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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

A130623/A130707

v.

**(Solano County
Super. Ct. Nos. FCR250361,
FCR250145)**

**JEREMY RAYMOND DONAGAL
and DEREK JOHN HOOD,**

Defendants and Appellants.

_____ /

Jeremy Raymond Donagal (Donagal) and Derek John Hood (Hood) appeal from judgments entered after they pleaded no contest to maintaining a place for the storage and distribution of a controlled substance. (Health & Saf. Code, § 11366.5, subd. (a).)

Donagal contends the trial court erred when it denied his motion to suppress. Hood asks this court to conduct an independent review of the record as is required by *People v. Wende* (1979) 25 Cal.3d 436. We conclude the court correctly denied Donagal’s motion and that there are no arguable issues within the meaning of *Wende*. Accordingly we will affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 25, 2007, Hood was arrested in Solano County for driving under the influence in a truck that contained approximately six pounds of marijuana.

On November 30, 2007, law enforcement personnel acting pursuant to a warrant searched Hood's residence on Northgate Road in Walnut Creek. They found a small amount of marijuana in the main house, 41 marijuana plants in an adjacent outbuilding, and 800 recently harvested marijuana plants in the back of Hood's truck.

Donagal was present at the house in Walnut Creek when it was searched and on December 7, 2007, law enforcement personnel executed a warrant at Donagal's home on Pleasant Hill Road in Lafayette. They found a little less than a pound of marijuana in a bedroom, over four pounds of marijuana in the garage, and fertilizer, timers, and grow lamps in an adjacent outbuilding.

On December 9, 2007, authorities acting pursuant to a warrant searched Donagal's home on Menesini Place in Martinez. They found books and publications on marijuana cultivation,¹ several weapons, and \$13,700 in cash. In Donagal's car parked outside, authorities found marijuana and \$4,580 in cash.

Based on these facts, a complaint was filed charging Donagal and Hood with numerous criminal offenses.

Donagal and Hood filed motions to suppress and to traverse the search warrants that had been executed at their respective properties. The trial court conducted a hearing on the motions in conjunction with the preliminary hearing and denied them.

Donagal and Hood renewed their motions in the superior court which denied them too.

Both cases were resolved through negotiation. Donagal pleaded no contest to maintaining a place for the storage and distribution of a controlled substance. (Health & Saf. Code, § 11366.5, subd. (a).) Hood pleaded no contest to the same charge and to an additional charge of driving under the influence. (Veh. Code, § 23152, subd. (a).) In exchange, other counts and allegations were dismissed.

¹ Among the titles found were "Marijuana Success Volume II," the "Marijuana Grower's Handbook," "The Best of Ask Ed[;] Questions Answered About Marijuana" and "Indoor Marijuana Horticulture."

Subsequently, the court suspended the imposition of sentence and placed Donagal and Hood on probation.

II. DISCUSSION

A. Donagal Appeal

Donagal contends the trial court erred when it denied his motion to suppress the evidence that was seized during the December 7, 2007 search of his residence on Pleasant Hill Road in Lafayette. To put this argument in context, further background is necessary.

Authorities searched Donagal's Pleasant Hill Road residence based on a warrant that was obtained by California Highway Patrol (CHP) Officer Steve Miriani. The affidavit Miriani submitted in support of his request for a warrant stated as follows:²

On November 25, 2007, Hood was involved in a one car traffic accident on Weber Road in Vacaville. CHP Officer Michael Erickson was dispatched to the scene and when he arrived, he noticed there was a large plastic garbage can in the bed of Hood's truck that was open and on its side. About six pounds of marijuana was inside the can. Erickson also found \$1,580 in cash on the front seat of the truck. Erickson arrested Hood for driving under the influence and for possessing marijuana for purposes of sale.

Officer Erickson transported Hood to a police station where he met with Officer Miriani. Miriani looked at the marijuana Erickson had seized and commented to Hood that the plants looked like they came from "an indoor grow." Hood responded, "they are."

Officer Miriani determined that Hood lived on Northgate Road in Walnut Creek and he stated he was going to start forfeiture proceedings on the money that had been seized. In response, Hood complained "how am I going to pay my PG&E bill." Miriani asked Hood what he was talking about. Hood replied that he had a \$10,000 bill from PG&E. When Miriani commented that was an extremely high bill for a house in Walnut Creek, Hood replied, "it[']s for eight months for my property in Vacaville."

² For clarity, we italicize the facts that are set forth in Miriani's search warrant affidavit.

Officer Miriani determined that the truck Hood was driving at the time of his arrest was registered to Hood and to Brenda Faye Bekakis on Northgate Road in Walnut Creek. Miriani also determined that Bekakis owned property located at 5752 Weber Road in Vacaville. Based in part on that information, warrants were issued authorizing searches of the Northgate Road and Weber Road properties.

Both warrants were executed on November 30, 2007. Officer Miriani participated in the Weber Road search and he located what he characterized as “the largest most sophisticated marijuana growing operation [he had] seen in [his] 27-year career in law enforcement.” However, “most of the live marijuana plants had recently been removed.”

That same day, authorities searching the Northgate Road Property in Walnut Creek found approximately 800 recently harvested marijuana plants in Hood’s vehicle that was parked there. Hood himself was present during the search as was appellant Donagal. Hood was arrested again, this time for possession and cultivation of marijuana for purposes of sale.

About a week later, Officer Erickson spoke with a man named Will Henderson “whose occupation is to repair electrical generators.” Henderson described an event that occurred a little more than seven months earlier on April 25, 2007. According to Henderson, he was summoned to 5752 Weber Road in Vacaville to repair a generator. When he arrived, a man who identified himself as Jeremy Donagal asked Henderson to repair a diesel generator that was attached to the exterior of a barn on the property. Henderson told Donagal that to make the repairs, he would need to access an electrical panel that was inside the barn. Donagal told Henderson he could not go inside the barn because it contained a “T-shirt manufacturing shop” and Donagal did not have the key.

Officer Miriani also spoke with the prior owner of 5752 Weber Road who said he sold the property to Brenda Bekakis and Derek Hood in August 2006 and that the barn was “completely wired for electricity when he sold the property.”

Officer Miriani opined in his affidavit that it was “highly unlikely the barn contained a T-shirt manufacturing shop at the time Will Henderson contacted Jeremy Raymond Donagal about the repair of the generator because, the magnitude of the

marijuana growing operation I found inside the barn was so great, I know it took a great amount of time, money and labor to assemble. In addition, I know persons that grow marijuana for profit prefer to pilfer and/or use generators to power grow lights because the lights spike electricity bills, which may alert law enforcement.” Miriani stated that based on his training and experience, Hood and Donagal were “co-conspirators involved in the long-term criminal enterprise of growing and selling marijuana for profit.” Furthermore, “because of the magnitude and complexity of the marijuana growing operation I saw in the barn, I know it is not the first and only marijuana growing operation that Derek John Hood and Jeremy Raymond Donagal are involved with.” Accordingly, Miriani stated he believed drugs and/or contraband would be found at Donagal’s Pleasant Hill Road property.

The magistrate reviewing Miriani’s application was convinced by this showing and he issued a warrant that authorized a search of Donagal’s property on Pleasant Hill Road in Lafayette. During the subsequent search, authorities found the marijuana and associated growing equipment that we have described above.

Donagal challenged the magistrate’s decision to issue the warrant by filing a motion to suppress and to traverse. He argued probable cause was not shown by his presence during the Walnut Creek search or by his actions at the Weber Road property. He also argued that the information Henderson provided was stale. Donagal argued the warrant should be traversed because Miriani stated in his warrant application that the person Henderson identified was Donagal when “Mr. Henderson really had never identified Jeremy Donagal.” The latter assertion was based on the following exchange that occurred during the cross examination of Miriani by Donagal’s attorney at the preliminary hearing:

“Q. In terms of identification, do you know if anyone verified with Mr. Henderson what this Jeremy Donagal looked like?

“A. I believe that I had Ericson, or whomever went out there, I told Ericson, anyway, to get a photo lineup and show photos and see if he can pick Donagal out of the

photos. [¶] And if -- you will have to confirm this with Ericson – but if my memory is correct, I don't think he was able to. I'm not sure on that.”

The trial court denied Donagal's motion. Addressing the alleged misrepresentation, the court disagreed with Donagal's reading of the record. The court understood the testimony to be that Officer Ericson, “was not able to show him the lineup; not that Mr. Henderson was unable to pick out . . . Donagal.” The court stated it did not “know of any reason . . . to just label Miriani a liar.”

The court also denied appellant's motion to suppress stating Donagal had “a rather substantial connection with the Weber [Road] property” as shown by “his calling out the repair person for this generator” The court rejected Donagal's assertion of staleness noting, “the improvements that were made to the barn to conduct this grow and this generator, this didn't just all appear overnight. [¶] This was . . . a very involved operation. It had taken a long time to assemble and get going.”

Donagal now challenges the court's ruling arguing the court should have granted his motion to suppress because “the facts alleged in the supporting affidavit were patently insufficient to establish probable cause to search the Pleasant Hill residence.”

Whether a given set of facts is sufficient to support a search is governed by the totality of circumstances test. “The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a ‘substantial basis for . . . conclud[ing]’ that probable cause existed.” (*Illinois v. Gates* (1983) 462 U.S. 213, 238-239.)

Whether an affidavit provided the magistrate a “‘substantial basis’” for concluding there was probable cause is an issue of law “subject to our independent review[.]” (*People v. Camarella* (1991) 54 Cal.3d 592, 601.) But, because “[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause,” we accord deference to the magistrate's determination and “‘doubtful or marginal’” cases are to be resolved with a preference for upholding a search under a

warrant. (*United States v. Leon* (1984) 468 U.S. 897, 914; see also *People v. Weiss* (1999) 20 Cal.4th 1073, 1082.) Ultimately, “the magistrate’s determination will not be overturned unless the supporting affidavit fails as a matter of law to support the finding of probable cause. [Citations.]” (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278.)

Applying these principles, we conclude the magistrate’s decision was well supported. The affidavit Officer Miriani submitted demonstrated that authorities had uncovered a major marijuana growing operation. On November 25, 2007, about six pounds of marijuana and a large amount of money was found in Hood’s truck. Hood was closely connected to a residence that was located on Weber Road in Vacaville, and when authorities searched that residence pursuant to a warrant on November 30, 2007, they found what Miriani described as “the largest most sophisticated marijuana growing operation [he had] seen in [his] 27-year career in law enforcement.” While “most” of the live marijuana plants “recently” had been removed from the growing operation, they were located quickly: that same day, authorities executing a warrant at the Northgate Road residence in Walnut Creek where Hood said he lived, found approximately 800 recently harvested marijuana plants. Donagal’s connection to the marijuana growing operation was established through two points. First, he was present at the Northgate Road residence during the search when the plants were found. Second, he was closely connected to the Weber Road property in Vacaville where the plants apparently were grown. Specifically, about seven months earlier Donagal contacted an electrician, Will Henderson (Henderson), and asked him to repair a generator that was attached to a barn on the property but was unwilling to give Henderson access to an electrical panel that was inside the barn. The magistrate reasonably could conclude the fact that Donagal was present at the Northgate Road residence when the 800 recently harvested marijuana plants were found, together with the fact that Donagal had exercised control over the property where those 800 marijuana plants apparently were grown, established that Donagal was involved in what Miriani described as a conspiracy to grow marijuana illegally. The challenged search of Donagal’s residence on Pleasant Hill Road in

Lafayette was supported by the fact that the conspirators were using multiple residences to conduct their illegal activities and by the scope of the illegal growing operation that was located at the Weber Road property. As Miriani stated, given “the magnitude and complexity of the marijuana growing operation [he saw] in the barn, [he knew] it [was] not the first and only marijuana growing operation” with which Donagal was involved. We conclude the magistrate had a substantial basis to conclude there was probable cause to believe marijuana would be found at Donagal’s residence on Pleasant Hill Road. (*Illinois v. Gates, supra*, 462 U.S. at pp. 238-239.) The trial court correctly denied the motion to suppress.

The arguments Donagal advances do not convince us the trial court erred. First, Donagal contends the trial court should have granted the motion to suppress because the information Henderson provided was stale. “No bright-line rule defines the point at which information is considered stale. [Citation.] Rather, ‘the question of staleness depends on the facts of each case.’ [Citation.] ‘If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale.’ [Citation.]” (*People v. Carrington* (2009) 47 Cal.4th 145, 163-164.)

The information that Henderson provided was older than some because it described an event that occurred more than seven months before the warrant was executed at Donagal’s house in Lafayette. At least one case has stated that “delays of more than four weeks are generally considered insufficient to demonstrate present probable cause.” (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652; see also *People v. Hirata* (2009) 175 Cal.App.4th 1499, 1504.) On the other hand, there was substantial evidence that illegal activities continued at the Weber Road property until just before the December 7, 2007 search. Specifically, on November 25, 2007, Hood was arrested after a traffic accident that occurred just two miles from the Weber Road residence. The fact that officials found six pounds of dried marijuana plants in the back of Hood’s truck, and the statements Hood made after his arrest (where he admitted the plants came from an “indoor grow” and said that his extremely high electricity bill was for property that was

located in Vacaville,) strongly suggested that marijuana plants were grown at the Weber Road residence. Then on November 30, 2007, when authorities executed a search warrant at the Weber Road residence, they found a highly sophisticated marijuana growing operation there. We conclude a person of ordinary prudence would conclude that illegal activity had continued at the Weber Road residence up to the time of the December 7, 2007 search. (*People v. Carrington, supra*, 47 Cal.4th at pp. 163-164.) The information Henderson provided was not stale.

Donagal challenges this conclusion arguing that “there was only speculation, not evidence, that marijuana was being cultivated in the barn at the time of Mr. Henderson’s supposed visit.” We simply disagree. While Henderson did not specifically see anything illegal, what he did see was highly incriminating. Specifically, Henderson said he was called to fix an electrical generator that was attached to a barn on the property. That, in itself, is odd because the prior owner said the barn was completely wired for electricity. An investigating officer would reasonably question why someone would need to attach an electrical generator to a barn that is wired for electricity. A possible answer is found in Officer Miriani’s affidavit. He said “persons [who] grow marijuana for profit prefer to . . . use generators to power grow lights because the lights spike electricity bills, which may alert law enforcement.” Also, Henderson said he told Donagal that to fix the generator, he would need to access an electrical panel that was inside the barn. Donagal denied him access saying there was a “T-shirt” manufacturing operation inside and that he did not have a key. Again, this is odd. Common experience teaches that a person who is in charge of property has access to that property. The fact that Donagal claimed he did not have access to the inside of the barn is highly suspicious. Finally and importantly, about seven months after the incident Henderson described, the very place to which Donagal denied Henderson access was found to contain what Officer Miriani described as “the largest most sophisticated marijuana growing operation [he had] seen in [his] 27-year career in law enforcement.” According to Miriani, given the “magnitude” of that growing operation and “amount of time, money and labor” that was required to assemble it, it was “highly unlikely” the barn contained a T-shirt manufacturing shop when

Donagal contacted Henderson. While Donagal contends “there is nothing in the affidavit – or in testimony [of Officer Miriani] for that matter” that would provide foundation for this statement, the record demonstrates otherwise. Miriani testified that he had investigated “[a]t least a hundred” marijuana growing operations and that he was highly experienced in this area. The search of Donagal’s home was supported by evidence, not speculation.

Next, Donagal argues “[t]he prosecution failed to establish that Mr. Henderson’s information was reliable.” Specifically, Donagal complains that there was “nothing in the warrant to indicate that the affiant, or any other officer, made any inquiries to establish that Mr. Henderson was who he said he was – a person who did generator repairs.”

While that is true, it is irrelevant. The record demonstrates Henderson was a citizen informant, i.e., a person who is innocent of criminal involvement and who volunteers his information fortuitously, openly, and through motives of good citizenship. (*People v. Ramey* (1976) 16 Cal.3d 263, 268-269.) Absent evidence to the contrary, a citizen informant is presumed to be reliable. (*Id.* at p. 269; see also *People v. Smith* (1976) 17 Cal.3d 845, 852.)

Donagal tries to evade this conclusion by arguing nothing in the record demonstrates Henderson was a citizen informant. This is incorrect. In order to qualify as a citizen informant, “[t]he affidavit must *affirmatively* set forth the circumstances from which the existence of [that] status can reasonably be inferred by a neutral and detached magistrate.” (*People v. Smith, supra*, 17 Cal.3d at p. 852.) Here, Miriani’s affidavit stated Henderson was an electrician who specialized in repairing generators who was called by Donagal to repair a generator on the Weber Road property. The magistrate reasonably could infer Henderson was a citizen informant who was motivated by principles of good citizenship to relay the information he obtained. No more was required.

Donagal next argues that his mere presence at the Northgate Road property when it was searched and marijuana was found did not establish probable cause to believe that marijuana would be found at his property on Pleasant Hill Road in Lafayette. Donagal

relies on cases that hold the “mere propinquity to others . . . suspected of criminal activity” does not give rise to probable cause. (See, e.g., *Ybarra v. Illinois* (1979) 444 U.S. 85, 91.) But the magistrate in the case before us did not authorize a search of Donagal’s residence in Lafayette based solely on the fact that Donagal was present at the Northgate Road property when the search was conducted. Rather the search was authorized based on Donagal’s presence at the Northgate Road residence *and* Donagal’s highly suspicious activities at the Weber Road residence that we have described. Those acts, construed together, provided a substantial basis for the magistrate to conclude there was probable cause to believe marijuana would be found at Donagal’s residence on Pleasant Hill Road. (*Illinois v. Gates, supra*, 462 U.S. at pp. 238-239.)

Donagal’s next argument focuses on facts he claims Officer Miriani omitted from his warrant affidavit. Specifically, Donagal contends Miriani should have but did not disclose to the magistrate that (1) Brenda Bekakis, who owned the Northgate Road property, was Donagal’s mother, (2) Hood was Bekakis’s boyfriend and caregiver, (3) Bekakis was suffering from terminal cancer, and (4) Donagal told an officer who was executing the warrant at the Northgate Road residence that he was there to visit his mother and he had only arrived recently. According to Donagal, when these facts “are added to those included in the affidavit . . . it is manifestly apparent that [his] presence at the Northgate [Road] residence did not provide probable cause to search”

A defendant has a limited right to challenge the veracity of statements that are made in an affidavit that is submitted in support of a request for a search warrant. (*People v. Scott* (2011) 52 Cal.4th 452, 484.) “A defendant who challenges a search warrant based on *omissions* in the affidavit bears the burden of showing an intentional or reckless omission of material information that, when added to the affidavit, renders it insufficient to support a finding of probable cause. [Citations.]” (*Ibid.*)

Donagal failed to satisfy his burden. First, Donagal failed to show that Officer Miriani (as opposed to some other officer) was aware of the facts that he asserts were intentionally or recklessly omitted from the affidavit. One cannot omit what one does not know. Furthermore, and more to the point, the “facts” Donagal has identified, when

added to the affidavit, *do not* cause it to be inadequate. As the People argue persuasively, “The ‘fact’ that Donagal ‘was there to spend some time with his dying mother’ . . . is not inconsistent with his visiting his mother *and* attending to the family marijuana business. Bekakis’s regrettable condition did not mean that her boyfriend Hood was not growing marijuana at her Vacaville property, nor did it sever the links between Hood, Donagal, and Bekakis.” We conclude the additional facts Donagal has identified, when added to the affidavit, do not render it insufficient to support a finding of probable cause. (*People v. Scott, supra*, 52 Cal.4th at p. 484.) There was no error on this ground.

Finally, Donagal contends the trial court should have granted his motion to suppress because the affidavit Officer Miriani submitted did not establish probable cause to search the place searched: i.e., his residence on Pleasant Hill Road. Donagal is correct that the “critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the “things” to be searched and seized are located on the property to which entry is sought. [Citation.]” (*People v. Frank* (1985) 38 Cal.3d 711, 728-729.) But the “connection between the items to be seized and the place to be searched need not rest on direct observation. It may be inferred from the type of crime involved, the nature of the item, and the normal inferences as to where a criminal might likely hide incriminating evidence.” (*People v. Miller* (1978) 85 Cal.App.3d 194, 201.) Indeed, many cases have recognized that, based on the nature of the crime and the nature of the evidence sought, a magistrate can reasonably conclude that a suspect’s residence is a logical place to look for incriminating evidence. (*People v. Carrington, supra*, 47 Cal.4th at p. 163.) Here, as we have explained above, the evidence presented to the magistrate showed appellant was part of a conspiracy of persons who were using multiple residences to conduct their illegal marijuana growing activities. Furthermore, as Miriani stated, given “the magnitude and complexity of the marijuana growing operation” that was found at the residence on Weber Road, it was likely it was not the “first and only marijuana growing operation” with which Donagal was involved. Given these factors, the magistrate could reasonably

conclude Donagal’s residence on Pleasant Hill Road was “a logical place to look for incriminating items.” (*Ibid.*) There was no error on this ground.

In sum, we conclude the trial court correctly denied appellant’s motion to suppress and to traverse.³

B. Hood’s Appeal

As we have stated, Hood’s counsel on appeal has filed a brief that asks this court to conduct an independent review of the record as is required by *People v. Wende, supra*, 25 Cal.3d 436. Counsel also informed Hood that he had the right to file a supplemental brief on his own behalf. Hood declined to exercise that right.

We have reviewed the record on appeal and conclude there are no meritorious issues to be argued. The trial court correctly denied Hood’s similar (though not identical) motion to suppress and to traverse. Prior to accepting Hood’s plea, the court took steps to ensure Hood understood the constitutional rights he was waiving. The court also made sure Hood understood the consequences of his plea. The sentence imposed was consistent with the plea agreement. Hood was represented by adequate counsel. We see no sentencing error.

We conclude there are no arguable issues within the meaning of *People v. Wende, supra*, 25 Cal.3d 436. (See also *People v. Kelly* (2006) 40 Cal.4th 106.)

³ Having reached this conclusion, we need not decide whether the good faith exception to the exclusionary rule that is set forth in *United States v. Leon, supra*, 487 U.S. 897 applies.

III. DISPOSITION

The judgments are affirmed.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.