STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 15, 2010
v	No. 289727 Wayne Circuit Court
DARRYLL JONES, Defendant-Appellee.	LC No. 08-013661-FH

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

The prosecutor appeals as of right from an order of dismissal entered by the trial court. Defendant had been charged with delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*); maintaining a drug house, MCL 333.7405(1)(d); felon in possession of a firearm, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b. The prosecutor had also filed a fourth-offense habitual offender notice under MCL 769.12. The heroin was discovered in defendant's home after the police obtained a search warrant for the home. The search warrant was based on a controlled buy conducted by a confidential source of information (SOI), who purchased cocaine from an individual in the home. The trial court concluded that the police officer who signed the affidavit supporting the search warrant misled the magistrate regarding the SOI's credibility. Accordingly, the court suppressed the evidence found in the home and dismissed the case. We reverse this decision and reinstate the case. We also order that the case be assigned to a different judge on remand.

After the prosecutor charged him, defendant filed a motion to suppress the evidence found in his home, stating that the person who signed the affidavit in support of the search warrant, Officer Joseph Castro of the Detroit Police Department, falsely or with a reckless disregard for the truth stated that he "saw the SOI go directly to the target location and then return to the affiant turning over suspected cocaine." Defendant argued that "no person came to the location of the execution of the search warrant and purchased cocaine" and "drugs are commonly sold on the entire street of the location."[1]

[1] Evidently defendant was suggesting that the SOI had actually purchased cocaine at a home other than defendant's.

At the motion hearing, Castro testified that he searched the SOI before the SOI went into the house in question and found no drugs on him. Castro stated that he saw the SOI approach the front door of the home, enter the building, "exit the location," and come back to Castro's vehicle. The SOI returned to the vehicle with "[a] sum of suspected cocaine,"[2] and the SOI also did not have the money that Castro had provided him beforehand for the controlled buy. Castro stated that he had "used" this SOI over 50 times previously and that the information provided by the SOI had resulted in convictions. Castro admitted that he did not see anyone come to the door of the house to greet the SOI. However, he stated that the SOI described the person who greeted him as "a black male, 5'10[", 165 pounds . . . with [s]hort, curly black hair, slim build, dark complexion." Castro admitted that the description does not match defendant.

A search warrant was obtained for the residence the same day; the police found no cocaine in the house, but they did find heroin and drug paraphernalia.

Berchara Jones, defendant's wife, testified that she lives at house, along with her three children, her mother, and defendant. She denied that anyone who matches the description provided by the SOI lives in or has access to the house. She also denied that anyone besides her mother and defendant and her children came into the residence on the day in question.

Defense counsel argued that "there's nothing to corroborate the information that's given the affiant by the SOI . . . ." He argued that maybe no SOI went into the house, or maybe the SOI planted cocaine in the house beforehand.

Before making its ruling, the trial court opined that the definition of "reliable" varies from person-to-person and from situation-to-situation. It then stated:

> But we have to get back. I think in this case, where all of this is going to, there is no standard except the abuse of discretion standard or somebody neglecting and intentionally doing something; and the focus is on the affiant and not on the SOI, and Mr. Castro doesn't have to go into the house, doesn't have to confirm anything. You know, what he confirmed is pretty much the standard. You don't have the money when you come back. You have some drugs when you come back . . . . The fact that it might have been different drugs, might go to the veracity, and I would question whether 2117 should ever be used again.
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> But as it relates to a prior recitation, in the four corners of the search warrant, there were those indications that the judge had as to his reliability. Castro got to determine what was reliable. The judge concurred. There was nothing to show that he was deceptive. I mean, he put some numbers in there. Whether they're true or not, that not what's being attacked. So based on the four corners, I can't find that there was an abuse of discretion by the magistrate to issue a finding that . . . the evidence, based on the search, should be suppressed.

[2] The substance was later analyzed and was indeed found to be cocaine.

The court signed an order denying the motion to suppress.

Later, the court *sua sponte* ordered the prosecutor to produce the search-warrant records for the cases in which Castro had used the SOI. The prosecutor complied and provided the court with the records in those 22 cases, but the court then requested the search-warrant records for any cases at all in which the SOI had been used. The prosecutor refused to comply with this order, arguing that it imposed an undue burden on her office.

Despite defense counsel's not having raised the issue, the court subsequently, at a motion hearing, revisited its earlier decision to deny defendant's motion to suppress. The court analyzed the 22 available records and stated that there were 10 instances in which the SOI participated in a controlled buy for a particular substance and that same substance was later found at the pertinent location. The court stated that on the first date Castro used the SOI and on the last date Castro used the SOI, he used the same words in his affidavit: "SOI has been used by the crew members of the Detroit Police Department Narcotic Division on over ten occasions resulting in seven arrests for violation of controlled substance acts and other offenses." The court noted that as of the last date, there were at least 22 additional instances in which the SOI had been used. The court stated:

> It doesn't have in there that the last 22 times that Mr. Castro used them that, you know, he was only credible half or less than half the time, or at least he was only successful half the time. You can't pull out what you would like to, to show somebody that they were right or that they're reliable. You can't tweak, omit, exaggerate statistics to try to prove a point that you want to point [sic].
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> There's no way in this world, if Mr. Castro was being honest – which is required by being the affiant in a search warrant – to attest to numbers – that you can exclude 22 numbers. The numbers are identical for the first search warrant that he requested using 2117 that was supplied to the court and the last one that was used for Mr. Jones. Identical. He omitted 22 from the magistrate's consideration. You can't hide results from the magistrate and rely on old numbers to try to attest to reliability. . . .
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> I think and I rule that by doing what Mr. Castro did, that he intentionally skewed the numbers, intentionally omitted known [failures] – not unknown, because these are where he was responsible, where he was the affiant. He intentionally omitted known failures of . . . SOI 2117 and didn't supply them in the affidavit so that the judge would be allowed – the magistrate would be allowed to make the decision about the SOI's credibility, and that's not what the law requires.
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> He didn't follow the law. He intentionally did not follow the law, and as a result of that, by revisiting the motion from the defense, I'm going to grant the motion to suppress what was found as a result of the search warrant . . . . It's not that the SOI has to establish their credibility, but the police have to demonstrate an honesty that Mr. Castro failed to do to allow the examining magistrate to make

> the decision about whether the numbers convince him, and those numbers have to be honest, have to reflect the truth, which these don't.

The court ordered the evidence suppressed and dismissed the charges against defendant, stating that it no longer needed the additional records involving the SOI.

On appeal, the prosecutor argues that the trial court erred in reversing its earlier ruling regarding the motion to dismiss. She contends that this case must be remanded for trial. 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).

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) (citations and quotation marks omitted).

We pay great deference to a magistrate's determination of probable cause in support of a search warrant. *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).]

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) (citations and quotation marks omitted).]

If it is determined that an affiant has knowingly or with reckless disregard for the truth inserted false material into an affidavit and that the false material was necessary for a finding of probable cause, the search warrant must be quashed and the fruits of the search excluded at trial. *People v Melotik*, 221 Mich App 190, 200; 561 NW2d 453 (1997). A defendant may "challenge the truthfulness of factual statements made in an affidavit supporting a warrant," even though there is a presumption that the affidavit is valid. *People v Turner*, 155 Mich App 222, 226; 399 NW2d 477 (1986).

> "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons." [*Id*. at 226-227, quoting *Franks v Delaware*, 438 US 154, 171; 98 S Ct 2674; 57 L Ed 2d 667 (1978).]

The prosecutor argues that a suppression hearing should have never even been held under *Turner*, 155 Mich App at 226-227, because defendant made an insufficient offer of proof. We conclude, however, that even assuming that a hearing was warranted, the trial court erred in reversing its initial decision to deny defendant's motion to suppress. As noted by the trial court during the first motion hearing, there was nothing within the four corners of the search warrant to show that the affiant had been deceptive, and the evidence later produced also failed to show that the affiant had been deceptive. The trial court took issue with the fact that in only 10 of 22 cases, the SOI participated in a controlled buy for a particular substance and that same substance was later found at the pertinent location. However, the prosecutor at one of the hearings noted that there were only five instances where nothing (i.e., no drug paraphernalia or drugs of any kind) was found. Moreover, that an observed, controlled buy occurs for a particular drug and that later, no drugs are found or a different drug is found at the location in question does not prove that the confidential informant is unreliable or deceptive. There are numerous reasons – running out of supplies, disposal of the drugs – why such a result might occur. The simple fact is that if a proper controlled buy occurs – the police search the SOI, provide him with money, and observe him entering a house, and the police then observe the SOI leaving the house and returning with drugs and without the money – there is credible information regarding drugs being located in that house. The number of prior cases here in which the SOI was "not credible" (to use the trial court's terminology) does not change this result. There was simply no evidence that the SOI lied to the police in this case.

Moreover, the statement criticized by the trial court in this case – "SOI has been used by the crew members of the Detroit Police Department Narcotic Division on over ten occasions resulting in seven arrests for violation of controlled substance acts and other offenses" – was not materially false or materially misleading. Accordingly, the trial court's basis for granting the motion to suppress was invalid. We emphasize that the trial court did not find, as initially argued by defendant, that Officer Castro lied or acted with reckless disregard for the truth in stating that he observed the controlled buy. The court's ruling was based solely on the 22 records provided by the prosecutor and Castro's inclusion in the affidavit of the statement quoted above. We reverse that ruling. Because the dismissal of the case was based solely on the grant of the motion to suppress, we also reverse the order of dismissal and remand this case for trial.

The prosecutor argues that the trial court erred in ordering her office to produce all search-warrant records involving the SOI. The prosecutor's argument makes clear that she is not challenging the request for the 22 records concerning Officer Castro but is instead challenging the later order involving all the SOI's search-warrant records. This issue is moot, because the trial court later found that it did not "need that information now" and essentially voided the subpoena. At any rate, we do find that the order constituted an abuse of discretion, see MCR

6.201(J), because there was simply no reasonable basis for the court to make the burdensome request that the prosecutor produce all search-warrant records related to the SOI.[3]

The prosecutor lastly argues that this case should be assigned to a different judge on remand.[4]

> The general concern when deciding whether to remand to a different trial judge is whether the appearance of justice will be better served if another judge presides over the case. We may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication . . . .
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> Repeated rulings against a party, no matter how erroneous, or vigorously or consistently expressed, are not disqualifying. Rather, plaintiff must demonstrate that the judge would be unable to rule fairly on remand given his past comments or expressed views. [*Bayati v Bayati*, 264 Mich App 595; 691 NW2d 812 (2004) (citations omitted).]

We have reviewed the transcripts and conclude that an irreconcilable conflict has developed between the trial judge and the prosecutor in this case. After the judge, with no prompting from defendant, ordered the search-warrant records, repeated arguments took place between the judge and the prosecutor, with the judge essentially becoming an advocate for defendant. Under these circumstances, we conclude that remand to a different judge is necessary.

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

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

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[3] The court seemed to acknowledge that these records were not pertinent when he stated at the last hearing that Castro "intentionally skewed the numbers, intentionally omitted known [failures] – *not unknown, because these are where he was responsible, where he was the affiant*" (emphasis added).

[4] The prosecutor did file a motion for recusal below, but the court did not rule on this motion because instead it unexpectedly dismissed the case.