

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DONALD H. LINN and PATRICIA A. LINN,

Defendants-Appellees.

UNPUBLISHED

November 14, 1997

No. 200197

Wayne Circuit Court

LC No. 96-629412-AR

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

The people appeal by leave granted a circuit court's order affirming the district court's suppression of various fireworks seized pursuant to a search warrant. We affirm.

I

Defendants operate Tri-City Fireworks, a business located in Canton Township. In 1989, the Attorney General's Office obtained a temporary restraining order prohibiting defendants from selling fireworks prohibited by MCL 750.243a; MSA 28.440(1).¹ In accordance with this statute, the TRO allowed defendants to engage in the interstate sale of fireworks, as provided by MCL 750.243a(3)(g); MSA 28.440(1)(3)(g).

In June 1995, the Canton Police Department executed a search warrant and seized 525 gross lots of fireworks from defendants' premises. The affidavit in support of the warrant alleged that defendant was engaging in the possession, sale, and storage of illegal fireworks. The affidavit set forth the details of an attempted undercover purchase of allegedly illegal items (saturn missiles, shooting stars, and planes flying at night) and a subsequent completed purchase of these items. The search warrant provided for the seizure of the following items:

All firecrackers, torpedoes, skyrockets, roman candles, daygo bombs, bottle rockets, whistling chasers, rockets on a stick, shooting stars, saturn missiles, and planes flying at night, other fireworks of like construction and items (books and records) indicating ownership of the property.

Based on the items seized from defendants' store, a 525 count criminal misdemeanor warrant was issued against defendants. Defendants filed a motion to suppress the evidence obtained in the search. The district court² quashed the warrant, dismissed the charges, and ordered the return of the property. The court noted that plaintiff remained free to bring charges relating directly to the arguably illegal sale of fireworks to the undercover officer, as those charges were not contained in the 525 dismissed counts. The circuit court denied plaintiff's application for leave to appeal,³ and this appeal followed.

II

A search warrant may not issue unless probable cause exists to justify the search. US Const, Amend IV; Const 1963, art 1, sec 11, *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995). Probable cause exists when the facts and circumstances would allow a person of reasonable prudence to believe that the evidence of a crime or contraband sought will be found in the place to be searched. *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995). This Court will not reverse a trial court's ruling at a suppression hearing unless it is clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). A decision is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1991).

There is no question that defendants possessed the types of fireworks expressly prohibited by MCL 750.243a; MSA 28.440(1). They also possessed, and admittedly sold to the public, saturn missiles, shooting stars, and planes flying at night; these fireworks arguably fall within the "and like construction" language of the statute. Plaintiff argues that defendants' sale of these allegedly prohibited fireworks provided probable cause to search for and seize those kinds of fireworks sold to the undercover officer, as well as all of the fireworks found on defendants' business premises at the time of the search which were specifically identified in MCL 750.243a; MSA 28.440(1) as prohibited.⁴ We disagree.

Because the undercover officer participated in the purchase of saturn missiles, shooting stars, and planes flying at night, he had probable cause to believe that defendants were selling these fireworks in violation of the statute. However, the officer's purchase of these fireworks did not establish probable cause to believe that defendants were engaged in the sale of other kinds of fireworks specifically prohibited in the statute. The officer testified that, neither at the time of the attempted or completed undercover purchases, nor at the time of the search and seizure, were any of the fireworks specifically prohibited for in-state sale on display in the public area of the store; rather, they were found in the back storeroom during the search. Indeed, nothing in the affidavit for the search warrant suggested that defendants were unlawfully selling any fireworks specifically prohibited by statute.

Defendants were permitted to possess certain enumerated fireworks for interstate sale pursuant to the express terms of both the amended TRO and MCL 750.243a(3)(g); MSA 28.440(1)(3)(g). However, neither the affidavit nor the search warrant made any distinction between those fireworks which defendants lawfully possessed and those which they allegedly sold in violation of the statute. No probable cause existed to support the seizure of virtually all of defendants' inventory. Accordingly, the

district court properly suppressed the evidence seized pursuant to the warrant, and dismissed the 525 count warrant against defendants.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ David H. Sawyer

/s/ Janet T. Neff

¹ This statute provides, in relevant part, as follows:

(2) **Sale, possession, transportation, use, prohibited.** Except as provided in subsection (3) . . . a person, firm, partnership, or corporation shall not offer for sale, expose for sale, sell at retail, keep with intent to sell at retail, possess, give, furnish, transport, use, explode, or cause to explode any of the following:

(a) A blank cartridge, blank cartridge pistol, toy cannon, toy cane, or toy gun in which explosives are used.

(b) An unmanned balloon which requires fire underneath to propel it and is not moored to the ground while aloft.

(c) Firecrackers, torpedoes, skyrockets, roman candles, daygo bombs, bottle rockets, whistling chasers, rockets on sticks, or other fireworks of like construction.

(d) Fireworks containing an explosive or inflammable compound or a tablet or other device commonly used and sold as fireworks containing nitrates, fulminates, chlorates, oxalates, sulphides of lead, barium, antimony, arsenic, mercury, nitroglycerine, phosphorus, or a compound containing these or other modern explosives.

(3) **Exceptions.** A permit is not required for the following:

* * *

(g) The sale of fireworks, provided they are to be shipped directly out of state pursuant to regulations of the United States department of transportation covering the transportation of explosives and other dangerous articles by motor, rail, and water. [MCL 750.243a; MSA 28.440(1) (emphasis added).]

² The judge who issued the warrant was the same judge who later suppressed the evidence and dismissed the charges.

³ The circuit court held that the application was untimely and failed to address the merits of what it viewed as the key issue; that is, the legality of interstate shipment of fireworks.

⁴ We note that plaintiff has failed to cite any authority for its argument that once defendants sold fireworks that were arguably prohibited for in-state sale they subjected their entire inventory to seizure, including those fireworks that they lawfully possessed for interstate sale. See *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997) ("A party may not leave it to this Court to search for authority to sustain or reject the party's position.")