

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TRACEY L. ROBERTSON,

Defendant-Appellee.

UNPUBLISHED

December 23, 2008

No. 280587

Wayne Circuit Court

LC No. 07-005189-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TOMMY B. ROBERTSON,

Defendant-Appellee.

No. 280588

Wayne Circuit Court

LC No. 07-005230-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NATHANIEL W. JONES,

Defendant-Appellee.

No. 280589

Wayne Circuit Court

LC No. 07-005189-01

Before: Murray, P.J., and Markey and Wilder, JJ.

PER CURIAM.

The prosecutor appeals by right from the circuit court orders dismissing the charges of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227,

and possession of a firearm during the commission of a felony, MCL 750.227b, against defendants Tracey L. Robertson (Docket No. 280587) and Nathaniel W. Jones (Docket No. 280589), and the charges of felon in possession of a firearm and felony-firearm against defendant Tommy B. Robertson (Docket No. 280589), following the grant of defendants' motions to suppress evidence. We reverse and remand. These appeals have been decided without oral argument pursuant to MCR 7.214(E).

These cases arise out of the execution of a search warrant at a clothing store. Shortly before the warrant was executed, Officer Lindsay Pace entered the store to conduct "pre raid surveillance." He pretended he was shopping when he saw defendant Tommy Robertson, the storeowner, emerge from the rear of the store. Tommy Robertson removed a handgun from his waistband and handed it to defendant Jones. Jones put the gun in his waistband. Then, defendant Tracey Robertson approached Pace to help him with selecting shoes. As Tracey Robertson bent forward, Pace observed a handgun and a holster on his waistband.

Pace left the store and returned five minutes later with backup to execute the warrant that had been issued the previous day. Once inside, the officers retrieved two handguns—one from the ground by Jones feet and the other from underneath the display an officer saw Tracey Robertson place the gun. Defendants were arrested, charged, and bound over for trial.

On March 20, 2007, defendants moved to suppress the evidence. In granting the motion, the trial court opined that the officers failed to make a "substantial showing that a crime is taking place or illegal activity is taking place." The trial court then dismissed the cases and entered orders of dismissal for all charges for each defendant.

On August 7, 2007, the prosecutor moved for reconsideration of the orders of dismissal, arguing that Pace had observed defendants in possession of guns while he was in the store before the search when it was open to the public and that those observations were independent of the search warrant. The trial court denied the motion. Plaintiff appealed by right the orders of dismissal in all actions. This Court consolidated the cases for purposes of appeal on September 26, 2007.

Plaintiff raises the same arguments in all three appeals. First, plaintiff argues that the trial court erred in quashing a search warrant where a substantial basis existed for the magistrate's finding of probable cause.

Generally, if evidence is unconstitutionally seized, it must be excluded from trial. Exclusion of improperly obtained evidence serves as a deterrent to police misconduct, protects the right to privacy, and preserves judicial integrity. *Terry v Ohio*, 392 US 1, 12-13, 88 S Ct 1868, 20 L Ed 2d 889 (1968). "It is settled law that probable cause to search must exist at the time the search warrant is issued and that probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct is in the stated place to be searched." *Russo, supra* at 606-607 (citations omitted). In other words "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).

Searches conducted pursuant to a search warrant are based on a magistrate's decision regarding probable cause and should be paid great deference. *Russo, supra* at 604, citing *Illinois v Gates*, 462 US 213, 236-237; 103 S Ct 2317; 76 L Ed 2d 527 (1983). "Affording deference to the magistrate's decision simply requires that reviewing courts ensure that there is a substantial basis for the magistrate's conclusion that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id.* at 604, quoting *Gates, supra* at 238.

The affidavit in support of a search warrant may be based on information supplied to the affiant by another person. If the other person is not named, the affidavit must contain affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information provided and that the informant is credible or his information is reliable. MCL 780.653(b). The search warrant and underlying affidavit are to be read in a commonsense and realistic manner. *Russo, supra* at 604.

The affidavit at issue included information from an anonymous informant (AI). The AI stated that a specific person was selling drugs from a particular location. The affiant then conducted an independent investigation and saw what appeared to be multiple sales of narcotics: people entered the premises, spoke to the person described by the AI, and, after waiting a few minutes, exchanged money for something that was not on display in the store. He then immediately left the store. The affiant indicated that the actions he observed were consistent with narcotics trafficking and corroborated the information supplied by the AI.

An officer's observation of drug trafficking activity during surveillance is sufficient to support a search warrant. See e.g., *People v Griffin*, 235 Mich App 27, 42-43; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007). Although the affidavit did not conclusively establish that the visitors obtained drugs from the seller, "the affidavit need not *prove* anything." *People v Whitfield*, 461 Mich 441, 445-446; 607 NW2d 61 (2000) (emphasis in original). It only has to provide a substantial basis for concluding there is a fair probability that contraband or evidence of a crime will be found in the stated place. *Whitfield, supra* at 445-446. Evidence from an informant that a specific person was selling drugs from a particular place, plus evidence of apparent narcotic transactions involving that person at that place corroborating observations of the informant, provides a substantial basis for concluding that drugs would be found at the place to be searched. *People v Perry*, 463 Mich 927; 620 NW2d 308 (2000). Therefore, the trial court erred in its determination that the affidavit was insufficient to establish probable cause.

Though defendants argue that the information in the affidavit was stale, that is not a separate consideration in the probable cause to search analysis. *People v Sobczak-Obetts*, 253 Mich App 97, 108; 654 NW2d 337 (2002). Instead, time is but one factor in the probable cause determination to be weighed and balanced in light of the totality of circumstances, including whether the crime is a single instance or an ongoing pattern of violations, whether the inherent nature of the crime suggests that it is probably continuing, and whether the person committing the offense is likely to be promptly disposed of or keep the property. *Id.*, citing *Russo, supra* at 605-606 (citations omitted). Here, the information the informant provided, and the affiant's corroborating observations suggested an ongoing criminal enterprise, increasing the chance that contraband be present at any given time at the premises. Thus, considering the totality of circumstances, we find no delay undermined the magistrate's probable cause determination.

Plaintiff argued in the alternative that the trial court erred in suppressing the guns seized under the search warrant where the police acted in good faith to obtain and execute the warrant. Although the prosecution did not raise this issue below, it involves the application of the exclusionary rule, which is a question of law. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001). “This Court may consider an unpreserved question of law where the facts necessary for its resolution have been presented.” *People v Houston*, 237 Mich App 707, 712; 604 NW2d 706 (1999). Questions of law are reviewed de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998).

When a law enforcement officer acts within the scope of, and relies in objective, good-faith on, a search warrant obtained from a judge or magistrate, the officer is acting as a reasonable officer would and should act in similar circumstances, thereby negating the deterrent effect of the exclusionary rule. *People v Goldston*, 470 Mich 523, 530-531; 682 NW2d 479 (2004). However, the good-faith exception to the exclusionary rule will not apply where “the issuing magistrate or judge is misled by information in the affidavit that the affiant either knew was false or would have known was false except for his reckless disregard of the truth,” “where the magistrate wholly abandons his judicial role,” or “where an officer relies on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Id.* at 531 (citations omitted).

There is simply no evidence that the police did not act in objective good faith when executing the warrant at issue. Specifically, the police officers’ reliance on the magistrate’s determination of probable cause and on the technical sufficiency of the search warrant was objectively reasonable. Moreover, the information in the affidavit was not false or misleading, and the issuing magistrate did not wholly abandon his judicial role. Consequently, were there reason to hold the warrant was not based on probable cause, because the police acted in reasonable reliance on a presumptively valid search warrant, the good-faith exception to the exclusionary rule would support the execution of the warrant.

Finally, plaintiff argues that even without the evidence seized during the execution of the search warrant, there was sufficient evidence to proceed to trial on the charges of felon in possession of firearm, carrying a concealed weapon, and felony-firearm against defendants.

Because this issue was raised in the prosecution’s motion for reconsideration, it is preserved for our review. See generally *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). This Court reviews a trial court’s decision to grant or deny a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). An abuse of discretion occurs if the trial court’s decision is outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006).

The exclusionary rule applies not only to evidence improperly seized during a search without a warrant but also to evidence subsequently seized pursuant to a warrant obtained as a result of an initial illegal search. Evidence in the latter category is excludable only if it would not have been obtained but for illegal government activity. *Segura v United States*, 468 US 796, 815; 104 S Ct 3380; 82 L Ed 2d 599 (1984).

Here, the search conducted pursuant to what the trial court determined an invalid search warrant was the basis for excluding the evidence and dismissing the charges. But, even without the evidence seized during the execution of the search warrant, the prosecution possessed sufficient evidence to proceed to trial on the firearm charges. Specifically, while lawfully on the premises, prior to and independent of the search, Officer Pace observed each defendant in possession of a handgun. Accordingly, the trial court erred in denying 'the prosecution's motion for reconsideration.

We reverse and remand for reinstatement of the charges against defendants. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Kurtis T. Wilder