

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DONALD WILLIS TRICE,

Defendant-Appellee.

UNPUBLISHED

April 13, 2001

No. 226519

Oakland County Circuit Court

LC No. 99-166306-FH

Before: K.F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver less than fifty grams of cocaine in contravention of MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant moved to suppress the evidence seized pursuant to a search of his home, arguing that the police failed to leave a copy of the affidavit supporting the search warrant at the premises as required by MCL 780.654; MSA 28.1259(4) and MCL 780.655; MSA 28.1259(5). In an opinion and order the trial court suppressed the evidence and dismissed the case. The prosecution appeals as of right. We reverse and remand.

I. Basic Factual and Procedural History

The police entered defendant's home pursuant to a valid search warrant and seized illicit drugs found on the premises. Defendant was thereafter charged with possession with intent to deliver less than 50 grams of cocaine in contravention of MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(a)(iv). In a pretrial motion, defendant moved to suppress the evidence seized because the police failed to provide him with a copy of the sworn affidavit at the time of the search specifying the probable cause upon which the warrant issued. Defendant does not contest that he was provided with the affidavit before his preliminary exam. Initially, the trial court denied the motion. However, on rehearing, and pursuant to this court's decision in *People v Sobczak-Obetts*, 238 Mich App 495; 606 NW2d 658 (1999), the trial court granted defendant's motion, suppressed the evidence, and dismissed the case.

II. Standard of Review

This court will review a trial court's findings of historical fact relative to a motion to suppress evidence for clear error, but reviews de novo the trial court's final decision on the motion to suppress. *People v Garvin*, 235 Mich App 90, 96; 597 NW2d 194 (1999).

III. The Statutes at Issue and the Police's Failure to Provide a Copy of the Affidavit

The prosecution contends that the trial court erred when it ordered the suppression of evidence seized pursuant to a valid search warrant because the police, after executing the warrant and seizing the evidence, failed to provide or leave a copy of the underlying affidavit delineating the requisite probable cause for its issuance. We agree. MCL 780.654; MSA 28.1259(4) provides in pertinent part that:

A search warrant shall be directed to the sheriff . . . commanding such officer to search the house . . . where any property or other thing for which he is required to search is believed to be concealed. Each warrant shall designate and describe the house . . . to be searched and the property or thing to be seized. *The warrant shall also state the grounds or the probable or reasonable cause for its issuance, in lieu thereof, a copy of the affidavit may be attached thereto.* [Emphasis added].

Additionally, MCL 780.655; MSA 28.1259(5) provides in relevant part that:

When an officer in the execution of a search warrant finds any property . . . for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things so seized. *The officer taking the property . . . under the warrant shall forthwith give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the persona a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken.* [Emphasis added].

In *Garvin*, *supra*, the court held that pursuant to the afore-referenced statutes, “[w]here a supporting affidavit is used in lieu of a statement of probable cause in the warrant as authorized by MCL 780.654; MSA 28.1259(4), then a copy of the affidavit must be provided or left pursuant to MCL 780.655; MSA 28.1259(5).” The issue therefore becomes whether police officer’s failure to leave a copy of the affidavit as required by statute automatically mandates suppression of the evidence seized pursuant thereto irrespective of any prejudice to the defendant. A review of the decisions relating to this issue reveals a split¹ among various panels of the Court of Appeals and will be

¹ See *People v Chapin*, 244 Mich App 196; ___ NW2d ___ (2000)(holding that the failure to leave a copy of the affidavit in support of the search warrant mandated suppression of the evidence); *People v Sobczak-Obetts*, 238 Mich App 495; 606 NW2d 658(1999)(holding that pursuant to our Supreme Court’s decision in *People v Moten*, 233 Mich 169; 206 NW 506 (continued...)

definitively resolved by the decision from our Supreme Court in *People v Sobczak-Obetts*, 238 Mich App 495; 606 NW2d 658 (1999)².

As opposed to following the splintered³ decision in *Sobczak-Obetts*⁴, *supra*, we elect to follow the precedent established by the court in *Garvin* line of cases and hold that an officer's failure to provide a copy of the underlying affidavit in support of the search warrant after executing an otherwise reasonable search is merely a technical violation of a statutorily prescribed procedural rule and does not impel the drastic remedy provided by the exclusionary rule preserved for violations of fundamental constitutional guarantees against unreasonable searches and seizures. *Garvin*, at 100. See also, *People v Sobczak-Obetts*, 238 Mich app 495; 606 658 (1999)(Gage, J., dissenting)(stating that, "[t]his technical, nonconstitutional, statutory deficiency does not by itself warrant invocation of the exclusionary rule."). On review of the entire record, we hold that the trial court

(...continued)

(1925), failure to leave a copy of the affidavit in support of the search warrant requires suppression of the evidence seized); *cf People v Garvin*, 235 Mich App 90; 597 NW2d 194 (1999)(holding that a technical violation of the statute does not trigger the exclusionary rule and thus, does not mandate suppression of evidence seized pursuant to an otherwise reasonable search); *People v Pipok*, 191 Mich App 669; 479 NW2d 359 (1991)(holding that suppression of the evidence is not required where the search warrant itself fails, on its face, to state the probable cause for its issuance, or in the alternative, where the supporting affidavit is not attached because the overarching purpose of the statutory scheme, to establish a record of probable cause, is not abrogated by this procedural error.)

² On July 12, 2000, our Supreme Court granted the prosecution's application for leave to appeal in *People v Sobczak-Obetts*, 238 Mich App 495; 606 NW2d 658 (1999) which is currently pending in that court.

³ Judge Hoekstra authored the opinion holding that a search warrant that relies upon an affidavit to establish the requisite probable cause to conduct the search must be attached to the warrant. According to Judge Hoekstra, failure to do so is sufficient, in and of itself, to invalidate the search and suppress the evidence seized. Judge Cavanagh concurred in the result only and did not specifically ascribe to Judge Hoekstra's position while Judge Gage authored the dissent.

⁴ We also note that the decision in *Sobczak-Obetts*, *supra*, relies for its result on our Supreme Court's decision in *People v Morten*, 233 Mich 169, 206 NW 506 (1925). However, since the *Morten* decision, the relevant statutes have been recodified which, to some extent, relaxed the exacting statutory mandate then in effect requiring that all of the facts supporting probable cause for a warrant *appear on the face of the warrant itself*. The overarching goal of the statute was to ensure that law enforcement officials made a record of the facts underlying the probable cause determination and the only way to accomplish this goal was to place those facts on the face of the search warrant. See *Sobczak-Obetts*, (Gage, J., dissenting), at 504. Since the material facts did not appear on the face of the warrant as required by the statute then in existence, the court in *Morten* suppressed the evidence. On the contrary, pursuant to the recodification, law enforcement officials may swear out an affidavit and attach same to the search warrant as opposed to delineating those underlying facts on the face of the warrant itself. Although in the case at bar, the affidavit was not attached to the warrant, the affidavit exists such that a record of the probable cause determination may be had and accordingly, challenged by defendant, thus satisfying the overarching goals underlying the governing statutes. *Sobczak-Obetts*, at 504-505 (Gage, J., dissenting).

committed error requiring reversal when it issued its order suppressing the evidence and dismissing the case against defendant. Accordingly, we reverse the trial order and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Michael R. Smolenski

/s/ Patrick M. Meter