

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

KIMBERLY FAYE CLARK,

Defendant-Appellee.

UNPUBLISHED

October 20, 2009

No. 287901

Wayne Circuit Court

LC No. 08-007473-FH

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant was charged with three counts of possession with intent to deliver a schedule two controlled substance, MCL 333.7401(2)(b)(ii), possession of a firearm during the commission of a felony, MCL 750.227b, and possession of prescription forms, MCL 333.7403(2)(e). The trial court dismissed the charges on the prosecution's motion after granting defendant's motion to suppress the evidence. The prosecution now appeals as of right. Because the information in the affidavit was sufficient to establish probable cause to believe that evidence of narcotics trafficking would be found in defendant's home on January 17, 2008, we reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The charges arose from evidence obtained during the execution of a search warrant at defendant's home on January 17, 2008. Defendant moved to suppress the evidence on the ground that the facts alleged in the search warrant affidavit were insufficient to justify issuance of a warrant. The affidavit indicated the following: (1) on January 16, 2008, the police sent a confidential informant (CI) to the house to make a controlled buy of narcotics; (2) the CI went to the house but was turned away; (3) the CI reported that he was met by a man "holding a clear plastic baggie with numerous lotto wraps in his hand" and that this man asked the CI "who do you know, who gotta call first" and refused to sell him anything; (4) the affiant then conducted surveillance and, during a 20-minute period, observed four persons go to the house, stay for a short time, and then leave. The affiant, a police officer, stated that, in his experience, such conduct was consistent with narcotics trafficking. He also stated that the CI had "been proven accurate and reliable" in that he "provided information that has been responsible for the arrest, prosecution, conviction, and incarceration of several individuals for Violations of the Controlled Substance Act." The trial court found that the affidavit was insufficient because it did not indicate why the police had targeted the house and did not describe in detail what was meant by the terms "numerous" and "several."

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 by *People v Hawkins*, 468 Mich 488, 502, 511; 668 NW2d 602 (2003), and by *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, 417-418; 605 NW2d 667 (2000). The "search warrant and the underlying affidavit are to be read in a common-sense and realistic manner." *Russo, supra* at 604. The affidavit may be based on information supplied to the affiant by another person. 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). A course of performance in which the informant 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 by *Hawkins, supra*, 468 Mich at 502. A mere statement that a CI is credible is insufficient to prove credibility. *Id.* at 511 n 16. The affidavit must contain facts from which the magistrate may conclude that the CI is credible. MCL 780.653(b); *People v Spencer*, 154 Mich App 6, 14; 397 NW2d 525 (1986).

Probable cause to search must exist at the time the warrant is issued. *People v Brown*, 279 Mich App 116, 127-128; 755 NW2d 664 (2008). The passage of time is a valid consideration in deciding whether probable cause exists because it cannot be assumed that evidence of a crime will remain in a given place for an indefinite time. *Russo, supra* at 605; *Brown, supra* at 128. 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* at 604-606. The length of time that may transpire depends on the circumstances of each case, "such as whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggests that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense." *Id.* at 605-606.

An officer's observation of drug trafficking activity during surveillance is sufficient to support a search warrant. *People v Griffin*, 235 Mich App 27, 42-43; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007). An officer's experience is relevant to the establishment of probable cause and police

officers are presumptively reliable. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001).

In accordance with these principles, an affidavit was found sufficient to establish probable cause for issuance of a warrant in *People v Whitfield*, 461 Mich 441; 607 NW2d 61 (2000), where it showed that an undercover officer approached the defendant and, when asked what he wanted, replied, “one.” The defendant removed a bundle of small coin envelopes from his pocket but became suspicious when the officer could not provide references, and a transfer was never completed. He did offer to “take care of” the officer if he returned with someone the defendant knew. *Id.* at 442-443, 448. Similarly, in *People v Mario Perry*, 463 Mich 927; 620 NW2d 308 (2000), the affidavit was found sufficient where it showed that a CI went to the defendant’s house and asked to buy cocaine. The defendant said, “I don’t know you, bring back someone I know and I will sell to you.” The police then conducted surveillance and observed visitor traffic consistent with narcotics trafficking. *Id.*

We conclude that the information in the affidavit was sufficient to establish probable cause to believe that evidence of narcotics trafficking would be found in defendant’s home on January 17, 2008. The police sent a CI to make a controlled buy, and the CI was greeted by a person holding a baggie containing “numerous lotto wraps,” items which the court acknowledged are commonly used for packaging narcotics. The seller refused to enter into a transaction, stating, “who do you know, who gotta call first,” indicating that a sale might occur if a mutual acquaintance could vouch for the CI. That the CI spoke with personal knowledge was established by the fact that the police saw him go to the house to try to make a controlled buy. The CI’s credibility was established by information that the CI had provided assistance in other narcotics investigations leading to the conviction of several persons. The affiant then saw four persons visit the residence and leave after a brief stay, conduct that the affiant stated was, in his experience, consistent with narcotics trafficking. The facts that the occupant had numerous lotto folds and received several visitors for a brief period of time on January 16 created probable cause to believe that narcotics trafficking was an ongoing enterprise such that evidence was likely to be found on the premises within the next 24 hours. Where the affidavit establishes probable cause for issuance of a warrant, it does not matter that there may be innocent explanations consistent with the activities observed by the police. *People v Larson*, 128 Mich App 552, 556; 340 NW2d 324 (1983).

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

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio