COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1564-CR **Cir. Ct. No. 2010CF811**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEONARD DAMONT BETHLY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Leonard Bethly appeals from a judgment of conviction, entered on his guilty pleas, for one count of possession with intent to deliver between 200 and 1000 grams of marijuana and one count of maintaining a drug trafficking place, contrary to WIS. STAT. §§ 961.41(1m)(h)2. and 961.42(1)

(2009–10).[1] Bethly argues that there was no probable cause to issue the search warrant and, therefore, the circuit court should have granted his motion to suppress.[2] We reject his argument and affirm the judgment.

BACKGROUND

¶2 Law enforcement officers obtained a warrant to search a particular home in Milwaukee for: marijuana; scales and packaging for marijuana; drug-related paraphernalia; documents demonstrating who controlled the premises; weapons and ammunition; and computers or electronic devices used to store drug-related information and photos. The suspected occupant of the home was "Keenan J. Bethley," the brother of the defendant in this case (hereafter "Keenan Bethly").[3]

¶3 Detective Willie M. Huerta filed an affidavit in support of the search warrant application.[4] He stated that the search warrant application was based on information he received from a police informant who had previously given law enforcement "information which directly led to the issuance of more than five search warrant(s)." He said that the execution of those search warrants led to the

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] In his brief, Bethly also suggested that the court commissioner may have lacked authority to issue the search warrant, noting that the Wisconsin Supreme Court was considering a case addressing court commissioner authority. In that case, the court recently held that the statute permitting court commissioners to issue search warrants is constitutional. *See* ***State v. Williams***, 2012 WI 59, ¶4, 341 Wis. 2d 191, 195, 814 N.W.2d 460, 463. Therefore, we reject Bethly's argument that a circuit court judge should have issued the search warrant. *See* ***ibid.***

[3] The warrant spelled Keenan Bethly's last name "Bethley," but the proper spelling is Bethly. We also note that the fact the warrant identified Keenan Bethly as the target, rather than Bethly, is not an issue that Bethly raises on appeal.

[4] Huerta's affidavit did not indicate the gender of the informant. For ease of writing, we will refer to the informant as a male.

seizure of drugs that the informant said would be found on the premises and to the conviction of more than five individuals on drug charges.

¶4 Huerta said that he believed the informant to be a credible person because the informant had previously "made more than five successful 'buys' of controlled substances for law enforcement." He added that the informant had given officers information concerning drug trafficking in the Milwaukee area that was confirmed "by reviewing controlled substances intelligen[ce] files in the offices of law enforcement agencies."

¶5 Huerta stated that the informant told him that "within the past 72 hours [the] informant was inside the premises of Keenan J. Bethley." (Underlining and some uppercasing omitted.) He said the informant "personally observed a large quantity of marijuana inside of the residence along with two firearms" and that the informant knew the substance was marijuana based on past purchases and his use "of both burnt and fresh marijuana."

¶6 Huerta said that based on his conversation with the informant, Huerta's "personal knowledge and experience based on the description of the substance by the informant, and the manner in which the substance was packaged as described by the informant," Huerta believed that the substance the informant saw was marijuana.

¶7 With respect to the two firearms, Huerta said that the informant reported seeing them "by a large quantity of marijuana inside of the residence" and "positioned inside of the residence in a fashion easily accessible" to Keenan Bethly. The informant indicated that he saw Keenan Bethly "in possession of one of the two firearms." Huerta said his research indicated that Keenan Bethly was

prohibited "from receiving or possessing a firearm under federal law" because there was a protection order issued against him.

¶8 Huerta indicated that he was familiar with the residence "from personal observation" and his conversation with the informant. Huerta described the outside of the two-story, single-family home and identified it by street number.

¶9 Finally, Huerta stated that the informant's identity was not being disclosed because disclosure "would end the informant's usefulness to the Milwaukee Police Department," discourage other informants from cooperating out of fear that their identities would be revealed, and result in physical harm to the informant.

¶10 Based on Huerta's affidavit and search warrant application, a court commissioner approved a no-knock search warrant. When the officers executed the warrant, they found a gallon-size plastic bag of marijuana, a digital scale, and two firearms. They also found mail addressed to Bethly, who told police that his mother owned the home and that he lived there.

¶11 Bethly was charged with being a felon in possession of a firearm, possession with intent to deliver marijuana, and keeping a drug house. He filed numerous pretrial suppression motions, only one of which is relevant to this appeal. Specifically, he argued that the search warrant application failed to establish probable cause that contraband would be found in the residence and, therefore, evidence seized pursuant to the search warrant should be suppressed.

¶12 The circuit court denied Bethly's motion.[5] It observed that the informant had worked with the officers in the past and concluded that the affidavit provided adequate probable cause to issue the warrant.

¶13 Bethly entered a plea bargain with the State pursuant to which the firearm charge was dismissed and read in and both sides were free to argue. The circuit court sentenced Bethly to three years of initial confinement and three years of extended supervision for possession with intent to deliver. It imposed a concurrent sentence of eighteen months of initial confinement and two years of extended supervision for keeping a drug house. Both sentences were imposed concurrent to a sentence Bethly received when his parole was revoked in another case.

DISCUSSION

¶14 At issue is whether the search warrant was supported by probable cause. *See* ***State v. Jones***, 2002 WI App 196, ¶10, 257 Wis. 2d 319, 329, 651 N.W.2d 305, 310 ("A search warrant may issue only upon probable cause."). When deciding whether to issue a search warrant, a court commissioner must consider the totality of the circumstances presented in the search warrant application and may draw reasonable inferences from the facts presented. ***Id.***, 2002 WI App 196, ¶10, 257 Wis. 2d at 329–330, 651 N.W.2d at 310. It must then "'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 the hearsay information, there is a fair probability that

[5] The Honorable Patricia D. McMahon denied the motion to suppress. The Honorable Rebecca F. Dallet accepted Bethly's pleas and sentenced him.

contraband or evidence of a crime will be found in a particular place.'" ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 735, 604 N.W.2d 517, 522 (citation and two sets of quotation marks omitted). On review of a challenge to a search warrant, "[w]e accord great deference to the warrant-issuing [court commissioner'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." ***State v. Multaler***, 2002 WI 35, ¶7, 252 Wis. 2d 54, 62, 643 N.W.2d 437, 441. "'The burden of proof in a challenge to the existence of probable cause for the issuance of a search warrant is clearly with the defendant.'" ***Ibid.*** (citation and one set of brackets omitted).

¶15 In this case, the facts presented in the affidavit were largely based on information supplied by a confidential informant. "A declarant's credibility is commonly established on the basis of the declarant's past performance of supplying information to law enforcement." ***State v. Romero***, 2009 WI 32, ¶21, 317 Wis. 2d 12, 29, 765 N.W.2d 756, 764. Huerta's affidavit indicated that he had worked with the informant in the past and that the information the informant provided had proven reliable, resulting in the recovery of drugs and more than five drug-related convictions. This information established the informant's credibility.

¶16 The credible informant told Huerta that within the last seventy-two hours he had been in the residence—a residence with which Huerta was familiar—and had seen what he knew from experience was marijuana. He also told Huerta how the marijuana looked and was packaged, and Huerta indicated that based on those descriptions, he believed that the informant had seen marijuana. The informant also said he had seen two guns, and had seen Keenan Bethly holding one of them.

¶17 Based on the information the informant provided and considering the totality of the circumstances presented in the search warrant application, the court commissioner reasonably concluded that marijuana and firearms (which Keenan Bethly could not legally possess) would probably be found in Keenan Bethly's home. Bethly disagrees with this conclusion, on several bases.[6]

¶18 First, Bethly complains about the lack of "sufficient detail." He points to unexplained references to a "large quantity of marijuana" and the fact that although Huerta's affidavit states that the informant told him how the drugs were packaged, that packaging is not described in the affidavit. He asserts that the information provided was too general. We are not persuaded. As the State notes: "[E]laborate specificity is not required, and probable cause may be supported by reasonable inferences as well as facts." *See* ***State v. Gralinski***, 2007 WI App 233, ¶15, 306 Wis. 2d 101, 112–113, 743 N.W.2d 448, 454 (court commissioner may draw inferences from the evidence when determining probability that contraband or evidence of a crime will be found in a particular place). Further, the precise amount of marijuana in the home need not be determined before a search warrant is issued, as no amount of marijuana can be legally possessed. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 508, 451 N.W.2d 752, 758 (1990) ("In this state, no minimum quantity of a controlled substance is necessary to sustain a conviction for possession.").

[6] Bethly points to numerous factors discussed in ***United States v. Mykytiuk***, 402 F.3d 773, 776 (7th Cir. 2005). The State argues that reliance on ***Mykytiuk*** is inappropriate because the case is not binding on Wisconsin courts. *See* ***State v. Smith***, 2006 WI 74, ¶31, 291 Wis. 2d 569, 587, 716 N.W.2d 482, 490 (cases from other jurisdictions are not binding in Wisconsin). It also points out that ***Mykytiuk*** involved an informant who was previously unfamiliar to the police and whose credibility was unknown. We agree with the State that this court is not required to follow the analysis in ***Mykytiuk***. We will, however, consider each of Bethly's concerns in the context of controlling Wisconsin case law.

¶19 Bethly also asserts that the police "did not independently corroborate any of the information provided by the informant prior to obtaining the search warrant." Setting aside the fact that there was independent corroboration of the address and description of the residence, we recognize that corroboration of details is generally used to determine the reliability of information provided by an informant when his credibility has not previously been established—which is not the case here. As the court explained in ***Romero***:

> To demonstrate a declarant's veracity, facts must be brought to the warrant-issuing officer's attention to enable the officer to evaluate *either* the credibility of the declarant *or* the reliability of the particular information furnished. *A declarant's credibility is commonly established on the basis of the declarant's past performance of supplying information to law enforcement.* Even if a declarant's credibility cannot be established, the facts still may permit the warrant-issuing officer to infer that the declarant has supplied reliable information on a particular occasion. The reliability of the information may be shown by corroboration of details; this corroboration may be sufficient to support a search warrant.

See ***id.***, 2009 WI 32, ¶21, 317 Wis. 2d at 29–30, 765 N.W.2d at 764 (emphasis added; footnotes omitted). Here, the affidavit contained detailed information about the informant's past work for law enforcement that established his credibility. *See* ***id.*** It was not necessary to provide corroborating details.

¶20 Next, Bethly asserts that the fact the informant did not appear before the court commissioner weighs against a finding of probable cause, although he does not cite any Wisconsin case law requiring a personal appearance by a confidential informant. We are not persuaded that this defeats the court commissioner's probable cause determination.

¶21 Finally, Bethly argues that because there is no suggestion that the confidential informant's statements were made against his penal interests, the informant is less credible. While statements against penal interest can be used to establish credibility, *see* ***id.***, 2009 WI 32, ¶39, 317 Wis. 2d at 40, 765 N.W.2d at 769, they are not required. Here, the credibility of the informant was established by his prior work with the officers, including the provision of credible tips that led to criminal convictions.

¶22 In summary, we conclude that "the totality of the circumstances demonstrates that the warrant-issuing commissioner had a substantial basis for concluding that there was a fair probability that a search of the specified premises would uncover evidence of wrongdoing." *See* ***id.***, 2009 WI 32, ¶27, 317 Wis. 2d at 34–35, 765 N.W.2d at 766–767. Bethly has not met his burden of proof in challenging the existence of probable cause. *See* ***Multaler***, 2002 WI 35, ¶7, 252 Wis. 2d at 62, 643 N.W.2d at 441. Therefore, we sustain the court commissioner's determination that there was probable cause to issue the search warrant for Keenan Bethly's residence.

By the Court.—Judgment affirmed.

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