

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
March 20, 2018

v

ANDRE VAN SABRA,

Defendant-Appellee.

No. 337524
Wayne Circuit Court
LC No. 16-000938-01-FH

Before: TALBOT, C.J., and BECKERING and CAMERON, JJ.

PER CURIAM.

In this criminal matter, plaintiff appeals as of right the trial court's order dismissing the case. Specifically, plaintiff challenges the order of the trial court that granted defendant's motion to suppress evidence obtained through the execution of a search warrant on defendant's residence. Granting defendant's motion to suppress led to there being insufficient evidence to proceed with the charges against defendant, which were delivery/manufacture of narcotics, MCL 333.7401(2)(a)(iii), possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b, possession of a firearm by a felon, MCL 750.224f, and possession of marijuana, MCL 333.7403(2)(d). At issue is whether there was probable cause to issue the search warrant used to obtain the incriminating evidence. Plaintiff contends that the trial court erred in suppressing the evidence, and we agree.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

On December 28, 2015, plaintiff filed an affidavit seeking a search warrant for defendant's person and residence. The affiant was a Detroit police officer assigned to the Major Violators Unit, formerly known as the Narcotics Enforcement Unit. Determining that the affidavit provided a substantial basis to find that there was probable cause to search the defendant's residence, the magistrate signed the warrant. When police officers executed the search warrant on December 30, 2015, they recovered from the residence four bags of cocaine and one bag of marijuana, as well as narcotic paraphernalia containing cocaine residue. Additionally, two weapons were discovered beneath a mattress in one of the bedrooms. When officers observed defendant near the residence, they detained and conveyed him back to the residence; while there, defendant allegedly confessed to the sale and possession of cocaine and to possession of the weapons. Plaintiff charged defendant as noted above.

On April 15, 2016, defendant filed a motion to suppress the evidence obtained from execution of the search warrant, arguing that the police obtained the warrant illegally because it was not supported by probable cause. Defendant further argued that the search was not supported by the “good faith” exception to the exclusionary rule and, alternatively, that the trial court should suppress the evidence because the affidavit contained intentionally or recklessly false information, “without which, the search warrant was not supported by probable cause.” Defendant requested a hearing pursuant to *Franks v Delaware*, 438 US 154, 171; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

At the hearing on defendant’s motion, the trial court agreed with defendant that the affidavit did not show probable cause to issue the search warrant. The court stated that in the affidavit, “there is a lot of discussion about how long the officer has been . . . doing this kind of work rather than what substantial evidence shows that there is probable cause to issue this warrant.” The court further stated that it did not “see evidence of the Defendant selling or passing controlled substances to another person” or any “evidence of materials that generally go along with controlled substances, such as a plastic bag or those small little manila envelopes.” The court further noted that the affidavit did not claim that the officer saw any money changing hands, and suggested that the amount of time the officer spent on surveillance was insufficient to determine that defendant was selling drugs. Additionally, the court noted that the officer had stopped neither the suspected drug buyers nor defendant to see if any of them possessed drugs. Based on its findings that the prosecution had failed to present “articulable reasons” to substantiate the officer’s suspicion that defendant was selling drugs, the court granted defendant’s motion to suppress the evidence. Defendant then moved to dismiss the case “for the prosecution’s failure to proceed without essential evidence,” and the court granted that motion as well.

II. ANALYSIS

Plaintiff argues on appeal that the trial court erred in two ways when it concluded that the police officer’s affidavit was insufficient to provide probable cause to support issuance of the search warrant. Plaintiff first contends that the trial court erred by ignoring the information provided by the confidential informant to the affiant, arguing that this information was sufficient in itself to support a finding of probable cause. Plaintiff next contends that the trial court erred by concluding that the affiant’s surveillance observations of hand-to-hand transactions between defendant and other individuals were insufficient to support a finding of probable cause because the affiant did not see actual money or drugs change hands. In addition, plaintiff asserts that even if the search warrant was not supported by probable cause, the court should have admitted the evidence under the “good faith exception” to the exclusionary rule. We agree that the affidavit was sufficient to establish probable cause.

We review a trial court’s factual findings in a suppression hearing for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). However, the application of constitutional standards by the trial court is not entitled to the same deference as factual findings. *Id.* (citation and quotation marks omitted). Application of the exclusionary rule to a Fourth Amendment violation is a question of law that is reviewed de novo. *Id.*

The United States Constitution, Am IV, prohibits unreasonable searches and seizures and states, “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Similarly, the Michigan Constitution provides that “[n]o warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.” Const 1963, art 1, § 11.3. The task of a magistrate when examining an affidavit for purposes of issuing a warrant

is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. [*People v Keller*, 479 Mich 467, 475, 739 NW2d 505 (2007), quoting *Illinois v Gates*, 462 US 213, 238-239; 103 S Ct 2317; 76 L Ed 2d 527 (1983).]

“[P]robable 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.” *People v Russo*, 439 Mich 584, 606-607; 487 NW2d 698 (1992).

MCL 780.653 sets forth the following requirements for finding reasonable or probable cause to issue a warrant:

The judge or district court magistrate’s finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

(a) If the person is named, affirmative allegations from which the judge or district court magistrate may conclude that the person spoke with personal knowledge of the information.

(b) If the person is unnamed, affirmative allegations from which the judge or district magistrate may 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.

The judge or magistrate analyzing an affidavit for purposes of making a probable-cause determination should derive the personal knowledge element “from the information provided or material facts,” not merely from the informant’s stating that he or she has personal knowledge. *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). “If personal knowledge can be inferred from the stated facts, that is sufficient to find that the informant spoke with personal knowledge.” *Id.* The specificity of relevant details provided by an informant is a substantial indicia of personal knowledge, especially where an independent investigation “produce[s] corroborating evidence that substantially verifie[s] the information supplied by the informant.” *Id.* Credibility and reliability may be established by the fact that police had previously used information provided by the informant with successful result. See *id.*

When reviewing a magistrate's decision to issue a warrant, a reviewing court is to read the search warrant and underlying affidavit in a common sense way, giving great deference to the magistrate's finding of probable cause. See *People v Whitfield*, 461 Mich 441, 445, 446; 607 NW2d 61 (2000) (noting that an appellate court's review is neither de novo nor for an abuse of discretion). "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 446, quoting *Illinois v Gates* 462 US at 238.

Because the informant in the case at bar was unnamed, in order for the affidavit to support a finding of probable cause, it had to contain affirmative allegations from which the magistrate could conclude that the informant spoke with personal knowledge, and either: (a) that the unnamed person is credible, or (b) that the information is reliable. MCL 780.653(b). Our review of the affidavit leads us to conclude that it contained sufficient affirmative allegations for the magistrate to conclude that the informant spoke with personal knowledge and was credible and that the information was reliable.

The content of the affidavit in the case at bar and the affiant's corroborating investigation provides sufficient indicia that the informant spoke from personal knowledge. The affidavit contained information about three specific instances in 2015—October 17 and 18, and December 11—when the informant reported that he or she was at the target house with unsuspecting buyers, or had very recently been there, and witnessed defendant sell drugs to the buyers. The affidavit also reported that the informant told the affiant on December 21, 2015, that he or she had met defendant on a street corner within the prior 24 hours and witnessed him sell cocaine to a buyer. According to the affidavit, the informant told the affiant on October 17, 2015, that he or she had been to the target house numerous times in the past and had witnessed defendant, whom the informant knew as "Dre" and who bragged about having served prison time, sell cocaine to buyers. The informant provided a detailed description of defendant and described the vehicle defendant used as a "blue older model Mercury station wagon." In addition, the informant told the affiant that defendant stored "large amounts" of cocaine in his house, and described defendant's practice of selling to unfamiliar buyers from his car on the streets rather than at the target location, where defendant sold only to buyers he knew.

In addition to the material facts obtained from the informant, the affidavit also reported the investigation conducted by the affiant. The affidavit states that on October 18, 2015, the affiant discovered information in a narcotics computer database indicating that in a recent investigation, defendant had identified the target location as his residence, and that a narcotic raid on the house had yielded marijuana, codeine syrup, and cash, and had resulted in a felony arrest and several misdemeanor arrests. The affiant also discovered that police had arrested defendant in 1987 for a felony weapons offense and in 1991 for felony homicide, and that defendant had been convicted in 1992 of involuntary manslaughter and felony firearm, for which he had served eight years in prison.

The affidavit also reported the outcome of the affiant's surveillance of the target residence and of defendant. The affiant surveilled the house and defendant for approximately 30 minutes on each of two consecutive days in December 2015. During this time, he observed surveillance cameras on the property and saw two vehicles parked in front of the house, one of

which, a blue Mercury Mountaineer, matched the informant's description of the vehicle used by defendant to transport and sell drugs, and both of which were registered to defendant. The affiant also observed a man matching the informant's description of the defendant exit the house, get into the Mountaineer, and drive to three different street locations, where he made hand-to-hand transactions with different people. In addition, the affidavit reported that during his second surveillance session, the affiant observed a man go into defendant's house and then exit and drive away "[s]econds later."

The affiant stated that he believed that the foregoing observations confirmed the credibility of the informant's information that defendant was actively selling narcotics. He noted that it was common for drug dealers to use surveillance cameras as a means of protecting their narcotics from rival drug dealers and from police. He further stated that he had worked with the informant in the past and that the informant had provided information on two prior narcotics investigations that yielded seizures of heroin, marijuana, weapons, cash, and vehicles and resulted in felony and misdemeanor arrests. He also noted that he is an 18-year veteran of the Detroit Police Department, with more than nine years' experience in a unit formerly known as the Narcotics Enforcement Unit, that he was trained and experienced in undercover and surveillance tactics, and that he had participated in numerous undercover buy-and-bust operations as the buyer.

We believe that the specificity of the informant's information regarding the dates and manner of drug transactions, descriptions of the defendant's appearance and the vehicle he used to transport and sell drugs, and his pattern of conducting drug transactions, along with the affiant's corroborating observations, provides sufficient indicia that the informant spoke from personal knowledge. The informant's information, taken together with the affiant's observation of surveillance cameras at defendant's house and of defendant's pattern of behavior, when viewed through the lens of the affiant's knowledge and experience of the narcotics trade, support the credibility of the informant's report that defendant was engaged in narcotics activity. The fact that the affiant had previously obtained information from the informant that had produced successful results supports the reliability of the informant's information. Therefore, considering all of the facts set forth in the affidavit, we conclude that trial court clearly erred in finding no "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.'" *Whitfield*, 461 Mich at 446, quoting *Gates*, 462 US at 238.

The trial court observed that the affidavit lacked evidence that defendant sold or handed narcotics to another person and evidence of materials generally used in narcotics transactions, such as baggies or small envelopes, and that the affiant did not claim to have seen money change hands. In other words, the affidavit lacked proof that defendant was engaged in drug activity. However, "[t]o provide adequate support for a warrant, the affidavit need not *prove* anything." *Whitfield*, 461 Mich at 445. It only has to provide a substantial basis for concluding that there is a " 'fair probability that contraband or evidence of a crime' " will be found in the place to be searched. *Whitfield*, 461 Mich at 446, quoting *Gates*, 462 US at 238. Probable cause may be established even where no money or drugs were seen being exchanged if it can be inferred from surrounding circumstances that the hand-to-hand transactions are drug deals. See *People v Lyon*, 227 Mich App 599, 611-612; 577 NW2d 124 (1998) (where surrounding circumstances provided probable cause for the warrantless arrest of an offender for operating under the influence of

intoxicating liquor (a misdemeanor) even though the officer did not witness the offender operating the vehicle). In the case at bar, the informant's information, and the affiant's own experience in the narcotics unit and as an undercover buyer provided the circumstances and context from which a magistrate could reasonably have inferred that there was a fair probability that the hand-to-hand transactions were drug deals.

The trial court also appeared to discount the relevance of the affiant's related training and experience. However, we held in *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997) that "an affiant's representations in a search warrant affidavit that are based upon the affiant's experience can be considered along with all the other facts and circumstances presented to the examining magistrate in determining probable cause." A magistrate is not required to accept blindly an affiant's statements, but he or she must "examine the affiant's reliance on the affiant's experience in the same way the magistrate examines other facts and circumstances presented in the affidavit and decide whether, when read in a common-sense and realistic manner, they together establish probable cause." *Id.* In the case at bar, the affidavit shows that the affiant relied on his training and experience with the narcotics unit and as an undercover buyer to interpret his observations as likely indicative of the active selling of narcotics. To the extent that this was information presented to the magistrate, and the magistrate had a duty to consider all of the information in the affidavit, the trial court also had an obligation to consider all of the information.

Further, reviewing courts should pay great deference to a magistrate's determination of probable cause. *Whitfield*, 461 Mich at 446, quoting *Gates*, 462 US at 236. In the case at bar, it seems to us that the trial court focused more on what the affidavit did not contain than on what it did contain. However, a reviewing court's "after-the-fact scrutiny . . . should not take the form of a de novo review" *Whitfield*, 461 Mich at 446, quoting *Gates*, 462 US at 236. Reviewing courts are not to read affidavits in a "grudging or negative way," or interpret them in a "hypertechnical, rather than a common sense, manner." *Id.* Rather, the question the reviewing court must ask is whether "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.*, quoting *Gates*, 462 US at 238. For the reasons stated above, we conclude that there was, and that the trial court clearly erred in finding otherwise. In light of our disposition of this issue, we need not address plaintiff's argument for admissibility of the evidence based on application of the "good faith" exception.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Thomas C. Cameron