

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

UNPUBLISHED  
January 19, 1999

No. 202814  
Gratiot Circuit Court  
LC No. 96-003332 FH

MARK ALLEN KRUGER,

Defendant-Appellant.

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 202815  
Gratiot Circuit Court  
LC No. 96-003331 FH

JOHN MILTON ERSKIN,

Defendant-Appellant.

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Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendants were convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). The trial court sentenced Defendant Erskin as a second habitual offender, MCL 769.10(1)(a); MSA 28.1082(1)(a), to three to six years' imprisonment. The trial court sentenced Defendant Kruger to four years' probation. We affirm.

Defendants appeal the trial court's refusal to quash a search warrant and suppress the evidence flowing from that search, alleging that the affidavit was insufficient and that the information it contained was stale. Article I, § 11, of the Michigan Constitution provides that no search warrant shall be issued without probable cause. Probable cause exists where a person of reasonable caution would conclude that contraband, or evidence of criminal conduct, will be found in the place to be searched. *People v Darwich*, 226 Mich App 635, 637, 575 NW2d 44 (1997). If portions of an affidavit in support of a search warrant are invalid, they may be redacted without invalidating the entire warrant. Therefore, the resulting evidence may be admissible if the remaining sections of the affidavit create probable cause for the search. *People v Melotik*, 221 Mich App 190, 200; 561 NW2d 453 (1997); *People v Kolniak*, 175 Mich App 16, 20; 437 NW2d 280 (1989).

Defendants first argue that the trial court erred in finding that the redacted affidavit adequately described a "controlled buy." We disagree. Although the affidavit does not use the term "controlled buy," it establishes that an informant was searched, and no contraband was found. The informant was then continuously observed before and after he went into defendants' house. After leaving defendants' house, the informant possessed material that appeared to be marijuana. These averments were sufficient to describe a "controlled buy." See *People v David*, 119 Mich App 289, 294; 326 NW2d 485 (1982). This Court has previously held that a single controlled buy is sufficient to establish probable cause for a search. See *People v Williams*, 139 Mich App 104, 108; 360 NW2d 585 (1984).

In addition, defendants maintain that the affidavit was insufficient because it contained hearsay. The hearsay information in the affidavit – that there was a large amount of marijuana and a triple beam scale in defendants' home – was alleged to have been garnered during a controlled buy, and was corroborated by the purchase of the marijuana during the buy. In *People v Wares*, 129 Mich App 136, 141; 341 NW2d 256 (1983), this Court indicated that hearsay in an affidavit, coupled with a controlled buy that corroborates the hearsay, may suffice to establish probable cause. Therefore, the redacted affidavit's description of a controlled buy, coupled with the informant's observations, was sufficient to establish probable cause that marijuana would be found in defendants' home.

Defendants also contend that the information provided by the affidavit was sixty-hours old at the time the warrant was requested and was therefore stale. It has been generally stated that the facts giving rise to a warrant are sufficiently fresh when it can be presumed that the items sought remain on the premises, or that the criminal activity is continuing at the time of the warrant request. See *People v Siemieniec*, 368 Mich 405, 407; 118 NW2d 430 (1962); *People v Sundling*, 153 Mich App 277, 286-287; 326 NW2d 485 (1986). If there is ongoing criminal activity, a lapse of time between the gathering of the information and the issuance of the warrant is less critical. *People v Gillam*, 93 Mich App 548, 552; 286 NW2d 890 (1979). Time is only one factor to be considered in the review of whether there was probable cause to search. *People v Russo*, 439 Mich 584, 605; 487 NW2d 698 (1992). In the present case, the quantity of marijuana observed in the home indicated that this marijuana was not for personal use, but for sale, suggesting an ongoing pattern of criminal activity. We

conclude that the evidence of this activity outweighed the sixty-hour delay between the controlled buy and the request for a warrant for purposes of determining whether the items sought would still be on the premises. See *id.* Therefore, the delay did not render the information stale.

## II

Defendant Erskin asserts that his sentence was disproportionate. Defendant compares his enhanced sentence to the guidelines; however, the sentencing guidelines do not apply to habitual offenders. *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998).

In the instant case, the trial court articulated the following reasons for sentencing Erskin to three to six years in prison: the low probability of rehabilitation in light of Erskin's age and extensive criminal history; his recruitment of his son into a marijuana distribution scheme; and his continuing refusal to accept responsibility for his actions. We conclude that defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Stephen J. Markman  
/s/ Michael R. Smolenski