NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 2366

STATE OF LOUISIANA

VERSUS

KELTON L. SPANN

Judgment Rendered: December 21, 2012

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington, State of Louisiana
Trial Court Number 10 CR8 107535

Honorable William J. Crain, Judge Presiding

* * * * * * * * * *

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BEFORE: WHIPPLE, McCLENDON AND HIGGINBOTHAM, JJ.

McClendon, J. concurs and assigns reasons.

WHIPPLE, J.

The defendant, Kelton L. Spann, was charged by bill of information with possession of hydrocodone, a violation of LSA-R.S. 40:968(C) (Count 1); possession with intent to distribute cocaine, a violation of LSA-R.S. 40:967(A)(1) (Count 2); possession of marijuana, a violation of LSA-R.S. 40:966(C) (Count 3); possession of a firearm by a convicted felon, a violation of LSA-R.S. 14:95.1 (Count 4); and production and/or manufacture of cocaine, a violation of LSA-R.S. 40:967(A)(1) (Count 5). The defendant filed a motion to suppress the evidence and, following a hearing on the matter, the motion was denied. Thereafter, the defendant withdrew his prior pleas of not guilty and, at the Boykin hearing, entered a Crosby plea of guilty to all five counts, reserving his right to challenge the trial court's ruling on the motion to suppress. See State v. Crosby, 338 So. 2d 584, 592 (La. 1976).

For the possession of hydrocodone conviction (Count 1), the defendant was sentenced to five years at hard labor; for the possession with intent to distribute cocaine conviction (Count 2), he was sentenced to fifteen years at hard labor with the first two years of the sentence to be served without benefit of parole, probation, or suspension of sentence; for the possession of marijuana conviction (Count 3), he was sentenced to six months in the parish jail; for the possession of a firearm by a convicted felon conviction (Count 4), he was sentenced to ten years at hard labor without benefit of parole, probation, or suspension of sentence; and for the production and/or manufacture of cocaine conviction (Count 5), he was sentenced to fifteen years at hard labor with the first five years of the sentence to be served without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run concurrently.

The defendant now appeals, designating two assignment of error. For the following reasons, we affirm the defendant's convictions and sentences.

FACTS

Because the defendant pled guilty, the facts were not developed at a trial. On January 21, 2010, Detective Lieutenant Donald Ray Phelps, with the Bogalusa Police Department, executed a search warrant on the defendant's residence. The return on the search warrant indicates that officers seized various items from the defendant's residence, including ten grams of suspected crack cocaine, a 9mm pistol, .22 rifle, suspected marijuana, suspected hydrocodone, assorted plastic baggies, two measuring cups containing suspected cocaine, and a Digiweigh scale.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the search warrant was invalid on its face. Specifically, the defendant contends the search warrant was issued by a court that does not exist.

The affidavit for the search warrant indicated that the Honorable Robert J. Black was the judge of "the Fourth Ward Municipal Court in and for the City of Bogalusa, State of Louisiana, Parish of Washington." Judge Black is a judge of, what today is referred to as, the City Court of Bogalusa. Bogalusa is in the Fourth Ward of Washington Parish. As indicated by older jurisprudence in this State, cases in the City of Bogalusa were filed in the City Court, City of Bogalusa, Fourth Ward, Washington Parish, Louisiana. See Champagne v. Employers Liability Assur. Corp., 112 So. 2d 118 (La. App. 1st Cir. 1959); Rider v. Rhodes, 110 So. 2d 834 (La. App. 1st Cir. 1959); See also State in the Interest of Pigott, 413 So. 2d 659, 660-61 (La. App. 1st Cir. 1982) (where the defendant was adjudicated in the "Juvenile Court for the Fourth Ward, Washington Parish.") In any event, the judge referenced in the affidavit and the city court in Bogalusa clearly did exist, resulting in the issuance of the search warrant before us, and any scribal error by the affiant notwithstanding, the identity of the judge and court were clear from a reading of the entire search warrant and affidavit. Further, no prejudice was suffered by the

defendant. The minor referential mischaracterization of the name of the issuing court is not fatal to the validity of the search warrant or the affidavit.

This assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in denying his motion to suppress the evidence seized from his residence. Specifically, the defendant contends that the search warrant affidavit did not establish probable cause, and further that the search warrant cannot be "saved" by the Leon good-faith exception.

When a search and seizure of evidence is conducted pursuant to a search warrant, the defendant has the burden to prove the grounds of his motion to suppress. LSA-C.Cr.P. art. 703(D); State v. Hunter, 632 So. 2d 786, 788 (La. App. 1st Cir. 1993), writ denied, 94-0752 (La. 6/17/94), 638 So. 2d 1092. When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See State v. Green, 94-0887 (La. 5/22/95), 655 So. 2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See State v. Hunt, 2009-1589 (La. 12/1/09), 25 So. 3d 746, 751.

Article 1, § 5 of the Louisiana Constitution requires that a search warrant issue only upon an affidavit establishing probable cause to the satisfaction of an impartial magistrate. LSA-C.Cr.P. art. 162. Probable cause exists when the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched. State v. Johnson, 408 So. 2d 1280, 1283 (La. 1982). The facts establishing the existence of probable cause for the warrant must be contained

within the four corners of the affidavit. State v. Duncan, 420 So. 2d 1105, 1108 (La. 1982). See State v. Green, 2002-1022 (La. 12/4/02), 831 So. 2d 962, 969.

Affidavits, by their nature, are often brief, and may omit some factual details. Unless the omission is willful and calculated to conceal information that would indicate that there is not probable cause, or would indicate that the source of other factual information in the affidavit is tainted, the omission will not change an otherwise good warrant into a bad one. In matters relating to the possibility that a warrant contains intentional misrepresentations, the question of the credibility of the witnesses is within the sound discretion of the trier of fact. Such factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence. The harsh result of quashing a search warrant, when the affidavit supports a finding of probable cause, should obtain only when the trial judge expressly finds an intentional misrepresentation was made to the issuing magistrate. State v. Fugler, 97-1936 (La. App. 1st Cir. 9/25/98), 721 So. 2d 1, 19, rehearing granted and amended in part on other grounds, 97-1936 (La. App. 1st Cir. 5/14/99), 737 So. 2d 894, writ denied, 99-1686 (La. 11/19/99), 749 So. 2d 668.

If the basis for the existence of probable cause is the tip of an informant, the affiant must articulate the basis for his belief that the informant is trustworthy. This may be done by showing circumstances where the informant has given reliable information in the past. The affidavit must also indicate the underlying circumstances from which the informant concluded that the drugs were where he said they would be. This may be done by reciting that the informant personally observed the drugs under the circumstances recited. An allegation of past reliability is not necessarily a *sine qua non* to sufficiency of probable cause as long as a common-sense reading of the affidavit supports the conclusion that the informant is credible and his information is reliable. Duncan, 420 So. 2d at 1108.

An issuing magistrate must make a practical, common-sense decision

whether, given all the circumstances set forth in the affidavit, there is a "fair probability" that evidence of a crime will be found in a particular place. Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983); State v. Byrd, 568 So. 2d 554, 559 (La. 1990). The process of determining probable cause for the issuance of a search warrant does not involve certainties or proof beyond a reasonable doubt, or even a prima facie showing, but rather involves probabilities of human behavior, as understood by persons trained in law enforcement and as based on the totality of circumstances. The process simply requires that enough information be presented to the issuing magistrate to enable him to determine that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal justice system. See State v. Rodrigue, 437 So. 2d 830, 832-33 (La. 1983); see also Green, 831 So. 2d at 968.

The review of a magistrate's determination of probable cause prior to issuing a warrant is entitled to significant deference by reviewing courts. "[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review." Gates, 462 U.S. at 236, 103 S. Ct. at 2331. Further, because of "the preference to be accorded to warrants[,]" marginal cases should be resolved in favor of a finding that the issuing magistrate's judgment was reasonable. United States v. Ventresca, 380 U.S. 102, 109, 85 S. Ct. 741, 746, 13 L. Ed. 2d 684 (1965); see Rodrigue, 437 So. 2d at 833.

In both his original and reply brief, the defendant repeatedly alleges that the search warrant affidavit did not contain objective facts to support the suspicion that cocaine could be found at his residence. Thus, according to the defendant, assertions contained in the affidavit such as "agents observed numerous known drug dealers in and out of the residence" and there was "traffic in and out of the residence consistent with that of narcotics trafficking" were merely conclusory allegations unsupported by any facts. The defendant also argues that the Leon

good-faith exception would not apply to the instant matter because a reasonably well-trained police officer would have known that the affidavit was completely devoid of any objective facts to support the conclusory assertions contained within it.[1]

In its ruling denying the defendant's motion to suppress, the trial court made the following findings:

> Defendant contends that the contraband found in connection with the search should be excluded from evidence. Generally, the factual information which is the foundation for the determination of probable cause must be found in the affidavit. Mere suspicion or belief is not sufficient to establish probable cause.
>
> Furthermore, while hearsay is sufficient to support probable cause, the affidavit must set forth underlying circumstances and details sufficient to provide a substantial factual basis by which the judge might find reliable, both the informant and the information given by him.
>
> In judging the sufficiency of the affidavit, a totality of the circumstances standard is applied. The subject affidavit contains both hearsay and firsthand observations and knowledge of the affiant Lieutenant D. Ray Phelps.
>
> The hearsay information is identified throughout the affidavit as having, quote, Received information from various sources, closed quotes; open quote, Received information, closed quotes; that the information was corroborated, open quotes, By more than one confidential informant, closed quotes; and that the affiant, open quotes, Received information from a C.I. who provided additional information, closed quotes.
>
> The affidavit does not contain facts establishing where the affiant was receiving his information or facts that established the reliability of confidential informant. Nevertheless, the affiant provides information establishing that he corroborated the information obtained from the confidential informant by his personal observations.
>
> The affiant conducted surveillance on the address to be searched. Nothing at the motion to suppress hearing suggests that that surveillance was an illegal invasion of the defendant's privacy. Affiant saw known drug dealers in and out of the subject's address. Affiant observed that the traffic in and out of this residence was consistent with narcotic trafficking.
>
> These personal observations of the affiant provided corroboration of the informant's information that defendant had, open quotes, Within the past 24 hours purchased approximately two and a half ounces of cocaine and was keeping it concealed inside the residence, closed quotes.
>
> The Court finds that affiant's corroboration of the informant's information that there were two and a half ounces of cocaine in the subject residence was sufficient to establish probable cause for the

[1] United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

search warrant.

Furthermore, the defendant failed to establish that affiant was not in good faith in obtaining the warrant. While defendant relies upon the claim, the error that the defendant's, open quote, Arrest include arrest for the possession of up to 400 grams of cocaine, closed quotes, defendant failed to prove that this was in fact an error.

If it was in error, there was no evidence that it was asserted in bad faith, and there is information independent of that statement that supports the finding of probable cause for the issuance of the search warrant.

Good faith is presumed and the defendant bears the burden of proving lack of good faith. In this case, the defendant has not met that burden and consequently the Court is going to deny the motion to suppress.

We see no reason to disturb the ruling of the trial court. The above-quoted information contained in the affidavit ("agents observed numerous known drug dealers in and out of the residence" and there was "traffic in and out of the residence consistent with that narcotics trafficking") are not conclusory allegations but, rather, are the facts that supported a finding of probable cause. If the defendant sought to challenge these factual assertions in the affidavit, then he had every opportunity to do so at the motion-to-suppress hearing. However, the defendant chose to represent himself at the suppression hearing and did not ask a single question regarding what he now refers to on appeal as conclusory allegations. An affidavit supporting a search warrant is presumed to be valid. State v. Brannon, 414 So. 2d 335, 337 (La. 1982). The defendant at the suppression hearing had the burden of proving that the representations in the affidavit by the affiant were false. See Brannon, 414 So. 2d at 337; see also Franks v. Delaware, 438 U.S. 154, 171-72, 98 S. Ct. 2674, 2685-85, 57 L. Ed. 2d 667 (1978). Had the defendant proved by a preponderance of the evidence that the affidavit contained false statements, then the burden would have shifted to the State to prove the allegations in the affidavit were true. See State v. Smith, 397 So. 2d 1326, 1330 (La. 1981). However, as noted, any such burden-shifting never occurred because at the suppression hearing, the defendant did not challenge any of

the factual assertions in the affidavit. Because the defendant did not prove that the factual representations made in the affidavit were false, the factual representations in the affidavit are, as a matter of law, presumed true. See State v. Trotter, 37,325 (La. App. 2nd Cir. 8/22/03), 852 So. 2d 1247, 1253-54, writ denied, 2003-2764 (La. 2/13/04), 867 So. 2d 689.

Accordingly, the affidavit in the instant matter contained sufficient facts to support a finding of probable cause by the magistrate. Under the "totality of the circumstances" standard, the essential undisputed facts in the affidavit that established probable cause included that: the affiant had information the defendant was involved in the distribution of cocaine in the area where he lived; the affiant had information from various sources the defendant kept large amounts of cocaine in his residence and was distributing cocaine in the area; the affiant had received information from a confidential informant that the informant had purchased cocaine from the defendant's residence within the last twenty-four hours; the affiant, along with DTF agents and Louisiana State Police Troopers, conducted surveillance on the defendant's residence, and the agents observed numerous known drug dealers at the residence, and the movement in and out of the residence was consistent with narcotics trafficking; and the defendant had numerous arrests and convictions for narcotic-related offenses. Thus, the information that the affiant, Detective Lieutenant Phelps, received from a confidential informant and other sources was corroborated by surveillance of the defendant's residence. See State v. Beach, 610 So. 2d 908, 912-13 (La. App. 1st Cir. 1992), writs denied, 614 So. 2d 1252 (La. 1993) & 94-1942 (La. 11/11/94), 644 So. 2d 389. Furthermore, Detective Lieutenant Phelps testified at the suppression hearing that he was personally familiar with the defendant and his criminal past. Information that the defendant has a record of arrests for drug violations is relevant in determining whether probable cause exists to issue a search warrant. See State v. Lehnen, 403

So. 2d 683, 686-87 (La. 1981); State v. Baker, 389 So. 2d 1289, 1293-94 (La. 1980).

The search warrant affidavit provides that the defendant's arrests for narcotic related offenses include "arrest for the possession of up to 400 grams of cocaine." The defendant asserts in his reply brief that this claim is false. While the rap sheet introduced into evidence at the suppression hearing did not contain the amounts of cocaine possessed by the defendant for his convictions for possession with intent to distribute cocaine and distribution of cocaine, it is not clear that the reference in the affidavit to possession of "*up to* 400 grams of cocaine" is inaccurate. (emphasis ours). Moreover, if unintentional misstatements are included, these misstatements must be excised and the remainder used to determine if probable cause for the issuance of a warrant is set forth. State v. Peterson, 2003-1806 (La. App. 1st Cir. 12/31/03), 868 So. 2d 786, 793, writ denied, 2004-0317 (La. 9/3/04), 882 So. 2d 606. We find that even with the reference to "400 grams" excised, the affidavit supports a finding of probable cause, since it still gives rise to a reasonable belief that illegal narcotics would be found at the defendant's residence.

We find also that even had the search warrant been based on less than probable cause, under the Leon good-faith exception, the suppression of the evidence seized pursuant to that search warrant would not be required. It is well settled that even when a search warrant is found to be deficient, the seized evidence may nevertheless be admissible under the good-faith exception of United States v. Leon, 468 U.S. 897, 918-22, 104 S. Ct. 3405, 3418-20, 82 L. Ed. 2d 677 (1984), wherein the United States Supreme Court held that the exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in an objectively reasonable good-faith reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be invalid.

Under Leon, 468 U.S. at 923, 104 S. Ct. at 3421, four instances in which suppression remains an appropriate remedy are: (1) where the issuing magistrate was misled by information the affiant knew was false or would have known was false except for a reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his detached and neutral judicial role; (3) where the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the warrant is so facially deficient - in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonably presume it to be valid.

The instances enunciated in Leon, in which suppression remains an appropriate remedy, clearly reflect that suppression of evidence seized pursuant to an invalid warrant is not a remedy to be lightly considered. Furthermore, the jurisprudence presumes good faith on the part of the executing officer, and the defendant bears the burden of demonstrating the necessity for suppression of evidence by establishing a lack of good faith. State v. Maxwell, 2009-1359 (La. App. 1st Cir. 5/10/10), 38 So. 3d 1086, 1092, writ denied, 2010-1284 (La. 9/17/10), 45 So. 3d 1056.

Applying these factors to this case, we find that even if we considered the search warrant deficient, the good-faith exception would apply. The defendant did not establish any bad faith on the part of the executing officer. There were no misleading statements contained in the affidavit. There was no evidence that Judge Black abandoned his neutral role in his issuance of the search warrant, nor was there anything on the face of the warrant that would make it so deficient that it could not be presumed valid. Detective Lieutenant Phelps provided the judge information gathered by the surveillance efforts of Louisiana police officers and narcotics agents. Detective Lieutenant Phelps was not unreasonable in believing he provided the judge with sufficient information to support the issuance of a

search warrant. Accordingly, suppression of the evidence would not be appropriate under the Leon good-faith exception to the exclusionary rule. See Maxwell, 38 So. 3d at 1092.

The trial court did not err in denying the defendant's motion to suppress. Accordingly, this assignment of error is without merit.

SENTENCING ERROR

Under LSA-C.Cr.P. art. 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. See State v. Price, 2005-2514 (La. App. 1st Cir. 12/28/06), 952 So. 2d 112, 123 (en banc), writ denied, 2007-0130 (La. 2/22/08), 976 So. 2d 1277. After a careful review of the record, we have found a sentencing error.

For his conviction of possession of a firearm by a convicted felon, the defendant was sentenced to ten years at hard labor without benefit of probation, parole, or suspension of sentence. Whoever is found guilty of violating the possession of a firearm by a convicted felon provision shall be imprisoned at hard labor for not less than ten nor more than fifteen years without benefits and be fined not less than one thousand dollars nor more than five thousand dollars. LSA-R.S. 14:95.1(B) (prior to its amendment by 2010 La. Acts No. 815, § 1). The trial court failed to impose the mandatory fine at sentencing.[2] Accordingly, the defendant's sentence, which did not include the mandatory fine, is illegally lenient. However, since the sentence is not inherently prejudicial to the defendant, and neither the State nor the defendant has raised this sentencing issue on appeal, we decline to correct this error. See Price, 952 So. 2d at 123-25.

CONVICTIONS AND SENTENCES AFFIRMED.

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[2]The minutes also reflect that no fine was imposed.

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COURT OF APPEAL

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VERSUS

KELTON L. SPANN

****

McCLENDON, J., concurs and assigns reasons.

While I am concerned about the failure of the trial court to impose the legislatively mandated fine, given the state's failure to object and in the interest of judicial economy, I concur with the majority opinion.