STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 28, 2014
v	No. 316172 Wayne Circuit Court
JASON ALLEN KENWARD, Defendant-Appellee.	LC No. 13-000936-FH

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

The prosecution appeals as of right the trial court's sua sponte order suppressing evidence of a firearm on the basis of a perceived defective search warrant and dismissing the charges of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We reverse and remand.

At about 11:30 p.m. on January 11, 2013, the police received multiple reports of a shooting at a housing project. The police investigated the scene of the shooting, and after communicating with witnesses and reviewing surveillance video, sought and obtained a search warrant. The search warrant and underlying affidavit read in relevant part as follows:

> **THEREFORE: IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I command that a search the following [sic]:** the entire dwelling located at 12026 Oklahoma, Hamtramck Michigan. The residence is described as being a single entity, two story unit located within a multiple row of townhouse-style units in the Hamtramck Housing Projects having the numbers "12026" affixed above the entry door on both the east and west (front & rear entrances) and the apartment number "255" to the left of the doors. The dwelling is the fifth door south of Circle Drive and is on Oklahoma, described as being a dark reddish brick façade on the east side of Oklahoma. To Include . . . Jason Allen Kenward, DOB 11-27-1983.
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> . . .
>
> Upon reviewing the surveillance video provided by the Hamtramck Housing Projects, several handgun muzzle flashes are seen at 11.34PM from unknown white male outside of 12024 Oklahoma and that man is then seen firing

> shots into this address before retreating inside of his home at 12026 Oklahoma. Multiple 911 calls immediately followed these gunshots. The resident of this address when run via SOS came back to the suspect named herein and matched the description given officers by witnesses of the gunfire. Kenward was not seen leaving the apartment.
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> On arrivals, officers observed the victim . . . escaping from a second story window from unit number 254 and fled northbound along the RR tracks until he was apprehended by officers and ultimately transported to Detroit Receiving Hospital by Hamtramck EMS.
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> . . .
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> The Hamtramck Police Department received numerous 911 Calls beginning at 11:42 PM this date of numerous shots being fired in the Hamtramck Housing Projects . . . . Witnesses described the shooter as a white male, heavy set who lives at 12026 Oklahoma, Apartment #255. Upon running the address, the resident registered via LEIN, is Jason Allen Kenward (w/m/29), 5'11, 200 lbs. and is seen via surveillance video at 11:34 PM firing a handgun while standing in front of 12024 Oklahoma. He is then seen retreating back into his dwelling next door at 12026 Oklahoma. [Boldface in original.]

The affiant, a Hamtramck Police Department detective, participated in the search of defendant's apartment and seized a handgun from the kitchen garbage. Defendant was arrested for his role in the shooting. At the police station, defendant told the detective that he shot the victim in self-defense. The district court dismissed a charge of first-degree home invasion and a charge of discharge of a firearm at a dwelling, as the witness who would have allegedly testified to those charges did not appear at the preliminary examination. The district court, however, did bind defendant over on felon-in-possession and felony-firearm charges.

Defendant thereafter moved to quash the information, raising three separate issues with respect to the preliminary examination. The issue of the search warrant's validity, however, was raised by the trial court sua sponte, which concluded that it was invalid. The trial court reasoned that the search warrant improperly authorized the search of an entire multi-unit dwelling and was not supported by probable cause. The trial court rejected application of the good-faith exception to the exclusionary rule because the affiant was also responsible for executing the search warrant. The trial court thus suppressed the firearm seized and dismissed the case.

On appeal, the prosecution argues that the trial court erred in ruling that the search warrant did not adequately specify the place to be searched and was not supported by probable cause. As a general rule, evidence seized in violation of the Fourth Amendment must be excluded from trial. *People v Hyde*, 285 Mich App 428, 439; 775 NW2d 833 (2009). We review for clear error a trial court's findings of fact with respect to the validity of a search warrant. *People v Hellstrom*, 264 Mich App 187, 198 n 6; 690 NW2d 293 (2004). "Questions of law relevant to a motion to suppress evidence are reviewed de novo." *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003). However, "[a] magistrate's determination of probable

cause should be paid great deference by reviewing courts." *People v Keller*, 479 Mich 467, 474; 739 NW2d 505 (2007) (citations and internal quotation marks omitted).

Under the Fourth Amendment, a search warrant must "'particularly describ[e] the place to be searched, and the person or things to be seized.'" *Id.* at 475, quoting US Const, Am IV. In addition, the search warrant must be issued upon probable cause. *Id*. "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), quoting *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). In *People v McGhee*, 255 Mich App 623, 626; 662 NW2d 777 (2003), this Court recited the test with respect to the particularization requirement of a warrant concerning identification of the place to be searched:

> "[T]he test for determining the sufficiency of the description of the place to be searched is (1) whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort, and (2) whether there is any reasonable probability that another premises might be mistakenly searched. The requirement is designed to avoid the risk of the wrong property being searched or seized." [Citations omitted.]

When the place to be searched is a sub-unit within a multi-unit dwelling, "the warrant must specify the particular sub-unit to be searched, unless the multi-unit character of the dwelling is not apparent and the police officers did not know and did not have reason to know of its multi-unit character." *People v Toodle*, 155 Mich App 539, 545; 400 NW2d 670 (1986).

In this case, the trial court erred in concluding that the search warrant did not particularly describe the place to be searched. While it is true that the first sentence broadly described the place to be searched as "the entire dwelling located at 12026 Oklahoma," the second sentence provided that the place to be searched had "the apartment number '255' to the left of the doors," i.e., a specific sub-unit of the building. This provision can only be reasonably construed as limiting the search of 12026 Oklahoma to the specific apartment dwelling numbered 255. Further, the search warrant identified the dwelling to be searched as "the fifth door south of Circle Drive." This description, considered with the rest of the warrant, was sufficient to both identify the place to be searched and prevent another place from being mistakenly searched. See *McGhee*, 255 Mich App at 626; see also *Moore v United States*, 149 US App DC 150, 152; 461 F2d 1236 (1972) ("The Court has sustained a warrant to search premises at a given address even though there were two apartments at the address, where the warrant itself went on to limit its scope" to the apartment of a particular individual.). We also note federal caselaw providing that "a warrant that is overbroad in its description is valid when the only apartment actually searched in a multi-occupancy structure was that for which probable cause was clearly established at the time of the warrant's issuance." *United States v Montijo-Gonzalez*, 978 F Supp 2d 95, 101 (D Puerto Rico, 2013); see also *United States v Parmenter*, 531 F Supp 975, 979, 981 (D Mass, 1982) (suppressing a search and distinguishing the facts from another case "since the search actually conducted under the warrant in that case in fact did not extend beyond the limited part of the building to which the warrant should have been restricted). Here, only defendant's apartment

– apartment #255 – was searched and, as explained below, probable cause to search defendant's apartment was clearly established.

Next, the trial court erred in concluding that the search warrant was not issued on probable cause. The search warrant affidavit stated that surveillance video of the scene showed a person, defendant, fire a handgun and then retreat into 12026 Oklahoma, that witnesses of the gunfire identified the shooter as residing in apartment number 255, that a check of the law enforcement information network (LEIN) showed that defendant was the registered resident of that apartment, and that defendant's description matched that of the shooter seen in the video, as well as the shooter observed by the witnesses. And while not expressly stated, the common-sense implication of the search warrant affidavit was that the person carried the handgun with him into the dwelling. See *Russo*, 439 Mich at 604 ("a search warrant and the underlying affidavit are to be read in a common-sense and realistic manner"). Further, the search warrant affidavit provided that defendant "was not seen leaving the apartment," suggesting that the evidence was still inside the dwelling. These facts, taken together, provided a substantial basis for the magistrate to determine that there was a fair probability that evidence of the crime—the handgun—would be found in apartment number 255.

Moreover, the fact that the search warrant affidavit referred to *unnamed* witnesses did not undermine the validity of the search warrant. When a search warrant includes information from an anonymous source that leads to the discovery of incriminating evidence, the reviewing court must remain focused on whether the search warrant itself was issued on probable cause in light of the discovered evidence. See *Keller*, 479 Mich at 477 ("Focusing on the tip was inappropriate because, regardless of the veracity of the source, the officer participated in a trash pull that revealed evidence of marijuana and correspondence tying the trash to the defendants."). Here, the unnamed witnesses referenced in the search warrant did nothing more than trigger the police investigation of the surveillance video and a LEIN search, which provided the incriminating evidence that supported issuance of the search warrant.

Finally, the trial court relied in part on its view that the search warrant affidavit did not include identification of defendant as the shooter by the apparent target of the shooting, who was referenced in the affidavit, which indicated that the victim suffered a "gunshot wound to his left hand." The search warrant affidavit provided that the victim informed police "that he is not acquainted with the shooter." This language does not definitively reflect that the victim did not identify defendant as the shooter, even perhaps suggesting that defendant was identified as the shooter, but whom was previously unknown to the victim. Regardless, any presumed absence of defendant's identification by the victim may have had nothing to do with whether defendant was the shooter and, more importantly, it did not undermine the evidence set forth in the affidavit that clearly supported a finding of probable cause.

Accordingly, we reverse the trial court's order suppressing the seized evidence and dismissing the case, and we remand for consideration of the issues raised in defendant's motion to quash.[1]

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[1] Having determined that the search warrant was valid, we need not address the prosecution's alternate argument that the evidence was admissible under the good-faith exception to the exclusionary rule. See *People v Goldston*, 470 Mich 523, 530; 682 NW2d 479 (2004) (explaining that under the good-faith exception to the exclusionary rule, evidence seized pursuant to a deficient search warrant need not be excluded when the "law enforcement officer acts within the scope of, and in objective, good-faith reliance on, a search warrant obtained from a judge or magistrate").