STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2004
v	No. 246270 Oakland Circuit Court
ADAN MENDOZA, Defendant-Appellant.	LC No. 2002-182537-FH

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals by right his convictions of felon in possession of a firearm, MCL 750.224f, possession of a controlled substance, MCL 333.7413(2), and two counts of felony-firearm, MCL 750.227b. We affirm.

I. FACTS

Detective Jerry Niedjelski testified that he received information from an anonymous informant that defendant was trafficking drugs from a house on 575 East Mansfield in Pontiac. A search of defendant's name on the central law enforcement system revealed that defendant had previously been arrested for drug offenses eleven and fourteen years before. Seeking to corroborate the tipster's information, Niedjelski conducted surveillance of defendant's residence for three days. Although Niedjelski saw defendant go in and out of the house at 575 East Mansfield, he testified that he did not see any other people or suspicious activity that would indicate drug trafficking. Niedjelski also testified, however, that he retrieved some bags of trash from the curb in front of the house and found one tenth of a gram of marijuana stems and seeds, along with papers bearing defendant's name. Based on this information, Niedjelski swore out an affidavit for a search warrant.

On July 10, 2001, detectives of the Oakland County Narcotics Enforcement Team executed the search warrant. The search resulted in the seizure of five unloaded rifles and a sawed-off shotgun wrapped in a blanket in the basement, a loaded .22 caliber pistol in a wooden box also in the basement, an unloaded .32 caliber pistol in a dresser drawer in a bedroom, and a total of 4.2 grams of marijuana, consisting of one marijuana cigarette, one partially-smoked marijuana cigarette ("roach"), and a quarter baggie of marijuana weighing approximately 3.3 grams. The detectives also found various items of mail addressed to defendant in the residence, including an electric bill.

Defendant moved to suppress the evidence seized, challenging the sufficiency of the affidavit and the magistrate's finding of probable cause. The motion was denied. Before trial, defendant stipulated to a previous felony drug conviction. Despite the stipulation, the prosecutor questioned defendant about this conviction on cross examination.

Defendant testified at trial that the guns had been removed from his family's cabin in northern Michigan to protect them from theft. Defendant stated that the guns were being stored in his basement at the request of his sister who did not want to keep them because she had small children. Defendant alleged that he knew the guns were in the basement but did not know anything more about them. Defendant admitted that he knew he was not permitted to possess firearms because of his previous felony convictions. He also admitted to possessing the marijuana for personal use. The jury convicted defendant of two counts of felony-firearm, one count of felon in possession of a firearm, and one count of unlawful possession of a controlled substance. The jury acquitted defendant of the charge of possessing a short-barreled shotgun.

Defendant now appeals, claiming unconstitutional search and seizure, prosecutorial misconduct, ineffective assistance of counsel, and cumulative error.

II. SUPPRESSION OF EVIDENCE

Defendant first claims the evidence seized in his house pursuant to a search warrant should have been suppressed because the affidavit supporting the warrant contained material misstatements and was insufficient to support a finding of probable cause. We disagree.

A. Standard of Review

A trial court's ultimate decision whether to suppress evidence is reviewed de novo, and the trial court's underlying findings of fact are reviewed for clear error. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). However, our Supreme Court has stated that "appellate scrutiny of a magistrate's decision involves neither de novo review nor application of an abuse of discretion standard." *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992), citing *Illinois v Gates*, 462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983). Rather the reviewing court need "ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Russo*, *supra* at 603.

B. Analysis

An unintentional misstatement in an affidavit does not require suppression of the evidence. As we stated in *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992), citing *Franks v Delaware*, 438 US 154; 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978):

> In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause.

Defendant provided no evidence – let alone a preponderance of evidence – to support his allegation that the affiant intentionally or recklessly misnamed his source a *confidential* informant instead of an *anonymous* informant. However, even presuming there was an intentional misstatement, suppression of the evidence is only required if the information was *necessary* to the finding of probable cause. *Stumpf*, *supra* at 224. The same standard applies to material omissions from the affidavit – omissions must be *intentional* and the information must be *necessary* to the probable cause determination. *Id*., citing *People v Kort*, 162 Mich App 680, 689; 413 NW2d 83 (1987).

Here, the information was not necessary to the finding of probable cause because the affidavit also included information about marijuana discovered in defendant's trash. "[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." *People v Russo*, 439 Mich 584, 606-607; 487 NW2d 698 (1992). The mere *odor* of marijuana, if detected by a qualified individual and testified to before a magistrate, may support a finding of probable cause. *Johnson v United States*, 333 US 10, 13; 68 S Ct 367; 92 L Ed 436 (1948), citing *Taylor v United States*, 286 US 1; 52 S Ct 466; 76 L Ed 951 (1932). Thus, the discovery of physical evidence of marijuana in defendant's trash was sufficient to support the magistrate's finding of probable cause.

Next, defendant claims the information from the anonymous source must be stricken from the affidavit because the affidavit violated MCL 780.653. However, our Supreme Court has held that a violation of MCL 780.653 does not require exclusion of the evidence obtained thereby. *People v Hawkins*, 468 Mich 488, 500; 668 NW2d 602 (2003). Moreover, even if the information from the anonymous source is disregarded, there was probable cause based on the marijuana evidence alone.

Next, defendant maintains that the prosecutor failed to establish a sufficient "nexus" between defendant and the trash taken from the curb in front of defendant's residence in which marijuana was found. This claim has no merit. The mere possibility of another explanation for the presence of contraband does not negate a finding of probable cause. *Russo*, *supra* at 613. Investigators are not required to eliminate all other possible sources of contraband before seeking a warrant. *Kort*, *supra* at 688.

Defendant further contends that case law upholds warrants based on trash pulls only when (1) there is more than one trash pull, (2) there is independent evidence of drug trafficking, and (3) there is evidence of drug trafficking in the garbage. This argument is refuted by our holding in *People v Pinnix*, 174 Mich App 445, 446; 436 NW2d 692 (1989), that a finding of probable cause may be based on the fruits of a warrantless search of household garbage set out for collection.

Next, defendant argues that the marijuana found in his trash was not contraband because the public health code, MCL 333.7106(3), excludes from the definition of "marijuana" the "mature stalks" or "sterilized seed of the plant." Even if this were true, defendant offered no evidence that the marijuana recovered from his garbage consisted of "mature stalks" and "sterilized seed." Therefore, this claim is without merit.

III. PRIOR CONVICTION

Next, defendant claims the prosecutor's improper inquiry into the specifics of defendant's prior drug conviction, in spite of defendant's stipulation to the prior offense, mandates reversal under *Old Chief v United States*, 519 US 172, 117 S Ct 644, 136 L Ed 2d 574 (1997). We disagree. *Old Chief* does not mandate reversal in all cases where the prosecutor seeks to introduce evidence about a stipulated matter. Rather, a prosecutor's improper inquiry is subject to harmless error analysis – defendant must show prejudice. *People v Swint*, 225 Mich App 353, 379; 572 NW2d 666 (1997). Here, the prior conviction was not prejudicial because there was substantial evidence that defendant unlawfully possessed a firearm. Police found numerous rifles and a handgun in the basement. A .32 caliber pistol was also found in a dresser drawer in a bedroom where clothes and several items belonging to defendant were also found. Defendant also admitted that he possessed and used marijuana and implied that he had sold marijuana or other drugs at some time in the past. This evidence alone was enough for a reasonable jury to convict defendant on the marijuana possession charge. Therefore, any prosecutorial misconduct was harmless and did not deny defendant a fair trial.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant claims ineffective assistance of counsel. However, a *Ginther*[1] hearing is required to preserve a claim of ineffective assistance of counsel. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Defendant did not move for a *Ginther* hearing. Therefore, this claim is not preserved. Regardless, counsel's failure to object to information regarding defendant's prior conviction – even if not trial strategy – was harmless in light of the other evidence against defendant, including his own admission that he used marijuana.

V. CUMULATIVE ERROR

Next, defendant argues that cumulative error denied him a fair trial. This claim has no merit. To establish a case of cumulative error, defendant must show "'cumulative unfair prejudice,'" and only actual errors may be aggregated to make this showing. *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002).

As discussed, the trial court did not err in failing to suppress the evidence obtained from defendant's house. Nor did the trial court err in failing to grant a mistrial. The prosecutor's improper questions about defendant's prior conviction was the sole potential error at trial, and this error was harmless. Consequently, we find no cumulative error.

VI. SENTENCING

Finally, defendant claims his sentence was statutorily invalid. The judgment of sentence was amended to correct the alleged error. Therefore, this issue is moot, and no further action by this Court is necessary.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper