

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,

vs.

JERRY A. TURPIN,
Defendant.

Case No. CR99-21

**ORDER GRANTING MOTION
TO SUPPRESS**

DATE OF HEARING: September 16, 1999.

DATE OF DECISION: September 23, 1999.

APPEARANCES:

For plaintiff: Thomas P. Herzog, Holt County Attorney.
For defendant: Pamela J. Dahlquist 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 this court.

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 court was received as Exhibit 1.

4. The affidavit shows that informant K.T. was the basic source of the information provided to the affiant. The affidavit contains no factual statement that K.T. 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. The affidavit does not expressly state that the affiant considered K.T. as a citizen informant, but states facts from which such status may be inferred.

a. The affidavit states that K.T. complained to Deputy Anderson.

(1) This raises the inference that K.T. initiated the contact with Deputy Anderson and was not solicited or sought out by Deputy Anderson.

(2) This also raises the inference, for which there is no contrary evidence, that K.T. was not a paid informant.

(3) This also raises the inference, for which there is no contrary evidence, that K.T. was not a regular unpaid informant.

b. The affidavit states that on Sunday, May 2, 1999, K.T. observed actively growing, cultivated marijuana plants. The affidavit then states that the next day at 8:00 A.M., in other words, on the first business day after discovery, K.T. arrived at the Sheriff's office and contacted Deputy Anderson.

(1) The prompt nature of the report, i.e. with only one day of time intervening, raises an inference that the informant was motivated by good citizenship.

(2) The informant's arrival at the beginning of the next business day raises an inference that the informant was motivated by good citizenship.

(3) The facts that the informant initiated the contact following discovery of contraband raises an inference that the informant was motivated by good citizenship.

c. The affidavit also states that K.T. undertook further investigation without instruction or suggestion by law enforcement. This raises an inference that the informant desired to get to the truth, but may also be consistent with the argument that he was motivated by ill will against his brother, i.e. that he wanted to "get" his brother.

d. When K.T. found the unoccupied car, he went to the neighbor's residence and requested the woman to call law enforcement to report that he "had caught the marijuana harvesters." He did not state any identity of any specific person at that point. The generic identification ("the marijuana

harvesters”) raises an inference more consistent with the absence of improper motivation and more consistent with motivation of good citizenship.

e. These factors state sufficient affirmative facts raising inferences that K.T. acted as a citizen informant. Information provided by a citizen informant is presumed to be reliable. Thus, as a preliminary determination before considering the matter of omitted information regarding K.T., the court would determine that the affidavit sets forth sufficient facts to raise the inference that K.T. was a citizen informant.

6. Deputy Anderson of the Rock County Sheriff’s office was clearly working with the affiant in a common investigation. The affiant testified that he inquired of Deputy Anderson concerning K.T. He testified that Anderson told him that K.T. had been in Vietnam (presumably in the United States armed forces during the Vietnam War) and that Anderson was not aware of anything bad in K.T.’s background.

7. Anderson testified that he had been a deputy sheriff since January of 1987, and that Anderson had investigated a shooting incident involving K.T. in 1988, 1989, or 1990. K.T. had shot ducks off the wall of K.T.’s home, and had been taken to the regional center under emergency protective custody, presumably because the officers, including Anderson, were then concerned about K.T.’s mental condition. There is no other reasonable way to view this evidence than that Anderson and his superior, the sheriff, had concluded that K.T. was then mentally disturbed. Anderson testified that he did not consider this information material because of the lapse of time and did not inform affiant about it. Anderson also admitted that he was aware of some old animosity between K.T. and his brother, apparently regarding some ranch land in the family. However, Anderson testified that he did not believe that the old animosity had continued to the current time, and did not believe that K.T. bore any ill will toward his brother at present.

8. It is clear that Anderson did not convey this additional information about K.T.’s background to the affiant. The affiant did not intentionally or recklessly omit any information material to the informant’s veracity from the affidavit. The question becomes, is Anderson’s omission chargeable to the affiant, and if so, does the omission make any difference.

9. The court finds no case expressly stating that the omission of material facts by a fellow officer to an affiant, with no bad faith on the part of the affiant, is nonetheless chargeable to the affiant.

However, Nebraska case law suggests that the affiant should be held responsible for the omission of a fellow officer engaged in a common investigation.

a. Numerous cases state that the observations of fellow law enforcement officers engaged in a common investigation constitute a plainly reliable basis for a warrant applied for by one of them. E.g., *State v. Waits*, 185 Neb. 780, 178 N.W.2d 774 (1970); *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969). The converse would seem to be equally true, i.e. the omission of an observation by a fellow law enforcement officer engaged in the common information would impair the reliability of the basis for the warrant application.

b. In *State v. Huggins*, 186 Neb. 704, 185 N.W.2d 849 (1971), the Supreme Court stated that the authority of an individual officer who makes an affidavit for a search warrant should not be circumscribed by the scope of his firsthand knowledge of the facts concerning a crime and that observations of fellow officers engaged in a common investigation constitute a reliable basis for a warrant applied for by one of their number. This language more strongly suggests that the converse equally applies, i.e. that omissions of a fellow officer are attributed to the one who makes the affidavit.

c. Any contrary rule would promote an untenable system in which officers have a motive to withhold unfavorable information from fellow officers or encouraging a “wink and nod” response by one officer to a fellow officer’s inquiry regarding an informant’s veracity. The court concludes that Anderson’s omissions regarding K.T.’s background must be charged to the affiant.

10. The court does not find, as a matter of fact, that Anderson intentionally withheld the information to mislead the affiant or the court. However, as the principal source of information regarding the existence of contraband, the issue of K.T.’s veracity was vital to the analysis of the affidavit. The inferences normally flowing from a close family relationship such as between brothers would preclude any likelihood that an informant would furnish false information to incriminate his brother. However, the information that there was an old grudge over some land, when coupled with the previous shooting incident resulting in at least temporary protective custody of the informant in a mental health facility, would significantly and materially reduce the apparent veracity and reliability of the informant’s information.

11. The court concludes that the omitted information substantially weakens the inferences flowing from the facts stated in the affidavit regarding the informant’s veracity. When so considered, the

affidavit lacks sufficient facts to show that K.T. was a citizen informant. The affidavit contains no facts to otherwise verify K.T.'s veracity. The affidavit discloses no previous experience with K.T. as an informant. The affidavit does not show that anyone other than K.T. ever observed any marijuana. The affidavit does not state or even hint that Deputy Anderson went to look at any marijuana on Monday, May 3. Anderson apparently either blindly accepted K.T.'s word regarding the existence of the marijuana or totally discounted K.T.'s information. These are the only two ways that would explain Anderson's failure to immediately proceed to the location and verify the existence of the marijuana. Neither explanation provides independent verification of the accuracy of the information provided by K.T. Without K.T.'s information and observations, there is simply no showing in the affidavit of the existence of marijuana. And because of the omitted information chargeable to the affiant, the affidavit fails to show the reliability of the informant.

12. The defendant has met his burden to show that the affidavit was insufficient to support the issuance of the warrant. The motion to suppress must be granted.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The defendant's motion to suppress is granted. The use of the evidence seized by the state pursuant to execution of the warrant is prohibited.

2. Pursuant to § 29-826, the state is allowed ten (10) days from the date of entry of this order to file a notice with the clerk of this court of the intention to seek review of this order in accordance with NEB. REV. STAT. § 29-824 *et seq.* (Reissue 1995).

Entered: September 23, 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: 9/23/99 Signed "Order Granting Motion to Suppress" entered.

Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel, District Judge