STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 3, 2008
v	No. 276990 Oakland Circuit Court
BRIAN KELLY WHITE, Defendant-Appellant.	LC No. 2005-202100-FH

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant pleaded no contest to possession with intent to deliver 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), possession of marijuana, MCL 333.7403(2)(d), felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 6-1/2 to 30 years for the possession with intent to deliver marijuana conviction, 2 to 7-1/2 years for the felon in possession conviction, and one year for the possession of marijuana conviction, to be served consecutive to two concurrent two-year terms of imprisonment for the felony-firearm convictions. This Court initially denied defendant's application for leave to appeal. Our Supreme Court, in lieu of granting leave to appeal, has remanded the case to this Court for consideration as on leave granted. *People v White*, 477 Mich 1054; 728 NW2d 423 (2007). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The evidence in this case was seized during the execution of a search warrant. Defendant argues that the search warrant affidavit failed to establish probable cause for a search and, therefore, the trial court erred in denying his motion to suppress the evidence. We disagree.

The trial court's ruling on a motion to suppress is reviewed de novo on appeal. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). When reviewing a magistrate's conclusion that probable cause to search existed, this Court does not review the matter de novo or apply an abuse of discretion standard. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). Paying deference to the magistrate's determination that probable cause did exist, this Court considers only whether the actual facts and circumstances presented to the magistrate would permit a reasonably cautious person to conclude that there was a substantial basis for the finding of probable cause. *People v Sloan*, 450 Mich 160, 168-169; 538 NW2d 380 (1995),

overruled in part on other grounds in *People v Hawkins*, 468 Mich 488, 502, 511; 668 NW2d 602 (2003), and *People v Wager*, 460 Mich 118, 123-124; 594 NW2d 487 (1999).

Issuance of a search warrant must be based on probable cause. MCL 780.651(1). "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). "A magistrate can consider only the information in the affidavit made before him 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 read in a commonsense and realistic manner. *Russo, supra* at 604.

When deciding the reasonableness of whether contraband will be found, it is not assumed that evidence of a crime will remain indefinitely in a given place. *Id.* at 605. Facts stated in an affidavit are sufficiently fresh when it can be presumed that the items sought remain on the premises to be searched or that criminal activity is continuing at the time the warrant is requested. *People v McGhee*, 255 Mich App 623, 636; 662 NW2d 777 (2003). A warrant becomes "stale" if too much time passes from observation of the contraband to the issuance of the search warrant. *Russo, supra.* The length of time that may transpire before a warrant becomes stale depends on the circumstances of each case. *Id*. at 605-606.

The affidavit may be based on information supplied to the affiant by another person. If the other person is named, the affidavit need only contain affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge. MCL 780.653(a). If the other person is not named, the affidavit must contain affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information provided and that the person is credible or his information is reliable. MCL 780.653(b). "Statements containing multiple layers of hearsay may be used to establish probable cause where the ordinary requirements of personal knowledge and reliability or credibility are met for each level of hearsay." *Echavarria, supra* at 367.

The affiant, Brent Miles, prepared the affidavit on January 12, 2005. It was based on information he received from Drug Enforcement Agency (DEA) Agent Krause on January 11. Krause reported that his confidential informant (CI) had received information from an "unwitting source" about a home located on Morrison in Southfield. The source had information that the resident was involved in narcotics trafficking and reported seeing cocaine, packaging material, and a large amount of cash inside the home within the last 24 hours. The source recruited the CI to join a robbery or kidnapping plot against the occupants of the home. They engaged in surveillance of the home in furtherance of the plot, which the source intended to carry out on January 12. The affidavit indicated that the CI was believed to be credible or reliable because he or she was acting voluntarily, statements indicating prior involvement in illegal narcotics purchases were against the CI's penal interests, and the CI had provided information in the past that led to the confiscation of narcotics and numerous arrests.

The first level of hearsay in the affidavit is the information provided by Agent Krause. The affidavit indicates that Krause spoke with personal knowledge because he had actually spoken to the CI. Further, Krause would have personal knowledge about his own informant's past performance. Because Krause was named, the affidavit did not have to contain information

concerning his reliability or credibility. Further, because Krause is a law enforcement officer, he is presumptively reliable. *People v Powell*, 201 Mich App 516, 523; 506 NW2d 894 (1993).

The second level of hearsay is that provided by the CI. The affidavit indicated that the CI spoke with personal knowledge because he or she had actually spoken to the source. In addition, the CI was recruited to join a criminal enterprise that targeted the house and had joined the other participants during surveillance operations. Further, the affidavit indicated that the CI was credible. Krause reported that the CI had provided information in the past that led to the confiscation of narcotics and numerous arrests. That an informant has a course of performance in which he or she has supplied reliable information is indicative of credibility. *People v Sherbine*, 421 Mich 502, 510 n 13; 364 NW2d 658 (1984), overruled in part on other grounds in *Hawkins, supra* at 502.

The last layer of hearsay is that provided by the source, the person who claimed that the resident was involved in drug dealing. That this person spoke with personal knowledge can be inferred from the fact that he or she knew that the house had recently been purchased, knew that the resident had a school-aged daughter, and that he or she had reported being inside the house and had actually seen cash and cocaine. There is also evidence that the source was credible. A statement against penal interest is indicative of credibility. *Sherbine, supra*; *People v Gleason*, 122 Mich App 482, 491-492 n 8; 333 NW2d 85 (1983). The source had recruited the CI for a robbery/kidnapping plot that targeted the house in question because of the drugs and money that were kept there.

Finally, the information in the affidavit was sufficient to create probable cause to believe that contraband would be found in the house. Although the source apparently had first contacted the CI about the robbery/kidnapping scheme a week before the affidavit was drafted, the affidavit indicated that preparations had been undertaken in furtherance of the plot and that the source had been inside the house and observed cocaine, packaging material, and a large amount of cash within the last 24 hours. Such information was sufficient to establish a substantial basis for finding that it was likely that narcotics would be found in the home.

Defendant also claimed that the affidavit contained false information. The general rule is that if the defendant shows that the affiant either knowingly and intentionally or with reckless disregard for the truth inserted false information and such information was necessary to a finding of probable cause, the evidence obtained pursuant to the warrant is to be suppressed. *People v Melotik*, 221 Mich App 190, 200; 561 NW2d 453 (1997). But if the false information is disregarded and the remaining untainted information in the affidavit is sufficient to establish probable cause, "the affidavit, and resulting search warrant, remain valid within the scope and to the extent of the untainted information." *People v Griffin*, 235 Mich App 27, 42; 597 NW2d 176 (1999), overruled in part on other grounds in *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007).

There is no evidence that the affiant intentionally used false information or acted with reckless disregard for the truth. The affiant never represented that defendant recently bought the house. Rather, the source reported that "the suspect" had recently purchased the house. The affiant indicated that he had confirmed a recent sale to Philicia Kareem via a computer search. There is nothing to indicate that the affiant did not check the information by computer search as indicated or that the computer search did not verify the recent transaction. The fact that Kareem

had rented the house nine months earlier did not preclude a finding that the house had been sold seven months later. Further, even if the leasing information suggested that the computer information may not have been accurate, there is no evidence that the affiant had reason to believe it was not accurate. The fact that someone other than defendant was the lessee is of no moment because the target of the warrant was the house, not any particular person therein, and defendant was never alleged to be a resident of the house.

Finally, the police reasonably relied on a warrant issued by a magistrate. In *People v Goldston,* 470 Mich 523, 531, 542-543; 682 NW2d 479 (2004), the Court held that the exclusionary rule does not bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant ultimately found to have been defective unless the police officer's reliance on the warrant was objectively unreasonable or the affidavit blatantly fails to establish probable cause or the affiant provided false information knowingly or in reckless disregard for the truth. As previously discussed, the affidavit did establish probable cause and there was no showing that the affiant intentionally provided information known to be false or acted in reckless disregard for the truth. Finally, the warrant was particularized with respect to the place to be searched and the items to be seized and there is nothing to indicate that the magistrate wholly abandoned his judicial role in authorizing the warrant. See *People v Hellstrom,* 264 Mich App 187, 197; 690 NW2d 293 (2004).

For these reasons, the trial court did not err in denying defendant's motion to suppress.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette