

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 30, 2003

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. 02-1398-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01-CF-362

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN C. DEMEUSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
WAYNE J. MARIK, Judge. *Affirmed.*

Before Nettlesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Brian C. Demeuse has appealed from a judgment convicting him upon a plea of no contest of possession of marijuana with intent to deliver. The sole issue on appeal is whether the trial court erred in denying Demeuse's motion to suppress evidence seized from his residence pursuant to a search warrant. Demeuse contends that the information contained in the affidavit

in support of the warrant was stale, and that the issuing judge therefore lacked probable cause to issue the search warrant. We conclude that the trial court properly denied the motion to suppress, and affirm the judgment of conviction.

¶2 The material facts are undisputed. On March 24, 2001, Brian Annen, a police officer for the city of Burlington, filed an affidavit in support of a request for a warrant to search Demeuse's residence at 225 Reynolds Avenue for marijuana, other controlled substances, drug paraphernalia, and other evidence of drug trafficking. Annen indicated that 225 Reynolds Avenue was a two-family duplex. He attested that police officers observed two white garbage bags placed on the curb in front of the residence at 225 Reynolds Avenue on March 22, 2001, the day before the weekly garbage pickup for that neighborhood. He attested that the police subsequently retrieved the bags, and that he examined their contents on March 23, 2001, discovering green plant material which tested positive for THC. He attested that the bags also included an envelope addressed to Demeuse's father "and Boys" at 225 Reynolds Avenue, and an ATM receipt.

¶3 Annen's affidavit also described events which occurred at a motel in Burlington on December 29, 2000. He attested that police were allowed into a rented room by the renter of the room, and asked everyone in the room for identification. Police reports indicated that Demeuse was present and fled from the room. He was caught after running several hundred yards and had in his possession a metal gram scale and \$570 in cash. According to the affidavit, Demeuse informed officers at the time that he was unemployed. Annen's affidavit also indicated that the search of another subject in the motel room uncovered a bong, which is used for smoking marijuana, and that Demeuse was convicted of possession of marijuana in 1998.

¶4 On March 24, 2001, the trial court issued a warrant authorizing police to search Demeuse's residence. The search warrant was executed on March 26, 2001. Inside a safe in Demeuse's bedroom the police discovered six plastic baggies containing marijuana and \$1060 in currency.

¶5 Demeuse was subsequently charged with possession of marijuana with intent to deliver.¹ He moved to suppress the evidence seized from his residence. He argued that the affidavit in support of the search warrant did not establish probable cause for the search because the events which occurred on December 29, 2000, and his 1998 drug conviction were too remote to support the search. He also relied on the fact that the building at 225 Reynolds Avenue was a duplex, and that Annen's affidavit did not indicate that the marijuana and the envelope with the Demeuse name on it came from the same garbage bag. He contended that nothing in the information therefore provided a basis to infer that the garbage bag containing the marijuana came from him rather than from the resident of the other half of the duplex.

¶6 A search warrant must be supported by probable cause. *State v. Jones*, 2002 WI App 196, ¶10, 257 Wis. 2d 319, 651 N.W.2d 305. Probable cause is determined by the totality of the circumstances. *Id.* Probable cause exists if the issuing judge is apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked to the commission of a crime and will be found in the place to be searched. *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991). The issuing judge must make a practical,

¹ The complaint against Demeuse initially included penalty enhancers and two additional misdemeanor charges. When Demeuse entered his no contest plea, the penalty enhancers were dropped and the misdemeanor charges were dismissed.

commonsense decision whether, given all the circumstances set forth in the affidavit, 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. *Id.* at 990.

¶7 The issuing judge may draw reasonable inferences from the facts asserted in the affidavit. *State v. Benoit*, 83 Wis. 2d 389, 399, 265 N.W.2d 298 (1978). The test is not whether the inference drawn is the only reasonable inference, but simply whether it is a reasonable inference. *Jones*, 2002 WI App 196 at ¶10.

¶8 When an appellant contends that a warrant was not supported by probable cause, our focus is not on the trial court's decision granting or denying the suppression motion, but on the issuing judge's determination that the application for the warrant stated probable cause. *State v. Ward*, 222 Wis. 2d 311, 318, 588 N.W.2d 645 (Ct. App. 1998), *rev'd on other grounds*, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517. The burden is on the person challenging the warrant to demonstrate that the evidence before the issuing judge was clearly insufficient. *State v. DeSmidt*, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990). We pay great deference to the issuing judge's decision, rather than reviewing the matter de novo. *Id.*

¶9 Our duty as the reviewing court is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Higginbotham*, 162 Wis. 2d at 989. The quantum of evidence necessary to establish probable cause for a search warrant is less than that required to support a bindover following a preliminary hearing. *Id.* Resolution of doubtful or marginal cases regarding an issuing judge's determination of probable cause must be largely determined by the

strong preference that law enforcement officers conduct their searches pursuant to a warrant. *Id.* at 990.

¶10 Demeuse contends that the information concerning his activities at the motel on December 29, 2000, and his 1998 drug conviction was “stale” by the time police applied for the search warrant.

There is not, however, any dispositive significance in the mere fact that some information offered to demonstrate probable cause may be called stale, in the sense that it concerns events that occurred well before the date of the application for the warrant. If such past fact contributes to an inference that probable cause exists at the time of the application, its age is no taint.

State v. Moley, 171 Wis. 2d 207, 213, 490 N.W.2d 764 (Ct. App. 1992) (citation omitted).

¶11 Courts must look to the circumstances of each case when determining whether the information is stale. *Jones*, 2002 WI App 196 at ¶21. “When the activity is of a protracted and continuous nature, the passage of time diminishes in significance.” *State v. Ehnert*, 160 Wis. 2d 464, 469-70, 466 N.W.2d 237 (Ct. App. 1991). The nature of the criminal activity under investigation and the nature of what is being sought have a bearing on where the line between stale and fresh information should be drawn in a particular case. *Id.* at 470.

¶12 The information regarding Demeuse’s 1998 conviction, the incident at the Burlington motel in December 2000, and the discovery of marijuana in one or both of the garbage bags in front of his home in March 2001 must be considered together, not separately. The information that on March 23, 2001, marijuana was found in one or both of the garbage bags in front of Demeuse’s home, along with

mail addressed to the Demeuse household, was clearly not stale on March 24, 2001. Moreover, when considered together, the evidence that Demeuse was involved in drug-related activity in 1998 and December 2000 contributed to an inference that the marijuana found in the garbage bags came from his residence, and not that of his neighbor. In making this determination, we note that, as asserted by Annen in his affidavit, Demeuse's flight from the motel room, combined with his possession of a type of scale used in marijuana sales and an unusually large amount of cash for an unemployed eighteen-year-old, supported an inference that he was involved with drug sales in December 2000. Because Demeuse also had a prior conviction for possession of marijuana, and because drug dealing is frequently an on-going, long-term activity, a reasonable inference when marijuana was discovered in the garbage in front of his residence in March 2001 was that it belonged to him. This inference was strengthened by the evidence that one of the garbage bags also contained mail addressed to Demeuse's residence, clearly permitting an inference that the marijuana came from his residence, and not that of his neighbor.²

¶13 Under the totality of the circumstances, the information permitted the issuing judge to reasonably conclude that evidence of drug dealing would probably be found in Demeuse's residence at 225 Reynolds Avenue. The search warrant therefore was properly issued, and the motion to suppress the evidence was properly denied.

By the Court.—Judgment affirmed.

² The record also indicates that both garbage bags were white, supporting an inference that they came from the same residence.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5 (2001-02).

