COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3042-CR **Cir. Ct. No. 2004CF99**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CALEB J. RILEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Caleb J. Riley appeals from a judgment convicting him upon his pleas of no contest to possession with intent to deliver cocaine, as party to a crime (PTAC), and to misdemeanor bail jumping. Riley argues that the

trial court wrongly denied his motion to suppress because the search warrant was not supported by probable cause. Our review of the totality of the circumstances presented to the warrant-issuing commissioner convinces us that the commissioner had a substantial basis for concluding there existed a fair probability that a search of the specified premises would uncover evidence of wrongdoing. We affirm.

¶2 On March 7, 2009, City of Sheboygan police officers executed a search warrant at 1618 Huron Avenue, the residence of Bonnie L. Bohlman, seeking evidence of cocaine and drug paraphernalia. The telephonic warrant affidavit, which is the subject of this appeal, contained descriptions by numerous sources of activities at 1618 Huron since August 2008.

¶3 At that time, informant 04-143 told the testifying officer, Officer Zempel, that "Bonnie," the white female resident of the house described in the affidavit, allowed males from Milwaukee to sell crack cocaine from her house. The informant then successfully carried out a controlled buy of crack cocaine. In November 2008, a Huron Avenue neighbor told a different police officer that "a great deal" of short-term traffic led the neighbor to suspect that crack was being sold there. In February 2009 and as recently as March 3, 2009, a third police officer, Officer Sass, had "numerous contacts" with "an informant of hers" who "trusts" her. The informant advised Sass that "there continues to be male parties from Milwaukee" using Bonnie's Huron Avenue house as a place to sell crack cocaine and that Bonnie called the informant the first week of February 2009 saying there was crack cocaine available for sale there. According to the affidavit, Sass's informant also had been inside the residence on an unspecified date and saw drug transactions occurring. On March 7, the same day the warrant was sought, Sass's informant told Officer Zempel that the informant had "received

word" that people from Milwaukee were at the Huron Avenue address and the informant was offered cocaine. The commissioner authorized the warrant.

¶4 Riley, who is from Milwaukee, was in the house when the warrant was executed. Police seized marijuana, crack cocaine and drug paraphernalia from the residence. A strip-search of Riley yielded more crack cocaine. He was charged with PTAC maintaining a drug-trafficking place, PTAC possession with intent to deliver cocaine, PTAC possession or attempted possession of THC, obstructing an officer and misdemeanor bail jumping.

¶5 Riley moved to suppress the evidence seized pursuant to the search warrant. Although the motion invoked ***Franks v. Delaware***, 438 U.S. 154 (1978), and ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985), Riley asserted that he meant only to argue that the search warrant application lacked probable cause. After a hearing on the motion, the court upheld the warrant. Riley later entered no-contest pleas to possession with intent to deliver cocaine and misdemeanor bail jumping. The court sentenced him to six years' imprisonment on the possession charge, bifurcated equally, and to a concurrent ninety days in jail on the obstructing charge. Riley appeals.

¶6 The sole issue on appeal is whether the information provided to the warrant-issuing commissioner supplied sufficient probable cause to justify issuing the warrant in March 2009. Riley, of course, asserts that it did not, and offers several arguments. None persuade us.

¶7 A search warrant may be issued only upon a "finding of probable cause by a neutral and detached magistrate." ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). On review, we accord great deference to the warrant-issuing magistrate's decision. *See* ***id.*** We examine the totality of the

circumstances presented to the warrant-issuing magistrate to determine whether there was a substantial basis for concluding that a fair probability existed that a search of the specified premises would uncover evidence of wrongdoing. ***State v. Romero***, 2009 WI 32, ¶3, 317 Wis. 2d 12, 765 N.W.2d 756. A defendant challenging the decision must establish that the facts were clearly insufficient to support a probable cause finding. ***Higginbotham***, 162 Wis. 2d at 989.

¶8 Riley first argues that the August 2008 evidence and the November 2008 report from the neighbor cannot support a probable cause finding because they are stale. We disagree. Timeliness is not determined by a strict marking of the calendar between the occurrence of the facts relied upon and the issuance of the warrant. *See* ***State v. Ehnert***, 160 Wis. 2d 464, 469, 466 N.W.2d 237 (Ct. App. 1991). Instead, it depends upon the nature of the underlying circumstances. ***Id.*** When the activity is of a protracted and continuous nature, the passage of time diminishes in significance. *See* ***id.*** at 469-70.

¶9 That is the case here. Police verified August 2008 reports of drug dealing at 1618 Huron through a controlled buy. Reports continued to come in that similar activity was ongoing. The substance of the reports corresponded despite coming from different sources. If old information in a warrant affidavit contributes to an inference that probable cause exists at the time of the warrant application, its age is no taint. ***State v. Moley***, 171 Wis. 2d 207, 210, 490 N.W.2d 764 (Ct. App. 1992). The inference the warrant-issuing magistrate draws need not be the *only* reasonable inference; the test is whether it is *a* reasonable one. ***State v. Ward***, 2000 WI 3, ¶30, 231 Wis. 2d 723, 604 N.W.2d 517.

¶10 Riley next asserts that the information used to support the affidavit was unreliable because the information supplied by the neighbor and Sass's

informant, both unidentified, lacked veracity and was uncorroborated by independent police work.

¶11 To demonstrate an informant's veracity, facts must be brought to the warrant-issuing commissioner's attention to enable him or her to evaluate either the credibility of the informant or the reliability of the particular information furnished. ***Romero***, 317 Wis. 2d 12, ¶21. An informant's credibility commonly is established on the basis of his or her past performance of supplying information to law enforcement. ***Id.*** Even if the informant's credibility cannot be established, the facts still may permit the warrant-issuing officer to infer that the informant has supplied reliable information on a particular occasion because corroboration of details may show the information's reliability. ***Id.***

¶12 While informants' veracity and the basis of their knowledge are "highly relevant" in determining the value of the information they impart, they are not entirely separate and independent requirements. ***Id.***, ¶20. Rather, these elements should be understood simply as closely intertwined issues that may shed light on the commonsense, practical question of whether probable cause exists to believe that contraband or evidence is located in a particular place. ***Id.***

¶13 Riley complains that there is no basis to believe the unidentified neighbor's conclusory allegations. The trial court, too, was somewhat cautious of neighbor's report. A citizen informant's reliability is subject to a much less stringent standard of than is a police informant's, however. *See* ***State v. Kolk***, 2006 WI App 261, ¶12, 298 Wis. 2d 99, 726 N.W.2d 337. That is because police informants typically are criminals themselves and their trustworthiness thus may depend on whether he or she previously has provided truthful information.

¶14 Here, the magistrate reasonably could have inferred that the neighbor's basis of knowledge was his or her direct observation. He or she may have chalked up a few instances of vehicles stopping for brief periods as mere coincidence. It is reasonable to infer that a nearby resident would grow concerned when it developed into "a great deal" of "short-term traffic,"[1] by which time describing earlier vehicles or precise dates no longer may be possible. If the neighbor feared that his or her suspicions were accurate, unobtrusively obtaining license plate numbers or other good descriptions of "short-term traffic" may be difficult. The neighbor's tip also aligned with the earlier reports of crack sales at the same address, which was corroborated by a monitored drug buy. Although the neighbor's information alone may not have supported probable cause, it gained credence when added to the evidentiary picture.

¶15 The third source, Sass's informant, likewise passes muster. The magistrate heard that Sass had numerous contacts with the informant, that the informant "trusts" Sass, that the informant was familiar with crack cocaine and its sale; that the informant had been physically present in the house and observed drug transactions; and that he or she had received a call from Bonnie in February that there was crack to be sold at that address. The fact that the informant was not identified with a confidential informant number for purposes of the warrant application does not render the information useless.

[1] Riley argues that "the phrase 'short-term traffic' describes an incident that is time-limited and not continuous in nature." We suppose it could, but at least as reasonable in this context is the pattern of brief stops often associated with illicit drug transactions. The inference the warrant-issuing magistrate draws need not be the *only* reasonable inference; it must be *a* reasonable one. ***State v. Ward***, 2000 WI 3, ¶30, 231 Wis. 2d 723, 604 N.W.2d 517.

¶16 We disagree with Riley's piecemeal challenge to the information in the affidavit. The successful drug buy in August 2008 formed a strong base for a totality-of-the-circumstances analysis. The remaining details built on that base. Two informants and a neighbor identified the same address and reported suspected drug activity at that address to three different police officers. The two informants indicated that "Bonnie" allowed men from Milwaukee to use her home to conduct the sale of crack cocaine. One informant was identified by a number. The warrant affidavit indicates that the other was "an informant of [Sass's]," permitting the reasonable inference that Sass had some familiarity with the informant and the reliability of his or her information. In addition, the informant stated that crack was available for sale at Bonnie's house on the same day the warrant application was made. The neighbor reported a high volume of short-term traffic. A pattern emerged from the pieces of information accrued from various sources over several months' time. Together, it created a larger picture that in the officers' knowledge, training and experience led them to believe illicit activity probably was afoot.

¶17 The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit there is a fair probability that contraband or evidence of a crime will be found in a particular place. ***Romero***, 317 Wis. 2d 12, ¶19 (citation omitted). The warrant affidavit may not showcase textbook perfection, but we are satisfied that it provided a substantial basis for the commissioner to find a fair probability existed that a search of the named premises would uncover evidence of wrongdoing. Riley has not established that the facts were clearly insufficient to support a probable cause finding.

¶18 Finally, Riley argues that public policy demands that the evidence seized pursuant to the search warrant be suppressed by applying the exclusionary

rule. Riley does not allege, however, that the magistrate abandoned her detached and neutral role, that the officers were dishonest or reckless in preparing their affidavit or that the officers could not have harbored an objectively reasonable belief in the existence of probable cause. Thus, suppression is not appropriate. *See* ***State v. Eason***, 2001 WI 98, ¶69, 245 Wis. 2d 206, 629 N.W.2d 625.

By the Court.—Judgment affirmed.

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