STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 21, 2008
v	No. 277896 Washtenaw Circuit Court
THURMAN AHMED-DIEN BELL, Defendant-Appellee.	LC No. 06-001785-FH

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant was charged with possession with intent to deliver a narcotic or cocaine under MCL 333.7401(2)(a)(iii); possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); possession with intent to deliver methamphetamine, MCL 333.7401(2)(b)(i); possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. The circuit court issued an order suppressing the evidence obtained from the search of defendant's residence and the case was thereafter dismissed based upon the prosecution's inability to proceed. The prosecutor appeals as of right from the final order dismissing the case against defendant. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The affiant, Officer David Reid of the Ann Arbor Police Department, received a tip that the "occupant(s)" of 2515 Russell Street were selling narcotics from that address. On August 17, 2006, Reid conducted a trash pull from a trash container located in front of the residence. In one trash bag, Reid found a small marijuana stem. In another trash bag, Reid found an address label that linked the trash to the residence. Reid did not observe trash out in front of the residence again until September 21, 2006, when he conducted a second trash pull. In one trash bag, Reid found a partially smoked marijuana cigarette. Based upon these two trash pulls and the anonymous tip, Officer Reid prepared an affidavit for a search warrant. The district court magistrate issued the warrant on September 22, 2006.

At the preliminary examination, the district court found that the affidavit contained enough information to merit the magistrate's finding of probable cause and denied defendant's motions to quash the search warrant and suppress the evidence.

At a hearing on defendant's motion to suppress in the circuit court, the circuit court held that the affidavit was insufficient to establish probable cause. Therefore, the court quashed the

search warrant and suppressed the evidence seized pursuant to the search. The prosecutor agreed to the dismissal of the case against defendant because it was unable to proceed to trial without the suppressed evidence.

Defendant initially alleges that the prosecutor does not have the right to appeal the circuit court's interlocutory order granting his motion to suppress because it was not a final order. We disagree. The prosecutor may challenge the trial court's ruling on the motion to quash the search warrant and suppress the evidence in its appeal from the final order dismissing the case. *People v Torres*, 452 Mich 43, 59; 549 NW2d 540 (1996). Contrary to what defendant asserts, we are bound by the holding in *Torres*. See *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds *Karaczewski v Farbman Stein & Co*, 478 Mich 28; 732 NW2d 56 (2007) ("it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority"). Further, we do not agree that the prosecution waived the right to challenge the trial court's ruling on the suppression motion when it stipulated to the dismissal of the case against defendant because it was unable to proceed to trial without the evidence. See *Dybata v Kistler*, 140 Mich App 65, 68; 362 NW2d 891 (1985).

On appeal, the prosecutor asserts that the circuit court erred in finding that a substantial basis did not exist for a finding of probable cause sufficient to issue a search warrant. We agree.

We review a trial court's ruling on a motion to suppress evidence for clear error, but we review its conclusions of law de novo. *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). Under de novo review, this Court gives no deference to the trial court. *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998).

We pay great deference to a magistrate's determination of probable cause. *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). Our review of a magistrate's determination regarding whether probable cause exists to support a search warrant

> involves neither de novo review nor application of an abuse of discretion standard. Rather, the preference for warrants . . . requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a "substantial basis" for the finding of probable cause. [*Id*. at 603 (citations omitted).]

To be valid, a search must typically be conducted pursuant to a warrant based on probable cause. *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). "Probable cause 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 Hellstrom*, 264 Mich App 187, 192, 690 NW2d 293 (2004) (internal citations and quotation marks omitted).

If a defendant shows, by a preponderance of the evidence, that the affidavit in support of a search warrant contained false statements or material omissions, which were made knowingly, intentionally, or with a reckless disregard for the truth, the evidence obtained from the resulting search must be suppressed if the false information or omissions were necessary to the finding of

probable cause. *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992).

The task of the magistrate considering whether to issue a search warrant

> is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. [*People v Keller*, 479 Mich 467, 475; 739 NW2d 505 (2007) (internal citations and quotation marks omitted.]

We first examine whether the information in the affidavit that gave rise to the search warrant contained intentional or recklessly made false statements or material omissions. At the preliminary examination, defendant argued that Reid intentionally misled the magistrate to believe the marijuana and item of residency were found inside the same trash bag. Reid stated he searched three trash bags and found a "green plant like material" in one of the bags. Reid then stated separately, "An item of residency was also seized." Reid did not specify that the item of residency was found in a separate trash bag. However, whether or not the marijuana and the item of residency were in the same trash bag is not material. We find it material that these items were found in the same trash container, thereby linking the marijuana to the residence.

Defendant also argued that Reid described the seized marijuana in a manner that misled the magistrate to believe the quantity of marijuana seized was greater than that actually seized. Reid described the marijuana found in the first trash pull as a "green plant like material" and the marijuana found in the second trash pull as a "marijuana cigarette in joint form." A "green plant like material" does not convey size and a marijuana cigarette in joint form is a marijuana cigarette, no matter how large. Reid did not make any false statements. There is no reason to believe the facts alleged in the affidavit were false or recklessly included in the affidavit.

Next, we must determine whether a substantial basis for probable cause existed. Our Supreme Court's recent decision in *Keller* is on point. *Keller* concerned the sufficiency of an affidavit in support of a search warrant. In *Keller*, an anonymous source provided a tip that the defendants were operating a marijuana growing and distribution operation out of their home. *Id*. at 469-470. The police conducted a trash pull and found "a partially burnt marijuana cigarette, a green leafy substance on the side of a pizza box, and correspondence tying defendants to the residence." *Id*. at 470. "Based on this information, the police applied for a search warrant for defendant's home." *Id*. The Supreme Court stated that because the officer found marijuana in the trash along with correspondence tying the trash to the defendants, it showed a fair probability that contraband or evidence of a crime would be found in a particular place and that probable cause existed for the issuance of a search warrant of defendant's residence. *Id*. at 477.

The defendant in *Keller*, as in this case, alleged that the drugs may have been deposited in the trash by a guest. *Keller*, *supra* at 477 n 29, cited the case of *United States v Briscoe*, 317 F3d 906, 908 (CA8 2003), which held that drugs found in trash "were sufficient *stand-alone* evidence to establish probable cause" to issue a search warrant for possession and distribution (emphasis in *Briscoe*). The possibility of an innocent explanation for the source of the contraband did not

negate the finding of a fair probability of criminal activity, see *Russo*, *supra* at 613, and we reject defendant's argument that the warrant was "overbroad."

We find that the marijuana, the address label, and the trash container registered to the residence established a fair probability that contraband or evidence of a crime would be found inside the residence. The trash seized, albeit five weeks apart, was the only trash placed outside 2515 Russell Street for those five weeks.[1] The drugs found in the trash were sufficient stand-alone evidence to establish probable cause to issue a search warrant for possession and distribution. Accordingly, reading the affidavit in a commonsense and realistic manner, and deferring to the decision of the magistrate, a reasonably cautious person could have concluded that there was a substantial basis for a finding of probable cause that evidence of narcotics and drug trafficking existed in the residence at 2515 Russell Street. The circuit court's determination that a substantial basis did not exist for a finding of probable cause was erroneous.

Reversed and remanded for reinstatement of the charges against defendant and for further proceedings on those charges. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto

[1] We acknowledge that Reid conceded he did not survey the home on one day during the five weeks and it was possible that trash was placed outside the home on that day. However, that possibility does not alter our conclusion.