

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2012AP525-CR

Cir. Ct. No. 2010CF3376

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLEN E. BLAND,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Allen E. Bland appeals from a judgment of conviction, entered upon his guilty plea to one count of possessing with intent to deliver more than ten grams but not more than fifty grams of heroin. He contends that the police arrested him without probable cause and that the circuit court

therefore erred by failing to suppress the evidence found during the search incident to his arrest.¹ We affirm.

BACKGROUND

¶2 We take the facts from the testimony presented at the suppression hearing. Milwaukee Police Detective Timothy Graham testified that he arrested someone on July 3, 2010, for selling heroin, and Graham offered the arrested person the opportunity to act as a confidential informant. Graham testified that when he offers suspects the chance to cooperate with law enforcement, he explains that if they provide worthless information, “they will be charged.”

¶3 In this case, the confidential informant said that he could provide information about “a big player ... from Chicago” who had sold heroin to the informant within the previous two weeks.² The informant identified this person as “Big Baby” and described “Big Baby” as a “shorter male, stockier build, medium complexion ... black male.” According to Graham, the informant said that when “Big Baby” comes to Milwaukee to deliver heroin, he arrives as a passenger in a blue Impala with Illinois license plates. The informant described “Big Baby’s” routine when delivering heroin. This routine included calling the prospective buyer and saying he was “getting on the freeway,” and then, upon arriving in Milwaukee, again calling the buyer and advising in a coded phrase where the drug transaction would take place. According to the informant, if “Big Baby” said he

¹ The Honorable David L. Borowski presided over the suppression hearing and denied Bland’s motion to suppress. The Honorable Michael Guolee presided over the sentencing proceeding and entered the judgment of conviction.

² We use a masculine pronoun to refer to the confidential informant because Graham did so.

was “going to go for food,” this meant that he would meet the buyer at a custard stand on the corner of 60th Street and West Hampton Avenue. The informant reported that, although “Big Baby” would not explicitly discuss controlled substances or any details of a contemplated drug transaction during telephone conversations, “Big Baby” always brought more than enough heroin to Milwaukee for the informant to purchase.

¶4 Graham described watching while the informant used a speaker phone on July 4, 2010, to place calls to a telephone number with a Chicago area code. Graham then heard a conversation between the informant and a person with a male voice, and the person speaking to the informant agreed to come to Milwaukee the next day. Graham testified, however, that “nothing materialized” when he met with the informant on July 5, 2010. Instead, the informant called a Chicago number, and Graham heard a male voice agree to meet with the informant the following day.

¶5 On July 6, 2010, Graham again met with the informant. Late in the afternoon, the informant received a telephone call. Graham observed from the display on the telephone’s face that the call originated from a number with a Chicago area code and that the caller was “Big Baby.” Graham could hear that the caller had the same voice as the person who spoke to the informant on July 4, 2010, and July 5, 2010. The caller said that he was getting on the freeway. At 6:48 p.m., the informant received another call from the same Chicago telephone number. The caller said that he was in the Milwaukee area and he was going to get something to eat.

¶6 Graham and the informant went to a custard stand at 60th Street and West Hampton Avenue. A few minutes after 7:00 p.m., someone drove a blue

Chevy Impala with Indiana license plates into the parking lot of the custard stand. Two men got out of the Impala. The informant told Graham that the person who got out of the passenger seat was “Big Baby,” and Graham observed that the passenger looked like the person that the informant had described as a heroin dealer from Chicago.

¶7 Additional police officers arrived on the scene in response to Graham’s call for assistance, and they approached the man identified by the informant as “Big Baby.” As the officers approached, the suspect made a defensive gesture, and Graham saw the suspect begin to fight with the officers. The officers subdued and handcuffed the suspect, who was subsequently identified as Bland. Bland said “the dope” was in his pocket, and Graham observed an officer recover a substance from Bland’s pocket that later proved to be heroin.

¶8 The circuit court found that Graham’s testimony was credible and, based on the totality of the circumstances, the circuit court concluded that the police had probable cause to arrest Bland when they approached him at the custard stand. The circuit court therefore denied the motion to suppress evidence found during the search incident to the arrest. Bland pled guilty to possessing heroin with intent to deliver, and this appeal followed.

DISCUSSION

¶9 “The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution establish the right of persons to be secure from unreasonable searches and seizures.” *State v. Secrist*, 224 Wis. 2d 201, 208, 589 N.W.2d 387 (1999). Therefore, every lawful warrantless arrest must be supported by probable cause. *See State v. Lange*, 2009 WI 49, ¶19, 317 Wis. 2d 383, 766 N.W.2d 551. Here, Bland seeks suppression of evidence

because, he says, the police found it pursuant to an arrest that lacked probable cause. See *State v. Knapp*, 2005 WI 127, ¶122, 285 Wis. 2d 86, 700 N.W.2d 899 (evidence may be suppressed when obtained in violation of a constitutional right).

¶10 When we review an order denying a motion to suppress evidence, we uphold the circuit court’s findings of fact unless they are against the great weight and clear preponderance of the evidence. *State v. Dubose*, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. Bland does not challenge the circuit court’s factual determinations here. Whether a given set of facts constitutes probable cause to arrest presents a question of law that we review *de novo*. See *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996).

¶11 “Probable cause is a flexible, commonsense standard.” *State v. Nieves*, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125. We have explained:

[p]robable cause for arrest exists when the totality of the circumstances within the arresting officer’s knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime. While the information must be sufficient to lead a reasonable officer to believe that the defendant’s involvement in a crime is more than a possibility, it need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.

State v. Kutz, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660 (citations and two sets of quotation marks omitted). To determine whether probable cause to arrest existed, the circuit court must consider “the information available to the officer.” *Id.*, ¶12. If the officer is faced “with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest.” *Id.*

¶12 In this case, probable cause turns on the information provided by the confidential informant. We must balance two factors to determine whether police acted reasonably in reliance on an informant. See *State v. Miller*, 2012 WI 61, ¶31, 341 Wis. 2d 307, 815 N.W.2d 349. The first factor is “the quality of the information, which depends upon the reliability of the source. The second is the quantity or content of the information.” *Id.* (citation and footnote omitted).

¶13 The reliability of informants varies, and an informant whose identity is known is generally more reliable than an anonymous source. *Id.*, ¶33. “[P]olice may infer that an informant who risks disclosing his or her identity is more likely to be providing truthful information because the informant knows that police can hold him or her accountable for providing false information.” *Id.*, ¶34. Even when an informant is anonymous, however, corroboration of the informant’s information may lend reliability to the informant’s allegations. *State v. Robinson*, 2010 WI 80, ¶27, 327 Wis. 2d 302, 786 N.W.2d 463.

¶14 Bland contests the informant’s reliability here, emphasizing that the informant had no history of supplying accurate information in the past. This contention is accurate, but prior performance as an informant is merely one of a variety of considerations to weigh when assessing an informant’s reliability. See *State v. Jones*, 2002 WI App 196, ¶¶13-16, 257 Wis. 2d 319, 651 N.W.2d 305. In this case, the equation includes many additional factors.

¶15 First, the informant was a person known to Graham, not an anonymous entity. Graham’s familiarity with the informant supports the conclusion that the informant was reliable. See *Miller*, 341 Wis. 2d 307, ¶33. Second, Graham cautioned the informant that providing false information to the police could lead to negative consequences for the informant. The potential risk to

a known informant of being held accountable for giving false information may permit police to conclude that an informant is reliable. See *State v. Rutzinski*, 2001 WI 22, ¶32, 241 Wis.2d 729, 623 N.W.2d 516. Third, the informant articulated a basis for his knowledge about “Big Baby” and his belief that “Big Baby” had controlled substances: the informant had purchased heroin from “Big Baby” within the previous two weeks. An informant’s disclosure of his or her source of knowledge is significant to assessing veracity. See *State v. Kolk*, 2006 WI App 261, ¶15, 298 Wis.2d 99, 726 N.W.2d 337. Fourth, the informant’s disclosure that he had recently purchased heroin from “Big Baby” was a statement against the informant’s penal interests. “Statements against penal interests may be used to establish reliability.” *State v. Romero*, 2009 WI 32, ¶39, 317 Wis.2d 12, 765 N.W.2d 756 (citation and one set of brackets omitted).

¶16 The most compelling circumstance here, however, is the number of accurate predictions that the informant proved capable of making. The informant stated that “Big Baby” would describe his progress in traveling from Chicago towards Milwaukee with telephone calls indicating that he was getting on the freeway and that he had arrived in the Milwaukee area, and the informant predicted that “Big Baby” would establish the meeting place for the drug transaction with coded language. Graham heard the informant’s telephone conversations with someone who had a Chicago telephone number and who made all of the predicted statements. Further, the informant predicted that “Big Baby” would arrive to deliver heroin in the passenger seat of a blue Impala with Illinois plates. Within minutes after the informant spoke to someone who uttered the code phrase allegedly used to establish a meeting with “Big Baby” at a custard stand on 60th Street and West Hampton Avenue, someone drove a blue Impala with

Indiana license plates into the custard stand parking lot at that address. The passenger in that vehicle matched the description of “Big Baby.”

¶17 Bland points out that the informant “got the license plate wrong,” and that the informant was not immediately successful in arranging a drug transaction. Under the totality of the circumstances, we do not think that either of these points diminishes the informant’s reliability as the events unfolded here.³ The quantity and content of the accurate information the informant supplied outweigh the facts Bland cites.

¶18 Our supreme court recently considered whether police had probable cause to arrest a person when an anonymous informant identified that person by name, address, and cell phone number and said that the identified person was selling marijuana. See *Robinson*, 327 Wis. 2d 302, ¶28. The *Robinson* court concluded that police had probable cause for an arrest after confirming that the suspect had the name, address, and cell phone number that the informant described. *Id.*, ¶¶3, 29.

¶19 Here, the informant gave Graham far more information than the informant gave the police in *Robinson*, and the informant predicted a variety of occurrences. Graham then corroborated many of the details that the informant provided as one prediction after another came to pass. An informant who is right

³ We are perplexed by Bland’s contentions that the informant’s reliability is undermined because the informant “described ‘Big Baby’ as a black male without giving any additional description,” and because “the record never makes clear how [Bland] does in fact match the description given.” As we have seen, Graham testified that the informant gave specific details about “Big Baby’s” physical attributes, including complexion, body type, and height. Further Graham testified that the passenger in the blue Impala “answered to the physical description” that the informant provided.

about some things “‘is more probably right about other facts.’” *Id.*, ¶27 (citation and one set of quotation marks omitted). Thus, an officer’s “corroboration of innocent, although significant, details of an informant’s tip lend[s] reliability to the informant’s allegations of criminal activity. For purposes of making a practical, common-sense determination of probable cause, that is sufficient.” *Id.* (citation omitted).

¶20 Based on the informant’s many accurate predictions and the informant’s other indicia of reliability, we are satisfied that the police had probable cause to believe, as the informant alleged, that the man identified as “Big Baby” was a heroin dealer who possessed a controlled substance when he arrived at the custard stand at 60th Street and West Hampton Avenue. The police were therefore entitled to arrest that man, who turned out to be Bland. Because probable cause supported Bland’s arrest, the police lawfully searched Bland incident to that arrest. *See State v. Sykes*, 2005 WI 48, ¶14, 279 Wis. 2d 742, 695 N.W.2d 277. Accordingly, Bland shows no basis for suppressing the evidence discovered during the search.⁴ We affirm.

By the Court.—Judgment affirmed.

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

⁴ Because we affirm on the ground relied upon by the circuit court, we do not discuss the State’s alternative theory that suppression of the evidence is unwarranted because police found it after stopping Bland upon reasonable suspicion and detaining him during the course of the police inquiry. *See State v. Zien*, 2008 WI App 153, ¶3, 314 Wis. 2d 340, 761 N.W.2d 15 (we decide cases on the narrowest possible ground).

