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20060164

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20060164

FILED
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CLERK OF SUPREME COURT

AUG 22 2006

State of North Dakota.)
)
 Plaintiff and Appellee,)
 vs.)
)
 Natalee Duchene,)
)
 Defendant and Appellant.)

STATE OF NORTH DAKOTA

APPEAL FROM THE CRIMINAL JUDGMENT ENTERED ON MAY 23, 2006
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN E. MCCULLOUGH, PRESIDING

APPELLEE'S BRIEF

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[¶2]STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- [¶3]I. The magistrate's finding of probable cause to support the issuance of the search warrant for Natalee Duchene's residence was supported by substantial evidence because the supporting affidavit contained detailed information regarding the appearance and location of drug paraphernalia recently observed by the confidential informant from within the residence, and the officer evaluated the confidential informant's veracity through the comparison of information to internal, confidential investigations.
- [¶4]II. The District Court correctly denied Natalee Duchene's Motion to Suppress evidence and applied the good-faith exception to the exclusionary rule because the officers reasonably relied upon the magistrate's finding of probable cause from the affidavit containing detailed and reliable information from the confidential informant.

[¶5]STATEMENT OF THE CASE

[¶6]The State concurs with the Appellant's Statement of the Case.

[¶7]STATEMENT OF THE FACTS

[¶8]On September 8, 2005, Detective Glen N. Hanson (hereinafter "Detective Hanson") with the Fargo Police Department submitted a search warrant application for 2526 15th St. S, Apartment #17, in Fargo, North Dakota. (App. at 7). The search warrant included an attached "Exhibit B" from Detective Hanson, which identified the facts known to him to support a finding of probable cause to issue the search warrant. (App. at 9).

[¶9]Detective Hanson received information from a confidential informant (hereinafter "CI") on September 7, 2005, in regards to drug paraphernalia located at 2526 15th St. S, Apartment #17. (App. at 11). Detective Hanson then checked Fargo Police records and learned Natalee Duchene was listed as living at this residence. (App. at 11). Detective Hanson requested Investigator Dane Hjelden with the Fargo Police Department check the subscriber information for power from Excel Energy, which showed Natalee

Duchene was the only listed subscriber. (App. at 11).

[¶10]The CI told Detective Hanson the CI personally observed “in the last 24 hours” an item of drug paraphernalia in the residence of Natalee Duchene. (App. at 11). The CI described the item of drug paraphernalia as a blue marijuana bong, approximately 1 foot high. (App. at 11). The CI described the drug paraphernalia’s location in the residence as in Natalee Duchene’s bedroom, on a night stand. (App. at 11). The CI also informed Detective Hanson that Natalee Duchene was a dealer of methamphetamine and marijuana based upon the CI’s conversations and observations at the residence in the past. (App. at 11).

[¶11]Detective Hanson summarized in “Exhibit B” his training and experience in narcotics and his familiarity with “common practices used by persons who use, manufacture and distribute controlled substances.” (App. at 10). Detective Hanson stated his belief the item described by the CI was a “marijuana water bong used for smoking marijuana” from his former experience as an investigator. (App. at 11).

[¶12]Detective Hanson included the following information in “Exhibit B” about the CI’s background and past experience working with law enforcement:

[¶13]Your Affiant note[s] that this is the first time information received from this confidential informant has been used to apply for a search warrant. Further your Affiant notes this CI is working off drug charges from an arrest in Fargo in the past month. Your Affiant notes that the CI has not been proved to be reliable yet. Your Affiant notes speaking with the CI in the past and informing the CI that in order to receive consideration for the charges they have against them, it is important to take some time to think about how important it is to be truthful with law enforcement. Further the CI was informed to report drug activity to your Affiant if they should so choose to help out law enforcement. Your Affiant notes that the CI took some time and spoke with their family members and decided to help themselves as well as help law enforcement by giving up information about those persons they are aware of that use

and deal in illegal drugs in consideration for the charges pressed against the CI. (App. at 10).

[¶14] Detective Hanson then added the following hand-written information at the end of “Exhibit B”:

[¶15] The CI has given additional information about 2 drug dealers in the Fargo area that your Affiant has had prior information on. Your Affiant states those individuals have been and are being investigated presently by the Fargo Police Narcotics Unit. The information provided by the CI has been checked on and found to be true – as far as information on names, addresses and the fact FPD officers have investigated these names. (App. at 12).

[¶16] The search warrant application, together with the supporting affidavit and “Exhibit B” from Detective Hanson, were reviewed by the Honorable Steven L. Marquart, Judge of the District Court, Cass County, to determine probable cause. (App. at 7). Judge Marquart found probable cause existed and issued the search warrant on September 8, 2005. (App. at 7). The search of Natalee Duchene’s residence occurred on the same day, September 8, 2005, and narcotics investigators seized 14 items of alleged drug paraphernalia from the residence. See (App. at 2, Docket Sheet Item #11. “Affidavit of Probable Cause”, Detective Glen Hanson, September 9, 2005, with attached investigative reports).

[¶17] As a result of the subsequent search and discovery of drug paraphernalia in the residence by the officers, the State charged Natalee Duchene by an Information dated September 9, 2005, (hereinafter “Information”) filed in the District Court for two counts of Possession of Drug Paraphernalia (C Felony and A Misdemeanor) under N.D.C.C. § 19-03.4-03. (App. at 4-5). Natalee Duchene filed the Motion to Suppress dated December 16, 2005, and the motion hearing was held before the District Court on January 25, 2006. (App. at 6).

[¶18]The State served a subpoena on Detective Hanson to testify at the motion hearing, but he did not appear. See (App. at 2, Docket Sheet Item #23). Investigator Dane Hjelden with the Fargo Police Department (hereinafter “Investigator Hjelden”) appeared and testified at the motion hearing in regards to his experience in narcotics investigations and his knowledge of the facts supporting Detective Hanson’s application for the search warrant of Natalee Duchene’s resident. (Transcript of Hearing for Motion to Suppress, Cass County Courthouse, Fargo, North Dakota, January 25, 2006, at 4) (hereinafter “Tr.”).

[¶19]Investigator Hjelden testified he was aware of the information provided to Detective Hanson in order to get the search warrant for Natalee Duchene’s residence. (Tr. at 5). “Exhibit B” was shown to Investigator Hjelden at the motion hearing, and he testified he was aware of these facts at the time of the search. (Tr. at 6). Investigator Hjelden gave the following testimony in regards to the CI’s reliability:

[¶20]Q: In your experience working as a detective, what do you - - how do you consider that information coming from someone for the first time? Do you feel that their - - they need to investigate that person in regards to reliability?

[¶21]A: You’ve got to verify some information that they give, the truthfulness of it. Verify that the person is who they say they are, where they live, etcetera, etcetera. And this person has given information in the past which corroborates with things that we were working on in the past. The fact that - - just the fact that we used them for the first time. So it does give him some credibility as to the fact of things that we’re already working on are true in nature.

[¶22]Q: In some of the experience working with this confidential informant in the past it’s indicated at the very end of Exhibit B where it’s handwritten by Detective Hanson there where it states that the CI - - the CI has given additional information about two drug dealers in the Fargo area that your affiant has had prior information on. Your affiant

states those individuals have been and are being investigated presently by the Fargo Police Narcotics Unit. It goes on to say that the names and addresses of those other suspects have been investigated. Do you believe that that is a reasonable investigation of this CI's reliability?

[¶23]A: Absolutely.

[¶24]Q: Okay. The fact that those other suspects are under investigation by Fargo - - by the Fargo narcotic's unit specifically, is that something that you typically - - you see with confidential informants? Do you compare information coming from them to other investigations?

[¶25]A: Yes, it would be something that we use. (Tr. at 6-8).

[¶26]Investigator Hjelden testified on his opinion about the specificity of the facts reported by the CI to Detective Hanson:

[¶27]Q: Looking at those facts, in your opinion based upon your training and experience, how specific are those facts if you could just state an opinion? How specific do you think they are?

[¶28]A: It's, again, very detailed. That the person has obviously been in there and to see this activity and see the things that are in the place. It's very good. I guess I would consider it reliable.

[¶29]Q: Would it - - would it raise caution in your mind if someone - - or a CI could not provide specific details?

[¶30]A: He would have to make you verify it. It they could do specific details, as detailed as they are. (Tr. at 8-9).

[¶31]On re-direct examination. Investigator Hjelden testified about the confidential status of information related to other persons under investigation by the Fargo Police Department:

[¶32]Q: Investigator Hjelden, would someone in the public know which persons are under investigation by the Fargo Police Narcotics Unit? Could they possibly know that information?

[¶33]A: They could take a name from the paper I image and say - - I guess if they were charged with something and then assume. But, no, if they're under our scope that's information that's within our system or within other agencies as well that we work with.

[¶34]Q: So generally the goal of the department would be to keep that information confidential until - - until the investigation is complete or there's at least a prosecution or a conviction or so on?

[¶35]A: That would be correct.

[¶36]Q: And so is there - - would there be any expectation by yourself or an officer that a CI would have access or know which people or which persons are specifically under investigation?

[¶37]A: They might know someone or have names of people that they think would be - - when they provide us with this information, we either tell them we're interested in that or if they give us this information, the people who are using, dealing, selling drugs, a lot of times we're not gonna let them know that they're in our scope or that we want to. They'll just tell us who they can possibly buy from or give us information on who they can or know people who use or sell drugs. (Tr. at 11-12).

[¶38]After hearing the testimony, receiving the search warrant and "Exhibit B" into evidence, and listening to arguments by counsel at the motion hearing, the District Court took the motion under advisement. (Tr. at 23). The District Court subsequently issued its "Memorandum Opinion and Order Regarding Defendant's Motion to Suppress Evidence" dated January 30, 2006, (hereinafter "Memorandum Opinion and Order") and denied the motion. (App. at 18). Natalee Duchene entered the conditional plea of guilty under N.D.R.Crim.P. 11(a)(2) to Counts 1 and 2 in the Information on May 8, 2006, to appeal the District Court's denial of the Motion to Suppress. (App. at 19).

[¶39] ARGUMENT

[¶40]I. The magistrate's finding of probable cause to support the issuance of the search warrant for Natalee Duchene's residence was supported by substantial evidence because the supporting affidavit contained detailed information regarding the appearance and location of drug paraphernalia recently observed by the confidential informant from within the residence, and the officer evaluated the confidential informant's veracity through the comparison of information to internal, confidential investigations.

[¶41]The “Statement of Issue” presented by Natalee Duchene in her brief challenges the District Court’s denial of her Motion to Suppress evidence “because the search warrant was not supported by probable cause.” (Appellant’s Brief at 10). Natalee Duchene’s brief does not directly address, or present any legal argument in support of, the reversal of the District Court’s application of the good-faith exception to the exclusionary rule under U.S. v. Leon, 468 U.S. 897 (1984), to the officers’ reliance on the magistrate’s finding of probable cause. Natalee Duchene is asking this Court to reverse the magistrate’s finding of probable cause without addressing the good-faith exception, which was the reason the District Court denied her motion.

[¶42]The District Court did not explicitly rule in its Memorandum Opinion and Order the facts contained in “Exhibit B” did not support the magistrate’s finding of probable cause. The District Court described the question as “a close case for the existence of probable cause” and then applied the good-faith exception under L. Leon. (App. at 17). However, the District Court’s decision to apply the good-faith exception in this “close case” must mean it necessarily determined the facts contained in “Exhibit B” did not support the finding of probable cause by the reviewing magistrate.

[¶43]The State will address the issue presented to this Court by Natalee Duchene in her brief in regards to whether the facts contained in “Exhibit B” supported the

magistrate's finding of probable cause. Cf. State v. Utvick, 2004 ND 36, ¶ 8, 675 N.W.2d 387 (reviewing whether probable cause existed for the search warrant when the trial court failed to rule on the issue). In the alternative, the State will address whether the good-faith exception was correctly applied by the District Court, if this Court determines "Exhibit B" did not support the finding of probable cause.

[¶44]The issuance of a search warrant must be supported by a showing of probable cause to be reasonable under the United States Constitution and North Dakota Constitution. State v. Ballweg, 2003 ND 153, ¶ 11, 670 N.W.2d 490. "Whether a search warrant was supported by probable cause is reviewed by this Court using 'the totality of the circumstances' approach, making an assessment independent of the trial court's determination." State v. Stewart, 2006 ND 39, ¶ 6, 710 N.W.2d 403 (citing State v. Hage, 1997 ND 175); accord State v. Ballweg, 2003 ND 153 at ¶¶ 11-12.

[¶45]The magistrate evaluates all the evidence and makes a practical, common sense decision whether probable cause exists to search a particular place. We generally defer to a magistrate's determination of probable cause so long as there was a substantial basis for the conclusion, and doubtful or marginal cases should be resolved in favor of the magistrate's determination. State v. Ballweg, 2003 ND 153 at ¶ 12 (citations omitted); accord State v. Stewart, 2006 ND 39 at ¶ 6 (citations omitted).

[¶46]Probable cause to search does not require the same standard of proof necessary to establish guilt at a trial; rather, probable cause to search exists if it is established that certain identifiable objects are probably connected with criminal activity and are probably to be found at the present time at an identifiable place. All of the information presented to establish probable cause should be taken together, not analyzed in a piecemeal fashion, and the magistrate is to make a practical commonsense decision whether probable cause exists to search that particular place. State v. Nelson, 2005 ND 59, ¶ 3, 693 N.W.2d 910 (citing State v. Damron, 1998 ND 71, 575 N.W.2d 912).

[¶47]This Court adopted the “totality of the circumstances” approach under Illinois v. Gates, 462 U.S. 213 (1983), when reviewing a magistrate’s determination of probable cause to issue a search warrant from information provided by an informant. State v. Birk, 484 N.W.2d 834, 837 (N.D. 1992) (citing State v. Ringquist, 433 N.W.2d 207 (N.D. 1988)). A magistrate must consider the informant’s status before considering their credibility or reliability. State v. Roth, 2004 ND 23, ¶ 9, 674 N.W.2d 495 (citing State v. Ronngren, 361 N.W.2d 224 (N.D. 1985)). Informants are classified as either “citizen, confidential, or anonymous.” Id. at ¶ 9. Also, an informant may be classified as a member of the “criminal milieu”. State v. Stewart, 2006 ND 39 at ¶ 8 (citing State v. Dahl, 440 N.W.2d 716 (N.D. 1989)). “The reliability of an informant remains pertinent to a determination of whether or not probable cause exists for the issuance of a warrant based upon that informant’s statement, particularly when that informant is a member of the ‘criminal milieu’”. State v. Dahl, 440 N.W.2d at 718. Similarly, a confidential informant is not presumed reliable, but is still considered to be more reliable than an anonymous informant. State v. Roth, 2004 ND 23 at ¶ 11.

[¶48]In this case, the CI was both “confidential” and a “member of the criminal milieu”, which required Detective Hanson to establish the CI’s reliability in “Exhibit B”. (App. at 14); cf. State v. Dahl, 440 N.W.2d at 718 (defining a “member of the criminal milieu”). Detective Hanson’s method of evaluation consisted of comparing the names and addresses of other suspected drug dealers identified by the CI to investigative information already known to the Fargo Police Department. This method of evaluation is explained by Detective Hanson in his own hand-writing at the very end of “Exhibit B”:

[¶49]The CI has given additional information about 2 drug dealers in the Fargo area that your Affiant has had prior information on. Your

Affiant states those individuals have been and are being investigate[d] presently by the Fargo Police Narcotics Unit. **The information provided by the CI has been checked on and found to be true – as far as information on names, addresses and the fact FPD officers have investigated these names.** (App. at 12) (bold added).

[¶50] “Exhibit B” does not indicate whether the other investigations resulted in arrests, prosecutions, or convictions. This is not a high degree of evaluation of its own accord, but the CI’s reliability was evaluated by Detective Hanson to the extent possible. Cf. State v. Roth, 2004 ND 23, ¶ 13, 674 N.W.2d 495 (noting the confidential informant provided past reliable information which had led to successful state and federal prosecutions and arrests).

[¶51] The confidential nature of investigative information known within the Fargo Police Department is a reason for officers to use this method to evaluate information from an informant. Investigator Hjelden explained at the motion hearing the confidential nature of this kind of investigative information:

[¶52]Q: Investigator Hjelden, would someone in the public know which persons are under investigation by the Fargo Police Narcotics Unit? Could they possibly know that information?

[¶53]A: They could take a name from the paper I image and say - - I guess if they were charged with something and then assume. But, no, if they’re under our scope that’s information that’s within our system or within other agencies as well that we work with.

[¶54]Q: So generally the goal of the department would be to keep that information confidential until - - until the investigation is complete or there’s at least a prosecution or a conviction or so on?

[¶55]A: That would be correct.

[¶56]Q: And so is there - - would there be any expectation by yourself or an officer that a CI would have access or know

which people or which persons are specifically under investigation?

[¶57]A: They might know someone or have names of people that they think would be - - when they provide us with this information, we either tell them we're interested in that or if they give us this information, the people who are using, dealing, selling drugs, a lot of times we're not gonna let them know that they're in our scope or that we want to. They'll just tell us who they can possibly buy from or give us information on who they can or know people who use or sell drugs. (Tr. at 11-12).

[¶58]Natalee Duchene has emphasized a single statement from Detective Hanson's "Exhibit B" throughout this case: "The CI had not been proved to be reliable yet." (App. at 10). This factual statement means Detective Hanson tested the CI's reliability to the extent possible because this was the first time he used information from this CI to apply for a search warrant. (App. at 10). This single statement should not be read alone, but considered together with Detective Hanson's hand-written information at the end of "Exhibit B" and all of the information contained therein.

[¶59]This is also a case where the high level of detailed information gained from personal and recent observations from within the residence supports the CI's reliability. The detail of information provided by the CI is relevant to establishing reliability. State v. Stewart, 2006 ND 39 at ¶ 8 (citing State v. Holzer, 2003 ND 19, 656 N.W.2d 686). Investigator Hjelden gave his opinion at the motion hearing on the specificity of the information provided by the CI and contained in "Exhibit B":

[¶60]Q: Looking at those facts, in your opinion based upon your training and experience, how specific are those facts if you could just state an opinion? How specific do you think they are?

[¶61]A: It's, again, very detailed. That the person has obviously been in there and to see this activity and see the things that

are in the place. It's very good. I guess I would consider it reliable.

[¶62]Q: Would it - - would it raise caution in your mind if someone - - or a CI could not provide specific details?

[¶63]A: He would have to make you verify it. It they could do specific details, as detailed as they are. (Tr. at 8-9).

[¶64]In State v. Ringquist, 433 N.W.2d 207, 212-13 (N.D. 1988), this Court adopted the flexible “totality of the circumstances” approach under Illinois v. Gates, in lieu of the strict analysis under Aguillar-Spinelli, when reviewing the magistrate’s determination of probable cause under these circumstances. The veracity and the basis of knowledge prongs are relevant to deciding if probable cause exists to issue a search warrant, but the two prongs are not “entirely separate and independent requirements intended to be rigidly compartmentalized.” State v. Ringquist, 433 N.W.2d at 211-12 (discussing Gates). Veracity and basis of knowledge are evaluated together “so that strength in one aspect can balance deficiencies in the other”. State v. Birk, 484 N.W.2d at 837 (citing State v. Mische, 448 N.W.2d 415 (1989)).

[¶65]The totality of the information presented to the magistrate by Detective Hanson in “Exhibit B” supported the finding of probable cause to issue the search warrant under Gates. The CI provided detailed information to Detective Hanson in regards to the location, type, size, and color of the drug paraphernalia seen in Natalee Duchene’s residence. Cf. State v. Roth, 2004 ND 23 at ¶ 14 (concluding probable cause when confidential informant provided detailed information regarding his knowledge of the defendant’s manufacture of methamphetamine in his home); cf. also State v. Holzer, 2003 ND 19 at ¶ 14 (concluding probable cause when level of specificity in describing the drug activity that was taking place at the residence made it more likely that the

information provided was accurate). The CI described the drug paraphernalia as a blue marijuana bong, approximately 1 foot high, located inside the residence, sitting on a night stand, in the bedroom of Natalee Duchene. (App. at 11). The CI made personal observations of drug paraphernalia in Natalee Duchene's residence within the "last 24 hours." (App. at 11).

[¶66] Detective Hanson's "Exhibit B" does not contain "bare bones information" or conclusory statements about the CI or the drug paraphernalia seen in the residence. In Gates, examples of such "bare bones information" were explained:

[¶67] Our earlier cases illustrate the limits beyond which a magistrate may not venture in issuing a warrant. A sworn statement of an affiant that "he has cause to suspect and does believe that" liquor illegally brought into the United States is located on certain premises will not do. An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement. An officer's statement that "affiants have received reliable information from a credible person and believe" that heroin is stored in a home, is likewise inadequate. Illinois v. Gates, 462 U.S. 213, 239 (U.S. 1983) (citations omitted).

[¶68] The District Court concluded "this is a close case for the existence of probable cause." (App. at 17). Accordingly, this Court should defer to the magistrate's finding of probable cause in this case. See State v. Stewart, 2006 ND 39 at ¶ 6 (citations omitted) (resolving doubtful or marginal cases in favor of the magistrate's determination so long as a substantial basis for the conclusion exists).

[¶69] II. The District Court correctly denied Natalee Duchene's Motion to Suppress evidence and applied the good-faith exception to the exclusionary rule because the officers reasonably relied upon the magistrate's finding of probable cause from the affidavit containing detailed and reliable information from the confidential informant.

[¶70] In the alternative, the State requests this Court affirm the District Court's application of the good-faith exception to the exclusionary rule under Leon to the officers' reliance on the magistrate's finding of probable cause to issue the search warrant. Cf. State v. Ballweg, 2003 ND 153, ¶ 26, 670 N.W.2d 490 (finding affidavit supported issuance of search warrant and refusing to consider whether the good-faith exception applies). "Under the good-faith exception to the federal exclusionary rule, suppression is not the appropriate remedy if the police reliance on the search warrant was objectively reasonable." State v. Utvick, 2004 ND at ¶ 26 (citing Leon). The good-faith exception to the exclusionary rule does not apply when the supporting affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Id. ¶ 26 (citations omitted).

[¶71] In this case, the officers were not relying upon a finding of probable cause by the magistrate from a "bare-bones" affidavit. The officers who executed the search of Natalee Duchene's residence believed the CI provided detailed and reliable information to support the search. Detective Hanson stated in "Exhibit B" it was his belief the item described by the CI was a "marijuana water bong used for smoking marijuana" from his former experience as an investigator. (App. at 11). The CI communicated information to Detective Hanson about the location, type, size, and color of the drug paraphernalia, which the CI had personally seen in Natalee Duchene's residence within the "last 24 hours." (App. at 11). Detective Hanson tested the CI's reliability by comparing information from this CI about other suspected drug dealers to internal, confidential investigations by the Fargo Police Department. Detective Hanson also checked for corroborative information from police records and electrical power records for this

residence. (App. at 10). Investigator Hjelden believed the CI's information was specific and reliable. (Tr. at 8-9).

[¶72]The District Court's decision to apply the good-faith exception in this "close case" was supported by the total amount of detailed information contained in "Exhibit B" and the officers' good faith reliance on those facts. This is not the egregious case where the exclusionary rule needs to be applied to discourage misconduct by the officers. See State v. Dodson, 2003 ND 187, ¶ 20, 671 N.W.2d 825 (citing Leon) (explaining if an officer reasonably relies on a warrant in good faith, there is no police misconduct to deter).

[¶73]CONCLUSION

[¶74]For the reasons set forth, the State respectfully requests this Court to affirm the Judgment of the District Court.

Respectfully submitted this 22nd day of August, 2006.

Jonathan H.P. Anderson
Assistant Cass County State's Attorney
ND Bar ID #05765

[¶75]CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by U.S. mail on this 22nd day of August, 2006, upon:

Mr. Steven D. Mottinger
Attorney at Law
15 South 9th Street
Fargo, ND 58103

Jonathan H.P. Anderson