# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>April 9, 2009 |
| v | No. 282449<br>Branch Circuit Court |
| JERRY LEE McCOLLOUGH,<br><br>Defendant-Appellee. | LC No. 07-058780-FH |

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant, | |
| v | No. 282450<br>Branch Circuit Court |
| BETH ANN McCOLLOUGH,<br><br>Defendant-Appellee. | LC No. 07-058781-FH |

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

In these consolidated criminal cases, the trial court suppressed evidence indicative of manufacturing methamphetamine seized from defendants' home, quashing the search warrant on determination that there was not a substantial basis for the magistrate to find that probable cause existed for a search of the home. On a motion for reconsideration, the trial court rejected the prosecution's argument that the good-faith exception to the exclusionary rule was applicable. The prosecution appeals by leave granted. We reverse.

Defendants, a married couple who live together, made multiple purchases of Sudafed between October 2006 and January 2007. Sudafed contains pseudoephedrine, which is commonly used to manufacture methamphetamine. Because of such illegal use of an otherwise legally sold product, our Legislature enacted MCL 333.17766e. Sudafed falls under subsection (1) of the statute, which further provides:

> (3) A person who sells a product described in subsection (1) shall do each of the following:
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> (a) Require the purchaser of a product described under subsection (1) to produce a valid photo identification that includes the individual's name and date of birth.
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> (b) Except as otherwise provided under subsection (2), maintain a log or some type of record detailing the sale of a product described under subsection (1), including the date of the sale, the name and date of birth of the buyer, and the amount and description of the product sold. The log or other means of recording the sale as required under this subdivision shall be maintained for a minimum of 6 months and made available to only a law enforcement agency upon request. . . .

Using MCL 333.17766e as a tool in the fight against the scourge of methamphetamine manufacture and use, the Michigan State Police reviewed store log books in the Coldwater area, discovering the sales made to defendants. An affidavit for a search warrant of defendants' home was submitted to a magistrate by a state trooper familiar with defendants' Sudafed transactions and highly experienced with respect to the manufacture of methamphetamine.[1] The trooper averred, on the basis of the store log books, that defendants made ten purchases of Sudafed between October 7, 2006, and January 3, 2007, each purchase being for the maximum allowed for any one transaction, i.e., "2 packages, or 48 tablets or capsules," MCL 333.17766f(1)(b). The purchases were made at four different stores. Seven of these purchases were made in the month of December. Between the two defendants, they bought Sudafed on December 3, 11, 16, 22 (two transactions), 28, and 31, followed by a purchase on January 3. The two purchases made on December 22 were both made by Mrs. McCollough, were made at two different stores, and were made approximately one hour apart. And again, each purchase was for the maximum amount allowed under law. There was no other evidence of manufacturing methamphetamine aside from the logged purchases. The magistrate issued the search warrant, finding probable cause to search defendants' home, and the police discovered incriminating evidence upon execution of the warrant. Subsequently, the trial court quashed the warrant, suppressed the fruits of the search, and rejected the prosecution's argument made pursuant to the good-faith exception to the exclusionary rule.

"This Court reviews a trial court's findings at a suppression hearing for clear error." *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). However, "the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court's ultimate ruling on the motion to suppress." *Id.*

[1] According to the affidavit, the trooper "is a member of the Michigan State Police Meth Response Team and has been trained in the recognition of Meth and its components." Also, he "is a Meth Responder and Site Safety Officer in reference to Clandestine Labs" and "has training and experience with Clandestine Meth Labs since 2001."

In *People v Hellstrom*, 264 Mich App 187, 192-193; 690 NW2d 293 (2004), this Court stated:

> It is well settled that both the United States Constitution and the Michigan Constitution "guarantee the right of persons to be secure against unreasonable searches and seizures." A search or seizure is considered unreasonable when it is conducted pursuant to an invalid warrant or without a warrant where the police officer's conduct does not fall within one of the specific exceptions to the warrant requirement. Generally, in order for a search executed pursuant to a warrant to be valid, the warrant must be based on probable cause. 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." . . .
>
> Ordinarily, if a warrant is determined to be invalid because it lacked a probable-cause basis or was technically deficient in some other manner, any evidence seized pursuant to that warrant, or seized subsequently as a result of the initial illegal search, is inadmissible as substantive evidence in related criminal proceedings. Certain exceptions to this exclusionary rule have been recognized in Michigan, but our courts had declined to recognize a "good-faith" exception to the exclusionary rule. [Citations omitted.]

The *Hellstrom* panel then observed that our Supreme Court had recently adopted, for purposes of Michigan law, the good-faith exception to the exclusionary rule in *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004). *Hellstrom, supra* at 193-194. In *Goldston, supra* at 528-531, the Court discussed at length *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984), in which the United States Supreme Court adopted a good-faith exception to the exclusionary rule. The *Goldston* Court held that it was adopting the good-faith exception in Michigan, reasoning that the purpose of the exclusionary rule is to deter police misconduct, which purpose is not "furthered by excluding evidence that the police recovered in objective, good-faith reliance on a search warrant." *Goldston, supra* at 526. Referencing *Leon*, our Supreme Court stated:

> The Court concluded that the exclusionary rule should be employed on a case-by-case basis and only where exclusion would further the purpose of deterring police misconduct. The Court emphasized, however, that a police officer's reliance on a magistrate's probable cause determination and on the technical sufficiency of a warrant must be objectively reasonable. Evidence should also be suppressed if the issuing magistrate or judge is misled by information in the affidavit that the affiant either knew was false or would have known was false except for his reckless disregard of the truth. Further, the Court stated that the good-faith exception does not apply where the magistrate wholly abandons his judicial role or where an officer relies on a warrant based on an affidavit "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" [*Id.* at 531 (citations omitted).]

Here, we find that police reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant to be objectively reasonable. The affiant state trooper did

not mislead the issuing magistrate, nor did the trooper include information in the affidavit that he knew was false or would have known was false except for his reckless disregard of the truth. Further, the magistrate did not wholly abandon his judicial role in evaluating the affidavit and in issuing the warrant. Finally, police were not relying on a warrant based on an affidavit that was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

Doing the arithmetic on the amount of Sudafed purchased, the recommended dosages, the number of household members known by police, and the various time spans involved, we acknowledge that it is mathematically feasible that members in defendants' household may have used the total amount of purchased Sudafed for legitimate purposes. That being said, the police were presented with evidence of two Sudafed purchases by Mrs. McCollough, each transaction being for the maximum amount allowed under the law, which purchases were made on the same day, one hour apart, at two different stores. Even if these facts, standing alone, do not give rise to reasonable police suspicion of criminal activities being afoot, when they are considered in conjunction with the other December and January maximum purchases of Sudafed at different stores, as reflected in the affidavit, it cannot fairly be concluded that police belief in the existence of probable cause was "entirely unreasonable." The pattern of Sudafed purchases most certainly should have raised red flags for any competent police officer.

While the presentation of additional evidence indicative of manufacturing methamphetamine would have been desirable, and while we strongly suggest for future reference that police attempt to procure more evidence than that submitted here before seeking a warrant, we cannot soundly find that it was entirely unreasonable for the police to go forward on the log-book evidence. The whole purpose of the exclusionary rule is to deter police misconduct, and police conduct in the instant case was within the boundaries of acceptable and appropriate police activity. Minimally, there was no misconduct. In *Herring v United States*, __ US __; 129 S Ct 695, 700-701; 172 L Ed 2d 496 (2009), the United States Supreme Court recently emphasized that the exclusionary rule should not be automatically invoked as a mere afterthought, stating:

> Indeed, exclusion "has always been our last resort, not our first impulse," and our precedents establish important principles that constrain application of the exclusionary rule.
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> First, the exclusionary rule is not an individual right and applies only where it "'result[s] in appreciable deterrence.'" We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.
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> In addition, the benefits of deterrence must outweigh the costs. "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." "[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free-something that "offends basic concepts of the criminal justice system."

> "[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application."
>
> These principles are reflected in the holding of *Leon*: When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated search warrant. We (perhaps confusingly) called this objectively reasonable reliance "good faith." . . . [Citations omitted.]

Pursuant to these principles, we find that it is not fitting to invoke the exclusionary rule under the circumstances presented. Accordingly, we reverse the trial court's ruling rejecting application of the good-faith exception to the exclusionary rule.[2] The evidence obtained on execution of the search warrant is admissible and may be used by the prosecution in pursuing its cases.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering

[2] In light of our ruling, there is no need to address the issue whether probable cause existed to issue the search warrant.