STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2010
v	No. 290832 Oakland Circuit Court
JAMES GREGORY DENT, Defendant-Appellant.	LC No. 2007-216132-FH

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. Because the search warrant affidavit failed to connect defendant's home with the heroin purchased at a different location, the affidavit did not establish probable cause. I would further hold that the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v Leon*, 468 US 897, 923; 104 S Ct 3405; 82 L Ed 2d 677 (1984), quoting *Brown v Illinois*, 422 US 590, 610-611; 95 S Ct 2254; 45 L Ed 2d 416 (1975).

A search warrant may issue only on a showing of probable cause. US Const, Am IV; Const 1963, art 1, § 11. "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, 418; 605 NW2d 667 (2000), quoting *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). The United States Supreme Court has succinctly set forth the legal analysis governing whether an affidavit supplies sufficient evidence to establish probable cause:

> The task of the issuing magistrate simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and the "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. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for … concluding that probable cause existed. [*Illinois v Gates*, 462 US 213, 239; 103 S Ct 2317; 76 L Ed 2d 527 (1983) (internal quotation omitted).]

The pertinent paragraphs of Officer Charles Janczarek's affidavit read as follows:

> (2) That Affiant has been conducting a continued investigation concerning illegal drug trafficking at 240 South Anderson, in the City of Pontiac, County of Oakland, State of Michigan. Confidential informant of established reliability provided the affiant with true and accurate information concerning criminal activity at 240 South Anderson.
>
> (3) The affiant has controlled the purchase of heroin from the location once within the past 48 hours. The controlled purchase was performed with the cooperation of a confidential informant.
>
> (A) The confidential informant contacted a black male and arranged to purchase narcotics. Within five minutes after the phone call Ofc. Main observed a black male exit 240 South Anderson, enter a 1997 Chevrolet Monte Carlo (Michigan registration: BEA 6709), and drive to the pre-arranged meet location. Once at the pre-arranged meet location affiant observed the black male conduct a hand to hand narcotics transaction with the confidential informant.
>
> (B) The substance alleged by the informant to be heroin was field-tested by affiant using the Mecke's Modified Reagent Tester and a positive reaction was received for the presence of heroin.
>
> (C) The informant was searched immediately before and after making the purchase with negative results.
>
> (D) The affiant observed the confidential informant perform the hand to hand transaction and return to the pre-arranged meet location without stopping at any other location or having contact with any other persons.
>
> (E) After the purchase had been made affiant identified the individual that sold the heroin to the confidential informant as Howard James McCullum (DOB 03/18/52).

The affidavit averred that the confidential informant had supplied "true and accurate information concerning criminal activity at 240 South Anderson." But nowhere in the affidavit did Officer Janczarek attest that the confidential informant had ever actually entered 240 South Anderson, seen contraband within the residence, or participated in a drug transaction that took place at that address. Officer Janczarek related that in response to the informant's call to an unnamed, unidentified "black male," Howell James McCullum emerged from defendant's residence, traveled to a different location, and participated in a hand-to-hand narcotics transaction. This evidence demonstrates that McCullum possessed contraband, but does not give rise to a fair probability that officer would find narcotics inside defendant's home. It is at least equally plausible that McCullum completed the narcotics transaction by drawing on a stash of heroin secreted on his person or inside the 1997 Chevrolet Monte Carlo that he drove to the

heroin sale.[1] Furthermore, the affidavit mentioned no evidence linking McCullum to defendant's residence in any respect besides his mere presence there for an unspecified time period. Although the affidavit states that the police "conducted a Computerized Criminal History search" regarding McCullum, the affidavit does not reference McCullum's address. Nor does the affidavit describe any alternative basis for concluding that McCullum owned, lived, or temporarily resided at 240 South Anderson. Because no facts link the contraband to 240 South Anderson, the affidavit does not supply a substantial basis for inferring a fair probability that drugs would be found there, or that the address served as the operation center for a drug enterprise.

The majority dismisses the fact that "nothing tied the seller to the house, other than his being present in it immediately before engaging in the transaction," concluding that McCullum's presence in the house, in combination with his sale to the informant and his history of selling drugs, established "enough to reasonably believe that drugs and associated paraphernalia could be located in the premises." *Ante* at 4. In my view, this evidence establishes that McCullum dealt illegal drugs, but at most raises only a bare suspicion that contraband might be located in defendant's home. With respect to Officer Janczarek's attestation that he "has been conducting a continued investigation concerning illegal drug trafficking at 240 South Anderson," the affidavit incorporates no mention of any illegal drug transactions associated with that address or that a resident of the home had participated in any criminal activity. To establish probable cause, there must be a "nexus between the place to be search and the evidence sought." *United States v Laughton*, 409 F3d 744, 747 (CA 6, 2005) (internal quotation omitted). The only nexus noted in the affidavit consisted of McCullum's presence at the residence shortly before engaging in a heroin sale. The affidavit otherwise remains devoid of any facts connecting McCullum and 240 South Anderson or any facts supporting an inference that additional drugs would be found at the residence. In my estimation, a drug dealer's presence in the home of another does not yield probable cause to search the host's home. I conclude that the affidavit's averments fall far short of establishing a substantial basis for inferring that evidence of illegal activity would be found in 240 South Anderson, a home visited for an unknown period by a narcotic seller.

That said, I agree with the majority's characterization of our differences as "vast." *Ante* at 7. In my view, a search warrant may issue only on the basis of specific and articulable *facts* linking a residence to evidence of a crime. Facts form the foundation for inferences. "Whether a sufficient nexus has been established between a defendant's suspected criminal activity and his residence thus necessarily depends upon the facts of each case." *United States v Bigelow*, 562 F3d 1272, 1279 (CA 10, 2009). The majority asserts that two "facts" support probable cause: that "a convicted drug felon" had been "located" in the house immediately before the controlled drug buy, and that "according to the reliable informant, the home had been the location of 'criminal activity.'" *Ante* at 7. The majority is willing to infer that a residence visited by "a

[1] The majority relies on two cases from other jurisdictions for the proposition that "if it is 'equally plausible' that the officer's version of the facts could be true, the warrant can be issued." *Ante* at 8. Here, however, the equally probable inferences flow from equally meager circumstantial evidence. Both inferences unconstitutionally draw on pure speculation, rather than legally sufficient evidence giving rise to a "substantial basis" for the facts inferred.

convicted drug felon" contains contraband. From my perspective, this evidence may engender a modicum of suspicion, but it does not support probable cause. "Probable cause is defined as reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion." *United States v Bennett*, 905 F2d 931, 934 (CA 6, 1990). "The probable cause standard requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that the fact asserted is true." *People v Tennyson*, ___ Mich ___; ___ NW2d ___ (Docket No. 137755, decided September 7, 2010), dissenting opinion by CORRIGAN, J., slip op at 8. Similarly, the informant's conclusory assertion that the home had been the location of criminal activity affords no basis at all for making a probable cause determination. Even together, the "facts" relied upon by the majority simply do not delineate "a substantial basis for determining the existence of probable cause." *Gates*, 462 US at 239.

Because the affidavit entirely failed to (1) describe any criminal activity observed at the residence, (2) identify the name of the homeowner or resident, and (3) link the homeowner or resident to criminal activity, official belief in the existence of probable cause qualified as entirely unreasonable. In *People v Goldston*, 470 Mich 523, 541; 682 NW2d 479 (2004), our Supreme Court adopted the good-faith exception to the exclusionary rule announced in *Leon*, 468 US 897. The United States Supreme Court in *Leon* reasoned that the exclusionary rule should not preclude the admission of evidence obtained by police officers acting in objectively reasonable reliance on a subsequently invalidated search warrant. *Id*. at 918-922. However, the Supreme Court identified four circumstances in which a police officer "will have no reasonable grounds for believing that the warrant was properly issued." *Id*. at 923. One such circumstance arises when an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id*. (internal quotation omitted).

Here, the affidavit lacks facts supporting anything more than a mere hunch that 240 South Anderson might contain narcotics. McCullum did not live at the address, and the Monte Carlo in which he drove to the controlled buy was not registered to the address. No evidence reasonably suggested that anyone had ever seen narcotics inside the home or witnessed a narcotics transaction anywhere near the residence. The affidavit did not identify the homeowner or substantiate that someone who lived at the home possessed a criminal record or a history of drug dealing. Nor does the affidavit indicate the length of time that McCullum had spent at the address before receiving the informant's call.

At its core, the Fourth Amendment preserves respect for the sanctity and privacy of the home. Any reasonable police officer would understand this fundamental principle, and that it is patently illegal to intrude on the sanctuary of the home without probable cause. Officer Janczarek would have known that without further surveillance, he possessed no information about whether McCullum lived at the house or regularly frequented it, or whether anyone else associated with the address had a history of drug-related activity. The notable absence of any information in the affidavit concerning the home's ownership reinforces my conclusion that Officer Janczarek knew that precious little information linked the address to the contraband. Judged by objective criteria, a reasonable officer would have recognized that the affidavit lacked a substantial basis for a fair inference that 240 South Anderson served as a base of operations for drug sales. I would hold that the patently insufficient information submitted to the magistrate

precluded both a determination of probable cause and good-faith reliance on the search warrant, and would reverse defendant's conviction on that basis.

/s/ Elizabeth L. Gleicher