STATE OF MINNESOTA
IN COURT OF APPEALS
A09-698

State of Minnesota,
Respondent,

vs.

Gerald John Seitz,
Appellant.

Filed December 22, 2009
Affirmed
Larkin, Judge

LeSueur County District Court
File No. 40-CR-07-857

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Brent Christian, LeSueur County Attorney, Jason L. Moran, Assistant County Attorney, 65 South Park Avenue, P.O. Box 156, Le Center, MN 56057 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Susan Andrews, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Minge, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges the district court's denial of his motion to suppress evidence obtained during a warranted search of his property. Appellant argues that there were intentional or reckless omissions from the affidavit supporting the warrant and that the omissions were material. Because we conclude that the alleged omissions were not material, we affirm.

FACTS

In August 2007, investigator Todd Waldron applied for a warrant to search a large machine shed located on appellant Gerald John Seitz's property. Waldron's supporting affidavit indicated that a known confidential reliable informant (CRI) reported that within the last 72 hours, he had been at Seitz's residence and had observed Seitz using methamphetamine in a large shed directly behind the residence. The CRI reported that Seitz stores methamphetamine in a lockbox inside a black toolbox. The affidavit indicated that Waldron had personally worked with the CRI in the past and that information provided by the CRI had led to the arrest and conviction of at least one person for first-degree controlled-substance crime. The affidavit also indicated that the CRI had worked with other law enforcement agencies, such as the Southwest Metro Drug Task Force and the Minnesota River Valley Drug Task Force, and had provided reliable information that led to additional arrests and convictions.

Waldron's affidavit further indicated that within the last several weeks, he met with an agent from the South Central Drug Task Force who recently had a conversation

with an inmate at the Rice County Jail. The inmate reported that he or she had been to Seitz's residence and had observed methamphetamine and marijuana and that Seitz stores these substances in the office area of a large machine shed located behind the residence. The affidavit did not identify the inmate or indicate when the inmate had observed controlled substances on Seitz's property.

Waldron's affidavit also stated that (1) he is familiar with Seitz from past investigations and had heard that Seitz is involved in the use and distribution of controlled substances, (2) he is familiar with Seitz's property and that there is a large machine shed behind the residence on the property, and (3) based on his experience and training, persons who buy and sell controlled substances commonly secure the substances in a safe or lockbox, along with proceeds from sales and possibly firearms. In the event a lockbox was located during the search, Waldron requested authority to open it.

A district court judge signed the warrant on August 27, and Waldron executed it that day. During the search of the machine shed on Seitz's property, Waldron found a locked toolbox containing 55.2 grams of methamphetamine. He also found glass pipes, a digital scale, hundreds of small baggies, and over $7,000. Seitz was subsequently charged with first-degree possession of a controlled substance under Minn. Stat. § 152.021, subd. 2(1) (2006).

Seitz moved to suppress the evidence seized during the search, arguing that Waldron knowingly omitted information from his supporting affidavit and that the judge would not have found probable cause if the information had been included. At the contested-omnibus hearing, Waldron acknowledged that while preparing his affidavit, he

listened to a recorded phone conversation between the CRI and another law enforcement officer in which the CRI described his recent visit to the Seitz residence.[1] The recording was made at Waldron's request a few hours before Waldron presented the warrant application to the judge.

In this conversation, the CRI stated that he had tried to purchase a "quarter ounce" from Seitz but that Seitz told him that he did not have anything to sell. The CRI believed that Seitz did not want to tell him anything because Seitz thought the CRI's wife was working with the police. The CRI admitted that he smoked methamphetamine with Seitz and an unnamed third party. The CRI said that the only methamphetamine that he saw in Seitz's shed was the methamphetamine in the pipe from which they smoked. When asked how much methamphetamine was on Seitz's property that day, the CRI answered that he did not know because he did not see it and that the pipe was already loaded. When asked whether Seitz was selling marijuana, the CRI said that he did not know and that he had "heard there's some amount[], but, yet, I, you know, I've never seen it."

[1] Seitz included a transcript of this conversation in the addendum to his appellate brief. However, Seitz did not offer the transcript at the hearing on his motion to suppress. Instead, Seitz attached the transcript to a later sentencing motion. A district court, when deciding a suppression issue, must base its decision on "the record of the evidence elicited at the time of [the] hearing." *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 554, 141 N.W.2d 3, 13 (1965). Relying on evidence that is not in the record implicates due process issues. *See Juster Bros. v. Christgau*, 214 Minn. 108, 119, 7 N.W.2d 501, 507 (1943) (stating that requirement of due process includes opportunity "to know the nature and contents of all evidence adduced in the matter"). Because the district court did not base its decision on the transcript, we would normally not consider it on appeal. However, the state does not object to Seitz's reliance on the transcript. Indeed, the state also cites the transcript in support of its position that the omissions were not reckless, intentional, or material. Because both parties rely on the transcript, and because the transcript supports our affirmation of the district court's denial of Seitz's motion to suppress, we consider the transcript in our analysis.

Waldron did not disclose these details in his supporting affidavit. Waldron also failed to disclose that the Rice County Jail inmate provided a map of Seitz's property, which showed the location of the shed, to an investigator who worked with Waldron. Finally, Waldron did not disclose that the CRI had prior convictions and pending criminal charges.

The district court rejected Seitz's challenge to the validity of the search warrant without specifically addressing whether the omissions were intentional or reckless and if so, material. The district court merely found that the supporting affidavit was facially sufficient to establish probable cause and that the CRI was credible. The parties agreed to proceed with a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 4, and to preserve Seitz's challenge to the search warrant for appellate review. After a stipulated-facts trial before a different judge, the district court found Seitz guilty of first-degree possession of a controlled substance. Seitz appeals.

D E C I S I O N

The United States and Minnesota Constitutions provide that no warrant shall issue without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, a search is lawful only if it is executed pursuant to a valid search warrant issued by a neutral and detached magistrate after a finding of probable cause. Minn. Stat. § 626.08 (2006); *State v. Harris,* 589 N.W.2d 782, 787 (Minn. 1999). "When determining whether a search warrant is supported by probable cause, we do not engage in a de novo review." *State v. McGrath,* 706 N.W.2d 532, 539 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). Instead, "great deference must be given to the

issuing [magistrate's] determination of probable cause." *State v. Valento*, 405 N.W.2d 914, 918 (Minn. App. 1987). This court limits its "review to ensuring that the issuing [magistrate] had a substantial basis for concluding that probable cause existed." *McGrath*, 706 N.W.2d at 539.

To determine whether the issuing magistrate had a substantial basis for finding probable cause, we look to the "totality of the circumstances." *Id.*

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. Wiley, 366 N.W.2d 265, 268 (Minn. 1985) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)).

When a search-warrant application is based on an informant's tip, we will not assume that the informant is credible. *See State v. Siegfried*, 274 N.W.2d 113, 114 (Minn. 1978) (recognizing that credibility of informants cannot be assumed). The supporting "affidavit must provide the magistrate with adequate information from which he can personally assess the informant's credibility." *Id.* As part of the "totality of the circumstances," the issuing judge should consider the informant's basis of knowledge and veracity. *State v. Souto*, 578 N.W.2d 744, 750 (Minn. 1998) (citing *Gates*, 462 U.S. at 238, 103 S. Ct. at 2332).

In this case, the district court rejected Seitz's challenge to the warrant, concluding that the supporting affidavit was "facially sufficient to establish probable cause." But because Seitz challenged the accuracy and veracity of the statements in Waldron's

affidavit, the district court's analysis should not have ended with a determination of facial validity. "Although a presumption of validity attaches to a search-warrant affidavit, this presumption is overcome when the affidavit is shown to be the product of deliberate falsehood or reckless disregard for the truth." *McGrath*, 706 N.W.2d at 540 (citing *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684 (1978)). "A search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause." *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989).

A misrepresentation is material if, once it is factored into the analysis, there is no longer probable cause to support the warrant. *Id.* But the misrepresentation, even if material, must be deliberate or reckless before a warrant will be invalidated; innocent or negligent misrepresentations will not invalidate a warrant. *Id.* When determining whether an affiant knowingly, or with reckless disregard for the truth, included false representations in an affidavit, courts apply a preponderance-of-the-evidence standard. *McGrath*, 706 N.W.2d at 540 (citing *Franks*, 438 U.S. at 156, 98 S. Ct. at 2676). If it is determined that the affiant deliberately falsified or recklessly disregarded the truth in his affidavit, the district court should set aside the false statements, supply any omissions, and then determine whether the affidavit still establishes probable cause. *State v. Doyle*, 336 N.W.2d 247, 250 (Minn. 1983) (citing *Franks*, 438 U.S. at 155-56, 98 S. Ct. at 2676).

The district court should have determined whether the identified omissions were intentional or reckless. At the contested-omnibus hearing, Seitz highlighted facts that

were known by Waldron but omitted from his supporting affidavit. Those facts primarily concerned the CRI's credibility: the CRI was using methamphetamine with Seitz when he "observed" the drugs, the CRI didn't see any drugs other than those that he ingested, and the CRI had prior convictions and pending charges against him. The issue, therefore, was not whether the supporting affidavit was facially sufficient, but whether the application was sufficient to establish probable cause in light of any intentional or reckless omissions. But the district court's approach does not necessitate a remand because assuming, without deciding, that the omissions were intentional or reckless, we nonetheless conclude that the omissions are not material. Once the omitted information is supplied, there remains probable cause to support the warrant.

Despite the CRI's pending criminal charges and criminal history, there is substantial evidence establishing the CRI's credibility: the CRI's observations were made first-hand during the past 72 hours, *see Wiley*, 366 N.W.2d at 269 ("Recent personal observation of incriminating conduct has traditionally been the preferred basis for an informant's knowledge."); the CRI's cooperation with Waldron on a previous occasion resulted in the arrest and conviction of another individual for a high-level drug offense, *see State v. Munson*, 594 N.W.2d 128, 136 (Minn. 1999) ("Having a proven track record is one of the primary indicia of an informant's veracity."); the CRI's statements were corroborated by the jail inmate,[2] *see State v. Ward*, 580 N.W.2d 67, 71 (Minn. App.

[2] Though the statements of the anonymous jail inmate were not sufficiently reliable to independently establish probable cause, the credibility of a corroborating witness need not rise to the level required of a CRI. *Cf. Hanson v. State*, 345 N.W.2d 794, 797 (Minn. App. 1984) (finding that corroboration of accomplice testimony need not be "strong

1998) (recognizing that "corroboration of even minor details can lend credence to an informant's information where the police know the identity of the informant" (quotation omitted)); the CRI was known by Waldron as reliable; *United States v. Harris*, 403 U.S. 573, 583, 91 S. Ct. 2075, 2081-82 (1971) (holding that officers can use their knowledge of an informant's reputation to assess the informant's reliability); and the CRI's description of the location of the shed was consistent with the layout of buildings on Seitz's property, *see Ward*, 580 N.W.2d at 71 (recognizing that corroboration of minor details is sufficient).

The fact that the CRI had past and current criminal involvement does not prevent a finding that he is credible. If an informant is designated as a "concerned citizen," law enforcement is relieved of having to establish the informant's credibility and veracity independently through corroboration or a history of providing reliable information. *McGrath*, 706 N.W.2d at 540 (noting that a "concerned citizen" informant distinctively "acts with an intent to aid law enforcement out of concern for society or for personal safety"). Conversely, when an informant is not designated as a "concerned citizen," the informant is assumed to be motivated by a desire for leniency or immunity from prosecution, and the informant's reliability must be independently established. *Id.* Thus, the absence of a "concerned citizen" designation tends to suggest that the informant is involved in criminal activity. For this reason, omissions regarding the CRI's criminal lifestyle are hardly momentous. As discussed above, once the omissions regarding the

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evidence," but evidence that "sufficiently tend[s] to confirm the truth of the accomplice testimony").

CRI's criminal history are supplied, the affidavit stills provides adequate information to establish the CRI's credibility.

We also disagree with appellant's claim that probable cause was lacking because the CRI did not see any drugs on Seitz's property other than the methamphetamine that he smoked with Seitz. Even small amounts of a controlled substance can establish a fair probability that evidence of a crime or contraband will be found in a particular place. *Id.* at 543-44. It was not necessary for the CRI to have seen a large cache of illegal substances; the CRI merely needed to provide enough trustworthy information to establish a fair probability that contraband or evidence of a crime would be found on Seitz's property. The CRI's report of the presence of methamphetamine on Seitz's property, based on the CRI's recent, first-hand observation, coupled with the indicia of reliability discussed above, established probable cause to support the search warrant despite the allegedly intentional or reckless omissions.

Affirmed.

Dated:

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Judge Michelle A. Larkin