

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS ALLEN DISNEY,

Defendant-Appellee.

UNPUBLISHED
February 17, 2004

No. 244350
Wayne Circuit Court
LC No. 02-007247

Before: Schuette, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting defendant's motion to suppress and dismissing the charges against him. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This Court will review a trial court's findings of fact in a suppression hearing for clear error; however, we review de novo the trial court's ultimate decision on the motion to suppress. *People v Wilson*, 257 Mich App 337, 351; 668 NW2d 371 (2003). "The application of the exclusionary rule to an alleged Fourth Amendment violation is a question of law that is reviewed de novo on appeal." *Id.*

A search warrant and the underlying affidavit must be read in a commonsense and realistic manner. *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). Affording deference to the magistrate's decision requires that the reviewing court ensure the existence of a substantial basis for the magistrate's conclusion that there is a fair probability that evidence of a crime will be found at a particular location. *Id.* "[P]robable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched." *Id.* at 606-607.

The information presented to the magistrate was limited. Evidence of a prior criminal record is not sufficient, in itself, to justify a search of a person's home. *Beck v Ohio*, 379 US 89, 96-97; 85 S Ct 223; 13 L Ed 2d 142 (1964). The anonymous tip was received some fifteen months before the search, and contrary to MCL 780.653(b), the affidavit contained no affirmative allegations from which the magistrate could conclude that the informant spoke with personal knowledge and was credible or provided reliable information. However, we note that evidence seized pursuant to a search warrant issued in violation of the affidavit requirement of

MCL 780.653 is not to be suppressed based on the statutory violation. *People v Hawkins*, 468 Mich 488, 502; 668 NW2d 602 (2003).

Apart from the statutory violation, the evidence presented by the undisclosed source was vague and stale and did not provide a substantial basis for a showing of probable cause. The validity of the search warrant largely rests on a stem of marijuana found, along with a paper bearing defendant's business name, on the designated trash pickup day in a trash bag in front of defendant's house, just two days before the search warrant was issued and executed. In *People v Burmeister*, 313 Ill App 3d 152, 155-156; 728 NE2d 1264 (2000), an Illinois court found that for a search warrant to be based on contraband found in trash, the affidavit must contain an eyewitness account of the resident disposing of the garbage. However, in *State v Erickson*, 496 NW2d 555, 559 (ND, 1993), the North Dakota Supreme Court found that such evidence was properly considered when there were letters in the trash linking the contraband to the defendant.

We conclude that here, the totality of the circumstances provided a substantial basis for the magistrate's conclusion that there was a fair probability that contraband or evidence of a crime would be found on defendant's premises. *Russo, supra* at 606-607. The magistrate could reasonably conclude that it was defendant who discarded the marijuana stem in his trash and that there was a fair probability that a search would reveal contraband or evidence of a crime on defendant's premises.

Reversed.

/s/ Bill Schuette
/s/ Patrick M. Meter
/s/ Donald S. Owens