

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant/Cross-Appellee,

v

IAN PETERSON,

Defendant-Appellee/Cross-  
Appellant.

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UNPUBLISHED

August 2, 2002

No. 235020

Wayne Circuit Court

LC No. 00-013676

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Defendant faced a charge of possession with intent to deliver more than 225 but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii). The charge resulted from the discovery by the police of cocaine in defendant's house. The police found the cocaine while executing a search warrant, which was issued, in large part, because of statements made by a confidential informant who claimed to have seen a large amount of cocaine on the kitchen table in the house. The trial court granted defendant's motion for production of the confidential informant for an in-camera hearing. After the prosecutor did not produce the informant, the court dismissed the case against defendant. The prosecutor appeals as of right, and defendant cross-appeals. We reverse and remand with respect to the prosecutor's issue and affirm with respect to defendant's issues.

The prosecutor argues that the trial court should not have ordered the production of the confidential informant, or, alternatively, should have held an evidentiary hearing before ordering the informant's production. We review for an abuse of discretion a trial court's decision regarding production of a confidential informant. See generally *People v Poindexter*, 90 Mich App 599, 610-611; 282 NW2d 411 (1979).

Generally, a prosecutor is not required to disclose the identity of confidential informants. *People v Sammons*, 191 Mich App 351, 368; 478 NW2d 901 (1991). However, if the defendant demonstrates a possible need for the informant's testimony, the trial court should order the informant produced and conduct a hearing outside the presence of the defendant. *People v Underwood*, 447 Mich 695, 706; 526 NW2d 903 (1994). The procedure for determining whether the production of an informant should be ordered is set forth in *Poindexter*, *supra* at 609-610. See *People v Howey*, 118 Mich App 431, 436, 325 NW2d 451 (1982). In *Poindexter*, this Court outlined the procedure as follows:

The procedure to be followed in resolving claims such as that in the instant case must parallel the procedure outlined in [*Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978)]. To begin with, there is a presumption of validity with respect to the affidavit supporting the search warrant and this presumption applies throughout the procedure.

To mandate an evidentiary hearing, defendant's attack must be more than conclusory, if possible, and must be supported by more than a mere desire to determine who the informant was. There must be specific allegations of deliberate falsehood or of reckless disregard for the truth. Those allegations must be accompanied by an offer of proof and should be accompanied by a statement of supporting reasons. Also, the defendant should furnish reliable statements of witnesses to support his claim, or satisfactorily explain their absence. If these requirements are met to the trial court's satisfaction and the statements challenged by the defendant are set aside but sufficient content still remains in the affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient to support a finding of probable cause, the defendant is entitled to an evidentiary hearing.

At the hearing, the trial judge should question the officer involved and consider any other relevant evidence offered by the prosecutor or the defendant. If the judge is convinced that the officer is being truthful regarding the existence of the informant, he should deny defendant's request for production. However, if the judge determines that there is some doubt as to the officer's credibility, he may require production of the informant. [*Poindexter, supra* at 609-610 (footnotes omitted).]

The trial court did not follow the *Poindexter* procedure in the instant case. Instead, the court merely noted as follows:

The only reason that I might grant an in-camera review of the confidential informant, is due to the fact that he was used in such a minimal fashion.<sup>[1]</sup> And I want to make sure that this particular informant does in fact exist. So I am going to order the prosecuting attorney within the next three weeks to produce the confidential informant to the Court just for the Court's viewing only.

I want to make sure that he exist[s], and I want to ask him some questions on this case.

\* \* \*

I am going to grant [defense's counsel's] request for this Court to have an in-camera review of the confidential informant.

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<sup>1</sup> In making this statement, the court was apparently referring to the statement in the search warrant affidavit indicating that the confidential informant had been used by the Detroit Police Narcotics Division on only one other occasion.

Instead of ordering production of the confidential informant based on the informant's sparse track record, the court should instead have determined whether defendant, in requesting the informant's production, made "specific allegations of deliberate falsehood or of reckless disregard for the truth" and supported those allegations. *Id.* at 609. If the court determined that defendant met this burden, it should have disregarded the challenged statements and determined if enough information remained in the search warrant affidavit to support a finding of probable cause. *Id.* If not, the court should then have held an evidentiary hearing<sup>2</sup> and questioned the author of the affidavit to evaluate his credibility. *Id.* at 609-610. If this credibility was found lacking, only then should the court have ordered production of the confidential informant. *Id.* at 610.

We conclude that, as a matter of law, defendant did not meet his initial burden under the *Poindexter* procedure. In making his motion regarding the confidential informant, defendant presented an affidavit in which he indicated, contrary to the informant's statement as set forth in the search warrant affidavit, that he did not have cocaine on his kitchen table on September 13 or 14, 2000. However, defendant's affidavit was unsigned and therefore was not a proper subject for the court's consideration. See generally *People v Budzyn*, 456 Mich 77, 92 n 14; 566 NW2d 229 (1997). Defendant additionally presented a report indicating that he passed a polygraph examination. In this report, a polygraph examiner stated that defendant spoke truthfully when stating that he had no drugs on his kitchen table on September 13 or 14, 2000. However, in *People v McKinney*, 137 Mich App 110, 115-117; 357 NW2d 825 (1984), this Court noted that in order for polygraph results to be considered in conjunction with pretrial motions, certain admissibility standards must be met, including the approval of the polygraph equipment and the approval of the procedures employed. These standards were not met by defendant in the instant case.<sup>3</sup>

Moreover, *Poindexter* specifically noted that "[t]he procedure to be followed in resolving claims such as that in the instant case must parallel the procedure outlined in *Franks, supra.*" *Poindexter, supra* at 609 (footnote omitted). In *Franks*, the Court stated:

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. *Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.* Allegations of negligence or

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<sup>2</sup> Defendant contends that *Poindexter* requires only a "hearing" and not an "evidentiary hearing." We disagree with this contention. Indeed, viewing the discussion in *Poindexter* as a whole, including the Court's statement that "At the hearing, the trial judge should question the officer involved and consider any other relevant evidence. . .," *Poindexter, supra* at 610, we conclude that an evidentiary hearing is required.

<sup>3</sup> We note that unlike the prosecutor in *McKinney, supra* at 117, the prosecutor in this case did object to the polygraph results below on the basis of these unmet standards.

innocent mistake are insufficient. *The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any government informant.* [Franks, *supra* at 171-172 (emphasis added).]

Defendant did not satisfactorily explain the absence of a signed affidavit by him. Also, and critically, defendant made no allegation of deliberate falsehood or reckless disregard for the truth on the part of the police officer affiant.

Under all the above circumstances, defendant simply did not meet his initial burden under the *Poindexter* standard for requiring the production of a confidential informant. We therefore reverse the court's orders requiring the informant's production and dismissing the case against defendant. We note that if defendant subsequently obtains proof of wrongdoing on the part of the police officer affiant, he may "renew his attack on the veracity of the search warrant affidavit." *Poindexter*, *supra* at 611. If he does so, the trial court shall evaluate the attack in accordance with the standards set forth in this opinion.

On cross-appeal, defendant argues that the trial court should have granted his motion to suppress based on a lack of probable cause in the search warrant. We review a magistrate's decision regarding probable cause to determine whether a substantial basis for the finding of probable cause existed. *People v Whitfield*, 461 Mich 441, 445-446; 607 NW2d 61 (2000). We must read the search warrant and the supporting affidavit in a realistic and commonsense manner and give deference to the magistrate's determination. *Id.* at 446. Our review is limited to those facts presented to the magistrate. *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995), overruled in part on other grounds *People v Wager*, 460 Mich 118; 594 NW2d 487 (1999).

Probable cause to search exists if a person of reasonable prudence, after considering all the facts and circumstances, would believe that evidence of a crime or contraband is in the stated place. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). A magistrate's determination of probable cause must be based on all the facts presented to him in the affidavit. *Id.* "[T]he affidavit must contain facts within the knowledge of the affiant rather than mere conclusions or beliefs." *Id.* Police officers are considered presumptively reliable with regard to probable cause determinations. *Id.*

Probable cause may be founded on hearsay from an unnamed informant. See MCL 780.653 and *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991). MCL 780.653 states, in part:

The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

\* \* \*

(b) If the person is unnamed, 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.

“The personal knowledge element should be derived from the information provided or material facts, not merely a recitation of the informant’s having personal knowledge.” *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). “If personal knowledge can be inferred from the stated facts, that is sufficient to find that the informant spoke with personal knowledge.” *Id.* The specificity of details provided by an informant regarding asserted facts such as dates, names, and addresses indicate that an informant is speaking from personal knowledge. See *id.* Moreover, the fact that the police previously used information from an informant with success provides support for the conclusion that an informant is credible or reliable. *Id.* Finally, an independent investigation by the police that produces corroborating evidence and verifies the information provided by an informant serves to establish the informant’s credibility. See *id.*

According to the search warrant affidavit, the confidential informant in the instant case represented that he<sup>4</sup> was speaking from personal knowledge. He stated that (1) he had been inside defendant’s home at 19200 Edgefield less than eight hours prior; (2) at that time, he saw a large amount of cocaine on the kitchen table; (3) he personally spoke with defendant, who stated “what ever [sic] he needed he has it;” and (4) defendant resided at the location with his wife. Because of the detailed nature of the information, these facts tended to show that the CI was speaking from personal knowledge. *Id.*

Moreover, because the police used information from the confidential informant on another occasion resulting in an arrest, the informant’s credibility and reliability were bolstered. Finally, the police conducted an independent investigation and thereby corroborated some of the information provided by the informant. The affiant, Gary Edwards, performed a utility check on the location reported as defendant’s address and found a utility registered in the name of defendant’s wife. Edwards also observed two vehicles at the location and then performed a registration check. Both of the vehicles were registered to defendant, with one of them also including the name of his wife. Edwards also performed a criminal history check on defendant, and it showed a prior felony arrest for a controlled substance. In light of all these circumstances, the magistrate did not err in finding probable cause and issuing the search warrant. The trial court correctly denied the motion to suppress.

Next, defendant argues that the district court erred in binding him over for trial. We review bindover decisions for an abuse of discretion; this standard is stringent and accords considerable deference to the lower court. See *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000).

A district court must bind a defendant over for trial if, at the conclusion of the preliminary examination, the court finds probable cause to believe that the defendant committed the crime charged. MCL 766.13; *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). “Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged.” *People v Orzame*, 224 Mich App 551, 558; 570 NW2d

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<sup>4</sup> The affiant used the pronoun “he” in referring to the confidential informant in the search warrant affidavit.

118 (1997). “It is not the function of the magistrate to discharge the accused when the evidence conflicts or raises a reasonable doubt as to guilt. Such questions are for the trier of fact.” *Hill, supra* at 469.

The evidence presented at defendant’s preliminary examination supported defendant’s bindover on the charged crime. Possession of illegal narcotics may be either actual or constructive and may be joint or exclusive. *Id.* at 470. “Constructive possession may be found where a defendant knowingly has the power and intention to exercise dominion or control over a substance, either directly or through another person, or if there is proximity to the substance together with indicia of control.” *Sammons, supra* at 371. Further, circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish defendant’s possession of an illegal narcotic. *Id.*

Here, the police found the two bags of cocaine totaling 267.46 grams in a drawer of a nightstand located in the upstairs bedroom of defendant’s home. The bedroom also contained both men’s and women’s clothing, as well as pictures of defendant and his family. Also in the bedroom, the police found several bills that were sealed and addressed to defendant at the home. The police also found in the house a digital scale of the sort that is used for weighing narcotics. Despite the fact that defendant was not home during the search, the above facts, together with the reasonable inferences that arise from them, sufficiently supported a finding of probable cause with regard to defendant’s guilt of the charged crime. No error occurred.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck  
/s/ Peter D. O’Connell  
/s/ Patrick M. Meter