstances,'" and that our inquiry on appeal is essentially "whether, objectively viewed, the record before the [issuing judge] provided 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 they will be found in the place to be searched." ***Ward,*** 2000 WI 3 at ¶¶ 26-27. And while the issuing judge's ruling "cannot be based on the [testifying officer's] suspicions and conclusions, the [judge] may make the usual inferences reasonable persons would draw from the facts presented." ***Id***. at ¶ 28. Thus, probable cause requires only "that the facts available to the officer would warrant a [person] of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false; [a] practical, nontechnical probability that incriminating evidence is involved is all that is required." ***Texas v. Brown***, 460 U.S. 730, 741 (1983) (quoted sources omitted; citations omitted) (quoted in ***State v. Pozo***, 198

Wis. 2d 705, 711, 544 N.W.2d 228 (Ct. App. 1995). "[It] is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991).[1]

¶7 Here, while the evidence supporting the warrant is scant, it is not so thin as to be insufficient. Burkhart was apprehended while burglarizing a home he had broken into. At the time of his arrest, he was in the process of absconding with some items that were not the usual objects of a burglary, including loose coins, a two-dollar bill and a dumbbell: items which, like many of those described in Sergeant Burke's testimony (and in the incident reports incorporated into the warrant) as having been taken in the unsolved burglaries, are much more suited to personal use than to resale for cash. There were also some general similarities between the unsolved burglaries and the one being committed by Burkhart at the

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[1] The supreme court also stated in ***Higginbotham*** that:

> [Testimony in support] of search warrants … must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. [It is] normally [offered] by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.
>
> Recital of some of the underlying circumstances in the [testimony] 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, … and when [an issuing judge] has found probable cause, the courts should not invalidate the warrant by interpreting the [supporting testimony] in a hypertechnical, rather than a commonsense, manner …."

Id., 162 Wis. 2d at 991-92.

time of his arrest. All were forced break-ins undertaken while the residents were away from their homes for some extended period of time.[2] Finally, the issuing judge had access to Burkhart's criminal record, which was characterized by a history of burglaries.

¶8 If we were to decide de novo whether the foregoing facts constituted probable cause, we might well come to a different conclusion than did the issuing judge. But, given the supreme court's analysis in ***Ward,*** and the high degree of deference we are bound to accord to the issuing judge's decision, it becomes immaterial whether we might disagree—even strongly—with that decision. Under the rules that govern our inquiry, we are constrained to conclude in this case that the issuing judge could reasonably infer from the evidence that Burkhart was responsible for the unsolved burglaries and, further, that the unique and personal items described in Burke's testimony and on the face of the warrant itself, likely would have been taken for personal use and thus would likely be found in Burkhart's own home.

II. Particularity

¶9 Even so, Burkhart argues that we should invalidate the warrant because it failed to describe the items to be seized with the particularity required by well-settled Fourth Amendment case law preventing police from engaging in general or "exploratory" searches. *See* ***Coolidge v. New Hampshire***, 403 U.S. 443, 467 (1971). The Wisconsin Supreme Court has said, for example, that "the

[2] The circuit court observed that, in pointing to similarities consisting of the forced entry through doors of homes whose residents were away for a weekend, the State did little more than "offer a generic description of a residential burglary." We don't disagree with that observation. As indicated, however, we believe the result in this case is driven by ***State v. Ward***, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517.

particularity requirement of the Fourth Amendment satisfies three objectives by preventing general searches, the issuance of warrants on less than probable cause, and the seizure of objects different from those described in the warrant." ***State v. Andrews***, 201 Wis. 2d 383, 390, 549 N.W.2d 210 (1996).

¶10 And while a warrant must enable the searcher to reasonably identify items that are authorized to be seized, *see* ***State v. Noll***, 116 Wis. 2d 443, 450-51, 343 N.W.2d 391 (1984), we agree with the State that there appears to be no broad, *per se* rule of general application condemning all generic descriptions as violating the particularity requirement. Rather, the degree of specificity required of a search warrant must reasonably depend on the nature of the crime involved and the types of items sought. *See* ***United States v. Blakeney***, 942 F.2d 1001, 1027 (6th Cir. 1991), *cert. denied*, 502 U.S. 1035 (1991). A search warrant does not need to be voluminously detailed in order to satisfy the particularity requirement. It must simply describe the items to be seized "with as much particularity and specificity as the circumstances and the nature of activity under investigation permit[]." ***State v. Petrone***, 161 Wis. 2d 530, 541, 468 N.W.2d 676 (1991).

¶11 As we have noted, the warrant specifically described several items—a rug, a bedspread and a championship football ring—and stated that other items to be seized included "various items of stolen property taken during burglaries, to include … various coins (both antique or valuable and current circulation), various weapons, various jewelry" etc. The warrant also referred to several police incident reports specifically describing the items taken in the other burglaries. We agree with the State that, given the large quantity of items reported stolen in the twenty-three unsolved burglaries, it is reasonable to allow a more generic description. *See* Wayne R. LaFave, *Search and Seizure*, § 4.6(c) (3d ed. 1996), where the authors state: "[W]here the probable cause showing is that the place to be searched is a

virtual warehouse of items stolen from many places, a description in terms of the general types of items sought will suffice."

¶12 Finally, we also agree with the State (and the trial court) that the warrant, by referencing the incident reports, limited the officers to seizing the items listed in those reports and thus precluded them from conducting a general search of Burkhart's residence. We therefore conclude that, considering the warrant as a whole, it reasonably meets the requirement of particularity imposed by the Fourth Amendment and applicable case law.

By the Court.—Judgment affirmed.

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