

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUIS FRANCISCO MARTINEZ,

Defendant-Appellant.

UNPUBLISHED

March 17, 2009

No. 280284

Livingston Circuit Court

LC No. 06-015579-FH

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant was found guilty following a bench trial of possession with the intent to deliver 50 grams or more but less than 450 grams of a controlled substance (to wit: cocaine), MCL 333.7401(2)(a)(iii), and was sentenced to fifty-one months' to twenty years' imprisonment. He appeals by right. We affirm.

On January 14, 2005, members of the Jackson Narcotics Enforcement Team (JNET) executed a search warrant at defendant's home, where defendant was present with his fiancé, his fiancé's brother, and his five children. Police officers seized a large quantity of cocaine and some marijuana seeds from the home. Defendant verbally admitted to the officers and gave a written statement admitting that he purchased the cocaine from a friend in Chicago for \$11,000 and gave it to his brother-in-law to hide in defendant's basement.

On appeal, defendant first argues that the trial court erred by refusing to suppress the evidence seized from his home on the ground that his Fourth and Fourteenth Amendment rights were violated because the search warrant affidavit failed to establish probable cause that evidence of a crime would be presently found at his residence. We disagree.

Probable cause exists where a reasonably prudent person, considering all of the known facts and circumstances, would be justified in believing that contraband or evidence of a crime will be found in the stated place. *Ornelas v United States*, 517 US 690, 696; 116 S Ct 1657; 134 L Ed 2d 911 (1996).

Defendant argues that while there may have been probable cause to believe he was personally involved in drug trafficking, that information alone, combined with nothing more than the affiant's training and experience, provided only a mere hunch that evidence of a crime would be found at his home.

Defendant's arguments fail because the affidavit did contain probable cause that a search of his home would uncover evidence of drug trafficking. The affidavit demonstrated that defendant's home was specifically connected to his criminal activity. One of defendant's employees had witnessed defendant exit his home and enter his white truck, where he placed methamphetamine inside the glove box.

In *People v Darwich*, 226 Mich App 635, 638, 640; 575 NW2d 44 (1997), the search warrant affidavit stated that officers had witnessed the defendant selling marijuana out of his store, but that they had found no significant quantity of marijuana at the store. The affidavit stated that a search of the defendant's residence would uncover evidence associated with his drug trafficking, based upon the affiant's experience, which "led him to believe that it is common for drug dealers to package and store narcotics at one location and distribute them at another." *Id.* The Court found that these statements, "together with the statements implicating defendant in the selling of narcotics, lead to a logical inference that defendant stored elsewhere the materials used in the operation," and thus, the "[d]efendant's residence was a logical place to look for the source of the marijuana packets sold at defendant's store." *Id.* at 640.

Similarly, in the present case, in addition to the affiant's training and experience and the statements implicating defendant in the selling of narcotics, the affidavit also stated that defendant operated his legitimate business, Textura Plastering, from his home; consequently, the court could properly conclude that defendant's residence was the *only* logical place to look for evidence of his drug trafficking. Thus, the affidavit was not based upon mere speculation that evidence of a crime would be found at defendant's home. Rather, the observations of defendant's employee, as well as the affiant's training and experience and investigation of the case, demonstrated probable cause that evidence of a crime would be found in defendant's home.

Defendant additionally argues that the affidavit did not contain probable cause that evidence of a crime would be presently found at his residence, i.e., that the search warrant was stale. A search warrant is stale "if the probable cause, while sufficient at some point in the past, is now insufficient as to evidence at a specific location." *United States v Abboud*, 438 F3d 554, 572 (CA 6, 2006). Defendant asserts that the affidavit only states that his employee worked for him for two months, without any other reference as to when the employee visited defendant's residence, or any mention of a date that criminal activity occurred at the home.

Nonetheless, the affidavit did establish that defendant lived and conducted his legitimate business from his residence and that he continued to sell methamphetamine from the residence, with the most recent transaction occurring the day before the affidavit was prepared. Moreover, time is not the only factor to be considered in determining whether probable cause exists to believe that evidence is presently located at the place to be searched. Other factors include "whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of a scheme suggests that it is probably continuing, and . . . whether [the property sought] is likely to be promptly disposed of or retained by the person committing the offense." *People v Russo*, 439 Mich 584, 605-606; 487 NW2d 698 (1992).

"The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily

transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.” [*Id.* at 606, quoting 2 LaFave, *Search and Seizure* (2d ed), § 3.7(a), in turn quoting *Andresen v Maryland*, 24 Md App 128, 172; 331 A2d 78 (1975).]

The affidavit alleged that defendant had a large quantity of methamphetamine along with “packaging material and scales,” and a ledger containing information regarding drug transactions located inside his white truck. Defendant’s employee worked for him for the two months preceding the preparation of the affidavit and was in charge of keeping track of his drug transactions, including the amount of drugs sold, the payments received and due, and the amount of drugs currently on hand. The employee had seen defendant deliver methamphetamine and had also seen defendant exit his home and enter into his truck, placing methamphetamine inside the glove box. Further, the employee had informed the police that defendant had received a shipment of methamphetamine “approximately a month ago,” and that defendant had approached the employee regarding finding someone who wanted to purchase it. Thus, the character of the crime was not a “chance encounter” but was continuing; the criminal was not “nomadic” but rather “entrenched”; the things to be seized were of “enduring utility” to defendant; and the character of defendant’s residence was not a “forum of convenience,” but rather a “secure operational base.”

Moreover, as to time, the affidavit revealed that defendant sold methamphetamine to a third person on the day before the affidavit was prepared, and that he had done so two or three times since he was introduced to that person during the two months preceding the preparation of the affidavit. Accordingly, the affidavit demonstrated probable cause that evidence of a crime would be presently found at defendant’s residence.

Next, defendant argues that his Fourth Amendment right to be free from an unreasonable search and seizure was violated because the search warrant failed to particularly describe the items to be seized by the investigating officers. Thus, defendant asserts the trial court erred in denying his motion to suppress evidence. We disagree.

The particularity clause of the Fourth Amendment is designed to prevent a “general exploratory rummaging in a person’s belongings.” *Coolidge v New Hampshire*, 403 US 443, 467; 91 S Ct 2022; 29 L Ed 2d 564 (1971). Defendant argues that the search warrant improperly authorized a general search and allowed police officers to exercise unfettered discretion in determining what to seize because it included the following to be seized, secured, and tabulated:

Any and all vehicles associated with the residence at the time the search warrant is executed whether located on the street or within the curtilage of the residence.

Any and all out buildings, trailers or garages at the time the search warrant is executed.

Any and all persons present and their clothes at the time the search warrant is executed.

Any and all vehicles registered to [T]extura [P]lastering.

Any and all buildings, trailer [sic], doing business as [T]extura [P]lastering.

Defendant relies on *Groh v Ramirez*, 540 US 551, 559-560; 124 S Ct 1284; 157 L Ed 2d 1068 (2004). In *Groh*, the police were searching for a stockpile of weapons. Instead of listing and describing any item to be seized, the search warrant only listed the seizure of a two-story house. *Id.* at 554. The Court found:

This warrant did not simply omit a few items from a list of many to be seized, or misdescribe a few of several items. Nor did it make what fairly could be characterized as a mere technical mistake or typographical error. Rather, in the space set aside for a description of the items to be seized, the warrant stated that the items consisted of a ‘single dwelling residence . . . blue in color.’ In other words, the warrant did not describe the items to be seized at all. In this respect the warrant was so obviously deficient that we must regard the search as ‘warrantless’ within the meaning of our case law. [*Id.* at 558.]

In contrast, the search warrant in the present case listed not only the vehicles and buildings specified above, but it also described the following items to be seized: controlled substances, including but not limited to methamphetamine, items used to package and process controlled substances, items taken in exchange for controlled substances (e.g., US currency, weapons, records such as deeds, bills, leases, bank records, etc.), and items used in drug transactions such as tally sheets, ledgers, notebooks, video tapes, cassette tapes, etc. The police did not actually seize any vehicles, trailers, outbuildings, or garages, but they were secured.

In any event, the remedy for a search warrant that is overbroad is not invalidation of the entire warrant, but rather “to sever the infirm portion of the search warrant from the remainder which passes constitutional muster.” *Abboud, supra* at 576. The evidence seized from defendant’s home was not within the overbroad portion of the search warrant, it was encompassed in the remainder of the search warrant “which passes constitutional muster.” Accordingly, the trial court correctly denied defendant’s motion to suppress the evidence seized from his home.

Defendant next argues that the trial court erred in denying his motion to suppress evidence because the good faith exception to the exclusionary rule does not apply. We disagree.

In *People v Goldston*, 470 Mich 523, 530, 542-543; 682 NW2d 479 (2004), our Supreme Court adopted the good faith exception to the exclusionary rule, finding that “no deterrence [of police misconduct] occurs when police reasonably rely on a warrant later found to be deficient.” The good faith exception applies when an officer’s actions are “within the scope of, and in objective, good-faith reliance on, a search warrant obtained from a judge or magistrate.” *Id.* at 530. In *United States v Leon*, 468 US 897, 923; 104 S Ct 3405; 82 L Ed 2d 677 (1984), the United States Supreme Court set out four instances where the good faith exception would not apply: (1) where the issuing magistrate was misled by information in an affidavit that the affiant

knew was false or should have known was false except for his reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his judicial role and failed to act in a neutral and detached fashion, serving merely as a rubber stamp for the police; (3) where the affidavit does not provide the magistrate with a substantial basis for determining the existence of probable cause, i.e., where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the officer could not have reasonably relied in good faith on the warrant because it was facially deficient.

Defendant asserts that the information set forth in the affidavit was stale, vague, and overbroad, and the list of items to be seized would have alerted any objectively reasonable officer that it was an unlawful search warrant. We hold that the police officers' reliance on the search warrant was objectively reasonable even if the search warrant were found to be defective from lack of probable cause that evidence of a crime would be found in defendant's home, based on staleness of the search warrant, a lack of particularity in, or the overbroad list of items to be seized.

First, with regard to the staleness of the search warrant, the affidavit stated defendant sold cocaine to a third person on the day before the affidavit was prepared. It further referenced the fact that defendant's employee had been working for defendant for the two months preceding the preparation of the affidavit and that during those two months the employee had observed defendant delivering methamphetamine; the employee had introduced defendant to the third person for the purpose of initiating a drug transaction, and defendant sold cocaine to the third person two or three times. Thus, all of the conduct under investigation occurred during the two months preceding the preparation of the affidavit.

Second, with regard to the lack of particularity, the search warrant did list the seizure of several items with particularity, for which there was probable cause, but also included a reference to *seizing and securing* vehicles, outbuildings, garages, etc., as opposed to *searching* them. This may have been a drafting error, but its inclusion did not diminish the affiant's objectively reasonable belief that the search warrant was otherwise valid.

Finally, with regard to the lack of probable cause that evidence of a crime would be found in defendant's house, there is no evidence that the affiant knowingly prepared a false affidavit or otherwise acted in bad faith. The warrant was issued by a proper authority, with no evidence that the issuing magistrate had abandoned his neutral judicial role. Moreover, the search warrant was not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *Leon, supra*, 468 US at 923, because it is undisputed that the affiant had probable cause to believe that defendant personally had committed a crime, and based upon the observations of defendant's employee, and the affiant's training, experience and investigation, the police also had probable cause that evidence of a crime would be found in defendant's home. *United States v Schultz*, 14 F3d 1093, 1098 (CA 6, 1994). Accordingly, the police officers' reliance on the search warrant affidavit was objectively reasonable, and the good faith exception should apply.

Finally, defendant argues that the trial court clearly erred in finding that he knowingly, intelligently, and voluntarily waived his Fifth Amendment rights before making statements to the police. We disagree.

A suspect's relinquishment of *Miranda* rights must be voluntary, meaning "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *People v Daoud*, 462 Mich 621, 633, 614 NW2d 152 (2000). A waiver must also "have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* The "totality of the circumstances," including the suspect's age, experience, education, background, and intelligence, and capacity to understand the warnings must reveal both an uncoerced choice and the requisite level of comprehension to conclude that the *Miranda* rights have been effectively waived. *Id.* at 633-634. The burden is on the prosecution to prove a valid waiver by a preponderance of the evidence. *Id.* at 634. To demonstrate that a waiver is knowing and intelligent, the prosecution must present evidence sufficient to demonstrate that defendant "understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him." *Id.* at 637. "[A] very basic understanding is all that is required for a valid waiver." *Id.* at 642. The prosecution is not required to demonstrate why a suspect confesses or that he understands the "ramification and consequences of choosing to waive or exercise" his rights. *Id.* (citation omitted).

Defendant asserts that having just returned from a four-day cocaine binge, he was under the influence of drugs at the time his home was searched and the police officers interviewed him. Further, defendant claims the officers threatened to take his children and all of his possessions while his family was in police custody, and that this was sufficient coercion to overcome his free will, forcing him to give the statements and admissions.¹

There is ample evidence in the record that defendant made a knowing, intelligent, and voluntary waiver of his rights in giving his statements to the police. Officer Mark Easter, an experienced narcotics investigator and member of JNET, often dealt with people under the influence of drugs and was with defendant "on and off for a couple of hours" during the execution of the search warrant. Officer Easter observed that defendant was coherent; his speech was not slurred; he did not appear to be "high" or under the influence of anything; he never fell asleep or appeared to be exhausted or in need of medical attention; and he was cordial and cooperative. Defendant gave appropriate responses to questions and, although he was nervous, he was no more so than anyone else that Officer Easter had dealt with during the execution of a search warrant. Defendant's written statement was clear and concise. Officer Easter testified that he made no promises or threats to defendant, and did not physically abuse defendant.

Officer Jeffrey John Wilson, who was also a member of JNET and was familiar with people under the influence of alcohol or drugs, testified that defendant was not under the influence of narcotics or alcohol. Officer Wilson observed defendant give answers that were clear and crisp and given without delay or fumbling. He observed defendant locate a bankbook

¹ We note that the only issue defendant raised in his statement of this issue in his "questions presented" is whether the prosecution established that he knowingly and voluntarily waived his Fifth Amendment [*Miranda*] rights. Defendant conflates into this argument whether the statements themselves were voluntary. See *People v Cipriano*, 431 Mich 315, 331-335; 429 NW2d 781 (1988). Generally, this Court need not consider an issue that is not set forth in the statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

in the house without any hesitation. According to Officer Wilson, defendant never expressed any need for help, sleep, or medical attention. Defendant offered an explanation to Officer Wilson that he did not sell cocaine, but that he only had it for personal use, and that he might share it at no cost with friends or co-workers. After he made the incriminating statement, defendant expressed a willingness to cooperate with police in exchange for some consideration. Thus, defendant demonstrated that he knew and understood his legal jeopardy he and tried to make a deal. Officer Wilson testified that he had conversations with defendant in person and over the telephone in the days after defendant had given his statements to the police, and defendant continued to remain calm and articulate, although he was still nervous.

The only evidence that defendant was under the influence of drugs or coerced by the police and therefore unable to knowingly, intelligently, and voluntarily waive his rights, came from self-serving hearsay statements that were introduced through his expert witness, a clinical psychologist.

We conclude the trial court did not clearly err in finding that defendant knowingly, intelligently, and voluntarily waived his rights before giving the police his verbal and written statements. *Daoud, supra* at 629.

We affirm.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey