DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CACR05-819

JUNE 28, 2006

APPEAL FROM THE POINSETT COUNTY CIRCUIT COURT
[NO. CR 2003-206]

ROGER PAUL WILLIAMS
APPELLANT

HON. VICTOR HILL,
JUDGE

V.

AFFIRMED

STATE OF ARKANSAS
APPELLEE

A Poinsett County jury found appellant Roger Paul Williams guilty of possession of drug paraphernalia with intent to manufacture methamphetamine and possession of pseudoephedrine. He was sentenced to an aggregate term of six years' imprisonment. On appeal to this court, appellant argued that the trial court erred in denying his motion to suppress evidence obtained during a search of his residence. In an unpublished opinion handed down on March 22, 2006, this court ordered rebriefing because appellant's Addendum was insufficient. Now that this court has reviewed the merits of his argument, we must affirm.

On June 11, 2003, Detective Mark Robinson with the Marked Tree Police Department sought an anticipatory search warrant for appellant's residence. Robinson prepared an affidavit listing the following grounds:

> An investigation of illegal controlled substance distribution and manufacturing by Roger Paul Williams has been on going for several months. This department has received several pieces of intelligence from different sources concerning Roger Paul Williams. One source, who is close to Williams and frequents the home of Williams, has reported the following information based on personal observations: Williams usually keeps a quantity of methamphetamine and drug paraphernalia at the residence; Williams sometimes stores a small amount of methamphetamine in nasal spray bottles for personal use; Williams has used his computer on-line to get recipes for making anhydrous ammonia, and researching tanks for storage of anhydrous ammonia; Williams has placed several surveillance cameras around his residence for the purpose of monitoring police approach; has been present when Williams has manufactured methamphetamine at the residence. A separate established police informant, that has provided information that has led to the arrest and successful prosecution of several felony drug offenders over the past year, contacted this department with information on Williams. The informant reported to this department that yesterday (10 June 2003) Williams solicited the informant for a proposed exchange of anhydrous ammonia for a quantity of ephedrine powder. Williams had told the informant the (sic) he (Williams) had obtained a large quantity of ephedrine powder, and would prefer to exchange it for the anhydrous ammonia instead of cash. The articles would be intended for the use in manufacturing methamphetamine. Williams stated to the informant that he was preparing to manufacture methamphetamine, and needed anhydrous ammonia to complete the list of ingredients needed to manufacture methamphetamine. The officers of the Marked Tree Police Department, including myself, have observed frequent visits to the Williams residence by individuals known to the Marked Tree Police Department to be associated with the use of methamphetamine, which is consistent with Williams residence being used has (sic) a point of distribution. A controlled delivery of anhydrous ammonia to Williams in exchange for a quantity of ephedrine powder and the informant is anticipated to be made this evening by the informant. The search warrant is to be executed contingent upon the successful delivery. The timing of the controlled delivery is difficult to predict with accuracy, therefore a nighttime search warrant is requested.

The warrant was issued on June 11, 2003, but the attempted delivery of anhydrous ammonia was unsuccessful on that day. On July 6, 2003, the anhydrous ammonia was delivered, and officers executed the search warrant.

A suppression hearing was held on October 25, 2004, and continued until October 28, 2004. Robinson disclosed the identity of the confidential informant, James Hunt. He testified that Hunt had been contacted by appellant through Marty Turpin. On cross-examination, Robinson conceded that the affidavit made no mention of Turpin. According to Robinson, he intentionally left out Turpin's name in order to further protect the informant. Robinson further testified that Hunt represented to him that he had dialogues with both appellant and Turpin but that the arrangements were actually made by Turpin. Robinson testified that, although Hunt was a convicted felon, he had worked with Hunt in the past and that Hunt had provided information that led to the arrest and successful prosecution of other felony drug offenders. Robinson stated that he believed Hunt was credible and that his reporting was accurate and reliable.

Officer Jeremy Bond testified that, based on his experience, what he observed at appellant's residence prior to execution of the warrant was consistent with its being used as a point of distribution of methamphetamine. Bond stated that he was involved in both the attempted transaction on June 11, 2003, and the successful controlled delivery and subsequent execution of the search warrant on July 6, 2003.

James Hunt testified that he was currently serving a six-year sentence following drug charges from Poinsett and Crittenden counties. He stated that he began working with Robinson as a confidential informant around 2001 and had worked with him approximately fifteen times that resulted in convictions or pleas on drug charges. Hunt testified that he had known appellant and his friend Turpin for approximately ten to twelve years. According to Hunt, Turpin told him that appellant, who was needing "gas," had some ephedrine he could exchange for the gas. Hunt, who told Turpin he had anhydrous ammonia, stated that they arranged for Hunt to fill up the bottle and leave it at "a rendezvous point." Hunt stated that he understood that appellant and Turpin would pick up the bottle or that Turpin would get the bottle and take it to appellant. Hunt testified that when he went by appellant's residence, he stopped and offered to give them the anhydrous ammonia at that time. According to Hunt, two females arrived unexpectedly, and appellant "shucked off the deal." Hunt testified that shortly after that encounter, he suffered a gallstone attack, for which he was hospitalized for several days.

Hunt further testified that at the second attempt to deliver the anhydrous ammonia, he simply stopped by appellant's residence and was invited inside. Hunt stated that appellant, Turpin, and "Tims" were present. Hunt said that he told appellant that he would rather have $200 than the ephedrine and that appellant instructed him to take the gas out to the truck and put it in the middle toolbox. Hunt stated that when he returned, "Tims" was saying that he had some money but that appellant said he thought he had the money, walked over to a desk,

and pulled $100 out of his wallet. Hunt testified that appellant said, "Will this work and I'll pay the rest later?" to which Hunt responded, "Yeah, that'll be fine."

Following the suppression hearing, the trial court entered an order on November 3, 2004, denying appellant's motion to suppress. The trial court set forth the following issues:

> (1) Whether Detective Robinson's deliberate failure to mention Turpin in his affidavit is sufficient to invalidate the warrant that was based upon that affidavit; (2) If the warrant is not invalid, the question is had the warrant become stale in the approximately 25 day interim between its issuance and its execution; and (3) Even if the warrant is found to be deficient, did the police act in good faith in their reliance on it.

The trial court addressed the staleness issue first. Ark. R. Crim. P. 13.2(c) provides that, "Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days." The trial court found that Rule 13.2(c) anticipates that manufacturing methamphetamine is an ongoing operation that is assembled over a period of time. The trial court further found that, although the contraband could not be delivered as planned because of circumstances out of the control of the police, the delivery was successfully completed at a later time. Next, the trial court chided Robinson for failing to disclose Turpin's identity to the magistrate because it was "not his call to make." The trial court found, however, that no false statement was made. Instead, the trial court found that Robinson had omitted a material piece of information and that, while his actions were "ill-advised," they did not rise to the level of misconduct sufficient to vitiate a search pursuant to a lawfully issued warrant. The trial court further found that Hunt testified at the suppression hearing that all of his dealings

were not strictly with Turpin. Finally, the trial court found that, even if the warrant was invalid, the officers acted in good-faith reliance on the search warrant.

In reviewing the trial court's denial of a motion to suppress evidence, we conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court and proper deference to the trial court's findings. *Jackson v. State*, 359 Ark. 297, ___ S.W.3d ___ (2004). The totality-of-the-circumstances test requires that the issuing magistrate make a practical, common-sense decision based on all the circumstances set forth in the affidavit. *See State v. Rufus*, 338 Ark. 305, 993 S.W.2d 490 (1999) (citing *Illinois v. Gates*, 462 U.S. 213 (1983)). The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Id*. We do not reverse the trial court's ruling on a motion to suppress unless it is clearly against the preponderance of the evidence. *Wray v. State*, 69 Ark. App. 170, 11 S.W.3d 9 (2000).

Although it was listed as his second point on appeal, we will first address appellant's argument that there was no independent corroborating evidence to support the anticipatory search warrant. An anticipatory search warrant will generally be upheld "if independent evidence shows the delivery of contraband will or is likely to occur and the warrant is conditioned on that delivery." *Mann v. State*, 357 Ark. 159, 170, 161 S.W.3d 826, 833 (2004) (citing *United States v. Bieri*, 21 F.3d 811, 814 (8th Cir. 1994)). Appellant contends

that the warrant was conditioned upon the exchange of ephedrine powder for anhydrous ammonia and that, although Hunt delivered the contraband provided to him by the officers, the condition was not met in that an exchange for ephedrine powder did not occur. In addressing the anticipatory search warrant, the trial court found that the delivery of anhydrous ammonia was successful, and thus the condition was met. The trial court did not rule on whether the failure to exchange the anhydrous ammonia for ephedrine powder rendered the condition unmet. A party is required to obtain a ruling on a precise issue presented in a motion to suppress in order to preserve that argument for appeal. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995).

Although the trial court found that Robinson did not make a false statement, but rather omitted material information, appellant insists that Robinson intentionally included a false statement in the affidavit by stating that he (appellant) had solicited Hunt for the anhydrous ammonia in exchange for ephedrine powder when it was actually Turpin who spoke with Hunt. Appellant contends that, if that false material is removed, all that is left are the information from an unnamed source with no reference as to when the source allegedly saw the criminal activities occur and the officers' "known criminal averment," neither of which is sufficient to support a finding of probable cause. Appellant argues, alternatively, that if the information is considered an omission, supplementing the affidavit with the omitted information does not result in a statement that he solicited the anhydrous ammonia from Hunt.

The United States Supreme Court in *Franks v. Delaware*, 438 U.S. 154 (1978), held that a warrant should be invalidated if a defendant shows by a preponderance of the evidence that: (1) the affidavit contained a false statement which was made knowingly, intentionally, or recklessly by the affiant, and (2) the false statement was necessary to a finding of probable cause. If those findings are made, the false material is excised and the remainder of the affidavit is examined to determine if probable cause exists. *Pyle v. State*, 314 Ark. 165, 862 S.W.2d 823 (1993). Similarly, when an officer omits facts from an affidavit, the evidence will be suppressed if the defendant establishes by a preponderance of the evidence that: (1) the officer omitted facts knowingly and intentionally, or with reckless disregard, and (2) the affidavit, if supplemented with the omitted information, is insufficient to establish probable cause. *Rufus*, *supra*. Finally, in *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court held that the good-faith exception does not apply when the issuing magistrate was misled by an affiant who either knew the information given was false or acted in reckless disregard of its truth or falsity.

Here, the trial court found that the search warrant was supported by probable cause and that, alternatively, the officers relied upon it in good faith. Appellant failed to challenge the trial court's independent and alternative basis for its decision. In other words, appellant is not assigning any error to the trial court's finding that the officers acted in good faith. *See Pearrow v. Feagin*, 300 Ark. 274, 778 S.W.2d 941 (1989) (where trial court expressly based its decision on two independent grounds and appellant challenged only one on appeal, our

supreme court affirmed without addressing either); *see also Pugh v. State*, 351 Ark. 5, 89 S.W.3d 909 (2002); *Camp v. State*, 66 Ark. App. 134, 991 S.W.2d 611 (1999). Accordingly, even if this court agreed that appellant's argument has merit, we would nevertheless affirm.

Affirmed.

ROBBINS and BIRD, JJ., agree.