STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 6, 2009
v	No. 284240 Kent Circuit Court
WAYNE LOUIS COVELL, Defendant-Appellant.	LC No. 07-001668-FH

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of operating a motor vehicle while intoxicated (OWI), third offense, MCL 257.625(1), (9)(c), and operating a motor vehicle with a suspended license, MCL 257.904(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 46 to 180 months' imprisonment for his OWI conviction and imposed a $500 fine for the driving with a suspended license conviction. Defendant appeals as of right. We affirm.

I

Defendant first submits that the trial court should have suppressed the results of a blood alcohol test because the warrant authorizing the search rested on an affidavit containing false or misleading information. In reviewing a trial court's ruling on a motion to suppress, we consider de novo the court's ultimate ruling and any involved questions of law, but review for clear error the court's findings of fact. *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008).

The United States Constitution and the Michigan Constitution protect persons against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. "A magistrate may issue a search warrant only when it is supported by probable cause." *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). A defendant challenging the veracity of an affidavit accompanying a search warrant "has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause." *Id*. at 510.

Here, Kent County Deputy Sheriff Michael W. Tanis prepared the affidavit alleging that defendant had violated MCL 257.625 in Spencer Township around 7:00 p.m. on January 30, 2007. In response to the affidavit inquiry, "Why do you believe suspect was operating the motor

vehicle[,]" Tanis wrote, "Driver admits to driving, then denies it. States he can't remember. Vehicle seat was empty (driver)—passenger seat had multiple items on it. Driver was in possession of keys, assisted by a bystander in being removed from vehicle[.] Passerby saw only defendant in car." Although defendant criticizes Deputy Tanis for not identifying that he learned *from another officer* of defendant's equivocal statements concerning his driving of the involved vehicle, defendant has entirely failed to demonstrate the falsity of the information that he made conflicting statements about his status as the vehicle's driver. At the preliminary examination, Deputy Tanis recounted that he had received the information about defendant's status as the vehicle driver from Cedar Springs Police Office Jason Schaefer, who had spoken to a witness. Deputy Tanis's incorporation of hearsay information into the affidavit does not render the affidavit's averments suspect. *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991) (observing that an affidavit may rely on hearsay); see also *Ulman*, *supra*, 244 Mich App 509 (explaining that probable cause may rest on information gleaned from police officers, who "are presumptively reliable").

Defendant also characterizes as false or misleading Officer Tanis's affidavit references to discussions with a passerby or bystander, in light of Tanis's preliminary examination testimony reflecting that he may not have spoken with one of the passersby, Brenda Ehrke, until after the magistrate had issued the search warrant. Nashley Ehrke testified at the examination that while driving along 21 Mile Road in Spencer Township on the evening of January 30, 2007, she noticed a vehicle off the road and on its side, that she stopped and assisted defendant in alighting from the vehicle, that defendant, who smelled of alcohol, was the vehicle's sole occupant, that defendant repeatedly told Ehrke he had been driving, and that he handed her the vehicle's keys. Ehrke explained that she drove defendant to a friend's house so he could use a telephone to call his parents, and that neither she nor her mother called the police because defendant urged them not to do so. Ehrke recalled that after she and her mother reached their home, the police called, and she returned to the scene of the accident, spoke to Officer Schaefer, a fireman, and someone from the sheriff's department, and answered their inquiries about what had occurred.[1] The available record thus reveals absolutely no support for defendant's complaint that Deputy Tanis falsely inserted into the affidavit mentions of information obtained from passersby. The fact that Deputy Tanis may have spoken with Brenda Ehrke sometime after the search warrant's issuance simply has no bearing on the veracity of the details contained in his affidavit.

We conclude that the search warrant set forth an ample basis for the magistrate's finding of probable cause that defendant had violated MCL 257.625. "Probable cause exists when the facts and circumstances known to the police officers at the time of the search would lead a reasonably prudent person to believe that a crime has been or is being committed and that evidence will be found in a particular place." *People v Beuschlein*, 245 Mich App 744, 750; 630 NW2d 921 (2001). "[T]he search warrant and underlying affidavit must be read in a commonsense and realistic manner to determine whether a reasonably cautious person could have concluded that there was a substantial basis for finding probable cause." *People v Martin*, 271 Mich App 280, 298; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). Here, a reasonably cautious person could have concluded that a substantial basis existed for believing that defendant

[1] Neither Brenda Ehrke nor Officer Schaefer testified at the preliminary examination.

had violated MCL 257.625 given the affidavit's accurate recitations that (1) defendant at some point had acknowledged driving the vehicle, (2) defendant possessed the vehicle's keys, (3) the passerby who assisted defendant in alighting from the vehicle saw only defendant in the vicinity, and (4) defendant emanated a very strong odor of intoxicants, had trouble standing upright, and slurred his speech. *Martin, supra*, 271 Mich App 298; *Beuschlein, supra*, 245 Mich App 750.

II

Defendant additionally contends that he endured unfair surprise and prejudice because of the prosecution's last minute disclosure of timely requested evidence.

> We review a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. The exercise of that discretion involves a balancing of the interests of the courts, the public, and the parties. It requires inquiry into all the relevant circumstances, including the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice. [*People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997) (internal quotation omitted).]

The appellant bears the burden of furnishing the reviewing court a sufficient record to establish the factual basis of his argument. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000).

After reviewing the record we find that defendant has failed to establish the factual predicate for his discovery violation claim. In a supplemental discovery request, defendant sought "all dispatch recordings related to this incident," "any 911 recording related to this incident," and "any supplemental reports . . . ." However, defendant does not identify the record, recording or report that contained the identity of the caller. Near the end of the second day of trial, the prosecution referenced "a document" provided by Kent County Sheriff Detective Joel Roon stating that "the person who called 911 was a person named Robin Murlington." But no further elaboration appears in the record or in parties' appellate briefs concerning where the document originated or whether the document was a police report. Because the document revealing the caller's identity was never proved to be a police report, a witness statement, or a supplemental report, all of which defendant requested in his two discovery motions, defendant has presented an inadequate factual predicate showing that he indeed requested the allegedly undisclosed information. See *People v Finley*, 161 Mich App 1, 10; 410 NW2d 282 (1987), aff'd 431 Mich 506; 431 NW2d 19 (1988) (noting that the prosecution's failure to disclosure an oral statement did not violate an order requiring disclosure of recorded or written statements).

Additionally, similar to *Elston, supra*, 462 Mich 760-761, the record does not substantiate that the prosecution willfully suppressed the identity of the 911 caller. Instead, the record tends to suggest that the caller-identity evidence surprised the prosecution as well because Detective Roon only disclosed the caller's identity after defendant's trial had begun. The record does not precisely document the moment when the prosecution disclosed the "document" bearing the caller's identity to defense counsel, but defense counsel conceded at trial that she received a copy of the document that identified the 911 caller. Therefore, the prosecution apparently disclosed the evidence shortly after becoming was aware of it. *Id*. at 760-762.

Even assuming that defendant requested the document containing the 911 caller's identity and that the prosecution neglected to timely supply it, defendant has not established resultant prejudice. Defendant theorized at trial that he had not driven the vehicle involved in the accident on January 30, 2007. In furtherance of that theory, defense counsel chose, apparently without further investigation, to employ the 911 tape to impeach the Ehrkes' testimony that defendant had admitted to driving that night. Though defense counsel may have prepared for trial in a different fashion had she known of the 911-caller's identity, defendant offers no substantiation that the mid-trial revelation of the caller's identity unfairly prejudiced him in any material respect. The somewhat minor detail of the caller's identity only became relevant once defense counsel attempted to impeach Brenda Ehrke with the contents of the tape recording. The prosecution's trial revelation of the caller's identity surely undermined defense counsel's trial strategy to some degree, but the trial court correctly recognized that counsel still had the opportunity to argue that defendant had not been driving the car that night. Moreover, defendant does not expressly identify any alternate defenses or theories that he might have pursued if he previously had known of the caller's identity. See *People v Clark*, 164 Mich App 224, 231; 416 NW2d 390 (1987) (observing that a "defendant's general allegations of surprise and prejudice" do not suffice to prove that an alleged discovery violation infringed on due process rights).

Under these circumstances, we detect no abuse of discretion in the trial court's refusal to sanction the prosecution for the alleged failure to disclose the 911 caller's identity, either by ordering suppression or a mistrial.

III

Defendant next maintains that the trial court improperly admitted the results of his blood tests on the ground that the prosecution did not lay a proper foundation for their admissibility. Because the record reflects that defense counsel affirmatively expressed that she had no objections to the admissibility of the laboratory analysis report, defendant has waived appellate review of this issue, thus extinguishing any error. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

IV

Defendant lastly avers that Deputy Tanis's remark at trial that defendant exercised his right to remain silent deprived him of a fair trial. "The Due Process Clause of the Fourteenth Amendment prohibits the use of postarrest, post-*Miranda*[2] warnings silence to impeach a defendant's exculpatory story at trial." *People v Allen*, 201 Mich App 98, 102; 505 NW2d 869 (1993). Our review of the record discloses no due process violation, in light of the facts that Deputy Tanis's comment occurred in response to inquiries posed by defense counsel, the improper remark occurred in an abbreviated and isolated fashion, the prosecution did not

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

thereafter reference defendant's silence, and the record contains additional, properly admitted testimony and other evidence of defendant's guilt. *People v Dennis*, 464 Mich 567, 570; 628 NW2d 502 (2001).

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher