

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELISA RENICE GLENN,

Defendant-Appellant.

UNPUBLISHED

April 1, 2004

No. 237515

Jackson Circuit Court

LC No. 01-001708-FH

ON RECONSIDERATION

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right her conviction following a bench trial on charges of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and resisting or obstructing a police officer, MCL 750.479(b). We vacate and remand for a new trial.

Defendant first asserts that the trial court erred in admitting a laboratory report indicating a substance found in defendant's vagina was cocaine because the laboratory analyst did not testify at trial. Defendant contends the report constituted hearsay and that the trial court erred in admitting it under the business records exception to the hearsay rule, MRE 803(6). We agree.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, a trial court's construction of a rule of evidence is subject to de novo review. *People v Washington*, 251 Mich App 520, 524; 650 NW2d 708 (2002).

In *People v McDaniel*, 469 Mich 409, 414; 670 NW2d 659 (2003), the Michigan Supreme Court held that a police laboratory report is inadmissible hearsay under MRE 803(6) because its preparation in anticipation of litigation, the prosecution of a charged crime, causes "the source of the information or the method or circumstances of preparation [to] indicate lack of trustworthiness." *Id.*, quoting MRE 803(6). The Supreme Court also held that a police laboratory report is inadmissible hearsay under MRE 803(8), which permits the admission of routine police reports that are nonadversarial as to the defendant. Because the report in this case is intended to establish an element of a crime, it is adversarial to defendant and therefore inadmissible. *McDaniel*, *supra* at 413. As the Supreme Court concluded in *McDaniel*, we conclude here that the erroneous admission of the report "cannot be harmless because this was the only evidence that established an element of the crime for which defendant was charged." *Id.*

Next, defendant challenges the warrant authorizing police to conduct a body cavity search of defendant, asserting that the trial court erred in denying her motion to suppress all evidence obtained through the search. First, defendant contends that probable cause did not exist to justify the search. We disagree.

In reviewing a ruling on a motion to suppress seized evidence, we review the trial court's findings of fact for clear error but review the lower court's ultimate decision de novo. *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001). A search warrant must be supported by probable cause to justify the search. US Const, Amend IV; Const 1963, art 1, § 11; MCL 780.651; *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). “Probable cause sufficient to support issuing a search warrant exists when all the facts and circumstances would lead a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be searched.” *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001), quoting *People v Brannon*, 194 Mich App 121, 132; 486 NW2d 83 (1992).

On appeal, we must determine whether a reasonably cautious person could have concluded that, under the totality of the circumstances, probable cause existed to conclude the evidence sought might be found in a specific location. *People v Echavarria*, 233 Mich App 356, 367; 592 NW2d 737 (1999). Further, we read the search warrant and the underlying affidavit in a realistic and common sense manner, and we give deference to the magistrate's determination. *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000).

Defendant asserts that the police based their search solely on defendant's furtive gestures, namely defendant placing her hands inside her unfastened pants. Our Supreme Court has held that furtive gestures alone do not create probable cause to justify a search. *People v Howell*, 394 Mich 445, 447; 231 NW2d 650 (1975). However, the record indicates other factors raised the officer's suspicion, including defendant's refusal to comply with the officer's orders to step out of the squad car, defendant's throwing a used tampon on the ground, and the officer's knowledge regarding the concealment of controlled substances. Viewing the factors as a whole, we conclude the officer had probable cause to perform a body cavity search on defendant.

Next, defendant argues in propia persona that the search warrant was invalid because the description “any and all controlled substances” did not describe with particularity the items to be searched for and seized. We disagree.

A search warrant must describe with particularity the items to be seized. US Const Am IV; Const 1963, art 1, § 11; MCL 780.654. A general search warrant does not pass constitutional muster because it leaves the search's scope to the officer's discretion. *People v Toodle*, 155 Mich App 539, 548; 400 NW2d 670 (1986). However, “[t]he degree of specificity required depends on the circumstances and the types of items involved.” *People v Zuccarini*, 172 Mich App 11, 15; 431 NW2d 446 (1988).

The description “any and all controlled substances” described with sufficient particularity the items to be seized from defendant because the language provided a significant limit on what the executing officers could seize. For instance, the officers could not have seized weapons or cash. Thus, the warrant was not overly broad.

Next, defendant also argues in propia persona that the search warrant was invalid because the judge issued it via facsimile. Defendant asserts that faxed search warrants may be used only to obtain blood-alcohol tests in drunken driving cases, but she cites irrelevant authority. MCL 780.651(2) and (3) allow application for and issuance of search warrants through electronic or electromagnetic means, including facsimile, without limitation to the crime involved. Therefore, defendant's argument is without merit.

Defendant next contends in propia persona that the search warrant was invalid because it did not appear on a form approved by the State Court Administrator's Office, was not printed on the proper paper, and did not bear a court seal. Defendant points to no authority to support her claim that a warrant must appear on a SCAO-approved form. Moreover, the form of the warrant at issue closely mirrors the SCAO-approved form for search warrants, and defendant failed to explain how the warrant at issue is deficient or what prejudice resulted from any departures from the SCAO-approved form.

Defendant also contends in propia persona that the warrant violates MCL 780.651 by allegedly failing to comply with paper quality and other standards established by the state court administrator. Because defendant fails to identify with specificity the standards with which the warrant is alleged to be noncompliant, we consider this issue abandoned.

Additionally, defendant claims in propia persona that the trial court improperly relied upon a controlled substance offense as part of the basis of her conviction as an habitual offender. We disagree. The information does not list a controlled substance offense among defendant's prior convictions, and the trial court stated at sentencing that the two prior felony convictions specified on the information were a forgery and uttering and publishing conviction in 1999, and a retail fraud conviction in 1992. Therefore, defendant's argument is without merit.

Finally, defendant asserts in propia persona that she was denied due process because she was not informed that she had been charged as an habitual offender. The record, however, establishes that the information contains a third offense notice advising defendant that she was subject to enhanced penalties upon conviction pursuant to MCL 769.11. Accordingly, we find that defendant's claim lacks merit.

In light of our resolution of the foregoing issues, we find it unnecessary to address defendant's remaining in propia persona assertion that when the trial court rendered its decision in this case, it did so without being aware of all the applicable law.

Defendant's conviction is vacated, and we remand for new trial. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder