

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN RAY GARTEN,

Defendant-Appellant.

UNPUBLISHED

March 13, 1998

No. 185513

Oakland Circuit Court

LC No. 94-134160-FH

Before: MacKenzie, P.J., and Holbrook, Jr. and Saad, JJ.

PER CURIAM.

Defendant pleaded guilty of possession with intent to deliver more than 50 grams but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(ii), and habitual offender-second, MCL 769.10; MSA 28.1082. He now appeals as of right. We affirm.

As a preliminary question, we must first decide if defendant properly entered a conditional guilty plea to preserve for appellate review his challenges to the search warrant. MCR 6.301(C)(2) permits a defendant to enter a conditional guilty plea, but only with the consent of the court and the prosecutor. Where a prosecutor refuses to agree to a conditional plea, this Court will generally not review issues otherwise waived by unconditional guilty pleas. *People v Andrews*, 192 Mich App 706, 707; 481 NW2d 831 (1992); *People v Kelley*, 181 Mich App 95, 97; 449 NW2d 109 (1989).

Here, however, the prosecutor erroneously informed the court that it could accept defendant's plea as a conditional guilty plea over the prosecutor's objection. Therefore, despite the prosecutor's objection, it was a mistake on the part of the prosecutor that invited the trial court to erroneously accept a conditional guilty plea in this case. Defendant entered his plea with the understanding that he preserved certain issues for appellate review. Therefore, on the unique facts of this case, we will address the issues preserved by the conditional plea.

I

Defendant first argues that probable cause did not exist to support issuance of a search warrant because the supporting affidavit allegedly contained false information and material omissions. When false statements are made in a supporting affidavit, evidence obtained pursuant to that warrant must be

suppressed if the false information was necessary to a finding of probable cause. *Franks v Delaware* 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992), *cert den. sub nom Stumpf v Michigan*, 510 US 1042; 114 S Ct 686; 126 LEd2d 654 (1994). To prevail on a motion to suppress, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. *Stumpf, supra*. The exclusionary rule from *Franks* also extends to material omissions from an affidavit. *Id.*

Here, although defendant may have shown that there was inaccurate information contained in the affidavit at the time of the evidentiary hearing, he has not shown that the officer preparing the warrant intentionally or recklessly included false information or made material omissions. At the time this matter was being investigated, the informant was not in custody or working off charges. There was no evidence that the informant was not credible because he used controlled substances. The fact that the informant was paid for his assistance was not a material omission. It is not reasonable to assume that the informant was biased against defendant because the informant was formerly beaten up by “someone” at defendant’s place of employment. Finally, defendant has not shown that the police were aware at the time the affidavit was prepared that the person who actually purchased the drugs for the informant was not an unwitting participant. Accordingly, defendant has failed to show by a preponderance of the evidence that the affidavit contained false statements or material omissions.

II

Defendant next argues that there was not probable cause to search his place of employment based upon the information the police included in the affidavit. We disagree. A search warrant may not be issued unless justified by probable cause. *People v Sloan*, 206 Mich App 484, 486; 522 NW2d 684 (1994). Probable cause to search exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct could be found in a stated place to be searched. *Stumpf*, 196 Mich App at 227. This Court must read the search warrant and affidavit in a common-sense and realistic manner while affording deference to the magistrate’s decision based upon the preference for searches conducted pursuant to warrants. *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992).

Having reviewed the search warrant and affidavit, we conclude that it was reasonable for the magistrate to determine that evidence of criminal conduct could be found at defendant’s place of employment. Furthermore, evidence of criminal conduct could reasonably have been found on defendant’s person. The fact that the police did not recover the marked money is not relevant to the issue of probable cause because the police could not have known this at the time the warrant was procured. As noted above, because the police believed that the person who purchased the drugs was an unwitting participant, the facts in the affidavit supported the magistrate’s finding of probable cause.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Donald L. Holbrook, Jr.

/s/ Henry William Saad