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IN THE COURT OF APPEALS OF INDIANA

DAVID LEWIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1002-CR-139
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge[1]
Cause No. 49G03-0812-FA-279771

September 9, 2010

[1] This case was originally assigned to Superior Court 20, where the Honorable Steven R. Eichholtz ruled on the defendant's motion to suppress. On September 25, 2009, prior to trial, the case was transferred into Superior Court 3 under the Honorable Sheila A. Carlisle.

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Prior to trial, Appellant-Defendant David Lewis moved to suppress certain drug evidence on the grounds that it was procured in violation of his Fourth Amendment Rights. Specifically, Lewis contended that the search warrant leading to the discovery of this evidence, which was based upon facts relating to a separate murder investigation, did not establish probable cause to permit a search of his apartment. The trial court denied Lewis's motion, and the evidence was admitted at trial. Following a jury trial and a guilty verdict on all counts, the trial court entered judgment of conviction on Class A felony Dealing in Cocaine[2] (Count I), Class C felony Possession of Cocaine and a Firearm[3] (Count III), and Class A misdemeanor Possession of Marijuana[4] (Count IV). Lewis's convictions for Counts I and III were based upon the same cocaine.

Lewis contends upon appeal that the trial court abused its discretion in admitting the disputed evidence at trial and that his convictions for Counts I and III violate Indiana Code section 35-38-1-6 (2008) and double jeopardy principles. We conclude that the search warrant, although based upon the facts of a separate murder investigation, contained an adequate link between Lewis and the alleged murder to justify the search which turned up the drug evidence leading to the instant convictions. We further conclude that, as the State concedes, Lewis's convictions for Counts I and III violate

[2] Ind. Code § 35-48-4-1 (2008).

[3] Ind. Code § 35-48-4-6 (2008).

[4] Ind. Code § 35-48-4-11 (2008).

Indiana Code section 35-38-1-6 and double jeopardy principles. We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

At approximately 5:00 a.m. on December 5, 2008, Troy Brown and Michael Nolan called their cocaine dealer, Lewis, at a cell phone number which Lewis had provided.[5] Brown and Nolan had participated in several drug transactions with Lewis in the past month. Lewis arrived at Brown's house in a blue vehicle accompanied by an unidentified male. Lewis sold Brown an "eight ball" of cocaine. During this transaction, Nolan showed Lewis and the unidentified male his new .357 revolver. Lewis and the male then left Brown's house. Minutes later, the male returned to the house and walked in the door without knocking. According to this male, Lewis had left without him. Nolan called Lewis, but Lewis allegedly hung up on him. At that point the male produced a 9 mm handgun and shot Nolan in the neck, took the .357 revolver from Nolan's pocket, and demanded money from Brown and another person present at the scene. Brown gave the male $600, after which the male fled the scene.

Brown contacted the police. Upon responding to Brown's call, Indianapolis Metropolitan Police Officer Jose Torres spoke with Brown, who gave him Lewis's phone number and a description of Lewis and his vehicle. Nolan later died as a result of his gunshot wound.

[5] The facts pertinent to this appeal are found both in the trial transcript and in the probable cause affidavit used to obtain a search warrant of Lewis's residence.

In an effort to locate Lewis, authorities determined that the subscriber information for his cell phone did not identify an existent person or address. Authorities later determined that several calls from the cell phone were made to a Karen Valladares at 1061 Henslow Lane in Indianapolis. On December 9, 2008, authorities followed a vehicle matching Brown's description of Lewis's car to the Henslow Lane address. A person later determined to be Lewis, whose driver's license address matched the Henslow Lane address, exited the car with the cell phone on his person. Authorities apprehended Lewis, secured his apartment, and received and executed a search warrant there.

This search warrant, issued December 9, 2008, authorized a search of Lewis's apartment for the following items: "firearms, firearm accessories, ammunition, spent casings, spent bullets, hair, blood, fiber and trace evidence, [and] clothing to include a blue jacket with white lettering." State's Exh. 1. The search uncovered, *inter alia*, crack cocaine, marijuana, a digital scale, plastic baggies, a loaded handgun, and ammunition in the apartment. Officer Torres arrested Lewis. That day, Brown identified Lewis in a photographic array as the person who had sold him cocaine.

On December 11, 2008, the State charged Lewis with Class A felony dealing in cocaine (Count I), Class A felony possession of cocaine (Count II), Class C felony possession of cocaine and a firearm (Count III), and Class A misdemeanor possession of marijuana (Count IV). Prior to trial, Lewis filed a motion to suppress. On April 14, 2009, the trial court held a hearing, and, following the parties' submissions of memoranda in support of their respective positions, denied the motion on June 25, 2009. The matter was tried to a jury on December 14, 2009, which found Lewis guilty as

charged, and the trial court entered judgment of conviction on each count. At the sentencing hearing, the trial court sentenced Lewis to forty years on Count I, with five years suspended, two to probation; merged Lewis's conviction in Count II into Count I; and sentenced Lewis to terms of six years and one year, respectively, on Counts III and IV, to be served concurrently with his sentence on Count I. This appeal follows.

DISCUSSION AND DECISION

I. Admissibility of Evidence

Upon appeal, Lewis first challenges the trial court's denial of his motion to suppress. Our standard of review of rulings on the admissibility of evidence is the same whether the challenge is made by a pre-trial motion to suppress or by a trial objection. *Ackerman v. State*, 774 N.E.2d 970, 974 (Ind. Ct. App. 2002), *trans. denied*. We look for substantial evidence of probative value to support the trial court's decision. *Swanson v. State*, 730 N.E.2d 205, 209 (Ind. Ct. App. 2000), *trans. denied*. We consider the evidence most favorable to the court's decision and any uncontradicted evidence to the contrary. *Id*.

A. Fourth Amendment

The Fourth Amendment to the United States Constitution guarantees that a search warrant will not be issued without probable cause. *Helsley v. State*, 809 N.E.2d 292 (Ind. 2004). In deciding whether to issue a search warrant, "'[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Query v. State*, 745 N.E.2d 769,

771 (Ind. 2001) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). The duty of the reviewing court is to determine whether the magistrate had a "substantial basis" for concluding that probable cause existed. *Id.* It is clear that a substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause. *Id.* A "reviewing court" for these purposes includes both the trial court ruling on a motion to suppress and an appellate court reviewing that decision. *Id*. In this review, we consider only the evidence presented to the issuing magistrate and not post hoc justifications for the search. *Id.*

Probable cause to search a premises "is established when a sufficient basis of fact exists to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime." *Helsley*, 809 N.E.2d at 295 (internal quotation omitted). "Probable cause" means a *probability* of criminal activity, not a prima facie showing. *Seltzer v. State*, 489 N.E.2d 939, 941 (Ind. 1986) (emphasis in original).

In assessing the facts, reviewing courts are limited to the facts presented to the issuing magistrate. *Id*. In this case, the issuing magistrate relied only upon the facts alleged in Defendant's Exhibit B, Officer Torres's probable cause affidavit. Accordingly, the issue is whether Officer Torres's probable cause affidavit alleged sufficient facts upon which the issuing magistrate could have made an independent determination of probable cause. *See id.* at 941-42.

Lewis challenges the search of his apartment by claiming that the probable cause affidavit alleged facts relating to Nolan's murder, not his alleged drug crimes, and that in

the absence of a link between him and the murder, which he argues the affidavit fails to establish, there was no probable cause to justify the search of his apartment.[6]

The facts before the issuing magistrate were that Lewis was a drug dealer; that he had participated in several past drug transactions with Brown and Nolan; that Brown called him to set up another drug transaction; that Lewis arrived at the site of the transaction in a blue car with an unidentified male; that Nolan showed Lewis and this male his new gun; that Lewis and the male left together after the drug sale; that the male returned to the home minutes later and said that Lewis had left him; that Nolan called Lewis to inquire into the circumstances; that Lewis responded by hanging up on Nolan; and that the male then shot and killed Nolan, took the gun Nolan had just shown him and Lewis, robbed Brown of money, and fled the scene.

The above facts establish the necessary link between Lewis and Nolan's murder. As the trial court observed, a reasonable person could infer from the fact of Lewis's joint arrival with the unidentified male at Brown's home, that Lewis and this male were acting in concert. The two arrived together to conduct a drug transaction with Brown and Nolan; they left together after the transaction; the male returned only minutes later without Lewis; Lewis refused to respond to questions regarding the circumstances of the male's return; and the male, after shooting Nolan, took the gun Nolan had just shown him and Lewis and robbed Brown of money. Given the facts establishing the probability of the joint nature of Lewis's and the male's joint actions, a reasonable person could

[6] Lewis does not contend that the discovery and seizure of the drug evidence exceeded the scope of the warrant.

conclude that a search of Lewis's apartment would turn up evidence relating to Nolan's murder. The trial court did not abuse its discretion in declining to suppress the evidence resulting from this search.

B. Article I, Section 11

Lewis also challenges the admissibility of the evidence under the Indiana Constitution. Article 1, section 11 of the Indiana Constitution similarly requires that warrants be supported by probable cause. *Hoop v. State*, 909 N.E.2d 463, 466 (Ind. Ct. App. 2009), *reh'g denied*, *trans. denied*. While almost identical in wording to the Fourth Amendment, the Indiana Constitution's Search and Seizure clause is given independent interpretation and application. *Mitchell v. State*, 745 N.E.2d 775, 786 (Ind. 2001). To determine whether a search or seizure violates the Indiana Constitution, courts must evaluate the "reasonableness of the police conduct under the totality of the circumstances." *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005). "[T]he totality of the circumstances requires consideration of both the degree of intrusion into the subject's ordinary activities and the basis upon which the officer selected the subject of the search or seizure." *Id.* at 360. The reasonableness of a search or seizure is assessed by balancing the following factors: "'(1) the degree of concern, suspicion, or knowledge that a violation has occurred, (2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and (3) the extent of law enforcement needs.'" *Id.*, 824 N.E.2d at 361, *quoted in Duran v. State*, 930 N.E.2d 10, 17-18 (Ind. 2010).

With respect to the *Litchfield* factors, Lewis does not contest the high degree of knowledge that a violation, namely Nolan's murder, had occurred. While the intrusion can be characterized as great because it involved the search of Lewis's home, we must conclude that law enforcement needs to conduct this intrusion were also great given the strong link between Lewis and the male who allegedly shot Nolan. We find no abuse of discretion in the trial court's denial of Lewis's motion to suppress.

II. Multiple Convictions

Lewis argues that his convictions for both Counts I and III, Class A dealing in cocaine and Class C possession of cocaine and a firearm, respectively, violate double jeopardy and Indiana Code section 35-38-1-6.[7] The Indiana Supreme Court has held that Class C felony possession of cocaine and a firearm is a lesser-included offense of Class A felony dealing in cocaine if both crimes are based upon the same cocaine. *Hardister v. State*, 849 N.E.2d 563, 574-76 (Ind. 2006). In such circumstances, the conviction for the lesser-included offense cannot stand. *Id.* Here, the State does not dispute that Lewis's convictions for Counts I and III were based upon the same cocaine, that Count III is a lesser-included offense of Count I, and that Count III must be vacated. Accordingly, we reverse in part and remand to the trial court with instructions to vacate Lewis's conviction and sentence for Count III. *See id.*; *see also Scott v. State*, 855 N.E.2d 1068, 1074 (Ind. Ct. App. 2006) (reversing and remanding *sua sponte*, pursuant to *Hardister*, for vacation of defendant's conviction for Class C felony cocaine possession on grounds that

[7] Under Indiana Code section 35-38-1-6, a defendant charged in separate counts with an offense and an included offense, if found guilty on both counts, cannot be convicted and sentenced for the included offense.

convictions for both Class C felony and Class B felony possession of same cocaine violated defendant's rights against double jeopardy).

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions.

DARDEN, J., and BROWN, J., concur.