

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHELLE ANN SOBCZAK-OBETTS, a/k/a
MICHELLE ANN McFARLAN, SHELLEY
McFARLAN,

Defendant-Appellee.

FOR PUBLICATION
September 20, 2002
9:05 a.m.

No. 236963
Kent Circuit Court
LC No. 98-002856-FH

Updated Copy
December 6, 2002

Before: Jansen, P.J., and Smolenski and Wilder, JJ.

JANSEN, P.J. (*concurring in part and dissenting in part*).

I agree with the majority with respect to the resolution concerning whether the search warrant is governed by state or federal law as set forth in part I of its decision. I respectfully disagree with respect to the staleness issue and would affirm the trial court's ruling that the search warrant was stale and that probable cause to search defendant's residence, therefore, was lacking.

With regard to the matters of staleness and probable cause, the state and federal standards are the same. In this regard, the trial court correctly applied the standard set forth in *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992), which adopted the standard of review set forth in *Illinois v Gates*, 462 US 213; 103 S Ct 2317; 786 L Ed 2d 527 (1983).

[A]ppellate scrutiny of a magistrate's decision involves neither de novo review nor application of an abuse of discretion standard. Rather, the preference for warrants . . . requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a "substantial basis" for the finding of probable cause.

* * *

In sum, a search warrant and the underlying affidavit are to be read in a common-sense and realistic manner. Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a "fair probability that

contraband or evidence of a crime will be found in a particular place." *Gates* at 238. [*Russo, supra* at 603-604.]

As stated in *Russo, supra* at 605, staleness is not a separate doctrine regarding probable cause to search analysis, but is an aspect of the Fourth Amendment inquiry regarding whether probable cause exists to support issuance of the search warrant. "Probable cause to search is concerned with whether certain identifiable objects 'are probably to be found at the present time in a certain identifiable place.'" *Id.*, quoting 2 LaFave, *Search and Seizure* (2d ed), § 3.7, p 75.

The threshold inquiry looks at the life cycle of the evidence sought, given a totality of the circumstances, that includes the criminal, the thing seized, the place to be searched, and, most significantly, the character of the criminal activities under investigation. . . .

* * *

Time as a factor in the determination of probable cause to search is weighed and balanced in light of other variables in the equation, such as whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggests that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense. . . . The matter must be determined by the circumstances of each case. [*Russo, supra* at 605-606.]

I agree with the trial court that the information contained in the affidavit was stale. Here, the warrant specified that the items to be seized were all business records relating to Pro Temp One, and financial records relating to the bank loan that was allegedly obtained by fraud. The paragraphs in the affidavit relating to any business or financial records kept at defendant's home are numbered twenty-nine and thirty. The affidavit avers that there is a computer system at the office of Pro Temp One and that defendant and Obetts maintained an office in their residence. The affidavit avers that defendant and Obetts "have utilized this home computer to access the records maintained in the computer system of Pro Temp One"; however, the affidavit provides no dates whatsoever regarding when this might have occurred or whether it was even ongoing. Further, the affidavit avers that defendant had put back-up disks from the office computer system into her briefcase, removed those disks from the office, and that "Source Three" had seen the disks and paper copies of Pro Temp One business records at defendant's residence. Again, however, there are no dates whatsoever regarding when those computer disks or other records were removed from the office or when they were seen at defendant's residence. There is simply no time frame whatsoever regarding when the business records and computer disks were taken to, or actually were in, defendant's house.

As aptly noted by the trial court, the business records are "highly portable and likely to be moved from place to place," as indicated by the affidavit itself. Moreover, information contained in computers and on computer disks is not necessarily permanent because information is constantly being modified or deleted in computers and disks. Additionally, about six months had passed from the time that the sources had been discharged from their jobs until the warrant was

issued. Considering the portable and easily modifiable nature of the items being sought, in conjunction with the fact that there is simply no time frame regarding *when* the computer disks and records were removed from the office to defendant's home, the information in the affidavit was stale at the time the search warrant was issued. Indeed, as stated by the trial court, "the fact that [a computer disk] may be in one location one day is no basis for believing it will be in that location days later, let alone six months or more later."

I would affirm the trial court's ruling to suppress the evidence of the handguns seized pursuant to a warrant that is not supported by probable cause.

/s/ Kathleen Jansen