COURT OF APPEALS
DECISION
DATED AND RELEASED

December 7, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0638-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEORGE W. ALLEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Rock County: JAMES E. WELKER, Judge. *Reversed and cause remanded*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. George W. Allen challenges a suppression order. The issue is whether the affidavit provided probable cause to issue a search warrant. Because of the affidavit's stale, irrelevant and conclusory averments, we conclude that the affidavit does not provide a sufficient basis for probable cause to issue a search warrant. Therefore, we reverse and remand for further proceedings, including withdrawal of Allen's guilty plea.

The affidavit on which the warrant to search Allen's house was based included the following information:

> 1. Allen produced $745 in cash--which he retrieved from his bathroom--as a warrant payment to a warden from DNR who had gone to Allen's house to arrest him for a boating violation; the warden also observed that Allen had a number of $100 bills on hand;
>
> 2. Allen sold marijuana from the same address nine months earlier, according to a reliable confidential informant;
>
> 3. a police dog, trained and experienced in drug searches, alerted to the currency collected from Allen;
>
> 4. Allen was convicted of the manufacture/ delivery of a controlled substance in 1989;
>
> 5. Allen was "involved" with the reckless use of a weapon in 1989;
>
> 6. police suspected that Allen sells cocaine;
>
> 7. Allen was employed at a topless bar.

The trial court considered the totality of the circumstances and denied Allen's suppression motion, primarily on the basis of the large amount of cash in Allen's bathroom and the information from the informant. The trial court refused to allow expert testimony on the reliability of a dog alerting to cash because the court didn't "think that the dog makes any difference." The court also disregarded the "gun episode [as] surplusage."

A court must determine whether the commissioner who issued the

> warrant was "apprised of 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." The warrant-issuing commissioner's determination of probable cause cannot be upheld, however, if the affidavit provides nothing more than the legal conclusions of the affiant.
>
> ....
>
> The task of the warrant-issuing commissioner "is simply to make a practical, common-sense 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."

State v. Kerr, 181 Wis.2d 372, 378-79, 511 N.W.2d 586, 588 (1994), *cert. denied*, 115 S. Ct. 2245 (1995) (citations omitted). On review, we decide whether there was a "substantial basis" for the probable cause determination. ***Illinois v. Gates***, 462 U.S. 213, 238-39 (1983); ***State v. Anderson***, 138 Wis.2d 451, 469, 406 N.W.2d 398, 406 (1987).

We conclude that the $745 in cash found in a somewhat unusual location is insufficient to establish probable cause to search Allen's house for evidence of drug dealing. We also conclude that the information from the informant was stale. The allegations supporting probable cause must be sufficiently recent to provide a reasonable basis to believe that the objects sought remain in the area subject to search. *See* ***United States v. Johnson***, 461 F.2d 285, 287 (10th Cir. 1972). An alleged sale of marijuana is too remote in time to provide probable cause to search Allen's house for contraband ten months later.

The State urges us to apply the canine alert evidence to supplement the other facts in the affidavit. Allen cites persuasive authority that "the evidentiary value of the narcotics dog's alert [is] minimal." ***United States v. $5,000 in U.S. Currency***, 40 F.3d 846, 849 (6th Cir. 1994). We conclude that the canine alert evidence in this record is insufficient to establish probable cause.

Allen's 1989 conviction is relevant but independently insufficient to establish probable cause. The l989 involvement with a weapon is too vague to establish probable cause. The Rock County Metro Unit files reflect that Allen is suspected of selling cocaine. However, the affidavit must provide more than mere suspicions to demonstrate probable cause. *See* ***State v. Higginbotham***, 162 Wis.2d 978, 992, 471 N.W.2d 24, 30 (1991). There also is an averment that Allen was employed as a disc jockey at a topless bar. No one attempts to assert that such employment is relevant to probable cause.

The State urges us to consider the totality of the circumstances, rather than the averments individually, citing ***State v. Kerr***, 181 Wis.2d 372, 380, 511 N.W.2d 586, 589 (1994) (totality of circumstances permits probable cause determination because affidavit supporting search warrant "contains a minimal factual basis to support probable cause"). However, even the "minimal factual basis" in the ***Kerr*** affidavit exceeded the totality of the instant averments.[1] We conclude that the marginally relevant averments—Allen's 1989 conviction, coupled with his keeping $745 in cash in his bathroom—even if considered collectively, do not establish probable cause.

The State alternatively urges us to recognize the good faith exception to the exclusionary rule. ***United States v. Leon***, 468 U.S. 897, 922-24 (1984). We decline to do so because "effectively overrul[ing] a controlling decision of the Wisconsin Supreme Court is patently erroneous and usurpative."[2] ***State v. Grawien***, 123 Wis.2d 428, 432, 367 N.W.2d 816, 818 (Ct. App. 1985). Therefore, we reverse and remand for further proceedings, including withdrawal of Allen's guilty plea.

---

[1] In ***State v. Kerr***, 181 Wis.2d 372, 377, 511 N.W.2d 586, 588 (1994), the affidavit supporting the search warrant contained averments that defendant: (1) was carrying large amounts of cash, from which he paid for his airline tickets and motel room; (2) had not made prior reservations or specified a departure date; (3) carried a metal suitcase of a type known to be used by drug traffickers; and (4) was suspected of possession of a concealed firearm. These averments, which collectively fit the profile of a drug trafficker, were current, relevant and factually specific, unlike those in the instant case.

[2] Before we recognize the good faith exception to the exclusionary rule, ***State v. Kriegbaum***, 194 Wis. 229, 215 N.W. 896 (1927), and ***Hoyer v. State***, 180 Wis. 407, 193 N.W. 89 (1923), must be overruled.

By the Court.—Judgment reversed and cause remanded.

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