[J-149-2008] [MO: McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 40 MAP 2008
	:	
Appellant	:	Appeal from the Opinion and Order of the
	:	Superior Court entered June 14, 2007 at
	:	2874 EDA 2005, vacating the Judgment of
v.	:	Sentence of the Court of Common Pleas
	:	of Delaware County entered September 7,
	:	2005 at 1758-02 CR-162-02
CURTIS JONES,	:	
	:	928 A.2d 1054 (Pa. Super. 2007)
Appellee	:	
	:	ARGUED: October 22, 2008
	:	

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: February 16, 2010**

I join the Majority Opinion. I agree that the search warrant at issue in this straightforward case was supported by probable cause, and the items seized fell within the proper scope of the warrant. I write separately only to address the proper standard of review applicable to the probable cause determination of a magistrate judge under the Fourth Amendment which is, in essence, a question of the level of review that is contemplated by the United States Supreme Court, the ultimate authority on the Fourth Amendment.

The Majority notes that our cases have inconsistently described the review as involving "due deference" and "great deference" in search warrant cases. Maj. Slip Op. at 10 n.10. The Majority then notes that "the question of such nomenclature is not pertinent to our disposition of the present appeal." Id. It is correct that we did not specifically accept

review in this case to resolve that particular discrepancy in "nomenclature," nor did we accept review to determine the appropriate level of deference, if any, that should be accorded probable cause determinations by magistrates in warrant cases.

On the other hand, identification of the proper standard of review is essential to the proper disposition of any case; the difference between "great," "due" and "no" deference can be outcome-determinative; appeals involving challenges to warrants are common; and the tension in the relevant cases is apparent. In such circumstances, I believe some commentary is appropriate to guide the bench and bar, and to that end I offer my own preliminary view.

Quoting Commonwealth v. Torres, 764 A.2d 532, 538-40 (Pa. 2001), the Majority begins its probable cause analysis by describing the reviewing court's responsibility to "accord deference to the issuing authority's probable cause determination," noting that its task is "not to conduct a *de novo* review of the issuing authority's probable cause determination, but [is] simply to determine whether or not there is substantial evidence in the record supporting the decision to issue the warrant." Maj. Slip Op. at 9. The Majority also quotes United States v. Leon, 468 U.S. 897, 914 (1984), for the proposition that the "preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." Maj. Slip Op. at 10.

But the Majority also notes that, more often than not, this Court has described our review of such probable cause determinations as employing an ordinary or "due" deference. Maj. Slip Op. at 10 n.10. See, e.g., Commonwealth v. Rega, 933 A.2d 997, 1013 (Pa. 2007); Commonwealth v. Rompilla, 653 A.2d 626, 632 (Pa. 1995); Commonwealth v. Baker, 615 A.2d 23, 25 (Pa. 1992); Commonwealth v. Moss, 543 A.2d 514, 518 (Pa. 1988); Commonwealth v. (Theodore) Jones, 484 A.2d 1383, 1387 (Pa. 1984); Commonwealth v. Tolbert, 424 A.2d 1342, 1344 (Pa. 1981); see also Torres, 764 A.2d at 537-38 (omitting "substantial" when actually setting forth standard of review); id. at

545 (Castille, J., concurring and dissenting) (criticizing majority's "fail[ure] to accord the issuing authority the deference due its decision" and contrasting due deference with "the sort of hypertechnical, legalistic, hindsight scrutiny that animated the now discarded Aguilar/Spinelli review of warrant affidavits") (citing Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969)). Moreover, as Madame Justice Todd develops, a careful reading of the High Court's precedent suggests that it may not have intended any specially deferential standard for reviewing the purely legal question of whether certain uncontested facts amount to probable cause.

We must accept pronouncements from the High Court as they are, and that Court has spoken of some form of heightened deference in this area. See Leon, supra. If the deference is intended to extend to the assessment of probable cause in warrant affidavit review, where no fact-finding or credibility determination within the special bailiwick of the magistrate is involved, it is indeed difficult to understand why any measure of "deference" should apply at all. When the question is a purely legal one (such as the question of whether an agreed-upon set of facts and circumstances establishes probable cause), there is no jurisprudential reason for a reviewing court to defer to the judgment of any entity below: whether it be the trial judge, a magistrate, or a police officer in the field.

Other courts and commentators have struggled over what to make of the suggestion by the High Court that "great deference," rather than *de novo* review, should be exercised when reviewing a magistrate's probable cause determination in a warrant case. A leading academic authority on the Fourth Amendment cogently summarizes the issue and suggests a useful and harmonizing analytical construct which mirrors my own considered view:

> The point, in brief, is simply this: in a warrant case, the appellate court has the same record as the magistrate (that is, the affidavit) and thus is in essentially as good a position as the magistrate was to make the probable cause determination. This being so, one could even argue for de novo review here (as one state has done, and as has sometimes been required elsewhere as to similar situations in which the review was one of factfinding

> only via documents), except for the fact that we want to give the magistrate's decision some deference "in the express service of the policy of encouraging resort to warrants." Because of this policy, there is good reason why "the reviewing court must give deference to … all reasonable inferences drawn by the issuing judge, and then decide whether, based upon the facts explicitly stated in the affidavit, supplemented by those reasonable inferences, the affidavit establishes probable cause." But that, it is submitted, is a lesser deference than practicalities make essential as to a suppression hearing judge's decision after hearing conflicting testimony.

LaFave, Wayne R., 6 Search and Seizure § 11.7(c) 455-56 (4th ed. 2004) (footnotes omitted). See generally id. at 451-56 (quoting and discussing federal and state cases).

I view the tension in this area, and the concomitant inconsistencies of expression in the caselaw, as resulting from: (1) the special importance of warrants, an investigative process which interposes a judicial officer between state action and individual rights, a process courts seek to encourage; and (2) the related importance of learning from the correction of debunked cases such as Aguilar and Spinelli that the task of warrant review must be conducted in a practical, and not a hypertechnical, fashion. "[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis . . . for conclud[ing] that probable cause existed.'" Commonwealth v. Gray, 503 A.2d 921, 925 (Pa. 1985) (quoting Illinois v. Gates, 462 U.S. 213, 238-39 (1983)) (alterations and omission in original).

I do not view this sort of real-world "deference" to the practical aspects of warrant review as diluting the power of a reviewing court to render its own judgment on a purely legal question, such as the existence of probable cause. In warrant review, when the facts are not in dispute, the question becomes whether those facts, considered in their totality, amount to probable cause. However, in applying that standard, we must be mindful of the Fourth Amendment values that are at stake and the realities of law enforcement. Like the

Majority, I believe that the Superior Court erred in finding the warrant in this case unsupported by probable cause.[1]

Mr. Justice Baer joins this concurring opinion.

[1] Generally, this Court does not accept a discretionary appeal merely to correct error. See Pa.R.A.P. 1114 ("appeal will be allowed only when there are special and important reasons therefor"). However, the error in this case compromised a murder prosecution in an instance where police secured a search warrant; supervisory correction is warranted in such circumstances.

As further basis for the conclusion that the Superior Court erred, the Majority cites Pennsylvania Rule of Criminal Procedure 201(3) and Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), correctly observing that "a search warrant *may* be used as an investigative tool, under the appropriate circumstances." Maj. Slip Op. at 15 (emphasis in original). I recognize the force in Justice Todd's discussion of the proper approach to such warrants. But in light of the Majority's controlling determination that probable cause existed to support the magistrate's decision to issue the search warrant here, as well as the fact that the items seized were properly the subject of such a warrant, I agree that the Superior Court panel plainly erred in granting relief based on its determination that probable cause did *not* exist to support identification of drugs or drug paraphernalia as items to be seized, as such items were not actually seized. Maj. Slip Op. at 17 n.13.