

STATE OF MINNESOTA
COUNTY OF KANDIYOHI

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT

State of Minnesota,

Court File No: 34-CR-17-1213

Plaintiff,

v.

OMNIBUS ORDER

Dennis Kirby Nazarenus,

Defendant.

The above-entitled matter came before the Honorable Stephen J. Wentzell, Judge of District Court, on May 16, 2018 for a contested evidentiary hearing at the Kandiyohi County Courthouse, Willmar, Minnesota.

Defendant, Dennis Kirby Nazarenus, appeared in person and was represented by Nicholas Rekieta, Attorney-at-Law. The State of Minnesota appeared by and through Suelana Kinney, Assistant Kandiyohi County Attorney. Prior to the commencement of the hearing, the Court conducted a joint representation inquiry with Defendant pursuant to Minn. R. Crim Pro. 17.03, Subd. 5. Defendant voluntarily waived his constitutional right to separate counsel.

Defendant is charged with two (2) counts: Count I - Drugs - 5th Degree - Possess Schedule 1,2,3,4 - Not Small Amount Marijuana, a Felony, in violation of Minn. Stat. § 152.025.2(1); and Count II - Possess Ammo/Any Firearm - User of Controlled Substance, a Gross Misdemeanor, in violation of Minn. Stat. § 624.713.1(10)(iii).

Defendant raised the following issues: 1. Whether probable cause existed for the issuance of the search warrant? 2. Whether there were material misrepresentations or omissions in the

search warrant application? 3. Whether there existed probable cause to arrest? Whether there exists probable cause for the charges?

At the hearing, the Court heard testimony from Kimberly Junkermeier. Additionally, the the Court received, without objection, the following exhibits:

- Exhibit 1: Florence Packet (Offered by State)
- Exhibit 2: Sales information of “Sirchie” Drug Field Testing kit for Marijuana. (Offered by Defendant)
- Exhibit 3: Sales information of “Sirchie” Drug Field Testing kit for Phenylclidine. (Offered by Defendant)

The parties were allowed to submit written briefs and the matter was thereafter taken under advisement.

Based upon the files, exhibits, records, proceedings, and being fully advised in the premise, the Court makes the following:

FINDINGS OF FACT

1. On October 7, 2017, Agent Travis Peterson of the CEE-VI Drug and Gang Task Force received information from an individual who wished to remain anonymous. The reporting party informed Agent Peterson that he/she had observed a digital message between Defendant and Tasha Wrolson discussing Ms. Wrolson’s attempt to purchase controlled substances from Defendant. Agent Peterson was able to determine that Defendant resided at 203 Anthony Street SE in Willmar though the Kandiyohi County Sheriff Department records.

2. On October 19, 2017¹, Agent Robbie Braness of the CEE-VI Drug and Gang Task Force conducted a garbage pull at 203 Anthony Street SE, Willmar, Minnesota, the residence of Defendant. Agents observed the garbage being placed on the boulevard for collection. The garbage was collected normally by the sanitation company. The sanitation workers met the Agents at a predetermined location to hand over the garbage. The garbage pull produced methamphetamine paraphernalia that field tested positive for the presence of methamphetamine, marijuana stems that field tested positive for THC, a spent 12 gauge shotgun shell, and residency documents for Tasha Wrolson, Joshua Skelrad, Kaleigh Gilberts, Dennis Nazarenus, Dillon Nazarenus, and Tracy Olson.
3. On October 19, 2017, Agent Ryan Schutz of the CEE-VI Drug and Gang Task Force applied for a search warrant.² In his Affidavit, Agent Schultz discussed the tip the Task Force had received from the concerned citizen regarding digital messages “to purchase a controlled substance from Autumn.” Agent Schultz also discussed the results of the garbage pull performed by the Task Force, and a brief synopsis of how the garbage pull was conducted. The warrant was signed by Judge Stephanie L. Beckman.
4. Kimberly Junkermeier testified that while serving as a guardian ad litem for the children of Tasha Wrolsen she observed a text message between Tasha Wrolsen and Defendant about drugs. Kimberly Junkermeier testified that she did not report this to the police but did encourage a third party who reported the information to the police. Kimberly Junkermeier did not identify the informant, but testified that it was not Tasha Wrolson.

¹ The search warrant lists the date of the garbage search as “Thursday October 14, 2017” while the case Agent’s report reflects the garbage search was on October 19, 2017. October 19, 2017 was a Thursday and it appears the reference to October 14, 2017 was a clerical error. Nevertheless, there is no contention that the information gained in the garbage search was stale.

² Ex. 1 Search Warrant Application is incorporated into the Findings of Fact.

5. On October 26, 2017 on or about 1:17 p.m. a search warrant was executed at 203 Anthony Street SE. Agent Peterson knocked on the door to announce their presence. Multiple dogs started barking. Agent Peterson continued to knock and the dogs continued barking; no one came to the door. Agent Peterson checked the door and it was unlocked. Agent Peterson entered the house and announced “Sherriff’s Office search warrant.”³
6. Inside the house the Agents found Autumn Dickson, Tasha Wrolson, and J.E. in the living room. They were all detained in handcuffs and kept in the living room. Agent Peterson noticed the smell of burnt marijuana was strong in the living room.
7. Multiple items of marijuana paraphernalia were found throughout the house including the living room.
8. While searching the upstairs southeast bedroom, multiple items of drug paraphernalia were found along with a small plastic vile labeled “Hemp oil”. Residency documents in Defendant and Autumn Dickson’s name were also found in the southeast bedroom. A 9mm pistol was found on top of a dresser in the southeast bedroom. A loaded 9mm magazine was also found inside of the dresser.
9. A closet gun safe was also discovered in the southeast bedroom. Autumn Dickson provided Agent Peterson with Defendant’s phone number. Agent Peterson made contact with Defendant in order to attempt to locate the key for the gun safe. Defendant eventually agreed to return to the residence and consented to Agents breaking into the safe after the key could not be located.
10. Numerous firearms were located in a closet safe.

³ Ex. 1 - Incident Report Dated 11/7/17 at 3

11. Agent Josh Helgeson of the CEE-VI Drug and Gang Task Force conducted a field test on the hemp oil using a Narcotics Analysis Reagent kit produced by Sirchie.⁴ In his report Agent Helgeson stated he used Narc test # 9, a test for marijuana, hashish, and THC.⁵ Agent Helgeson stated the hemp oil field tested positive for THC.⁶ According to Sirchie's website, Narc Test # 9 is for phencyclidine and methaqualone.⁷ Agent Helgeson did not testify at the hearing.
12. No testimony or evidence was submitted to suggest that the vile of hemp oil was mislabeled, tampered with, or contained a substance other than hemp oil.
13. Defendant was placed under arrest and transported to the Kandiyohi County Law enforcement Center.
14. In a mirandized statement, Autumn Dickson admitted the paraphernalia in the SE bedroom belonged to herself and Defendant.⁸ Dickson stated that the gun was there for her protection as she had been "threatened".⁹ Dickson further stated that the firearms found in the house belonged to Defendant.¹⁰ Dickson admitted she is a lifelong marijuana user.¹¹ Dickson stated she uses marijuana two to three times a day for pain.¹² When asked if she supplied anyone with drugs Dickson stated "They come to me and I'll, like, I'll contact people. I'm not gonna lie yes I know some drug dealers, but they, we all

⁴ Ex. 1 - Supplemental Report of Agent Helgeson at 1

⁵ *Id.*

⁶ *Id.* at 2

⁷ Defendant's Motion for Dismissal filed 5/11/18 at 5, Exhibits 2 and 3.

⁸ Ex. 1 - Statement of Autumn Dickson at 2:15

⁹ *Id.* at 3:20

¹⁰ *Id.* at 2:50

¹¹ *Id.* at 1:13

¹² *Id.* at 1:46

are friends and everyone knows that if you can't get a hold of that person call Autumn. Autumn will be able to get a hold of them.”¹³

15. In a mirandized statement to Agents of the CEE-VI Drug and Gang Task Force

Defendant stated he has been a marijuana user since he was 18.¹⁴ Further, he stated that he takes approximately two hits of marijuana a week and admitted a couple of the pieces of paraphernalia belonged to him.¹⁵ When asked if he thought Dickson sold controlled substances Defendant stated: “Maybe. I don't know. She doesn't have much money. She doesn't have any money.”¹⁶

ORDER

1. Defendant's motion for dismissal of Count I is **GRANTED**.
2. Defendant's motion for dismissal of Count II is **DENIED**.
3. Defendant's motion for suppression of the evidence obtained from the search warrant is **DENIED**.
4. Defendant's motion for suppression of the Defendant's statement is **DENIED**.
5. A Pretrial hearing shall be scheduled.

BY THE COURT:

Dated:

Honorable Stephen J. Wentzell
Judge of District Court

¹³ *Id.* at 6:17

¹⁴ Ex. 1 - Statement of Defendant at 1:56

¹⁵ *Id.* at 2:05

¹⁶ *Id.* at 5:00

MEMORANDUM OF LAW

Probable Cause for the Search Warrant

Defendant argues there was insufficient probable cause to support the search warrant and seeks suppression of all evidence obtained from the search. Defendant argues that the concerned citizen was in fact Tasha Wrolson, a criminal informant who would require a different credibility assessment than a concerned citizen. Additionally, Defendant argues that the garbage pull cannot be used to support probable cause as there was not a clear chain of custody and the Agent who applied for the search warrant was not the one who conducted the garbage pull.

No warrant may be issued without probable cause. U.S. Const. amnd. IV; Minn. Const. art. I, § 10. “Generally, a search is lawful only if it is executed pursuant to a valid search warrant issued by a neutral and detached magistrate after a finding of probable cause.” *State v. Holiday*, 749 N.W.2d 833, 839 (Minn. App. 2008). “A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property or thing to be seized, and particularly describing the place to be searched.” Minn. Stat. § 626.08 (2017). “When determining whether a search warrant is supported by probable cause, [the court] does no engage in a de novo review.” *State v. McGrath*, 706 N.W.2d 532, 539 (Minn. App. 2005). Review is limited to “ensuring that the issuing [magistrate] had a substantial basis for concluding that probable cause existed.” *Id.* “Great deference must be given to the issuing [magistrate’s] determination of probable cause.” *State v. Valento*, 405 N.W.2d 914, 918 (Minn. App. 1987). To determine if there was sufficient probable cause to issue the warrant, a totality-of-the-circumstances analysis must be used. *Holiday*, 749 N.W.2d at 839.

Concerned citizens are given special deference as informants. Concerned citizens are distinct because of their motivation; concerned citizens act out of concern for society or personal safety. *McGrath*, 706 N.W.2d at 540. As such, the credibility of a concerned citizen does not have to be established through a history of reliable information or through corroborating information as a confidential informant would. *Id.* However, it is not enough to simply say an informant is a concerned citizen. *Id.* As the defining characteristic of a concerned citizen is their motivation some factual background must be provided so the issuing magistrate may make a determination about the informant's motivation. *See Id.* "Any possible lack of information as to informant reliability is not fatal where, as here, there is other corroborative evidence sufficient to establish credibility." *State v. Eling*, 355 N.W.2d 286, 291 (Minn. 1984). The collective knowledge doctrine applies to establishing probable cause to search. *See United States v. Rowe*, 878 F.2d 623, 626 (8th Cir. 2017).

At the hearing, the State offered the testimony of Kimberly Junkermeier who stated that she knew the identity of the concerned citizen and that it was not Tasha Wrolson. Ms. Junkermeier also testified that the concerned citizen reported the information at her behest due to Ms. Junkermeier's concerns. Defendant did not provide any evidence beyond suspicion that the concerned citizen was Tasha Wrolson. Additionally, even if the statements of the concerned citizen were omitted, the garbage pull provides probable cause by itself. *State v. Papadakis*, 643 N.W.2d 349, 356 (Minn. App. 2002); *McGrath*, 706 N.W.2d at 543. The search warrant Affidavit sufficiently demonstrated that the method used to obtain the trash was sufficiently reliable which is confirmed by the observation of residency documents of several of the 203 Anthony Street residents found within the trash. Additionally, there is no requirement that the officer applying for a search warrant has been personally involved in everything he is putting

forth. Collective knowledge applies to probable cause to search. *See Rowe*, 878 F.2d at 626. The garbage pull is valid. Upon review, there exists probable cause to support the search warrant.

Franks Challenge

Defendant argues that the search warrant is invalid as it was based at least in part upon the statements of a concerned citizen who Defendant argues was actually Tasha Wrolson; a person Defendant argues should not be afforded the same presumption of credibility accorded to a concerned citizen.

“A search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause.” *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989). “When a defendant seeks to invalidate a warrant, the two-prong *Franks* test requires a defendant to show that (1) the affiant “deliberately made a statement that was false or in reckless disregard of the truth,” and (2) “the statement was material to the probable cause determination.” *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010) (internal citation omitted).

Defendant fails to satisfy the first prong of the test. The State offered credible testimony that the concerned citizen was not Tasha Wrolson. Defendant did not supply any affidavits or other evidence beyond mere suspicion that material omissions or misrepresentations existed in the warrant. Defendant did not meet the threshold showing utilizing a preponderance of the evidence standard. *McGrath*, 706 N.W.2d at 540. Defendant cannot establish that the warrant was issued based on a deliberately false statement or in reckless disregard of the truth. *Andersen*, 784 N.W.2d at 327. The search warrant is valid.

Probable Cause for Count 1

Defendant seeks dismissal of both charges for want of probable cause. Defendant argues all evidence and statements that support probable cause are fruit of the poisonous tree from an insufficient warrant and should be suppressed. Additionally, Defendant argues the only item alleged to be a drug was a legal substance.

The Court will grant a motion to dismiss based upon lack of probable cause if the facts appearing in the record warrant “the granting of a motion for a directed verdict of acquittal if proved at trial . . .” *State v. Florence*, 306 Minn. 442, 459, 239 N.W.2d 892, 903 (1976) (holding modified by *State v. Rud*, 359 N.W.2d 573 (Minn. 1984)). “The test for granting a motion for a directed verdict is whether the evidence is sufficient to present a fact question for the jury’s determination, after viewing the evidence and all resulting inferences in favor of the state.” *State v. Slaughter*, 691 N.W.2d 70, 74-75 (Minn. 2005) (citation omitted). “The trial court’s function at the omnibus hearing d[oes] not extend to assessing the relative credibility or weight of conflicting evidence.” *State v. Hegstrom*, 543 N.W.2d 698, 702 (Minn. Ct. App. 1996) (citation omitted).

The State must establish sufficient evidence to support probable cause for Drugs - Possess Schedule 1,2,3,4 - Not Small Amount Marijuana, by demonstrating, in pertinent part, that Defendant knowingly possessed one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV, that Defendant knew or believed the mixture was a controlled substance classified in Schedule I, II, III or IV, the Defendant’s possession of the mixture was without lawful authority, and that Defendant’s act took place on or about October 26, 2017, in Kandiyohi County. 10 Minn. Prac. Jury Instr. Guides—Criminal CRIMJIG 20.36 (6th ed.).

Hemp oil is legal in Minnesota so as long as it contains no more than 0.3 percent THC on a dry weight basis. Minn. Stat. § 18K.02 (2017). Although numerous items that appear to contain lawful materials can certainly be used to hide illegal items, there was no evidence or testimony that the hemp oil in this case was tampered with or contained a substance other than hemp oil. The field test that was reported to have tested positive for THC was itself called into question. The report provided by the Agent reflects that a test used for another class of drugs was used for this test and the State called no witnesses to clarify this information. Upon review of the evidence possessed by the State, probable cause does not exist to support count 1 of the complaint.

Probable Cause for Arrest

Defendant argues that probable cause to arrest didn't exist as the hemp oil was the only basis to arrest Defendant. Defendant argues that any statements obtained after her arrest must be suppressed. "Probable Cause to arrest a suspect exists when "the objective facts are such that under the circumstances, a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997). The standard is less demanding and requires "far less evidence" than proof beyond a reasonable doubt. *State v Hawkings*, 622 N.W.2d 576, 580 (Minn. App. 2001).

In the present case, even without consideration of the hemp oil, there existed probable cause to arrest and further question Defendant for the offense found under Count 2, Drug user in possession of a controlled substance. The Agents found evidence of drug use including marijuana stems and straws that tested positive for methamphetamine and a spent shotgun shell during the garbage pull. Residency documents including those in Defendant's name were also found. In executing the search warrant, marijuana paraphernalia was located in the living room

and other areas of the house including a bedroom with residency documents belonging to Defendant on a dresser. A pistol was located on top of this dresser and other additional weapons in Defendant's gun cabinet were also discovered in this room. There existed an "honest and strong suspicion" that Defendant was a drug user in possession of firearm which justified his arrest and later Mirandized statement.

Probable Cause for Count 2

The State must establish sufficient evidence to support probable cause for Count 2: Possess Ammo/Any Firearm - user of Controlled Substance, by demonstrating, in pertinent part, that Defendant knowingly possessed ammunition, a pistol, semi-automatic military-style assault weapon, or any other firearm, or exercised dominion and control over it, that Defendant was an unlawful user of controlled substances, and that Defendant's act took place on or about October 26, 2017, in Kandiyohi County. 10 Minn. Prac. Jury Instr. Guides—Criminal CRIMJIG 32.21 (6th ed.).

The reports reflect that a 9 mm pistol was found on the dresser next to the bed in the bedroom Defendant shared with Autumn Dickson. Ammunition for the pistol was found in one of the drawers of the dresser. There was marijuana paraphernalia in Defendant's room. Additionally, in Defendant's mirandized statement to the police he admitted to being a longtime marijuana user who uses a couple "hits" per week. Defendant further admitted that a couple of the pieces of marijuana paraphernalia belonged to him. Upon review of the evidence, there exists probable cause to support Count 2 of the Complaint.

SJW



MINNESOTA JUDICIAL BRANCH