[Cite as *State v. Pustelnik*, 2009-Ohio-3458.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91779

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT PUSTELNIK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-496763

BEFORE: Dyke, J., Rocco, P.J., and Jones, J.

RELEASED: July 16, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Larry W. Zukerman
Scott Michael Lear
Paul B. Daiker
Zukerman, Daiker & Lear Co., L.P.A.
3912 Prospect Avenue
Cleveland, Ohio 44115

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
By: William Kaczmarek
Assistant Prosecuting Attorney
2210 Cedar Avenue, 3rd Floor
Cleveland, Ohio 44115

By: Diane Smilanick
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant Robert Pustelnik appeals from the order of the trial court that denied his motion to suppress evidence. For the reasons set forth below, we affirm.

{¶ 2} On June 8, 2007, defendant was indicted pursuant to a four-count indictment. In Count One, he was charged with one count of trafficking in less than 200 grams of marijuana. In Count Two, he was charged with possession of less than the bulk amount of Oxycodone. In Count Three, he was charged with possession of less than five grams of cocaine, and in Count Four, he was charged with possession of criminal tools.

{¶ 3} Defendant pled not guilty and filed a motion to suppress the state's evidence. In relevant part, defendant asserted that the arresting officers failed to establish probable cause prior to the issuance of the search warrant, the officers did not act in good faith, and the warrant was overbroad in that it permitted the officers to search for any illegal item on anyone at defendant's residence.

{¶ 4} The trial court held a hearing on the motion to suppress on November 28, 2007. The state presented the testimony of Lyndhurst Police Officer Michael Scipione and Detectives James Fiore and William Duffy.

{¶ 5} Officer Scipione testified that in late 2006, the department received a tip from a confidential informant regarding possible drug activity at defendant's home. Officer Scipione then began surveillance at the premises. Over the course of four months, he observed heavy traffic to the home, which included the vehicles of known

drug users. Scipione then received an additional tip that defendant was selling marijuana, as well as small amounts of Oxycodone and cocaine, and that defendant kept marijuana inside the center console of his car. Police officers subsequently picked up defendant's trash on trash collection day and found marijuana. The next day, officers Scipione and Duffy prepared an affidavit in support of a search warrant. The officers later obtained a search warrant authorizing the search of defendant's home and car.

{¶ 6} During execution of the search warrant, Officer Scipione found marijuana in a night stand to the left of defendant's bed and vials containing cocaine residue. Oxycontin, a scale, a glass pipe, and other items were also recovered.

{¶ 7} On cross-examination, Officer Scipione stated that his partner received the initial tip and mentioned the identity of the informant. The department had not previously dealt with this person. He also admitted that he observed people enter the house but did not see them exiting, and that he did not make any averments about defendant's car in the search warrant affidavit.

{¶ 8} Detective Fiore testified that he assisted in the execution of the search warrant and found bags of suspected marijuana in defendant's night stand drawer. He also collected vials containing white powdery substances as well as containers of pills and loose pills. He also discovered marijuana in defendant's car.

{¶ 9} Detective Duffy testified that he knew defendant from previous incidents. After the department obtained information from a confidential informant, Det. Duffy collected defendant's trash and found material that appeared to be marijuana

residue. Duffy tested the material and it was positive for marijuana. He and Officer Scipione subsequently obtained a search warrant for defendant's home and car. Drugs were recovered from defendant's bedroom and car, and drug paraphernalia was found in his livingroom.

{¶ 10} Detective Duffy further testified that he interviewed defendant at the police station, and defendant admitted to being a heavy pot user and to smoking one to three ounces of marijuana per week. Defendant also reportedly stated that the cocaine had been in his home for a while and that he had not used that drug recently. He stated that he takes Percocet (an Oxycodone tablet) and sometimes sells this drug to people he knows.

{¶ 11} On cross-examination, Det. Duffy stated that he had periodically driven past defendant's house and on one occasion saw defendant and another individual entering the home, but did not see others entering.

{¶ 12} The trial court found that the Lyndhurst Police received a tip that defendant was selling cocaine from his home; that surveillance of the premises indicated heavy vehicular traffic to the premises, including vehicles belonging to individuals known to be involved in drug activity; that the officers received an additional tip that defendant received drugs from one of his co-workers; and that officers found marijuana in defendant's trash on trash collection day. The trial court then concluded that based upon the totality of the circumstances, the officers had probable cause to obtain a search warrant authorizing the search of defendant's car

and home, and that defendant was not subject to an unreasonable search or seizure.

{¶ 13} Defendant subsequently pled no contest to the charges of the indictment. He was found guilty of each charge and was sentenced to two years of community control sanctions. Defendant now appeals and assigns three errors for our review.

{¶ 14} Defendant's first assignment of error states:

{¶ 15} "The trial court committed prejudicial error by denying appellant's motion to suppress by finding that the search warrant was supported by probable cause."

{¶ 16} Within this assignment of error, defendant asserts that the affidavit in support of the search warrant was insufficient to establish probable cause because the officers relied upon hearsay from a tipster whose reliability was unknown, defendant's trash contained only marijuana and not other controlled substances, and a statement in the search warrant affidavit was contradicted by testimony at the hearing.

{¶ 17} The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures and provides that "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."

{¶ 18} In *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph two of the syllabus, the Supreme Court set forth the standard for reviewing an affidavit submitted in support of a search warrant:

{¶ 19} "In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant. (*Illinois v. Gates* [1983], 462 U.S. 213, followed.)"

{¶ 20} The standard for probable cause does not require a prima facie showing of criminal activity, but only the probability of criminal activity. *Illinois v. Gates*, supra. The *Gates* Court explained:

{¶ 21} "The task of the issuing magistrate 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. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for * * * [concluding]' that probable cause existed."

{¶ 22} Further, with regard to confidential or anonymous informants, their veracity, reliability and basis of knowledge are all highly relevant in determining probable cause, id., so "[t]here must be some basis in the affidavit to indicate the informant's credibility, honesty or reliability." *State v. Harry,* Butler App. No. CA2008-01-013, 2008-Ohio-6380. Nonetheless, a deficiency in one of these principles does not negate probable cause if there is a strong showing on another or if there is some other indicia of reliability. *Illinois v. Gates,* supra. Thus, an identified informant who provides corroborated information may establish probable cause. See *State v. Martin,* Cuyahoga App. No. 89030, 2007-Ohio-6062. The *Martin* Court stated:

{¶ 23} "Although there was no evidence in the affidavit to demonstrate the affiant's prior knowledge of the veracity of the confidential informant, the informant's statements were corroborated by police investigation and the trash pulls. We find that this corroboration provided sufficient indicia of the reliability and veracity of the informant's statements. See *Illinois v. Gates* (1983), 462 U.S. 213, 242-246, 76 L.Ed.2d 527, 103 S.Ct. 2317; *State v. Banna,* Cuyahoga App. Nos. 84901 and 84902, 2005-Ohio-2614."

{¶ 24} In this matter, the identified informant told the police that defendant sold cocaine out of his house. The officers learned that defendant had prior arrests for "drugs for sale" and drug trafficking. The officers also conducted surveillance and observed heavy vehicular traffic at the premises . The tipster subsequently informed the police that defendant gets marijuana from a co-worker and sells it in smaller

quantities, as well as cocaine and Oxycontin. The officers verified defendant's employment and found marijuana residue and stems in his trash. From the foregoing, we conclude that the trial court properly concluded that the judge who issued the search warrant had "a substantial basis for concluding that probable cause existed for the search. The identified informant had a good basis of knowledge, since he was familiar with defendant's home, car, and workplace. He was also reliable in that surveillance of defendant's home and the trash pull corroborated his statement.

{¶ 25} Although the trash pull revealed only marijuana, the tipster asserted that defendant also sold cocaine and Oxycontin, and surveillance indicated traffic at the residence.

{¶ 26} Defendant insists, however, that the information obtained by the police was stale and therefore not reliable. We reject this claim since the trash pull occurred within one day of the affidavit for a search warrant. Accord *State v. Bailey,* Butler App. No. CA2002-03-057, 2003-Ohio-5280.

{¶ 27} Further, as is set forth in greater detail below, the statement in the affidavit, which was contradicted by the officers' testimony, is not significant and does not undermine the finding of probable cause.

{¶ 28} The first assignment of error is without merit.

{¶ 29} Defendant's second assignment of error states:

{¶ 30} "The trial court erred to the prejudice of appellant by denying appellant's motion to suppress as appellant clearly established that a material, sworn, false

statement was made by affiants in the affidavit for a search warrant and that said material false statement was made knowingly, intentionally and/or with reckless disregard for the truth and that without said false statement, the affidavit's remaining content was insufficient to establish probable cause."

{¶ 31} In support of this assignment of error, defendant complains that Officer Scipione averred that he observed individuals "enter [defendant's home] through the front door, stay for varying lengths of time, [and] exit through the front door * * *." He admitted at the hearing, however, that he could not recall particular individuals entering the home, and he did not wait and observe until they left the premises.

{¶ 32} In *Franks v. Delaware* (1978), 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667, the United States Supreme Court held that a defendant who seeks to challenge the veracity of a search warrant affidavit must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and * * * the alleged false statement is necessary to the finding of probable cause." Id., at 155, 156.

{¶ 33} Thus, "a challenge to the factual veracity of a warrant affidavit must be supported by an offer of proof which specifically outlines the portions of the affidavit alleged to be false, and the supporting reasons for the defendant's claim. This offer of proof should include the submission of affidavits or otherwise reliable statements, or their absence should be satisfactorily explained." *State v. Roberts* (1980), 62 Ohio St.2d 170, 178, 405 N.E.2d 247.

{¶ 34} In this matter, there was no preliminary showing of a false statement, other than general assertions that the affidavit contained false information. This is insufficient. *State v. Martin,* Cuyahoga App. No. 89030, 2007-Ohio-6062. In any event, this statement offered herein is not significant and was not necessary to a finding of probable cause. Cf. *State v. Gravelle,* Huron App. No. H-07-010, 2009-Ohio-1533.

{¶ 35} The second assignment of error is without merit.

{¶ 36} Defendant's third assignment of error states:

{¶ 37} "The trial court erred to the prejudice of appellant by failing to rule on all of the issues raised by appellant in his motion to suppress."

{¶ 38} Defendant asserts that the search warrant was overly broad because it permitted the officers to search "[m]arijuana, or other illegal drugs and/or controlled substances, instruments and paraphernalia," "any and all evidence pertaining to the violation of the laws of Ohio," and "all persons on the premises."

{¶ 39} As an initial matter, we note that the Fourth Amendment to the United States Constitution requires that a warrant describe with "particularity * * * the place to be searched and the persons or things to be seized." See, also, *State v. McGettrick* (1988), 40 Ohio App.3d 25, 29, 531 N.E.2d 755.

{¶ 40} In determining whether a warrant is specific enough, courts have determined that the specificity required varies with the nature of the items to be seized. *State v. Overholt,* Medina App.No. 02CA0108-M, 2003-Ohio-3500, citing *State v. McGettrick*, supra. The key inquiry is whether the warrant could reasonably

have described the items more precisely. *State v. Benner* (1988), 40 Ohio St.3d 301, 307, 533 N.E.2d 701. Thus, a broad or generic listing of items to be seized is permissible if the circumstances do not allow for greater specificity and detail. *State v. Mansfield,* Medina App. No. 06CA0022-M, 2007-Ohio-333.

{¶ 41} With regard to defendant's challenge to the "[m]arijuana, or other illegal drugs and/or controlled substances, instruments and paraphernalia" provision of the warrant, defendant argues that this language lacks specificity and is improper pursuant to *State v. Dalpiaz,* 151 Ohio App.3d 257, 2002-Ohio-7346, and *State v. Casey,* Mahoning App. No. 03-MA-159, 2004-Ohio-5789.

{¶ 42} In *State v. Dalpiaz,* supra, the police had evidence that the defendant was growing marijuana, but they obtained a search warrant, which authorized the officers to seize "any drug processing, making, manufacturing, producing, transporting, delivering, possessing, storing, distributing, selling, using, or otherwise dealing with a controlled substance, and all other fruits and instrumentalities of the crime at the present time unknown[,]" and "any and all evidence pertaining to violations of the drug laws of the State of Ohio[.]" The court of appeals held that the warrant was so broad that it was essentially a "laundry list" that encompassed items that the officers could not reasonably have expected to find.

{¶ 43} In *State v. Casey,* supra, the police had evidence that the defendant trafficking in crack cocaine, but they obtained a search warrant, which authorized them to seize crack cocaine and "other drugs of abuse as defined by [R.C.] 3719.011(A)." The court of appeals held that this broad term included drugs such as

cocaine, it also included intoxicants such as plastic cement, gasoline, anesthetic gas, and prescription medications, and was a fishing expedition for contraband.

{¶ 44} In this matter, however, the affidavit indicated that defendant sold marijuana, cocaine, and Oxycontin, not just a single drug as in *State v. Dalpiaz,* supra, and *State v. Casey,* supra. Further, the search warrant at issue does not contain the language condemned in *Dalpiaz,* which described the property to be seized was described as "any drug processing, making, manufacturing, producing, transporting, delivering, possessing, storing, distributing, selling, using, or otherwise dealing with a controlled substances."

{¶ 45} Moreover, in *United States v. Lengen* (C.A. 6, 2007), No. 05-4321, the court addressed the defendant's challenge to the particularity of the search warrant that authorized the search for:

{¶ 46} "Cocaine and other narcotic drugs and/or controlled substances, instruments, and paraphernalia used in the taking of drugs and/or preparation of illegal drugs for sale, use, possession, or shipment, records of illegal transactions, articles of personal property, papers and documents tending to establish the identity of persons in control of the premises, any and all evidence of communications used in the furtherance of drug trafficking activity, including, but not limited to, pagers, cellular telephones, answering machines, and answering machine tapes, any and all other contraband, including, but not limited to, money, firearms, and other weapons being illegally possessed therein, and any and all evidence pertaining to the violation

of the drug laws of the State of Ohio, to wit: Ohio Revised Code Chapters 2923 and 2925."

{¶ 47} The court found the warrant to satisfy the need for particularity, and held:

{¶ 48} "In this case, the warrant satisfied those particularity requirements. Not only did it describe the real property to be searched, but the authorization also sufficiently detailed the items that the police could seize. Because of the very nature of contraband drugs and any drug-trafficking operation, a warrant cannot be expected to identify exactly the weights or quantities of controlled substances and paraphernalia that might be found in a private dwelling."

{¶ 49} Similarly, in *State v. Brown,* Summit App. Nos. 23076 and 23080, 2006-Ohio-6749, the defendant challenged a search warrant authorizing the search and seizure of "[a]ny and all narcotics including but not limited to marijuana, a schedule 1 controlled substance." The court rejected defendant's challenge because information provided by the informants indicated drug activity, and the type or types of drugs involved were not known, defendant's car contained marijuana and a drug dog alerted to the presence of narcotics.

{¶ 50} With regard to defendant's challenge to the search warrant provision authorizing the search for "any and all evidence pertaining to violations of the laws of the State of Ohio to wit: Chapters 2925 and 2923 of the Ohio Revised Code," we note that this court approved a similar provision in *State v. Young,* Clermont App.

No. CA2005-08-074, 2006-Ohio-1784. Cf. *State v. Jordan* (April 29, 1999), Cuyahoga App. No. 73453.

{¶ 51} With regard to defendant's claim that the search warrant impermissibly authorized the search of "any persons present therein," this provision was upheld in *State v. Kinney* (1998), 83 Ohio St.3d 85, 1998-Ohio-425, 698 N.E.2d 49. The *Kinney* Court stated:

{¶ 52} "An 'all persons' clause may still be carefully tailored to its justifications if probable cause to search exists against each individual who fits within the class of persons described in the warrant. The controlling inquiry is whether the requesting authority has shown probable cause that every individual on the subject premises will be in possession of, at the time of the search, evidence of the kind sought in the warrant. If such probable cause is shown, an 'all persons' provision does not violate the particularity requirement of the Fourth Amendment."

{¶ 53} In this matter, the tipster indicated that defendant sold drugs from his home and the affidavit clearly indicated that others frequented the home for drug sales so the "any persons present therein" clause is permissible.

{¶ 54} The third assignment of error is without merit.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's

conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR