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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2177

State of Minnesota,
Respondent,

vs.

Robert Nicholas Trapp,
Appellant.

Filed August 31, 2010
Reversed
Stoneburner, Judge

Ramsey County District Court
File No. 62CR0814654

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Stauber, Judge; and Harten, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

STONEBURNER, Judge

Appellant challenges his conviction of second-degree controlled-substance crime, arguing that the district court erred in denying his motion to suppress evidence seized from his residence during a warranted search. Appellant asserts that the search-warrant application failed to provide a substantial basis to believe that drugs or evidence of drugs would be found at his residence, making the warrant invalid, the search illegal, and the evidence seized inadmissible. We agree and reverse.

FACTS

Jeffrey Potter, a Fridley Police Department detective and member of the Anoka/Hennepin Drug Task Force, applied for and obtained a warrant to search the home of appellant Robert Nicholas Trapp for evidence of possession and/or sale of illegal drugs. Potter's affidavit supporting the warrant application states, in relevant part, that Potter had learned from a "cooperating reliable individual" (CRI), that the CRI had been present in Trapp's residence "within the last 72" hours and observed cocaine in the home. The affidavit asserts that Anoka County records reveal "several contacts with Trapp and [that] he uses [the residence address] as his home address." Potter recites that police contact had occurred as recently as a month before the warrant application but does not state what that contact was about. Potter states that a different "CI" confirmed that Trapp lives at the residence. Both the CRI and CI confirmed that Trapp is selling cocaine and marijuana on a regular basis and has surveillance cameras on the front and back of the residence. Potter stated that based on the information, he had reason to believe that the

residence is being used as an outlet for drug trafficking and its occupants are engaged in selling and/or possession of illegal drugs.

The warrant was executed eight days after it was issued. During the search, officers found the following items in a basement safe: two kilograms of marijuana, 24 grams of a substance containing cocaine, and $2,600 in cash. The officers also seized surveillance cameras, a digital scale, and materials used to package drugs. Trapp stated that he lived in the residence with his girlfriend and that the safe and its contents belonged to him.

Trapp was charged with second-degree controlled-substance crime (possession of six grams or more of cocaine). Trapp moved to suppress evidence seized during the search, arguing that there was insufficient probable cause that drugs or evidence of drugs would be found in his residence to support issuance of the warrant because the information in the warrant application was stale. The district court denied the motion.

Trapp agreed to a court trial on stipulated facts under Minn. R. Crim. P. 26.01, subd. 4, preserving his right to appeal the pretrial ruling. The district court found him guilty and sentenced him to serve 58 months in prison. In this appeal, Trapp challenges the denial of his motion to suppress.

D E C I S I O N

Both the United States and Minnesota Constitutions require that a search warrant be supported by probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. In determining whether a warrant is supported by probable cause, this court gives great deference to the issuing court's probable-cause determination. *State v. Rochefort*, 631

N.W.2d 802, 804 (Minn. 2001). Our review is limited to ensuring "that the issuing judge had a 'substantial basis' for concluding that probable cause existed." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quoting *Illinois v. Gates*, 462 U.S. 213, 238–39, 103 S. Ct. 2317, 2332 (1983)).

Probable cause is defined as "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) (quotation omitted). A probable-cause determination involves "practical considerations of everyday life," not legal technicalities. *State v. Hanson*, 355 N.W.2d 328, 329 (Minn. App. 1984) (quotation omitted). The issuing magistrate's task is to make a "practical, common-sense decision," in light of all the information provided, whether the search-warrant affidavit has established probable cause. *State v. Harris*, 589 N.W.2d 782, 788 (Minn. 1999) (quotation omitted). "Elements indicating probable cause include information linking the crime to the place to be searched, the freshness of the information, and the reliability of the sources of information." *State v. Hochstein*, 623 N.W.2d 617, 622 (Minn. App. 2001) (citing *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998)).

Trapp's primary argument on appeal is that the district court erred in not suppressing the evidence found during the search of his home because the information supporting probable cause for the search warrant had become stale by the time the search warrant was executed (eight days after it was issued).

> Whether a delay in executing a search warrant is unconstitutional depends on whether the probable cause recited in the affidavit still exists at the time of execution of

> the warrant—that is, whether it is still likely that the items sought will be found in the place to be searched.

State v. Yaritz, 287 N.W.2d 13, 16 (Minn. 1979), *review denied* (Minn. Mar. 29, 2005). "In general, a single incident of criminal activity . . . 'will support a finding of probable cause only for a few days at best.'" *State v. Ward*, 580 N.W.2d 67, 72 (Minn. App. 1998) (quoting *State v. Cavegn*, 356 N.W.2d 671, 673 (Minn. 1984). But there is no arbitrary time limit or rigid formula for determining whether the probable cause underlying a search warrant has grown stale. *King*, 690 N.W.2d at 401. Rather, we examine the circumstances of each case. *State v. Jannetta*, 355 N.W.2d 189, 193 (Minn. App. 1984), *review denied* (Minn. Jan. 14, 1985). Relevant circumstances include whether there is "any indication of ongoing criminal activity, whether the articles sought are innocuous or incriminating, whether the property sought is easily disposable or transferable, and whether the items sought are of enduring utility." *Souto*, 578 N.W.2d at 750.

"The passage of time is less significant when an activity is of an ongoing, protracted nature." *King*, 690 N.W.2d at 401. For example, in *Yaritz*, the police executed a search warrant supported by an affidavit indicating that an informant, "[o]n 2 separate occasions within the past month," had made controlled buys from Yaritz who was observed by law enforcement going directly from his home to the location of the controlled buy. 287 N.W.2d at 14 & n.1. After law enforcement discovered drugs in Yaritz's home during the search, Yaritz was charged with and convicted of possession of marijuana with intent to distribute. *Id.* at 14. Yaritz appealed his conviction, arguing that the six-day delay in executing the warrant violated his Fourth Amendment rights. *Id.*

The supreme court disagreed and concluded that the delay in the execution of the warrant to search for drugs at Yaritz's home was not a constitutional violation because "the affidavit . . . indicate[d] that [Yaritz] was in the business of selling drugs and that he had been doing it on a *continuing basis*." *Id.* at 17 (emphasis added). The supreme court noted that the continuity of the crime is the most important factor in deciding the staleness issue and that in Yaritz's case "it [wa]s reasonable to conclude that the probable cause which obtained on April 14, when the warrant was issued, continued to exist on April 20, when the warrant was executed." *Id.*

Likewise, in *King*, this court concluded that although there was a seven-day delay in the execution of the warrant to search King's residence for drugs and evidence of drug sales, the district court did not err in denying a motion to suppress the evidence found during the search of King's apartment because the search-warrant affidavit, viewed as a whole, "showe[d] that King was in the ongoing business of selling drugs from his apartment." 690 N.W.2d at 399, 401. The affidavit stated that a confidential reliable informant (CRI) had made a controlled purchase of crack cocaine from King's residence and was given a phone number to contact King should he wish to make additional purchases, and that citizens and the owner of King's apartment building had complained of activity suggesting a history of drug sales from King's apartment. *Id.* at 401. We stated: "It is reasonable to conclude that the probable cause that existed at the time the search warrant was issued continued to exist when the warrant was executed." *Id.* at 402.

In the present case, the only information in the affidavit that could possibly supply law enforcement with probable cause was obtained from confidential informants.

"Whether the information provided by a confidential informant is sufficient to establish probable cause is determined by examining the totality of the circumstances, particularly the credibility and veracity of the informant." *State v. Ross*, 676 N.W.2d 301, 303–04 (Minn. App. 2004) (quotation omitted). "[A] collection of pieces of information that would not be substantial alone can combine to create sufficient probable cause." *State v. Jones*, 678 N.W.2d 1, 11 (Minn. 2004). In applying this standard, marginal cases should be resolved in favor of issuance of the warrant. *State v. McCloskey*, 453 N.W.2d 700, 704 (Minn. 1990).

While it is true that law enforcement "may rely on an informant's tip if the tip has sufficient indicia of reliability," to assess reliability, "courts examine the credibility of the informant and *the basis of the informant's knowledge* in light of all the circumstances." *State v. Cook*, 610 N.W.2d 664, 667 (Minn. App. 2000) (emphasis added).

> This basis of knowledge may be supplied directly, by first-hand information, such as when a CRI states that he purchased drugs from a suspect or saw a suspect selling drugs to another; a basis of knowledge may also be supplied indirectly through self-verifying details that allow an inference that the information was gained in a reliable way and is not merely based on a suspect's general reputation or on a casual rumor circulating in the criminal underworld.

Id. at 668. "Assessment of the CRI's basis of knowledge involves consideration of the quantity and quality of detail in the CRI's report and whether police independently verified important details of the informant's report." *Id*.

In this case, the informants' tips included: (1) a description of Trapp (i.e., the CRI positively identified Trapp from a driver's license photograph); (2) Trapp's home

address; (3) that Trapp owns a car-washing business; (4) that the CRI, on a single occasion within 72 hours of the warrant application, had been in Trapp's home with several other persons and had observed cocaine in the home; (5) the assertions, without a stated basis or timeframe, that Trapp is regularly selling cocaine and marijuana; and (6) the statements that Trapp has surveillance cameras on the front and back of his home.

The description of Trapp, his address, the fact that he owns a car-washing business, and the CRI's observation of cocaine in Trapp's home on one occasion more than a week before the warrant was executed do not provide reason to believe that Trapp either possessed or sold drugs out of his home on a *basis continuing to the time of the search*, especially given the disposable nature of cocaine and lack of information in the affidavit about the quantity of cocaine observed. And the informants' statements that Trapp was regularly selling cocaine and marijuana and had surveillance cameras on the front and back of his home did not provide the source or timeframe for such knowledge.

Probable cause cannot be based solely on "a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause. Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Gates*, 462 U.S. at 239, 103 S. Ct. at 2333. For example, in *Souto*, where the only evidence of a crime continuing to the time when Souto's residence was searched was an "officer's statement that 'he [knew]' that Souto was involved in the possession and/or distribution of drugs on a wide scale," the Minnesota Supreme Court concluded that the statement "was too vague and conclusory to bolster the state's position that Souto

was a drug dealer." 578 N.W.2d at 749 (alteration in original). The affidavit's failure to indicate a source of the information, coupled with the statement's lack of detail, made the information unreliable and made it impossible for a magistrate to independently make a probable cause determination that Souto was a drug dealer and therefore that law enforcement was substantially likely to find incriminating evidence at the time of the search, which occurred at least six months after the date of the most recent information supplied in the affidavit. *Id*. at 749–50.

Similarly, Potter's affidavit failed to establish the source or timeframe of the assertion by the informants that Trapp was engaged in ongoing sales of controlled substances and had surveillance cameras at his residence. There is nothing in the affidavit to indicate that either informant had ever directly observed a drug sale, cameras, drug paraphernalia, or other indicia of such sales (e.g., packaging materials, scales, etc.).[1] And neither informant provided any details that would allow an inference that the information was gained in a reliable way, or was timely. And no part of the information supporting continuing criminal activity was corroborated by law enforcement. We

[1] The state argues that it is reasonable to infer that the statements regarding the surveillance camera came from the informants' personal knowledge. But the state does not cite any relevant authority for this proposition. The state cites *City of Minnetonka v. Shepherd*, 420 N.W.2d 887, 891 (Minn. 1988). In that case, the supreme court concluded that a telephone caller's statement that an intoxicated driver had just left a gas station suggested that the caller's information was based on personal observation. *Shepherd*, 420 N.W.2d at 891. But the issue in *Shepherd* was whether the information was sufficient for law enforcement to *reasonably suspect* that the driver of the car was intoxicated and therefore sufficient to justify a limited investigatory stop. The issue was not whether the information established *probable cause* for a full search. It is well-established that the reasonable-suspicion standard is "less demanding than probable cause." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008).

conclude, therefore, that the informants' statements do not support a determination of probable cause that Trapp was involved in ongoing drug activity out of his home. *See Cook*, 610 N.W.2d at 668 (stating that an informant's basis of knowledge may be supplied directly by firsthand information, or indirectly through self-verifying details that allow an inference that the information was gained in a reliable way; and that assessment of an informant's basis of knowledge involves consideration of the quality and quantity of detail in the informant's report and whether the police corroborated important details).

The state argues that *Cavegn*, *Yaritz*, and *Hochstein* are controlling in this case and support a finding of probable cause that Trapp was involved in continuing criminal activity. In each case, despite a delay between issuance and execution of a search warrant, probable cause was determined not to be stale. *Cavegn*, 356 N.W.2d at 373–74; *Yaritz*, 287 N.W.2d at 17; *Hochstein*, 623 N.W.2d at 623. But in each case, reliable information from informants provided law enforcement reason to believe that the defendants were involved in selling drugs on an ongoing basis. *Cavegn*, 356 N.W.2d at 374; *Yaritz*, 287 N.W.2d at 17; *Hochstein*, 623 N.W.2d at 623.

Cavegn and *Yaritz* involved search-warrant affidavits indicating that the informants had recently purchased drugs from the defendants through one or more controlled buys and that the defendants had previously been involved in distributing illegal drugs. *Cavegn*, 356 N.W.2d at 672–73; *Yaritz*, 287 N.W.2d at 14 n.1. And in *Hochstein*, each informant's information was corroborated by statements of the other informants, the personal-knowledge basis of the information from two informants was established, and one informant had a conversation with Hochstein 72 hours before the

application in which Hochstein and the informant discussed "drugs" that Hochstein had recently brought back from Mexico. 623 N.W.2d at 623 (stating that the argument that information in the warrant was stale was rebutted). In this case, the state has not rebutted the argument that the information in the warrant application was stale by the time the warrant was executed.

Because we conclude that the warrant, when executed, lacked probable cause that drugs or evidence of drugs would be found in Trapp's residence, we conclude that the district court erred in denying the motion to suppress evidence obtained as a result of the search. And because Trapp's conviction was based solely on evidence obtained from the illegal search, his conviction must be reversed.

Reversed.