STATE OF LOUISIANA	*	**NO. 2003-K-0698**
VERSUS	*	**COURT OF APPEAL**
SHAQUISHA JACKSON AND MARK JOHNSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON APPLICATION FOR SUPREVISORY WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 426-786, SECTION "G"
HONORABLE JULIAN A. PARKER, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, Judge Terri F. Love)

JONES, J. - DISSENTS

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STATEMENT OF THE CASE

On December 13, 2001, the defendants Mark Johnson and Shaqueisha Jackson were both charged with one count each of possession with the intent to distribute heroin, possession with the intent to distribute marijuana, and possession with the intent to distribute cocaine, charges to which they subsequently pled not guilty. The court heard their motion to suppress the evidence on January 25, March 27, and May 31, 2002, and on July 30 the court denied the motion as to evidence seized at the scene of the arrests but granted the motion as to evidence seized from a residence not near the scene. The State sought writs, and in an unpublished opinion this court reversed the trial court's ruling (which apparently was based on the incorrect assumption that there was no search warrant issued for the residence) and remanded the case for the court's determination of whether there was probable cause for the issuance of the search warrant for the residence. State v. Mark Johnson, unpub. 2002-1575 (La. App. 4 Cir. 8/28/02). On remand, further testimony was taken on October 11. The matter was reset several times for a ruling, and on April 4, 2003 the court denied the motion to suppress the evidence seized from the residence. The defendants noted their objection and now come before this court seeking relief from this ruling.

FACTS

The evidence in the case was seized from two locations: (1) evidence was seized from the defendants and pursuant to a search warrant from a car located in the 2300 block of Josephine, the scene of the defendants' arrest; and (2) evidence was seized pursuant to a search warrant at a residence on Crozat Street in the Iberville Housing Project. Most of the testimony taken at the first three suppression hearings pertained to the evidence seized on the scene of the arrest. The court denied the motion to suppress this evidence and its admissibility is not the subject of this writ.

According to the affidavit for the warrant to search the residence, on November 30, 2001, police officers received a tip from an untested confidential informant that a male named Mark Johnson and a female named "Shaquesha" were selling heroin, cocaine, and marijuana in the 2300 block of Josephine Street. The C.I. described the two sellers and indicated they stored the drugs in a silver Chevy Lumina. The C.I. gave its license plate number and stated it was parked in that block. The C.I. also indicated that the pair traveled to and from the scene in an aqua Nissan Altima.

At approximately 4:00 p.m. that day one officer set up a surveillance of the 2300 block of Josephine. He observed the defendants Mark Johnson and Shaqueisha Jackson standing in that block up against an aqua Altima,

which was parked directly across the street from a silver Lumina. The defendants matched the descriptions given by the C.I. Approximately ten minutes later, the officer observed an unknown man walk up to the defendants, engage in a brief conversation with them, and then hand Johnson some currency. Johnson walked across the street to the Lumina, used a key to enter, leaned inside for a short time, then exited, closed and locked the door, and walked back to the unknown man, giving him a small object. The man then left. Soon thereafter, another unknown man approached the pair, engaged them in conversation, and gave Johnson some money. Johnson gave the keys to Ms. Jackson, who walked over to the Lumina, unlocked and opened the door, leaned inside briefly, and then exited and walked back to the man, giving him an object. That man then left.

A few minutes later, a third man on a bicycle passed the officer who was conducting the surveillance and looked inside the officer's car. The man continued riding, stopped at the defendants, and spoke briefly with them, pointing to the officer's car. The man rode away, and the defendants walked to the corner and turned onto LaSalle Street, out of the officer's sight. The officer, believing the surveillance had been discovered, contacted backup units to come to the area and arrest the defendants. At that point the defendants walked back into the block and were detained as they neared the

Altima. The officers advised them of the narcotics investigation and advised them of their rights. As one of the officers passed the Lumina, Johnson denied that the Lumina belonged to him. Soon a canine arrived and "alerted" on the front passenger door and the trunk of the Lumina.

The officers obtained a warrant to search the car, and pursuant to this search they found in the middle console of the Lumina one plastic bag containing forty-eight tinfoil packets of what was later found to be heroin, another plastic bag containing one tinfoil packet of heroin, a plastic bag of what was discovered to be loose heroin, another plastic bag of what was found to be cocaine, and two plastic bags containing what was found to be marijuana. They also seized from the car a picture of Ms. Jackson, a picture of Johnson, some paperwork in Johnson's name, and a two-month-old phone bill in Ms. Jackson's name for service at 243 Crozat Street, Apt. M. The officers arrested the defendants and again advised them of their rights. The officers searched the defendants and seized $192 from Johnson and $52 from Ms. Jackson, as well as matching sets of keys from each defendant. Johnson told them he lived on Alvar Street with his father, while Ms. Jackson stated she lived with her grandmother in the 2300 block of Josephine. Both denied any knowledge of the apartment on Crozat Street.

While on the scene, one officer received a call from a second C.I.,

confirming that the defendants had been selling narcotics. This C.I. also indicated the defendants lived at an address in the Iberville Housing Project and that they kept more drugs there. The C.I. also indicated that Johnson had a red Chevy Tahoe at that address. The officers went to the Crozat Street address, which was in the Iberville Project, and saw the Tahoe parked on the street. The officers pushed the remote button on the keys they had seized from the defendants and discovered it belonged to the Tahoe. They ran the license plate number and found it had been rented from a company in Maryland. They also learned that the driver's license number of the person who rented the car was Johnson's driver's license number. They tried the house keys in the door to the apartment and found they fit.

Based upon these facts, the officers obtained a warrant to search the Crozat Street apartment. Prior to obtaining the warrant, the officers entered the apartment to secure it and found lying in plain view on a table in the living room more tinfoil packets of heroin and more smaller baggies of cocaine. This information was not placed in the affidavit for the search warrant. After obtaining the warrant, the officers used a canine which "alerted" on the living room table and closet, as well as on the closets, dressers, and mattresses in two upstairs bedrooms. The officers seized: the contraband from the living room table; bags of marijuana, $1900, and a

shoebox containing materials for cutting and packaging drugs from the living room closet; cocaine from the kitchen; some ammunition from inside a dryer; more ammunition and $1285 from one bedroom; and $602 from another bedroom.

At the January suppression hearing, one officer testified that some officers entered the Crozat Street apartment to secure it while other officers were attempting to obtain the search warrant. He stated that they did not know that there was anyone else in the apartment, but they feared that if someone were there, that person would learn of Ms. Jackson's arrest, possibly from her grandmother who lived in the block where the arrests occurred, and anyone inside the apartment would then destroy any evidence inside. He also testified that the officers decided to go to that apartment because of the tip from the second C.I. that the defendants lived there and kept more drugs there, as well as the defendants' denial of any knowledge of the apartment, even in the face of the phone bill in Ms. Jackson's name from that address. He admitted that other than the second C.I.'s tip, they had no information concerning that apartment. He also admitted he did not know how the C.I. knew that drugs could be found there.

The vast majority of the testimony at the three earlier hearings dealt with the surveillance and the actual arrests on Josephine Street, including

testimony presented by the defense by two women who claimed to be present when the arrests occurred and two juveniles who claimed they were briefly detained on the scene and then released.

At the October hearing, held after this court remanded the case, Det. Ferrier testified that he was the affiant for the search warrant and he received the tip from the second C.I. concerning the defendants' residence in the Iberville Project. After answering various questions concerning the initial stop and the search of the Chevy Lumina in the 2300 block of Josephine Street, Det. Ferrier stated he received a phone call on the scene from a second, reliable C.I. who told him the defendants lived in the Iberville Project, that they had a red Tahoe parked at the residence, and that they stored drugs at that residence. He stated the tip from the first C.I., which concerned the sales in the 2300 block of Josephine, did not mention the Iberville Project residence or any drugs there. He stated, however, that he believed the Iberville Project residence contained drugs due to: the second tip, which came on the heels of the corroboration of the first tip leading to the discovery of drugs in the 2300 block of Josephine; the defendants' "stash" of drugs in the Lumina at the scene; and their declarations that they lived elsewhere, even though the phone bill seized from the Lumina indicated at least Ms. Jackson lived at the Crozat Street apartment. Det.

Ferrier admitted the second C.I. did not tell him the basis of his information that drugs were in the apartment, mostly because the call was so hurried. Det. Ferrier testified he did not remember if the call came on his own cell phone. Det. Ferrier reiterated that the officers found the Chevy Tahoe parked where the second C.I. indicated it would be parked, and further he testified that keys seized from the defendants fit both the lock in the Tahoe and the lock in the door of the Crozat Street apartment.

DISCUSSION

The relators raise three claims in this application: (1) the officers illegally entered the Crozat Street address prior to the issuance of the warrant; (2) the search warrant affidavit did not establish probable cause to believe there were drugs in the apartment; and (3) the trial court improperly denied the defense access to impeachment evidence. With respect to the first issue, the relators argue there were no exigent circumstances to allow the officers to enter the apartment prior to the issuance of the warrant. However, as noted by the trial court, this court addressed this issue in its prior unpublished opinion and found that while the State did not establish exigent circumstances, the evidence seized from the apartment need not be suppressed on this ground because the evidence was subsequently seized

pursuant to the search warrant. This court noted:

> The State argues that because the evidence would have inevitably been discovered when they executed the warrant, its seizure was lawful. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963). In United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244 (1980), the Court noted there are three exceptions to Wong Sun's exclusionary rule: the independent source doctrine, the inevitable discovery doctrine, and the attenuation doctrine. See also State v. Welch, 449 So. 2d 468 (La. 1984); State v. Irby, 93-2220 (La. App. 4 Cir. 2/4/94), 632 So. 2d 801. As this court noted in State v. Tassin, 99-1692, pp. 4-5 (La. App. 4 Cir. 3/15/00), 758 So. 2d 351, 354:
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> > In *Nix v. Williams*, 467 U.S. 431, 446-47, 104 S.Ct. 2501, 2510-11, 81 L.Ed.2d 377 (1984), the Supreme Court held that the exclusionary rule does not apply when the State proves that the unconstitutionally obtained evidence would inevitably have been found in a constitutional manner. "The court's decision was based on its belief that it is unfair to penalize the government through application of the exclusionary rule where the police would have obtained the evidence even if no misconduct occurred." *State v. Garner*, 621 So.2d 1203, 1208 (La.App. 4 Cir.1993), *writ denied*, 627 So.2d 661 (La.1993).

State v. Johnson, 02-1575, pp. 7-8. Because the trial court and all parties mistakenly believed no warrant was issued in this case, this court remanded the case to the trial court for a determination of whether there was probable

cause for the issuance of the warrant. It must be remembered that nothing observed during the entry into the house was placed in the warrant affidavit, nor was anything seized prior to the issuance of the warrant; thus, even if there were no exigent circumstances to justify the officers' entry, this entry would not have tainted the subsequent seizure pursuant to the search warrant. The relators argue the officers started searching the apartment prior to the issuance of the warrant. However, there is nothing in any of the transcripts to indicate the officers did anything other than enter the apartment to secure it prior to the issuance of the warrant, unlike in State v. Jones, 2002-1931 (La. App. 4 Cir. 11/6/02), 832 So. 2d 382, where this court found the officers' illegal entry into an apartment was not cured by the subsequent issuance of a search warrant for the apartment because the officers admitted they started searching the apartment before the warrant was signed. Jones is distinguishable from this case, and the lack of exigent circumstances here does not mandate the suppression of the evidence seized from the apartment if there was probable cause for the issuance of the warrant.

The relators next argue there was no probable cause for the issuance of the warrant. In State v. Rando, 03-0073, pp. 6-7 (La. App. 4 Cir. 4/9/03), ___ So. 2d ___, ___, 2003 WL 1879018, this court set forth the standard for

determining whether an affidavit contains sufficient evidence to support the issuance of a warrant:

> In *State v. Green*, 2002-1022, pp.7-9 (La. 12/4/02), 831 So. 2d 962, 968-970, the Louisiana Supreme Court, in considering whether an affidavit established the requisite probable cause for the issuance of a search warrant, stated:
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> > Probable cause sufficient to issue a search warrant "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 (La. 1982). A magistrate must be given enough information to make an independent judgment that probable cause exists to issue a warrant. See, e.g., *State v. Manso*, 449 So. 2d 480, 482 (La. 1984), *cert. denied sub nom., Manso v. Louisiana*, 469 U.S. 835, 105 S.Ct. 129, 83 L. Ed. 2d 70 (1984). The United States Supreme Court held that "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *United States v. Leon*, 468 U.S. 897, 915, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (citations omitted). Moreover, this Court previously held: "[t]he process [of determining probable cause] 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." *State v. Rodrigue*, 437 So. 2d 830, 833 (La. 1983) (citing *Jaben v. United States*, 381 U.S. 214, 85 S. Ct. 1365, 14 L. Ed. 2d 345 (1965)).

An issuing magistrate must make a practical, common sense decision whether, given all of the circumstances set forth in the affidavit, there is a fair probability that evidence of a crime will be found in a particular place. *State v. Byrd*, 568 So. 2d 554, 559 (La. 1990). This affidavit must contain, within its four corners, the facts establishing the existence of probable cause for the warrant. *State v. Duncan*, 420 So. 2d 1105 (La. 1982); *State v. Wells*, 253 La. 925, 221 So. 2d 50 (1969). In *Wells*, the source of the "four corners" doctrine" [sic] in this state, this Court noted that Article 162 required that the facts establishing probable cause be recited in the affidavit because the judge, not the affiant, is the one who must be satisfied as to the existence of probable cause. LA. CODE EVID. ANN. Art. 703 (D) states that when evidence is seized pursuant to a search warrant, the defendant bears the burden of proof at a trial on his motion to suppress that evidence. The task of a reviewing court is simply to insure that under the totality of the

circumstances the issuing magistrate has a "substantial basis" for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed. 2d 527 (1983). Accordingly, in *Rodrigue*, we stated, "The magistrate's determination of probable cause, prior to issuance of a search warrant, is entitled to significant deference by the reviewing court and marginal cases should be resolved in favor of finding the magistrate's assessment to be reasonable." *Rodrigue*, 437 So. 2d at 833. Moreover, if the magistrate finds the affidavit sufficiently detailed and reliable to show probable cause, reviewing courts should interpret the affidavit in a realistic and common sense fashion, aware that it is normally prepared by non-lawyer police officers in the midst and haste of a criminal investigation. Within these guidelines, courts should strive to uphold warrants to encourage their use by police officers. *State v. Jenkins*, 2001-0023 (La. 6/22/01), 790 So. 2d 626 (citing *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed 2d 684 (1965)); *State v. Loera*, 530 So. 2d 1271, 1278 (La. App. 2 Cir. 1988), *writ denied*, 536 So. 2d 1252 (La. 1989).

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The determination of probable cause, although requiring something more than bare suspicion, does not require evidence sufficient to support a conviction. Probable cause, as the name implies, deals with probabilities. *Brinegar v. United States*, 338 U.S.

> 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); *Simms*, 571 So. 2d at 148. The determination of probable cause, unlike the determination of guilt at trial, does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands. *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); *Rodrigue*, 437 So. 2d at 830. The determination of probable cause involves factual and practical considerations of everyday life on which average men, and particularly average police officers, can be expected to act. *Simms*, 571 So. 2d at 149; *State v. Ogden and Geraghty*, 391 So. 2d 434 (La. 1980).

See also State v. Powell, 2001-0638 (La. App. 4 Cir. 12/12/01), 804 So. 2d 802; State v. Hoffpauir, 99-0128 (La. App. 4 Cir. 4/7/99), 731 So. 2d 1026.

Here, as noted above the affidavit details: the initial tip concerning drug sales by the defendant; the surveillance which resulted in suspected drug sales; the detention of the relators; the discovery in the Lumina of the drugs and phone bill in Ms. Jackson's name for the Crozat apartment; and the tip from the second C.I. concerning more drugs at that apartment. The relators argue these facts do not show it was more probable than not that there would be drugs in the apartment because the affidavit did not set forth how the second C.I. knew there were drugs in the apartment, nor did it set

forth that the C.I. was a reliable informant. At the October suppression hearing, Det. Ferrier testified that the informant was reliable and that he did not ask the C.I. how he knew drugs were in the apartment because their conversation, on the scene of the arrests, was a hurried one. However, there is no declaration in the affidavit itself that this C.I. was reliable.

The relators argue that the affiant tried to mislead the magistrate by not stating that the tip concerning the drugs in the apartment came from a *second* C.I. rather than from the same C.I. who informed the officers of the drugs sales in the 2300 block of Josephine Street. The relators contend that because the affidavit indicated the first C.I. was reliable and that his information was corroborated, the failure to note that the information about the apartment came from a different C.I. led the magistrate to believe the second bit of information came from the same C.I. However, the affidavit does not indicate the first C.I. was reliable. In addition, there is nothing in the affidavit which shows Det. Ferrier tried to imply this second tip came from the same C.I. who gave him the first tip. The affidavit merely mentions that Det. Ferrier received a call from "a confidential informant" concerning the apartment; it does not say it was the same C.I. The relators' assertion that this statement misled the magistrate to believe these tips came from the same C.I. is speculative at best.

The relators argue that the affidavit was also misleading because it did not mention that the officers were already searching the apartment at the time Det. Ferrier was trying to obtain the warrant. However, as noted above, there was no evidence the officers started searching the apartment until after the warrant was issued. Indeed, the officers had entered and had seen drugs in plain view, but none of this information was included in the affidavit. Given the fact that it is not clear that the State established exigent circumstances for the officers to enter without the warrant, if Det. Ferrier had included any information gleaned from this entry, this court would have to excise this information in its determination of whether there was probable cause for the issuance of the warrant.

The relators contend that the State failed to show that the information concerning drugs in the apartment was not stale because the C.I. did not state how he knew drugs were there. As noted by this court in State v. Rando, 2003-0073, pp. 11-12, ___ So. 2d at ___:

> A warrant may become stale if facts and circumstances at the time of its execution show that probable cause no longer exists. *State v. Casey*, 99-0023, pp.4-5 (La. 1/26/00), 775 So. 2d 1022, 1028. Thus, staleness is an issue only when the passage of time makes it doubtful that the object sought in the warrant will be at the place where it was observed. *Id*.

Here, is it true that the C.I. did not mention how long before the tip he

became aware there were drugs in the apartment. However, the fact that the defendants had just been arrested for selling drugs from the car would show they were still involved in the sale of drugs, thus establishing a timeframe for the tip.

The relators further note that the fact that the Tahoe was found parked near the apartment, as predicted by the C.I., does not necessarily mean that there would be drugs in the apartment as this bit of information would be known by anyone who knew the relators. The relators point out that this information, while partially corroborative of the tip, did not contain any predictive information which would have supported the inference that drugs were in the apartment. See Alabama v. White, 496 U.S. 325, 110 S.Ct. 2412 (1990). If, indeed, the second tip were the only information in the affidavit concerning drugs in the apartment, this argument would have more merit. However, looking at the totality of the circumstances, the magistrate was presented with the initial tip of drug sales by the relators, the corroboration of that tip through the observation of drug transactions, and the seizure of drugs from the Chevy Lumina also mentioned in the first tip. In addition, although both relators indicated they lived elsewhere, the officers found a phone bill in Ms. Jackson's name listing her address as the Crozat Street apartment. When confronted with this bill, both relators denied any

knowledge of the apartment. This denial, added to the tip from the second C.I. that the apartment contained drugs, and the fact that keys seized from Johnson fit the Tahoe parked on the scene and the door to the apartment, support a finding that under the totality of the circumstances there was probable cause to believe the apartment contained drugs. Thus, the affidavit supported the issuance of the search warrant.

The relator's last claim concerns the trial court's refusal to allow him to discover impeachment evidence. He argues he should have been allowed to subpoena Det. Ferrier's cell phone records to determine if he received a call while on the scene of the arrests, apparently in an attempt to show no call was made and the "tip" was a fabrication. However, Det. Ferrier testified that he was not sure if he received the call on his cell phone or on another phone. Thus, even if the cell phone records were ordered and showed no call at that time, this fact would not mean no call had been received because Det. Ferrier could not remember on what phone he received the call. The trial court observed the detective's demeanor and found him believable. The trial court is the "trier of fact" at a suppression hearing, and a reviewing court must accept the trial court's credibility findings in the absence of manifest error. See State v. Perez, 99-2063 (La. App. 4 Cir. 9/15/99), 744 So. 2d 173. There is nothing in the application

before this court to show the trial court abused its discretion by believing Det. Ferrier's testimony concerning the second C.I.'s tip. Thus, we conclude the trial court did not err by refusing to order the production of Det. Ferrier's cell phone records.

In State v. Scull, 93-2360, p. 9 (La. App. 4 Cir. 6/30/94), 639 So. 2d 1239, 1245, this court stated: "The trial court is vested with great discretion when ruling on motion to suppress." See also Jones; State v. Briley, 2001-0143 (La. App. 4 Cir. 10/3/01), 798 So. 2d 1191. Here, given the totality of the circumstances, we agree with the trial court that the affidavit contained sufficient evidence for the magistrate to find it was more probable than not that there were drugs in the apartment; thus, the search warrant was validly issued, and the trial court did not err by denying the motion to suppress the evidence seized from the apartment nor in refusing to order the production of Det. Ferrier's cell phone records. Accordingly, this writ application is granted, but relief is denied.

WRIT APPLICATION GRANTED; RELIEF DENIED.