COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP98-CR **Cir. Ct. No. 2009CF1291**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DEMONN S. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Demonn S. Williams appeals from a judgment of conviction entered upon his guilty pleas to two felonies. The issue is whether the circuit court erroneously denied his motion to suppress evidence found when police executed a search warrant at his home. Williams contends that the search

warrant was invalid because it rested on stale information. We disagree and affirm.

BACKGROUND

¶2 On March 4, 2009, Police Officer Nathan Neibauer applied for a warrant to search Williams's home, a single-family Milwaukee residence. Neibauer's supporting affidavit showed that he spoke to a reliable confidential informant within the previous seventy-two hours and that the informant saw Williams in his home carrying a gun in his waistband "within the last week." The affidavit further showed that Neibauer knew from other sources that Williams is a felon who may not legally possess firearms, that Williams previously was convicted of both illegally possessing firearms and possessing narcotics with intent to deliver them, that Williams is a member of the Vice Lords street gang, and that a security camera is positioned at the front entrance of Williams's home. The affidavit described Neibauer's experience in executing search warrants and reflected that searches for firearms frequently uncover evidence of their use, such as holsters, cartridges, additional magazines, and ammunition.[1]

¶3 Based on the information in the affidavit, a Milwaukee County court commissioner signed the search warrant, and officers executed it on March 6, 2009. The search uncovered a firearm and a quantity of marijuana plants. Williams moved to suppress the evidence, claiming that the officers lacked

[1] Williams appropriately included copies of some record documents in the appendix to his brief-in-chief, but he discusses the search warrant, supporting affidavit, and other relevant documents without including any citations to assist the court in locating those materials in the appellate record. We remind appellate counsel that the court requires "citations to ... parts of the record relied on." *See* WIS. STAT. RULE 809.19(1)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

probable cause for a search because the warrant rested on stale information from the informant. After the circuit court denied the motion, Williams pled guilty to possessing a firearm as a felon and to possessing more than four but less than twenty plants containing THC with intent to manufacture THC. This appeal followed.[2]

DISCUSSION

¶4 "A search warrant may issue only upon probable cause." ***State v. Jones***, 2002 WI App 196, ¶10, 257 Wis. 2d 319, 651 N.W.2d 305. The warrant-issuing magistrate must consider the totality of the circumstances presented in the search warrant application, and the magistrate may also draw reasonable inferences from the facts presented. ***Id.*** The magistrate must then "make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517 (citation omitted). When we review a challenge to a search warrant, we "accord great deference to the warrant-issuing [magistrate's] determination of probable cause, and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause. Thus, 'the burden of proof ... is clearly with the defendant.'" ***State v. Multaler***, 2002 WI 35, ¶7, 252 Wis. 2d 54, 643 N.W.2d 437 (citations and one set of brackets omitted).

[2] A circuit court's order denying a motion to suppress evidence may be reviewed on appeal from a judgment of conviction notwithstanding the defendant's guilty pleas. *See* WIS. STAT. § 971.31(10).

¶5 Here, Williams complains that the search warrant application contained stale information from the confidential informant. The supporting affidavit reflects that several days passed between the time that the informant observed Williams with a gun and the time that Neibauer applied for a warrant. Williams emphasizes that as many as ten days may have separated the observation and the application. He concludes that probable cause therefore is not shown. Williams, however, focuses too narrowly on the timing of the informant's observation.

¶6 Courts distinguish between stale probable cause and stale information:

> Stale probable cause, so called, is probable cause that would have justified a warrant at some earlier moment that has already passed by the time the warrant is sought.
>
> 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.

Jones, 257 Wis. 2d 319, ¶20 (citations and quotation marks omitted). Thus, the age of the information in the search warrant application does not determine whether the application supports a finding of probable cause. Rather, "[t]he probable cause determination in the face of a staleness challenge depends upon the nature of the underlying circumstances, whether the activity is of a protracted or continuous nature, the nature of the criminal activity under investigation, and the nature of what is being sought." ***Multaler***, 252 Wis. 2d 54, ¶37.

¶7 The circumstances here include a reliable report of a felon in possession of a firearm within the previous ten days.[3] Significantly, Williams fails to cite any case in which a court suppressed evidence because it was seized pursuant to a search based on stale information about suspected gun possession. A number of courts, however, have observed that a gun is not the kind of object that is consumed, used up, or casually discarded, and therefore information about illegal possession of a firearm is not too old to support a search warrant application even after the passage of many days or weeks. *See, e.g.*, ***United States v. Neal***, 528 F.3d 1069, 1074 (8th Cir. 2008) ("Information that someone is suspected of possessing firearms illegally is not stale, even several months later, because individuals who possess firearms tend to keep them for long periods of time."); ***United States v. Singer***, 943 F.2d 758, 763 (7th Cir. 1991) (passage of six months between anonymous tip about a firearm and no-knock warrant not too long because firearms "are durable goods useful to their owners for long periods of time"). *See also* ***United States v. Morrow***, No. 06-CR-54, 2006 WL 1937355, at *7 (E.D. Wis. Jul. 11, 2006) (passage of thirty to forty days between observation of firearm and issuance of warrant not too long because guns "are the type of thing that people keep for a long time"); ***United States v. Mayes***, No. 06-CR-314, 2007 WL 486601, at *4 (E.D. Wis. Feb. 12, 2007) (passage of twenty days between shooting and warrant application not too long because gun is not likely to be "consumed or dispersed").[4]

[3] Williams does not suggest that the confidential informant was an unreliable source, and the record would not support such a claim on appeal.

[4] Unpublished federal court opinions may be cited for their persuasive value. *See* ***State ex rel. Gendrich v. Litscher***, 2001 WI App 163, ¶7 n.6, 246 Wis. 2d 814, 632 N.W.2d 878.

¶8 Further, the circumstances presented to the magistrate included more than the informant's observation of Williams with a gun to support the conclusion that his home probably contained evidence of a crime. The magistrate could properly take into account Williams's prior convictions for gun possession and for possessing narcotics with intent to deliver them. *See* ***State v. Schaefer***, 2003 WI App 164, ¶22, 266 Wis. 2d 719, 668 N.W.2d 760 (prior convictions are part of the "brick-by-brick case for probable cause"); *see also* ***State v. Lee***, 2009 WI App 96, ¶15, 320 Wis. 2d 536, 771 N.W.2d 373 (guns are tools of the drug trade). Additionally, the disclosure that Williams is a member of the Vice Lords street gang gave rise to a reasonable inference that he would maintain possession of the gun. *See* ***Jones***, 257 Wis. 2d 319, ¶10 (test is whether inference drawn is reasonable, not whether it is the only reasonable inference). The security camera at the door of Williams's single-family residence was another "suspicious sign[]." *See* ***State v. Artic***, 2010 WI 83, ¶42, 327 Wis. 2d 392, 786 N.W.2d 430.

¶9 A felon commits a crime by possessing a firearm, no matter how briefly the possession lasts. ***State v. Black***, 2001 WI 31, ¶19, 242 Wis. 2d 126, 624 N.W.2d 363. The warrant application in this case described Williams's commission of that crime within the previous ten days, and the application also advised the magistrate that paraphernalia associated with firearms is routinely discovered during searches for them. In light of all of the information available, the magistrate could reasonably conclude that a firearm or evidence of firearm possession would probably be found in Williams's home less than two weeks after the informant saw Williams there illegally carrying a gun.

By the Court.—Judgment affirmed.

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