

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY MARTELL JACKSON,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 249665
Wayne Circuit Court
LC No. 01-004113-01

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver over 650 grams of cocaine, MCL 333.7401(2)(a)(i), and sentenced to life imprisonment. He appeals by delayed application of leave. Defendant raises three issues on appeal. We affirm defendant's conviction and remand for resentencing.

First, defendant argues that he is entitled to resentencing because the trial court did not recognize that it was not required to sentence defendant to life imprisonment. The prosecutor concedes that resentencing is required. The trial court stated on the record that it had no discretion in this matter and was not allowed to deviate from life imprisonment. The statute, MCL 333.7401(2)(a)(i), does give the court discretion, and accordingly we remand for resentencing.

Defendant also argues that the trial court erred in failing to grant the defense request for a *Franks*¹ hearing. The trial court's findings are reviewed for clear error. *People v Reid*, 420 Mich 326, 336; 362 NW2d 655 (1984). However, the "ultimate decision regarding a motion to suppress" is reviewed de novo. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). A search warrant may issue only on a showing of probable cause, supported by oath or affirmation. Const 1963, art 1, § 11. The affidavit supporting a warrant may be based upon information supplied to the complainant by an unnamed person if the affidavit contains "affirmative allegations from which the magistrate may conclude that the person spoke with

¹ *Franks v Delaware*, 438 US 154, 171; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.” MCL 780.653(b).

A defendant may “challenge the truthfulness of factual statements” in an affidavit supporting a search warrant, but there is a presumption that the affidavit is valid. *People v Turner*, 155 Mich App 222, 226; 399 NW2d 477 (1986). For an evidentiary hearing to be required, however, “the challenger’s attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.” *Id.*, quoting *Franks v Delaware*, 438 US 154, 171; 98 S Ct 2674; 57 L Ed 2d 667 (1978). “Where a defendant can show by a preponderance of the evidence that the affiant had knowingly and intentionally or with reckless disregard for the truth inserted false material into the affidavit and that the false material is necessary to a finding of probable cause, the search warrant must be quashed and the fruits of the search excluded at trial.” *People v Kort*, 162 Mich App 680, 686; 413 NW2d 83 (1987).

Reviewing courts must read the warrant “in a common-sense and realistic manner.” *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). “Rather than engage in hypertechnical after-the-fact scrutiny of affidavits, we give great deference to the magistrate’s decision because of our preference for the use of search warrants.” *Stumpf, supra*. Probable cause “requires ‘only the probability, and not a prima facie showing, of criminal activity.’” *Russo, supra*, citations omitted. “Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place.” *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000).

Here, at the beginning of the hearing, the trial court told defendant to make “whatever argument [he] wish[ed].” The affidavit supporting the warrant stated that police were working with a confidential source of information (SOI) who had provided credible information on at least five previous occasions, leading to seven arrests. The SOI personally observed defendant at the Manning Street address, weighing and packaging cocaine for sale, and had accompanied defendant in a gold Yukon when he went to drug houses to pick up money. Police observed a man who met the description provided by the SOI, later identified as defendant, leaving the Manning Street address in a gold Yukon, saw him engage in two suspected narcotics transactions, and saw him enter the Balfour apartment. The police verified that defendant lived in the Balfour apartment. Defendant did not make any offer of proof, but merely testified to a different version of events than the officer who swore out the affidavit. The affidavit clearly sets out probable cause to believe that defendant was engaged in selling drugs, and there is nothing in the record except defendant’s unsupported claim to suggest that the police did not have a valid warrant. The trial court did not err. *Franks, supra; Turner, supra*.

Finally, defendant argues that he was denied a fair trial because of prosecutorial misconduct. Prosecutorial issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers alleged prosecutorial misconduct in context to determine whether it denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). The prosecutor is not required to use the “blandest possible terms” to state his inferences and conclusions. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor may use strong and emotional language in

making his argument so long as it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). A prosecutor may draw inferences from the testimony and may argue that a witness, including the defendant, is not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985).

Defendant argues on appeal that the prosecutor improperly used a civic-duty argument, vouched for prosecution witnesses, appealed to the jury's sympathy, and injected broader issues into the proceedings. Viewing the remarks in context, we find that most of the challenged comments were in the nature of strong and emotional argument that the prosecution witnesses were worthy of belief. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Although the prosecutor improperly denigrated defense counsel, the trial court sustained defendant's objection and instructed the jury that the issues in this case involved the evidence, not defense counsel. The court also instructed the jury as to the burden of proof, that the arguments of lawyers were not evidence and that it was the sole judge of the evidence. The jury is presumed to follow the instructions of the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant was not denied a fair and impartial trial as a result of prosecutorial misconduct. *Reid, supra*.

We affirm defendant's conviction and remand for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot