NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2000-KA-0517**
VERSUS	*	**COURT OF APPEAL**
VINCENT BOYD	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 396-019, SECTION "F"
Honorable Dennis J. Waldron, Judge
* * * * * *
Judge Patricia Rivet Murray

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(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge James F. McKay, III)

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CONVICTIONS AFFIRMED; SENTENCE AS TO COUNT ONE AFFIRMED; SENTENCE AS TO COUNT TWO AMENDED AND AFFIRMED AS AMENDED

Defendant was charged with having violated La. R.S. 40:967(A) and 40:969(A), possession with intent to distribute cocaine and diazepam (Valium), respectively, and pled not guilty. The trial court denied defendant's motion to suppress the evidence, and defendant withdrew his former pleas and entered pleas of guilty under *State v. Crosby*, 338 So.2d 584 (La. 1976). On August 26, 1998, the trial court sentenced defendant to five years at hard labor, without benefit of parole, probation, or suspension of sentence, on each count, to run concurrently, with credit for time served. Defendant now appeals on the ground that the trial court erred in denying his motion to suppress.

FACTS

New Orleans Police Officer Randy Lewis testified that he conducted an investigation of a residence located at 1827 Chippewa Street. A confidential informant was sent in to purchase cocaine from defendant. One sale occurred on July 21, and another on July 22. Of five subsequent sales, one occurred inside. The other four occurred at the front door, with Officer

Lewis observing defendant make the sales to the informant. Officer Lewis subsequently obtained a search warrant. He assisted in the execution of the warrant, recovering approximately forty-seven grams of cocaine, and seventeen diazepam tablets, along with a firearm, crossbow, and assorted drug paraphernalia.

At the motion to suppress hearing, the trial court reviewed the search warrant application, reflecting that two sales occurred on July 21 and 22, and others on August 7, September 5 and 24, October 9, and November 12, 1997. The search warrant was executed on November 21, 1997.

ERRORS PATENT

A review of the record reveals one error patent. The trial court sentenced defendant on count two, possession with intent to distribute diazepam, to five years at hard labor without benefit of parole, probation or suspension. La. R.S. 40:969(B) provides for a sentence for possession with intent to distribute diazepam of not more than five years at hard labor, without any provision for denial of the benefits of parole, probation or suspension of sentence. Therefore, defendant's sentence as to count two must be amended to delete that portion denying him the benefits of parole, probation and suspension of sentence.

ASSIGNMENT OF ERROR

By his sole assignment of error, defendant claims the trial court erred in denying his motion to suppress the evidence, arguing that the information used to obtain the search warrant was stale.

Article 162 of the Louisiana Code of Criminal Procedure provides that a search warrant may be issued "only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for the issuance of the warrant." Probable cause exists when the facts and circumstances within the affiant's knowledge, and those of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that evidence or contraband may be found at the place to be searched. State v. Casey, 99-0023 (La. 1/26/00), __ So.2d __, __, 2000 WL 101212, cert. denied, Casey v. Louisiana, __ U.S. __, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000); State v. Gereighty, 2000-0830 (La. App. 4 Cir. 8/10/00), __ So. 2d __, __, 2000 WL 1125622.

A search warrant may become stale if facts and circumstances at the time of its execution show that probable cause no longer exists. Casey, supra, at ___. Staleness of the information contained in the search warrant application is relevant to the issue of whether there was probable cause to

issue the warrant. However, "staleness is only an issue when the passage of time makes it doubtful that the object sought in the warrant will be at the place where it was observed." Id., at ___, quoting State v. Tate, 407 So.2d 1133, 1137 (La.1981). By statute, a search warrant cannot be lawfully executed after the expiration of the tenth day after its issuance. La. Code. Crim. Pro. art. 163.

In State v. Martin, 97-2904 (La. App. 4 Cir. 2/24/99), 730 So.2d 1029, writ denied, 99-0874 (La. 10/1/99), 747 So.2d 1136, this court stated:

> In its review of a magistrate's finding of probable cause, the reviewing court must determine whether the "totality of circumstances" set forth in the affidavit is sufficient to allow the magistrate 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 reasonable probability that contraband ... 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 ... conclu[ding] that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2232, 76 L.Ed.2d 527 (1983).

97-2904 at pp. 4-5, 730 So.2d at 1031-1032.

In the instant case, neither the search warrant application, the search warrant itself, nor the return on the warrant, are contained in the record. While the transcript of the motion to suppress hearing reflects that these documents were presented at the hearing, and reviewed by the trial court, apparently the documents were never filed

into evidence. Nevertheless, defendant does not argue that the record is not sufficient to review the trial court's denial of his motion to suppress the evidence, but merely argues that the evidence as reflected by the motion hearing transcript and record indicates that the information relied upon by the trial court to issue the search warrant was stale.

Officer Lewis observed defendant, standing in the doorway of his residence, sell narcotics to the confidential informant four times between August 7 and November 12, 1997. The informant also purchased narcotics once during that period inside of defendant's residence. In addition, the informant purchased narcotics from defendant on July 21 and 22, 1997, although it is unclear whether Officer Lewis was investigating defendant at that time. The search warrant was obtained sometime between November 12 and November 21, the date the warrant was served. There was no indication that the informant had ever gone to the residence to purchase narcotics, but had come away empty-handed because defendant had nothing to sell him. Defendant correctly notes that there is no evidence that the informant made large purchases of narcotics, and it can be assumed that the amounts purchased were consistent with retail sales for

personal use.

In State v. Durand, 461 So.2d 1090 (La. App. 4th Cir. 1984), a reliable confidential informant stated on February 2, 1984, that within the past three days he had purchased narcotics from the defendant, who advised him that he could obtain more if he needed it. Officers set up a surveillance that day and observed two, possibly three, narcotics sales at the address within a one-hour period. The next day, February 3, the officers obtained a search warrant. However, it was not executed until February 13, the tenth day after issuance. This court found that the indication of ongoing drug-related activity in the premises to be searched would justify a man of reasonable caution to believe that drugs would be found in the premises ten days after the warrant was issued.

In the instant case, the record does not reflect when the search warrant was issued. However, defendant's argument is premised on the assumption that the warrant was issued after the last sale and, of course, before it was executed. It does not matter whether the warrant was issued on November 12, the day of the last sale, November 21, the day the warrant was executed, or anywhere in between. Purchases were made on July 21 and 22. Over two weeks later, on August 7, another purchase was made. The next purchase was not made until

September 5, almost one month later. The next was made on September 24, almost three weeks later. The following purchase was made on October 9, over two weeks later. The next and final purchase before the issuance of the search warrant was not made until November 12, over one month later. Considering the totality of the circumstances in this case, that defendant possessed narcotics at the Chippewa Street address for sale on seven separate occasions over a four and one-half month period, we cannot say that the trial court erred in concluding that there was probable cause to believe there would be narcotics on the premises anytime during the nine day period from November 12 to November 21. Defendant's argument that the warrant became stale after its issuance also fails for the same reasons.

We therefore find no merit to defendant's assignment of error.

Accordingly, the defendant's convictions are affirmed. The defendant's sentence as to count one is affirmed. The defendant's sentence as to count two is amended to delete that portion denying him the benefits of parole, probation and suspension of sentence, and is affirmed as amended.

CONVICTIONS AFFIRMED; SENTENCE AS TO

COUNT ONE AFFIRMED; SENTENCE AS TO COUNT TWO AMENDED AND AFFIRMED AS AMENDED.