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State v. McCalip Appellant's Brief Dckt. 43711

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43711
Plaintiff-Respondent,)	
)	GOODING COUNTY NO. CR 2015-282
v.)	
)	
CASANDRA MCCALIP,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF GOODING**

HONORABLE JOHN K. BUTLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Casandra McCalip appeals from the district court's order denying her motion to suppress. She contends the district court erred in denying her motion because the magistrate abused its discretion in concluding that the affidavit in support of the search warrant established probable cause to search her residence. More specifically, Ms. McCalip contends that messages communicated to a police officer via Facebook must be corroborated by independent evidence to support a finding of probable cause.

Statement of Facts and Course of Proceedings

On February 23, 2015, a young woman identifying herself as the 17-year-old daughter of Ms. McCalip contacted Gooding City Police Department Detective Teresa Thiemann via Facebook to report that her stepfather was growing marijuana at their residence. (4/30/15 Tr., p.7, Ls.20-22, p.8, Ls.3-8; R., p.71.) Detective Thiemann asked the informant how she knew the plants she observed were marijuana. (R., p.71.) The informant said that her stepfather had been in trouble in Washington for child abuse and for growing marijuana and she had "seen this all before." (R., p.71.) Detective Thiemann reviewed reports from the State of Washington which reflected that Ms. McCalip and her husband had been investigated in Washington for drug use. (R., p.71.) Detective Thiemann did not do anything further to confirm that the informant was, in fact, Ms. McCalip's daughter.

Detective Thiemann asked the informant if she could send pictures of the marijuana plants and approximately one hour later, the informant sent four digital images to Detective Thiemann via Facebook. (4/30/15 Tr., p.8, Ls.19-23; R., p.71.)

Detective Thiemann did not make any effort to determine whether the photographs were, in fact, from Ms. McCalip's residence. (4/30/15 Tr., p.9, L.5 – p.10, L.16.)

Based upon the information she received from the informant, Detective Thiemann completed an affidavit in support of a search warrant for Ms. McCalip's residence. (R., p.71.) A magistrate executed a search warrant on that same date. (R., p.72.) Police officers searched Ms. McCalip's residence pursuant to the search warrant and located marijuana plants and drug paraphernalia in the residence. (4/30/15 Tr., p.5, Ls.23-25; R., p.72.)

Ms. McCalip was charged by Information with manufacturing a controlled substance and misdemeanor injury to children. (R., pp.52-54.) Ms. McCalip filed a motion to suppress. (R., pp.64-65.) At the hearing on the motion to suppress, counsel for Ms. McCalip argued that the search warrant was invalid because the affidavit did not establish probable cause. (7/14/15 Tr., p.6, Ls.7-11.) The district court denied Ms. McCalip's motion in a memorandum decision, concluding the magistrate did not abuse its discretion in finding that the search warrant was supported by probable cause. (R., pp.70-80.)

Ms. McCalip then entered into an agreement with the State pursuant to which she agreed to plead guilty to manufacturing a controlled substance, reserving her right to appeal from the denial of her motion to suppress, and the State agreed to dismiss the misdemeanor charge and recommend a suspended sentence of three years, with one year fixed. (R., p.86; 8/11/15 Tr. p.4, Ls.7-10.) The district court accepted Ms. McCalip's guilty plea and dismissed the misdemeanor charge. (R., pp.87, 96.) The district court sentenced Ms. McCalip to a withheld judgment, and placed Ms. McCalip on

probation for a period of three years. (R., p.108.) The withheld judgment was entered on October 13, 2015. (R., pp.103-111.) Ms. McCalip filed a timely notice of appeal on November 2, 2015. (R., pp.121-24.)

ISSUE

Did the district court err when it denied Mr. McCalip's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Ms. McCalip's Motion To Suppress

A. Introduction

Ms. McCalip contends the magistrate abused its discretion in concluding the affidavit in support of the search warrant established probable cause to search her residence, and the district court thus erred in denying her motion to suppress. Mindful of the case law on the reliability of information obtained from citizen informants, Ms. McCalip contends the information Detective Thiemann received via Facebook from a person identifying herself as S.N. was not sufficiently reliable given the authentication concerns inherent in social media communications.

B. Standard Of Review

“In reviewing a district court order granting or denying a motion to suppress evidence, the standard of review is bifurcated.” *State v. Purdum*, 147 Idaho 206, 207 (2009) (citation omitted). “This Court will accept the trial court’s findings of fact unless they are clearly erroneous. However, this Court may freely review the trial court’s application of constitutional principles in light of the facts found.” *Id.* (citations omitted). “At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court.” *State v. Aguirre*, 141 Idaho 560, 562 (Ct. App. 2005) (citations omitted).

C. The Magistrate Abused Its Discretion In Concluding There Was Probable Cause To Issue A Search Warrant Because The Affidavit In Support Of A Search Warrant Did Not Suggest A Fair Probability That Contraband Would Be Found In Ms. McCalip's Residence

In order for a search warrant to be valid, it must be supported by probable cause. U.S. Const. amend. IV; Idaho Const. Art. 1, § 17. “When probable cause to issue a search warrant is challenged on appeal, the reviewing court’s function is to ensure that the magistrate had a substantial basis for concluding that probable cause existed.” *State v. Harper*, 152 Idaho 93, 98 (Ct. App. 2011). “The test for reviewing the magistrate’s action is whether he or she abused his or her discretion in finding that probable cause existed.” *Id.* This Court’s review of the magistrate’s decision “is conducted with due regard for, but independently from, the district court’s decision.” *Id.* (citation omitted).

This Court’s analysis of probable cause is governed by the United States Supreme Court’s decision in *Illinois v. Gates*, 462 U.S. 213, 238 (1983). See *State v. Alexander*, 138 Idaho 18, 23 (Ct. App. 2002). When determining whether probable cause exists, “[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Gates*, 462 U.S. at 238 (quotation marks omitted); see also *Alexander*, 138 Idaho at 23. Where, as here, the affidavit in support of a search warrant is based upon information provided by an informant, “factors supporting probable cause may include facts in the affidavit indicating the reliability of the informant and the basis

of the informant's knowledge." *State v. Carlson*, 134 Idaho 471, 476 (Ct. App. 2000) (citation omitted).

In the present case, the information set forth in the affidavit in support of a search warrant did not suggest a fair probability that contraband would be found in Ms. McCalip's residence because it was based on information transmitted through a medium that was not sufficiently reliable. In *Carlson*, the Court of Appeals stated that "information may be sufficiently reliable to support a probable cause finding if the information is corroborated by independent evidence." 134 Idaho at 476 (citation omitted). Here, Detective Thiemann did not corroborate by independent evidence the information she received from the informant via Facebook. Detective Thiemann did not make any effort to confirm that she was, in fact, communicating with Ms. McCalip's daughter; nor did she make any effort to confirm that the photographs she received from the informant were, in fact, from Ms. McCalip's residence.

Ms. McCalip is mindful of the fact that in *State v. Van Dorne*, 139 Idaho 961 (Ct. App. 2004), the Court of Appeals stated that "where . . . information comes from a known citizen informant rather than an anonymous tipster, the citizen's disclosure of her identity, which carries the risk of accountability if the allegations turn out to be fabricated, is generally deemed adequate to show veracity and reliability." *Id.* at 965 (citations omitted). However, Ms. McCalip contends that the Court's statement in *Van Dorne* does not account for the complications of the digital age, when the lines between known citizen informants and anonymous tipsters are blurred.

Detective Thiemann received unsolicited communications via Facebook, which are far from self-authenticating. See Caren Myers Morrison, *Passwords, Profiles, and*

the Privilege Against Self-Incrimination: Facebook and the Fifth Amendment, 65 Ark. L. Rev. 133, 139-40 (2012) (noting “[t]he authentication of Facebook messages presents similar issues to the authentication of email, with the added difficulty of proving that the Facebook profile actually belongs to the defendant”); see also *Griffin v. State*, 19 A.3d 415, 421 (Md. 2011) (discussing the concern about social media profiles “because anyone can create a fictitious account and masquerade under another person’s name or can gain access to another’s account by obtaining the user’s username and password”).

Detective Thiemann did not make any effort to determine whether she was, in fact, communicating with Ms. McCalip’s daughter and did not attempt to determine whether the photographs she received were, in fact, from Ms. McCalip’s residence. In this day and age, there are many tools available to law enforcement to determine the source and veracity of digital information. As counsel for Ms. McCalip argued in the district court, Detective Thiemann could have investigated the IP address of the computer used by the informant. She also could have reviewed the metadata in the digital images she received. Detective Thiemann did neither of these things, and instead simply assumed that the information was trustworthy. Absent independent corroboration, the information Detective Thiemann received from the informant, which formed the basis of her affidavit in support of a search warrant, was not sufficient to establish probable cause. The magistrate abused its discretion in concluding otherwise and the district court erred in denying Ms. McCalip’s motion to suppress.

CONCLUSION

Ms. McCalip respectfully requests that this Court vacate her conviction, reverse the district court's order denying her motion to suppress, and remand this case to the district court for further proceedings.

DATED this 20th day of April, 2016.

_____/s/_____
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of April, 2016, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

CASANDRA MCCALIP
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JOHN K BUTLER
DISTRICT COURT JUDGE
E-MAILED BRIEF

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_____/s/_____
EVAN A. SMITH
Administrative Assistant

AWR/eas