

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EUGENE WILLIAMS,

Defendant-Appellee.

UNPUBLISHED

April 18, 2000

No. 218926

Wayne Circuit Court

LC No. 99-000058

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

The prosecution appeals as of right from the trial court orders granting defendant's motion to suppress certain evidence and to dismiss the charge of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). We reverse.

The prosecutor argues that the trial court clearly erred in granting defendant's motion to suppress the evidence on the basis that the affidavit supporting the search warrant did not contain sufficient information to support a finding of probable cause. We review for clear error the trial court's findings of historical fact in deciding a motion to suppress evidence, but we review de novo the trial court's ultimate decision regarding a motion to suppress. *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999).

Appellate scrutiny of a magistrate's decision involves neither de novo review nor application of an abuse of discretion standard. *People v Whitfield*, 461 Mich 441, 445; ___ NW2d ___ (2000). Reviewing courts should give great deference to the decision of the magistrate. A reviewing court simply must ask whether a reasonably cautious person could have concluded that there was a "substantial basis" for concluding that a search would uncover evidence of wrongdoing. A search warrant and the underlying affidavit are to be read in a commonsense and realistic manner. *Id.* at 445-446.

In *Whitfield*, *supra*, the police submitted the affidavit of a member of the narcotics division in support of the application for a search warrant. The officer averred that when the alleged seller asked him what he wanted, he responded, "one." The seller asked the officer to name a common

acquaintance; when the officer was unable to comply, the seller told him to return with someone the seller knew. The seller had a large bundle of folded coin envelopes; the officer stated that he had participated in over one hundred narcotics raids, and he had seen heroin packaged in such coin envelopes “on numerous occasions.” *Id.* at 443. The Supreme Court held that, on these facts, the magistrate had a substantial basis for finding probable cause to issue the search warrant because there was a fair probability that contraband or evidence of a crime would be found at the location. *Id.* at 448.

In the present case, the search warrant was issued on December 21, 1998. The accompanying affidavit stated that the affiant was a member of the Narcotic Division. An informant, who had been used by the Narcotic Enforcement Unit on at least fifteen occasions, had purchased cocaine from the premises on December 15, 1998. On December 18, 1998, the informant knocked on the front door and attempted to purchase one rock of cocaine from a different individual, who “refused to sell to the SOI [source of information] as he did not know the SOI.” On December 21, 1998, the affiant conducted a covert surveillance of the premises for approximately thirty minutes. During that time, he observed seven men approach the front door at different times. Each of the men gave money to a black male and received in exchange an unknown substance from a clear plastic baggie. The affiant averred that “[t]his activity is consistent with the activities of an on-going narcotics enterprise.”

Considering these facts in a commonsense and realistic manner, and giving due deference to the decision of the magistrate, we are satisfied that the search warrant was properly issued. Cocaine had been purchased from the location six days earlier. Three days before the warrant was issued, a second attempt to purchase cocaine from the premises was unsuccessful because the person who answered the door did not know the prospective buyer. On the day the warrant was issued, a police officer witnessed what appeared to be seven different narcotics transactions take place at the house. A reasonably cautious person could have concluded from these facts that there was a fair probability that evidence of wrongdoing would be found on the premises. See *id.* at 446.

Defendant argues that probable cause did not exist because the officer did not stop any of the seven men who visited the house on December 21 to verify that a sale of narcotics had occurred. However, “[t]o provide adequate support for a warrant, the affidavit need not *prove* anything.” *Whitfield, supra* at 445. Probable cause requires ““only the probability, and not a prima facie showing, of criminal activity.”” *People v Russo*, 439 Mich 584, 607; 487 NW2d 698 (1992), quoting *Illinois v Gates*, 462 US 213, 235; 103 S Ct 2317, 2330; 76 L Ed 2d 527 (1983).

Defendant further notes that the only confirmed sale of cocaine occurred on December 15, six days before the issuance of the search warrant at issue; and the search warrant issued on the same day either was never executed or had been executed with unknown results. Defendant therefore contends that the evidence of the December 15 sale was stale.

As defendant argues, staleness is a factor to weigh in determining if there is probable cause to search. See *People v Stumpf*, 196 Mich App 218, 226; 492 NW2d 795 (1992). However, the age of the information alone is not determinative, but must be evaluated as part of the particular circumstances of the case. *Id.* In the present case, the affidavit set forth two facts that indicated that the December 15 sale was part of an ongoing criminal enterprise. First, the informant’s attempted purchase

of cocaine on December 18 was not rebuffed on the basis that cocaine was not for sale at the house, but rather because the informant was not known to the person who answered the door. Second, the affiant witnessed seven apparent narcotics transactions on December 21. Thus, the lapse of time between the sale of cocaine and issuance of the warrant was not determinative because the evidence, evaluated in its entirety, suggested that the sale of narcotics was continuing and that there existed a fair probability that contraband would be found on the premises.

In sum, the affidavit provided a sufficient basis for issuance of the search warrant, and the trial court erred in finding otherwise. Accordingly, we reverse the trial court orders suppressing the evidence found during the execution of the search warrant and dismissing the charge against defendant.

Reversed.

/s/ Mark J. Cavanagh

/s/ David H. Sawyer

/s/ Brian K. Zahra