# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant,<br><br>v<br><br>MICHAEL DAVID KELLER,<br><br>Defendant-Appellee. | FOR PUBLICATION<br>March 30, 2006<br>9:00 a.m.<br><br>No. 264865<br>Genesee Circuit Court<br>LC No. 05-016145-FH |
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant,<br><br>v<br><br>MELINDA SUE KELLER,<br><br>Defendant-Appellee. | No. 265118<br>Genesee Circuit Court<br>LC No. 05-016144-FH<br><br>Official Reported Version |

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

TALBOT, J. (*dissenting*).

On October 14, 2005, this Court granted the prosecution's application for leave to appeal, "limited to the issues raised in the application and supporting brief. MCR 7.205(D)(4)."[1] The issue raised by the prosecution in its application for leave to appeal was:

> Where the trial court denies defendants' motion to suppress evidence obtained pursuant to a search warrant, may defense counsel argue to the jury that the police intentionally and deliberately misled the magistrate in seeking the warrant?

[1] *People v Michael D. Keller*, unpublished order of the Court of Appeals, entered October 14, 2005 (Docket No. 264865); *People v Melinda S. Keller*, unpublished order of the Court of Appeals, entered October 14, 2005 (Docket No. 265118).

Defendants never applied for leave to appeal and have not cross-appealed. Instead, defendants attempted to reframe the issue on which this Court granted leave by stating in their responsive briefs:

> The Correctly Stated Issue Presented by Defendant-Appellee [sic]
>
> Whether the Circuit Court should have denied the Defendant-Appellee's [sic] motion to suppress when finding that the police, in seeking the search warrant, misled the magistrate, violated Michigan Statute MCL 780.653, and that the anonymous tip coupled with a trash pull, which netted a "roach" and some crumbs of marijuana, was not sufficient to give rise to probable cause; in other words, should the exclusionary rule be applied[.]

Defendants have done no more than improperly restate the issue for which this Court granted leave to the prosecution and, thus, failed to properly raise their purported "issue" before this Court on appeal. Defendants have not even requested this Court to allow them to raise any additional grounds for appeal. Defendants' argument has, therefore, not been properly briefed for this Court's consideration at this time. Under these circumstances, I do not believe this Court should alter sua sponte alter the prosecution's issue on appeal. There were numerous avenues for defendants to seek review of the circuit court's ruling on their motions to suppress that would have afforded the prosecution an opportunity to fully brief and address their claim; however, defendants have not availed themselves of any of them. I, therefore, respectfully dissent from the majority's decision to address defendants' issue without full briefing and argument.

Defendant Michael Keller's motion in limine to suppress "any and all evidence obtained as a result of the execution of a search warrant" contains no brief in support of the motion and amounts to nothing more than a disconnected list of statements attacking the reliability of the search warrant. The motion stated that the anonymous tip at issue in this case failed to meet the standards set forth in MCL 780.653. The only constitutional arguments found in this motion are conclusory statements of constitutional infirmity, citing *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), *People v Sloan*, 450 Mich 160; 538 NW2d 380 (1995),[2] and *People v Stumpf*, 196 Mich App 218; 492 NW2d 795 (1992), without any additional analysis. Specifically, there is no citation of *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984), *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004), or the good-faith exception to the exclusionary rule, which defendants now argue the circuit court erred in applying.

After hearing defendants' motions, the circuit court agreed with defendants that the police violated MCL 780.653, but, following *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003), refused to order suppression of the evidence obtained pursuant to the warrant.[3] Rather, the

[2] Overruled by *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003).

[3] The transcript of the hearing on defendants' motion to suppress indicates that the circuit court only addressed the violation of MCL 780.653, but did not reach the constitutional issues defendants now raise on appeal.

circuit court fashioned its own remedy, allowing defendants to argue to the jury that the police intentionally violated the law of the state and misled the magistrate when seeking the search warrant. At no point did the circuit court address defendants' constitutional arguments or order an evidentiary hearing pursuant to *Franks* to determine whether the remaining evidence was sufficient to issue the warrant, nor did defendants request such a hearing.

Generally, an issue is not properly preserved if it is not raised before, addressed, or decided by the circuit court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Here, defendants did not raise, and the circuit court did not address or decide, the constitutional argument defendants now assert on appeal, which argument concerns the proper application of the good-faith exception to the exclusionary rule as discussed in *Goldston*. Thus, defendants have not preserved their argument. Furthermore, in cases for which leave to appeal was granted, the appeal is limited to the issues raised in the application, MCR 7.205(D)(4), and the appellee may not assert additional issues through a purported cross-appeal, *Wilcoxon v Wayne Co Neighborhood Legal Services*, 252 Mich App 549, 555; 652 NW2d 851 (2002). Rather, an appellee is limited to the issues raised by the appellant unless the appellee cross-appeals as provided in MCR 7.207. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993).

Here, this Court granted the prosecution leave to appeal only on the issue raised in the application, which concerned the appropriateness of the trial court's remedy of allowing defense counsel to argue to the jury that the police intentionally violated state law and misled the magistrate in seeking the search warrant. Defendants now wish to challenge the trial court's denial of their motion to suppress without seeking leave to appeal this decision or filing a cross-appeal. Moreover, defendants' argument on appeal raises constitutional concerns, such as the proper application of the good-faith exception to the exclusionary rule, that were not presented before or addressed by the circuit court. Despite our Supreme Court's admonition that appellate courts should avoid deciding constitutional issues when it is possible to resolve a case on other grounds, *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001), and the fact that defendants never even requested this Court to permit additional grounds for appeal pursuant to its discretionary powers under MCR 7.216, the majority, nonetheless, chose to address defendants' restatement of the prosecution's issue on appeal as though defendants had originally brought this appeal. As a result, the prosecution has not had the opportunity to fully brief or respond to defendants' purported counterstatement of the prosecution's issue. Defendants' appeal of the circuit court's order denying their motions to suppress is simply not properly before this Court. *Barnell, supra* at 123, citing MCR 7.207 ("Defendant's failure to cross appeal precludes our review of this issue.").

The prosecution's appeal, however, is properly before this Court. Turning to that issue, and only that issue, the prosecution argues that the circuit court erred when it ruled that defense counsel could argue to the jury that the police misled the magistrate and violated MCL 780.653 when they sought and obtained the search warrant. I agree.

In *Hawkins, supra* at 502, 510-511, our Supreme Court held that suppression is not an appropriate remedy where the objective of the exclusionary rule, "to sanction police misconduct

as a means of deterrence," would not be served, for example, when a mere statutory violation of the affidavit requirements of MCL 780.653 has occurred.[4] The *Hawkins* Court concluded that the Legislature did not specifically intend the remedy of exclusion for a violation of the affidavit requirements of MCL 780.653. *Hawkins, supra* at 502. The *Hawkins* Court further supported its conclusion that exclusion was not an intended remedy by showing that the Legislature provided specific sanctions in MCL 780.657[5] and MCL 780.658[6] for a violation of MCL 780.653. *Hawkins, supra* at 511 n 23.

According to the Court's reasoning in *Hawkins*, it follows that if the Legislature intended to allow a defendant to argue to the jury that the police illegally obtained a search warrant as a remedy for a violation of MCL 780.653, it would have specifically listed such a remedy and would not have provided the specific remedies in MCL 780.657 and MCL 780.658. The circuit court, therefore, 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. First, the affidavit in support of the warrant did not mislead the magistrate, but merely presented statements that the magistrate erroneously concluded were sufficient to support the warrant; thus, the evidence would not support the argument.[7] See *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v McCain*, 84 Mich App 210, 215; 269 NW2d 528 (1978) ("An attorney may not argue or refer to facts not of the record . . . ."). Second, MCL 780.653 does not provide such a remedy. See *Hawkins, supra* at 511 n 23. Third, a violation of MCL 780.653 is not relevant to the issues to be decided by the jury—whether defendants committed the charged offenses. MRE 401, 402.

Confining this Court's disposition to the resolution of the issue for which this Court granted leave, I would reverse the circuit court's orders to the extent that they allow defense counsel to argue to the jury that the police misled the magistrate and violated Michigan law when they sought and obtained the search warrant.

/s/ Michael J. Talbot

---

[4] Although defendants argue on appeal that a constitutional, and not merely a statutory, violation occurred when the police obtained the search warrant, this issue is not properly before this Court because defendants have not properly raised it either in the circuit court or on appeal. Therefore, for the purposes of this appeal, I will assume, without deciding, that the circuit court correctly denied defendants' motions to suppress.

[5] MCL 780.657 provides that "[a]ny person who in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000.00 or imprisoned not more than 1 year."

[6] MCL 780.685 provides that "[a]ny person who maliciously and without probable cause procures a search warrant to be issued and executed shall be fined not more than $1,000.00 or imprisoned not more than 1 year."

[7] I disagree with the majority's characterization that the affidavit was misleading in that it "indicated that [Lott] had directly received the anonymous tip." *Ante* at ___. The affidavit merely stated that Lott "received an anonymous tip," but as the term anonymous would indicate, it does not state from whom she received the tip.