

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL DAVID KELLER,

Defendant-Appellee.

---

FOR PUBLICATION

March 30, 2006

9:00 a.m.

No. 264865

Genesee Circuit Court

LC No. 2005-016145-FH

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

MELINDA SUE KELLER,

Defendant-Appellee.

---

No. 265118

Genesee Circuit Court

LC No. 2005-016144-FH

Official Reported Version

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

CAVANAGH, J.

In these consolidated appeals, the prosecution appeals by leave granted the trial court's orders denying defendants' motions to suppress evidence obtained from the execution of a search warrant, but ruling that defense counsel could argue to the jury that the police misled the magistrate and violated Michigan law when they sought and obtained the search warrant. We reverse the denial of defendants' respective motions to suppress; therefore, we need not reach the question whether defendants may argue police misconduct to the jury.

On appeal the prosecution argues that the trial court erred when it ruled that defense counsel could argue to the jury that the police misled the magistrate and violated Michigan law when they sought and obtained the search warrant. After review de novo, we conclude that the

trial court erroneously denied defendants' motions to suppress.<sup>1</sup> See *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

First, we agree with the trial court's conclusion that the magistrate erred in issuing the search warrant. "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), citing *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992). A "finding of reasonable or probable cause shall be based upon all the facts related within the affidavit . . . ." MCL 780.653. Here, the affidavit was based on information provided by an unnamed person. Such information is deemed sufficient if the magistrate can "conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." MCL 780.653(b).

In this case, the "tip" was not given directly to the police by the anonymous informant and the police could not prove that the informant spoke with personal knowledge of the information. Furthermore, because the police never used the anonymous informant in the past, they could not prove that the anonymous informant was credible. Moreover, after several days of surveillance investigation and a "trash pull," the police only found a marijuana cigarette butt (a roach) in the trash and possibly a small amount of marijuana residue in a pizza box—not evidence of marijuana manufacture or delivery; thus, the police could not prove that the information that the anonymous informant supplied was reliable. See *People v Levine*, 461 Mich 172, 180-183; 600 NW2d 622 (1999). Therefore, the "tip" information in the affidavit did not meet the requirements of MCL 780.653(b), and the trial court properly concluded that the magistrate erred in issuing the search warrant. See *Kazmierczak*, *supra*.

But, the trial court relied on our Supreme Court's decision in *People v Hawkins*, 468 Mich 488, 513; 668 NW2d 602 (2003), to conclude that the exclusionary rule was not the proper remedy. The trial court was correct in noting that a violation of the statutory affidavit requirements set forth in MCL 780.653 does not, by itself, warrant the application of the exclusionary rule. *Hawkins*, *supra* at 502, 510-511. However, the *Hawkins* Court did not address the dispositive issue that we have here—whether the affidavit as a whole contained enough facts to establish probable cause to issue the warrant and, if not, whether the exclusionary rule applies in the context of a constitutional violation. Const 1963, art 1, § 11.

---

<sup>1</sup> We respectfully disagree with our dissenting colleague's position that we are not permitted to consider this issue in the absence of a cross-appeal. The prosecutor argues on appeal that the search warrant at issue was valid, thus, any remarks to the contrary by defendants to the jury would be inappropriate, i.e., defendants were not entitled to such a remedy. Obviously, to properly address the prosecutor's argument on appeal, defendants were required to argue that the trial court correctly determined that the search warrant was unlawfully issued and that they were entitled to the proper remedy for the violation, just as they argued in the trial court. Ultimately, then, the issues in this case are whether the search warrant was lawfully issued and, if not, the remedy to which defendants were entitled. These issues are inextricably linked. Further, pursuant to authority granted to us by MCR 7.216(A), we deem this relief just under the circumstances of this case.

The *Hawkins* Court specifically indicated that it was considering only the issue of a statutory violation. *Id.* at 497, 498, 500.

Considering the search warrant and the underlying affidavit, as read in a commonsense and realistic manner, we conclude that a reasonably cautious person could not have concluded that there was a "substantial basis" for the finding of probable cause, i.e., for inferring a "fair probability" that evidence of drug trafficking would be found at defendants' house. See *Russo, supra* at 603-604. The warrant was supported by an affidavit that contained primarily two statements allegedly inferring probable cause: (1) "an anonymous tip," purportedly received by the affiant<sup>2</sup> without mention of any other supportive or descriptive information, and (2) a trash pull that revealed a marijuana roach and some possible marijuana residue. The alleged "tip" was that "large quantities of marijuana was [sic] being sold and manufactured out of" defendants' house which, obviously, is at significant odds with the uncovered evidence. These assertions do not provide a "substantial basis" for inferring a fair probability that evidence of drug trafficking would be found at defendants' house. Therefore, any evidence obtained pursuant to the warrant was illegally obtained and should be suppressed by the operation of the exclusionary rule unless an exception applies. See *People v Stevens (After Remand)*, 460 Mich 626, 634-635; 597 NW2d 53 (1999).

The exception, if any, that would appear to apply under the circumstances is the good-faith exception. When the police act in reasonable and good-faith reliance on a search warrant, the items seized need not be suppressed if the warrant is later declared invalid. *People v Goldston*, 470 Mich 523, 526, 538; 682 NW2d 479 (2004). Here, we cannot conclude that the police acted in objectively reasonable, good-faith reliance on the search warrant. The information in the affidavit was misleading. The affiant indicated that she had directly received the anonymous tip when, in fact, Crime Stoppers received the tip and then conveyed it to the police. And, the affidavit indicates that only a roach and some possible marijuana residue were found during a trash pull—hardly evidence that would lead a reasonable person to believe that drug trafficking was occurring at the house. Further, the good-faith exception is also inapplicable where the judge "wholly abandons his judicial role . . . ." *Id.* at 531, 542. Because the affidavit was insufficient, we would also conclude that the magistrate wholly abandoned his judicial role when he issued the warrant. For these reasons, we conclude that the good-faith exception is inapplicable in this case. Accordingly, we reverse the trial court's denials of defendants' respective motions to suppress. In light of the resolution of this issue, it is unnecessary to reach the question whether defendants could argue police misconduct to the jury.

Reversed and remanded. We do not retain jurisdiction.

Davis, P.J., concurred.

/s/ Mark J. Cavanagh

/s/ Alton T. Davis

---

<sup>2</sup> At the preliminary examination it was revealed by the affiant that she did not directly receive the anonymous tip, contrary to her sworn statement; rather, Crime Stoppers received the tip.