

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2015

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. 2014AP124-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2012CF458

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHELLE L. KOSTUCK-HASS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
PHILLIP A. KOSS, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Michelle L. Kostuck-Hass appeals from a judgment of conviction for manufacturing between 2,500 and 10,000 grams of tetrahydrocannabinols (THC), as a party to the crime, entered upon her guilty plea following the trial court's denial of her suppression motion. Kostuck-Hass contends that the search warrant leading to the discovery of contraband in her

residence was invalid and that her statements to officers should be suppressed as a fruit of the illegal search. Because we conclude that the warrant was supported by probable cause to believe that the items sought were evidence of or linked to the commission of a crime and would be found in the residence, we affirm.

¶2 Police officers conducted a traffic stop on Christopher Hass, the defendant's husband. Upon initial contact with Hass, police detected a strong odor of cannabis emitting from the car. During a search of the car, police discovered two baggies containing suspected THC, drug paraphernalia believed to be used in connection with heroin, and a sealed packet labeled Suboxone. The car was neither titled to Hass, nor registered to his address. Officer Jeffrey Price applied for and obtained a search warrant for Hass's residence. The stated purpose of the search was to recover any documentation or items relating to the ownership of the car, including keys, title, service paperwork, and maintenance receipts.

¶3 Michelle Kostuck-Hass was present during the execution of the search warrant and at the officer's request, she waited outside. While conducting an initial sweep of the basement, officers observed a marijuana grow operation containing in excess of seventy-five potted marijuana plants. Based on these observations, police obtained a second search warrant and discovered additional contraband, including two bags of marijuana.¹

¶4 That evening, Officer Price conducted a taped interview with Kostuck-Hass at her residence. Kostuck-Hass stated that she lived at the residence

¹ Kostuck-Hass does not independently challenge the issuance or execution of the second search warrant. She argues that because the affidavit underlying the second warrant relied solely on evidence discovered pursuant to the allegedly unlawful first warrant, all evidence must be suppressed as derivative of the initial search.

and helped set up and maintain the grow operation. The State charged Kostuck-Hass with three drug-related offenses and she moved to suppress all evidence discovered during the search of her residence, as well as her statements made after the search. As grounds, Kostuck-Hass alleged that the initial warrant authorizing the search of the residence for items and documents relating to the car's ownership was unsupported by probable cause.

¶5 At the suppression hearing, the court ascertained that the parties did not dispute the material facts, and that the affidavit offered in support of the warrant averred that the car was registered not to Christopher Hass who resided in Elkhorn, Wisconsin, but to Robert D. Hass who resided in South Milwaukee. The court determined that from the affidavit, a neutral magistrate reasonably could have found probable cause sufficient to issue a warrant. The court agreed with the State's position that the legitimate purpose of obtaining proof of ownership was to eliminate any potential defense Hass might raise that the illegal items found in the car belonged to someone else, adding:

I guess one could worry that this is some sort of pretext[] or subterfuge to try and get in the house and see if there's more drugs. Even if that's true, that does not mean they don't have the right to do that. And I don't agree with [trial counsel] that they have to exhaust every other avenue before they turn to the search warrant, or even any other avenue before they turn to a search warrant.

And I will emphasize that they did what law enforcement is supposed to do, get a search warrant. Not just go in there and knock on the door and say: Hey, we're coming here to look for the title to the vehicle. They had a neutral and detached magistrate ... look at this. Do we have enough to go in, judge?

And my ruling here is not whether I would have issued it, but whether it was reasonable for [the issuing magistrate] to issue it. And clearly - - and I'm not deciding that in every single case they can do this, but there was a real issue here of who's going to claim ownership of these things. And I

think that this was an appropriate way to begin that step to try and determine that.

¶6 A search warrant may issue 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). Before issuing a warrant, a magistrate must be “apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched.” *Id.* (citations omitted). Probable cause for a search warrant “is not a technical or legalistic concept, but rather, is a flexible, common-sense measure of the plausibility of particular conclusions about human behavior.” *State v. Herrmann*, 2000 WI App 38, ¶22, 233 Wis. 2d 135, 608 N.W.2d 406 (citation omitted). Elaborate specificity is not required, and probable cause may be supported by reasonable inferences as well as facts. *State v. Sloan*, 2007 WI App 146, ¶24, 303 Wis. 2d 438, 736 N.W.2d 189.

¶7 In reviewing a suppression ruling, we uphold the trial court’s findings of historical fact unless clearly erroneous, but review the application of constitutional principles to those facts de novo. *Sloan*, 303 Wis. 2d 438, ¶7. Our review is confined to the record that was before the warrant-issuing judge and we accord great deference to the magistrate’s determination of probable cause. *Id.*, ¶8. We will uphold the decision to issue a warrant unless the facts in the supporting affidavit “were clearly insufficient to support a finding of probable cause.” *Id.* We recognize that “both the experience and special knowledge of police officers who are applying for search warrants are among the facts that the warrant-issuing court may consider [.]” *State v. Gralinski*, 2007 WI App 233, ¶16, 306 Wis. 2d 101, 743 N.W.2d 448 (citation omitted). Doubtful or marginal cases will be resolved in favor of the warrant. *Higginbotham*, 162 Wis. 2d at 990.

Kostuck-Hass, as the person challenging the search warrant, bears the burden of establishing insufficient probable cause. *Gralinski*, 306 Wis. 2d 101, ¶14.

¶8 We conclude that the affidavit provided probable cause, the warrant was valid, and the resultant search was therefore lawful. Hass was discovered driving a car which contained contraband, including two bags of cannabis. The cannabis was located on the floor behind the front passenger seat, and not in his direct control. Hass's driver's license indicated that Hass resided in Elkhorn. A check of the car's registration revealed that it was not titled to either Hass or his wife, but to a Robert D. Hass, and that it was registered to a different address in another city.² The warrant stated with particularity the items sought from Hass's residence, such as keys, door lock openers, fuel or maintenance records, and title, registration and insurance documents. These items bore on Hass's relationship to the car and would thus serve to link him to the possession and control of the contraband discovered therein.

¶9 Kostuck-Hass argues that because prior to the warrant application, officers possessed sufficient probable cause linking Hass to the contraband, there was no need for them to search for the specified items. Though she acknowledges the trial court's finding that the warrant was issued for the legitimate purpose of obtaining proof that Hass owned the car, she contends that this rationale ignores

² Though not averred in the affidavit, Hass denied any knowledge of the illegal items in the vehicle. This fact was supplemented in the State's trial brief and discussed at the suppression hearing. It is possible that officers shared this fact with the issuing magistrate as part of the application process, and at the suppression hearing, Kostuck-Hass did not explicitly object to the trial court considering this fact. However, there is no record testimony to this effect, and this information is not included in the four corners of the affidavit. The trial court ruled on the suppression motion without reference to this supplementary fact. For purposes of our opinion, this court will not consider the police officer's statement in his report that Hass disclaimed knowledge of the contraband in the car.

the doctrine of “constructive possession.” She argues that because Hass was discovered in a car emitting a strong odor of marijuana, the only reasonable conclusion is that “Hass was the likely possessor of the THC in the vehicle.” Essentially, Kostuck-Hass contends that the high degree of circumstantial evidence linking Hass to possession of the contraband discovered in the car rendered the issue of actual ownership irrelevant and severed the nexus between the items specified in the search warrant and the commission of a crime.

¶10 We agree with the State that this is “akin to saying that officers were precluded from obtaining a search warrant based upon conceded probable cause because they had probable cause [,]” an argument that is “illogical and contrary to the probable cause standard.” Pursuant to the warrant, officers were entitled to search for items that would confirm their probable cause belief that Hass had possession or control of the items in the vehicle, and would contradict any assertion that Hass was unaware of or had no control over the contraband. This is particularly true given the back-seat location of the contraband discovered in the car. We are not aware of and Kostuck-Hass has not provided any authority for the proposition that officers are not entitled to seek additional supporting evidence where they arguably possess probable cause that an individual has committed a crime.

¶11 We also reject Kostuck-Hass’s argument that a warrant can only authorize a search for contraband or what she deems “direct evidence of criminal activity [,]” such as legal items used in an illegal manner or in the commission of a crime. In addition to prior authorization by a neutral magistrate and a particularized description of the place to be searched and items to be seized, a valid search warrant requires a demonstration upon oath or affirmation that there is probable cause to believe that evidence sought will aid in a particular conviction

for a particular offense. *Dalia v. United States*, 441 U.S. 238, 255 (1979); *State v. Henderson*, 2001 WI 97, ¶19, 245 Wis. 2d 345, 629 N.W.2d 613. Here, the affidavit stated that the keys and ownership documents “may constitute evidence of a crime, to wit: Possession of THC with intent to deliver, contrary to Section 961.41(1m)(h), Wisconsin Statutes” This is all the law requires.

¶12 In sum, we conclude that the warrant authorizing the search of Hass’s residence for evidence of his ownership or control of the car was supported by probable cause. Because the initial warrant was valid and officers discovered evidence of a marijuana grow operation in plain view, the second warrant and search was also lawful. Therefore, any statements Kostuck-Hass made to officers were not derived from an illegal search and are not suppressible as fruits of a poisonous tree.³

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

³ Given our conclusion that the search warrant was valid, we need not address the State’s argument that the officers’ search was justified under the good faith exception to the exclusionary rule. See *State v. Eason*, 2001 WI 98, ¶74, 245 Wis. 2d 206, 629 N.W.2d 625 (suppression is not appropriate where officers acted in objectively reasonable reliance on a warrant issued by a neutral magistrate, despite the absence of probable cause supporting the warrant).

