

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEMETRIUS BRYANT,

Defendant-Appellee.

UNPUBLISHED

December 18, 1998

No. 209869

Wayne Circuit Court

LC No. 97-006290

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

The prosecution appeals as of right from the trial court's order granting defendant's motion to quash the search warrant and dismissing the case. Defendant had been charged with possession with intent to deliver 50 grams or more, but less than 225 grams, of heroin, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). We reverse and remand for trial.

The prosecution's first argument on appeal is that the trial court clearly erred when it found that Officer Gawaine Hughes knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit underlying the search warrant. We agree.

In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. [*People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992).]

Here, there is no evidence that Hughes, the affiant, knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit underlying the search warrant. The trial court based its finding to the contrary upon alleged discrepancies between the affidavit and Hughes' preliminary examination testimony. However, those discrepancies were adequately explained by Hughes in his un rebutted testimony at the hearing on defendant's motion to quash the search warrant.

Although Hughes testified at the preliminary examination that he only saw one person enter the premises in question during a surveillance the day before he executed the search warrant, thus contradicting the affidavit that indicated that two persons entered and left the premises, it is clear from Hughes' testimony at the motion hearing that he was simply confused regarding the scope of the questioning at the preliminary examination and that the allegations in the affidavit were correct. Also, Hughes' failure to refer at the preliminary examination to the brown paper bags carried by the individuals as they left the premises, which were referred to in the affidavit, does not establish that Hughes intentionally lied or recklessly disregarded the truth in his affidavit, since Hughes was not asked any questions at the preliminary examination about what the individuals were carrying, and had no obligation to volunteer such information. In addition, Hughes' failure to refer in his affidavit, as he did at the preliminary examination, to the fact that defendant opened the door from the inside when one of the individuals entered the premises during Hughes' surveillance is immaterial to whether there was probable cause to search the premises. Thus, any omission of such immaterial information would not require suppression of the evidence seized. *Id.*

We conclude that there is no evidence of record that Hughes knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit. Moreover, there is no basis for believing that any false information inserted into, or information omitted from, the affidavit was material to a finding of probable cause. The trial court's finding to the contrary was clearly erroneous. Accordingly, the trial court erred in granting defendant's motion to quash the search warrant and dismissing the case.

Further, even without considering the portion of the affidavit relating to the officer's observations, the information provided to the officer by the informant provided an adequate basis for the magistrate's finding of probable cause. We apply a common sense and realistic approach in reviewing a magistrate's decision to issue a search warrant. *People v Darwich*, 226 Mich App 635, 636-637; 575 NW2d 44 (1997). We ask whether a reasonably cautious person would have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause. *Id.* at 637. Probable cause exists where a person of reasonable caution would conclude that contraband or evidence of criminal conduct will be found in the place to be searched. *Id.* Further, the affidavit on which the magistrate relies to issue the search warrant must contain allegations from which the magistrate may conclude that the informant spoke with personal knowledge of the information and that either the informant is credible or the information is reliable. MCL 780.653; MSA 28.1259(3); *People v Poole*, 218 Mich App 702, 706; 555 NW2d 485 (1996).

In the case at bar, the specific facts set forth in the affidavit are sufficient to support an inference that the informant spoke with personal knowledge. The informant specifically described the heroin, the seller, and the location on the premises where the heroin was seen. Moreover, the affidavit indicates that the informant had provided reliable information in the past. Finally, although independent police corroboration is a factor that may be relied upon by the magistrate when determining whether there was probable cause, *People v Sellars*, 153 Mich App 22, 27; 394 NW2d 133 (1986), there is no authority

to establish that such corroboration is necessary to a finding of probable cause, as suggested by defendant and the trial court.

Accordingly, we conclude that even if the trial court had not erred in striking the portion of the affidavit regarding the officer's observations, the remaining portions of the affidavit provided an adequate basis for the magistrate's finding of probable cause.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ E. Thomas Fitzgerald

/s/ Hilda R. Gage