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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP1538-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GUY S. HILLARY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A SUPPRESSION MOTION ENTERED IN THE WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF ISSUES

1. Does Hillary have a reasonable expectation of privacy in his home's electrical usage records, stored with a third party, under either the Federal or Wisconsin Constitutions?

The trial court answered no.

2. Was there sufficient probable cause in the affidavit supporting the subpoena for Hillary's electrical usage records?

The trial court answered no.

3. If the subpoena's supporting affidavit had deficient probable cause, should the electrical usage records generated by the subpoena be suppressed?

The trial court answered no.

4. Was the search warrant for Hillary's home, based in part on the electrical usage records obtained via subpoena, lawfully issued?

The trial court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Since this case deals with the relatively unexplored issue of what is sufficient probable cause for a subpoena for electrical usage records held by a third party, publication would be helpful. The State does not request oral argument, but would welcome it if the Court believes it would be helpful in deciding this case.

STATEMENT OF FACTS

On June 13, 2014, Deputy Daniel Winger, a member of the Walworth County Drug Enforcement Unit and a 25 year veteran in law enforcement, received an anonymous complaint of drug activity in Hillary's residence. (A-App. 104.) The complainant advised that he/she was in Hillary's residence to fix a vehicle when he/she observed a very large marijuana grow in a garage on Hillary's property. (*Id.*) The complainant further advised that there were several grow rooms with several large marijuana plants and that Hillary was bragging about how much money he was making. (*Id.*) On June 23, 2014, Deputy Winger followed up on the complaint. After checking both Walworth County Sheriff office records and the Wisconsin Department of Transportation driving license records, Winger learned that Hillary resided at W1434 County Road B, in the town of Bloomfield, Walworth County, Wisconsin. (*Id.*) On June 26, 2014 Winger applied for and was issued a subpoena by the Honorable Judge James L. Carlson, for Hillary's electrical usage records kept by Allied Energy Corporate Service. (A-App. 102–103.)

On July 1, 2014, Winger received Hillary's electrical billing records from Alliant Energy. (A-App. 108.) The electrical records showed that from February 4, 2013, till June 5, 2014 Hillary had used, on a monthly basis, a minimum of 4,496 kilowatts and a maximum of 7,706 kilowatts. (*Id.* at 3.e.) Deputy Winger spoke with Jeff Hale from the Cannabis Enforcement and Suppression Effort, and Hale advised Winger that the normal monthly electrical usage for an average single family residence in Wisconsin is between 750 and 800 kilowatts. (*Id.* at 3.j.) Hale, who had investigated numerous indoor and outdoor marijuana grows, advised Winger that Hillary's electrical usage was indicative of an indoor marijuana grow operation. (*Id.*)

On July 7, 2014 Winger checked the Walworth County Drug Enforcement Unit in house records which showed that the unit had received a Crime Stoppers tip in November 2012 that Hillary had an ongoing marijuana grow in his residence. (*Id.* at 3.h.) On July 7, 2014, based on the Crime Stopper tip, the anonymous eye witness complaint from the person fixing Hillary's car, the electrical records obtained from Alliant Energy, and Jeff Hale's interpretation of those records, Winger applied for and was issued a search warrant for Hillary's residence, by the Honorable Judge Phillip A. Koss. (A-App. 110–111.)

The search warrant was duly executed. Officers found various items of evidence on Hillary's property including numerous marijuana plants, and other drug paraphernalia. Hillary was charged with manufacturing THC, possession of THC with Intent to Deliver, and Possession of Drug Paraphernalia. (1.)

ARGUMENT

I. Introduction.

This case involves two legal issues: 1) The propriety of the subpoena for Hillary's electrical usage records and 2) The propriety of the search warrant for Hillary's residence. The two issues are interrelated since the evidence obtained from the subpoena was substantially relied on in the application for the search warrant. So, if Hillary is correct that the subpoena should not have been issued and the evidence it produced should have been suppressed, then the State cannot prevail, as it cannot demonstrate probable cause for the search warrant without the electrical usage information.

On the first issue, the trial court held that Hillary has no reasonable expectation of privacy in his electrical usage records stored with Alliant Energy. Indeed, neither the United States Supreme Court nor any Wisconsin court has found a Fourth Amendment privacy right in bank records, let alone electrical usage records. Relying on *State v. Popenhagen,* 2008 WI 55, 309 Wis. 2d 601, 749 N.W. 2d 611, Hillary claims he is entitled to suppression as a statutory right, even in the absence of a constitutional one. But *Popenhagen* is not applicable both because Wis. Stat. § 968.135 was fully complied with, and because even if there was insufficient probable cause, *Popenhagen* does not require suppression under the facts and circumstances of this case.

Hillary argues that the subpoena should not have been issued since the probable cause was formulated almost entirely from an anonymous tipster, without any information buttressing the veracity and reliability of the informant. To support this contention, Hillary erroneously relies on this Court's opinion in *State v. Popp*, 2014 WI App. 100, 357 Wis. 2d 696, 855 N.W.2d 471, which dealt with a similar type of informant, but in the search warrant context. The probable cause standard for a subpoena for electrical usage records held by a third party is substantially lower than the probable cause standard for a search warrant authorizing a home search.

Even if this Court found the probable cause insufficient for a subpoena for electrical usage records, suppression is not mandated by *Popenhagen* because the proper subpoena was used, the subpoena was duly brought before the judge who reviewed and authorized it, and the subpoena's lone alleged defect is a deficiency in the probable cause section for non-private records.

On the second issue, the search warrant was properly issued based on the Crime Stopper tip, the information provided by the anonymous eye witness complainant, and the information gleaned from the electrical usage records. Again misreading *Popp,* Hillary argues that there was insufficient probable cause because the Crime Stopper tip, and the anonymous complaint, should be excised from the warrant, since neither had any indicia of reliability or veracity. (Hillary's Br. 16–17.) *Popp* did not hold that anonymous tips, without sufficient indicia of reliability and veracity, should be excised, but rather commented only that, standing alone, they are insufficient probable cause for a search warrant. Here, both the Crime Stopper tip and the anonymous complainant were strengthened by the supporting electrical usage records. Those pieces of evidence, combined to form the requisite probable cause.

II. The subpoena for the electrical usage records was properly issued.

A. Standard of review and applicable law.

Great deference is to be given to the subpoena issuing judge's determination of probable cause and that determination stands unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding. *State v. Swift,* 173 Wis. 2d 870, 883, 496 N.W.2d 713 (Ct. App 1993).

A person has a reasonable expectation of privacy if the person has an actual or subjective expectation in the place searched and item seized; the expectation is objectively reasonable, that is one that society is prepared to recognize as reasonable. *State v. Bruski,* 2007 WI 25, ¶¶ 20–23, 299 Wis. 2d 177, 727 N.W.2d 503.

The United States Supreme Court held that a bank customer does not have a reasonable expectation of privacy in his/her records in the bank's possession. *United States v. Miller,* 425 U.S. 435, 445 (1976). Similarly, this Court declined to find a privacy interest in bank records under Art. I, Sec. 11 of the Wisconsin Constitution. *Swift,* 173 Wis. 2d at 882–883. There are no United States Supreme Court or Wisconsin cases dealing with privacy interests in electrical usage records in the possession of third parties, but it is difficult to contemplate that they would be afforded more privacy than bank records.

B. Hillary did not have a reasonable expectation of privacy in his electrical records stored with Alliant Energy.

Hillary's position as to his constitutional expectation of privacy in the electrical usage records is unclear. He argues that *Miller* is not controlling, since it does not implicate the Wisconsin Constitution. (Hillary's Br. 11–12.) Hillary then points to *Popenhagen* as the controlling authority (Hillary's Br. 12), but he properly recognizes that *Popenhagen* did not consider bank records in a Fourth Amendment context. (*Id.*) Then Hillary backtracks and says that *Popenhagen* would not have been decided the way it was if the State were correct that there is no privacy rights in third-party records. (*Id.*) Looking at Hillary's argument in its totality, it may not hinge on his Fourth Amendment interests in the electrical usage records, but rather on what he perceives to be his statutory protections under Wis. Stat. § 968.135.

Miller and *Swift* found no privacy interests in bank records held by a third party, under the United States and Wisconsin Constitutions respectively. It is fair to extrapolate these holdings to electrical usage records, particularly when, as Hillary practically concedes (Hillary's Br. 11), common

sense tells us that our kilowatt information is less private than our financial dealings. *Popenhagen,* another bank record case, does not attempt to reject *Miller,* or overrule *Swift*. Indeed its whole analysis was predicated on what to do with suppression in circumstances where there is no constitutional right or specifically enumerated statutory suppression provision. By implication, *Popenhagen* had no quarrel with existing law finding no Fourth Amendment privacy right in bank records stored by third parties.

The trial court here properly found no constitutional basis for suppression because Hillary did not have a reasonable expectation of privacy in his electrical usage records.

C. The probable cause standard for a subpoena for electrical usage records stored by a third party is appreciably lower than the probable cause standard for a search warrant for a home.

It is well established in Wisconsin case law that the term "probable cause" means different things depending on the privacy interest and the stage in the proceedings that is implicated. The probable cause for a warrant is less than the probable cause necessary needed for a bind-over after a preliminary hearing. *State v. Dunn,* 121 Wis. 2d 389, 396, 359 N.W.2d 151 (1984). The probable cause at a hearing on the revocation of a driver's license is less than that needed to establish probable cause at a suppression hearing. *State v. Wille,* 185 Wis. 2d 673, 682, 518 N.W.2d 325 (Ct. App. 1994). The probable cause for asking a subject to submit to a preliminary breath test is less than the probable cause necessary to arrest a person for operating while intoxicated. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 304, 603 N.W.2d 541 (1999).

Probable cause is not an unvarying standard but changes depending on the particular stage of the proceedings. *State v. Knoblock,* 44 Wis. 2d 130, 134, 170 N.W.2d 781 (1969). Probable cause indicates different levels of proof at different stages of proceedings. *Renz,* 231 Wis. 2d 293, ¶ 33. The further along in the proceedings, the higher the standard for probable cause. *Id.* ¶¶ 32, 33.

A fair summary of the law is that probable cause is a fluctuating standard based on the privacy right implicated, and the stage of the proceedings. It follows logically that probable cause in the subpoena for electrical usage records context, would be at one of lowest levels since it involves a non-privacy interest and occurs at the embryonic stages of the proceedings, the initial point of a criminal investigation.

D. The anonymous complaint that Hillary was engaged in a drug grow operation was sufficient probable cause for a subpoena for Hillary's electrical usage records.

Here, the anonymous tip and experience of the officer were sufficient probable cause to support a subpoena for electrical usage records. The affiant, an experienced police officer with training and practical experience in marijuana investigations, received an anonymous tip from somebody who was in Hillary's residence fixing a vehicle. The complainant had specific information; he or she told the affiant that there were several grow rooms with several large marijuana plants and that Hillary was bragging about how much money he was making. From this information the affiant was able to determine Hillary's address. (A-App. 104.) While this information is not probable cause for a search warrant for a home, it is sufficient for a subpoena for non-private records stored by a third party, solicited at the very beginning of the investigation.

The trial court erred in addressing the probable cause issue, by analyzing it from a probable cause for a search warrant perspective. The trial court felt that since *State v. Popp* found insufficient probable caused based on an anonymous tipster without indicia of reliability and veracity, it had to do the same for a similar anonymous tipster in a subpoena affidavit context. (42:9.) The trial court was wrong on this; *Popp*, as a home search warrant case, is not instructive of the probable cause needed for a subpoena application. The probable cause standard for an affidavit for a subpoena is lower than the probable cause for a search warrant, both as a matter of law and common sense. If the probable cause needed for a subpoena is the same as the probable cause needed for a search warrant there would never be a need for a subpoena for electrical usage records; the affiant would already have enough for a search warrant for the home. Electrical use records, in the possession of a third party, should be far easier to obtain than judicial permission to make an investigatory intrusion into someone's home.

While the trial court erred by relying on *Popp* in finding insufficient probable cause, its ultimate decision to not suppress the electrical usage record evidence was proper. This Court is not constrained to the circuit court's reasoning in affirming or denying its order; affirmance of the circuit court's order can be based on different grounds. *State v. Holt,* 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985).

E. The subpoena for electrical usage records fully complied with Wis. Stat. § 968.135.

Hillary argues that Wis. Stat. § 968.135 was not complied with since, in his view, the subpoena lacked probable cause. As argued above, the subpoena had the

requisite probable cause. There is no dispute that in all other ways there was full compliance with § 968.135. The proper subpoena form was used, and it was duly presented to the judge who authorized its issuance.

As the statute was fully complied with and as there was no violation of any constitutional right, there is no basis for suppression. The trial court properly denied Hillary's motion to suppress the evidence generated by the subpoena.

F. Even if this Court determined that there was not sufficient probable cause for the subpoena, the subpoena need not be suppressed.

There was no statutory violation in this case. But if this Court concluded that there was one, it would not be grounds for suppression under *Popenhagen.*

In *Popenhagen*, the State's failure was not simply a matter of using the wrong form, but of failing to submit evidence of probable cause and of not allowing the court to make probable cause findings. In asking the circuit court to issue subpoenas for bank records, the district attorney did not comply with the investigatory process under Wis. Stat. § 968.135 that requires a showing of probable cause on oath. *Popenhagen,* 309 Wis. 2d 601, ¶ 10. Instead, the subpoena request simply relied on statutes used to secure the appearance of witnesses, and documents in the witnesses' possession. *Id.* ¶¶ 8–9. As a result of using the wrong subpoena form, the district attorney thus failed to comply with the substantive provisions of Wis. Stat. § 968.135. *Id.* ¶ 98 (Prosser, concurring).

Unsurprisingly, the supreme court wanted to suppress the evidence the faulty subpoena generated as well as the derivative evidence it spawned. Because there was no violation of a constitutional right, and no provision in the applicable statute authorizing suppression, the *Popenhagen* court held that evidence could be suppressed, under proper facts and circumstances, if it was obtained in violation of statutory requirements. But unlike for a violation of a constitutional right or the violation of a statute with a suppression provision, such suppression would be left to the discretion of the court.

> The cases demonstrate that the circuit court has *discretion to suppress or allow* evidence obtained in violation of a statute that does not specifically require suppression of evidence obtained contrary to the statute, depending on the facts and circumstances of the case and the objectives of the statute.

Id. ¶ 68 (emphasis added).

Under the facts at issue in that case, when the wrong subpoena was used and none of the requirements of Wis. Stat. § 968.135 were complied with, suppression was an easy call. "[T]his was a subpoena, which at every juncture of the entire process, was defective." *Id.* ¶ 141 (Ziegler, concurring in part, dissenting in part).

In stark contrast to *Popenhagen*, the subpoena here only has one alleged defect: a perceived deficiency in the fully completed probable cause section. Unlike in *Popenhagen,* the proper form was used, there was a completed probable cause section, the subpoena was duly presented to the magistrate for review, and the magistrate approved, signed and authorized the subpoena. And while the subpoena in *Popenhagen* was for bank records, the subpoena here was for electrical usage records, records that

can be found in substantial part on line. Hillary makes much about the electrical usage records one can find on line, arguing that since this was not noted in either the affidavit for the subpoena or the search warrant, this fact should not be considered in determining the validity of either document. The State agrees with Hillary on this score; if it's not in the four corners of the affidavit it is out of play. But the ease with which a substantial form of electrical usage records can be obtained outside judicial process is relevant in an analysis of the expectation of privacy one can reasonably feel in the records. And the ease with which these records can be viewed publically, is a relevant factor in the court exercising its *Popenhagen* discretion not to suppress evidence from a subpoena whose only flaw is an alleged deficiency in the completed probable cause section.

The trial court did not specifically address *Popenhagen* in denying Hillary's motion to suppress, other than to note that *Popenhagen* was a bank record case and that Hillary did not have a reasonable expectation of privacy in electrical usage records. But it can be inferred that the trial court, being fully aware of *Popenhagen,* did not feel that it mandated suppression. This is correct, since *Popenhagen* leaves the matter to the judge's discretion based on the facts and circumstances of the case. Here, with the proper subpoena for electrical usage records presented to a judge for review and endorsement, the facts and circumstances support the trial court's decision not to suppress the evidence on *Popenhagen* grounds.

III. The search warrant for Hillary's residence was properly issued and executed.

A. Applicable law.

A reviewing court should accord "great deference" to a search warrant-issuing magistrate's probable cause

determination. It should uphold the magistrate's probable cause finding unless the defendant establishes that the facts asserted in support of the warrant are "clearly insufficient" to support probable cause. *State v. Ward,* 2000 WI 3, ¶ 21, 231 Wis. 2d 723, 604 N.W.2d 517. This deferential standard of review furthers the Fourth Amendment's strong preference for searches conducted with a warrant. *State v. Romero,* 2009 WI 32, ¶ 18, 317 Wis. 2d 12, 765 N.W.2d 756.

Probable cause for a search warrant is not a technical, legal concept, but a flexible common-sense measure of the plausibility of particular conclusions about human behavior. *Id.* ¶ 17 n.9. Probable cause is more than a possibility but less than a probability that the conclusion is more likely than not. *State v. Tompkins,* 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988). In assessing probable cause, an issuing magistrate may consider the officer's expertise and specialized knowledge as well as the officer's expert opinion. *State v. Multaler,* 2002 WI 35, ¶ 43, 252 Wis. 2d. 54, 643 N.W.2d 437.

When a reviewing court decides whether probable cause existed for a search warrant's issuance, it must examine the totality of the circumstances presented to the issuing magistrate. The reviewing court must determine whether the magistrate had a substantial basis for determining there was a fair probability that a search of identified premises would uncover evidence of wrongdoing. *Romero*, 317 Wis. 2d 12, ¶ 3.

B. The Crime Stopper tip, the anonymous eye witness complainant tip, and the electrical usage records interpreted and explained by an experienced officer in drug investigations combined to create sufficient probable cause to search Hillary's residence.

Hillary argues there was insufficient probable cause to support the search warrant.[1] He argues that *Popp* authorizes the removal of the anonymous tips from consideration. But he misunderstands *Popp*. *Popp* excised information that was unconstitutionally discovered; it does not say that evidence in a search warrant is excised because it is weak. Such an extreme function is limited to evidence that was wrongfully obtained. Hillary, erroneously relying on *Popp,* excises the two anonymous tips from the search warrant. He then asserts that since only the electrical usage records remain for a probable determination, the probable cause is insufficient under *State v. Loranger,* 2002 WI App 5, ¶ 23, 250 Wis. 2d 198, 640 N.W.2d 555.

Here, all of the evidence must be taken together. The electrical usage records themselves were accompanied by information from Jeff Hale from the Cannabis Enforcement and Suppression Effort, who has investigated numerous indoor and outdoor marijuana grow operations. Hale advised that the normal kilowatt usage for the average single family residence is between 750 and 800 kilowatts per month. And

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[1] Hillary's primary argument is that there was no probable cause in the search warrant affidavit, because the electrical use records should be excised. The State agrees with Hillary that without the electrical usage records there was no probable cause for the search warrant. But, as argued above, the trial court's decision to deny Hillary's motion to suppress the electrical use records was properly rendered.

that Hillary's records showed that he used 841 KW in January 2013, and after that never used less than 4,496 KW and as much as 7,706 KW in a month; numbers consistent with an indoor marijuana grow operation. (A-App. 108–109) And these facts did not stand alone; they stand with the Crime Stopper tip and the anonymous eye witness tip. Those tips, even if weak by themselves, gain vitality from the electrical usage records and the records gain strength from the tips. Probable cause is a fluid concept based on a composite view of the totality of the circumstances. From all of these facts, the judge properly found probable cause and issued the search warrant.

Hillary warns that finding the search warrant valid here, based on significantly high electrical usage records, "would produce absurd results, with warrants being issued against all households with higher than average electricity consumption, and resulting in a trampling of citizen's rights to be free from government entanglements." (Hillary's Br. 21.) A fair sentiment in general, but not applicable here where a Crime Stopper tip asserted that Hillary was engaged in a marijuana grow operation, an anonymous eye witness tip indicated that Hillary had many large marijuana plants and a marijuana grow operation, and an experienced drug officer analyzed the significance of the electrical usage records showing dramatically high usage rates. Hillary's insistence that the electrical use records must be viewed in a vacuum is not supported by fact or law. Giving great deference to the issuing magistrate, this Court should affirm the trial court's order denying Hillary's motion to suppress evidence generated by the search warrant.

CONCLUSION

For all the reasons stated above, the trial court's rulings denying Hillary's motion to suppress the evidence obtained from the subpoena and the search warrant, should be affirmed.

Dated this 23rd day of February, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 3,883 words.

____

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 23rd day of February, 2017.

____

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