

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**THE STATE OF NEBRASKA,**  
Plaintiff,

vs.

**ROBERT E. McCART,**  
Defendant.

Case No. CR99-11

**ORDER DENYING MOTION  
TO SUPPRESS**

**DATE OF HEARING:** July 15, 1999.

**DATE OF DECISION:** July 26, 1999.

**APPEARANCES:**

For plaintiff: Thomas P. Herzog, Holt County Attorney.  
For defendant: Mark A. Johnson with defendant.

**SUBJECT OF ORDER:** defendant's motion to suppress.

**FINDINGS:** The court finds and concludes that:

1. The court sets forth detailed findings and conclusions on the defendant's motion to suppress as required by *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996). The search was conducted pursuant to a search warrant issued by a county judge.

2. The court begins by recalling the applicable principles of law:

a. The Nebraska Supreme Court has adopted the "totality of the circumstances" rule. *State v. Duff*, 226 Neb. 567, 412 N.W.2d 843 (1987). Under this standard, the question is whether, under the totality of the circumstances, the issuing magistrate had a "substantial basis" for finding that the affidavit established probable cause. *Id.* Thus, in evaluating the validity of a search warrant, the reviewing court must ensure that the issuing magistrate had a substantial basis for determining that probable cause existed. *State v. Swift*, 251 Neb. 204, 556 N.W.2d 243 (1996).

(1) This means that if the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient. *State v. Johnson*, 256 Neb. 133, \_\_\_ N.W.2d \_\_\_ (1999); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994), *overruled on other grounds*, *State v. Johnson*, *supra*.

(2) However, a reasonable suspicion based on articulable facts that evidence of crime would be found is not sufficient; issuance of a search warrant requires probable cause. *State v. Johnson, supra*.

b. The magistrate's determination for issuance of a search warrant should be paid great deference by a reviewing court. *State v. Swift, supra*. Constitutional policy demands that doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *State v. Duff, supra; State v. Payne*, 201 Neb. 665, 271 N.W.2d 350 (1978).

(1) Searches conducted pursuant to search warrant supported by probable cause are generally considered to be reasonable. Consequently, if the police act pursuant to search warrant, the defendant bears the burden of proof that a search or seizure is unreasonable. *State v. Swift, supra*.

(2) Courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner. *State v. Duff, supra*.

c. When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *State v. Flores, supra, overruled on other grounds, State v. Johnson, supra*.

d. A criminal defendant may challenge the validity of a search warrant based on an affidavit only if the affidavit contains deliberate falsehoods or statements made with a reckless disregard for the truth. In order to be entitled to a hearing to examine the contents of the affidavit, the challenger must attack only the veracity of the affiant and not of any other informant; he must also make a "substantial preliminary showing," including allegations of "deliberate falsehood or of reckless disregard for the truth," supported by an offer of proof. Moreover, even if the foregoing two requirements are met, no hearing is required if, when the material which is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause. *State v. Flores, supra, overruled on other grounds, State v. Johnson, supra*.

e. Even if there is no question as to the accuracy of the facts alleged, it is not necessary to specify the items that are missing in order for a defendant to challenge the affidavit as insufficient to establish probable cause. *State v. Flores, supra, overruled on other grounds, State v. Johnson, supra.*

f. Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *State v. Flores, supra, overruled on other grounds, State v. Johnson, supra.*

(1) The affidavit must set forth facts indicating the reliability of the informant, not mere conclusions of the affiant. *State v. Flores, supra, overruled on other grounds, State v. Johnson, supra.*

(2) A citizen informant is defined as a citizen who purports to be the victim of or to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement. *State v. Utterback, 240 Neb. 981, 485 N.W.2d 760 (1992), overruled on other grounds, State v. Johnson, supra.* The informant's status as a citizen informant may be inferred from the facts stated in the affidavit. *State v. Detweiler, 249 Neb. 485, 544 N.W.2d 83 (1996).*

(3) Observations by fellow officers engaged in a common investigation constitute a reliable basis for issuance of a search warrant. *State v. Stickelman, 207 Neb. 429, 299 N.W.2d 520 (1980).*

g. In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *State v. Johnson, supra.* The purpose of the four corners doctrine is to require a police officer seeking a search warrant to include in the affidavit all information he or she possesses bearing on the probable cause determination at the time of issuance of the warrant, thus

preventing supplementation of that information if the warrant is subsequently challenged. *State v. Johnson, supra*.

h. The good faith exception recognized in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), provides that even in the absence of a valid affidavit to support a search warrant, evidence seized pursuant thereto need not be suppressed where police officers act in objectively reasonable good faith in reliance upon the warrant. *State v. Johnson, supra*.

(1) In regard to a police officer's reasonable reliance on an invalid warrant, the test for reasonable reliance is whether the affidavit was sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause. This is an objective standard of reasonableness, which requires officers to have a reasonable knowledge of what the law prohibits. *State v. Johnson, supra*.

(2) Under *United States v. Leon, supra*, suppression of evidence remains appropriate if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid. *State v. Johnson, supra*.

(3) The good faith exception recognized in *United States v. Leon, supra*, does not preclude suppression where the issuing magistrate was misled by omissions in an affidavit. Omissions in an affidavit used to obtain a search warrant are considered to be misleading when the facts contained in the omitted material tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit. *State v. Johnson, supra*.

3. The affidavit presented to the county judge was received as Exhibit 1. The affidavit contains numerous paragraphs, which are not numbered. For convenience, the court will consider the paragraphs as if numbered consecutively from 1 to 17, where paragraph 1 recites that affiant is a certified law enforcement officer and paragraph 17 is the second "wherefore" paragraph and the last paragraph above the traditional statement of conclusion of an affidavit.

4. The affidavit contains numerous conclusions regarding persons from whom information has been obtained, referring to each person as someone “whom affiant believes to be a reliable and trustworthy person.” Such conclusions fail to state facts and add nothing to the determination of reliability of information. The affidavit contains no factual statements that any of these persons have provided information to the affiant in the past. Consequently, the affidavit fails to state facts regarding the first method of showing reliability. Similarly, the affidavit contains no statements against penal interest, the third method in the cited case law. Consequently, the reliability analysis depends upon the second method, a citizen informant, and the fourth method, the officer’s independent investigation.

5. Upon consideration of the applicable precedent, the court considers Terri M. McCart as a citizen informant. Several Nebraska cases adopt language, apparently originating from a California case, including victims of crimes as citizen informants. The affidavit does not expressly state that Terri M. McCart is a citizen informant, but states numerous facts from which such status may be inferred. The facts include the shattered basement window in her house (criminal mischief), missing screens from other basement windows in her house (theft), and missing articles of her clothing taken from her house (theft or burglary). E1, ¶ 4. These facts and other similar facts in the affidavit allow reasonable inferences of the commission of crimes in which Terri M. McCart was the victim. E1, ¶¶ 8, 11, 12, 13, and 14. Under the case law, the information provided by Terri McCart as a citizen informant is presumed to be reliable.

6. The officer testified that he personally observed the harassment protection order recited in paragraph 2 of the affidavit. Thus, this information does not depend upon the reliability of an informant.

7. The officer initially testified that he did not recall who gave him the information in paragraph 3 of the affidavit, but later averred that Terri McCart had personally told him about it at some point although not necessarily during the week of January 15. The officer did not verify the information by looking at the note or photographs, and did not know if any other deputies had looked at the materials. The court accepts the officer’s testimony that Terri McCart told him about these matters at some point. Because of Terri McCart’s status as a citizen informant, the information in paragraph 3 is presumptively reliable.

8. Regarding paragraph 4 of the affidavit, the officer did not look at the broken window and did no independent investigation to verify missing articles of clothing. He presumed that Terri McCart’s

statements were true. Again, he testified that Terri McCart informed him about these matters at some point in time. He also testified of his reliance upon the investigations and reports of fellow officers.

9. Regarding paragraph 5 of the affidavit, the officer testified that Terri McCart personally told him about the matters, but at some time after January 21. As discussed above, the information provided by a citizen informant is presumptively reliable.

10. Paragraph 6 of the affidavit provides presumptively reliable information from the citizen informant. That information includes statements of the defendant tending to show ill will toward Terri McCart and an intention to take action against McCart.

11. Regarding paragraph 7 of the affidavit, the officer talked personally to both Terri McCart and to the defendant. The defendant did not deny being present. Paragraph 7 also states facts regarding an incident involving Marcus McCart. The officer testified that he talked to both Terri McCart and directly to Marcus McCart about these incidents. The description of events shows conduct by the defendant well beyond the bounds of normal behavior, even in the context of a bitter divorce, particularly in view of the existence of the protection order.

12. With respect to paragraph 8 of the affidavit, the officer testified that the information originally came from a fellow deputy sheriff, Mark Hash, who had participated in the investigation. He also testified that Terri McCart directly told him about it later. The officer did not report in the affidavit that Hash, and Hash's investigative reports, were the original source of the information. However, that omission is not material, and do not tend to weaken or damage the inferences which can logically be drawn from the facts as stated in the affidavit. Indeed, such information may well strengthen the logical inferences.

13. The officer personally saw the domestic abuse protection order related in paragraph 9 of the affidavit.

14. Regarding paragraph 10 of the affidavit, the officer testified that he did not speak directly to Jacquelyn McCart, but was advised of the information by Deputy Hash. As noted above, Hash constituted a fellow officer also involved in the investigation. Information from a fellow officer in the investigation is considered reliable.

15. The last sentence of paragraph 10 omits the information that the defendant asked to speak with Jacquelyn McCart's "little sister." However, the repeated calls were made to the residence of Terri

McCart, and may nevertheless, because of the repeated nature thereof, be considered as a disturbance of the peace. To that extent, it matters little what person the defendant said he was calling. Because of the repeated nature of the telephone calls, the omitted information does not weaken or damages the inferences which may be drawn therefrom. Even if the court concluded the omission was material, more than sufficient material remains even if the last sentence of paragraph 10 was excised.

16. Paragraph 11 of the affidavit recites information regarding statements obtained from Jacquelyn McCart and Jody Johnson regarding their purported observations.

a. The officer testified that they gave this officer the statements, but that he did not remember where the statements were given. The facts recited, though skimpy, state sufficient information from which the status of both girls as citizen informants may be inferred.

b. Jacquelyn McCart testified that her conversations were with Deputy Hash and initially denied that the affiant was present, but later stated that she did not recall if the affiant was present. This testimony does not directly impeach the affidavit, because the affiant may have been present when written statements were given to Hash. The omission of this additional information (that written statements may have been given to Hash while the affiant was present) does not tend to weaken or damage the inferences arising from the statements.

c. At the suppression hearing, the defendant called both Jacquelyn McCart and Jody Johnson with the apparent expectation that they would recant their statements about the defendant. However, both young ladies asserted their Fifth Amendment right against self-incrimination. Even if the court is permitted to infer that their original statements to the officer were untruthful, this does not affect the officer's credibility or veracity as the affiant. No evidence was adduced nor does any inference tend to show that the officer knew of any false statements or exhibited any reckless disregard for the truth. Moreover, even if the first two sentences of paragraph 11 were excised, sufficient material remains to support the county judge's determination of probable cause.

17. The inconsistency between the dates of the Jacquelyn McCart and Jody Johnson written statements and the affidavit recitation of their statements does not materially weaken their value. Even if the written statements tended to show the defendant's presence at a suspicious hour on the previous night, and not the night of the actual occurrence, the information provides an inference that the defendant would

be present at a suspicious hour and at a location that he was not supposed to be present. Further, as noted above, even if excised, sufficient material remains.

18. The last two sentences of paragraph 11 depend upon material related by Terri McCart as a citizen informant, providing presumptively reliable information. Further, the officer testified that he personally observed all of the damage, except that he did not expressly testify one way or the other about the chopped hole in the back side of the storage shed.

19. Paragraph 12 states sufficient information from which to infer the status of Daryl Braun as a citizen informant, which renders such information as presumptively reliable.

20. Although the officer did not personally observe the damage to Terri McCart's car, the information regarding paragraph 13 was related by Terri McCart, whose information as a citizen informant is presumptively reliable. The affiant testified that Deputy Steven Fernau, a fellow officer in the investigation, told the affiant that Fernau identified the defendant on the telephone. However, the affiant did not include the information about Fernau's purported identification in the affidavit. The defendant offered a preliminary hearing transcript in which Fernau testified that he did not identify the defendant on the telephone. In view of Fernau's later testimony, the affiant's omission of the purported identification from the affidavit strengthens the officer's veracity. Moreover, the omission would not tend to damage or weaken the inferences arising from the facts actually recited in the affidavit. The strength of the information essentially depends upon Terri McCart's status as a citizen informant.

21. Regarding paragraphs 14 and 15 of the affidavit, the officer omitted a conversation with the "boot and shoe expert," Lonnie Johnson, about the size of the boots that the officer should be looking for, specifically size 10 to 11.

a. At the time of submission to the county judge, this omission would have had no effect, as there is no evidence of any information known to the officer regarding the boot size worn or possessed by the defendant.

b. The observation of a similar boot in the defendant's possession (paragraph 15) was not weakened by the subsequent determination that the boots seized pursuant to execution of the warrant are apparently size 8. There was no testimony or other evidence that the size difference between a size 8 and size 10 is sufficient to be readily apparent to the officer, who does not claim to be an expert.

22. The affidavit supported the issuance of the warrant and the defendant has failed to sustain his burden to show that the search was unreasonable. The motion to suppress should be denied.

**ORDER:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The defendant's motion to suppress is denied.

Entered: July 26, 1999.

If checked, the Court Clerk shall:

: Mail a copy of this order to all counsel of record and to any pro se parties.

Done on \_\_\_\_\_, 19\_\_ by \_\_\_\_\_.

: Note the decision on the trial docket as: 7/26/99 Signed "Order Denying Motion to Suppress" entered.

Done on \_\_\_\_\_, 19\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel, District Judge