STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN WILLIAM MCPHAIL, JR.,

Defendant-Appellant.

UNPUBLISHED
August 28, 1998

No. 192699
Oakland Circuit Court
LC No. 93-125118-FH

Before: Cavanagh, P.J., and White and Young, Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manufacturing marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to six to forty-eight months' imprisonment for manufacturing marijuana and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

I

Defendant argues that the trial court erred in denying his motion to suppress evidence seized pursuant to two search warrants because the affidavits were facially invalid. We disagree.

A trial court's decision following a suppression hearing will not be reversed unless it is clearly erroneous. *People v Melotik*, 221 Mich App 190, 198; 561 NW2d 453 (1997). Deference is afforded the magistrate's decision on the basis of a preference for searches conducted pursuant to warrants, and a reviewing court must only insure 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. *People v Stumpf*, 196 Mich App 218, 220; 492 NW2d 795 (1992), citing *People v Russo* 439 Mich 584, 603; 487 NW2d 698 (1992).

A

Defendant first challenges the April 16, 1993 search warrant authorizing the search of Detroit Edison utility records of his residence as defective. Defendant argues that the statement in the affidavit which indicates that Detroit Edison bills are evidence of criminal conduct is conclusory. We reject defendant's challenge to the search warrant on the basis that he lacked a reasonable expectation of privacy in the utility records.

In order for a defendant to have standing to object to the introduction of evidence of the results of a search or seizure, the search or seizure must have infringed on the defendant's reasonable expectation of privacy. *People v Smith*, 420 Mich 1, 26-28; 360 NW2d 841 (1984) (adopting and applying the reasonable expectation of privacy test discussed in *Rakas v Illinois*, 439 US 128, 152-155; 99 S Ct 421; 58 L Ed 2d 387 (1978) [Powell, J., concurring]). An expectation of privacy is legitimate if the individual has an actual, subjective expectation of privacy and that actual expectation is one that society recognizes as reasonable. *Smith, supra* at 27, quoting *People v Nash*, 418 Mich 196, 205; 341 NW2d 439 (1983). In considering the reasonableness of asserted privacy expectations, the ultimate question is whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances. *Smith, supra* at 26, quoting *Rakas, supra* at 152.

In *United States v Payner*, 447 US 727; 100 S Ct 2439; 65 L Ed 2d 468 (1980), the Court held that a bank customer had no reasonable expectation of privacy in a loan guarantee agreement that was illegally seized by government agents from a bank official. In *Smith v Maryland*, 442 US 735; 99 S Ct 2577; 61 L Ed 2d 220 (1979), the Court held that a telephone user has no constitutionally protected expectation of privacy in the numbers dialed from his telephone. In *United States v Miller*, 425 US 435; 96 S Ct 1619; 48 L Ed 2d 71 (1976), the Court held that a bank depositor has no expectation of privacy in copies of checks, deposit slips, and monthly statements. In *United States v Porco*, 842 F Supp 1393, 1398 (D Wyo, 1994), aff'd sub nom *United States v Cusumano*, 83 F3d 1247 (CA 10, 1996), a marijuana manufacturing case, the court held that a defendant does not have a reasonable expectation of privacy in utility records of residential electrical usage. Similarly, we conclude that defendant did not have a reasonable expectation of privacy in his residential utility records.

B

Defendant also argues that the April 22, 1993 search warrant was invalid, asserting a paragraph-by-paragraph challenge of the warrant. Defendant argues that there is no information in the affidavit indicating that the informants had personal knowledge of the marijuana growing operation or presented reliable information. He further argues that he is entitled to an evidentiary hearing.

Reviewing courts should read search warrants and their supporting affidavits in a common sense manner, according deference to the magistrate's decision on the basis of a preference for searches conducted pursuant to warrants, and determining only whether there is a substantial basis for the magistrate's finding of probable cause. *Russo, supra* at 603; *Stumpf, supra* at 220. If an informant is unnamed, the affidavit must contain affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information, and either that the unnamed person is

credible or that the information is reliable. MCL 780.653(b); MSA 28.1259(3). An informant's personal knowledge may be inferred from the facts. *Stumpf, supra* at 223.

The challenged affidavit contained information that two reliable informants tipped police that there was a marijuana growing operation in defendant's home. One informant identified one of the occupants of the home, along with the home's color and location, and that the occupant had an outstanding arrest warrant. The police corroborated the existence of the outstanding warrant through the LEIN. The second informant referred to the home at the same location and relayed that the house had a large wood deck "off the rear porch" and a large stack of wood "to the rear of the residence." The affiant corroborated this information through personal observation. Further, a search of defendant's trash produced information corroborating the informants' tips and also produced a plant stem that tested positive for marijuana. In addition, the utility company records indicated that defendant's electricity usage was abnormally high, and followed cycles consistent with a marijuana growing operation.

We conclude that the informants' personal knowledge could reasonably be inferred from the facts. *Stumpf, supra*. Further, an independent police investigation that verifies information provided by an informant can also support the issuance of a search warrant. See *People v Harris*, 191 Mich App 422, 426; 479 NW2d 6 (1991); *People v Lucas*, 188 Mich App 554, 569-570; 188 NW2d 554 (1991). After reviewing the affidavit in a common-sense and realistic manner, we conclude that there was a substantial basis for the magistrate to find probable cause.

Defendant argues that he should have been granted an evidentiary hearing under *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978), because the deck and wood pile are not in the back of the home, but are off the side of the home. We conclude that defendant has failed to establish that this discrepancy is the result of a wilful or reckless misrepresentation, or that the accuracy of such details is necessary to the finding of probable cause. Thus, defendant has failed to establish his entitlement to an evidentiary hearing under *Franks, supra*.

II

Defendant next argues that the trial court erred when it denied his motion to quash the felony-firearm charge. We review a circuit court's decision regarding a motion to quash for abuse of discretion. *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996). In order to establish that a crime has been committed at the preliminary examination stage, the prosecution need not prove each element beyond a reasonable doubt, but must present some evidence of each element. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). A conviction of felony-firearm requires proof that defendant carried or possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; MSA 28.424(2); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Possession may be either actual or constructive. *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995). Constructive possession of a firearm for purposes of the felony firearm statute is satisfied if the firearm is readily accessible to the defendant. *Id. at 609-610.*

Defendant does not dispute that sufficient evidence of the underlying felony was presented, but argues that the firearms were not readily accessible to him, and that they were far removed from the basement area where the marijuana growing operation was conducted. We conclude that the evidence presented at the preliminary examination was sufficient to justify the bindover. There was testimony that defendant was in the kitchen area when the search warrant was executed, and that a nine millimeter loaded gun was found on the coffee table in the living room. The other occupant was found upstairs, and additional weapons were found in an upstairs bedroom. We conclude that the gun on the living room table was sufficiently close and accessible to defendant to justify the bindover, and that the evidence of defendant's ready possession of a firearm in the home in which he conducted an ongoing marijuana growing operation was sufficient to constitute probable cause to believe that defendant constructively possessed the gun while manufacturing marijuana. Therefore, the district court did not abuse its discretion in binding defendant over on the felony-firearm charge.

III

Next, defendant argues that he is entitled to resentencing because the trial court erred in scoring OV 9 and OV 16, and because there were unusual circumstances justifying departure from the guidelines.

Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. *People v Mitchell*, 454 Mich 145, 178; 560 NW2d 600 (1997). Claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables do not state cognizable claims for relief. *Id.* at 176-177. Application of the guidelines states a cognizable claim on appeal only where (1) the factual predicate is wholly unsupported, (2) the factual predicate is materially false, and (3) the sentence is disproportionate *Id.* at 177. We conclude that a factual basis for the court's scoring decisions existed and defendant has failed to establish a claim subject to review.

Defendant also argues that his sentence was disproportionate because of unusual circumstances. Sentencing issues are reviewed for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant's unusual circumstances consisted of family support evidenced by numerous letters sent to the court, his acknowledged culpability, his age of 38 years, and his lack of a prior criminal record. There was testimony at trial that over three hundred marijuana plants were growing in defendant's basement hydroponically, under timed track lights. An officer testified that based upon his experience, the quantity of marijuana and the presence of scales indicated that the marijuana was for resale. The packaging material found in the basement of defendant's home also indicated that the marijuana was for resale. We conclude that under these circumstances the sentence was not disproportionate to the seriousness of the offense and offender.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Robert P. Young, Jr.