

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-3202-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CM-122

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON J. HULBERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Florence County:
ROBERT A. KENNEDY, JR., Judge. *Affirmed.*

¶1 CANE, C.J.¹ Jason Hulbert appeals from his conviction, after a guilty plea, for possessing marijuana, contrary to WIS. STAT. § 961.41(3g)(b). The

(continued)

circuit court denied his pretrial motion challenging the validity of the search warrant. Specifically, Hulbert contends the anticipatory search warrant was unconstitutional because it lacked sufficient probable cause and failed to set forth the conditions precedent for the warrant's execution. Based on the totality of circumstances, we conclude that the search warrant was a valid anticipatory search warrant and supported by probable cause. The judgment is therefore affirmed.

BACKGROUND

¶2 On November 14, 2001, the Florence County Sheriff's Department received information that led them to seek a search warrant for the Steven Herman residence at HC3, Box 153, Florence, Wisconsin. The sole basis for the search warrant was contained in an affidavit of the Florence County Sheriff, Jeff Rickaby, with an attached Incident Report from the sheriff's department stating:

Our office received an anonymous tip about an alleged drug deal to occur on 11-16-2001 at the Steven Herman residence at Hc3 box 153, Florence, Wi. The residence is described as a trailer home, with a barn just down the hill. The residence is located on a road which runs between ush2 and sth 70. The caller wished to remain anonymous and did not provide any personal information. When asked how the caller [k]new about this occurrence, the caller stated that someone invited to the party had provided the information because Stanley has two Children and they were worried about the children being around drugs.

From personal knowledge r/o is aware of the Herman residence on First Crossing road which does begin and end on those roadways. The residence does also match the

¹ This appeal is decided by one judge pursuant to Wis. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

description given by the informant and is in Florence township, Florence County Wi. R/o was also able to confirm that Stanley does have two children.

The caller stated that Herman and his brother Stanley were taking a drug delivery of marijuana from a man named Jason (unknown last name) driving a dark colored conversion van with lots of windows. The caller stated that a large party was planned for Stanley's birthday and Jason was bringing marijuana up, driving the van described above. Jason lives in Neenah.

A check of our records revealed that it is Stanley Herman's birthday on November 16th. The records also indicate that Stanley D. Herman dob 11-16-1964 has several prior arrests. Steven Herman is also listed as an offender for a theft.

The caller stated that Stanley's Girlfriend is Sandi Hoeper of Iron Mountain, Mi.

¶3 The court commissioner issued a search warrant for the search of a gray trailer home, barn, outbuildings and any vehicles located at FN 2388 First Crossing Road. The execution of the search warrant was not conditioned on any precedent circumstances. The Florence County Sheriff's Department executed the search warrant on November 16, and found a bag of marijuana, a portable scale and a brown pouch in the bedroom where Hulbert was staying as an overnight houseguest.

¶4 The circuit court denied Hulbert's challenge to the anticipatory warrant, but did not address the issue of whether the Constitution requires the search warrant or the warrant affidavit to explicitly condition the search upon delivery of the contraband to the stated residence.

¶5 Anticipatory search warrants are issued in advance of the receipt of contraband at the premises designated in the warrant based on probable cause that the contraband will be located there at the time of the search. While Hulbert

acknowledges that anticipatory search warrants are constitutional, he contends, as he did before the circuit court, the warrant is invalid because it does not state sufficient probable cause and the conditions precedent for the warrant's execution.

CONDITIONS PRECEDENT

¶6 We first address whether the warrant is defective because it failed to explicitly state the conditions that must occur prior to its execution. In *United States v. Leidner*, 99 F.3d 1423, 1427 (7th Cir. 1996), the seventh circuit rejected a similar argument and concluded that anticipatory search warrants need not explicitly state the conditions precedent for the warrant's execution. The court noted that while caselaw in other circuits might support a preference to have the anticipatory search warrants contain such language, the Constitution did not compel the warrant to explicitly contain language indicating what must occur prior to execution of the warrant. *Id.* All that is required is that the warrant be supported by probable cause that the particular property will be at the location at the time of the search. *Id.* Here, the affidavit stated that a man named Jason driving a dark colored conversion van with lots of windows would deliver the marijuana to the Herman residence for Stanley's large birthday party, which a record check indicated would be on November 16. Thus, in any event, explicit conditioning language is not necessary where, as here, such a requirement is logically implicit that the warrant could not be executed until the delivery to the Herman residence on November 16.

PROBABLE CAUSE

¶7 In *Ornelas v. United States*, 517 U.S. 690, 699 (1996), the Court held as a general matter that Fourth Amendment probable cause determinations are to be reviewed de novo. However, the Court added that reviewing courts

should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers. *Id.* When determining whether probable cause exists to issue an anticipatory search warrant, we must consider the totality of the circumstances. See *State v. Falbo*, 190 Wis. 2d 328, 337, 526 N.W.2d 814 (Ct. App. 1994).

¶8 A probable cause determination in an anticipatory search warrant is the same as the probable cause determination in a conventional search warrant. In *State v. Stevens*, 181 Wis. 2d 410, 420, 511 N.W.2d 591 (1994), when addressing the validity of search warrants, the court stated: “The ultimate question concerning the search of any residence is whether it is reasonable under the Fourth Amendment to the United States Constitution.” When issuing a search warrant, a trial court must simply make a common-sense determination as to whether there is a fair probability that contraband or evidence of a crime will be found in a particular place at the time of the search. *State v. Kerr*, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994). In making this decision, the trial court must consider all of the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information. *Id.* “Whether probable cause exists is to be determined by analyzing the totality of the circumstances.” *Id.* at 380 (quoted source omitted).

¶9 When reviewing the probable cause for the warrant, the circuit court acknowledged the question was close, but ultimately denied Hulbert’s motion challenging the warrant. We also agree that it is a close question, but are satisfied that the information supporting the issuance of the search warrant allows for a finding of probable cause.

¶10 Attached to the affidavit was the Incident Report indicating that the Florence County Sheriff's Department received an unsolicited telephone call from an anonymous individual just two days before the marijuana was to be delivered to the Herman residence. The caller was specific about when the drugs would arrive, how it was coming, that it was marijuana, and where it was going to be delivered. The caller also explained how this information was learned and why this information was passed on to the sheriff's department. As the circuit court observed, rather than simply taking the telephone call and requesting a search warrant, the sheriff was able to verify some of the information. He verified that Stanley Herman had two children, his birthday was on the day planned for the delivery, who lived at the location, and the description of the premises. We are satisfied this information is sufficient to lead the magistrate to reasonably conclude that the marijuana would be present at the Herman residence on November 16.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

