STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED September 7, 2004
v	No. 251759 Iron Circuit Court
WALTER WILLIAM DOERR, Defendant-Appellee.	LC No. 02-008290-FH

Before: Donofrio, P.J. and White and Talbot, JJ.

PER CURIAM.

Defendant was charged with nine counts of perjury, MCL 750.422. This case is before us on remand from our Supreme Court for consideration as on leave granted. *People v Doerr*, 469 Mich 936 (2003). The prosecution challenges a pretrial order suppressing evidence on search and seizure grounds.[1] Because the information contained in the affidavit in support of the search warrant was neither stale nor unsupportive of the magistrate's determination of probable cause, suppression of evidence seized was inappropriate on that basis. While the evidence seized in plain view was not that identified in the search warrant, it was incriminating, relevant, and supportive of the criminal allegations for which the warrant was sought. The trial court erred in suppression of the evidence, we vacate the order suppressing the evidence, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The prosecution argues that the trial court erred by suppressing the evidence at issue because the underlying search warrant was valid and the items at issue were properly seized under the plain view doctrine. With regard to the validity of the search warrant, appellate review of a magistrate's decision to issue a search warrant is neither de novo nor for an abuse of discretion. *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992). Rather, we determine if there was a substantial basis for the magistrate's finding of probable cause, i.e., whether there was a

[1] We recognize that Chief Justice Corrigan's concurring statement to our Supreme Court's remand order urges this Court to consider certain additional matters. See *Doerr*, *supra* at 936-937 (Corrigan, C.J.). However, given that these matters are not addressed by the parties and our determination renders the issues suggested for consideration moot, we need not address those additional matters.

substantial basis for the conclusion that there was a fair probability that contraband or evidence of a crime would be found. *Id.* at 603-604. See also *People v Whitfield,* 461 Mich 441, 445-446; 607 NW2d 61 (2000). As to whether certain items of evidence were properly seized under the plain view doctrine, we review a trial court's findings of fact at a suppression hearing for clear error. However, whether there has been a violation of the Fourth Amendment and application of the exclusionary rule based on such a violation are matters of law that are reviewed de novo. *People v Fletcher,* 260 Mich App 531, 546; 679 NW2d 127 (2004).

We have been directed to consider whether in light of *Russo, supra,* "the search warrant in this case was stale."[2] We agree with the prosecution that, in light of *Russo,* the trial court erred by concluding that the search warrant was invalid. The facts of *Russo* are strikingly similar to the present case. In *Russo,* the complainant informed the police when she was age sixteen that she had been sexually assaulted by the defendant every other weekend when she was from five to ten years old. *Id.* at 589. The affidavit in support of the search warrant at issue in *Russo* also stated that the complainant reported that the defendant photographed her nude or in "various stages of undress" and videotaped her alone or involved in sexual activity with him. *Id.* at 598. She also reported having been shown the photographs and videotapes numerous times by the defendant during visits to his home and that she was familiar with locations in the home where he stored the material. *Id.*

The pertinent issue in *Russo* was whether a reasonable magistrate could have found a substantial basis to infer that the incriminating evidence, i.e., the photographs and videotapes described by the complainant, was still in the defendant's home six and one-half years after it was last seen. *Russo, supra* at 604-605. The Court concluded that the magistrate had such a substantial basis for issuing the search warrant. *Id.* at 611. A critical theme in *Russo* was the existence of a reasonable basis for concluding that a pedophile who made pornographic videotapes and photographs of a child victim would be likely to retain possession of the material for an extended length of time. The Court discussed a 1984 study by a subcommittee of the United States Senate that determined "the collection and retention of such items [child pornography items] is a recurring pattern for some persons whose sexual gratification is obtained through and with children" and that documented "the basis for the common-sense inference that the life cycle of child pornography may be extensive." *Id.* at 599-601. It also noted "the type of material and the use to which it was put, made it highly unlikely that it would be kept anywhere but in the home." *Id.* at 612. Effectively bringing these two points together, the Court held that the magistrate could conclude that there was a fair probability "of the presence of evidence which had sexual, historical, and perhaps even sentimental, significance for its possessor and creator." *Id.* at 613. Notably, the Court indicated that "staleness" is not a separate doctrine in

[2] Although read literally, our Supreme Court directed this Court to consider whether the search warrant was stale, *Doerr, supra,* it is apparent and not actually disputed that the *search warrant* was not stale inasmuch as the search at issue occurred on the same day that the warrant was issued. Rather, it is apparent that the real question in this regard is whether the information in the affidavit in support of the search warrant was "stale" in the sense that the conduct it described occurred so far in the past that it did not support the magistrate's finding of probable cause.

analyzing probable cause for a search, but rather that time is to be considered with other factors in making a probable cause determination. *Id.* at 605.

In light of *Russo,* there was a substantial basis for the magistrate to conclude that there was a fair probability that a search of defendant's home would find child pornography. The affidavit in support of the search warrant reflects that defendant's sexual abuse of the complainant ended about seven and one-half years prior to the date of the affidavit. While the affidavit does not state exactly when the complainant last saw the videotape or nude photographs, the time frame is comparable to that in *Russo* in which six and one-half years passed between the complainant last seeing similar videotapes and photographs. It is true that there is no indication that defendant's daughter knew the location of the videotape and photographs. However, following *Russo,* it was reasonable to view it as unlikely that defendant would keep the materials anywhere other than his home. In addition, the affidavit relates that defendant's daughter believed defendant intended to keep the nude photographs he took of her because he wanted to show them to others. Accordingly, the trial court erred in concluding that the search warrant was invalid because the affidavit in support of the search warrant provided a substantial basis for the magistrate to find that there was a fair probability that child pornography would be found in a search of defendant's home.

Further, even if the magistrate had erred in issuing the search warrant at issue, we would conclude that this should not result in suppression of evidence based on the illegality of the search because the police acted reasonably in relying on the search warrant. Subsequent to the filing of the parties' briefs, our Supreme Court recently adopted the "good-faith exception to the exclusionary rule in Michigan" of *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984). *People v Goldston,* ___ Mich ___; ___ NW2d ___ (Docket No. 122364, decided July 15, 2004), pp 2, 22. Under this exception, the exclusionary rule generally does not bar the admission of evidence seized in reasonable, good-faith reliance on a defective search warrant. *Id.,* p 1. For this exception to apply, an officer's reliance on a search warrant must be objectively reasonable. *Id.,* p 8. Given the allegations recounted in the affidavit underlying the search warrant, we believe it is manifest that it was objectively reasonable for the police to rely on the magistrate's finding of probable cause in issuing the warrant. Accordingly, even if the magistrate had erred in issuing the search warrant, this still would not warrant application of the exclusionary rule based on the search itself.[3]

[3] The good-faith exception does not apply if the affiant includes information in the affidavit underlying the search warrant that (1) the affiant knows is false or would know to be false except for showing a reckless disregard for the truth and that misleads the magistrate or (2) if the magistrate "wholly abandons his judicial role." *Goldston, supra,* pp 8-9. There is no indication from the trial court's findings or our review of the record that the affiant included any information in the relevant affidavit that he knew was false or with reckless disregard of its accuracy. While defendant asserts that the affiant did not include certain additional facts in the affidavit, this does not mean that the information provided was false or provided with reckless disregard of the truth. Also, there is no indication that the magistrate who issued the search warrant abandoned the magistrate's judicial role.

We further agree with the prosecution's contention that the items actually seized during the search, a videotape of defendant and his wife having sex and the nude photographs of an unknown woman were legally seized under the plain view doctrine. This doctrine allows police officers to seize items without authorization by a search warrant if the officers are lawfully in a position to observe the items and their incriminating character is immediately apparent. *Fletcher, supra* at 546. The incriminating character of an item is "immediately apparent" if there is probable cause for the police officer to regard the item as incriminating. *People v Champion*, 452 Mich 92, 108-109; 549 NW2d 849 (1996). The prosecution's argument that the incriminating nature of the items was immediately apparent is based on their alleged tendency to corroborate the allegations of defendant's daughter that he sexually assaulted her because otherwise she would be unaware of his proclivity to use videotaping and photography in a sexual manner. We agree that a police officer viewing the evidence during the search would have probable cause to regard the items as incriminating. We note, however, that in the context of this case, the evidence, if offered, is in the nature of other acts evidence and subject to MRE 404b and MRE 403 analysis. Any such evidentiary issues are not before us and we offer no opinion in that regard.

Accordingly, the order suppressing evidence is vacated and the matter remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Helene N. White
/s/ Michael J. Talbot