STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v DANIEL DAVID CHAPIN, Defendant-Appellee.	FOR PUBLICATION December 26, 2000 10:00 a.m. No. 226419 Mecosta Circuit Court LC No. 00-013690-AR

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

Hood, J. (*dissenting*).

I must respectfully dissent because my reading of the current affidavit and warrant requirements does not comport with the conclusion reached by the majority.

MCL 780.653; MSA 28.1259(3) sets forth the contents of the affidavit. Specifically, the magistrate is to consider all the information relayed in the affidavit and that information may be provided by a named or unnamed person. MCL 780.651; MSA 28.1259(1) addresses the issuance of the search warrant. This statute provides, in relevant part:

> (1) When an affidavit is made on oath to a magistrate authorized to issue warrants in criminal cases, and the affidavit establishes grounds for issuing a warrant pursuant to this act, the magistrate, if he or she is satisfied that there is probable cause for the search, shall issue a warrant to search the house, building, or other location or place where the property or thing to be searched for and seized is situated.

Additionally, MCL 780.654; MSA 28.1259(4) provides that the warrant shall contain the grounds or the probable cause or, in lieu thereof, attach a copy of the affidavit:

> A search warrant shall be directed to the sheriff or any peace officer, commanding such officer to search the house, building or other location or place, where any property or other thing for which he is required to search is believed to be concealed. Each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized. *The warrant shall also state the grounds or the probable or reasonable cause for its issuance, or in lieu thereof, a copy of the affidavit may be attached thereto.* [Emphasis added.]

In the present case, defendant does not take issue with the individual requirements of MCL 780.654; MSA 28.1259(4). Rather, defendant takes issue with the provisions of MCL 780.655; MSA 28.1259(5):

> When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things so seized. *The officer taking property or other things under the warrant shall forthwith give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken. He shall file the tabulation promptly with the court or magistrate.* The tabulation may be suppressed by order of the court until the final disposition of the case unless otherwise ordered. The property and things so seized shall be safely kept by the officer so long as necessary for the purpose of being produced or used as evidence on any trial. As soon as practicable after trial, stolen or embezzled property shall be restored to the owner thereof. Other things seized under the warrant shall be disposed of under direction of the court or magistrate, except that moneys and other useful property shall be turned over to the state, county or municipality, the officers of which seized the property under the warrant. Such moneys shall be credited to the general fund of the state, county or municipality. [Emphasis added.]

Review of the statutes at issue reveals that *People v Moten*, 233 Mich 169; 206 NW 506 (1925), does not govern this case. The issue in *Moten* involved the statutory requirements that must be contained within a search warrant, now codified at MCL 780.654; MSA 28.1259(4). The defendant in *Moten* never took issue with the delivery of the search warrant that was left at the home; rather, he took issue with the contents of the search warrant itself. In the present case,

defendant, in effect, argues that the statutory requirements of MCL 780.654; MSA 28.1259(4) are incorporated within the delivery provisions of MCL 780.655; MSA 28.1259(5). I disagree.

As the majority opinion notes, statutory interpretation presents a question of law that we review de novo. *People v Nimeth*, 236 Mich App 616, 620; 601 NW2d 393 (1999). The function of a reviewing court resolving disputed interpretations of statutory language is to effectuate the legislative intent. *People v Valentin*, 457 Mich 1, 5; 577 NW2d 73 (1998). When the language of the statute is clear, the Legislature intended the meaning plainly expressed, and the statute must be enforced as written. *Id*. Technical words and phrases, such as those words that may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to the appropriate meaning. MCL 8.3a; MSA 2.212(1). We presume that every word has some meaning, and we must avoid any construction that would render any part of the statute surplusage or nugatory. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). The omission of a provision from one part of a statute that is included in another part of a statute must be construed as intentional. That is, we "cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

In the present case, MCL 780.654; MSA 28.1259(4) provides that the search warrant must contain the basis of probable cause within the document or, in lieu thereof, a copy of the affidavit may be attached thereto. Defendant does not dispute that at one time, the two documents, the search warrant and the supporting affidavit, were both available. Indeed, Sergeant John Terry testified, during the preliminary examination, that he left a copy of the

search warrant at the home, but did not leave the affidavit at the home at the request of the prosecutor.[1] Defendant's challenge then involves MCL 780.655; MSA 28.1259(5), which provides, as previously stated, in relevant part:

> The officer taking property or other things under the warrant shall forthwith give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, *or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken. He shall file the tabulation promptly with the court or magistrate* . . . . [Emphasis added.]

Pursuant to the plain language of this statute, the officer is only required to leave a copy of the search warrant itself and a copy of the tabulation.[2] Defendant does not dispute that those documents were left. Rather, defendant contends that a copy of the affidavit should have been included as well because the search warrant did not contain a basis for probable cause on its face. In effect, defendant seeks to incorporate the language of MCL 780.654; MSA 28.1259(4) into MCL 780.655; MSA 28.1259(5). In my opinion, the rules of statutory construction preclude us from doing so. One must presume that the Legislature intended that the search warrant without the supporting affidavit be left, even in the absence of a probable cause statement on the face of the warrant itself. *Farrington, supra*. The failure to include the requirement that an affidavit in support of the search warrant be left at the home may be an intentional omission to protect members of the general public. An affidavit in support of probable cause to support issuance of a warrant may contain the name of the person that provided the basis for the search. MCL 780.653(a); MSA 28.1259(3)(a). Therefore, if police left the affidavit with the name of the source at the residence of the individual whose items were seized, the individual is not under arrest at that time and may take the opportunity to exact revenge on the named source.

The underlying purpose of *Moten* is still preserved within the provisions of MCL 780.654; MSA 28.1259(4). That is, a record of the judgment of probable cause is preserved within the warrant itself or in the affidavit. This *record* will be available for the individual's review should the seizure of items result in the filing of criminal charges based on the search. However, MCL 780.655; MSA 28.1259(5), perhaps wisely, does not require that the affidavit, which may name a potential source, be placed in the hands of an unarrested individual whose property has been seized.[3]

Once it is accepted that *Moten* is not controlling, some perceived conflict with prior decisions of this Court either does not exist or is distinguishable. First, it should be noted that *People v Sobczak-Obetts*, 238 Mich App 495; 606 NW2d 658 (1999), is without precedential value because a majority of the judges concurred in the result only and did not concur in the rationale underlying the decision. Where a majority reaches a decision, but does not agree on the underlying reasoning, no point of law is established by the decision. *Fogarty v Dep't of Transportation*, 200 Mich App 572, 574; 504 NW2d 710 (1993).[4] Additionally, the decision of *People v Pipok (After Remand)*, 191 Mich App 669; 479 NW2d 359 (1991), is not controlling because it involved the statutory interpretation of MCL 780.654; MSA 28.1259(4), not the statute at issue here. Instead, this case is *factually* in accordance with the decision of *People v Garvin*, 235 Mich App 90; 597 NW2d 194 (1999).[5] Both cases address the issue of an alleged technical failure to comply with MCL 780.655; MSA 28.1259(5), and the *Garvin* Court concluded that that failure did not require suppression of the evidence. The *Garvin* decision was criticized and deemed wrongly decided for its failure to address the *Moten* decision. *Sobczak-Obetts, supra* at 502-503. However, as indicated, when the actual language of the statute addressed in *Moten* is

traced, one concludes that the statute was recodified at MCL 780.654; MSA 28.1259(4). The issue before this panel and the *Garvin* Court concerned MCL 780.655; MSA 28.1259(5), a statute not addressed by the *Moten* Court. Accordingly, the precedent of *Moten* would not be disregarded in reaching this holding.

I therefore conclude that the provisions of MCL 780.655; MSA 28.1259(5) do not require automatic suppression of evidence, taken pursuant to a valid search warrant, on the basis of the technical failure to leave the affidavit *with the warrant* at the home of the individual whose property was seized. As was noted in *Garvin, supra*, defendant is in no way deprived of an opportunity to challenge probable cause supporting the warrant, and the affidavit requirement itself is procedural.[6] The suppression was erroneous.

I would reverse.

/s/ Harold Hood

[1] There is some indication that the prosecutor had been advised against this procedure on other occasions. While I would never condone deliberately ignoring any order by the trial court, this does not affect the assessment of the statutes involved.

[2] MCL 780.654; MSA 28.1259(4) treats the search warrant and the affidavit as two different things, and there is no defining language in MCL 780.654; MSA 28.1259(4) to indicate that the term "search warrant" alone may refer to both the search warrant and the affidavit. See MCL 8.3a; MSA 2.212(1).

[3] In the present case, there were allegations of domestic violence by defendant against the source of the information that served as the basis for issuance of the search warrant. Arguably, the failure to leave the affidavit in support of the search warrant was designed to provide the source with some protection until a warrant was issued for defendant's arrest and he could be apprehended.

[4] In any event, even if the *Sobczak-Obetts* majority had concurred in the underlying rationale for the decision, it is distinguishable because it does not address the statute at issue here.

[5] The language of *Garvin* cited in the majority opinion is dictum and does not affect the conclusion that I have reached. *People v Squires*, 240 Mich App 454, 458; 613 NW2d 361 (2000). The *Garvin* Court found that the statutory language was not plainly expressed, but then

failed to apply the rules of statutory construction to determine the legislative intent. Because the search warrant and the affidavit are referred to as separate documents, it is erroneous to treat them as one and the same for purposes of MCL 780.655; MSA 28.1259(5). See MCL 8.3a; MSA 2.212(1).

[6] It is also noted that at the time of the preliminary examination, the tabulation was not filed with the court or the magistrate. However, MCL 780.655; MSA 28.1259(5) does not place an exact time frame on the filing. It merely requires that the filing should occur "promptly." While suppression is a drastic remedy to enforce the constitutional guarantees against unreasonable searches and seizures, US Const, Am IV, and Const 1963, art 1, § 11, we will not extend the exclusionary rule to a technical deficiency, *Garvin, supra* at 100-101, where defendant has failed to identify any prejudice as a result of a technical deficiency that could be cured upon notice of the deficiency.