

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT THOMAS MCCULLUM,

Defendant-Appellant.

UNPUBLISHED

September 17, 2009

No. 284634

Oakland Circuit Court

LC No. 2007-215300-FH

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

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver 50 or more but less than 450 grams of heroin, MCL 333.7401(2)(a)(iii). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of 10 to 20 years. He appeals as of right. We affirm.

Defendant's conviction arises from the discovery of more than 200 grams of heroin in his home during the execution of a search warrant. After his arrest, defendant gave a statement to the police, in which he stated that he stored the drugs for someone else in exchange for cash and heroin.

I. Probable Cause to Issue the Search Warrant

Defendant first argues that the trial court should have granted his motion to suppress the evidence because the affidavit offered in support of the search warrant failed to establish probable cause that evidence of drugs would be found in his home. We disagree.

"A search warrant may not be issued absent probable cause to justify the search. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1)." *People v Martin*, 271 Mich App 280, 298; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). "Probable cause to search must exist at the time a warrant is issued." *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992). "Probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct could be found in a stated place to be searched." *Id.* "Probable cause does not require certainty. Rather, it requires only a probability or substantial chance of criminal activity." *People v Champion*, 452 Mich 92, 111 n 11; 549 NW2d 849 (1996).

Regarding the degree of certainty that probable cause requires, “[t]he threshold inquiry looks at the life cycle of the evidence sought, given a totality of circumstances, that includes the criminal, the thing seized, the place to be searched, and, most significantly, the character of the criminal activities under investigation.” [*People v McGhee*, 255 Mich App 623, 635; 662 NW2d 777 (2003), quoting *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992).]

When presenting an affidavit in support of a search warrant, the affiant must include facts within his knowledge and may not merely state conclusions or beliefs. He may not state his own inferences, but rather must include statements that justify the drawing of any inferences by the reviewing magistrate. *Martin*, *supra* at 298.

When reviewing a decision to issue a search warrant, the reviewing court must read the search warrant and the affidavit in a common-sense and realistic manner. *Russo*, *supra* at 604. Great deference is given to a magistrate’s finding of probable cause. *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008). A reviewing court does not review de novo the magistrate’s decision regarding the sufficiency of a search warrant affidavit. *Russo*, *supra* at 603. Rather, a reviewing court must only be sure that there is a substantial basis for the magistrate’s conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place before issuing the warrant. *Id.* at 603-604.

The affidavit in this case indicated that an informant participated in a controlled purchase of heroin within the preceding 48 hours. According to the affidavit, the informant was searched immediately before and after the sale, and the police officer affiant also observed the transaction. In addition, the affidavit indicated that less than five minutes after the informant arranged for the purchase of the drugs, another officer observed an individual with a prior drug conviction leave defendant’s house, drive to the prearranged location, and conduct a hand-to-hand transaction with the informant. The substance received by the informant was field-tested and the results were positive for heroin. The affidavit also included information that the informant had assisted the police in over 60 controlled buys in the past, which resulted in the issuance of more than 20 other search warrants.

Defendant primarily argues that evidence of a single controlled purchase of drugs is insufficient to establish probable cause to search for evidence of drug trafficking. We disagree. Defendant’s reliance on *People v David*, 119 Mich App 289; 326 NW2d 485 (1982), is misplaced because that case is distinguishable. In *David*, this Court stated that it was

not convinced that a controlled buy alone is enough to establish probable cause for the issuance of a search warrant. There must be some indication of the reliability of the buyer-informant so that a conclusion that a purchase actually took place may be legitimately drawn. [*Id.* at 295.]

Unlike *David*, the search warrant affidavit in this case contained information establishing the reliability of the informant. In addition, the averments that the informant was searched before and after the transaction, and was monitored by surveillance officers during the transaction, and that an individual was observed delivering a substance to the informant that field-tested positive for heroin, were sufficient to enable the magistrate to draw the conclusion that a purchase actually took place.

Defendant also relies on *People v Wares*, 129 Mich App 136, 141-142; 341 NW2d 256 (1983), and *People v Head*, 211 Mich App 205, 209; 535 NW2d 563 (1995). Although the Court in each of those cases found that two controlled purchases of drugs supported the issuance of a search warrant, in neither case did the Court hold that at least two controlled purchases were required before probable cause to search for evidence of drug trafficking could be established. On the contrary, in *People v Clarence Williams*, 139 Mich App 104, 108; 360 NW2d 585 (1984), overruled in part on other grounds in *Russo, supra* at 602-603 n 32, this Court distinguished *David* and *Wares*, and held that a single controlled purchase of narcotics by an informant during a transaction that the officer-affiant also participated in was sufficient to support issuance of a warrant, which was issued one day after the controlled buy.

In this case, the search warrant contained information that enabled the magistrate to conclude that a reliable informant participated in a controlled purchase of heroin during a transaction that was independently monitored by the police. In addition, the information that another named officer observed an individual leave defendant's house less than five minutes after the informant arranged to purchase the drugs, and that the individual drove directly to the prearranged location where he delivered to the informant a substance that field-tested positive for heroin, was sufficient to enable the magistrate to conclude that the drugs were obtained from defendant's house.

We also disagree with defendant's argument that the information regarding the controlled buy was stale because the buy occurred 48 hours earlier. In *People v Craig Brown*, 279 Mich App 116, 128; 755 NW2d 664 (2008), this Court explained:

The passage of time is a valid consideration in deciding whether probable cause exists. The measure of the staleness of information in support of a search warrant rests on the totality of the circumstances, including the criminal, the thing to be seized, the place to be searched, and the character of the crime.

Facts supporting a warrant are considered sufficiently fresh when it can be presumed that the items sought remain on the premises or that the criminal activity is continuing at the time the warrant is requested. *McGhee, supra* at 636. The crime involved in this case is drug trafficking, which typically involves ongoing criminal activity. Moreover, the fact that the individual who delivered the drugs to the informant left defendant's house less than five minutes after the informant arranged to purchase the drugs supported an inference that the individual had a supply of drugs readily at hand at the residence, such that it could be presumed that additional drugs could be found at the premises less than 48 hours later.

In sum, affording deference to the magistrate's finding of probable cause, there is a substantial basis for the magistrate's conclusion that there was a fair probability that evidence of drug trafficking would be found at defendant's residence at the time the search warrant was issued. Accordingly, defendant's motion to suppress was properly denied.

The trial court alternatively upheld the search under the good-faith exception. Where the police act in reasonable and good-faith reliance on a search warrant, the evidence seized need not be suppressed if the warrant is subsequently declared invalid. *People v Goldston*, 470 Mich 523, 526, 538; 682 NW2d 479 (2004). The goal of the exclusionary rule is to deter police misconduct

and that goal would not be served in cases where police officers act in objectively reasonable good-faith reliance on a search warrant. *Id.*

In *People v Hellstrom*, 264 Mich App 187, 196-199; 690 NW2d 293 (2004), this Court summarized the principles that make up the good-faith exception, as explained in *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984), and *Goldston, supra*:

[A]s stated in *Leon* and adopted by our Supreme Court in *Goldston, supra*, we are guided by the following principles with regard to application of the good-faith exception to Michigan's exclusionary rule:

"We do not suggest [] that exclusion is always inappropriate in cases where an officer has obtained a warrant and abided by its terms. "[Searches] pursuant to a warrant will rarely require any deep inquiry into reasonableness," for "a warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search." Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

"Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc v New York*, 442 US 319 [99 S Ct 2319; 60 L Ed 2d 920] (1979); in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient- *i.e.*, in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid.

"In so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant. Other objections to the modification of the Fourth Amendment exclusionary rule we consider to be insubstantial. The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time. [*Leon, supra* at 922-924 (citations omitted).]"

In sum, “In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.” *Id.* at 926.

Leon further instructs:

“If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue. Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue. Even if the Fourth Amendment question is not one of broad import, reviewing courts could decide in particular cases that magistrates under their supervision need to be informed of their errors and so evaluate the officers’ good faith only after finding a violation. In other circumstances, those courts could reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers’ good faith. We have no reason to believe that our Fourth Amendment jurisprudence would suffer by allowing reviewing courts to exercise an informed discretion in making this choice. [*Id.* at 925.]” [Footnotes omitted.]

Here, defendant has not shown that the affidavit contained any false information. Further, there are no deficiencies apparent from the face of the warrant such that the police could not reasonably presume it to be valid. Moreover, for the reasons previously explained, the affidavit offered in support of the warrant was not so lacking in indicia of probable cause that it would have been unreasonable for the police to believe that there was probable cause to search defendant’s residence. Finally, there is no indication that the magistrate abandoned his judicial role when approving the warrant. Defendant asserts that because other warrants were issued at the same time for simultaneous searches at other locations, the magistrate could not have known or considered the contents of each affidavit and warrant individually. This argument is based only on speculation, not objective evidence. The mere fact that multiple warrants were issued does not prove that the magistrate failed to exercise his judicial role of reviewing each affidavit individually before issuing each warrant.

Thus, we agree with the trial court that even if the search warrant was improperly issued, suppression was not required because the police acted in good faith in executing the warrant.

II. Motion for Mistrial

Defendant next argues that the trial court erred in denying his motion for a mistrial after an investigating police officer testified that defendant shared the same attorney as other suspects believed to be involved in the drug organization. Defense counsel immediately objected to this testimony at trial, and the trial court sustained the objection, struck the testimony, and instructed the jury to disregard it.

The grant or denial of a mistrial is within the sound discretion of the trial court. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994). A court should grant a mistrial only

for an irregularity that is prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A mistrial should be granted if the prejudicial effect of an error cannot be removed in any other way. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). A trial court's instructions are presumed to cure most errors. *Id.*

In this case, the jury was aware that other individuals were suspected of being part of a drug organization, and that defendant had given a statement to the police in which he admitted that he was storing heroin for others in exchange for cash and drugs. Under the circumstances, while the challenged testimony was irrelevant and improper, it was not so prejudicial that the jury would not be able to disregard it in accordance with the trial court's instruction. The comment that defendant was sharing the same attorney as some other suspects, even if irrelevant, was not so prejudicial that its effect could not be removed by the trial court's instruction to disregard the testimony. Thus, the trial court did not abuse its discretion in denying defendant's request for a mistrial.

III. Jury Instruction

Defendant argues that a new trial is required because, although the trial court instructed the jury on how to consider the opinion testimony of Officer Janczarek as an expert in the field of narcotics trafficking, it failed to give a similar instruction with respect to Officer Main's testimony. The record discloses that defendant did not request such an instruction with respect to Officer Main, and in fact approved the instructions as given. Defendant's express approval of the trial court's jury instructions waived any claim of error. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Furthermore, even if we considered this issue for plain error affecting defendant's substantial rights, *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003), reversal would not be warranted. This case is distinguishable from *United States v Lopez-Medina*, 461 F3d 724 (CA 6, 2006), because Officer Main was never qualified as an expert witness. Indeed, defendant declined the opportunity to qualify Officer Main as an expert witness when the trial court sustained the prosecutor's objection to defendant's request for opinion testimony from Officer Main. Thus, it was not necessary to give an instruction explaining the difference between a witness's role as a fact witness and an expert witness with respect to Officer Main. There was no plain error.

IV. Peremptory Challenge

Next, defendant argues that the prosecutor improperly used a peremptory challenge to excuse the only African-American juror from the jury venire, contrary to *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), as modified in *Powers v Ohio*, 499 US 400; 111 S Ct 1364; 113 L Ed 2d 411 (1991). We disagree.

A mixed standard of review applies to a trial court's ruling regarding a *Batson* challenge. In *People v Knight*, 473 Mich 324, 345; 701 NW2d 715 (2005), the Court explained:

[T]he proper standard of review depends on which *Batson* step is before us. If the first step is at issue (whether the opponent of the challenge has satisfied his burden of demonstrating a prima facie case of discrimination), we review the trial court's underlying factual findings for clear error, and we review questions of

law de novo. If *Batson*'s second step is implicated (whether the proponent of the peremptory challenge articulates a race-neutral explanation as a matter of law), we review the proffered explanation de novo. Finally, if the third step is at issue (the trial court's determinations whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination), we review the trial court's ruling for clear error.

In *People v Marlon Bell*, 473 Mich 275, 282-283; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005), our Supreme Court explained the procedure for resolving *Batson* challenges:

In *Batson*, the United States Supreme Court made it clear that a peremptory challenge to strike a juror may not be exercised on the basis of race. *Batson*, *supra* at 89, 96-98. The prosecution in *Batson* attempted to exclude African-American jurors solely on the basis of their race. *Id.* at 82-83. The Court determined that the prosecution's actions violated the Equal Protection Clause. It set forth a three-step process for determining an improper exercise of peremptory challenges. First, there must be a prima facie showing of discrimination based on race. *Id.* at 94-97. To establish a prima facie case of discrimination based on race, the opponent of the challenge must show that: (1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the exclusion was based on race. *Id.* at 96. The *Batson* Court directed trial courts to consider all relevant circumstances in deciding whether a prima facie showing has been made. *Id.*

Once the opponent of the challenge makes a prima facie showing, the burden shifts to the challenging party to come forward with a neutral explanation for the challenge. *Id.* at 97. The neutral explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing. *Id.* at 97-98. If the challenging party fails to come forward with a neutral explanation, the challenge will be denied. *Id.* at 100.

Finally, the trial court must decide whether the nonchallenging party has carried the burden of establishing purposeful discrimination. *Id.* at 98. Since *Batson*, the Supreme Court has commented that the establishment of purposeful discrimination "comes down to whether the trial court finds the . . . race-neutral explanations to be credible." *Miller-El v Cockrell*, 537 US 322, 339; 123 S Ct 1029; 154 L Ed 2d 931 (2003). The Court further stated, "Credibility can be measured by, among other factors, the . . . [challenger's] demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id.* at 339. If the trial court finds that the reasons proffered were a pretext, the peremptory challenge will be denied. *Batson*, *supra* at 100.

It appears from the record in this case that the trial court found that defendant failed to satisfy his burden of demonstrating a prima facie case of discrimination. Defendant was charged with possession with intent to deliver more than 200 grams of heroin. The juror in question stated that her grandmother was incarcerated for possession of drugs. Upon further questioning,

the juror stated that another relative had also been arrested in a drug case. The trial court later clarified that the juror's sister had been convicted in a drug case and sentenced to prison. The trial court did not clearly err in finding that the circumstances surrounding the peremptory dismissal of the juror from defendant's drug trial did not support an inference that the exclusion was based on the juror's race.

V. Sentencing

Defendant argues that he is entitled to resentencing because his sentence was improperly enhanced as punishment for exercising his right to a trial. He additionally argues that the trial court should have departed below the sentencing guidelines range. We find no error.

Defendant's ten-year minimum sentence is within the sentencing guidelines range of 99 to 320 months. As explained in *People v Gary Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008):

Under MCL 769.34(3), a minimum sentence that departs from the sentencing guidelines recommendation requires a substantial and compelling reason articulated on the record. In interpreting this statutory requirement, the Court has concluded that the reasons relied on must be objective and verifiable. They must be of considerable worth in determining the length of the sentence and should keenly or irresistibly grab the court's attention. Substantial and compelling reasons for departure exist only in exceptional cases. "In determining whether a sufficient basis exists to justify a departure, the principle of proportionality . . . defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed." For a departure to be justified, the minimum sentence imposed must be proportionate to the defendant's conduct and prior criminal history.

The trial court may not base a departure "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight."

On appeal, courts review the reasons given for a departure for clear error. The conclusion that a reason is objective and verifiable is reviewed as a matter of law. Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. [Footnotes and citations omitted.]

Defendant argues that there were substantial and compelling reasons to depart below the guidelines range because of his age (64 years), his poor health, and his limited role in the drug operation. As the trial court observed, however, defendant has a substantial criminal history and had spent a significant portion of his adult life in prison. The trial court found that defendant's role in the drug organization was adequately reflected in the scoring of the guidelines, and the court imposed a sentence near the lower end of the guidelines. The trial court did not abuse its

discretion in finding that the case did not present substantial and compelling reasons to depart below the guidelines range.

We also find no merit to defendant's claim that he was punished for exercising his right to a trial. The sole basis for defendant's argument is that when he previously contemplated pleading guilty, a probation officer recommended a sentence within the guidelines range, which was 99 to 320 months, but when an updated report was prepared after his conviction, another probation officer recommended a sentence of 10 to 20 years. Defendant appears to rely on the presumption of vindictiveness, which this Court explained in *People v Colon*, 250 Mich App 59, 66-67; 644 NW2d 790 (2002):

“When a defendant is resentenced by the same judge and the second sentence is longer than the first, there is a presumption of vindictiveness. That presumption may be overcome if the trial court enunciates reasons for doing so at resentencing.” *People v Lyons (After Remand)*, 222 Mich App 319, 323; 564 NW2d 114 (1997) (citations omitted). However, that presumption does not apply when the sentences are imposed by different judges. *People v Mazzie*, 429 Mich 29, 33; 413 NW2d 1 (1987); *People v Grady*, 204 Mich App 314, 317; 514 NW2d 541 (1994).

Here, defendant was never sentenced previously and the differences in the presentence recommendations are attributable to the different probation officers involved. There is no basis for concluding that the trial court imposed a more severe sentence because defendant exercised his right to a trial.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra