STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 2004
v	No. 249980 Muskegon Circuit Court
DWAYNE HILL, Defendant-Appellant.	LC No. 02-047306-FH

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals by right his convictions after jury trial of possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm while committing or attempting to commit a felony, MCL 750.227b. Defendant asserts the trial court erred by failing: (1) to suppress evidence seized with a search warrant (2) to suppress his statement and (3) to order disclosure of a confidential informant. We affirm.

Defendant first argues that the facts set forth in the affidavit[1] in support of the search warrant are insufficient to sustain a finding of probable cause. On appeal from a finding a probable cause, the reviewing court must examine the affidavit and determine whether the information it contains could have caused a reasonably cautious person to conclude that, under the totality of the circumstances, there was a substantial basis to find probable cause that the evidence sought might be found in a specific location. *People v Whitfield*¸ 461 Mich 441, 446; 607 NW2d 61 (2000), citing *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992), in turn citing *Illinois v Gates*, 462 US 213, 236-238; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

Defendant's argument has no merit. A reasonably cautious person, under the totality of the circumstances, would have cause to conclude that there was a substantial basis for a finding of probable cause to conclude that drugs would be found at 456 Abbey where the facts set forth in the affidavit included that the confidential informant (CI) knows defendant, that the CI heard defendant talk about selling marijuana, the CI had seen defendant at 456 Abbey in the past, that the CI knows from past experience what marijuana looks like, that the CI had been inside the residence at 456 Abbey within 48 hours of the request for the warrant and observed a quantity of marijuana inside 456 Abbey and that defendant was twice convicted for delivering drugs. *Whitfield*, supra at 445-446; *People v Echavarria*, 233 Mich App 356, 366-367; 592 NW2d 737

(1999). The representations that the CI knew defendant, had seen defendant at 456 Abbey in the past, had heard defendant talk about selling marijuana, knew what marijuana looked like and had seen it at 456 Abbey establish that the information supplied by the CI was within his personal knowledge. *Id*.; MCL 780.653(b).[2] Moreover, the representations that the CI had twice supplied reliable information to two detectives regarding two separate non-drug related police investigations and that information on the C.L.U.E.S. system indicated that defendant was involved in a domestic relations complaint with a woman who gave her address as 456 Abbey established the credibility of the CI and the reliability of the CI's information. *Id*.; *Echavarria, supra* at 366.

To the extent that defendant argues that the information in the affidavit was stale because the CI saw the marijuana "within the last 48 hours," we note that staleness is not a separate consideration in the probable cause to search analysis. *People v Sobczak-Obetts*, 253 Mich App 97, 108; 654 NW2d 337 (2002). Instead, time is but one factor in the probable cause determination to be weighed and balanced in light of the totality of circumstances, such as whether the crime is a single instance or an ongoing pattern of violations, whether the inherent nature of the crime suggests that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense. *Id*., citing *Russo, supra* at 605-606. Here, the representation that defendant talked about selling marijuana indicated an ongoing criminal enterprise, increasing the chance that marijuana may be present at any given time at 456 Abbey. Thus, considering the totality of circumstances, the 48-hour delay did not undermine the magistrate's probable cause determination.

Next, defendant challenges the trial court's decision not to suppress defendant's statement to the police. We set forth the trial court's findings of fact and conclusions of law on this issue below:

> Defendant also moves the Court to suppress statements made by defendant to the police after his arrest and for a *Walker*[3] hearing. A *Walker* hearing has been conducted. Based upon the record established at the *Walker* hearing, the Court makes the following findings of fact: At the time of the execution of the search warrant, defendant was placed under arrest. The police gave defendant his *Miranda* rights, and defendant declined to make any statement. Defendant then looked at Detective Davis and shook his head. Detective Davis then said to defendant, "Things do not have to be this way." Defendant responded, "What do you mean?" Detective Davis replied, "You have an opportunity to help yourself." Defendant asked, "How, in what way?" Detective Davis then told defendant that based upon a person's cooperation, they can help themselves later on. Defendant then asked, "O.K., what is it that I am going to have to do?" Detective Davis then responded that Detective Davis's superior, Detective Sergeant Barthelemy,[4] would have to come into the room.
>
> When Det. Sgt. Barthelemy returned to the room, defendant told him that he wanted to talk to him. Defendant then stated that the marijuana and crack cocaine were his and that he sold them. No promises or threats were made to the defendant by any police officer or the prosecutor at the scene.

> Based upon this record, the Court **denies** defendant's motion to suppress the statement he made to the police. The Court finds that defendant's right to cut off questioning was "scrupulously honored" by the police as required by *Michigan v Mosley*, 423 US 96; [96 S Ct 321]; 46 L Ed 213 (1975)[,] as cited in *People v Kowalski*, 230 Mich App 464[; 584 NW2d 613] (1998). Defendant initiated contact with Det. Davis by the non-verbal communication of looking up at him and shaking his head, an act which would be likely to invite a response from Det. Davis. The statements by Det. Davis to defendant did not constitute "interrogation" as that term has been defined in *Rhode Island v Innis*, 446 US 291, 300-302[;] 64 L Ed 2d 297 (1980), as cited in *People v Fisher*, 166 Mich App 699, 707-708[; 420 NW2d 858] (1988). Rather, the statements of Det. Davis were in response to defendant's gestures and/or comments and in themselves were not designed to elicit inculpatory responses from defendant in response to Det. Davis's statements. Det. Davis was merely ascertaining whether defendant desired to make further statements to Det. Barthelemy, who at that time was not in the room with Det. Davis and defendant, and who was responsible for interrogating defendants at the time of arrest. Indeed, defendant never made any incriminating statements in response to the questions and comments of Det. Davis. The only incriminating statements made by defendant were those he volunteered to Det. Barthelemy after Barthelemy reentered the room. [Trial court opinion and order, November 18, 2002, pp 2-4 (citations modified).]

When considering a motion to suppress a statement, the trial court must determine from the totality of the circumstances whether defendant's statement was voluntary and whether defendant made a voluntary, knowing, and intelligent waiver of his constitutional rights to silence and to counsel. *People v Cheatham*, 453 Mich 1, 27 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996); *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). This Court must review the entire record de novo, but factual determinations of the trial court will not be set aside unless clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000); *Cheatham*, *supra* at 30. A factual finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made, giving due deference to the trial court's superior ability to determine credibility. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *Cheatham*, *supra* at 30.

The testimony at the *Walker* hearing established that defendant initially declined to make a statement after being advised of his Fifth Amendment rights as required by *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). It also established that the detectives discontinued their interrogation at that time, which they were required to do. *Id*. at 473-474; *Michigan v Mosley*, 423 US 96, 104-105; 96 S Ct 321; 46 L Ed 2d 313 (1975). But defendant did not request counsel; therefore, defendant's invocation of silence did not by itself bar further interrogation by the police.[5] *Id*. at 102-103. The *Mosley* Court explained,

> To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned. At the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances,

> would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. [*Id*. at 102.]

The *Mosley* Court further explained that the right to cut off questioning, as specified in *Miranda*, *supra* at 474, 479, is a critical safeguard, which "counteracts the coercive pressures of the custodial setting." *Mosley, supra* at 103-104. Thus, whether a statement by a person in police custody may be admitted after invocation of the right to remain silent depends on whether the person's "right to cut of questioning" was "scrupulously honored." *Id*. at 104; *People v Slocum (On Remand)*, 219 Mich App 695, 704; 558 NW2d 4 (1996). Although both the length of time between invocation of the right to remain silent and renewed questioning and whether new *Miranda* warnings are administered are highly relevant factors, the application of the "scrupulously honored" standard is not susceptible to "black-and-white line drawing." *Slocum, supra* at 701. Ultimately, the inquiry must focus on whether the "police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Mosley, supra* at 105-106.

We conclude the trial court did not clearly err by finding that the police "scrupulously honored" defendant's right to cut of questioning. The undisputed testimony at the *Walker* hearing established that immediately after defendant declined to waive his *Miranda* rights and make a statement, Barthelemy, the officer assigned to interrogate defendant left the room. Within minutes of Barthelemy's exit, however, defendant looked at Davis and shook his head. The import of the testimony regarding defendant's gesture is uniquely within the superior fact-finding ability of the trial court. In that regard, we find no clear error in the trial court's determination that, in essence, defendant's gesture was an ambiguous non-verbal communication that defendant might desire to waive his *Miranda* rights and make a statement. Thus, Detective Davis' remarks in response to defendant's non-verbal communication do not constitute impermissible police-initiated renewed interrogation. Rather, Davis' statements that "it doesn't have to be like this" and "you have an opportunity to help yourself," are the functional equivalent of asking defendant whether he had changed his mind about remaining silent. Such an inquiry does not constitute police-initiated interrogation. *People v Kowalski*, 230 Mich App 464, 479-482; 584 NW2d 613 (1998). Further, Davis' statements did not contain a measure of compulsion above and beyond that inherent in defendant's custody. *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995) (1995). Nor did Davis' statements constitute express questioning or call for or elicit an incriminating response. *Kowalski, supra* at 482-483. Accordingly, the trial court did not clearly err by finding that the police did not subject defendant to further police interrogation before he changed his mind about remaining silent.

Of greater concern is whether Davis' statements constituted impermissible efforts to wear down defendant's resistance and make him change his mind. *Mosley, supra* at 105-106. Certainly, Davis' statements can be characterized as an attempt to get defendant to change his mind about invoking his right to remain silent. But the evidence adduced at the *Walker* hearing supports the trial court's determination that the statements were made in response to defendant's actions, which suggested to Davis that defendant might be rethinking his decision. Additionally, the few statements made over a period of a couple of minutes cannot be characterized as

repeated coercive efforts to wear defendant down and make him change his mind. Under these circumstances we find no apparent violation of *Miranda* as interpreted by *Mosley*.

Defendant's claim that Barthelemy should have advised defendant of his *Miranda* rights a second time before interrogating him lacks merit. The failure of the police to repeat the *Miranda* warnings before a second statement does not preclude a finding based on the totality of circumstances that defendant voluntarily, knowingly and intelligently waived his Fifth Amendment rights to silence and counsel. *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992); *People v Godboldo*, 158 Mich App 603; 405 NW2d 114 (1986). Given that only a matter of minutes passed between the time Barthelemy initially advised defendant of his *Miranda* rights, which the undisputed testimony established defendant understood, and defendant's changing his mind and agreeing to make a statement, it was unnecessary for Barthelemy to recite the rights a second time. See e.g., *United States v Gordon*, 895 F 2d 932, 938 (CA 4, 1990). Accordingly, we find no clear error in the trial court's implicit finding that defendant made a voluntary, knowing, and intelligent waiver of his *Miranda* rights. *Daoud, supra* at 629.

Defendant also argues that his statement was involuntary. This argument lacks merit. Defendant was advised of his *Miranda* rights only minutes before he made his statement. The undisputed testimony at the *Walker* hearing indicated that the two detectives in the room did not make any promises or threats at any time. Nothing about Davis's statements to defendant during Barthelemy's brief absence were coercive above and beyond that inherent in defendant's being in custody. Further, when the prosecutor entered the room during the interrogation, he also made no promises. Under the totality of these circumstances, defendant's statement was his free and unconstrained choice, not the result of having his capacity for self-determination critically impaired and, thus, was voluntary. *Sexton, supra* at 752-753; *Cipriano, supra* 334.

Finally, defendant challenges the validity of the trial court's ruling that defendant was not entitled to either the identity of the CI or an *in camera* hearing at which the court would ascertain whether the CI had information that would benefit the defense. The challenge lacks merit.

Generally, the identity of a CI is privileged information. *People v Underwood*, 447 Mich 695, 703-704; 526 NW2d 903 (1994). But if the disclosure of the CI's identity or of the contents of his communication is relevant and helpful to the defense of an accused or is essential to a fair determination of the cause, the privilege must give way. *People v Stander*, 73 Mich App 617, 621-622; 251 NW2d 258 (1976). Upon a showing by the accused of possible need for an informant's testimony, the trial court should require the production of the CI and conduct an *in camera* hearing out of the presence of the accused. *Id*. At this hearing, the trial court may examine the CI to determine whether he could offer any testimony helpful to the defense; a sealed record of the hearing would be available for appellate review. *Id*. at 622-623.

Here, the trial court correctly determined that defendant failed to demonstrate a need for the CI's testimony. The fact that other individuals might have been at 456 Abbey when the CI saw the marijuana or that defendant may not have been present at that time, was not material to defendant's defense. The circumstances in the home 48 hours before the search and defendant's arrest was simply not relevant to whether defendant possessed the drugs and gun when he was

arrested. Because defendant failed to demonstrate a need for the CI's testimony, the trial court correctly denied the request for an *in camera* hearing. *Id*. at 621-622.

We affirm.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey

[1] The affidavit in support of the search warrant provides:

"DETECTIVE STEVE WALTZ, AFFIANT, BEING FIRST DULY SWORN, ON OATH DEPOSES AND SAYS:

1. Affiant is an officer with 7½ years experience, employed by the Muskegon Police Department and assigned to the West Michigan Enforcement Team (WEMET). Affiant has investigated illegal drug trafficking including cocaine for 2 years. As a result, Affiant knows marijuana to be a green plant like substance.

2. Affiant has had contact with a confidential informant (CI). Affiant has used CI to make 1 controlled buy of cocaine. This buy included the strip search of CI by officers before the buy and close observation of CI during the buy. This buy resulted in the purchase of cocaine. Affiant has spoken with Detective Trejo of the Muskegon Police Department. Detective Trejo told affiant that CI has provided information to Trejo on one occasion in the past on a non-narcotic investigation that was subsequently proven reliable. Affiant has spoken with Detective Bleich and Bleich told affiant that CI has provided information to Bleich on one occasion in the past on a non-narcotic investigation that was subsequently proven reliable.

3. Affiant has spoken with CI in the last 30 days and CI told affiant the following: CI has seen marijuana in the past and CI knows what marijuana looks like; CI knows an individual by the name of Dwayne Hill; CI has heard Hill talk about selling marijuana; CI has seen Hill at 456 Abbey in the past; CI described Dwayne Hill as a male black, approximately 5' 8" in height, weighing approximately 180 lbs. On April 7, 2002 Affiant spoke with CI and CI told affiant the following: within the last 48 hours CI was inside 456 Abbey; inside 456 Abbey CI observed a quantity of marijuana.

4. Affiant looked up the name of Dwayne Hill on the Muskegon Police Department C.L.U.E.S. system. Affiant knows from training and experience that the C.L.U.E.S. computer system keeps a computer record of all police contacts with individuals. Affiant observed that the C.L.U.E.S. system indicated a contact with Dwayne Hill on March 20, 2001 and was a domestic complaint involving a Pamela Jackson who listed her address as 456 Abbey, Muskegon, MI and a

Dwayne Hill, male black, DOB 11/6/67, who listed his address as 3105 Jefferson, City of Muskegon, MI.

5. Affiant ran a Criminal History on L.I.E.N. [sic] for Dwayne Hill, DOB 11/6/67, and affiant observed the print out which indicated that Dwayne Hill has a felony conviction for Controlled Substance Del/Mfg less that 50 grams in 1991 and felony conviction for Double Penalty Controlled Substance Del/Mfg less than 50 grams in 1994.

6. Affiant has personally observed that 456 Abbey is a single family, single story, brown brick residence, with the numbers 456 affixed to the front of the residence which is facing Abbey, located on the northeast corner of Abbey and Ducey and has a single tin type shed or outbuilding located on the same city lot, City of Muskegon, County of Muskegon, State of Michigan.

7. Based upon drug investigation experience, Affiant has observed that guns, weapons, ammunition, money, records of deposits or money transfers, drug records, drug packaging, drug preparation and distribution materials, and drug paraphernalia are often found in areas where persons are selling or storing illegal drugs including marijuana. Affiant has also come to know based upon narcotics training and experience that individuals involved in the distribution and storage of marijuana will commonly store marijuana and money in the residences of girlfriends or relatives and in outbuildings and vehicles on the property. Your Affiant intends to seek criminal warrants as a result of this investigation. Further Affiant sayeth not."

[2] MCL 780.653 provides:

> "The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable."

Our Supreme Court recently held in *People v Hawkins*, 468 Mich 488, 491, 502, 507; 668 NW2d 602 (2003) that the mere violation of this statute is insufficient, absent a constitutional violation, to mandate the application of the exclusionary rule.

[3] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

[4] Contrary to the trial court's order, the detective spelled his name at the *Walker* hearing "Barthelemy."

[5] "'[A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel *has been made available* to him, *unless the accused himself initiates* further communication, exchanges or conversations with the police.'" *People v Paintman*, 412 Mich 518, 525-526; 315 NW2d 418 (1982), quoting and adopting the rule announced in *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981) (emphasis in *Paintman*).