COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2334-CR **Cir. Ct. No. 2005CM8**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD L. DRAGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Taylor County: GARY L. CARLSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Richard Drager appeals a judgment of conviction for misdemeanor domestic disorderly conduct, contrary to WIS. STAT. §§ 947.01

and 968.075(1)(a).[1] The court entered judgment after revoking Drager's deferred entry of judgment agreement because of a new criminal complaint against him. Drager asserted he was entitled to an evidentiary hearing on the new complaint, but the court denied that request. Drager renews his assertion of a due process right to an evidentiary hearing and further asserts the trial court applied an incorrect standard of probable cause and the State failed to carry its burden of proof for revocation. We reject Drager's arguments and affirm the judgment.

Background

¶2 Drager was charged with one count of domestic disorderly conduct and three counts of misdemeanor intimidation of a victim arising out of a confrontation with his then-girlfriend, Nancy Tiedke. As part of his bail conditions, he was ordered to have no contact with Tiedke. Drager ultimately entered a plea agreement wherein he would plead no contest to the disorderly conduct charge and the intimidation charges would be dismissed and read in. The agreement contained provisions for a deferred entry of judgment of conviction. The deferral would run for one year and during that time, Drager had to attend an anger management class, "incur no new criminal charges supported by probable cause," and have no contact with Tiedke. Upon successful completion of the deferral, the State would move to amend the misdemeanor disorderly conduct charge to a county disorderly conduct forfeiture. The court accepted the plea and approved the deferral on March 31, 2005.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 On May 3, 2005, Tiedke called police to report Drager was driving around outside her apartment. When an officer arrived, she gave him a list of five previous dates and times she had seen Drager outside her apartment, along with descriptions of his behaviors. The officer took her written statement and then attempted to contact Drager, but could not reach him. The officer referred the report to the district attorney, who issued new charges of bail jumping and violating a domestic abuse order against Drager in a new criminal complaint.

¶4 Following issuance of the new complaint, the State moved to revoke the deferral agreement in this case. Drager responded by filing a "Notice of Right to Seek Postconviction Relief," which the court construed as a motion to dismiss for lack of probable cause. Drager asserted he should be entitled to present alibi evidence that would undercut Tiedke's assertions and the new complaint. The trial court disagreed, concluded there was probable cause to support the new charges, and revoked the deferral. The court entered judgment on the domestic disorderly conduct charge and sentenced Drager to five days in jail and twelve months' probation.

Discussion

¶5 On appeal, Drager's major premise is that he has a due process right to an evidentiary hearing on the new criminal complaint that prompted revocation of his deferral agreement. He also asserts the trial court applied the incorrect probable cause standard in evaluating the new charges and that the State failed to meet its probable cause burden under any standard.

¶6 We first address the appropriate standard of probable cause. The deferral agreement required Drager to "incur no new criminal charges supported by probable cause." Drager asserts this is ambiguous because probable cause is

subject to multiple definitions in the law. He asserts the trial court applied the lowest standard—probable cause necessary to issue an arrest warrant—but should have applied the highest standard as in ***State v. Williams***, 104 Wis. 2d 15, 22-23, 310 N.W.2d 601 (1981) (there must be reasonable probability a crime was committed and defendant committed it).[2]

¶7 There is, however, no ambiguity. Criminal charges are incurred following issuance of a complaint, which is the written description of the charges. WIS. STAT. § 968.01. There is a specific probable cause standard we apply to criminal complaints:

> We look within the four corners of the complaint to see whether there are facts or reasonable inferences set forth that are sufficient to allow a reasonable person to conclude that a crime was probably committed and that the defendant probably committed it. … A complaint is sufficient if it answers the following questions: "(1) Who is charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so? or how reliable is the informant?"

State v. Reed, 2005 WI 53, ¶12, 280 Wis. 2d 68, 695 N.W.2d 315 (citations omitted).

¶8 Generally, whether a criminal complaint sets forth probable cause to justify the charge is something we review de novo. ***Id.***, ¶11. However, the criminal complaint underlying the revocation does not appear in this record. It is

[2] Drager asserts, without citation to authority, that when there is a question of which probable cause standard to use, we should use the standard that most favors the defendant. He then refers to WIS. STAT. § 970.03(1), which refers to preliminary hearings in felonies. However, none of the charges Drager faces are felonies, and he fails to adequately connect this case to a felony standard.

an appellant's responsibility to present a complete record, and we assume any missing material supports the trial court's determination. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).[3] Thus, we assume an independent review of the complaint would lead us to conclude it is supported by probable cause, even if the trial court did apply an incorrect standard.

¶9 We also conclude Drager was not entitled to an evidentiary hearing. First, as noted, we look only to the four corners of the complaint to seek probable cause. ***Reed***, 280 Wis. 2d 68, ¶12. This renders any extrinsic evidence irrelevant to a probable cause determination. Second, even if we permitted an evidentiary hearing, Drager's evidence would not prevent the court from finding probable cause. "Where reasonable inferences may be drawn establishing probable cause and equally reasonable inferences may be drawn to the contrary, the criminal compliant is sufficient." ***State v. Manthey***, 169 Wis. 2d 673, 688-89, 487 N.W.2d 44 (Ct. App. 1992). Moreover, we decline to turn deferral revocation proceedings into collateral mini-trials. As the trial court advised at the plea hearing, nothing in the deferral agreement stated Drager had to be convicted of a crime before the agreement would be revoked. It required only that he not incur new charges supported by probable cause.[4]

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[3] Drager has also added documents to his appendix—Tiedke's written statement, the officer's report, the request for charges, and an injunction—that are not part of the record. An appendix may not be used to supplement the record. ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

[4] While Drager asserts that without an evidentiary hearing, there is no vehicle for challenging the basis upon which revocation was sought, we disagree. He challenged the probable cause of the underlying complaint in the trial court and on appeal, although his challenges consist primarily of a denial that he engaged in the alleged conduct. That his arguments are unsuccessful does not implicate due process.

¶10 Finally, Drager asserts that the State failed to meet its burden of proof under any probable cause standard because the police failed to conduct any investigation of Tiedke's complaint beyond taking her statement. Relying on ***State v. Boggess***, 110 Wis. 2d 309, 316, 328 N.W.2d 878 (Ct. App. 1982), he asserts that without independent police verification, Tiedke's reliability is undermined. However, lack of independent police verification is not always fatal, particularly when an informant or complaining witness is identifiable and therefore exposed to the threat of criminal charges for making a false statement to police.[5] *See* ***State v. Rutzinski***, 2001 WI 22, ¶¶31-32, 241 Wis. 2d 729, 623 N.W.2d 516; *see also* WIS. STAT. § 946.41.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[5] Drager also asserts that without some type of evidentiary hearing, nothing prevents the State or a witness from fabricating charges against a person in his position. However, prosecutors are presumably aware of the consequences, both criminal and professional, of misconduct should they be found to be falsifying evidence. And, as noted above, citizen informants or witnesses who file a false police report are subject to criminal charges.