COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2358-CR **Cir. Ct. No. 00-CM-14**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

NATASHA M. RUETTEN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Richland County: EDWARD E. LEINEWEBER, Judge. *Reversed and cause remanded.*

¶1 VERGERONT, J.[1] The State appeals the order of the circuit court granting the motion of Natasha Ruetten to suppress evidence obtained in a search

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

of her apartment pursuant to a search warrant. As a result of that evidence, Ruetten was charged with possession of tetrahydrocannabinols (THC) contrary to WIS. STAT. §§ 961.41(3g)(e) and 961.14(4)(t), and possession of drug paraphernalia contrary to WIS. STAT. § 961.573(1), both as a party to the crime. We conclude the warrant was supported by probable cause to believe there was evidence of a crime in her apartment. We therefore reverse and remand for further proceedings.

¶2 The search warrant was issued on July 8, 1999, based on the affidavit of Sergeant James Lane of the Richland Center Police Department, signed on that same date. The relevant averments in the complaint for the warrant are as follows: On Monday, July 5, 1999, at 4:10 a.m., Sergeant Lane removed two bags of trash from the alley behind a building at 155 South Main Street. The building housed a business, the Travel Center, on the ground floor, and an apartment above. Sergeant Lane was aware from past observations that the bags were in the spot where the garbage for the apartment was typically picked up by the city, and that Monday was garbage pickup day for this part of the city. The next day Sergeant Lane examined the bags at the police department. In the first bag there was a plastic baggie with crumbs and a seed, and several notes to and from "Natasha," with one listing the telephone number of "Natasha." The seed tested positive for THC.[2] Sergeant Lane believed the phone number was unlisted, but that it was the telephone number of Natasha Ruetten at 155 1/2 South Main Street. Based on a prior search warrant executed at the apartment over the Travel Center and on prior police contacts concerning Natasha Ruetten, Sergeant Lane

[2] The complaint explained the type of test that showed the presence of tetrahydrocannabinols and Sergeant Lane's training and experience regarding this test.

believed that she lived in that apartment. In the second bag there were an empty box of Zig-Zag rolling papers, a "roach," which is a butt of a marijuana cigarette, and stems; the roach and stems tested positive for THC. There were also two plastic baggies, and crumbs in one tested positive for THC. In this second bag, too, there were notes to and from "Natasha."[3]

¶3 The search warrant was executed on July 13, 1999, at 3:40 a.m. Ruetten was present in the apartment, as was another individual. According to the criminal complaint, crumbs in an empty cigarette package, crumbs in a pipe, crumbs on a pack of Zig-Zag papers, crumbs in a roach, and crumbs on a triple beam scale all tested positive for THC.

¶4 Ruetten moved to suppress the evidence seized from her apartment on the ground that the warrant was issued without probable cause, in violation of her rights under the Fourth and Fourteenth Amendment.[4] The circuit court initially denied Ruetten's motion. However, it reconsidered that decision on its own motion and, after providing the parties with the opportunity to present more argument, ultimately ordered the evidence suppressed. The court concluded that "the presence of extremely small quantities of marijuana" in a single garbage

[3] The complaint seeking the warrant also averred that in the second bag were "what could be a cocaine bindl[e], straw and mirror. Your affiant was unable to test the substance present on the straw and mirror as the quantities of material were to small." These averments are not relevant to our analysis.

[4] The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

pickup from a residence three days earlier did not support a finding of probable cause to believe the residence continued to contain evidence of THC on the date of the issuance of the warrant.

¶5 As the circuit court recognized, when it is considering whether a search warrant is supported by probable cause, it is to accord great deference to the issuing magistrate, and this court does the same in our review. ***State v. Ward***, 2000 WI 3, ¶21, 231 Wis. 2d 723, 604 N.W.2d 517. We are to uphold the issuing magistrate's decision that probable cause exists unless the facts averred in the complaint seeking the warrant are clearly insufficient to support that decision. ***Id.*** Our deference to the magistrate's probable cause determination supports the well-established preference under the Fourth Amendment that searches be conducted pursuant to a warrant. ***Id.*** at ¶22. Thus, when a magistrate's determination of probable cause is doubtful or marginal, we examine it in the light of this strong preference. ***Id.*** at ¶24.

¶6 Probable cause for this purpose exists if the facts averred are such that a reasonable person can determine that there is a fair probability that contraband or evidence of a crime will be found at the location to be searched. ***State v. Swift***, 173 Wis. 2d 870, 883-84, 496 N.W.2d 713 (Ct. App. 1993) In making this determination, the magistrate may "make the usual inferences reasonable persons would draw from the facts presented." ***Ward***, 2000 WI 3 at ¶28 (quoting ***Bast v. State***, 87 Wis. 2d 689, 693, 275 N.W.2d 682 (1979)). As long as the particular inference drawn by the magistrate from the facts averred is reasonable, it need not be the only reasonable inference that could be drawn; thus, the existence of a competing reasonable inference is not a proper basis on which to reverse a magistrate's determination of probable cause. ***Ward***, 2000 WI 3 at ¶30.

¶7 Applying this standard, we conclude that the facts averred in the complaint seeking the warrant, together with the reasonable inferences that may be drawn from those facts in favor of probable cause, are sufficient to support a determination that probable cause existed on July 8 to believe that evidence of a crime would be found in the apartment above the Travel Center. First, the notes in both bags to and from Natasha, coupled with the officer's knowledge that Natasha Ruetten lived in that apartment, permit the reasonable inference that the two garbage bags are from that apartment. Second, because the garbage is picked up every Monday, it is reasonable to infer that this garbage was set out sometime since the previous Monday. Third, each garbage bag contained a plastic baggie that had evidence of THC in it, and one garbage bag contained an empty pack of Zig-Zag papers, as well as a roach. It is reasonable to infer that the baggies were used to hold marijuana; it is also reasonable to infer that the package of Zig-Zag papers had been used for rolling marijuana cigarettes—like the roach found in the same garbage bag. It is therefore reasonable to infer that someone in the apartment had been smoking marijuana cigarettes on a number of occasions. From that inference, it is reasonable to infer that someone in the apartment smokes marijuana cigarettes on a continuing basis, which, in turn, makes it reasonable to infer that some evidence of marijuana would be found in the apartment three days after the garbage bags were recovered.

¶8 The circuit court was concerned that with such small amounts of THC in the garbage bags, and with only one garbage pickup involved, it was not reasonable to infer that there was THC in the apartment three days later. However, as we have explained, other items found in the garbage bags made it reasonable to infer that someone in the apartment was smoking marijuana on an

ongoing basis. From that, it is reasonable to infer there would be marijuana in the apartment three days after the garbage bags were discovered.

¶9 It appears the circuit court may have found ***United States v. Cunningham***, 145 F. Supp. 2d 964 (E.D. Wis. 2001), persuasive. There the district court concluded that the "trace amount" of cocaine found in the garbage at a residence was, by itself, insufficient to establish probable cause that contraband would be found in the residence, and, since the other statements in the affidavit were too conclusory, the court decided there was no probable cause. ***Id.*** at 968. The court stated: "The presence of cocaine traces in garbage does not necessarily give rise to an inference that additional drugs are located on the premises. Cocaine traces may be attributable to one[-]time personal use of drugs by either a resident or a third party." ***Id.*** at 967. We consider this case to be of limited use for the following reasons: (1) the court frames the question as whether an inference "necessarily" follows, not as whether it is reasonable, which is the standard under ***Ward***; (2) there were no other items found with the trace amount of cocaine that would give rise to reasonable inferences that the contents of the garbage were from the residence and that there was ongoing use; and (3) the court did not mention or utilize the deferential standard of review of the magistrate's decision that we are bound to apply under ***Ward*** and prior Wisconsin precedent.[5]

¶10 Ruetten argues that the contents of the garbage bags show only that "sometime in the past the former possessor of the garbage probably discarded that

[5] In ***Cunningham***, the magistrate found probable cause based on the trace amounts of cocaine in conjunction with the statements the district court considered too conclusory; the magistrate agreed with the court that the trace amount of cocaine alone was insufficient. ***U.S. v. Cunningham***, 145 F. Supp. 2d 964, 967 (E.D. Wis. 2001).

residue and the marijuana the residue came from probably was consumed." However, Ruetten does not explain why it is not reasonable to infer that someone in the apartment was smoking marijuana on an ongoing basis.

¶11 Ruetten also argues that the circuit court fully and carefully considered all the circumstances and suggests we should not "undermine" the circuit court's decision. We agree the circuit court gave very thoughtful consideration to the issue before it, but, as we have explained above, we are to defer to the issuing magistrate, not to the reviewing circuit court. Finally, Ruetten argues that, when the government's interest in law enforcement conflicts with the rights of an individual, "the balance should generally tilt in favor of the individual." However, as the State points out in reply, the requirement of probable cause for a search warrant as specified in the Fourth Amendment expresses the balance between the interests of government and the rights of the individual that the framers of the United States Constitution decided upon.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.