

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 20, 2002

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. 01-1849-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CF-153

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

THOMAS E. FORMARO,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 BROWN, J. Thomas E. Formaro appeals from a judgment of conviction as a party to the crime of manufacturing a controlled substance. He filed a motion to suppress evidence seized at his home under a search warrant. The trial court suppressed the thermal image scan evidence as an unreasonable search under *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 2046 (2001). Relying

on *State v. Loranger*, 2002 WI App 5, No. 00-3364-CR, we determine that the thermal imaging scan is admissible because it was obtained in good faith reliance on *State v. McKee*, 181 Wis. 2d 354, 510 N.W.2d 807 (Ct. App. 1993), which held that no warrant was required. Further, we conclude that the results of the thermal imaging scan in combination with electricity records showing that Formaro used above average amounts of electricity, police observation of fan venting and an anonymous informant's tip, were sufficient to provide the magistrate with a substantial basis for finding probable cause to issue a warrant to search Formaro's home.

¶2 On February 20, 2001, Kenosha County Detective Bruce Klawitter requested that the Kenosha County Circuit Court issue a warrant authorizing the search of Formaro's home. In his affidavit in support of the search warrant, Klawitter stated that the police had received a letter written by an anonymous person stating that a large marijuana grow was taking place at a particular residence and phone number. The letter writer claimed that the residence contained "1000 plus plants high quality." The affidavit stated that Klawitter then confirmed independently that the phone number matched with the address.

¶3 The affidavit further stated that, based on this tip, another detective went to the address and from the outside observed a fan in an open window located on the east side of the residence. The detective noted that at the time the temperature was in the low twenties and snow was falling. The affidavit stated that this detective knew from his experience that a fan placed at such a location in a building during those weather conditions was a common method of venting the odor of marijuana from a residence.

¶4 Additionally, the affidavit contained information regarding electric power used at Formaro's residence compared to the "average electric usage for a residence in Wisconsin." The records showed two meters at the location, one registered to Formaro's wife, DeAnna Miller, and one to his sister, who lived in an upper apartment. During November and December 2000 and January 2001, according to the records subpoenaed from Wisconsin Electric, the monthly electric bills were 3644 kilowatt hours and 4385 kilowatt hours. Other utility bills dating back to November 1999 showed kilowatt usage over 2000 kilowatt hours per month. The affidavit alleged that the average monthly kilowatt usage for a residential home is between approximately 700 to 900 kilowatt hours per month.

¶5 Finally, the warrant stated that, based on the anonymous tip, Klawitter and Agent Matthew Joy, a certified thermographer, conducted a thermal image of Formaro's residence. The thermal imagery device indicated that the heat signature from the residence was very high and showed unusual heat patterns emanating from the roof. According to Joy, the unusual heat patterns indicated the presence of indoor grow lights associated with the cultivation of marijuana.¹

¶6 The magistrate issued a warrant, and police searched Formaro's home, after which the State charged Formaro with being a party to the crime of manufacturing a controlled substance in violation of WIS. STAT. §§ 961.41(1)(h)3 and 939.05 (1999-2000),² and a party to the crime of possession with intent to

¹ The affidavit also alleged that Formaro had provided a false mailing address in the Kenosha county tax records and that "persons utilizing buildings for illegal production of drugs often provide false records regarding ownership or addresses of same." The State now concedes that the mailing address was not false but instead reflected a former address of Formaro's. We do not further consider that allegation in our analysis.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

deliver in violation of §§ 961.41(1m)(h)3 and 939.05. In response, Formaro moved to suppress all evidence obtained by the State as the result of the thermal image search and the subsequent search of his home. The motion was denied and on May 10, 2001, Formaro pled guilty to the manufacturing charge; the remaining charge was dismissed on the State's motion.

¶7 In light of the decision of the United States Supreme Court in *Kyllo*, issued on June 11, 2001, the trial court permitted Formaro to withdraw his plea and the court reinstated both charges. The court said the issue to be considered was whether the search warrant affidavit provided probable cause absent the thermal imaging information. After a hearing, the court concluded that the affidavit was sufficient even without the scan:

I am satisfied that even without the thermal imaging within the affidavit for the warrant the fact that you had the anonymous tip, the match-up of the address, phone number, records, electricity records, and the fan venting, those facts would be sufficient for a magistrate, even without thermal imaging, to issue the warrant.

¶8 Subsequently, Formaro pled guilty to the manufacturing charge and the possession with intent to deliver charge was dismissed. The court sentenced Formaro to five years in prison and five years of extended supervision.

¶9 The outcome of this case on appeal is controlled by *Loranger*, in which we applied the good faith exception to admit thermal imaging evidence obtained without a warrant by the police in reliance on *McKee*, 181 Wis. 2d at 356, which held that thermal imaging scans were not a “search” triggering Fourth Amendment concerns. *Loranger*, 2002 WI App 5 at ¶14. Similarly, in this case, the thermal imaging evidence was obtained without a warrant in violation of the Fourth Amendment. See *Kyllo*, 533 U.S. ___, 121 S. Ct. at 2046. However, in

February 2001 when police used the device to detect heat from Formaro's home, *Kyllo* had not yet been decided and *McKee* was still good law. Therefore, the police relied on *McKee* in good faith and therefore, as we concluded in *Loranger*, suppressing the evidence would serve no remedial purpose. *Loranger*, 2002 WI App 5 at ¶14.

¶10 We now turn to the question of whether the affidavit supported a finding of probable cause. In our review of the magistrate's finding of probable cause, we accord great deference to the magistrate's determination. *State v. Multaler*, 2001 WI App 149, ¶24, 246 Wis. 2d 752, 632 N.W.2d 89, review granted, 2001 WI 117, 247 Wis. 2d 1031, 635 N.W.2d 781 (Wis. Sept. 19, 2001) (No. 00-1846-CR). "The test for the issuance of a search warrant is whether, considering the totality of the circumstances set forth in support of the warrant, probable cause exists to believe that objects linked to the commission of a crime are likely to be found in the place designated in the warrant." *Loranger*, 2002 WI App 5 at ¶22. Our duty on appeal is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id.*

¶11 Viewing the totality of the circumstances, we conclude that the magistrate had a substantial basis for concluding that probable cause existed. In this case, as in *Loranger*, the electric utility readings in combination with the results of the thermal imaging scan are consistent with the heat generated by lights used to grow marijuana indoors. *Id.* at ¶23. In addition to these facts, the police observed the use of a fan in an open window in the middle of winter, another fact that is consistent with an indoor marijuana grow operation.

¶12 The only difference between the facts before us now and the *Loranger* case is that in *Loranger* the confidential informant was an eyewitness to

the presence of the marijuana plants in the defendant's home. *Id.* at ¶3. In our case, the anonymous informant did not provide specific information on how he or she came to know about the marijuana in the home. While we would prefer to have more detailed information, its absence in this case does not mandate a different outcome. The reliability of the tip was independently corroborated by the police investigation that included matching the phone number with the address, observing the fan venting, and collecting the electricity and thermal imaging records. Based on these facts as they were set forth in the affidavit, we conclude that the magistrate had a substantial basis for determining that probable cause existed.

¶13 Formaro argues that these corroborating facts are merely innocent details that cannot establish probable cause. We do not agree. While the use of a fan, for example, may be a common fact, its use in the middle of winter nonetheless corroborates the anonymous tip. Moreover, the United States Supreme Court has recently reminded us that in viewing the totality of the circumstances we should not consider factors in isolation from each other. *See United States v. Arvizu*, 122 S. Ct. 744, 753 (2002) (holding that factors which by themselves suggested a “family in a minivan on a holiday outing” collectively amounted to reasonable suspicion). As the Supreme Court observed, although each of a series of acts may be innocent in itself, taken together, they may warrant further investigation. *Id.* at 751. We determine that the combination of “innocent” details alleged in the affidavit—the fan venting, electricity usage, and unusual heat patterns emanating from the residence—justified a finding of probable cause.

¶14 Finally, Formaro argues that the information concerning the fan was too stale to provide probable cause for the warrant. He points out that two months

elapsed between the time the fan was observed in the window and the issuance of the warrant. As we discussed in *Loranger*, however, the continuous nature of marijuana growing justifies greater lapses of time. *Loranger*, 2002 WI App 5 at ¶24. In *Loranger*, we determined that an informant's tip based on information eighteen months old was not stale when electricity records and thermal imaging results suggested that the operation was ongoing. *Id.* Here, the electricity records and thermal imaging results indicate that the marijuana grow was in operation at the time the police observed the fan venting in the window. Formaro's argument that the fan evidence is stale is without merit.

¶15 In sum, we conclude that probable cause existed to believe that objects linked to the commission of a crime were likely to be found in Formaro's residence.

By the Court.—Judgment affirmed.

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