

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 30, 2009**

David R. Schanker  
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. 2008AP1397-CR**

**Cir. Ct. No. 2005CF111**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RICKY L. SCHMALING,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Forest County:  
ROBERT A. KENNEDY, JR., Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Ricky Schmaling appeals a judgment of conviction for possessing THC as a second or subsequent offense and two counts of felony bail jumping. He contends the court should have suppressed evidence obtained during the execution of a search warrant at his cabin because a confidential

informant who provided information to law enforcement was not reliable. We affirm the judgment.

### **BACKGROUND**

¶2 On November 17, 2005, police applied for a warrant to search Schmaling's cabin in Forest County. As relevant here, the affidavit supporting the warrant request stated that, on November 15, 2005, the Department of Natural Resources received a call on its tip line from a confidential citizen witness regarding Ricky Schmaling. The informant reported that Schmaling was a convicted felon and would be hunting in Forest County during the gun deer season. The informant also provided the cabin's address.

¶3 The affidavit further stated that warden Timothy Otto contacted the informant by phone on November 16, and the informant told Otto that Schmaling would be at a cabin in Forest County, which was owned by Schmaling and Schmaling's sister and brother-in-law. The informant also stated that Schmaling would be driving a white Dodge pickup truck and provided the truck's license plate number. The informant told Otto that Schmaling would likely be carrying a bow while hunting and, if confronted, assert that he was bow hunting.

¶4 Otto instructed the informant to contact deputy Bill Mertig of the Forest County Sheriff's Department. That same day, the informant called Mertig and told him Schmaling would be staying at the cabin, that Schmaling was a convicted felon, and that the informant knew Schmaling was an avid hunter known to carry firearms.

¶5 Additionally, the affidavit stated police ascertained that Schmaling had purchased a resident gun deer hunting license, that Schmaling's cabin address

matched that provided by the informant, and that Schmaling owned a pickup truck matching the description and license plate number provided by the informant. Police also confirmed that Schmaling was a convicted felon. On November 17, a judge signed a warrant to search the cabin, and the warrant was executed November 18. Among other things, police recovered firearms and marijuana during the search.<sup>1</sup>

¶6 Schmaling moved to suppress evidence obtained from the search, arguing the affidavit supporting the warrant failed to establish probable cause. Specifically, he contended the affidavit failed to establish the informant was reliable. The circuit court denied the motion.

## DISCUSSION

¶7 A search warrant may only be issued 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) (citation omitted). On review, we accord great deference to a warrant-issuing magistrate’s decision. *See id.* A defendant challenging a magistrate’s decision to issue a search warrant must establish that the facts were clearly insufficient to support a probable cause finding. *Id.* We will uphold a magistrate’s decision if we conclude there is a substantial basis for the magistrate’s probable cause finding. *See id.*

¶8 A magistrate determining whether to issue a search warrant  
is simply to make a practical, commonsense decision  
whether, given all the circumstances set forth in the

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<sup>1</sup> While Schmaling was charged with being a felon in possession of a firearm, a jury found him not guilty of that offense.

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.

*Illinois v. Gates*, 462 U.S. 213, 238 (1983). When a magistrate’s determination is marginal or doubtful, we review it “in light of [the] strong preference that law enforcement officers conduct searches pursuant to a warrant.” *State v. Ward*, 2000 WI 3, ¶24, 231 Wis. 2d 723, 604 N.W.2d 517 (citation omitted).

¶9 Whether probable cause exists to believe evidence is located in a particular place is determined based on the totality of the circumstances. *Id.*, ¶26. A probable cause determination must be based on the reasonable inferences that can be drawn from the information provided by police. *Id.* When reviewing the magistrate’s determination, we must consider whether, viewed objectively, 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.” *State v. Kerr*, 181 Wis. 2d 372, 378, 511 N.W.2d 586 (1994) (quoting *State v. Starke*, 81 Wis. 2d 399, 408, 260 N.W.2d 739 (1978)).

¶10 Assessing the reliability of an informant’s information is part of the totality of the circumstances. *Gates*, 462 U.S. at 241. Factors considered when assessing the reliability of an informant’s tip include:

- (1) whether the informant personally observed the events,
- (2) the degree of detail shown in the informant’s statements,
- (3) whether the police independently corroborated the information,
- (4) the interval of time between the events and application for a warrant, and
- (5) whether the informant appeared in person before the judicial officer who issued the warrant.

*United States v. Mykytiuk*, 402 F.3d 773, 776 (7<sup>th</sup> Cir. 2005). An anonymous informant's veracity is largely unknown and unknowable. *State v. Boggess*, 115 Wis. 2d 443, 455, 340 N.W.2d 516 (1983). However, an anonymous informant is not automatically discredited. *Id.* The information provided by an anonymous informant is still considered as part of the totality of the circumstances. *Id.*

¶11 Schmaling's challenge to the search warrant focuses on the reliability of the confidential informant. He asserts the informant's information lacked sufficient detail to be reliable because many of the details provided were of public record. He also asserts police could have taken more steps to corroborate the information.

¶12 We conclude the level of detail provided by the informant, combined with the amount of police corroboration, were sufficient to justify issuing the search warrant. The informant told law enforcement that Schmaling, a convicted felon, would be staying at the cabin, possessed firearms, and would be hunting with a firearm during the gun deer hunting season. The informant also provided specific information about the cabin and the vehicle Schmaling would be driving. The police investigation corroborated Schmaling's status as felon, the ownership and address of the cabin, and Schmaling's vehicle registration.

¶13 Law enforcement's determination that Schmaling had obtained a gun deer hunting license also lent credence to the informant's assertion that Schmaling would be hunting with a firearm while staying at the cabin. Further, we note that while the informant's identity remains confidential, the informant did have multiple contacts with law enforcement. This indicates, at a minimum, the informant risked revealing his or her identity to police, making a nefarious tip less

likely. *See State v. Williams*, 2001 WI 21, ¶38, 241 Wis. 2d 631, 623 N.W.2d 106.

¶14 Altogether, the totality of the circumstances outlined in the affidavit supporting the search warrant supported a reasonable inference that Schmaling would possess a firearm at the cabin. *See Gates*, 462 U.S. at 238. Therefore, a substantial basis existed for the warrant-issuing court's determination that evidence of a crime would be found at the cabin. *See Higginbotham*, 162 Wis. 2d at 989.

*By the Court.*—Judgment affirmed.

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

