NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 KA 0759

STATE OF LOUISIANA

VERSUS

CONRAD P. SHELBY

Judgment Rendered: December 22, 2010

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 470,111

Honorable William J. Crain, Judge

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

The defendant, Conrad P. Shelby, was charged by bill of information with possession with intent to distribute MDMA, a violation of La. R.S. 40:966(A)(1) (Count 1); possession with intent to distribute marijuana, a violation of La. R.S. 40:966(A)(1) (Count 2); possession with intent to distribute methamphetamine, a violation of La. R.S. 40:967(A)(1) (Count 3); possession with intent to distribute cocaine, a violation of La. R.S. 40:967(A)(1) (Count 4); and possession with intent to distribute psilocybins, a violation of La. R.S. 40:966(A)(1) (Count 5). The defendant filed a motion to suppress the evidence, and following a hearing on the matter, the motion was denied. Thereafter, the defendant withdrew his prior pleas of not guilty and, at the **Boykin** hearing, entered a **Crosby** plea of guilty to all five counts, reserving his right to challenge the trial court's ruling on the motion to suppress. See **State v. Crosby**, 338 So.2d 584 (La. 1976). The defendant was sentenced as follows: on Count 1, he was sentenced to five years at hard labor; on Court 2, he was sentenced to twenty years at hard labor and ordered to pay a $10,000 fine, with fifteen years of the sentence to be suspended, five years to be served without benefit of probation, parole, or suspension of sentence, and upon release, the defendant was to serve five years of supervised probation, subject to special conditions of probation; on Count 3, he was sentenced to five years at hard labor; on Count 4, he was sentenced to five years at hard labor; and on Count 5, he was sentenced to five years at hard labor. The sentences were ordered to run concurrently. The defendant now appeals, designating one assignment of error. We affirm the convictions and sentences.[1]

FACTS

At the motion to suppress hearing on May 14, 2009, several law enforcement officers from Louisiana and Mississippi testified about the events

[1] The defendant filed a motion for leave to file a reply brief. We grant the motion.

surrounding the defendant's arrest and the subsequent application for and execution of several search warrants. Agent Brian Sullivan, with the Mississippi Bureau of Narcotics, testified that in July of 2008, he received information from a confidential informant that a female, later identified as Rani Cuevas[2] (co-defendant), was delivering large quantities of marijuana to the residence of Cory Ladner in Pass Christian, Mississippi. Several days later, Agent Sullivan, along with other Mississippi law enforcement officers, initiated surveillance on Ladner's residence and observed Cuevas leaving Ladner's residence in a vehicle with a Louisiana license plate. Officers followed Cuevas to a Liberty Road residence in Slidell, Louisiana. James Impastato and his wife, Melissa Cuevas, Cuevas's mother, lived at the Liberty Road residence. Impastato testified at the hearing that, while Cuevas had a second floor bedroom at his home, she was not there often. During the time Cuevas was under surveillance, she was not, according to Impastato, living at the house on Liberty Road.

Days later, Mississippi officers again initiated surveillance on Ladner in Mississippi. Officers followed him from his home and conducted a traffic stop. They found marijuana in his vehicle. Ladner informed the officers that he was receiving marijuana in bulk, from one to four pounds, from Cuevas. Ladner believed Cuevas's source of the marijuana was the defendant, Cuevas's boyfriend. Officers determined that Ladner could be used as an informant. Subsequently, Ladner communicated with Cuevas through text messaging. Cuevas agreed to sell several pounds of marijuana to Ladner.

On July 2, 2008, the day of the arranged drug buy, Mississippi and Louisiana officers initiated surveillance on Slidell addresses that agents from Mississippi believed Cuevas was residing at or frequented, namely residences on

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[2] The defendant's girlfriend was identified at the motion to suppress hearing as Rani Cuevas, who has also appealed in docket no. 2010KA0649, decided this day, raising the same issue as the defendant in her appeal. **State v. Cuevas**, 2010-0649 (La. App. 1st Cir 12/22/10)(*unpublished*).

Garden Drive and Liberty Road. Officers observed the defendant and Cuevas drive to the Garden Drive residence in a blue full-size Dodge Ram truck with an extended cab. They went inside. When they returned to the truck, the defendant was carrying a bundle of clothes, and Cuevas had a book bag over her shoulder. They then drove to the Liberty Road residence where they stayed for several minutes. From there, they drove to a gas station. They left the gas station and drove to a residence on CC Road where they stayed for several minutes. During the time the defendant and Cuevas were making those stops, Cuevas and Ladner were text-messaging each other. Ladner kept Agent Sullivan informed about the contents of the text messages. After the defendant and Cuevas left the CC Road residence, Cuevas texted Ladner that they were headed to Pass Christian to meet him (Ladner) at a gas station at the Kiln-Delise exit. Trooper Ron Whittaker, Jr., with the Louisiana State Police narcotics section, testified at the hearing that he conducted surveillance on the Liberty Road residence. Officers conducted a "trash pull" at that residence and found marijuana gleanings, paraphernalia, and gallon-sized vacuum-sealed bags.

Law enforcement agents followed the defendant and Cuevas to Mississippi. Agent Sullivan contacted the Harrison County Sheriff's Department and asked them to stop the truck the defendant and Cuevas occupied when it entered Harrison County. Deputy Danny Gilkerson with the Harrison County Sheriff's Department observed the defendant pass him. Deputy Gilkerson followed the truck and saw it veer onto the shoulder of the road. Having observed that traffic violation, which provided probable cause for stopping the truck, Deputy Gilkerson stopped the vehicle. Upon approaching the truck, Deputy Gilkerson smelled marijuana from the truck. He requested consent to search the truck, but the defendant and Cuevas refused. A K-9 unit was brought to the scene. The dog alerted, and upon a search of the vehicle, officers found behind the driver's seat a cardboard box containing

approximately three pounds of marijuana. The defendant and Cuevas were arrested and **Mirandized**. The defendant was asked by an agent where he was coming from. The defendant responded he had come from his house, which was the residence on CC Road.

Louisiana police officers subsequently requested search warrants for the three residences where the defendant and Cuevas were observed under surveillance stopping at before traveling to Mississippi with approximately three pounds of marijuana to sell. At the Liberty Road address, officers seized a large amount of narcotics and paraphernalia, including marijuana, cocaine, assorted prescription pills, hashish, mushrooms, vacuum-seal bags, smoking pipes, and a digital scale. At the Garden Drive address, officers seized a pipe used for smoking marijuana and vacuum-seal bags. At the CC Road address, officers seized a black suitcase filled with marijuana and $62,100 in cash inside a compact disc case near the suitcase.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant argues that the trial court erred in denying his motion to suppress evidence seized from 32865 CC Road in Slidell. Specifically, the defendant contends that the search warrant affidavit did not establish probable cause, and further, that the search warrant cannot be saved by the **Leon** good-faith exception. The defendant is not attacking the validity of the Liberty Road address and Garden Drive address search warrants.

When a search and seizure of evidence is conducted pursuant to a search warrant, the defendant has the burden to prove the grounds of his motion to suppress. La. C.Cr.P. art. 703(D); **State v. Hunter**, 632 So.2d 786, 788 (La. App. 1st Cir. 1993), writ denied, 94-0752 (La. 6/17/94), 638 So.2d 1092. When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, *i.e.*, unless

such ruling is not supported by the evidence. See **State v. Green**, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 281. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

Article 1, § 5 of the Louisiana Constitution requires that a search warrant may issue only upon an affidavit establishing probable cause to the satisfaction of an impartial magistrate. La. C.Cr.P. art. 162. Probable cause exists when the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched. **State v. Johnson**, 408 So.2d 1280, 1283 (La. 1982). The facts establishing the existence of probable cause for the warrant must be contained within the four corners of the affidavit. **State v. Duncan**, 420 So.2d 1105, 1108 (La. 1982); see **State v. Green**, 2002-1022, pp. 6-7 (La. 12/4/02), 831 So.2d 962, 969.

An issuing magistrate must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, there is a "fair probability" that evidence of a crime will be found in a particular place. **Illinois v. Gates**, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983); **State v. Byrd**, 568 So.2d 554, 559 (La. 1990). The process of determining probable cause for the issuance of a search warrant does not involve certainties or proof beyond a reasonable doubt, or even a *prima facie* showing, but rather involves probabilities of human behavior, as understood by persons trained in law enforcement and as based on the totality of circumstances. The process simply requires that enough information be presented to the issuing magistrate to enable him to determine that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal justice system. See **State v. Rodrigue**, 437

So.2d 830, 832-33 (La. 1983); see also **Green**, 2002-1022 at p. 7, 831 So.2d at 968.

The review of a magistrate's determination of probable cause prior to issuing a warrant is entitled to significant deference by reviewing courts. "[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review." **Gates**, 462 U.S. at 236, 103 S.Ct. at 2331. Further, because of "the preference to be accorded to warrants," marginal cases should be resolved in favor of a finding that the issuing magistrate's judgment was reasonable. **United States v. Ventresca**, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965); **Rodrigue**, 437 So.2d at 833.

In the instant matter, the defendant contends that the CC Road address search warrant affidavit contained no information on ownership of that property, that the surveilling officers observed no activity independently warranting suspicion there, and there was no evidence that either the defendant or Cuevas entered any of the buildings on CC Road. The defendant also maintains that agents had not on any prior occasion connected the CC Road address to Cuevas.

We address first Cuevas's connection to the CC Road address. Agent Sullivan testified at the motion to suppress hearing that the defendant and Cuevas went to 32865 CC Road in Slidell and stayed there for several minutes before driving to Mississippi. While it is not clear whether they entered the house or the trailer on that property,[3] it is clear they remained at the property for several minutes. The Liberty Road search warrant affidavit indicated that the investigation by agents with the Mississippi Bureau of Narcotics revealed that Cuevas had provided marijuana to subjects both in the Slidell area and Mississippi. Testimony at the hearing further established that the defendant lived at the CC Road residence

[3] The CC Road address search warrant describes the residence as follows: a single two story wooden residence set off of the roadway. A large white FEMA trailer is located east of the residence.

and that Cuevas was the defendant's girlfriend. Also, Ladner, to whom Cuevas agreed to sell about three pounds of marijuana, testified that he thought Cuevas's source of the marijuana was the defendant, Cuevas's boyfriend. As such, despite the defendant's contention, Cuevas was clearly connected to the CC Road address.

As indicated by the defendant in his brief, the CC Road address search warrant affidavit, as well as the search warrant, did not provide that the defendant lived at the CC Road address. This likely was an oversight on the part of Detective Scott Saigeon, the search warrant affiant. About two hours prior to Judge Elaine DiMiceli signing the CC Road address search warrant, she signed the Liberty Road address search warrant, which indicated that the defendant's residence was on CC Road. The affiant of the Liberty Road address search warrant was Trooper Whittaker. It would appear, therefore, that Judge DiMiceli was aware that the defendant lived at the CC Road residence when she signed the CC Road address search warrant. Nevertheless, even had Judge DiMiceli not known that the defendant lived at the CC Road residence, we would look to the testimony at the motion to suppress hearing, which established the defendant resided at the CC Road address.

Normally, the law does not permit a reviewing court to go outside the four corners of a search warrant affidavit in reviewing a probable cause determination. However, when there are inadvertent material omissions, the court will look to outside evidence to support or destroy a probable cause finding. **State v. Morris**, 444 So.2d 1200, 1202 (La. 1984); see **State v. Fugler**, 97-1936, p. 25 (La. App. 1st Cir. 9/25/98), 721 So.2d 1, 20, amended in part on rehearing, 97-1936 (La. App. 1st Cir. 5/14/99), 737 So.2d 894, writ denied, 99-1686 (La. 11/19/99), 749 So.2d 668. Detective Saigeon included in his affidavit twenty paragraphs that address the workings of drug dealers and drug dealing in broad, general terms. In his brief, the defendant asserts that Detective Saigeon "was reduced to pumping up his meager

offering with 20 paragraphs . . . of boilerplate descriptions that include generalizations so farfetched in their invocation of the drug world at large as to be absurd in our case."

We do not agree. In **United States v. Webster**, 960 F.2d 1301, 1307 (5th Cir.)(per curiam), cert. denied, 506 U.S. 927, 113 S.Ct. 355, 121 L.Ed.2d 269 (1992), wherein a search warrant was upheld, the affidavit alleged that, based on the officer's experience, drug dealers and traffickers commonly keep caches of drugs, as well as paraphernalia and records of drug transactions, in their residences. Similarly, Detective Saigeon in the instant matter provided information regarding how drug dealers might use their homes, such as:

> d. That it is common for narcotics traffickers to maintain books, records, receipts, notes, ledgers, airline tickets, receipts relating to the purchase of financial instruments and/or the transfer of funds, and other papers relating to the transportation, ordering, sale and distribution of controlled substances. That the aforementioned books, records, receipts, notes, ledgers, etc., are maintained where the traffickers have ready access to them;
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> e. That it is common for large-scale drug dealers to secrete contraband proceeds of drug sales and records of drug transactions in secure locations within their residences, their businesses and/or other locations which they maintain dominion and control over, for ready access and to conceal these items from law enforcement authorities;
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> f. That, in order to accomplish this concealment narcotics traffickers frequently build "stash" places within their residences or businesses. . . .

The addition of these paragraphs to the affidavit indicates that Detective Saigeon was aware that the defendant lived at the CC Road residence. A judge issuing a search warrant may infer that evidence is likely to be found where a drug dealer lives. See **State v. Profit**, 2000-1174, pp. 5-6 (La. 1/29/01), 778 So.2d 1127, 1130 (per curiam). Also, a sufficient nexus exists between marijuana seized from a vehicle and the defendant's residence to establish probable cause for a warrant to search the premises because "[a] residence is a quite convenient,

commonly-used place for planning continuing criminal activities like large-scale marijuana trafficking and money laundering." **Profit**, 2000-1174 at p. 6, 778 So.2d at 1130 (quoting **United States v. Robins**, 978 F.2d 881, 892 (5th Cir. 1992)). Accordingly, we conclude that the information that the defendant lived at the CC Road address, which was not included in the affidavit, was a material omission.

Given the importance of the evidence that the defendant lived at the CC Road address, that such information had been provided in Trooper Whittaker's affidavit for the Liberty Road address, and that Detective Saigeon provided in his search warrant affidavit information on how drug dealers use their homes to maintain and secret records of drug transactions, we conclude that such an omission from Detective Saigeon's affidavit was inadvertent. Therefore, considering all of the information officers had, including that the defendant and Cuevas were known drug dealers, the defendant lived at the CC Road address, and the CC Road address was the last place they visited before being arrested in Mississippi for transporting about three pounds of marijuana, we find there was probable cause to issue the CC Road address search warrant. See **State v. Revere**, 572 So.2d 117, 128 (La. App. 1st Cir. 1990), writ denied, 581 So.2d 703 (La. 1991).

While not dispositive of the probable cause issue, which has been resolved, we feel the following issue should be addressed. The defendant states in his brief, "It is reasonable to conclude that the decision to seek the CC Road warrant was an afterthought." According to the defendant, "When the searches of Garden Drive and Liberty Drive failed to produce a major trove of evidence the agents were hoping to discover, they seized on the idea of taking a shot at CC Road." We do not agree with this assessment of why CC Road was searched. The only information Detective Saigeon had at the time he applied for a search warrant was

that the defendant and Cuevas, after having left the CC Road residence, were arrested in Mississippi for drug possession. Neither the CC Road search warrant nor the affidavit makes any reference to any searches, or the products thereof, of the Liberty Road or Garden Drive residences. Further, Detective Saigeon testified on cross-examination at the motion to suppress hearing that the information he included in his CC Road search warrant affidavit had nothing to do with any evidence seized at either Liberty or Garden:

> Q. Did anybody tell you that there was any evidence seized at either of those two locations?
>
> A. Nobody did, and I wasn't present for either one of those search warrants. While those were occurring, I was preparing my affidavit.
>
> Q. So, you're preparing your affidavit as they were actually searching those other two residents [sic]?
>
> A. That's correct.
>
> Q. So, nothing retrieved from those two residents [sic] caused you to believe that there was anything at the CC address?
>
> A. No, sir; I wasn't present, that's correct.

Finally, we note that even had the CC Road address search warrant been based on less than probable cause, under the **Leon** good-faith exception, the evidence seized pursuant to that search warrant would not be suppressed. It is well settled that even when a search warrant is found to be deficient, the seized evidence may nevertheless be admissible under the good-faith exception of **United States v. Leon**, 468 U.S. 897, 919-20, 104 S.Ct. 3405, 3418-19, 82 L.Ed.2d 677 (1984), wherein the United States Supreme Court held that the exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in an objectively reasonable, good-faith reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid.

Under **Leon**, 468 U.S. at 923, 104 S.Ct. at 3421, four instances in which suppression remains an appropriate remedy are: (1) where the issuing magistrate was misled by information the affiant knew was false or would have known was false except for a reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his detached and neutral judicial role; (3) where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid.

The instances in which suppression remains an appropriate remedy enunciated in **Leon** clearly reflect that suppression of evidence seized pursuant to an invalid warrant is not a remedy to be lightly considered. Furthermore, the jurisprudence presumes good faith on the part of the executing officer, and the defendant bears the burden of demonstrating the necessity for suppression of evidence by establishing a lack of good faith. **State v. Maxwell**, 2009-1359, p. 11 (La. App. 1st Cir. 5/10/10), 38 So.3d 1086, 1092, writ denied, 2010-1284 (La. 9/17/10), ___ So.3d ___.

Applying these factors to this case, we find that even if the CC Road address search warrant was to be considered defective, the good-faith exception would apply. The defendant did not establish a lack of good faith on the part of the executing officer. There were no misleading statements contained in the affidavit. There was no evidence that Judge DiMiceli abandoned her neutral role in her issuance of the search warrant, nor was there anything on the face of the warrant that would make it so deficient that it could not be presumed valid. Detective Saigeon provided the judge information gathered by the surveillance efforts of Louisiana police officers and Mississippi narcotics agents. Detective Saigeon was not unreasonable in believing he provided the judge with sufficient information to

issue a search warrant. Accordingly, suppression of the evidence would not be appropriate under the **Leon** good-faith exception to the exclusionary rule. See **Maxwell**, 2009-1359 at pp. 11-12, 38 So.3d at 1092.

The trial court did not err in denying the defendant's motion to suppress. The assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.