

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2006AP638-CR

Cir. Ct. No. 2005CF253

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW R. KAPINOS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Brown County:
KENDALL M. KELLEY, Judge. *Affirmed.*

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

¶1 CANE, C.J. Matthew Kapinos appeals an order denying his motion to suppress evidence obtained at his home pursuant to a search warrant. Kapinos argues there was no probable cause for the search warrant because the affidavit

supporting the search warrant failed to establish a nexus between his drug purchase and his home. We disagree and affirm the circuit court's order.

BACKGROUND

¶2 Kapinos was charged with one count of possession with intent to deliver THC as a second or subsequent offense. Kapinos was charged based on the results of a search warrant executed at his home by members of the Brown County Drug Task Force.

¶3 During a drug investigation, a confidential informant made two controlled buys of one ounce of marijuana from Nick Mueller. The first buy occurred on February 4, 2005, and the second occurred on February 7. During the second buy, Narcotics Investigator David Poteat heard Mueller tell the informant he could only give him an ounce of marijuana because his landlord was coming over to pick up a quarter pound. Shortly thereafter, a red van pulled up to the residence. Police observed Kapinos get out of the van and go into Mueller's apartment. Records listed Kapinos as the owner of the apartment.

¶4 On February 8, Mueller was arrested. He told the police he sold a quarter pound of marijuana to his landlord, Kapinos, the night before. In exchange for the drugs, Kapinos paid Mueller \$1,300 in cash and took \$50 off his rent. Mueller also told the police he sold another half pound to Kapinos a week and half earlier. He informed the police that Kapinos lived in the upper unit of a duplex across the street from Frank and Pat's Pizza. Police confirmed the description was 626 ½ Bellevue Street in Green Bay, which matched the red van's registration and was a property owned by Kapinos.

¶5 The police executed the search warrant at Kapinos's Bellevue residence where they found three baggies of marijuana. The marijuana totaled less than sixty grams. The police also found rolling papers and a roller, which are paraphernalia normally associated with marijuana.

¶6 On February 9, Kapinos turned himself in to police because he was not home during the search. Kapinos waived his preliminary hearing, and he pled not guilty on July 12. He filed a motion to suppress physical evidence, claiming that the search warrant failed to establish probable cause to search his residence because it failed to establish a nexus between his purchase of marijuana at Mueller's apartment and his residence on Bellevue Street in Green Bay.

¶7 The court found there was probable cause to believe Kapinos would have marijuana at his Bellevue residence because of Kapinos's purchases of high-grade marijuana in quantities consistent with intent to deliver and his receiving marijuana in lieu of rent. On October 4, Kapinos entered a plea of no contest to the amended charge of possession of THC as a second or subsequent offense. Kapinos was then sentenced to three-years' probation with a condition that he serve sixty days in the county jail.

DISCUSSION

¶8 In reviewing a finding of probable cause to issue a search warrant, we give "great deference" to a magistrate's probable cause determination. *State v. Marquardt*, 2005 WI 157, ¶23, 286 Wis. 2d 204, 705 N.W.2d 878. The finding stands unless the defendant shows the facts are "clearly insufficient" to support the probable cause finding. *Id.* We will uphold the determination of probable cause if there is a substantial basis for the warrant-issuing magistrate's decision. *State v. Ward*, 2000 WI 3, ¶21, 231 Wis. 2d 723, 604 N.W.2d 517

¶9 When considering an application for a search warrant, the issuing magistrate should “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. Schaefer*, 2003 WI App 164, ¶4, 266 Wis. 2d 719, 668 N.W.2d 760 (citation omitted). Whether there is probable cause that evidence is located at a particular place is determined by examining the “totality of the circumstances.” *State v. DeSmidt*, 155 Wis. 2d 119, 131, 454 N.W.2d 780 (1990) (citation omitted). Therefore, we consider “whether objectively viewed, the record before the warrant-issuing judge provided ‘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 they will be found in the place to be searched.’” *Ward*, 231 Wis. 2d 723, ¶27 (citation omitted).

¶10 Kapinos agrees the affidavit provided probable cause to believe he bought marijuana from Mueller; however, he contends the affidavit did not connect that activity with his residence. In essence, Kapinos’s argument is that it was not reasonable to search his residence absent information directly linking his house to the drug activity. We are not persuaded.

¶11 The test of probable cause for a search warrant is not whether the inference that Kapinos dealt drugs from his Bellevue property is the only reasonable inference. *See id.*, ¶30. The test is whether the inference is a reasonable one. *Id.* In *Ward*, the supreme court addressed a similar issue presented in this case. The supreme court upheld a search warrant for the home of a suspected drug dealer where the only fact linking the dealer’s home to his activities were statements by an informant that “Lance on Royce” was the

informant's supplier. *Id.*, ¶¶34, 36.¹ The court also rejected the formalism of requiring search warrant affidavits to contain either a statement by the police or an informant regarding the likelihood of discovering contraband at a location because “[s]eldom can an affiant seeking a search warrant state positively that a certain residence contains contraband.” *See id.*, ¶33 (citation omitted). Additionally, in *State v. Tompkins*, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988), the court held “where there is evidence that would lead a reasonable person to conclude that the evidence sought is likely to be in a particular location ... there is probable cause for a search of [that] location” even if it may also be reasonable to conclude that the evidence may be in a second or third location as well.

¶12 Here, the affidavit supporting the search warrant provided a sufficient basis for the magistrate to grant the search warrant. The affidavit contained information that Kapinos bought a significant amount of marijuana consistent with the intent to deliver, that the van used to buy the drugs was registered to the location for which the search warrant was requested, that Mueller identified the property, that Kapinos was the owner of that property, and that in Poteat's experience drug dealers often keep drugs, paraphernalia, and weapons at their home. This information is sufficient to support the conclusion that the magistrate “in issuing the search warrant made a practical, commonsense decision whether, given all of the circumstances set forth in the affidavit before him [or her], there was a fair probability that contraband or evidence of a crime would be

¹ Kapinos attempts to distinguish *State v. Ward*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517, from the present case based on the amount of drugs involved, the fact that Ward was the supplier, and the fact that the court took care not to create a per se rule. We hold each of these distinctions is without merit because none of them undermine the magistrate's determination that there was a fair probability evidence of Kapinos's crimes might be discovered at his home.

found at [Kapinos's] residence.”² See *State v. Lindgren*, 2004 WI App 159, ¶20, 275 Wis. 2d 851, 687 N.W.2d 60; see also *Ward*, 231 Wis. 2d 723, ¶26.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

² Because the search warrant was supported by probable cause, we do not reach the State's argument that evidence seized at Kapinos's home is admissible under a good faith exception to the exclusionary rule.

Additionally, we note, as the supreme court did in *Ward*, that just because there is probable cause to believe an individual is a drug dealer, it does not automatically give rise to probable cause to search that individual's residence. See *Ward*, 231 Wis. 2d 723, ¶36.

