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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/17/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0321
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
CESAR ALBERT TRIGUEROS,) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201000195

The Honorable Steven F. Conn, Judge

REVERSED AND REMANDED

Thomas C. Horne, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
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P O R T L E Y, Judge

¶1 Cesar Albert Trigueros was found guilty of misconduct involving weapons, a class four felony, and sentenced to three and a half years in prison. He argues that his conviction and

resulting sentence should be reversed because the search warrant was deficient and the seized evidence should not have been admitted under the good-faith exception. We agree, and for the following reasons, reverse his conviction and sentence.

FACTS¹ AND PROCEDURAL BACKGROUND

¶2 A state gang task force detective was investigating a gang-related shooting in Bullhead City in October 2009. The victim and a witness recognized Christopher and Anthony Lua, brothers and South Side Boyz ("Boyz") gang members, as the shooters, but were unable to identify the third suspect. Trigueros, who was in prison at the time of the shooting, was friends with Anthony Lua but was not a Boyz member.

¶3 As part of his investigation, the detective prepared an affidavit seeking authorization to search the homes and vehicles of the Luas, two other Boyz members, and Trigueros – who was described as a Boyz "associate." The detective outlined his training and experience in criminal and gang investigations, and opined that "[Boyz] gang members pass weapons, as well as fruits of their crimes from associate to associate for the specific reason to avoid detention by law enforcement." He

¹ To review a denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996) (citation omitted), and view that evidence "in the light most favorable to upholding the trial court's factual findings." *State v. Sanchez*, 200 Ariz. 163, 165, ¶ 5, 24 P.3d 610, 612 (App. 2001) (citations omitted).

concluded that the Luas had "evidence in their possession and within their primary, secondary and fellow gang members [sic] and or associates [sic] residences" that would link them to the October 2009 shooting.

¶14 The detective consulted with other investigators and a deputy county attorney about the sufficiency of the twenty-six-page affidavit before submitting it to a judge. The warrant issued on February 23, 2011, and was executed the following day. During the search of Trigueros's home, officers seized a handgun.

¶15 Trigueros, a prohibited possessor, was arrested and charged with misconduct involving weapons.² He subsequently argued there was no probable cause to search his home and moved to suppress the seized evidence pursuant to the Fourth Amendment and Article 2, Section 8, of the Arizona Constitution.

¶16 After reviewing the affidavit, the trial court found that the only facts specific to Trigueros were that he associated with Boyz gang members and allegedly was present when two Boyz members committed an assault six days before the affidavit was submitted.³ The court also found that the detective's "extensive training and experience in investigating

² An additional charge for possession of drug paraphernalia was subsequently dismissed.

³ The affidavit did not suggest that Trigueros had participated in the assault or that a gun had been involved.

criminal street gangs" provided the only basis for his opinion about gun transfers. Accordingly, the court agreed that there was no probable cause, but found that the detective had reasonably relied on the signed warrant and denied the motion to suppress under the good-faith exception.

¶7 The parties agreed to a bench trial on stipulated evidence and Trigueros was convicted.⁴ After the State proved a prior historical felony conviction, he was sentenced to a mitigated term of three and a half years in prison, and given credit for thirteen days of presentence incarceration. We have jurisdiction over the appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012), 13-4031 (West 2012), and 13-4033(A) (West 2012).

DISCUSSION

¶8 Trigueros argues that the court erred when it admitted the seized evidence based on the good-faith exception to the exclusionary rule because the detective's reliance on the warrant was not objectively reasonable.

⁴ The parties also agreed that the State could pursue its prior historical felony conviction allegation if Trigueros were convicted, but that any resulting sentence would not exceed four and a half years.

I. Standard of Review

¶9 We review a ruling on a motion to suppress for an abuse of discretion. *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996) (citation omitted). We defer to the court's factual findings but review its legal conclusions de novo. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996) (citations omitted). Thus, if the record substantially supports the court's factual premises, we will assume those facts and independently assess whether the good-faith exception was properly applied. *See id.*

II. Good-faith Exception

¶10 In addition to incorporating the Fourth Amendment's protection against unreasonable searches and seizures, Article 2, Section 8, of the Arizona Constitution specifically "preserv[es] the sanctity of homes and in creating a right of privacy." *State v. Bolt*, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984). The requirement for a search warrant protects this constitutional interest by "plac[ing] a neutral magistrate between an officer engaged in the often competitive enterprise of ferreting out crime and the constitutional safeguards on an individual's freedom from undue governmental intrusion." *State v. Hyde*, 186 Ariz. 252, 268, 921 P.2d 655, 671 (1996) (citation and internal quotation marks omitted). The process is designed to authorize only those searches that comply with the Fourth

Amendment's probable cause and particularity requirements. See *State v. Roark*, 198 Ariz. 550, 552, ¶ 8, 12 P.3d 225, 227 (App. 2000); *State v. Turney*, 134 Ariz. 238, 240, 655 P.2d 358, 360 (App. 1982) (citing A.R.S. § 13-3913).

¶11 To determine if a proposed search is based on probable cause, "the issuing magistrate is simply to make a practical, common-sense 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." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Evidence seized pursuant to a warrant lacking probable cause is subject to exclusion unless the evidence was "obtained in objectively reasonable reliance on a subsequently invalidated search warrant." *United States v. Leon*, 468 U.S. 897, 922 (1984); see also A.R.S. § 13-3925(C) (West 2012) (codifying the good-faith exception).⁵ In recognizing the exception, the *Leon* Court observed that, ordinarily, an officer who procures a warrant demonstrates good faith and is entitled to rely on the magistrate's probable-cause determination. *Leon*, 468 U.S. at 921. If, however, the officer had "no reasonable grounds for believing that the warrant was properly issued," the suppression

⁵ "The trial court shall not suppress evidence that is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer as a result of a good faith mistake or technical violation." A.R.S. § 13-3925(C).

of evidence remains a viable remedy. *Id.* at 923. Accordingly, notwithstanding the issuance of a warrant, the good-faith exception does not apply:

(1) when a magistrate is misled by information that the affiant knew was false or would have known was false but for his or her reckless disregard for the truth; (2) when the issuing magistrate wholly abandons his or her judicial role; (3) when a warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when a warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid.

Hyde, 186 Ariz. at 273, 921 P.2d at 676 (quoting *Leon*, 468 U.S. at 923) (internal quotation marks and ellipsis omitted).

¶12 Trigueros argues that the affidavit supporting the warrant lacked facts from which a reasonable officer could conclude that there was a fair probability of finding the handgun that had been involved in the October 2009 shooting in his house. We agree.

¶13 The State argues that a reasonably competent officer could form a belief in the warrant's validity based on the information in the affidavit,⁶ which consisted of the following:

⁶The State does not challenge the trial court's determination that the facts alleged in the affidavit failed to establish probable cause as to Trigueros, but argues that the good-faith exception sustains the court's evidentiary ruling.

That the [Boyz] criminal street gang is a violent gang, whose members are closely knit. Therefore, it is not uncommon for these gang members to collectively plan acts of vandalism and or aggression. That the [Boyz] criminal street gang has a financial backing through illegal narcotic sales, and thefts. This financial surplus gives credence to the fact that these [Boyz] criminal street gang members have the finances to purchase firearms and ammunition and other items commonly used in criminal gang activity. That [Boyz] gang members pass weapons, as well as fruits of their crimes from associate to associate for the specific reason to avoid detention by law enforcement.

The affidavit also asserted that "evidence of a crime is presently at [Trigueros's home]" because "evidence of gang membership or affiliation with any criminal street gang . . . might suggest a motive for the commission of the crimes [under investigation]; and it might also tend to identify persons who may have knowledge of, or be involved in, the commission of those crimes."

¶14 Given our longstanding adherence to the rule that probable cause cannot be based exclusively on association with alleged or confirmed criminals, we cannot conclude that the detective's reliance on the warrant was reasonable. See *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (citation omitted) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."); *State v. Hansen*, 117 Ariz. 496,

498, 573 P.2d 896, 898 (App. 1977) (citations omitted) (“[M]ere association with a known or suspected offender, without more, is an insufficient basis for [probable cause].”). Furthermore, mere status as a gang member cannot, by itself, justify an invasion of a person’s privacy. See *State v. Valle*, 196 Ariz. 324, 330, ¶ 23, 996 P.2d 125, 131 (App. 2000) (gang affiliation irrelevant to probable cause determination); *United States v. Rubio*, 727 F.2d 786, 794 (9th Cir. 1983) (without allegation that enterprise is wholly illegitimate, membership alone cannot support search for evidence of wrongdoing because probable cause requires nexus between evidence and member’s criminal activity); see also A.R.S. § 13-2321 (West 2012) (participating in or assisting criminal street gang means engaging in prohibited conduct with culpable mental state). If probable cause cannot be predicated on gang membership, it stands to reason that evidence of gang affiliation is similarly inadequate to satisfy the Fourth Amendment’s requirements. See *Rubio*, 727 F.2d at 794.

¶15 In *Rubio*, federal agents obtained “indicia warrants” to search the homes of some thirty Hell’s Angels Motorcycle Club members who had been indicted with violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”). 727 F.2d at 790. Because associating with an enterprise that is engaged in

systemic racketeering is an element of a RICO offense,⁷ the warrants authorized agents to collect evidence of club membership and association. *Id.* In response to the defendants' argument that the warrants were facially invalid because they violated the members' right of free association, the Ninth Circuit held that protected conduct may be the subject of a criminal investigation so long as "courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search." *Id.* (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978)).

¶16 The court, however, also found that proof of mere association with an enterprise is insufficient to support a RICO conviction unless the enterprise is alleged to be wholly illegitimate. *Id.* at 793. No such claim had been made about the motorcycle club in *Rubio*, and although the supporting affidavits "contain[ed] voluminous detail about the indicia customarily kept by members and associates," they did not include any statement or facts to indicate that any defendant

⁷ It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (West 2012).

had engaged in illegal conduct. *Id.* at 794. Because the affidavits did not establish "the requisite nexus between the association of the defendants with the enterprise and some form of criminal activity," the court concluded that the warrants lacked probable cause and reversed the defendants' convictions.⁸ *Id.*

¶17 Here, like the defendants in *Rubio*, the only connection between Trigueros and any illegal activity was his association with Boyz gang members. Apart from this association, the lack of a nexus between him or his home and evidence of the shooting amounted to a random search without probable cause of any sort; such a glaring defect should have been readily apparent to a reasonable officer. See *State v. Crowley*, 202 Ariz. 80, 92, ¶ 36, 41 P.3d 618, 630 (App. 2002) (citing *Leon*, 468 U.S. at 919 n.20) (good-faith exception inapplicable if affidavit fails to comply with specific legal requirement for issuance of warrant because a reasonable officer is presumed to know the law and what it prohibits). Consequently, it was objectively unreasonable to conclude that the warrant was properly issued.

¶18 Although the State concedes that "subjective good faith is not enough," *State v. Killian*, it nevertheless argues

⁸ The conviction of Donald Duane Smith, who had consented to the search, was affirmed. *Rubio*, 727 F.2d at 791.

that the good-faith exception applies because the detective presented the supporting affidavit to his supervisor and a county prosecutor, who was a former judge, for review before submitting the warrant application to a superior court judge rather than a magistrate. 158 Ariz. 585, 588, 764 P.2d 346, 349 (App. 1988) (citation omitted). The State points out that the Supreme Court recently considered officers' conduct as part of its good-faith analysis, and held that the officers in the civil action were entitled to qualified immunity in part because they presented the supporting affidavits to their supervisors and a prosecutor for review. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1249-50 (2012). The Court indicated that seeking and obtaining the approval of ranking law enforcement officers and a district attorney "before submitting [the warrant application] to the magistrate provide[d] further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause." *Id.* at 1249 (citation omitted).

¶19 Similarly, an officer's conduct is relevant but not dispositive in determining whether the good-faith exception applies. See *id.* at 1249-50. Once the court found that the affidavit's only references to Trigueros concerned his association with Boyz members, the detective's subjective good faith was insufficient to satisfy the objective standard and

establish reasonable reliance on the fundamentally defective warrant.⁹ As a result, the good-faith exception did not apply, and evidence seized pursuant to the unconstitutional search was inadmissible and should have been suppressed.

CONCLUSION

¶20 Based on the foregoing, Trigueros's conviction and sentence are reversed, and the matter is remanded for a new trial.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Judge

/s/

ANDREW W. GOULD, Judge

⁹Unlike the present case, ample facts in *Messerschmidt* established probable cause to search the suspect's residence for a sawed-off shotgun he had used to assault his ex-girlfriend. 132 S. Ct. at 1241-42. The issue was whether the officers reasonably relied on the warrant even though the authorization to search for all firearms and gang-related material was not based on probable cause. *Id.* at 1244. After explaining how specific facts in the affidavit supported reasonable inferences as to why a valid warrant would include the challenged items, *id.* at 1246-49, the Court concluded that the overbreadth was not the type of defect that "even a cursory reading of the warrant" would have exposed. *Id.* at 1250 (quoting *Groh v. Ramirez*, 540 U.S. 551, 564 (2004)).