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October 1, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP1892-CR

State of Wisconsin v. Jonathan D. Marshall (L.C. #2011CF1323)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Jonathan Marshall appeals a judgment convicting him of possession of a firearm by a felon and possession of body armor by a felon. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The sole issue on appeal is whether evidence seized from Marshall's home should have been suppressed because the affidavit in support of the search warrant failed to establish probable cause for the search. The applicable test is whether, under the totality of the circumstances, the facts set forth in the affidavit and reasonable inferences drawn therefrom would "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." *State v. Casarez*, 2008 WI App 166, ¶10, 314 Wis.2d 661, 762 N.W.2d 385. We will uphold the decision to issue a search warrant unless the supporting affidavit is "clearly insufficient" to meet this standard. *Id.*

Police applied for a warrant to search Marshall's home for evidence related to the crime of intimidation of a witness. Specifically, the police sought to find letters or other communications showing that Marshall was involved in a conspiracy with a jail inmate named Deyul Thames to intimidate or kill Thames' girlfriend.

According to the affidavit, the girlfriend had provided the police with information leading to drug charges that were pending against Thames. During one recorded telephone call from jail, Thames directed his daughter to write down an encrypted message, which the police later decoded as saying, "MZ BITCH HAS TO BE KILLED BY TKE SECOND." In another phone call, Thames told his daughter that she needed to get the girlfriend "to do what needs to be done," and to "drill that script" into her.

The jail also recorded several phone calls initiated by Thames, sometimes involving third parties, to an individual called "Nip." In one call with Nip on the line, Thames asked a female later identified to be Elizabeth Gray whether she had "talked to those people." When police

subsequently spoke with Gray, Gray turned over a letter that Thames had sent her from jail in an envelope with another inmate's name on it. In the letter, Thames had directed Gray to attempt to find the girlfriend and to visit in jail two other people later charged in a plot to kill the girlfriend, to instruct them on what to say when called to testify against Thames. The girlfriend's brother-in-law was later shot to death at one of the locations identified in Thames' letter as a place to look for the girlfriend. Gray also told police that she had been instructed to share a portion of Thames' letter with Nip, who was a former boyfriend of Gray's daughter. Both Gray's daughter and the girlfriend identified Nip as Marshall and described the same address as his residence.

In the portion of the letter that Gray was supposed to share with Marshall, Thames noted that he would have a chance in his case if neither the girlfriend nor Thames' daughter testified. The letter also stated that Thames was going to attempt to show that the coded message that had been intercepted was part of a book or movie that he was writing, and that the chapters or titles of the alleged book were on the top of some of the pages that Thames had sent to Marshall. The affiant concluded that the phone calls between Thames and Marshall and Thames' letter to Gray showed that Marshall was fully involved in Thames' scheme to influence witness testimony, and that the reference in the letter to Gray about other pages Thames had sent to Marshall showed that Marshall was likely in possession of other letters from Thames.

Marshall contends that the affidavit provided no more than speculation that there might have been other letters in Marshall's residence relating to witness intimidation because: Thames did not explicitly direct Marshall to talk to any witness in any of the intercepted communications; Thames did not send any letters directly to Marshall from jail and authorities had not intercepted any other letters sent by Thames through other inmates; the affiant did not explain how the code was broken; and Gray did not even know that Marshall was Nip's real

name. We disagree. The affiant's conclusions were firmly based upon reasonable inferences from specific, articulable facts, not merely speculation.

Moreover, none of the omissions to which Marshall points in the affidavit undermine the inferences that Marshall was involved in the plot and that Thames had likely sent him prior letters. Whether or not Thames directed Marshall to talk to anyone in the phone calls, the fact that Marshall was on the line during the conversation with Gray fully supports the inference that he was involved in the witness intimidation scheme. The fact that the jail did not intercept any other letters from Thames to Gray is meaningless, because it had been clearly alleged that Thames could get messages out through letters sent by other inmates to third parties. The reliability of the codebreaking was supported by the corroborating evidence that the girlfriend's brother-in-law was in fact shot to death at a location where Thames thought the girlfriend might be. And the fact that Gray did not know Nip's real name does not negate the fact that she knew him as her daughter's boyfriend and that two other people identified Nip as Marshall.

IT IS ORDERED that the judgment of conviction is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals