

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KEVIN ALLEN MYERS,

Defendant-Appellee.

UNPUBLISHED

December 18, 2007

No. 276721

Jackson Circuit Court

LC No. 06-004652-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VALERIE ANN MYERS,

Defendant-Appellee.

No. 276723

Jackson Circuit Court

LC No. 06-004707-FH

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff prosecutor appeals by leave granted the trial court's order granting codefendants' motion for suppression of the evidence obtained from the search of defendants' house. Codefendants were charged with possession of marijuana with intent to deliver, MCL 333.7403(2)(d), and maintaining a drug house, MCL 333.7405(d), after the police searched their residence, pursuant to a warrant. The district court bound codefendants over on the charge of maintaining a drug house, and codefendants later moved the circuit court to suppress evidence collected during the search that led to the charges. The circuit court granted the motion to suppress, finding that the affidavit in support of the search warrant was insufficient to establish probable cause. We reverse.

When reviewing a trial court's decision to suppress evidence, we review the trial court's finding of facts for clear error, while reviewing questions of law and the trial court's ultimate decision de novo. *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003). When reviewing a magistrate's decision to issue a search warrant, a trial court is required to afford deference to the magistrate's determination of probable cause. *People v Sloan*, 450 Mich 160,

168; 538 NW2d 380 (1995), overruled in part on other grounds *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003). A search warrant may only be issued upon a showing of probable cause. MCL 780.651(1). Probable cause to issue a search warrant exists when the facts and circumstances contained in the affidavit would allow a reasonably cautious person to believe that the evidence sought will be found in a specific location. *Sloan, supra* at 168. A magistrate is limited to considering only the information in the affidavit in determining whether probable cause exists to issue a search warrant. *People v Sundling*, 153 Mich App 277, 285-286; 395 NW2d 308 (1986). The search warrant and underlying affidavit are to be interpreted through the lens of common sense, in a realistic manner. *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000). As a reviewing Court, we may consider only those facts presented to the magistrate. *Sloan, supra* at 168.

Here, the affidavit for the search warrant contained information from the affiant police officer that the police received a telephone call from an anonymous informant, who asserted that “the residents of 1910 East Ganson St. weren’t working and they had a lot of items which didn’t seem right . . . due to no one having a job.” The informant also asserted “that during the daytime hours a lot of short term traffic was moving in and out of the residence.” The affidavit also contained information that, after receiving the anonymous tip, the affiant searched codefendants’ trash, where he found one clear plastic baggie with a small amount of a substance suspected to be marijuana, nine individual marijuana stems, and proof of codefendants’ residency at the house where the garbage was recovered. The discovery of small amounts of marijuana in codefendants’ trash, combined with evidence of a nexus between the trash and codefendants’ residence, was sufficient evidence to establish probable cause. *People v Thivierge*, 174 Mich App 258, 260; 435 NW2d 446 (1988). Therefore, the trial court erred by granting codefendants’ motion for suppression.

In ruling, we note that the trial court based its order of suppression on its determination that the prosecutor failed to show that the informant was reliable, and that the small amount of marijuana found in codefendants’ trash was inconsistent with the informant’s assertion that codefendants were engaged in marijuana distribution. The trial court based its determination, that the evidence of marijuana found in codefendants’ trash was not sufficient to establish probable cause, on our opinion in *People v Keller*, 270 Mich App 446; 716 NW2d 311 (2006). However, the Supreme Court recently reversed and remanded *Keller*, after determining that marijuana found in a trash pull search is sufficient to establish probable cause that illegal activities are occurring in a defendant’s residence. *People v Keller*, 479 Mich 467; 739 NW2d 505 (2007). The Supreme Court determined:

[The Court of Appeals] improperly framed this case as a test of the source’s reliability instead of examining all the circumstances set forth in the affidavit to determine whether there was a substantial basis for the magistrate to conclude that “there [was] a fair probability that contraband or evidence of a crime [would] be found” at defendants’ home. Focusing on the tip was inappropriate because, regardless of the veracity of the source, the officer participated in a trash pull that revealed evidence of marijuana and correspondence tying the trash to the defendants. The presence of marijuana in defendants’ trash shows “a fair probability that contraband or evidence of a crime will be found in a particular place.” Because this officer uncovered direct

evidence of illegal activity, the marijuana, it was unnecessary to delve into the veracity of the source. [*Id.* at 477.]

Codefendants argue that, even if the affidavit contained sufficient evidence to establish probable cause, the trial court correctly suppressed the evidence because the police trespassed when they searched codefendants' trash. Codefendants are correct that suppression is the proper remedy for a search that intrudes upon the curtilage of a dwelling without probable cause. But see *California v Greenwood*, 486 US 35; 108 S Ct 1625; 100 L Ed 2d 30 (1988) (The Fourth Amendment does not prohibit the search and seizure without a warrant of garbage left outside the curtilage of the home). However, on the record before us, codefendants cannot show that the police trespassed on their property to obtain the bag of garbage, or that the bag of garbage originated from within the curtilage of their property. According to the affiant's testimony at the preliminary hearing, the trash he inspected came from a garbage bag "located at the west end of [codefendants'] property, halfway between the garage and the roadway." The affiant did not specify whether the trash was in the place where garbage would normally be placed outside for collection. In addition, nothing in the affidavit in support of the search warrant shows that the police trespassed on codefendants' property and obtained the trash from within the curtilage of codefendants' residence. Therefore, codefendants fail to establish on the record before us that the police trespassed, or violated the curtilage of codefendants' residence. In ruling, we again note that, as a reviewing Court, we may consider only the facts presented to the magistrate. *Sloan, supra*.

Reversed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh