

ORIGINAL

IN THE SUPREME COURT

20010306

STATE OF NORTH DAKOTA

State of North Dakota,)
)
 Plaintiff/Appellee,)
)
 vs.)
)
 Michael Duane Taylor,)
)
 Defendant/Appellant.)

Supreme Court No. 20010306

District Court No. 01-K-0529

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT OF WARD COUNTY
 NORTHWEST JUDICIAL DISTRICT
 DISTRICT COURT NO. 01-K-0529
 THE HONORABLE GARY A. HOLUM

APPELLANT'S BRIEF

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ISSUE PRESENTED FOR REVIEW

1. The trial court erred in denying Taylor's Motion to Suppress on the grounds that the affidavit in support of the warrant was insufficient to establish probable cause.

STATEMENT OF CASE

Appellant, Michael Taylor was charged with unlawful possession of a controlled substance with intent to deliver – marijuana following a search of the home of Christopher Olson at A-17 Jefferson Trailer Court, Minot, North Dakota, executed pursuant to a search warrant issued by Referee Connie Portscheller on the same date. Taylor moved to suppress evidence seized from the Olson residence as well as statements made to Task Force officers by way of Motion dated July 13, 2001. The Honorable Gary A. Holum denied the motion in a memorandum issued August 29, 2001. Taylor was tried before a jury of twelve September 25, 26, and 27, 2001 and was found guilty of unlawful possession and fleeing a police officer. He was sentenced to the maximum of ten years incarceration on December 4, 2001.

STATEMENT OF FACTS

Appellant, Michael Taylor, hereinafter Taylor, was arrested on March 19, 2001 for unlawful possession of a controlled substance with intent to deliver – marijuana, following a search of the home of Christopher Olson at A - 17 Jefferson Trailer Court, Minot, North Dakota. App. 4. The search was executed pursuant to a warrant issued by Referee Connie Portscheller on the same date. The warrant was issued based on an affidavit submitted by Mike Marchus, Bureau of Criminal Investigation. App. 15. Seized during the search was approximately eighteen pounds of marijuana, various items of drug-related paraphernalia, documents bearing Michael Taylor's name, and a laptop computer owned by Michael Taylor.

Taylor, through trial counsel, moved to suppress evidence seized from the Olson residence as well as statements made to task force officers by Taylor on the grounds that the affidavit of Agent Mike Marcus, in application for the warrant, failed to establish probable cause for issuance of the warrant. No hearing was held on the motion. The Honorable Gary A. Holum, denied the motion to suppress. App. 6. Taylor was convicted on the charge of unlawful possession as well as fleeing a peace officer following trial September 25, 26, and 27, 2001. Judge Holum sentenced Mr. Taylor to the maximum ten (10) years incarceration on December 4, 2001. App. 8.

LAW AND ARGUMENT

THE TRIAL COURT ERRED IN DENYING TAYLOR'S MOTION TO SUPPRESS ON THE GROUNDS THAT THE AFFIDAVIT IN SUPPORT OF THE WARRANT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE.

The Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota State Constitution require probable cause for issuance of a search warrant. State v. Wamre, 1999 ND 164, ¶5, 599 NW2d 268 *citations omitted*.

Probable cause to search exists "if the facts and circumstances relied on by the magistrate would warrant a person of reasonable caution to believe that contraband or evidence sought probably will be found in the place to be searched." State v. Thieling, 2000 ND 106, ¶ 7, 611 NW2d 861, *citing State v. Johnson*, 531 NW2d 275, 278 (ND 1995). Whether probable cause exists to issue a search warrant is a question of law. State v. Damron, 1998 ND 71, ¶ 5, 575 NW2d 912, *citations omitted*.

Although each piece of information supplied to the issuing magistrate may not alone be sufficient to establish probable cause, and some of the information may have an innocent explanation, "probable cause is the sum total of layers of information and the syntheses of what the police have heard, what they know, and what they observed as trained officers." Id. at ¶ 7. Information which may cause suspicion and warrant further investigation does not establish probable cause to search. State v. Lewis, 527 NW2d 658, 663 (ND 1995).

The affidavit and application for search warrant in the instant action was submitted by agent Mike Marchus, North Dakota Bureau of Criminal Investigation. Marchus' affidavit alleged that the Ward County Narcotic Task Force received a telephone call from Captain Willie Graham of the Ward County Sheriff's Department on March 7, 2001, wherein Graham reported that, while transporting an individual by the name of Roger Enget to the correctional facility in Jamestown, North Dakota, Enget told him that "a white guy, who was approximately 27 years old and who drives a black 1997 Honda, makes frequent trips to Colorado and brings back multiple pounds of marijuana for sale in the Minot area." App. 10. Enget provided a physical description of the white male. App. 10. He further informed Graham that the white male "usually stays at the Ho Hum Motel and that he is the drug supplier for Dusty Shehan, Nathan Dosh, and Brandon Peterson." App. 10. Marchus, in his affidavit concluded that these individuals are "known drug users and may possibly be dealers as well, based on intelligence reports received by the Task Force," but provided no details to allow the magistrate to make an independent determination. App. 10.

Marchus further alleged that a K.C. Peters was stopped by the North Dakota Highway Patrol on March 15, 2001, for an equipment violation and subsequently charged with possession of one pound of marijuana and drug related paraphernalia. App. 10-11. Without the assistance of counsel, Peters allegedly told Task Force officers that "an individual by the name of Mike Taylor is a big supplier of marijuana in the Minot area." App. 11. Marchus' affidavit further indicates that Peters advised officers that "Taylor takes frequent trips to Colorado to get supplies from the Mexican Mafia." App.

11. Peters allegedly described the Taylor vehicle as a 1997 black Honda Civic with a luggage rack. App. 11. Further information allegedly provided by Peters includes travel dates for Taylor of the weekend of March 16 through March 18, 2001, that Taylor “hangs out” at A-17 Jefferson Trailer Park with an individual by the name of Chris Warren Olson. App. 11.

Marchus further alleges in his affidavit that “a teletype was put out to all law enforcement in an attempt to intercept the car (Taylor’s Honda Civic) prior to its arrival in Minot.” App. 11. The vehicle was not located until March 19, 2001, at which time Minot patrol officers observed a black Honda Civic at A-17 Jefferson Trailer Court, surveillance was then set up at that residence. App. 11-12. Later that afternoon, Marchus alleges, that “a car driven by a known drug user by the name of Dorothy Walter stopped for a short period of time at A-17 Jefferson.” App. 12. Marchus again provided no information to verify his statement that this person is a “known drug user”. Walter was then followed to a local convenience store where Marchus alleges that “officers believed, but it is unconfirmed that a drug transaction occurred... .” App. 12. Walter was then stopped by law enforcement for a probation search ordered by her probation officer during which officers apparently found a small amount of marijuana and drug related paraphernalia. App. 12.

Marchus, in his affidavit, states that earlier intelligence reports indicated that Taylor was driving a teal colored vehicle. App. 12. Marchus further states that the Task Force confirmed that there was an active felony warrant for Taylor’s arrest from South Dakota on the charge of possession of marijuana dating back to June 4, 2000. App.12.

The supporting affidavit goes on to allege that surveillance observed an individual by the name of Dustin Sheehan, “who is known to be supplied by Mike Taylor,” arrived at A-17 Jefferson Trailer Park. after surveillance units observed Taylor remove a white garbage bag and a black suit case from the trunk of the Honda Civic and carry those items into the residence at A-17 Jefferson Trailer Park. App. 13. Marchus also reported an unconfirmed allegation that Taylor is “known to carry fire arms.” App. 13. Marchus further alleged that the black Honda Civic left A-17 Jefferson Trailer Court “with Taylor as a passenger.” App. 13. Surveillance units attempted to stop the Honda Civic, with Taylor driving, however the occupants from the vehicle fled pursuing officers and eventually abandoned the vehicle and fled on foot. App. 13. Based on the foregoing, Referee Connie Portscheller issued a warrant for the search of the residence known as A-17 Jefferson Trailer Court on March 19, 2001 at 3:33 p.m. App. 15.

Sufficient information, rather than “bare bones” information must be presented to the magistrate in order for the magistrate to determine whether probable cause exists for the issuance of a search warrant. Thieling at ¶ 11. A conclusory affidavit which does not detail underlying information is not sufficient to establish probable cause. Id. *citations omitted.*

“An informant must supply information from which one may conclude the informant is honest and his information is reliable, or from which the informant’s basis of knowledge can be assessed.” State v. Hage, 1997 ND 175, ¶ 17, 568 NW2d 741 *citing* Woehlfoff v. State, 487 NW2d 16, 18 (ND 1992). “A practical, and common sense determination of probable cause includes examining the veracity and basis of

knowledge of persons supplying hearsay information.” State v. Runck, 537 NW2d 829, 833 (ND 1995). Probable cause can not rest solely on a conclusory allegation from an untested informant. State v. Duchene, 2001 ND 66, ¶ 31, 624 NW2d 668 *citations omitted*.

Neither the statement given by Roger Enget, nor the statement by K.C. Peters was given directly to Marchus, rather they were provided to other law enforcement personnel who apparently passed the information on to Marchus. The issuing magistrate was provided no facts relating to the basis of knowledge or the veracity of the informants. The magistrate was not provided enough meaningful information to make an informed judgment on the informants’ past performance in that capacity. There was apparently no inquiry by Marchus or the issuing magistrate as to why Enget was in custody and being transferred to the State Correctional Facility in Jamestown. Such information may have shed a great deal of light on his credibility. No information was provided as to when and how the informants obtained their information. Further, the two informants and “earlier intelligence” provided conflicting information as to where Taylor typically stays while in Minot and as to the color of Taylor’s vehicle.

Marchus’ contention that Dustin Sheehan who “is known to be supplied by Mike Taylor” is nothing more than a conclusory bare bones statement. Mere statement of reputation or unsupported conclusions or allegations, without some elaboration of the underlying circumstances supporting those conclusions or statements are insufficient to establish probable cause. State v. Rangeloff, 1998 ND 135, ¶ 25, 580 NW2d 593 *citations omitted*. Mere association with a known or suspected criminal or presence at

the scene of a crime is not probable cause. State v. Serr, 1998 ND 66, ¶ 14, 575 NW2d 896 *citations omitted*.

This Court in State v. Thieling reversed the trial court's denial of a motion to suppress citing insufficient information to establish probable cause, where the affiant officer indicated that three persons with prior drug convictions had visited the Thieling home during the officer's surveillance. This Court determined that there was no information indicating that the persons visiting the Thieling home were involved in any illegal activity while at that home. Thieling at ¶ 12.

The facts in Thieling are strikingly similar to the facts in the instant action. Marchus relied on Taylor's alleged reputation as a drug dealer and his association with persons with prior drug convictions. However, as in Thieling, Marchus' affidavit lacked any information as to what those individuals did while inside the residence at A-17 Jefferson Trailer Court. This Court further found in Thieling that an appropriate inference to persons visiting a residence would be that they were mere "casual social guests", and that the association did not raise a high degree of suspicion measured in the probable cause analysis. Thieling at ¶ 12. "Mere suspicion that persons visiting the premises are connected with criminal activity will not suffice for issuance of a warrant to search the premises." Id. citations omitted. The BCI agents in Thieling had physical evidence in the form of baggies and small pieces of tin foil seized from Thieling's garbage to further support their application for a search warrant. This Court still found insufficient evidence to establish probable cause to search. There was no physical evidence of drug activity linked to Taylor when Machus applied for the search warrant.

Further, as in Thieling, there was no evidence presented to the Magistrate of how the informants determined Taylor was involved in drug trafficking.


As noted herein, Marchus also relied on surveillance reports of Taylor removing a white garbage bag and a black suitcase from the Honda and carrying those items into the residence. This type of activity is not unlawful, nor can an inference be made that such activity is unlawful. Marchus further relied on Taylor's attempt to allude police officers. However, Taylor would obviously know that a warrant for this arrest was outstanding from the State of South Dakota since he had been arrested there a year earlier and apparently failed to appear for a Court date. App. 12. Mere suspicion without anything more specific, does not amount to probable cause to search. State v. Lewis, 527 NW2d 658, (ND 1995) *citations omitted*.

Taylor provided Marchus with a statement implicating himself at approximately 8:13 p.m., after the search warrant had been issued and executed. App. 17. Thus Taylor's statement to law enforcement constitutes fruit of the poisonous tree and should have been suppressed, along with the evidence seized at A-17 Jefferson Trailer Court.

CONCLUSION

For the above-stated reasons, Michael Taylor respectfully request the Court follow precedent finding lack of probable cause and that the trial court erred in suppressing evidence seized and statements made by Taylor.

Respectfully submitted this 8th day of March, 2002.



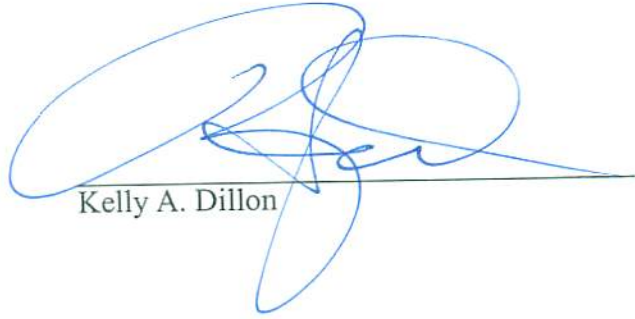
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CERTIFICATE OF SERVICE

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A true and correct copy of the foregoing Appellant's Brief and Appendix were, on the 8th day of March, 2002 mailed to:

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