STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WESLEY CLARK,

Defendant-Appellant.

UNPUBLISHED
September 28, 2004

No. 249118
Wayne Circuit Court
LC No. 02-012563-01

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was fined for his convictions of possession of cocaine and possession of marijuana. He was sentenced to three to twenty years' imprisonment for his conviction of possession with intent to deliver cocaine and a consecutive term of two years' imprisonment for his felony firearm conviction. We affirm.

I

This case stems from police surveillance of defendant's home for illegal drug activity, which culminated in a traffic stop of defendant, a search of his car, and a subsequent search of his home. Defendant's home at 19308 Hartwell in Detroit was placed under surveillance after police obtained information that he and his son were involved in a large-scale cocaine operation. On September 11, 2002, surveillance officers observed defendant's son carry a large plastic bag from the home and place it into the trunk of a 1997 Oldsmobile Cutlass driven by defendant. The son then walked across the street into a home at 19329 Hartwell and, shortly after, returned with another large plastic bag, which he also placed in the trunk of the Cutlass. When defendant drove away, a surveillance officer, Officer Michael Williams, followed him, and a police unit subsequently stopped the car. When Williams approached the car, he observed a plastic baggie protruding from the console in plain view. The baggie was removed from the console and suspected to contain cocaine. Defendant was arrested. The two plastic bags in the trunk of the car each contained more than $26,000 in cash. A canine unit sweep of the vehicle was positive for drugs. Police obtained a search warrant for defendant's home, where they found additional cocaine, marijuana, cash, and firearms.

II

Defendant first argues that the lower court erred in denying his motion to suppress evidence seized from the car on the ground that the police lacked probable cause to stop and search the car. We disagree.

We review a lower court's factual findings in a suppression hearing for clear error. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). The findings will be affirmed unless we are left with a definite and firm conviction that a mistake was made. *Id*. We review de novo the lower court's ultimate ruling with regard to the motion to suppress. *Id*.

Following an evidentiary hearing, the court found that Williams followed defendant's car after defendant left his home, and saw defendant make two turns without using a signal. Defendant does not argue that these findings are clearly erroneous.[1] The court concluded that once Williams saw defendant commit a traffic violation, he had a legal basis to stop defendant's vehicle. We find no error in the court's conclusion.

If an officer has probable cause to believe a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment. *Id.* at 363. "[A]s long as the police are doing no more than they are legally permitted and objectively authorized to do, a stop or an arrest is constitutional." *People v Haney*, 192 Mich App 207, 210; 480 NW2d 322 (1991). Williams had probable cause to believe that defendant had committed an offense because he saw him turn without using a signal. *Id*.

As the court noted, the fact that Williams stopped defendant's car to investigate defendant for narcotics does not make the stop illegal because Williams could also have stopped defendant's car on the basis of the traffic violations. See *id., supra* at 209 (officer testified that the defendant was stopped both because he had instructions to stop all vehicles and people leaving a particular house and because the defendant failed to signal a left turn).

Further, as the lower court concluded, Williams' observation of the plastic baggie in plain view provided sufficient basis for him to investigate its contents. *People v Champion*, 452 Mich 92, 101-102; 549 NW2d 849 (1996). The suspected contents of the baggie, cocaine, was a sufficient basis for defendant's arrest and the subsequent searches. *Haney, supra*. The court did not err in denying defendant's motion to suppress evidence on the basis that the traffic stop and defendant's arrest were illegal.

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[1] In any event, the findings are supported by the record. The court noted that although defendant argued that Williams' testimony that defendant failed to use his turn signal and that there was a baggie protruding from the console should not be believed, there was no evidence contradicting Williams' testimony. Further, defendant did not testify that the assertions were not true, and the court had no reason to doubt them.

III

Defendant argues that he was denied his Fourth Amendment rights prohibiting unreasonable search and seizure because the affidavit supporting the search warrant failed to establish probable cause. We disagree. Although defendant is correct that the affidavit is technically deficient in some respects, the affidavit contained sufficient facts to support the magistrate's finding of probable cause.

Search warrants and the underlying affidavits must be read in a common-sense and realistic manner. *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). On appeal, this Court must afford deference to the magistrate's decision, and determine whether a reasonably cautious person could conclude that there was a substantial basis for the finding of probable cause. *Id*. at 615; *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000). The question is whether, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Whitfield, supra* at 446, 448; *Russo, supra* at 604-605, 608.

The trial court aptly summarized the critical averments in the affidavit:

> [O]ne[:] in the early months of 2002 a reliable and credible registered S.O.I. provided information concerning the defendant's involvement in narcotics trafficking, his nickname, a description of one of his vehicles, and two locations he operated from.
>
> Two: In April 2002 a D.E.A. [Drug Enforcement Administration] agent provided information concerning defendant's address, the defendant, and the defendant's son.
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> Three: On September 11, 2002, two officers conducted surveillance at the addresses provided by the S.O.I. and the D.E.A. agent. They saw the car described by the S.O.I., the people described by the S.O.I., and the activity involving the use of shopping bags as described by the S.O.I.
>
> Four: The defendant's vehicle was legally stopped and had about Fifty-five Thousand Dollars in case in two shopping bags.
>
> Five: The police had a narcotics dog check each of the vehicles, the defendant's vehicle and his son's red Jeep vehicle, and the dog reacted to the smell of cocaine.
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> Six: A week before the surveillance and issuance of the search warrant, an S.O.I. advised the police that the defendant had a large amount of cocaine at that same address.
>
> Seven: Forty-eight hours before the search warrant was issued, the S.O.I. saw a large quantity of cocaine at the same location.

Defendant does not allege that the averments are false or misleading. Rather, he contends that the information provided by the first S.O.I. and the D.E.A. agent is stale; the information provided by the second S.O.I. does not support a conclusion that the drugs would be found at 19308 Hartwell because there was no evidence of ongoing criminal activity and because drugs are portable and after forty-eight hours, it is unlikely they would still be in the house. Further, neither the officers nor the informants alleged that they saw cocaine or weapons at 19308 Hartwell; there are no facts demonstrating that the informants were credible, their information was reliable or that they spoke with personal knowledge. Finally, there is no information that the police corroborated the information from the informants by independent investigation.

Defendant is correct that the affidavit does not provide specific facts establishing the second S.O.I.'s credibility or the reliability of the information, although with regard to the first S.O.I, the affidavit states the S.O.I. "has provided information on over three occasions resulting in over 50 grams of cocaine being confiscated and at least three felony arrest (sic) for narcotic charges." Defendant also correctly points out that the information from the first informant and the D.E.A. agent preceded the date of the affidavit by several months. Nonetheless, we cannot conclude that these omissions are fatal to a finding of probable cause, given the totality of the circumstances.

The affidavit contained information from two S.O.I.'s, several months apart, but which was consistent with other information obtained from the D.E.A. agent and through police surveillance. Police officers are presumptively reliable and self-authenticating details also establish reliability. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001); *People v Powell*, 201 Mich App 516, 522-524; 506 NW2d 894 (1993). Further, independent police investigation that verifies information provided by an informant can support issuance of a search warrant. *Ulman*, *supra* at 509-510. The affidavit contained information from several sources concerning defendant's involvement in drug activity, over a period of time, which was consistent with the facts recounted concerning the police surveillance on September 11, 2002, defendant's arrest, and the seizure of the cocaine and more than $52,000 in cash from the car he was driving. Considering these facts in a common-sense and realistic manner, we conclude that the magistrate had a substantial basis for finding probable cause to issue the search warrant because there was a fair probability that contraband or evidence of a crime would be found at 19308 Hartwell. *Whitfield*, *supra* at 448.

IV

Defendant argues that there was insufficient evidence of possession of drugs to support his convictions. We disagree.

In reviewing a claim of insufficient evidence in a criminal case, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). The standard of review is deferential, which requires that a reviewing court "'draw all reasonable inferences and make credibility choices in support of the jury verdict.'" *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003), quoting *Nowack*, *supra* at 400. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of a crime. *Id*.

Defendant argues that the prosecutor submitted no evidence that defendant had any knowledge of drugs being in the vehicle. He notes that he did not personally place the shopping bags in the vehicle. Further, there was no evidence that he had exclusive control over the house, other than his ownership, and no evidence that he had exclusive control over the garage where the drugs were found.

"[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence. *Id*. at 526. Here, several factors linked defendant to the drug and permitted an inference of defendant's intent to deliver. *Id*. at 522, 524. The prosecutor presented evidence that defendant was present, standing near the trunk, when the bags were placed into the vehicle he was driving. Defendant's vehicle was followed by police and stopped a short time later. The police recovered cocaine from the console of the vehicle and more than $52,000 in cash from the bags in the trunk. That same day, police searched defendant's home and recovered a large amount of cocaine at defendant's home, in an amount inconsistent with personal use. They discovered guns, marijuana, cocaine, drug paraphernalia, and nearly $4,000 cash in defendant's bedroom, which he did not share with his wife. The police also recovered wrapping material that is used in distributing cocaine, to wrap kilos. The evidence was sufficient to establish constructive possession of the cocaine and that defendant possessed the cocaine with intent to deliver it.

Defendant also claims that there was insufficient evidence to establish that he had possession of the weapons. However, defendant has failed to argue the merits of this claim. This claim is therefore abandoned. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

V

Defendant argues that he was denied his due process right to a fair trial by the prosecutor's closing argument that referenced the war on drugs in Detroit, which inflamed the passions of the jury. Because defendant failed to object to the prosecutor's argument, we review this claim for plain error that affected defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is warranted only when the plain error results in a conviction of an innocent defendant or seriously affects the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* at 454. No error requiring reversal exists where a curative instruction could have alleviated any prejudice. *Id.* at 455-456. We find no error requiring reversal.

The prosecutor's remarks were made during rebuttal argument, in response to defense counsel's argument that this was "a perfect situation of police officers making mistakes and police officers overtly coming before you sworn to tell the truth and lying about the evidence and about this case . . .," that "[t]hese police officers lied," "[a]nd they tried to fool you." Defense counsel emphasized that the police moved evidence from a known drug house, 19329 Hartwell, to defendant's house, and argued that the police officers were not believable and had pushed defendant into this situation. In response, the prosecutor noted that the police admitted mistakes in this case and that certain evidence such as the bag for the money was lost, and then stated:

> Ladies and gentlemen, if it's a setup they're going to get you a bag to bring here and he'd have something on evidence that this is all a big setup. It is ridiculous to believe because they made some mistakes it's a setup. And ladies and gentlemen, it is so disheartening to hear trial after trial, guys like this disrespect these police officers like they do. Every narcotics trial you're going to hear that cops are liars because they have no choice. And you know what? These officers told you every time they raid a house they are fearful. And they're fearful because of what they might find in that house. And they do it every single day.
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> *That is their job. That is what they do. Their job is to fight the war on drugs in the city of Detroit. These people have families and they sacrifice themselves every day. And he wants you to believe that not one but every one of these officers got together, risked their careers to set this guy up.*

Defendant argues that the emphasized remarks were nothing more than an attempt to frighten and arouse the jury by associating defendant with broader social problems that were irrelevant to his guilt or innocence. We disagree.

Generally, prosecutors are afforded great latitude regarding their arguments and conduct. Still, prosecutors should not resort to civic duty arguments which appeal to the fears and prejudices of jurors. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). Comments must be judged in context of both the prosecution and defense's theories. *Id.* at 283, 286-287.

Viewing the prosecutor's remarks in context, we find no error. The remarks merely responded to defense counsel's theory that the charges against defendant were a setup. *Thomas, supra* at 454-455. Further, any prejudice could have been alleviated by a curative instruction had defendant timely objected to the comments. *Id.* at 455-456.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey