

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/  
Cross-Appellant,

v

DAVID MARTINEZ,

Defendant-Appellant/  
Cross-Appellee.

UNPUBLISHED

September 27, 1996

No. 184992

LC No. 90-011184

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Before: J.H. Gillis, P.J., and G.S. Allen and J.B. Sullivan, JJ.\*

MEMORANDUM.

Defendant was charged with possession of 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Following a hearing, the trial court granted his motion to suppress evidence and dismissed the case. Plaintiff appealed and this Court remanded for another suppression hearing because the trial court applied the wrong standard in determining the legality of the search. On remand, the trial court conducted the hearing and this time denied defendant's motion to suppress the evidence. Defendant subsequently entered a conditional plea of guilty to the charged offense and was sentenced to a term of nine months to thirty years in prison. Defendant appeals as of right and plaintiff cross-appeals. We affirm defendant's conviction but remand for resentencing. This case has been decided without oral argument pursuant to MCR 7.214(E)(1)(b).

The trial court did not clearly err in denying defendant's motion to suppress the evidence. Defendant failed to show by a preponderance of the evidence that the affiant recklessly inserted false evidence or omitted material information from the affidavit. *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992). Furthermore, defendant did not show that the false evidence or alleged omissions eroded the magistrate's finding of probable cause. Even without the false information or the alleged omissions, probable cause still existed to support the issuance of the search warrant. We reject

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\*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

defendant's claim that the court erred in refusing to hold a hearing on the issue of knowing or reckless omission. At the hearing on remand, the court determined that the affiant had no knowledge of the informant's prior record or other indicia of unreliability. Therefore, he could not have knowingly or recklessly omitted this information.

Next, the trial court did not abuse its discretion in refusing to allow defendant to view the transcript of the in camera hearing with the informant. Since defendant's sole purpose for requesting the production of the transcript was to challenge the truth of the information supplied to the police and used to obtain the search warrant, the transcript was not required to be produced. See *People v Johnson*, 83 Mich App 1, 11; 268 NW2d 259 (1978); *People v Davis*, 72 Mich App 21, 26; 248 NW2d 690 (1976). Accordingly, the trial court did not abuse its discretion in refusing to unseal the transcript.

On cross-appeal, plaintiff contends that the trial court abused its sentencing discretion in regard to the extent of the departure from the recommended range of the sentencing guidelines. We agree. The offense of which defendant was convicted carries a twenty-year minimum sentence, and defendant was sentenced to only nine months. Although the circumstances clearly justified a departure, we conclude that the extent of the departure in this case violates the principle of proportionality by being disproportionately lenient. *People v Catanzarite*, 211 Mich App 573, 585; 536 NW2d 570 (1995). Therefore, we remand for resentencing.

Remanded for resentencing. We do not retain jurisdiction.

/s/ John H. Gillis

/s/ Glenn S. Allen, Jr.

/s/ Joseph B. Sullivan